PCA Case No. 2021-26

IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT ("CUSMA"), CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA"), AND THE 2013 UNCITRAL ARBITRATION RULES

- between -

WINDSTREAM ENERGY LLC

(the "Claimant")

- and -

THE GOVERNMENT OF CANADA

(the "Respondent", and together with the Claimant, the "disputing parties")

AWARD

(WINDSTREAM II)

The Arbitral Tribunal
Ms Wendy Miles KC (Presiding Arbitrator)
Prof. John Gotanda
Rt. Hon. Beverley McLachlin

Administering Authority
Permanent Court of Arbitration

Tribunal Secretary
Mr José Luis Aragón Cardiel

20 April 2026

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GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

AOR	Applicant of Record
CAD	Canadian Dollar(s)
CIA	Customer Impact Assessment
Claimant	Windstream Energy LLC
CUSMA	Canada-United States-Mexico Agreement
DCF	Discounted cash flow
ERPP	Emerging Renewable Power Program
FET	Fair and equitable treatment
FMV	Fair market value
FIT	Feed-in-tariff
FIT Contract	Feed-in-tariff contract between Windstream Energy LLC and the Government of Canada dated 4 May 2010
FIT Program	Feed-in-Tariff Program in Ontario launched by the OPA on 1 October 2009
Hydro One	The Ontario Government entity responsible for managing Ontario's transmission system
GEGEA	Green Energy and Green Economy Act 2009
ICJ	International Court of Justice
IESO	Independent Electricity System Operator
ILC Articles	International Law Commission Draft Articles on State Responsibility
MEI	Ministry of Energy for the Province of Ontario

Mexico's 1128 Submission	Submission of Mexico pursuant to NAFTA Article 1128 dated 29 November 2023
MCOD	Milestone Date for Commercial Operation
MNR	Ministry of Northern Development, Mines, Natural Resources, and Forestry for the Province of Ontario
MOE	Ministry of the Environment, Conservation and Parks for the Province of Ontario
NAFTA	North American Free Trade Agreement
Offshore Wind Policy Proposal	Ontario's policy proposal of 25 June 2010 entitled "Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach"
Ontario	Province of Ontario
Ontario Government	Government of the Province of Ontario
OPA	Ontario Power Authority
PCA	Permanent Court of Arbitration
Project	Wolfe Island Shoals Project
REA	Renewable Energy Approval
REA Regulation	Renewable Energy Approval Regulation
Respondent	Government of Canada
SIA	IESO System Impact Assessment
Suppliers	FIT Contract Holders
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 2013

US 1128 Submission	Submission of the United States of America pursuant to NAFTA Article 1128 dated 29 November 2023
Windstream I	The previous arbitration commenced by the Claimant against the Respondent, PCA Case No. 2013-22
***Windstream I* Award**	Award in *Windstream I*, dated 27 September 2016
Wood Report	Expert report prepared by Wood for the Claimant
WEI	Windstream Energy Inc.
WWIS	Windstream Wolfe Island Shoals Inc.

TABLE OF CASES

Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011	*Abaclat v. Argentina*
Accession Mezzanine Capital L.P. and Others v. Republic of Hungary (ICSID Case No. ARB/12/3), Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013	*Accession v. Hungary*
ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary (ICSID Case No. ARB/03/16), Award of the Tribunal, 2 October 2006	*ADC v. Hungary*
ADF Group Inc. v. United States of America (ICSID Case No. ARB (AF)00/1), Award, 9 January 2003	*ADF Group v. US*
AES Solar and Others (PV Investors) v. Kingdom of Spain (PCA Case No. 2012-14), Award, 28 February 2020	*AES v. Spain*
Mohammad Ammar Al-Bahloul v. Republic of Tajikistan (SCC Case No. V064/2008), Final Award, 8 June 2010	*Al-Bahloul v. Tajikistan*
Adel A Hamadi Al Tamimi v. Sultanate of Oman (ICSID Case No. ARB/11/33), Award, 3 November 2015	*Al Tamimi v. Oman*
Amco Asia Corporation and Others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Resubmitted Proceeding, Decision on Jurisdiction, 10 May 1988	*Amco v. Indonesia*, Decision on Jurisdiction in Resubmitted Proceeding
Amco Asia Corporation and Others v. Republic of Indonesia (ICSID Case No. ARB/81/1), Resubmitted Proceeding, Award, 31 May 1990	*Amco v. Indonesia*, Award in Resubmitted Proceeding
Ampal-American Israel Corporation and Others v. Arab Republic of Egypt (ICSID Case No. ARB/12/11), Decision on Jurisdiction, 1 February 2016	*Ampal v. Egypt*, Decision on Jurisdiction

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain (ICSID Case No. ARB/13/31), Award, 15 June 2018	*Antin v. Spain*
Apotex Inc. v. United States of America (ICSID Case No. UNCT/10/2), Award on Jurisdiction and Admissibility, 14 June 2013	*Apotex v. US*
Apotex Holdings Inc. and Apotex Inc. v. United States of America (ICSID Case No. ARB(AF)/12/1),) Award, 25 August 2014	*Apotex v. US (III)*
Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/04/5), Award, 21 November 2007	*ADM v. Mexico*
Azurix Corp. v. Argentine Republic (ICSID Case No. ARB/01/12), Award, 14 July 2006	*Azurix v. Argentina*
Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan (I) (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005	*Bayindir v. Pakistan*, Decision on Jurisdiction
Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan (I) (ICSID Case No. ARB/03/29), Award, 27 August 2009	*Bayindir v. Pakistan*, Award
Bayview Irrigation District et al. v. United Mexican States (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007	*Bayview v. Mexico*
Bernhard von Pezold and Others v. Republic of Zimbabwe (ICSID Case No. ARB/10/15), Award, 28 July 2015	*Pezold v. Zimbabwe*
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, 43	*Bosnia and Herzegovina v. Serbia and Montenegro*
British Caribbean Bank Limited & Belize Bank Limited v. Government of Belize (LCIA Case No. 81116), Award, 15 January 2013	*British Caribbean Bank v. Belize*

Burlington Resources Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5), Decision on Liability, 14 December 2012	*Burlington v. Ecuador*, Decision on Liability
Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India (I) (PCA Case No. 2016-7), Award, 21 December 2020	*Cairn v. India*
Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. Republic of Kazakhstan (II) (ICSID Case No. ARB/13/13), Award, 27 September 2017	*Caratube v. Kazakhstan*
Cargill, Incorporated v. United Mexican States (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009	*Cargill v. Mexico*
Crompton (Chemtura) Corporation v. Government of Canada (PCA Case No. 2008-01), Award, 2 August 2010	*Chemtura v. Canada*
Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (I) (PCA Case No. 2007-02/AA277), Interim Award, 1 December 2008	*Chevron & TexPet v. Ecuador (I)*, Interim Award
Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador (II) (PCA Case No. 2009-23), Third Interim Award on Jurisdiction and Admissibility, 27 February 2012	*Chevron & TexPet v. Ecuador (II)*, Third Interim Award on Jurisdiction
China Navigation Co., Ltd v. United States of America (1921) 4 RIAA 64	*Newchwang Case*
Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498 (11th Cir. 1990), 5 July 1990	*Citibank v. Data Lease*
CME Czech Republic B.V. v. Czech Republic, Legal Opinion Christoph Schreuer and August Reinisch, 20 June 2002	*CME v. Czech Republic*, Challenge Legal Opinion
CME Czech Republic B.V. v. Czech Republic, Partial Award, 13 September 2001	*CME v. Czech Republic*, Partial Award
CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003	*CMS v. Argentina*, Decision on Objections to Jurisdiction

CMS Gas Transmission Company v. Argentine Republic (ICSID Case No. ARB/01/8), Award, 12 May 2005	*CMS v. Argentina*, Award
Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3), Award, 20 August 2007	*Vivendi v. Argentina (II)*
Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica (ICSID Case No. ARB/96/1), Final Award, 17 February 2000	*Santa Elena v. Costa Rica*
Corona Materials, LLC v. Dominican Republic (ICSID Case No. ARB(AF)/14/3), Award on Respondent's Expedited Preliminary Objections in accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016	*Corona v. Dominican Republic*
*Crystallex International Corporation v. Bolivarian Republic of Venezuel*a (ICSID Case No. ARB(AF)/11/2), Award, 4 April 2016	*Crystallex v. Venezuela*
Detroit International Bridge Company v. Government of Canada (PCA Case No. 2012-25), Mexico's NAFTA Article 1128 Submission, 14 February 2014	*Detroit International v. Canada*, Mexico 1128 Submission
Detroit International Bridge Company v. Government of Canada (PCA Case No. 2012-25), Canada's Reply to the United States and Mexico's NAFTA Article 1128 Submissions, 3 March 2014	*Detroit International v. Canada*, Canada 1128 Reply
Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/09/02), Award, 31 October 2012	*Deutsche Bank v. Sri Lanka*
Deutsche Telekom AG v. Republic of India (PCA Case No. 2014-10), Final Award, 27 May 2020	*Deutsche Telekom v. India*
Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador (ICSID Case No. ARB/04/19), Award, 18 August 2008	*Duke Energy v. Ecuador*
ECE Projektmanagement International GmbH and Kommanditgesellschaft Panta Achtundsechzigste Grundstücksgesellschaft mbH & Co v. Czech Republic (PCA Case No. 2010-5), Award, 19 September 2013	*ECE v. Czech Republic*

Eco Oro Minerals Corporation v. Republic of Colombia (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021	*Eco Oro v. Columbia*, Decision on Jurisdiction and Liability
EDF (Services) Limited v. Romania (ICSID Case No. ARB/05/13), Award, 8 October 2009	*EDF v. Romania*
Eiser Infrastructure Limited and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain (ICSID Case No. ARB/13/36), Award, 4 May 2017	*Eiser v. Spain*
El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15), Award, 31 October 2011	*El Paso v. Argentina*
Electrabel S.A. v. Republic of Hungary (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012	*Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability
Elettronica Sicula S.p.A (United States of America v. Italy), Judgment, I.C.J. Reports 1989, 15	*Elettronica Judgment*
Eli Lilly and Company v. Government of Canada (ICSID Case No. UNCT/14/2), Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016	*Eli Lilly v. Canada*, Mexico 1128 Submission
Eli Lilly and Company v. Government of Canada (ICSID Case No. UNCT/14/2), NAFTA Article 1128 Submission of United States of America, 18 March 2016	*Eli Lilly v. Canada*, US 1128 Submission
Eli Lilly and Company v. Government of Canada (ICSID Case No. UNCT/14/2), Respondent's Observations on NAFTA Article 1128 Submissions, 22 April 2016	*Eli Lilly v. Canada*, Canada 1128 Reply
Eli Lilly and Company v. Government of Canada (ICSID Case No. UNCT/14/2), Final Award, 16 March 2017	*Eli Lilly v. Canada*, Award
Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7), Award, 13 November 2000	*Maffezini v. Spain*

Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary (ICSID Case No. ARB/12/2), Decision on Respondent's Application for Bifurcation, 13 June 2013	*Emmis v. Hungary*, Decision on Bifurcation
Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary (ICSID Case No. ARB/12/2), Award, 16 April 2014	*Emmis v. Hungary*, Award
Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic (ICSID Case No. ARB/01/3),) Award, 22 May 2007	*Enron v. Argentina*
Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50), Decision on Respondent's Application under Rule 41(5), 20 March 2017	*Eskosol v. Italy*, Rule 41(5) Decision
Eskosol S.p.A. in liquidazione v. Italian Republic (ICSID Case No. ARB/15/50), Award, 4 September 2020	*Eskosol v. Italy*, Award
Eureko B.V. v. Republic of Poland (Ad Hoc UNCITRAL), Partial Award, 19 August 2005	*Eureko v. Poland*
European Media Ventures S.A. v. Czech Republic (Ad Hoc UNCITRAL), Partial Award on Liability, 8 July 2009	*EMV v. Czech Republic*
Factory at Chorzów (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17, 13 September 1928, 44	*Chorzów Factory Case*
Marvin Roy Feldman Karpa v. United Mexican States (ICSID Case No. ARB(AF)/99/1), Award and Dissent, 16 December 2002	*Feldman v. Mexico*
Fireman's Fund Insurance Company v. United Mexican States (ICSID Case No. ARB(AF)/02/1), Award, 17 July 2006	*Fireman's Fund v. Mexico*
Marco Gavazzi and Stefano Gavazzi v. Romania (ICSID Case No. ARB/12/25), Decision on Jurisdiction, Admissibility and Liability, 21 April 2015	*Gavazzi v. Romania*, Decision on Jurisdiction, Admissibility and Liability

Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. United Mexican States (ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4), Award, 16 June 2010	*Gemplus v. Mexico*
Generation Ukraine, Inc. v. Ukraine (ICSID Case No. ARB/00/9), Award, 16 September 2003	*Generation v. Ukraine*
Glamis Gold, Ltd. v. United States of America (Ad Hoc UNCITRAL), Counter-Memorial of Respondent United States of America, 19 September 2006	*Glamis Gold v. US*, US Counter-Memorial
Glamis Gold, Ltd. v. United States of America (Ad Hoc UNCITRAL), Award, 8 June 2009	*Glamis Gold v. US*, Award
Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)09/1), Award, 22 September 2014	*Gold Reserve v. Venezuela*
Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru (ICSID Case No. UNCT/18/2), Final Award, 6 December 2022	*Gramercy v. Peru*
Grand River Enterprises Six Nations, Ltd., et al. v. United States of America (Ad Hoc UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006	*Grand River v. US*, Decision on Jurisdiction
Grand River Enterprises Six Nations, Ltd., et al. v. United States of America (Ad Hoc UNCITRAL), Award, 12 January 2011	*Grand River v. US*, Award
Joseph Houben v. Republic of Burundi (ICSID Case No. ARB/13/7), Award, 12 January 2016	*Houben v. Burindi*
ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic (I) (PCA Case No. 2010-9), Award on Jurisdiction, 10 February 2012	*ICS v. Argentina (I)*
Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005	*Impregilo v. Pakistan*, Decision on Jurisdiction

Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5), Decision on Jurisdiction, 4 December 2017	*Infinito v. Costa Rica*, Decision on Jurisdiction
Infinito Gold Ltd. v. Republic of Costa Rica (ICSID Case No. ARB/14/5), Award, 3 June 2021	*Infinito v. Costa Rica*, Award
InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain (ICSID Case No. ARB/14/12), Award, 2 August 2019	*InfraRed v. Spain*
International Thunderbird Gaming Corporation v. United Mexican States (Ad Hoc UNCITRAL), Award, 26 January 2006	*Thunderbird v. Mexico*
Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia, (ICSID Cases Nos. ARB/05/18 and ARB/07/15), Award, 3 March 2010	*Kardassopoulos v. Georgia*
Ronald S. Lauder v. Czech Republic (Ad Hoc UNCITRAL), Final Award, 3 September 2001	*Lauder v. Czech Republic*
Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability, 14 January 2010	*Lemire v. Ukraine*, Decision on Jurisdiction and Liability
Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18), Award, 28 March 2011	*Lemire v. Ukraine*, Award
LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006	*LG&E Energy v. Argentina*, Decision on Liability
LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic (ICSID Case No. ARB/02/1), Award, 25 July 2007	*LG&E Energy v. Argentina*, Award
Lion Mexico Consolidated LP v. United Mexican States (ICSID Case No. ARB(AF)/15/2), Decision on Jurisdiction, 30 July 2018	*Lion Mexico v. Mexico*
Loewen Group, Inc. and Raymond L. Loewen v. United States of America (ICSID Case No. ARB(AF)/98/3), Award, 26 June 2003	*Loewen v. US*

Lone Pine Resources Inc. v. Government of Canada (ICSID Case No. UNCT/15/2), Non-Disputing Party Submission of the United States of America Pursuant to NAFTA Article 1128, 16 August 2017	*Lone Pine v. Canada*, Non-Disputing Party Submission
Lone Pine Resources Inc. v. Government of Canada (ICSID Case No. UNCT/15/2), Award, 21 November 2022	*Lone Pine v. Canada*, Award
Malicorp Limited v. Arab Republic of Egypt (ICSID Case No. ARB/08/18), Award, 7 February 2011	*Malicorp v. Egypt*
Mercer International Inc. v. Government of Canada (ICSID Case No. ARB(AF)/12/3), Canada Rejoinder Memorial, 31 March 2015	*Mercer v. Canada*, Canada Rejoinder
Mercer International Inc. v. Government of Canada (ICSID Case No. ARB(AF)/12/3), Article 1128 Submission of the United States of America, 8 May 2015	*Mercer v. Canada*, US 1128 Submission
Mercer International Inc. v. Government of Canada (ICSID Case No. ARB(AF)/12/3), Government of Canada Reply to 1128 Submission, 12 June 2015	*Mercer v. Canada*, Canada 1128 Reply
Mercer International Inc. v. Government of Canada (ICSID Case No. ARB(AF)/12/3), Award, 6 March 2018	*Mercer v. Canada*, Award
Merrill & Ring Forestry, L.P. v. Government of Canada (ICSID Case No. UNCT/07/1), Opinion with respect to the Effect of NAFTA Article 1116(2), 22 April 2008	*Merrill & Ring v. Canada*, Opinion
Merrill & Ring Forestry, L.P. v. Government of Canada (ICSID Case No. UNCT/07/1), United States of America's 1128 Submission, 14 July 2008	*Merrill & Ring v. Canada*, US Submission
Merrill & Ring Forestry, L.P. v. Government of Canada (UNCITRAL, ICSID Administered Case), Award, 31 March 2010	*Merrill & Ring v. Canada*, Award
Mesa Power Group, LLC v. Government of Canada (PCA Case No. 2012-17), Award, 24 March 2016	*Mesa v. Canada*

Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), Award, 30 August 2000	*Metalclad v. Mexico*
Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1), Submission of the Government of the United States of America, 9 November 1999	*Metalclad v. Mexico*, US Submission
Methanex Corporation v. United States of America (Ad Hoc UNCITRAL), Amended Statement of Defence of Respondent United States of America, 5 December 2003	*Methanex v. US*, Amended Statement of Defence
Methanex Corporation v. United States of America (Ad Hoc UNCITRAL), Mexico Fourth Submission pursuant to NAFTA Article 1128, 30 January 2004	*Methanex v. US*, Mexico (4th) 1128 Submission
Methanex Corporation v. United States of America (Ad Hoc UNCITRAL), Final Award, 3 August 2005	*Methanex v. US*, Award
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, I.C.J. Reports 1986, 14	*Nicaragua v. US*
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	*Mobil Investments v. Canada (I)*, Decision on Liability and Quantum
Mobil Investments Canada Inc. v. Government of Canada (II) (ICSID Case No. ARB/15/6), Decision on Jurisdiction and Admissibility, 13 July 2018	*Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility
Mobil Investments Canada Inc. v. Government of Canada (II) (ICSID Case No. ARB/15/6), Award, 4 February 2020	*Mobil Investments v. Canada (II)*, Award
Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Second Submission of Canada Pursuant to NAFTA Article 1128, 6 July 2001	*Mondev v. US*, US (2nd) 1128 Submission

Mondev International Ltd. v. United States of America (ICSID Case No. ARB(AF)/99/2), Award, 11 October 2002	*Mondev v. US*, Award
National Grid plc v. Argentine Republic (Ad Hoc UNCITRAL), Award, 3 November 2008	*National Grid v. Argentina*
Joshua Dean Nelson and Jorge Blanco v. United Mexican States (ICSID Case No. UNCT/17/1*)*, Award, 5 June 2020	*Nelson & Blanco v. Mexico*
NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain (ICSID Case No. ARB/14/11), Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019	*NextEra v. Spain*, Decision on Jurisdiction, Liability and Quantum
Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2016, 3	*Nicaragua v. Colombia*
Nissan Motor Co., Ltd. v. Republic of India (PCA Case No. 2017-37), Decision on Jurisdiction, 29 April 2019	*Nissan Motor v. India,* Decision on Jurisdiction
Occidental Exploration and Production Company v. The Republic of Ecuador (LCIA Case No. UN3467), Final Award, 1 July 2004	*Occidental v. Ecuador*
Odyssey Marine Exploration, Inc. v. United Mexican States (ICSID Case No. UNCT/20/1), Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 2 November 2021	*Odyssey v. Mexico*, Canada 1128 Submission
Oil Company Sapphire International Petroleum, Ltd. v. National Iranian Oil Company (35 ILR (1963) 136), Award, 15 March 1963	*Sapphire v. NIOC*
Orascom TMT Investments S.à.r.l. v. People's Democratic Republic of Algeria (ICSID Case No. ARB/12/35), Award, 31 May 2017	*Orascom v. Algeria*
Pac Rim Cayman LLC v. Republic of El Salvador (ICSID Case No. ARB/09/12), Decision on the Respondent's Jurisdictional Objections, 1 June 2012	*Pac Rim v. El Salvador*, Decision on Jurisdiction

Petrobart Limited v. Kyrgyz Republic (SCC Case No. 126/2003), Arbitral Award, 29 March 2005	*Petrobart v. Kyrgyz Republic*
Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay (ICSID Case No. ARB/10/7), Award, 8 July 2016	*Philip Morris v. Uruguay*
Phoenix Action, Ltd. v. Czech Republic (ICSID Case No. ARB/06/5), Award, 15 April 2009	*Phoenix v. Czech Republic*
Pope & Talbot Inc. v. Government of Canada (Ad Hoc UNCITRAL), Interim Award, 26 June 2000	*Pope & Talbot v. Canada*, Interim Award
Pope & Talbot Inc. v. Government of Canada (Ad Hoc UNCITRAL), Award in respect of damages, 31 May 2002	*Pope & Talbot v. Canada*, Award on Damages
"President Allende" Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile (PCA Case No. 2017-30), Award, 28 November 2019	*Victor Pey Casado v. Chile*
PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey (ICSID Case No. ARB/02/5), Award, 19 January 2007	*PSEG v. Turkey*
Quiborax S.A., Non Metallic Minerals S.A. and Allan Henry Isaac Fosk Kaplún v. Plurinational State of Bolivia (ICSID Case No. ARB/06/2), Award and Partial Dissent, 16 September 2015	*Quiborax v. Bolivia*
The Renco Group, Inc. v. Republic of Peru (PCA Case No. 2019-46),) Decision on Expedited Preliminary Objections, 30 June 2020	*Renco v. Peru (II)*
Renée Rose Levy and Gremcitel S.A. v. Republic of Peru (ICSID Case No. ARB/11/17), Award, 9 January 2015	*Levy v. Peru*
Renergy S.à.r.l. v. Kingdom of Spain (ICSID Case No. ARB/14/18), Award, 6 May 2022	*Renergy v. Spain*

Resolute Forest Products Inc. v. Government of Canada (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018	*Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility
Resolute Forest Products Inc. v. Government of Canada (PCA Case No. 2016-13), Final Award, 25 July 2022	*Resolute Forest v. Canada*, Award
RSM Production Corporation and Others v. Grenada (ICSID Case No. ARB/10/6), Award, 10 December 2010	*RSM v. Grenada*
Rusoro Mining Limited v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016	*Rusoro v. Venezuela*
S.D. Myers, Inc. v. Government of Canada (Ad Hoc UNCITRAL), Partial Award, 13 November 2000	*S.D. Myers v. Canada*, Partial Award
S.D. Myers, Inc. v. Government of Canada (Ad Hoc UNCITRAL), Second Partial Award, 21 October 2002	*S.D. Myers v. Canada*, Second Partial Award
Saipem S.p.A. v. People's Republic of Bangladesh (ICSID Case No. ARB/05/7), Award, 30 June 2009	*Saipem v. Bangladesh*
Saluka Investments BV v. Czech Republic (Ad Hoc UNCITRAL), Partial Award, 17 March 2006	*Saluka v. Czech Republic*, Partial Award
Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Decision on Objections to Jurisdiction, 11 May 2005	*Sempra v. Argentina*, Decision on Jurisdiction
Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Decision on Jurisdiction, 3 August 2004	*Siemens v. Argentina*, Decision on Jurisdiction
Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8), Award, 17 January 2007	*Siemens v. Argentina*, Award
Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt (ICSID Case No. ARB/84/3), Award, 20 May 1992	*Southern Pacific v. Egypt*

Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica (UNCITRAL) Corrected Interim Award, 30 May 2017	*Spence v. Costa Rica* Corrected Interim Award
Southern Pacific Railroad Company v. United States, 168 U.S. 1, 18 October 1897	*Southern Pacific Railroad Co. v. US*
Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic (ICSID Case No. UNCT/13/2), Corrected Interim Award, 30 July 2010	*Suez InterAgua v. Argentina*, Corrected Interim Award
Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic (ICSID Case No. ARB/03/17), Decision on Liability, 30 July 2010	*Suez InterAgua v. Argentina*, Decision on Liability
Técnicas Medioambientales Tecmed S.A. v. United Mexican States (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003	*TECO v. Mexico*
Telenor Mobile Communications A.S. v. The Republic of Hungary (ICSID Case No. ARB/04/15), Award, 13 September 2006	*Telenor Mobile v. Hungary*
Tembec Inc. et al. v United States of America, US District Court of Colombia, Memorandum, Civil Action No. 07-1905 (RMC), 14 August 2008*Telenor*	*Tembec v. US*, Judgment
Tembec Inc., et al. v. United States of America, US District Court for the District of Columbia, Memorandum Opinion, Civil Action No. 07	*Tembec v. US*, Opinion
Tennant Energy, LLC v. Government of Canada (PCA Case No. 2018-54), Final Award, 25 October 2022	*Tennant Energy v. Canada*
Tokios Tokelés v. Ukraine (ICSID Case No. ARB/02/18), Award, 26 July 2007	*Tokios Tokelés v. Ukraine*
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	*Tulip v. Turkey*, Decision on Jurisdiction

Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica (ICSID Cases Nos. ARB/08/1 and ARB/09/20), Award, 16 May 2012	*Unglaube v. Costa Rica*
United Parcel Service of America Inc v. Government of Canada (ICSID Case No. UNCT/02/1), Award on the Merits, 24 May 2007	*UPS v. Canada*
United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980, 3	*US v. Iran*
Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic (ICSID Case No. ARB/07/26), Decision on Jurisdiction, 19 December 2012	*Urbaser v. Argentina*, Decision on Jurisdiction
Vito G. Gallo v. Government of Canada (PCA Case No. 2008-03), Award, 15 September 2011	*Gallo v. Canada*
Waste Management, Inc. v. United Mexican States (II) (ICSID Case No. ARB(AF)/00/3), Decision on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002	*Waste Management v. US (II)*, Decision on Preliminary Objection
Waste Management, Inc. v. United Mexican States (II) (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004	*Waste Management v. US (II)*, Award
Wena Hotels Ltd. v. Arab Republic of Egypt (ICSID Case No. ARB/98/4), Award, 8 December 2000	*Wena v. Egypt*
Westmoreland Mining Holdings LLC v. Government of Canada (ICSID Case No. UNCT/20/3), Award, 31 January 2022	*Westmoreland v. Canada*
William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada (PCA Case No. 2009-04), Submission of the United States of America, 19 April 2013	*Bilcon v. Canada*, US 1128 Submission
William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. Government of Canada (PCA Case No. 2009-04), Award on Jurisdiction and Liability, 17 March 2015	*Bilcon v. Canada*, Award

Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22), Award on Damages, 10 January 2019	*Windstream v. Canada (I)*
Windstream Wolfe Island Shoals Inc. v. Independent Electricity System Operator, S.C.J. Court File No. CV-17-11745-00, Notice of Application, 27 March 2017	*Windstream*, OSCJ - Notice of Application
Yukos Universal Limited (Isle of Man) v. The Russian Federation (PCA Case No. AA 227), Final Award, 18 July 2014	*Yukos v. Russia*

I. INTRODUCTION

A. THE DISPUTING PARTIES

1. Windstream Energy LLC (the "**Claimant**") is a company incorporated in the United States of America, with a registered address at 20 Pine Brook Road, Bedford, NY 10506, United States of America.[1] It is a company in the business of developing renewable energy, founded in 2007 by an investment group with experience developing and operating energy projects,[2] and is managed by its managing director White Owl Capital Partners LLC, a private equity firm based in New York City, United States.[3]

2. The Claimant is represented in these proceedings by:

Mr John Terry
Ms Rachael Saab
Ms Emily Sherkey
Ms Alexandra Shelley
Ms Julie Lowenstein
Ms Natasha Williams

Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD South Tower
Toronto, Ontario
Canada M5K 1N2

3. The Government of Canada ("**Canada**" or the "**Respondent**" and together with the Claimant, the "**disputing parties**") is represented in these proceedings by:

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1 Notice of Arbitration, para. 4.

2 Memorial, para. 59.

3 Memorial, para. 60.

Mr Rodney Neufeld
Ms Heather Squires
Ms Alexandra Dosman
Mr Yu Cai Tian
Ms Kayla McMullen
Ms Darian Bakelaar
Ms Christine Ayoub

Trade Law Bureau (JLT)
Government of Canada
Global Affairs Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
Canada K1A 0G2

B. THE DISPUTE

4. This is the second arbitration in *Windstream Energy LLC v. Canada* (*i.e.*, *Windstream II*). It arises out of the first arbitration award, the *Windstream I* Award, and events thereafter. For consistency, where possible, this Award mirrors the factual findings in the *Windstream I* Award.

5. The original dispute is set out in the *Windstream I* Award as follows (the same defined terms are adopted in this Award):[4]

> The dispute between the Parties arises out of an offshore wind electricity generation project in the Wolfe Island Shoals area in Ontario, Canada (the "**Project**" or the "**WWIS Project**"). The Project was undertaken following Ontario's enactment of the Green Energy and Green Economy Act of 2009 ("**GEGEA**") and the subsequent promulgation of additional rules and regulations, creating a Feed-in-Tariff ("**FIT**") program ("**FIT Program**") (the "**FIT Program**") for the development of renewable energy projects, including onshore

[4] *Windstream I* Award, para. 5 [Emphasis added].

and offshore wind. According to the Claimant, following the award of a Feed-in-Tariff Contract (the "**FIT Contract**") to the Claimant, the Government of Ontario (also referred to as the "**Government**" or "**Ontario**") delayed the approval of the required permits and authorizations, including those allowing access to Crown land, and eventually, on 11 February 2011, imposed a moratorium on the development of offshore wind that frustrated the Claimant's attempts to develop the Project.

6. The disputing parties' positions in the *Windstream I* dispute were as follows:[5]

> 6. The Claimant argue[d] that the conduct of the Government, including the Ontario Power Authority (the "**OPA**"), is attributable to the Respondent and contends that the measures taken by Ontario authorities are inconsistent with the Respondent's obligations under Chapter 11 of the North American Free Trade Agreement ("**NAFTA**"), specifically Articles 1110 (Expropriation and Compensation), 1105 (Minimum Standard of Treatment), 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment) and, to the extent that the OPA is a State enterprise as defined in NAFTA Article 1505, Article 1503(2) (State Enterprises).
>
> 7. The Respondent dispute[d] that it is in breach of any of its obligations under NAFTA. According to the Respondent, the Claimant was always aware of the regulatory risks related to the development of the regulatory processes and the significant scientific uncertainty regarding the effects of offshore wind projects on human health, safety and the environment. The Respondent contends that Ontario's decision to defer the development of offshore wind was taken to allow the necessary scientific research to be completed and applied to all such projects and thus was not discriminatory, and fell within the legitimate policy-making power of the Government of Ontario to regulate in the public interest.

7. The *Windstream I* Award determined that the Respondent had breached NAFTA Article 1105 by failing to accord the Claimant's investments in Windstream Wolfe Island Shoals Inc. ("**WWIS**"), the WWIS Project and the FIT Contract, fair and equitable treatment, awarding the Claimant CAD 25 million in compensatory

[5] *Windstream I* Award, paras. 6 to 7.

damages.[6] It rejected three remaining claims for breach of (i) NAFTA Article 1110 (alleged unlawful expropriation of the Claimant's investments); (ii) NAFTA Article 1102 (alleged failure to accord treatment no less favourable than accorded, in like circumstances, to its own investors); and (iii) NAFTA Article 1103 (alleged failure to accord treatment no less favourable than that accorded to investors of third party States).[7]

8. Most significantly for the *Windstream II* arbitration and Award, the *Windstream I* Award made the following findings in respect of alleged expropriation:[8]

> 290. The Tribunal has carefully reviewed the relevant evidence and finds that, on the facts, no expropriation has taken place in this case. First, the Claimant's FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario; consequently, while the Tribunal agrees with the Claimant that the Project can no longer be completed by the MCOD, 4 May 2017, it continues to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium. Second, and more importantly in the context of the Claimant's expropriation claim, the Claimant's CAD 6 million security deposit is still in place and has not been taken or rendered otherwise worthless as a result of any action taken by the Government of Ontario. Under Article 10.1(g) of the FIT Contract, if by reason of force majeure the MCOD is delayed for an aggregate of more than 24 months (which is the case here), completion and performance security will be returned at the time of the termination of the agreement by either party. Consequently, the Respondent cannot terminate, and indeed confirmed at the hearing that it would not be able to terminate, the FIT Contract pursuant to Article 10.1(g) without returning the security. It therefore cannot be said that the Claimant has been substantially deprived of its investment.
>
> 291. In reaching the conclusion that, on the facts, the Claimant has not been substantially deprived of its investment, the Tribunal has taken into account

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6 *Windstream I* Award, para. 515.

7 *Windstream I* Award, para. 515.

8 *Windstream I* Award, paras. 290 to 291 [Emphasis added].

> its determination of the overall value of the Claimants' investment, as set out in Section B below. As determined in Section B, the amount of money invested by the Claimant in the Project – its sunk costs – do not substantially exceed, if at all, the value of the security deposit. Consequently, although the Tribunal accepts (as determined in Section B below) that the Claimant's investment consists not only of the sunk investment costs and the security deposit, but also of the value created by the Claimant in developing the Project, the value of the asset that is still available to the Claimant as it has not been taken (i.e., the security deposit) is substantial, in particular when compared to the overall value of the investment. In the circumstances, the Tribunal is unable to conclude that the Claimant has been substantially deprived of the value of its investment.

9. In *Windstream II*, the Claimant submitted that it was "[e]*ncouraged by the tribunal's decision and Canada's representations that the Project had a future*", and claimed to have "*emerged from the NAFTA proceedings with the expectation that the Project would proceed*".[9] Accordingly, and thereafter it proceeded as follows:[10]

> While courting substantial third-party interest in investing in the Project, Windstream worked to advance the Project and attempted to engage the Government of Ontario and the Independent Electricity System Operator ["**IESO**"] [the successor of the OPA] in discussions about the path forward. The Ontario Government ignored those requests – and its promise in 2011 to "freeze" the FIT Contract – and allowed the IESO to terminate the FIT Contract in February 2020.

10. According to the Claimant, despite its own post-*Windstream I* Award efforts, the Respondent:

    a. failed in a timely manner to complete the work necessary for lifting the moratorium to ensure it would not further prejudice WWIS by continued delay to the WWIS Project (claiming that none of the studies stated to be

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9 Memorial, para. 6.

10 Memorial, para. 6.

the basis for the moratorium was completed) and no steps were taken to lift it;

b. continued the moratorium, knowing it would create conditions allowing IESO to terminate the FIT Contract (directly contradicting its promise to protect the WWIS Project from the effects of the moratorium); and

c. failed to direct IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that the Project would be "*deferred*", "*frozen*" and "*on hold*".[11]

11. In the meantime, on 1 July 2020, the applicable investment protection regime changed. NAFTA was terminated and replaced by the Canada-United States-Mexico Agreement ("**CUSMA**"), which contains no investor-State arbitration mechanism for investments of U.S. investors in Canada. However, the CUSMA Contracting Parties consented to submit to arbitration, in accordance with NAFTA Chapter 11 Section B and CUSMA Annex 14-C, claims arising out of alleged breach of NAFTA Chapter 11 Section A obligations for "*an investment of an investor of another Party* [to CUSMA] *in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994* [*i.e.*, 1 July 2020]*, and in existence on the date of entry into force of this Agreement* [*i.e.*, also 1 July 2020]", for a period of three years from the date of NAFTA termination.[12]

12. In December 2020, the Claimant commenced the *Windstream II* arbitration pursuant to the provisions of CUSMA Annex 14-C, seeking "*the full value of its investment*", which it alleges "*has now been destroyed – not just damaged – as a result of the Ontario Government's actions (and inaction) after the Windstream I Award*".[13]

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11 Memorial, para. 7.

12 CUSMA Annex 14-C, para. 6.

13 Memorial, para. 7.

13. In these *Windstream II* arbitration proceedings, the Claimant requests by way of relief:[14]

    a. a declaration that the Respondent has now unlawfully expropriated its investments in WWIS, the Project, and the FIT Contract, contrary to NAFTA Article 1110;

    b. a declaration that the Respondent has again failed to accord its investments fair and equitable treatment in accordance with international law, contrary to NAFTA Article 1105;

    c. alternatively, a declaration that the Respondent failed to ensure through regulatory control, administrative supervision or the application of other measures, that its State enterprise, the IESO, acted in a manner consistent with the Respondent's obligations under NAFTA Chapter 11;

    d. damages in the range of between CAD 291.4 million and CAD 333 million, to be updated as at the time of the hearing, or alternatively between CAD 284.7 million and CAD 299.1 million, to be updated as at the time of the hearing;

    e. pre- and post-award interest at a rate to be fixed by the Tribunal;

    f. all legal fees and costs associated with this arbitration; and

    g. such other relief as the Tribunal considers appropriate.

14. The Respondent requests that the Tribunal dismiss the claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including the Respondent's costs for legal representation and assistance, and grant any further relief it deems just and proper.[15]

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[14] Memorial, para. 563; Reply, para. 443.

[15] Counter-Memorial, para. 293; Rejoinder, para. 259.

II. PROCEDURAL HISTORY

15. A brief procedural history of the *Windstream II* arbitration is set out below.

A. COMMENCEMENT OF ARBITRATION

16. On 22 January 2020, the Claimant issued a Notice of Intent to Submit a Claim to Arbitration pursuant to Article 1119 of NAFTA.

17. By Notice of Arbitration dated 22 December 2020, the Claimant commenced arbitration proceedings against the Respondent "*on its own behalf and on behalf of its enterprise* […] [WWIS]*,*"[16] pursuant to Article 3 of the 2013 UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**"), Articles 1116, 1117 and 1120 of NAFTA, and Annex 14-C to CUSMA.[17]

18. The Tribunal is composed of Professor John Gotanda, an American national appointed by the Claimant; The Rt Hon. Beverley McLachlin, a Canadian national appointed by the Respondent; and Ms Wendy J. Miles KC, a New Zealand national appointed by agreement of the disputing parties as presiding arbitrator.

19. On 21 December 2021, the Tribunal issued Procedural Order No. 1, which:

    a. names Toronto, Ontario as the place of arbitration (Section 4);

    b. sets out the applicable procedural rules of the arbitration as the UNCITRAL Rules (as modified by the provisions of Annex 14-C to CUSMA and Chapter 11 of NAFTA) (Section 5);

    c. determines the language of the arbitration to be English (Section 6);

    d. establishes the Procedural Calendar for the arbitration and procedural rules for the conduct of the proceedings (Section 7); and

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16 Notice of Arbitration, para. 1.

17 Notice of Arbitration, para. 6.

e. establishes the PCA's role as administering authority (Section 23).

20. Mr José Luis Aragón Cardiel, PCA Senior Legal Counsel, was designated to act as Registrar and Secretary to the Tribunal. Together with Procedural Order No. 1, the disputing parties also executed a confidentiality agreement.[18]

B. PRELIMINARY ISSUE – BIFURCATION

21. On 18 February 2022, the Claimant submitted its Memorial ("**Memorial**"), together with factual exhibits C-1907 to C-2528, legal authorities CL-139 to CL-174, seven witness statements,[19] and 13 expert reports.[20]

22. On 12 May 2022, the Respondent submitted its Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility ("**Request for Bifurcation and Memorial on Jurisdiction**"), together with factual exhibits R-0659 to R-0666 and legal authorities RL-109 to RL-164.

23. On 16 June 2022, the Claimant submitted its Response to Canada's Request for Bifurcation ("**Response to Request for Bifurcation**"), together with legal authorities CL-175 to CL-179.

24. On 27 June 2022, the Tribunal confirmed the disputing parties' agreement, as set out in their joint communication of 24 June 2022, that the Tribunal should proceed

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18 *Windstream II* Confidentiality Agreement, Annex B to Procedural Order No. 1.

19 **CWS-N. Baines**, Witness Statement of Nancy Baines; **CWS-Mars-3**, Third Witness Statement of David Mars; **CWS-Baines-3**, Third Witness Statement of Ian Baines; **CWS-Ziegler-3**, Third Witness Statement of William Ziegler; **CWS-Killeavy**, Witness Statement of Michael Killeavy; **CWS-Smitherman-2**, Second Witness Statement of George Smitherman; **CWS-Benedetti-2**, Second Witness Statement of Chris Benedetti.

20 **CER-Secretariat**, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard; **CER-Wood**, Technical Expert Report of Wood Group; **CER-Power Advisory-2**, Second Expert Report of Power Advisory, Jason Chee-Aloy; **CER-Powell-3**, Third Expert Report of Sarah Powell; **CER-WSP-2**, Second Expert Report of WSP Canada Inc.; **CER-Baird-3**, Third Expert Report of W.F. Baird & Associates Coastal Engineers Ltd.; **CER-Aercoustics-2**, Second Expert Report of Aercoustics Engineering Ltd.; **CER-Two Dogs (Wind Turbine Selection Report)**, Expert Report of Two Dogs Projects Ltd., Ian Irvine; **CER-Two Dogs (Capex Opex Sensitivity Report)**, Expert Report of Two Dogs Two Dogs Projects Ltd., Mr Ian Irvine; **CER-COWI (Wind Turbine Gravity Base Foundation Design)**, Expert Report of COWI North America Inc., Brent Cooper, Jørn Thomsen, Jørgen Bang Cramwikt, Carly Wilmott and, Emma Chick; **CER-COWI (Opinion of Probable Cost)**, Expert Report of COWI North America Inc., Brent Cooper, Jørn Thomsen, Jørgen Bang Cramwikt, Carly Wilmott and, Emma Chick; **CER-4C Offshore-3**, Third Expert Report of 4C Offshore Ltd.; **CER-Weeks-2**, Expert Report of Weeks Marine.

to decide the Respondent's Request for Bifurcation on the basis of the written submissions already filed with no oral hearing.

25. On 13 September 2022, the Tribunal issued Procedural Order No. 2 (Decision on Bifurcation), stating in its operative part as follows:[21]

> 71. On the basis of the foregoing, the Tribunal makes the following decisions:
>
> (a) the Respondent's Request for Bifurcation is denied;
>
> (b) the Tribunal reserves its decision on costs relating to the Request for Bifurcation;
>
> (c) the arbitration shall proceed on the basis of the procedural timetable in Procedural Order No. 1, Annex A.2, which provides for the time periods that will apply if the Respondent's Request for Bifurcation is denied; and
>
> (d) the disputing parties are directed to confer with a view to agreeing on a joint proposed timetable […], and to submit such a modified annex to the Tribunal, jointly if possible, and separately if not, on or before Friday, 30 September 2022.

C. AMENDMENTS TO PROCEDURAL CALENDAR

26. On 23 September 2022, the disputing parties submitted a joint proposed timetable for the proceedings.

27. On 26 September 2022, the Tribunal (i) confirmed the disputing parties' agreed schedule; and (ii) invited the disputing parties to confer and identify potential dates for a hearing in February 2024, as well as to express their preferences regarding the hearing venue.

28. On 29 September 2022, the disputing parties confirmed their availability for a hearing during the weeks of 5 February and 12 February 2024. They further

[21] [Emphasis omitted].

expressed their preference to reserve 10 business days for the hearing and for Arbitration Place in Toronto to be the hearing venue.

29. On 3 November 2022, the Tribunal issued Procedural Order No. 3, setting out the revised Procedural Calendar for the arbitration.

30. On 12 December 2022, the Respondent submitted its Counter Memorial on Jurisdiction, Merits and Damages ("**Counter-Memorial**"), together with factual exhibits R-0667 to R-0819, legal authorities RL-165 to RL-200, one (1) witness statement,[22] and one (1) expert report.[23]

D. DOCUMENT PRODUCTION PHASE

31. On 31 March 2023, the Claimant submitted its completed Redfern Schedule, and requested a ruling from the Tribunal in respect of three outstanding document production requests. At the same time, the Claimant informed the Tribunal that the disputing parties had reached agreement as to the remaining Claimant document production requests and all of the Respondent document production requests.

32. On 1 May 2023, the Tribunal issued Procedural Order No. 4 on Document Production dealing with the outstanding Claimant requests. The Tribunal granted the Claimant's first document production request in full and the second document production request in part, and denied the Claimant's third document production request.

33. Pursuant to Procedural Order No. 3 and Procedural Order No. 4, the Tribunal ordered the Respondent to produce all documents in accordance with its ruling no later than 31 May 2023.

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22 **RWS-Lyle**, Witness Statement of Michael Lyle.

23 **RER-Guillet**, Expert Report of Dr Jérôme Guillet on Damages Valuation.

E. FURTHER SUBMISSIONS

34. On 14 August 2023, the Claimant submitted its Reply Memorial ("**Reply**"), together with factual exhibits C-2529 to C-2840, legal authorities CL-180 to CL-206, two (2) witness statements,[24] and three (3) expert reports.[25]

35. On 30 October 2023, the Respondent submitted its Rejoinder Memorial ("**Rejoinder**"), together with factual exhibits R-820 to R-951, legal authorities RL-201 to RL-227, one (1) witness statement,[26] and one (1) expert report.[27]

36. On 21 November 2023, the Tribunal provided the disputing parties with a draft procedural order on the organisation of an oral hearing and invited them to provide their comments (with the disputing parties providing comments on 1 December 2023).

37. On 29 November 2023, the United Mexican States ("**Mexico**") and the United States of America ("**US**") each filed Submissions Pursuant to NAFTA Article 1128 ("**1128 Submissions**").

38. The same day, the Respondent submitted a Motion for Costs Undertaking ("**Motion for Costs Undertaking**"), together with factual exhibits R-952 to R-962 and legal authorities RL-228 to RL-259.

39. On 6 December 2023, having taken note of the disputing parties' agreement on the terms of the draft procedural order, the Tribunal vacated the scheduled pre-hearing conference scheduled for 7 December 2023 and issued Procedural Order No. 5, convening a hearing on jurisdiction, the merits, and quantum (the "**Oral Hearing**"),

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24 **CWS-N. Baines-2**, Second Witness Statement of Nancy Baines; **CWS-Mars-4**, Fourth Witness Statement of David Mars.

25 **CER-Secretariat-2**, Independent Expert Reply Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard; **CER-Power Advisory-3**, Third Expert Report of Power Advisory, Jason Chee-Aloy; **CER-Two Dogs-2**, Second Expert Report of Two Dogs Projects Ltd., Ian Irvine.

26 **RSW-Teliszewsky**, Witness Statement of Andrew Teliszewsky.

27 **RER-Guillet-2**, Second Expert Report of Dr Jérôme Guillet on Damages Valuation.

establishing its place, time, agenda, format, and all other technical and ancillary aspects.

40. On 14 December 2023, the Claimant submitted its Response to the Motion for Costs Undertaking ("**Response to Motion for Costs Undertaking**").

41. Further on 14 December 2023, both the Claimant and the Respondent submitted their responses to Mexico and the United States' Article 1128 Submissions and the accompanying indexes.

42. On 17 January 2024, the Tribunal issued Procedural Order No. 6, denying the Respondent's Motion for Costs Undertaking from the Claimant.

F. HEARING AND POST-HEARING SUBMISSIONS

43. From 5 February 2024 to 9 February 2024, the Oral Hearing was held at Arbitration Place, in Toronto, Ontario. The following persons were present:

Tribunal

Ms Wendy Miles KC (Presiding Arbitrator)
Professor John Gotanda
Rt Hon Beverley McLachlin

Claimant

Party Representative
Mr David Mars

Counsel
Mr John Terry, Counsel, Torys LLP
Ms Emily Sherkey, Counsel, Torys LLP
Ms Alexandra Shelley, Counsel, Torys LLP
Ms Julie Lowenstein, Counsel, Torys LLP
Ms Natasha Williams, Counsel, Torys LLP
Ms Shoshana Israel, Clerk, Torys LLP

Ms Nicole Wannop, Clerk, Torys LLP

Fact and Expert Witnesses

Ms Nancy Baines

Mr Michael Killeavy

Mr Edward Tobis, Secretariat

Mr Chris Milburn, Secretariat

Mr Pierre-Antoine Tetard

Respondent

Party Representatives

Ms Karen Slawner, Team Lead, Ministry of Energy, Government of Ontario

Mr Erik Guloien, Counsel, Ministry of Energy, Government of Ontario

Ms Sejal Shah, Senior Legal Counsel, Independent Electricity System Operator

Ms Adrianna Militano, Senior Policy Advisor, Ministry of Economic Development, Job Creation and Trade, Government of Ontario

Ms Sidrah Naveed, Policy Advisor, Ministry of Economic Development, Job Creation and Trade, Government of Ontario

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Fact Witnesses
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Expert Witness
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Trial Graphic Expert
Mr Ryan Knecht, Core Legal Concepts
Ms Nathalie Korth, Core Legal Concepts

Permanent Court of Arbitration

Mr José Luis Aragón Cardiel
Mr Stefan Schäferling
Ms Helen Griffin

Court Reporter

Ms Lisa Lamberti

44. Following oral closing submissions, the Oral Hearing closed on 9 February 2024.

45. On 27 March 2024, the Tribunal wrote to the disputing parties to direct as follows:

a. for Post-Hearing Submissions, noting that the disputing parties were provided with the opportunity to make closing statements at the Oral Hearing, the Tribunal did not require written any further written submissions; and

b. for costs, the disputing parties were requested to file submissions by 26 April 2024, which were required succinctly to enumerate and describe the

costs incurred by each Party, quantified by separate cost categories, permitted to include brief reasons for requests for an award on costs, and not required to append supporting documentation.

46. On 26 April 2024, the disputing parties simultaneously submitted costs submissions.

III. FACTUAL BACKGROUND

47. The disputing parties agree that events underlying the *Windstream I* arbitration proceedings form part of the factual background in the *Windstream II* arbitration; both disputing parties rely on submissions in *Windstream I* and factual findings in the *Windstream I* Award.[28] Accordingly, Procedural Order No. 1 Section 10.1 declares that the record of written submissions, witness statements, expert reports, exhibits, and legal authorities in the *Windstream I* arbitration proceedings also forms part of the record in the *Windstream II* arbitration.

48. At **Annex A** to this Award, the relevant factual findings of the *Windstream I* Award are set out in full and incorporated by reference in this *Windstream II* Award. To the extent that the disputing parties rely on specific factual findings in the *Windstream I* Award in their submissions in *Windstream II*, reference is made to those findings.[29] A brief summary of key factual findings in the *Windstream I* Award, as relevant to *Windstream II*, and facts arising after the *Windstream I* Award, is set out below.

A. THE RELEVANT ENTITIES

(i) The Claimant's Subsidiaries and Management

49. WWIS is a subsidiary of the Claimant, incorporated in Ontario in 2007 as a special purpose company to develop and operate the Project.[30] The Claimant directly owns

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28 Memorial, para. 86; Counter-Memorial, para. 19.

29 For the detailed factual findings of the *Windstream I* tribunal see *Windstream I* Award, paras. 86 to 160.

30 Memorial, para. 61.

85% of the shares of WWIS, and indirectly owns the remaining 15% of the shares through OCP Option Inc., which is a wholly-owned subsidiary of the Claimant.[31] WWIS is the counterparty to the FIT Contract and is the holder of all rights under that contract.[32]

50. The President of WWIS is Mr Ian Baines, an Ontario-based engineer with experience in renewable energy projects.[33] Mr Baines is also the President of Windstream Energy Inc. ("**WEI**"),[34] another subsidiary of the Claimant owned wholly by the Claimant,[35] which provides various services to WWIS under a Management Services Agreement.[36]

(ii) The Respondent's Organs of State

51. Ontario is one of the Respondent's 10 provinces. Lake Ontario, Lake Erie, Lake Huron and the St. Lawrence Seaway form the southern and western borders of the southern area of Ontario.[37] Ontario's *de facto* head of government is its Premier.[38]

52. Three organs of government within the Ontario province are relevant to the arbitrations, as follows.

53. *First*, the Ontario Ministry of Energy ("**MEI**"), previously known as the Ministry of Energy and Infrastructure, is responsible for developing Ontario's electricity generation, transmission and other energy-related facilities.[39] The Ontario Minister of Energy, the head of MEI, is an elected member of the Legislature of Ontario and

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31 Memorial, para. 61.

32 Memorial, para. 62; **C-251**, OPA Feed-In Tariff Contract (FIT Contract), 4 May 2010.

33 Memorial, paras. 68 to 69; **CWS-Baines**, Witness Statement of Ian Baines, paras. 1, 3 to 6.

34 **CWS-Baines-3**, Third Witness Statement of Ian Baines, para. 1.

35 Memorial, para. 61.

36 *Windstream I* Award, para. 2; **CWS-Baines**, Witness Statement of Ian Baines, para. 30.

37 Memorial, para. 70.

38 Memorial, paras. 72 to 73. From 23 October 2003 to 11 February 2013, Ontario's Premier was Dalton McGuinty; from 11 February 2013 to 29 June 2018, Ontario's Premier was Kathleen Wynne; the current Premier is Doug Ford.

39 Memorial, para. 75.

is accountable to the Legislature of Ontario.[40] The MEI has put in place bodies to regulate and operate electricity systems in Ontario:

a. in 2004, OPA was established as "*an independent non-share capital corporation responsible for medium and long-term system planning, conservation, demand management and procurement of new generation through long-term power purchase agreements* […]";[41]

b. the Green Energy and Green Economy Act 2009 ("**GEGEA**"), empowered the Minister of Energy to direct OPA, among other things, to procure electricity supply from renewable sources and develop a feed-in-tariff programme ("**FIT Program**") for electricity produced by renewable sources;[42]

c. on 1 January 2015, OPA was amalgamated with Ontario's Independent Electricity System Operator, ("**IESO**"), a corporation established under the Electricity Act 1998, which:

   i. is governed by a Board of Directors that oversees its business and affairs, appointed by and serving at the pleasure of the Minister of Energy (with exception of the CEO);

   ii. is subject to mandatory directives issued by the Minister of Energy pursuant to the Electricity Act 1998;[43]

   iii. is now responsible for forecasting electricity demand, planning for electricity generation and engaging in activities to ensure an adequate supply of electricity in Ontario, including procuring electricity, such

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40 Memorial, para. 76.

41 *Windstream I* Award, para. 87.

42 Memorial, para. 77.

43 Memorial, para. 79.

as by entering into long-term purchase agreements with private sector developers;[44] and

d. from 2015, OPA's objects, powers, and contracts were transferred to IESO,[45] making IESO the successor to the FIT Contract with WWIS.[46]

54. *Secondly*, the Ministry of Northern Development, Mines, Natural Resources, and Forestry ("**MNR**"), also known as the Ministry of Natural Resources,[47] is responsible for the Public Lands Act, and for managing, selling and disposing of Crown lands in Ontario.[48] It exercises regulatory authority on behalf of Ontario Government for granting access to Crown land for offshore wind development.[49]

55. *Thirdly*, the Ministry of the Environment, Conservation and Parks ("**MOE**") is constituted by the Ministry of the Environment Act and is responsible for managing and protecting the natural environment in Ontario.[50] It is empowered under the Environmental Protection Act to "*issue, amend or revoke policies in respect of renewable energy approvals*" in Ontario.[51]

B. THE REGULATORY FRAMEWORK

56. The Ontario renewable policy and regulatory framework from 2004 to 2014 is set out in full in **Annex A**. The renewable energy framework governs (i) site control, (ii) permitting, (iii) offtake (or revenue); and (iv) grid connection. The key elements for this arbitration are the renewable energy regime under GEGEA (implemented through OPA then IESO) and the Crown land lease regime.

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44 Memorial, para. 80.

45 Counter-Memorial, para. 52.

46 Memorial, para. 78.

47 Memorial, para. 81.

48 Memorial, para. 81.

49 *Windstream I* Award, para. 89.

50 Memorial, para. 83.

51 Memorial, para. 85.

57. Regarding the renewable regime, in 2009, the Ontario Government announced its proposal to enact the GEGEA, introducing three project procurement process elements to encourage private investment in new renewable infrastructure in Ontario, relating to economics, grid connection and permitting, respectively:[52]

    a. a FIT Program, intended to provide standard program rules, contracts and pricing for specified renewable energy sources in order to increase investor confidence in renewable energy projects;

    b. a "*right to connect*" to the electricity grid for renewable projects; and

    c. a streamlined approvals process for renewable energy projects, which combined the previous amalgam of municipal and provincial permits into a single new "*renewable energy approval*" ("**REA**").

58. As to the FIT Program, on 14 May 2009, the GEGEA was adopted and entered into force,[53] making the MOE the primary regulator in the renewable energy sector, and authorising the MEI to direct OPA (IESO from 2015) to develop that Program. In September 2009, the MEI exercised its directing authority, and in October 2009, OPA began taking applications for the FIT Program, in relation to which:[54]

    a. OPA was to pay a 20-year fixed premium price for energy from renewable sources (except waterpower projects), including onshore and offshore wind; and

    b. OPA developed feed-in-tariff rules and a standard contract, *i.e.*, a standard long-term fixed-price contract with general terms and conditions applicable to all feed-in-tariff related projects, and specific terms and conditions for different types of renewable energy sources.[55]

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52 Memorial, para. 90; *Windstream I* Award, para. 96.

53 Memorial, para. 94; *Windstream I* Award, para. 96.

54 Memorial, para. 95; *Windstream I* Award, para. 97.

55 Memorial para. 98; *Windstream I* Award, paras. 98 to 99.

59. As to the "*right to connect*" in relation to projects generating greater than 10 megawatts, (as here) applicants were required to obtain a connection assessment, which included:

    a. an IESO System Impact Assessment ("**SIA**"), to assess the impact of a project on Ontario's integrated power system; and

    b. a Customer Impact Assessment ("**CIA**") from the relevant transmitter, to assess the impact on existing customers of the new project connection to the grid.[56]

60. As to the streamlined approvals process, on 14 May 2009, the Renewable Energy Approval Regulation ("**REA Regulation**") (Ontario Regulation 359/09) was adopted and entered into force, providing for a single streamlined approvals process with a six-month service guarantee. Under this process, developers could submit a single application to satisfy all provincial and municipal regulatory requirements for developing renewable energy projects,[57] including offshore wind,[58] which would follow four sequential steps:

    a. the project proponent conducts certain "*pre-submission activities*," including:[59]

        i. a draft project description report submission to the MOE;

        ii. consultations with stakeholders and preparing a consultation report; and

        iii. a natural heritage assessment, as well as a water assessment;

    b. the proponent then submits the application and accompanying materials to the MOE;

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[56] *Windstream I* Award, para. 112.

[57] Memorial, para. 101; **CER-Powell**, Expert Report of Sarah Powell, para. 25.

[58] Memorial, para. 104; *Windstream I* Award, para. 103.

[59] *Windstream I* Award, paras. 103, 111.

c. the MOE completes its technical review, making "*an independent and discretionary determination of whether or not it* [was] *in the public interest to issue a REA*";[60] and

d. the applicant and any resident of Ontario may appeal the determination to the Environmental Review Tribunal.[61]

61. Regarding the Crown land lease regime, in 2009 when the FIT Program was launched, all but one lakebed in Ontario was on Crown land.[62] Therefore, the MNR established a three-stage process for applications for access to Crown land for wind testing and project construction and operation which included:[63]

a. the Site Release process to obtain an Applicant of Record ("**AOR**") status for specific "*grid cells*" or groupings of grid cells of Crown land,[64] divided into two-stages, including:

i. wind power testing application and review; and

ii. wind power development review; then

b. the process for requesting necessary permits and approvals for development of the project,[65] including tenure for development of a wind farm on Crown land.[66]

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60 *Windstream I* Award, para. 111.

61 *Windstream I* Award, para. 111.

62 Memorial, para. 107.

63 Memorial, para. 107.

64 Memorial, para. 107; *Windstream I* Award, para. 107.

65 *Windstream I* Award, para. 107.

66 *Windstream I* Award, para. 107.

C. THE WOLFE ISLAND SHOALS PROJECT

62. In 2008, the Claimant began its investment in developing the Project, a 300-megawatt offshore wind energy facility in Lake Ontario,[67] including resource evaluation, engineering and technical reviews.[68]

63. In February 2008, the Claimant submitted for its "*right to connect*" and Crown land access the following two applications:

    a. a SIA application to IESO (whilst undertaking other preparatory work);[69] and

    b. an AOR status application to the MNR to develop a wind facility on Crown land,[70] (with the Project occupying a subset of the "*grid cells*" within the application).[71]

64. In September 2009, the MNR acknowledged the Claimant's Crown land AOR status application in writing and informed it that in order to maintain priority position within MNR's site release process, it needed to submit an application to the FIT Program.[72]

65. On 27 November 2009, the Claimant (through WWIS and other subsidiaries), submitted its application to OPA for (among other things), a feed-in-tariff contract in respect of the Project, with WWIS posting a CAD 3 million letter of credit.[73]

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67 Memorial, para. 55.

68 Memorial, para. 112; *Windstream I* Award, para. 117.

69 Memorial, para. 113; *Windstream I* Award, para. 118.

70 Memorial, para. 113.

71 Memorial, para. 115; *Windstream I* Award, para. 123.

72 Memorial, para. 114; *Windstream I* Award, para. 121.

73 Memorial, para. 115; *Windstream I* Award, para. 123.

66. In May 2010, the OPA offered a feed-in-tariff contract to WWIS for the Project,[74] followed by meetings with government representatives.[75] On 20 August 2010, WWIS executed the FIT Contract, and posted an additional CAD 3 million as security (total CAD 6 million).[76]

67. From 2009 to spring 2012, the Claimant carried out work to advance the Project, including wind resource/energy yield testing, preparing designs for the electrical system, a lake bottom investigation, financial assessments and the organisation of specialised consultants.[77]

68. According to the Claimant, by Spring 2012 the Project assets included:[78]

    a. the FIT Contract;

    b. the CAD 6 million letter of credit;

    c. all WWIS work product in connection with the Project development, including all studies to define the wind resource and determine the Project feasibility;

    d. all data that WWIS collected or acquired in connection with the Project, including wind resource data and meteorological data;

    e. the Project meteorological tower;

    f. WWIS's turbine supply agreement with Siemens for the Project; and

    g. land leases applications for the Project

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74 Memorial, para. 127.

75 Memorial, paras. 128 to 135; *see below* paras. 72.b-73.

76 Memorial, paras. 121, 137.

77 Memorial, para. 116; *Windstream I* Award, para. 124.

78 Memorial, para. 417.

69. It is undisputed that, by Spring 2012, the Project had not obtained the right to connect or control over the Crown land Project site. It did, however, have a FIT Contract.

D. THE FIT CONTRACT

70. The WWIS FIT Contract provided as follows:

a. WWIS became an electricity Supplier;

b. OPA would purchase all electricity generated by the Project from the Supplier:[79]

i. at a rate of CAD 190 per MW/hour;

ii. with full escalation for inflation until the Project's commercial operation date, and up to a maximum of 20 percent in total thereafter;

iii. for 20 years starting from commercial operation date;

c. the Supplier would put in place a security deposit;

d. construction could not commence until the OPA issued a Notice to Proceed (FIT Contract section 2.4), which was subject to the Supplier's:

i. receipt of REA (the approval) and any other equivalent environmental and site plan approvals necessary for construction to commence, and

ii. submission of a financing plan including signed commitment letters from sources of financing representing at least 50 percent of expected development costs, stating agreement in principle to provide necessary financing;[80]

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79 Memorial, para. 117; *Windstream I* Award, para. 137.

80 **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 2.4(b), p. 8.

e. prior to the Notice to Proceed, the Supplier could terminate only by forfeiting its security of CAD 6 million security,[81] (the original draft permitted OPA to terminate prior upon refunding the security and compensating supplier for a portion of its pre-construction development costs, but that was subsequently waived by OPA);[82]

f. the Supplier must commence commercial operation by the "*Milestone Date for Commercial Operation*" ("**MCOD**"), *i.e.*, usually four years from contract date,[83] although the Claimant obtained a specific term to extend by one year, *i.e.*, five years from contract date;[84]

g. once the Project achieved MCOD, the CAD 6 million security would be refunded;[85]

h. if the Supplier failed to achieve MCOD within 18 months (*i.e.*, by 4 November 2016), OPA would be entitled to terminate, retain the CAD 3 million initial security and sue the Claimant for damages;[86]

i. in the event of a *force majeure* event (within the meaning of the FIT Contract):

   i. the Supplier's obligation to achieve commercial operation by MCOD was suspended for the duration of the *force majeure* status;[87]

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81 **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 2.4(a)(ii), p. 8.

82 **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 2.4(a), pp. 7 to 8; **C-549**, Waiver Agreement OPA and WWIS re: Pre-NTP Termination Right, 29 August 2011; **C-575**, Email from Ian Baines (WEI) to John Vellone (BLG) and Adam Chamberlain (BLG), 19 December 2011.

83 *Windstream I* Award, para. 100.

84 *Windstream I* Award, para. 136; Memorial, para. 118; **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 2.5, p. 9.

85 **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 5.1(c), p. 19.

86 **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 9.2(d), p. 29.

87 **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Sections 10.1(a) and (g), pp. 31-32; *Windstream I* Award, para. 102.

ii. if, by reason of *force majeure* event, commercial operation was delayed more than 24 months after MCOD, either party could unilaterally terminate without costs or payments of any kind, and the security would be returned;

iii. if one or more events of *force majeure* prevented the Supplier from complying with its obligations for more than an aggregate of 36 months in any 60-month period, either party could unilaterally terminate;[88]

j. the Project could be brought into commercial operation within 18 months after the MCOD, although that would reduce the term of the FIT Contract;[89] and

k. commercial operation occurred when the following principal conditions were met:[90]

i. the Contract Facility has been completed in all material respects;

ii. the Contract Facility has been constructed, connected, commissioned and synchronized to the IESO-controlled grid such that 90 percent of the contract capacity is available to deliver electricity to the grid; and

iii. connection is achieved at the Connection Point of the Contract Facility set out in the FIT Contract cover page (in this case, the Lennox Connection Point).

71. WWIS did not execute the FIT Contract until 20 August 2010,[91] by which time a review of Ontario's offshore wind policy had commenced, as below.

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88 *Windstream I* Award, para. 102; **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 10.1(h), p. 32.

89 **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010), Section 9.1(j), p. 28.

90 Memorial, para. 119; **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 2.6(a)(iv), pp. 9 to 10.

91 Memorial, para. 137; *Windstream I* Award, para. 137.

E. MOE OFFSHORE WIND STRATEGY REVIEW AND *FORCE MAJEURE*

72. In the period after the FIT Contract was agreed but prior to its execution:

a. on 25 June 2010, MOE sought comment on a policy proposal entitled "*Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach*" ("**Offshore Wind Policy Proposal**"), including a proposed five-kilometre exclusion zone for offshore wind projects;[92]

b. in late June 2010, the Claimant sent a proposal to the Ontario Government, suggesting release of its application for parts of the lakebed within five kilometres of Wolfe Island in exchange for other lakebed lands further offshore;[93]

c. subsequently, land swap discussion continued, the Claimant formally applied to MNR to "*swap*" Crown land grid cells, and it reiterated its request for AOR status;[94] and

d. no "*swap*" occurred prior to the FIT Contract execution in August 2010.

73. Following the execution of the FIT Contract:

a. in September 2010, WWIS sought permission from MNR to erect a temporary wind monitoring mast to carry out wind speed testing;[95]

b. on 8 November 2010, IESO sent Notification of Conditional Approval for Connection to the WWSI, allowing it to connect to the grid at the Lennox Connection Point; and

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92 Memorial, para. 129; *Windstream I* Award, para. 131.

93 Memorial, para. 130; *Windstream I* Award, para. 133.

94 Memorial, paras. 131 to 141; *Windstream I* Award, paras. 134 to 139.

95 Memorial, para. 141 b); *Windstream I* Award, para. 139.

c. also on 8 November 2010, Hydro One, owner of the relevant power lines, issued a CIA for WWIS, which provided that WWIS was not expected adversely to impact transmission customers in the area of Lennox County.[96]

74. On 22 November 2010, MNR informed WWIS that:

a. the Offshore Wind Policy Proposal review remained "*still outstanding*";

b. it had yet to consider granting AOR status to the Project;[97] and

c. WWIS should not expect any decision on permission to conduct testing while the review was outstanding.[98]

75. On 10 December 2010, WWIS claimed a *force majeure* event under its FIT Contract "*on account of the lack of regulatory assistance from MNR and MOE*", in light of its inability to advance the Project in the absence of an AOR status,[99] and accordingly claimed that:

a. the MCOD was to be extended for the duration of the *force majeure* event; and

b. either party to the FIT Contract could unilaterally terminate if the Project did not reach commercial operation within two years of the original MCOD.[100]

76. Subsequently, WWIS proposed to the MOE that the Project proceed as a pilot project that would generate scientific data to assist Ontario; discussions on this proposal took place but no decision was made.[101]

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96 *Windstream I* Award, para. 140.

97 Memorial, para. 141 (d).

98 *Windstream I* Award, para. 141.

99 Memorial, para. 143; *Windstream I* Award, para. 142.

100 Memorial, para. 144; *Windstream I* Award, para. 142.

101 *Windstream I* Award, paras. 143 to 144.

77. In the course of February and March 2011, the OPA contacted each Supplier, including the Claimant, with an offer to execute an amending agreement that would extend the MCOD by up to one year in exchange for settlement of *force majeure* rights. WWIS did not accept this offer.[102]

F. THE MORATORIUM

78. On 11 February 2011, the Government of Ontario publicly announced the offshore wind moratorium, which included the Project (*i.e.*, that it would not be "*proceeding with any development of offshore wind projects until the necessary scientific research is completed and an adequately informed policy framework can be developed*").[103]

79. Thereafter, the Claimant continued unsuccessfully to seek to renegotiate the FIT Contract terms,[104] and events proceeded as follows:

a. in October 2011, the Claimant again unsuccessfully sought to have the Project proceed as a pilot, requesting reconfiguration of its AOR status application to permit testing activities;[105]

b. on 9 September 2011, OPA confirmed that delays arising out of the moratorium had constituted a *force majeure* event from 22 November 2010;[106]

c. in 2013, the Minister of Energy directed OPA:

i. to end procurement of electricity from large-scale FIT projects,[107] and

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102 Counter-Memorial, para. 35; *Windstream I* Award, para. 145.

103 Memorial, para. 148; Counter-Memorial, para. 34; *Windstream I* Award, para. 147.

104 Memorial, paras. 164 to 169; *Windstream I* Award, paras. 150 to 155.

105 Memorial, para. 170; *Windstream I* Award, para. 158.

106 Memorial, para. 147; *Windstream I* Award, para. 157.

107 Counter-Memorial, para. 55.

ii. to undertake a competitive Large Renewable Procurement process;[108] and

d. on 10 January 2014, OPA refused to agree to return WWIS's letter of credit and waive its unilateral right to terminate if the Project did not achieve commercial operation by 4 May 2017.[109]

80. By the end of 2012 the moratorium remained in place.

G. *WINDSTREAM I* ARBITRATION

81. On 28 January 2013,[110] the Claimant commenced the *Windstream I* arbitration, arguing that Ontario Government's conduct breached NAFTA Articles 1110, 1105, 1102 and 1103 rendering its Project investment worthless.[111]

82. The *Windstream I* Award granted one claim (NAFTA Article 1105 on fair and equitable treatment) and dismissed the other three (expropriation, non-discrimination, and most favoured nation treatment) as follows:[112]

> (a) The Claimant's claim that the Respondent has unlawfully expropriated the Claimant's investments in WWIS, the Project and the FIT Contract, contrary to Article 1110 of NAFTA, *is dismissed*;
>
> (b) ***The Claimant's claim that the Respondent has failed to accord the Claimant's investments fair and equitable treatment in accordance with international law, contrary to Article 1105 of NAFTA, is granted***;
>
> (c) The Claimant's claim that the Respondent has failed to accord the Claimant's investments treatment no less favorable than that accorded, in like circumstances, to its own investors contrary to Article 1102 of NAFTA *is dismissed*;

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108 Counter-Memorial, para. 55.

109 Memorial, para. 172.

110 *Windstream I* Award, para. 11.

111 *Windstream I* Memorial, para. 5.

112 *Windstream I* Award, para. 515 [Emphasis added].

(d) The Claimant's claim that the Respondent has failed to accord the Claimant's investments treatment no less favorable than that accorded, in like circumstances, to investors of any other Party or of a non-Party contrary to Article 1103 of NAFTA *is dismissed*;

(e) The Claimant ***is awarded compensation for the Respondent's breach of its obligations under Article 1105(1) of NAFTA in the amount of CAD 25,182,900***. This amount is payable within 30 days of the notification of this award;

(f) The Claimant's claim for post-award interest is dismissed; and

(g) The Respondent is ordered to pay CAD 2,912,432 to the Claimant within 30 days of notification of this award.

83. Specifically in respect of the successful NAFTA Article 1105(1) claim, the *Windstream I* Award held:[113]

> […] the Government ***did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium***. While the regulatory framework continued to envisage the development of offshore wind, additional and more detailed regulations governing offshore wind specifically were never developed. The Government let the OPA conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so under the GEGEA (a power it had exercised when introducing the FIT program). As a result, as the negotiations between the OPA and Windstream failed to produce results, ***by May 2012 the Project had a reached a point at which it was no longer financeable***. Nonetheless, ***the Government failed to clarify the situation***, either by way of promptly ***completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract***, or by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy and terminating Windstream's FIT Contract in accordance with the applicable law. ***For these reasons***, the Tribunal finds that the Government's

[113] *Windstream I* Award, para. 379 [Emphasis added].

> conduct vis-à-vis Windstream during the period following the imposition of the moratorium ***was unfair and inequitable within the meaning of Article 1105(1) of NAFTA***.

84. The *Windstream I* Award awarded the Claimant CAD 25,182,900 in damages to compensate for that breach of the fair and equitable treatment standard, reasoning that it was "*not entitled to compensation for the full value of its investment*" as a consequence of breach because:[114]

    a. "*the Claimant has not lost the **letter of credit**, which is still in place*", therefore:

        i. "*in order to quantify the damage caused by the Respondent's breach to the value of the Claimant's investment*";

        ii. "*a further adjustment must be made to reflect the value of the letter of credit (CAD 6 million)*"; and

    b. "*the **FIT Contract** is still in force and could, in theory, be still revived and renegotiated if the Parties so agreed*", however:

        i. "*the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place*";

        ii. "*although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value*"; and

        iii. "[i]*t is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them*".

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114 *Windstream I* Award, para. 483 [Emphasis added].

85. The final *Windstream I* Award was released on 6 December 2016, following the uncorrected Award, which had been circulated on 30 September 2016.

H. EVENTS POST-*WINDSTREAM I* ARBITRATION

86. Following the *Windstream I* Award, the Claimant allegedly proceeded to seek to create value by reactivating and renegotiating the FIT Contract on the basis that the *Windstream I* Award identified this to be an option. It proceeded to engage with potential investors, conducted further studies, and sought to interact with the MOE and MEI, IESO and Ontario Government, as set out below.

*(i) Post-*Windstream I *Award Potential Investors*

87. During the course of 2016 and 2017, the Claimant engaged with potential investors and partners in relation to the Project.[115] According to the Claimant, third parties, [redacted][116] expressed interest in investing in the Project following the *Windstream I* Award, as follows:[117]

a. a number of parties proactively reached out to the Claimant to express interest in learning more about the Project, including [redacted] in October 2016, [redacted] in October 2016, and [redacted] in November 2016;

b. in May 2017, the Claimant met with [redacted] and all of whom expressed interest in the Project and learning more about the potential opportunity;

c. in June 2017, the Claimant met a second time with [redacted] about potential investment in the Project;

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115 Memorial, para. 225; Counter-Memorial, para. 84.

116 Memorial, para. 225; Reply, para. 101.

117 Memorial, para. 228.

d. in June and July 2017, the Claimant met with [redacted] the former offering to demonstrate its capabilities to the Claimant;

e. by June 2017, [redacted]

f. in July 2017, the Claimant launched a data room so that potential investors could review information related to the Project and conduct due diligence; and

g. in August and September 2017, the Claimant continued to meet up with [redacted] to discuss investment in the Project.

88. According to the Claimant, [redacted][118] The Respondent questioned the seriousness of the negotiations and interest in the Project.[119]

*(ii) Post-*Windstream I *Award Work Conducted*

89. According to the Claimant, in 2017, it engaged Canadian Seabed Research to use more advanced software and hardware to interpret the original data obtained in 2010 by Canadian Seabed Research in its preliminary site investigation.[120] In particular:

a. in February 2017, Ortech prepared the updated Project Description Report that was submitted to MOE and, in the spring of 2017, also prepared an updated wind resource assessment;[121] and

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118 Memorial, paras. 229 to 230.

119 Counter-Memorial, paras. 83 to 85, 180; Reply, paras. 86 to 101.

120 Memorial, para. 219; **CWS-Baines-3**, Third Witness Statement of Ian Baines, paras. 42 to 43; **C-2143**, CSR 2017 Geological Assessment Report Project Number 1714, 27 February 2018.

121 **C-2074**, ORTECH Report: Project Description - Wolfe Island Shoals Offshore Wind Farm, 15 February 2017; **CWS-N. Baines-2**, Second Witness Statement of Ian Baines; **C-2713**, Email from Hank Van Bakel to Tyler G. Nielsen, David Mars, et al. re Windstream Contract and WRA, 30 June 2017.

b. also in 2017, CSR updated its report on the regional bathymetry and geophysical conditions of the turbine area.[122]

*(iii) Post-*Windstream I *Award Interactions with MOE and MEI*

90. Following receipt of the uncorrected *Windstream I* Award in September 2016, the Claimant unsuccessfully sought to reactivate and renegotiate the FIT Contract with the MOE and MEI as follows:[123]

a. the Claimant's Government Relations consultant, Mr Chris Benedetti, unsuccessfully sought to facilitate a meeting between the Claimant and MEI to discuss the Project:[124]

i. on 6 October 2016, Mr Benedetti spoke with MEI Chief of Staff, Mr Andrew Teliszewsky, to seek a meeting for the Claimant, but Mr Teliszewsky requested discussions to take place between legal counsel;

ii. on 13 October 2016, Mr Benedetti met with the Minister of Energy, who stated that he was not willing to meet with the Claimant;

iii. on 16 October 2016, Mr Benedetti spoke again to Mr Teliszewsky about meeting with the Claimant, but Mr Teliszewsky stated that MEI lawyers were still digesting the implications of the *Windstream I* Award;

iv. on 9 November 2016, Mr Benedetti spoke again to Mr Teliszewsky, but the latter informed him that the MEI had been advised by counsel not to engage with the Claimant;

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122 *See* Memorial, para. 219; **C-2143**, CSR 2017 Geological Assessment Report Project Number 1714, 27 February 2018.

123 Counter-Memorial, para. 59; **CWS-Benedetti-2**, Second Witness Statement of Chris Benedetti, para. 5.

124 Reply, paras. 108 to 122; Memorial, para. 236; **CWS-Benedetti-2**, Second Witness Statement of Chris Benedetti, para. 5.

b. following the legislative debate on 17 October 2016, the Claimant's efforts to re-open discussions with the Ontario Government intensified, based on:[125]

i. comments by the Premier of Ontario, Ms Kathleen Wynne, that:

1. the Ontario Government was continuing to take a "*cautious and reasonable approach to offshore wind to allow for the development of research and coordination*", which was the reason "*why there's a moratorium*";[126]

2. "*the Minister of the Environment is finalizing research on the issue, including decommission requirements and noise over water*";[127]

3. two preliminary studies were commissioned in 2014;[128]

4. until the necessary work was undertaken, the moratorium would not be lifted;[129] and

5. the Government was "*going to continue to work with the renewable industry*";[130]

ii. comments by Minister Glenn Thibeault, the then-Minister of Energy, that:

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125 Counter-Memorial, para. 61.

126 Memorial, para. 200; **C-2471, Exhibit 78**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, 17 October 2016, p. 720.

127 Memorial, para. 200; **C-2471, Exhibit 78**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, 17 October 2016, p. 720.

128 Counter-Memorial, para. 60; **R-383**, Merx Opportunity Abstract, "*Technical Evaluation to Predict Offshore Wind Farm Noise Impacts in Ontario*", 4 September 2014; **R-384**, Merx Opportunity Abstract, "*Assessment of Offshore Wind Farm Decommissioning Requirements*", 4 September 2014.

129 **C-2471, Exhibit 78**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, 17 October 2016, p. 720.

130 Memorial, para. 200; **C-2471, Exhibit 78**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, 17 October 2016, p. 720.

1. "[t]*he decision to place a moratorium on offshore wind is one our government still believes is correct, and that's why we're going to continue to take a cautious approach to offshore wind*";[131]

2. the Government was "*continuing to move forward with that cautious approach to offshore wind, which include*[d] *finalizing that research to make sure that* [they] [were] *protective of both human health and the environment*" (in a subsequent parliamentary session on 26 October 2016 in response to questioning about the *Windstream I* Award);[132]

c. on 23 November 2016, the Claimant wrote to Minister Glen Murray, then Minister of the Environment, to "*request an update regarding the offshore wind-related research that the Ministry of the Environment is in the process of finalizing*";[133]

d. on 28 November 2016, the Claimant wrote to Minister Thibeault requesting a meeting to discuss the Project and impact of delay caused by finalising research identified in the 11 February 2011 decision notice;[134]

e. after the corrected final *Windstream I* Award was issued, on 6 December 2016, Minister Thibeault replied that:

i. the MEI was "*not in a position to discuss matters related to individual Feed-in-Tariff (FIT) contracts*";

ii. the IESO is "*the counterparty to all FIT contracts*";[135] and

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131 Memorial, para. 201; **C-2041**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, 17 October 2016, p. 723.

132 Memorial, para. 202; **C-2045**, Official Report of Debates (Hansard) Transcript – English, Standing Committee on Estimates, Legislative Assembly of Ontario, 26 October 2016, p. E-159.

133 **R-784**, Letter from David Mars (Windstream) to Minister Murray (MOE), 23 November 2016.

134 **C-2049 (A)**, Letter from David Mars (Windstream) to Minister Thibeault (MEI), 28 November 2016.

135 **R-787**, Letter from Minister Thibeault (MEI) to David Mars (Windstream), 6 December 2016.

iii. "*it would* [not] *be appropriate to meet*" because the period for the setting aside the *Windstream I* Award had yet to expire;[136]

f. on 6 December 2016, the media reported Minister Thibeault as commenting that a "*government appeal of the Windstream decision could still happen"* and responded affirmatively to the question as to whether the government could just let the Project be built,[137] which the Respondent claimed was inaccurate and that he was flustered responding to media queries;[138]

g. on 15 December 2016, the Claimant wrote further to Minister Thibeault:

i. to request a meeting, explaining that "*given that the ongoing moratorium is not within the sphere of the IESO's responsibility or power to resolve, we do not believe that meeting with the IESO alone would be productive in achieving a resolution*";[139]

ii. pointing out the *Windstream I* Award paragraphs 379 and 380 state that the FIT Contract was in contractual limbo; and

iii. noting that it was "*for the Government of Ontario, including where necessary by way of directing the IESO* […] *to resolve the situation that has prevailed due to the actions of the Government of Ontario such that* [the Claimant] *may either move forward with the project or negotiate a reasonable resolution*";[140]

h. on 23 December 2016, the MOE emailed the Claimant with the two studies related to offshore wind (on noise and decommissioning), as mentioned by the Premier during the legislative debate on 17 October 2016;[141]

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136 **R-787**, Letter from Minister Thibeault (MEI) to David Mars (Windstream), 6 December 2016.

137 Memorial, para. 204; **R-788**, Article, "*Energy minister says all options still being considered in offshore wind power case*", 6 December 2016.

138 Counter-Memorial, para. 65.

139 **C-2055 (A)**, Letter from David Mars (Windstream) to Minister Thibeault (MEI), 15 December 2016.

140 **C-2055 (A)**, Letter from David Mars (Windstream) to Minister Thibeault (MEI), 15 December 2016.

141 **C-2471, Exhibit 80**, Email from Sarah Paul (MOE) to David Mars (Windstream), 23 December 2016.

i. on 15 February 2017, the Claimant submitted an updated REA to the MOE:[142]

   i. characterised as its third REA submission;[143]

   ii. making three requests in the cover letter:

      1. cessation of the moratorium;

      2. confirmation of the proposed 5 km setback; and

      3. provision of an Aboriginal Consultation List, which was required under the REA's guidelines;[144] and

   iii. the Claimant did not receive an immediate response,[145] and sent follow up letters on 21 April 2017, 13 June 2017 and 10 August 2017;[146]

j. on 21 February 2017, Minister Thibeault replied to the Claimant's letter dated 15 December 2016, stating again that:

   i. "*the Ministry* [was] *not in a position to discuss matters related to individual Feed-in-Tariff (FIT) contracts*"; and

   ii. the IESO, "*as the administrator of the FIT program and counterparty to all FIT contracts, would be the appropriate contact on such matters*";[147]

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142 **C-2073**, Letter from Ian Baines (WEI) to Dolly Goyette (MOE), 15 February 2017.

143 Memorial, paras. 211 to 214; **C-2073**, Letter from Ian Baines (WEI) to Dolly Goyette (MOE), 15 February 2017.

144 Memorial, para. 213.

145 Memorial, para. 215.

146 Memorial, para. 215; **C-2477, Part 1, Exhibit D,** Letter from Ian Baines (WWIS) to Dolly Goyette (MOE), 13 June 2017; **C-2477, Part 1, Exhibit D**, Letter from Ian Baines (WWIS) to Dolly Goyette (MOE), 10 August 2017.

147 **C-2076**, Letter from Minister Thibeault (MEI) to David Mars (Windstream), 21 February 2017.

k. on 25 August 2017, the MOE responded to the Claimant's REA submission:[148]

i. making the following statements in response to the Claimant's 15 February 2017 submission:

1. the documents provided did not constitute the required reports for an REA application;[149]

2. Ontario still had not "*developed an offshore wind policy framework on approval requirements*" nor "*a process for obtaining Crown land site access under the Public Lands Act*";

3. it was not able to "*confirm whether or when Ontario will be revisiting the February 2011 decision*";[150]

4. "*the Ministry does not endorse any of the studies that* [it has] *conducted in the absence of any provincial framework on offshore wind*"; and

5. "[a]*ny studies* [it carries] *out are entirely at* [its] *own risk*" for they "*may not meet the standards set out in the provincial guidelines and policies should these be developed*";[151] and

ii. further provided a list of aboriginal communities pursuant to section 14 of Ontario Regulation 359/09, as requested by the Claimant, noting that:[152]

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148 **R-795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017.

149 **R-795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017.

150 **R-795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017.

151 **R-795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017 [Emphasis omitted].

152 **R-795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017.

1. "*doing so does not imply approval or support of this project or the contents of the* [Project] *or any other studies that* [the Claimant has] *prepared*";

2. it would "*write to these communities to advise them that they have been identified as potentially having aboriginal or treaty rights that may be adversely impacted or may otherwise be interested in the negative environmental effects of* [the Project]", and

3. they would be advised that "*the policy framework governing offshore wind has yet to be developed and that no decisions have been made granting* [the Claimant] *access to Crown land*".[153]

*(iv) Post-*Windstream I *Award Interactions with IESO*

91. Following receipt of the uncorrected *Windstream I* Award in September 2016, and after receipt of the corrected Award on 6 December 2016, the Claimant unsuccessfully sought to reactivate and renegotiate the FIT Contract with the IESO as follows:

a. on 2 December 2016, the Claimant wrote to IESO requesting to meet and discuss the Project and the FIT Contract;[154]

b. on 10 December 2016, the Claimant sent a follow-up letter and asked for a response;[155]

c. on 13 December 2016, IESO replied and agreed to meet with the Claimant;[156]

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153 **R-795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017. The Claimant submitted in the *Windstream II* arbitration that it did not consult directly with the aboriginal communities because it did not consider it respectful to do so, "until it received clarity about the Project". Counter-Memorial, para. 79; Reply, para. 84.

154 **C-2050 (A)**, Letter from David Mars (Windstream) to Michael Killeavy (IESO), 2 December 2016.

155 **C-2052 (A)**, Letter from David Mars (Windstream) to Michael Killeavy (IESO), 10 December 2016.

156 Memorial, para. 246.

d. on 12 January 2017, WWIS and IESO met to discuss the FIT Contract:[157]

   i. WWIS indicated that it did not want the FIT Contract to terminate and that it was prepared to build the Project;

   ii. IESO indicated that it would not waive its contractual right to terminate, and that it had no intention of extending any of the milestone dates;

   iii. when asked about the Ontario Government's indication that it would "*freeze*" the FIT Contract, IESO responded that freezing did not mean a perpetual *force majeure*, which IESO was not prepared to give;[158]

   iv. the Claimant asked IESO to consider amending the FIT Contract; and

   v. IESO agreed to consider the matters discussed;[159]

e. on 9 February 2017, IESO wrote to the Claimant stating that:

   i. it was "*not prepared to amend the FIT Contract to provide an extension of the* [MCOD] *or the date that would be an event of default under Section 9.1(j)*";

   ii. it would not "*waive any of its rights under the FIT Contract, including its rights to terminate the FIT Contract pursuant to Section 10.1(g)*"; and

   iii. it had "*not made a decision whether to exercise its termination right*", which would arise in three months' time.[160]

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157 **C-2067**, Meeting Minutes of Windstream and IESO Meeting, 12 January 2017.

158 **C-2067**, Meeting Minutes of Windstream and IESO Meeting, 12 January 2017.

159 **C-2067**, Meeting Minutes of Windstream and IESO Meeting, 12 January 2017.

160 **R-662**, Letter from Michael Killeavy (IESO) to Nancy Baines (WEI), 9 February 2017.

*(v) Post-*Windstream I *Award Public Information Regarding Moratorium*

92. In September 2016, the IESO released the Ontario Planning Outlook, stipulating that "*Ontario's existing, committed and directed resources would be sufficient to meet the flat demand outlook*".[161]

93. On 26 October 2017, Ontario released its Long-Term Energy Plan, announcing a move away from "*relying on long-term electricity contracts*", preferring a "*market-based approach to reduce electricity supply costs*".[162]

94. On 13 February 2017, media articles indicated that the moratorium on offshore wind in Ontario would continue.[163]

*(vi) Post-*Windstream I *Award Internal Ontario Government Correspondence*

95. In the course of document production in the *Windstream II* proceedings, the Claimant obtained internal Ontario Government correspondence as follows:

a. September 2016 MNR and MOE internal correspondence regarding the response to the question "*what research have you done into offshore*" in which:[164]

i. MOE proposed "*not to mention future decisions or reg development to avoid speculation on the possibility of offshore development in Ontario*";[165]

ii. MNR proposed to remove any indication that the Ontario Government was conducting further research or would proceed with offshore wind development in Ontario (*i.e.*, amend the sentence, "[t]*he province is*

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161 Counter-Memorial, para. 54; **C-2035**, IESO Ontario Planning Outlook, 1 September 2016, pp. 8 to 9.

162 Memorial, para. 315; Counter-Memorial, para. 54; **C-2061**, Ontario's Long-Term Energy Plan 2017, p. 35.

163 **R-794**, The Globe and Mail, "*Ontario signals moratorium on offshore wind projects will continue for years*", 13 February 2017; **C-2072**, Chat News Today, "*Ontario signals offshore wind moratorium will continue for years*", 13 February 2017.

164 Memorial, para. 299; **C-2037**, Email from Kate Jordan (MNR) to Mark Rabbior (MOE), 8 September 2016.

165 **C-2037**, Email from Kate Jordan (MNR) to Rosalyn Lawrence (MNR), 30 September 2016.

meeting its short term renewable energy targets and will not proceed with offshore projects until there is sufficient scientific evidence demonstrating that they will not have adverse effects to humans or the local environment", to delete the words from "*until*" and to replace with language that the Ontario Government would "*continue to monitor the latest developments and research in other jurisdictions*";[166]

iii. a subsequent MOE response shared internally at the MNR omitted the entire paragraph;[167] and

b. A 16 May 2019 MNR internal email, commenting on the plan for offshore wind: "[g]*iven the new govt messages on wind power I don't think it's about doing more studies anymore.* […] *Given all those contracts cancelled*".[168]

(vii) Post*-Windstream I *Award Emerging Renewable Power Program

96. In January 2018, Canada's Minister of Natural Resources announced the launch of an expression of interest for Emerging Renewable Power Program ("**ERPP**") to expand renewable energy sources available to provinces.[169]

97. On 20 April 2018, WWIS submitted an application under the ERPP for the Project.[170]

98. On 13 July 2018, Natural Resources Canada responded that, despite scoring well, the Project was not recommended to be funded under Phase 1 of the ERPP, but

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166 **C-2037**, Email from Kate Jordan (MNR) to Mark Rabbior (MOE), 8 September 2016.

167 **C-2037,** Email from Kate Jordan (MNR) to Rosalyn Lawrence (MNR), 30 September 2016.

168 **C-2219**, Email from Pauline Desroches (MNR) to Kevin Edwards (MNR), 16 May 2019.

169 **C-2138**, Natural Resources Canada News Release, "*Canada Supports Next Wave of Emerging Renewable Power*", 18 January 2018.

170 **C-2149**, **C-2149 (A)**, **C-2149 (B)**, and **C-2149 (C)**, Cover letter from Windstream Energy to Natural Resources Canada with attached supporting documentation, 20 April 2018.

upon agreement by the Claimant included it under the Phase 2 project list, among other projects that could be considered for funding in the future.[171]

I. COURT PROCEEDINGS AND FIT CONTRACT TERMINATION

99. On 15 March 2017, the Respondent paid the Claimant the amount ordered in the *Windstream I* Award, *i.e.*, CAD 25 million with interest.

100. On 27 March 2017, the Claimant filed an Ontario municipal court application against the IESO ("**Court Proceedings**"), requesting *inter alia*:

    a. an order restraining the IESO from exercising any of its termination rights under the FIT Contract; and

    b. a declaration that the IESO could not rely on the moratorium or pre-moratorium delays to exercise any of those termination rights,[172] (IESO's FIT Contract section 10.1(g) termination rights would arise on 5 May 2017).

101. On 28 April 2017, IESO agreed to defer its termination decision pending the resolution of the Court Proceedings, reserving its FIT Contract section 10.1(g) right to do so if circumstances changed, upon a 30-day notice.[173]

102. From March to October 2017, IESO and the Claimant exchanged affidavits, document productions and conducted cross-examinations in the Court Proceedings.[174]

103. On 1 November 2017, IESO and the Claimant agreed to adjourn the Court Proceedings to allow IESO to make a decision regarding the exercise of its

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171 Memorial, paras. 220 to 223; **C-2164**, Letter from Natural Resources Canada to Ian Baines (WWIS), 13 July 2018; **CWS-Baines-3**, Third Witness Statement of Ian Baines, paras. 44 to 49.

172 **C-2471, Exhibit A**, WWIS Notice of Application, 27 March 2017.

173 Memorial, para. 267; Counter-Memorial, para. 82; **C-2083**, Email from Melanie Ouanounou (Goodmans LLP) to Emily Sherkey (Torys LLP), 28 April 2017.

174 Memorial, para. 268; **CWS-N. Baines**, Witness Statement of Nancy Baines, para. 48.

termination right under the FIT Contract ("**Adjournment Agreement**").[175] IESO requested that the Claimant provide information relating to the Project, which the Claimant provided accordingly.[176]

104. On 29 November 2017, the Claimant wrote to inform IESO that it would:

a. commence commercial operation within 63 months of the end of the *force majeure*;[177]

b. "*allow the IESO to exercise whatever rights it has under section 10.1(g) of the FIT Contract if the FIT Contract has remained under* force majeure *as a result of the current* Force Majeure *event and the Moratorium for the period beginning on November 22, 2010 and ending on the date that is ten years after the date the IESO accept*[ed] *WWIS' offer*";

c. "*not exercise whatever rights it has under s. 10.1(g) of the FIT Contract during the ten year period described*"; and

d. "*leave in place its fully-cash collateralized $6 million Completion and Performance Security in accordance with the terms of the FIT Contract*".[178]

105. On 16 February 2018, IESO's contract management presented an analysis memorandum to Mr Michael Lyle, IESO's General Counsel and Vice-President, Legal Resources and Corporate Governance, recommending that [redacted] ("**Analysis Memorandum**").[179] [redacted]

106. The Analysis Memorandum [redacted]

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175 Memorial, para. 271; Counter-Memorial, para. 86; **R-664**, Adjournment Agreement between IESO and Windstream, 1 November 2017.

176 Memorial, para. 272; Counter-Memorial, paras. 87 to 89.

177 **R-801**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO), 29 November 2017, pp. 2 to 3.

178 **R-801**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO), 29 November 2017, p. 8.

179 **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018.

a. it conducted an analysis guided by [redacted]

b. [redacted][180] and

c. [redacted]

107. [redacted]

a. [redacted][181]

b. [redacted][182] and

c. [redacted][183]

108. [redacted]

180 Counter-Memorial, paras. 98 to 101; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, pp. 9 to 14.

181 Counter-Memorial, para. 99; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, p. 13.

182 Counter-Memorial, para. 99; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, p. 14.

183 Counter-Memorial, para. 99; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, p. 14.

184 Counter-Memorial, para. 100; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, pp. 14 to 15.

[redacted][185]

109. [redacted]

a. [redacted][186] and

b. [redacted][187]

110. [redacted][189]

111. [redacted][190]

[redacted]

185 Counter-Memorial, para. 101; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, pp. 15 to 17.

186 Counter-Memorial, para. 102; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, p. 17.

187 **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, p. 17.

188 Counter-Memorial, para. 103; **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, p. 18.

189 Memorial, para. 329; Reply, para 137.

190 **R-808**, Section 10.1(g) Analysis Memorandum, 16 February 2018, p. 18.

[redacted]

112. On 20 February 2018, IESO communicated its decision to terminate to the Claimant ("**Termination Decision**").[191] Pursuant to the Adjournment Agreement, WWIS had 60 days to notify IESO if it intended to continue the Court Proceedings to challenge the Termination Decision, in which case it would not be effective pending the outcome.[192]

113. On 23 February 2018, the Claimant requested reasons for the Termination Decision.[193]

114. On 2 March 2018, IESO responded to provide the bases for the Termination Decision, as follow:[194]

    a. the "*factual circumstances surrounding the FIT Program and its objectives, as well as the FIT Contract itself*", including:

        i. extensive delays to the Project;

        ii. lack of clarity as to whether the *force majeure* event would be resolved;

        iii. that WWIS had not been able to gain site access or commence certain regulatory approval processes (which first required resolution of the moratorium); and

        iv. that the Ontario Government had not yet established regulatory guidelines (and therefore timelines) for offshore wind;

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191 **R-665**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS), 20 February 2018.

192 **R-664**, Adjournment Agreement between IESO and Windstream, 1 November 2017.

193 **C-2477, Exhibit N**, Letter from Nancy Baines (WWIS) to Michael Lyle (IESO), 23 February 2018.

194 Memorial, para. 276; **C-2477, Exhibit O**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS), 2 March 2018.

b. the evidence and documentary productions obtained in the Court Proceedings;

c. the Ontario Government's 2017 Long-Term Energy Plan;

d. directions from the Minister of Energy dated 12 June 2013 and 27 September 2016;

e. a letter from MOE to IESO dated 2 February 2018, which confirmed that Ontario had not, among other things, "*developed an offshore wind policy framework on approval requirements*" and was "*not in a position to confirm whether or when Ontario* [would be] *revisiting*" the Moratorium; and

f. information from WWIS from late 2017 to early 2018.

115. On 20 April 2018, WWIS delivered a Notice of Return ("**NOR**"), indicating its intention to continue with the Court Proceedings against the IESO:

a. challenging its decision to exercise its section 10.1(g) termination right; and

b. seeking a declaration that the IESO could not rely on the moratorium or the pre-moratorium delays to exercise any of its termination rights under the FIT Contract.[195]

116. From May 2018 to March 2019, the disputing parties exchanged documents in the Court Proceedings, but disagree as to causes of procedural delay.[196]

117. In parallel, the Claimant continued with its efforts to engage with the Ontario Government.[197]

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195 **C-2148**, Email from Nick Kennedy (Torys LLP) to Melanie Ouanounou (Goodmans LLP), 20 April 2018.

196 Counter-Memorial, para. 108; Reply, para. 129.

197 Counter-Memorial, para. 109; **R-812**, Office of the Integrity Commissioner, "*Lobbyists Registration*", search results for Patrick Harris; **R-814**, Office of the Integrity Commissioner, "*Lobbyists Registration*", search results for Kory Teneycke and Christine Simundson; Reply, para. 130.

J. THE FORD GOVERNMENT ELECTION

118. On 7 June 2018, Ontario elected a new provincial Government, replacing the Liberals with Premier Ford's Conservatives.[198] The new Government made statements regarding renewable energy generation and rising electricity prices in Ontario.[199] Following the 2018 election, in the renewable sector:

a. in July 2018, the MEI issued a directive ordering IESO to "*immediately take all steps necessary to wind down all FIT 2, 3, 4 and 5 contracts where the IESO has not issued* [a] *Notice to Proceed*", resulting in the cancellation of 758 renewable energy contracts,[200] pursuant to which, according to the Claimant:

i. Ontario spent CAD 231 million compensation for cancelled contracts, with limited liability because, "*IESO had not granted these FIT 2, 3, 4, and 5 contracts a waiver of the IESO's contractual right to terminate the FIT Contract prior to the issuance of a Notice to Proceed (NTP) upon refunding the security and compensating the contract holder for a portion of its pre-construction development costs, up to a liability limit*";[201] and

ii. for the White Pines project in particular, a FIT contract supplier (for a much smaller project than the Claimant's), settlement payment is estimated in the sum of CAD 100 million upward,[202] following legislation terminating the project;[203]

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198 Counter-Memorial, para. 111.

199 Memorial, para. 254.

200 **C-2162**, Order in Council and Directive of the Minister of Energy, Northern Development and Mines to the IESO, "*Wind Down of Feed-in Tariff and Large Renewable Procurement Contracts*", 13 July 2018.

201 Reply, paras. 170 to 171.

202 **C-2759**, CityNews, "*Ford government spending $231M to cancel renewable energy projects*", 19 November 2019; **C-2751**, Global News, "*Ontario to compensate White Pines wind turbine developers for cancelled contract*", 11 July 2019.

203 Reply, paras. 172 to 174; **C-2741**, White Pines Wind Project Termination Act, 2018, S.O. 2018, Chapter 10, Schedule 2.

b. on 6 December 2018, the Green Energy Repeal Act, 2018 was adopted and entered into force:

i. repealing the Green Energy Act 2009, and

ii. enhancing the authority of the Environmental Protection Act to prohibit the issuance of renewable energy approvals including where demand for electricity is not demonstrated;[204] and

c. on 30 May 2019, the REA regulation (O. Reg. 359/09) was amended to require current and future applicants for renewable energy approval to show that the proposed project fulfils a need for the electricity produced.[205]

119. Despite the new directives, legislative amendments and regulations in 2018 and 2019, according to the Claimant, "*little has changed to the regulatory framework*" [206] (relying on the Environmental Protection Act provisions on renewable energy and REAs (Section 6 of O. Reg. 359/09), which still includes offshore wind projects for the class of "*wind facilities*" eligible to obtain an REA).[207]

K. COMMENCEMENT OF THE CURRENT ARBITRATION

120. On 26 November 2019, the Claimant wrote to then-Minister of Energy, Minister Greg Rickford:

a. "*request*[ing] *that* [he] *exercise*[s] [his] *powers, both formal and informal, to direct the IESO to take certain steps regarding WWIS'* [FIT] *Contract with the IESO*";[208]

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204 Counter-Memorial, para. 113.

205 Counter-Memorial, para. 114; **R-816**, Amendments to the Renewable Energy Approvals Regulation (Ontario Regulation 359/09), Environmental Registry of Ontario, 11 June 2019.

206 Memorial, para. 259.

207 Memorial, para. 261.

208 **C-2249**, Letter from David Mars (Windstream) to Minister Rickford (MEI), 26 November 2019.

b. stating that it would be "*forced to bring a claim against the Government of Canada pursuant to* [NAFTA]" if the MEI refused to do so; and

c. requesting the MEI to do the following:[209]

1. Direct the IESO to withdraw its letter of February 20, 2018 purporting to terminate the FIT Contract;

2. Direct the IESO not to exercise any of its termination rights under the FIT Contract, including without limitation its rights under sections 9.1(j) and 10.1(g) of the FIT Contract, for reasons relating to the Moratorium or pre-Moratorium delays caused by the Ontario Government; and

3. Direct the IESO to take all steps necessary to ensure that the FIT Contract is "frozen" such that the Project may proceed as soon as the Moratorium is lifted, as if the Moratorium had not been imposed.

121. On 10 December 2019, Minister Rickford responded that "*Ontario* [had] *decided not to intervene in this matter*" and that "*it* [was] *more appropriate for* [the Claimant] *to engage with the IESO*".[210] The next day, *i.e.*, 11 December 2019, the Claimant wrote to IESO to reconsider its Termination Decision, but did not receive a response.[211]

122. On 15 January 2020, the Claimant informed the IESO of its decision to discontinue the Court Proceedings in order to pursue the *Windstream II* arbitration.[212]

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209 **C-2249**, Letter from David Mars (Windstream) to Minister Rickford (MEI), 26 November 2019.

210 **C-2253**, Letter from Minister Rickford (MEI) to David Mars (Windstream), 10 December 2019.

211 Memorial, para. 287; **C-2254**, Letter from David Mars (Windstream) to Peter Gregg (IESO), 11 December 2019.

212 Memorial, para. 279; Counter-Memorial, para. 115.

123. On 22 January 2020, the Claimant delivered its Notice of Intent to submit a claim to arbitration against the Government of Canada in the *Windstream II* arbitration.[213]

124. By letter dated 18 February 2020, IESO stated that the FIT Contract was terminated as of that date, in light of the abandonment of the Court Proceedings and pursuant to the terms of the Adjournment Agreement.[214]

125. Two days later, IESO directed the Claimant's bank to cancel the CAD 6 million letter of credit.[215] It is undisputed that the amount has since been returned to the benefit of the Claimant.[216]

IV. PRELIMINARY ISSUES

126. In relation to jurisdiction pursuant to CUSMA (and NAFTA), the disputing parties agree that:

a. pursuant to NAFTA Articles 1116, 1117 and 1122, the Respondent as a NAFTA Contracting Party is *prima facie* subject to the Tribunal's jurisdiction;[217] and

b. the Claimant's investments, namely WWIS, the Project and the FIT Contract, fall within the meaning of paragraph 6 of Annex 14-C to CUSMA because:[218]

i. they were established or acquired after NAFTA came into force, and

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213 Counter-Memorial, para. 115.

214 **C-2289**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS), 18 February 2020.

215 **C-2291**, Letter from Darryl Yahoda (IESO) to Bank of Montreal Global Trade Operations, 20 February 2020.

216 Memorial, para. 281; Counter-Memorial, para. 117.

217 Memorial, paras. 409 to 425.

218 Memorial, paras. 441 to 442; according to the Claimant, in para. 5 of its Response to the Notice of Arbitration, the Respondent stated that "Canada's consent to arbitration is conditional upon Windstream having a 'legacy investment' as defined in CUSMA Annex 14-C.6, a matter that has yet to be established.". The Claimant addressed the Respondent's statement in its Memorial, paras. 440 to 446, expressing its view that the Respondent had not formally raised this point as a jurisdictional defence and reserving its right to address the matter in more detail, should the Respondent articulate its concern in more detail. However, following the submission of the Claimant's Memorial, the Respondent did not further raise the issue.

ii. they were in existence on the date of entry into force of CUSMA.[219]

127. The Respondent nevertheless makes three preliminary objections to the claims in the *Windstream II* arbitration:

a. that based on principles of *res judicata*, collateral estoppel and/or abuse of process, the claims are barred because the Claimant failed to identify any measures following the *Windstream I* Award that could sustain an independent cause of action under NAFTA Chapter 11;[220]

b. that the Claimant fails to meet the requirement of NAFTA Articles 1116(1) and 1117(1) to establish *prima facie* loss or damage because:

i. it is estopped from asserting that the Project or FIT Contract has any value by virtue of its argument to the contrary in the *Windstream I* arbitration;

ii. a finding otherwise would require overturning the findings of the *Windstream I* Award; and

iii. the Claimant does not identify any "*subsequent, separable, self-standing cause of action that has caused any possible loss beyond what it claimed previously*";[221] and

c. that NAFTA Articles 1116(2) and 1117(2) strict three-year limitation periods mean that the Tribunal does not have jurisdiction *ratione temporis*, (*i.e.*, the Claimant had knowledge of the alleged breaches before the critical date for the limitation period of 22 December 2017).[222]

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219 Memorial, para. 446.

220 Request for Bifurcation and Memorial on Jurisdiction, paras. 49 to 91; Counter-Memorial, paras. 120, 146, 194; Rejoinder, paras. 20 to 21.

221 Request for Bifurcation and Memorial on Jurisdiction, paras. 109, 92 to 133; Counter-Memorial, para. 120.

222 Counter-Memorial, para. 120; Rejoinder, para. 79.

128. The Claimant rejects all three objections.[223]

129. The Tribunal takes each objection in turn below, setting out the disputing parties' positions (and United States and/or Mexico NAFTA Article 1128 submissions where relevant), followed by the Tribunal's analysis.

A. *RES JUDICATA*, COLLATERAL ESTOPPEL, AND ABUSE OF PROCESS

130. The first preliminary objection is that, based on principles of *res judicata*, collateral estoppel and/or abuse of process, the claims are barred because the Claimant failed to identify measures sustaining an independent cause of action following the *Windstream I* Award.[224]

(i) The Respondent's Position

131. According to the Respondent, the *Windstream I* Award "*fully and finally addressed all the issues currently put before this Tribunal*".[225] Therefore, it submits, claims for alleged breaches of NAFTA Article 1110 and Article 1105(1) are barred by the doctrine of *res judicata* and the doctrine of collateral estoppel.[226]

(a) The Applicable Legal Standard

132. According to the Respondent, general principles of international law preclude the Claimant from relitigating its claim in relation to the same measures.[227] It set out its submissions as to those general principles regarding *res judicata*, collateral

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223 Reply, para. 178.

224 Request for Bifurcation and Memorial on Jurisdiction, paras. 49 to 91; Counter-Memorial, paras. 120, 146, 194; Rejoinder, paras. 20 and 21. The claims that *res judicata* and collateral estoppel precludes the Claimant from bringing its claims are styled as "jurisdictional objections." Technically, *res judicata* and collateral estoppel are not jurisdictional in nature and are not set forth in the treaty articles conferring a tribunal jurisdiction authority to hear the matter. By contrast, *res judicata* and collateral estoppel addresses the finality of a prior award or decision and prevents the relitigation of a claim or issue that has already been decided. In fact, in the case of collateral estoppel, it is hard to see how issue preclusion would impact the jurisdiction of a tribunal to hear a claim. The same can be said for the doctrine of abuse of right, which similarly goes toward admissibility as opposed to being a jurisdictional question. Weinclude the discussion of the doctrines at the outset to align with the Parties pleadings.

225 Request for Bifurcation and Memorial on Jurisdiction, paras. 2, 47.

226 Counter-Memorial, paras. 193 to 194; Request for Bifurcation and Memorial on Jurisdiction, para. 55.

227 Request for Bifurcation and Memorial on Jurisdiction, para. 47.

estoppel and abuse of process in its Request for Bifurcation, as summarised below.[228]

133. First, as to *res judicata*, the Respondent submits that the doctrine is widely accepted as a rule of international law, which:[229]

a. has been applied in prior awards, including under ICSID and NAFTA, as follows:[230]

i. *Apotex v. US (III)* and *Waste Management v. Mexico* demonstrate that *res judicata* applies to NAFTA Chapter 11 disputes;[231]

ii. *Amco v. Indonesia* found that "*a right, question or fact distinctly put in issue and distinctly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed*";[232] and

iii. *Apotex v. US (III)* found that "*the purpose of this doctrine is to ensure finality of decisions, encourage judicial economy and to prevent potentially divergent decisions on the same issue*";[233] and

b. is characterised in commentary as, a "*final judgment already decided between the same parties or their privies on the same question by a legally constituted court having jurisdiction is conclusive between the parties, and the issue cannot be raised again*".[234]

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228 Request for Bifurcation and Memorial on Jurisdiction, paras. 47 to 66.

229 Request for Bifurcation and Memorial on Jurisdiction, paras. 49 to 52.

230 Request for Bifurcation and Memorial on Jurisdiction, para. 50.

231 Request for Bifurcation and Memorial on Jurisdiction, para. 51; **RL-005**, *Apotex v. US (III)*, paras. 7.4 to 7.66; **RL-111**, *Waste Management v. Mexico (II)*„Decision on Preliminary Objection, para.39.

232 **RL-113**, *Amco v. Indonesia*, para. in Resubmitted Proceeding, para. 30.

233 Request for Bifurcation and Memorial on Jurisdiction, para. 51; *see* **RL-005**, *Apotex v. US (US (III),))*, paras. 7.7 to 7.9.

234 **RL-114**, Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration', 8 Afr. J. Int'l & Comp. L. 38 (1996), pp. 38 to 39.

134. Further, according to the Respondent, *res judicata* requires that there are proceedings:

a. in the same legal order (*e.g.*, both decision-making bodies are international courts or international tribunals);

b. between the same parties; and

c. involving the same relief and grounds,[235] which considers whether the same matter is being raised in the new claim, based on it being:[236]

i. distinctly put in issue by the parties in the prior dispute, and

ii. distinctly decided by the tribunal in the prior dispute.[237]

135. It further submitted that although *res judicata* is a "*recognized rule of international law, the breadth of its application continues to be a matter of some contention*", and in particular:[238]

a. other prior awards suggest that "*the operative part of a judgment has relevance to* res judicata, *even if not direct* res judicata *effect*" (according to the Respondent: per Judge Anzilotti in *Factory at Chorzów*, "*although the binding effect attaches only to the operative part of a judgment and not to the statement of reasons, the statement of reasons has to be referred to in*

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235 **RL-115**, *CME* , Challenge Legal Opinion, paras. 15, 41 to 55, 92 to 129; **RL-005**, *Apotex v. US (III)*, para. 7.15; **RL-116**, *Newchwang Case*, p. 65.

236 **RL-117**, Interim Report: '*Res Judicata* and Arbitration', International Law Association, Berlin Conference ("*ILA Interim Report*"), 2004, pp. 20 to 21; **RL-005**, *Apotex v. US (III)*, paras. 7.13 to 7.16.

237 **RL-113**, *Amco v. Indonesia*, Decision on Jurisdiction in Resubmitted Proceeding, para. 30; **RL-114**, Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration', 8 Afr. J. Int'l & Comp. L. 38 (1996), p. 39.

238 Request for Bifurcation and Memorial on Jurisdiction, para. 54. *See also* **RL-112**, ILA Final Report on *Res Judicata* and Arbitration ("**ILA Final Report**"), LCIA Arbitration International, Vol. 25, Issue 1, 2009, para. 56; **RL-120**, 'Chapter 27: Preclusion, Lis Pendens and Stare Decisis in International Arbitration', in Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014), p. 3776; **RL-121**, Silja Schaffstein, "*The Doctrine of Res Judicata before International Commercial Arbitral Tribunals*" (Oxford International Arbitration Series 2016), para. 6.236.

order to understand the operative part and the grounds on which a decision was based");[239] and

b. "[d]*iffering approaches in domestic law*",[240] "*have resulted in confusion, with some international tribunals recognizing the distinction between the doctrines of* res judicata *and collateral estoppel and others stretching the doctrine of* res judicata *to incorporate the doctrine of collateral estoppel*".[241]

136. Secondly, as to collateral estoppel ("*also referred to as issue estoppel or issue preclusion*"), the Respondent submits that, "*international courts and tribunals have regularly examined under international law a prior tribunal's reasoning, and the*

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239 Request for Bifurcation and Memorial on Jurisdiction, para. 53; *see* **RL-119**, *Chorzów Factory Case*, Interpretation of Judgments Nos. 7 and 8, Dissenting Opinion by M. Anzilotti, Publications of the Permanent Court of International Justice, Collection of Advisory Opinions, Series A – No. 13, 16 December 1927, p. 24. Although this was the dissenting viewpoint in that case, it has since been recognized as a leading decision on *res judicata* and is often cited in academic and jurisprudence. *See also* **RL-005**, *Apotex v. US (III)*, paras. 7.30 to 7.32.

240 Request for Bifurcation and Memorial on Jurisdiction, para. 54. *See e.g.* **RL-163**, *Tembec v. US*, Opinion, outlining the distinct principles of *res judicata* and collateral estoppel, pp. 5 to 8: "Under the doctrine of *res judicata*, also known as claim preclusion, 'a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action' […] [i]n short, the doctrine embodies the principle 'that a party who once has had a *chance* to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.' […] Under the doctrine of collateral estoppel, or issue preclusion, an issue of fact or law that was actually litigated and necessarily decided is conclusive in a subsequent action between the same parties or their privies. […] Like res judicata, collateral estoppel relieves parties of the cost and vexation of multiple lawsuits, conserves judicial resources, prevents inconsistent decisions, and encourages reliance on adjudication.". *See also* **RL-005**, *Apotex v. US (III)*, para. 7.23: "The Tribunal recognises that historical differences as to issue estoppel have existed and, to a lesser extent, still exist in national laws between certain common law and certain civil law systems. As the ILA Interim Report makes clear, however, there is no sharp divide between these two legal systems."

241 Request for Bifurcation and Memorial on Jurisdiction, para. 54; **RL-122**, Gavan Griffith and Isabella Seif, 'Chapter 8: Work in Progress: Res Judicata and Issue Estoppel in Investment Arbitration', in Neil Kaplan and Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018), p. 122: "Investment tribunals also have applied mixed and confusing nomenclature within these contexts, to reach, in most matters, objectively 'correct' results to vindicate the underlying public policy for there to be finality. Some use the term res judicata without particularising that they are applying issue estoppel. Some do not apparently recognize concepts of issue estoppel as a separate exclusionary principle. Others treat res judicata and issue estoppel as entirely distinct doctrines." *See e.g.* **CL-086**, *Tokios Tokelés v. Ukraine*, para. 98; **RL-123**, *British Caribbean Bank v. Belize*, para. 77; **RL-124**, *Al Tamimi v. Oman*, paras. 131 and 358; **RL-125**, *Gavazzi v. Romania*, Decision on Jurisdiction, Admissibility and Liability, paras. 164 to 166.

arguments it considered, in determining the scope, and thus the preclusive effect, of the prior award's operative part".[242] In particular, it submits that the doctrine:[243]

a. "*prevents parties from litigating an issue that has already been effectively decided in a previous proceeding*";[244]

b. "*precludes a party from relitigating a point of law or fact that was decided by a previous tribunal and formed an essential element of deciding the dispute*";

c. "*can also apply when the party against whom it is asserted has had a full and fair opportunity to litigate the issue in the previous proceeding, but is now attempting to relitigate that same issue*";[245] and

d. "[e]*ven where the issue relates to a different claim, it can prevent a party from attempting to relitigate an issue that was already resolved in a previous proceeding.*"[246]

137. The Respondent relies on the description of collateral estoppel in prior awards and judgments including:

a. in *RSM v. Grenada* as follows:[247]

> […] a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding:

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242 Request for Bifurcation and Memorial on Jurisdiction, para. 60.

243 Request for Bifurcation and Memorial on Jurisdiction, paras. 54 to 60.

244 Request for Bifurcation and Memorial on Jurisdiction, para. 55.

245 *See* **RL-126**, *RSM v. Grenada*, para. 7.1.2 *referring to* **RL-113**, *Amco v. Indonesia*, Decision on Jurisdiction in Resubmitted Proceeding, para. 30. The *RSM* tribunal also noted the analysis used by the mixed claims commission in the C*ompany General of the Orinoco Case*, which itself quoted the US Supreme Court's Decision in *Southern Pacific Railroad Co. v. US*. The latter case was of special significance to the *RSM* tribunal because of its holdings that the collateral estoppel rule applies in a subsequent suit "[…] between the same parties or their privies."

246 *See* **RL-112**, ILA Final Report, para. 56; **RL-120**, 'Chapter 27: Preclusion, Lis Pendens and Stare Decisis in International Arbitration', in Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014), p. 3776; **RL-121**, Silja Schaffstein, "*The Doctrine of Res Judicata before International Commercial Arbitral Tribunals*" (Oxford International Arbitration Series 2016), para. 6.236.

247 **RL-126**, *RSM v. Grenada*, para. 7.1.1.

> (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.

b. US Supreme Court in *Southern Pacific Railroad Co. v. US*:[248]

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

c. *Apotex III* as "*being applied by tribunals, although not necessarily in name*", referring to:[249]

   i. the prior award in *Orinoco Steamship* award, finding claimants were "*forever estopped from asserting any right or claim based in any part upon any fact actually and directly involved*" in an earlier judgment, and

   ii. Professor Lowe, stating that "*the tribunal in the resubmitted* Amco *case 'clearly applied the principle of issue estoppel to the determination of specific facts and of the legal characterisations of facts by the previous tribunal*'".

138. The Respondent further noted that collateral estoppel was endorsed by the International Law Association ("**ILA**") Recommendation as "*a more extensive notion of* res judicata*, which is also followed in public international law, under*

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248 **RL-127**, *Southern Pacific Railroad Co. v. US*, 168 U.S. 1, 18 October 1897, pp. 48 to 49.

249 Request for Bifurcation and Memorial on Jurisdiction, para. 58; **RL-005**, *Apotex v. US (III)*, paras. 7.18, 7.23, 7.59 *citing* Jackson H. Ralston and W. T. Sherman Doyle, *Claim of Company General of the Orinoco Case*, Report of French-Venezuelan Mixed Claims Commission of 1902 (Washington, Government Printing Office, 1906), pp. 186, 276 and **RL-114**, Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration', 8 Afr. J. Int'l & Comp. L. 38 (1996), p. 42.

which res judicata *not only is to be read from the dispositive part of an award but also from its underlying reasoning*",[250] with Recommendation No. 4 providing that "[a]*n arbitral award has conclusive and preclusive effects in the further arbitral proceedings as to* […] *issues of fact or law which have actually been arbitrated and determined by it, provided any such determination was essential or fundamental to the dispositive part of the arbitral award*."[251]

139. Thirdly, as to abuse of process, according to the Respondent, "[a] *number of international arbitral tribunals have relied on the related doctrines of collateral estoppel and abuse of process when dealing with the initiation of multiple and successive claims against the same party*",[252] including by reference to abuse of process, submitting as follows:[253]

    a. "[a]*s a legal doctrine, abuse of process is a recognized principle of public international law that prohibits the exercise of a procedural right in contravention of the purpose for which that right was established*";[254]

    b. "[t]*he principle that every legitimate procedural right must be exercised in good faith forms the foundation of the abuse of process doctrine in public international law*"; and

    c. its purpose is "*to prevent the misuse of procedure in the face of unfairness to another party (even though a party's conduct may not be inconsistent*

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250 **RL-112**, ILA Final Report, para. 52 [Footnotes omitted]. While the Report applies only to international commercial arbitration (para. 17), "[its] Recommendations may still have some indirect relevance for BIT arbitrations" (para. 36).

251 **RL-164**, Annex 2: Recommendations on *Res Judicata* and Arbitration, 'International Commercial Arbitration', 72nd Conference of the International Law Association, Resolution No. 1/2006, 4-8 June 2006, p. 5.

252 *See e.g.* **RL-128**, *Eskosol v. Italy,* Rule 41(5) Decision, para. 167; **RL-126**, *RSM v. Grenada*, para. 7.1.1. *See also e.g.* **RL-195**, *Caratube v. Kazakhstan*, para. 376; **RL-130**, *Orascom v. Algeria*, paras. 546 to 548; **RL-131**, *Ampal v. Egypt*, Decision on Jurisdiction, para. 331.

253 Request for Bifurcation and Memorial on Jurisdiction, paras. 61 to 66.

254 *See* **RL-132**, *Abaclat v. Argentina*, para. 646. *See also* World Trade Organization, Report of the Appellate Body, '*United States – Import Prohibition of Certain Shrimp and Shrimp Products*', WT/DS58/AB/R, 12 October 1998, para. 158. "The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'."

with the literal application of the procedural rules), or to avoid the risk that the administration of justice might be brought into disrepute among right-thinking people".[255]

140. As to prior awards according to the Respondent, these "*have begun to employ abuse of process to contend with multiple and successive arbitrations against the same party in relation to the same circumstances and financial harm*",[256] including:

a. in *RSM v. Grenada*, to prevent an "*attempt to re-litigate and overturn the findings of another ICSID tribunal*" (based on information already known to it or that ought to have been raised before the prior tribunal),[257] and "*the tribunal concluded that the second arbitration was an abusive attempt to circumvent the 'binding' nature of the first ICSID decision*";[258]

b. in *Ampal v. Egypt*, to prevent "*a complex web of parallel proceedings*",[259] on the basis that "*it would crystallize in an abuse of process*" if "*the same claim is to be pursued on the merits before two tribunals*";[260] and

c. in *Orascom v. Algeria*,[261] to prevent multiple proceedings "*in relation to the same investment, the same measures and the same harm*".[262]

141. Having set out the Respondent's submissions as to the applicable legal standard(s), the Tribunal summarises below its position as to their application to the facts.

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255 **RL-117**, ILA Interim Report, p. 8.

256 Request for Bifurcation and Memorial on Jurisdiction, para. 64.

257 **RL-126**, *RSM v. Grenada*, paras. 7.3.1 to 7.3.7.

258 Request for Bifurcation and Memorial on Jurisdiction, para. 64; *see* **RL-126**, *RSM v. Grenada*, para. 7.3.7.

259 Request for Bifurcation and Memorial on Jurisdiction, para. 65; *see* **RL-131**, *Ampal v. Egypt,* Decision on Jurisdiction, paras. 312 to 317.

260 **RL-131**, *Ampal v. Egypt,* Decision on Jurisdiction, para. 331.

261 **RL-130**, *Orascom v. Algeria*, paras. 540 to 543.

262 **RL-130**, *Orascom v. Algeria*, para. 542.

(b) Application to the Facts

142. The Respondent's three primary points arising out of the effect of *res judicata*, collateral estoppel or abuse of process on the facts in *Windstream II* are that, following the *Windstream I* Award findings, the Claimant:

a. has identified no new measure that forms any basis for a new cause of action for NAFTA breach based on:

i. the continued imposition of the Moratorium following the *Windstream I* Award; and

ii. the termination of the FIT Contract;

b. is barred from reopening the determination that its CAD 6 million security deposit constituted a substantial portion of the value of its investment; and

c. is barred from seeking additional damages based on a valuation of its investments contrary to the value determined in the *Windstream I* Award.

143. As to absence of any new cause of action, the Respondent summarises the alleged six measures that the Claimant relies on post-*Windstream I* Award as follow:[263]

a. Ontario's failure to complete the work necessary to lift the Moratorium;

b. Ontario's continued application of the Moratorium;

c. Ontario's failure to direct IESO not to terminate the FIT Contract;

d. Ontario's failure to direct IESO to amend the FIT Contract to defer the project;

e. IESO's decision to terminate the FIT Contract; and

[263] Memorial, para. 428.

f. IESO's failure to amend the FIT Contract to ensure the Project would be deferred.

144. According to the Respondent, these measures culminate in an alleged NAFTA breach based on: (i) continued application of the Moratorium; and (ii) termination of the FIT Contract, as opposed to its deferral or amendment. It submits that, "[a]*t their core, these complaints reflect the same claim that was the subject of the* Windstream I *arbitration commenced in 2013, by the same investor and for the exact same investment*".[264] In particular, the Respondent submits that:

a. the Claimant has failed to identify any measure post-dating the *Windstream I* Award to support its claims because complaints based on the offshore wind Moratorium and FIT Contract termination complaints reflect the subject of the *Windstream I* arbitration;[265]

b. the Claimant attempts artificially to distinguish the claims in this arbitration, based on termination of the FIT Contract only after the *Windstream I* Award;[266]

c. "*it does not matter that all of the facts are not exactly the same, but whether the 'substance of the actions, not their form' gives rise to the same cause of action*";[267] and

d. the post-*Windstream I* Award acts are not new measures, but rather "*continued application of Ontario's acts and omissions, which were all challenged in* Windstream I."[268]

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264 Request for Bifurcation and Memorial on Jurisdiction, para. 68 *referring to* Notice of Arbitration.

265 Request for Bifurcation and Memorial on Jurisdiction, paras. 3, 48, 68; Rejoinder, para. 29.

266 Rejoinder, paras. 32 to 38.

267 Rejoinder, para. 32; **R-837**, *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498 (11th Cir. 1990), 5 July 1990, p. 1503.

268 Rejoinder, para. 39.

145. Further and specifically regarding continued imposition of the Moratorium, the Respondent raises five additional points regarding the *Windstream I* Award:[269]

a. the Claimant fails to explain how continued imposition of the Moratorium,[270] "*can amount to a breach without reopening the* Windstream I *Tribunal's final and binding determination that the implementation of 'a moratorium on offshore wind development* [was not] *wrongful*'";[271]

b. the tribunal "*did not just consider Ontario's decision to impose the moratorium; it was also faced with the moratorium's continued imposition*", (*i.e.*, it had been in place nearly six years by the date of the *Windstream I* Award, and "*over 4 years had passed since Windstream's Project became impossible to finance*");

c. the breach of NAFTA Article 1105 "*was the result of the Government not taking the necessary steps to bring clarity to that regulatory uncertainty and to the status and the development of the Project 'within a reasonable period of time after the imposition of the moratorium*'";[272]

d. the Claimant was compensated and the period of "*regulatory and contractual limbo*" occurring "*in the years following the imposition of the moratorium*" was over;[273] and

e. the tribunal "*was seized with the continuing imposition of the moratorium, specifically determining that the regulatory framework for offshore wind development remained incomplete and fully compensating the Claimant because its Project had no path forward*".[274]

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269 Request for Bifurcation and Memorial on Jurisdiction, paras. 71 to 74.

270 Memorial, paras. 303 and 331.

271 *Windstream I* Award, para. 376.

272 *Windstream I* Award, para. 380.

273 *Windstream I* Award, para. 380.

274 Request for Bifurcation and Memorial on Jurisdiction, para. 74.

146. On that basis, the Respondent submits that the Claimant is "*barred from relitigating the continued imposition of the moratorium, as it does not give rise to an independent cause of action under the NAFTA*".[275]

147. Further and specifically regarding the FIT Contract termination, the Respondent raises five additional points regarding the *Windstream I* Award:[276]

    a. the Claimant argues that it was only "*as of February 20, 2020, when the Termination Decision took effect*", when there was "*no longer any possibility for the Project to move forward or to be built as planned*" and "*no longer any possibility for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period*",[277] that its claim arose, but the Claimant lost any opportunities over a decade ago, as:[278]

        i. by late 2010, the FIT Contract was in *force majeure*;

        ii. by May 2012, "*it was clear that the Project could no longer be completed by* [MCOD]";[279]

        iii. as the Claimant noted in *Windstream I*, "*this* [termination] *right will inevitably arise when the Project fails to achieve commercial operation two years after the Project's MCOD, i.e. by 4 May 2017*";[280] and

        iv. the Claimant already argued in *Windstream I* that the FIT Contract had been effectively cancelled;[281]

    b. the *Windstream I* Award accordingly:

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275 Request for Bifurcation and Memorial on Jurisdiction, para. 74.

276 Request for Bifurcation and Memorial on Jurisdiction, paras. 75 to 81.

277 Memorial, para. 288.

278 *Windstream I* Award, para. 374.

279 Request for Bifurcation and Memorial on Jurisdiction, para. 76.

280 *Windstream I* Award, para. 189 (paraphrasing *Windstream I* Reply, para. 405).

281 *Windstream I* Award, para. 189 (paraphrasing *Windstream I* Reply, para. 399).

i. found that "*absent reactivation or renegotiation, the FIT Contract could no longer be completed by the MCOD*";[282] and

ii. awarded damages on this basis;[283]

c. the Claimant now "*resurrects representations made to, and considered by, the* Windstream I *Tribunal*", including promises by Ontario that:[284]

i. the "*Claimant's Project would be allowed to continue, that it would be frozen, deferred or on hold rather than cancelled*", and

ii. the "*Claimant would be kept whole*", which it is barred from relying on as those points were "*specifically considered by the* Windstream I *Tribunal as part of its finding that the Government caused legal and contractual limbo*" and they "*formed the basis for the compensation it awarded*";[285]

d. the Claimant identifies no new representation (since the *Windstream I* Award), "*that the moratorium would be lifted or that the FIT Contract would be frozen*", instead relying on "*promises that predate*" it and "*cannot be divorced from the compensation it has already received to make it whole again*", in particular:

i. the Claimant had "*no reasonable expectation that IESO would refrain from exercising its s.10.1(g) termination right under the FIT Contract*";

ii. "*IESO continued to communicate to WWIS that it was not willing to waive its termination right*";[286]

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282 Request for Bifurcation and Memorial on Jurisdiction, para. 77; *see Windstream I* Award, para. 290.

283 *See Windstream I* Award, para. 483.

284 *See* Memorial, paras. 10, 18; *Windstream I* Award, paras. 185, 218.

285 *See Windstream I* Award, paras. 379, 473.

286 *See* **R-662**, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream), 9 February 2017.

iii. the Claimant's awareness that IESO could exercise its FIT Contract s.10.1(g) termination right is evidenced by WWIS':[287]

1. "*notice of application to the Ontario SCJ, requesting an order restraining IESO from exercising any of its termination rights* […]"; and

2. "*concurrent letter to IESO requesting that it abstain from exercising its termination decision until after the application* […]";

e. as the *Windstream I* Award compensation "*relies on its determination that the Project became impossible to finance by May 2012*", the Claimant is "*barred from resurrecting the representations* […] *it relied* [on] *that led to that determination*":[288]

i. it cannot reargue that its Project "*has no possibility to move forward, to be built, or to generate and deliver electricity to Ontario's grid*";

ii. its FIT Contract termination claims "*are intrinsically and unavoidably tied to measures that have already conclusively been determined in the* Windstream I *Award and for which the Claimant has already been compensated*"; and

iii. IESO's termination decision "*does not give rise to any independent cause of action under NAFTA Articles 1105 or 1110 that can be brought to this Tribunal for consideration*".

148. Further and specifically as to the determination in the *Windstream I* Award concerning the CAD 6 million security deposit, the Respondent argued that:[289]

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287 *See* **R-660**, OSCJ - Notice of Application, 27 March 2017; **R-663**, Letter from John Terry (Torys LLP) to John Rattray and Michael Boll (IESO), 27 March 2017; *Windstream I* Award, para. 189 (paraphrasing *Windstream I* Reply, para. 399); Memorial, para. 14.

288 Request for Bifurcation and Memorial on Jurisdiction, para. 81.

289 Request for Bifurcation and Memorial on Jurisdiction, paras. 82 to 85.

a. the Claimant's submission that "*the FIT Contract has been unilaterally terminated as a consequence of the conduct of the Ontario Government, and all the value remaining in Windstream's investments has been taken*",[290] requires the Tribunal to "*reopen*[] *matters conclusively determined by* [] Windstream I", *i.e.*, that:

   i. the "*Claimant had not been substantially deprived of its investment because its CAN$6 million security deposit had not been taken*";[291]

   ii. "[e]*ither the parties could reactivate and, as appropriate, renegotiate the FIT Contract and put the security deposit to use, or the security deposit would be returned to the Claimant at the time of the termination of the FIT Contract*";[292]

   iii. "*the security deposit constituted a substantial portion of the value of the Claimant's FIT Contract*";

b. accordingly, if returned to the Claimant upon termination, "*there could be no finding that Windstream has been substantially deprived of its investment*";

c. the "*Claimant is barred from relitigating this determination*"; and

d. "*as its security deposit has* […] *been returned*", the Claimant is unable to "*claim that it has been substantially deprived of its investment*".

149. Further and specifically as to the *Windstream I* Award valuation of the investment, the Respondent argued that the Claimant is barred from seeking additional damages based on the FIT Contract having substantial potential value,[293] or the Project

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290 Memorial, para. 457.

291 *See Windstream I* Award, para. 290: "Consequently, the Respondent cannot terminate, and indeed confirmed at the hearing that it would not be able to terminate, the FIT Contract pursuant to Article 10.1(g) without returning the security. It therefore cannot be said that the Claimant has been substantially deprived of its investment."

292 *See Windstream I* Award, para. 290.

293 *See* Memorial, para. 224.

having "*a lot of value*",[294] because the *Windstream I* Award made "*clear and conclusive determinations* […] *in this respect*", including that:[295]

a. the Project was valued at CAD 31 million at the time,[296] awarding that amount of damages "*less the CAN$6 million security deposit which remained available to the Claimant, constituted the award of damages which was furnished in order to make it whole again*",[297] thus barring the Claimant from asserting additional value "*unless such value was created subsequent to the Award*";

b. "*the FIT Contract was valueless at the time*", and it was necessary for both disputing parties "*to act together in order to create value in a contract that was determined to otherwise have no value*", which did not happen ("*failed attempts to renegotiate the FIT Contract and to drum up interest in its Project* […] *merely demonstrate that its Project continued to have no path forward and consequently, no value*"), thus barring the Claimant from relitigating value:[298]

> [A]lthough the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value. (It is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them.)

c. the DCF method of valuation was inappropriate given the Project's "*early development stage and the related risks and uncertainties*",[299] and was not further developed (with no financial closure (*i.e.*, no financing, crown land

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294 Memorial, para. 229; **CWS-Mars-3**, para. 16.

295 Request for Bifurcation and Memorial on Jurisdiction, paras. 86 to 91.

296 *Windstream I* Award, para. 485.

297 *See Windstream I* Award, para. 484.

298 *Windstream I* Award, para. 483.

299 *Windstream I* Award, para. 475.

access, permits or approvals)) and "*remains an early stage project for which a DCF analysis is inappropriate*".

(ii) The Claimant's Position

150. The Claimant accepts that the findings of the *Windstream I* Award are "*final and binding, and are* res judicata *in this proceeding*", and submits that it "*is not seeking to re-litigate any of the issues that were determined by that tribunal, nor is it open to Canada to do so*".[300]

151. According to the Claimant, *res judicata,* collateral estoppel and abuse of process are established rules of international law,[301] but their requirements are not met because (i) the "*matters at issue in this arbitration have not been determined by the* Windstream I *tribunal*"; and (ii) "*the measures raised in this arbitration could not have been raised in the* Windstream I *proceedings, since they all took place after the issuance of the* Windstream I *Award*". In particular:

a. the *Windstream I* Award found "*there was no expropriation because the FIT Contract remained in place and had not been terminated*", and therefore "*declined to award* [the Claimant] *compensation for the loss of its investment, and instead awarded* [it] *damages for the harm to its investment*";[302]

b. the FIT Contract has now been terminated, a new measure taking effect in February 2020;

c. the Respondent's liability under NAFTA for the FIT Contract termination "*was not and could not have been determined by the* Windstream I *tribunal, nor has the question of what damages flow from that new measure*";

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300 Memorial, para. 195; *see also* Response to Request for Bifurcation, para. 31.

301 Reply, paras. 179 to 193; **RL-110**, *Mobil Investments v. Canada (II),* Decision on Jurisdiction and Admissibility, para. 177.

302 *See Windstream I* Award, paras. 290, 483.

d. the Respondent "*bears the burden of establishing that the requirements of* res judicata*, collateral estoppel, and abuse of process are made out*" and "[t]*he threshold is high*";[303] and

e. it is the Respondent that seeks "*to re-litigate issues decided in* Windstream I".

(a) The Applicable Legal Standard

152. As to the applicable legal standard, the Claimant set out its position as to the principles applicable to establishing *res judicata*, or collateral estoppel including as to the high burden on the Respondent.

153. As to *res judicata*, the Claimant submits that it:

a. "*is a well-established principle of international law that applies to a Chapter 11 NAFTA dispute*";

b. "*prevents the relitigation of matters where 'a right, question or fact* [was] *distinctly put in issue and directly determined by a court of competent jurisdiction*'";[304]

c. divides into two branches:

i. cause of action estoppel, which "*bars the effect of bringing a second claim where the triple identity test (identity of persons, cause of action, and object) is met*"; and

ii. collateral estoppel, which "*prevents the relitigation of specific issues that were decided upon by a previous tribunal*"; and

303 *See* **CL-183**, *Chevron & TexPet v. Ecuador (I)*, Interim Award, paras.139, 143: "[i]t is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim."

304 Reply, para. 185 *citing* **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 188 [Emphasis added by the Claimant].

d. does not operate to treat collateral estoppel (or issue estoppel), as "*a separate doctrine from* res judicata",[305] (as "[the Respondent] *previously recognized in the* Mobil v. Canada II *proceeding*").[306]

154. According to the Claimant, cause of action estoppel requires two steps:

a. the triple identity test, requiring identity of the:

i. parties: ("*prior award must have been rendered between the same parties as the parties in the further arbitration proceedings*");

ii. cause of action: (claims "*must be based on the same cause of action as in the prior arbitration proceedings (i.e., the same legal arguments are relied upon)*"); and

iii. object: ("*same relief must be sought*");[307] and

b. assessment as to what was actually determined[308] (*i.e.*, "*to ascertain the* content *of the decision, and not just look at what the parties argued in the earlier proceeding*"), as explained by the ICJ:[309]

> 59. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successfully submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.

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305 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 49, 54.

306 *See* **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 177.

307 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 191.

308 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, paras. 191 to 193. As accepted in the Request for Bifurcation and Memorial on Jurisdiction, para. 52 ("*Res judicata* will bar a legal issue from being reconsidered by a new tribunal if that legal issue was (i) distinctly put in issue by the parties in the prior dispute and (ii) distinctly decided by the tribunal in the prior dispute.") [Emphasis added].

309 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 189 *citing Nicaragua v. Colombia*, p. 126 [Emphasis added by the Claimant].

> 60. The Court underlined in its Judgment of 26 February 2007, rendered in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), that "[i]*f a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it*" […].

c. prior awards found that "*the issue must actually have been decided by the prior tribunal*".[310]

155. As to collateral (or issue) estoppel, according to the Claimant it may apply, "[i]*f the 'triple identity test' is not satisfied*", whereby "*it is still possible that specific issues that have been determined by a prior tribunal are* res judicata", in relation to which the Claimant agrees with the Respondent that:

a. "*in the event of a subsequent arbitration claim between the same parties or privies of those parties, the test for establishing issue estoppel is* [as set out] *in* RSM Production Corporation and others v. Gr[e]nada":

b. "*a finding* [of a prior competent tribunal] *concerning a right, question or fact, may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding*":[311]

i. "*it was distinctly put in issue*";

ii. "*the court or tribunal actually decided it*"; and

iii. "'*the resolution of the question was necessary to resolve the claims before that court or tribunal*" (*i.e.*, "*it does not apply to statements made by tribunal in* obiter dicta").

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310 *See* **RL-110**, *Mobil Investments v. Canada (II)*, para. 193; **RL-113**, *Amco v. Indonesia*, Decision on Jurisdiction in Resubmitted Proceeding, para. 30; **RL-126**, *RSM v. Grenada*; **RL-111**, *Waste Management v. US (II),* Decision on Preliminary Objection, para. 45; **RL-005**, *Apotex v. US (III)*, para. 7.20.

311 Request for Bifurcation and Memorial on Jurisdiction, paras. 56 to 57 *citing* **RL-126**, *RSM v. Grenada*, para. 7.1.1 [Emphasis added]. *See also* **CL-192**, *Victor Pey Casado v. Chile*, para. 219.

156. Finally, as to the applicable standard, according to the Claimant, under both cause of action and collateral (or issue) estoppel, a necessary element is that "*the issue in question must actually have been decided by the prior tribunal*".

(b) Application to the Facts

157. The Claimant submits that the issues raised in *Windstream II* were not decided in the *Windstream I* Award, meaning the Respondent "*failed to meet the high burden of showing the issues raised in* [Windstream II] *are* res judicata", based on either cause of action estoppel or collateral estoppel.[312] It submits that there can be no *res judicata* effect, because the measures forming the basis of its claims in *Windstream II*, "*arose after the* Windstream I *arbitration*".[313]

i. Cause of action estoppel

158. For cause of action estoppel in particular, according to the Claimant,[314] the triple identity test must be met to establish: (a) same parties, (b) same cause of action and (c) same relief, *i.e.*, that "[t]*he same matters must not just have been raised in both proceedings, but actually determined in the first proceeding.*". The triple identity test is not met, it submits, for the reasons set out below.

159. *First*, as to identity of parties, it is undisputed that the disputing parties in *Windstream I* and *Windstream II* are the same.[315]

160. *Secondly*, as to identity of cause of action, according to the Claimant,[316] the Respondent must, and cannot, "*demonstrate that the two proceedings are based on the same cause of action*" because:[317]

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312 Reply, para. 193.

313 Memorial, para. 448 [Emphasis in original]; *see also* Response to Request for Bifurcation, paras. 2, 23.

314 Reply, paras. 194 to 227.

315 Reply, para. 195.

316 Reply, paras. 196 to 213.

317 *See* **CL-190**, *Malicorp v. Egypt*, para. 103; **RL-195**, *Caratube v. Kazakhstan*, para. 494.

a. the prior decision must concern "*the same claims based on the same factual and legal bases,*"[318] which the ILA Report defined as "*all facts and circumstances arising from a single event and relying on the same evidence which are necessary to give rise to a right of relief*",[319] (*i.e.*, "*the prior decision must relate to the same claims arising from the same measures and set of facts*");

b. in this case the "*measures and legal grounds in the two arbitrations are distinct*", with measures and grounds in *Windstream II* all arising "*after the* Windstream I *arbitration*", which "*cannot be* res judicata*, as they did not exist at the time the* Windstream I *award was issued*";

c. in particular, in *Windstream I*, the two relevant measures occurred in and around 2011 to 2012, being the Ontario Government's:[320]

   i. imposition of the Moratorium on 11 February 2011; and

   ii. failure, (or alternatively failure of its State enterprise OPA), "*to comply with the commitment made by the Government, through MEI, to* [the Claimant] *to take steps to ensure that* [its] *investments would not be impacted negatively by the Moratorium*".

161. In the *Windstream I* arbitration, the Claimant argued:

a. breach of NAFTA Articles 1110 (expropriation) and 1105 (fair and equitable treatment) based on the two measures rendering "*WWIS, the Project, and the FIT Contract substantially worthless because there was no prospect of the Project reaching commercial operation by May 4, 2017*",[321] and

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318 *See* **CL-190**, *Malicorp v. Egypt*, para.103; **RL-195**, *Caratube v. Kazakhstan*, para. 494.

319 **RL-112**, ILA Final Report, p. 76, fn. 18.

320 Reply, paras. 199.

321 *See* Memorial, paras. 555 to 560.

b. that those measures included that "*the imposition of the Moratorium, and the failure to freeze the FIT Contract to account for the Moratorium",* which was "*politically motivated and was a stark reversal of Ontario's repeated commitment to offshore wind and the representations made to Windstream*".[322]

162. According to the Claimant, the *Windstream I* Award:

a. determined that there was no NAFTA Article 1110 expropriation because:[323]

i. the "*FIT Contract* [was] *still formally in force and ha*[d] *not been unilaterally terminated by the Government of Ontario*"; and it "*continue*[d] *to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium*";

ii. "*the $6 million security deposit was still in place and had not been taken or rendered worthless*",[324] and

iii. thus rejecting the Claimant's argument that the FIT Contract and investments were "*substantially worthless*";

b. determined that there was a NAFTA Article 1105(1) fair and equitable treatment breach based on the findings that:

i. the Moratorium "*was not only driven by the lack of scientific research on the issue but was also politically motivated*";

ii. its imposition itself was not "*wrongful and a breach of Article 1105*";[325]

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322 *See* Memorial, paras. 604 to 607, 616 to 622; *Windstream I* Award, para. 235.

323 Reply, para. 202.

324 *See Windstream I* Award, para. 290.

325 *See Windstream I* Award, paras. 376 to 377.

iii. the conduct of the Respondent *vis-à-vis* the Claimant "*during the period following the imposition of the moratorium*" violated Article 1105,[326] because:

1. the Respondent "*did little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason*" for the Moratorium, and "*the legal and contractual limbo in which* [the Claimant] *found itself after* [its] *imposition*";

2. the regulatory framework "*continued to envisage offshore wind, but additional and more detailed regulations governing offshore wind were never developed*"; and

3. the Respondent "*let the OPA conduct the negotiations with* [the Claimant] *even though 'the decision on the moratorium had been taken by the Government and not by the OPA'*", and "*without providing any direction to the OPA for the negotiations although it had the authority to do so* […]";[327]

c. determined that Article 1105 was breached by "*the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium*";[328]

d. related to measures that arose "*during the period following the imposition of the moratorium*",[329] based on the Respondent's failure "*to take measures to resolve the legal and contractual limbo in which Windstream found itself*"; and

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326 *Windstream I* Award, para. 379.

327 *Windstream I* Award, paras. 378 to 379.

328 *Windstream I* Award, para. 380.

329 *Windstream I* Award, para. 379.

e. found that the FIT Contract "*remained in force and it was open to the parties to re-activate and renegotiate the terms of the FIT Contract to adjust it to the terms of the Moratorium*".

163. The *Windstream II* arbitration, according to the Claimant, by contrast deals with "*the post-Award conduct relating to the subsequent termination of the FIT Contract*", namely:

a. the Respondent's failure "*to complete in a timely manner the work it considered necessary in order to lift the Moratorium*";

b. the Respondent's "*continued application of the Moratorium to WWIS,* […]*, despite its knowledge that the continued application of the Moratorium to WWIS would create the conditions necessary to allow the IESO to terminate the FIT Contract*";

c. the Respondent's failure "*to direct the IESO not to terminate the FIT Contract*";

d. the Respondent's failure "*to direct the IESO to amend the FIT Contract to ensure that the Project would be 'deferred', 'frozen,' and 'on hold' for the duration of the Moratorium*";

e. the decision of the IESO, a State enterprise exercising delegated governmental authority, "*to terminate the FIT Contract*"; and

f. IESO's failure "*to amend the FIT Contract to ensure that the Project would be 'deferred', 'frozen' and 'on hold' for the duration of the moratorium, contrary to the Ontario's Government promise to Windstream and WWIS.*"[330]

164. In response to the Respondent's argument that the six aforementioned measures "*boil down to two complaints of a NAFTA breach: (i) the continued application of the moratorium; and (ii) the termination of the FIT Contract, as opposed to its*

330 Memorial, para. 428.

deferral or amendment", which reflect the same claim as in *Windstream I*,[331] the Claimant submits that its complaint in *Windstream II* is that:

a. arises instead out of "*failure to lift and the continued application of the Moratorium to WWIS created the conditions necessary to allow the IESO to terminate the FIT Contract*";

b. concerns "*measures, and the resulting termination of the FIT Contract,* [which] *violate Articles 1110 and 1105 of the NAFTA*";[332] and

c. is a "*cause of action* [that] *was not determined by the* Windstream I *tribunal, most obviously because the FIT Contract remained in place at the time*";

d. arises out of the actual FIT Contract terminations, as opposed to the Claimant's *de facto* cancellation argument in *Windstream I* ("*because it could no longer be brought into commercial operation by the MCOD date*") which differs from actual unilateral termination (with *Windstream I* finding no termination at that time);[333] and

e. now that the FIT Contract has been terminated, "*that is the basis of this second arbitral proceeding*", (*i.e.*, "*new facts and measures that were not – and could not have been – before the* Windstream I *tribunal*").

165. The Claimant relies on the prior award in *Caratube v. Kazakhstan II*, which it submits found no *res judicata* even though the "*facts underlying the two cases on which the claim to ICSID jurisdiction is based are identical*" and claimant chose not to bring them together, where:[334]

a. the first award dismissed claims pursuant to the Kazakhstan-United States BIT, and the second arbitration was brought in contract and pursuant to

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331 Request for Bifurcation and Memorial on Jurisdiction, para. 68.

332 *See* **RL-195**, *Caratube v. Kazakhstan*, paras. 491 to 495.

333 *See Windstream I* Award, para. 290.

334 **RL-195**, *Caratube v. Kazakhstan*, para. 336.

Kazakhstan's Foreign Investment Law, based on the same facts and measures (but different legal instruments);

b. no cause of action preclusion was found because the causes of action were distinct;

c. no collateral estoppel was found because the first award found no "*investment*" pursuant to the BIT, whereas the second arbitration required jurisdiction under the contract;[335] and

d. it was shown that "*the application of* res judicata *is strict*", even where "*the underlying facts in both proceedings were identical*" (which is not the case here).

166. *Thirdly*, as to identity of object, according to the Claimant the relevant question is "*whether the relief sought and determined in both proceedings is identical*",[336] and it submits it was not because in *Windstream I*:

a. the Claimant "*argued*" the same relief in *Windstream II*, seeking "*compensation for the loss of the full value of its investment, in other words for the loss of the Project*";

b. but the tribunal rejected that argument and "*instead awarded Windstream compensation for the* damage *to its investment, and not the* full value *of its investment, because the FIT Contract was still in force*";

c. instead, in determining damages flowing from breach of NAFTA Article 1105, the tribunal:

i. sought to make the Claimant "*whole*" only with a specific context:[337]

> […] keeping in mind the Tribunal's determination that [Windstream] ha[d] not lost the entire value of its investment as the

335 *See* **RL-195**, *Caratube v. Kazakhstan*, paras. 470 to 475, 491 to 495.

336 Reply, paras. 214 to 227 [Emphasis in original]; *see* **RL-195**, *Caratube v. Kazakhstan*, para. 492.

337 *Windstream I* Award, para. 473 [Emphasis added].

> FIT Contract [was] still formally in force (albeit under an extended force majeure) and, accordingly, as the CAD 6 million letter of credit [was] still available to [Windstream] and ha[d] not been lost or taken by the Government.

ii. found that the compensation awarded must "*reflect* [its] *loss (damage to the investment) rather than the full value of the investment*" and that the "*latter would be relevant only if* [Windstream] *ha*[d] *lost the entirety of its investment as a result of an expropriation*", which was not the case at the time of the *Windstream I* Award;[338]

iii. determined the Claimant's loss ("*i.e.,* the *damage to the investment rather than the full value of the investment*")[339] at the date of the Award, 27 September 2016, as EUR 21 million;[340]

iv. found that the Claimant:[341]

> […] [was] not entitled to compensation for the full value of its investment: [Windstream] ha[d] not lost the letter of credit, which [was] still in place, and the FIT Contract [was] still in force and could, in theory, be still revived and renegotiated if the Parties so agreed.

v. adjusted the valuation downward by CAD 6 million to reflect the value of the letter of credit;

vi. declined to make any adjustments to reflect the fact that the FIT Contract was still in place "*because, factually, the parties had not renegotiated its terms*", and "[t]*herefore, as of the date of the Award, the FIT Contract did not have any value*"; and

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338 *Windstream I* Award, para. 473 [Emphasis added].

339 Reply, para. 216.

340 *Windstream I* Award, paras. 474, 482, 484.

341 *Windstream I* Award, para. 483 [Emphasis added].

vii. noted that it was "*another matter that the Parties* [could] *create such value by reactivating and renegotiating the FIT Contract after the award, which option* [was] *still open to them*".[342]

167. In response to the argument that it "*fails to acknowledge that it was compensated for the full value of its investment less the CAN$6 million security deposit*",[343] the Claimant submits that the Respondent:

a. relies heavily on the *Windstream I* Award finding that the FIT Contract, as at the date of the Award, had no value;[344]

b. ignores the *Windstream I* Award relief granting "*compensation for the damage to its investment rather than the full value of the investment*";

c. suggests that the claim arises from a "*misleading interpretation*" of the *Windstream I* Award,[345] but such interpretation aligns with MEI emails (*i.e.*, the *Windstream I* Award "*did not consider the value of the contract, only the specific damages to Windstream's project that* [the] *company incurred as a result of the moratorium*", "*determined that the Claimant hasn't lost the entire value of its investment (i.e., its project) as there was no expropriation: the contract is still in force*", and "*noted that the purpose of damages is to make the Claimant 'whole,' keeping in mind that the contract is still in force*");[346] and

d. conducted itself "*consistent with the interpretation of the* Windstream I *Award circulated within the Ontario Government just after it was issued*",

342 *Windstream I* Award, para. 483.

343 Request for Bifurcation and Memorial on Jurisdiction, para. 27.

344 Request for Bifurcation and Memorial on Jurisdiction, paras. 33 to 34.

345 Request for Bifurcation and Memorial on Jurisdiction, para. 12.

346 **C-2652**, Email from Erin Thompson to Jennifer Kacaba, 26 October 2016. *See also* **C-2643**, IESO Issues Note: Windstream NAFTA Claim, 6 October 2016; **C-2667**, Email from Adam Hendy to Dan Moulton and others, 13 January 2017. *See also* **C-2641**, MNRF House Note Issue: Windstream Energy Offshore Wind Power NAFTA Claim, 30 September 2016; **C-2649**, Email from Katrina Xavier to Richard Blackwell, 20 October 2016.

with IESO not returning the CAD 6 million letter of credit "*until after the FIT Contract was terminated in February 2020*".

168. Further in response to the Respondent's argument that the *Windstream I* Award had already "*compensated Windstream fully for not being able to proceed with the development of the* Project", including "[having] *determined that the FIT Contract was worthless and would only obtain value if the parties decided to reactivate it*",[347] the Claimant argues that the Award:

    a. "*recognized that there was value beyond what was awarded that could be created if the FIT Contract was renegotiated*", which "*unlocked value was taken when the FIT Contract was terminated*" (but further that this is in any event is "*a merits-based argument, not a jurisdictional one*");[348] and

    b. "*never determined the value of the Project in the context of the termination of the FIT Contract*", and any "*delta between what was awarded in* Windstream I *and what the value is in 2020*" is "*a matter of quantum, not a matter of jurisdiction*", which has not been determined.

169. In this regard, the Claimant relies on the prior award in *Mobil Investments v. Canada (II)*, which it submits concerned a claim in *Mobil Investments v. Canada (I)* for damages sustained between 2012-2015 based on future losses and a claim in *Mobil Investments v. Canada (II)* for damages already incurred, where the *Mobil Investments v. Canada (I)* Award did not award damages for future losses as "*not ripe for determination*"[349]:

    a. rejected that the Claimant was precluded from seeking damages in *Mobil Investments v. Canada (II)*, because *Mobil Investments v. Canada (I)* "did

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347 Request for Bifurcation and Memorial on Jurisdiction, para. 32.

348 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 33 to 34.

349 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 183. *See e.g.* Memorial, para. 467.

not decide the question of damages for the period 2012 to 2015", meaning no *res judicata*;[350]

b. recognised that *Mobil Investments v. Canada (I)* assessed the evidence of future damages, commented on it and highlighted its uncertainty of the evidence;[351] and

c. found that *Mobil Investments v. Canada (I)* "*did not in fact arrive at a definitive settlement of the claim*", so "*even though the claimant advanced the same claim for relief in both arbitrations, the matter was not* res judicata *because the tribunal did not definitely determine that issue*".[352]

170. According to the Claimant, similarly here, the *Windstream I* Award "*did not determine what relief should be awarded as a result of the termination of the FIT Contract (not could it have, since it found that the FIT Contract had not been terminated)*", so any argument as to a "*delta between the amount awarded by the tribunal in* Windstream I *and the damage* [the Claimant] *has suffered to its investment is a matter that goes to quantum, not to jurisdiction*".[353]

ii. Collateral (or issue) estoppel

171. For collateral (or issue) estoppel, according to the Claimant, the agreed test is that it applies where:[354]

> […] a finding [of a prior competent tribunal] concerning a right, question or fact, may not be relitigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolve the claims before that court or tribunal.

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350 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 183.

351 *See* **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 196.

352 *See* **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 197.

353 *See* **CER-Secretariat**, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard, para. 2.40; **CER-Secretariat-2**, Second Expert Report of Secretariat, paras. 2.7, 4.44.

354 Request for Bifurcation and Memorial on Jurisdiction, paras. 56 to 57 *citing* **RL-126**, *RSM v. Grenada*, para. 7.1.1.

172. The Claimant deals with each of the four issues that the Respondent claims it is "*barred from re-litigating*",[355] namely:

    a. challenging the continued imposition of the Moratorium;

    b. challenging the termination of the FIT Contract;

    c. arguing it has been substantially deprived of its investment; and

    d. seeking compensation for damages flowing from the FIT Contract termination.

173. First, as to challenging the Respondent's alleged failure, following the *Windstream I* Award, "*to complete in a timely manner the work it considered necessary to lift*" the Moratorium,[356] the Claimant submits that the Respondent mischaracterises its position as it "*is not seeking to re-argue the issue of whether the decision to impose the Moratorium was wrongful*", which the *Windstream I* Award "*found it was not*".

174. Instead, according to the Claimant, it is arguing "*that keeping the Moratorium in place after the* Windstream I *Award was issued and failing to do any of the research required to lift* [it] *breaches the NAFTA, "in combination with the other impugned measures," as it created the conditions that led to the termination of the FIT Contract*", in that:

    a. for expropriation, following the *Windstream I* Award, the Respondent:

        i. "*announced that the research required to lift the Moratorium was being 'finalized'*";[357]

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355 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 70 to 91.

356 *See* Request for Bifurcation and Memorial on Jurisdiction, para. 71.

357 *See* Memorial, para. 199; **C-2471, Exhibit 78**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, 17 October 2016; **C-2045**, Legislative Assembly of Ontario – Official Report of Debate (Hansard) Standing Committee on Estimates, 26 October 2016, p. E-159.

ii. "*then decided to stop conducting any of the scientific studies that were the stated preten*[c]*e for applying the Moratorium*", with "*no credible basis*";[358]

iii. "*continued to apply the Moratorium to WWIS knowing that this would create the conditions that would allow the IESO to terminate the FIT Contract, in direct contradiction of its promise to protect the Project from the effects of the Moratorium*";

iv. "*made the deliberate decision 'not to intervene in this matter' and refused to direct the IESO not to terminate the FIT Contract or to amend the FIT contract to fulfil the promise the Project would be 'frozen'*";[359]

v. IESO's termination right "*arose because of th*[ose] *actions*"; and

vi. the Respondent "*sought to use the Moratorium delays as a pretext to terminate a Project it no longer wanted for political reasons*";[360]

b. for fair and equitable treatment, following the *Windstream I* Award:

i. the Respondent's actions had a "*composite effect*" on the Claimant's investments;[361]

ii. the Respondent "*did nothing to prevent*" FIT Contract termination or "*require the IESO to renegotiate* [its] *terms in a manner consistent with* [its] *promises*";

iii. "*MEI refused to meet with* [the Claimant] *and made the deliberate decision not to intervene in* [its] *negotiations with IESO*"; and

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358 *See also* Memorial, paras. 295 to 302.

359 *See* Memorial, para. 335.

360 *See* Memorial, paras. 458 to 459.

361 Memorial, para. 484.

iv. the Respondent "*failed to conduct the scientific studies which were the purported premise of the moratorium, which remains in effect to this day*";[362]

c. it does not argue that the continued Moratorium "*is in and of itself a breach of the NAFTA*", but rather that the Respondent "*is liable under the NAFTA for the termination of the FIT Contract*";

d. the measures that make it liable "*not only include the failure to direct the IESO to renegotiate the FIT Contract and/or not to terminate the FIT Contract, but also the* […] *creation of the conditions that allowed the IESO to terminate*"; and

e. this does "*not involve re-arguing the issue of whether the decision to impose the Moratorium in February 2011 violated the NAFTA*".

175. According to the Claimant, the Respondent mischaracterises the *Windstream I* Award as finding that the decision to impose the Moratorium *and* its continued imposition breached NAFTA,[363] whereas the findings were that the:

a. the "*decision to impose a moratorium on offshore wind development, or the process that led to it, were* [not] *in themselves wrongful*";

b. the Respondent "*on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium*";[364]

c. NAFTA Article 1105 was breached by the Respondent's failure to take necessary measures "*within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding*

362 Memorial, para. 487.

363 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 72 to 74.

364 *Windstream I* Award, paras. 376, 378.

the status and the development of the Project created by the moratorium";[365] and

d. the Claimant was to be compensated "*for that breach of Article 1105 and the period of contractual and legal limbo it found itself in from February 11, 2011 to September 27, 2016, the date of the Award*".

176. However, the *Windstream I* Award:[366]

a. "*did not address whether the continued application of the Moratorium to the Project after September 27, 2016 was wrongful*";

b. "*did not determine whether the continued application of the Moratorium is one of the composite measures that led to the wrongful termination of the FIT Contract*"; and

c. could not do so as "*all of these facts arose after the* Windstream I *Award*".

177. Secondly, as to challenging the FIT Contract termination following the *Windstream I* Award, the Claimant submits that:

a. the FIT Contract was not terminated until 20 February 2020, so no findings arising out of its termination could have been made in *Windstream I*, as:[367]

i. the Claimant had argued that effective termination was May 2012, because the Project could not meet MCOD (4 May 2017), but this was rejected; and

ii. the *Windstream I* Award found that "*in the absence of any further amendments to the FIT Contract to address the suspension, as of*

365 *Windstream I* Award, para. 380.

366 Reply, para. 235 [Emphasis in original].

367 Request for Bifurcation and Memorial on Jurisdiction, para. 75.

[4 May 2012] *the Project effectively became non-financeable*",[368] but did not award damages for cancellation of the FIT Contract;[369]

b. the Respondent's argument "*conflates what was argued with what was decided*", and this Tribunal must determine whether or not the *Windstream I* Award decided whether or not the FIT Contract termination violated NAFTA;

c. in this regard, the *Windstream I* Award found that:

i. "*the FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario*";[370]

ii. "*the Project* [could] *no longer be completed by the MCOD*"; and

iii. there was no expropriation because "*it continue*[d] *to remain open to the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium*".[371]

178. According to the Claimant, the Respondent relies on collateral estoppel over arguments, not findings, as follows:

a. the *Windstream I* Award accepted the Respondent's "*position in the arbitration that the FIT Contract was only 'frozen,' the Project could proceed, and the Moratorium was just a temporary measure*";

b. the "*issue that was determined and is* res judicata *is the tribunal's finding that the FIT Contract has <u>not</u> been terminated and is in force*";[372]

368 *Windstream I* Award, para. 374.

369 Request for Bifurcation and Memorial on Jurisdiction, paras. 77, 81.

370 *Windstream I* Award, para. 290.

371 *Windstream I* Award, para. 290.

372 Reply, para. 239 [Emphasis in original].

c. "*it remained open for the parties to re-activate and renegotiate the FIT Contract to adjust its terms to the Moratorium*"; and

d. the issue whether or not the FIT Contract termination breaches NAFTA was therefore not considered and is not *res judicata*;

179. Moreover, according to the Claimant, the Respondent's arguments are in any event merit-based damages arguments in that:

a. they arise out of the Claimant's compensation in the *Windstream I* Award;

b. that compensation was based on the finding that the FIT Contract could not be completed by the MCOD;[373] and

c. there was no compensation "*for the full value of the Project*" (*i.e.*, damages flowing from the FIT Contract termination);

180. Further in response to the Respondent's argument that the Claimant "*resurrects*" the promises "*that the Project would be 'frozen' from the impacts of the Moratorium and that* [it] *is barred from relying on these representations*", according to the Claimant, the Respondent:

a. merely asserts that such representations "*cannot be divorced from the compensation 'it has already received to make it whole again'*", with no prior awards cited in support;"[374] and

b. does not take into account the fact of the undisputed promises, reiterated throughout *Windstream I* and the *Windstream I* Award relying on them in finding the Respondent liable for breach of NAFTA Article 1105 "*does not make the subsequent actions by Canada or Ontario that breach these promises* res judicata".

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373 *See Windstream I* Award, para. 290.

374 Request for Bifurcation and Memorial on Jurisdiction, paras. 77 to 79.

181. The Claimant therefore argues that this Tribunal must determine "*how these background facts contribute to the allegations that the new measures, which post-date the* Windstream I *Award, breach the NAFTA*".

182. The Claimant proceeds to submit that, following the *Windstream I* Award:

a. it "*formed the expectation that the Project could go ahead and that the original promise made in 2011 could be fulfilled*";

b. its "*expectation was not based on the 2011 promises alone, but on new facts*", which included the:

i. *Windstream I* Award "*finding that the FIT Contract was in force and able to be renegotiated*";

ii. *Windstream I* Award finding that the Respondent's "*conduct in failing to fulfil the promise, and failing to direct the IESO, amounted to a breach of the NAFTA*";

iii. the Respondent's representations "*in* Windstream I *that the Project was 'frozen' and could proceed once the temporary Moratorium was lifted*";

iv. the Respondent's public statements following the *Windstream I* Award "*that offshore wind research would soon be 'finalized' and a statement that the Government could let the Project be built*"; and

v. IESO not (immediately) returning the CAD 6 million security deposit; and

c. it did not expect the Respondent "*to continue the very conduct that was already found to breach the NAFTA", but to "work with* [it] *to implement the promises made*".[375]

375 *See* **CWS-N. Baines**, Witness Statement of Nancy Baines, para. 16.

183. Therefore, the Claimant argues, the *Windstream I* Award could not determine "[w]*hether or not this new conduct, and the termination of the FIT Contract, violates the NAFTA*".

184. *Thirdly*, as to substantial deprivation of its investment following the *Windstream I* Award, the Claimant submits that:[376]

a. it has now been substantially deprived of the value of its investments due to the FIT Contract termination;[377]

b. regarding the Respondent's argument that it is barred from making this argument because the *Windstream I* Award found that CAD 6 million security deposit "*constituted a substantial portion of the value of the FIT Contract*",[378] the *Windstream I* Award in fact:

i. determined the value of the Project in 2016, the date of the Award;

ii. concluded that the CAD 6 million security deposit was a substantial portion of the value of the investment;

iii. did not determine the value lost as a result of the 2020 FIT Contract termination; and

iv. made "*no determination of whether* [the Claimant] *has been substantially deprived from the loss of that value*", taking into account that it has subsequently received its CAD 6 million security deposit.

185. *Fourth*, as to seeking compensation for damages flowing from the FIT Contract termination following the *Windstream I* Award, the Claimant submits that it is not barred from seeking compensation for the damages flowing from FIT Contract termination.

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376 Reply, paras. 246 to 247.

377 *See* Memorial, paras. 456 to 457.

378 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 82 to 85.

186. In response to the Respondent's arguments otherwise,[379] the Claimant submits as follows:

a. regarding its argument that the *Windstream I* Award valued the Project at CAD 31 million, as damages "*to make it whole again*", meaning it cannot claim additional damages "*unless such value was created subsequent to the Award*",[380] the Claimant says:

i. it was "*not awarded compensation for the full value of the investment, but for damages to its investment*", and

ii. that left a "*new question*" as to "*the value of the Project as of the 2020 valuation date, less the amount already awarded*";

b. regarding its argument that the *Windstream I* Award determined that the FIT Contract had no value and was not renegotiated so no further value was created,[381] the Claimant says:

i. the tribunal "*recognized that had the FIT Contract been renegotiated, there was additional value* […] *that could be created"*, which "*was not available to* [the Claimant] *at the time of the Windstream I Award without renegotiating the contract*";

ii. therefore "*the tribunal did not consider that value in compensating* [it]", and

iii. "*now that the FIT Contract has been terminated, that additional value had the FIT Contract been renegotiated is gone*", due to the Respondent's "*failure to do anything in response to* [the Claimant's]

379 *See* Request for Bifurcation and Memorial on Jurisdiction, para. 86.

380 Request for Bifurcation and Memorial on Jurisdiction, para. 87.

381 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 88 to 89.

efforts to engage with it, including directing the IESO not to terminate the FIT Contract and to renegotiate the FIT Contract";[382]

c. regarding its argument that the *Windstream I* Award found that *"the DCF method of valuation was inappropriate given the Project's 'early development stage and the related risks and uncertainties'. At the time of the FIT Contract's termination, the Claimant's Project had not been further developed*",[383] the Claimant says:

i. the tribunal "*did not determine what the value of the Project was at the time it was terminated in February 2020*"; and

ii. therefore "*its prior finding that the DCF method of valuation was not appropriate in determining the damage to the Project as of 2016, that flowed from the measures at issue in that case, is not* res judicata" (although accepted it may be an obiter finding).[384]

187. For abuse of process, according to the Claimant, the doctrine is inapplicable, because this:[385]

a. is a "*recognized principle of public international law and that it is a tool used to weed out abusive claims*";[386]

b. "*is not intended to be a tool for parties that are unable to meet the test for establishing* res judicata";[387]

c. according to the ILA Report, in international law it is recognised "*but it is extremely rarely applied*";[388]

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382 A party cannot rely on its own breaches to escape liability; *see* **CL-052**, *Gemplus. v. Mexico*, para. 13-92.

383 Request for Bifurcation and Memorial on Jurisdiction, para. 91 [Footnote omitted].

384 *See* **RL-126**, *RSM v. Grenada*, para. 7.1.1. *See also* **CL-192,** *Victor Pey Casado v. Chile*, para. 219.

385 *See* Reply, paras. 254 to 260; Request for Bifurcation and Memorial on Jurisdiction, paras. 61 to 66.

386 *See* **RL-195**, *Caratube v. Kazakhstan*, para. 372.

387 *See e.g.* **RL-130**, *Orascom v. Algeria*.

388 **RL-117**, ILA Interim Report,, p. 22. *See also* **RL-195**, *Caratube v. Kazakhstan*, para. 377.

d. carries a high burden, given "*the seriousness of a charge of bad faith amounting to abuse of process*",[389] with the prior award in *Chevron v. Ecuador (I)* recognising it as an "*extraordinary remedy*", which is used only in "*very exceptional circumstances*";[390]

e. "*often arises in the context of corporate restructuring, where an investor manipulates its corporate structure to gain jurisdiction under an investment treaty after a dispute has become foreseeable*";

f. "*has also been invoked where a claimant concurrently commences multiple proceedings in different forums to resolve the same dispute in order to maximize its chances of success*", such as in:

   i. *Orascom v. Algeria*: three arbitration proceedings, all "*concern*[ing] *the same measures or events*" taken by Algeria, and "*effectively one and the same*",[391] where the second arbitration after the first settled was found to be an abuse of process, because *res judicata* could not apply absent any reasoned final award, different claimants and treaties but "*duplicative relief in relation to the same investment, the same measures, and the same harm*";[392]

   ii. *Ampal v. Egypt*: different shareholders initiated two arbitration proceedings under separate investment treaties and the tribunal "*held that the claimant had to cure the abuse by choosing one forum*";[393]

   iii. *Caratube II*: rejected an abuse of process, taking a "*cautious approach*",[394] recognising that claimants could have raised the claims in *Caratube I* but "*was not persuaded they deliberately omitted to do*

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389 **CL-183**, *Chevron & TexPet v. Ecuador ((I)*, Interim Award, para. 143.

390 **CL-183**, *Chevron & TexPet v. Ecuador (I)*, Interim Award, paras. 143, 146. *See also* **CL-193**, *Levy v. Peru*, para. 186.

391 **RL-130**, *Orascom v. Algeria*, paras. 485, 486, 488.

392 *See* **RL-130**, *Orascom v. Algeria*, paras. 543, 545.

393 *See* **RL-131**, *Ampal v. Egypt*, Decision on Jurisdiction, paras. 331 to 339.

394 **RL-195**, *Caratube v. Kazakhstan*, para. 379.

> *so 'in a bad faith attempt to preserve such claims for further arbitration proceedings' should the* Caratube I *arbitration not go in their favour and to misuse the arbitration 'to get a second bite at the cherry'*";[395] and

g. none of which supports using the abuse of process doctrine as a back-up to *res judicata*,[396] and according to the Claimant, the Respondent "*has not proven that the abuse of process doctrine applies to this proceeding, nor could it*", as the matters at issue here "w*ere never determined by the* Windstream I *tribunal*", and abuse of process "*is inapplicable*".

(iii) The Tribunal's Analysis

188. The Tribunal has relied on the entire record before it, including the disputing parties' written submissions and oral pleadings, concerning the Respondent's *res judicata* (or cause of action estoppel), collateral estoppel and abuse of process objections. To the extent that some arguments are not reproduced in this Award, they have been considered and subsumed in the Tribunal's analysis.

189. By way of summary, both causes of action in *Windstream II* arise out of the *Windstream I* Award (in particular paragraphs 290, 291 and 483) and the Respondent's alleged conduct thereafter. All three preliminary objections (and the substantive claims) primarily emanate from the *Windstream I* Award findings that (i) the Claimant's investment continued, at least in part, in the form of the security deposit and FIT Contract, and (ii) the FIT Contract was capable of reactivation and renegotiation by the disputing parties. According to the Claimant, the Respondent's conduct towards it and its continuing investment following the *Windstream I* Award, culminating in the FIT Contract termination, gives rise to fresh NAFTA breaches. According to the Respondent, it is undisputed that the security deposit was returned and that IESO terminated the FIT Contract within its express terms

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395 *See* **RL-195**, *Caratube v. Kazakhstan*, paras. 381, 383.

396 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 65 to 66.

(as set out in the Factual Background Section above),[397] thus ending the investment lawfully, in circumstances in which it was under no legal obligation to reactivate or renegotiate the FIT Contract.

(a) The Applicable Legal Standard

190. The applicable legal standards for *res judicata* (or cause of action estoppel), collateral estoppel and abuse of process are broadly agreed. The main disagreement lies in taxonomy rather than legal principle or standards.

191. The Respondent characterises *res judicata* as equivalent to cause of action estoppel, *i.e.*, the bar on repeating a claim that has been subject to final decision by a competent court or tribunal. It approached collateral estoppel and abuse of process as separate doctrines. The Claimant appears to characterise *res judicata* as the overarching principle, which in turn divides into sub-categories of cause of action estoppel (concerning claims) and issue estoppel (concerning issues of fact or law), as well as abuse of process.

192. The Tribunal accepts that the use of the term *res judicata* in prior awards has been inconsistent. The literal meaning of the Latin term is "*a matter judged*" or "*the thing has been judged*". The Latin phrase alone does not distinguish whether the matter or thing judged be a cause of action, or may also include an issue. For the purpose of this Award, the Tribunal broadly adopts the Respondent's approach that *res judicata* and collateral estoppel are separate doctrines. For the avoidance of doubt, this Award proceeds on the basis that *res judicata* encompasses claim preclusion (*i.e.*, the claim has been fully and finally determined) and collateral estoppel deals with issue preclusion. The two doctrines are therefore treated as related but separate. The Tribunal acknowledges that, in some common law jurisdictions, *res judicata* is often seen as preventing parties from relitigating claims that have already been adjudicated as well as claims that could have been raised in

397 *See* **C-245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, Section 10.1(a) and Section 10.1(g), pp. 31 to 32; *Windstream I* Award, para. 102.

a prior proceeding, and that there is no precise uniformity across national legal systems.

193. For the purpose of these arbitration proceedings, both disputing parties agree that the foundation for *res judicata* (cause of action estoppel) and collateral estoppel is the principle of finality of arbitral awards. This principle is enshrined in NAFTA Chapter 11 at Article 1136:

> **Article 1136: Finality and Enforcement of an Award**
>
> 1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
>
> 2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
>
> 3. A disputing party may not seek enforcement of a final award until:
>
> […]
>
> (b) in the case of a final award under […] the UNCITRAL Arbitration Rules
>
> (i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or
>
> (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
>
> 4. Each Party shall provide for the enforcement of an award in its territory.
>
> […]
>
> 6. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention regardless of whether proceedings have been taken under paragraph 5.

> 7. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the Inter-American Convention.

194. As the disputing parties' respective submissions set out, finality is not a unique feature of NAFTA arbitration, or indeed arbitration generally. The finality of decisions in any judicial (or quasi-judicial) system is to encourage judicial economy and prevent potentially divergent decisions on the same issue.[398] Development of estoppel principles in various legal jurisdictions has contributed to treatment of the concept in international investment law disputes.[399]

195. There is considerable common ground between the disputing parties as to the legal requirements for *res judicata* and collateral estoppel. The Tribunal takes each in turn below.

i. *Res judicata*

196. For *res judicata* (characterised by the Claimant as cause of action estoppel), both the Respondent and the Claimant agree that three criteria must be satisfied (which the Claimant characterises as a "*triple identity*" test, *i.e.*, "*identity of persons, cause of action, and object*"), as follow:[400]

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398 *See* **RL-005**, *Apotex v. US (III)*, paras. 7.7 to 7.9.

399 *See* **RL-122**, Gavan Griffith and Isabella Seif, 'Chapter 8: Work in Progress: *Res Judicata* and Issue Estoppel in Investment Arbitration', in Neil Kaplan and Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018), p. 122: "Investment tribunals also have applied mixed and confusing nomenclature within these contexts, to reach, in most matters, objectively 'correct' results to vindicate the underlying public policy for there to be finality. Some use the term res judicata without particularising that they are applying issue estoppel. Some do not apparently recognise concepts of issue estoppel as a separate exclusionary principle. Others treat res judicata and issue estoppel as entirely distinct doctrines." *See also* **CL-086**, *Tokios Tokelés v. Ukraine*, para. 98; **RL-123**, *British Caribbean Bank v. Belize*, para. 77; **RL-124**, *Al Tamimi v. Oman*, paras. 131, 358; **RL-125**, *Gavazzi v. Romania*, Decision on Jurisdiction, Admissibility and Liability, paras. 164 to 166; Request for Bifurcation and Memorial on Jurisdiction, para. 54; **RL-112**, ILA Final Report, para. 56; **RL-120**, 'Chapter 27: Preclusion, Lis Pendens and Stare Decisis in International Arbitration', in Gary B. Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014), pp. 3732 to 3827, 3776; **RL-121**, Silja Schaffstein, "*The Doctrine of Res Judicata before International Commercial Arbitral Tribunals*" (Oxford International Arbitration Series 2016), para. 6.236.

400 Request for Bifurcation and Memorial on Jurisdiction, para. 52; Reply, paras. 187 to 188.

a. proceedings before in the same legal order (*e.g.*, both decision-making bodies are international courts or international tribunals);

b. between the same parties (*i.e.*, the prior award must have been rendered between the same parties as the parties in the further arbitration proceedings); and

c. involving the same relief and grounds,[401] which considers whether the same matter is being raised in the new claim, based on it being:[402]

i. distinctly put in issue by the parties in the prior dispute as a cause of action, which the Claimant further distinguished as requiring both:

1. claims based on the same cause of action in both arbitration proceedings (*i.e.*, the same legal arguments are relied upon); and

2. the same object: ("*same relief must be sought*");[403] and

ii. distinctly decided by the tribunal in the prior dispute.[404]

197. The underlying purpose is to prevent "*relitigation of matters where 'a right, question or fact* [was] *distinctly put in issue and directly determined by a court of competent jurisdiction*"'.[405] The Tribunal accepts that, for *res judicata*, as opposed to collateral estoppel, the cause of action must have been both put and determined, and must therefore appear in the operative part of the award.[406]

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401 *See e.g.* **RL-115**, *CME v. Czech Republic*, Challenge Legal Opinion, para. 15; **RL-005**, *Apotex v. US (III)*, para. 7.15; **RL-116**, *Newchwang Case*, p. 65.

402 *See* **RL-117**, ILA Interim Report, pp. 20 to 21; **RL-005**, *Apotex v. US (III)*, paras. 7.13 to 7.16.

403 *See* **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 176..

404 *See* **RL-118**, *Amco v. Indonesia*, Award in Resubmitted Proceeding, para. 30; **RL-114**, Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration', 8 Afr. J. Int'l & Comp. L. 38 (1996), p. 39.

405 **RL-110**, *Mobil Investments v. Canada (II)*, para. 188; **RL-113**, *Amco v. Indonesia*, Decision on Jurisdiction in Resubmitted Proceeding, para. 30; **RL-114**, Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration', 8 Afr. J. Int'l & Comp. L. 38 (1996), p. 39.

406 **RL-119**, *Chorzów Factory Case*, Interpretation of Judgments Nos. 7 and 8, Dissenting Opinion by M. Anzilotti, Publications of the Permanent Court of International Justice, Collection of Advisory Opinions, Series A – No. 13,

198. In this regard, the ICJ in *Nicaragua v. Columbia* judgment characterised the standard as follows, with which the Tribunal agrees:[407]

> 59. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successfully submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.
>
> 60. The Court underlined in its Judgment of 26 February 2007, rendered in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), that "[i]*f a matter has not in fact been determined, expressly or by necessary implication, then no force of* res judicata *attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it*" […].

199. As discussed below in the application of this legal standard to the facts, the Claimant considers that the requirement for the issue to have been determined by the prior tribunal to be decisive in this case.

ii. Collateral estoppel

200. For collateral estoppel, also referred to as issue estoppel or issue preclusion, the disputing parties both accept that this may bind a subsequent tribunal to an earlier tribunal's determination of an issue in subsequent proceedings. In this respect, there is no "*triple identity test*", and both disputing parties accepted the standard is

16 December 1927, p. 24. Although this was the dissenting viewpoint in that case, it has since been recognized as a leading decision on *res judicata* and is often cited in academic and jurisprudence. *See also* **RL-005**, *Apotex v. US (III)*, paras. 7.30 to 7.32.

407 **RL-110**, *Mobil Investments v. Canada (II),* para. 191 *citing Nicaragua v. Colombia*, p. 126.

as set out in the prior award in *RSM Production Corporation and others v. Grenada*, as follows:[408]

> […] a finding concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal.

201. Therefore, the test provides that:

a. if a competent tribunal has made "*a finding concerning a right, question or fact*",

b. such finding "*may not be re-litigated (and, thus, is binding on a subsequent tribunal)*",

c. provided that in the prior proceeding the finding:[409]

i. was distinctly put in issue,

ii. the court or tribunal actually decided it, and

iii. the resolution of the question was necessary to resolve the claims before that court or tribunal (*i.e.*, "*it does not apply to statements made by tribunal in obiter dicta*").

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408 **RL-126**, *RSM v. Grenada*, para. 7.1.1. This test was relied on in the US Supreme Court in **RL-127**, *Southern Pacific Railroad Company v. US*, Judgment, pp. 48 to 49 ("The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."). The principle is also recognized in **RL-005**, *Apotex v. US (III)*, paras. 7.18, 7.23, 7.59 *citing* Jackson H. Ralston and W. T. Sherman Doyle, *Claim of Company General of the Orinoco Case*, Report of French-Venezuelan Mixed Claims Commission of 1902 (Washington, Government Printing Office, 1906), p. 355 and **RL-114**, Vaughan Lowe, 'Res Judicata and the Rule of Law in International Arbitration', 8 Afr. J. Int'l & Comp. L. 38 (1996), p. 42.

409 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 56 to 57 *citing* **RL-126**, *RSM v. Grenada*, para. 7.1.1. *See also* **CL-192**, *Victor Pey Casado v. Chile*.

202. As pointed out by the Respondent in this regard, "*international courts and tribunals have regularly examined under international law a prior tribunal's reasoning, and the arguments it considered, in determining the scope, and thus the preclusive effect, of the prior award's operative part*".[410] This Tribunal is thus permitted, and indeed required, to take the same approach.

iii. Abuse of process

203. For abuse of process in the context of multiple proceedings, ultimately both disputing parties appear to accept that this arises where the strict criteria for cause of action estoppel, or, if relevant, issue estoppel, have not been met on the facts but, nevertheless, the court or tribunal feels compelled to act.

204. The Tribunal acknowledges that, in appropriate cases of multiple proceedings, it remains open to an arbitral tribunal to find that the subsequent proceedings may constitute an abuse of process. It takes guidance from commentary by Sir Hersch Lauterpacht, that "[t]*here is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused*".[411]

205. However, the Tribunal considers that in this context abuse of process is an extraordinary remedy that "*is extremely rarely applied*".[412] As such, its application carries a high burden, involving bad faith or an intention wrongful act on the part of a party.[413]

(b) Application to the Facts

206. As explained above, each of the doctrines of *res judicata* (cause of action estoppel), collateral estoppel and abuse of process, as considered in this *Windstream II* arbitration, concern findings in the earlier proceedings between the disputing parties

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410 Request for Bifurcation and Memorial on Jurisdiction, para. 60.

411 **RL-134**, Hersch Lauterpacht, 'The Development of International Law by the International Court' (1958), p. 164, also cited in **RL-130**, *Orascom v. Algeria*, para. 541.

412 **RL-117**, ILA Interim Report, p. 22. *See also* **RL-195**, *Caratube v. Kazakhstan*, para. 377.

413 *See* **CL-183**, *Chevron & TexPet v. Ecuador (I)*, Interim Award, paras. 143, 146. *See also* **CL-193**, *Levy v. Peru*, para. 186.

in the *Windstream I* Award. The Tribunal accepts, and neither Party appears seriously to refute, that it is not for this Tribunal to seek to determine that which was already determined in the *Windstream I* Award. That goes both to any cause of action and any issue relied upon in the *Windstream I* Award reasoning to reach the final decision.

i. *Res Judicata* (cause of action estoppel)

207. As to cause of action estoppel, it is common ground that the first two criteria are met. In particular, the *Windstream I* and *Windstream II* arbitration proceedings are:

a. before the same legal order, and although the constitution of each arbitral tribunal is different (and CUSMA has since entered into force), they are both NAFTA Chapter 11 international arbitration tribunals; and

b. between the same disputing parties (some prior awards referred to by the disputing parties involved a different named claimant (*i.e.*, a shareholder or legal entity within an investor's organisational structure), requiring careful consideration as to effective identity), but that is not the case here.

208. The dispute arises out of the third criteria for cause of action estoppel: same grounds and relief.

209. As to the same grounds, it is undisputed that at least some of the grounds that the Claimant relied on for its NAFTA Articles 1110 and 1105 claims in *Windstream I* are repeated and relied upon in *Windstream II*, including, in particular, the imposition and continuation of the Moratorium and the circumstances surrounding it. In *Windstream I*, the Claimant argued that the Moratorium resulted in the constructive or effective termination of the FIT Contract. The *Windstream I* Award did not accept that, finding instead that the FIT Contract remained in force (*i.e.*, there had been no constructive or effective termination). In *Windstream II* therefore, the Claimant either relies on the elements of its original causes of action with the additional element of actual termination, and/or it relies on a new course of conduct following the *Windstream I* Award, which subsequently resulted in termination.

210. In both scenarios, leaving aside the merits of the arguments, it is clear that there are new elements to the *Windstream II* NAFTA Article 1110 and 1105 causes of action. For expropriation, the FIT Contract that the *Windstream I* Award found to remain in place in 2016, has now been terminated; the unsuccessful claim for breach arising out of constructive termination is now a claim for breach arising out of actual termination. For fair and equitable treatment, the breach found in the *Windstream I* Award arose out of measures occurring prior the *Windstream I* Award; the Claimant now relies on conduct post-dating the Award for its new fair and equitable treatment breach claim.

211. At least one critical element for each cause of action had not occurred at the date of the *Windstream I* Award and, therefore, the grounds for the claims in the two arbitrations cannot be said to be the same. This approach arises solely because the *Windstream I* Award found that the Claimant's investment (at least in part) continued at the date of that Award.

212. As to the same relief, it is also undisputed that the Claimant sought compensatory damages based on the full value of the Project in *Windstream I* and now seeks compensatory damages based on the full value of the Project in *Windstream II*. Its expert evidence as to the quantum of that full value is different: among other things, the valuation date and some of the assumptions in its valuation methodology have changed. But the premise of full reparation of the value of its entire Project is what the Claimant sought or seeks in both proceedings.

213. As is clear from the *Windstream I* Award, paragraph 483, the Claimant did not recover the full value of its Project, on the basis that it had not been deprived of that full value. Accordingly, issues as to the existence and value of its continuing investments identified in the *Windstream I* Award and the existence and quantum of any additional value in respect of those investments are new issues in *Windstream II*. Therefore, it cannot be said that the same relief exists in both proceedings.

214. Consequently, on the basis that the same grounds and same relief criteria for cause of action estoppel have not been met, the Tribunal rejects the Respondent's

objection to the claims on the grounds of *res judicata* (cause of action estoppel). This is explained further below, in relation to each cause of action.

(i) Expropriation Cause of Action

215. In finding that there had been no expropriation of the Claimant's investment on the grounds that both (i) "*the Claimant's FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario*", and (ii) "*the Claimant's CAD 6 million security deposit is still in place and has not been taken or rendered otherwise worthless as a result of any action taken by the Government of Ontario*", the *Windstream I* Award determined that the Claimant retained investment assets at that date,[414] which in turn retained value.[415]

216. As to the value of the retained investment assets at the date of the *Windstream I* Award, the tribunal deducted from its quantification of compensatory damages the sum of CAD 6 million security deposit. It attributed no additional value to the FIT Contract and made no reduction to the awarded compensatory damages in relation to it.

217. Therefore, the *Windstream I* Award determined that the Claimant retained two investment assets, but only one of those had a quantifiable value at the date of the Award. It is possible that the *Windstream I* Award intended to treat the FIT Contract and security deposit as coalescent, with the retained value of the security deposit representing the entire collective value of both assets. However, this is not how these two investment assets were characterized in the *Windstream I* Award. Instead, the Award clearly differentiated two extant investment assets, but attributed value only to one.

218. For *res judicata* to apply, to the NAFTA Article 1110 expropriation cause of action in *Windstream II*, the Respondent would need to show that all elements of the Claimant's current expropriation claim were in place at the time of the *Windstream I* Award. That is clearly not the case. Rather, at the time of the *Windstream I*

414 *Windstream I* Award, para. 290.

415 *Windstream I* Award, para. 291.

Award, the Tribunal clearly determined that the Claimant retained two assets, at least one of which had significant value. This meant, in the *Windstream I* Award finding, that there could be no expropriation.

219. The Respondent relied on the Claimant's argument in the *Windstream I* arbitration that, at that time, the FIT Contract had been *de facto* terminated. The Claimant was unsuccessful in that argument. The Tribunal found that the FIT Contract was not *de facto* terminated and, instead, that it continued in effect. It did so, at least in part, based on the representations by the Respondent in the *Windstream I* arbitration that there had indeed been no *de facto* determination and that the FIT Contract did indeed continue to remain in place with full effect.

220. A claim for expropriation based on the taking of the investment in a Project, which included a disputed (and rejected) claim for *de facto* taking of the FIT Contract, is different to a claim for expropriation following the actual termination of the FIT Contract, return of the security deposit and conclusive and unequivocal end of the Project. This is particularly so, when the Tribunal in the earlier arbitration has expressly determined that "*the Claimant's FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario*" and that "*it continues to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium*".[416] The key fact, factor and element in the cause of action in *Windstream II*, which is different to the cause of action in *Windstream I*, is that the FIT Contract had previously remained in place (together with the security deposit) and that is no longer the case.

221. As to the Respondent's separate argument that the FIT Contract in any event was found by the Tribunal in the *Windstream I* arbitration to have no value, it is correct that the *Windstream I* Award found that it did not as at the date of the Award stating that it was not:[417]

> […] appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could

416 *Windstream I* Award, para. 290.

417 *Windstream I* Award, para. 483 [Emphasis added].

> have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, ***as at the date of this award, the FIT Contract cannot be considered to have any value***.

222. However, the *Windstream I* Award noted further, in parenthesis at the end of the aforementioned paragraph in its damages analysis, that "[i]*t is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them*".[418] Consequently, while the finding of no expropriation in the *Windstream I* Award, on the basis that the FIT Contract and security deposit both remained in place at that time, is *res judicata*, there is an open issue for these proceedings as to whether or not subsequent events have given rise to expropriation thereafter.

(ii) FET Cause of Action

223. As regards the cause of action pursuant to NAFTA Article 1105(1), breach of the fair and equitable treatment standards, the Tribunal also considers that the *Windstream I* Award did not determine, and indeed could not determine, whether or not the conduct of the Respondent following the issuance of the *Windstream I* Award gave rise to new breaches of NAFTA. This would not arise but for the *Windstream I* tribunal finding that the Claimant did indeed retain an investment (*i.e.*, its entire investment had not been expropriated), and accordingly that the continuing investment was entitled to continuing investment protection.

(iii) Conclusion

224. The Tribunal therefore concludes that the Claimant's causes of action pursuant to both NAFTA Articles 1110 and 1105(1) in *Windstream II* are not barred by *res judicata* (cause of action estoppel). That is, those causes of action were not determined in the *Windstream I* Award. In so far as causes of action in these *Windstream II* proceedings arise out of conduct that post-dated the *Windstream I* Award and relate to investment assets that the *Windstream I* Award expressly found to have been retained as at the date of that Award, they are not barred by *res*

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418 *Windstream I* Award, para. 483.

judicata. The Tribunal accepts that the Claimant's claims in this *Windstream II* arbitration are challenging and give rise to genuine procedural concerns on the part of the Respondent. However, the *Windstream I* Award unequivocally found that there had been no expropriation of the Claimant's investment at the date of that Award based on facts that existed at that time but no longer exist now, and, therefore, the Claimant may assert its claims. Similarly, for its fair and equitable treatment claim, the finding of breach related to the events up to the date of *Windstream I* Award and loss suffered as at that time.

225. If the claims in this *Windstream II* arbitration were simply a resurrection of the claims run and partly won and partly lost in *Windstream I*, this Tribunal would treat those as precluded on the basis of *res judicata*. But it does not consider that to be the case.

226. Causes of action arising pursuant to NAFTA or any other investment treaties do not differ from other causes of action in so far as a past breach does not immunise the wrongdoer from consequences of future breach. Therefore, as long as the legal relationship continues – and here that is as long as there was a protected investment – the obligation to comply with the NAFTA standards of protection continue.

227. Therefore, the Tribunal finds that the claims for breach of NAFTA Articles 1105 and 1110 in this *Windstream II* arbitration, in so far as they arise out of events occurring after the *Windstream I* Award, are new claims that were not put in issue in *Windstream I* and were not decided by the *Windstream I* Award.

i. Collateral estoppel

228. Having rejected the Respondent's position on *res judicata* (cause of action estoppel) on the basis that the *Windstream I* Award found that the Claimant's investment (in part) still existed and that the claims in *Windstream II* arise out of events that post-date the *Windstream I* Award, the Tribunal turns to the more nuanced issue of the findings in the *Windstream I* Award that inform or determine necessary elements relied on by the Claimant in its new claims. That is, the question of collateral (or issue) estoppel.

229. In order for the Claimant to establish that the FIT Contract termination gave rise to any basis for a claim for breach of fair and equitable treatment in *Windstream II*, the Claimant needs to present it against the backdrop of the Moratorium. Otherwise, IESO's termination of the FIT Contract based on its express terms cannot give rise to any wrongdoing by the Respondent or its agencies, in contract or pursuant to NAFTA protections.

230. The *Windstream I* Award made an important number of factual and legal findings concerning the Moratorium, including that:

    a. its imposition was not in breach of NAFTA protections;

    b. its continuation for the period leading up to the *Windstream I* Award was a breach of the fair and equitable treatment standard of protection;

    c. although its continuation (in breach) gave rise to IESO's contractual right to terminate the FIT Contract, it had not (yet) done so; and

    d. it remained open to the disputing parties at the time of and following the *Windstream I* Award to renegotiate and reactivate the terms of the FIT Contract and for the Claimant to proceed with the Project.

231. The Tribunal considers it important to acknowledge that these findings, and in particular, the finding that the FIT Contract could be renegotiated and reactivated, were not made in a vacuum. They derived from consistent representations by the Respondent that the Moratorium was temporary. As such, the possibility of reactivation or revival of the Project and renegotiation of the FIT Contract was represented as being a distinct possibility.

232. It may well be that this was a tactical decision by the Respondent in the *Windstream I* arbitration, in order best to defend the position that there was no expropriation. If it was, then it paid off in so far as the *Windstream I* Award found that there was indeed no expropriation, including because the FIT Contract remained afoot and the Moratorium subject to being lifted.

233. As to the Claimant's case that these representations, among other things, gave rise to a positive obligation on the Respondent subsequently to lift the Moratorium and to revive or reactivate the Projects and renegotiate the FIT Contract terms, that is a matter for the merits as below.

234. But for its part, it is not open to the Respondent successfully to 'hold the line' on the continuing existence of an investment (in the form of the FIT Contract) in order to defend an expropriation claim in *Windstream I*, and then to argue that the Claimant is estopped from subsequently claiming expropriation when the same FIT Contract is later terminated.

235. That said, the Tribunal considers it equally important to recognise that the *Windstream I* Award found that, although there was no expropriation including because the FIT Contract was still formally in force and had not been unilaterally terminated, it could be terminated upon return of the security deposit. Any breach of the fair and equitable treatment standard that gave rise to the legal right to terminate (with return of the security deposit) was fully compensated in the *Windstream I* Award. In other words, the conduct of the Respondent in continuing the Moratorium was found to breach the fair and equitable treatment shown in *Windstream I*, and that conduct led to the contractual right to terminate the FIT Contract accruing. That conduct was subject to compensation in the *Windstream I* Award.

236. This Tribunal considers itself to be bound by the findings of fact in the *Windstream I* Award. In order for the Claimant to succeed in a new cause of action, for expropriation or breach of fair and equitable treatment, it needs to show steps taken after the *Windstream I* Award that led to a new breach and, given the return of the CAD 6 million second deposit, some new expectation of value. Unilateral termination of the FIT Contract in accordance with its terms is not enough; in so far as the Respondent's breach of fair and equitable treatment caused the "*contractual limbo*" that gave rise to IESO's unilateral right to terminate, that loss was compensated for in the *Windstream I* Award.

237. Collateral estoppel does not preclude the *Windstream II* Tribunal from proceeding and determining any new causes of action in *Windstream II*. It must, however, follow any relevant determination of issues from the *Windstream I* Award. Therefore, the most efficacious approach is to deal with the relevant *Windstream I* Award findings that apply to this *Windstream II* arbitration as they arise in the course of this Award.

ii. Abuse of process

238. As to abuse of process, given the findings of the *Windstream I* Award, in particular that there was no expropriation because the Claimant had not (at the time) lost its security deposit or the FIT Contract, and that the damages assessment was adjusted down to account for the former, it was not necessarily abusive for the Claimant to revisit that finding when it ultimately did lose the FIT Contract.

239. In particular, the language adopted in the *Windstream I* Award did leave open ambiguity as to whether or not the Project (or any part of it, including a reactivated or renegotiated FIT Contract and/or security deposit) could be expropriated in the future.

240. Therefore, a second arbitration proceeding in the circumstances cannot be said to be abusive. In so far as the claims in these second proceedings present challenges for the Claimant, particularly given that the asset that it ultimately lost had not been attributed any value in the *Windstream I* Award, the Claimant proceeds at its own costs risk. Any prejudice caused by ultimately unsuccessful claims may be addressed in a costs award.

B. FAILURE TO ESTABLISH *PRIMA FACIE* LOSS OR DAMAGE

241. The Respondent's second preliminary objection is that the Claimant has not met the requirement in NAFTA Articles 1116(1) and 1117(1) to set out a *prima facie* case on damage.[419]

[419] *See* Request for Bifurcation and Memorial on Jurisdiction, para. 96; **CL-88**, *UPS v. Canada*, para. 37.

242. NAFTA Article 1116(1) provides as follows:[420]

> **Article 1116: Claim by an Investor of a Party on Its Own Behalf**
>
> 1. An investor of a Party ***may submit to arbitration*** under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor ***has incurred loss or damage by reason of, or arising out of, that breach***.

243. NAFTA Article 1117(1) provides as follows:[421]

> **Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise**
>
> 1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, ***may submit to arbitration*** under this Section a claim that the other Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise ***has incurred loss or damage by reason of, or arising out of, that breach***.

244. Unlike its *res judicata*, collateral estoppel and abuse of process objections, the NAFTA Article 1116(1) and 1117(1) objections are based on the qualifying requirements for a claim within the applicable NAFTA language, *i.e.*, that the

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420 [Emphasis added].

421 [Emphasis added].

Claimant is not entitled to submit a claim under NAFTA Chapter 11 unless it has established a cause of action that could cause possible loss or damage.

(i) The Respondent's Position

245. In a nutshell, this second preliminary objection is that, based on NAFTA Articles 1116(1) and 1117(1), the Claimant failed to meet the requirement of to establish *prima facie* loss or damage because: (i) it is estopped from asserting that the Project or FIT Contract had any value by virtue of *Windstream I*, (ii) finding otherwise would require overturning the findings of the *Windstream I* Award, and (iii) the Claimant does not identify any "*subsequent, separable, self-standing cause of action that has caused any possible loss beyond what it claimed previously*".[422]

246. Preliminarily, the Respondent submits that the Claimant has the burden of proof for a NAFTA Chapter 11 claim, relying on prior awards as follow:[423]

a. *Mesa v. Canada*: "[i]*t is for the Claimant to establish the factual elements necessary to sustain the Tribunal's* [] *jurisdiction over the challenged measures*",[424] (following *Apotex v. United States*, *Methanex v. United States*, *Bayview v. Mexico*, *Grand River v. United States*, and *Gallo v. Canada*);[425]

422 Request for Bifurcation and Memorial on Jurisdiction, paras. 109, 92 to 133; *see also* Counter-Memorial, para. 120.

423 Request for Bifurcation and Memorial on Jurisdiction, paras. 92 to 94.

424 **CL-163**, *Mesa v. Canada*, para. 236.

425 **RL-006**, *Apotex v. US*, para. 150 *citing* **RL-135**, *Phoenix v. Czech Republic*, paras. 58 to 64 (summarizing previous decisions, and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase."); **RL-009**, *Bayview v. Mexico*, paras. 63, 122 (finding that the "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that the "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **CL-054**, *Grand River v. US*, Award, para. 122 (holding that the "Claimants must […] establish an investment that falls within one or more of the categories established by […] Article [1139]"); **RL-136**, *Gallo v. Canada*, para. 328 (stating that "[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.").

b. *Resolute Forest v. Canada*:[426]

> Article 24(1) of the UNCITRAL Rules, which are applicable here by virtue of Article 1120(1) of NAFTA, imposes on the relevant party 'the burden of proving the facts relied on to support [its] claim or defence'. The Tribunal does not see any reason to limit Article 24(1) to matters of substance, and the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are, in its view, facts relied on in support of the claim.

c. *Spence International Investments v. Costa Rica*:[427]

> [I]t is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. *The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction*.

247. In order to establish *prima facie* loss or damage "*by reason of, or arising out of*" an alleged breach,[428] the Respondent submits that the Claimant must set out a *prima facie* case of damage pursuant to NAFTA Articles 1116(1) and 1117(1),[429] referring to the prior awards in:

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426 **RL-137**, *Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility, para. 84. *See e.g.* **RL-053**, *Tulip v. Turkey*, Decision on Jurisdiction, para. 48 ("As a party bears the burden of proving the facts it asserts, it is for Claimant to satisfy the burden of proof required at the jurisdictional phase."); **RL-008**, *Bayindir v. Pakistan,* Decision on Jurisdiction, para. 192 ("[The Claimant] has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); **RL-028**, *ICS v. Argentina (I)*, para. 280: ("[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.").

427 **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 239 [Emphasis added].

428 Request for Bifurcation and Memorial on Jurisdiction, paras. 96 to 97.

429 For example, the Tribunal in *UPS v. Canada* held that a claimant is required to "*state a* prima facie *case of damage*" at the jurisdictional stage. *See* **CL-088**, *UPS v. Canada*, para. 37.

a. *Methanex v. United States*, where the award required that loss "*originates in the measure adopted or maintained by the NAFTA Party*";[430] and

b. *Westmoreland v. Canada*, where the award found that the claimant had "*not identified any subsequent act of Canada which has caused any such possible loss and it has claimed precisely the same loss as that claimed*" in the previous claim.[431]

248. As to the Respondent's argument that the Claimant is estopped from asserting that the Project or the FIT Contract had any value by virtue of the *Windstream I* Award findings, it submits that:

a. the *Windstream I* Award determined that "*the Project had a value of CAN$31,162,000 and the FIT Contract was worthless*";[432]

b. the Claimant argued in *Windstream I* that:

i. "[t]*he moratorium and Ontario's related actions have had devastating and drastic effects on* [its] *investments in Ontario, which are now effectively worthless and have no prospect of recovering in value even if the moratorium is lifted*";[433]

ii. "[e]*ven if the OPA now relieved* [the Claimant] *from its deadlines under the FIT Contract,* [its] *investments would not recover in value*";[434]

iii. in response to the argument that the Project was frozen not cancelled, that:

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430 **CL-063**, *Methanex v. US*, Award, para. 26.

431 **RL-139**, *Westmoreland v. Canada*, paras. 235, 237.

432 Request for Bifurcation and Memorial on Jurisdiction, para. 98.

433 Memorial, para. 2.

434 Memorial, para. 15; *see also* the *Windstream I* Tribunal's summary of the Claimant's position in *Windstream I* Award, paras. 192, 235, 239, 303, 423, 431.

1. "[b]*y the time* [the *Windstream I*] *arbitration is heard, five years will have passed since the moratorium was announced*",

2. "[t]*here is not (nor has there ever been) an end in sight*",

3. its "*investments in Ontario – the Project, the FIT Contract and WWIS – became worthless in May 2012 when it became impossible for* [it] *to bring the Project into commercial operation without triggering the OPA's termination rights under the FIT Contract*",

4. "[t]*he Project is not 'frozen' at all*", and

5. "[i]*t has been* de facto *cancelled by the severe delays to which the Ontario Government has subjected it*";[435]

c. the *Windstream I* Award noted that the "*Claimant contends that, as a direct consequence of the moratorium and the Respondent's failure to effectively 'freeze' the Project as promised, its investments in the Project and the FIT Contract are now substantially worthless*";[436]

d. the *Windstream I* Award granted CAD 25,162,000 to the Claimant, stating that "*by May 2012 the Project had* [] *reached a point at which it was no longer financeable*",[437] and that "*as at the date of this award, the FIT Contract cannot be considered to have any value*";[438]

e. the Claimant's reliance on the *Windstream I* Award finding that "*it continues to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium*",[439] must

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435 *Windstream I* Reply, para. 24.

436 *Windstream I* Award, para. 239. *See Windstream I* Memorial, paras. 560, 563; *Windstream I* Reply, paras. 367 to 371, 407 to 408, 532.

437 *Windstream I* Award, para. 379.

438 *Windstream I* Award, para. 483.

439 *Windstream I* Award, para. 290; *see* Memorial, paras. 20, 177, 186, 231, 303.

be taken in the context that no renegotiation or reactivation has occurred;[440] and

f. the Claimant is barred from bringing a new claim that the FIT Contract had a "*future and substantial potential value*" and the Project had "*a lot of value*",[441] because it is:

i. "*barred from advancing a claim that directly contradicts its previously held position that its FIT Contract, the Project and enterprise are worthless, and that also defies the Tribunal findings*"; and

ii. "*unable to show that its investments have any value, and therefore, unable to present a* prima facie *damage claim*".

249. As to the Respondent's argument that finding otherwise would require overturning the findings of the *Windstream I* Award, the Respondent submits that, even if not estopped:

a. the Claimant would need to overcome determinations of the *Windstream I* Tribunal, which constitute issue estoppel and would require reopening matters that were determined, including that:[442]

i. the Claimant was made whole by the *Windstream I* Award;

ii. the FIT Contract had no value at the time of the Award; and

iii. the FIT Contract and Project would only obtain value if the disputing parties jointly opted to renegotiate and reactivate the contract and Project;[443]

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440 *See* Memorial, section XV, paras. 231 to 252 *including* "*XV.A. MEI Refuses to Meet with Windstream and Refuses to Discuss the Path Forward for the Project*" and "*XV.B. The IESO Refuses to Renegotiate the FIT Contract*".

441 Memorial, para. 229; **CWS-Mars-3**, Third Witness Statement of David Mars, para. 16.

442 Request for Bifurcation and Memorial on Jurisdiction, paras. 104 to 105.

443 *See* Request for Bifurcation and Memorial on Jurisdiction, para. 105 and Sections II.A.4 and III.E.

b. this would require overturning the "*clear and indisputable determination that the Project was no longer financeable*";[444]

c. its damages claim would require overturning determinations that "*WWIS Project is an early stage project and that a DCF method of evaluation is unavailable to early stage projects*";[445]

d. the Tribunal has no power to so overturn and is "*bound by the Windstream I Tribunal's rejection of the DCF analysis as an appropriate means to calculate damages*"; and

e. as the Claimant was made whole and the FIT Contract was found not to "*have any value*",[446] absent reactivation or renegotiation to create new value, "*its termination could not have resulted in any loss to the Claimant*", meaning failure to make a *prima facie* damages claim.

250. As to the Respondent's argument that the Claimant does not identify any "*subsequent, separable, self-standing cause of action that has caused any possible loss beyond what it claimed previously*", the Respondent submits that:

a. no such action originated from measures prior to 4 May 2012;

b. reasoning in prior awards regarding the requirement for loss within three-years, pursuant to NAFTA Articles 1116(2), are also relevant to *prima facie* loss including:

i. *UPS v. Canada*: "[i]*t is incumbent on claimants to establish the damages associated with asserted breaches, and for continuing conduct that must include a showing of damages not from the inception of the course of conduct but only from the conduct occurring within the period allowed by article 1116(2)*",[447] and in

444 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 16, 20, 81, 106.

445 *See* Request for Bifurcation and Memorial on Jurisdiction, Sections II.A.4 and III.E.

446 *Windstream I* Award, para. 483.

447 **CL-088,** *UPS v. Canada*, para. 30.

"*circumstances in which a series of associated actions may be divided up*",[448] the claim must rest on a breach occurring within the time limit, and "*rest on a breach that gives rise to a self- standing cause of action*", [449] which "*must be separately actionable, i.e., it must constitute a cause of action, a claim, in its own right*";[450] and

ii. *Spence v. Costa Rica*: "*its jurisdiction to award damages will be necessarily linked to and constrained by the breach of which it is sei*[z]*ed and over which it has jurisdiction*",[451] and the breach would "*necessarily confine the damages that may be awarded to what is due in consequence of that particular breach*";[452] and

c. the Claimant identified no breach capable of meeting this standard, *i.e.*, a breach "*constituting a subsequent act capable of causing loss*", in that:

i. it seeks damages to eliminate consequences of breach based on six measures,[453] with no subsequent act or omission amounting to any self-standing cause of action that can be separated from the causes of action in *Windstream I*;[454]

ii. its submission that the six measures were not determined has no merit as these "*effectively boil down to two complaints: that the continued application of the moratorium breaches NAFTA and that the termination of the FIT Contract, as opposed to its deferral or amendment, breaches NAFTA*", [455] neither of which "*stands on its*

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448 **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 211.

449 **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 210.

450 **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 210.

451 **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 211.

452 **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 212; *see also* **RL-140**, *Infinito Gold v. Costa Rica,* Award, para. 221 ("the loss or damage must flow from the alleged breach").

453 *See* Memorial, para. 428.

454 *See Windstream I* Memorial, paras. 14, 539, 542, 563, 623.

455 Memorial, para. 448.

own or is divorceable from the measures that it put in issue in Windstream I";

iii. the Claimant already argued in *Windstream I* that:

1. failure to lift the Moratorium is no different to its adoption and continuation;

2. the FIT Contract s.10.1(g) termination right was challenged, even though actual termination had not yet occurred, with the Claimant using "*de facto*", "*effective*" or "*indirect*" cancellation or termination terms;[456]

3. it was "*no longer able to attract financing for the Project because the FIT Contract – which would be the key element to securing financing – is now at risk of being terminated by the OPA*";[457] and

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456 *Windstream I* Memorial, para. 14 "[...] the Project cannot be developed in time to meet the May 4, 2017 deadline. It is no longer financeable. As a result, the Project has effectively been cancelled and is now substantially worthless, as are Windstream's investments in WWIS and the FIT Contract."; para. 477 "Windstream has lost the entire value of its Project as a result of Ontario's cancellation of its Project."; para. 564 "Ontario allowed the moratorium to cause delays in the Project so drastic that the Project can now not be developed in time to meet the deadlines in the FIT Contract that Ontario refused to remove. Ontario did that with full knowledge that, without removing the deadlines in the FIT Contract, moratorium-related delays would crystallize into an effective cancellation of the Project – a *de facto* cancellation, if not a formal one."; para. 574 "Ontario has failed to conduct itself in accordance with its obligation of due process." Indeed, it indirectly cancelled the Project"; para. 611 "The moratorium, which has now crystallized into an effective cancellation, is a repudiation of Ontario's commitments to Windstream and amounts to a breach of Article 1105."; and para. 626 "As is now apparent, Ontario also chose to cancel Windstream's Project for political reasons [...]"; *Windstream I* Reply, para. 24 "The Project is not 'frozen' at all. It has been *de facto* cancelled by the severe delays to which the Ontario Government has subjected it."; para. 399 [Emphasis in original] "*W*hile the FIT Contract may formally still be under *force majeure*, **in effect**, it and the Project have been cancelled."; para. 474 "Thus, even if the moratorium was lifted and the Project allowed to proceed, the Project could not continue. It has been *de facto* cancelled. The moratorium therefore has deprived Windstream of the value of its investments."; para. 480 "Even if the moratorium is ever lifted (of which there is no indication), the Project can no longer continue. It has thus been *de facto* cancelled"; para. 609 "A decision to effectively terminate Windstream's project also appears to have been made […]"; and para. 618 "Windstream's Project was *de facto* cancelled as a result of the indefinite-term moratorium, a decision made to 'kill' offshore wind projects".

457 *Windstream I* Memorial, para. 558.

4. without financing, it "*could not build the Project and bring it into commercial operation by its deadline under the FIT Contract even if the moratorium were to be lifted*";[458] and

iv. the *Windstream I* Award duly acknowledged that:[459]

> The Claimant contends that, while the Project is currently under *force majeure*, there is no longer any realistic prospect that the Project can reach commercial operation by 4 May 2017. Consequently, the Project is no longer financeable and has effectively lost all of its value. This is the case even if the OPA were to waive its right to terminate the FIT Contract as the conduct of the Ontario Government has created such uncertainty around the offshore wind industry in Ontario that no potential investor would be prepared to invest in the Project.

251. In *Windstream II*, the Claimant now relies on actual termination. However, the Respondent submits that this "*changes nothing*" because "[t]*he Project has never been able to proceed*", as the Claimant argued and the tribunal acknowledged in *Windstream I,* (*i.e.*, even if IESO waived its right to terminate, the Project was "*unable to secure the necessary financing*", "*had no prospect of proceeding and was therefore worthless*"). Moreover, the ability to return the security deposit upon termination was the reason the *Windstream I* Award found no substantial deprivation. It pointed out that, had the security deposit not been returned, or the FIT Contract "*reactivated and thwarted a second time after further development*", then "*perhaps the Claimant could point to a subsequent act giving rise to separately actionable damage.*" Its firm position on the evidence is that this was not the case.[460] Instead, the Claimant's damages claim again rests on "*'the complete frustration' of its investment on account of 'the moratorium, combined with Ontario's failure to fulfill its promises to keep Windstream whole.'*"[461]

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458 *Windstream I* Memorial, para. 558.

459 *Windstream I* Award, para. 288.

460 *See* Memorial, paras. 250 to 251, 281.

461 Request for Bifurcation and Memorial on Jurisdiction, para 124 *citing Windstream I* Memorial, para. 661.

252. According to the Respondent, the Claimant also sought the same losses in *Windstream I* as it seeks in *Windstream II*, similar to the claimant in the prior award in *Westmoreland v. Canada* in that:

a. its claim for damages in its *Windstream II* Memorial, paragraphs 535 to 538 "*are a near copy and paste*" of its *Windstream I* Memorial, paragraphs 672 to 675;

b. it relied on evidence that allegedly "*the Project would have obtained its environmental permitting, its Crown land tenure and its financing, and it would have met the commercial operation deadlines laid out in the FIT Contract*";

c. it concluded with the "*exact same claim for damages*", *i.e.*, *Windstream II* Memorial, paragraph 538 and *Windstream I* Memorial, paragraph 675, both state: "[a]*ccordingly, the DCF method provides the most reliable and accurate measure of Windstream's losses resulting from Canada's breaches of Articles 1110, 1105(1) and 1102 of NAFTA*";[462] and

d. "*no matter what post-Award value the Claimant professes exists in its investment, its claim for damage makes abundantly clear that the damage it seeks in 2022 is the same damage it sought in 2015*".

253. The Respondent relies on the prior award in *Westmoreland v. Canada*, which it alleges "*held that there was no need to proceed to an evidentiary hearing on quantum of loss, because 'the point is that* [the claimant] *has not identified any subsequent act of Canada which has caused any such possible loss and it has claimed precisely the same loss as* [the previous claim] *'*".[463] It went on to suggest that:

a. evidence does not help the Claimant because:

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462 The Respondent noted that the Claimant failed to amend the correct NAFTA provisions following CUSMA.

463 **RL-139**, *Westmoreland v. Canada*, para. 235.

i. "[t]*he damage it points to originates out of* [the Claimant's] *inability to finance and advance its project as of May 2012*", not "*Ontario's continued application of the moratorium or IESO's decision to terminate the FIT Contract*"; and

ii. "[t]*he Project had already been prevented from proceeding at that point*" and "[t]*he damage was done*", so "*continued application of the moratorium and termination decision were not capable of causing any new losses beyond what the* Windstream I *Tribunal addressed*"; and

b. the *Windstream I* Award "*simply does not contemplate future damages based on the continued application of the measures*",[464] instead making "*the Claimant whole*", leaving it "*no access to a new damage claim arising out of that Award*".

(ii) The Claimant's Position

254. According to the Claimant, the issue whether or not it incurred *prima facie* damages is not a jurisdictional matter and should be resolved as a matter of merits, because (i) it meets the low threshold requirement,[465] and (ii) the objection "*is premised on the same mischaracterizations raised as part of* [the Respondent's] res judicata *objection*" and should fail for the same reasons.[466]

255. As to the applicable standard, the Claimant points out that there is a low threshold for establishing a *prima facie* case, the question being whether or not "*the alleged facts, taken as true, are* capable *of breaching the NAFTA and* may *have caused a loss*".[467] It submits that this threshold is met because it "*pleads that the measures*

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464 In this regard, the *Windstream I* Award bears no statement similar to the one made by the tribunal in *Mobil Investments v. Canada (I)*, at para. 478 "Given that the implementation of the 2004 Guidelines is a continuing breach, the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings." *See* **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 75.

465 Reply, paras. 261 to 278.

466 Reply, para. 261.

467 Reply, para. 262.

– all of which arose after the Windstream I *Award – caused it loss beyond what it was compensated for by* Windstream I".[468]

256. In this regard, the Claimant submits further that:

a. compliance with NAFTA Articles 1116(1) and 1117(1) "*constitute*[s] *a jurisdictional requirement in respect of which* [it] *bears the burden of proof*";[469]

b. "[i]*t is not disputed that the other requirements of Article 1116(1) and 1117(1) have been met in this case*";[470]

c. the "*low threshold*" question is whether or not "*the facts, as alleged,* may *constitute a loss*";[471]

d. prior awards "*have recognized this threshold as a low bar*",[472] including:

i. *Tennant Energy v. Canada*: "[t]*he Claimant need not prove the extent of such loss or damage suffered, given that these facts necessarily relate to the Claimant's case on the merits*";[473]

ii. *UPS v. Canada*: "*Canada mistakes as well the nature of the demonstration that the claimant must make under article 1116*", and "[e]*valuation of the damage actually incurred is not, however, apposite to disposition of Canada's objection here*";[474]

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468 Reply, para. 262.

469 Reply, para. 263; **CL-197**, *Tennant Energy v. Canada*, para. 349.

470 Reply, para. 264.

471 Reply, para. 265.

472 Reply, para. 265; **CL-197**, *Tennant Energy v. Canada*, para. 357; **CL-088**, *UPS v. Canada*, paras. 37 to 38; **CL-178**, *Infinito Gold v. Costa Rica*, Decision on Jurisdiction, para. 255; *see also* **RL-030**, *Impregilo v. Pakistan*, Decision on Jurisdiction, paras. 237, 254; **CL-184**, *Chevron & TexPet v. Ecuador*, Third Interim Award on Jurisdiction, para. 4.11; **CL-195**, *Siemens v. Argentina*, Decision on Jurisdiction, para. 180; **RL-008**, *Bayindir v. Pakistan*, Decision on Jurisdiction, para. 197.

473 **CL-197**, *Tennant Energy v. Canada*, para. 357.

474 **CL-088**, *UPS v. Canada*, paras. 37 to 38.

iii. *Infinito v. Costa Rica*: according to the Claimant, the tribunal held that "*what matters for the purposes of a* prima facie *test on damages is that the facts as alleged may constitute a loss*", and "[w]*hat act may constitute a breach, if any, and whether that act can have caused the damages claimed are different questions which exceed the limited scope of the* prima facie *test and must be dealt with at the merits stage*";[475] and

iv. *Westmoreland v. Canada*: relied on by the Respondent which,[476] according to the Claimant, "*is entirely different from the present case*" in so far as "*the claimant was not in existence at the time of the challenged measures*" and "*the losses were incurred by a different entity*", and according to the Claimant, the tribunal held that "*the claimant must be the entity that owned or controlled the investment at the time of the alleged breach, and that the claimant was not the legal successor of that entity*".[477]

257. According to the Claimant, "*the challenged measures in this case all arose after* Windstream I", and it "*has pleaded facts and measures that post-date* Windstream I *and has pleaded that it has suffered damages that are distinct from what the* Windstream I *tribunal awarded*", so as to "*establish a* prima face *case*".[478]

258. As to the Respondent's arguments that: (i) it is barred from asserting its investments have value, (ii) it was made whole in *Windstream I* and (iii) damages in *Windstream II* originate from the same measures as *Windstream I*, the Claimant asserts that each "*is premised on the same mischaracterization of* [its] *claim and the* Windstream I *Award as it asserts on the* res judicata *objection*".[479] The Claimant submits that:

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475 **CL-178**, *Infinito Gold v. Costa Rica,* Decision on Jurisdiction, para. 255.

476 *See* Request for Bifurcation and Memorial on Jurisdiction, para. 97.

477 *See* **RL-139**, *Westmoreland v. Canada*, paras. 194, 212, 230 to 237.

478 Reply, para. 269; *see* **CL-088**, *UPS v. Canada*, para. 37.

479 Reply, para. 271.

a. as to being barred from asserting that its investments have any value,[480] it "*is not estopped from arguing the Project had value that was taken by the termination of the FIT Contract*", after the *Windstream I* Award, and the "*subsequent question of* what *value was taken* […] *is a merits-based determination*";[481]

b. as to the *Windstream I* Award making the Claimant whole,[482] the Claimant submits that the *Windstream I* Award:[483]

   i. "*recognized that there could be further value created in the FIT Contract*" (and the Respondent subsequently "*deprived* [the Claimant] *of that additional value by its continued wrongful conduct and the termination of the FIT Contract*");[484]

   ii. "*did not find that additional value could only be obtained if the FIT Contract was renegotiated and reactivated, nor did it find that the parties had to 'jointly opt' to do so*";[485]

   iii. "*recognized that the parties could create value 'by reactivating and renegotiating the FIT Contract after the award, which option is still open to them'*";[486]

   iv. "*recognized that, through renegotiating the FIT Contract, there was additional value that could be created*," but "*did not award* [the Claimant] *that value because, in 2016, that value had yet to be unlocked*";[487]

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480 *See* Request for Bifurcation and Memorial on Jurisdiction, paras. 98 to 103.

481 Reply, para. 272.

482 Reply, para. 273.

483 Reply, para. 274.

484 Reply, para. 274; *see* Request for Bifurcation and Memorial on Jurisdiction, paras. 104 to 108.

485 Reply, para. 275; *see* Request for Bifurcation and Memorial on Jurisdiction, paras. 104 to 108.

486 Reply, para. 275; *Windstream I* Award, paras. 290, 483.

487 Reply, para. 276.

v. means that "*when the FIT Contract was terminated in 2020, that value was taken*"; and

vi. further means that the Respondent's "*reliance on the fact that the FIT Contract was not renegotiated to argue there was no additional value created relies on the very wrongdoing that is alleged to breach the NAFTA*";[488]

c. following the *Windstream I* Award, in order "*to comply with* [the Respondent's] *ongoing obligations under the NAFTA, Ontario was obligated to renegotiate the FIT Contract to implement the promises made to* [the Claimant]*, consistent with the promises it made to* [it] *when it implemented the Moratorium, the representations made in the* Windstream I *arbitration, and the findings of the* Windstream I *tribunal*",[489] and its failure to do so "*is an issue for this Tribunal to determine*";[490]

d. as to damages originating from the same measures,[491] it submits further that:[492]

i. the FIT Contract was terminated after the *Windstream I* Award, and the "*question of what loss flows from that breach is a merits-based determination*";

ii. the *Windstream I* tribunal "*did not award* [the Claimant] *the losses for the full value of its investment*"; and

iii. the heart of this jurisdictional objection is the following question:

> Did the *Windstream I* Award make [the Claimant] whole for the loss of the Project, as [the Respondent] claims, or did the Award only

488 *See* **CL-052**, *Gemplus v. Mexico*, para. 13-92.

489 Reply, para. 275.

490 Reply, para. 275.

491 Request for Bifurcation and Memorial on Jurisdiction, para. 109.

492 Reply, paras. 277, 278.

> provide [it] damages for the harm to its investment as of the date of the *Windstream I* Award, as [the Claimant] claims? If it did not make [it] whole, then it necessarily follows that [the Claimant] has *prima facie* damages flowing from the termination of the FIT Contract.

259. According to the Claimant, "*loss of the value of the Project that was taken and was not awarded by the* Windstream I *tribunal*" is the loss or damage incurred that forms the basis of its claims in *Windstream II*.[493]

(iii) The Tribunal's Analysis

260. The Tribunal has relied on the entire record before it, including the disputing parties' written submissions and oral pleadings, concerning the objection arising out of alleged failure to *prima facie* loss or damage. To the extent that some arguments are not reproduced in this Award, they have been considered and are subsumed in the Tribunal's analysis.

261. The relevant language of NAFTA Article 1116(1) and 1117(1) are set out above at paragraphs 242 and 243.

262. As to the applicable standard, the disputing parties agree that the threshold for showing *prima facie* loss for damage is a low one, relying on various statements in prior awards. In the manner of summary disposition, the inquiry for the purpose of Articles 1116(1) and 1117(1) is whether or not the alleged facts, if accepted, could constitute a loss. The threshold question does not permit the Tribunal to interrogate the alleged facts; it simply assumes them to be true for the purpose of identifying *prima facie* loss or damage.[494]

263. Further as to the applicable standard, the Tribunal accepts the Claimant's characterisation, reflected in prior NAFTA awards in *Tennant* and *UPS* (and in

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493 Reply, para. 278.

494 Reply, para. 265; **CL-197**, *Tennant Energy v. Canada*, para. 357; **CL-088**, *UPS v. Canada*, paras. 37 to 38; **CL-178**, *Infinito Gold v. Costa Rica*, Decision on Jurisdiction, para. 255; *see also* **RL-030**, *Impregilo v. Pakistan*, Decision on Jurisdiction, paras. 237, 254; **CL-184**, *Chevron & TexPet v. Ecuador*, Third Interim Award on Jurisdiction, para. 4.11; **CL-195**, *Siemens v. Argentina*, Decision on Jurisdiction, para. 180; **RL-008**, *Bayindir v. Pakistan*, Decision on Jurisdiction, para. 197.

Infinito),[495] that the amount of loss and damage is a question for merits. The threshold question requiring *prima facie* loss and damages requires showing possible loss or damage.

264. The Tribunal applies that standard (*i.e.*, the threshold nature of *prima facie* loss or damage and the appropriate time for quantum being merits phase) to the facts of this case.

265. This is a serious objection in the context of this *Windstream II* arbitration. NAFTA claims appear to have a disproportionate number of cases involving multiple proceedings in respect of the same investments compared to other bilateral and multilateral investment treaties.[496] These multiple proceedings under NAFTA occur despite a prerequisite to any claim being that the investor has incurred loss or damage by reason of, or arising out of, the alleged breach.

266. For the four reasons set out below, this Tribunal has determined that the NAFTA Articles 1116(1) and 1117(1) thresholds are met.

267. *First*, the threshold is, as both disputing parties pointed out in their submissions, low. A *prima facie* case for possible loss or damage is all that is required. The alleged facts, if accepted, conceivably could form the basis for breach, and loss may have ensued. The purpose of the precondition appears to be to weed out claims that do not arise out of genuine investment that is capable of being harmed by the alleged measure.

268. For multiple proceedings in respect of the same investment, it will ultimately come down to a question of fact whether or not the remaining investment retained (or obtained) any additional value over and above what was compensated for in the

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495 **CL-197**, *Tennant Energy v. Canada*, para. 357; **CL-088**, *UPS v. Canada*, paras. 37 to 38; **CL-178**, *Infinito Gold v. Costa Rica*, Decision on Jurisdiction, para. 255.

496 *See e.g. Apotex v. US (I)*, *(II)* and *(III)*, *Mobil Investments v. Canada (I)* and *(II)*, *Waste Management v. US (I)* and *(II)*, *Westmoreland v. Canada (I)*, *(II)* and *(III)*, *Windstream v. Canada (I)* and *(II)*, *TransCanada v. US (I)* and *(II)*, *ES Holdings and L1bre v. Mexico (I)* and *(II)* and *First Majestic v. Mexico (I)* and *(II)*. Multiple proceedings pursuant to NAFTA appear in almost 10% of awards, whereas pursuant to other investment agreements this proportion is lower.

first proceedings. Given the low *prima facie* threshold for that question, provided there is a case to be answered, it is met.

269. In these circumstances, it is difficult to conclude that there is no *prima facie* case for retained (or obtained) value in the asset by the date of *Windstream II.*

270. *Secondly* and relatedly, the valuation questions are complex. The Claimant has asked the Tribunal in *Windstream II* to adopt a different valuation date, valuation methodology and assumptions, including as to the stage of development of the Project, than those determined to be appropriate in the *Windstream I* Award. The approach to valuing any investment, loss and or damage deserves the Tribunal's full and considered attention and, given the complexity, does not warrant summary disposition. As noted in prior awards, the quantum of damages is for merits, not for jurisdiction.

271. *Thirdly*, the alleged loss or damage in *Windstream II* arises out of full deprivation of the investment (both for the purpose of expropriation and fair and equitable treatment), which is different to the cause of action ultimately compensated in the *Windstream I* Award. Although both fair and equitable treatment and expropriation were causes of action in *Windstream I* (as well as *Windstream II*), the harm compensated in the *Windstream I* Award was the damage to the investment arising out of breach of the fair and equitable treatment standard, but not for complete loss or deprivation of that investment. Although the Claimant alleges both causes of action again for events following the *Windstream I* Award, a key factual difference is that then the FIT Contract is no longer in place and the associated security deposit has been returned to the Claimant.

272. The *Windstream I* Award clearly determined that expropriation had not taken place at that time because "*the Claimant's FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario*",[497] and "*the Claimant has not been substantially deprived of its investment*".[498] The question is

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497 *Windstream I* Award, para. 290.

498 *Windstream I* Award, para. 291.

open to this Tribunal to determine is whether or not expropriation (or new breach of fair and equitable treatment) has now occurred following termination of the FIT Contract – despite the return of the CAD 6 million deposit – and, if so, the value of the finally extinguished entire investment. It is for the Claimant to prove, on the facts, that new value has accrued subsequent to the *Windstream I* Award.

273. *Fourthly* and finally, the NAFTA Article 1116(1) and 1117(1) requirement is for loss ***or*** damage. Conceivably, the claim for loss to an investment may be non-pecuniary, although that is not the case here. However, the Tribunal simply notes that, in theory at least, an investor may suffer loss to an investment that has no monetary value but provides strategic or other non-monetary value to its investment in the host State. Remedies other than compensatory damages may be sought, such as specific performance, nominal damages or even moral damages.

274. Therefore, the Tribunal rejects the Respondent's second jurisdictional objection.

C. LIMITATION PERIOD ARGUMENT

275. The third and final objection to jurisdiction or admissibility is that NAFTA Article 1116(2) and 1117(2) strict three-year limitation periods mean that the Tribunal does not have jurisdiction *ratione temporis*, (*i.e.*, the Claimant had knowledge of the alleged breaches before the critical date for the limitation period of 22 December 2017).[499]

276. In this regard, NAFTA Articles 1116(2) and 1117(2) prescribe a three-year limitation period for claims.

277. NAFTA Article 1116(2) provides:[500]

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[499] Counter-Memorial, para. 120; Rejoinder, para. 79. ("In accordance with the Procedural Order No. 1, [the Respondent] did not raise its objection to the Tribunal's jurisdiction *ratione tem*[]*poris* for bifurcation purposes, leaving it to be argued as part of this Counter-Memorial.")

[500] [Emphasis added].

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

278. NAFTA Article 1117(2) provides:[501]

> An investor may not make a claim on behalf of an enterprise described in paragraph 1 ***if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge*** of the alleged breach and knowledge that the enterprise has incurred loss or damage.

279. As the Claimant filed its Notice of Arbitration on 22 December 2020, the disputing parties agree that the critical date in this arbitration for the limitation period is three years before that date, *i.e.*, 22 December 2017.[502]

(i) The Respondent's Position[503]

280. According to the Respondent, the Claimant has "*completely ignored the preclusive effect of the strict three-year limitation periods under Articles 1116(2) and 1117(2) of the NAFTA, which also serves as a prerequisite to engaging Canada's consent to arbitrate under Article 1122(1)*".[504] It submits that the Tribunal has no jurisdiction *ratione temporis* under NAFTA Articles 1116(2) and 1117(2) because the Notice of Arbitration was not submitted within the three-year limitation period, based on five main points:

a. NAFTA Articles 1116 and 1117 impose a strict three-year time limitation period for submitting a claim to arbitration;

b. the limitation period begins on the date the claimant first acquires (or should have acquired) knowledge of alleged breach loss or damage incurred;

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501 [Emphasis added].

502 Counter-Memorial, para. 122; Reply, para. 281.

503 Counter-Memorial, paras. 120 to 145.

504 Counter-Memorial, para. 120; *see* Request for Bifurcation and Memorial on Jurisdiction, paras. 47 to 133.

c. knowledge of the full extent of the loss or damage incurred is not required to start the time limitation in Articles 1116(2) and 1117(2);

d. the Claimant knew of the alleged breach of Articles 1105 and 1110 prior to 22 December 2017; and

e. the Claimant knew of the alleged loss or damage prior to 22 December 2017.

281. Prior to summarising the Respondent's case on each of those points, the Tribunal notes the Respondent's preliminary arguments that,[505] "[a]*n 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*",[506] and that the Articles 1116(1) and 1117(1) time limits are "[o]*ne such pre-condition*".[507] In support of these arguments, the Respondent cites *Resolute*, *Apotex*, *Mesa*, *Bayview*, *Methanex*, *Grand River*, and

505 Request for Bifurcation and Memorial on Jurisdiction.

506 Counter-Memorial, fn. 214: "[t]he corollary of a finding that Article 1116(1) constitutes a jurisdictional requirement is that, unless all conditions under Article 1116(1) are satisfied to the requisite standard of proof, the Tribunal has no jurisdiction to hear the present claim. This fundamental principle was also confirmed in *Mesa v. Canada* where the tribunal held that '[i]t is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures.' In so holding, the *Mesa* tribunal followed earlier NAFTA tribunals, including those in *Apotex v. United States*, *Methanex v. United States*, *Bayview v. Mexico*, *Grand River v. United States*, and *Gallo v. Canada*, which have consistently affirmed that it is for the claimant to establish that its claims fall within the scope and coverage of NAFTA Chapter Eleven and within the tribunal's jurisdiction." **RL-006**, *Apotex v. US*, para. 150 *citing* **RL-135**, *Phoenix v. Czech Republic*, paras. 58 to 64 (summarizing previous decisions, and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase."); **RL-009**, *Bayview v. Mexico*, paras. 63, 122 (finding that the "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting the Claimant's submission that the "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **CL-054**, *Grand River v. US*, Award, para. 122 (holding that the 'Claimants must […] establish an investment that falls within one or more of the categories established by that Article [1139]'); **RL-136**, *Gallo v. Canada*, Award, para. 328 (stating that '[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted')".

507 *See* **RL-024**, *Feldman v. Mexico*, paras. 46 to 47 (Counter-Memorial, fn. 215 "In its Award, the Feldman tribunal noted that it identified five 'preliminary jurisdictional questions' on which the parties were to submit written pleadings, including '[w]hether the Respondent was entitled to raise any defense on the basis of the time limitation set forth in NAFTA Article 1117(2)'.")

Gallo (where tribunals found the investor bears the burden of proving that its claims are timely).[508]

282. The Tribunal notes the Respondent's further preliminary argument that the limitation period "*begins to run when a claimant first acquires knowledge of the alleged breach and loss or damage arising out of that breach*",[509] submitting that here:

a. it is undisputed that the dispute was submitted to arbitration on 22 December 2020, making 22 December 2017 the critical date;[510]

b. the Claimant failed to demonstrate it first acquired knowledge after 22 December 2017;

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508 *See* Resolute **CL-153**, *Mesa v Canada*, para. 236; **RL-006**, *Apotex v. US*, para. 150; **RL-135**, *Phoenix v. Czech Republic*, paras. 58 to 64 (summarizing previous decisions, and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase."); **RL-009**, *Bayview v. Mexico*, paras. 63, 122: (finding that the "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that the "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **CL-054**, *Grand River v. US*, para. 122 (holding that the "Claimants must […] establish an investment that falls within one or more of the categories established by that Article [1139]"); **RL-136**, *Gallo v. Canada*, para. 328 (stating that "[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."). *See also Windstream I* Counter-Memorial, para. 60 and fns. 135, 136, where it affirms that the principle that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction is well established in international investment arbitration more generally and cites to numerous cases where this principle has been recognized.

509 Counter-Memorial, para. 121.

510 *See also* **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 245: ("In the face of this extensive pre-1 January 2009, pre-10 June 2010 conduct, the Tribunal considers that Claimants have failed to show […] that they first acquired, or must be deemed to have first acquired, knowledge of the breaches and losses that they now allege only after 10 June 2010. The appreciations that lie at the core of every allegation that the Claimants advance can be traced back to pre-10 June 2010 conduct, and indeed to pre-1 January 2009 conduct, by the Respondent. The claims thus fall at the first acquisition of knowledge requirement of Article 10.18.1."); **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 147: ("the Tribunal accepts Canada's argument that the fact that the limitation period begins to run when a would-be claimant first acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot first acquire knowledge of the same matter on more than one occasion").

c. the Claimant is challenging "*a series of measures which all occurred after the Windstream I Award*",[511] each of which was "*adopted more than three years prior to*" 22 December 2017,[512] including Ontario's:[513]

   i. decision to continue to apply the Moratorium;

   ii. failure to complete the work necessary to lift the Moratorium; and

   iii. failure to direct the IESO to amend the FIT Contract to ensure that the Project would be "*deferred*", "*frozen*" and "*on hold*" for the duration of the Moratorium;

d. the Claimant's reference to the FIT Contract termination "*as a measure within the meaning of Article 1101 of the NAFTA*",[514] does not "*challenge the decision of the IESO as a breach of either Article 1105 or 1110*", or "*crystalize*" damages based on it;[515]

e. each of the measures "*had already been put before the* Windstream I *tribunal as early as 2012*", which demonstrates the "*Claimant's actual knowledge of the alleged breaches and loss or damage arising out of those breaches, well before the critical date*"; and

f. "*continued application of these measures following the* Windstream I *Award does not re-set the limitation periods, nor does it cure the clear jurisdictional defects of the claim*".

283. Turning to the first of its five points on limitation, the Respondent submits that NAFTA Articles 1116(2) and 1117(2) impose "*a strict limitation period that forms one of the fundamental bases of* [its] *consent to arbitration disputes under NAFTA*

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511 As noted by the Tribunal in Procedural Order No. 2, para. 45; Response to Request for Bifurcation, para. 2.

512 *See* Memorial, para. 458.

513 *See* Memorial, paras. 7, 10, 18, 428; Notice of Arbitration.

514 *See* Memorial, para. 428.

515 According to the Respondent, "[a]s the Claimant itself argued in the *Windstream I* proceedings, its damages had already crystalized at the time of the *Windstream I* proceedings". *See Windstream I* Reply, para. 483 and *Windstream I* Memorial, para. 318.

Chapter [11]",[516] to "*provide legal predictability and certainty*",[517] and to ensure that any allegation of a breach "*will be addressed promptly rather than allowed to linger*", creating "*certainty and stability for both NAFTA Parties and their investors*".[518]

284. In this regard, the Respondent relied on prior awards in:

a. *Feldman v. Mexico*: describing the three-year limitation period as a "*clear and rigid*", and "*not subject to any suspension, prolongation or other qualification*";[519]

b. *Resolute Forest v. Canada*: "*this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period*";[520]

c. *Mobil Investments v. Canada (II)*: made "*clear the importance which* [the NAFTA Parties] *attach to that guarantee while the awards themselves highlight that the limitation period is 'clear and rigid'*";[521] and

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516 *See* **RL-024**, *Feldman v. Mexico*, para. 63 ("[T]he Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense which, as such, is not subject to any suspension […], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years […]"). *See also* **RL-137**, *Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility, para. 153 (the *Resolute* tribunal stating when referring to Article 1116(2), "this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period […]"); *see also* **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 29; **RL-006**, *Apotex v. US*, para. 327.

517 This is consistent with one of the NAFTA's objectives, *i.e.*, to create effective procedures for the resolution of disputes. *See* NAFTA, Article 102(1)(e).

518 *See* **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 146. *See also* **RL-167**, *Renco v. Peru (II)*, para. 226 (where the tribunal, in discussing the equivalent limitation period provision in the United States-Peru Trade Promotion Agreement, remarked: "The Parties seem to agree, as does this Tribunal, that one of the objectives of the Treaty is to provide a predictable legal framework, and that Article 10.18.1 in particular aims at providing legal predictability by protecting State respondents against late claims, not least to ensure that claims will be resolved when evidence is reasonably available and fresh.").

519 **RL-024**, *Feldman v. Mexico* [Emphasis added and citation omitted]. *See also* **RL-168**, *Corona v. Dominican Republic*, paras. 192,199 *citing Feldman v. Mexico* with approval in interpreting equivalent the three-year limitations period in the DR-CAFTA as "*strict*" and not susceptible to suspension or tolling.

520 **RL-137**, *Resolute Forest v. Canada,* Decision on Jurisdiction and Admissibility, paras. 153, 83: ("Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.").

521 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 146.

d. *Grand River v. US:* dismissed claims on the basis of the Claimant's failure to comply with this strict three-year limitation period.[522]

285. As to its second point, that the limitation period begins on the date the Claimant first acquires (or should have acquired) knowledge of breach and loss or damage incurred, the Respondent submits that:[523]

a. a claimant cannot merely assert when it "*first acquires*" knowledge;

b. acquisition is a question of fact, and sufficient evidence must be provided;

c. the Tribunal must "*determine based on the evidence provided whether the Claimant has met its burden*";

d. if it "*first acquired*" or "*should have first acquired*" knowledge of the breach and loss prior to 22 December 2017, "*the Tribunal must conclude that the Claimant's* [Notice of Arbitration] *was submitted after the expiration of the limitation period and that it has no jurisdiction to hear the claim*";[524]

e. the limitation period runs from when a claimant "*has acquired either actual or constructive knowledge of both the alleged breach and the loss or damage*";[525]

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522 *See* **RL-166**, *Grand River v. US*, Decision on Jurisdiction, paras. 103 to 104. The only claim the tribunal reserved for consideration on the merits was one based on separate and distinct legislation adopted by individual States after 12 March 2001 (*i.e.*, within the applicable three-year limitation period); *see also* **RL-006**, *Apotex v US*, paras. 314 to 335; **CL-134**, *Bilcon v. Canada*, Award, paras. 258 to 282; **CL-066**, *Mondev v. US*, para. 87.

523 Counter-Memorial, para. 128 [Emphasis omitted] and fn. 235.

524 *See* **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 54 ("This is foremost a question of fact."). With the exception of constructive knowledge, which is imputed; **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 163: ("If the Claimants cannot establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after 10 June 2010, they fall at the first hurdle. To surmount this obstacle, each claimant must show, in respect of each property claim, that they have a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which they first became aware in the period after 10 June 2010."). *See also* paras. 166, 239; **RL-170**, *Pac Rim v. El Salvador*, Decision on Jurisdiction, para. 2.9.

525 *See* **RL-166**, *Grand River v. US,* Decision on Jurisdiction, paras. 53, 58; **CL-134**, *Bilcon v. Canada*, Award, para. 273. *See also* **RL-168**, *Corona v. Dominican Republic*, paras. 193, 217; **RL-138**, *Spence v. Costa Rica,* Corrected Interim Award, para. 170.

f. "[t]*he notion of actual knowledge accounts for what an investor subjectively knew*";[526] and

g. "*the notion of constructive knowledge accounts for what an investor objectively ought to have known*".

286. The Respondent relied on definitions, commentary and prior awards, as follows:

a. the term "*first*" means "*earliest in occurrence, existence*";[527]

b. Professor Michael Reisman: it "*takes great effort to misunderstand*" the ordinary meaning of Article 1116(2), and "*the challenge of the compatibility of the measure must be made within three years of* first *acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred*";[528]

c. *Mobil Investments v. Canada (II)*: "*the fact that the limitation period begins to run when a would-be claimant first acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot* first *acquire knowledge of the same matter on more than one occasion*";[529]

d. *Nissan Motor v. India*: "[b]*earing these provisions in mind, the Tribunal agrees with India on a threshold proposition: that once an investor has knowledge that it has been harmed by a particular State act alleged to breach a CEPA obligation, additional conduct relating to the* same underlying harm *'cannot without more renew the limitation period' for the*

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526 *See e.g.* **RL-168**, *Corona v. Dominican Republic*, para. 217 ("As already noted above, DR-CAFTA Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage: actual knowledge – what the Claimant did in fact know at a given time – and constructive knowledge – what the Claimant should have known at a given time.") The tribunal in *Grand River* qualified the existence of actual knowledge as a question of fact (**RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 54).

527 Shorter Oxford English Dictionary (5th ed., New York: Oxford University Press, 2002), p. 965.

528 **RL-171**, *Merrill & Ring v. Canada*, Opinion, para. 28 [Emphasis in original].

529 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 147 [Emphasis in original].

filing [sic] *a claim seeking redress. If the three years have elapsed from first knowledge, then that particular investment dispute cannot be revived*";[530]

e. *Bilcon v. Canada*: a NAFTA tribunal must determine the specific date that a claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of incurred loss or damage arising out of that breach;[531] and

f. *Spence v. Costa Rica*: similar approach by tribunals interpreting equivalent provisions in CAFTA-DR.[532]

287. As to continuing measures, according to the Respondent:

a. "*regardless of whether a measure is continuing or not, a NAFTA claim must be brought within three years of the claimant having first acquired*

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530 **RL-172**, *Nissan Motor v. India*, Decision on Jurisdiction, para. 325 [Emphasis in original].

531 *See* **CL-134**, *Bilcon v. Canada*, Award, para. 281 (establishing that the three-year cut-off date is 17 June 2005); **RL-006**, *Apotex v. US*, para. 315 (establishing that the three-year cut-off date is 5 June 2006); **RL-166**, *Grand River v. US,* Decision on Jurisdiction, para. 53 (establishing that the three-year cut-off date is 12 March 2001); **RL-173**, *Merrill & Ring v. Canada*, US Submission, para. 5 ("An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular 'date.' Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis." [Emphasis in original]); **RL-174**, *Detroit International v. Canada*, Mexico 1128 Submission, para. 22 ("As Canada has demonstrated, all three NAFTA Parties have agreed that the term 'first acquired' means that the time limitation starts when an investor first acquires knowledge of an alleged breach and loss at a particular moment in time."); **RL-175**, *Detroit International v. Canada*, Canada 1128 Reply, para. 33 ("The NAFTA three-year time limitation provision exists to ensure claims are brought within a finite period of time from the moment an investor first acquired knowledge of the breach and loss.").

532 *See* **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, paras. 208, 299. The interpretation and approach was also affirmed by the CAFTA tribunal in *Corona v. Dominican Republic*. *See* **RL-168**, *Corona v. Dominican Republic*, para. 200: ("Article 10.18.1 requires the Tribunal to determine the date on which the Claimant 'first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)[)] has incurred loss or damage.' A comparison of that date with the 'critical date' will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant's Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant's claims.").

knowledge of breach and loss", as affirmed in several prior awards including *Bilcon v. Canada*,[533] *Mercer v. Canada*,[534] *Eli Lilly v. Canada*;[535]

b. the prior award in *Grand River v. United States* further noted:[536]

> [T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.

c. the prior award in *Apotex v. United States* also noted: "*nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA's limitation period*" by asserting that the measure at issue was "*'part of a 'continuing breach' by the United States, or 'part of the same single, continuous action'*";[537] and

d. therefore, knowledge starts at first acquisition of knowledge, "*even if the effects of that measure continue on past that moment in time*".

288. As to its third point, that knowledge of the full extent of loss or damage incurred is not required to start the time limit in Articles 1116(2) and 1117(2), the Respondent submits that:

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533 *See* **RL-199**, *Bilcon v. Canada*, US 1128 Submission, para. 12. In the footnote following this paragraph (fn. 16), the United States noted: ("The United States' views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case *Merrill & Ring Forestry, L.P. v. Canada.*").

534 *See* **RL-186**, *Mercer v. Canada*, US 1128 Submission, para. 5; **RL-200**, *Mercer v. Canada*, Canada Rejoinder, paras. 223 to 228.

535 *See* **RL-165**, *Eli Lilly v. Canada*, US 1128 Submission, para. 4; **RL-197**, *Eli Lilly v. Canada*, Mexico 1128 Submission, paras. 7 to 8; **RL-198**, *Eli Lilly v. Canada*, Canada 1128 Reply.

536 **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 81.

537 **RL-006**, *Apotex v. US*, paras. 325 to 326.

a. NAFTA tribunals have "*consistently held that concrete knowledge of the actual amount of loss or damage incurred is not a pre-requisite to the running of the limitations period under NAFTA Chapter* [11]";[538] and

b. "*simple knowledge that loss or damage has been caused, even if its extent or quantification is still unclear, is sufficient to trigger the limitation period*".[539]

289. As to its fourth point, that the Claimant knew of the alleged breach of Articles 1105 and 1110 prior to 22 December 2017, the Respondent submits that:[540]

a. the Claimant's "*entire claim is based on the Ontario government's*":

i. "*decision to continue to apply the moratorium*",

ii. "*continued failure to complete the work necessary to lift the moratorium*"; and

iii. "*continued refusal to direct the IESO to 'to amend the FIT Contract to ensure that the Project would be 'deferred', 'frozen' and 'on hold' for the duration of the moratorium'*";

b. alleged new measures after the *Windstream I* Award,[541] "*are the continued application of the measures first known to the Claimant at the time of the Windstream I arbitration*";

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538 *See* **CL-066**, *Mondev v. US*, para. 87; **RL-166**, *Grand River v. US*, Decision on Jurisdiction, paras. 77 to 78; **RL-006**, *Apotex v. US*, para. 303; **CL-134**, *Bilcon v. Canada*, Award, para. 275.

539 *See* **CL-066**, *Mondev v. US*, para. 87; **RL-166**, *Grand River v. US,* Decision on Jurisdiction, paras. 77 to 78; **CL-134**, *Bilcon v. Canada*, Award, paras. 271 to 275 (tribunal "agree[d] with the reasoning of its predecessors" that "[t]he plain language of Article 1116(2) does not require full or precise knowledge of loss or damage"); **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 155; **RL-006**, *Apotex v. US*, paras. 303, 318 to 320, 324 to 325; **RL-176**, *Rusoro v. Venezuela* , paras. 204 to 205, interpreting Article XII.3(d) of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, para. 217 ("what is required is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear").

540 Counter-Memorial, paras. 136 to 141.

541 As noted by the Tribunal in Procedural Order No. 2, para. 45; Response to Request for Bifurcation, para. 2.

c. the "*Claimant cannot 'first acquire' knowledge of these measures simply because they continue to exist, and the continued application of these measures does not toll the three-year limitation period set out in NAFTA Articles 1116(2) and 1117(2)*";

d. the Claimant "*first acquired*" knowledge of the Moratorium in February 2011, including that its imposition created conditions[542] to allow IESO to terminate the FIT Contract,[543] because:

i. on 11 February 2011, "*Ontario announced that the Province would not proceed with offshore wind development until further science, regulatory work, and coordination with US partners was complete*";[544]

ii. the Moratorium "*was already continuing for five years on the date of the* Windstream I *Award*", with the Claimant arguing in *Windstream I* that "*the moratorium on its Project was for an 'Indefinite-Term'*",[545] and "*no evidence that the Ontario Government was contemplating lifting* [it]";[546]

iii. Ontario never gave "*any indication as to when – and indeed whether – the moratorium might be lifted*";[547]

iv. its continued application "*cannot change the fact that the Claimant 'first acquired' knowledge of the measure well before*" 22 December 2017;

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542 *See* Memorial, para. 7.

543 *See* Memorial, para. 293. *See also Windstream I* Memorial, para. 560.

544 *See* **C-0481**, Announcement (OPA), Offshore Windpower Not Proceeding, 11 February 2011, as cited in *Windstream I* Memorial, para. 268.

545 *Windstream I* Reply, para. 257 ("The policy decision that MOE announced on February 11, 2011 is best described as an indefinite-term moratorium on offshore wind development."); para. 369 ("It was therefore important to Windstream that any negotiated solution reflect that the moratorium did not have a defined term.")

546 *See Windstream I* Reply, para. 411.

547 *See* Reply, para. 357.

v. as to Ontario's alleged "*continued refusal to complete the work necessary to lift the moratorium following the* Windstream I *Award*",[548] the Claimant both:

1. "*fails to establish how a continued failure to complete this work following the* Windstream I *Award constitutes a breach of the NAFTA*"; and

2. "*neglects to indicate how it 'first acquired' knowledge of this as a breaching measure within the strict three-year time limit*" as it was "*the very measure that the* Windstream I *tribunal found was a breach of Article 1105*";[549] and

e. the Claimant cannot rely on Ontario's "*failure to direct the IESO to amend the FIT Contract to ensure that the Project would be deferred, frozen, or on hold following the* Windstream I *Award*", [550] as the Claimant had "*already put before the Tribunal alleged promises by Ontario that* [its] *Project would be allowed to continue*",[551] and "*that Ontario should have taken steps to ensure that the Claimant was not penalized as a result of the moratorium*";[552] and

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548 *See* Memorial, para. 7.

549 According to the Respondent, Ontario's "alleged failure to complete the work, including the research and studies it had identified as necessary to lift the moratorium, was a core measure put forward by the Claimant in that arbitration", including "allegations that the Ontario Government has conducted very little research since announcing the moratorium, that it had failed to meet the timelines in every research plan it has developed, that the studies it has disclosed were either irrelevant to the Project or minimally relevant to the stated rationale for the moratorium. The Claimant repeatedly raised the lack of progress in completing this work before the *Windstream I* tribunal, and highlighted its role in delaying the lifting of the moratorium. The Claimant had submitted to the *Windstream I* tribunal that MOE had failed to complete 'this research in the four years and four months since issuing the policy decision', and that it was clear that 'MOE considered that any research it conducted during the indefinite-term moratorium would have no or limited application to Windstream's Project.'" See *Windstream I* Reply, paras. 261, 409 to 426.

550 *See* Memorial, para. 7.

551 *Windstream I* Award, paras. 149 to 160.

552 *See Windstream I* Memorial, paras. 563 to 564 ("Ontario could have fulfilled its promises and taken steps to ensure that Windstream was not penalized as a result of the moratorium. For example, pending the lifting of the moratorium, the MEI could have directed the OPA to remove the *force majeure* limitation that kept the clock running on Windstream's deadline to bring the Project into commercial operation, constrained the OPA's termination rights for the Project, and returned Windstream's security in the meantime. That would have had the effect of "freezing" the

f. the *Windstream I* record "*makes abundantly clear that the Claimant 'first acquired' knowledge of these breaching measures well before*" 22 December 2017.[553]

290. As to its fifth and final point on the limitation period, that the Claimant knew of the alleged loss or damage prior to 22 December 2017, the Respondent submits that:

a. the Claimant's submissions in *Windstream I* confirm such knowledge:[554]

> There is no indication on the record that the Ontario Government truly intends to lift the moratorium in the near future, or at all. It has never provided even an approximate "end date" for the moratorium […]. The fact is that the moratorium may never be lifted. But even if the moratorium is not permanent, Windstream's loss is.

b. the Claimant expressly argued at the time of *Windstream I* that:

i. the Moratorium had the effect of "*permanently depriv*[ing] *Windstream of the value of its investments*";[555]

ii. even if lifted, "[i]*n light of the period that would be required to re-start the Project, confirm regulatory requirements, obtain the required approvals, complete development work and build the Project, as of May 4, 2012 it was no longer feasible to expect that the Project could achieve that commercial operation date*";[556]

iii. it has been "*permanently deprived*" of the value of its investment:[557]

Project, as Ontario had promised to do. Or Ontario could have replaced the Project with an alternative, equivalent project as Windstream proposed on many occasions and as Ontario did for TransCanada after the government made a political decision to cancel TransCanada's Oakville gas plant. The OPA could have taken those steps even without direction from the MEI."); *see also Windstream I* Award, para. 185.

553 *See* Request for Bifurcation and Memorial on Jurisdiction, para. 130.

554 *Windstream I* Reply, para. 485.

555 *Windstream I* Reply, para. 483.

556 *Windstream I* Memorial, para. 318.

557 *Windstream I* Memorial, para. 14.

> [Ontario] allowed the moratorium to cause delays so drastic that the Project cannot be developed in time to meet the May 4, 2017 deadline. It is no longer financeable. As a result, the Project has effectively been cancelled and is now substantially worthless, as are Windstream's investments in WWIS and the FIT Contract.

c. the Claimant's *Windstream I* witness testimony stated that "*our entire investment in WWIS, the Project and the FIT Contract is now substantially worthless*" and the "*damage irreparable*";[558]

d. the Claimant's knowledge of loss or damage arising out of the alleged breach "*can sufficiently be established by the Claimant's own assertions that its Project was 'substantially worthless', 'de facto cancelled' and 'deprived* […] *of the value'*" following the Moratorium;[559] and

e. accordingly, by the time of *Windstream I*, the "*Claimant had 'first acquired' the requisite knowledge of both the alleged breach and the alleged loss or damage arising out of it*".

(ii) The Claimant's Position

291. According to the Claimant, the limitation point comes down to three questions,[560] based on the claim as pleaded:[561]

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558 **CWS-Mars-1**, Witness Statement of David Mars, paras. 106 to 107. *Windstream I* Memorial, para. 560: "As a direct consequence of the moratorium, Windstream's investments in WWIS, the Project and the FIT Contract are now substantially worthless"; "of the moratorium, Windstream has lost the entire value of investments [...] so that it could [not] meet its deadlines under the FIT Contract."

559 *See Windstream I* Reply, para. 473 ("Windstream's investments in WWIS, the FIT Contract and the Project are now substantially worthless. As a result of the drastic delays caused by the moratorium, the Project no longer has any hope of achieving commercial operation by the deadlines set out in the FIT Contract. Under the FIT Contract, the OPA has the right to terminate the FIT Contract if it does not achieve commercial operation by May 4, 2017, even though the FIT Contract is currently under *force majeure*. The OPA refused to waive this right, and has on the contrary gone so far as to reserve all of its right under the FIT Contract. This has rendered the Project unfinanceable. Thus, even if the moratorium was lifted and the Project allowed to proceed, the Project could not continue. It has been *de facto* cancelled. The moratorium therefore has deprived Windstream of the value of its investments.")

560 *See* Reply, paras. 279 to 301; **CL-178**, *Infinito Gold v. Costa Rica*, Decision on Jurisdiction, para. 330.

561 *See* **CL-178**, *Infinito Gold v. Costa Rica*, Decision on Jurisdiction, para. 332.

a. what is the cut-off date for the three-year limitation period (undisputedly 22 December 2017);[562]

b. did the Claimant first know, or should it have known, about the breaches before the cut-off date; and

c. did the Claimant first know, or should it have known, that it incurred loss or damage before the cut-off date?

292. As to the two disputed questions, the Claimant submits that it first knew that the Respondent had breached NAFTA, and that it suffered damages, no earlier than February 2018.[563]

293. As to expropriation, the Claimant submits that it "*first acquired*" knowledge of:[564]

a. breach when the FIT Contract was terminated (*i.e.*, "*IESO's termination right arose because of the actions of Ontario and it was only with the termination of the FIT Contract that Windstream was deprived of the value of its investments*"),[565] which:

i. was the "*point of time that the expropriation occurred*", which the Claimant was first informed of on 20 February 2018;[566]

ii. took effect 18 February 2020 once the Ontario Application was discontinued;[567]

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562 Counter-Memorial, para. 122. Windstream filed its Notice of Arbitration on 2 November 2020. Canada raised issues with respect to that NOA and a supplementary one was filed on 22 December 2020. Windstream does not agree that its original NOA was not valid. However, nothing turns on the difference between 2 November 2020 and 22 December 2020, and a resulting cut-off date of either 2 November 2017 or 22 December 2017.

563 *See* **CL-178**, *Infinito Gold v. Costa Rica*, Decision on Jurisdiction, para. 330; **RL-140**, *Infinito Gold v. Costa Rica*, Award, paras. 221, 223; **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 148.

564 *See* Reply, paras. 285 to 286.

565 Memorial, paras. 458 to 462.

566 *See* **C-2477**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS), 20 February 2018.

567 *See* **C-2289**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS), 18 February 2020.

iii. is after the cut-off date of 22 December 2017; and

b. its losses on 18 February 2020, when the FIT Contract termination took effect, as that was when:

i. there was "*no longer any possibility for the Project to move forward or for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period*";

ii. it "*lost the full value of its investment in WWIS, the Project and the FIT Contract and was not compensated for that loss*"; and

iii. the potential loss that ii was aware of on 18 February 2018 "*crystallized*".

294. According to the Claimant:

a. prior awards demonstrate that "*the limitation period does not run simply because a loss and breach is foreseeable*";[568]

b. breach and losses here only crystallized when the termination took effect on 18 February 2020;

c. as to the Respondent's argument that the Claimant "*should have anticipated*" that Ontario would permit the FIT Contract termination, and IESO would terminate, it submits that, "*in addition to being false, these suppositions are not enough to trigger the limitation period*"; and

d. in any event, 20 February 2018 and 18 February 2020 are both "*within the limitation period*".

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568 *See* **RL-184**, *Eli Lilly v. Canada*, paras. 167, 170 ("An investor cannot be obliged or deemed to know of a breach before it occurs." In that case, the limitation period did not begin to run until the Supreme Court of Canada, the country's highest appellate court, denied Eli Lilly leave to appeal. The potential losses were known with the lower court decision but did not crystallize until the decision took effect).

295. As to fair and equitable treatment, the Claimant submits that it "*first acquired*" knowledge of:[569]

a. breach "*based on the composite effect of the challenged Measures*",[570] as:

i. "*crystalliz*[ing] *with the termination of the FIT Contract and the alleged breach arises from that event*";

ii. "*based on the failure of the Ontario Government to take any steps to prevent the termination of the FIT Contract and/or to require the IESO to renegotiate the FIT Contract in a manner consistent with the promises made*";

iii. in light of "*MEI refus*[ing] *to meet with* [the Claimant] *and ma*[king] *the deliberate decision to not intervene in this matter*", "*creating the conditions that led to the termination of the FIT Contract, including by failing to intervene with the IESO and failing to conduct any studies to lift the Moratorium*"; and

iv. constituting "*unfair, inequitable, arbitrary, discriminatory and in breach of representations reasonably relied on by Windstream*";[571] and

b. its losses only arose "*upon the termination of the FIT Contract*", because "[t]*he termination of the FIT Contract – and Windstream's loss of its investment – is the direct result of that deliberate and unfair inaction*", and the Respondent "*through the actions of the Ontario Government which are attributable to it, failed to accord Windstream's investments* [FET]*, contrary to Article 1105(1)*".[572]

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569 Reply, paras. 287 to 288.

570 Memorial, para. 484.

571 Memorial, paras. 485 to 492.

572 Memorial, paras. 491 to 492.

296. Further in relation to the limitation period, the Claimant submits that there is no basis to accept the Respondent's "*recharacterization of* [the Claimant's] *claim*".[573] According to the Claimant, this is a factual question as to when it "*first became aware of the alleged breaches and claimed losses*", in relation to which:

a. the Respondent ignores the alleged breach,[574] which:

i. is not the continued application of the Moratorium imposed in February 2011 and failure to complete the work necessary to lift it;[575]

ii. is instead "*Ontario* [having] *created the circumstances that allowed the IESO to terminate the FIT Contract*";

iii. is supported by prior awards in:

1. *Infinito v. Costa Rica*, where the tribunal required "*knowledge of the alleged breach, and not to knowledge of the facts that make up the alleged breach*", or "[i]*n other words, the limitations period only starts to run once the breach (as a legal notion) has occurred*";[576]

2. *ECE v. Czech Republic*:[577]

> [I]t is for the investor to allege and formulate its claims of breach of the relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly fall to be assessed on the basis of which they are pleaded.

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573 Reply, paras. 289 to 301.

574 *See* Counter-Memorial, paras. 137 to 140.

575 *See* Counter-Memorial, para. 140.

576 **RL-140**, *Infinito v. Costa Rica*, Award, para. 220. (underlining added) (*italics* in original).

577 **CL-185**, *ECE v. Czech Republic*, para. 4.743. *See also* **CL-178**, *Infinito v. Costa Rica*, Decision on Jurisdiction, para. 185; **RL-184**, *Eli Lilly v. Canada*, Award, paras. 162 to 165; **CL-198**, *Urbaser v. Argentina*, Decision on Jurisdiction, paras. 235 to 237; **RL-140**, *Infinito v. Costa Rica*, Award, para. 231.

3. *Mobil Investments v. Canada (II)*: where in *Mobil (I)*, the tribunal found breached Article 1106 arising out of implementation and enforcement of guidelines in 2004, and *Mobil (II)* arose out of continued enforcement of the 2004 guidelines,[578] rejecting the argument that the breach was a "*continuing*" one,[579] holding that the respondent "*misunderst*[ood] *the nature of the breach on which Mobil's claim is based*",[580] and "*was obliged to cease enforcing them against Mobil*", and failure to do so was "*was a fresh breach*";[581]

b. the Respondent ignores the alleged loss,[582] which:

i. was not compensated by the *Windstream I* Award;

ii. only arose "*upon learning that the IESO intended to exercise its termination right – on February 20, 2018*" and due to the ongoing Court Proceedings, "*did not take effect until* [it] *was discontinued in January 2020*", with the FIT Contract termination becoming effective on 18 February 2020;

iii. arose in circumstances where the Claimant did not "*always kn*[o]*w that the FIT Contract would be terminated*",[583] with WWIS bringing the Court Proceedings in March 2017 "*to preserve its rights under the FIT Contract and to prevent the breach that is being addressed in these proceedings from occurring*";[584]

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578 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, paras. 6, 162.

579 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, paras. 100 to 101.

580 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 150.

581 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, paras. 162, 172.

582 Counter-Memorial, paras. 142 to 145.

583 Counter-Memorial, para. 186.

584 **CWS-N. Baines**, Witness Statement of Nancy Baines, para. 45.

iv. position is supported by the prior award in *Mobil Investments v. Canada (II)*, that "[c]*oncern or suspicion that something may happen is not the same as knowing that something has happened*", as stated in *Mobil II*:[585]

> Even if it is possible to read the requirements in Articles 1116(2) and 1117(2) that the investor must have acquired knowledge that loss or damage *has been* incurred as embracing a case in which the investor knows that loss or damage *will be* incurred, the time limit imposed in those provisions could not start to run until the investor had *knowledge* that it would suffer such loss or damage. To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty.

v. means that the earliest the Claimant "*could have learned that it would incur loss or damage flowing from the alleged breach was February 20, 2018, when it learned of the* [FIT Contract termination decision]", which is "*well within the limitation period*".

(iii) Mexico's Position

297. As a party to NAFTA and CUSMA, Mexico made a third-party submission pursuant to NAFTA Article 1128 ("**Mexico's 1128 Submission**"). In Mexico's 1128 Submission, it submits that the NAFTA Articles 1116(2) and 1117(2) limitation period:

a. is a strict limitation on the NAFTA Parties' consent under NAFTA Article 1122(1);[586]

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585 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 155 [Emphasis in original].

586 Mexico's 1128 Submission, para. 3.

b. begins to run from the time when an investor first acquires knowledge, or should have first acquired knowledge, of the alleged breach and the loss or damage resulting from the alleged breach;[587]

c. is understood by the NAFTA Parties to mean by the term "*first acquired*", that the time limitation starts when an investor first acquires knowledge of an alleged breach and loss at a particular moment in time and that this does not imply sufficient, full or precise knowledge of the loss or damage, nor additional, repeated, or ultimate acquisition of such knowledge;[588]

d. once it has commenced to run, "*neither the continuation of an alleged violation nor subsequent or additional acts can re-set, extend or interrupt it*";[589]

e. is clear and rigid, "*not subject to any suspension or 'tolling', extension nor other qualification*";[590] and

f. is meant to discourage the attempt of "*ad perpetuam prosecution of one claim based on sub-components of a breach.*"[591]

(iv) The United States' Position

298. Also as a party to NAFTA and CUSMA, the US made a third-party submission pursuant to Article 1128 (**US 1128 Submission**). In the US 1128 Submission, it submits that NAFTA Articles 1116(2) and 1117(2) limitation period:

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587 Mexico's 1128 Submission, para. 6; **RL-197**, *Eli Lilly v. Canada*, Mexico 1128 Submission, para. 5; **RL-174**, *Detroit International v. Canada*, Mexico 1128 Submission, para. 22; **RL-173**, *Merrill & Ring v. Canada*, US Submission; **RL-110**, *Mobil Investments v. Canada*, Decision on Jurisdiction and Admissibility, paras. 147 to 148; **CL-134**, *Bilcon v. Canada*, Award, para. 275.

588 Mexico's 1128 Submission, para. 6; **RL-174**, *Detroit International v. Canada*, Mexico 1128 Submission, para. 22.

589 Mexico's 1128 Submission, para. 5; **RL-197**, *Eli Lilly v. Canada*, Mexico 1128 Submission, para. 7; **RL-174**, *Detroit International v. Canada*, Mexico 1128 Submission, para. 21.

590 Mexico's 1128 Submission, para. 4; **RL-024**, *Feldman v. Mexico*, para. 58; **RL-137**, *Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility, para. 153; **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 29.

591 Mexico's 1128 Submission, para. 5.

a. imposes a jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute, and it is up to claimants to establish that each of their claims falls within the three-year limitation period;[592]

b. is a clear and rigid requirement that is not subject to any suspension, prolongation or other qualification;[593]

c. means that an investor first acquires knowledge of an alleged breach and loss as of a particular date, and that such knowledge cannot first be acquired at multiple points in time or on a recurring basis;[594]

d. means that subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitation period once an investor knows, or should have known, of the alleged breach and loss or damage;[595]

e. means that where a series of similar and related actions by a respondent State is at issue, an investor cannot evade the limitation period by basing its claim on the most recent transgression in that series;[596]

f. as to the requirement of knowledge of the incurred loss or damage, permits a claimant to have such knowledge even if the amount or extent of the loss or damage cannot be precisely quantified yet,[597] and even if the financial impact of that loss or damage is not immediate;[598] and

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592 US 1128 Submission, para. 3; **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, paras. 163, 239, 245 to 246.

593 US 1128 Submission, para. 4; **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 29; **RL-024**, *Feldman v. Mexico*, para. 63.

594 US 1128 Submission, para. 4.

595 US 1128 Submission, para. 4; **RL-137**, *Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility, para. 158.

596 US 1128 Submission, para. 5; **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 81.

597 US 1128 Submission, para. 6; **CL-066**, *Mondev v. US*, para. 116.

598 US 1128 Submission, para. 6; **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 77; **RL-138**, *Spence v. Costa Rica*, Corrected Interim Award, para. 213.

g. means that, regarding the question what a claimant should have known, that a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact.[599]

(v) The Tribunal's Analysis

299. In its analysis as to the NAFTA Article 1116(2) and Article 1117(2) time limits, the Tribunal has relied on the entire record before it, including the disputing parties' written submissions and oral pleadings relating to this issue, as well as the submissions by Mexico and the US. As before, to the extent that some arguments are not reproduced in this Award, they have been considered and are subsumed in the Tribunal's analysis.

300. As to the applicable standard, both disputing parties (as well as Mexico and the US as intervening third parties) accept that the limitation period is a strict one. It applies if the investor first acquired (or should have acquired) knowledge of the breach more than three years before commencing its claim, and first acquired (or should have acquired) knowledge of the loss or damage more than three years before commencing its claim.

301. Various prior awards have addressed the NAFTA Article 1116(2) and 1117(2) time limit and its meaning and effect, and this Tribunal sees no reason to diverge from the mostly uniform approach in those prior awards. In summary, prior NAFTA awards have characterised the strict application of the three-year time limit as follows:

a. *Feldman v. Mexico*: "*clear and rigid*", and "*not subject to any suspension, prolongation or other qualification*";[600]

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599 US 1128 Submission, para. 7; **RL-166**, *Grand River v. US*, Decision on Jurisdiction, para. 59.

600 **RL-024**, *Feldman v. Mexico*, para. 63 [Emphasis added and citation omitted]. *See also* **RL-168**, *Corona v. Dominican Republic*, paras. 192, 199 *citing Feldman v. Mexico*, para. 63 with approval in interpreting equivalent the three-year limitations period in the DR-CAFTA as "*strict*" and not susceptible to suspension or tolling; **RL-166**, *Grand River v. US*, Decision on Jurisdiction, paras. 103 to 104.

b. *Resolute Forest v. Canada*: "*strict, not flexible. There is no provision for the Tribunal to extend the limitation period*";[601]

c. *Mobil Investments v. Canada (II)*: "*awards themselves highlight that the limitation period is 'clear and rigid'*";[602] and "[t]*he fact that the limitation period begins to run when a would-be claimant first acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot first acquire knowledge of the same matter on more than one occasion*";[603]

d. *Grand River v. US*: it would "*render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries*";[604]

e. *Apotex v. US* also noted: "*'part of a 'continuing breach' by the United States, or 'part of the same single, continuous action'*";[605]

f. as well as the following definitions and characterisations in commentary:

   i. Oxford English Dictionary: "*first*" means "*earliest in occurrence, existence*";[606]

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601 **RL-137**, *Resolute Forest v. Canada*, Decision on Jurisdiction and Admissibility, para. 153. *See also* para. 83 ("Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.")

602 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 146.

603 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, para. 147 [Emphasis in original].

604 **RL-166**, *Grand River v. US*, Decision on Jurisdiction, paras. 103 to 104. The only claim the tribunal reserved for consideration on the merits was one based on separate and distinct legislation adopted by individual States after 12 March 2001 (*i.e.*, within the applicable three-year limitation period); **RL-006**, *Apotex v. US*, paras. 314 to 335; **CL-134**, *Bilcon v. Canada*, Award, paras. 258 to 282; **CL-066**, *Mondev v. US*, para. 87.

605 **RL-006**, *Apotex v. US*, para. 325.

606 Shorter Oxford English Dictionary (5th ed., New York: Oxford University Press, 2002), p. 965.

ii. Professor Reisman: "*the challenge of the compatibility of the measure must be made within three years of first acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred*";[607] and

g. prior awards pursuant to other treaties with similar provisions:

i. *Spence v. Costa Rica*, based on similar approach to equivalent provisions in CAFTA-DR;[608] and

ii. *Nissan Motor v. India*, "[b]*earing these provisions in mind, the Tribunal agrees with India on a threshold proposition: that once an investor has knowledge that it has been harmed by a particular State act alleged to breach a CEPA obligation, additional conduct relating to the same underlying harm 'cannot without more renew the limitation period' for the filing* [sic] *a claim seeking redress. If the three years have elapsed from first knowledge, then that particular investment dispute cannot be revived*".[609]

302. As indicated, the Tribunal considers these prior awards, relied on by both disputing parties in these proceedings, accurately to reflect the uniform position of arbitral tribunals to the time limitation provisions in NAFTA Articles 1116(2) and 1117(2), and to similar provisions pursuant to other investment treaties.

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607 **RL-171**, *Merrill & Ring v. Canada*, Opinion, para. 28 [Emphasis in original].

608 **RL-138**, *Spence v. Costa Rica,* Corrected Interim Award, paras. 208, 299. The interpretation and approach was also affirmed by the CAFTA tribunal in **RL-168**, *Corona v. Dominican Republic*, para. 200 ("Article 10.18.1 requires the Tribunal to determine the date on which the Claimant 'first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b) has incurred loss or damage.' A comparison of that date with the 'critical date' will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant's Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant's claims.")

609 **RL-172**, *Nissan Motors v. India*, Decision on Jurisdiction, para. 325.

303. Despite this clear and uniform approach to strict application of the time limit from the time knowledge was or should have been first acquired (of the breach and loss or damage), the position is less clear in the case of multiple facts giving rise to a claim of breach and loss. In this regard, the disputing parties refer in particular to the following two prior awards:

a. *Mobil Investments v. Canada (II)*: continued enforcement of 2004 guidelines,[610] was not a "*continuing*" breach,[611] as the respondent "*was obliged to cease enforcing them against Mobil*" and its failure to do so was "*was a fresh breach*";[612] and

b. *Infinito Gold v. Costa Rica*, "*knowledge of the alleged* breach*, and not to knowledge of the* facts *that make up the alleged breach*", so "*the limitations period only starts to run once the breach (as a legal notion) has occurred*".[613]

304. It is indeed in the territory of a series of facts that the dispute as to the application of the time limits arises in *Windstream II.* According to the Claimant, the relevant knowledge is of the final FIT Contract termination, which was acquired only after the Ontario proceedings (although even the initial notice of termination on 18 February 2018 is also within the time limit). It maintains, as it must, that measures prior to the termination, including the Ontario Government's decision not to intervene or to direct IESO to renegotiate the Contract, caused the termination. Otherwise, termination in accordance with the contractual terms would not have been unlawful, either contractually or as a matter of international law.

305. It is only against the prior alleged measures that any unlawfulness could be said to arise from the FIT Contract termination.

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610 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, paras. 6, 162.

611 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, paras. 100 to 101.

612 **RL-110**, *Mobil Investments v. Canada (II)*, Decision on Jurisdiction and Admissibility, paras. 162, 172.

613 **RL-140**, *Infinito Gold v. Costa Rica*, para. 220 [Emphasis in original].

306. The NAFTA Article 1116(2) and Article 1117(2) language is clear: an investor cannot make a claim "*if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach*", as well as "*knowledge that the investor has incurred loss or damage*".

307. The determinative date is that of the breach, not the individual acts comprising the elements of breach. If the breach is a necessarily cumulative one, *i.e.*, it does not crystalise until the final act in a series has occurred, then logically the three-year time limit would not run until that final act. If, on the other hand, the breach is a continuing one, *i.e.*, it started with the first act and continued (even if it was compounded by subsequent acts), then time for the first breach will run from the first act. In the latter case, it is conceivable that an investor may be timed out of some but not other, subsequent, breach claims.

308. In this *Windstream II* arbitration, the alleged breach and loss culminated with the FIT Contract termination. For the expropriation claim, at least, the significant act was the denouement (conclusion, finale or completion) of the taking of the Project. The surviving Project assets, which gave the Claimant continued hope that it still could successfully to proceed to develop the offshore wind farm, were terminated as at 18 February 2020, or subsequently refunded. From that time, the Claimant had lost the only remaining element. From that point it had nothing.

309. For the purpose of the NAFTA time limitation provisions, the *Windstream II* claims for breach of NAFTA Article 1110, (based on acts culminating in the FIT Contract termination), and for breach of NAFTA Article 1105(1), (for the series of acts leading up to that termination), the Tribunal considers that the Claimant knew of (or ought to have known of) those breaches and the alleged losses arising out of them only after the FIT Contract was in fact terminated on 18 February 2020.

310. Accordingly, the new alleged breaches in *Windstream II* are not barred by the NAFTA time limitation provisions.

V. THE CLAIMANT'S EXPROPRIATION CLAIM

311. The Claimant seeks to hold the Respondent liable in *Windstream II* for unlawfully expropriating its investments in violation of Article 1110 of NAFTA, on the basis that "*the FIT Contract has been unilaterally terminated as a consequence of the conduct of the Ontario Government, and all the value remaining in Windstream's investments has been taken*".[614]

312. Article 1110 of NAFTA states:[615]

> 1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation") except:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraph 2 through 6.

313. The Claimant complains of the following measures:[616]

a. the Ontario Government's failure, following the *Windstream I* Award, to complete in a timely manner the work it considered necessary in order to lift the Moratorium;

b. the Ontario Government's continued application of the Moratorium to WWIS, following the *Windstream I* Award, despite its knowledge that the continued application of the Moratorium to WWIS would create the conditions necessary to allow the IESO to terminate the FIT Contract;

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614 Memorial, para. 457.

615 Memorial, para. 450.

616 Memorial, paras. 428, 458; Reply, para. 206.

c. the Ontario Government's failure, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract;

d. the Ontario Government's failure, following the *Windstream I* Award, to direct the IESO to amend the FIT Contract to ensure that the Project would be "*deferred*", "*frozen*" and "*on hold*" for the duration of the Moratorium;

e. the decision of IESO, a State enterprise exercising delegated governmental authority, to terminate the FIT Contract; and

f. the failure of IESO, following the *Windstream I* Award, to amend the FIT Contract to ensure that the Project would be "*deferred*", "*frozen*" and "*on hold*" for the duration of the Moratorium, contrary to the Ontario Government's promise to Windstream and WWIS.

314. It is common ground that the acts and omissions of an organ of the Ontario Government are attributable to the Respondent.[617] There is, however, some disagreement as to whether or not the same is true for acts and omissions of IESO, and the relevance of its acts or omissions to the case.[618]

A. THE APPLICABLE STANDARD

315. As to expropriation pursuant to NAFTA Article 1110, the disputing parties agree that the applicable standard pursuant to NAFTA requires an investment capable of being expropriated, expropriation in fact, and unlawfulness pursuant to NAFTA Article 1110(1).[619]

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617 Memorial, paras. 430 to 431. The Respondent has not challenged the Claimant's assertion in this respect. *See also Windstream I* Award, paras. 219, 380. Note, however, the Respondent's position that the alleged NAFTA breaches do not depend on the IESO's conduct, Rejoinder, para. 95.

618 The Claimant argues that while attribution of the IESO's actions and omissions is not necessary for finding the Respondent liable, the measures taken by the IESO are attributable to the Respondent, because the IESO is a State enterprise in the sense of NAFTA Article 1503 exercising delegated governmental authority; Memorial, paras. 432 to 439. The Respondent asserts that the alleged NAFTA breaches do not depend on the IESO's conduct; Rejoinder, para. 95. In *Windstream I*, while not denying the OPA's nature as a State enterprise, the Respondent claimed that none of the OPA's actions were done in the exercise of delegated governmental authority, Canada's Counter-Memorial in Windstream I, paras. 310 to 316. *See also Windstream I* Award, para. 219, fn. 400 and para. 380.

619 Memorial, paras. 452 to 453; Reply, paras. 306, 309; Counter-Memorial, para. 151.

316. In this *Windstream II* arbitration, the disputing parties further agree that the aforementioned alleged measures would not constitute a direct expropriation.[620] Their respective positions as to how to apply the requirements for expropriation in the context of an indirect expropriation are set out below.

(i) The Claimant's Position

317. According to the Claimant, the *Windstream I* Award held that two steps are required for indirect expropriation,[621] which approach has been adopted in numerous prior awards:[622]

a. as a matter of fact, an effective or *de facto* taking of property, attributable to the State, has taken place (*i.e.*, the investor been substantially deprived of the value of its investment); and

b. that taking was unlawful.

318. In its Reply, the Claimant responded to the Respondent's argument that it "[m]*istates the* [t]*est*",[623] which it submits required an additional third step, being the existence of an investment capable of being expropriated, and that the remaining two steps are as set out in the *Windstream I* Award.[624] According to the Claimant, the Respondent made the same argument in *Windstream I*,[625] but the "*tribunal did not accept Canada's argument that this is an independent first step*".[626] Nevertheless, it went on to accept that "*practically speaking, the parties do not disagree on the applicable test*", and that "[i]*t is not disputed that as a threshold matter,* [the Claimant] *must have rights capable of being expropriated*".[627]

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620 Memorial, para. 456; Counter-Memorial, para. 146.

621 Reply, para. 309; Memorial, paras. 452 to 453; *Windstream I* Award, paras. 284 to 285.

622 *Windstream I* Award, para. 285.

623 Counter-Memorial, p. 61 and para. 154.

624 Counter Memorial, para. 151.

625 *Windstream I* Counter-Memorial, para. 463; *Windstream I* Award, paras. 257 to 259.

626 Reply, para. 309.

627 Reply, para. 309.

319. In addition,[628] the Claimant submits that the CUSMA Annex 14-B guidance in interpreting NAFTA Article 1110,[629] does not apply to legacy NAFTA claims and instead only applies to CUSMA Article 14.8, which is not at issue in this case. In particular, according to the Claimant:

a. CUSMA Article 14, like NAFTA Chapter 11, sets out investment protections;

b. CUSMA Article 14.8 applies to expropriation and provides that "[t]*his Article shall be interpreted in accordance with Annex 14-B*";

c. the Annex 14-B guiding principles apply to a claimant under CUSMA Article 14.8 (e.g., Annex 14-D provides for investment disputes between Mexico and the United States);

d. Annex 14-B, Article D.3 provides for a claimant to submit to arbitration a claim alleging breach of CUSMA Article 14.8, to which Annex 14-B applies; and

e. the CUSMA Parties "*did not use similar language with respect to legacy claims under Annex 14-C*".

320. As the Claimant in *Windstream II* "*is not alleging that Article 14.8 of the CUSMA is violated*" but rather that "*Article 1110 of the NAFTA is violated,*"[630] the CUSMA Parties did not provide in Annex 14-C that NAFTA provisions should be interpreted by reference to Annex 14-B. Therefore, according to the Claimant, Annex 14-B "*has no bearing on the Tribunal's interpretation of Article 1110 of the NAFTA*", and "[i]*t is not open to Canada to attempt to use the CUSMA to retroactively re-write the NAFTA when the NAFTA state parties did not themselves believe they should apply this Annex to legacy NAFTA claims*".[631]

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628 Reply, paras. 310 to 311.

629 Counter-Memorial, paras. 152 to 153.

630 Memorial, fn. 432.

631 Reply, paras. 310 to 311.

(ii) The Respondent's Position

321. The Respondent pointed out that NAFTA Article 1110(1) sets out conditions, but does not define the term "*expropriation*":[632]

> NAFTA Article 1110, These conditions are set out as follows:
>
> (a) for a public purpose;
>
> (b) on a non-discriminatory basis;
>
> (c) in accordance with due process of law and Article 1105(1); and
>
> (d) on payment of compensation in accordance with paragraphs 2 through 6.

322. It submits that tribunals therefore "*have interpreted it in accordance with customary international law*",[633] applying "*a three-step analysis to determine whether a Party's measures have breached Article 1110*".[634] That is, the Tribunal must (i) identify an investment capable of being expropriated, (ii) determine whether that investment has been expropriated and (iii) determine whether it was lawful under Article 1110(1).[635]

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632 Counter-Memorial, para. 150.

633 **CL-023**, *ADM v.* Mexico, para. 237 ("The key terms in Article 1110 – 'nationalization,' 'expropriation,' and 'measures tantamount thereto' – are not defined in the NAFTA. The interpretation of these terms requires an analysis of the applicable rules of international law, in accordance with Article 1131 of the NAFTA."); **CL- 081**, *S.D. Myers v. Canada* Partial Award, para.280 ("The term 'expropriation' in Article 1110 must be interpreted in the light of the whole body of State practice, treaties and judicial interpretations of that term in international law cases."); **CL-053**, *Glamis Gold v. US*, para. 354 ("The inclusion in Article 1110 of the term 'expropriation' incorporates by reference the customary international law regarding that subject"); **CL-091**, *Waste Management v. US (II)*, Award, para. 177 (referring to "the international law of expropriation as reflected in Article 1110"). *See also* the positions of the NAFTA Parties on this issue **RL-177***, Metalclad v. Mexico,* US 1128 Submission, para. 10 "The United States Government believes that it was the intent of the Parties that Article 1110(1) reflect customary international law as to the categories of expropriation."; **RL-178**, *Mondev v. US,* Canada (2nd) 1128 Submission*,* paras. 64 to 65: defining "*expropriation*" in Article 1110 with reference to international law; **RL-080***, Methanex v. US,* Mexico (4th) 1128 Submission, para. 13: "Article 1110, which must be interpreted in accordance with the applicable rules of customary international law, incorporates the principle that States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest, including human health."

634 **CL-037**, *Chemtura v. Canada*, para. 242.

635 **RL-025**, *Fireman's Fund v. Mexico*, para. 174 ("[T]he conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110."); **RL-024***, Feldman v. Mexico*, para. 98; **CL-037**, *Chemtura v. Canada*, para. 242.

323. According to the Respondent, the Claimant recognised, "*as it had before the* Windstream I *tribunal*",[636] that "*an indirect expropriation requires a 'taking' of fundamental ownership rights that causes a substantial deprivation of the economic value of the investment*",[637] yet insisted on "*an incorrect two-step test*".[638]

324. The Respondent stressed that expropriation requires a "*'taking' of fundamental ownership rights that causes a substantial deprivation of the economic value of an investment*".[639] The threshold is "*high*" – the deprivation has to be "*significant*", "*fundamental*", "*radical*", "*serious*" or "*complete*".[640]

325. From there, according to the Respondent,[641] the exercise "*requires a case-by-case, fact-based inquiry*". It is in that context that the Respondent referred to CUSMA Annex 14-B as "[t]*he NAFTA Parties' common understanding of what constitutes an indirect expropriation under customary international law*", which alongside

636 *Windstream I* Memorial, paras. 542 to 554; Memorial, para. 451.

637 Rejoinder, para. 145; **CL-074**, *Pope & Talbot v. Canada,* Interim Award, para. 102: ("[...] under international law, expropriation requires a 'substantial deprivation [']"); **CL-054**, *Grand River v. US*, para. 148: ("Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment [...]"); **CL-053**, *Glamis Gold v. US*, para. 357.

638 Rejoinder, para. 149; Memorial, para. 452.

639 Counter-Memorial, para. 172; **CL-074**, *Pope & Talbot v. Canada*, para. 102; **CL-061**, *Merrill & Ring v. Canada*, para. 145; **CL-054**, *Grand River v. US*, para. 148; **CL-053**, *Glamis Gold v. US*, para. 357.

640 Counter-Memorial, para. 172; **RL-025**, *Fireman's Fund v. Mexico*, para. 176(d); **CL-053**, *Glamis Gold v. US*, para. 360; **RL-048**, Christoph Schreuer, 'The Concept of Expropriation under the ETC and Other Investment Protection Treaties', May 2005, p. 29.

641 Rejoinder, para. 152.

"*similar annexes found in other treaties entered into by the NAFTA Parties*",[642] submits provides that an indirect expropriation occurs:[643]

a. where "*an action or series of actions*" or a "*measure or series of measures*";

b. has "*an effect equivalent to direct expropriation without formal transfer of title or outright seizure*";[294]

c. taking into account:

i. "*the economic impact of the government action or measure*";

ii. "*the extent to which the government action or measure interferes with distinct, reasonable investment-backed expectations*"; and

iii. "*the character of the government action or measure, including its object, context, and intent*".

326. At minimum, the Respondent submits that CUSMA Annex 14-B, like similar annexes in other treaties between NAFTA Parties, "*provides useful guidance to interpret and applying NAFTA Article 1110*", and:[644]

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642 **CL-053**, *Glamis Gold v. US*, para. 356: "[T]he tribunal referred to the Annex of the United States model treaty to decide whether the impugned measure was expropriatory." *See* **RL-078***, Methanex v. US,* Amended Statement of Defence of Respondent US, para. 405, fn. 636; **RL-067**, *Glamis Gold v. US*, Counter Memorial of the US, pp. 159 to 160, fn. 740; **RL-068**, *Grand River v. US*, Counter Memorial of the US, p. 147, fn. 524; *Windstream I* Rejoinder, para. 9: "[T]he lack of such an annex in the NAFTA is irrelevant. These annexes merely explain what the NAFTA Parties mean and have always meant by the term 'indirect expropriation', as affirmed by other submissions."; *Windstream I* Canada's Counter-Memorial, para. 475: "[W]hile the NAFTA does not contain the same annex, the factors laid out in these recent interpretative texts provide useful guidance to assess whether there has been an indirect expropriation in this case."; **RL-179**, *Odyssey Marine v. Mexico,* Canada 1128 Submission, paras. 28, 31 and fns. 39, 45. *See also* **RL-035**, Andrea J. Menaker, "*Benefiting From Experience: Developments in the United States' Most Recent Investment Agreements*" (2006), 12:1 U.C. Davis J. Int'l L. Pol'y, p. 122; **RL-061**, Andrew Newcombe, "*Canada's New Model Foreign Investment Protection Agreement*" (August 2004), pp. 5 to 6.

643 Rejoinder, para. 153; CUSMA, Annex 14-B(3); *See also* **RL-012**, *Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (entered into force October 1, 2014) at Annex B.10 (Expropriation), 1: ("Indirect expropriation results from a measure or series of measures of a Contracting Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure"); **RL-055**, *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment*, November 2005, at Annex B (Expropriation), 4: ("The second situation addressed by Article 6(1) is known as indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.")

644 Rejoinder, fn. 293.

> […] do[es] not change the nature of the substantive obligations that existed under […] prior agreements; instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties' intent in agreeing to those obligations.

(iii) Mexico's Position

327. Mexico intervened as a third party on the applicable standard, noting also that:[645]

a. NAFTA does not define the term "*expropriation*" and

b. the NAFTA Parties and NAFTA tribunals have interpreted the term in accordance with customary international law.

328. Recalling its previous submissions in other proceedings, Mexico endorsed the following conclusions:[646]

> An 'investment' cannot exist in the absence of vested legal rights comprising an asset described in Article 1139. Contingent contractual rights cannot amount to an investment.
>
> The existence (or non-existence) of investor's "distinct, reasonable, investment-backed expectations" is at most a factor to consider in determining whether a measure or series of measures have risen to the level of an indirect expropriation. […] Put simply, Article 1110 requires measures equivalent to expropriation of an "investment of an investor of another Party", not non-fulfillment or frustration of an investors' expectations, be they distinct, reasonable, legitimate or otherwise.
>
> Bona fide regulatory action taken in the public interest that adversely affects the value and/or viability of an investor of another Party will not ordinarily amount to an indirect expropriation.

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645 Mexico 1128 Submission, para. 7.

646 Mexico 1128 Submission, paras. 8, 9; *Windstream I*, Mexico 1128 Submission, paras. 11 to 13; **RL-080** *Methanex v. US,* Mexico (4th) 1128 Submission, paras. 6, 9 to 11, 13; **RL-222**, *Pope & Talbot v. Canada*, Mexico 1128 Submission, paras. 47, 56; **RL-221**, *Lone Pine v. Canada*, Mexico 1128 Submission, para. 8.

(iv) The United States' Position

329. The US also intervened as a third party on the applicable standard, noting in relation to the Respondent's so-called third step that:

a. in order for there to have been an expropriation, a property right or interest must have been taken;

b. as such, the first step in assessing whether there was an expropriation must be to determine whether there was an investment capable of being expropriated;[647] and

c. that this is a question for the domestic law of the host State.[648]

330. More broadly in relation to indirect expropriation, the US submits that:

a. this occurs where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure;[649]

b. the assessment requires a case-by-case, fact-based inquiry that considers, among other factors:

i. the economic impact of the governmental action;

ii. the extent to which that action interferes with distinct, reasonable-investment-backed expectations; and

iii. the character of the government action.[650]

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647 US 1128 Submission, para. 23; **CL-53**, *Glamis Gold v. US*, para. 356; Rosalyn Higgins, 'The Taking of Property by the State; Recent Developments in International Law', 176 R.C.A.D.I. 259, 272 (1982).

648 US 1128 Submission, para. 23.

649 US 1128 Submission, para. 25; **RL-180**, *Lone Pine v. Canada*, para. 495.

650 US 1128 Submission, para. 25; 2012 U.S. Model Bilateral Investment Treaty ann. B (Expropriation), para. 4(a); *see also* CUSMA Annex 14-B (Expropriation).

331. As to the first factor (economic impact), the US said further that:[651]

a. a claimant must demonstrate that the government measure at issue destroyed all, or virtually all, of the economic value of its investment; or

b. interfered with it to such an extent as to support a conclusion that the property has been taken from the owner.

332. As to the second factor (extent of interference), United States said further:

a. this requires an objective inquiry of the reasonableness of the claimant's investment-backed expectations;[652]

b. reasonableness of investment-backed investor expectations depends on factors including:[653]

i. whether or not the government provided the investor with binding written assurances;

ii. the nature and extent of governmental regulation; or

iii. the potential for government regulation in the relevant sector.

333. As to the third factor (character of government action), the US submits that:

a. the nature and character of the government action includes whether or not it involves physical invasion by the government or is more regulatory in nature;[654]

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651 US 1128 Submission, para. 26; **CL-074**, *Pope & Talbot v. Canada*, Interim Award, para. 102; **CL-053**, *Glamis Gold v. US*, para. 357.

652 US 1128 Submission, para. 27.

653 US 1128 Submission, para. 27.

654 US 1128 Submission, para. 28.

b. where an action is a *bona fide*, non-discriminatory regulation, it will not ordinarily be deemed expropriatory under the police powers doctrine;[655] and

c. it is not aware of any general and consistent State practice or *opinio juris* requiring the host State to show the regulation was, in addition to being a *bona fide*, non-discriminatory, also subject to proportionality.[656]

B. APPLICATION OF THE STANDARD

334. Although the Claimant resisted characterisation of the test for expropriation as being a three step rather than two step one, both disputing parties ultimately accepted that in order for there to be an expropriation logically there must be a thing capable of being expropriated. The Tribunal sets out below each Party's submissions in this regard below, followed by their respective submissions on expropriation and unlawfulness.

(i) The Claimant's Position

335. The Claimant considered that the two-step inquiry for expropriation requires the Tribunal to consider if there has been a taking and if it is unlawful. Nevertheless, in its submissions it addressed the Respondent's argument that a preliminary step was to establish an investment capable of being expropriated.

(a) Investment Capable of Expropriation

336. According to the Claimant, first and foremost the investments in the *Windstream II* proceedings capable of expropriation are (i) WWIS and (ii) the Project. In the alternative, it argues that the FIT Contract is an investment capable of being expropriated.[657] As to the FIT Contract in particular, the Claimant refuted that it is

655 US 1128 Submission, para. 29; **CL-53**, *Glamis Gold v. US*, para. 354.

656 US 1128 Submission, para. 29.

657 Reply, paras. 312 to 314; *Windstream I* Award, paras. 257 to 259, 290.

not an investment capable of being expropriated because it is a contingent right depending on a future event.[658]

337. For all of its investments, the Claimant submits that the Respondent had already put forward the argument that there was no investment capable of expropriation in *Windstream I*, and it was rejected, barring the Respondent from relitigating the matter.[659] In this regard, it submits as follows:[660]

a. in *Windstream I*, the Claimant put forward expert evidence from Ms. Powell showing that the FIT Contract is intangible personal property under Ontario law;[661]

b. the *Windstream I* Award:

i. summarized the Respondent's argument to the contrary and ultimately rejected it;[662]

ii. found no expropriation on the basis that the "*FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario*";[663] and

iii. rejected the Respondent's argument that the FIT Contract was not capable of being expropriated, as "[i]*f it was not capable of being expropriated, then it would not have mattered if it was in force or not*"; and

c. the findings in the *Windstream I* Award are "*not open for re-litigation*".

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658 Counter-Memorial, paras. 155 to 168.

659 Counter-Memorial, paras. 155 to 168.

660 Reply, paras. 313 to 314. See *Windstream I* Award, paras. 257 to 259; *Windstream I* Reply, paras. 454 to 471.

661 *Windstream I* Award, paras. 257 to 259; *Windstream I* Reply, paras. 454 to 471.

662 *Windstream I* Award, paras. 257 to 259.

663 *Windstream I* Award, para. 290.

338. As to the Claimant's position regarding the existence of investments in the form of WWIS and the Project, "*even if this issue is open for re-litigation in this arbitration,* [the Respondent's] *argument must fail*" because:[664]

a. the Respondent admits that WWIS is an investment of the Claimant and capable of being expropriated;[665]

b. other than the FIT Contract, the Respondent "*does not dispute that the Project is an investment capable of being expropriated*";

c. the Respondent "*cannot isolate one aspect of the investment*", as the test for expropriation "applies *to the investment as a whole*", *i.e.*, whether or not "the investment as a whole has become unviable"; and

d. "[t]*he measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return*".[666]

339. The Claimant relied on the prior award in *Electrabel v. Hungary*, concerning termination of a power purchase agreement ("**PPA**"), which it submits found that:[667]

a. the PPA constituted an investment;

b. there was no expropriation because the investment as a whole ("*aggregate collection of interests in Dunamenti* [power plant]*)*" was not expropriated;

c. the PPA was an intrinsic and inseparable part of the investment as a whole;

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664 Reply, paras. 315 to 318.

665 Counter-Memorial, para. 169.

666 **CL-029**, *Burlington Resources v. Ecuador*, Decision on Liability, para. 398; **CL-196**, *Telenor Mobile v. Hungary,* para. 67.

667 Reply, para. 318; **CL-048**, *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, paras. 6.53 to 6.64.

d. notwithstanding the PPA termination, claimant was not deprived of the use of its power plant, equipment or other real property; and

e. its business was not rendered financially worthless as it continued competing in Hungary's electricity market, with the plant operational and operated by Dunamenti.

340. The Claimant here submits that "[t]*he opposite is true here*", as the termination of the FIT Contract rendered the Claimant's "*investment as a whole in WWIS and the Project* […] *substantially worthless*", with no remaining power generating facility or right to build one and "[t]*he Project and investment are over*".[668]

341. As to the Claimant's alternative argument that the FIT Contract, even isolated from the Project as a whole, is an investment capable of being expropriated under Article 1110,[669] it made three points:

a. the FIT Contract was WWIS's "*most important property right and asset", constituting its "most significant source of revenue*";[670] and

b. the Respondent's argument that the FIT Contract is conditional or contingent and that there is no vested right under it,[671] must be rejected because:

i. it misstates the nature of the investment; and

ii. it improperly characterizes the FIT Contract as a contingent or non-vested interest.

342. Further as to the Respondent's alleged misstatement of the investment, according to the Claimant:[672]

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668 Reply, para. 318.

669 Reply, paras. 319 to 333; Memorial, paras. 419 to 425.

670 **CER-Powell**, Expert Report of Sarah Powell, para. 111.

671 Counter-Memorial, paras. 158, 164,165.

672 Reply, paras. 322 to 323.

a. the Respondent raised the same argument in *Windstream I*;

b. the Claimant countered in *Windstream I* that this "*beats a straw man; Canada has constructed an argument that Windstream did not make, and proceeds to refute that argument while failing to address Windstream's actual position*";[673]

c. the Respondent nevertheless "*cherry-picks a single sentence from* [the Claimant's] *overview that states as a matter of background that the FIT Contract gives WWIS the right to a guaranteed revenue stream over a 20-year period*", inviting the Tribunal to conclude such investment is contingent on other events occurring;

d. the Claimant "*does not claim its investment is an operating wind farm with a guaranteed revenue stream over a 20-year period*", but defines its investments as "*WWIS, the Project and the FIT Contract*"; and

e. if it "*asserted its investment included an operational wind farm with a guaranteed revenue stream from the sale of electricity*", then "*its damages would be orders of magnitude greater than they are*".[674]

343. Further as to the FIT Contract being a vested property right under Ontario law, according to the Claimant:[675]

a. thus complies with NAFTA Article 1139(g) and (h), being an "*interest arising from the commitment of capital or other resources in the territory of* [the Respondent] *to economic activity in the territory,*" and intangible property "*acquired in the expectation or used for the purpose of economic benefit or other business purposes*";

673 *Windstream I* Reply, para. 457.

674 *Windstream I* Reply, para. 458.

675 Reply, paras. 324 to 331.

b. the Claimant committed capital to acquire the FIT Contract (including its CAD 6 million security deposit);

c. the Respondent's argument that it is contingent in nature "*is based on its mischaracterization that the investment is the guaranteed revenue stream*", whereas the investment is the FIT Contract;

d. as to whether the FIT Contract itself is intangible property:

i. it is "*well-recognized that contract rights may be expropriated*";[676]

ii. the property right or asset in question must have vested for the claimant to seek redress;[677]

iii. "[p]*ublic international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law*";[678]

iv. therefore, this is a question of host State law, and Ms Powell in *Windstream I*, provided expert evidence as to Ontario law that the FIT Contract:

1. is in and of itself intangible personal property;

2. is a "*valuable asset*" and "c*onstitutes intangible personal property which could be the subject matter of a security interest, and which would be transferable on bankruptcy to the trustee-in-bankruptcy of WWIS*";[679]

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676 **CL-034**, *Factory at Chorzów (Germany v. Poland)*, p. 44. *See also* **CL-159**, *Crystallex v. Venezuela*, fn. 941; **CL-083**, *Southern Pacific Properties v. Egypt*, para. 164; **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 506; **CL-092**, *Wena Hotels v. Egypt*, para. 98; **CL-041**, *Vivendi v. Argentina (II)*, paras. 7.5.4, 7.5.22 to 7.6.2; **CL-049**, *Eureko v. Poland*, Partial Award, paras. 238 to 243; **CL-039**, *CME v. Czech Republic*, Partial Award, paras. 173, 270 to 271, 591.

677 **RL-022**, *Emmis v. Hungary*, para. 168.

678 **RL-022**, *Emmis v. Hungary*, paras. 162, 169. *See also* **CL-189**, *Lion Mexico v. Mexico*, Decision on Jurisdiction, para. 231.

679 **CER-Powell**, Expert Report of Sarah Powell, para. 130.

3. "*may be the subject of a change of control*", or "*mortgaged, charged or otherwise encumbered to the benefit of a secure creditor*";[680]

4. is not a "*contingent*" or "*potential*" interest under Ontario law;[681]

5. was a valid and binding contract which creates a long list of obligations and rights, (e.g., FIT Contract Clause 2.5 required WWIS to bring the Project into commercial operation in by MCOD and maintain in good standing the CAD 6 million letter of credit it posted as security);[682]

6. if WWIS was in default under the FIT Contract, IESO had the right to retain the security;[683] and

7. when the Project achieved commercial operation, IESO was obligated to pay for all electricity generated by the Project;

e. the Respondent is wrong to say the FIT Contract is "*expressly conditioned on the Claimant acquiring all of the permits and approvals needed to develop, construct and operate its proposed Project*", in that:[684]

i. Clause 2.4 only provides that IESO may not issue Notice to Proceed until REA and other necessary permits for construction;

ii. Clause 2.4 does not state that the FIT Contract was "*'conditional' upon approvals*" and "*not binding if the permits are not obtained*";

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680 **CER-Powell**, Expert Report of Sarah Powell, paras. 118, 126 to 129; **CER-Powell-2**, Second Expert Report of Sarah Powell, para. 81.

681 **CER-Powell-2**, Second Expert Report of Sarah Powell , paras. 79 to 86.

682 **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, s. 5.1

683 **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0, 4 May 2010, s. 9.2(d)(ii).

684 Counter-Memorial, para. 165.

iii. WWIS' security could have been forfeited if it failed to achieve MCOD;

iv. WWIS' security would have been forfeited if it exercised its termination right before the Notice to Proceed was issued;[685] and

v. these were legally binding, unconditional, obligations under the FIT Contract; and

f. Ms. Powell in *Windstream I* further explained that the Respondent conflated FIT Contract Notice to Proceed pre-requisites with the FIT Contract itself,[686] noting that:

i. Notice to Proceed pre-requisites were not conditions precedent to an enforceable contract;[687] and

ii. the Respondent raises the same argument with no independent expert evidence in support and offers no basis for the FIT Contract being a non-vested property right under Ontario law.

344. As to the legal authorities based on municipal law of the host State, according to the Claimant:

a. none of the prior awards cited by the Respondent in its Counter Memorial is relevant;[688] and

685 **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 2.4(a)(ii).4

686 **CER-Powell-2**, Second Expert Report of Sarah Powell, paras. 79, 86: "although the issuance of a [Notice to Proceed] was conditional on WWIS obtaining the required permits, the FIT Contract itself was not conditional on such permits or on the issuance of an [Notice to Proceed], but from the outset was a valid, enforceable and valuable contract."

687 **CER-Powell-2**, Second Expert Report of Sarah Powell, para. 84.

688 Reply, paras. 332 to 333.

b. none of the prior awards involves situations of expropriation of a contract,[689] except for *Eureko v. Poland*, which involved a share purchase agreement with a contractual right to IPO with majority control in a Polish entity, PZU,[690] and held that claimant was not deprived of its shares but was deprived of its contractual right,[691] rejecting that these were contingent based on the language of the contract.[692]

(b) Existence of Expropriation in Fact

345. Following the threshold question as to whether or not there is an investment capable of being expropriated, the next question to consider is whether or not that investment was in fact expropriated. In this regard, the Claimant asked the Tribunal to consider whether or not an effective or *de facto* taking has taken place, "*even if there has been no formal transfer of title and even if the host State has not obtained any economic benefit*".[693] It asserted that the question whether or not the investor has been substantially deprived of the value of its investment focuses on the "*effect of the measure on the investor*".[694]

346. In this regard, it relied on the prior awards as follows:

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689 **RL-022**, *Emmis v. Hungary*, para. 221 (a right to a broadcasting licence (that the tribunal found did not arise from the relevant contract under Hungarian law); **CL-057**, *Thunderbird v. Mexico*, para. 221: (a gambling operation which the claimant did not operate pursuant to any permit or contract); **RL-024**, *Feldman v. Mexico*, para. 152: (an alleged right to export cigarettes to which the claimant had no right under a contract or otherwise): **RL-182**, *Eskosol v. Italy*, paras. 471 to 472: (an alleged right to the solar power revenue guarantee arising from legislation); **RL-057**, *Generation v. Ukraine*, paras. 18.59, 22.1 (an alleged right to use a neighbouring property as a construction staging area (which the tribunal found would be a "flagrant breach of Ukrainian land law" to recognize)); **CL-061**, *Merrill & Ring v. Canada*, paras. 139 to 140: a "potential interest" in exporting logs "that may or may not materialize under contracts the Investor might enter into with its foreign customers", specifically recognizing that a right to export logs would be a property right subject to expropriation "if an existing contract for a certain volume of logs, at a certain price, had been interfered with by the government to the requisite extent" (para. 149).

690 **CL-049**, *Eureko v. Poland*, Partial Award, para. 232.

691 **CL-049**, *Eureko v. Poland*, Partial Award, paras. 238 to 240.

692 **CL-049**, *Eureko v. Poland*, Partial Award, paras. 151 to 160.

693 Memorial, para. 452; Reply, para. 306; *Windstream I* Award, para. 284.

694 Memorial, para. 453 [Emphasis omitted]; *Windstream I* Award, para. 285; **CL-029**, *Burlington v. Ecuador*, Decision on Liability, paras. 396 to 398, 401; **CL-023**, *ADM v. Mexico*, para. 240; **CL-071**, *Occidental v. Ecuador*, paras 87 to 88; **CL-041**, *Vivendi v. Argentina (II)*, para. 7.5.20.

a. in *Metalclad v. Mexico*, expropriation under NAFTA included "*covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property*";[695]

b. *Metaclad* and other prior awards found that substantial deprivation amounts to expropriation where:

   i. the investment is no longer capable of generating a commercial return;[696]

   ii. the investor has lost, in whole or in significant part, the use or reasonably-to-be expected economic benefit of the investment;[697]

   iii. the most economically optimal use of the investment has been rendered useless;[698] and

   iv. the investment's economic value has been neutralised or destroyed, as if the rights related thereto had ceased to exist;[699] and

c. various tribunals have confirmed that expropriation may occur where the host State interferes with the investor's contractual rights.[700]

347. Further as to the standard for expropriation, the Claimant argued further that CUSMA Annex 14-B is not applicable to these proceedings, as Annex 14-B was not incorporated by the CUSMA Parties into legacy claims brought under

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695 Memorial, para. 453; **CL-062**, *Metalclad v.* Mexico, para. 103; *Windstream I* Award, para. 287.

696 Memorial, para. 455; **CL-029**, *Burlington v. Ecuador*, Decision on Liability, para. 398.

697 Memorial, para. 455; **CL-062**, *Metalclad v. Mexico*, para. 103; **CL-023**, *ADM v. Mexico*, para. 240; **CL-041**, *Vivendi v. Argentina (II)*, paras. 7.5.11 to 7.5.16.

698 Memorial, para. 455; **CL-023**, *ADM v. Mexico*, para. 246.

699 Memorial, para. 455; **CL-084**, *Tecmed v. Mexico*, para. 115; **CL-048**, *Electrabel v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, para. 6.62; **CL-039**, *CME v. Czech Republic*, Partial Award, para. 604.

700 Memorial, fn. 552; **CL-034**, *Chorzów Factory*, p. 44; **CL-159**, *Crystallex v. Venezuela*, fn. 941; **CL-083**, *Southern Pacific Properties v. Egypt*, para. 164; **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 506; **CL-092**, *Wena Hotels v. Egypt*, para. 98; **CL-041**, *Vivendi v. Argentina (II)*, paras. 7.5.4, 7.5.22 to 7.6.2; **CL-049**, *Eureko v. Poland*, Partial Award; **CL-039**, *CME v. Czech Republic*, Partial Award, paras. 173, 270 to 271, 591.

NAFTA.[701] Therefore, the three interpretative factors in Annex 14-B, relied on by the Respondent as "*a binding test*" for expropriation (*i.e.*, "*economic impact of the measures, the extent to which the measures interfere with distinct, reasonable investment-backed expectations, and the character of the measures*"),[702] are not "*the actual test for an indirect expropriation as laid out in Article 1110 of the NAFTA*".[703]

348. The actual test, according to the Claimant, is:

a. as set out in the *Windstream I* Award, whether or not there has been a *de facto* taking, *i.e.*, whether or not the investor has been substantially deprived of the value or economic viability of its investment in relation to which:[704]

i. tribunals generally apply the "*sole effects*" test,[705] *i.e.*, focus is entirely on the economic impact of the measure on the investor;

ii. intent to expropriate is not a precondition, (per *Vivendi II*, "*focus is on the* effect *of the measure*";[706] and

b. if there has been a *de facto* taking, the next question is whether that taking is lawful (as below, *i.e.*, (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance with due process of law, and (d) on payment of compensation for the fair market value of the investment).

349. Dealing with the first stage of taking, according to the Claimant, the FIT Contract termination substantially deprived it of the value of its investments,[707] in that it eliminated any possibility "*for the Project to move forward or for WWIS to sell*

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701 Reply, paras. 310 to 311, 335 to 336.

702 Reply, para. 335; Counter-Memorial, para. 171.

703 Reply, para. 335; Counter-Memorial, paras. 181 to 191.

704 *Windstream I* Award, paras. 284 to 285.

705 **CL-029**, *Burlington v. Ecuador*, Decision on Liability, paras. 396 to 398; **CL-023**, *ADM v. Mexico*, para. 240; **CL-070**, *Occidental v. Ecuador*, paras. 87 to 88; **CL-062**, *Metalclad v. Mexico*, para. 108; **CL-081**, *S.D. Myers v. Canada* Partial Award, para. 283.

706 **CL-041**, *Vivendi v. Argentina (II)*, para. 7.5.20; **CL-068**, *National Grid v. Argentina*, para. 147.

707 Reply, para. 334; Memorial, paras. 456 to 462.

electricity to the IESO at an indexed fixed price over a 20-year period as set out in the FIT Contract" causing the Claimant to lose "*the full value of its investment in WWIS, the Project and the FIT Contract*".[708]

350. In particular, the Claimant submits that, following the *Windstream I* Award:

a. the Ontario Government and IESO failed:

i. to insulate the Project and the FIT Contract from the Moratorium and related delays; and

ii. to resolve the legal and contractual limbo the Ontario Government had created;[709]

b. the Ontario Government's inaction was a "*deliberate choice*",[710] to terminate a project it no longer wanted, telling the Claimant that "[it] *decided not to intervene*" with IESO's decision to terminate;[711]

c. the Respondent is responsible for IESO's decision to terminate, evidenced by the reasons given by IESO, including lack of direction from the Ontario Government;[712]

d. the Respondent failed to fulfil its promise that "*the FIT Contract would be 'frozen' and the Project would be 'on hold' for the duration of the moratorium so that it could 'continue' after the moratorium was lifted*", as represented before and during *Windstream I*;[713]

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708 Memorial, para. 462.

709 Memorial, para. 459.

710 Memorial, para. 459.

711 Memorial, para. 286.

712 Memorial, para. 459.

713 Memorial, para. 460.

e. the Respondent instead continued the same course of conduct, refusing to meet with the Claimant, and telling the Claimant to deal with IESO while at the same time refusing to direct IESO to do anything;[714] and

f. measures undertaken by IESO,[715] further breached NAFTA.[716]

351. As to the value of the FIT Contract, according to the Claimant:[717]

a. the *Windstream I* Award recognised "*that there was value beyond what was awarded that could be created if the FIT Contract were renegotiated*";[718]

b. "[t]*hat additional value was taken when the FIT Contract was terminated*";[719]

c. Regarding the Respondent's objection that value was never created because the FIT Contract was not renegotiated, according to the Claimant "*failure to renegotiate the contract is part of the wrongful conduct that has breached the NAFTA*" and the Respondent "*cannot rely on its own breaches to escape liability*";[720]

d. the Respondent's position on value is "*inconsistent with Ontario's documents relating to the FIT Contract and its treatment of other FIT contract holders*",[721] following the *Windstream I* Award, including:

i. MEI internal communications that:

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714 Memorial, para. 461.

715 *See above* paras. 313.e and 313.f.

716 Memorial, para. 523.

717 Reply, paras. 339 to 345.

718 Reply, para. 341

719 Reply, para. 341

720 Reply, para. 342; **CL-052**, *Gemplus v. Mexico*, paras. 13 to 92.

721 Reply, paras. 343, 64 to 66.

1. "*the Tribunal did not consider the value of the contract, only the specific damages to Windstream's project that the company incurred as a result of the moratorium*";[722]

2. the outcome "*did not change the status of the FIT Contract, which was still in force*";[723]

3. "*the expected value of the FIT Contract was at least $2.76 billion over its 20 year term*";[724] and

ii. Ontario's cancellation of other FIT contracts in 2018, paying "*hundreds of millions of dollars to compensate those project holders*", including "*more than $100 million to WPD for the cancelled White Pines project, an 18 MW project*", which "*was also a FIT 1 contract holder*", for which "*IESO had waived its pre-NTP termination right*".[725]

352. In response to the Respondent's argument that the Claimant was not substantially deprived of its investment because the FIT Contract had no value to begin with (based on the *Windstream I* Award),[726] the Claimant submits that the *Windstream I* Award:[727]

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722 **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value, 26 October 2016, Attachments: RE: Wind Contract value.

723 **C-2643**, Independent Electricity System Operator Issues Note: Windstream NAFTA Claim, 6 October 2016; **C-2667**, Email from Adam Hendy to Dan Moulton re: Media Call Summary, 13 January 2017. *See also* **C-2641**, MNRF House Note Issue: Windstream Energy Offshore Wind Power NAFTA Claim, 30 September 2016; **C-2649**, Email from Katrina Xavier to Richard Blackwell re: Globe&Mail query, 20 October 2016.

724 **C-2638**, Email from Emma Ferner to Sam Colalillo re Windstream Contract Value Estimate, 30 September 2016, Attachments: Windstream Contract Value Estimate.xlsx; **C-2639**, Email from Sam Colalillo to Daniel Cayley re "*FW: Windstream Contract Value Estimate*", 30 September 2016; **C-2650**, Email from Mirrun Zaveri to Erin Thompson re: Wind Contract Value, 21 October 2016, Attachments: Windstream Contract Value Estimatev06.xlsx; **C-2620**, Windstream Contract Value Estimatev06.xlsx.

725 *See above* para. 118.

726 Counter-Memorial, paras. 173 to 175.

727 Reply, paras. 251, 252, 340. Memorial, paras. 452 to 453; *Windstream I* Award, paras. 284 to 285.

a. recognized that "*there was value beyond what was awarded that could be created if the FIT Contract were renegotiated*";

b. did not award the Claimant damages for that value "*as at the 2016 valuation date but recognized it was there if the FIT Contract were renegotiated*", which according to the Claimant "[t]*hat additional value was taken when the FIT Contract was terminated*"; and

c. "*never determined the value of the Project in the context of the termination of the FIT Contract*".

353. According to the Claimant, its expert evidence in *Windstream II* is, "*that the value of what was taken from* [it] *as a result of the measures in this case is between $291.4 million and $333 million*".[728] Moreover, it argued that it was the only FIT contract holder "*that was not paid upon the termination of its FIT Contract*", and consequently "*has lost the full value of its investment in WWIS, the Project and the FIT Contract*", as there is "*no longer any possibility for the Project to move forward*".[729]

(c) Lawfulness of Expropriation

354. The Claimant submits that there has been a *de facto* taking, and it was unlawful because it did not meet the four criteria set out in NAFTA Article 1110 and the police powers doctrine does not apply.[730]

355. According to the Claimant, the expropriation is an unlawful breach of NAFTA Article 1110 unless it meets the following criteria: (i) it is for a public purpose; (ii) it was conducted on a non-discriminatory basis; (iii) it was conducted in accordance with the due process of law and Article 1105(1); and (iv) compensation was paid in

728 **CER-Secretariat**, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard, para. 2.40; **CER-Secretariat-**2, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard, paras. 2.7, 4.44.

729 Reply, para. 341.

730 Reply, paras. 346 to 354; *Windstream I* Award, paras. 284 to 285; Memorial, paras. 463 to 475.

accordance with Articles 1110(2) to (6).[731] It asserts that none of the criteria named in NAFTA Article 1110(1) is met because:

a. no compensation has been paid,[732] which is sufficient, in and of itself, to render the expropriation unlawful[733] (the *Windstream I* Award only compensated for damage to the investment and not the full value of the investment);[734]

b. expropriation was not for a public purpose,[735] as the Respondent's change of mind regarding wind energy is not a legitimate public purpose;[736]

c. the expropriation was not completed in accordance with due process, as reflected in the Respondent's failure to apply its own regulations and continued failure to address the Claimant's legal limbo;[737] and

d. the expropriation was discriminatory,[738] as the Respondent took action beneficial to the counterparties for other PPAs,[739] (e.g., TransCanada Energy Ltd and OPA, where the Respondent directed the OPA to offer a proposal satisfactory to TransCanada Energy Ltd after the project was cancelled,[740] and Windlectric Inc. which the Claimant speculated received an extension from IESO or IESO agreed not to exercise its termination rights).[741]

731 Memorial, para. 464.

732 Memorial, para. 465.

733 Memorial, para. 465.

734 Memorial, para. 462.

735 Memorial, para. 470.

736 Memorial, para. 471.

737 Memorial, para. 474.

738 Memorial, para. 475.

739 Memorial, para. 353.

740 Memorial, paras. 353(a), 357 to 358.

741 Memorial, para. 252.

356. In response to the Respondent's submissions in defence of the expropriation claim, according to the Claimant:

a. the Respondent did not address the four criteria in NAFTA Article 1110;

b. the Respondent instead argued no expropriation based on "*no interference with* [the Claimant's] *reasonable, investment-backed expectations*" and "*the character of the measures*",[742] which was "*seek*[ing] *a broad public-policy exemption from expropriation if those factors are present*";[743]

c. there is no support for that position and it should be rejected for four reasons:[744]

i. it ignores the plain wording of NAFTA Article 1110, which prescribes four preconditions, including public purpose, referring to prior awards:

1. *Metalclad*, where according to the Claimant a tribunal "*does not need to consider the motivation or intent of an ecological regulatory measure to determine that the measure was expropriatory*";[745] and

2. *Feldman*, "[i]*f there is a finding of expropriation, compensation is required,* even if*, the taking is for a public purpose, non-discriminatory and in accordance with due process of law*";[746]

742 Counter-Memorial, paras. 181 to 191.

743 Reply, para. 347.

744 Reply, paras. 347 to 353.

745 **CL-062***, Metalclad v. Mexico*, para. 111.

746 **RL-024**, *Feldman v. Mexico*, para. 98.

ii. prior awards only recognise a "*narrow exemption to expropriation if a measure falls within the police powers doctrine*":[747]

1. "*in exceptional circumstances where the respondent state has provided clear evidence that there was imminent or serious risk to human health or financial stability*";[748]

2. only apply in circumstances where the measure:

a. "*is truly necessary and proportionate to its stated rationale*";[749]

b. "*is not contrary to the investor's legitimate expectations*";[488]

c. "*does not otherwise breach international obligations*";[750] and

d. "*is not contrary to domestic law*";[751]

3. "*a violation of an investor's legal expropriation is a reason the police powers doctrine* cannot *apply to exempt the government conduct from liability, but it does not make an investor's legitimate expectations a requirement to establish an expropriation*";[752]

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747 **CL-074**, *Pope & Talbot v. Canada*, Interim Award, para. 99; **CL-041,** *Vivendi v. Argentina (II)*, para. 7.5.21; **CL-164**, *Quiborax v. Bolivia*, para. 200; **CL-029**, *Burlington v. Ecuador*, Decision on Liability, para. 506; **CL-084**, *Tecmed v. Mexico*, para. 119; **CL-080**, *Saluka v. Czech Republic*, Partial Award, paras. 258, 263.

748 **CL-191**, *Philip Morris v. Uruguay*, paras. 284 to 286; **CL-080**, *Saluka v. Czech Republic*, Partial Award, paras. 262 to 265, 270 to 275, **CL-037**, *Chemtura v. Canada*, para. 266.

749 **CL-084**, *Tecmed v. Mexico*, para. 122; **CL-029**, *Burlington v. Ecuador*, Decision on Liability, paras. 528 to 529; **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 522; **CL-025**, *Azurix v. Argentina*, para. 311; **CL-059**, *LG&E Energy v. Argentina*, Decision on Liability, paras. 189, 195.

750 **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 523.

751 **CL-029**, *Burlington v. Ecuador*, Decision on Liability, para. 529; **CL-164**, *Quiborax v. Bolivia*, paras. 214, 221, 227.

752 Reply, para. 350.

4. the Respondent's position otherwise is unsupported by prior awards, relying on those involving measures "*to protect human health or to ensure financial stability*", such as:[753]

    a. *Saluka*, in privatizing its banking industry, the host State "*engaged in the forced administration of a bank in which the claimant held shares when it appeared the bank was in crisis and its circumstances endangered the stability of the Czech banking system*";[754] and

    b. *Chemtura*, in enacting a chemical ban, the host State validly exercised the police powers doctrine as "*the evidence clearly demonstrated the dangers posed by lindane to human health and the environment*";[755]

iii. the Respondent is "*re-litigating the same arguments raised before the Windstream I tribunal*", (*i.e.*, "*that the expropriation test contained a broad public purpose exemption that required the investor to establish breach of reasonable, investor- backed expectations and an assessment of the character of the measures*"),[756] which "*was not accepted by the Windstream I tribunal in setting out the two- step test for expropriation*";[757]

iv. police powers doctrine "*has no application in this case*":[758]

    1. absent any "*evidence of some exceptional circumstance like risk to human health*";

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753 Reply, para. 351.

754 **CL-080**, *Saluka v. Czech Republic*, Partial Award, paras. 262 to 265, 270 to 275.

755 Reply, para. 351. **CL-037**, *Chemtura v. Canada*, para. 266.

756 *Windstream I* Counter-Memorial, paras. 490 to 504.

757 Reply, para. 352.

758 Reply, para. 353.

2. where the Respondent has not "*attempted to argue the narrow doctrine has been met*", and

3. as this was a 300MW renewable power project, "*[i]n light of climate change and the urgent need for energy supply in Ontario, the idea that cancelling a project of this kind falls within the limited scope of the police powers doctrine is simply not credible*".

357. The Claimant argues further and in any event that the measures both interfered with its expectations and were expropriatory in their character, because:[759]

a. the Respondent was relitigating "*that there was regulatory uncertainty regarding offshore wind and* [the Claimant] *is asking the tribunal to hold* [the Respondent] *liable for its own speculations*",[760] which the *Windstream I* Award rejected finding that:

i. Ontario promoted itself as "*'open for business' when it came to offshore wind and created the specific regulatory requirements for such projects*";

ii. Ontario's position only "*grew gradually more ambiguous towards the development of offshore win*d" after the FIT Contract was signed;[761]

making it "res judicata, as is the [Windstream I Award] finding that the legal and contractual limbo that Ontario created after the imposition of the Moratorium violated the NAFTA";[762] and

759 Reply, para. 354.

760 Reply, para. 354.a); Counter-Memorial, paras. 181 to 182.

761 *Windstream I* Award, para. 366.

762 *Windstream I* Award, paras. 378 to 379.

b. "*continuation of that legal and contractual limbo after* Windstream I *is equally the responsibility of the Ontario Government*", as:[763]

i. the *Windstream I* Award "*held that Ontario was liable for putting Windstream in that situation*";

ii. the Ontario Government "*is equally liable for the failure to end that limbo following the* [Windstream I] *Award, which caused* [the Claimant] *further damages*";

iii. the Claimant should not expect Ontario "*to continue the conduct that was already found to be internationally wrongful*"; and

iv. the proper place for the Claimant's expectations following the *Windstream I* Award is in relation to violation of NAFTA Article 1105 fair and equitable treatment.

(ii) The Respondent's Position

358. According to the Respondent, the Claimant fails to demonstrate that it expropriated any of the Claimant's investments in violation of NAFTA Article 1110.[764] Its position on each of the four elements it asserts is summarised out below.

(a) Investment Capable of Expropriation

359. As to an investment capable of being expropriated, the Respondent characterised the Claimant's investment in the *Windstream II* arbitration as:[765]

a. "*the Project, which includes the FIT Contract, the security deposit, as well as other items, such as a meteorological tower, data that the Claimant has collected, and land leases it concluded in connection with the Project*";[766]

763 Reply, para. 354.

764 Counter-Memorial, paras. 146 to 191.

765 Counter-Memorial, para. 146.

766 Memorial, para. 417.

b. with "*nominal value*" in damages ascribed to "*these other items*";[767] and

c. "*leaving only the FIT Contract to make up its expropriation and damages claim*".[768]

360. The Respondent's three primary (merits) arguments against this were:

a. the Claimant fails to demonstrate that the FIT Contract was an investment capable of expropriation, as:[769]

i. it did not give rise to a contingent interest in a potential future revenue stream;

ii. its existence and validity is misleading;

iii. rights could only be expropriated under it if they "*had vested such that they provided a demonstrable economic benefit or asset of value*"; and

iv. no right to a guaranteed revenue stream had "*vested at the time in question, the FIT Contract was not capable of being expropriated*";

b. the Claimant fails to demonstrate that it has been substantially deprived of its investment because:[770]

i. the *Windstream I* Award found no substantial deprivation as the "*$6 million security deposit was a significant amount compared the overall value of the investment,*" and "*it ha*[d] *not been taken*";[771]

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767 The Claimant stated that "nominal value may be attributed to past costs incurred related to certain assets of the Project, including the meteorological tower and the studies performed". *See Windstream I* Award, para. 192.

768 Memorial, para. 531.

769 Counter-Memorial, para. 147.

770 Counter-Memorial, para. 148.

771 *Windstream I* Award, paras. 291, 483.

ii. "*by its own admission, its FIT Contract and Project had no value as of the* Windstream I *Award, and the security deposit was returned to it*";[772] and

iii. no new value has been gained following that *Windstream I* Award;

c. no measures interfered with "*any reasonable investment-backed expectations that it could have had*", and its expectations "*were entirely unreasonable*", based on:[773]

i. the nature of the Claimant's communications with IESO and Ontario;

ii. the Claimant's unilateral efforts to advance a project that it was "*unable to finance, marred in considerable risk, and that it could not bring into commercial operation before the IESO was in a position to terminate*"; and

iii. the reality that the *Windstream I* Award statement that "*it remains open for the Parties to reactivate and, as appropriate, renegotiate the FIT Contract*":[774]

> […] did not and could not create any reasonable expectations that the Claimant's Project had a path forward, nor could it create any obligations for the Government to reactivate or renegotiate.

361. In support of its argument that the FIT Contract was not an asset capable of expropriation, the Respondent sought guidance from prior awards.[775] It stresses the

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772 *Windstream I* Memorial, para.14; **CWS-Mars-1**, Witness Statement of David Mars, paras. 106 to 107; **R-0659**, Letter from Darryl Yahoda (IESO) to Bank of Montreal, 20 February 2020.

773 Counter-Memorial, para. 149.

774 *Windstream I* Award, para. 290.

775 Counter-Memorial, para. 155; **RL-057**, *Generation v. Ukraine*, para. 8.8 ("[T]here cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place."); **CL-037**, *Chemtura v. Canada*, para. 258: ("The first issue is whether the Claimant had an investment in Canada capable of being expropriated."); **CL-159**, *Crystallex v. Venezuela*, para. 659 ("The Tribunal starts its analysis on expropriation with the threshold question as to whether the Claimant had rights capable of being expropriated."); **RL-161**, *Emmis. v. Hungary*, Decision on

finding in *Generation Ukraine v. Ukraine*, that "*it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred*",[776] and the caution by commentators "*against a broad interpretation of the scope of economic interests capable of being expropriated, as this may deviate from the original intention of the Parties, clash with domestic tradition and complicate the process of valuation*".[777] In this context, it further relies on the descriptive definition in CUSMA Annex 14-B (Expropriation): "[a]*n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right*[301] *or property interest in an investment*."[778]

362. According to the Respondent, the Claimant's focus on contractual rights "*illustrates its misunderstanding not only of the expropriation test, but also of the principles at issue in NAFTA Article 1110*".[779] The Respondent disagrees with the Claimant's argument that "[n]*umerous tribunals have confirmed that expropriation may occur not only with respect to property rights, but also where the host state interferes with*

Bifurcation, para. 43 ("[T]he Tribunal would need to determine the nature and incidents of the rights held by Claimants that may be considered as investments capable of enjoying the protection of international law against expropriation before deciding whether Respondent's conduct had in fact caused any such expropriation."); **RL-022**, *Emmis v. Hungary* Award, para. 159 ("In view of the fact that the only cause of action within the Tribunal's jurisdiction is that of expropriation, Claimants must have held a property right of which they have been deprived. This follows from the ordinary meaning of the term."); **RL-140***, Infinito Gold v. Costa Rica*, paras. 705 to 706: ("[T]he Tribunal must first determine whether the Claimant [...] held rights capable of being expropriated. If no valid rights exist under domestic law, there can be no expropriation."); **RL-180**, *Lone Pine v. Canada,* US 1128 Submission.

776 Counter-Memorial, para. 155; **RL-057***, Generation v. Ukraine*, para. 6.2; **CL-026**, *Bayindir v. Pakistan*, para. 442 ("The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated.")

777 Counter-Memorial, para. 154; **CL-074**, *Pope & Talbot v. Canada*, Interim Award, para. 102 ("[...] under international law, expropriation requires a 'substantial deprivation ['']"); **CL-054**, *Grand River v. US*, para. 148 ("Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners' rights in the totality of the investment [...]"); **CL-053**, *Glamis Gold v. US,* Award*,* para. 357; **RL-161**, *Emmis v. Hungary*, Decision on Bifurcation, para. 43 ("[I]t is of fundamental importance that the Tribunal identify precisely whether, and if so which investments of Claimants are capable of giving rise to their expropriation claim."); **RL-157***, Accession v. Hungary,* Decision on Jurisdictional Objections and Request for Bifurcation, para. 39(2)(a) ("The Tribunal is required to identify whether and which investments of Claimants may properly give rise to an expropriation claim[.]"); UNCTAD Series on International Investment Agreements II, "*Expropriation: A Sequel*", (2012), p. 131 ("Broad interpretation of the scope of economic interests capable of being expropriated may deviate from the original intention of the contracting States, clash with domestic tradition and complicate the process of valuation.")

778 CUSMA, Annex 14-B: Expropriation, para. 1; CUSMA, Annex 14-B: Expropriation, fn. 18: ("For greater certainty, the existence of a property right is determined with reference to a Party's law.")

779 Counter-Memorial, para. 157. *See Windstream I* Counter-Memorial, paras. 464 to 473, where both the issue and its application were previously argued. The arguments were not addressed by the tribunal.

the investor's contractual rights",[780] based on a principle that "*dates back to the* Chorzów Factory *Case and has been applied in a large number of investment treaty cases*", citing *Crystallex v. Venezuela*, *Southern Pacific*, *Deutsche Bank v Sri Lanka*, *Wena Hotels*, *Vivendi v. Argentina*, *Eureko*, and *CME v. The Czech Republic*.[781]

363. Instead, according to the Respondent, prior awards show that:[782]

a. an asset related to an investment is not necessarily "*an asset capable of expropriation*";

b. for an intangible property right acquired in expectation of economic benefits,[783] "*it is necessary to discern what that intangible property right is*"; and

c. if it arises from commitment of capital,[784] the Claimant must "*prove that the specific rights in question under the FIT Contract have vested such that they are capable of being expropriated*".[785]

364. It referred to various prior awards in support,[786] including as follows:

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780 Counter-Memorial, para. 157; Memorial, fn. 552.

781 Counter-Memorial, para. 157. Memorial *citing* **CL-034**, *Chorzów Factory*, p. 44. *See also* **CL-159**, *Crystallex v. Venezuela*, fn. 941; **CL-083**, *Southern Pacific v. Egypt*, 20 May 1992, para. 164; **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 506; **CL-092**, *Wena Hotels v. Egypt*, para. 98; **CL-041**, *Vivendi v. Argentina (II)*, paras. 7.5.4, 7.5.22 to 7.6.2; **CL-049**, *Eureko v. Poland*, Partial Award, para. 151; **CL-057**, *Thunderbird v. Mexico*, paras. 208, 238 to 243; **CL-039**, *CME v. Czech Republic*, Partial Award, paras. 173, 270 to 271, 591.

782 Counter-Memorial, para. 158.

783 Counter-Memorial, para. 158; *Windstream I* Memorial, para. 420.

784 Counter-Memorial, para. 158; *Windstream I* Memorial, para. 420.

785 Counter-Memorial, para. 158; **RL-181**, *EMV v. Czech Republic*: ("[T]he questions (a) whether the contractual rights on which Claimant relies constitute an investment within Article 1 of the Treaty; (b) whether those rights are capable of expropriation under Article 3; and (c) whether they were in fact expropriated, to be three entirely separate questions.")

786 Counter-Memorial, para. 159; **RL-024**, *Feldman v. Mexico*, para. 152: ("However, as with S.D. Myers, it may be questioned as to whether the Claimant ever possessed a 'right' to export that has been 'taken' by the Mexican government."); **CL-057**, *Thunderbird v. Mexico*, para. 208: ("[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited."); **CL-061**, *Merrill & Ring v. Canada*, para. 142: ("The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal

a. *Merrill & Ring v. Canada*:[787]

> [t]he right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the Feldman tribunal's conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.

b. *Feldman v. Mexico*: measure prevented claimant from exporting cigarettes, but it was not clear it ever possessed a vested right to do so, so no expropriation;[788]

c. *Thunderbird v. Mexico*: no expropriation giving rise to compensation "*where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited*";[789]

d. *Infinito v. Costa Rica*: the tribunal "*must first determine whether the Claimant* […] *held rights capable of being expropriated. If no valid rights exist under domestic law, there can be no expropriation*";[790]

e. *Generation v. Ukraine*: "[t]*here cannot be an expropriation of something to which the Claimant never had a legitimate claim*";[791] and

f. *Emmis v. Hungary*: where, according to the Respondent, for expropriation purposes the tribunal asked "*what rights conferred under a contract were allegedly taken and whether they were actual property interests or assets*

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instrument. This reasoning underlies the *Feldman* tribunal's conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.") *See also* **RL-022**, *Emmis v. Hungary*, para. 168; **RL-182**, *Eskosol v. Italy*, para. 470: ("[A] finding of expropriation must be premised on a showing that 'Claimants must have held a property right of which they have been deprived. The property right or asset in question 'must have vested (directly or indirectly) in the claimant for him to seek redress.'") and para. 472: ("[A]bsent any established right that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.").

787 *Windstream I* Counter-Memorial, paras. 465 to 473; **CL-061**, *Merrill & Ring v. Canada*, para. 142.

788 **RL-024**, *Feldman v. Mexico*, para. 152.

789 **CL-057**, *Thunderbird v. Mexico*, para. 208.

790 **RL-140**, *Infinito v. Costa Rica*, paras. 705 to 706.

791 **RL-057**, *Generation v. Ukraine*, para. 22.1.

held at the relevant time",[792] concluding that although Hungarian law property rights include intangible assets, claimant's broadcasting agreement did not confer any rights for the relevant period constituting assets capable of expropriation,[793] noting that:[794]

> […] it is important to emphasize that the protection from expropriation in relation to rights conferred under contract still requires identification of a property interest or asset held by the Claimant.

and:[795]

> […] [it] follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress.

and that:[796]

> […] the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. […] Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.

365. The Respondent argues that, based on the approach in those prior awards, in the current arbitration "*it is not sufficient to identify the existence and validity of the FIT Contract*", as the Claimant "*must also prove that the specific rights in question under the FIT Contract have vested such that they are capable of being expropriated*".[797] It submits it cannot do so because the Claimant:[798]

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792 **RL-022**, *Emmis v. Hungary*, paras. 150, 158 to 177.

793 **RL-022**, *Emmis v. Hungary*, paras. 192, 221.

794 **RL-022**, *Emmis v. Hungary*, para. 165.

795 **RL-022**, *Emmis v. Hungary*, para. 168.

796 **RL-022**, *Emmis v. Hungary*, para. 169.

797 Counter-Memorial, para. 164.

798 Counter-Memorial, paras. 165 to 168.

a. fails to identify "*any vested right under the FIT Contract and the demonstrable economic benefit or asset of value that has been taken*";

b. identifies its investment as "*a guaranteed revenue stream over a 20-year period with a credit worthy counterparty*",[799] arguing that the FIT Contract's termination caused it to lose its full value as "*there is no longer any possibility for the Project to move forward or for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period*",[800] however:[801]

i. a "*possibility for the Project to move forward*" is not a property right;[802] and

ii. the FIT Contract:

1. "*did not give the Claimant a vested right – an actual and demonstrable entitlement – to a certain benefit of being able to generate and sell electricity at an indexed fixed price over a 20-year period*";

2. "*is expressly conditioned on the Claimant acquiring all of the permits and approvals needed to develop, construct and operate its proposed Project*";[803] and

3. its payment obligation is "*expressly conditioned upon the Claimant's Project being in operation and producing electricity by a specific deadline, the MCOD*";[804]

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799 Memorial, para. 8.

800 Memorial, para. 462.

801 Counter Memorial, para. 165.

802 Counter Memorial, para. 165.

803 **R-092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, Schedule 1, s. 2.4.

804 **R-092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, Schedule 1, s. 2.4.

c. fails to demonstrate that its Project:[805]

   i. obtained "*even one of the permits or approvals it required to proceed*";

   ii. would have reached commercial operation; and

   iii. would have given the Claimant the right to the fixed-price revenue stream under the FIT Contract;

d. "*was and is unreasonably optimistic about its Project and has failed to adequately account for the many risks that surrounded the advancement of the Project*", given:[806]

   i. "*the Project's lack of development, inability to get financing, unavoidable risks, and high costs made it unviable within the constraints imposed by the FIT Contract*";[807]and

   ii. the Green Giraffe Report from *Windstream I* (confirmed in *Windstream II*) noting that "*a number of items that would make its financing more difficult, and its valuation accordingly lower, such as lack of supply chain or lack of financing experience and availability*";[808] and

e. the nature of the FIT Contract was contingent, and the Claimant had "*no guarantee it would ever obtain the revenue stream it contemplated*", which has "*not changed in any way following the Windstream I Award*", providing

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805 Counter Memorial, para. 166.

806 Counter Memorial, para. 167.

807 Counter-Memorial, para. 481. *See also Windstream I* Rejoinder, paras. 529 to 556.

808 **RER-Jérôme Guillet**, Expert Report of Dr Jérôme Guillet on Damages Valuation, paras. 81 to 105.

it "*with no vested right and as such, is not an investment capable of being expropriated*",[809] including because:[810]

i. IESO's right to terminate arose as of 5 May 2017 (2 years after original MCOD of 4 May 2015);

ii. through domestic litigation, the Claimant extended to 18 February 2020;

iii. the termination decision took effect after the WWIS domestic litigation;

iv. WWIS never obtained the right to develop and operate its Project or sell the energy it generated;

v. if the Project was not operational by MCOD, then the Claimant had no right to any payment under the FIT Contract; and

vi. as confirmed in the *Windstream I* Award and argued by the Claimant, "*the FIT Contract could no longer be completed by requisite two years after the MCOD*".

(b) Existence of Expropriation in Fact

366. The Respondent maintains that the FIT Contract was not an investment capable of being expropriated, accepting that the Claimant made investments in Canada, including "*its enterprise, WWIS*", which "*in theory*" are "*investments capable of being expropriated*", but ascribed "*no value to the enterprise or to other assets in its damages analysis*".[811]

367. It argues that, even if the Tribunal disagreed and considered the FIT Contract to be an investment capable of being expropriated, none of the Claimant's investments

809 *Windstream I* Award, para. 290.

810 Counter Memorial, para. 168.

811 Counter-Memorial, para. 169.

has been expropriated in violation of NAFTA Article 1110. In particular, regarding each of the three alleged measures by the Ontario Government following the *Windstream I* Award, namely:[812]

a. failure to conduct any further studies to address the scientific uncertainty surrounding offshore wind;

b. imposition of the Moratorium, "*knowing that* [it] *would create the conditions that would allow IESO to terminate the FIT Contract*"; and

c. failure to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that the Project would be "*deferred*", "*frozen*" and "*on hold*",

the Respondent considered: (i) their economic impact, (ii) the extent to which they interfered with distinct, reasonable investment-backed expectations, and (iii) their character, and concluded no expropriation.

368. Taking first the economic impact of the alleged measures, according to the Respondent:[813]

a. an "*expropriation requires a 'taking' of fundamental ownership rights that causes a substantial deprivation of the economic value of an investment*";

812 Counter-Memorial, para. 170; Memorial, para. 428.

813 Counter-Memorial, para. 172; **CL-074**, *Pope & Talbot v. Canada*, Interim Award, para. 102: ("[...] under international law, expropriation requires a 'substantial deprivation ['']"); **CL-061**, *Merrill & Ring v. Canada*, para. 145: ("The standard of substantial deprivation identified in Pope & Talbot, and followed by many other decisions, both in the context of NAFTA and other investment protection agreements, is the appropriate measure of the requisite degree of interference."); **CL-054**, *Grand River v. US*, para. 148; **CL-053**, *Glamis Gold v. US*, para. 357.

b. the threshold for substantial deprivation is high,[814] variously characterised as "*significant*", "*fundamental*", "*radical*" or "*serious*" deprivation;[815] and

c. if an investment "*lost its economic value prior to the alleged expropriation*", then a host State "*cannot deprive it of value, since it had no value to begin with*".[816]

369. The Respondent relies on the Claimant's position in *Windstream* I, where it maintained that its investment was worthless, summarised in the *Windstream I* Award as follows:[817]

> The Claimant contends that, while the Project is currently under force majeure, there is no longer any realistic prospect that the Project can reach commercial operation by May 4, 2017. Consequently, the Project is no longer financeable and has effectively lost all of its value. It argued that this is the case even if the IESO were to waive its right to terminate the FIT Contract as the conduct of the Ontario Government has created such uncertainty around the offshore wind industry in Ontario that no potential investor would be prepared to invest in the Project.

370. According to the Respondent, the findings in the *Windstream I* Award were, therefore, that:[818]

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814 Counter-Memorial, para. 172; **CL-091**, *Waste Management v. US (II)*, Award, para. 160: "It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise." [Emphasis added]; **RL-025**, *Fireman's Fund v. Mexico*, para. 176(c): "The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment)." [Emphasis added] and fn. 157 "A number of tribunals employ the adjective 'significant,' 'fundamental,' 'radical' or 'serious'."; **CL-040**, *CMS v. Argentina*, para. 262 "The essential question is [...] to establish whether the enjoyment of the property has been effectively neutralized."

815 Counter-Memorial, para. 172; **RL-025**, *Fireman's Fund v. Mexico*, para. 176(d): ("[t]he taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment)"); **CL-053**, *Glamis Gold v. US*, para. 360. *See also* **RL-048**, Christoph Schreuer, "*The Concept of Expropriation under the ETC and Other Investment Protection Treaties*", May 2005, pp. 28-29 and generally at p. 29: ("The deprivation would have to be permanent or for a substantial time.")

816 Counter-Memorial, para. 173; **RL-057***, Generation v. Ukraine*, para. 20.30. *See also:* **RL-140**, *Infinito Gold v. Costa Rica*, para. 719, where the investments "were already worthless prior to the challenged measures".

817 Counter-Memorial, para. 174. *Windstream I* Award, para. 288.

818 Counter-Memorial, paras. 174 to 177.

a. absent reactivation or renegotiation, the Project could no longer be completed by the MCOD,[819]

b. the FIT Contract could not be considered to have any value;[820]

c. it was appropriate to adjust its valuation of the Project to account for the fact that the Claimant had not lost its CAD 6 million security deposit;

d. no adjustment was made for the extant FIT Contract "*because it was without value"*,[821] noting that:[822]

> Consequently, in order to quantify the damage caused by the Respondent's breach to the value of the Claimant's investment, a further adjustment must be made to reflect the value of the letter of credit (CAD 6 million). On the other hand, the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value.

e. having "*clearly and conclusively determined, the fact that the FIT Contract had not formally been terminated had no impact on the valuation of the Claimant's investment*", determined that the Claimant's Project:

   i. was no longer financeable;[823]

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819 *Windstream I* Award, para. 290.

820 *Windstream I* Award, para. 483. ("[A]lthough the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value. It is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them"). As Canada has already submitted, this determination is *res judicata*, the valuation of the FIT contract is *res judicata*. Indeed, the *Windstream I* tribunal's award of compensation relies on its determination that the Project became impossible to finance by May 2012 and that the FIT Contract had no value.

821 Counter Memorial, para. 176. *Windstream I* Award, paras. 290, 483.

822 Counter Memorial, para. 176. *Windstream I* Award, para. 483.

823 Counter Memorial, para. 177. *Windstream I* Award, para. 374.

ii. could no longer be developed under the terms of the FIT Contract;[824] and

iii. could not "*be considered to have any value*".[825]

371. Based on those findings, the Respondent concludes that the investments "*had no post-Award value to lose, with the exception of the security deposit, which has been returned*",[826] and the Claimant "*has not been substantially deprived of its investment*".[827]

372. As to appreciation in value following the *Windstream I* Award, according to the Respondent, the Claimant's:[828]

a. lobbying efforts to reactivate or renegotiate the FIT Contract bore no results;[829]

b. efforts it claims to have made to advance its Project bore no result (e.g., "*efforts to move the Project forward, which included completing research studies to address the concerns raised in relation to the Moratorium*");[830]

c. the ORTECH Report,[831] "*does not reference a single study completed after the* Windstream I *Award*",[832] and its "*nothing but a repackaging of studies*

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824 *Windstream I* Award, para. 374.

825 *Windstream I* Award, para. 483.

826 The amount of the security deposit paid by the Claimant was already determined by the *Windstream I* tribunal not to "substantially exceed, if at all, the value of the security payment". *See Windstream I* Award, para. 291. Indeed, the tribunal determined that the security deposit was "substantial" when compared to the overall value of the investment. *Windstream I* Award, para. 291. This determination is *res judicata*, and must be equally applicable to the Claimant's investment today. *See* Request for Bifurcation and Memorial Objecting to Jurisdiction, paras. 82 to 85.

827 Counter-Memorial, para. 177.

828 Counter-Memorial, paras. 178 to 180.

829 Counter-Memorial, para. 178

830 **CER-Secretariat**, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard, para. 4.14.

831 Counter-Memorial, para. 179. **C-2075**, ORTECH Status Report: Summary of Engineering and Environmental Studies in Support of the Wolfe Island Shoals Offshore Wind Farm, 15 February 2017.

832 Counter-Memorial, para. 179. The ORTECH report also accompanied the Claimant's submission of an "*updated REA*" to the Ministry of the Environment. *See* **C-2073**, Letter from Ian Baines (WWIS) to Ministry of Environment and Climate Change (MOECC) – "*Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130- 602*", 15 February 2017.

undertaken prior to the moratorium or as part of the Claimant's damages claims in the Windstream I *arbitration*";

d. the geophysical and bathymetric survey and application Emerging Renewable Power Program ("**ERPP**") "*did not create post-Award value for the Project*", as:[833]

   i. the bathymetric survey "*was based on 2010 data, work undertaken prior to the moratorium*", and

   ii. "*lodging an unsuccessful application to another government renewable energy program (the ERPP) added no value*";

e. the 1 March 2017 website launch,[834] stating that the Project was *"approved through the Government of Ontario's Feed-in-Tariff (FIT) program*" and would "*create 300 MW of energy through 130 turbines*" as its contract was "*valid and in force*",[835] did not create value;

f. the Claimant discussions with third parties, [redacted][836] "*to find potential funders or purchasers for its Project*" did not bear fruit:

   i. Mr Mars testified in 2014 that "*there is no prudent equity or debt investor that would want to join this Project at this stage*";[837]

   ii. post-*Windstream I* Award exchanges with third parties "*consist of* [redacted]", with Mr Mars describing

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833 Counter-Memorial, para. 179.

834 Counter-Memorial, para. 180. **R-0798**, Windstream's Twitter Page (accessed on November 28, 2022).

835 Counter-Memorial, para. 110. **R-0799**, Windstreamenergy.ca homepage (accessed on 8 December 2022).

836 **C-2085**, [redacted] Engagement Letter ([redacted] – *Windstream I EL – Fully Executed*"), 1 May 2017 (Confidential); **CWS-Mars-3**, Witness Statement of David Mars, para. 12; **CER-Secretariat**, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard, para. 4.15.

837 Counter-Memorial, para. 110. **CWS-Mars-1**, Witness Statement of David Mars, para. 106.

interest as "*based on the 'potential' value of the Project, or the value* [redacted]";[838]

iii. "[a]*s an early-stage project, with a moratorium in place*", [redacted][839] and

iv. [redacted][840]

373. Therefore, according to the Respondent, there was no expropriation.

(c) Lawfulness of Expropriation

374. As pointed out by the Claimant, the Respondent did not directly address the four criteria for unlawfulness of expropriation in its submissions. Instead, it focused on two arguments: (i) lawfulness based on the absence of any "*distinct, reasonable, investment-backed expectations*" and (ii) that the character of the measures meant they were not capable of constituting unlawful expropriation.

375. First, the Respondent submits that any measures taken by it or its bodies "*did not significantly interfere with any "distinct, reasonable, investment-backed expectations*" held by the Claimant, for the following reasons:[841]

a. analysis must be undertaken against "*the regulatory regime in place at the time of investment*";[842]

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838 Counter-Memorial, para. 110. **CWS-Mars-3**, Witness Statement of David Mars, paras. 7, 16.

839 Counter-Memorial, para. 180. Memorial, paras. 224 to 225, 229: "As explained by Mr Mars, it was clear that there was a lot of interest in the Project, [redacted] *See also* paras. 228 (f): '[redacted] and (g): [redacted]

840 Reply, paras. 180, 252 to 255.

841 Counter-Memorial, paras. 181 to 187; **CL-053**, *Glamis Gold v. US*, para. 356 and fn. 704.

842 **RL-016**, Jack Coe, Jr., and Noah Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions', in Todd Weiler, ed., *International Investment Law and Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties and Customary International Law* (2005), p. 624.

b. NAFTA Article 1110 "*does not eliminate the normal commercial risks of a foreign investor*", or place on the host State "*the burden of compensating a foreign investor for the failure of a business plan that was not prudent in the circumstances*";[843]

c. after the *Windstream I* Award, the Claimant's situation was "*particularly precarious*", in that it:

i. knew the offshore wind development regulatory framework was unfinished, a moratorium remained in place with no indication of lifting, and the FIT Contract termination right was imminent;

ii. had "*no basis to ask the Tribunal to hold the state liable for its own incorrect expectations and speculations*";[844]

iii. "*professe*[d] *to have had an expectation that its Project would proceed*", but failed "*to demonstrate the reasonableness of these expectations*";

iv. was not reasonable to have "*conclude*[d] *from the* Windstream I *tribunal's statement that the parties had the option of renegotiating or reactivating the FIT Contract, that it expected Ontario would do so*",[845] as "[a]*n option is not an obligation*";

v. had previously acknowledged in the *Windstream I* that:[846]

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843 **CL-091**, *Waste Management v. US (II)*, Award, para. 160: "It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise", and para. 177: "[I]t is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance."; **RL-025**, *Fireman's Fund v. Mexico*, paras. 184, 218: "The NAFTA, like other free trade agreements and bilateral investment treaties, does not provide insurance against the kinds of risks that FFIC assumed [...]".

844 **RL-183**, *Nelson & Blanco v. Mexico*, para. 281 (claimant "had, at best, a business opportunity, a bet based on its own interpretations and speculations, that was proven wrong").

845 *Windstream I* Award, para. 483.

846 *Windstream I* Reply, para. 485.

> There is no indication on the record that the Ontario Government truly intends to lift the moratorium in the near future, or at all. It has never provided even an approximate "end date" […]. The fact is that the moratorium may never be lifted. But even if the moratorium is not permanent, Windstream's loss is.

vi. "*made numerous attempts to reactivate or renegotiate its FIT Contract*", but neither Ministry of Energy nor MOE "*ever led* [it] *to believe that a path forward existed for the Project*";

vii. the Ministries and Premier "*stated within days of the release of the Windstream I Award* […] *that the moratorium would not be lifted until the necessary research was completed*";[847]

viii. MOE "*redirected the Claimant's requests to counsel and to the IESO, and the IESO unequivocally communicated to the Claimant that it was not prepared to amend the FIT Contract or waive its s.10.1(g) termination right*";[848]

ix. MOE indicated to the Claimant that:[849]

1. Ontario still had "*not developed an offshore wind policy framework on approval requirements*";

2. Ontario had not "*developed a process for obtaining Crown land site access under the Public Lands Act*";

3. the "*Ministry has not published any final guidelines or policies specific to offshore wind*"; and

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847 **C-2471**, **Exhibit 78**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, 17 October 2016; **C-2072**, "*Ontario signals offshore wind moratorium will continue for years*", Chat News Today, 13 February 2017.

848 **R-0662**, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream), 9 February 2017.

849 **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017 (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn 23 October 2018 with exhibits).

4. it did "*not endorse any of the studies that* [Windstream] *has conducted in the absence of any provincial policy framework on offshore wind*";

d. the Claimant's "*true expectations were made clear*" in its municipal court application to restrain IESO from terminating the FIT Contract, in that:[850]

i. it "*admitted that, by May of 2012, its Project could not be financed and was 'effectively cancelled' in light of the period that would be required to re-start the Project, confirm regulatory requirements, obtain the required approvals, complete development work and build the Project*";[851] and

ii. its "*persistent efforts, both in lobbying the Ontario government and pursuing domestic litigation, indicate that it was well aware of the status of its Project and the real and tangible likelihood that IESO would exercise its termination right*"; and

e. the Claimant is not entitled to rely on "*alleged promises and representations that predate the Windstream I Award*",[852] to challenge "*a series of measures which all occurred after the Award*",[853] and cannot "*resurrect*" 10 year old "*promises to found its post-Award expectations that its project would advance*", which "*cannot be divorced from the* Windstream I *tribunal's determination that no expropriation had occurred at the time of its Award, and from the compensation that the Claimant has already received in* Windstream I".[854]

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850 **R-0660**, OSCJ - Notice of Application.

851 *Windstream I* Memorial, para. 318; *Windstream I* Reply, para. 405.

852 Request for Bifurcation and Memorial on Jurisdiction, para. 48. *See also*, for the Claimant's reliance on these alleged promises and representations following the *Windstream I* Award, Memorial, paras. 458 to 461.

853 As noted by the Tribunal in Procedural Order No. 2, para. 45; Response to Request for Bifurcation, para. 2.

854 Counter-Memorial, paras. 187 to 191.

376. Secondly, as to the character of the measures, the Respondent argued that these are not consistent with there being an indirect expropriation because:[855]

a. "[m]*any types of government regulation will have effects on an investment, and potentially even significant and negative effects without amounting to an expropriation*";

b. the "*prohibition against indirect expropriation does not function so as to limit the policy space of governments to such an extent that they are handcuffed in their ability to regulate in the public interest*"; and

c. prior awards have noted in this regard as follows:

i. *Feldman v. Mexico*:[856]

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.

ii. *Suez InterAgua v. Argentina*:[857]

> […] in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation …

855 Counter-Memorial, paras. 188 to 191.

856 **RL-024***, Feldman v. Mexico*, para. 103.

857 **RL-050**, *Suez InterArgua v. Argentina*, Decision on Liability, para. 128.

iii. *Chemtura v. Canada*: a manufacturer of pesticide challenged a chemical ban as an expropriation in violation of NAFTA Article 1110, and the tribunal found:[858]

1. no substantial deprivation of investment,

2. the State agency "*took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment*"; and

3. "*A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation*."

377. According to the Respondent, the Claimant's objection to the Ontario Government's "*decision to allow the FIT Contract to be terminated in accordance with the applicable law*",[859] (*i.e.*, its "*decision not to intervene to ensure reactivation or renegotiation rather than termination*"), taken against its understanding that "*following the* Windstream I *Award* […] *the Claimant had been compensated for the full value of its investment less the CAN$6 million security deposit*",[860] "*lacks an expropriatory character*". It argues that NAFTA Article 1110 "*does not require the State to put value back into an investment that was rendered worthless and then fully compensate*[] *for its loss*."[861]

378. Finally in this context, as to the Ontario Government's alleged "*failure to apply its own regulations and continued failure to address this legal limbo demonstrates a lack of due process*",[862] the Respondent submits that:

858 **CL-037**, *Chemtura v. Canada*, para. 266.

859 Memorial, para. 471.

860 **R-0659**, Letter from Darryl Yahoda (IESO) to Bank of Montreal, 20 February 2020.

861 Counter-Memorial, para. 190.

862 Memorial, para. 474.

a. the Ontario government and IESO "*have both been transparent with the Claimant following the Windstream I Award*", their actions serving "*to address the status of the Project*";

b. the FIT Contract termination right was "*embedded in the contract and belonged to both WWIS and the IESO*";

c. "*IESO demonstrated immense restraint in exercising its right*", allowing the municipal court proceeding "*to run its course*";[863]

d. the "*Claimant is responsible for the delays to the s. 10.1(g) decision and the termination itself, not the IESO or Ontario*";[864] and

e. "*Ontario allowed the IESO to terminate the FIT Contract in accordance with* [its] *terms*" and that "*certainly did not have the character of an expropriation*".

379. Therefore, the Respondent concludes, its conduct was not unlawful.

C. THE TRIBUNAL'S ANALYSIS

380. As before, the Tribunal has relied on the entire record before it, including the disputing parties' written submissions and oral pleadings, concerning the Claimant's claim for expropriation in breach of NAFTA Article 1110. To the extent that some arguments are not reproduced in this Award, they have been considered and are subsumed in the Tribunal's analysis.

381. The initial issue is whether or not, following the *Windstream I* Award, the Claimant continued to maintain a protected investment in Canada, capable of being expropriated. The question arises based on the *Windstream I* Award paragraphs 288 to 291, set out in full below for ease of reference:[865]

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863 Counter-Memorial, paras. 191, 107 to 110.

864 Counter-Memorial, paras. 191, 107 to 110.

865 *Windstream I* Award, paras. 288 to 291 [Emphasis added] (paras. 290 and 291 are also reproduced above at para. 8).

288. The Claimant claims that such a de facto taking of its investment has occurred in the present case. According to the Claimant, under the FIT Contract, WWIS had the obligation to bring the Project into commercial operation by 4 May 2015. This deadline could be extended, but only up to two years, i.e., until 4 May 2017, for reason of force majeure, whereafter either party will be entitled to terminate the Contract. The Claimant contends that, while the Project is currently under force majeure, there is no longer any realistic prospect that the Project can reach commercial operation by 4 May 2017. ***Consequently, the Project is no longer financeable and has effectively lost all of its value.*** This is the case even if the OPA were to waive its right to terminate the FIT Contract as the conduct of the Ontario Government has created such uncertainty around the offshore wind industry in Ontario that no potential investor would be prepared to invest in the Project.

289. As summarized above, the Respondent argues that, on the facts, there has been no expropriation in this case because the Project had no value at the time of its alleged taking. At most, the Claimant was deprived of an "opportunity" to develop the Project. Moreover, the moratorium is only a temporary measure and therefore could not have resulted in a permanent deprivation of the Claimant's investment. The Claimant's assets, including the security deposit, remain intact and could be returned if the Claimant entered into a mutual termination agreement with the OPA.

290. The Tribunal has carefully reviewed the relevant evidence and finds that, ***on the facts, no expropriation has taken place in this case***. First, ***the Claimant's FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario***; consequently, while the Tribunal agrees with the Claimant that ***the Project can no longer be completed by the MCOD, 4 May 2017, it continues to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium***. Second, and more importantly in the context of the Claimant's expropriation claim, ***the Claimant's CAD 6 million security deposit is still in place and has not been taken or rendered otherwise worthless as a result of any action taken by the Government of Ontario***. Under Article 10.1(g) of the FIT Contract, if by reason of force majeure the MCOD is delayed for an aggregate of more than 24 months (which is the case here), completion and performance security will be returned at the time of the termination of the agreement by either party. ***Consequently, the Respondent cannot terminate, and indeed confirmed at the hearing that it would not be able to terminate,***

> ***the FIT Contract pursuant to Article 10.1(g) without returning the security. It therefore cannot be said that the Claimant has been substantially deprived of its investment.***
>
> 291. ***In reaching the conclusion that, on the facts, the Claimant has not been substantially deprived of its investment, the Tribunal has taken into account its determination of the overall value of the Claimants' investment***, as set out in Section B below. As determined in Section B, the amount of money invested by the Claimant in the Project – its sunk costs – do not substantially exceed, if at all, the value of the security deposit. Consequently, although the Tribunal accepts (as determined in Section B below) that ***the Claimant's investment consists not only of the sunk investment costs and the security deposit, but also of the value created by the Claimant in developing the Project***, the value of the asset that is still available to the Claimant as it has not been taken (i.e., the security deposit) is substantial, in particular when compared to the overall value of the investment. In the circumstances, ***the Tribunal is unable to conclude that the Claimant has been substantially deprived of the value of its investment***.

and paragraph 483 regarding the consequences following the finding of no expropriation:[866]

> 483. While the Tribunal considers that this is the proper valuation of the Project, it should be kept in mind that, as determined above, ***the Claimant is not entitled to compensation for the full value of its investment: the Claimant has not lost the letter of credit, which is still in place, and the FIT Contract is still in force and could, in theory, be still revived and renegotiated if the Parties so agreed***. Consequently, in order to quantify the damage caused by the Respondent's breach to the value of the Claimant's investment, ***a further adjustment must be made to reflect the value of the letter of credit (CAD 6 million)***. On the other hand, the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, ***as at the date of this award, the FIT Contract cannot be considered to have any value***. (It is another matter that the Parties

866 *Windstream I* Award, para. 483 [Emphasis added].

> can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them.)

382. As the Tribunal has found above at **Section IV.A**, the disputing parties are bound by the findings of fact in the *Windstream I* Award *i.e.*, there was no expropriation up to the *Windstream I* Award on the basis that the Claimant had not "*been substantially deprived of the value of its asset*" at that time. The Tribunal has found above that collateral estoppel bars the disputing parties from re-litigating in *Windstream II* the findings of fact upon which that determination was based.

383. The expropriation question for this Tribunal is, therefore, whether or not the conduct of the Respondent following the *Windstream I* Award constitutes expropriation, given that the FIT Contract is now indisputably no longer in force and was not revived, reactivated or renegotiated following the *Windstream I* Award.

(i) The Applicable Standard

384. The *Windstream I* Award sets out its findings as to the NAFTA standard for expropriation at paragraphs 284 to 287 as follows:[867]

> 284. NAFTA tribunals have generally taken the view that under Article 1110 of NAFTA the determination of whether an indirect expropriation has taken place is in the first place a matter of evidence, that is, a factual determination of whether an effective or *de facto* taking of property that is attributable to the State has taken place, even if there has been no formal transfer of title, and even if the host State has not obtained any economic benefit. If it is determined that such a *de facto* taking has indeed taken place, the issue arises as to whether the taking is lawful, and what the appropriate form and level of relief should be. In certain circumstances, the question may also arise as to whether the alleged taking is excused by a justification provided under international law, such as the police powers doctrine.

867 *Windstream I* Award, paras. 283 to 287 and fns. 573 to 576, which refer to: [573] "[i]n making its determination on this and other issues, the Tribunal has reviewed and considered the submissions of the United States and Mexico pursuant to Article 1128 of NAFTA"; [574] **CL-023**, *ADM v. Mexico*, para. 240; [575] **CL-031**, *Cargill v. Mexico*, para. 360 [Footnotes omitted]; [576] **CL-062**, *Metalclad v. Mexico*, para. 103.

285. The Tribunal agrees that the first step in the process of determining whether an effective taking has taken place is to determine whether the investor has been substantially deprived of the value of its investment.[573] This is a test that has been applied by numerous investment treaty tribunals, including NAFTA tribunals. Thus, in *ADM v Mexico*, the tribunal held:

> "The test on which other Tribunals and doctrine have agreed – and on which the Claimants' [sic] rely – is the 'effects test.' Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. There is a broad consensus in academic writings that the intensity and duration of the economic deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure."[574]

286. The *Cargill v Mexico* tribunal similarly stressed that a finding of expropriation requires "radical deprivation of the Claimant's economic use and enjoyment of its investment:"

> "It is widely accepted that a finding of expropriation of property under customary international law requires a radical deprivation of a claimant's economic use and enjoyment of its investment. This is the consistent view of previous NAFTA tribunals. '[T]he affected property must be impaired to such an extent that it must be seen as 'taken.'' 'The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).' It is a view also stated in numerous BIT arbitrations. Therefore, putting to the side the question of sufficiency of the duration of the interference, the Tribunal must find a radical deprivation of the Claimant's economic use and enjoyment of its investment for the period of the interference."[575]

287. In *Metalclad v Mexico* the tribunal analyzed the distinction made in Article 1110 of NAFTA between direct and indirect expropriation, noting that both require "*the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property*."

> "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."

385. This Tribunal sees no reason to deviate from the expropriation standard as set out in the *Windstream I* Award, and does not understand the disputing parties to do so either. In summary, the standard for determining whether or not there has been an effective or *de facto* taking of property attributable to the host State, is based on:

a. substantial deprivation;

b. using an "*effects test*", *i.e.*, that the severity of the economic impact is the decisive criterion in determining whether or not an indirect expropriation or measure tantamount to expropriation has taken place;

c. with intensity and duration of economic deprivation as the crucial factor;

d. involving "*radical deprivation of the Claimant's economic use and enjoyment of its investment for the period of the interference*"; and

e. having "*the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property*".

386. Ultimately, the *Windstream I* Award determined that there had been no taking, primarily for the reasons explained in paragraphs 290 and 291 of the Award, namely that, as at the date of that Award, "*on the facts, the Claimant has not been substantially deprived of its investment*",[868] because: (i) the "*FIT Contract is still formally in force*" and "*it continues to remain open for the Parties to re-activate and, as appropriate, renegotiate* [it] *to adjust its terms to the moratorium*" and (ii) "*the Claimant's CAD 6 million security deposit is still in place and has not been*

868 *Windstream I* Award, para. 291.

taken or rendered otherwise worthless as a result of any action taken by the Government of Ontario".[869]

387. As it found no taking, the *Windstream I* Award therefore did not need to consider whether or not:[870]

a. any "*taking is lawful*";

b. "*what the appropriate form and level of relief should be*"; or

c. "*whether the alleged taking is excused by a justification provided under international law, such as the police powers doctrine*".

388. According to the Respondent, if this *Windstream II* Tribunal were to consider those factors, it must take into account that, at the time of the *Windstream II* proceedings, the measures at issue did not significantly interfere with any "*distinct, reasonable, investment-backed expectations*" held by the Claimant, due to:[871]

a. "*the regulatory regime in place at the time of investment*";[872]

b. the "*normal commercial risks of a foreign investor*", which it submits the NAFTA Article 1110 does not eliminate, and nor does it place on the host State "*the burden of compensating a foreign investor for the failure of a business plan that was not prudent in the circumstances*;[873]

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869 *Windstream I* Award, para. 290.

870 *Widstream I* Award, para. 284.

871 Counter-Memorial, paras. 181 to 187.

872 Counter-Memorial, para. 181 *citing* **RL-016**, Jack Coe, Jr., and Noah Rubins, "Regulatory Expropriation and the Tecmed Case: Context and Contributions*", in Todd Weiler, Ed ed., "International Investment Law and Arbitration: Leading Cases From Thefrom the ICSID, NAFTA, Bilateral Treaties Andand Customary International Law*"," (2005)), p. 624.

873 Counter-Memorial, para. 181 *citing Waste Management v. US (II),* Award, para. 160 "[i]t is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise", and para. 177 "[i]t is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance."; **RL-025**, *Fireman's Fund v. Mexico*, paras. 184, 218 "The NAFTA, like other free trade agreements and bilateral investment treaties, does not provide insurance against the kinds of risks that FFIC assumed […]".

c. the Claimant's own precarious situation following the *Windstream I* Award;[874]

d. it not being "*reasonable for the Claimant to conclude from the* Windstream I *tribunal's statement that the parties had the option of renegotiating or reactivating the FIT Contract, that it expected Ontario would do so*", on the basis that "[a]*n option is not an obligation*";[875]

e. the Claimant's acknowledgement in the *Windstream I* proceedings that "[t]*here is no indication on the record that the Ontario Government truly intends to lift the moratorium in the near future, or at all*";[876]

f. the Claimant's numerous attempts to reactivate the FIT Contract, which did not occur, including because Ontario still had "*not developed an offshore wind policy framework on approval requirements*", or "*developed a process for obtaining Crown land site access under the Public Lands Act*", that the "*Ministry has not published any final guidelines or policies specific to offshore wind*" and did "*not endorse any of the studies that* [Windstream] *has conducted in the absence of any provincial policy framework on offshore wind*";[877]

g. the Claimant's "*true expectations*" as it expressed in domestic proceedings to restrain the IESO from terminating the FIT Contract, that "*by May of 2012, its Project could not be financed and was 'effectively cancelled' in light of the period that would be required to re-start the Project, confirm regulatory requirements, obtain the required approvals, complete development work and build the Project*";[878] and

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874 Counter-Memorial, para. 182 *citing Nelson & Blanco v. Mexico*, para. 281, where the Claimant "had, at best, a business opportunity, a bet based on its own interpretations and speculations, that was proven wrong".

875 Counter-Memorial, para. 183 *citing Windstream I* Award, para. 483.

876 Counter-Memorial, para. 184 *citing Windstream I* Reply, para. 485.

877 Counter-Memorial, para. 185.

878 Counter-Memorial, para. 186 *citing Windstream I* Memorial, para. 318 and *Windstream I* Reply, para. 405.

h. the Claimant's reliance being based on alleged promises made prior to the *Windstream I* Award and almost 10 years prior that the Project would advance.[879]

389. The Claimant argues that this is an attempt by the Respondent to introduce a broad public-policy exemption from expropriation provided the aforementioned factors are present.[880] The Tribunal does not consider the Respondent's reference to the Claimant having no "*distinct, reasonable, investment-backed expectations*" to support a position that a broad public policy exemption from expropriation will exist provided those factors are present. Instead, the Tribunal considers the factors set out by the Respondent to relate to the facts existing in relation to the specific legacy investment assets in this case, following the *Windstream I* Award, in the form of a FIT Contract that remained terminable (on its terms) and a security deposit that remained refundable (and was refunded). In assessing whether or not these legacy assets had value at the date of the alleged taking, given the specific facts of this particular case, it is logical to consider the factors identified by the Respondent in order to examine any expectations associated with those assets.

390. As to the standard for expropriation, the Tribunal accepts that the NAFTA Article 1110 four criteria apply,[881] requiring that a taking be: (i) for a public purpose; (ii) on a non-discriminatory basis; (iii) in accordance with the due process of law and Article 1105(1); and (iv) accompanied by compensation paid in accordance with Articles 1110(2) to (6)).[882]If one or more of those requirements is not met, there is presumptively an unlawful expropriation entitling the Claimant to a determination of the appropriate form and level of relief.

391. The Tribunal accepts this characterisation of the applicable standard in the NAFTA Article 1110. This broadly accords with the findings in the *Windstream I* Award, as well as prior awards that, in assessing lawfulness, a tribunal "*does not need to*

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879 Counter-Memorial, para. 187 *citing Windstream I* Memorial, para. 318 and *Windstream I* Reply, para. 405.

880 Reply, para. 347.

881 Reply, paras. 346 to 354. *Windstream I* Award, paras. 284 to 285; Memorial, paras. 463 to 475.

882 Memorial, para. 464.

consider the motivation or intent of an ecological regulatory measure to determine that the measure was expropriatory",[883] and that, "[i]*f there is a finding of expropriation, compensation is required,* even if*, the taking is for a public purpose, non-discriminatory and in accordance with due process of law*".[884]

392. However, the NAFTA Article 1110 remains subject to the separate question as to "*whether the alleged taking is excused by a justification provided under international law, such as the police powers doctrine*".[885] Both disputing parties appear in their submissions in *Windstream II* to accept the existence of an excuse doctrine based on exercise of police powers, although there appears to be disagreement as to its scope and requirements.

393. In this regard, the Respondent submits that a separate factor for tribunals to consider is "*the character of the measure in question to determine whether it can amount to an indirect expropriation requiring compensation*".[886] In this regard, the Respondent:

a. summarises that: "[m]*any types of government regulation will have effects on an investment, and potentially even significant and negative effects without amounting to an expropriation*";[887]

b. elaborates that indirect expropriation, or indeed direct expropriation, "*does not function so as to limit the policy space of governments to such an extent that they are handcuffed in their ability to regulate in the public interest*"; and

c. appears to invoke police powers relying on the prior awards including:[888]

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883 **CL-062***, Metalclad v. Mexico*, para. 111.

884 **RL-024**, *Feldman v. Mexico*, para. 98 [Emphasis in original].

885 *Windstream I* Award, para. 284.

886 Counter-Memorial, para. 188 *citing* **CL-084**, *Tecmed v. Mexico*, paras. 115, 122; **RL-024**, *Feldman v. Mexico*, para. 103; **CL-081**, *S.D. Myers v. Canada*, Partial Award, para. 281; **CL-023**, *ADM v. Mexico*, para. 250; **CL-063**, *Methanex v. US*, Award, para. 7.

887 Counter-Memorial, para. 184 *citing Windstream I* Reply, para. 485.

888 Counter-Memorial, paras. 188 to 191.

i. *Feldman v. Mexico*, stating that that "*governments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like*", and therefore that "[r]*easonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this*";[889]

ii. *Suez InterAgua v. Argentina*, stating that "*in evaluating a claim of expropriation it is important to recognize a State's legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation*",[890] further submitting that "*NAFTA tribunals have approached and applied the doctrine the same way*";[891] and

iii. *Chemtura v. Canada*, which found that Canada's ban on lindane did not amount to a substantial deprivation of the claimant's investment (in lindane-based pesticide manufacturing), and stating that the government agency "*took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment*", and that "[a] *measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation*".[892]

394. Regarding the applicable standard for police powers, the Tribunal notes its broad agreement with statements in prior awards, including *Feldman v. Canada*,[893] *Suez*

889 Counter-Memorial, para. 188 *citing* **RL-024** *Feldman v. Mexico*, para. 103.

890 Counter-Memorial, para. 189 *citing* **RL-050** *Suez Interagua v. Argentina*, Decision on Liability, para. 128.

891 Counter-Memorial, para. 189.

892 Counter-Memorial, para. 189 *citing* **CL-037** *Chemtura v. Canada*, para. 266.

893 **RL-024***, Feldman v. Mexico*, para. 103.

Interagua v. Argentina,[894] and *Chenture v. Canada,*[895] (as above). As to the Claimant's position that prior awards only recognise a "*narrow exemption to expropriation if a measure falls within the police powers doctrine*",[896] the Tribunal notes that the Claimant relies on further submissions that:

a. the doctrine has only been applied by tribunals in "*exceptional circumstances where the respondent state has provided clear evidence that there was imminent or serious risk to human health or financial stability*";[897]

b. "[t]*ribunals have also held that the doctrine will only apply in the following circumstances*" when the measure:[898]

   i. "*is truly necessary and proportionate to its stated rationale*";[899]

   ii. "*is not contrary to the investor's legitimate expectations*";[900]

   iii. "*does not otherwise breach international obligations*";[901]

   iv. "*is not contrary to domestic law*";[902]

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894 **RL-050**, *Suez InterAgua v. Argentina*, Decision on Liability, para. 128.

895 **CL-037**, *Chemtura v. Canada*, para. 266.

896 Reply, para. 350 *citing* **CL-074**, *Pope & Talbot v. Canada*, Interim Award, para.99; **CL- 041,** *Vivendi v. Argentina (II)*, para. 7.5.21; **CL-164**, *Quiborax v. Bolivia*; **CL-029**, *Burlington v. Ecuador*, Decision on Liability, para. 506; **CL-084**, *Tecmed v. Mexico*, para. 119; **CL-080**, *Saluka v. Czech Republic,* Partial Award, paras. 258 and 263.

897 Reply, para. 350 *citing* **CL-191**, *Philip Morris v. Uruguay*, paras. 284 to 286; **CL-080**, *Saluka v. Czech Republic*, Partial Award, paras. 262 to 265, 270 to 275 (in privatizing its banking industry, the host State "engaged in the forced administration of a bank in which the claimant held shares when it appeared the bank was in crisis and its circumstances endangered the stability of the Czech banking system"); **CL-037**, *Chemtura v. Canada*, para. 266 (in enacting a chemical ban, the host State validly exercised the police powers doctrine as "the evidence clearly demonstrated the dangers posed by lindane to human health and the environment").

898 Reply, para. 350.

899 *Citing* **CL-084**, *Tecmed v. Mexico*, para. 122; **CL-029**, *Burlington v. Ecuador*, Decision on Liability, paras. 528 to 529; **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 522; **CL-025**, *Azurix v. Argentina*, para. 311; **CL-059**, *LG&E v. Argentina,* Decision on Liability, paras. 189, 195.

900 *Citing* **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 523.

901 *Citing* **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 523.

902 *Citing* **CL-029**, *Burlington v. Ecuador*, Decision on Liability, para. 529; **CL-164**, *Quiborax v. Bolivia*, paras. 214, 221, 227.

c. "*violation of an investor's legitimate expectations is a reason the police powers doctrine cannot apply to exempt the government conduct from liability*", but not "*a requirement to establish an expropriation*"; and

d. there is "*no basis in the text of Article 1110 or the jurisprudence for that requirement*".

395. The Tribunal does not understand the Respondent to be making an argument that legitimate expectations are a necessary predicate for expropriation. The Claimant's understanding of this appears to be based on the Respondent's arguments concerning the effect of the measures (*i.e.*, whether or not there was an investment to be interfered with) as opposed to the character of the measures (*i.e.*, a state's legitimate right to exercise its police powers). The *Windstream I* Award clearly found that, "[i]*n certain circumstances, the question may also arise as to whether the alleged taking is excused by a justification provided under international law, such as the police powers doctrine*".[903] This Tribunal accepts the existence of such excuse doctrine pursuant to international law and, in so far as the Claimant submits that this is not permitted by the NAFTA, Article 1110, it rejects that submission.

396. As the doctrine of police powers operates to excuse or justify an otherwise unlawful expropriation based on one or more of the four express conditions for lawfulness in NAFTA Article 1110, it must therefore require circumstances beyond those set out in the language of Article 1110. For example, it is not enough that the taking was for a public purpose; if it is unaccompanied by appropriate compensation it is presumptively unlawful. Similarly, it is not enough that the taking was in accordance with law and due process; again if unaccompanied by appropriate compensation it is presumptively unlawful. For the police powers doctrine to operate at international law so to excuse compensation, something more is required.

397. In that respect, a host State indeed maintains the right to govern and to regulate. As both disputing parties have alluded to in various contexts, proper exercise of the right to regulate is critical to global transition to renewable energy in response to

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[903] *Windstream I* Award, para. 284.

climate change (risk, commitments and international treaties). If, in the course of regulating, a host State, directly or indirectly expropriates a foreign investor's property, which is subject to protection from expropriation at international law, the host State must provide compensation. In this regard, the Tribunal affirms the statement in the *Feldman v. Mexico* prior award (at para. 376(c)(i) above), which is particularly pertinent in the context of climate change related measures required pursuant to international law that: "*governments must be free to act in the broader public interest through protectiveness of the environment*."

398. The police powers doctrine cannot serve to remove the obligation to provide compensation for taking of property, except in the most limited of circumstances. Prior awards offer some insight into such circumstances. According to the Claimant these are limited to issues of public health or a financial systems crisis. The Tribunal does not accept that subject-matter limits to the police powers doctrine exist; if the circumstances call for the exercise of police powers then the subject-matter is secondary. For example, police powers conceivably may be exercised in response to energy security, climate change risk, climate change induced extreme weather event or environmental catastrophe or other such reasons.

399. The requirement is that the taking by reason of police powers must be truly necessary and proportionate to its stated rationale,[904] not otherwise breach international obligations,[905] and not contrary to domestic law.[906]

400. Ultimately, these factors effectively distil down to the Respondent's requirements for consideration of the character of the measures (*i.e.*, necessary and proportionate to the stated rationale, not otherwise in breach of law). As to the role of legitimate expectations in this analysis, the Tribunal accepts the Respondent's characterisation

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904 **CL-084**, *Tecmed v. Mexico*, para. 122; **CL-029**, *Burlington v. Ecuador*, Decision on Liability, paras. 528 to 529; **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 522; **CL-025**, *Azurix v. Argentina*, para. 311; **CL-059**, *LG&E v. Argentina* Decision on Liability, paras.189, 195.

905 **CL-043**, *Deutsche Bank v. Sri Lanka*, para. 523.

906 **CL-029**, *Burlington v. Ecuador*, Decision on Liability, para. 529; **CL-164**, *Quiborax v. Bolivia*, paras. 214, 221, 227.

of consideration of the investor's "*reasonable, investment-backed expectations.*" As stated in Feldman,

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.

401. The Tribunal accepts the Respondent's characterisation in relation to each of the elements for expropriation and the police powers doctrines as follows:

    a. analysis must be undertaken against "*the regulatory regime in place at the time of investment*";[907] and

    b. NAFTA Article 1110 "*does not eliminate the normal commercial risks of a foreign investor*", or place on the host State "*the burden of compensating a foreign investor for the failure of a business plan that was not prudent in the circumstances*".[908]

402. On the basis of that applicable legal standard as determined in part by the *Windstream I* Award, and to the extent not so determined as set out above, the Tribunal proceeds below to apply the law to the facts.

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907 **RL-016**, Jack Coe, Jr., and Noah Rubins, 'Regulatory Expropriation and the Tecmed Case: Context and Contributions', in Todd Weiler (ed.) *International Investment Law and Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties And Customary International Law* (2005), p. 624.

908 **CL-091**, *Waste Management v. US (II)*, Award, para. 160 "It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise", and para. 177 "[I]t is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance."; **RL-025**, *Fireman's Fund v. Mexico*, paras. 184, 218 "The NAFTA, like other free trade agreements and bilateral investment treaties, does not provide insurance against the kinds of risks that FFIC assumed [...]".

(ii) Application of the Standard

403. In applying the NAFTA Article 1110 standard to the claims in this *Windstream II* arbitration, as set out above, the Tribunal considers itself bound to the decisions on issues in the *Windstream I* Award, to the extent there were necessary steps in the reasoning in determining the causes of action in that Award (*i.e.*, they are not *obiter dictum*).

404. The relevant *Windstream I* Award findings based on facts that this Tribunal considers itself bound by regarding expropriation include that, as at the date of that Award: [909]

a. "*the Claimant's FIT Contract* [was] *still formally in force and has not been unilaterally terminated by*" Ontario;

b. "*the Project* [could] *no longer be completed by the MCOD, 4 May 2017*";

c. "*it continue*[d] *to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium*";

d. "*the Claimant's CAD 6 million security deposit* [was] *still in place and has not been taken or rendered otherwise worthless as a result of any action taken by*" Ontario;

e. "*the Respondent cannot terminate* […] *the FIT Contract pursuant to Article 10.1(g) without returning the security*";

f. "[i]*t therefore cannot be said that the Claimant* [had] *been substantially deprived of its investment*";

g. regarding substantial deprivation, the tribunal "[took] *into account its determination of the overall value of the Claimant's investment*"; and

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[909] *Windstream I* Award, paras. 290, 291.

h. "*the value of the asset that* [was] *still available to the Claimant as it has not been taken (i.e. the security deposit) is substantial*".

405. Therefore, the *Windstream I* Award treated the FIT Contract and the security deposit as coterminous. Its reasoning at paragraphs 290 and 291 deals with both and with their interdependence: the FIT Contract cannot be lawfully terminated unless the security deposit was returned. The security deposit was a creature of the FIT Contract; there remained a risk of it being retained in breach of the FIT Contract terms.

406. It was entirely reasonable for the Claimant, and indeed the *Windstream I* tribunal, to be mindful of a future risk of the security deposit being unlawfully retained. The *Windstream I* tribunal had determined that the Respondent had already breached the minimum standard of treatment based on its conduct dealing with the Claimant and its investment prior to the *Windstream I* Award. Having ordered that the Respondent compensate for that breach in damages, the Tribunal recognised that the Claimant retained substantial value in that investment (*i.e.*, the CAD 6 million security deposit) that had not (yet) been expropriated.

407. As noted above in **Section IV.A**, logically, a retained investment with substantial value after the *Windstream I* Award compensation is an investment that gives rise to ongoing investment protection after the *Windstream I* Award.

408. The *Windstream I* Award does not expressly deal with the coterminous nature of the FIT Contract and security deposit provided pursuant to its terms. However, it is implicit that: (i) as long as the FIT Contract remained formally in force, the security deposit would be retained; and (ii) on termination on the FIT Contract the security deposit had to be returned as a matter of law. In other words, they stand or fall together. One cannot lawfully exist, or cease to exist, without the other doing the same.

409. Consequently, this Tribunal considers that the *Windstream I* Award paragraphs 290 and 291 are intended to be read to treat the surviving (but unilaterally terminable) FIT Contract and the security deposit as two parts of a whole; a whole that the

tribunal considered to be a substantial value of the asset in the sum of CAD 6 million. In so far as the *Windstream I* Award placed any other value on the FIT Contract, that value was compensated with the CAD 25 million damages. That is, any additional value created by the Claimant in developing the Project (referred to the *Windstream I* Award, paragraph 291), took into account the totality of the Project but for the breach, which included an ongoing FIT Contract that would not become terminable on its terms before the Project could be completed. That was lost as a consequence of the Respondent's conduct following the Moratorium, when the delay gave rise to a contractual right to terminate prior to Project completion. That loss was inherently tied to the Project as a whole and, therefore, was compensated. The remaining asset in the form of a FIT Contract subject to unilateral termination was a legal instrument, which in the *Windstream I* tribunal's view, had no monetary value (save for its contentious security deposit) unless it could be revived, reactivated or renegotiated.

410. As set out above, after the Notice of Intent in *Windstream II*, on 20 February 2020, IESO directed the Claimant's bank to cancel the CAD 6 million letter of credit and the amount was returned to the Claimant. Consequently, by the time of the Notice of Arbitration in December 2020, the Claimant was not deprived of an asset of substantial value in the form of its security deposit. At the date of the *Windstream I* Award it was not so deprived for a different reason: the security deposit was "*still available to the Claimant as it had not been taken.*"[910] Now, it is also not deprived because the security deposit amount has been returned to it.

411. Nevertheless, the Claimant continued to pursue the *Windstream II* arbitration seeking to recover compensatory damages for value of WWIS and the Project lost as a result of the Respondent's conduct following the *Windstream I* Award. This requires it to establish a taking in respect of any continued or new investment following the *Windstream I* Award. There was no new investment and the only legacy assets following the *Windstream I* Award were limited to:

910 *Windstream I* Award, para. 291.

a. a terminable FIT Contract, which could have been (but was not) reactivated or renegotiated; and/or

b. a CAD 6 million security deposit, which could have been retained, but was not.

412. The Claimant nevertheless submits that the Project appreciated in value from the date of the *Windstream I* Award, and/or that the FIT Contract had independent value prior to its termination (on its terms) despite never having been re-activated or renegotiated and despite its associated security deposit having been returned to the Claimant in full.

413. According to the Claimant, the alleged appreciation of value is a question of quantum. It has submitted expert evidence in support of its proposed valuation at 10 times the value attributed in *Windstream I* for the same asset 10 years earlier. It is fair to say that investment assets may appreciate (or indeed depreciate) over time. It is also fair to say that valuation model outcomes may be impacted by change in valuation dates or other variables. However, the reason for those changes is usually intervening events between the alternative dates for valuation.

414. In this case, the events that occurred between the date of the valuation date in *Windstream I* (*i.e.*, the Award date of 27 September 2016) and the valuation date in *Windstream II* (*i.e.*, the date of unilateral termination on 18 February 2020) are the basis for the alleged expropriation.

415. The *Windstream I* Award at paragraph 482 valued WWSI and the Project in full at EUR 21 million. At paragraph 483, the *Windstream I* Award made three further findings:

a. EUR 21 million "*is the proper valuation of the Project*";

b. "*the Claimant is not entitled to compensation for the full value of its investment*" because:

i. it "*has not lost the letter of credit*";

ii. "*the FIT Contract is still in force and could, in theory, be still revived and renegotiated if the Parties so agreed*"; and

iii. adjustment must be made to reflect value of the letter of credit (CAD 6 million).

416. More importantly, for the purpose of this expropriation discussion, the *Windstream I* Award further determined that:

> […] the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value. (It is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them.)

417. In light of those determinations, given this Tribunal's approach to collateral (or issue) estoppel, it is only open to the Claimant to recover compensation for any additional loss based on appreciation created by the disputing parties "*by reactivating and renegotiating the FIT Contract after the* [*Windstream I*] *award*."

418. As a matter of fact, despite the *Windstream I* Award's reference to the option that the FIT Contract may be re-activated or renegotiated by the contracting parties, by the time of IESO's notice of unilateral termination, the FIT Contract was as it had been at the date of the *Windstream I* Award: unactivated and unnegotiated. It remained, in accordance with its terms and governing national law, unilaterally terminable by IESO, provided the security deposit was returned (which it was). Therefore, there is no taking as required for expropriation.

419. Consequently, the Claimant argues, among other things, that IESO's failure to reactivate and renegotiate the FIT Contract, and the Ontario Government's failure to intervene and to direct it to do so, was or contributed to the expropriation of the FIT Contract. Again, given the Tribunal's position on collateral estoppel, this

allegation must be examined against the *Windstream I* Award findings at paragraphs 290, 291 and 483, in particular that:

a. the Award found that the FIT Contract had no value, unless subsequently created by reactivation and renegotiation after the *Windstream I* Award;

b. any such reactivation or renegotiation was an "*option* […] *open to them*"; and

c. such "*option*" was not accompanied by any order or direction by the *Windstream I* tribunal to renegotiate or any other legal obligation pursuant to contract or Ontario law, or indeed international law.

420. As the Respondent pointed out, an option is not an obligation. Therefore, there was no value in the FIT Contract at the date of the *Windstream I* Award, and no value created subsequent to that Award unless the Respondent chose to reactivate or renegotiate. It did not choose to do so and therefore the consequence is that the FIT Contract continues to have no value.

421. Therefore, as the FIT Contract was terminated on its terms and the security deposit returned, there was no taking. Moreover, there was no unlawfulness in the termination, or failure to reactivate or renegotiate. The option to revive, reactivate or renegotiate the FIT Contract referred to by the *Windstream I* Award was not an obligation or right. It did not exist on the FIT Contract terms, or pursuant to its governing national law, and it was not created in international law by virtue of the *Windstream I* Award.

422. In summary, the Tribunal finds that:

a. loss of the value of the Project and WWIS arising out of the Claimant's development, was fully compensated in the *Windstream I* Award, save for the value of its then retained asset in the form of the unilaterally terminable FIT Contract and its coterminous security deposit in the sum of CAD 6 million;

b. the *Windstream I* Award found no expropriation at the date of that Award on the basis that "*the Claimant's CAD 6 Million security deposit was still in place and has not been taken or rendered otherwise worthless as a result of any action taken by the Government of Ontario*";[911]

c. the *Windstream I* Award found further that:

   i. pursuant to "*Article 10.1(g) of the FIT Contract, if by reason of* force majeure *the MCOD is delayed for an aggregate of more than 24 months (which is the case here), completion and performance security will be returned at the time of termination of the agreement by either party*"; and

   ii. "*the Respondent cannot terminate, and indeed confirmed at the hearing that it would not be able to terminate, the FIT Contract pursuant to Article 10.1(g) without returning the security*";

d. the *Windstream I* Award further attributed no further value to the FIT Contract at the date of that Award, "*to reflect the fact that* […] *although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value*";[912] and

e. although the *Windstream I* Award recognises that "*the Parties can create such value by reactivating and renegotiating the FIT Contract after the award*",[913] they did not as a matter of fact do so and the Respondent was under no legal obligation to do so.

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911 *Windstream I* Award, para. 290.

912 *Windstream I* Award, para. 483.

913 *Windstream I* Award, para. 483.

423. The Respondent ultimately did terminate and did return the security in full in the sum of CAD 6 million. There was no expropriation in respect of either of those assets and, as set out above, there was no other asset at the time of termination. The *Windstream I* Award compensated the Claimant in full for the Respondent's breach of international law; the *Windstream I* Award did not create new obligations that could be subject to further or future compensation. For these reasons, the Tribunal rejects the Claimant's Expropriation Claim.

VI. THE CLAIMANT'S FAIR AND EQUITABLE TREATMENT (FET) CLAIM

424. The Claimant further seeks to hold the Respondent liable for failing, post-*Windstream I*, to grant its investments fair and equitable treatment ("**FET**") in violation of NAFTA Article 1105(1),[914] which provides:[915]

> 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.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
>
> 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

425. According to the Claimant, Article 1105(1) "*guarantees foreign investors fair and equitable treatment of their investments in accordance with the minimum standard of treatment under customary international law*".[916] The Respondent submits that (i) Article 1105 legal standard is high, (ii) its conduct was not manifestly arbitrary or grossly unfair, (iii) its conduct was not discriminatory, and (iv) it was not in

914 Memorial, para. 476.

915 NAFTA, Article 1105(1) (**C-1**).

916 Reply, para. 355.

breach of any legitimate expectations. According to the Claimant, this "*narrow interpretation of the NAFTA's FET protections*", is "*not in keeping with the standard that has been well-established by international tribunals*", and "[a]*ll NAFTA tribunals to which Canada has proposed this interpretation have rejected it*".[917]

426. The question for this Tribunal is whether or not, following the *Windstream I* Award, Ontario had an obligation to intervene and direct IESO to ensure that WWIS' rights under the FIT Contract were not terminated. The Claimant argued that it did because failure to do so would continue a "*course of conduct that was already found to be unfair and inequitable, i.e., the failure to act and rectify the 'legal and contractual' limbo Ontario created*".[918] It submits that the Respondent's:

> […] failure to do so created the conditions that led to the wrongful termination of the FIT Contract. This was contrary to the promises made to Windstream and the representations made to the *Windstream I* tribunal: that the Project was only on hold and could proceed once the temporary Moratorium was lifted.

427. According to the Claimant, the conduct was also arbitrary and capricious, there being no "*valid reason for Ontario's failure to intervene or for the IESO to terminate*", (including "*in light of Ontario's current energy needs*"), and "*inconsistent with the way other FIT contract holders have been treated*", in violation of NAFT Article 1105(1).[919]

A. APPLICABLE STANDARD

428. It is common ground between the disputing parties that:

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917 Reply, para. 356.

918 Reply, para. 357.

919 Reply, para. 357.

a. the investor's legitimate expectations, in so far as they arise out of specific commitments, are relevant to the NAFTA Article 1105 fair and equitable treatment standard of protection;[920] and

b. the acts and omissions of an organ of the Ontario Government are attributable to the Respondent.[921]

429. In all other respects, the disputing parties disagree as to the applicable standard for fair and equitable treatment.

(i) The Claimant's Position

430. According to the Claimant, NAFTA Article 1105(1) requires the Respondent to grant the Claimant's investments "*treatment in accordance with international law, including fair and equitable treatment*…", which it describes as:[922]

a. a "*well-established standard*";

b. articulated in the prior award in *Waste Management II*, as requiring that a host State must not act in a manner that is "*arbitrary, grossly unfair, unjust or idiosyncratic,* [or] *is discriminatory*", among other things;[923] and

c. in relation to which treatment in breach of representations made by the host State, which were reasonably relied on by investor, is relevant.[924]

431. The Claimant submits that in these *Windstream II* proceedings, the Respondent is "[r]*epeating its argument from* Windstream I *and many other NAFTA cases*", which the Claimant argued has been rejected, namely that:[925]

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920 Memorial, para. 478; Reply, paras. 358, 395; Rejoinder, para. 106; **CL-91**, *Waste Management v. US (II)*, para. 98; **CL-064**, *Mobil Investments v. Canada,* para. 152.

921 *See above* para. 313 and accompanying footnotes also regarding acts and omissions of the IESO.

922 Reply, paras. 358 to 359.

923 Reply, para 358; Memorial, paras. 478 to 483; **CL-091**, *Waste Management v. US (II),*Award, para. 98.

924 **CL-091**, *Waste Management v. US (II),* Award, para. 98.

925 Reply, para. 359; Counter-Memorial, paras. 202 to 203; **CL-053**, *Glamis Gold v. US*, paras. 612 to 616.

a. the threshold for proving a violation of Article 1105(1) is "*extremely high*";

b. "*the impugned conduct must have been "egregious or shocking…such as serious malfeasance, manifestly arbitrary behaviour, or denial of justice by the respondent NAFTA party*"; and

c. the standard is "*exacting*".

432. In support of its position, the Claimant relies on the prior award *Waste Management II*, as well as prior awards following its reasoning including:[926]

a. *Bilcon v. Canada*, finding the prior award in *Waste Management II* tribunal to be particularly influential and rejecting that the required standard "*reaches the level of shocking or outrageous behaviour*";[927]

b. *Mesa Power v. Canada*, finding that the prior award in *Waste Management II* correctly identified the content of NAFTA Article 1105 and rejecting that the required standard must be "*egregious and shocking*";[928]

c. *Resolute Forest Products v. Canada*, not accepting the *Glamis Gold* standard, affirmatively quoting other NAFTA awards including *Waste Management II*;[929]

d. *Windstream I*, rejecting the *Glamis Gold* standard, finding it "*inconsistent with the plain meaning of Article 1105, which require*[s] *'fair and equitable' treatment*", and as to the meaning of fair and equitable that: "*just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts*";[930]

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926 Reply, para. 360.

927 **CL-157**, *Bilcon v. Canada*, paras. 442 to 444.

928 **CL-163**, *Mesa v. Canada*, paras. 488, 496, 500, 501.

929 **CL-194**, *Resolute Forest v. Canada*, paras. 669, 738 to 742.

930 *Windstream I* Award, paras. 354 to 362. Canada also unsuccessful made this argument in **CL-061**, *Merrill & Ring v. Canada,* Award, paras. 209, 213.

e. *Mondev v. United States of America*, "[t]*o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious*";[931] and

f. *International Thunderbird*, according to the Claimant that, "[t]*he minimum standard should not be rigidly interpreted and should reflect evolving customary international law*".[932]

433. As to the Respondent's reliance on the applicable standard based on the prior award in *Glamis Gold*, requiring "*egregious or shocking*" conduct, the Claimant submits that its reasoning:[933]

a. "*rested entirely on* [the tribunal's] *finding that it was bound to apply the standard from the 1926* Neer *decision absent evidence that the minimum standard of treatment under customary international law had evolved since* Neer";[934]

b. has consistently been rejected by:

i. NAFTA tribunals,[935]

ii. other tribunals applying the minimum standard of treatment;[936] and

iii. commentators such as Judge Stephen Schwebel;[937] and

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931 **CL-066**, *Mondev v. US*, Award, para. 116.

932 **CL-057**, *Thunderbird v. Mexico,* para. 194. *See also* **CL-022**, *ADF Group. v. US,* paras.179 to 186; **CL-053,** *Glamis Gold v. US*, paras. 612 to 616.

933 Reply, paras. 359 to 362.

934 Reply, para. 362.

935 **CL-037**, *Chemtura v. Canada*, para. 121; **CL-140**, *Pope & Talbot v. Canada*, Award on Damages, para. 65; **CL-091**, *Waste Management v. US (II)*, Award, para. 93; **CL-061**, *Merrill & Ring v. Canada,* Award, para. 204; **CL-022**, *ADF Group v. US*, para. 179; **CL-157**, *Bilcon v. Canada*, paras. 433 to 441; **CL-066**, *Mondev v. US*, Award, paras. 115 to 125.

936 **CL-085**, *TECO v. Guatemala*, paras. 449 to 455; **CL-043**, *Deutsche Bank v. Sri Lanka*, paras. 419 to 420.

937 **CL-205**, Schwebel, S.M., 'Is Neer Far from Fair and Equitable', Int'l Arb. Club, London, 5 May 2011, paras. 557 to 558.

c. was referred to in the *Bilcon v. Canada* prior award as follows:[938]

> NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis* and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors.

434. Therefore, the Claimant submits, the Tribunal should follow the standard for fair and equitable treatment that is set out in the main body of prior awards, including the *Windstream I* Award, as opposed to the standard in the *Glamis Gold* prior award.

(ii) The Respondent's Position

435. According to the Respondent, NAFTA Article 1105(1) requires that it "*accord the customary international law minimum standard of treatment of aliens*".[939]

436. It relies on the NAFTA Free Trade Commission ("**FTC**") binding Note of Interpretation of 31 July 31 2001, for the "*proper interpretation of Article 1105(1)*":[940]

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

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938 **CL-157**, *Bilcon v. Canada*, Award, para. 435.

939 Counter-Memorial, paras. 200 to 203.

940 **CL-010**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001, s. 2 ("*NAFTA, Note of Interpretation*"); Pursuant to NAFTA Article 1131(2), "[a]n interpretation by the [FTC] of a provision of this Agreement shall be binding on a Tribunal established under [Section B of Chapter Eleven]." NAFTA tribunals have invariably acknowledged the binding nature of the FTC Note. *See e.g.* **CL-053**, *Glamis Gold v. US*, para. 599; **CL-057**, *Thunderbird v. Mexico*, para. 192; **CL-063**, *Methanex v. US*, Award, para. 20; **CL-066**, *Mondev v. US,* Award, paras. 100 to 101, 120 to 122; **CL-060**, *Loewen v. US*, para. 126; **CL-091**, *Waste Management v. US (II)*, Award, paras. 90 to 97; **CL-031**, *Cargill v. Canada*, paras. 135, 267 to 268; *ADF Group v. US*, para. 176; **RL-184**, *Eli Lilly v. Canada*, paras. 105 to 106; **CL-153**, *Mesa v. Canada*, paras. 478 to 480; *Windstream I* Award, paras. 348 to 350.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

437. The Respondent argues that the "*threshold for proving a violation of the customary international law minimum standard of treatment under Article 1105(1) is extremely high*", relying on the summary in the prior award in *Glamis Gold*:[941]

> […] violation of 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.

438. The Respondent disagrees with the Claimant and maintains that the *Glamis Gold* standard:[942]

> […] has been upheld by various tribunals, including the *Waste Management II* tribunal: which found that in order for there to be a breach of Article 1105, the impugned conduct must have been "arbitrary, grossly unfair, unjust or idiosyncratic" or "involve[ ] a 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[…] .

439. The Respondent further refers to statements in other prior awards including:[943]

a. *Cargill v. Mexico*:[944]

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941 Counter-Memorial, para. 202; **CL-053**, *Glamis Gold v. US*, para. 627. *See* **CL-091**, *Waste Management v. US (II)*, para. 98: ("Taken together, the *S.D. Myers, Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome 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 an administrative process.")

942 Counter-Memorial, para. 203.

943 Counter-Memorial, paras. 203, 204.

944 **CL-031**, *Cargill v. Canada*, para . 296.

> [t]o determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained-of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected or shocking repudiation of a policy's very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.

b. *Mondev v. US*:[945]

> [i]n 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 […] .

c. *ADF v. US*: "*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);[946] and

d. *Waste Management v. US (II)*: the standard would be breached by conduct that is:[947]

> […] 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.

440. The Respondent maintains that the treatment of the investment must be manifestly arbitrary or grossly unfair, submitting that NAFTA tribunals "*have consistently affirmed that a violation of the minimum standard of treatment under customary international law will not be found unless there is evidence of egregious or shocking conduct, such as serious malfeasance, manifestly arbitrary behaviour, or denial of*

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945 **CL-066**, *Mondev v. US*, para. 127.

946 **CL-022**, *ADF v. US*, para.190.

947 **CL-091**, *Waste Management v. US (II)*, para.98.

justice by the respondent NAFTA Party".[948] In particular, it argues that "*since the FTC Note of Interpretation was issued in July 2001*" NAFTA tribunals "*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*",[949] based on the FTC Note language:[950]

> 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 ……

441. Further, the Respondent submits that NAFTA Article 1105(1) does not prohibit differential treatment amongst investors.[951] Rather, the type of manifestly wrongful discrimination contemplated by the article is on the grounds of gender, race, or religious beliefs.[952]

442. Finally, the Respondent stressed the requirement "*that an investor's expectations must be objectively reasonable*".[953]

(iii) Mexico's Position

443. In its third party intervention as to the applicable standard for fair and equitable treatment under NAFTA Article 1105, Mexico made three primary points:

    a. the threshold for proving a violation of the customary international law minimum standard of treatment under Article 1105(1) is extremely high:[954]

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948 Counter-Memorial, para. 204.

949 Counter-Memorial, fn. 389.

950 **CL-066**, *Mondev v US*, para 127.

951 Rejoinder, paras. 104 to 105.

952 Counter-Memorial, para. 210.

953 Rejoinder, para. 106 [Emphasis in original]; **RL-215**, *RREEF v. Spain*, para. 262.

954 Mexico 1128 Submission, para. 11; Counter-Memorial, para. 202; **CL-194**, *Resolute Forest v. Canada;* para. 740; **CL-57**, *Thunderbird v. Mexico*, para. 194.

i. requiring an act that is sufficiently egregious and shocking, such as a gross denial of justice or manifest arbitrariness falling below acceptable international standards;[955]

ii. with the burden on a claimant to prove that such rule of customary international law has changed;[956] and

iii. "*the mere failure to fulfil a commitment does not, without more, fall below the standard of treatment required by NAFTA Article 1105*".[957]

b. the NAFTA State parties' agreed that investors' expectations are not a component element of the minimum standard of treatment under Article 1105 and should not give rise to an independent obligation of the host State;[958] and

c. Article 1105 does not provide a blanket prohibition on discrimination against foreign investors or their investments,[959] as:

i. when the NAFTA State parties wanted to prohibit discrimination between domestic and foreign investors or among foreign investors, they did so, specifically in NAFTA Articles 1102 and 1103;[960] and

ii. interpreting Article 1105 in such a way as to prohibit nationality-based discrimination would render Articles 1102 and 1103 void.[961]

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955 Mexico's 1128 Submission, para 11; **CL-53**, *Glamis Gold v. US*, para. 627; **CL-57**, *Thunderbird v. Mexico*, para. 194; **CL-091**, *Waste Management v. US (II)*,para. 98.

956 Mexico 1128 Submission, para. 11.

957 Mexico 1128 Submission, para. 12; Counter-Memorial, para. 212.

958 Mexico 1128 Submission, para. 13.

959 Mexico 1128 Submission, para. 14.

960 Mexico 1128 Submission, para 14.

961 Mexico 1128 Submission, para 14; **CL-194**, *Resolute Forest v. Canada*, para. 742; **CL-53**, *Glamis Gold v. US*, para. 615.

(iv) The United States' Position

444. In its third party intervention as to the applicable standard for fair and equitable treatment, the US submits that NAFTA Article 1105 establishes a minimum floor below which treatment of foreign investors must not fall, and that its standard is the same as under customary international law.[962] It sets out its understanding of the appropriate methodology for determining the content of customary international law as follows:[963]

a. determination of breach of the minimum standard of treatment must be made in the light of the high measure of deference that international law generally extends to the right to regulate; and

b. NAFTA tribunals do not have an open-ended mandate to second-guess government decision-making.[964]

445. As to the requirements of NAFTA Article 1105(1) fair and equitable treatment, the US submits that:

a. there is no customary rule establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations, instead, something more is required;[965]

b. there is no prohibition on economic discrimination against aliens or a general obligation of non-discrimination;[966]

c. to the extent that the customary international law minimum standard of treatment incorporated in NAFTA Article 1105(1) prohibits discrimination,

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962 US 1128 Submission, paras. 9 to 10; **CL-10**, NAFTA Free Trade Commission, Note of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, paras. B.1 to B.3; **CL-81**, *S.D. Myers v. Canada,* Partial Award, para. 259; **CL-53**, *Glamis Gold v. US*, para. 615.

963 US 1128 Submission, paras. 11 to 16.

964 US 1128 Submission, para. 17; **CL-81**, *S.D. Myers v. Canada,* Partial Award, paras. 261 and 263.

965 US 1128 Submission, para. 19.

966 US 1128 Submission, para. 20; **CL-54**, *Grand River v. US*, Award, paras. 208 to 209;

it is only in the context of other established customary international law rules, such as:

i. prohibitions against discriminatory takings,

ii. access to judicial remedies, or

iii. the obligation of States to provide full protection and security and to compensate aliens and nationals on an equal basis in times of violence, insurrection, conflict or strife;[967] and

d. no obligation of host State transparency under the minimum standard of treatment has crystallised.[968]

B. APPLICATION OF THE STANDARD

446. Based on the respective standards as summarised above, each Party sought to apply its own test for breach of the fair and equitable treatment standard to the facts. Although the applicable legal test was disputed, the facts are largely uncontentious.

(i) The Claimant's Position

447. According to the Claimant, the question whether or not the fair and equitable treatment standard of treatment was breached "*is a fact-specific inquiry*".[969] In this regard, it submits that the Respondent's conduct following the *Windstream I* Award was "*unfair, inequitable, arbitrary, discriminatory, and in breach of representations reasonably relied on by Windstream's investments*".[970]

448. In this regard, the Claimant submits that:

967 US 1128 Submission, para. 20.

968 US 1128 Submission, para. 21.

969 Reply, para 363.

970 Memorial, para. 489; Reply para 363.

a. prior to the *Windstream I* proceedings, the Respondent promised that:[971]

   i. "*the FIT Contract would be 'frozen' or insulated from the effects of the* Mo*ratorium*",

   ii. the Moratorium "*would not mean the termination of the Project*";

b. during the *Windstream I* arbitration proceedings, "[t]*hese representations were repeated by* [the Respondent]":[972]

   i. it "*repeatedly stated that the Project was only 'on hold' and 'frozen' and could resume once scientific studies had been conducted and the temporary* Mo*ratorium (or, as Canada called it, the 'deferral') was lifted*"; and

   ii. Ontario "*did nothing to clarify* [the Claimant's] *contractual position or direct the OPA in its negotiations with WWIS*";

c. the *Windstream I* Award found that:[973]

   i. the Ontario Government's failure to intervene in OPA negotiations with the Claimant regarding the Moratorium breached NAFTA Article 1105(1), because: [974]

      1. "*the Government let the OPA conduct the negotiations with* [the Claimant] *even if the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so*";

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971 Memorial, para. 485; **C-484**, Transcription of Audio Recording Telephone Conference Call, 11 February 2011 and **C-483**, Audio Recording of Telephone Conference, 11 February 2011; *see also* Reply, para. 364.

972 Memorial, para. 485; *Windstream I* Counter-Memorial, paras 21, 260, 265, 266, 268, 353, 486, and 487; *see also* Reply, paras. 365 and 398.

973 *Windstream I* Award, para. 290; Reply, para. 364.

974 Memorial, para. 486; *Windstream I* Award, para. 379; Reply, para. 364.

2. "[a]*s a result, as the negotiations between the OPA and* [the Claimant] *failed to produce results, by May 2021 the Project had reached a point at which it was no longer financeable*";

3. "*the Government failed to clarify the situation, either*":

a. "*by way of promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract*", or

b. "*by amending the relevant regulations so as to exclude offshore wind altogether*";

c. by "*terminating* [the Claimant's] *FIT Contract in accordance with the applicable law*"; and

ii. "*the Project (and the FIT Contract) had not been terminated, and could be renegotiated in a manner that would implement the promises made by Ontario and the representations made by Canada*".[975]

449. According to the Claimant:

a. based on "*the representations made by* [the Respondent] *in* Windstream I*, and the representations Ontario made after the Award (that the research needed to lift the Moratorium was being 'finalized' and the Project could proceed)*", it "*expected that there was a future for the Project*";[976]

b. at minimum, it expected "*Ontario would agree to meet with it to discuss a path forward*";[977] and

975 Memorial, para. 486; *Windstream I* Award, para. 290.

976 Reply, para. 365.

977 Reply, para. 365.

c. more specifically, the Claimant:[978]

> […] expected that the Ontario government would speak to us, in good faith, about the FIT Contract to fulfil their promise to freeze the Project from the effects of the moratorium. We did not expect the government to maintain the conduct that was already found to be a breach of its international obligations.

450. Therefore, based on those promises and *Windstream I* Award findings, according to the Claimant:

a. it was reasonable for it "*to anticipate that the Ontario Government would operate transparently, in good faith, and would seek to uphold its promises and representations after the Award in* Windstream I";[979] and

b. contrary to the Respondent's position, Ontario was obliged to cease the ongoing breach of international law determined in the *Windstream I* Award.[980]

451. However, and further according to the Claimant, instead of complying with ongoing obligations in international law following the *Windstream I* Award, instead:

a. the Ontario Government "*did nothing to prevent the termination of the FIT Contract or require the IESO* […] *to renegotiate the FIT Contract's terms in a manner consistent with the* […] *promises*";[981]

b. MEI refused to meet for negotiations, and refused to direct IESO to renegotiate the FIT Contract to implement its promise not to exercise its termination right;[982]

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978 Reply, para. 63. **CWS-N. Baines**, Witness Statement of Nancy Baines, para. 4(c).

979 Memorial, para. 486. *See also*, Reply, para. 365.

980 Reply, paras. 387-390; **CL-206**, Article 30 of the Draft Articles on the Responsibility for Internationally Wrongful Acts, 12 December 2001, UN Doc. A/RES/56/83; **RL-110**, *Mobil v. Canada II*, Decision on Jurisdiction and Admissibility, 13 July 2018, para. 165.

981 Memorial, para. 487.

982 Memorial, para. 334; Reply, paras 366, 376.

c. the Ontario Government failed to conduct the scientific studies that were the purported premise of the Moratorium,[983] despite stating throughout *Windstream I* that the Moratorium was only temporary for the purpose of conducting research;

d. the Ontario Government continued to state in public that the Moratorium was temporary, on multiple occasions announcing that the research required to lift the Moratorium was being finalised,[984] e.g., in February 2017, the Ontario Government stated that more research was needed to lift the Moratorium;[985]

e. at the same time it had not commissioned any further studies,[986] and internal correspondence from MNR and MOE,[987] indicated that it was not conducting further research and there was no political will to lift the Moratorium to allow offshore wind development;[988]

f. given that five government-commissioned studies were completed since 2011 assessing offshore wind's impacts on fish, other environmental impacts, sound and decommissioning requirements, it remained unclear what further studies were required;[989] and

g. those existing studies largely found that while there were still some unknowns about offshore wind in freshwater environments, impacts were likely to be minimal.[990]

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983 Memorial, para. 487; Reply, para. 379.

984 Memorial, para. 295.

985 Memorial, para. 297; **C-2072**, Chat News Today, "*Ontario signals offshore wind moratorium will continue for years*", 13 February 2017.

986 Memorial, para. 297.

987 See above, paras. 95-95.b.

988 Memorial, para. 298; **CER-Powell-3**, Third Expert Report of Sarah Powell, para. 83.

989 Memorial, para. 301.

990 Memorial, para. 301.

452. Meanwhile, the Claimant submits, there was a rising number of offshore wind projects in the world. It concluded, therefore, that the only reasonable inference is that Ontario Government had no intention to conduct the scientific research that was the basis of the "*temporary*" application of the Moratorium, or to lift the Moratorium.[991]

453. As to the Respondent's conduct in relation to the Moratorium and FIT Contract termination, the Claimant argues that it:

a. was deliberate, as purportedly evidenced by the 2019 letter stating "*not to intervene*";[992] and

b. created conditions that led to the FIT Contract termination, giving IESO the ability to terminate, [993] [redacted]

i. [redacted][994]

ii. [redacted][995]

iii. [redacted][996]

iv. [redacted]

991 Memorial, paras. 301 to 302.

992 Memorial, para. 488; **C-2253**, Letter from Minister Rickford (MEI) to David Mars (Windstream), 10 December 2019.

993 Memorial, paras 294, 488, 491.

994 *See above*, para. 105.

995 Memorial, para. 310; **C-2477, Part 1, Exhibit K**, Letter from Dolly Goyette (MOE) to Michael Lyle (IESO), 2 February 2018, Exhibit D to the Affidavit of Michael Lyle dated 1 June 2018.

996 Memorial, para. 313.

[redacted][997]

454. Regarding the Ontario Government's power to direct IESO to amend the FIT Contract to implement its alleged promises, according to the Claimant:

a. this was recognised in the *Windstream I* Award;[998]

b. [redacted][999]

c. the MEI exercises legal and formal control over IESO pursuant to Electricity Act section 25.32:

i. the Minister of Energy is empowered to issue directives to the IESO to take certain actions related to a broad range of electricity procurement issues;

ii. IESO is obliged to follow the directives;[1000] and

iii. directives may relate to broad planning and resource initiatives, or require IESO to take particular actions regarding particular contract, proponents, and/or projects, including extending a contract

997 Memorial, paras 316, 325.

998 Memorial, para. 336; Reply, para. 374; *Windstream I* Award, para. 380.

999 Memorial, paras 337, 342; *see also* Reply, para. 384. These instances include the Minister of Energy issuing directives to the IESO to (i) enter into negotiations with TransCanada for a contract for a gas-fired power plant to be located at the Lennox Generating Station; (ii) negotiate and enter into a contract with Ontario Power Generation for the procurement of electricity from advanced biomass from one converted unite at the Thunder Bay Generating Stations; (iii) offer a four-year extension to the MCOD for existing Large FIT Contracts for Aboriginal Participation Projects where the generating facilities are located entirely on reserve lands; (iv) offer a three-year extension to the MCOD for existing FIT Contracts for waterpower projects; (v) extend timelines for completion of certain projects under the now terminated Conservation First Framework; (vi) enter into contract negotiations with ITC on its Lake Erie Connector Project which would establish a new 1000 MW underwater transmission intertie between Ontario and Pennsylvania; (vii) enter into contract negotiations with NRStor Inc. And Six Nations of the Grand River Development Corp. To explore a ten-year agreement for their proposed 250 MW Oneida Battery Storage facility; (viii) enter into discussion with Atlantic Power on options for a new five year contract for the Calstock biomass generating facility to support a longer-term transition plan for the forestry sector; and (ix) draft a contract for the Oneida Battery Park Project.

1000 Memorial, para. 340.

MCOD,[1001] (e.g., MEI directed IESO to terminate renewable energy procurement contracts in July 2018 after the Ford Government election);[1002] and

d. [redacted][1003]

i. stems from the fact that MEI is accountable for IESO's performance; and

ii. [redacted][1004]

455. The Claimant submits that, despite this formal and informal control over IESO, the Ontario Government refused to direct it in respect of the Project.[1005] As a matter of fact, it contended that the lack of direction from the Ontario Government was one of the reasons for IESO's termination of the FIT Contract.[1006]

456. On the basis of the aforementioned facts, the Claimant submits that:

a. the Respondent's treatment of its investments was arbitrary and grossly unfair;

b. the Respondent is obligated to cease internationally wrongful conduct including following an earlier award finding breach;

c. the Respondent discriminated against the Claimant; and

1001 Memorial, para. 341; **CER-Powell-3**, Third Expert Report of Sarah Powell, para. 49; **CWS-Killeavy**, Witness Statement of Michael Killeavy, para. 17.

1002 Memorial, para. 343; *see above*, para. 118.a.

1003 Memorial, paras 345; **CWS-Killeavy**, Witness Statement of Michael Killeavy, para. 11(b).

1004 Memorial, paras 347-357; *see above*, para. 355.d.

1005 Memorial, para. 489.

1006 Memorial, para. 488. *See above*, para. 110.

d. the Respondent breached its legitimate expectations.

The Tribunal summarised the Claimant's position in relation to each below.

457. First, as to alleged arbitrary and grossly unfair treatment, the Claimant submits that the Respondent misstated the applicable standard and ignored international law in arguing that:

a. "*Ontario's non-intervention in the IESO's termination of the FIT Contract was neither manifestly arbitrary nor grossly unfair as it was not a wilful disregard of due process or one that amounts to an act that shocks or surprises a sense of judicial propriety*",[1007]

b. it "*respected every legal rule*";[1008] and

c. it "*was not obliged to ensure that* [the Claimant] *was insulated from the post-Award continuation of the* M*oratorium*".[1009]

458. According to the Claimant, the correct standard is that the conduct that is arbitrary and grossly unfair, which "*is not limited to conduct that violates due process or does not respect legal rules*".[1010] In particular:

a. the plain meaning of arbitrariness and gross unfairness does not equate to violation of due process alone;

b. violation of due process is "*expressly identified as a separate type of conduct that may breach the FET standard*";

c. "[c]*onduct that violates due process may be arbitrary, but that is not the only way conduct may be arbitrary*";

1007 Reply, para. 369.

1008 Reply, para. 369.

1009 Counter-Memorial, paras. 205 to 206; Reply, para 369.

1010 Memorial, para. 262; Reply, para 371.

d. "[i]*nterpreting the 'arbitrary and grossly unfair' standard narrowly would effectively interpret it out of the FET standard*"; and

e. prior awards have described "*arbitrariness*" as:[1011]

i. "*encompassing violations of due process or conduct that surprises a sense of judicial propriety*";

ii. including conduct "*founded on prejudice or preference rather than reason or fact*";

iii. conduct that "*manifestly violate*[s] *the requirements of consistency, transparency, even-handedness and non-discrimination*";

iv. conduct that "*inflicts damages on the investor without serving any apparent legitimate purpose or is a measure taken for reasons that are different from those put forward by the decision maker*".

459. The Claimant contended that Ontario's conduct was arbitrary and grossly unfair on the basis that it was arbitrary "*as it lacked transparency and even-handedness, served no legitimate purpose, and was carried out for reasons that are different from those put forward by the decision maker*",[1012] in that:

a. the Ontario Government:

i. "*had the power to direct the IESO to amend the FIT Contract and/or not to terminate the FIT Contract based on delays caused by the Moratorium*", as "*recognized by the* Windstream I [Award]" and as is undisputed by the Respondent;[1013] and

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1011 Reply, para. 372: **CL-188**, *Lemire v. Ukraine*; Decision on Jurisdiction and Liability, para. 262; **CL-159**, *Crystallex v, Venezuela*, para. 578; **CL-058**,. *Lauder v. Czech Republic*, para. 221; **CL-080**, *Saluka v. Czech Republic,* Partial Award, para. 307; **RL-020**, *EDF v. Romania*, para. 303; **CL-187**, *Gramercy v. Peru*, para. 830; **CL-186**, *Eco Orov. Columbia,* Decision on Jurisdiction, Liability, para. 760.

1012 Reply, para. 373.

1013 Reply, para. 374;*Windstream I* Award, para. 380.

ii. "[d]*espite its ability to do so, Ontario refused to do* anything", including meet with the Claimant "*even though its own internal documents recognized that the* Windstream I [Award] *found that* [the Claimant] *'ha*[d]*n't lost the entire value of its investments (i.e., its project) as there was no expropriation: the contract* [was] *still in force' and that the value of the contract over its life was worth at least $2.76 billion dollars over its 20-year term*";[1014]

b. the Respondent provided no legitimate rationale for:

i. "*Ontario's refusal to do anything to make good on its promises and representations*":[1015]

1. the Ontario Government "*appeared to adopt an obstructionist attitude as a matter of reflex*";

2. shortly after the *Windstream I* Award, MEI's Chief of Staff sent an email "*strongly suggest*[ing] *that no political government representative engage in dialogue with Windstream*";[1016]

3. the reason provided was "*because the Windstream I proceeding involved allegations of political intervention impacting the contractual relationship*";[1017] or

ii. "*IESO's decision to terminate the FIT Contract*", including IESO's:[1018]

1014 Reply, para. 374; **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value, 26 October 2016, Attachments: RE: Wind Contract value.

1015 Reply, para. 375.

1016 **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada,* 5 October 2016.

1017 **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada* 5 October 2016.

1018 Reply, para. 377 (*see also* paras. 137 to 141).

1. termination of the FIT Contract "*based solely on circumstances created by the Moratorium and the Ontario Government*";

2. reliance on the "*indefinite nature of the Moratorium and the* lack of direction from Ontario *in its negotiations with* [the Claimant]";[1019]

3. reliance on "*an analysis about the total cost of electricity service and capacity needs that was severely flawed*";[1020]

c. the "*lack of a legitimate rationale*" for termination is further demonstrated by "*Ontario's current energy needs*", in that:[1021]

i. the Project is "*needed now more than ever*";

ii. expert evidence from Power Advisory showed Ontario as "*anticipating a severe electricity supply shortfall and has reverted back to using long-term contracts to address that forecasted supply shortfall*";[1022]

iii. the Claimant "*attempted on numerous occasions to try to present its Project* […] *as a solution to Ontario's forecasted energy crisis*";[1023]

iv. yet Ontario and the Respondent "*maintained their refusal to meet or even discuss a possible solution*";[1024]

1019 Reply, para. 377 [Emphasis in Original].

1020 Reply, para. 377; **C-2475**, Affidavit of Michael Killeavy sworn 18 October 2018 (according to the Claimant "*Michael Killeavy – the IESO official that wrote the recommendation to terminate the FIT Contract – testified in the Ontario Application, if he had been aware of the flaws in the analysis at the time, he would not have made the termination recommendation*.").

1021 Reply, para. 378.

1022 Reply, paras. 378 and 148 to 150; **CER-Power Advisory-2**, pp. 2, 12.

1023 **C-2828**, Letter from John Terry (Torys LLP) to Rodney Neufeld (GAC), 31 July 2023.

1024 Reply, paras. 378 and 157 to 162.

d. Ontario further "*failed to conduct any of the studies required to lift the Moratorium*":[1025]

i. having represented in *Windstream I* that:

1. the "*Claimant's Project was merely frozen and could continue after the necessary science is conducted and an adequate policy framework can be developed*";[1026] and

2. the Moratorium (or "*deferral*") was:[1027]

> […] intended to last only as long as necessary to conduct the scientific research and develop and implement an adequately informed framework for offshore wind projects in Ontario…Ontario has been working to conduct the required scientific studies […] demonstrating that the deferral is a temporary measure.

but "*not followed through on those representations*";

ii. such "*research into offshore wind was not pursued during the Ford administration, which was elected on a platform opposing renewable energy projects, in particular wind projects*";[1028] and

iii. "[t]*here can be no credible basis for refusing to advance the research that was the pretence for the Moratorium more than a decade ago*" (and "*a key pillar of* [the Respondent's] *position before the* Windstream I *tribunal*"), contributing to "*the arbitrariness of the*

1025 Reply, para. 378.

1026 *Windstream I* Counter-Memorial Canada, para. 455. *See also* para. 457.

1027 *Windstream I* Counter-Memorial Canada, paras. 483 to 485.

1028 Reply, para. 379; **C-2219**, Email to Pauline Desroches from Kevin Edwards – "*Re: For Approval Revised: Proposed Project List & Information Requirements and Time Management Regulations under the Impact Assessment Act*" (May 16, 2019): "[g]*iven the new govt messages on wind power I don't think it's about doing studies anymore.*".

conduct and the circumstances that led to the termination of the FIT Contract".[1029]

460. Further according to the Claimant, the "*only purported rationale provided*" for the Respondent's decision not to act was so as "*not to interfere with WWIS' contractual relationship with the IESO*",[1030] however:

a. although IESO was the contractual counterparty, IESO did not impose the Moratorium or promise the Claimant that it "*would be insulated from the impacts*",[1031] and the *Windstream I* Award found that "*Ontario's failure to direct the IESO in the negotiations with* [the Claimant] *was conduct contributing to a breach of Article 1105*", despite not being the contractual counterparty; [1032] and

b. this "*does not genuinely reflect the reality of Ontario's relationship with the IESO*", as it "*regularly intervene*[s] *in contractual matters*", and in particular the Minister of Energy:[1033]

i. previously issued directives to IESO on at least 10 prior occasions;

ii. "*issued formal directives to extend timelines for projects under certain contracts, to negotiate and enter into contracts with specific parties with respect to specific projects, and to terminate contracts for the procurement of electricity*";[1034]

1029 Reply, para. 380.

1030 Reply, para. 381; Counter-Memorial, para. 207.

1031 Reply, para. 382; **C-2055**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) re Response to Ministry of Energy Letter of December 6, 2016, 15 December 2016: "[the] *ongoing moratorium is not within the sphere of the IESO's responsibility or power to resolve" and as such a meeting alone with the IESO would not be productive in achieving a resolution, "which is why we wrote to your office…*".

1032 *Windstream I* Award, para. 379; Reply, para. 383**; CWS-Killeavy**, Witness Statement of Michael Killeavy.

1033 Reply, para. 384.

1034 Reply, para. 384; Memorial, para. 342; **CSW-Killeavy**, Witness Statement of Michael Killeavy.

iii. [redacted][1035]

1. [redacted][1036]

2. [redacted][1038] and

iv. as Ms. Powell further confirmed:[1039]

> […] has previously inserted itself in the IESO's contractual relationships and has both acted unilaterally and directed the IESO to amend, cancel and even move energy projects. Ms. Powell notes that "directing the IESO to amend the FIT Contract, whether formally or informally, would not have been exceptional.

461. The Claimant submits that the Respondent did not respond to the aforementioned factual and expert evidence, putting forward no fact witness statements from the Ontario Government and a single fact witness, Mr Lyle, IESO, who did not address the relationship between the Government and IESO.[1040]

462. On the basis of those arguments, the Claimant concluded that there was no legitimate rationale for the decision "*not to intervene and to create circumstances leading to the termination of the FIT Contract*", it being "*arbitrary and grossly*

1035 Reply, para. 384; **CWS-Killeavy**, Witness Statement of Michael Killeavy, para. 11(b).

1036 **CWS-Killeavy**, Witness Statement of Michael Killeavy, para. 20. According to the Claimant, an example involving it, prior to signing the FIT Contract, the OPA rejected Windstream's request to extend the COD in its FIT Contract from four years to five years. The Minister of Energy's Chief of Staff requested that the OPA make that amendment and then the OPA did so.

1037 **CWS-Smitherman**, Witness Statement of George Frederick Smitherman, para. 13.

1038 Memorial, para. 353.

1039 **CER-Powell-3**, Third Expert Report of Sarah Powell, paras. 65 to 66.

1040 Reply, para. 385.

unfair" and particularly so "*given the Project's value to Ontario as a green energy project that should contribute to the economy, the workforce and, of course, Ontario's energy supply deficit*".[1041]

463. Secondly, as to an alleged obligation to cease internationally wrongful conduct, the Claimant addressed the Respondent's three arguments that:[1042]

a. "*there was nothing 'untoward' about its refusal to deal with* [the Claimant] *and to implement a policy of refusing to intervene in* [its] *negotiations with the IESO*";

b. "*it had no obligation to act to 'insulate'*" the Claimant from the Moratorium;[1043] and

c. the *Windstream I* Award finding that its conduct violated NAFTA Article 1105,[1044] "*essentially did not have to do anything to change its conduct going forward*", because the *Windstream I* tribunal "*had no power to obligate Ontario to act*".

464. According to the Claimant, these arguments "*ignore*[] *the widely accepted rule of customary international law that a State is required to cease an ongoing breach of its international law obligations*".[1045] It relied prior awards,[1046] and in particular on the award in *Mobil II*, which it submits:[1047]

1041 Reply, para. 386.

1042 Reply, para. 387.

1043 Counter-Memorial, para. 196.

1044 Reply para. 386; Counter-Memorial, para. 206.

1045 Reply, para. 387; **CL-206**, U.N. Articles on the Responsibility of States for Internationally Wrongful Acts, Dec 12, 2001, Article 30. Article 30 of the UN Articles on the Responsibility Articles states "[t]*he State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing*."

1046 **RL-110**, *Mobil II*, para. 165. *See also* **RL-070**, *LG&E v. Argentina,* Award, para. 85; **CL-181**, *Military and Paramilitary Activity in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (June 27, 1986), para. 292(12); **CL-182**, C*ase Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment (May 24, 1980), paras. 77 to 78 and 95(1).

1047 Reply, para. 389.

a. rejected the argument that the Respondent was not required to remove a measure which had been found to violate NAFTA Chapter 11;

b. accepted that NAFTA "*confers no power on a Chapter Eleven tribunal to order that an offending measure be repealed or that it cease to be enforced*",[1048] and

c. considered States to be under a continuing obligation not to maintain measures in breach as follows:[1049]

> The Tribunal considers that, as a matter of general international law the position is quite straightforward. NAFTA Article 1106(1) prohibits Canada from imposing or enforcing measures which are contrary to its terms. That obligation is a continuing one and, like any treaty obligation, must be performed in good faith. Once a Chapter Eleven tribunal found that the imposition and enforcement of the 2004 Guidelines was contrary to Article 1106, it is difficult to see how Canada could discharge its duty to perform its obligations under Article 1106 in good faith while still enforcing the Guidelines. That conclusion is reinforced by the ILC Articles on State Responsibility, Article 30 of which provides that a State which is responsible for an internationally wrongful act is under an obligation to cease that act if it is a continuing one.

465. The Claimant submits that "*continuing the course of conduct that gave rise to a finding of liability under Article 1105 in* Windstream I*, Ontario has continued to breach its obligations to treat* [the Claimant] *fairly and equitably*", the existence of an Award does not "*provide a licence to Ontario to continue the course of conduct that led to that breach*", and instead "*only underscores the arbitrary and unfair character of Ontario's conduct*".[1050]

466. Further and in response to the Respondent's argument that the Claimant was responsible for continuation of the "*legal and contractual limbo*" following the

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1048 **RL-110**, *Mobil II*, para. 164.

1049 **RL-110**, *Mobil II*, para. 165

1050 Reply, para. 390.

Windstream I Award,[1051] (*i.e.*, that it would not have occurred but for the Ontario court proceedings), the Claimant submits that:[1052]

a. "*WWIS commenced the Ontario Application because of Ontario's inaction and refusal to intervene*";

b. on 4 May 2017, the termination right "*became effective*" and therefore "*WWIS sought to protect its rights*";

c. IESO "*agreed not to exercise its termination right pending*" the court application;

d. in 2017, IESO agreed to adjourn the court application;

e. on 20 February 2018 IESO decided to terminate the FIT Contract, but agreed it did not take effect while the application was pending; and therefore

f. "*WWIS did nothing inappropriate or improper in seeking to protect its rights and the IESO entered into those agreements about the timing of its Termination Decision freely and having received legal advice*".

467. Thirdly, as to discrimination, according to the Claimant, the "*arbitrariness and gross unfairness of Ontario's conduct is further underscored by the differential way it treated* [the Claimant] *compared to other FIT Contract and energy sector proponents*".[1053] In this regard, it:

a. reiterates that "*Ontario regularly interjects itself into other contractual relationships and directs the IESO accordingly*";

b. submits that the argument that NAFTA Article 1105 "*does not apply to discrimination claims outside of conduct involving sectional, racial, gender*

1051 Counter Memorial, para. 208.

1052 Reply, paras. 393 to 394.

1053 Reply, para. 391.

or religious prejudice",[1054] is "*inconsistent with the case law*",[1055] including:

i. *Joshua Dean Nelson v. Mexico*, NAFTA Article 1105 discrimination exists "*if the State wilfully targets the investor*" and "*tribunals look at whether there is a legitimate justification for the targeting*";[1056] and

ii. *Saluka v. Czech Republic*, "*State conduct is discriminatory if (i) similar cases are (ii) treated differently (iii) and without reasonable justification*".[1057]

468. Fourthly, as to breach of the Claimant's legitimate expectations, according to the Claimant:[1058]

a. the disputing parties are in agreement that "*it is relevant to consider whether a state has breached an investor's legitimate expectations arising from specific commitments made to the investor to induce the investment*";[1059]

b. the Respondent's "*attempt to dismiss the Claimant's expectations and the representations made by counsel for Canada itself during the* Windstream I *Award should be dismissed*", (*i.e.*, that the Claimant improperly relies on "*old promises*" previously litigated, and "*nothing changed*" since the *Windstream I* Award "*to give rise to a reasonable belief that the Project would proceed*");[1060]

1054 Counter Memorial, para. 210.

1055 **CL-164**, *Quiborax v. Bolivia*, para. 292; **CL-080**, *Saluka v. Czech Republic, Partial Award*, para. 313; **CL-040**, *CMS – Award*, para. 290; **CL-180**, *Cairn v. India*, para. 1725.

1056 **RL-183**, *Nelson & Blanco v. Mexico*, paras. 351 to 352.

1057 **CL-080**, *Saluka v. Czech Republic,* Partial Award, para. 313.

1058 Reply, paras. 397 to 400.

1059 Counter-Memorial, para. 213. *See* **CL-064**, *Mobil Investments v. Canada*, Decision on Liability and Principles of Quantum, 22 May 2012, paras. 152 to 171; **CL-134**, *Bilcon v. Canada*, paras. 446 to 454; **CL-091**, *Waste Management v. US (II), Award*, para. 98.

1060 Counter Memorial, paras. 216 to 218.

c. the Respondent "*provides no basis for its assertion that Windstream cannot rely on the promises made in 2011*", which:[1061]

   i. "*are part of the factual background, although the impugned measures relate to conduct that arose after the Windstream I Award*";

   ii. "*did not evaporate by virtue of the Windstream I Award*";

   iii. are "*background facts*", which "*contribute to the allegations that the new measures, which post-date the Windstream I Award, breach the NAFTA*";

   iv. "*were entirely consistent" with representations made during* Windstream I", on the basis of which the Respondent "*succeeded in part in* Windstream I" (*i.e.*, that the Moratorium was temporary and the Project had a future), and "*expropriation was not found and damages for the loss of the full investment were not awarded*"; and

   v. the Respondent "*cannot now claim that these representations cannot be relied upon*";

d. following the *Windstream I* Award, the Claimant "*felt optimistic about the Project*", based on:[1062]

   i. "*these earlier promises and representations*";

   ii. "*public statements by the Ontario Government following the Award that offshore wind research would soon be 'finalized' and the Project could still be built*"; and

   iii. IESO not returning the CAD 6 million security credit;

1061 Reply, para. 397.

1062 Reply, para. 399.

e. its expectation "*is supported by* [its own] *contemporaneous documents*";[1063] and

f. "*Ontario's refusal to even meet* […] *to discuss the FIT Contract is inconsistent with these legitimately held expectations*", which does not "*alone gives rise to a breach of the FET standard*", but is "*part of the context of understanding why Ontario's conduct was arbitrary, grossly unfair, and nontransparent*".[1064]

(ii) The Respondent's Position

469. The Respondent makes four primary arguments in response:[1065]

a. a breach of NAFTA Article 1105 claim based on previous claims is barred; and

b. Ontario's failure to direct IESO not to terminate the FIT Contract or to intervene to save the Project following the *Windstream I* Award was not:

i. "*manifestly arbitrary or grossly unfair*";[1066]

ii. in breach of any protection for investors against discrimination, including minimum standard of treatment under customary international law or the NAFTA Article 1105 national treatment standard, as arising out of sectional, racial, gender or religious;[1067] or

iii. in breach of the Claimant's legitimate expectations.[1068]

1063 Reply, paras. 399 and 60.

1064 Reply, para. 400.

1065 Counter-Memorial, paras. 192 to 218.

1066 Counter-Memorial, paras. 196 and 205 to 209.

1067 Counter-Memorial paras. 197 and 210 to 211.

1068 Counter-Memorial, paras. 198 to 199 and 212 to 218.

470. First, as to the duplication of claims, the Respondent explains that the NAFTA Article 1105 claim in *Windstream II* repeats the claim in *Windstream I*:[1069]

a. the *Windstream II* fair and equitable treatment claim is based on Ontario's failure to:

i. "*conduct the studies necessary to lift the moratorium, which remains in effect to this day*";[1070]

ii. "*uphold its promises and representations to keep the Claimant's FIT Contract 'frozen', 'on hold' or insulated from the effect of the moratorium*";[1071] and

iii. "*direct IESO not to terminate or to amend the FIT Contract*";[1072]

b. the *Windstream I* fair and equitable treatment claim was based on Ontario's:

i. "*decision to apply the moratorium and failure to conduct the necessary work to lift the moratorium*";[1073]

1069 Counter-Memorial, paras. 192 to 195.

1070 Memorial, para. 487: ("The Government has also failed to conduct the scientific studies which were the purported premise of the moratorium, which remains in effect to this day.").

1071 Memorial, paras. 484 to 491: ("In light of the tribunal's findings and Canada's representations, it was reasonable for Windstream to anticipate that the Ontario Government would operate transparently, in good faith, and would seek to uphold its promises and representations after the Award in Windstream I.").

1072 Memorial, para. 487: ("[T]he Ontario Government did nothing to prevent the termination of the FIT Contract or require the IESO (the OPA's successor) to renegotiate the FIT Contract's terms in a manner consistent with the Ontario Government's promises."); para. 489: ("Despite its ability to direct the IESO not to terminate or to renegotiate Windstream's Contract (as it has done on multiple occasions with respect to other power purchase agreements, set out at paragraphs 353 to 358 above), and the Windstream I tribunal's findings that its previous failure to provide directions to the OPA had breached the FET standard, the Ontario Government refused to take any action that would make good on its promises to Windstream.").

1073 *Windstream I* – Claimant's Memorial, para. 604: ("Because it was an abrupt reversal of Ontario's promises to support offshore wind and the Project, the moratorium was arbitrary, grossly unfair and contrary to Ontario's commitments and representations and to Windstream's legitimate expectations, and therefore amounts to a breach of Article 1105(1)."); para. 620: ("[...] very little has been done since the moratorium to advance scientific research. Indeed, efforts by lower-level staff to engage in research projects have been left unapproved and unfunded.").

ii. "*failure to fulfil its promise to ensure that the Project would be 'frozen' so that the moratorium would not penalize the Claimant*";[1074] and

iii. "*failure to direct the OPA to amend Windstream's FIT Contract or to constrain OPA's termination rights*";[1075]

c. the *Windstream II* claims are barred due to *res judicata* (cause of action estoppel) and the NAFTA Articles 1116(2) and 1117(2) time limits (per the jurisdictional objections above); and

d. even if the preliminary objections were overcome, none of the measures breaches NAFTA Article 1105 because they distil down to the Claimant's "*expectation that Ontario should have directed the IESO to not terminate the FIT Contract, or otherwise intervene to save a Project that the Claimant itself had repeatedly stated was no longer viable*".[1076]

1074 *Windstream I* – Claimant's Memorial, para. 623: ("The devastating effects of the moratorium on Windstream were compounded by Ontario's failure to take steps to ensure that Windstream was not penalized as a result of the moratorium, in breach of the promises it made to do that very thing. [...] Ontario could have followed through on its promise to ensure that the Project was "frozen" and not "cancelled" by removing the contractual deadlines that applied even though Windstream could no longer meet the deadlines because of the moratorium. It could also have given Windstream an alternative project, like it did for TransCanada after Ontario decided to cancel TransCanada's project for political reasons. Instead, Ontario chose to breach its further commitments to Windstream, on which Windstream relied in continuing to invest to develop the Project even after the moratorium was announced."); para. 624: ("Ontario's conduct is all the more shocking when compared to its preferential treatment of TransCanada, Samsung, other applicants for Crown land and the other developers of large-scale projects who were awarded FIT contracts at the same time as Windstream. Ontario's discriminatory treatment of Windstream further breaches Canada's obligations to grant fair and equitable treatment to Windstream's investments.").

1075 *Windstream I* – Claimant's Memorial, *para.* 629: ("Meanwhile, Ontario should have been carrying out its promises to ensure that Windstream's project was "frozen" and not "cancelled" following the moratorium and to create a solution acceptable to Windstream [sic]. Although those promises are reflected in the OPA's internal correspondence, the government never directed the OPA to modify Windstream's FIT Contract to address the commercial realities created by the moratorium or to constrain OPA's termination rights under the Contract. As a result, the FIT Contract continues to require that the Project be brought into commercial operation by May 4, 2017 at the latest. Nor did Ontario grant Windstream an alternative project, as it did for TransCanada.").

1076 Memorial, para. 487: ("Despite its promises to Windstream and the tribunal's determination [...], the Ontario Government did nothing to prevent the termination of the FIT Contract or require the IESO (the OPA's successor) to renegotiate the FIT Contract's terms in a manner consistent with the Ontario Government's promises."); para. 488: ("In making the deliberate decision not to act, Ontario created the conditions that led to the termination of the FIT Contract."); para. 489: ("The Ontario Government had the power to direct the IESO to amend the FIT Contract to implement the promise to freeze and/or not to terminate the FIT Contract based on delays caused by the Government, namely the moratorium. [...] Despite its ability to direct the IESO not to terminate or to renegotiate Windstream's

471. Secondly, the Respondent argues that Ontario's non-intervention in IESO's termination FIT Contract termination "*was neither manifestly arbitrary nor grossly unfair*".[1077] It refers to the ICJ decision in the *ELSI* case, to argue that Ontario's actions "*fall far short of the kind of conduct required for a breach of Article 1105*",[1078] because it:[1079]

a. was not "*opposed to the rule of law*";

b. "*respected every legal rule*";

c. did not constitute "*a wilful disregard of due process of law*"; and

d. did not amount to "*an act which shocks, or at least surprises, a sense of juridical propriety*".

472. In response to claims arising out of its post-*Windstream I* Award conduct, the Respondent submits that as a matter of law:

a. it "*was under no obligation to ensure the Claimant was insulated from the post- Award continuation of the moratorium*";[1080]

b. the Claimant "*fails to provide any evidence of an obligation*" to direct or reactivate "*or any post-Award commitment by Ontario that it would take*

Contract [...], and the Windstream I tribunal's findings that its previous failure to provide directions to the OPA had breached the FET standard, the Ontario Government refused to take any action that would make good on its promises to Windstream."); para. 491: ("Instead, notwithstanding the Windstream I tribunal's findings that the Ontario Government's conduct breached the FET standard by failing to take any measures (including by directing the OPA) to resolve the legal and contractual limbo it had created for Windstream, the Ontario Government adopted an explicit policy of refusing to take any steps to prevent the IESO from acting as it eventually did.").

1077 Counter-Memorial, para. 205.

1078 **CL-081**, *S.D. Myers v. Canada*, Partial Award, para. 263: (a treatment that "rises to the level that is unacceptable from the international perspective"); **CL-091**, *Waste Management v. US (II), Award*, para. 115: ("wholly arbitrary" conduct); **CL-057**, *Thunderbird v. Mexico*, para. 194: (requiring proof of "manifest arbitrariness failing below international standards"); **CL-053**, *Glamis Gold v. US*, para. 617: (requiring "something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning"); **CL-031**, *Cargill v. Mexico*, para. 293: ("The Tribunal thus finds that arbitrariness may lead to a violation of a State's duties under Article 1105, but only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.").

1079 **RL-021**, *Elettronica Sicula S.p.A. (US v. Italy)*, [1989] I.C.J. Rep., Judgment, 20 July 1989, para. 128.

1080 Counter-Memorial, para. 206.

steps to direct the IESO to reactivate or renegotiate the FIT Contract or agree to a perpetual force majeure";[1081]

c. such position "*flies in the face of the $25 million in damages*" award;[1082]

d. the Claimant's argument that the *Windstream I* Award finding that "[Ontario's] *previous failure to provide directions to the OPA had breached the FET standard*" created an obligation forming the basis of a new Article 1105 breach must be rejected;[1083]

e. the *Windstream I* Award did not "*create an obligation on Ontario to act*" and the Tribunal had no power to award such relief;[1084]

f. the Claimant itself states that the "'*impugned measures and legal grounds' in the first Windstream arbitration and this arbitration 'are distinct*'";[1085] and

g. the breach for which the Respondent was held liable in *Windstream I* occurred at a specific time, did not have a continuing character and was fully remedied with the payment of the *Windstream I* Award on 14 March 2017.[1086]

473. Moreover, as a matter of fact, the Respondent submits that the Ontario Government:

1081 Counter-Memorial, para. 206.

1082 Counter-Memorial, para. 206.

1083 Memorial, para. 489; Counter-Memorial, para. 206.

1084 Counter-Memorial, para. 206. Article 1135(1) of the NAFTA provides, in part, that "[w]here a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.".

1085 Rejoinder, para. 128; Reply, para. 198.

1086 Rejoinder, para. 129.

a. met with WWIS representatives and answered its letters, either referring it to legal counsel (in the context of ongoing litigation), or to IESO (as its contract counterparty);[1087]

b. considered it "*normal practice*":

   i. "*for the Ministry of Energy to direct FIT contract holders to the IESO, its FIT contract counterparty*"; and

   ii. to redirect "*somebody to counsel when a dispute*";

c. Ministry of Energy "*policy of not dealing with individual FIT contract-holders, given that their contractual relationship is with the IESO"* involved "*nothing untoward*";

d. "*offered a consistent and clear message to the Claimant that it did not intend to interfere with IESO's contractual rights under the FIT Contract*"; and

e. "*never directed the IESO to terminate WWIS' FIT Contract or deliberately create the post-Award conditions leading to the termination of the FIT Contract*" as:[1088]

   i. such conditions existed from 2012; and

   ii. the Government's "*ability to direct the IESO not to terminate or to renegotiate Windstream's Contract*",[1089] coupled with its decision

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1087 Counter-Memorial, para. 207: Memorial, para. 487. CWS-Benedetti-2; **R-0813**, E-mail exchange between David Mars (White Owl Capital) and Patrick Sackville (Ontario Premier's Office) (October 2018). **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI), 6 December 2016 (also found as Exhibit 83 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits); **R-0785**, Email from Sarah Paul (MOE) to David Mars (WEI) 23 December 2016 (also found as Exhibit 80 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits); **C- 2076**, Affidavit of Jason Chee-Aloy sworn October 19, 2018 with exhibits; **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS), 25 August 2017 (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn 23 October 2018 with exhibits); **C- 2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 10 December 2019. **R-0819**, Letters from Ministry of Energy to individual FIT contract holders (16 January 2015; 28 May 2014; 9 December 2014; 19 April 2017).

1088 Memorial, para. 488.

1089 Memorial, para. 489.

"*not to save a project that has not been viable since 2012*",[1090] "*cannot be evidence of unfair and arbitrary treatment*".

474. The Respondent further argues as to causation in the context of fair and equitable treatment that, "*any legal and contractual limbo in which WWIS could have found itself*" was "*the result of its own actions*".[1091] In particular, it submits that IESO did not make its s.10.1(g) decision "*when it arose*" because the Claimant "*did everything in its power to prevent or delay it from doing so*", including:[1092]

a. on 27 March 2017, it commenced the Court Proceedings;[1093]

b. on around 31 October 2017, IESO and WWIS agreed to adjourn the Court Proceedings "*to allow the IESO to finally make its decision on whether to terminate the FIT Contract pursuant to s.10.1(g)*";[1094]

c. on 20 February 2018, IESO informed WWIS of "*its decision to terminate the Project*";[1095]

d. on 20 April 2018, the Claimant "*brought a Notice of Return*";[1096]

e. from March 2019, "*WWIS did not take steps to move its* [court proceedings] *forward*",[1097] despite IESO counsel reminders;[1098]

1090 **RL-109**, *Windstream I* – Award, para. 483.

1091 Memorial, para. 491: ("[...] notwithstanding the Windstream I tribunal's findings that the Ontario Government's conduct breached the FET standard by failing to take any measures (including by directing the OPA) to resolve the legal and contractual limbo it had created for Windstream [...]").

1092 Counter-Memorial, para 208.

1093 Counter-Memorial, para 208; **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits.

1094 **C-2482**, Cost Submissions of IESO dated July 24, 2020, Attachment H.

1095 **R-0665**, Letter from Michael Lyle (IESO) to Nancy Baines (Windstream Wolfe Island Shoals Inc.), 20 February 2018.

1096 **R-0667**, Notice of Return dated 20 April 2018.

1097 **RWS-Lyle**, Witness Statement of Michael Lyle, para. 14.

1098 **R-0669**, E-mails regarding Confidentiality Undertaking between Melanie Ouanounou (Goodmans) and Nick Kennedy (Torys) (2019).

f. on 22 January 2020, WWSI "*abandoned*" the Court Proceedings when the Claimant "*elected to pursue a new NAFTA claim*"; and

g. that leaves "*no basis to argue that its Project remained in contractual limbo*" from 27 March 2017.

475. In addition, in relation to causation, the Claimant committed to the FIT Contract terms, which included:

a. WWSI bearing the risk associated with permitting and meeting MCOD, "*irrespective of the status of a regulatory path forward for the Project*"; and

b. the mutual right under s. 10.1(g) unilaterally to terminate "*if by reason of* force majeure *the commercial operation date is delayed by more than 24 months after the MCOD*", *i.e.*, 5 May 2017.

476. Therefore, according to the Respondent, in light of the contractual terms:

a. Ontario's decision not to intervene and to allow the contracting parties "*to exercise their contractual rights in accordance with the terms of the FIT Contract*", brought an end to any contractual limbo;

b. Ontario's decision not to accept the Claimant's request to rewrite the contractual terms "*cannot be considered 'opposed to the rule of law', nor does it 'shock or surprise a sense of juridical propriety'*";[1099] and

c. Ontario was under "*no obligation*" to insulate the Claimant from continuation of the Moratorium post-*Windstream I* Award.[1100]

477. Thirdly, the Respondent denies that the "*Ontario Government's failure to take any action is discriminatory because it is contrary to the actions it has taken in respect*

[1099] Counter-Memorial, para 209. **RL-021**, *Elettronica – Judgment*, para. 128.

[1100] Counter-Memorial, paras. 196 and 206; Rejoinder, paras. 124 to 125.

of other investments in the energy sector by other proponents".[1101] In this regard, it submits that:

a. NAFTA Article 1105 does not prohibit differential treatment;

b. the Claimant cites "*no authority or legal rationale to support*" otherwise;

c. prior awards instead provide as follows:

   i. *Waste Management II* (and *Mobil*),[1102] referred to discriminatory conduct that "*exposes the claimant to sectional or racial prejudice*";[1103]

   ii. In *Grand River*, the tribunal stated that "*neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments*";[1104]

   iii. The *Methanex* tribunal stated that Article 1105 "*does not support the contention that the 'minimum standard of treatment' precludes government differentiation between nationals and aliens*";[1105]

   iv. *Mercer* found that "*the Claimant's claims for 'discriminatory treatment' under NAFTA Article 1105(1) can add nothing to the Claimant's claims under NAFTA Articles 1102 and 1103*";[1106] and

d. in the *Mercer* submissions, the three NAFTA State parties "*expressed the concordant view that less favourable treatment between domestic and foreign investors is not prohibited by Article 1105(1)*".[1107]

1101 Counter-Memorial, para. 210. Rejoinder, paras. 130 to 131: Memorial, para. 490.

1102 Memorial, paras. 478 and 480.

1103 **CL-091**, *Waste Management v. US (II), Award*, para. 98.

1104 **CL-054**, *Grand River v. US*, para. 209.

1105 **CL-063**, *Methanex v.US,* Award, para. 14; *See also* **CL-053**, *Glamis Gold v. US,* Award, fn. 1087.

1106 **RL-186**, *Mercer v. Canada*, Award, para. 7.60.

1107 **RL-186**, *Mercer v. Canada*, Award, paras. 21-23; **RL-187***, Mercer v. Canada*, Canada 1128 Reply, para. 20; **RL-188**, *Mercer v. Canada,* US 1128 Submission, paras. 43 to 46.

478. According to the Respondent, the Claimant's "*attempt to shoehorn national treatment into Articles 1102 and 1103*" "*must be rejected*".[1108] It submits that even if NAFTA Article 1105 protected against different investor treatment, the "*Claimant's inappropriate comparison to TransCanada Energy, a Request for Proposal ("**RFP**") contract holder, in no way proves nationality-based discrimination*", because:

    a. it did not involve the standard form FIT Contract; and

    b. as the *Windstream I* Award acknowledged, "*the moratorium and the related measures did not apply to TransCanada*".

479. Fourthly, according to the Respondent, the Claimant further "*failed to demonstrate that Article 1105 obligates Canada to respect all of the Claimant's expectations*".[1109] In particular, it argued that:[1110]

    a. the Claimant "*failed to identify any specific commitments or representations by Ontario that could reasonably have been relied on by [it] in deciding to invest in Ontario or to expect its Project to proceed*";

    b. the Claimant "*made no investment in Ontario following the* Windstream I *Award*";

    c. Article 1105 obligates States "*to refrain from egregious conduct that would shock the judicial conscience*", not "*guarantee that every legitimate policy decision made by a government will operate to the benefit of foreign investors*"; and

    d. "[e]*very measure in this dispute, considered in its appropriate context*" met the NAFTA Article 1105 obligations.

1108 Counter-Memorial, para. 211; Rejoinder, para. 133.

1109 Counter-Memorial para. 198.

1110 Counter-Memorial, para. 198.

480. As to the requirement for legitimate expectations, according to the Respondent:

a. "*mere failure to fulfil a commitment does not, without more, fall below the standard of treatment required by NAFTA Article 1105*";[1111] and

b. prior NAFTA awards confirm that failure to comply with legitimate expectations "*will not, in itself, constitute a breach of the minimum standard of treatment*",[1112] as:

i. this is "*a factor to be taken into account by a tribunal when assessing an allegation of breach of another element of the standard*";[1113]

ii. in *Waste Management II*,[1114] breach of host State representations that had been reasonably relied on by an investor, was "*relevant*" to whether or not it acted in a "*grossly unfair, unjust or idiosyncratic*" manner or exhibited "*a complete lack of transparency and candour in an administrative process*";[1115]

iii. in *Mobil*, "c*lear and explicit representations made* […] *to induce the investment*" that were objectively and reasonably relied upon by an investor was a "*relevant factor*" for breach, if "*egregious behaviour*";[1116] and

iv. in *Glamis Gold*, "*violation of Article 1105 based on the unsettling of reasonable, investment-backed expectations, requires as a threshold*

1111 Counter-Memorial, para. 212; Memorial, para. 486: ("In light of the tribunal's findings and Canada's representations, it was reasonable for Windstream to anticipate that the Ontario Government would operate transparently, in good faith, and would seek to uphold its promises and representations after the Award in *Windstream I*."), para. 489: ("The Government's conduct was unfair, inequitable, arbitrary, discriminatory, and in breach of representations reasonably relied on by Windstream's investments.").

1112 Counter-Memorial, para 212.

1113 Counter-Memorial, para 213; **RL-189**, Dumberry, Patrick. "*The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*", Journal of International Arbitration (2014), 31(1); 47-74, p. 49, referring to **CL-064**, *Mobil v. Canada*, Decision on Liability and on Principles of Quantum, 152; **CL-091**, *Waste Management v. US (II), Award*, para. 98.

1114 Memorial, para. 478; **CL-091**, *Waste Management v. US (II),* Award, para. 98.

1115 **CL-091**, *Waste Management v. US (II),* Award, para. 98.

1116 Memorial, para. 480; **CL-064**, *Mobil v. Canada*, Decision on Liability and Principles of Quantum, paras. 152 to 153.

circumstances, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment" and assurance must have been "*definitive, unambiguous and repeated*".[1117]

481. In the event that the Tribunal were to consider legitimate expectations to be a "*relevant factor*", the Respondent argues that this "*must be based on specific assurances given by Ontario to them in order to induce investment*".[1118] In this regard it argues that:

a. the Claimant relies on previously litigated promises, the *Windstream I* Award and representations during the *Windstream I* proceedings;[1119]

b. "*old promises, coupled with Ontario's refusal to direct the re-activation or renegotiation of the FIT Contract*" do not constitute breach;[1120]

c. 2011 statements were extensively litigated in *Windstream I* and were not referenced in the *Windstream I* Award findings on NAFTA Article 1105;[1121]

d. the Respondent's arguments in *Windstream I*, that Ontario did not plan to conduct any further studies,[1122] cannot be characterized as clear and explicit representations in order to induce the very investment at issue in that proceeding;[1123]

e. reliance on the *Windstream I* Award finding "*that the FIT Contract could have been renegotiated*" as the "*basis for its expectations that it would be*

1117 **CL-053**, *Glamis Gold v. US*, Award, paras. 766 and 802.

1118 Counter-Memorial, para. 216; **CL-091**, *Waste Management v. US (II),* Award. para. 98; Rejoinder, para. 133.

1119 Counter-Memorial, para. 216.

1120 Counter-Memorial, para. 216; Memorial, paras. 487 and 491; **CWS-N.Baines**, Witness Statement of Nancy Baines, para. 16: Rejoinder, paras. 137 to 139; Reply, paras. 396 to 398.

1121 Rejoinder, para. 138.

1122 Rejoinder, para. 139; *Windstream I* Award, para. 378.

1123 Rejoinder, para. 139.

renegotiated is completely unrealistic", particularly given damages awarded;[1124]

f. there was no representation post Award;[1125]

g. events after the *Windstream I* Award were limited to:

i. the Energy Minister's 6 December 2016 communication that the MOE was not in a position to discuss matters related to individual FIT contracts;[1126] and

ii. IESO's 12 January 2017 indication that it was not prepared to amend to extend MCOD or waive termination rights;[1127]

h. the Claimant's "*true expectations*" were "*made clear*" on 27 March 2017, when it initiated the Court Proceedings to prevent termination;[1128]

i. termination was "*the most rational expectation the Claimant could have had after having been awarded over $25 million in damages, representing the value for its Project, less the security deposit*";

j. "*the moratorium remained in place, the technical specifications for offshore wind development had yet to be developed, and there was no indication*

1124 Rejoinder, para. 139; **R-0781**, PRNewswire, Press Release, "*Windstream Energy awarded $28 million in damages and costs for inequitable treatment by Ontario; largest NAFTA award against Canada*", 13 October 2016; **R-0788**, Article, "*Energy minister says all options still being considered in offshore wind power case*" 6 December 2016 (also found as Exhibit 79 in C-2471, WWIS Application Record and Affidavit of David Mars sworn 2 June 2017 with exhibits).

1125 Rejoinder, para. 135.

1126 Counter-Memorial, para. 217; **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016) (also found as Exhibit 83 in C-2471, WWIS Application Record and Affidavit of David Mars sworn 2 June 2017 with exhibits); *see also* **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI), 21 February 2017.

1127 Counter-Memorial, para. 217; **C-2067**, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017); See also **R-0662**, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream), (February 9, 2017) (also found as Exhibit 82 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn 2 June 2017 with exhibits); Rejoinder, paras. 132 to 139.

1128 Counter-Memorial, para. 217; **C-2471**, WWIS Application Record and Affidavit of David Mars sworn 2 June 2017 with exhibits.

when any of that would change", and the Project "*substantially worthless*" and "de facto *cancelled*";[1129] and

k. when viewed in context, statements, news reports and quotes that the Claimant relies on for its reasonable assumption that the Project would still be built cannot support a legitimate expectation.[1130]

482. In those circumstances, the Respondent submits that "[a]*ny expectation on the part of the Claimant that its Project would proceed was not reasonable or even logical*".[1131]

(iii) The Tribunal's Analysis

483. As before, the Tribunal has relied on the entire record before it, including the disputing parties' written submissions and oral pleadings, concerning the Claimant's claim for expropriation in breach of NAFTA Article 1110. To the extent that some arguments are not reproduced in this Award, they have been considered and are subsumed in the Tribunal's analysis of the applicable standard for breach of the fair and equitable treatment standard pursuant to NAFTA Article 1105(1). This Tribunal accepts and affirms their standard as set out in the *Windstream I* Award, as set out at paragraphs 347 to 362 as follows:[1132].

> 347. As summarized above, the Claimant alleges that the Respondent has breached Article 1105(1) ("Minimum Standard of Treatment") of NAFTA. Article 1105(1) provides:

1129 Counter-Memorial, para. 217; *Windstream I* – Claimant's Reply Memorial, para. 473 ("Windstream's investments in WWIS, the FIT Contract and the Project are now substantially worthless. As a result of the drastic delays caused by the moratorium, the Project no longer has any hope of achieving commercial operation by the deadlines set out in the FIT Contract.").

1130 Rejoinder, paras. 135 to 136.

1131 Counter-Memorial, para. 218; Memorial, para. 489.

1132 Windstream I, paras 357 to 362 and footnotes 744 to 747; **CL-74** *Pope & Talbot v. Canada*, Interim Award, p. 26; **CL-66**, *Mondev. v. US*, Award, paras. 118, and 122; **CL-66**, *Mondev v. US,* Award, para. 118.

> "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."

348. While the Parties disagree on the content of the minimum standard of treatment set out in Article 1105(1), as well as on how the content of the standard should be established, they agree that the interpretation of this provision by the FTC in its Notes of Interpretation of 31 July 2001 is binding on all NAFTA tribunals under Article 1131(2) ("Governing Law") of NAFTA.[741] The FTC's Notes of Interpretation state:

> "1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> 2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
>
> 3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

349. The Claimant submits that both Parties bear the burden of proving the content of the standard. According to the Claimant, rather than requiring the Parties to prove the existence of custom on the basis of state practice and *opinio juris*, NAFTA tribunals have relied primarily on arbitral jurisprudence in determining the level of conduct that amounts to a breach of the requirement of fair and equitable treatment. The Respondent submits, in response, that it is the Claimant that bears the burden of proving the content of the standard because it is the party alleging that the standard has been breached. In support of its position, the Respondent refers *inter alia* to *Cargill v Mexico*, in which the tribunal held that "it is for the party asserting the custom to establish the content of that custom."

350. The Tribunal agrees that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule. However, in the present case the issue is not whether the

relevant rule of customary international law exists; the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation. The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist – the minimum standard of treatment in Article 1105(1) of NAFTA – should be established. The Tribunal is therefore unable to accept the Respondent's argument that the burden of proving the content of the rule falls exclusively on the Claimant. In the Tribunal's view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence. On this issue, the Respondent argues, and the Claimant appears to agree, that the Tribunal is not strictly bound by the Parties' positions although it may be said to be bound by the record before it in the sense that, if the Tribunal considers that there are issues or questions that neither Party has fully or properly addressed, or if it wishes to refer to legal authorities other than those cited by the Parties, it should draw the Parties' attention to those issues, questions and authorities and solicit the Parties' views thereon. This is indeed what the Tribunal has sought to do in the course of the present proceedings, having put forward a series of questions both before and during the February 2016 hearing, including regarding the content of the minimum standard of treatment.

351. The Tribunal further agrees with the Respondent that in principle the content of a rule of customary international law such as the minimum standard of treatment can best be determined on the basis of evidence of actual State practice establishing custom that also shows that the States have accepted such practice as law (*opinio juris*). However, the Tribunal notes that neither Party has produced such evidence in this arbitration. In the circumstances, the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet*. Such indirect evidence includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship.[742]

352. The Tribunal notes that other NAFTA tribunals have adopted a similar approach when seeking to determine the contents of the minimum standard

of treatment in Article 1105(1) of NAFTA. Both Parties have also extensively cited to NAFTA awards and legal scholarship. Furthermore, while decisions of earlier international tribunals such as the *Neer* tribunal are often referred to as reflective of the content of the customary international law minimum standard of treatment, including by the Respondent in the present proceedings, the Tribunal notes that *Neer* is also an award (or more accurately, a decision of an international claims commission), not direct evidence of State practice, and that the *Neer* tribunal itself did not have any direct evidence relating to State practice before it.[743] The Tribunal is therefore unable to determine the content of the customary international law minimum standard of treatment by revisiting the evidence before the *Neer* tribunal. Nor did the *Neer* decision deal with the treatment of foreign investors, and consequently the factual circumstances of the case are in any event not directly relevant here.

353. The Parties also disagree on the content of the minimum standard of treatment. According to the Claimant, the minimum standard of treatment is an "umbrella concept" which incorporates different elements, the fair and equitable treatment standard being one of these elements. Citing *Pope & Talbot*, the Claimant contends that the FTC Notes do not require that the reference to the fair and equitable treatment standard in Article 1105(1) should be ignored; any other reading would require "including" to be read as "excluding." Moreover, according to the Claimant, the content of the minimum standard of treatment is not static, but evolves over time with the development of customary international law, as explained by Professor Dolzer in his expert opinion.

354. The Respondent argues, in turn, that a breach of the minimum standard of treatment requires "egregious" conduct, and while bad faith is not required to commit a breach, it will in practice often be present. According to the Respondent, treaties containing "autonomous" fair and equitable treatment standards are not evidence of State practice or *opinio juris*, and the expert opinion of Professor Dolzer must therefore be rejected. Moreover, mere inconsistency with domestic law or breach of contract is not sufficient to breach customary international law, nor are NAFTA tribunals courts of appeal from decisions of domestic courts.

355. The Tribunal has carefully analysed the Parties' positions and considers that, when determining the content of the standard of treatment contained in Article 1105(1) of NAFTA, it cannot disregard the language of the provision. While the FTC in its Notes of Interpretation established that the rule contained in Article 1105(1) of NAFTA, bearing the heading "Minimum Standard of Treatment," is the customary international law minimum standard of treatment, it does not follow that the terms used in this provision have thereby become irrelevant; there is nothing in the FTC's Notes which would suggest that NAFTA tribunals should entirely disregard the relevant rules of treaty interpretation. Indeed, there can be no "plain reading" of a treaty provision that would involve no interpretation at all; "plain meaning" is in itself a result of interpretation. Consequently, when determining the content of the standard of treatment contained in Article 1105(1), the Tribunal must take into account both FTC's Notes of Interpretation, which establish that the standard contained in Article 1105(1) is indeed the customary international law minimum standard of treatment, and the general rule of treaty interpretation, as reflected in Article 31 of the Vienna Convention, which establishes that a treaty must 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."

356. As to the terms used, Article 1105(1) provides that each State 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." Consequently, while keeping in mind that the standard set out in the provision is the customary international law minimum standard of treatment, the Tribunal must also take into account the express language of the provision, which refers to "fair and equitable treatment" and "full protection and security." The Tribunal therefore considers that the treatment required under Article 1105(1) is fair and equitable treatment and full protection and security consistent with the minimum standard of treatment under customary international law. In other words, as stated by the FTC, the treatment required is not "in addition to or beyond" that which is required by the customary international law standard, but one that is in accordance, or consistent, with the standard,

while remaining "fair and equitable" and providing "full protection and security."

357. In the present case, the Claimant argues that the Respondent is in breach of the "fair and equitable" treatment component of the minimum standard of treatment, but does not allege that the Respondent has failed to provide "full protection and security." The Tribunal does not consider it helpful, for purposes of determining the content of the "fair and equitable" treatment component of the standard, to look for dictionary definitions of the terms used in Article 1105(1) – "fair" and "equitable." This is not only unhelpful as it would effectively result in replacing these terms with other words which would then also have to be interpreted; but also because it would create the risk that if the alleged breach were to be assessed in light of such other terms rather than the terms actually used in Article 1105(1), the standard to be applied would not be the standard set out in Article 1105(1), but another standard that might not be in accordance with the customary international law minimum standard of treatment. The State parties to NAFTA must have considered, when using the terms "fair and equitable treatment" and "full protection and security," that it is these terms, and not any others, that best reflect the content of the minimum standard of treatment set out in the provision. Nor can the FTC's Notes of Interpretation be taken to mean that a NAFTA tribunal must entirely disregard the terms "fair and equitable" and "full protection and security" in Article 1105(1) when considering whether the customary international law standard of treatment set out in the provision has been met.

358. Given that the Claimant invokes the "fair and equitable" treatment element, but not the "full protection and security" element of Article 1105(1) of NAFTA, in support of its Article 1105 claim, the Tribunal must determine whether the Respondent's conduct that the Claimant alleges as a breach of Article 1105(1) of NAFTA may be considered "unfair" or "inequitable" in accordance with the customary international law minimum standard of treatment. This determination is best done, not in the abstract, but in the context of the facts of this particular case, taking into account the indirect evidence of the content of the customary international law minimum standard of treatment as evidenced in the decisions of other NAFTA tribunals.

359. As noted above, this is also how other NAFTA tribunals have approached the issue. The Tribunal agrees in particular with the *Pope & Talbot* tribunal, which stated:

> "The [FTC] Interpretation concluded that Article 1105 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 other Parties. The Interpretation does not require that the concepts of 'fair and equitable treatment' and 'full protection and security' be ignored, but rather that they be considered as part of the minimum standard of treatment that it prescribes. Parenthetically, any other construction of the Interpretation where by the fairness elements were treated as having no effect, would be to suggest that the Commission required the word 'including' in Article 1105(1) to be read as 'excluding.' Such an approach has only to be stated to be rejected. Therefore, the Interpretation requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law."[744]

360. Similarly, the *Mondev* tribunal observed:

> When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.
>
> …
>
> [T]he FTC interpretation makes it clear that that in Article 1105(1) the terms 'fair and equitable treatment' and 'full protection and security' are, in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard. The word 'including' paragraph (1) supports that conclusion. To say that these elements are included in the

> standard of treatment under international law suggests that Article 1105 does not intend to supplement or add to that standard. But it does not follow that the phrase 'including fair and equitable treatment and full protection and security' adds nothing to the meaning of Article 1105(1), nor did the FTC seek to read those words out of the article, a process which *would* have involved amendment rather than interpretation."

361. The Tribunal underwrites all of these observations, including in particular the *Mondev* tribunal's observation that *"[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case*."[746] The Mondev tribunal rightly stressed that "*[i]t is part of the essential business of courts and tribunals to make judgments such as these*;" and that "*[i]n doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.*"[747]

362. In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.

484. In summary, in the *Windstream I* Award, the "*fair and equitable*" treatment element of Article 1105(1) of NAFTA minimum standard of treatment, includes the following requirements:

a. whether or not the Respondent's conduct may be considered "*unfair*" or "*inequitable*" in accordance with the customary international law minimum standard of treatment;

b. in the context of the facts of the particular case, taking into account the indirect evidence of the content of the customary international law minimum standard of treatment as evidenced in the decisions of other NAFTA tribunals;

c. the [FTC] Interpretation does not require that the concepts of "*fair and equitable treatment*" and "*full protection and security*" be ignored, but rather considered as part of the minimum standard of treatment that it prescribes;

d. any other construction would be to suggest that the Commission required the word "*including*" in Article 1105(1) to be read as "*excluding*", which should be rejected;

e. the Interpretation requires the host State to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law;

f. the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts;

g. it is part of the essential business of courts and tribunals to make judgments such as these; and

h. the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.

485. The *Windstream I* Award applied this standard and determined that, at the date of that Award, there had been a breach of the NAFTA Article 1105(1) minimum standard of treatment for the reasons explained in paragraphs 363 to 382 of the Award. The primary findings of the Tribunal in fact and law are at paragraphs 366 to 379, culminating in the findings at paragraphs 380 and 381 as follows:

> 380. The Tribunal concludes that the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA. It was indeed the Government of Ontario that imposed the moratorium, not the OPA, so it cannot be said that the resulting regulatory and contractual limbo was a result of the Claimant's own failure to negotiate a reasonable settlement with the OPA. The regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium was a result of acts and omissions of the Government of Ontario, and as such is attributable to the Respondent. The Tribunal therefore need not consider

whether the conduct of the OPA during the relevant period must also be considered attributable to the Respondent.[773]

381. [redacted][74] Indeed, the evidence before the Tribunal suggests that the Government expected that Windstream would bring legal action to settle the consequences of the moratorium, which the Government was unable to address within a reasonable period of time either by way of appropriate regulatory action or by way of an appropriate direction to the OPA.

486. Therefore, the *Windstream I* Award concluded that NAFTA Article 1105(1) was breached as a consequence of the Respondent failing to take the necessary measures, including directing the OPA, within a reasonable period of time after the Moratorium. This, in turn, led to a "*regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium*", in circumstances whereby [redacted] expecting the Claimant to "*bring legal action to settle the consequences of the moratorium, which the Government was unable to address within a reasonable period of time*".

487. As set out above, the cause of action for breach of minimum standard of treatment based on the failure to take the necessary measures, including directing the OPA, within a reasonable time after the Moratorium (prior to the *Windstream I* Award) was fully and finally determined in the Claimant's favour. Moreover, the losses caused to the Claimant by the resulting legal and contractual limbo were compensated in damages in the *Windstream I* Award.

488. The rationale for the *Windstream I* Award compensatory damages is set out in paragraph 483 (as set out above in relation to expropriation). Again, the *Windstream I* Award compensated the Claimant for the "*proper valuation of the Project*", adjusted only to deduct the security deposit amount of CAD 6 million:

> 483. While the Tribunal considers that this is the proper valuation of the Project, it should be kept in mind that, as determined above, the Claimant is not entitled to compensation for the full value of its investment: the Claimant has not lost the letter of credit, which is still in place, and the FIT Contract is still in force and could, in theory, be still revived and renegotiated if the Parties so agreed. Consequently, in order to quantify the damage caused by the Respondent's breach to the value of the Claimant's investment, a further adjustment must be made to reflect the value of the letter of credit (CAD 6 million). On the other hand, the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value. (It is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them.)

489. For the purpose of fair and equitable treatment breach in *Windstream II*, the Tribunal requires two things: (i) that the Respondent took steps after the *Windstream I* Award to appreciate or otherwise enhance the value of the FIT Contract; and (ii) the Respondent's action or inaction caused that appreciation not to occur and was in breach of the fair and equitable treatment standard.

490. The *Windstream I* Award did not, as set out above, make any order or finding that the Respondent was obligated in law to take any steps whatsoever to reactivate or renegotiate the FIT Contract. It merely recognised that it had not, at that time, yet been terminated and that reactivation and renegotiation remained a possibility as between the disputing parties.

491. In the event that both disputing parties had proceeded, entirely of their own volition, to reactivate and renegotiate the FIT Contract, then that may have created additional value in the FIT Contract. The Tribunal accepts that this was an entirely reasonable outcome. If the FIT Contract were renegotiated, the Moratorium lifted and the Project proceeded, it is entirely conceivable that WWIS and the Project as a whole would have appreciated in value as the Claimant took affirmative steps to resurrect

the investment. If the Respondent then committed a subsequent breach that damaged the resurrected Project and investment, it may have been liable to compensate the Claimant for that damage in new proceedings.

492. None of this happened.

493. Instead, in the period following the *Windstream I* Award, the Respondent did not agree to reactivate or renegotiate the FIT Contract, despite the Claimant's dogged efforts to persuade it to do so. In due course, IESO terminated the FIT Contract in accordance with its terms, a course entirely open to it on the terms of the existing FIT Contract. The Moratorium was not lifted and the Claimant's Project remains as it was in September 2016, save for the security deposit having been repaid. There has been no resurrection, no reactivation and no renegotiation of the FIT Contract or the Project.

494. Given the *Windstream I* tribunal's finding that the disputing parties had an "*option*" to reactivate or renegotiate the FIT Contract after the *Windstream I* Award, and this *Windstream II* Tribunal's conclusion that this was indeed an option and not a legal obligation pursuant to Ontario law governing the FIT Contract or to international law, the Respondent's failure to do so cannot constitute breach.

495. Again, absent revival and renegotiation, it was uncontested that the FIT Contract could be unilaterally terminated by either Party once the MCOD was reached and, moreover, it was impossible for the Claimant to meet the MCOD requirements prior to that date. A unilaterally terminable FIT Contract was the *status quo* without reactivation or renegotiation. There was no legal obligation to renegotiate or revive.

496. Therefore, the Respondent's or Ontario Government's failure to take steps directly or to direct IESO to take steps prior to the FIT Contract becoming worthless was a breach that was found to have occurred prior to the *Windstream I* Award, and was fully compensated by that earlier *Windstream I* Award. The Respondent was under no legal obligation to ensure that the Claimant was able to resurrect the Project and create new value. It was an option, not an obligation. Therefore, its failure to

permit, assist or enable the Claimant to do so is not a breach of NAFTA Article 1105(1).

497. The claim for breach of fair and equitable treatment arising out of conduct following *Windstream I* Award is rejected.

VII. CAUSATION AND DAMAGES

498. Given the Tribunal's finding of no breach, there is no need to consider causation or damages.

VIII. COSTS

A. THE CLAIMANT'S POSITION

499. According to the Claimant, if successful in this arbitration, the Respondent should bear its costs, as defined in the UNCITRAL Rules Article 40, in the total amount of **CAD 5,654,577.01**, including:

a. legal fees of CAD 2,858,147.93;

b. costs of expert witnesses, third-party service providers and witness travel costs of CAD 2,172,017.39;

c. disbursements of CAD 226,451.69; and

d. Tribunal and Permanent Court of Arbitration costs advanced by Windstream of CAD 397,960.00.

500. It submits that these costs are "*reasonable in light of the length of the arbitration, the substantial evidentiary record, the need for complicated expert evidence and the complexity of the issues*",[1133] and "s*ubstantially lower than the costs it incurred in the prior* Windstream I *hearing*",[1134] noting however "*inflation in the cost of legal services over the past eight years since the first hearing*" and the Respondent's "*two*

[1133] Claimant Costs Submission, para. 4.

[1134] The Claimant noted that its expectation is that "Canada's costs will likewise be lower in this arbitration, given the more circumscribed nature of the *Windstream II* proceeding. In *Windstream I*, Canada sought costs of $8,261,052.35".

costly and unsuccessful motions in these proceedings: a motion for bifurcation and an ill-timed motion for security for costs".[1135]

501. The Claimant makes a distinction between costs that should be awarded to it, should it prevail in whole or part, and costs that should be awarded to the Respondent if the Claimant is unsuccessful.

502. As to the first, according to the Claimant:

a. under the applicable arbitration rules, there is a presumption in favour of awarding the successful party its costs in the arbitration, which was also agreed in *Windstream I*, as follows:[1136]

i. NAFTA Article 1135(1) provides that "[a] tribunal may also award costs in accordance with the applicable arbitration rules";[1137]

ii. UNCITRAL Rules Article 40 provides that the Tribunal "shall fix the costs of the arbitration in the final award…" The term "costs" is defined to include the fees and reasonable expenses of the Tribunal, the fees and expenses of the PCA, the reasonable costs of expert advice, the reasonable expenses of witnesses to the extent such expenses are approved by the Tribunal, and the reasonable legal and other arbitration costs incurred by the parties;[1138]

iii. UNCITRAL Rules Article 42 provides that the "costs of the arbitration shall in principle be borne by the unsuccessful party or parties," but the Tribunal may portion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case;[1139]

1135 Claimant Costs Submission, para. 4.

1136 *Windstream I* Award, paras. 491 and 500.

1137 NAFTA, Art. 1135(1).

1138 UNCITRAL Rules, Art. 40.

1139 UNCITRAL Rules, Art. 42.

b. the presumption that costs should "*follow the event*" is consistent with "*common practice in investment arbitration, which aligns with the principle of reparation set out in the* Chorzów Factory *case*";[1140]

c. the Claimant's costs are reasonable and it did not take steps in this arbitration that unnecessarily increased the costs borne by the disputing parties; and

d. if partially successful, the Tribunal should order an appropriate portion of costs.[1141]

503. As to the second, according to the Claimant:

a. "*[t]ribunals will depart from the presumption that costs follow the cause if it is reasonable to do so in the circumstances, such as where a state party has succeeded on one, but not all, grounds raised, where the issues raised in the arbitration are novel or complex, and considering the conduct of the parties during the proceedings*";[1142]

b. the Tribunal should reduce the Respondent's costs to reflect:[1143]

1140 See **CL-150**, *Hrvatska v. Slovenia*, para. 599; **CL-156**, *Bernhard von Pezold v. Zimbabwe*, paras. 1002-1003; **CL-121**, *Gold Reserve v. Venezuela Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, para. 860; **CL-021**, *ADC v. Hungary*, para. 533: "[w]ere the claimants not to be reimbursed their costs in justifying what they alleged to be egregious conduct on the part of Hungary it could not be said that they were being made whole."

1141 **RL-106**, *S.D. Myers v Canada,* Final Award on Costs, 30 December 2002, para. 15: a successful claimant that has "in effect been forced to go through the process in order to achieve success," should not then be "penalized by having to pay for the process itself." **CL-076**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, para. 352 (although the claimant did not prevail on the major portions of their monetary claims, "[t]o obtain justice, they had no option but to bring this arbitration forward and to incur related costs." The tribunal ordered the respondent to bear 65% of the arbitration costs). See, e.g., **CL-070**, *Occidental Exploration and Production Company v. The Republic of Ecuador* (UNCITRAL, LCIA Case No. UN3467) Final Award, 1 July 2004, para. 216; **CL-131**, *Valeri Belokon v. The Kyrgyz Republic* (UNCITRAL) Award, 24 October 2014, para. 333.

1142 **CL-247**, *Renco v. Peru (I)*, paras. 29 to 48. See also **CL-245**, *Philip Morris v.Australia*, para. 59.

1143 **CL-247**, *Renco v. Peru (I)*, para. 42.

i. two costly and unsuccessful motions (bifurcation and security for costs), the response to which totalled $88,382.31;[1144]

ii. Canada is not represented by external counsel, with legal fees reflecting actual out of pocket expenses, but a team of salaried lawyers employed by Global Affairs Canada;

iii. even if Canada is successful on the merits, "*it was reasonable for it to bring this arbitration given the clear mistreatment it was afforded by the Government of Ontario, including the lack of clarity regarding the status of its FIT Contract in the post-2016 period*"; and

iv. the *Windstream I* Award found that the FIT Contract was not expropriated, and that the claim was premature, so the Claimant "*has conducted itself in good faith and in such circumstances*", and "*NAFTA tribunals have taken such factors into account in exercising their discretion in terms of costs and expenses*".[1145]

504. The Claimant then explains why it considers its arbitration costs to be reasonable.

505. As to its legal costs, in the sum of CAD 2,858,147.93, it notes that these had been paid in full and reflect the fees actually paid by the Claimant, based on Torys' standard hourly rates but reflecting discounts applied.

506. According to the Claimant, in assessing reasonableness of costs, tribunals have "*considered factors such as the length of the proceedings, the size of the evidentiary*

1144 **CL-244**, *OperaFund v. Spain*, para. 726. See also **RL-102**, *European American Investment Bank v. Slovak Republic* Award on Costs, para. 42 (A successful party should not be made whole "in respect of independent claims, jurisdictional objections, or procedural applications, on which it was not successful and which have contributed to the overall costs of the arbitration in a significant and measurable way").

1145 *See* **CL-066**, *Mondev v. US*, para. 159; **CL-053**, *Glamis Gold v. US*, para. 833; **RL-025**, *Fireman's Fund v. Mexico*, para. 221; **CL-051**, *Gami Investments v. Mexico* para. 135. **RL-139**, *Westmoreland v. Canada (I)*, paras. 248 to 249, (tribunal dismissed the claim on jurisdictional grounds. Despite Canada's success, the tribunal held that the parties should bear their own arbitration costs equally given the claimant's "*evident good faith*"). **CL-061**, *Merrill & Ring v. Canada*, paras. 270 to 271: (tribunal dismissed the claim but held that the claimant had in some respects plausible arguments and that professional competence characterized the submissions, allegations and arguments of the parties at all times. In such circumstances, the tribunal held each party should bear their own arbitration costs).

record and the complexity of the issues in dispute".[1146] It submits that this was "*a complex case that involved lengthy written submissions, extensive expert evidence, thousands of exhibits, and a week-long hearing. In response to document requests, Windstream produced a total of 6,066 documents, and Canada produced a total of 2,835 documents, all of which needed to be reviewed by counsel*", yet it pursued "*a focused case*".

507. It further submits that "[c]*osts sought and granted in other comparable arbitrations have been significantly higher, further demonstrating the reasonableness of* [its] *costs in this arbitration*",[1147] and that the Tribunal "*should not judge the reasonableness of Windstream's costs by the amount claimed by Canada*",[1148] because the Claimant:

a. bore the burden of proof, requiring it to produce more experts and witnesses to prove its case; and

b. was required to respond to the Respondent's unsuccessful motions for bifurcation and security for costs.

508. As to its expert costs in the sum of CAD 2,172,017.39, for expert witnesses, travel costs and third-party service providers, this amount:

a. does not include costs for Project work, such as engineering, regulatory and design work, included in Secretariat's calculation of sunk costs;[1149]

b. is reasonable, this being "*a complicated case that raised numerous technical and damage calculation issues requiring expert evidence*", requiring "*specialized expert evidence in order to establish the technical feasibility of*

1146 **CL-243**, *Hulley v. Russia*, paras. 1876 to 1882; **CL-242**, *ConocoPhillips v. Venezuela*, paras. 982 and 989; **CL-246**, *Tethyan Copper v. Pakistan*, para. 1850.

1147 In **CL-246**, *Tethyan Copper v. Pakistan*, the Claimants were awarded USD 62 million USD in costs. In **CL-243**, *Hulley v. Russia*, the Claimants claimed USD 80 million and were awarded USD 60 million.

1148 **CL-021**, *ADC v. Hungary* , para. 535; **CL-132**, *Siag and Vecchi v. Egypt*, para. 624; **CL-243**, *Hulley v. Russia*, para. 1882. *See also* **CL-052**, *Gemplus v. Mexicano,* paras. 17 to 25.

1149 *See* **CER-Secretariat**, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard, Schedule 3, pp. 176 to 181.

the Project, the reasonableness of Windstream's conduct following the Windstream I Award and the quantum of Windstream's damages as a result of Ontario's and Canada's breaches"; and

c. included "*reasonable costs for other third-party service providers, for witness travel costs and for other disbursements (such as the cost of document hosting, reviewing, printing, binding and copying and research costs)*".

B. THE RESPONDENT'S POSITION

509. According to the Respondent, the Claimant should be ordered to pay all of its costs in the arbitration, which amount to **CAD 3,320,851.47**.

510. The Respondent submits that, pursuant to NAFTA Article 1135(1) and the UNCITRAL Rules Articles 40 and 42, the Tribunal should order that its costs be borne by the Claimant in light of the Claimant's "*unnecessary and unreasonable arguments and the inefficient manner with which it pursued its claim*".[1150] It noted further that:

a. NAFTA Article 1135(1) provides tribunals with discretion to apportion costs "*in accordance with the applicable arbitration rules*";

b. UNCITRAL Rules Article 42(1) provides the Tribunal with discretion to order the unsuccessful party to bear the costs of the other, or to apportion costs if it determines it reasonable, "*taking into account the circumstances of the case*";[1151]

1150 Respondent Costs Submission, para. 1.

1151 Article 40(2) of the UNCITRAL Rules states that "[t]he term 'costs' includes only: (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41; (b) The reasonable travel and other expenses incurred by the arbitrators; (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal; (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; and (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA".

c. the Tribunal should consider "*the outcome of the proceedings and to other relevant factors*",[1152] in order to serve "*the dual function of reparation and dissuasion*";[1153] and

d. an important factor is the extent to which the case was presented in an efficient manner.[1154]

511. According to the Respondent, the "inefficiencies with which the Claimant brought its case justify a costs order in [its] favour", including:

a. relying heavily on a discounted cash flow ("**DCF**") methodology but shifting course completely on the last day of the hearing, abandoning its original position;[1155]

b. criticising "*Canada for not putting forward responsive expertise and DCF calculations, which had compelled [it] to retain Dr. Jérôme Guillet*", before "*the Claimant ultimately abandoned its theory of damages*", arguing that "*the DCF stood for nothing more than 'a reality check'*";[1156]

c. causing Canada and the Tribunal "*to spend time and incur unnecessary costs to address and evaluate the Claimant's DCF methodology*";

1152 **CL-091**, *Waste Management, Inc. v. US (II)*, para. 183.

1153 **RL-007**, *Azinian, v. Mexico*, para. 125.

1154 **RL-007**, *Azinian, v. Mexico*, para. 126; **CL-057**, *Thunderbird v. Mexico*, para. 218. As noted by the UNCITRAL Working Group considering revisions and updates to the UNCITRAL Notes on Organizing Arbitral Proceedings, "[t]he arbitral tribunal may also consider the conduct of the parties in allocating costs", which may include consideration of "procedural requests by a party (for example, document requests, procedural applications and cross-examination requests) to the extent that any such failure actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings"; **RL-018**, UNCITRAL, "Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings", A/CN.9.WG.II/WP.194, Sixty-Fourth Session, New York, 1-5 February 2016, para. 47.

1155 Memorial, paras. 499 and 528 to 542; Reply, paras. 416 to 421; **CER-Secretariat**, Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard; **CER-Secretariat**, Second Independent Expert Report of Chris Milburn, Edward Tobis, and Pierre-Antoine Tetard; Memorial, paras. 499, 529 to 531, 534, and 539 to 542; Reply, paras. 416 to 421. Hearing Transcript, Day 3, 7 February 2024, pp. 689-1025 (Secretariat Testimony).

1156 Memorial, paras. 434 and 435. Hearing Transcript, Day 5, 9 February 2024, pp. 1380:10-1381:7 (Claimant's Closing Arguments).

d. making it "*unreasonable for Canada to bear any costs associated with the Claimant's passing reliance on the DCF methodology, including the Secretariat reports, and also the reports of Baird, COWI, Two Dogs, Aerocoustics, Weeks, Wood, WSP, and Canada's expert, Dr. Guillet*"; and

e. refusing "*to narrow down the disputed issues and repeatedly focused on pre-* Windstream I *facts*", (e.g., launching its opening "*by playing the same 2011 audio recording*", calling "*every witness Canada put forward, and having set aside half a day for Mr. Teliszewsky's cross- examination, spent a total of 12 minutes with him*", demonstrating "*disinterest in streamlining issues, particularly if it meant focusing on post* Windstream I *facts*").

512. Further, according to the Respondent, in contrast it "*made significant efforts to reduce, and prevent further costs*",[1157] and "*to improve the efficiency of the arbitral process*", (e.g., not cross-examining many of the Claimant's witnesses, "*recognizing the substantial overlap in facts between* Windstream I *and the current claim, which ultimately allowed the hearing to be reduced from two weeks to one*").

513. The Respondent further submits that its costs and disbursements were reasonable, with total billings for legal representation reflecting hourly rates "*well below market rates*", reflecting the "*complexities of defending against a NAFTA claim in a federated State such as Canada and include time for both lawyers and paralegals from the Trade Law Bureau of the Government of Canada*",[1158] and not representing "*the full cost to the Governments of Canada and Ontario associated with defending against this claim*".

514. It considers those to be reasonable compared to decisions on costs in other prior awards.[1159]

1157 In Canada's settlement proposal of February 16, 2023 (**C-2814**), Canada offered to waive the costs it had incurred should the Claimant withdraw its claim. The Claimant never responded to Canada's request.

1158 NAFTA tribunals have ordered claimants to pay Canada's costs, including costs of provincial counsel. *See for example*, **RL-186**, *Mercer v. Canada*, Award, para. 9.11; and **CL-153**, *Mesa v. Canada*, para. 705.

1159 *See* **CL-153**, *Mesa v. Canada*, para. 706 (ordering the claimant to pay CAD 2,948,701.00 for the respondent's legal costs and arbitration costs); **RL-186**, *Mercer v. Canada,* Award, para. 10.7 (ordering the claimant to pay

515. Regarding the reasonableness of its disbursements, the Respondent notes that it "*was compelled to hire Dr. Guillet due to the Claimant's groundless and now abandoned use of a DCF methodology to calculate its damages*", and "*also incurred expenses relating to its fact witnesses that it only put forward after being criticized by the Claimant for not having witnesses*".[1160]

C. THE TRIBUNAL'S ANALYSIS

516. The disputing parties agree that the standard for costs is as stated at NAFTA Article 1135(1) and the UNCITRAL Rules Articles 40 and 42, and in particular:

a. NAFTA Article 1135(1) provides tribunals with discretion to apportion costs "*in accordance with the applicable arbitration rules*"; and

b. UNCITRAL Rules Article 42(1) provides the Tribunal with discretion to order the unsuccessful party to bear the costs of the other, or to apportion costs if it determines it reasonable, "*taking into account the circumstances of the case*".

517. UNCITRAL Rules Article 40(1) provides that "[t]*he arbitral tribunal shall fix the costs of arbitration*". UNCITRAL Rules Article 40(2), in turn, defines the costs of arbitration to include:

a. the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with Article 41;

b. the reasonable travel and other expenses incurred by the arbitrators;

c. the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

CAD 9,000,000.00 for the respondent's costs); **RL-184**, *Eli Lilly v. Canada*, para. 480 (ordering the claimant to pay CAD 4,448,625.32 for the respondent's legal costs); and **CL-037**, *Chemtura v. Canada*, para. 587 (ordering the claimant to pay CAD 2,889,233.80 for the respondent's legal costs).

1160 Memorial, paras. 68, 114, 122, 147, 155, 165, and 385.

d. the reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

e. the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; and

f. any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

518. The disputing parties have each made advances towards the costs in the amount of USD 462,500.00, leading to a total advance of USD 925,000.00. The fees of the Tribunal Members amount to USD 95,350.00 for The Rt Hon Beverley McLachlin, USD 84,000.00 for Professor John Gotanda, and USD 308,812.50 for Ms Wendy Miles KC, together amounting to USD 488,162.50. The expenses of the Tribunal amount to USD 7,370.74 for The Rt Hon Beverley McLachlin, USD 11,068.68 for Professor John Gotanda, and USD 13,989.00 for Ms Wendy Miles KC, together amounting to USD 32,428.42. The PCA's fees for registry services, which were paid in accordance with the PCA's Schedule of Fees, amount to USD 158,922.89; the PCA's expenses to USD 7,899.91. Other costs incurred (including costs of banking services, catering, courier services, hearing venue services, office supplies and printing, telecommunications and currency variances) amount to USD 198,931.14.

519. The disputing parties' legal and other costs in the sense of UNCITRAL Article 40 (2)(d) and (e) are set out in paragraphs 499 and 509 above.

520. Thus, the costs of the arbitration, excluding the disputing parties' costs in the sense of UNCITRAL Article 40 (2)(d) and (e) incurred by the disputing parties, amount to USD 886,344.86.

521. Having fixed the costs of arbitration, the Tribunal proceeds to the apportionment of costs.

522. As set forth above, the Respondent wholly prevailed on the merits in this *Windstream II* arbitration. According to the Respondent, it should therefore be awarded its costs pursuant to UNCITRAL Rules Article 42(1) and principles stated in prior awards that the Tribunal should also consider "*other relevant factors*",[1161] in order to serve "*the dual function of reparation and dissuasion*",[1162] including the extent to which the case was presented in an efficient manner.[1163]

523. The Tribunal takes no issue with the reasonableness of the Respondent's costs. It deployed its internal government lawyers, and its costs amount to 3/5 of the fees and costs of the Claimant.

524. However, this is an unusual case. The language of the *Windstream I* Award left the disputing parties with reasonable uncertainty as to the status of the Claimant's surviving investment in Canada. Had that not been the case, no second arbitration would have been necessary.

525. There may of course have been other ways to proceed. For example, the Claimant, or disputing parties jointly, could have asked this Tribunal for an interpretation or even early indication of the meaning of the critical paragraphs in *Windstream I* Award. The Respondent would argue that this was the purpose of its bifurcation application on jurisdiction and admissibility issues. However, based on the reasoning set out above, that would not have resolved the matter and instead led to additional time and cost to both disputing parties.

526. Therefore, the Tribunal has decided to exercise its discretion to order that each Party bears its own costs in the arbitration. The Claimant, having commenced the second

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1161 **CL-091**, *Waste Management, Inc. v. US (II)*, Award, para. 183.

1162 **RL-007**, *Azinian v. Mexico*, para. 125.

1163 **RL-007**, *Azinian v Mexico,* para. 126; **CL-057**, *Thunderbird v.Mexico*, para. 218. As noted by the UNCITRAL Working Group considering revisions and updates to the UNCITRAL Notes on Organizing Arbitral Proceedings, "[t]he arbitral tribunal may also consider the conduct of the parties in allocating costs", which may include consideration of "procedural requests by a party (for example, document requests, procedural applications and cross-examination requests) to the extent that any such failure actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings". **RL-018**, UNCITRAL, "Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings", A/CN.9.WG.II/WP.194, Sixty-Fourth Session, New York, 1-5 February 2016, para. 47.

arbitration, was required to defend challenges on every conceivable ground by the Respondent (which in turn was not unreasonable but required considerable work).

527. The Respondent, for its part, did not appear to make any real effort to resolve the dispute amicably with the Claimant, despite its repeated entreaties.

528. It was unfortunate that the disputing parties were required to participate in season two of the *Windstream* arbitration proceedings. For the most part, the Tribunal considers them to have conducted themselves reasonably efficiently in the circumstances and most certainly with a collegial and cooperative approach to the Tribunal, the process, and one another.

529. The unused balance in the amount of USD 38,655.14 held on deposit by the PCA shall be returned to the disputing disputing parties in equal shares, *i.e.*, USD 19,327.57 each.

IX. THE DISPOSITIVE

530. For the reasons set out above, the Tribunal hereby declares, orders and awards as follows:

a. the Tribunal has jurisdiction and the claims are admissible;

b. the disputing parties are bound by the *res judicata* (cause of action estoppel) and collateral (issue) estoppel based on the findings of fact in the *Windstream I* Award as set out above;

c. Canada has not unlawfully expropriated Windstream's investments in WWIS, the Project and the FIT Contract, contrary to Article 1110 of NAFTA;

d. Canada has not further failed to accord Windstream's investments fair and equitable treatment in accordance with international law, contrary to Article 1105 of NAFTA, following the *Windstream I* Award;

e. Canada has not failed to ensure through regulatory control, administrative supervision or the application of other measures, that its State enterprise, the

IESO, acts in a manner consistent with Canada's obligations under Chapter 11 of NAFTA;

f. no additional damages are payable in this arbitration;

g. each Party shall bear its own legal fees and costs associated with this arbitration; and

h. the Tribunal rejects all other claims in full.

Place of Arbitration: Toronto, Ontario

Date: 20 April 2026 (corrected on 11 June 2026)



Prof. John Gotanda
Arbitrator



Rt. Hon. Beverley McLachlin
Arbitrator



Ms Wendy Miles KC
Presiding Arbitrator

ANNEX A

FACTUAL BACKGROUND EXTRACT WINDSTREAM (I) AWARD

A. The Regulatory Framework Governing Renewable Energy in Ontario

1. In 2003, the Government of Ontario determined that without increasing electricity supply in the Province of Ontario, it would run a risk of electricity shortages.[1] At the same time, the Government felt that the Province's dependence on coal-fired power plants as an energy source gave rise to health and environmental concerns.[2] Consequently, Ontario started exploring the use of alternative and renewable sources of electricity generation[3] and adopting policies to promote renewable energy development.[4] In the same year, Ontario's Premier announced a plan to close Ontario's coal-fired power plants.[5]

2. In 2004, Ontario enacted the Electricity Restructuring Act that amended the Electricity Act of 1998, establishing *inter alia* the OPA as "*an independent non-share capital corporation responsible for medium and long-term system planning, conservation, demand management and procurement of new generation through long-term power purchase agreements (PPAs).*"[6] The OPA had separate legal personality and could enter into electricity procurement contracts.[7] The Minister of Energy could direct the OPA to undertake specific actions regarding its electricity procurement programs, but the Electricity Act specified that the OPA was "*not an agent of the Crown.*"[8]

3. Between 2003 and 2008, Ontario and the OPA ran a number of procurement programs to encourage the desired use of alternative and renewable energy sources. However,

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1 Counter-Memorial, para. 36.

2 Counter-Memorial, para. 36.

3 Amended Response to the Notice of Arbitration, para. 12.

4 Memorial, para. 80.

5 Parties' Joint Chronology, p. 1 (citing **C-1090,** Article, Spears, John (Toronto Star), Ontario Coal-Burning Power Plants to Close This Year of 10 January 2003).

6 Counter-Memorial, para. 39; Amended Response to the Notice of Arbitration, para. 12.

7 Counter-Memorial, para. 40.

8 Counter-Memorial, paras. 39, 41 (referring to the **C-3**, *Electricity Act, 1998*, Part II.1, s. 25.3).

all these initiatives failed to produce the required level of new investment.[9] On 1 January 2015, the OPA was merged with the Independent Electricity System Operator ("**IESO**") and the new entity kept working under the IESO name.[10]

4. In Ontario, all lakebeds (with one exception that is not relevant) are Crown land.[11] The MNR, among other things, exercises regulatory authority on behalf of Ontario for granting access to Crown land for offshore wind development.[12] In March 2003, the MNR released for public comment a draft policy on the disposition of Crown land (including the beds of the Great Lakes) for wind energy development.[13] In March 2004, the draft policy was finalized, and the MNR subsequently issued it as Policy Number 4.10.04, Wind Power Development on Crown Land ("**Wind Policy 4.10.04**").[14] Wind Policy 4.10.04 established for the first time a set of standardized rules for wind developers to apply for the use of Crown land.[15] Between 2004 and 2006, the MNR engaged in research regarding the potential environmental effects of offshore wind energy projects.[16]

5. In November 2006, the MNR decided to defer its consideration of applications for access to Crown land to develop offshore wind power.[17] In light of the "*relatively little experience with understanding the positive and negative social and economic effects associated*" with wind power, this deferral was meant to allow the further study of the effects of offshore wind as a source of energy generation.[18]

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9 Amended Response to the Notice of Arbitration, paras. 13-14.

10 Counter-Memorial, para. 34.

11 Memorial, para. 132.

12 Amended Notice of Arbitration, para. 16; Memorial, para. 74.

13 Memorial, para. 80.

14 Memorial, para. 81.

15 Memorial, para. 133.

16 Memorial, para. 81 (referring to **CER-Powell**, Expert Report of Sarah Powell, para. 63).

17 Memorial, para. 86.

18 Memorial, para. 86 (referring to **C-460,** Issues Management Plan (MNR), Offshore Wind Power – Temporary Deferral of 17 January 2011); Parties' Joint Chronology, p. 1 (citing **C-13,** Letter from Boysen, Eric (MNR) to Proponent Address of 21 November 2006).

6. In January 2008, following "considerable activity on the policy and resource analysis front," the MNR determined that the existing policy and Environmental Assessment processes "[were] *sufficient to address site-specific issues and concerns related to offshore wind.*"[19] On 16 January 2008, the Premier of Ontario, Mr Dalton McGuinty, informed the local media that "*offshore wind could play an important role in the development of renewable energy resources in Ontario.*"[20] He also stated that offshore wind power could be harnessed "*in a way that does not compromise ecosystems.*"[21] On 17 January 2008, the MNR announced the lifting of the deferral decision of November 2006.[22]

7. The lifting of the deferral meant that new applications for access to offshore Crown land would be reviewed by the MNR.[23] On 28 January 2008, Wind Policy 4.10.04 was updated and reissued to include offshore wind, and guidelines were published regarding the application of the Policy.[24] On 23 April 2008, Ms Donna Cansfield, the Minister of Natural Resources, stated at an energy conference:

    i. "For the past two years we've been assessing potential benefits and impacts of this technology. Our research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place. As a result, we were able to lift the deferral last January and began accepting applications for exploration proposals."[25]

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19 Memorial, para. 90 (citing **C-52**, House Note (MNR), Issue: Lifting of the Off-Shore Wind Power Deferral of 3 January 2008).

20 Memorial, para. 88 (referring to **C-56**, Article, Hamilton, Tyler (Toronto Star), Premier Reveals Support for Offshore Energy Plan of 16 January 2008); Parties' Joint Chronology, p. 1 (also citing (**C-56**)).

21 Reply, para. 193 (citing **C-56** Article, Hamilton, Tyler (Toronto Star), Premier Reveals Support for Offshore Energy Plan of 16 January 2008, p. 1). *See also* Reply, paras. 194-195.

22 Memorial, para. 87; Press Release (MNR), **C-58** Ontario Lays Foundation for Offshore Wind Power of 17 January 2008; Reply, paras. 59, 191; Parties' Joint Chronology, p. 1 (also citing (**C-58**)).

23 Amended Response to the Notice of Arbitration, para. 23; Memorial, para. 87; Reply, para. 59; Parties' Joint Chronology, p. 1.

24 Memorial, para. 87; Parties' Joint Chronology, p. 1 (citing **C-60** Policy No. PL 4.10.04 (MNR) of 28 January 2008; Policy No. PL 4.10.04 (MNR), **C-59** Wind Power Site Release and Development Review – Crown Land of 28 January 2008).

25 Reply, para. 192 (citing Remarks by Natural Resources Minister Cansfield, Donna to the Energy 2100 of 23 April 2008 (**C-761**), pp. 16-17).

8. On 30 June 2008, Minister Cansfield was quoted in the Toronto Star newspaper to the effect "*that Ontario was 'open for business' when it comes to offshore wind.*"[26] On 29 October 2008, at the annual Ontario Waterpower Conference, Minister Cansfield gave a speech in which she confirmed that "*timely approval of applications to use Crown land for offshore wind energy development could be expected by those submitting applications*."[27]

9. On 20 February 2009, the Ontario Government announced a proposal to enact the GEGEA.[28] The Government described the proposal as "*sweeping new legislation to attract new investment, create new green economy jobs and better protect the climate.*"[29] On the same date, the Deputy Premier, Minister George Smitherman, explained before the Toronto Board of Trade that the GEGEA meant that Ontario would "*offer an attractive price for renewable power, including wind – onshore and offshore* […] *and we'll guarantee the price for decades.*"[30]

10. On 21 February 2009, the Toronto Star newspaper published an interview with Minister Smitherman in which he stated that there were "*wonderful opportunities for offshore wind*" and the Government had been "*making sure we'll move those proposals along.*"[31] On 23 February 2009, Minister Smitherman gave a speech at the Legislative Assembly of Ontario in which he stated that the GEGEA "*would make Ontario the 'destination of choice' for green power developers, would 'incent proponents large and small to develop projects by offering an attractive price renewable energy' and would provide 'the certainty that creates an attractive investment climate.*'"[32] He also

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26 Memorial, para. 91 (citing **C-81,** Email from Cooper, John (MNR) to Morencie, Mike (MNR) et al. attaching Toronto Star Article of 30 June 2008).

27 Memorial, para. 98 (referring to **CWS-Baines**, Witness Statement of Ian Baines, para. 96).

28 Memorial, para. 100; Reply, para. 71; Parties' Joint Chronology, p. 2 (citing **C-110** News Release, Smitherman, George (MEI), The Green Economy of 20 February 2009).

29 Memorial, para. 100 (citing **C-115** News Release (Ministry of Energy), Ontario's Bold New Plan for a Green Economy of 23 February 2009).

30 Memorial, para. 103 (citing **C-110** News Release, Smitherman, George (MEI), The Green Economy of 20 February 2009); Reply, para. 71.

31 Reply, para. 71 (citing **C-111** Article, Hamilton, Tyler (Toronto Star), Province to Fast-Track Wind Turbine Projects of 21 February 2009, p. 2).

32 Memorial, para. 161 (citing **C-116,** Legislative Assembly of Ontario (Hansard Transcript), Smitherman, George Statement of 23 February 2009); Reply, paras. 70, 79.

stated that the GEGEA "*would coordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process with a service guarantee,*"[33] adding that "*so long as all necessary documentation is successfully completed, permits would be issued within a six-month service window.*"[34]

11. On 14 May 2009, the GEGEA was approved.[35] The GEGEA introduced the FIT Program and consolidated many of the provincial environmental approvals for renewable energy projects into a streamlined approval process, the Renewable Energy Approval ("**REA**") process, making the MOE the primary regulator in the renewable energy sector.[36]

12. The GEGEA authorized the MEI to direct the OPA to develop the FIT Program. On 24 September 2009, the MEI exercised its authority and the OPA began taking applications for the FIT Program on 1 October 2009.[37] The launch of the FIT Program and the GEGEA was accompanied by a press release, published on 24 September 2009, which stated that "*Ontario's new regulations provide a stable investment environment where companies know what the rules are – giving them confidence to invest in Ontario, hire workers, and produce and sell renewable energy.*"[38] On the same date, the OPA issued a press release announcing the adoption of the Renewable Energy Approval Regulation ("**REA Regulation**") and stating that the REA "[i]*s coordinated*

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33 Memorial, para. 100 (citing News Release, Smitherman, George (MEI), The Green Economy of 20 February 2009 (**C-110**)); Reply, para. 70.

34 Reply, para. 84 (citing **C-116,** Legislative Assembly of Ontario (Hansard Transcript), Smitherman, George, Statement of 23 February 2009 , p. 2).

35 Memorial, para. 105 (referring to **C-123**, *An Act to enact the Green Energy Act of 2009 and to build a green economy, to repeal the Energy Conservation Leadership Act of 2006 and the Energy Efficiency Act and to amend other statutes*); Parties' Joint Chronology, p. 2 (also citing (**C-123**)).

36 Memorial, para. 102; Counter-Memorial, para. 7.

37 Amended Response to the Notice of Arbitration, paras. 14-15; Parties' Joint Chronology, p. 2 (citing **C-141,** Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) of 24 September 2009).

38 Reply, para. 77 (citing **C-143,** Article, Green Energy Rules Make Ontario a North American Leader of 24 September 2009, p. 1); Parties' Joint Chronology, p. 2 (citing Article, Green Energy Rules Make Ontario a North American Leader of 24 September 2009).

with other provincial approvals to ensure a streamlined approach, providing a six-month service guarantee per project."[39]

13. The OPA developed the FIT Rules, Standard Definitions and a standard FIT Contract, together setting out the terms and conditions for participating in the FIT Program.[40]

14. The FIT Contract was a standard long-term fixed-price contract that provided standard terms and conditions applicable to all FIT projects, as well as terms and conditions specific to different types of renewable energy fuels under the FIT Program.[41] The FIT Program established a 20-year fixed premium price to be paid by the OPA for energy from renewable sources, including onshore and offshore wind, hydroelectric, solar, biogas, biomass and landfill gas.[42] The goal of the FIT Program was to ensure that project "*proponents could use their FIT contracts to secure long term limited recourse debt financing to fund the planning and construction of their projects.*"[43]

15. FIT Contract holders (known as "**Suppliers**") were required to bring their project into commercial operation by what the standard FIT Contract referred to as the "Milestone Date for Commercial Operation" ("**MCOD**").[44] The standard FIT Contract for offshore wind facilities provided for a MCOD four years after the contract date, and subjected a project to termination if commercial operation did not occur within eighteen months of the MCOD.[45] At the moment of signing a FIT Contract, a Supplier would have to provide security, which would in principle be forfeited if the Supplier could not bring its project into commercial operation within the time frames specified in its FIT Contract.[46]

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39 Reply, para. 84 (citing **C-137**, Article (Ministry of Energy), Ontario Makes it Easier, Faster to Grow Green Energy of 24 September 2009 p. 4); Parties' Joint Chronology, p. 3 (citing **C-103,** *Environmental Protection Act*, Ontario Regulation 359/09).

40 Amended Response to the Notice of Arbitration, para. 16.

41 Counter-Memorial, para. 53.

42 Amended Notice of Arbitration, para. 12. It is noted that waterpower projects have a 40-year term.

43 Memorial, para. 131.

44 Counter-Memorial, para. 55; Hearing Transcript (15 February 2016), 320:10-20.

45 Counter-Memorial, para. 12.

46 Reply, para. 99; **C-245,** OPA FIT Contract, Schedule 1, General Terms and Conditions of 4 May 2010, s. 9.2 (d)(i).

16. Commercial operation under the standard FIT Contract was defined to be occurring when the following principal conditions were met:

> a) the Contract Facility has been completed in all material respects;
>
> b) the Connection Point of the Contract Facility is that set out in the FIT Contract Cover page […]; and
>
> c) the Contract Facility has been constructed, connected, commissioned and synchronized to the IESO-Controlled Grid such that 90% of the contract capacity is available to deliver electricity to the grid.[47]

17. The standard FIT Contract allowed Suppliers who were encountering difficulties in meeting their obligations under the Contract, including achieving its MCOD, due to factors outside their control, to invoke force majeure.[48] In the event of force majeure, a Supplier would be excused and relieved from its obligation to achieve commercial operation by the MCOD for the duration of the force majeure status.[49] Pursuant to Section 10.1 of the Contract, if one or more events of force majeure delayed commercial operation for an aggregate of more than 24 months after the original MCOD, both the OPA and the Supplier would be entitled to unilaterally terminate a FIT Contract.[50] Similarly, both parties could unilaterally terminate a FIT Contract if one or more events of force majeure prevented the Supplier from complying with its obligations for more than an aggregate of 36 months in any 60-month period during the term of the FIT Contract.[51] In both situations, when either party exercised its force majeure termination rights, the Supplier was entitled to the return of the security deposited at the moment of signing the FIT Contract.[52]

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47 Memorial, para. 180.

48 Counter-Memorial, para. 57.

49 Counter-Memorial, paras. 57-58.

50 Counter-Memorial, para. 61; Memorial, para. 246; **R-92** FIT Contract, v. 1.3, s. 10.1(g).

51 Counter-Memorial, para. 61; **R-92,** FIT Contract, v. 1.3 s. 10.1(h).

52 Counter-Memorial, para. 62.

18. Two key regulatory documents related to the FIT Program were the REA Regulation[53] and the Approval and Permitting Requirements Document for Renewable Energy Projects ("**APRD**").[54] The REA Regulation established the environmental approval requirements for wind, solar, thermal and anaerobic digestion energy facilities, setting out specific requirements for all types of wind facilities, including offshore wind projects, which it defined as "Class 5" wind facilities.[55] The REA Regulation specified that proponents of offshore wind projects would be required to submit an Offshore Wind Facility Report, identifying potential negative environmental impacts which would result from proposed projects and mitigation measures.[56] Between June 2009 and June 2010, the MOE posted four Environmental Bill of Rights ("**EBR**") notices regarding the REA Regulation and the regulatory framework that was to be developed for offshore wind.[57]

19. The APRD described the requirements and approval process for matters falling under the responsibility of the MNR, specifying the requirements for completing the Offshore Wind Facility Report needed under the REA Regulation.[58] The APRD requirements related primarily to the natural heritage component of the REA Regulation.[59]

20. The FIT application process was identical for onshore and offshore wind projects.[60] The initial FIT application period was opened by the OPA from 1 October 2009 to

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53 **C-103**, *Environmental Protection Act*, Ontario Regulation 359/09.

54 **C-136**, Report (MNR), APRD; **Parties' Joint Chronology**, p. 3.

55 Memorial, para. 118.

56 Reply, paras. 12, 201.

57 Counter-Memorial, para. 117; Memorial, para. 197; **RWS-Wallace**, paras. 19-24; Parties' Joint Chronology, pp. 2, 3, 4, 6 (citing Report (MOE), Proposed Content for the Renewable Energy Approval Regulation under the Environmental Protection Act of 9 June 2009 (**C-126**); **R-72,** MOE, "Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Economy Act, 2009" (EBR Registry No. 010-6516) of 24 September 2009; **C-188**, Policy Proposal Notice (MOE), Renewable Energy Approval Technical Guidance Bulletins (EBR Registry Number: 010-9235) of 1 March 2010; **C-194,** Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines of 1 March 2010; **R-118,** MOE, Policy Proposal Notice: Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry No. 011-0089) of 25 June 2010 ; **R-119,** Discussion Paper; **C-298,** Discussion Paper).

58 Memorial, para. 121; Reply, para. 204.

59 Counter-Memorial, para. 116.

60 Memorial, para. 131.

30 November 2009.[61] It generated significant interest from renewable energy investors around the world, receiving 454 applications in total.[62] Offshore wind projects accounted for only a few applications: in addition to the Claimant's application, only one other proponent filed a complete and eligible FIT application for an offshore wind project.[63] In response to this first round of applications, the OPA offered 186 FIT Contracts.[64]

21. According to the GEGEA, an offshore wind project proponent had to meet four requirements: (i) obtain a FIT Contract; (ii) obtain access to Crown land; (iii) obtain an REA; and (iv) obtain a grid-connection approval from the IESO (an entity that monitors the operation of Ontario's power system and ensures its reliability).[65]

22. In particular, project proponents building on Crown land had to apply for the "*release*" of the applicable sections of Crown land for wind testing and project construction and operation.[66] The process of applying for permission to test or build on Crown land was called the Site Release process, and a project proponent obtaining Site Release was referred to as an Applicant of Record ("**AOR**").[67] When the FIT Program was launched, the MNR had a three-stage process for establishing a wind project on Crown land under Wind Policy 4.10.04: (i) wind power testing application and review; (ii) wind power development review; and (iii) issuing permits and tenure for development of a wind farm on Crown land.[68] The first two stages represented the Site Release process, through which the applicants for Crown land sought to obtain an AOR status in respect of specific "*grid cells*" or groupings of grid cells of Crown land. Obtaining an AOR status allowed an applicant to proceed to the third stage, at which it could request the

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61 Memorial, para. 131; Parties' Joint Chronology, p. 3 (citing **C-208,** Report (OPA), FIT Program – Backgrounder of April 2010).

62 Amended Response to the Notice of Arbitration, para. 17.

63 Counter-Memorial, para. 173.

64 Amended Response to the Notice of Arbitration, para. 17.

65 Memorial, para. 130.

66 Memorial, para. 132.

67 Memorial, para. 132.

68 Counter-Memorial, para. 151.

permits and approvals necessary for the development of the wind project.[69] AOR status gave sole right to apply for permits and approvals with respect to particular grid cells of Crown land,[70] but was "not a disposition" and still required completion of "*all* [e]*nvironmental* [a]*ssessment requirements for the proposal prior to any authorizations or approvals being issued.*"[71]

23. On 21 October 2009, Minister Cansfield gave a speech at a conference on Offshore Wind Energy in Coastal North America and the Great Lakes, stating:

i. "In 2006, my ministry placed a deferral on proposals for Great Lakes offshore development. We needed to get a better understanding of how offshore wind turbines might affect the surrounding environment. We also needed to assess the potential benefits and impacts of this technology. Our research made it clear that developing offshore win potential would be practical and environmentally sound once the appropriate infrastructure is in place. As a result, the deferral was lifted in January [2008] and the province began accepting applications for project proposals.[72]

ii. […]

iii. [W]e know that when it comes to new investment, one of the most important factors for investors is certainty. When companies know exactly what the rules are it instills greater confidence to invest in Ontario, hire workers and produce self-renewable energy.[73]

iv. […]

v. Offshore windpower is included in the Feed-in-Tariff program at 19 cents per kilowatt hour. Ontario is the first jurisdiction in North America to set a price for offshore windpower, reflecting our strong support for exploring offshore potential."[74]

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69 Counter-Memorial, para. 151.

70 Counter-Memorial, para. 152.

71 Counter-Memorial, para. 153 (citing **C-60,** Policy No. PL 4.10.04 (MNR) of 28 January 2008).

72 Memorial, para. 127 (citing **C-147,** Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference of 21 October 2009).

73 Reply, para. 105 (citing **C-147,** Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference of 21 October 2009).

74 Reply, para. 105 (citing **C-147**, Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference of 21 October 2009); Parties' Joint Chronology, p. 3 (also citing (**C-147**)).

24. In a letter addressed to the Canadian Wind Energy Association dated 24 November 2009, the Assistant Deputy Minister from the MNR, Ms Rosalyn Lawrence, stated:

    i. "Existing Crown land applicants who apply to FIT during the launch period, and who are awarded contracts by the OPA, will be given the highest priority to the Crown land sites applied for. This means that these applications will take precedence over all others for this site, and will receive priority attention from MNR."[75]

25. The letter also specified that "*an application for Crown land does not create a legal entitlement or confer rights*" and that "*the Minister of Natural Resources has the sole authority to approve or deny any application for the use of Crown land to support wind power testing or development.*"[76]

26. The approvals process under the REA Regulation consists of several steps. First a project proponent had to conduct certain "pre-submission activities," including submitting to the MOE a draft project description report,[77] conducting consultations with stakeholders and preparing a consultation report,[78] and conducting a natural heritage assessment[79] as well as a water assessment.[80] The proponent then had to submit its application with the necessary accompanying materials to the MOE.[81] If the application was found to be complete, it was reviewed by a team of inter-ministerial experts led by the MOE's Environmental Approvals Branch to determine if the application met the regulatory requirements and "*whether or not there* [was] *adequate information to allow the* [MOE] *Director to make a decision in the public interest to issue or not issue a REA.*"[82] Once the technical review had been completed, the Director of the MOE was to make "*an independent and discretionary determination*

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75 Memorial, para. 163 (citing **C-158,** Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) of 24 November 2009); Parties' Joint Chronology, p. 3 (also citing (**C-158**)).

76 Counter-Memorial, para. 163 (citing **C-158,** Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) of 24 November 2009).

77 Counter-Memorial, paras. 82-83.

78 Counter-Memorial, para. 94.

79 Counter-Memorial, para. 96.

80 Counter-Memorial, para. 103.

81 Counter-Memorial, para. 104.

82 Counter-Memorial, para. 105.

of whether or not it [was] *in the public interest to issue a REA.*"[83] Subsequently, the applicant and any resident of Ontario might appeal that decision to the Environmental Review Tribunal.[84]

27. Renewable energy proponents of projects larger than ten megawatts ("**MW**") were also required to obtain a connection assessment, which included an IESO System Impact Assessment ("**SIA**") and a Customer Impact Assessment ("**CIA**") from the relevant transmitter.[85] The purpose of the SIA was to assess the impact of a project on Ontario's integrated power system,[86] while the purpose of the CIA was to assess the impact of the connection of a new project to the power grid on existing customers.[87]

28. A project could only start after issuance of a Notice to Proceed ("**NTP**") by the OPA pursuant to Section 2.4 of the standard FIT Contract once the following requirements had been met: (i) receipt of the REA; (ii) submission of a financing plan including signed commitment letters from sources of financing representing at least 50% of the expected development costs; and (iii) submission of a domestic content plan explaining that the Project would meet a 50% Ontario content requirement.[88]

29. On 1 March 2010, the MOE posted one of the aforementioned EBR notices entitled "*Renewable Energy Approval Technical Guidance Bulletins*" with six attached technical bulletins including "*Technical Bulletin Six: Required Setbacks for Wind Turbines.*"[89]

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83 Counter-Memorial, para. 106.

84 Counter-Memorial, para. 109.

85 Memorial, para. 141.

86 Memorial, para. 142.

87 Memorial, para. 143.

88 Memorial, para. 181.

89 Reply, para. 207 (referring to **C-189,** Report (MOE), Renewal Energy Approvals, Technical Bulletin One, Guidance for Preparing the Project Description Report of 1 March 2010 ; **C-190,** Report (MOE), Renewal Energy Approvals, Technical Bulletin Two, Guidance for Preparing the Design and Operations Report of 1 March 2010; **C-191,** Report (MOE), Renewal Energy Approvals, Technical Bulletin Three, Guidance for Preparing the Construction Plan Report of 1 March 2010; **C-192,** Report (MOE), Renewal Energy Approvals, Technical Bulletin Four, Guidance for Preparing the Decommissioning Plan Report of 1 March 2010; **C-193,** Report (MOE), Renewal Energy Approvals, Technical Bulletin Five, Guidance for Preparing the Consultation Report of 1 March 2010; **C-194,** Report (MOE), Renewable Energy Approvals, Technical

30. During the spring and summer of 2010, the MOE held technical workshops on topics concerning offshore wind such as noise, water quality and sediment management, and technical and safety standards.[90] In particular, on 29 April 2010 and 23 August 2010, the MOE held workshops on the propagation of noise for offshore wind projects in Ontario.[91] The workshops were not able to recommend an appropriate noise propagation model, instead recommending that research be conducted and empirical data be collected through measurements.[92]

31. Similarly, on 16 July 2010 the MOE held a water quality and sediment management workshop, which indicated that several communities were potentially affected by offshore wind development in Ontario and might claim aboriginal title over the lakebed.[93] The workshop concluded that "no development should be allowed within one kilometer of an intake protection zone 1 […] and […] water quality modelling would need to be conducted within intake protection zones 2 and 3,"[94] and also that "it was necessary to conduct research to obtain baseline data for modelling."[95] On 13 September 2010, the MOE held a workshop on technical specifications and safety issues which indicated that modifications of international design standards for offshore wind turbines "were necessary for the Great Lake context," and that "standards

Bulletin Six, Required Setbacks for Wind Turbines of 1 March 2010); Parties' Joint Chronology, p. 4 (citing Policy Proposal Notice (MOE), Renewable Energy Approval Technical Guidance Bulletins (**C-188,** EBR Registry Number: 010-9235) of 1 March 2010; and also citing (**C-194**)).

90 Counter-Memorial, para. 134.

91 Counter-Memorial, paras. 135-137; Parties' Joint Chronology, pp. 4, 8 (citing **R-103,** MOE, Technical Session, Off-Shore Wind Facilities – Noise Agenda(; **R-133,** MOE, Agenda for Second Technical Stakeholder Session, Off-Shore Wind Farms – Noise Issues of 23 August 2010; **R-134,** Off-Shore Wind Noise Workshop Meeting Notes of Postacioglu, Dilek (MOE) of 23 August 2010)).

92 Counter-Memorial, para. 138 (citing **R-134,** Off-Shore Wind Noise Workshop Meeting Notes of Postacioglu, MOE of 23 August 2010).

93 Counter-Memorial, paras. 140- to 141; Parties' Joint Chronology, p. 7 (citing **R-125**, MOE, Off-Shore Wind Facilities – Water Quality and Sediment Management Workshop Agenda of 16 July 2010; **R-436**, MOE, Off-Shore Wind Facilities: Water Quality and Sediment Management Workshop Recap, undated).

94 Counter-Memorial, para. 141.

95 Counter-Memorial, para. 142.

specific to all other offshore wind facility components […] would require further study."[96]

B. THE WOLFE ISLAND SHOALS PROJECT

32. Starting in 2008, Windstream began to invest in resource evaluation, engineering and technical reviews relating to the WWIS Project.[97]

33. On 8 February 2008, Windstream submitted to the MNR Crown land applications to develop an offshore wind facility.[98] Windstream proposed to construct approximately 100 wind turbines, capable of generating 300 MW of electricity, in Lake Ontario near Wolfe Island, south of the City of Kingston.[99] Windstream applied for AOR status and submitted SIA applications to the IESO, together with other preparatory work regarding the Project.[100]

34. In April 2008, the OPA received a document addressing the future of offshore wind in Ontario from wind energy consultant Helimax Inc. ("**Helimax**").[101] Helimax had identified 64 offshore sites that were considered to have potential for wind project development in the Ontario Great Lakes region and had performed a technical assessment and ranking of these sites.[102] The site of the Project was "[o]*ne of the nine locations identified* [by Helimax] *as being most favourable for offshore wind development.*"[103]

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96 Counter-Memorial, para. 146; Parties' Joint Chronology, p. 9 (citing **R-141**, MOE, Off-Shore Wind Development in Ontario, Technical Specifications, Spectrum Interference and Safety Issues Technical Workshop Agenda of 13 September 2010; **R-130**, Meeting Notes of Chan, Jim, Canadian Environmental Assessment Agency, Off-Shore Wind Meeting: Summary Action Items and Notes of the Meeting of 4 August 2010).

97 Amended Notice of Arbitration, para. 17.

98 Amended Notice of Arbitration, para. 17; Memorial, para. 156.

99 Amended Response to the Notice of Arbitration, para. 30.

100 Memorial, paras. 157 to 158.

101 Memorial, para. 92; Parties' Joint Chronology, p. 2 (citing **C-72**, Report (Helimax), Analysis of Future Offshore Wind Farm Development of 30 April 2008).

102 Memorial, para. 94.

103 Memorial, para. 94; Report (Helimax), Analysis of Future Offshore Wind Farm Development of 30 April 2008 (**C-72**), pp. 29 to 30.

35. According to the Claimant, in October 2008, Mr Ian Baines, the President of WEI,[104] met with the Assistant Deputy Ministers for Energy, Finance and Natural Resources. During that meeting the Assistant Deputy Ministers "indicated that they were determined to direct the OPA to take steps to facilitate renewable energy development in the Province."[105]

36. On 24 September 2009, the MNR wrote to Windstream, acknowledging its Crown land applications.[106] On the same day, Minister Cansfield informed Windstream that "*in order to maintain priority position within MNR's site release process,* [Windstream] *must submit an application to the FIT Program within the FIT launch application process.*"[107]

37. The initial FIT application period was open from 1 October 2009 to 30 November 2009.[108] According to the Claimant, by the end of October 2009, Windstream had met with a number of investors to attract potential partners in the Project and managed to secure additional investment from two investors, Mr Steven Webster and Lucky Star Shipping S.A.[109] Windstream also retained ORTECH Consulting Inc. ("**Ortech**"), an environmental engineering firm specialized in renewable energy projects, to act as project manager and conduct the relevant development work.[110]

38. On 27 November 2009, Windstream, through WWIS and other subsidiaries, applied to the OPA for eleven FIT Contracts: ten for onshore wind facilities and one for the Project.[111] The Project was based on a subset of the grid cells for which Windstream

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104 **CWS-Baines**, Witness Statement of Ian Baines , para. 1.

105 Memorial, para. 98; **CWS-Baines**, Witness Statement of Ian Baines, para. 40; **C-93**, Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) of 30 October 2008.

106 Memorial, para. 159.

107 **Memorial**, paras. 159, 163 (referring to **C-144**, Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) of 24 September 2009; **CWS-Baines**, Witness Statement of Ian Baines, para. 56; **CWS-Mars**, Witness Statement of David Michael Mars, para. 57); Reply, para. 175.

108 Memorial, para. 131.

109 Memorial, paras. 167-168. *See also* Reply, para. 401; **CWS-Mars**, Witness Statement of David Michael Mars, paras. 58-59.

110 Memorial, para. 171; Reply, para. 209.

111 Memorial, para. 165. *See also* Counter-Memorial, para. 172; Amended Response to the Notice of Arbitration, para. 32; Reply, para. 99; Parties' Joint Chronology, p. 3 (citing **C-84**, FIT Program Application Form, FIT–FALCB9K – Wolfe Island Shoals Wind Farm of 29 November 2009).

had requested AOR status.[112] Windstream posted with WWIS's application a CAD 3 million letter of credit, as required by the FIT Program rules.[113]

39. According to the Claimant, from 2009 until spring 2012, Windstream performed work to advance the Project, including wind resource/energy yield testing, the preparation of designs relating to the Project's electrical system, a lake bottom investigation, financial assessments and the organization of specialized consultants.[114]

40. On 8 April 2010, the OPA advised WWIS that it had approved WWIS' FIT application.[115] On 19 April 2010, Windstream representatives met with representatives of the MNR, the MEI, the MOE and the Ministry of Culture to discuss the Project and determine what information Ontario would need from Windstream to further advance the Project.[116]

41. On 4 May 2010, the OPA offered WWIS a FIT Contract.[117] In accepting the Contract, WWIS had to provide a CAD 6 million letter of credit to replace the CAD 3 million letter of credit paid to secure WWIS's application.[118] Pursuant to the FIT Rules, the offer to WWIS was open for a period of ten business days, i.e. until 18 May 2010.[119] WWIS did not sign the contract by this deadline. According to the Respondent, the delay in signing was "*due to the regulatory risk* [the Claimant] *perceived and sought to resolve.*"[120]

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112 Counter-Memorial, para. 179.

113 Memorial, para. 166; Reply, para. 96; **C-162**, Standby Letter of Credit (RBS) of 27 November 2009.

114 Memorial, paras. 302-315.

115 Memorial, para. 173; Parties' Joint Chronology, p. 4 (citing **C-207**, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) of 8 April 2010).

116 Memorial, para. 194; Reply, para. 147; Parties' Joint Chronology, p. 4 (citing **C-214**, Email from Baines, Ian (WEI) to Roeper, Uwe (Ortech) of 14 April 2010; **C-97**, Email from Boysen, Eric (MNR) to Dumais, Doris (MOE) and Ing, Pearl (MEI) of 13 April 2010).

117 Counter-Memorial, para. 192; Parties' Joint Chronology, p. 4 (citing **C-246**, Letter from Butler, Joanne (OPA) to Baines, Nancy (WWIS) of 4 May 2010)).

118 Reply, para. 99; **C-692**, Standby Letter of Credit (RBS) of 14 April 2014.

119 Counter-Memorial, para. 193.

120 Counter-Memorial, para. 193.

42. The OPA granted several extensions of the deadline to sign the contract, with the last one expiring on 12 August 2010.[121]

43. On 21 May 2010, a representative of the MEI informed Mr Chris Benedetti, the principal of Sussex Strategy Group, a consultancy that had been engaged by Windstream,[122] that the MEI and the MOE were working to finalize offshore REA guidelines and that "*the guidelines would be available soon.*"[123]

44. On 15 June 2010, Windstream representatives met with staff from the MEI, the MNR, the MOE and the Renewable Energy Facilitation Office.[124] In the context of this meeting, Windstream put forward a proposal of "*'swapping' the land that Windstream had applied for with other land further offshore in order to comply with a five-kilometer setback from shore, which at the time was rumored to be under consideration by the MOE.*"[125] MNR staff promised to consider Windstream's proposal for a possible "land swap" and to inquire about the status of Windstream's AOR application, while also offering to provide input on the field studies required for the Project.[126] MOE staff indicated that guidelines for setbacks were being developed.[127] In addition, MEI staff indicated that they would speak to the OPA about FIT Contract provisions dealing with Ontario content requirements and the need for flexibility on this issue for offshore projects.[128]

45. On 23 June 2010, Windstream's counsel spoke with the Director of the MNR's Renewable Energy Program regarding the WWIS Project.[129] According to the

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121 Counter-Memorial, paras. 217-218; Reply, para. 133; Parties' Joint Chronology, pp. 5-8.

122 *See* **CWS-Benedetti**, para. 1.

123 Memorial, para. 197 (referring to E C-270 mail from Roeper, Uwe (Ortech) to Ing, Pearl (MEI) of 25 May 2010); Parties' Joint Chronology, p. 5 (also citing (C-270)).

124 Reply, para. 150; **CWS-Baines**, Witness Statement of Ian Baines, para. 79; Parties' Joint Chronology, p. 6 (citing **C-281**, Email from Duffey, Barry (ENE) to Ing, Pearl (MEI) et al. of 15 June 2010; **C-285**, Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010).

125 Memorial, para. 198; Reply, para. 136.

126 Memorial, para. 198 (referring to **C-285**, Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010).

127 Memorial, para. 198 (referring to **C-285**, Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010).

128 Memorial, para. 198 (referring to **C-285**, Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010).

129 Parties' Joint Chronology, p. 6 (citing **C-291**, Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) of 23 June 2010).

Claimant, the Director indicated to Windstream "*that the Project was 'special,' and that he was 'advancing' Windstream's proposal to swap grid cells selected for the Project.*"[130]

46. On 25 June 2010, the MOE posted for public comment a further EBR notice, this time a policy proposal entitled "*Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach,*" which outlined its approach for developing the regulatory requirements and guidance in respect of offshore wind facilities ("**Offshore Wind Policy Proposal Notice**").[131] Among other things, the draft policy proposed a five-kilometer shoreline exclusion zone for offshore wind projects ("**setback**"). The MOE proposed the five-kilometer exclusion zone "in light of its commitment to protect water bodies, including the Great Lakes, and to ensure that Ontarians enjoy safe drinking water, beaches, food and fish, and natural and cultural heritage."[132]

47. The Offshore Wind Policy Proposal Notice further explained that "[partner] *ministries* [were] *working together to provide greater certainty and clarity on off-shore wind requirements*" and that the "*Ontario Government* [was] *proposing an approach and* [was*] seeking input from interested members of the public, early in the process, to inform the work that will be completed to finalize the approach and the off-shore wind specific requirements under the REA regulation.*"[133] The Notice indicated that "[the proposed] *approach* [would] *also be supplemented by the outcome of research underway by the Ministry of the Environment, Ministry of Natural Resources (MNR), and Ministry of Tourism and Culture and will be the subject of subsequent Environmental Registry postings that [would] outline requirements for off-shore wind development.*"[134]

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130 Memorial, para. 199 (referring to **C-291**, Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) of 23 June 2010); **CWS-Roeper**, para. 30).

131 Counter-Memorial, paras. 121 and 429; **C-298**, Discussion Paper; Parties' Joint Chronology, p. 6 (citing **C-118**, MOE, Policy Proposal Notice: Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry No. 011-0089) of 25 June 2010; **C-119**, Discussion Paper; **C-298**, Discussion Paper).

132 Counter-Memorial, para. 121; **C-298**, Discussion Paper .

133 **C-296**, Policy Decision Notice (MOE) of 25 June 2010.

134 **C-297**, Presentation, Wolfe Island Shoals Off-Shore Wind Project of 25 June 2010.

48. Still in June 2010, Windstream informed the MEI and the MNR that it "*believe*[d] *that* [it] *could work within the proposed 5 km set-back guidelines*"[135] and sent a proposal to the Government, suggesting that it "*release its application for parts of the lakebed* […] *that were within five kilometers of Wolfe Island in exchange for other lakebed lands further offshore.*"[136]

49. On 5 July 2010, Windstream attended a meeting with senior staff from the MNR and the MEI, in the context of which it asked for clarifications with respect to the timing of receiving AOR status and requested an extension from four to five years of the MCOD specified in the FIT Contract.[137] Mr Paul Ungerman, the MEI's representative, committed to following up on the issues Windstream had identified regarding the Project.[138] A further meeting was held with Mr Ungerman on 7 July 2010, to discuss the Project and the extension of the deadline for the Project to reach its MCOD.[139] According to the Claimant, Windstream was told that "*MEI representatives* [would*] speak to OPA representatives about extending the commercial operation date under the FIT Contract, and* […] [would] *support Windstream in its discussions with the MNR on the process and methodology for the 'land swap.* "[140]

50. On 5 August 2010, WWIS sent a proposed layout and description of the grid cells required for the Project to be built outside the five-kilometer exclusion zone to the MNR.[141] On 9 August 2010, with the approval of the MEI and the Premier's Office, the MNR sent Windstream a letter confirming its willingness to discuss a reconfiguration of the Project site after the conclusion of the five-kilometer setback policy proposal and promising to move "*as quickly as possible through the remainder*

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135 **C-302**, Email from Baines, Ian (WEI) to Cain, Ken (MNR) of 26 June 2010.

136 Memorial, paras. 201, 204.

137 Memorial, para. 202; Parties' Joint Chronology, p. 6 (citing **C-1904**, Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) et al. of 5 July 2010; **C-308**, Memorandum from Ortech to WEI of 6 July 2010).

138 Memorial, para. 202; **CWS-Baines**, Witness Statement of Ian Baines , para. 86.

139 Parties' Joint Chronology, p. 6.

140 Memorial, para. 205; Reply, para. 152; **CWS-Baines**, Witness Statement of Ian Baines, para. 87.

141 Memorial, para. 208; **CWS-Roeper**, para. 36.

of the application review process in order that [WWIS] *may obtain Applicant of Record status in a timely manner.*"[142]

51. On the same day, Windstream requested that the MCOD in the draft FIT Contract be amended.[143] On 12 August 2010, the OPA confirmed to Windstream that it would issue a revised FIT Contract with a special term that extended the MCOD by a year from the standard offer, i.e. from four to five years from the contract date.[144] On 18 August 2010, the OPA provided WWIS with a revised contract[145] and granted it three additional business days to sign the contract.[146]

52. On 20 August 2010, WWIS executed its FIT Contract[147] and substituted the CAD 3 million letter of credit deposited when it applied for the FIT Contract with a letter of credit in the amount of CAD 6 million.[148] Regardless of the extensions of the deadline to sign the Contract, its date remained the date of the original offer, i.e. 4 May 2010.[149] Accordingly, the FIT Contract required WWIS to bring the Project into commercial operation by its MCOD, specified as 4 May 2015.[150] The FIT Contract required the OPA to purchase all electricity generated by the Project at a rate of CAD 190 per MW hour, with full escalation for inflation until the Project's

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142 Memorial, para. 208 (citing **C-334**, Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) of 9 August 2010; Reply, paras. 137, 139; Parties' Joint Chronology, p. 7 (also citing (**C-334**)).

143 Counter-Memorial, para. 219; Parties' Joint Chronology, p. 8 (citing **C-340**, Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) of 10 August 2010).

144 Counter-Memorial, para. 220; Parties' Joint Chronology, p. 8 (citing **C-343**, Email from Cecchini, Perry (OPA) to Chamberlain, Adam (BLG) et al. of 12 August 2010).

145 Memorial, para. 210 (referring to **C-349**, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) of 18 August 2010; **C-243**, OPA FIT Contract, Schedule 2, Special Terms and Conditions Wind (Off-Shore) Facilities of 4 May 2010); Parties' Joint Chronology, p. 7 (also citing (**C-349**)).

146 Counter-Memorial, para. 221.

147 Counter-Memorial, para. 222; Parties' Joint Chronology, p. 8 (citing **C-251**, FIT Contract; **C-199**, OPA FIT Contract, Schedule 1, General Terms and Conditions, v.1.3; **C-243**, OPA FIT Contract, Schedule 2, Special Terms and Conditions Wind (Off-Shore) Facilities of 4 May 2010; **C-195**, Appendix 1 – Standard Definitions of 9 March 2010).

148 Memorial, para. 223; Amended Notice of Arbitration, para. 20; **CWS-Baines**, Witness Statement of Ian Baines, para. 92; **Parties' Joint Chronology**, p. 8.

149 Counter-Memorial, para. 223.

150 Memorial, para. 179; **C-245**, OPA FIT Contract, Schedule 1, General Terms and Conditions of 4 May 2010, s. 2.5.

commercial operation date, and escalation for inflation up to a maximum of 20% in total for the 20 years starting from the date of the Project's commercial operation.[151]

53. The public consultation period relating to the Offshore Wind Policy Proposal Notice was originally open for 60 days until 23 August 2010, but according to the Respondent, due to significant public interest, the MOE extended the consultation period by an extra fourteen days until 7 September 2010.[152] The Respondent states that during the consultation period the MOE received 1,403 comments.[153] Over 65% of respondents opposed offshore wind development, and a majority of respondents expressed concern either that the proposed five-kilometer exclusion zone might not be far enough from the shoreline, or that there were significant areas of scientific uncertainty requiring further study.[154]

54. On 9 September 2010, Mr Uwe Roeper, the President of Ortech, and other representatives of Ortech met with MNR officials on behalf of Windstream "*to discuss the technical studies that Ortech needed to carry out while MNR and MOE were considering the issues raised in* […] [the Offshore Wind Policy Proposal Notice]."[155] At this meeting, Ortech was informed that setting up an offshore wind measurement mast required a temporary land use permit, "*which could not be granted until WWIS was given Applicant of Record status under the site release process.*"[156] On 30 September 2010, Mr Baines wrote to the MNR and requested that WWIS "*be allowed to erect a temporary wind monitoring mast to carry out wind speed testing.*"[157] On

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151 Memorial, para. 178.

152 Counter-Memorial, para. 123.

153 Counter-Memorial, para. 123.

154 Counter-Memorial, para. 124.

155 Memorial, para. 233 (referring to **C-357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting of 9 September 2010); Parties' Joint Chronology, p. 9 (also citing (**C-357**)).

156 Memorial, para. 234 (referring to **C-357**, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting of 9 September 2010).

157 Memorial, para. 236 (referring to **C-366**, Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) of 30 September 2010); Parties' Joint Chronology, p. 9 (also citing (**C-366**)).

7 October 2010, Windstream formally applied to the MNR for the "*swap*" of Crown land grid cells, also reiterating its request to obtain AOR status.[158]

55. On 8 November 2010, WWIS received a Notification of Conditional Approval for Connection from the IESO, allowing it to connect to the grid at the Lennox connection point.[159] On the same day, Hydro One, the owner of the relevant power lines, issued a CIA for WWIS, which provided that WWIS was not expected to adversely impact transmission customers in the area of Lennox County.[160]

56. On 22 November 2010, the MNR informed WWIS that the Government's offshore wind power policy review was "*still outstanding*" and that it was "*not yet able to consider advancing the Wolfe Island Shoals project through the Application of Record process, nor implement the potential exchange of grid cells.*"[161] The MNR also informed WWIS that "*no decision on* […] *permission to conduct testing should be expected while the government's offshore wind power policy review is still outstanding.*"[162]

57. On 10 December 2010, WWIS claimed a force majeure event under its FIT Contract "*on account of the lack of regulatory assistance from MNR and MOE.*"[163] In its force majeure notice, WWIS indicated that "*it was unable to advance further towards the milestone dates in the FIT Contract without being able to carry out wind testing, further defining of the project area, and related studies, all of which required that AOR status be granted."*[164] The force majeure event meant that the MCOD would be extended for its duration, but either Party could still unilaterally terminate the FIT

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158 Memorial, para. 238; Parties' Joint Chronology, p. 9 (citing **C-371**, Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) of 7 October 2010).

159 Memorial, para. 231; Parties' Joint Chronology, p. 10 (citing **C-381**, System Impact Assessment Report, Wolfe Island Shoals Wind Generation Station, Connection Assessment & Approval Process (Final Report) of 8 November 2010).

160 Memorial, para. 231; Parties' Joint Chronology, p. 10 (citing **C-383**, Report (Hydro One), CIA, Wolfe Island Shoals GS 300 MW Wind Turbine Generator Generation Connection of 8 November 2010).

161 Memorial, para. 240**; Parties' Joint Chronology**, p. 10 (citing **C-388**, Email from Cain, Ken (MNR) to Roeper, Uwe (Ortech) of 22 November 2010).

162 Counter-Memorial, para. 231.

163 Counter-Memorial, para. 232; Reply, para. 402; Parties' Joint Chronology, p. 10 (citing **C-408**, Windstream's Notice of Force Majeure of 10 December 2010; **C-406**, Exhibit A to Windstream's Notice of Force Majeure).

164 Memorial, para. 244.

Contract if the Project did not reach commercial operation within two years of the original MCOD, *i.e.*, by 4 May 2017.[165] Windstream had to maintain the CAD 6 million security deposit posted at the signature of the FIT Contract during the force majeure period.[166]

58. WWIS subsequently proposed to MOE officials that the Project proceed as a "*pilot project,*" generating scientific data to assist Ontario in determining how to proceed with future offshore wind projects.[167] According to the Claimant, on 15 December 2010, Mr Baines discussed the pilot project proposal with a policy advisor from the MEI.[168] The Claimant also states that on 21 December 2010, Mr Benedetti spoke with a policy advisor from the MEI "*who told him the Ministry was receptive to the pilot project proposal, but it was unclear what the government's timelines would be for moving the project forward.*"[169]

59. The Claimant states that on 19 January 2011, Mr Baines met with MEI representatives who "confirmed that the pilot project concept was being favorably received" and told him to "*leave it with* [them]" and to "*have faith.*"[170] According to the Respondent, at the same time, the MNR and the MOE internally expressed [redacted][171]

60. According to the Respondent, on 9 February 2011, the OPA announced that it would offer to amend the contracts of all FIT Contract holders who had not yet reached commercial operation so that they could extend their MCOD by up to one year. In the course of February and March 2011, the OPA contacted each FIT Supplier, including the Claimant, with an offer to execute an amending agreement that would extend the

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165 Memorial, para. 246; Counter-Memorial, para. 61.

166 Memorial, para. 280.

167 Memorial, para. 253.

168 Memorial, para. 254 (referring to **CWS-Baines**, Witness Statement of Ian Baines, para. 109; **C-414**, Email from Baines, Ian (WEI) to Benedetti, Chris (Sussex Strategy) et al. of 15 December 2010).

169 Memorial, para. 254 (referring to **CWS-Baines**, Witness Statement of Ian Baines, para. 109; **CWS-Benedetti**, para. 51).

170 Memorial, para. 255 (referring to **CWS-Baines**, Witness Statement of Ian Baines, para. 110).

171 Counter-Memorial, paras. 248, 250 (referring to **RWS-Lawrence**, paras. 46-48; **RWS-Wallace**, para. 61; **R-208,** Email from Wallace, Marcia (MOE) to Dumais, Doris (MOE) of 13 January 2011().

MCOD by up to one year in exchange for trade-offs by the Supplier on certain force majeure rights.[172] WWIS did not accept this offer.[173]

61. On 11 February 2011, officials from the MEI, the MOE, the MNR and the OPA held a conference call with the Claimant to inform the latter of a forthcoming announcement regarding a deferral on offshore wind projects and how it would affect Windstream.[174] During the call, officials explained that the Government of Ontario had decided that it "*will not be moving forward with offshore wind until further science regulatory work and co-ordination with our U.S. partners is complete.*"[175] The impact of the deferral was described by the Government officials in the following terms:

    i. "[Andrew Mitchell of MEI:] We set this call up today just to give you some notice about a decision of the Government of Ontario is going to be announcing this afternoon. And that decision is that we will not be moving forward with offshore wind until further science regulatory work and co-ordination with our U.S. partners is complete. Our feeling is that offshore wind in freshwater lakes is in its early developments and to date there are gaps that exist in the science that don't support siting wind projects in freshwater at this time. […] We acknowledge that your project is unique in that it has a FIT Contract and so that end Perry [of the OPA] is here but we've asked that the OPA sit down with you to negotiate a number of pieces including the force majeure provisions, the two-year force majeure termination clause associated with those provisions and the security deposits […] .[176]

    ii. […]

    iii. [Brenda Lucas of MOE:] We came out at the end of the summer as you know and we've proposed five fifty and did the EBR consultation and we had over 1400 people write in and we have a lot more questions than we have answers so the concern from the Environment Ministry's perspective is a lot of questions, not enough information, not

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172 Counter-Memorial, para. 234 (referring to **C-475,** FAQs on FIT COD Extension of 9 February 2011).

173 Counter-Memorial, para. 234 (referring to **C-475,** FAQs on FIT COD Extension of 9 February 2011; **R-449,** FIT Amending Agreement Re: Extension of MCOD for Non-CAE Projects).

174 Memorial, para. 258; Counter-Memorial, para. 263; Reply, para. 258; Parties' Joint Chronology, p. 13 (citing **C-483,** Audio Recording of Call of 11 February 2011; **C-484,** Transcription of Audio Recording of Telephone Conference Call of 11 February 2011).

175 **C-484,** Transcription of Audio Recording of Telephone Conference Call of 11 February 2011, p. 2.

176 **C-484,** Transcription of Audio Recording of Telephone Conference Call of 11 February 2011, p. 2.

enough science to build an offshore specific REA regulation and similarly questions about how we would evaluate the reports and studies that any individual project brought in to us in terms of how they would be able to mitigate any of those concerns from you know fish and fish habitat to ice, freeze and thaw issues to noise issues over water, there's just like I said, too much uncertainty for us to go forward on that now, so our part of the news today essentially is that we're not ready with the REA regulation. We are going to take the time and do more science work.[177]

iv. […]

v. [Richard Linley of MNR]: [O]ur piece of the announcement is that MNR will be cancelling all existing Crown Land Applications for access to lake beds for offshore wind development but that does not mean those with the initial Feed in Tariff contracts which is yourselves, but this will include those without that kind of record status and we will not be accepting any new Crown Land Applications and to Brenda's point, when there is greater scientific certainty, consideration of offshore wind development will resume."[178]

62. Later on the same day, the Government of Ontario publicly announced that it would not be "proceeding with any development of offshore wind projects until the necessary scientific research is completed and an adequately informed policy framework can be developed."[179] It stated that:

i. Ontario is not proceeding with proposed offshore wind projects while further scientific research is conducted. No Renewable Energy Approvals for offshore have been issued and no offshore projects will proceed at this time. Applications for offshore wind projects in the Feed-in-Tariff program will no longer be accepted and current applications will be suspended.[180]

63. On the same day, the MOE and the MNR also published policy decisions, stating that:

i. [d]uring […] [the moratorium], applications for offshore wind projects in the Feed-in-Tariff program will no longer be accepted and the current applications will be cancelled;

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177 **C-484,** Transcription of Audio Recording of Telephone Conference Call of 11 February 2011, p. 3.

178 **C-484,** Transcription of Audio Recording of Telephone Conference Call of 11 February 2011, p. 3.

179 Counter-Memorial, para. 252.

180 Amended Response to the Notice of Arbitration, para. 40 (citing **C-485,** News Release (MOE), Ontario Rules Out Offshore Wind Projects of 11 February 2011).

> the MNR will be cancelling all existing Crown land applications for offshore wind development that do not have a Feed-in-Tariff contract, including those with Applicant of Record status. MNR will not be accepting any new Crown land applications for offshore wind development. When there is greater scientific certainty, consideration of offshore wind development will continue.[181]

64. After the announcement of the moratorium, the Claimant engaged in without-prejudice settlement negotiations with the OPA over its FIT Contract terms,[182] which still provided that WWIS had to bring the Project into commercial operation by 4 May 2017 and maintain the CAD 6 million security deposit.[183]

65. On 23 February 2011, Windstream made a proposal to the OPA, suggesting that "*the force majeure situation persist until such date as Windstream elects to resume the Project, and that the OPA waive its force majeure termination rights under Sections 10.1(g) and (h) of the FIT Contract.*"[184] Windstream also requested that "*it be permitted to elect when to resume the Project*"[185] given the regulatory uncertainty,[186] and that the security deposit be returned for the duration of the event of force majeure.[187]

66. In its response dated 18 March 2011, the OPA rejected Windstream's requests.[188] The OPA offered "*to extend the MCOD for the Project to the earlier of (a) the date on which the Government of Ontario makes a definitive decision to either allow development of the Project or (b) the fifth year anniversary of the original MCOD for*

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181 Memorial, para. 269 (citing **C-494,** Policy Decision Notice (MOE), Renewable Energy Approval Requirements of 11 February 2011); Parties' Joint Chronology, p. 13 (citing **C-725,** Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry Number: 011-0089) of 2 February 2011 ; **C-482,** Decision on Policy (MNR), Offshore Wind Power: Consideration of Additional Areas to be Removed from Future Development of 11 February 2011).

182 Memorial, para. 282; Counter-Memorial, paras. 270-274.

183 Memorial, para. 280.

184 Reply, para. 376.

185 Reply, para. 376.

186 Reply, para. 376; Parties' Joint Chronology, p. 13 (citing C-223, Letter from Chamberlain, Adam (BLG) to Cecchini, Perry and Killeavy, Michael (OPA) of 23 February 2011).

187 Reply, para. 377.

188 Reply, para. 380 (referring to **R-226,** Letter from Killeavy, Michael (OPA) to Chamberlain, Adam (BLG) of 18 March 2011); Parties' Joint Chronology, p. 13 (also citing (**R-226**)).

the Project (so, May 4, 2020)"[189] and "*to waive its force majeure termination rights under Sections 10.1(g) and (h) of the FIT Contract until the earlier of the dates in (a) or (b).*" [190] The OPA further offered to reduce WWIS's security deposit to CAD 3 million.[191]

67. Windstream subsequently approached the OPA with a proposal to replace the Project with a ground-mount solar photovoltaic project that would allow WWIS to preserve its rights under the FIT Contract.[192] On 14 April 2011, Windstream gave a presentation to the OPA about its proposed solar project.[193] However, the proposal was not received favorably, and the Claimant states that during a meeting on 30 May 2011, the OPA made it "clear" to Windstream that the proposed project would "*not be considered.*"[194]

68. Following the OPA's rejection, by letter dated 7 June 2011, Windstream requested that the OPA remove its termination right prior to the NTP under Section 2.4 of the FIT Contract and "*waive all reporting requirements on Windstream for the duration of the force majeure delay.*"[195] In a further letter dated 13 June 2011, Windstream submitted a revised proposal regarding a ground-mount solar project "*as an immediate alternative to the 300 MW offshore wind project.*"[196] On 24 June 2011, in response to the two letters from Windstream, the OPA repeated its earlier position.[197]

69. On 5 July 2011, Windstream informed the OPA that it was "*prepared to accept the five-year extension provided that the force majeure could be further extended if the force majeure conditions were not resolved on time for the Project to achieve*

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189 Reply, para. 382.

190 Reply, para. 382.

191 Reply, para. 383.

192 Memorial, para. 284; Counter-Memorial, para. 276.

193 Memorial, para. 287; Parties' Joint Chronology, p. 13 (citing **C-526,** Presentation, Discussion with OPA, Windstream Energy of 14 April 2011 .

194 **R-247,** Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 7 June 2011.

195 Parties' Joint Chronology, p. 14 (citing **R-247,** Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 7 June 2011).

196 **R-248,** Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 13 June 2011.

197 Reply, para. 384 (referring to **R-247,** Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 7 June 2011; **R-248** Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 13 June 2011; **R-250,** Letter from Cecchini, Perry (OPA) to Baines, Ian (WEI) of 24 June 2011); Parties' Joint Chronology, p. 14 (also citing (**R-250**)).

commercial operation before it risked triggering the termination provisions."[198] Windstream also repeated its request that the security deposit be returned.[199]

70. On 12 October 2011, the OPA responded stating that it had reviewed the content of the 5 July letter and has instructed that "*the views of the OPA as set out in its letter of March 18 and June 24 remain unchanged.*"[200]

71. After the deferral decision, the MOE developed a research plan to address the issues related to offshore wind development that had been identified as requiring further study, including noise propagation, water quality requirements, technical design requirements and safety issues.[201] According to the Respondent, while a number of studies have in the meantime been completed, several others are still ongoing and are not expected to be completed before the end of 2016.[202]

72. On 9 September 2011, the OPA advised Windstream of its recognition that the delays faced by the Project constituted a valid force majeure event from 22 November 2010.[203] In the same correspondence, the OPA indicated that it would "*determine the appropriate relief following the notice of termination of the force majeure event.*"[204]

73. The Claimant notes that in October 2011, following the provincial election, Windstream renewed its efforts to have the WWIS Project proceed as a pilot project.[205] Windstream also renewed its requests for a reconfiguration of its Crown land

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198 Reply, para. 386 (referring to **CWS-Mars**, Witness Statement of David Michael Mars, paras. 56-58; **R-254,** Letter from Chamberlain, Adam (BLG) to Clark, Ron (Aird & Berlis) of 5 July 2011, pp. 2-4); Parties' Joint Chronology, p. 14 (also citing (**R-254**)).

199 Reply, para. 387.

200 Reply, para. 391 (referring to **R-264,** Email from Lalla, Geetu (Aird & Berlis) to Chamberlain, Adam (BLG) of 12 October 2011 , attaching Letter from Clark, Ron (Aird & Berlis) to Chamberlain, Adam (BLG) of 12 October 2011); Parties' Joint Chronology, p. 14 (also citing (**R-264**)).

201 Counter-Memorial, para. 277; Parties' Joint Chronology, p. 13.

202 Counter-Memorial, paras. 294-299.

203 Memorial, para. 245; Parties' Joint Chronology, p. 14 (citing **C-550**, OPA's Acceptance of Force Majeure Status of 9 September 2011.

204 Counter-Memorial, para. 233.

205 Memorial, para. 291.

application and for approval to proceed with testing activities on the Project site.[206] These efforts did not produce any results.[207]

74. On 4 May 2012, Windstream sent a "*final letter*" to the Premier's Office, asking "*why after two years it was still unable to determine when and if the Project would ever be allowed to proceed.*"[208] The Claimant states that it did not receive a response to this letter and there was no further correspondence with the Premier's Office.[209]

75. On 10 January 2014, the OPA refused to return WWIS's letter of credit and waive its right to unilaterally terminate WWIS's FIT Contract if the Project has not achieved commercial operation by 4 May 2017.[210]

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206 Memorial, para. 296.

207 *See* Memorial, paras. 295 to 296.

208 Memorial, para. 299; Parties' Joint Chronology, p. 15 (citing **C-613,** Email from Baines, Ian (WEI) to Brodhead, John (PO) of 4 May 2012).

209 Memorial, para. 300.

210 Memorial, paras. 317, 322; Parties' Joint Chronology, p. 16 (citing **C-680,** Letter from OPA to Chamberlain, Adam (BLG) of 10 January 2014).