

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

**BETWEEN:**

**MESA POWER GROUP, LLC**

**Claimant**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

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**GOVERNMENT OF CANADA**

**Rejoinder on the Merits**

**July 2, 2014**

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Trade and Development  
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**TABLE OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Definition</b>
2010 LTEP	Long-Term Energy Plan, 2010
AWA	American Wind Alliance
BIT	Bilateral Investment Treaty
BRG	Berkeley Research Group
CanWEA	Canadian Wind Energy Association
DAT	Distribution Availability Test
ECT	Economic Connection Test
EDA	Economic Development Adder
FET	Fair and Equitable Treatment
FIPA	Foreign Investor Promotion and Protection Agreement
FIT Program	Feed-in Tariff Program
FTC	NAFTA Free Trade Commission
GATT	General Agreement on Tariffs and Trade
GE	General Electric
GEIA	<i>Green Energy Investment Agreement</i>
GPA	Government Procurement Agreement
ICJ	International Court of Justice
IESO	Independent Electricity System Operator
ILC	International Law Commission
IPA	Individual Project Assessment
Korean Consortium	Samsung C&T Corporation and the Korea Electric Power Corporation
kV	Kilovolts
LEI	London Economics International
MFN	Most-Favoured-Nation
MOU	Memorandum of Understanding
MTSA	Master Turbine Sales Agreement
MW	Megawatts

<b>Abbreviation</b>	<b>Definition</b>
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
OPA	Ontario Power Authority
PPA	Power Purchase Agreement
REA	Renewable Energy Approval
RES	Renewable Energy Supply
SCM Agreement	Agreement on Subsidies and Countervailing Measures
TAT	Transmission Availability Test
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WPT	Windfall Tax Law
WTO	World Trade Organization



## INTRODUCTION

### I. Overview

1. As a U.S. investor, the Claimant is entitled to certain protections pursuant to Chapter 11 of the North American Free Trade Agreement (the "NAFTA"). However, the protections and guarantees provided by Chapter 11 are not unlimited. They do not guarantee that the business ventures of the Claimant will be successful. They do not guarantee that the Claimant will be accorded better treatment than any other investor. And they do not guarantee that the Claimant will be awarded a contract in a procurement process.

2. The Claimant has now submitted over 500 pages of written argument, nearly 300 pages of expert testimony, approximately 50 pages of witness testimony, and over 650 documents as exhibits. In addition, Canada has disclosed nearly 8,000 documents to the Claimant, totalling approximately 46,000 pages. In the end, the Claimant has failed to prove a breach of Canada's obligations under Chapter 11. To the contrary, as Canada has shown in its Counter-Memorial, Ontario's actions in the development and implementation of its renewable energy procurement policies, including the Feed-in Tariff Program ("FIT Program") and the *Green Energy Investment Agreement* ("GEIA") were non-discriminatory, reasonable, appropriate, and entirely consistent with Canada's obligations under Chapter 11 of NAFTA.

3. In its Reply Memorial, the Claimant has for the most part merely repeated the same factually inaccurate claims and the same unsubstantiated conspiracy theories that it presented in its Memorial. The evidence does not support any of the Claimant's allegations of wrongdoing. In essence, the Claimant asks this Tribunal to assume that officials in Ontario were corrupt, that they behaved in unreasonable and economically irrational ways, that they lied to the public about what they were doing and why, and that they are deliberately lying to this Tribunal now. In contrast, in its Counter-Memorial, Canada has provided the Tribunal with a fully substantiated statement of the relevant details and facts in this case, most of which are publicly available. As a result, Canada will not include in this submission a separate statement of relevant facts. Instead, to the extent that there remain particular facts to be addressed because of the skewed or inaccurate claims made by the Claimant in its Reply Memorial, Canada will address them in the context of the relevant legal argument below.

4. Not only are the Claimant's arguments based on speculation, inaccuracies, and misrepresentations, its claims rely on overly broad and unreasonable interpretations of Chapter 11. The Claimant's submissions ask this Tribunal to stretch and distort NAFTA Chapter 11's obligations into something they are not. With respect to Article 1108 and its arguments on the procurement exclusion, the Claimant asks the Tribunal to import the standards of other treaty provisions. In its Article 1102 and 1103 arguments, the Claimant asks the Tribunal to ignore the ordinary meaning and purpose of these provisions and find that they are not about nationality-based discrimination, but instead provide protection against any type of differential treatment. With respect to its arguments on Article 1105, the Claimant asks the Tribunal to import the rules from other treaties that allegedly do not contain the same standards as Chapter 11. Finally, in its damages claims, the Claimant asks the Tribunal to ignore the requirements of both Chapter 11 and international law and allow it to recover damages with respect to alleged breaches that did not cause it any actual losses. The Tribunal should reject the Claimant's efforts to distort both the facts and law in support of its claims.

5. In this Rejoinder, Canada will first demonstrate that this Tribunal does not have jurisdiction over the challenged measures of the Ontario Power Authority ("OPA").<sup>1</sup> In particular, Canada will show that the Claimant's new allegation that the OPA is not a state enterprise, which contradicts the position that it has taken in its previous submissions, is meritless. The OPA is a state enterprise and, as a result, Canada is only responsible for its actions if they are carried out in the exercise of delegated governmental authority. The particular actions of the OPA challenged by the Claimant in this arbitration were not carried out in the exercise of delegated governmental authority. Thus, those measures are not subject to the obligations in Chapter 11 and are, consequently, beyond this Tribunal's jurisdiction. Further, Canada will also show that even if the OPA is not found to be a state enterprise, the Claimant's new argument that Canada is responsible for the measures in question pursuant to Article 8 of the *Articles on the Responsibility of States for Internationally Wrongful Acts* ("ILC Articles") is also meritless.

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<sup>1</sup> Canada maintains its position that it has not consented to this arbitration because of the Claimant's failure to respect the conditions precedent to bringing investor-State claims in Article 1120 of NAFTA. The Claimant makes no new arguments in its Reply that have not already been fully addressed by Canada. Moreover, Canada respects the fact that as a matter of the Tribunal's procedure, this Rejoinder is not expected to address this particular jurisdictional issue. As a result, Canada will not reiterate its position in this pleading.

None of the challenged measures of the OPA were carried out under the direction or control of Ontario. Thus, none of these measures can be attributed to Canada under ILC Article 8.

6. Second, Canada will explain why the Claimant has failed to rebut the arguments made by Canada that the Claimant's allegations with respect to Articles 1102, 1103 and 1106(1)(b) are precluded by the application of Articles 1108(7)(a) and 1108(8)(b). The NAFTA Parties expressly preserved flexibility in Article 1108 to use their purchasing power to stimulate their domestic economies, including by imposing buy local requirements and favouring investors of certain nationalities. Canada will show that the Claimant's continued efforts to avoid the plain language of Article 1108, including by seeking to import other standards from other treaty provisions, should be definitively rejected.

7. Third, Canada will show that even if Articles 1102 and 1103 are considered, the Claimant's arguments that Canada has wrongfully discriminated against it are meritless. In particular, the Tribunal must reject the Claimant's attempt to reinterpret these provisions to relate to something other than nationality-based discrimination. The Claimant, a U.S. national, cannot prove its claim of discrimination by pointing to allegedly better treatment accorded to other U.S. nationals. Allowing it to do so would turn these provisions into a guarantee that the Claimant will receive the best treatment of any investor. This was not their intent and is not supported by their plain meaning. Instead, to establish a breach of these provisions, the Claimant must show that it was accorded less favourable treatment than the treatment accorded, in like circumstances, to either Canadian or other non-U.S. investors or investments. The Claimant has failed to do so. The evidence shows that the Claimant was accorded identical treatment to all other applicants to the FIT Program, and that it was not in like circumstances with the Korean Consortium which obtained contracts through a specifically negotiated commercial agreement outside of the FIT Program.

8. Fourth, Canada will show how none of the Claimant's allegations that Canada has violated its obligations under Article 1105 have any merit. In this regard, the Claimant invites the Tribunal to ignore the clear and binding language of Article 1105 as further clarified in the Note of Interpretation of the NAFTA Free Trade Commission ("FTC Note"). The Tribunal should decline this invitation. The Claimant is entitled to the minimum standard of treatment of aliens at

customary international law – nothing more. The Claimant's insistence that this standard is lower than it has been consistently recognized to be, including in the most recent decisions by NAFTA Chapter 11 tribunals, should be rejected. However, even if the Claimant's alleged standard were accepted, neither Ontario's nor the OPA's conduct violated this obligation. Every challenged measure in this case is the result of reasonable, rational, fair and good faith policy decisions. Faced with a complete lack of evidence to support its allegations, the Claimant has instead turned to misrepresenting the evidence and attacking the character of the officials involved. As Canada has shown in its Counter-Memorial, and more fully develops below, these accusations should be rejected.

9. Finally, Canada will show that the great majority of the actions that the Claimant challenges resulted in no actual losses for the Claimant. The Claimant apparently believes that it has the right to bring a claim for any measure that it alleges violates NAFTA, regardless of whether that measure had an actual impact on it or its investments. The Claimant is wrong. NAFTA Chapter 11 does not give the Claimant a blank cheque to pursue a windfall in damages beyond those it actually "incurred ... by reason of, or arising out of" specific alleged breaches. Since the Claimant has failed to demonstrate that it has actually incurred any losses caused by certain of the challenged measures, the Tribunal need not even consider whether those measures are consistent with Canada's NAFTA obligations. Further, with respect to the measures that could be seen as causally connected with the Claimant's alleged losses, the Claimant's damages claims are exaggerated, and based on improbable scenarios.

10. For the reasons that Canada has identified in its Counter-Memorial and has further elucidated here, the Tribunal should dismiss all of the Claimant's claims. Further, the Tribunal should order that the Claimant is liable for all of the Tribunal's and Canada's costs and fees in this arbitration, including the costs of legal representation.

## **II. Witness Statements and Expert Report Submitted in Support of this Rejoinder**

11. In support of this Rejoinder, Canada has submitted the following witness statements and expert report:

- Second Witness Statement of Susan Lo: Ms. Lo provides further testimony regarding the GEIA that Ontario entered into with the Korean Consortium. In particular, she

explains the amendments to the GEIA that were completed in 2011, before the Economic Development Adder (“EDA”) took effect. Ms. Lo also corrects the record with regard to certain speculation offered by the Claimant about what happened at meetings with the Minister’s Office and the Premier’s Office concerning the Bruce to Milton allocation.

- Second Witness Statement of Rick Jennings: Mr. Jennings provides further testimony regarding the negotiation of the GEIA from 2008, when Ontario was first approached by the Korean Consortium with an offer, through to the actual execution of the GEIA in 2010. In so doing, he rebuts the unsupported assertions that Canada has withheld an additional agreement signed by Ontario and the Korean Consortium.
- Second Witness Statement of Shawn Cronkwright: Mr. Cronkwright offers further testimony with respect to how the OPA procures electricity supply for Ontario generally, and in the context of the FIT Program and the GEIA. He also responds to certain misrepresentations made by the Claimant about the views of the OPA with respect to the process for allocating capacity on the Bruce to Milton Line in 2011.
- Second Witness Statement of Richard Duffy: Mr. Duffy responds to the claims made by the Claimant and its expert Mr. Timm, with respect to the evaluation of the Claimant’s TTD and Arran applications. He explains why it was entirely appropriate that the Claimant was not awarded any criteria points for these applications.
- Second Witness Statement of Bob Chow: Mr. Chow offers further testimony regarding the Claimant’s allegations about the OPA’s provision of requested information to the Government during the Bruce to Milton allocation. He also responds to further allegations made by the Claimant about the Economic Connection Test, connections to the L7S circuit and connections to the 500 kV Bruce to Longwood Line.
- Rejoinder Expert Report of Mr. Goncalves, Berkley Research Group (“Rejoinder BRG Report”): Berkley Research Group (“BRG”) responds to the Reply report of Messrs. Taylor and Low and, to the extent that it is relevant to the issue at all, the expert report of Mr. Adamson (the “Adamson Report”). They explain why the Reply report of Messrs. Taylor and Low continues to greatly overstate any damages to the Claimant arising from the measures that have been challenged in this arbitration.

## **THE TRIBUNAL LACKS JURISDICTION TO HEAR THE CLAIMANT’S CLAIM**

### **I. Summary of Canada’s Position**

12. In its Objections to Jurisdiction and in its Counter-Memorial and Reply on Jurisdiction, Canada explained that the Claimant had failed to comply with the requirements of Article 1120

in attempting to submit its claim to arbitration.<sup>2</sup> When this issue was first raised by Canada prior to the Claimant filing its Notice of Arbitration, the Claimant could have easily addressed it without suffering any prejudice. However, it chose not to. It should now bear the consequences of that choice. In particular, as a result of the Claimant's failure to comply, Canada has not consented to this arbitration and without Canada's consent, this Tribunal lacks jurisdiction to hear this matter. In its Reply Memorial and Rejoinder on Jurisdiction, the Claimant has done nothing more than repeat its previous arguments.<sup>3</sup> In response, Canada relies upon the arguments it made in its previous filings.<sup>4</sup>

13. The following section addresses the issues of the application of Article 1503(2) – State Enterprises, and the question of attribution pursuant to Article 8 of the ILC Articles. As Canada demonstrated in its Counter-Memorial and Reply on Jurisdiction, and will further demonstrate below, this Tribunal lacks jurisdiction in so far as the claims are based on the actions of state enterprises who were not acting in the exercise of delegated governmental authority. Further, and in the alternative, Canada is not responsible for certain measures of the OPA pursuant to Article 8 of the ILC Articles because the OPA was not acting under the instructions, direction or control of Ontario with respect to these measures.

## **II. The Tribunal Lacks Jurisdiction to Consider the Challenged Acts of the OPA**

14. Prior to addressing the outstanding jurisdictional arguments, Canada wishes to briefly address the Claimant's new argument that the question of state responsibility is an issue of admissibility and not a matter of jurisdiction.<sup>5</sup> There is no merit to this position.

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<sup>2</sup> Canada's Counter-Memorial and Reply on Jurisdiction, 28 February 2014, ¶¶ 91-100 ("Canada's Counter-Memorial"); Canada's Objection to Jurisdiction, 3 December 2012, ¶¶ 17-41 ("Canada's Objection to Jurisdiction").

<sup>3</sup> Claimant's Reply Memorial and Rejoinder on Jurisdiction, 30 April 2014, ¶¶ 817-849 (Claimant's Reply Memorial").

<sup>4</sup> Canada's Counter-Memorial, ¶¶ 91-100; Canada's Objection to Jurisdiction, ¶¶ 17-41.

<sup>5</sup> Claimant's Reply Memorial, ¶¶ 50(f), 800(f), 860. Canada notes that the Claimant also makes this argument, for the first time, with respect to Canada's lack of consent to arbitrate this dispute (Claimant's Reply Memorial, ¶¶ 50(a), 800(a), 810). In its Objection to Jurisdiction and in its Counter-Memorial and Reply on Jurisdiction, Canada explained fully why the question of the Party's consent is fundamental to the Tribunal's jurisdiction (Canada's Objection to Jurisdiction, ¶¶ 33-37; Canada's Counter-Memorial, ¶¶ 256-259). Canada further notes that while the Claimant has argued that the issue of consent is one of admissibility at ¶ 810 of its Reply Memorial and Rejoinder on Jurisdiction, the Claimant goes on to argue at ¶ 816 that: ("[t]here is no latitude under the NAFTA for Canada to

15. Unsurprisingly, the Claimant has not cited to a single legal authority in support of its proposition. In fact, the legal authorities the Claimant cites to are directly contrary to its position. International tribunals consistently recognize that the question of whether the acts being challenged can be attributed to the State is a jurisdictional issue.<sup>6</sup> In this particular case, it is clear that the question of attribution is jurisdictional because, under Article 1101, this Tribunal can only hear claims regarding “measures adopted or maintained by a Party”; that is, measures that can be attributed to a State. The mere fact that such arguments are often heard with the merits is not, contrary to the Claimant’s suggestion, at all relevant as to their nature. Attribution issues are typically heard with the merits for the simple reason that the relevant factual determinations are often closely intertwined.<sup>7</sup>

16. As will be demonstrated below, this Tribunal lacks jurisdiction to consider the challenged acts of the OPA. First, the OPA is a state enterprise and, as the challenged actions were not carried out in the exercise of delegated governmental authority, they are not subject to the obligations in Chapter 11. Second, in the alternative, if the Tribunal finds that the OPA is not a state enterprise, the actions of the OPA are not attributable to Canada pursuant to Article 8 of the ILC Articles.

**A. Pursuant to Article 1503(2), a State Enterprise Is Only Subject to the Obligations of Chapter 11 if It Is Exercising Delegated Governmental Authority**

17. In its Notice of Arbitration and Memorial,<sup>8</sup> the Claimant argued that the OPA was a state enterprise subject to Article 1503(2). In its Counter-Memorial, Canada agreed with the Claimant

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refuse to consent to arbitrate. Canada is bound by the jurisdictional clauses of the NAFTA, and if these clauses, properly read, confer jurisdiction, then there is no further issue about ‘consent’”) (emphasis added).

<sup>6</sup> **RL-055**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶¶ 143-145 (“*Hamester – Award*”); **RL-110**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Award, 10 March 2014, ¶¶ 276-280 (“*Tulip Real Estate – Award*”). See also, **RL-057**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008, ¶¶ 155-175 (“*Jan de Nul – Award*”).

<sup>7</sup> **RL-055**, *Hamester - Award*, ¶¶ 143-145; **RL-110**, *Tulip Real Estate – Award*, ¶¶ 276-280.

<sup>8</sup> Notice of Arbitration, 4 October 2011, ¶ 69 (“Notice of Arbitration”); Claimant’s Memorial, 20 November 2013, ¶ 80 (“Claimant’s Memorial”).

as to the status of the OPA.<sup>9</sup> As Canada explained in its Counter-Memorial, Article 1503(2) creates a *lex specialis* for when the acts of a state enterprise can be attributed to the respondent State under NAFTA.<sup>10</sup> This *lex specialis* displaces the rules of customary international law regarding when the acts of a non-State entity such as the OPA can violate a State's international obligations.<sup>11</sup> As Canada noted in its Counter-Memorial, since there was no dispute between the parties that the OPA was a state enterprise, the *lex specialis* created in Article 1503(2) applies to this dispute.<sup>12</sup>

18. In its Reply Memorial and Rejoinder on Jurisdiction, the Claimant has now adopted the position that the OPA is not a state enterprise.<sup>13</sup> As shown below, the new position espoused by the Claimant is incorrect. The OPA is a state enterprise, and as a result, the *lex specialis* created by Article 1503(2) applies.

### **1. The OPA Is a State Enterprise**

19. The Claimant now maintains that the OPA is not a state enterprise because of what it calls a "technical reason", namely that the OPA "does not meet the definition requirement of a state enterprise under a Canada-specific definition which is set out in Annex 1505."<sup>14</sup> The Claimant provides no other argument in support of its contention that the OPA is not a state enterprise. This argument is without merit and misunderstands Annex 1505.

20. The relevant Article in this dispute with respect to the OPA is Article 1503(2). However, by its own clear terms, Annex 1505 applies only with respect to Article 1503(3), *not* Article 1503(2). As such, the Claimant's late developed arguments are meritless, and the Tribunal need not give any further consideration to them.

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<sup>9</sup> Canada's Counter-Memorial, ¶ 290.

<sup>10</sup> Canada's Counter-Memorial, ¶¶ 291-293.

<sup>11</sup> Canada's Counter-Memorial, ¶¶ 291-293; **RL-075**, *United Parcel Service of America, Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007, ¶ 62 ("*UPS – Award*").

<sup>12</sup> Canada's Counter-Memorial, ¶¶ 290-296, 302-305.

<sup>13</sup> Claimant's Reply Memorial, ¶ 871.

<sup>14</sup> Claimant's Reply Memorial, ¶ 872.



21. Even if the Tribunal were to continue its analysis, the OPA meets the definition of a state enterprise as defined in Article 1505. Article 1505 defines a state enterprise as “an enterprise owned, or controlled through ownership interests, by a Party.”<sup>15</sup> Canada does not dispute that in the case of ordinary share-capital corporations, the phrase “owned, or controlled through ownership interests” may very well refer to ownership through share holdings. However, for non-share capital corporations created by the State, such as the OPA,<sup>16</sup> the term “owned or controlled through ownership interests” must be understood differently. For example, in considering the question of whether a State owned an enterprise, the Tribunal in *Wena Hotels v. Egypt* pointed to the power to appoint the Board of Directors and the power to dismiss the Chairman and Board members in addition to shareholding.<sup>17</sup>

22. In this regard, there are numerous indicia of Ontario's ownership of the OPA which demonstrate that the OPA is in fact a state enterprise. While the *Electricity Act, 1998* indicates that the OPA is not an agent of the Government of Ontario for any purpose,<sup>18</sup> the Government of Ontario brought the OPA into existence by statute, and may decide, at any time, to dissolve it and terminate its existence. Further, if the Government were to wind up the OPA, the remaining property following payment of all debts and liabilities, would belong to the Government of Ontario.<sup>19</sup> In addition, the Minister of Energy has the power to appoint the members of the Board of Directors of the OPA<sup>20</sup> and also retains the power to dismiss an individual from the Board of Directors.<sup>21</sup> Additionally, the Minister of Energy retains sole power to approve the business plan

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<sup>15</sup> NAFTA, Article 1505.

<sup>16</sup> **C-0401**, *Electricity Act*, S.O. 1998, Part II.1, s. 25.1 (“*Electricity Act*”).

<sup>17</sup> **RL-112**, *Wena Hotels LTD. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award, 8 December 2000, ¶¶ 65-69.

<sup>18</sup> **C-0401**, *Electricity Act*, Part II.1, s. 25.3.

<sup>19</sup> **C-0401**, *Electricity Act*, Part II.1, s. 25.2(3).

<sup>20</sup> **C-0401**, *Electricity Act*, Part II.1, s. 25.4(2).

<sup>21</sup> **C-0401**, *Electricity Act*, Part II.1, s. 25.4(8); **R-174**, Ontario Power Authority Governance and Structure By-Law, 1 November 2005, s. 3.5: (When Director Ceases to Hold Office). Available at: [http://powerauthority.on.ca/sites/default/files/page/1066\\_OPA\\_GS\\_Bylaws\\_2005-11-01.pdf](http://powerauthority.on.ca/sites/default/files/page/1066_OPA_GS_Bylaws_2005-11-01.pdf).

of the OPA for each fiscal year.<sup>22</sup> All of these factors support the proposition that the OPA is a state enterprise pursuant to Article 1505 of the NAFTA.

**2. The Acts of the OPA that the Claimant Alleges Were Breaches of the NAFTA Were Not Done in the Exercise of Delegated Governmental Authority**

23. Canada has previously established in its Counter-Memorial and Reply on Jurisdiction that the acts of the OPA that the Claimant alleges to have breached the NAFTA were not done in the exercise of delegated governmental authority.<sup>23</sup> The Claimant has not disputed this. To the extent that this issue remains in dispute, Canada relies on its earlier submissions.<sup>24</sup> As proven there, the alleged acts of the OPA of which the Claimant complains were not exercised under delegated governmental authority.

**B. In the Alternative, the Acts of the OPA Cannot Be Attributed to Canada Pursuant to Article 1108 of the ILC Articles on State Responsibility**

24. The Claimant alleges that actions of the OPA are attributable to Canada pursuant to Article 8 of the ILC Articles.<sup>25</sup> In doing so, the Claimant appears to concede that the OPA is not an organ of the Government of Ontario, and therefore, appears to have abandoned the arguments that it had made in respect of the application of Article 4 of the ILC Articles.<sup>26</sup> Accordingly, Canada will only address the Claimant's Article 8 arguments here.<sup>27</sup>

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<sup>22</sup> **C-0401**, *Electricity Act*, Part II.1, s. 25.22(2).

<sup>23</sup> Canada's Counter-Memorial, ¶¶ 291-296; 302-305 (citing to **RL-075**, *UPS – Award*, ¶ 57, 62, 71, 77-78; **RL-057**, *Jan de Nul – Award*, ¶ 45; **CL-006**, ILC Articles, Article 8, Commentary(6), p. 112).

<sup>24</sup> *Ibid.*

<sup>25</sup> Claimant's Reply Memorial, ¶¶ 860-869.

<sup>26</sup> Claimant's Reply Memorial, ¶¶ 862-863. To the extent that the Claimant is continuing to pursue this argument based on Article 4, Canada relies on the arguments that it made in its Counter-Memorial and Reply on Jurisdiction that established that the OPA is neither a *de jure* nor a *de facto* organ of the Government. Canada's Counter-Memorial, ¶¶ 271-289.

<sup>27</sup> Canada did not address these arguments in its Counter-Memorial and Reply on Jurisdiction because the parties, at that time at least, agreed that the OPA was a state enterprise, and thus, agreed that Article 1502 applied, and that as a result, the ILC Articles were not relevant.

**1. The Standard for Attributing the Acts of a Private Entity to a State under ILC Article 8 Is High and Requires Effective Control over the Act in Question**

25. Article 8 of the ILC Articles summarizes the rules of attribution when an entity is acting on the instructions or under the direct control of a State. It provides:

Article 8: Conduct Directed or Controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct.<sup>28</sup>

26. Attribution under Article 8 of the ILC Articles is “exceptional.”<sup>29</sup> It will apply only when private persons act on the instructions of the State or under the State’s direction or control, in carrying out the specific wrongful conduct at issue.<sup>30</sup>

27. As the commentary to the ILC Articles explains, a private person will be deemed to be acting under the instructions of a State “where State organs supplement their own action by recruiting or instigating private persons or groups who act as ‘auxiliaries’ while remaining outside the official structure of the State.”<sup>31</sup> The commentary to Article 8 of the ILC Articles also speaks specifically to instances where a State has established an entity via statute. In particular, it notes that “[t]he fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity.”<sup>32</sup> Similarly, it further explains that although these corporate entities may be owned by the State, they are “considered to be separate, *prima facie* their conduct in carrying

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<sup>28</sup> CL-008, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, Article 8 (“ILC Articles - Commentary”).

<sup>29</sup> CL-342, *EDF (Services) Ltd v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, ¶ 200.

<sup>30</sup> CL-008, ILC Articles – Commentary, p. 47.

<sup>31</sup> *Ibid.*

<sup>32</sup> CL-008, ILC Articles – Commentary, p. 48 (citing, for example, the Workers’ Councils considered in *Schering Corporation v. The Islamic Republic of Iran*, Iran-U.S. C.T.R., vol. 5, p. 361 (1984); *Otis Elevator Company v. The Islamic Republic of Iran*, *ibid.*, vol. 14, p. 283 (1987); and *Eastman Kodak Company v. The Government of Iran*, *ibid.*, vol. 17, p. 153 (1987)).

out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5 [of the ILC Articles].”<sup>33</sup>

28. The extremely careful approach to attribution suggested by the ILC has been followed by international tribunals. The International Court of Justice (“ICJ”) considered the term “controlled” in Article 8 of the ILC Articles in the *Nicaragua* decision. In considering whether the conduct of the contras was attributable to the U.S., the Court held that:

For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>34</sup>

29. Thus, as explained by the ICJ, responsibility pursuant to Article 8 of the ILC Articles is only triggered when a State has “effective control” over the entity in question. Specifically, only in certain instances, when actions of the entity are based upon the “actual participation of and directions given by that State”, will attribution come into play.<sup>35</sup>

30. In the more recent *Genocide Convention* case, the ICJ further explained this standard. It held that in order for Article 8 to apply, it would have to be shown that the person or group of persons “acted in accordance with that State’s instructions or under its ‘effective control’ [and that] . . . this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.”<sup>36</sup>

31. Various international tribunals have also discussed Article 8 of the ILC Articles in the context of investment arbitration and have appropriately upheld its exceptional nature and the

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<sup>33</sup> CL-008, ILC Articles – Commentary, p. 48.

<sup>34</sup> RL-064, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* I.C.J. Reports 1986, Merits, Judgment of 27 June 1986, ¶ 115.

<sup>35</sup> CL-008, ILC Articles – Commentary, p. 47.

<sup>36</sup> RL-050, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* I.C.J. Reports 2007, Judgment, 26 February 2007, ¶ 400 (“*Genocide Convention Case*”) (emphasis added).

standards adopted by the ICJ. In speaking of the degree of control necessary for the purposes of attribution, the Tribunal in *Jan de Nul v. Egypt* held that:

International jurisprudence is very demanding in order to attribute the act of a person or entity to a State, as it requires both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake; this is known as the “effective control” test.<sup>37</sup>

32. Similarly, the Tribunal in *Hamester v. Ghana* noted that:

Moreover, the State can also be responsible under certain circumstances for the act of a private or public person – if the State has a significant involvement, before the commission of the act in question, such that the act can be considered as controlled by, and thus performed by the State.<sup>38</sup>

33. The same Tribunal went on to explain the threshold required under Article 8 of the ILC Articles:

The jurisprudence of the ICJ sets a very demanding threshold in attributing the act of a private entity to a State, as it requires both general control of the State over the entity, and specific control of the State over the particular act in question. This is known as the “effective control” test.<sup>39</sup>

34. Recently, the Tribunal in *Tulip v. Turkey* also agreed that the relevant test for determining whether the acts of an entity are attributable to a State pursuant to Article 8 of the ILC Articles is that of “effective control.”<sup>40</sup> According to that Tribunal, the relevant inquiry is whether the entity was being “directed, instructed or controlled” by the State “with respect to the specific activity” in question.<sup>41</sup> The *Tulip v. Turkey* Tribunal further clarified that even when the State is the

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<sup>37</sup> **RL-057**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008, ¶ 173 (referring to *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1984, ¶¶ 113 and 115).

<sup>38</sup> **RL-055**, *Hamester – Award*, ¶ 178.

<sup>39</sup> **RL-055**, *Hamester – Award*, ¶ 179.

<sup>40</sup> **RL-110**, *Tulip Real Estate – Award*, ¶ 304.

<sup>41</sup> **RL-110**, *Tulip Real Estate – Award*, ¶ 309: (“However, the relevant enquiry remains whether Emlak was being directed, instructed or controlled by TOKI with respect to the specific activity of administering the Contract with Tulip JV in the sense of sovereign direction, instruction or control rather than the ordinary control exercised by a majority shareholder acting in the company’s perceived commercial best interest.”).

majority shareholder in an entity, the actions of that entity are not necessarily attributable to the State.<sup>42</sup>

**2. The Claimant Has Not Proven that the Acts of the OPA that It Claims Violated NAFTA Were Carried Out under the Effective Control of Ontario**

35. The Claimant alleges that the “Government of Ontario used the Ontario Power Authority as an instrument to carry out provincial government policy, and achieve a desired result as it concerned renewable energy.”<sup>43</sup> It further alleges that in each instance where it was harmed, and where the proximate cause of the injury was a measure of the OPA, that the final cause of this measure was a mandatory direction from an “organ” of the State.<sup>44</sup> Canada does not dispute that in certain instances the OPA acts directly upon the instructions of the Government of Ontario. When such directions are issued they are made public and are always in writing. These directions are measures of the Government of Ontario, and thus, there is no dispute that they can be challenged directly under Chapter 11 of NAFTA. However, absent a specific written direction from the Minister of Energy, the OPA acts on its own accord and not under the direction or control of the Government of Ontario. As explained more fully below, the Claimant has not demonstrated that the Government of Ontario had effective control over the OPA in respect of each operation in which the alleged violations occurred.

36. The Claimant makes general statements on the FIT Program and GEIA, and refers broadly to certain directions issued by the Minister of Energy to the OPA, such as the direction that the OPA establish a FIT Program.<sup>45</sup> However, the Claimant is not challenging the OPA's mere initiation of the FIT Program. Rather, the Claimant challenges certain aspects of the OPA's design and implementation of the FIT Program. More specifically, the Claimant has challenged the OPA's review of Mesa's FIT applications,<sup>46</sup> including its bid for the major equipment control

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<sup>42</sup> **RL-110**, *Tulip Real Estate – Award*, ¶¶ 306-311.

<sup>43</sup> Claimant's Reply Memorial, ¶ 866.

<sup>44</sup> Claimant's Reply Memorial, ¶ 862.

<sup>45</sup> Claimant's Reply Memorial, ¶¶ 867-868. At the time of the September 2009 Direction, the Minister's portfolio also included infrastructure, so the issuing Minister shows the “Minister of Energy and Infrastructure”.

<sup>46</sup> Claimant's Reply Memorial, ¶¶ 712-719.

point,<sup>47</sup> the prior experience point,<sup>48</sup> and the financial capacity point<sup>49</sup> during the launch period. The Claimant also challenged the OPA's decision not to provide explanations regarding the launch period ranking process as it specifically applied to the Claimant's TTD and Arran projects,<sup>50</sup> the OPA's decision on what information to include in the TAT tables<sup>51</sup> and the OPA's decision to offer NextEra a FIT Contract with connection points on the 500 kV Bruce to Longwood Line.<sup>52</sup> Finally, the Claimant has challenged the OPA's meeting with other FIT applicants on the basis that such meetings led to benefits being granted to these FIT applicants which were not available to the Claimant.<sup>53</sup> The Claimant has not pointed to a single direction from the Minister of Energy to the OPA directing it to commit any of these alleged breaches. There are no such directions.

37. While Ontario provided a general mandate to the OPA, it did not direct or control the OPA in relation to the specific actions challenged in this dispute. Indeed, as Mr. Duffy has stated, with respect to the ranking of projects and awarding of contracts, "[t]hese were OPA processes, and indeed, given our mandate, on specific technical tasks like those I would not have accepted Ministry involvement."<sup>54</sup>

38. For the reasons outlined above, the Claimant has failed to demonstrate that the actions of the OPA which it is challenging in this arbitration are attributable to Canada pursuant to Article 8 of the ILC Articles. As a result, even if this Tribunal finds that the OPA is not a state enterprise, it is still without jurisdiction to consider a challenge to the measures in question.

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<sup>47</sup> Claimant's Reply Memorial, ¶¶ 720-725.

<sup>48</sup> Claimant's Reply Memorial, ¶¶ 726-732.

<sup>49</sup> Claimant's Reply Memorial, ¶¶ 733-743.

<sup>50</sup> Claimant's Reply Memorial, ¶¶ 744-752.

<sup>51</sup> Claimant's Reply Memorial, ¶¶ 765-776.

<sup>52</sup> Claimant's Reply Memorial, ¶¶ 661-674.

<sup>53</sup> Claimant's Reply Memorial, ¶¶ 412(d), 798(d), 878(b)(iv), 878(d)(iv).

<sup>54</sup> RWS-Duffy, ¶ 4.

## **CANADA HAS NOT VIOLATED ITS NAFTA OBLIGATIONS**

### **I. Articles 1102, 1103 and 1106(1)(b) Do Not Apply to the FIT Program by Virtue of the Procurement Exemption in Article 1108**

#### **A. Summary of Canada's Position**

39. As Canada explained in its Counter-Memorial, if a measure constitutes or involves procurement by a Party or a state enterprise, then pursuant to Article 1108, it cannot breach NAFTA Articles 1102, 1103 or 1106(1)(b).<sup>55</sup> According to its ordinary meaning, procurement exists when a Party engages in the act of obtaining a good or a service whether by effort, labour, purchase, lease or rental with or without option to buy.<sup>56</sup> Canada's Counter-Memorial sets out all of the facts demonstrating that the FIT Program is a procurement program, and there is no reason to repeat them here.<sup>57</sup>

40. In essence, the Claimant is challenging measures pursuant to which electricity is being purchased by Ontario through the OPA for the use of the Ontario public. These measures, whether they pertain to the FIT Program, or to the GEIA, constitute or involve the procurement of electricity by Ontario and therefore cannot be challenged under NAFTA Articles 1102, 1103 or 1106(1)(b). In an attempt to escape this conclusion, the Claimant's Reply Memorial proposes various means of avoiding the plain language and application of Article 1108. These attempts fail to respect the ordinary meaning of the provisions at issue and must, therefore, be rejected.

#### **B. The Claimant Is Wrong that Article 1108 Is "Invalid for Use" Due to the Canada-Czech Republic FIPA**

41. As an initial matter, the Claimant argues in its Reply Memorial that Article 1108 "could never apply to NAFTA Article 1103 with respect to Mesa."<sup>58</sup> It alleges that Article 1108 is blocked by the combination of Chapter 11's guarantee of most-favoured-nation ("MFN") treatment and an absence of a procurement exception in the 2009 *Canada-Czech Republic*

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<sup>55</sup> Canada's Counter Memorial, ¶¶ 309-310.

<sup>56</sup> Canada's Counter Memorial, ¶ 311 (citing to **CL-072**, *ADF – Award*, ¶¶ 160-174 and **RL-075**, *UPS – Award*, ¶¶ 121-136) and NAFTA, Article 1001(5)).

<sup>57</sup> Canada's Counter Memorial, ¶¶ 315-319.

<sup>58</sup> Claimant's Reply Memorial, fn. 17.



*Foreign Investor Promotion and Protection Agreement* (“Canada-Czech Republic FIPA”). According to the Claimant, Article 1108 is “invalid for use” because the treatment accorded under the Canada-Czech Republic FIPA is not subject to a procurement exception and therefore amounts to more favourable treatment under Article 1103.<sup>59</sup>

42. In making this argument, the Claimant has not even attempted to meet its burden of demonstrating that the requirements of Article 1103 have been met. In particular, it has made no effort to show comparable treatment accorded in like circumstances to investors under the Canada-Czech Republic FIPA, or that the treatment it received was less favourable than that received by a Czech Republic investor. It is not enough to establish a violation of Article 1103 to simply point to different language in another treaty. Article 1103 is not a tool through which an investor can choose the language it prefers from Canada's various investment agreements. To prove a breach of Article 1103, the Claimant has the burden of providing evidence of actual – not hypothetical – treatment of an investor of a third party to the dispute. Otherwise, it would be impossible for the Tribunal to answer the necessary factual questions, such as whether the treatment was in fact “more favourable” and whether it was accorded in “like circumstances”. The Claimant has failed to provide any evidence that it was accorded treatment, in like circumstances, that was less favourable than the treatment accorded to an investor covered under the Canada-Czech Republic FIPA. For this reason alone, this argument should be rejected.

43. However, even if the Tribunal were to consider this issue further, the Claimant's argument is meritless. NAFTA Article 1108(7) provides that: “Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise”. Since Article 1108(7) excludes the application of Article 1103, the Claimant is precluded from claiming that Canada has violated Article 1103 without first showing that Article 1108(7) does not apply. In other words, for Article 1103 to apply and the Tribunal even to begin to consider treatment accorded under the Canada-Czech Republic FIPA, the Tribunal would first have to find that the measure in question is not procurement. However, if it does make such a finding, then the question of Article 1103 and the Canada-Czech Republic FIPA is irrelevant.

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<sup>59</sup> Claimant's Reply Memorial, ¶ 51.

44. To apply Article 1103 without first determining whether Article 1108 applies, as the Claimant has suggested, would fly in the face of the ordinary meaning of the terms in Article 1108 and go against at least two other rules of treaty interpretation. In particular, such an interpretation would nullify Article 1108's application, violating the basic rule of effectiveness in treaty interpretation.<sup>60</sup> It would also require an application of the general, less specific rule over the more specific derogation of that rule, contrary to the rule of *generalia specialibus non derogant*.<sup>61</sup> In this regard, the Tribunal in *Canfor v. United States* helpfully noted that while general principles are found in the NAFTA, "the existence of general principles does not exclude the existence of significant and sometimes highly specific exceptions."<sup>62</sup> In its words, a general proposition "cannot expand, let alone override, the text of the NAFTA."<sup>63</sup>

45. In conclusion, NAFTA Article 1103 cannot oust the application of Article 1108, when the very purpose of Article 1108 is to condition the application of Article 1103. Accordingly, the Claimant's argument must be dismissed.

### C. The Terms of Article 1108 Must Be Interpreted in Accordance with their Ordinary Meaning

46. In its Reply Memorial, the Claimant cites to *Canfor*, and submits that "exceptions [are] to be interpreted narrowly", which "argue[s] against [their] flexible interpretation".<sup>64</sup> Canada agrees that Article 1108 should not be interpreted "flexibly", but rejects the notion that this dictates a narrow or restrictive approach. Article 1108, like all NAFTA provisions, must be interpreted in accordance with the customary rules of treaty interpretation, as embodied in Article 31 of the

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<sup>60</sup> See **RL-111**, *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, ¶ 52: ("Effectiveness of a treaty rule denotes the need to avoid an interpretation which leads to either an impossibility or absurdity or empties the provision of any legal effects.").

<sup>61</sup> **CL-020**, *Oil Platforms (Islamic Republic of Iran v. United States)* Preliminary Objection, Judgment of 12 December 1996, I.C.J. Reports 1996, ¶ 28 holding that an article in a treaty providing that "there shall be enduring peace and sincere friendship" ... "must be regarded as fixing an objective, in light of which the other Treaty provisions are to be interpreted and applied," but cannot be the basis on which a breach of the treaty could be found.

<sup>62</sup> **CL-005**, *Canfor Corporation v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 183 ("*Canfor – Decision on Preliminary Question*").

<sup>63</sup> **CL-005**, *Canfor – Decision on Preliminary Question*, ¶ 247.

<sup>64</sup> Claimant's Reply Memorial, ¶ 189; **CL-005**, *Canfor – Decision on Preliminary Question*, ¶ 187.

*Vienna Convention on the Law of Treaties* (“VCLT”). This means that its terms should be interpreted in accordance with their ordinary meaning in their context and in light of their object and purpose.<sup>65</sup> This rule has been followed by NAFTA Chapter 11 tribunals whether they are interpreting a substantive provision or an exception.<sup>66</sup>

47. For example, the Tribunal in *Mobil v. Canada* resisted the “proposition that Article 1108 reservations are to be interpreted restrictively” and held that “[t]he task of ascertaining the meaning of a reservation, like the task of interpreting any other treaty text, involves understanding the intention of the NAFTA Parties, and it is to be achieved by following the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the VCLT”.<sup>67</sup>

48. This has also been the approach adopted by non-NAFTA tribunals, including the *Mer d'Iroise* arbitration between France and the U.K., which held that reservations must be construed “in accordance with the natural meaning of [their] terms”.<sup>68</sup>

49. Further, in 1998, the World Trade Organization (“WTO”) Appellate Body expressly confirmed, contrary to the earlier General Agreement on Tariffs and Trade (“GATT”) Panel opinion relied upon in the *Canfor* case cited by the Claimant, that:

[M]erely characterizing a treaty provision as an “exception” does not by itself justify a “stricter” or “narrower” interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words,

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<sup>65</sup> Claimant's Reply Memorial, ¶ 192.

<sup>66</sup> See, for example, **CL-168**, *Mobil Investments, 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, ¶¶ 251 and 254 (“*Mobil – Decision on Liability and on Principles of Quantum*”).

<sup>67</sup> **CL-168**, *Mobil Investments, 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, ¶¶ 251 and 254 (“*Mobil – Decision on Liability and on Principles of Quantum*”).

<sup>68</sup> **RL-088**, *Case Concerning Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic* (also known as the “Mer d'Iroise” case), Award of 30 June 1977, in United Nations, Reports of International Arbitral Awards (UNRIAA), vol. XVIII, pp. 38-40, ¶¶ 51, 53, 55.

viewed in the context and in light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.<sup>69</sup>

50. Thus, the normal rules of treaty interpretation apply to the interpretation of Article 1108. However, even if this Tribunal were to adopt a position that exclusions are to be interpreted narrowly, this does not mean that the most narrow interpretation possible is not, in fact, a broad one. This was the exact finding in *Canfor*. At issue in that case was the application of NAFTA Article 1901(3). Like Article 1108(7) and (8), this provision creates a bar to the application of Chapter 11 obligations, but instead of barring their application to procurement, Article 1901(3) bars them from application to "antidumping or countervailing duty law".

51. The *Canfor* Tribunal carefully considered the text of Article 1901(3), and having decided to apply a narrow interpretation, it held that the provision in fact "sets forth a broad exclusion".<sup>70</sup> In other words, while the Claimant appears to rely on the *Canfor* decision in an attempt to limit the application of Article 1108, that decision in no way narrowed the exclusion it was considering. To the contrary, the Tribunal's *narrow* interpretation of the terms at issue led it to conclude that Article 1901(3) provides a *broad* exclusion to the substantive obligations.<sup>71</sup> The language of Article 1108 would require the same approach as adopted by the Tribunal in *Canfor*. In short, even if this Tribunal were to interpret Article 1108 narrowly (and it should not), the most narrow interpretation possible would lead to the conclusion that Article 1108 creates a broad exclusion for procurement.

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<sup>69</sup> **RL-090**, *European Communities - Measures Concerning Meat and Meat Products (Hormones)* (1998), WTO Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, ¶ 104; *See also* **RL-091**, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* (2004), WT/DS246/EB/R, ¶ 98.

<sup>70</sup> **CL-005**, *Canfor – Decision on Preliminary Question*, ¶ 262.

<sup>71</sup> Based on its interpretation of Article 1901(3), the *Canfor* Tribunal ultimately barred all of the claims brought except for those relating to the *Byrd Amendment*, which the U.S. flatly admitted had "nothing to do with the administration of the anti-dumping and countervailing duty laws." **CL-005**, *Canfor – Decision on Preliminary Question*, ¶ 325.

**D. The Ordinary Meaning of “procurement by a Party” in Article 1108 Does Not Include the Additional Requirements or Limitations Found in Other Provisions**

52. As explained in Canada's Counter-Memorial, the ordinary meaning of procurement has been expressly considered and applied in two NAFTA Chapter 11 disputes.<sup>72</sup> The *ADF* Tribunal held that “[i]n its ordinary or dictionary connotation, “procurement” refers to the act of obtaining, ‘as by effort, labor or purchase’. To procure means ‘to get; to gain; to come into possession of.’”<sup>73</sup> The *UPS* Tribunal adopted a similarly broad interpretation and relied on the fact that the procured service in question was provided to the government pursuant to a “commercial fee-for-service contract”.<sup>74</sup>

53. Thus, the ordinary meaning of the term procurement in Article 1108 covers all measures constituting or involving the lease or purchase of goods or services by a government or state enterprise, regardless of whether the government ultimately paid the cost, and regardless of whether the government retained possession of the end product. The key question is whether the measures at issue involve a process pursuant to which a government or state enterprise acquires products or services.

54. The Claimant rejects the definition that was applied by the Tribunals in *ADF* and *UPS*. It complicates the test of what constitutes procurement by importing concepts and limitations into NAFTA Chapter 11 from other sources of law. Refusing to acknowledge the obviously different language of the various treaty provisions it seeks to apply, the Claimant baldly asserts that “[a]ll of the meanings of procurement are consistent.”<sup>75</sup> According to the Claimant, every international agreement provides the same definition of procurement. The Claimant is mistaken. As is shown below, the provisions upon which the Claimant relies contain additional terms, text and concepts not found in the broad and unencumbered use of the term “procurement” in Article 1108.

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<sup>72</sup> Canada's Counter-Memorial, ¶¶ 311-312.

<sup>73</sup> **CL-072**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, ¶ 161 (“*ADF – Award*”).

<sup>74</sup> **RL-075**, *UPS - Award*, ¶ 161.

<sup>75</sup> Claimant's Reply Memorial, ¶ 201.

**1. Article 1108 Does Not Contain the Same Limitations Found in NAFTA Chapter 10's Description of Procurement**

55. Since NAFTA Chapter 11 does not define “procurement by a Party”, the Claimant seeks to import the description of procurement relevant to Chapter 10. It argues that Chapter 10 provides “NAFTA’s own definition”, based on the following argument:

It is logical to believe that the drafters of the NAFTA presumed that the definition of the term “procurement” in the NAFTA would be internally consistent within the NAFTA and that if any presumption for a different meaning should take place, then it would have been specified.<sup>76</sup>

56. The Claimant’s argument misses the point. In understanding the NAFTA Parties’ use of the term “procurement,” the Tribunal must look to the specific context in which it is used. The term procurement is found in several NAFTA provisions, each with its own context. The most significant functional difference in these various provisions is that in Chapters 3, 11, 12 and 15 the term is used in a carve-out, whereas in Chapter 10 it is used in a carve-in. In particular, Chapter 10 provides a description of what kinds of procurement are and are not covered by the obligations in that specific Chapter.

57. The description of procurement in Chapter 10 must be read in the context of Article 1001(1), which stipulates that “[t]his Chapter applies to measures adopted or maintained by a Party relating to procurement”. Therefore, the description of procurement that follows does not serve to preclude the application of substantive provisions. Rather, it stipulates the measures to which the substantive provisions of Chapter 10 apply.

58. The Claimant accuses Canada of declaring the description of procurement in Chapter 10 to be irrelevant in relation to the meaning of procurement in Article 1108.<sup>77</sup> The Claimant misunderstands Canada’s position. Canada has never said that Article 1001(5) is not part of the context to be used to interpret Article 1108. However, context can be relevant in its similarities as well as its differences.

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<sup>76</sup> Claimant’s Reply Memorial, ¶ 221.

<sup>77</sup> Claimant’s Reply Memorial, ¶ 196.

59. With respect to Article 1001(5), while the language still differs from Article 1108, Canada does not dispute that interpretative assistance can be found in the following words: “procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy”, which is the wording that the *ADF* Tribunal also considered in its interpretation of Article 1108. This is consistent with the ordinary meaning of procurement. Similar to Article 1108, the *chapeau* of Article 1001(5) contains no additional requirement that a procurement must be for governmental purposes and not with a view to commercial resale.

60. However, if interpreting Article 1108, caution is warranted when drawing meaning, as the Claimant suggests this Tribunal do, from the limitations in sub-paragraphs (a) and (b) of Article 1001(5). Those sub-paragraphs describe certain types of activities that fall outside the scope of Chapter 10's obligations, namely “(a) non-contractual agreements or any form of government assistance...” and “(b) the acquisition of fiscal agency or depository services...”. However, they do not stipulate whether these activities amount to procurement in its ordinary meaning or for the purposes of Article 1108; they are merely meant to carve them out of the scope of Chapter 10. Indeed, sub-paragraph (b) appears to contemplate an activity that would almost certainly amount to a type of procurement in the ordinary sense, namely, the “acquisition” of depository, management, distribution and other services.

61. The Claimant attempts to rely on sub-paragraph (a) as a means of limiting the definition of procurement in Article 1108, and asks the Tribunal to conclude that the FIT Program does not constitute procurement because it is “a form of governmental assistance” and it is a “government provision of goods and services to persons”.<sup>78</sup> The Claimant's argument must be rejected.

62. First, as Canada has already explained in its Counter-Memorial, the Claimant's interpretation of Article 1001(5)(a) is incorrect.<sup>79</sup> Second, the Claimant's characterization of the FIT Program is inaccurate. The FIT Program is not a governmental assistance program through which goods or services are provided to private persons or entities. Rather, the FIT Program involves the purchase of electricity. In fact, when faced with the argument that the FIT Program

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<sup>78</sup> Claimant's Reply Memorial, ¶¶ 260, 261.

<sup>79</sup> Canada's Counter-Memorial, ¶ 329.

is better characterized as a “transfer of funds” with the goal of ensuring a stable supply of electricity, the WTO Panel and the Appellate Body disagreed. Both concluded, correctly, that the FIT Program involved the purchase of goods because “the Government of Ontario purchases electricity through the FIT Programme [sic] and Contracts.”<sup>80</sup>

63. Third, and most importantly, the limitation in Article 1001(5)(a) applies to Chapter 10, not to Article 1108. This same language is not found in Article 1108(7)(a). Indeed, if any textual similarity exists, it is between the limitation in sub-paragraph (a) and the subsidies and grants preclusion in Article 1108(7)(b), since both capture government assisted loans and guarantees. Ultimately however, while the distinction between what is procurement and what is government assistance is vital to the scope of Chapter 10, it is academic in the context of Chapter 11, which contains separate preclusions for procurement and subsidies in Articles 1108(7)(a) and (b), respectively.

64. Moreover, Article 1108(8)(b), when read together with Article 1106(3)(b), specifically allows a NAFTA Party that is engaging in procurement to “condition the receipt or continued receipt of an advantage” on the requirement “to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory”. Thus, the NAFTA Parties expressly maintained their ability to use government procurement to provide advantages to companies and to persons. One way in which such advantages can be provided is through governmental assistance, including the government’s provision of goods and services to persons. The language in Article 1001(5)(a) should not be read to effectively nullify the NAFTA Parties’ rights under 1108(8)(b) by carving out of Article 1108’s exclusion all forms of governmental assistance. This inconsistency makes it clear that the NAFTA Parties did not intend Article 1001(5)(a) to apply to the exclusion in Article 1108.

65. In any event, even if the Tribunal were to accept the Claimant’s position that the FIT Program is a form of government assistance – which it is not – then it would constitute a subsidy

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<sup>80</sup> **CL-001**, *Canada – Certain Measures Affecting The Renewable Energy Generation Sector, Canada – Measures Relating To The Feed-In Tariff Program* (WT/DS412/R, WT/DS426/R), Report of the Panel, 19 December 2012, ¶ 7.243 (“Panel Report”); **CL-002**, *Canada – Certain Measures Affecting The Renewable Energy Generation Sector, Canada – Measures Relating To The Feed-In Tariff Program* (WT/DS412/AB/R, WT/DS426), Report of the Appellate Body, 19 February 2013, ¶¶ 5.124, 5.128 and 5.132 (“Appellate Body Report”).



and the obligations under Articles 1102, 1103 and 1106 would still not apply by virtue of Article 1108(7)(b). As noted above, the difference between procurement and government assistance is important in the context of Chapter 10. However, it is irrelevant for understanding the obligations under Chapter 11 because whether a measure constitutes procurement or government assistance, the effect is the same – Articles 1102, 1103 and 1106 will not apply.

66. Ultimately, the Tribunal need not determine exactly how the procurement and subsidies preclusions overlap in Article 1108. What is clear from the text of the NAFTA is that the Parties intended for the measures enumerated in Article 1001(5)(a) and (b) to be excluded from the meaning of procurement for the purposes of Chapter 10. However, this in no way means that the these measures do not constitute procurement for the purposes of Article 1108. Article 1108 applies to all procurement by a Party or a state enterprise irrespective of whether the NAFTA Parties have taken on obligations with respect to procurement in Chapter 10.

## **2. Article 1108 Does Not Contain the Requirements and Limitations upon which the Decisions at the WTO were Based**

67. The Claimant continues to rely on the ultimate conclusion reached by the Panel and Appellate Body in *Canada – Renewable Energy* as though it applies in this case. The Claimant ignores the different treaty language at issue in the WTO dispute and mischaracterizes the findings made by those tribunals.

68. With respect to the treaty language, as explained at length in Canada's Counter-Memorial, the Claimant ignores the additional restrictions contained in GATT Article III:8(a) that require a procurement to be "for governmental purposes" and "not with a view to commercial resale". The NAFTA drafters clearly knew of the GATT language and approach. They did not incorporate those limitations into Article 1108.

69. The Claimant also ignores the different contexts in which these provisions were drafted and operate. GATT Article III:8(a) is part of the national treatment provision in GATT Article III, and the GATT itself pertains solely to *trade in goods*. In contrast, Article 1108 is part of Chapter 11 of NAFTA, which deals solely with the treatment of *investors and their investments*, not goods. This is the reason that a "nexus" between the good being procured and the good subject to domestic content was fundamental to the WTO findings, but is irrelevant here.

70. With respect to the findings of the Appellate Body and the Panel, the Claimant misconstrues and mischaracterizes the results, particularly with respect to whether there was a procurement and the product that was being procured. For example, the Claimant states that it is relying on the “Appellate Body’s determination that there was no procurement under the FIT Program”.<sup>81</sup> However, the Claimant provides no citation for where to find such a determination in the Appellate Body’s decision – in fact, the Appellate Body made no such determination.

71. To the contrary, the Appellate Body recognized that Ontario was engaged in procurement, stating clearly that “the product being procured is electricity.”<sup>82</sup> However, for reasons important to its interpretation of GATT Article III:8(a), the WTO Appellate Body drew a line between the procurement of electricity taking place through the FIT Program, and the domestic content provisions within the same program which applied to equipment for generating electricity.

72. While this distinction was deemed important in the WTO setting, due to the Appellate Body’s interpretation of GATT Article III:8(a), such a distinction is not relevant here. Unlike at the WTO, where the complaint centred on the alleged discriminatory treatment of generating equipment, what the Claimant sought to have procured in this case was not the equipment, but rather the electricity that it would be generating. Using the Claimant’s own words, its case is founded on its efforts “to be able to qualify for a twenty year long [sic] renewable energy Feed-in Tariff Power Purchase Agreement (PPA) for each of four wind generation investment facilities that it owned in Ontario.”<sup>83</sup> Indeed, all of its complaints are rooted in the fact that the OPA entered into procurement contracts for electricity with suppliers other than the Claimant.

73. The Claimant seems to recognize this with respect to its Article 1102 and 1103 claims, but seeks to distinguish its Article 1106 claims. However, the Claimant’s efforts to suggest that its claims under Article 1106 should be viewed differently must fail. Article 1108(8)(b) plainly preserves the NAFTA Parties’ right to adopt measures within a procurement program that

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<sup>81</sup> Claimant’s Reply Memorial, ¶ 264.

<sup>82</sup> **CL-002**, Appellate Body Report, ¶ 5.79; See also ¶¶ 5.75 and 5.84.

<sup>83</sup> Claimant’s Reply Memorial, ¶ 2.

require “a given level or percentage of domestic content” or the use of “goods produced or services provided in its territory”. As the U.S. pointed out in the *ADF* case, “[t]he NAFTA Parties explicitly made reference to those provisions in the exception for ‘procurement by a Party’ precisely because buy-national specifications such as these were intended to be excepted as ‘procurement by a Party.’”<sup>84</sup>

74. The Claimant apparently disagrees. Relying on the reasoning of the Appellate Body when it applied GATT Article III:8(a), it argues that the good being procured must be identical to the good to which the domestic content provisions apply.<sup>85</sup> However, such an interpretation is not supported by the ordinary meaning of the NAFTA provisions at issue.

75. First, Article 1108(8)(b) applies to requirements in Article 1106 that clearly include production and processing methods. For example, Article 1106(1)(c) and 1106(3)(c) prevent requirements or the conditioning of advantages on requirements to “purchase, use or accord a preference to goods produced or services provided in the territory”. The words “use or accord a preference” signal the coverage of more than the end product or service. Similarly, Article 1106(1)(f) prevents requirements “to transfer technology, a production process or other proprietary knowledge”. Yet, while these obligations apply to the upstream inputs, Article 1108 excludes their application to a measure involving procurement.

76. Second, Article 1108(8)(b) applies to both goods and services. The Claimant’s narrow interpretation would make it next to impossible for the preclusion to apply to the procurement of services. NAFTA Parties may choose to make their procurement of services conditional upon the use by service providers of domestic goods or other services. However, according to the Claimant’s interpretation, Article 1108(8)(b) would not apply in these instances because the domestic input is different from what is being procured. This cannot be correct.

77. Further, the *ADF* Tribunal endorsed the view that domestic content provisions can benefit from the procurement preclusion when they are part of the procurement process, even if the buy

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<sup>84</sup> **RL-077**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Rejoinder of Respondent United States of America on Competence and Liability, 29 March 2002, p. 15 (“*ADF – Rejoinder*”).

<sup>85</sup> Claimant’s Reply Memorial, ¶ 205.

local requirements apply to an upstream input rather than the end product.<sup>86</sup> In that case, the claimant challenged the U.S. Buy America provisions as being separate and distinct from the procurement process and therefore not precluded by Article 1108.<sup>87</sup> These measures required not only that the steel be purchased in the U.S. but that the manufacturing and processing of the steel be performed there too. Indeed, it was the manufacturing of the steel in the U.S. that was at the heart of the claimant's case, since this is what caused it to subcontract part of its work, which in turn caused its costs to escalate.<sup>88</sup> The Tribunal ultimately concluded that this was part of the procurement process, even though the Buy America provisions dictated how steel was to be manufactured and the procurement was for a highway interchange project. Indeed, in that case the state of Virginia was not procuring steel, and it certainly was not procuring the process by which steel was manufactured; it was procuring the construction of a highway interchange.<sup>89</sup> Yet, the Tribunal concluded that the measures could not be challenged on the basis that they involved procurement.<sup>90</sup> The situation is not materially different on the facts of this case.

78. The Claimant has stressed that for Article 1108(8)(b) to apply, a nexus must exist between the domestic content provisions and the procurement provisions. Canada does not disagree.<sup>91</sup> However, Canada does not agree with the Claimant that, in the context of NAFTA Chapter 11, the nexus must be so tight that the product being procured must be the same as the product over which domestic content provisions apply. This is not true based on the plain text of Article 1108, and it was not found to be the case in *ADF*. As the U.S. argued in that case, "given the fact that the majority of the world's nations discriminate in their government procurement, if

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<sup>86</sup> CL-072, *ADF – Award*, ¶¶ 172-174.

<sup>87</sup> CL-072, *ADF – Award*, ¶¶ 56-59.

<sup>88</sup> CL-072, *ADF – Award*, ¶¶ 54-55.

<sup>89</sup> CL-072, *ADF – Award*, ¶¶ 44, 173.

<sup>90</sup> CL-072, *ADF – Award*, ¶ 174.

<sup>91</sup> In this regard, Canada notes that the Appellate Body found "that, under the challenged measures, a connection is articulated between the procurement of electricity, and the Minimum Required Domestic Content Levels regarding generation equipment." CL-002, Appellate Body Report, ¶ 5.78.

the NAFTA Parties had intended so greatly to broaden their obligations, they would have done so in a clear and unambiguous manner.”<sup>92</sup>

### **3. Article 1108 Does Not Require the Goods or Services to Have Been Procured for the Benefit or Use of Government**

79. The Claimant argues that the “fundamental reason why the FIT Contract cannot constitute a procurement is because the government is not obtaining goods and services for its own use”,<sup>93</sup> but rather for commercial resale.<sup>94</sup> Here again, the Claimant bases its position on additional concepts found outside NAFTA Chapter 11. The Claimant fails to understand that while these non-NAFTA provisions may serve as context, it is the difference in their wording that is key to a proper understanding of Article 1108.

80. For example, the Claimant cites Canada's General Note to Appendix I of the WTO Government Procurement Agreement (“GPA”) in support of its argument that an inherent part of the procurement is that the goods or services procured be obtained for the benefit or use of government.<sup>95</sup> However, this too is but an example of contextual differences. Far from demonstrating that governmental purpose is inherent to the concept of procurement, this Note, which was drafted in 2010, specifically and expressly includes the concepts of “direct benefit or use of the government.”<sup>96</sup> If these concepts were widely understood to be part of the ordinary meaning of procurement, Canada would not have had to specifically include them as part of the definition applicable to only its specific obligations under the GPA.

81. The Claimant also relies on the wording from GATT Article III:8(a) of “purchased for governmental purposes” and “not for commercial resale”, in support of its interpretation of Article 1108. It argues that “the clear meaning of procurement always excludes any activities

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<sup>92</sup> **RL-077**, *ADF – Rejoinder*, pp. 24-25.

<sup>93</sup> Claimant's Reply Memorial, ¶ 270.

<sup>94</sup> Claimant's Reply Memorial, ¶ 258.

<sup>95</sup> Claimant's Reply Memorial, ¶ 236.

<sup>96</sup> **RL-113**, Section 2 of Canada's General Notes, Appendix I to the *Government Procurement Agreement* (WT/Let/672), 19 March 2010. Available at: [http://www.wto.org/english/tratop\\_e/gproc\\_e/appendices\\_e.htm#cane](http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#cane).

where there is commercial resale of the good or service”.<sup>97</sup> However, the unavoidable fact is that unlike GATT Article III:8(a), Article 1108 simply does not include those limitations.

82. In fact, such a conclusion is consistent with that drawn by the WTO Panel in *Canada – Renewable Energy* when it considered the word “procurement” on its own. In that case, it specifically held that the:

[A]rgument that “procurement” implies “governmental use, benefit, or consumption” does not sit well with the immediate context within which the term “procurement” is used in Article III:8(a) of the GATT 1994. [...] The notion of governmental *use, benefit or consumption* is not immediately apparent from the ordinary meanings of these terms.<sup>98</sup>

83. In short, nothing in the words of Article 1108 requires that procurement be for government use or benefit. Governments procure on behalf of their public all of the time. Of the two NAFTA Chapter 11 tribunals that have applied the exception to date, both involved procurement for the benefit of the people, not the government.<sup>99</sup> For example, the procurement in *ADF* was of a highway interchange, which was obviously not solely for the use of government. Yet, in the Claimant’s opinion, the measure in question in *ADF* is “in the proper nature of procurement.”<sup>100</sup>

#### **4. Article 1108 Does Not Require that the Government Take Possession of or Title to the Goods or Services Procured**

84. The Claimant argues that the FIT Program cannot constitute procurement because the OPA does not obtain the electricity or title to it. Despite having argued in its Memorial that possession was *not* a necessary element of procurement,<sup>101</sup> an argument with which Canada agreed, the Claimant now submits that procurement can only exist when it results in government ownership or title. This interpretation is based only on the Claimant’s extrapolation of how it would like to see Article 1108 applied, and not on the ordinary meaning of its terms.

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<sup>97</sup> Claimant’s Reply Memorial, ¶ 263.

<sup>98</sup> CL-001, Panel Report, ¶ 7.131 (emphasis in original, footnotes omitted).

<sup>99</sup> Canada’s Counter-Memorial, ¶ 333.

<sup>100</sup> Claimant’s Reply Memorial, ¶ 248.

<sup>101</sup> Claimant’s Memorial, ¶ 449.

85. For example, the Claimant refers to the findings of fact of the WTO Panel in *Canada – Renewable Energy*, and particularly the alleged finding that the OPA “does not take any form of possession over electricity supplied by FIT generators, including legal title”.<sup>102</sup> However, that statement by the Panel pertains to an analysis of Article 1 of the WTO Subsidies and Countervailing Measures Agreement (“SCM Agreement”), not the GATT procurement exception. Further, the statement is actually a summary of the E.U. and Japan’s arguments, not a finding of the Panel. Further still, the arguments cited are about whether the OPA takes possession over the electricity, but the Claimant ignores the next sentence, which considers the fact that Ontario *does* take possession of the electricity. And finally, the actually relevant finding of the Panel with respect to this provision of the SCM Agreement was: “we conclude that the appropriate legal characterization to be given to the FIT Programme [sic] is as ‘government purchases [of] goods’”.<sup>103</sup> The Appellate Body upheld this finding recognizing that “the Government of Ontario takes possession over electricity and therefore purchases electricity.”<sup>104</sup> In short, even if the Claimant could prove that possession is a necessary condition of procurement, which it is not, the Claimant’s argument would fail because Ontario does take possession of the electricity.

86. The Claimant also argues that the OPA is not procuring electricity, but merely “provid[ing] a payment and settlement function in the renewable energy market that is the subject of the FIT Contract.”<sup>105</sup> In this sense, the Claimant alleges that the OPA acts as a broker or a central financing body, which finances the expenditure for the electricity obtained. While this argument seems to have been influenced by the arguments in the WTO, it ignores the very conclusion drawn in that forum that the FIT Program is a “government purchase of goods” rather than a “transfer of funds”.<sup>106</sup> The fact is that the FIT Program is called a procurement program, and it has the typical hallmarks of a procurement program. The OPA enters into standard FIT Contracts, or “Power Purchase Agreements” with generators. They are fixed-price long-term

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<sup>102</sup> Claimant’s Reply Memorial, ¶ 209 (citing **CL-001**, Panel Report, ¶ 7.232).

<sup>103</sup> **CL-001**, Panel Report, ¶ 7.243.

<sup>104</sup> **CL-002**, Appellate Body Report, ¶¶ 5.127-5.128.

<sup>105</sup> Claimant’s Reply Memorial, ¶ 202.

<sup>106</sup> **CL-002**, Appellate Body Report, ¶¶ 5.128 and 5.132.

supply contracts pursuant to which the OPA purchases “Electricity and Future Contract Related Products” from the generator.<sup>107</sup>

87. The Claimant also refers to a statement made in passing by the *ADF* Tribunal to argue that for Article 1108 to apply, the funds used for the procurement cannot “result[] in private property not retained by the government.”<sup>108</sup> The comment pertained to an argument about a U.S. reservation in NAFTA for its *Clean Water Act*, under which a grant may be made “to construct a privately owned treatment plant serving one or more principal residences or small commercial establishments”.<sup>109</sup> While it may be interesting to compare the various similarities and differences between the FIT Program and the U.S. *Clean Water Act*, it suffices here to point out that what the *ADF* Tribunal expressed serious doubts about was a U.S. program to fund the construction of a private facility. The purpose of the FIT Program, in contrast, is not to build facilities, but “to procure energy from renewable energy sources”.<sup>110</sup>

88. Finally, Canada notes that limiting the meaning of procurement on the basis that there must be possession does not flow from the ordinary meaning of the term. Introducing the limitation would render the Article 1108 preclusion inapplicable to the procurement of services, which are not capable of being possessed. As a result, such an interpretation would significantly diminish the scope of the exclusion agreed to by the NAFTA Parties.

## **II. The Claimant Has Still Failed to Demonstrate a Breach of Article 1102**

### **A. Summary of Canada's Position**

89. As Canada has explained above, Article 1102 does not apply to the treatment at issue in this arbitration because of the exclusion contained in Article 1108. Nevertheless, even if Article

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<sup>107</sup> Canada's Counter-Memorial, ¶ 318; **C-0051**, Letter (Direction) from George Smitherman, Ministry of Energy to Colin Andersen, Ontario Power Authority (Sep. 24, 2009), p. 21; **R-003**, FIT Program Rules, v. 1.2, s. 6.3; **C-0109**, Ontario Power Authority, Feed-in Tariff Contract, Version 1.1 (Sep. 30, 2009), Articles 2.10(a) and 3.5.

<sup>108</sup> Claimant's Reply Memorial, ¶¶ 229, 250.

<sup>109</sup> **CL-072**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) Award, 9 January 2003, fn 165 (citing to the *Clean Water Act*, 33 USC s.1281[h][1]-[3]) (“*ADF – Award*”).

<sup>110</sup> **C-0401**, *Electricity Act*, s. 25.35.



1102 did apply, the treatment accorded to the Claimant was consistent with Canada's national treatment obligation.

90. In its Reply Memorial, the Claimant argues that Canada has breached its national treatment obligations under Article 1102 because of the allegedly more favourable treatment that was accorded to the investments of five companies: Pattern Renewable Holdings Canada ULC ("Pattern Canada"), Samsung Renewable Energy Inc. ("Samsung Canada"), NextEra Energy Inc. ("NextEra"), Boulevard Associates Canada Inc. ("Boulevard Associates"), and Suncor Energy Products Inc. ("Suncor").<sup>111</sup> In advancing these arguments, the Claimant misconstrues the protections afforded by Article 1102. Contrary to what the Claimant alleged in its Memorial, and what it has continued to argue in its Reply Memorial, Article 1102 obligates Canada to accord to U.S. investors, or the investments of U.S. investors, treatment no less favourable than that it accords, in like circumstances, to its own investors or the investments of its own investors, respectively. As shown below, the Claimant has failed to meet its burden of demonstrating that the treatment that it was accorded breached Canada's national treatment obligation.

**B. The Claimant's Argument that Article 1102 Does Not Require Nationality-Based Discrimination Is Meritless**

91. As previously stated in Canada's Counter-Memorial, the purpose of Article 1102 is to prevent nationality-based discrimination.<sup>112</sup> In its Reply Memorial, the Claimant purports to respond to this argument by claiming that Canada's position is that the Claimant needs to demonstrate intentional nationality-based discrimination.<sup>113</sup> The Claimant misunderstands Canada's argument. Canada did not suggest that for something to be nationality-based

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<sup>111</sup> Notably, the Claimant's Reply challenges the treatment accorded to new entities, even though it knew about the treatment accorded to these entities prior to the filing of its Memorial months ago. Specifically, the Claimant continues to challenge the treatment accorded to Pattern Canada and Boulevard Associates, but now also alleges that better treatment was provided to Samsung Canada and Suncor. Claimant's Reply Memorial, ¶¶ 411. With respect to the treatment accorded to NextEra, the Claimant's position is now unclear. The Claimant does not mention the treatment accorded to NextEra in its overview of its Article 1102 claims, but does discuss NextEra's investments in Canada in the course of its Article 1102 arguments. Compare Claimant's Reply Memorial, ¶¶ 411 and 426-431. As a result, in what follows Canada will assume that the Claimant continues to challenge the treatment accorded to NextEra itself, rather than simply NextEra's wholly-owned subsidiary Boulevard Associates, under Article 1102.

<sup>112</sup> Canada's Counter-Memorial, ¶¶ 354-355.

<sup>113</sup> Claimant's Reply Memorial, ¶¶ 442-447.

discrimination it must also be shown to be intentional discrimination.<sup>114</sup> What the Claimant must show is evidence of nationality-based discrimination, i.e. evidence that U.S. investors and their investments were treated less favourably than Canadian investors or their investments because of their nationality.<sup>115</sup> It has not met this burden.

92. Notably, the Claimant has not provided any objective evidence that the Bruce to Milton allocation resulted in more favourable treatment of Canadian investors over U.S. investors. This is because it did not. The Minister of Energy's direction to the OPA on June 3, 2011 (the "June 3, 2011 Direction") affected domestic and U.S. applicants for FIT Contracts in the Bruce region in similar ways. For example, based on the OPA's December 21, 2010 FIT priority ranking, had the June 3, 2011 Direction not been issued, contract offers would have been made to Canadian-owned projects such as Lakewind/Bervie, Q3WEC, Q2WEC and Seaforth Wind Farm (assuming they passed the connection tests).<sup>116</sup> However, as a result of the June 3, 2011 Direction, the aforementioned Canadian-owned projects did not receive FIT Contract offers.<sup>117</sup> As a result, domestic investors and U.S. investors were affected in the same ways by the June 3, 2011 Direction. The fact is that the process was nationality-neutral. As any process will, it operated to the benefit of some, and to the detriment of others, but there was no nationality-based discrimination.

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<sup>114</sup> Indeed, numerous NAFTA tribunals have held that it is not necessary to prove an intent to discriminate, though evidence of such intent may be considered (e.g. **RL-078**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05), Award, 21 November 2007, ¶¶ 209-210 and **RL-089**, *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01) Award, 15 January 2008, ¶¶ 118 and 138).

<sup>115</sup> See **RL-075**, *UPS – Award*, ¶¶ 83-84: (“[The] legal burden...rests squarely with the Claimant. That burden never shifts to the Party, here Canada.”).

<sup>116</sup> **C-0073**, Ontario Power Authority, “Priority ranking for first-round FIT Contracts” (Dec. 21, 2010) (“OPA, Priority Ranking for first-round FIT Contracts”).

<sup>117</sup> **C-0292**, Ontario Power Authority, “FIT Contract Offers for the Bruce-Milton Capacity Allocation Process” (Jul. 4, 2011) (“July 4, 2011 Contract Offers”).

### C. The Claimant Continues to Inappropriately Compare Its Treatment to the Treatment Accorded to the Investments of Non-Canadians

93. The Claimant alleges that it received less favourable treatment than the “Canadian investments of members of the Korean Consortium”<sup>118</sup> and “NextEra’s Canadian projects.”<sup>119</sup> As explained in Canada’s Counter-Memorial, Pattern Canada and Boulevard Associates are investments of non-Canadians.<sup>120</sup> Similarly, as acknowledged by the Claimant, Samsung Canada is “a Canadian corporation owned by Samsung”, the latter being a South Korean company.<sup>121</sup> Accordingly, Samsung Canada is the Canadian investment of a South Korean investor. Finally, while the Claimant never defines which NextEra corporate entity it is speaking about specifically in its Reply Memorial, even if it is NextEra Energy Canada ULC (“NextEra Canada”), the Claimant admits that NextEra Canada is a wholly-owned subsidiary of a U.S. investor, not the investment of a Canadian investor.

94. While not disputing the fact that these entities are not the investments of Canadian investors, the Claimant’s position seems to be that these facts are irrelevant to a claim under Article 1102. The Claimant argues that under Article 1102, “[t]he ultimate ownership of [the] better treated investment is irrelevant” and that based on Article 1104, all that is required to establish a breach of Article 1102 is that the Claimant be of “another Party”.<sup>122</sup> In making this argument, it refers to the definition of an “investor of a Party” in Article 1139, pointing out that it includes an “enterprise”.<sup>123</sup> In this light, it argues that Pattern Canada, Samsung Canada and Boulevard Associates are Canadian investors themselves and that their further downstream investments are, therefore, investments of Canadian investors. It argues that the fact that each

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<sup>118</sup> Claimant’s Reply Memorial, ¶¶ 418-425.

<sup>119</sup> Claimant’s Reply Memorial, ¶¶ 426-430.

<sup>120</sup> Canada’s Counter Memorial, ¶¶ 356-360.

<sup>121</sup> Claimant’s Reply Memorial, ¶ 411; **R-193**, Bloomberg Businessweek, Company Overview of Samsung Renewable Energy Inc. Available at: <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=116242954>; **R-194**, Bloomberg Businessweek, Snapshot of Samsung C&T Corp (000830: Korea SE). Available at: <http://investing.businessweek.com/research/stocks/snapshot/snapshot.asp?ticker=000830:KS>.

<sup>122</sup> Claimant’s Reply Memorial, ¶¶ 432-441.

<sup>123</sup> Claimant’s Reply Memorial, ¶ 438.

company and all of the downstream investments are ultimately wholly-owned and controlled by non-Canadian investors should be ignored.<sup>124</sup>

95. The Claimant's position is contrary not only to the plain language of Article 1102, but also requires this Tribunal to ignore the purpose of this provision and the context in which it must be interpreted. At a minimum, any allegation of a breach of the national treatment obligation in Article 1102 requires a comparison of the treatment accorded to a claimant, with the treatment accorded, in like circumstances, to investors of the respondent NAFTA Party. This is clear from the plain language of the provision, which states that each Party shall accord "treatment no less favourable than that it accords, in like circumstances, to its own investors" or "to investments of its own investors" (emphasis added). The identification of a relevant comparator under Article 1102 as an investor of the respondent Party is crucial – discrimination in favour of the respondent's own nationals cannot be established by referring to treatment that was accorded to the nationals of other countries.

96. Such a conclusion is also mandated when the context of this provision is properly understood. The inclusion of national treatment provisions in investment treaties stems from concerns regarding protectionist measures, which can create barriers to trade and unfair competitive conditions.<sup>125</sup> Ignoring the requirement to specify a domestic comparator under Article 1102 would transform the national treatment obligation into a provision prohibiting any form of differentiation between investors. Such an interpretation would require the Tribunal to read out of existence many of the words in Article 1102.

97. If the NAFTA Parties had intended to agree to a general provision banning all discrimination irrespective of the nationality of the ultimate investor receiving the allegedly more favourable treatment, they could have done so. They did not. To the extent that the Claimant is suggesting that Article 1104 produces such a result, it is wrong. Article 1104 does nothing more than clarify that investors of other NAFTA Parties, and their investments, are entitled to the best

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<sup>124</sup> Claimant's Reply Memorial, ¶¶ 438-440.

<sup>125</sup> **RL-096**, Meg N. Kinnear et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006), pp. 10-1102 - 11-1102.

treatment that a NAFTA Party accords to its own or to third party investors and their investments.

98. Moreover, the interpretation suggested by the Claimant is inconsistent with the Claimant's own arguments concerning how the nationality of an investor is to be determined. As is shown by the corporate organization chart contained on page 11 of the Claimant's Memorial, there are a number of downstream Canadian companies which stand between the Claimant itself and the specific project companies that were accorded the treatment at issue in this arbitration. In arguing that this Tribunal has jurisdiction over this dispute, the Claimant asserts that these intervening Canadian companies in its ownership structure are irrelevant.<sup>126</sup> However, if the analysis that the Claimant applies to Samsung Canada, Pattern Canada and NextEra were applied to the Claimant itself, the only logical conclusion would be that the Claimant's TTD, Arran, North Bruce and Summerhill Projects would be investments of Canadian investors, not of a U.S. investor. In such a case, the Claimant would not be an investor under NAFTA since it would have no Canadian investments, and as a result, it would be unable to even bring this claim. Neither the Claimant nor Canada has ever argued this to be the case – both have accepted that these projects are the investments of a U.S. investor.

99. Put simply, the Claimant cannot, on the one hand, claim that the investments of Pattern Canada, Samsung Canada and Boulevard Associates are investments of Canadian investors for the purposes of Article 1102, and on the other hand, claim that its own wind project companies—which are also directly owned by Canadian enterprises—are the Canadian investments of a U.S. investor for the purposes of Article 1116. If the Claimant were permitted to do so, it would lead to the absurd result that NextEra could bring a NAFTA claim against Canada with respect to the treatment of Boulevard Associates and all of Boulevard Associates' projects, as the investments of a U.S. investor, while the Claimant could use the exact same treatment as evidence of more favourable treatment of the investment of a Canadian investor in an Article 1102 analysis. In fact, if the Claimant is correct, there would be nothing to prevent a claimant from bringing a claim on behalf of one of its investments, on the grounds that another investment that it wholly-

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<sup>126</sup> Claimant's Reply Memorial, ¶ 432.

owned through a local subsidiary was accorded more favourable treatment. Such an interpretation would be unreasonable, and the Tribunal should reject it.

100. For the above reasons, the Tribunal should reject the Claimant's attempts to use the treatment accorded to Pattern Canada, Samsung Canada, Boulevard Associates and NextEra for the purposes of Article 1102.

**D. The Claimant Continues to Inappropriately Refer to Treatment that Was Not Accorded in Like Circumstances to Its Treatment**

101. Even if the Tribunal were to accept the Claimant's analysis that Pattern Canada and Samsung Canada are Canadian investors (which it should not), the treatment accorded to these entities under the GEIA was not in like circumstances to the treatment accorded to the Claimant under the FIT Program.

102. In its Reply Memorial, the Claimant continues to argue that the treatment of "all investors and investments who are seeking renewable energy Power Purchase Agreements in Ontario" is relevant for both its Article 1102 and 1103 claims.<sup>127</sup> However, this approach misconstrues the like circumstances test. In particular as Canada explains below, focusing solely on the competition for renewable energy Power Purchase Agreements ("PPAs") completely ignores the fact that the treatment accorded to the Korean Consortium was under the GEIA, an investment agreement that was separately negotiated between the Government of Ontario and Korean Consortium.<sup>128</sup> Treatment accorded under a specific investment agreement is not accorded in like circumstances to treatment accorded pursuant to a standard offer program like the FIT Program. As shown below in Canada's Article 1103 analysis, Pattern Canada and Samsung Canada's involvement in the GEIA, rather than the FIT Program, establishes that they were not in like circumstances as Mesa.<sup>129</sup>

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<sup>127</sup> Claimant's Reply Memorial, ¶ 415.

<sup>128</sup> *Infra*, ¶¶ 123-125.

<sup>129</sup> *Infra*, ¶¶ 123-134.

**E. The Claimant's Argument that NextEra, Boulevard Associates and Suncor Received More Favourable Treatment Is Meritless**

103. In its Reply Memorial, the Claimant generally alleges that "NextEra's Goshen, Bornish and Adelaide projects were awarded FIT Contracts on a basis that was not available to the investments of the investor through its participation in the FIT Program."<sup>130</sup> There is no merit to this claim.

104. As explained in Canada's Counter-Memorial, all FIT applicants were accorded the same treatment under the FIT Program.<sup>131</sup> The outcome of this treatment was different – as it had to be considering the fact that, in procurement programs, there are necessarily winners and losers. However, the ultimate outcome of the treatment (i.e. who received contracts and who did not) is not determinative of whether or not there has been a breach of Article 1102. The fact is that all applicants, including Boulevard Associates, Suncor and Mesa, were subject to the same applicable FIT Rules, as well as the same process for applying for and obtaining a FIT Contract. The Bruce to Milton allocation was no exception.<sup>132</sup> All renewable energy developers in the province were subject to the June 3, 2011 Direction.<sup>133</sup> More specifically, all FIT proponents situated in the Bruce and West of London regions had the opportunity to apply for a connection point change during a five business-day window, and to select connection points for which generator paid upgrades would be required in order to connect to the transmission system.<sup>134</sup> The Claimant has provided no evidence to support its allegation that these opportunities were not available to it – none exists.

105. In addition to this general allegation of more favourable treatment, the Claimant also points to specific examples of what it claims to be more favourable treatment accorded to both NextEra and Suncor.<sup>135</sup> In particular, it alleges that the June 3, 2011 Direction was drafted

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<sup>130</sup> Claimant's Reply Memorial, ¶ 427.

<sup>131</sup> Canada's Counter-Memorial, ¶¶ 376-379.

<sup>132</sup> RWS-Lo, ¶ 50.

<sup>133</sup> C-0046, Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA (Jun. 3, 2011).

<sup>134</sup> *Ibid.*

<sup>135</sup> Claimant's Reply Memorial, ¶¶ 429-432.

specifically to ensure that NextEra's projects received FIT Contracts, that NextEra and Suncor were allowed to connect to the 500 kV Bruce to Longwood Line when no one else was, and that NextEra was allowed to connect to the L7S circuit when no one else was made aware of the capacity on that circuit.<sup>136</sup> These assertions are all baseless and fail to establish that either NextEra or Suncor were afforded more favourable treatment than that accorded to the Claimant.

106. First, as explained by Ms. Lo, the June 3, 2011 Direction was drafted in a neutral and impartial manner. It was based on the need to extend contract offers as quickly as possible, as well as on a careful balancing of FIT developers' expectations under the FIT Program with the policy goals under the *2010 Long-Term Energy Plan* ("2010 LTEP").<sup>137</sup> It had nothing to do with benefitting NextEra.<sup>138</sup> The Claimant's allegations of NextEra's political influence and that it had advance notice of the June 3, 2011 Direction are entirely without merit.<sup>139</sup> Indeed, the one fact that the Claimant points to in order to corroborate its conspiracy theories and its allegations of corruption is that a meeting occurred between NextEra and government officials on May 11, 2011, the day before the Government decided on its approach to the Bruce to Milton allocation. However, contrary to the Claimant's speculation – the decision-making of the Government of Ontario is a far more deliberate process. As shown by the documentary evidence, the recommendation to adopt a regional "ECT-like" process, which allowed changes in connection points and generator paid upgrades, had been discussed for months.<sup>140</sup> The ultimate policy decision was the result of months of government deliberations culminating in a briefing of the Premier's Office and Minister's Office on May 12, 2011. Ms. Lo has confirmed this fact as well as the fact that the meeting with NextEra occurring the previous day was a coincidence.<sup>141</sup>

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<sup>136</sup> *Ibid.*

<sup>137</sup> RWS-Lo-2, ¶¶ 14-17.

<sup>138</sup> RWS-Lo-2, ¶¶ 14-19.

<sup>139</sup> Claimant's Reply Memorial, ¶¶ 428-429.

<sup>140</sup> RWS-Lo-2, ¶ 13; **R-183**, Ontario Ministry of Energy Presentation, "DRAFT KC and Future FIT Accommodation on Near-Term Transmission Projects (Mar. 21, 2011); **C-0067**, Ontario Ministry of Energy Presentation, "DRAFT Bruce to Milton Next Steps" (May 5, 2011); **C-0269**, Ontario Ministry of Energy Presentation, "Bruce to Milton Transmission Line FIT Contract Awards" (May 11, 2011). *See also*, **R-182**, DRAFT Ontario Power Authority Presentation, "Economic Connection Test (ECT) Moving Forward" (Mar. 1, 2011).

<sup>141</sup> RWS-Lo-2, ¶ 17.



107. Second, the Claimant provides no proof for its allegations that NextEra had “advanced and special knowledge” of the ability to connect to the 500 kV Bruce to Longwood Line.<sup>142</sup> Most tellingly, Suncor was also able to change its connection point to the 500 kV line during the five day connection point change window, and the Claimant has made no allegation that Suncor had “secret meetings” with government officials or advance knowledge. The fact is that it was open to anyone, not just NextEra and Suncor, to contact the Independent Electricity System Operator (“IESO”) about connecting to this line. Indeed, another developer (i.e., not NextEra and Suncor) had been granted permission to connect to the 500 kV line before the Bruce to Milton allocation.<sup>143</sup>

108. Finally, there is no merit to the argument that NextEra was somehow given special knowledge of the ability to connect to the L7S circuit, or that allowing it to do so was more favourable treatment than was accorded to anyone else. It was open to anyone, not just NextEra, to contact the IESO for detailed information about the capacity on any circuit in the transmission system, including L7S. The fact is that NextEra was proactive in pursuing its interests.<sup>144</sup> That is good business. However, there is no evidence that the IESO told NextEra anything different than it would have told any other proponent about connecting to the L7S circuit.<sup>145</sup>

109. For the above reasons, the Claimant has failed to establish that the treatment accorded to NextEra, Boulevard Associates or Suncor was different, let alone more favourable, than the treatment that was accorded to it. The Tribunal should, therefore, dismiss the Claimant's allegations of a breach of Article 1102.

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<sup>142</sup> As a preliminary matter, it is the IESO that is responsible for decisions regarding connections to transmission lines. Consequently, such treatment is not attributable to Ontario or Canada. Moreover, the Claimant has confirmed that it is not challenging the IESO conduct here.

<sup>143</sup> RWS-Chow-2, ¶ 22. For a fuller discussion on this, *infra* ¶¶ 206-211.

<sup>144</sup> **C-0125**, E-mail from Bobby Adjemian (NextEra Energy) to Mike Falvo (IESO) (Apr. 1, 2011); **C-0149**, E-mail from Bobby Adjemian (NextEra) to Ioan Agavriiloai (IESO) (Jul. 2, 2010).

<sup>145</sup> For a fuller discussion on this, *infra* ¶¶ 212-218.

### **III. The Claimant Has Still Failed to Demonstrate a Breach of Article 1103**

#### **A. Summary of Canada's Position**

110. As Canada has explained above, Article 1103 does not apply to the treatment at issue in this arbitration because of the exclusion contained in Article 1108. Nevertheless, even if Article 1103 did apply, the treatment accorded to the Claimant is consistent with Canada's most-favoured-nation treatment obligation.

111. In its Counter-Memorial, Canada explained that the treatment accorded to the Korean Consortium under the GEIA was not in like circumstances to the treatment accorded to Mesa under the FIT Program.<sup>146</sup> It also explained that Article 1103 does not prohibit the NAFTA Parties from entering into investment agreements such as the GEIA.<sup>147</sup>

112. In its Reply Memorial, the Claimant incorrectly applies Article 1103 by comparing the treatment of the Claimant, a U.S. national, with the treatment accorded to other U.S. nationals.<sup>148</sup> As explained below, this should be rejected because a diversity of nationality is necessary to prove nationality-based discrimination. Furthermore, the Claimant's allegation that it never had the opportunity to negotiate an investment agreement like the GEIA is false – it simply chose not to take advantage of the opportunity to pursue such an agreement. Finally, the analysis of the GEIA and the obligations it imposes is ultimately irrelevant to the determination of whether or not Canada has breached its obligations under Article 1103. Accordingly, as explained further below, the treatment of the Korean Consortium was not accorded in like circumstances to the treatment accorded to the Claimant.

#### **B. The Claimant's Argument that Article 1103 Permits a Comparison of the Treatment of Investors of the Same Nationality Is Meritless**

113. In its Reply Memorial, the Claimant maintains that Canada violated Article 1103 by providing less favourable treatment to it than it did to the members of the Korean Consortium

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<sup>146</sup> Canada's Counter-Memorial, ¶¶ 363-367.

<sup>147</sup> Canada's Counter-Memorial, ¶¶ 371-375.

<sup>148</sup> Claimant's Reply Memorial, ¶ 333.

and NextEra, a U.S. investor.<sup>149</sup> Its argument relies on the suggestion that the words “investors of any other Party” in Article 1103 includes the U.S., even though that also happens to be the nationality of the Claimant.<sup>150</sup> The Tribunal should reject the Claimant’s argument that Article 1103 allows a comparison between two investors of the same nationality.

114. It is well-established that the most-favoured-nation treatment obligation is designed to prevent discrimination on the grounds of nationality. As stated by the United Nations Conference on Trade and Development (“UNCTAD”), in its study of MFN obligations: “[i]n order to establish a violation of MFN treatment, the difference in the treatment must be based on or caused by the nationality of the foreign investor”.<sup>151</sup> The comparison of the treatment of investors of the same nationality is therefore inconsistent with the purpose of the most-favoured nation obligation, since it cannot possibly lead to the conclusion that any difference in treatment was a result of the nationality of the comparators.

115. Likewise, Article 8(2) of the ILC’s *Draft Articles on Most-Favoured-Nation Clauses* specifies that the extent to which a beneficiary State may lay a most-favoured-nation claim “is determined by the treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State”.<sup>152</sup> A “third State” is defined as “any State other than the granting State or the beneficiary State”, which in this dispute means any State, other than Canada or the United States.<sup>153</sup>

116. Ultimately, the phrase “investors of any other Party” was used because NAFTA is a multilateral treaty. In bilateral trade and investment treaties (“BIT”), the typical approach used in a most-favoured-nation obligation is to refer to the treatment accorded to investors of a “non-

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<sup>149</sup> Claimant’s Reply Memorial, ¶ 333.

<sup>150</sup> Claimant’s Reply Memorial, ¶¶ 365-366.

<sup>151</sup> **CL-066**, United Nations Conference on Trade and Development, *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II (New York and Geneva: 2010), at p. 27.

<sup>152</sup> **RL-094**, United Nations, *Draft Articles on Most-Favoured-Nation Clauses with Commentaries*, in Yearbook of the International Law Commission, 1978, vol. II, Part Two, p. 27 (“*ILC Articles – MFN – Commentary*”). Available at: [http://legal.un.org/ilc/texts/instruments/english/commentaries/1\\_3\\_1978.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/1_3_1978.pdf).

<sup>153</sup> *Ibid*, Article 2(1)(d).

Party” or “any third state”.<sup>154</sup> However, such language does not work in the multilateral context because there is a non-party to the dispute which is still a contracting Party to the treaty. In order to ensure equality of treatment amongst the contracting Parties, it is necessary to modify the most-favoured-nation clause as has been done in NAFTA. Indeed, similar wording has been used in other multilateral treaties, such as Article 9(1) of the Energy Charter Treaty, which calls for a comparison of conditions accorded to “companies and nationals of any other Contracting Party or any third state”.<sup>155</sup> Nothing in such text eliminates the fact that the Article requires nationality-based discrimination. And nothing in this drafting suddenly renders comparisons to nationals from the same State as the Claimant appropriate for an MFN analysis.

**C. The Government of Ontario Did Not Accord the Korean Consortium More Favourable Treatment Simply by Agreeing to Negotiate an Investment Agreement**

117. The Claimant alleges that it never had the opportunity to negotiate an investment agreement like the GEIA with the Government of Ontario.<sup>156</sup> This is not true. It had the same opportunity as any investor to pursue an investment agreement with Ontario. It simply never attempted to do so, opting to apply to the standard offer FIT Program instead.

118. The Claimant has provided no evidence to support its assertion that it was accorded less favourable treatment than the Korean Consortium with respect to its opportunity to negotiate an investment agreement with the Government of Ontario. The Government's partnership with the Korean Consortium did not prevent other investors or investments from negotiating other investment agreements with the province. The statement in the Adamson Report that the GEIA “clearly prevented any competing entities (such as Mesa and its partners) from entering into the

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<sup>154</sup> See, e.g., **RL-080**, *Agreement Between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments*, 2009; **RL-081**, *Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments*, 2009.

<sup>155</sup> **RL-092**, Energy Charter Secretariat, *The Energy Charter Treaty and Related Documents*, September 2004, Article 9(1) (emphasis added).

<sup>156</sup> Claimant's Reply Memorial, ¶ 296.

same economic transaction” is inaccurate.<sup>157</sup> Article 4.1 of the Memorandum of Understanding (“MOU”) between Ontario and the Korean Consortium, states:

4.1 The Parties agree to cooperate and negotiate exclusively with each other in good faith in connection with wind and solar procurement of 2000 MW of wind power generating capacity and 500 MW of solar power generating capacity along with associated manufacturing facilities, accompanied by value-added employment in locations agreed upon by the Parties.<sup>158</sup>

119. The purpose of this provision was to establish Ontario and the Korean Consortium as exclusive partners with respect to the GEIA itself. The extent to which the exclusivity clause applies is with respect to the 2,500 MW of generation capacity and manufacturing facilities contemplated by that agreement.

120. The GEIA did not, however, prevent Ontario from seeking to enter into other investment agreements with renewable energy developers. As stated in the Ministry of Energy press release announcing the GEIA on January 21, 2010:

The [GEIA] stems from opportunities created for developers and investors through Ontario's Green Energy Act, and is expected to be among the first of many major investments to result from the leadership position Ontario has taken in green energy.<sup>159</sup>

121. Further, while the Claimant certainly did not need an invitation to approach the Government of Ontario in order to seek an investment agreement, the fact is that, like all developers it got one. When announcing the GEIA, Premier Dalton McGuinty publicly invited companies to come forward with their proposals to build manufacturing facilities in the renewable energy sector:

If there are other companies out there who have in mind to put in place this kind of manufacturing infrastructure that enables us to go beyond meeting our own

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<sup>157</sup> Expert Report of Seabron C. Adamson, 27 April 2014, ¶¶ 21-23 (“Adamson Report”).

<sup>158</sup> **C-0536**, Memorandum of Understanding by and among Her Majesty the Queen In Right of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation (Dec. 12, 2008), Article 4.1 (“Memorandum of Understanding”).

<sup>159</sup> **R-076**, Ministry of Energy Archived Background, “Ontario Delivers \$7 Billion Green Investment” (Jan. 21, 2010) (emphasis added).

demand, our own needs here in Ontario, to reach into the American market, we're all ears.<sup>160</sup>

122. Indeed, both before and after the announcement of the GEIA, the province met with various investors to discuss proposals for investment agreements. However, none of these proposals were of the same size and scope as the GEIA.<sup>161</sup> Most importantly for the claim here, Ontario never received any proposals for an investment agreement from the Claimant.

#### **D. The Treatment Accorded to the Korean Consortium under the GEIA Was Not Accorded in Like Circumstances to that Accorded to the Claimant under the FIT Program**

##### **1. Treatment Accorded Pursuant to Different Regulatory Regimes Cannot Be Compared in an Article 1103 Analysis**

123. Contrary to the Claimant's assertion,<sup>162</sup> Canada has never argued that investment agreements are exempt from the most-favoured-nation obligation. Indeed, Canada recognizes that "a state cannot use contractual mechanisms to avoid its national and MFN treatment obligations".<sup>163</sup> However, as Canada explained in its Counter-Memorial, investment tribunals, such as the one in *Paushok v. Mongolia*, have all upheld a State's freedom to contract. A State's freedom to contract as it wishes has also been consistently recognized by international organizations such as UNCTAD,<sup>164</sup> as well as by numerous scholars<sup>165</sup> – all of whom note that

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<sup>160</sup> The Premier's statement is in direct contrast to the Claimant's allegation in ¶ 396 of its Reply Memorial that "Canada never indicated to any other foreign investors generally that they could have a deal like the GEIA". **R-078**, City News, "Korean Deal Approved: Wind Solar Farms Coming to Ontario" (Jan. 21, 2010).

<sup>161</sup> For example, and as noted by the Claimant, NextEra had originally proposed an investment agreement with Ontario, which sought priority access to the transmission system and a working group to facilitate execution. Claimant's Memorial, ¶ 651.

<sup>162</sup> Claimant's Reply Memorial, ¶ 381.

<sup>163</sup> **RL-103**, Andrew Newcombe, Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Wolters Kluwer, 2009) at p. 227 ("Newcombe & Paradell").

<sup>164</sup> **CL-054**, United Nations Conference on Trade and Development, *Most-Favoured-Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements, p. 6-8 (1999); **C-054**, United Nations Conference on Trade and Development, *Most-Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II, p. 29 (2010).

<sup>165</sup> See for example, **RL-105**, M. Perkowski and E. Gruszewska, "Interpretation of Bilateral Treaties for the Promotion and Protection of Foreign Investments" *Studies in Logic, Grammar and Rhetoric* 32 (45), p. 99 (2013); **RL-087**, Bradley J. Condon and Tapen Sinha, *The Role of Climate Change in Global Economic Governance* (Oxford University Press: 2013), p. 101; and **RL-103**, Newcombe & Paradell, p. 227.

the treatment under an investment contract cannot be compared, for MFN purposes, to the treatment accorded to an investor without such a contract.

124. Even more generally, tribunals have recognized that treatment accorded under different legal and regulatory regimes cannot be compared. As noted by the Tribunal in *Merrill & Ring Forestry L.P. v. Canada*, “the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority.”<sup>166</sup> This situation is analogous in that the treatment was accorded under two different regimes. On the one hand, the treatment accorded to the Claimant was as an applicant to the FIT Program, whereas on the other hand, the Korean Consortium obtained transmission access through the GEIA, an investment agreement with the Government of Ontario.<sup>167</sup>

125. In the end, the Claimant's argument that the treatment that it was accorded under the FIT Program can be compared with the treatment accorded to the Korean Consortium under the GEIA is untenable. It would effectively result in a breach of Article 1103 every time a NAFTA Party entered into an investment agreement, but did not offer the same terms to all other NAFTA investors.<sup>168</sup> If that was indeed what NAFTA requires, there would be no reason to enter into investment agreements. Article 1103 cannot reasonably be interpreted to require such a result. Ultimately, the only conclusion is that the treatment under the GEIA was not accorded in like circumstances to the treatment accorded within the FIT Program. In the end, the Claimant's argument that the treatment that it was accorded under the FIT Program can be compared with the treatment accorded to the Korean Consortium and its joint venture partner, Pattern Canada, under the GEIA is untenable.

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<sup>166</sup> **RL-059**, *Merrill & Ring Forestry L.P. v. Government of Canada* (UNCITRAL) Award, 31 March 2010, ¶¶ 89-93 (“*Merrill & Ring – Award*”).

<sup>167</sup> Canada's Counter-Memorial, ¶¶ 368-370.

<sup>168</sup> Claimant's Reply Memorial, ¶¶ 333(d), 335, and 379.

## 2. The Claimant Mischaracterizes and Misunderstands the Obligations in the GEIA

126. The Claimant relies on the Adamson Report to argue that the Korean Consortium and FIT proponents were accorded treatment in like circumstances. However, as shown below, this report is inaccurate, cites to the wrong version of the GEIA, and misinterprets the GEIA's obligations.

127. In return for priority transmission capacity, the offer of an EDA, and the other benefits negotiated under the GEIA, the Korean Consortium was required to make two substantial commitments: (1) to develop 2,500 MW of renewable energy in Ontario (the "generation commitment"); and (2) to attract manufacturing facilities for wind and solar generation equipment and components to Ontario (the "manufacturing commitment").<sup>169</sup> From the Government of Ontario's perspective, both of these commitments were vital to the establishment of a green energy economy in the province.<sup>170</sup>

128. Mr. Adamson's analysis of the GEIA is problematic for several reasons. First, the GEIA was a negotiated agreement and the Government of Ontario's view was that the Korean Consortium's generation and manufacturing commitments were both necessary to achieve the underlying objectives of the agreement. As such, the terms and conditions must be interpreted as a whole.<sup>171</sup> Mr. Adamson's focus exclusively on the EDA provisions, and how they relate to its manufacturing commitments, ignores the Korean Consortium's generation commitment.

129. Moreover, Mr. Adamson's analysis of the EDA fails to take into consideration the subsequent amendments to the GEIA.<sup>172</sup> In the GEIA executed in January, 2010, the Government of Ontario agreed to an approach for calculating the EDA that was based on the Korean Consortium's ability to bring manufacturing plants to Ontario.<sup>173</sup> The EDA was originally negotiated to be 0.5 cents per kWh for wind generation and 2.6 cents per kWh for solar

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<sup>169</sup> RWS-Jennings-2, ¶ 4.

<sup>170</sup> RWS-Jennings-2, ¶¶ 17-19.

<sup>171</sup> RWS-Jennings-2, ¶ 21.

<sup>172</sup> **C-0282**, Amended Green Energy Investment Agreement (Jul. 29, 2011); **R-133**, Amended and Restated Green Energy Investment Agreement (Jun. 20, 2013).

<sup>173</sup> **C-0322**, Green Energy Investment Agreement, 21 January 2010, Articles 8.1, 8.4 and 9.3 ("GEIA").



generation, if the Korean Consortium could provide evidence that the manufacturing plants of its manufacturing partners were established and operational in accordance with the Operational Time Frame set out in Article 8.1.<sup>174</sup> These are the terms of the EDA that Mr. Adamson analyzes.

130. However, there was never any payment of the EDA under these terms.<sup>175</sup> The *Green Energy Investment Agreement Amending Agreement* (the “Amended GEIA”), which was signed on July 29, 2011, resulted in (1) a reduction of the EDA to 0.27 cents per kWh for wind generation and 1.43 cents per kWh for solar generation, with no potential increases for amounts attributable each component; (2) a limitation in terms of eligibility with respect to only the first two phases of the GEIA;<sup>176</sup> and (3) a total cap on the EDA equal to a net present value of \$110 million.<sup>177</sup> To be eligible for the full EDA under the Amended GEIA, the Korean Consortium was required to demonstrate a minimum average of 765 jobs at the manufacturing plants of its manufacturing partners over a period of at least three years. This requires supporting documentation for the number of employees and hours worked at the manufacturing plants.<sup>178</sup> Additionally, in the event that a manufacturing plant ceased commercial operation prior to December 31, 2016, the EDA was subject to a 25 percent reduction, thereafter.<sup>179</sup>

131. By amending the GEIA to link the EDA to the creation of jobs and the continued commercial operation of manufacturing plants, the Korean Consortium has been made directly responsible for ensuring that the GEIA’s job creation and manufacturing goals are met.<sup>180</sup> This goes well beyond the requirements of the FIT Program. While in hindsight the FIT Program has also helped to stimulate manufacturing capacity in the province, the Government of Ontario

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<sup>174</sup> **C-0322**, GEIA, Articles 8.1, 8.6 and 9.3.1.

<sup>175</sup> RWS-Lo-2, ¶ 5.

<sup>176</sup> In the Amended GEIA, executed on June 20, 2013, a separate EDA was included for Phase 3 projects, if research and development solar manufacturing plants and a centre support a minimum average of 265 jobs through the end of 2016 and 300 jobs at peak capacity. **C-0282** Amended GEIA, Article 15.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> **C-0282** Amended GEIA, Article 13.

<sup>180</sup> **C-0282**, Amended GEIA.

believes that the GEIA has been an important factor in establishing a foundation for the province's renewable energy sector in a timely manner.<sup>181</sup> For example, the Korean Consortium has been successful at attracting green energy manufacturing jobs to Ontario.<sup>182</sup> Ms. Lo confirms that "the Korean Consortium has entered into manufacturing partnership agreements with four manufacturing partners to establish manufacturing plants in Ontario: SMA (solar inverters), Canadian Solar (solar panels), Siemens (wind turbine blades) and CS Wind (turbine towers)."<sup>183</sup> Ms. Lo also confirms the pivotal role that the Korean Consortium and the GEIA played, as the anchor tenants in the development of Ontario's renewable energy manufacturing sector.<sup>184</sup>

### 3. Article 1103 Does Not Permit the Tribunal to Second-Guess Ontario's Policy Choices

132. Even if Mr. Adamson's analysis were correct, and Ontario did not obtain the benefits it believed – and still believes – it did, the Tribunal's role is not to assess the policy choices of the Government of Ontario with respect to the negotiation of the GEIA. It is well-recognized that the role of international tribunals is not to second guess governments' decision making authority with respect to matters of public policy. For example, in its analysis of whether the Claimant was in like circumstances as non-expropriated mill owners, the Tribunal in *GAMI v. Mexico* observed that:

Mexico determined that nearly half of the mills in the country should be expropriated in the public interest. The reason was not that they were prosperous and the Government was greedy. To the contrary: Mexico perceived that mills operating in conditions of effective insolvency needed public participation in the interest of the national economy in a broad sense. The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between

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<sup>181</sup> RWS-Lo-2, ¶ 10.

<sup>182</sup> Specifically, the Korean Consortium has submitted evidence to Ontario stating that an average total of 779 jobs were maintained for its four manufacturing facilities in 2013. **R-192**, Letter from Ki-Jung Kim, Executive Vice President of Samsung C&T Corporation to Hon. Bob Chiarelli (Feb. 28, 2014).

<sup>183</sup> Adamson Report, ¶ 40.

<sup>184</sup> RWS-Lo-2, ¶ 10.

candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination.<sup>185</sup>

133. Similarly, with respect to the arguments of the claimant in a case with respect to whether or not a Mongolian windfall profit tax law (“WPT”) should have applied to different sectors, the *Paushok* Tribunal held:

The WPT may have been a poor instrument to achieve the objectives of the Great Khural and the tribunal has no evidence to the effect that they were in fact achieved. It is not the role of the Tribunal to weigh the wisdom of legislation, but merely to assess whether such legislation breaches the Treaty. Claimants have not succeeded in demonstrating that this was an abusive or irrational decision and that it constituted discriminatory treatment.<sup>186</sup>

134. Mr. Adamson may disagree with the approach taken by the Government of Ontario, but ultimately, his analysis of the economic and financial burdens imposed by the GEIA is irrelevant to the determination as to whether or not Canada has breached its obligations under Article 1103. Therefore, the Claimant's Article 1103 claim should be dismissed.

#### **IV. The Claimant Has Still Failed to Demonstrate a Violation of Article 1105**

##### **A. Summary of Canada's Position**

135. In its Counter-Memorial, Canada set out the ways in which the Claimant failed to discharge its burden of proving that Canada has breached Article 1105(1). In its Reply Memorial, the Claimant largely disregarded Canada's response, and presented, for the most part, a further in-depth discussion of the arguments already introduced in its Memorial.<sup>187</sup>

136. In particular, the Claimant continues to misrepresent the applicable standard of treatment under Article 1105(1). It suggests that the Tribunal ignore the express wording of Article

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<sup>185</sup> **CL-195**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 114 (emphasis added).

<sup>186</sup> **RL-065**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (UNCITRAL) Award on Jurisdiction and Liability, 28 April 2011, ¶ 316 (“*Paushok*”) (emphasis added). See also, ¶ 366.

<sup>187</sup> Canada also notes that the Claimant made use of its right of reply to present new arguments that should have been set out in its Memorial, as they do not respond to Canada's arguments.

1105(1) and the binding nature of the FTC Note.<sup>188</sup> The Tribunal should refuse to do so. As demonstrated by Canada, the threshold to prove a breach of Article 1105 remains high. The Claimant's efforts to lower the standard, and include additional obligations which are not required by customary international law, should be rejected. Moreover, all the evidence on record shows that Canada acted consistently with its obligations under Article 1105(1).

## **B. The Claimant's Interpretation of Article 1105 Is Incorrect**

### **1. Article 1105(1) Requires Canada to Abide by the Customary International Law Minimum Standard of Treatment of Aliens**

137. As Canada explained in its Counter-Memorial, the FTC Note definitively clarifies that Article 1105(1) requires no more and no less than "the customary international law minimum standard of treatment of aliens".<sup>189</sup>

138. The Claimant suggests in its Reply Memorial that this Tribunal should be the first tribunal to ignore the content of the FTC Note and its binding effect on the basis that: (1) pursuant to the customary international law of treaty interpretation, the FTC Note is only one source of interpretation for Article 1105(1);<sup>190</sup> and (2) the FTC Note is so at odds with the plain meaning of Article 1105(1) that it is not a *bona fide* interpretation but rather an illegal amendment of NAFTA that should be given no effect by the Tribunal.<sup>191</sup> In the alternative, the

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<sup>188</sup> **RL-063**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001 ("NAFTA, FTC Note").

<sup>189</sup> Canada's Counter Memorial, ¶ 386. NAFTA, Article 1131(2) provides that: ("an interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section"). NAFTA Tribunals have consistently recognized that the Note of Interpretation is binding on them. See, for example, **CL-138**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 599; **CL-194**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Final Award, 26 January 2006, ¶ 192 *et seq.*; **CL-022**, *Methanex – Final Award on Jurisdiction and Merits*, Part IV, Chapter C, ¶ 20 ("Methanex – Final Award"); **CL-034**, *Mondev – Award*, ¶ 100 *et seq.*; **CL-121**, *The Loewen Group Inc. and Raymond L. Loewen v. United States of America* (ICSID No. ARB/98/3) Award on Merits, 26 June 2003, ¶ 126; **CL-091**, *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 90 *et seq.*; **RL-045**; *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 135, 267-268; **CL-072**, *ADF – Award*, ¶ 176; **CL-168**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶¶ 135, 152.

<sup>190</sup> Claimant's Reply Memorial, ¶¶ 543, 553, 572.

<sup>191</sup> Claimant's Reply Memorial, ¶ 572(b).

Claimant suggests that even if it were binding, the FTC Note itself requires that it be treated as only one source of interpretation.<sup>192</sup> These arguments are meritless.

**(a) The FTC Note Is Binding and Is the Only Source of Interpretation for Article 1105(1)**

139. The Claimant argues that “[t]he Notes of Interpretation cannot be read to exclude the consideration of sources of law other than custom...”<sup>193</sup> and that the “Tribunal should consider itself at liberty to interpret the meaning of ‘fair and equitable treatment’ as contained in NAFTA Article 1105(1) as an autonomous standard in accordance with all the normal and well-accepted sources of international law – not just customary international law.”<sup>194</sup>

140. This argument ignores the express wording of Article 1131(2) which provides that an “interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section” (emphasis added). In essence, the Claimant’s position is that this text does nothing more than restate Article 31 of the VCLT. That argument is meritless, and has not been accepted by a single tribunal. If the NAFTA Parties had simply wanted to restate the rule in Article 31 of the VCLT, they would have done so. They did not. In fact, if the NAFTA Parties had wanted to leave the interpretation of Article 1105 to the customary international law of treaty interpretation, they would not have issued the FTC Note at all. In short, a binding Note of Interpretation leaves no space for the application of the customary international law rules of treaty interpretation. If it were permissible for NAFTA tribunals to take into account other sources of interpretation and to interpret Article 1105(1) in a way other than that set out in the FTC Note, then the Note would not, in fact, be binding at all.

**(b) The FTC Note Must Be Given Effect by this Tribunal**

141. The Claimant further argues that even if, in general, an interpretation by the FTC is binding, this particular FTC Note is not binding as it is contrary to the plain meaning of Article

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<sup>192</sup> Claimant’s Reply Memorial, ¶ 596.

<sup>193</sup> Claimant’s Reply Memorial, ¶ 572.

<sup>194</sup> Claimant’s Reply Memorial, ¶ 596.

1105(1).<sup>195</sup> The Claimant asserts that the FTC Note does not constitute a valid “interpretation” of NAFTA Article 1105 and is instead an “amendment” outside the FTC’s mandate.<sup>196</sup> On this basis, it claims that the FTC Note “has no legal force or effect.”<sup>197</sup> This must be rejected for two reasons.

142. First, given the clear wording of Article 1131(2), it is not this Tribunal’s place to question the validity of the FTC Note. The *ADF* Tribunal was faced with a similar objection, and refused to consider it, explaining that it lacked jurisdiction to make a ruling on the validity of the FTC Note. It held:

Nothing in NAFTA suggests that a Chapter 11 tribunal may determine for itself whether a document submitted to it as an interpretation by the Parties acting through the FTC is in fact an ‘amendment’ which presumably may be disregarded until ratified by all the Parties under their respective internal law.<sup>198</sup>

143. The *Methanex* Tribunal also considered the FTC Note to be “entirely legal and binding on a tribunal seized with a Chapter 11 case.”<sup>199</sup> Indeed, since its issuance over a decade ago, not one tribunal under Chapter 11 has found that it was not bound to apply the FTC Note when interpreting Article 1105(1).

144. Second, it is clear that the FTC Note is, in fact, an interpretation, which clarifies the meaning of Article 1105(1) that was always intended by the NAFTA Parties. This is evident from how Article 1105(1) was consistently interpreted by all of the NAFTA Parties in the years before the FTC Note was issued. In particular, in the years preceding the issuance of the FTC Note, each of the three NAFTA Parties filed non-disputing party submissions emphasizing that

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<sup>195</sup> Claimant’s Reply Memorial, ¶¶ 564-565.

<sup>196</sup> Claimant’s Reply Memorial, ¶¶ 559, 563 and 577.

<sup>197</sup> Claimant’s Reply Memorial, ¶ 583.

<sup>198</sup> **CL-072**, *ADF - Award*, ¶ 177.

<sup>199</sup> **CL-022**, *Methanex – Final Award*, Part IV-Chapter C, ¶ 20.

Article 1105(1) was intended to prescribe the customary international law minimum standard of treatment of aliens.<sup>200</sup>

**(c) The FTC Note Does Not Itself Prescribe that Article 1105(1) Be Interpreted in Accordance with the Customary International Laws of Treaty Interpretation**

145. Finally, contrary to what the Claimant asserts,<sup>201</sup> the FTC Note itself does not prescribe that Article 1105(1) must be interpreted in accordance with customary international law of treaty interpretation. If the Claimant's argument was correct, it would lead to the absurd result that Article 1131(2) would require the Tribunal to apply only the FTC Note and not the customary international law rules of interpretation, only to then have the FTC Note require the Tribunal to apply the customary international law rules of interpretation. As noted above, if the NAFTA Parties had wished tribunals to apply the customary international law rules of interpretation to Article 1105, there would have been no need to issue the FTC Note at all. The FTC Note clarifies that the standard of treatment guaranteed under 1105(1) is the customary international law minimum standard of treatment of aliens. That is, the FTC Note chooses a particular substantive standard of treatment, not a rule of interpretation.

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<sup>200</sup> See e.g., **RL-108**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Article 1128 Submission of the United Mexican States, 14 January 2000, ¶ 28: ("Article 1105 does not expand the standard of treatment recognized in customary international law. Rather, it is a minimum standard that reflects the expectation in international law that governments will act in good faith and will not subject foreign investors to abusive or discriminatory treatment, nor fail to accord them full protection and security."); **RL-101**, *Methanex Corporation v. The United States of America* (UNCITRAL) Second Submission of Canada Pursuant to NAFTA Article 1128, 30 April 2001, ¶ 26: ("Article 1105 incorporates the international minimum standard of treatment recognized by customary international law."); **RL-106**, *Pope & Talbot v. Canada* (UNCITRAL) Fourth Submission of the United States of America, 1 November 2000, ¶¶ 2-3: ("the obligation of Article 1105(1), by its plain terms, is to provide 'treatment in accordance with international law.'... '[F]air and equitable treatment' and 'full protection and security' are provided as examples of the customary international law standards incorporated into Article 1105(1). The plain language and structure of Article 1105(1) requires those concepts to be applied as and to the extent that they are recognized in customary international law."); See also **RL-102**, *Mondev International Ltd., v. United States of America* (ICSID Case No. ARB(AF)/99/2) Counter-Memorial on Competence and Liability of Respondent United States of America, 1 June 2001, pp. 33-34; **RL-099**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Counter-Memorial of the United States of America, 30 March 2001, pp. 170-171. Similarly, Canada's Statement of Implementation for NAFTA indicates that the intent of Article 1105 is "to assure a minimum standard of treatment of investments of NAFTA investors" and to provide for "a minimum absolute standard of treatment, based on long-standing principles of customary international law.", **CL-012**, Canada, Department of Foreign Affairs and International Trade, *Statement of Implementation: North American Free Trade Agreement*, vol.128, no.1 (Ottawa: Canada Gazette, 1994), p. 149.

<sup>201</sup> Claimant's Reply Memorial, ¶¶ 572, 596.

## 2. The Threshold for Establishing a Breach of the Customary International Law Minimum Standard of Treatment of Aliens Is High

146. Canada explained at length in its Counter-Memorial that the threshold for a breach of the customary international law minimum standard of treatment under Article 1105(1) is high.<sup>202</sup> In its Reply Memorial, the Claimant attacks Canada's position as supposedly being based on the *Neer* award, and further claims that Canada is suggesting that customary international law has not evolved in the many decades since that award was issued.<sup>203</sup> The Claimant's arguments mischaracterize what Canada has said. Canada does not rely on the *Neer* award.<sup>204</sup> Rather, as explained in its Counter-Memorial,<sup>205</sup> Canada relies on the articulations of the customary international law minimum standard of treatment in *Glamis*,<sup>206</sup> *Cargill*<sup>207</sup> and most recently *Mobil*.<sup>208</sup> As the *Mobil* Tribunal concluded, Article 1105(1) "protects against egregious behavior"<sup>209</sup> such as "conduct attributable to a NAFTA Party and harmful to a claimant that is arbitrary, grossly unfair, unjust or idiosyncratic, or is discriminatory and exposes a claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."<sup>210</sup>

147. Further, Canada has never argued that customary international law has not evolved. However, it is a well-established principle of international law that the party alleging the

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<sup>202</sup> Canada's Counter-Memorial, ¶¶ 394-402.

<sup>203</sup> Claimant's Reply Memorial, ¶ 597.

<sup>204</sup> In fact, the *Neer* award is mentioned three times only in Canada's Counter-Memorial. The first two times are as part of the quote taken from *Cargill*, in which the Tribunal found that: "the current customary international law standard of "fair and equitable treatment" at least reflects the adaptation of the agreed *Neer* standard to the current conditions". The third is in an explanatory footnote to this reference. The footnote states that the Claimant attempts to do away with the *Neer* standard.

<sup>205</sup> Canada's Counter-Memorial, ¶¶ 394-402.

<sup>206</sup> **CL-138**, *Glamis – Award*, ¶ 627. Further, in the Claimant's Reply Memorial, ¶ 618, the Claimant presents an argument that Canada relies on *Neer* through the *Glamis* award. This is wrong, and simply ludicrous. This is not Canada's position and such wrong allegations should be disregarded entirely.

<sup>207</sup> **RL-045**, *Cargill – Award*, ¶ 286.

<sup>208</sup> **CL-168**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶¶ 152-153.

<sup>209</sup> **CL-168**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 153.

<sup>210</sup> **CL-168**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 152(2).



existence of a rule of customary international law bears the burden of proving it.<sup>211</sup> Thus, the burden is on the Claimant to prove that customary international law has evolved to include the elements it claims are protected. In its Reply Memorial, the Claimant seeks to evade this burden by arguing that Article 1105(1) is a treaty standard, and not a standard of customary international law.<sup>212</sup> However, the fact that Article 1105(1) is a treaty standard is irrelevant. As the party alleging the breach, the Claimant has the burden to prove that the conduct in question breaches the treaty obligation contained in Article 1105(1).<sup>213</sup> This includes proving the content of that treaty obligation. As the content of Article 1105 is customary international law, the Claimant has the burden to prove that the elements it claims are part of Article 1105 are also part of the content of customary international law. The Claimant has certainly not shown that the standard of customary international law has evolved to require a lower threshold for a breach since the recent decisions in *Glamis*, *Cargill*, and just last year, in *Mobil*.

### **3. The Claimant Has Not Demonstrated that the Autonomous Standard of Fair and Equitable Treatment and the Minimum Standard of Treatment Have Converged**

148. In an apparent effort to lessen its burden under Article 1105(1), the Claimant relies on non-NAFTA decisions which interpret treaties that contain an autonomous fair and equitable treatment (“FET”) standard, rather than a standard requiring the application of the customary international law minimum standard of treatment of aliens.<sup>214</sup> The Claimant argues this is appropriate because there are no material differences between the content of Article 1105 and that of stand-alone FET provisions in other treaties under which these awards were rendered.<sup>215</sup> In particular, the Claimant argues that the autonomous standard of fair and equitable treatment

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<sup>211</sup> See Canada's Counter-Memorial, ¶¶ 389-393 (citing to **RL-068**, *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)* [1952] I.C.J. Rep. 176, 27 August 1952, p. 200; **RL-044**, Ian Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed. (Oxford: Oxford University Press, 2008), p. 330; **CL-072**, *ADF - Award*, ¶ 185; **RL-073**, *UPS - Award on Jurisdiction*, ¶ 84).

<sup>212</sup> Claimant's Reply Memorial, ¶¶ 626-639.

<sup>213</sup> Canada's Counter-Memorial, ¶¶ 389-393.

<sup>214</sup> Claimant's Reply Memorial, ¶¶ 556-557.

<sup>215</sup> Claimant's Reply Memorial, ¶¶ 540-566.

and the customary international law minimum standard of treatment in Article 1105(1) have converged.<sup>216</sup>

149. The Claimant fails to cite even one award interpreting a treaty with a customary international law minimum standard of treatment provision that supports its conclusion. As Canada explained in its Counter-Memorial, NAFTA tribunals have found that arbitral awards applying “autonomous standards provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom”<sup>217</sup> and that “significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than required by custom”.<sup>218</sup>

150. Further, none of the awards interpreting autonomous FET standards cited by the Claimant undertake the necessary examination of state practice and *opinio juris* to establish that the customary international law minimum standard of treatment has the same substantive content as the autonomous fair and equitable treatment standard. In fact, to the extent that these awards address the relationship between the two standards at all,<sup>219</sup> they often simply assert that the two standards are the same with no real analysis.<sup>220</sup> For example, the *CMS Gas* Tribunal summarily stated that in the particular context in front of it, the customary international law minimum standard of treatment was the same as the standard of fair and equitable treatment. Moreover, that Tribunal limited its decision to the facts in front of it which involved specific legal and contractual commitments. It explained that “[w]hile the choice between requiring a higher treaty

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<sup>216</sup> Claimant's Reply Memorial, ¶¶ 460-465.

<sup>217</sup> See Canada's Counter Memorial, ¶ 391 (citing to **CL-138**, *Glamis – Award*, ¶ 608).

<sup>218</sup> *Ibid.* See also, **RL-045**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 276 (“*Cargill – Award*”).

<sup>219</sup> For example, there is no reference to the customary international minimum standard of treatment in the applicable BIT in the *Azurix* arbitration and that tribunal did not undertake any analysis of state practice or *opinio juris*.

<sup>220</sup> **CL-070**, *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006, ¶ 361; **CL-064**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S., v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, ¶ 611.

standard and that of equating it with the international minimum standard might have relevance in the context of some disputes, the Tribunal is not persuaded that it is relevant in this case.”<sup>221</sup>

#### 4. Article 1103 Does Not Change the Obligations in Article 1105

151. The Claimant argues that “if a MFN clause in another treaty obliged Canada to provide treatment to investments of foreign investors that would be advantageous or surpassing the quality of that provided to investments under NAFTA Article 1105, then more favourable treatment would need to be provided by Canada under Article 1103 with respect to the conduct, management, operation, control or disposition of investments or investors in like circumstances.”<sup>222</sup> This is wrong.

152. The Claimant is misguided in suggesting that the substantive content of Article 1105 is modified by Article 1103, Chapter 11's MFN provision, through the incorporation of standards of treatment found in other treaties.<sup>223</sup> All three NAFTA Parties have consistently rejected this proposition.<sup>224</sup> The FTC Note is binding on this Tribunal and mandates that it interpret Article 1105(1) as providing for the customary international law standard of treatment of aliens and nothing else. As a matter of law, the provisions of other treaties, and other clauses in NAFTA including the MFN clause are, therefore, irrelevant. As the FTC Note itself provides “[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)”.<sup>225</sup>

153. Moreover, even if this Tribunal were to look at the other treaties that Canada has signed, the Claimant has not proven that any of these treaties contain any more favourable treatment in terms of the minimum standard of treatment than Article 1105(1). All the Claimant does in this

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<sup>221</sup> **CL-073**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 25 April 2005, ¶ 284 (“*CMS – Award*”).

<sup>222</sup> Claimant's Reply Memorial, ¶ 540.

<sup>223</sup> Claimant's Reply Memorial, ¶¶ 542-548.

<sup>224</sup> See, for example the Parties' submissions in *Chemtura v. Canada*: **RL-085**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial, 20 October 2008, ¶¶ 871-874; **RL-084**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) The United States' 1128 Submission of 31 July 2009, ¶ 9; **RL-083**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Mexico's 1128 Submission of 31 July 2009, ¶ 5.

<sup>225</sup> **RL-063**, NAFTA, FTC Note, at B.

regard is point to differences in language,<sup>226</sup> and then rely on other cases under other treaties.<sup>227</sup> As noted above, it is not enough to simply identify differences in treaty language in order to establish a breach of Article 1103. Indeed, arguments of these sorts have been consistently rejected by tribunals. In particular, the Tribunal in *ADF* rejected the claimant's attempt to use two BITs in support of the contention that they provide a higher standard of treatment than NAFTA Article 1105.<sup>228</sup> Similarly, the Tribunal in *Chemtura v. Canada* dismissed an attempt to use NAFTA's MFN clause to import allegedly more favourable standards of fair and equitable treatment from other treaties concluded by Canada. The Tribunal in that case explained that the arguments the claimant made there, which are essentially identical to the arguments raised by the Claimant here, "[did] not establish[ ] that the FET clause of any of the treaties to which it indistinctly refers grants any additional measure of protection not afforded by Article 1105 of NAFTA."<sup>229</sup>

### **C. The Actions of the Government of Ontario Did Not Violate Article 1105**

#### **1. Negotiating the GEIA with the Korean Consortium Did Not Breach Article 1105**

154. The Claimant alleges that the Government of Ontario's decision to "secretly" negotiate the GEIA with the Korean Consortium breached Article 1105.<sup>230</sup> This is entirely baseless. First, Article 1105 does not impose an obligation on the NAFTA Parties to act with complete transparency in all their operations.<sup>231</sup> In particular, there is no authority at all to support the

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<sup>226</sup> Claimant's Reply Memorial ¶¶ 544-546.

<sup>227</sup> Claimant's Reply Memorial ¶ 566.

<sup>228</sup> **CL-072**, *ADF-Award*, ¶¶ 193-197.

<sup>229</sup> **CL-090**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 3 August 2010, ¶¶ 235-236: ("The Tribunal can dispense with resolving this issue as a matter of principle. Indeed, even if it were admissible to import a BIT FET clause...Claimant has not established that the FET clause of any of the treaties to which it indistinctly refers grants any additional measure of protection not afforded by Article 1105 of NAFTA").

<sup>230</sup> Claimant's Reply Memorial, ¶¶ 655-660. The Claimant also asserts in its reply that there is another "secret" deal between Ontario and the Korean Consortium, which it refers to as the Framework Agreement, which was signed in October 2012. As Mr. Jennings explains, there is no such additional agreement. The framework agreement being prepared for signature in October 2009 was a draft of the GEIA. It was not signed in October 2009 as originally planned, but rather in January 2010, at which time it became known as the GEIA. RWS-Jennings-2, ¶¶ 9-11.

<sup>231</sup> This conclusion was reached in a study done by the Organization of Economic Cooperation and Development ("OECD"), which described the transparency requirement as a "relatively new concept not generally considered a customary international law standard." (**RL-104**, OECD, Working Papers on International Investment Number

Claimant's apparent argument that Article 1105 requires the NAFTA Parties to be transparent about commercial negotiations with private entities who are the Claimant's competitors before those negotiations are even concluded. As a commercial matter, such negotiations must be allowed to be conducted in confidence in order for them to succeed. This was why the MOU that was signed between the Government of Ontario and Korean Consortium required confidentiality during the negotiations.<sup>232</sup> There is nothing surprising or egregious about such a fact, and nothing about Ontario agreeing to such a term violates Article 1105(1).

155. Second, the Government of Ontario publicized this process as much as possible. Most importantly in the circumstances of this arbitration is the fact that the negotiation of the GEIA and the content of its key terms were known in advance of the Claimant making its investments in Ontario. In particular, the existence of the deal and its key terms were discussed publicly in September 2009 in a Toronto Star newspaper article.<sup>233</sup> In that article, the main obligations of what would become the GEIA were discussed, including with respect to the manufacturing commitments, the creation of jobs, and even the FIT rate granted supplemented by the EDA.<sup>234</sup> After that article was released, the Government of Ontario also publicly disclosed, in a direction to the OPA requiring it to reserve capacity on the transmission system, that it was negotiating a

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2004/3), Fair and Equitable Treatment Standard in International Investment Law, September 2004, p. 37). The Claimant cites to the *Metalclad* case to argue that Article 1105 includes an obligation to provide transparency. Its description of the case is incorrect. While the *Metalclad* Tribunal's finding suggests that transparency is included in Article 1105, this aspect of the Award was subsequently set aside by Justice Tysoe of the B.C. Supreme Court on the grounds that it exceeded the scope of Chapter 11. In fact, Justice Tysoe specifically held that the so-called transparency obligation was not part of customary international law and was not covered by Article 1105. Justice Tysoe also expressly stated that no transparency obligation exists under NAFTA Chapter 11 (but only under another chapter, Chapter 18), **RL-100**, *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, ¶¶ 68, 71-72. The Claimant also cites the *Waste Management II* Tribunal which held that Article 1105 is infringed if conduct "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 candor in an administrative process." (**CL-091**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, ¶ 98 ("*Waste Management II – Award*") (emphasis added). This is a reference to the principles of denial of justice and due process in the administrative process, and not to the abstract concept of "transparency." It certainly does not support the proposition that the Government must be transparent in all its dealings, especially when it is negotiating specific commercial arrangements with third parties who compete with the Claimant.

<sup>232</sup> **C-0536**, Memorandum of Understanding, Art. 5.1 Confidentiality (Dec. 12, 2008).

<sup>233</sup> **R-177**, The Star News Article, Tyler Hamilton, "Ontario eyes green job bonanza" (Sep. 26, 2009). Available at: [http://www.thestar.com/business/2009/09/26/ontario\\_eyes\\_green\\_job\\_bonanza.html](http://www.thestar.com/business/2009/09/26/ontario_eyes_green_job_bonanza.html).

<sup>234</sup> *Ibid.*

private commercial province-wide framework agreement for renewable energy generation.<sup>235</sup> The Claimant did not incorporate any of its enterprises in Canada until months after this public release of information.<sup>236</sup> As such, when the Claimant invested in Canada, not only was it fully aware that the GEIA was being negotiated, but it also had knowledge of its key terms. Therefore, its current complaints about the secret nature of the deal should be rejected.

156. Finally, the Claimant also appears to allege that the fact that the Government of Ontario entered into the GEIA in and of itself violated Article 1105.<sup>237</sup> This is a frivolous claim, for which there is absolutely no authority. Article 1105 does not restrict a State's freedom to enter into contracts with particular investors.<sup>238</sup>

## 2. The Alleged Statements of Minister Papatello in April 2011 Did Not Breach Article 1105

157. The Claimant alleges that Article 1105(1) includes a stand-alone obligation protecting legitimate expectations, and then appears to claim that a phone call with Minister Sandra Papatello, the then-Minister of Economic Trade and Development, created certain expectations and actually induced the Claimant to apply to the FIT Program.<sup>239</sup> These claims are meritless.

158. First, as a matter of law, there is no stand-alone obligation under Article 1105 requiring a State to respect the legitimate expectations of investors. In this regard, the Claimant fails to provide any evidence of state practice and *opinio juris* establishing the existence of such a rule of customary international law. In several recent NAFTA awards, including the recent *Mobil* award,

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<sup>235</sup> **C-0105**, Letter (Direction) from George Smitherman, Minister of Energy to Colin Andersen, Ontario Power Authority (Sep. 30, 2009).

<sup>236</sup> Claimant's Memorial, ¶ 32. Both TTD Wind Project, ULC and Arran Wind Project, ULC were incorporated under the *Alberta Business Corporations Act* on November 19, 2009 (see **C-0087**, Certificate of Incorporation for TTD Wind Project ULC under the *Alberta Business Corporations Act* (Nov. 17, 2009); and **C-0049**, Certificate of Incorporation for Arran Wind Project ULC under the *Alberta Business Corporations Act* (Nov. 17, 2009)). The North Bruce Project, ULC and the Summerhill Project, ULC, were incorporated under the *Alberta Business Corporations Act* on April 6, 2010 (see **C-0050**, North Bruce Project, ULC Certificate of Incorporation for North Bruce Project ULC under the *Alberta Business Corporations Act* (Apr. 6, 2010); and **C-0041**, Certificate of Incorporation for Summerhill Project ULC under the *Alberta Business Corporations Act* (Apr. 6, 2010)).

<sup>237</sup> Claimant's Reply Memorial, ¶ 655.

<sup>238</sup> **CL-033**, *S.D. Myers - Partial Award*, ¶¶ 261, 263.

<sup>239</sup> Claimant's Reply Memorial, ¶¶ 21, 22, 87, 91.

tribunals have held that a breach of legitimate expectations is not itself a breach of Article 1105(1), though it can be a relevant factor in considering whether a measure amounts to the type of egregious conduct that would constitute a breach.<sup>240</sup> However, for any of the Claimant's "expectations" to be a relevant factor, the Claimant must demonstrate that it had objective expectations which arose from specific assurances made by Canada and which actually induced it to make its investments. Further, as the *Feldman* Tribunal explained, for expectations to be relevant, the government assurances have to be definitive, unambiguous, repeated, and given by an entity that had the authority to do so.<sup>241</sup>

159. The Claimant cannot meet its burden to establish that any of its alleged expectations arising from its phone call with then-Minister Papatello are even remotely relevant to the Tribunal's analysis of Article 1105. First, it provides no evidence of any specific, definitive, unambiguous or repeated assurances made by Minister Papatello. All that it alleges is that Minister Papatello "encouraged" Mesa to come to Ontario and invest.<sup>242</sup> As the Minister of Economic Development and Trade at the time, it was part of Minister Papatello's job to encourage investment in Ontario.<sup>243</sup> Such encouragement is insufficient to create expectations that could be relevant for an analysis of Article 1105.

160. Second, it is impossible that this encouragement actually induced the Claimant to invest for one simple reason – the investment was made before this conversation occurred. In its Reply Memorial, the Claimant asserts that "Minister Papatello personally encouraged the controlling

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<sup>240</sup> See **CL-168**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 152. See also **CL-194**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Final Award, 26 January 2006, ¶¶ 147, 194 and **CL-091**, *Waste Management II – Award*, ¶ 98.

<sup>241</sup> See **CL-040**, *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶ 148. Moreover, the Claimants' reliance on the *Metalclad* Tribunal's treatment of legitimate expectations here is unhelpful because, as Canada observed in its Counter-Memorial (at fn. 779) and as the *Mobil* Tribunal correctly pointed out, the relevant part of the *Metalclad* award was set aside by the Supreme Court of British Columbia. Moreover, the legitimate expectations arguments in *Metalclad* were made on the basis of the issuance of a permit, while here the Claimant merely relies on a phone call "encouraging" a foreign investor to bring its business to Ontario. (See **CL-168**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 140).

<sup>242</sup> Claimant's Reply Memorial, ¶ 21.

<sup>243</sup> See, for example, **R-195**, Ministry of Economic Development, Employment and Infrastructure website excerpt "About the Ministry". Available at: <https://www.ontario.ca/government/about-ministry-economic-development-trade-and-employment>.

shareholder of Mesa, Dallas Texas based T. Boone Pickens, to come to Ontario in 2010 to make investments in Ontario, including Ontario's renewable energy sector."<sup>244</sup> However, the evidence that the Claimant provides in support of this statement is an April 15, 2011 email confirmation of a call to be held between Mr. Pickens and Minister Pupatello.<sup>245</sup> The Claimant offers no explanation of how a call in mid-2011 could have encouraged Mr. Pickens to "come to Ontario in 2010" nor does it explain how such a call could have induced the Claimant to make investments in Ontario and apply to the FIT Program in light of the fact that the Claimant had already made its alleged investments and applied to the FIT Program months before this call happened.

### 3. The Bruce to Milton Allocation Did Not Breach Article 1105

161. The Claimant has continued to challenge the Bruce to Milton allocation based on allegations that the process departed from what was originally planned with respect to the allocation of capacity on the Bruce to Milton Line.<sup>246</sup> In particular, it challenges the Government of Ontario's decision to place a cap on the amount of electricity to be procured,<sup>247</sup> to allocate the capacity through a regional ECT-like process,<sup>248</sup> and to allow only a brief period of time to change connection points.<sup>249</sup> The Claimant alleges that decisions were made because of corruption and favouritism, and that the process was arbitrary and unfair.<sup>250</sup> As Canada has shown in its Counter-Memorial,<sup>251</sup> and as it will show again below, there is no evidence to support any of the Claimant's accusations. The decisions taken by Ontario were taken in the good-faith implementation of non-discriminatory public policies. Moreover, in designing the Bruce to Milton allocation, Ontario was particularly aware of the need to ensure as much

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<sup>244</sup> Claimant's Reply Memorial, ¶ 21 (emphasis added).

<sup>245</sup> C-0648, E-mail from Sally Geymuller to Cole Robertson (Apr. 15, 2011).

<sup>246</sup> Claimant's Reply Memorial, ¶¶ 640-654, 675-711.

<sup>247</sup> Claimant's Reply Memorial, ¶¶ 692-698.

<sup>248</sup> Claimant's Reply Memorial, ¶¶ 682-711.

<sup>249</sup> Claimant's Reply Memorial, ¶¶ 645-654.

<sup>250</sup> Claimant's Reply Memorial, ¶ 643.

<sup>251</sup> Canada's Counter-Memorial, ¶¶ 409-431, 440-444.



consistency with developer expectations as possible, and adopted the approach that it did in light of such concerns.

**(a) The Decision Not to Allocate the Bruce to Milton Capacity through a Full ECT Process Did Not Breach Article 1105**

162. As discussed by Canada in its Counter-Memorial, the OPA had originally intended to allocate the additional capacity that would be made available on the Bruce to Milton Line through the Economic Connection Test (“ECT”), which was planned to be run as part of the FIT Program.<sup>252</sup> There is no dispute that a full ECT was not run in order to allocate this capacity. The fact is that from time to time, governments are required to amend their laws, regulations and policies in order to adapt to changing circumstances and needs. Such adaptation for legitimate policy reasons does not run afoul of the obligations accepted by governments in investment treaties. As the Tribunal in *Mobil* recently elucidated:

[Article 1105] is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made...[w]hat the foreign investor is entitled to under Article 1105 is that any changes are consistent with the requirements of customary international law on fair and equitable treatment. Those standards are set, as we have noted above, at a level which protects against egregious behavior.<sup>253</sup>

163. Further, in this particular case, Section 1 of the FIT Rules expressly stated that they are to be “reviewed periodically and may be amended”.<sup>254</sup> More specifically, section 10.1(a) allowed for flexibility, and contemplated amendments taking place at any time, including, “in response to ministerial directions, changes in Laws and Regulations, significant changes in market conditions or other circumstances as required.”<sup>255</sup> The Claimant was fully aware of and accepted these provisos when it submitted its FIT Applications to the OPA.<sup>256</sup>

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<sup>252</sup> Canada's Counter-Memorial, ¶ 412.

<sup>253</sup> **CL-168**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 153.

<sup>254</sup> **R-003**, FIT Program Rules, v. 1.2, ss. 1.1 and 10.

<sup>255</sup> *Ibid*, s. 10.1(1).

<sup>256</sup> FIT Applications – E.g. **C-0129**, Arran Wind Project FIT Application - Printout of OPA Website (Dec. 2, 2009), p. 5: (“By submitting this Application, the Applicant agrees and acknowledges that the Applicant has read and

164. It was exactly these sort of changing market conditions that led to changes in Government policy concerning the FIT Program and in particular how the Bruce to Milton capacity would be allocated. As acknowledged by the Claimant, the decision not to run an ECT was based on the new policy objectives established in the 2010 LTEP, and in particular the provincial 10,700 MW renewable energy target by 2018.<sup>257</sup> That target was established to (1) respond to the province's changing energy supply and demand outlook; and (2) address concerns regarding the ratepayer impact of renewable energy procurement.<sup>258</sup> The establishment of the renewable energy target signalled the need for Ontario and the OPA to slow down the rate of renewable energy procurement. In particular, the target meant that the full province-wide ECT that had been contemplated for the summer of 2010 would have to be delayed.<sup>259</sup> At the time the 2010 LTEP was released, running a full ECT was not completely ruled out due to the uncertainties about the FIT Program relating to project attrition.<sup>260</sup> However, in the spring of 2011, as the Bruce to Milton Line neared regulatory approval, it was clear that a full ECT could not be carried out because it would likely result in more electricity being procured than the 10,700 MW target set in the 2010 LTEP. Accordingly, the Government was required to develop a new approach.

165. The Claimant has failed to demonstrate how this decision, which was based on legitimate policy reasons that responded to changes in the environment and market conditions, amounts to the sort of egregious behaviour that rises to a violation of Article 1105.<sup>261</sup>

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understood the FIT Rules, obtained independent legal advice, and agrees to comply with all requirements contained therein.”).

<sup>257</sup> Claimant's Reply Memorial, ¶¶ 130-131.

<sup>258</sup> RWS-Lo, ¶¶ 37-38; **C-0414**, Ministry of Energy, Ontario's Long-Term Energy Plan (2010), pp. 4, 15, 31 (“Ontario's Long-Term Energy Plan”).

<sup>259</sup> RWS-Lo, ¶¶ 32, 39-40.

<sup>260</sup> RWS-Lo, ¶ 40; **R-183**, Ontario Ministry of Energy Presentation, “DRAFT KC and Future FIT Accommodation on Near-Term Transmission Projects (Mar. 21, 2011) .

<sup>261</sup> **C-0414**, Ontario's Long-Term Energy Plan; **R-011**, Letter (Direction) from Minister Brad Duguid, Ministry of Energy to Colin Andersen, Ontario Power Authority (Jun 3, 2011); **C-0354**, Ministry of Energy, Ontario's Feed-in Tariff Program: Two-Year Review Report (Mar. 19, 2012).

**(b) The Decision to Allocate the Bruce to Milton Capacity through a Regional ECT-Like Process Rather than a Special TAT Did Not Breach Article 1105**

166. Having alleged that the decision not to run a full ECT was a violation of Article 1105, the Claimant then goes on to take the contradictory position that the decision of the Government to allocate the Bruce to Milton capacity in a way that resembled a partial or regional ECT also violates Article 1105.<sup>262</sup> In particular, the Claimant appears to allege that the decision of Ontario to allocate the Bruce to Milton capacity through a regional ECT-like process, rather than through a special Transmission Availability Test (“TAT”) was arbitrary and unfair.<sup>263</sup> Again, these arguments are meritless.

167. First, Article 1105 does not obligate a Government to adopt any particular policy approach in its procurement programs. Moreover, the approach adopted by Ontario was not arbitrary – it was based on relevant policy considerations as well as developer expectations. In the spring of 2011, when the Ministry of Energy and the OPA realized that the running of a full ECT would be inconsistent with the policy objectives of the Government as they evolved over 2010 in response to changing market conditions, they began to consider alternate plans for allocating the transmission capacity made available by the Bruce to Milton Line.<sup>264</sup> On March 21, 2011, the OPA met with Ministry of Energy staff to discuss possible options for the allocation.<sup>265</sup> As explained by Mr. Cronkwright, at that time, both Ministry of Energy staff and OPA staff were recommending adopting an ECT-like process for allocating the capacity on the Bruce to Milton Line.<sup>266</sup> As particularly relevant here, both were advocating a process that would have allowed changes in connection points.<sup>267</sup>

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<sup>262</sup> Claimant's Reply Memorial, ¶¶ 645-654, 682-711.

<sup>263</sup> Claimant's Reply Memorial, ¶¶ 137-163, 645-654, 682-711.

<sup>264</sup> Canada's Counter-Memorial, ¶ 191; **R-104**, Ontario Power Authority, Draft Memorandum RE: Release of Additional FIT Contracts from Bruce to Milton Transmission Capacity (Apr. 27, 2011); RWS-Lo, ¶ 46; RWS-Cronkwright, ¶ 16.

<sup>265</sup> **C-0438**, OPA Presentation, Economic Connection Test (ECT) & Program Evolution (Mar. 21, 2011); RWS-Cronkwright-2, ¶ 16.

<sup>266</sup> RWS-Cronkwright-2, ¶ 16.

<sup>267</sup> *Ibid.*

168. Discussions in this regard continued for the next few weeks. As Mr. Cronkwright explains, given the tight time frames requested by the Ministry of Energy, in April and May 2011, the OPA ultimately thought it was prudent to recommend that the allocation be carried out through a special TAT process, not through an ECT-like process.<sup>268</sup>

169. As both Mr. Cronkwright and Mr. Chow have explained, the OPA began to prefer this approach as it could be done fairly quickly and was straightforward from an implementation perspective.<sup>269</sup> However, they were also aware that such an approach would have required amendments to the FIT Rules<sup>270</sup> and that it would not have been consistent with developers' expectations on how the Bruce to Milton capacity would be awarded.<sup>271</sup> This is because a special TAT process would not have involved some of the key features of an ECT-like process, including connection point changes or generator paid upgrades.<sup>272</sup>

170. Ultimately, both options were put to decision-makers in Government at a meeting on May 12, 2011, and as Ms. Lo explains, those policy makers decided that they should make best efforts to respect developer expectations and to allocate the Bruce to Milton capacity through a process that resembled the ECT process as much as possible.<sup>273</sup> There is nothing egregious or shocking about a government decision to allocate capacity on its transmission system in a way that most closely resembles the process that had been planned all along. The evidence shows that officials made considered, reasonable and appropriate decisions based on relevant factors.

**(c) The Bruce to Milton Allocation Process Ultimately Used by Ontario Did Not Violate Article 1105**

171. Finally, after alleging that Ontario should have proceeded with a full ECT to allocate the Bruce to Milton capacity, and then claiming that it should have used a process (the special TAT) that looked nothing like an ECT process to allocate the Bruce to Milton capacity, the Claimant

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<sup>268</sup> RWS-Cronkwright-2, ¶¶ 17-18.

<sup>269</sup> RWS-Chow-2, ¶ 7; RWS-Cronkwright-2, ¶¶ 17-18.

<sup>270</sup> RWS-Cronkwright-2, ¶ 18.

<sup>271</sup> RWS-Cronkwright-2, ¶ 20; RWS-Chow-2, ¶ 6.

<sup>272</sup> *Ibid.*

<sup>273</sup> RWS-Lo-2, ¶ 19; RWS-Cronkwright-2, ¶¶ 20-21; RWS-Chow-2, ¶ 8.

then goes on to allege that the fact that the actual process used was “materially different from the ECT process established in the FIT Rules” also violated Article 1105.<sup>274</sup> It appears that the Claimant’s position is that whatever way the Government chose to modify the process for allocating the capacity on the Bruce to Milton Line would be a breach of Article 1105. That cannot be correct.

172. Specifically, the Claimant alleges that unlike the Bruce to Milton allocation, the ECT as originally designed, (1) allowed connection point changes only in limited circumstances prior to an ECT;<sup>275</sup> (2) did not allow connection point changes between regions;<sup>276</sup> (3) did not allow enabler requested projects to select a connection point prior to the ECT;<sup>277</sup> (4) included a step to assess the feasibility of expansions to the transmission system;<sup>278</sup> (5) did not establish any cap on the amount of capacity that would be procured;<sup>279</sup> and (6) allowed for a connection point change window that would occur over the course of several weeks not days.<sup>280</sup>

173. The Claimant’s allegations are without merit and are based on a misunderstanding of the Bruce to Milton allocation and the ECT process. Indeed, when explained properly, it is apparent that the process used to allocate the Bruce to Milton capacity was not materially different for those projects in the Bruce and West of London regions than the full ECT process that had been publicly discussed by the OPA since the inception of the FIT Program in 2009. As Canada discussed in its Counter-Memorial, the June 3, 2011 Direction was specifically crafted to create a regional ECT-like process so as to respect the expectations of the investors in the affected regions.<sup>281</sup> As Canada will show below, the first three aspects of the Bruce to Milton allocation that are challenged by the Claimant were always going to be a part of the ECT process. Further, while the latter three aspects of the Bruce to Milton allocation were specifically introduced in the

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<sup>274</sup> Claimant’s Reply Memorial, ¶ 685.

<sup>275</sup> Claimant’s Reply Memorial, ¶¶ 699-703.

<sup>276</sup> Claimant’s Reply Memorial, ¶¶ 704-707.

<sup>277</sup> Claimant’s Reply Memorial, ¶¶ 708-711.

<sup>278</sup> Claimant’s Reply Memorial, ¶ 685(b).

<sup>279</sup> Claimant’s Reply Memorial, ¶ 685(a).

<sup>280</sup> Claimant’s Reply Memorial, ¶ 685(c).

<sup>281</sup> Canada’s Counter-Memorial, ¶ 412 (citing to RWS-Chow, ¶ 41; RWS-Cronkwright, ¶ 17; RWS-Lo, ¶ 46).

June 3, 2011 Direction, they were the result of reasonable policy considerations fully consistent with Canada's obligations under Article 1105.

**(i) The Bruce to Milton Allocation Closely Resembled the Previously Contemplated ECT Process**

174. With respect to the first challenged aspect, according to the Claimant only distribution connected projects were permitted to change connection points prior to an ECT under the FIT Rules.<sup>282</sup> The Claimant points to various sections under the "Distribution Availability Test" ("DAT") section of the FIT Rules where it explicitly allows distribution connected projects that pass the TAT but fail the DAT to change their connection point prior to an ECT.<sup>283</sup> As explained by Mr. Chow, the explicit reference to a connection point change in the DAT section of the FIT Rules "in no way restricted the ability of transmission connected projects also to change connection points. There is nothing in the FIT Rules that imposes such a restriction."<sup>284</sup>

175. Indeed, the Claimant's restrictive reading of the FIT Rules fails to take into account all other contemporaneous information provided to FIT applicants explaining what the FIT Rules meant. As Mr. Chow further explains:

After a FIT applicant received a TAT result, they were permitted to request a change of connection point for their project in advance of the ECT being run.<sup>285</sup> We communicated this to all FIT applicants in my presentation of March 23, 2010,<sup>286</sup> May 19, 2010<sup>287</sup> and also elsewhere, including the December 21, 2010 priority ranking which was publicly available.<sup>288</sup> The March 23, 2010 presentation also indicated that such a change must be requested prior to the ECT application

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<sup>282</sup> Claimant's Reply Memorial, ¶¶ 699-703.

<sup>283</sup> Claimant's Reply Memorial, ¶ 700.

<sup>284</sup> RWS-Chow-2, ¶ 10.

<sup>285</sup> C-0034, Ontario Power Authority Presentation, "The Economic Connection Test Process" (Mar. 23, 2010).

<sup>286</sup> *Ibid.*

<sup>287</sup> C-0088, Ontario Power Authority Presentation, "The Economic Connection Test – Approach, Metrics and Process" (May 19, 2010), p. 46.

<sup>288</sup> C-0405, Ontario Power Authority website excerpt, "Priority ranking for first-round FIT Contracts posted" (Dec. 21, 2010): ("FIT applicants will have the opportunity to request a change of connection point prior to the ECT. Connection point changes could impact the ECT outcome for other applicants requesting a nearby connection point.").

deadline which would have been sixty days prior to the start of an ECT.<sup>289</sup> The change in connection point was available to all FIT applicants awaiting the ECT, not just distribution connected projects.<sup>290</sup>

176. With respect to the second challenged aspect, the Claimant continues to allege that the Bruce to Milton allocation differed from the ECT, in that the ECT did not allow for connection point changes between regions and that the ECT itself was to be run within regions only.<sup>291</sup> These claims have been fully rebutted in Canada's Counter-Memorial.<sup>292</sup> Nonetheless, in its Reply Memorial, the Claimant points to the word "region" as it appears in section 5.1(b) and 5.4(a) of the FIT Rules.<sup>293</sup> Again, the Claimant has misunderstood the ECT process.

177. The Claimant has confused the use of the word "region" in the FIT Rules and with the OPA's division of the province for planning and communication purposes. As Mr. Chow explains:

[A]s discussed in my previous witness statement, at no time did the OPA indicate that connection point changes were to be limited to within regions.<sup>294</sup> The OPA divided up the province for planning and communications purposes into certain regions, such as the Bruce Region and the West of London Region. But electricity does not respect lines on a map, so dividing the province up in the same way simply does not make sense from an electrical point of view.<sup>295</sup>

178. Rather, the reference to "region" in the sections of the FIT Rules highlighted by the Claimant refers to electrical regions and how the province would have been divided up for the purposes of an ECT.<sup>296</sup> Specifically, with respect to the Bruce and West of London regions, Mr. Chow indicates that:

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<sup>289</sup> C-0034, Ontario Power Authority Presentation, "The Economic Connection Test Process" (Mar. 23, 2010).

<sup>290</sup> RWS-Chow-2, ¶ 10.

<sup>291</sup> Claimant's Reply Memorial, ¶¶ 704-707.

<sup>292</sup> Canada's Counter-Memorial, ¶¶ 412-420.

<sup>293</sup> Claimant's Reply Memorial, ¶ 704.

<sup>294</sup> RWS-Chow, ¶ 30.

<sup>295</sup> RWS-Chow-2, ¶ 12.

<sup>296</sup> *Ibid.*

For example, we would have treated the Bruce and West of London regions as one region for the ECT because they are electrically interconnected (as evidenced by the fact that the Bruce to Milton line also freed up capacity in West of London).<sup>297</sup>

179. Finally with respect to the third challenged aspect, the Claimant also continues to allege that the FIT Rules did not allow enabler requested projects to select a connection point prior to the ECT, and that for this reason, the Bruce to Milton allocation was materially different.<sup>298</sup> Again, the Claimant is wrong as a matter of fact. As Mr. Chow explains:

Prior to an ECT, applicants were permitted to revise their connection points or request a change to an enabler project.<sup>299</sup> This was also true in the reverse scenario: enabler requested projects were permitted to choose a connection point during this time as well.<sup>300</sup>

180. The Claimant argues that such an option was not expressly permitted in the FIT Rules. Again, it is important to note that the FIT Rules were not meant to outline every detail of the FIT process. Indeed, the method for carrying out the ECT itself is not even outlined in the FIT Rules. As Canada explained in its Counter-Memorial, there was nothing in the FIT Rules that restricted enabler requested FIT applicants from selecting a connection point during a connection point change window.<sup>301</sup> In fact, the December 21, 2010 TAT priority ranking released by the OPA expressly indicated that the projects listed therein would be able to change connection points prior to an ECT,<sup>302</sup> making no distinction between enabler requested projects and other FIT applicants.

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<sup>297</sup> RWS-Chow-2, ¶ 13.

<sup>298</sup> Claimant's Reply Memorial, ¶¶ 708-711.

<sup>299</sup> C-0034, Ontario Power Authority Presentation, "The Economic Connection Test Process".

<sup>300</sup> RWS-Chow-2, ¶ 11.

<sup>301</sup> Canada's Counter-Memorial, ¶ 416; RWS-Chow-2, ¶ 27.

<sup>302</sup> C-0073, Ontario Power Authority, "Priority ranking for first-round FIT Contracts" (Dec. 21, 2010): ("FIT applicants will have the opportunity to request a change of connection point prior to the ECT. Connection point changes could impact the ECT outcome for other applicants requesting a nearby connection point.").



**(ii) The Modifications Made to the ECT Process in the  
Context of the Bruce to Milton Allocation Were  
Reasonable and Appropriate in the Circumstances**

181. As noted above, the Claimant points to three particular aspects of the Bruce to Milton allocation which Canada agrees were introduced by the June 3, 2011 Direction: (1) an absence of a second stage to consider the economic feasibility of further transmission upgrades to accommodate more projects;<sup>303</sup> (2) a cap on the capacity to be procured;<sup>304</sup> and (3) a connection point change window limited to just five days.<sup>305</sup> However, none of these changes to the process for allocating capacity on the Bruce to Milton Line approach the standard of egregious conduct needed to establish a breach of Article 1105.

182. First, the Claimant has alleged that the fact that the Bruce to Milton allocation “did not include a phase for proposing and assessing new expansions to the transmission system to accommodate additional FIT projects” as an ECT would have, violates Article 1105.<sup>306</sup> The Claimant provides no further discussion with respect to this allegation; nor does it attempt to explain how this is a breach of Article 1105. Nothing in Article 1105 requires a government to expend public funds in order to construct new infrastructure projects. While it is true that the Bruce to Milton allocation did not consider such expansion by carrying out the second step of the ECT, the Claimant fails to appreciate why this is the case. As Mr. Chow indicated in his first witness statement:<sup>307</sup>

The second stage of the ECT would have provided a process to assess the need, scope, and economics of potential expansions to the transmission system.<sup>308</sup> During this stage of the ECT, the OPA would work with the IESO, transmitters and distributors, as appropriate, to determine if transmission and distribution upgrades could be done on an economical basis in order to allow new renewable energy projects to connect to the grid. Through the ECT, the OPA could identify

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<sup>303</sup> Claimant's Reply Memorial, ¶¶ 685(b).

<sup>304</sup> Claimant's Reply Memorial, ¶¶ 692-698.

<sup>305</sup> Claimant's Reply Memorial, ¶¶ 645-654.

<sup>306</sup> Claimant's Reply Memorial, ¶ 685(b).

<sup>307</sup> RWS-Chow, ¶ 35.

<sup>308</sup> RWS-Chow, fn. 19 (citing C-0034, Ontario Power Authority Presentation, “The Economic Connection Test Process” (Mar. 23, 2010)).

economically justifiable expansion projects which would be required to accommodate FIT applicants who were not awarded a contract through the TAT or IPA processes.<sup>309</sup>

183. Essentially, the second phase of an ECT would identify any transmission construction projects that could be justified from an economic perspective.<sup>310</sup> By the time of the Bruce to Milton allocation, the Government of Ontario had already released the 2010 LTEP, which identified those transmission projects which the Government considered economically justifiable.<sup>311</sup> There were none identified in the Bruce region aside from projects enabled by the Bruce to Milton Line for a rather obvious reason – with the Bruce to Milton Line coming into service, there were no other transmission projects that could have been done in the Bruce region that would have been economically justifiable.<sup>312</sup> As such, as part of the Bruce to Milton allocation, carrying out the second phase of an ECT would have been unnecessary – the answer to the question it posed was already known.

184. Second, the caps on the amount of capacity to be procured in the Bruce to Milton allocation were introduced as part of the June 3, 2011 Direction in light of the 2010 LTEP and the 10,700 MW renewable energy target that it set for the province by 2018.<sup>313</sup> As noted above, this target was established based on an assessment of various supply and demand factors in the province and due to concerns regarding the impact of Ontario's renewable energy procurement on ratepayers.<sup>314</sup> By the spring of 2011, Ontario was already quickly approaching the 2010 LTEP renewable energy target as applications to the FIT Program continued to grow and the GEIA proceeded into Phase 2.<sup>315</sup> Thus, in developing the June 3, 2011 Direction, there was a need for certainty with respect to the amount of transmission capacity that would be procured through the

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<sup>309</sup> RWS-Chow, fn. 20 (citing **C-0034**, Ontario Power Authority Presentation, "The Economic Connection Test Process" (Mar. 23, 2010)).

<sup>310</sup> *Ibid.*

<sup>311</sup> RWS-Lo, ¶¶ 37-40; RWS-Chow, ¶ 37.

<sup>312</sup> Canada's Counter-Memorial, ¶ 470 (citing RWS-Chow, ¶ 37 and RWS-Lo, ¶ 40); **C-0414**, Ontario's Long-Term Energy Plan, p. 31.

<sup>313</sup> **C-0414**, Ontario's Long-Term Energy Plan, p. 10; RWS-Lo, ¶¶ 38-39; Canada's Counter-Memorial, ¶¶ 167, 178, 194-196.

<sup>314</sup> RWS-Lo, ¶¶ 37-38.

<sup>315</sup> RWS-Lo, ¶ 46; RWS-Lo-2, ¶¶ 15-16; RWS-Cronkwright-2, ¶¶ 14-15, 19; RWS-Chow-2, ¶ 6.

Bruce to Milton allocation.<sup>316</sup> It was determined that the best way of controlling the amount of megawatts contracted would be to impose a hard cap, and that the fairest way to do so would be to clearly state, upfront in the Minister's direction, the amount of transmission capacity that would be allocated in the Bruce and West of London regions.<sup>317</sup>

185. While at the time the cap in the Bruce region was thought to reflect physical limits, as the Claimant has pointed out, the reality is that the Bruce to Milton Line actually enabled more transmission capacity than was made available in the Bruce to Milton allocation.<sup>318</sup> However, that is irrelevant to an analysis of Article 1105. The decision to cap the amount of electricity procured was reasonable and based on the renewable energy target set out in the 2010 LTEP, which reflected the province's renewable energy supply and demand needs.<sup>319</sup> It is not credible to argue that Article 1105, and hence customary international law, requires Ontario to procure more energy than it needs or can afford.

186. Third, the Claimant alleges that the decision to have only a five day connection point change window as part of the Bruce to Milton allocation constituted a "sudden, significant, and arbitrary departure from the established FIT Process."<sup>320</sup> While it was a departure from what was planned in the ECT process as designed, that departure was neither significant nor arbitrary, and certainly does not rise to the level of a violation of Article 1105.

187. As Canada outlined in its Counter-Memorial, the first step in an ECT process entailed the opportunity for applicants to change connection points, or if they were enabler requested, to

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<sup>316</sup> **C-0444**, Email from Sue Lo, Ministry of Energy to JoAnne Butler, Shawn Cronkwright and Michael Lyle (May 12, 2011): ("The uncertainty of bringing in hundreds of MW through the change window/connection point change process is unsettling as we also see the need to pace the speed of FIT Contract award – especially at the prevailing prices").

<sup>317</sup> **R-011**, Letter (Direction) from Minister Brad Duguid, Ministry of Energy to Colin Andersen, Ontario Power Authority (Jun 3, 2011); RWS-Lo-2, ¶ 15; RWS-Cronkwright-2, ¶ 21.

<sup>318</sup> Claimant's Reply Memorial, ¶¶ 694, 696.

<sup>319</sup> **C-0444**, Email from Sue Lo, Ministry of Energy to JoAnne Butler, Shawn Cronkwright and Michael Lyle (May 12, 2011): ("Is there a way to control/cap the MWs that are allocated on BxM..."); **C-0067**, Ontario Ministry of Energy Presentation, "DRAFT Bruce to Milton Next Steps" (May 5, 2011); Canada's Counter-Memorial, ¶¶ 202-203.

<sup>320</sup> Claimant's Reply Memorial, ¶ 645.

select a connection point.<sup>321</sup> Originally, the idea was that the OPA would open this opportunity up for a period of three weeks in August 2010.<sup>322</sup> Accordingly, FIT applicants were working to prepare for such a change window since at least that summer. Indeed, the evidence in this case shows that FIT applicants were not waiting for an announcement to occur before commencing the required technical and economic analysis.<sup>323</sup>

188. No ECT was run in August 2010 for the reasons already discussed. When the Bruce to Milton Line was nearing approval in the spring of 2011, and the Government of Ontario was getting ready to finalize the process to allow changes in connection points, the length of time required for such changes was specifically discussed. Developers had been preparing for this opportunity since August 2010, and had had all the information required to make decisions in this regard since December 2010.<sup>324</sup> The Government also considered the fact that developers themselves, through industry groups, were advocating for a shorter window than originally contemplated because of this.<sup>325</sup> On these grounds, the Government made the reasonable and rational decision to allow only five business days, rather than three weeks, for developers to change connection points during the Bruce to Milton allocation. This allowed contracts to be awarded as quickly as possible, in line with developer expectations.

189. Tellingly, immediately prior to the Bruce to Milton allocation, it appears that the Claimant was aware that a connection point change window would be opened shortly. On May 26, 2011, Chuck Edey of Leader Resources forwarded an email to Cole Robertson of the Claimant, indicating that Carol Mitchell, MPP for the Huron-Bruce riding had indicated to him

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<sup>321</sup> Canada's Counter-Memorial, ¶¶ 197, 100-103; RWS-Chow, ¶¶ 26-29; **C-0034**, Ontario Power Authority Presentation, "The Economic Connection Test Process" (Mar. 23, 2010).

<sup>322</sup> **C-0034**, Ontario Power Authority Presentation, "The Economic Connection Test Process" (Mar. 23, 2010); Canada's Counter-Memorial, ¶ 200.

<sup>323</sup> Canada's Counter-Memorial, ¶¶ 197-201; **R-011**, Letter (Direction) from Minister Brad Duguid, Ministry of Energy to Colin Andersen, Ontario Power Authority (Jun 3, 2011); **R-113**, Letter from Robert Hornung, President of CanWEA to Brad Duguid, Minister of Energy (May 27, 2011).

<sup>324</sup> Canada's Counter-Memorial, ¶¶ 100-103; **R-113**, Letter from Robert Hornung, President of CanWEA to the Brad Duguid, Minister of Energy (May 27, 2011).

<sup>325</sup> RWS-Lo-2, ¶ 16; **R-113**, Letter from Robert Hornung, President of CanWEA to Brad Duguid, Minister of Energy (May 27, 2011).

that an “announcement [was] imminent” with respect to a change window.<sup>326</sup> Similarly, an internal General Electric (“GE”) email dated June 2, 2011, on which Brian Case, Project Development Manager of GE, and a Director of the TTD and Arran projects is copied, demonstrates that FIT applicants knew the connection point change window was being discussed:

Connection point change – which the gov’t was contemplating not moving forward with two weeks ago, has made a comeback. The window shall be open for 5 business days beginning next week or the week after as opposed to the 30 days originally outlined.<sup>327</sup>

190. As is clear from the documents, neither Mr. Edey nor GE seem to be surprised or alarmed that a change window would be opening, or that it would be open for only five days. The Claimant’s decision to wait until an announcement occurred before carrying out the required technical engineering and planning work was a bad business decision. Like all FIT proponents, the Claimant knew that a window to change connection points was coming. Indeed, it had known that since at least the summer of 2010. The fact that the Claimant did not have the foresight to plan, like many other FIT applicants, in regards to changing its connection points does not make the announcement of the connection point change window or the fact that it lasted five days a breach of Article 1105.

**(d) The Claimant’s Allegations that Ontario Developed the Bruce to Milton Allocation Specifically in Order to Favour NextEra Are Meritless**

191. In its Reply Memorial, the Claimant persists in claiming, despite all the actual evidence being to the contrary, that the Government developed the Bruce to Milton allocation with the specific intention of benefiting and favouring its competitor, NextEra. In particular, it alleges that the FIT Program was tainted by political influence<sup>328</sup> which led to “unfair, arbitrary, and non-

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<sup>326</sup> **R-184**, E-mail from Heather Boa to Chuck Edey Re: Carol Mitchell (May 26, 2011).

<sup>327</sup> **R-186**, E-mail from Hari Suthan Subramaniam (GE, Corporate) to Rembrandt Niessen (GE Power & Water), Brian Case (GE Power & Water), Marc A. Rousseau (GE Power & Water), Benjamin Kennedy (GE Power & Water), Simon Olivier (GE Infra, Energy) and Mandar Pandit (GE Power & Water) (Jun. 3, 2011).

<sup>328</sup> Claimant’s Reply Memorial, ¶¶ 777-791.

transparent interference in a public regulatory program.”<sup>329</sup> As the evidence of those involved in the decision making shows, there is no basis for these accusations.

192. In order to make the allegations it does, the Claimant is forced to misconstrue and misrepresent the evidence, and to make leaps of conspiratorial faith that have no place in legal proceedings. In particular, the Claimant points to a “dry-run” conducted by the OPA of how many megawatts would have been awarded as part of the Bruce to Milton allocation if the approach had been one of a special TAT.<sup>330</sup> [REDACTED]

[REDACTED].<sup>331</sup> As the Claimant notes, this result was shared with the Ministry of Energy in mid-April.<sup>332</sup> However, as is clear from the document itself, it was only shared with staff at the Ministry of Energy, not with any of the officials whom the Claimant alleges exerted untoward political interference.<sup>333</sup>

193. The Claimant alleges that this “dry run” was intended to show the Ministry of Energy which applicants would receive contracts so that it could make efforts to favour specific projects.<sup>334</sup> This is not true, as confirmed both by the OPA and Ministry staff who prepared and discussed the dry run in April 2011.<sup>335</sup> The reason why this “dry-run” was actually run is explained fully in the witness statements of Ms. Lo and Mr. Cronkwright.<sup>336</sup> The fact is that no discussions of any specific projects or applicants took place at the meeting in mid-April.

194. Proceeding based on nothing but conjecture, the Claimant then suggests that in light of its knowledge of the dry run, the Government of Ontario's choice to proceed with a process that included connection point changes and generator upgrades was made to ensure that specific

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<sup>329</sup> Claimant's Reply Memorial, ¶ 777.

<sup>330</sup> Claimant's Reply Memorial, ¶¶ 152-155.

<sup>331</sup> *Ibid.*

<sup>332</sup> Claimant's Reply Memorial, ¶ 153; **C-0448**; Bruce Scenario Analysis, Table of Results (Apr. 13, 2011).

<sup>333</sup> **C-0448**; Bruce Scenario Analysis, Table of Results (Apr. 13, 2011); RWS-Cronkwright-2, ¶ 19.

<sup>334</sup> Claimant's Reply Memorial, ¶¶ 152-155.

<sup>335</sup> RWS-Lo-2, ¶ 15; RWS-Cronkwright-2, ¶ 23; RWS-Chow-2, ¶ 6.

<sup>336</sup> RWS-Lo-2, ¶ 15; RWS-Cronkwright-2, ¶¶ 18-23.

proponents, including NextEra, would be favoured.<sup>337</sup> The Claimant ignores the fact that the relevant decision makers in the Government of Ontario had no knowledge of the results of the dry run. Instead as “evidence”, he cites to an email sent by Tracy Garner explaining that the OPA felt that the Ministry of Energy expected a “very specific outcome”.<sup>338</sup> However, the “specific outcome” referred to is not one that favours specific applicants, but rather, as explained by Mr. Cronkwright: “that the outcome here would be that the highest ranked projects would necessarily be the ones which obtained contracts.”<sup>339</sup> While it makes eminent policy sense to design a program in which those with the highest rankings receive the contracts, the OPA’s practical concern with this expectation was that it could not design a program guaranteeing such a result because of the intricacies of the electrical system.

195. In support of its accusations of corruption and favouritism, the Claimant next points to the fact that on May 11, 2011, NextEra’s Senior Vice President Al Wiley had a meeting with Andrew Mitchell, Director of Policy at the Ministry of Energy.<sup>340</sup> It is undisputed that the next day, the decision was taken to go with the modified ECT process following a meeting between the Minister’s Office and the Premier’s Office.<sup>341</sup> The Claimant immediately assumes that meeting with NextEra led to the result of the meeting the next day. That is a baseless assumption. As confirmed by Ms. Lo:

This is completely untrue. In fact, the planning and development of the Bruce to Milton allocation process was well underway in March, 2011, months prior to the May 11, 2011 meeting with NextEra.<sup>342</sup>

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<sup>337</sup> Claimant’s Reply Memorial, ¶¶ 156-163, 645-654, 682-711.

<sup>338</sup> **C-0449**, E-mail from Bob Chow, Ontario Power Authority to Tracy Garner, Ontario Power Authority (May 18, 2011); Claimant’s Reply Memorial, ¶ 783.

<sup>339</sup> RWS-Cronkwright-2, ¶ 23.

<sup>340</sup> **C-0090**, E-mail from Sue Lo, Ministry of Energy to Phil Dewan, Counsel Public Affairs (May 12, 2011); Claimant’s Reply Memorial, ¶¶ 781, 147, 318.

<sup>341</sup> **C-0473**, E-mail from Pearl Ing, Ministry of Energy to Sue Lo and Sunita Chander, Ministry of Energy (May 12, 2011).

<sup>342</sup> RWS-Lo-2, ¶ 13; **R-183**, Ontario Ministry of Energy Presentation, “DRAFT KC and Future FIT Accommodation on Near-Term Transmission Projects (Mar. 21, 2011); **C-0067**, Ontario Ministry of Energy Presentation, “DRAFT Bruce to Milton Next Steps” (May 5, 2011); **C-0269**, Ontario Ministry of Energy Presentation, “Bruce to Milton Transmission Line FIT Contract Awards” (May 11, 2011). *See also*, **R-182**, DRAFT Ontario Power Authority Presentation, “Economic Connection Test (ECT) Moving Forward” (Mar. 1, 2011).

196. As Ms. Lo also confirms, the May 12, 2011 meeting was not convened as a result of NextEra's meeting the previous day.<sup>343</sup> The meeting revolved around high level policy issues, such as "the need to move forward with contract awards as quickly as possible and to balance the developers' expectations under the FIT Program, with alignment to the policy goals of the 2010 LTEP."<sup>344</sup> NextEra was not discussed.<sup>345</sup>

197. The Claimant alleges that the process ultimately run was the result of corruption. In particular, it claims that Ontario designed the Bruce to Milton allocation in order to favour NextEra because "around the time of the June 3, 2011 rule changes", NextEra made "the maximum donation amount permitted under Ontario law" to the governing Liberal Party.<sup>346</sup>

198. In making this accusation, the Claimant omits certain rather important facts. First, under Ontario law, as it stood in 2011, the maximum permissible donation by a corporation to a political party was \$9,300.<sup>347</sup> In total, this donation by NextEra only represented a tiny fraction (0.24%) of the total amount of donations received by the Liberal Party in 2011.<sup>348</sup> Second, NextEra did not make this contribution until after the decision on how to allocate the capacity on the Bruce to Milton Line was made.<sup>349</sup> Third, NextEra actually also made contributions to other political parties. In fact, at the time of the Bruce to Milton allocation, NextEra had contributed more to those other parties than to the Liberal Party.<sup>350</sup>

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<sup>343</sup> RWS-Lo-2, ¶¶ 17-18.

<sup>344</sup> RWS-Lo-2, ¶ 17.

<sup>345</sup> *Ibid.*

<sup>346</sup> Claimant's Reply Memorial, ¶ 778.

<sup>347</sup> **R-185**, *Election Finances Act*, R.S.O. 1990, c E.7, s 18(1). Specifically, this section states that the maximum contribution is "\$7,500 multiplied by the indexation factor determined under section 40.1."

<sup>348</sup> **R-196**, 2011 Political Party Campaign Period Return CR-4 Final, Ontario Liberal Party, Statement of Income & Expenses from September 7, 2011 to January 6, 2012 (Apr. 10, 2012).

<sup>349</sup> **C-0522**, NextEra Energy Canada ULC, Elections Ontario Contributions to Political Parties (Liberal Party) (2011).

<sup>350</sup> For example, NextEra made contribution to the Progressive Conservative Party of Ontario, the official opposition to the Government, for \$6,000 and \$1,240 on April 11 and May 10, 2011, respectively. **R-189**, NextEra Energy Canada ULC, Elections Ontario Contributions to Political Parties (PC Party) (2011). Available at: <http://rtd.elections.on.ca/rtd/jsp/en/RTDParty.jsp>.



199. In short, the Claimant's allegation that the Government of Ontario influenced and manipulated a process in order to shift tens of millions of dollars of renewable generation procurement contracts to NextEra is unsupported by the evidence and should be dismissed.

**D. The Actions of the OPA Did Not Violate Article 1105**

**1. The OPA's Ranking of the Claimant's Projects and Award of FIT Contracts Did Not Breach Article 1105**

200. In its Reply Memorial, the Claimant has argued, and has now retained an expert, Mr. Timm, to argue on its behalf, that the OPA's ranking "did not fairly or reasonably assess projects", that evidence was "disregarded", and that, in sum, the evaluation was "arbitrary".<sup>351</sup> In particular, the Claimant continues to assert that its TTD and Arran projects should have received points during the OPA's launch period ranking process with respect to major equipment control (notably, Mr. Timm does not support the Claimant's claim in this regard), prior experience and financial capacity.<sup>352</sup>

201. In response to these allegations, Mr. Duffy of the OPA, who was in charge of overseeing the launch period ranking process at the time, has once again reviewed the Claimant's applications.<sup>353</sup> He has confirmed that, contrary to the Claimant's allegations, the launch period applications for the TTD and Arran projects did not merit any criteria points during the ranking process.<sup>354</sup> The reasons why it was appropriate for the OPA not to award any criteria points to the Claimant's applications in respect of each of the relevant criteria are technical and specific. They are fully described in detail in the first and second witness statements of Mr. Duffy, and as a result, Canada will not repeat them here.<sup>355</sup> However, they can be simply summarized. In filing the applications, the Claimant failed to provide all of the relevant and required information. The OPA's evaluation of the Claimant's applications was not the result of arbitrary decisions,

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<sup>351</sup> Claimant's Reply Memorial, ¶ 713.

<sup>352</sup> Claimant's Reply Memorial, ¶¶ 713-719, 720-725, 726-732, 733-743; Expert Report of Gary Timm, "Analysis of the London Economics International Report dated March 31, 2010 and of the Ontario Power Authority Evaluation of the Feed-in Tariff Program Criteria", 28 April 2014, ¶¶ 2.4,-2.5, 6.1-6.26 ("Expert Report of Gary Timm").

<sup>353</sup> RWS-Duffy-2, ¶ 3.

<sup>354</sup> *Ibid.*

<sup>355</sup> RWS-Duffy-2, ¶¶ 3-22; RWS-Duffy, ¶¶ 14-51.

premature conclusions or hidden criteria, as the Claimant and its expert Mr. Timm argue.<sup>356</sup> Instead, it was a result of the Claimant's poorly prepared applications.<sup>357</sup>

202. The fact that the Claimant did not put sufficient effort into understanding the requirements for the FIT Program launch period is demonstrated by the Claimant's own documents. In an email of June 11, 2011, long after the launch period was closed, Mr. Robertson, who alleges that he was in charge of overseeing the Claimant's day-to-day operations,<sup>358</sup> could not even name the four launch period criteria. He asked Mr. Edey, allegedly the expert consultant hired to assist with the filing of the applications, what the third criterion was, listing the others as "(1) turbine supply agreement, (2) financial wherewithal and (4) the date of the assignation or signature of the leases."<sup>359</sup> Mr. Ward and Mr. Edey both responded, commenting that the missing criterion was "permitting" or "environmental approval".<sup>360</sup> However, neither was apparently aware that the fourth criterion was not the date of the leases but rather the prior experience of the applicant. This lack of understanding of the procedures and the rules for the launch period pervades the Claimant's applications and is reflected in the results it obtained. NAFTA Article 1105 does not operate to protect the Claimant from its own mistakes and errors.

## 2. The Evaluation Done by London Economics International of the OPA's Launch Period Ranking Process and Results

203. The Claimant and its expert, Mr. Timm, spend a considerable amount of time and energy criticizing the role of London Economics International ("LEI") and the report that it issued.<sup>361</sup> The reason why is, at best, unclear from the Claimant's submissions. It would appear that the Claimant is asking that the Tribunal accord this contemporaneously prepared report little weight because the expert that the Claimant has hired and paid to attack the report in this arbitration

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<sup>356</sup> Expert Report of Gary Timm, ¶ 7.2; Claimant's Reply Memorial, ¶ 713.

<sup>357</sup> RWS-Duffy-2, ¶ 22; RWS-Duffy, ¶ 50.

<sup>358</sup> CWS-Robertson-2, ¶ 5.

<sup>359</sup> **R-187**, E-mail from Cole Robertson (Mesa) to Chuck Edey (Leader) and Kathryn Freimanis (Leader) (Jun. 11, 2011).

<sup>360</sup> **R-188**, E-mail from Chuck Edey (Leader) to Mark Ward (Mesa), Cole Robertson (Mesa) and Kathryn Freimanis (Leader) (Jun. 11, 2011).

<sup>361</sup> Expert Report of Gary Timm, ¶¶ 4.1-5.3, Claimant's Reply Memorial, ¶¶ 753-764.

concludes that LEI did not act as a true “independent fairness monitor”<sup>362</sup> and that its “role was broader.”<sup>363</sup> Mr. Duffy agrees that LEI did not act purely as a traditional fairness monitor, but rather in the role considered by the OPA as an evaluation monitor.<sup>364</sup> It is true that LEI provided expertise and assistance to the OPA in developing the appropriate processes to handle what turned out to be an extraordinarily complex and difficult procurement exercise because of the volume of applications received. What is unclear is the basis for Mr. Timm’s and the Claimant’s argument that there is something wrongful about the OPA seeking such guidance or LEI providing it.

204. LEI was retained by the OPA with a specific mandate to assist in the development of the launch period criteria, the creation of the tools necessary for the evaluation, the design of the evaluation process and finally the monitoring of that process.<sup>365</sup> The OPA purposefully extended the mandate of a regular fairness monitor in the Request for Quote it posted on its website on November 30, 2009. As Mr. Duffy explains, the OPA’s intent was to have a monitor ensure the transparency and fairness of the process.<sup>366</sup> LEI served as a second sober thought in terms of how the process was developed and a second set of eyes in the review.<sup>367</sup>

205. Ultimately, LEI and the OPA were satisfied that everything had been done in order to “treat applicants as fairly and equally as possible in the review of the launch period applications.”<sup>368</sup> If the Claimant’s and Mr. Timm’s sole point is to suggest that this contemporaneous conclusion is somehow entitled to less weight because LEI did more than a typical fairness monitor would do, then Canada does not see a response as necessary. Canada

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<sup>362</sup> Claimant’s Reply Memorial, ¶ 754.

<sup>363</sup> Claimant’s Reply Memorial, ¶ 755.

<sup>364</sup> RWS-Duffy-2, ¶ 23.

<sup>365</sup> **R-072**, E-mail from OPA Procurement Services to OPA Procurement Services (Nov. 30, 2009); **R-073**, Ontario Power Authority, Request for Quote: Fairness Monitor required in assisting the Fee-in-Tariff Application Criteria Review (Nov. 30, 2009).

<sup>366</sup> RWS-Duffy, ¶ 52.

<sup>367</sup> **R-082**, London Economics Report, “Feed-in Tariff Launch Period Criteria Evaluation – Independent Process Review” (Mar. 31, 2010), ¶ 1; RWS-Duffy, ¶¶ 54-55.

<sup>368</sup> RWS-Duffy-2, ¶ 25.

will leave it to the Tribunal to consider the contemporaneous LEI Report and Mr. Timm's report for whatever assistance they can provide.

**3. The OPA's Decision to Offer Contracts on July 4, 2011 to FIT Applicants Who Specified Connection Points on the 500 kV Bruce to Longwood Line Did Not Breach Article 1105**

206. The Claimant has alleged that the OPA granted special privileges to NextEra by allowing it to connect to the 500 kV Bruce to Longwood Line. Specifically, the Claimant alleges that specific connection points on this line were not listed on the TAT table released on June 3, 2011 and that allowing NextEra to select unpublished connection points "provided it with an unfair advantage as compared to Mesa, which simply followed established FIT Rules."<sup>369</sup> The Claimant further alleges that connecting to the Bruce to Longwood Line was not permitted due to its role as a "critical back up" to the Bruce Nuclear facility,<sup>370</sup> and that June 3, 2011 was the first time the TAT table contained any reference to the Bruce to Longwood Line.<sup>371</sup> Finally, the Claimant points to "numerous internal communications" which it claims demonstrate that connecting to the 500 kV Bruce to Longwood Line was "undesirable and made the system unreliable."<sup>372</sup> Again, these allegations are both meritless and factually incorrect.

207. As previously mentioned in the witness statement of Mr. Chow, the Bruce to Longwood Line was originally considered a critical back up for the Bruce Nuclear facility, and as a result, the IESO was reluctant to allow connections to it.<sup>373</sup> However, the additional capacity created by the new Bruce to Milton Line in the spring of 2011 "reduced the need to keep the Bruce to Longwood line as a critical reserve line."<sup>374</sup> In citing to this section of Mr. Chow's witness statement on several occasions, the Claimant seems to forget this additional information.<sup>375</sup>

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<sup>369</sup> Claimant's Reply Memorial, ¶ 661.

<sup>370</sup> *Ibid.*

<sup>371</sup> Claimant's Reply Memorial, ¶ 665.

<sup>372</sup> Claimant's Reply Memorial, ¶ 667.

<sup>373</sup> RWS-Chow, ¶ 47.

<sup>374</sup> *Ibid.*

<sup>375</sup> Claimant's Reply Memorial, ¶¶ 671 and 661.

208. Once it became clear that the additional capacity would be available on the Bruce to Milton Line, the OPA felt comfortable including a reference to the 500 kV Bruce to Longwood Line in the June 3, 2011 TAT table.<sup>376</sup> However, it did not “approve” or “authorize” connections to that line. Rather, the reference to that line in the TAT table indicated that FIT applicants wishing to connect to it should speak to the IESO.<sup>377</sup> While the TAT table did not publish specific connection capability for each connection point on this line, such information could be obtained from the IESO.

209. [REDACTED]

[REDACTED] Indeed, even before the June 3, 2011 TAT table was published, FIT applicants were not prevented from applying to connect to the Bruce to Longwood Line, nor were projects as part of other OPA procurement processes, such as Renewable Energy Supply (“RES”) II and III precluded from seeking connection on this line. In fact, as part of the RES II and III Programs, the Kingsbridge II wind farm requested a system impact assessment from the IESO in order to connect to this line and was granted approval from the IESO to connect in 2007.<sup>380</sup> Further, during the launch period of the FIT Program, Capital Power applied to connect to the Bruce to Longwood Line. They were not awarded a FIT Contract due to their provincial ranking (224), not because of their proposed connection point.<sup>381</sup>

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<sup>376</sup> RWS-Chow, ¶ 47.

<sup>377</sup> C-0166, Ontario Power Authority, Transmission Availability Table (Jun. 3, 2011); RWS-Chow-2, ¶ 23.

<sup>378</sup> C-0125, E-mail from Bobby Adjemian (NextEra Energy) to Mike Falvo (IESO) (Apr. 1, 2011); C-0149, E-mail from Bobby Adjemian (NextEra) to Ioan Agavriloai (IESO) (Jul. 2, 2010).

<sup>379</sup> *Ibid.*

<sup>380</sup> RWS-Chow-2, ¶ 22. The Claimant also indicates, at ¶ 666 of its Reply Memorial, that in 2009 the OPA indicated that connecting to the 500 kV was not feasible for the Kingsbridge II project. This is misleading. As Mr. Chow indicates in his Rejoinder witness statement at ¶ 24, the OPA “certainly did not advise that connecting to this line was not feasible from a system perspective.”

<sup>381</sup> RWS-Chow-2, ¶ 25.

210. The “numerous internal communications” relied on by the Claimant to allege that connecting to the 500 kV Bruce to Longwood Line should not have been permitted as it was “undesirable and made the system unreliable”,<sup>382</sup> are not in any way helpful to its arguments. The Claimant seems to entirely misunderstand the FIT Rules and contract process. Once NextEra was offered contracts on July 4, 2011, it was required to undergo a system impact assessment to determine the feasibility of physically connecting where it had proposed to connect.<sup>383</sup> Each of the communications referred to by the Claimant is discussing this technical assessment process after the FIT Contract offer. As Mr. Chow indicates:

In that case, the difficulties being discussed were not with the electricity system itself, but rather the difficulties faced by the particular generator, such as the need to purchase more expensive breakers that would not otherwise be needed on a lower kV line, and the ability to carry out a T-tap (simple connection) to the 500kV line.<sup>384</sup>

211. Tellingly, even one of the Claimant's own documents acknowledges that connecting to the 500 kV Line, while not easy, was certainly not impossible or prohibited.<sup>385</sup> Thus, there is no evidence to support the claim that the OPA acted in bad faith, or in a manner that was egregious, grossly unfair and in breach of the customary international law minimum standard of treatment under Article 1105.

#### **4. The Information Published by the OPA in the TAT Tables with Respect to Connection Point Capability Did Not Breach Article 1105**

212. The Claimant has once again pointed to the information available in the TAT tables concerning the L7S connection point as a violation of Article 1105. According to the Claimant, the published transmission capacity of 30 MW was significantly lower than what was required by FIT applicants who were offered a FIT Contract at that connection point.<sup>386</sup> The Claimant alleges that this means that NextEra must have been provided with information regarding

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<sup>382</sup> Claimant's Reply Memorial, ¶ 667.

<sup>383</sup> RWS-Chow-2, ¶ 26; **R-003**, FIT Program Rules, v. 1.2, s. 6.3(d).

<sup>384</sup> RWS-Chow-2, ¶ 27; **C-0481**, E-mail from Bob Chow, Ontario Power Authority to Kun Xiong, Ontario Power Authority (Aug. 16, 2011).

<sup>385</sup> **R-181**, E-mail from Chuck Edey to Cole Robertson and Mark Ward (Jan. 21, 2011).

<sup>386</sup> Claimant's Reply Memorial, ¶ 150.

connection capacity at L7S that was not available in the TAT tables, and thus, that it was wrongfully given an unfair advantage during the Bruce to Milton allocation.<sup>387</sup> This is not true.

213. There is no dispute that the TAT tables listed the capacity at L7S as only 30 MW. However, the TAT tables developed by the OPA were only ever intended to provide applicants with a general indication of the capability of Ontario's transmission system.<sup>388</sup> This was specifically communicated to FIT applicants in the OPA's November 2009 presentation.<sup>389</sup> Further, it continued to be communicated to FIT applicants through various webinars.<sup>390</sup> The OPA made clear that it was only providing the minimum number of MW available in order to allow FIT applicants to "make more informed choices."<sup>391</sup> As Mr. Chow explains:

Essentially, a FIT applicant with a project less than 30MW who was interested in the L7S circuit would know that its project would have a greater likelihood of passing the TAT test. Those FIT applicants with projects larger than the published minimum value could choose to discuss their specific connection points on the circuit with transmitters (i.e. Hydro One Networks Inc.) or the Independent Electricity System Operator ("IESO") to learn more information about other sections of the circuit which may have more capability than the published minimum.<sup>392</sup>

214. Thus, while information about capacity all along the L7S circuit was not stated in the TAT tables, it was available to all FIT applicants, including the Claimant. In particular, FIT applicants were able to obtain additional information on the capacity at specific connection points on any circuit by speaking with the IESO.<sup>393</sup> All one had to do was ask.

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<sup>387</sup> Claimant's Reply Memorial, ¶¶ 765-776.

<sup>388</sup> RWS-Chow-2, ¶ 18.

<sup>389</sup> **R-179**, Ontario Power Authority Presentation, "Feed-in Tariff Program: Transmission and Distribution Technical Information Session" (Nov. 20, 2009), p. 7. Available at: [http://fit.powerauthority.on.ca/Storage/10842\\_20-Nov-09\\_presentation\\_FINAL.pdf](http://fit.powerauthority.on.ca/Storage/10842_20-Nov-09_presentation_FINAL.pdf).

<sup>390</sup> RWS-Chow-2, ¶ 19.

<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.*

<sup>393</sup> *Ibid.*

215. The Claimant also points to various documents from the OPA, Hydro One and the IESO to allege that connecting to L7S “would not be viable”<sup>394</sup> without a generator-paid upgrade. Based on these arguments, the Claimant suggests that NextEra, in selecting the L7S connection point, must have had prior knowledge that it could carry out a generator paid upgrade in order to connect to L7S with the 102 MW capacity its Goshen project required.<sup>395</sup> However, the Claimant has either taken these documents out of context, or has completely misunderstood how electricity is available at various places on a circuit. The Goshen project was not required to upgrade the L7S circuit at its own expense in order to connect there. In fact, the only project that would have required a generator paid upgrade that was awarded a FIT Contract on July 4, 2011 was Silvercreek Solar Park, a 10 MW project in the West of London area.<sup>396</sup> The real reason Goshen was able to connect at the L7S connection point was that sufficient capacity was available at the point they selected on that circuit.

216. The Claimant refers to a February, 2010 OPA presentation that indicates that “most applications will pass except those on L7S” and provides various alternatives for proceeding.<sup>397</sup> However, this presentation is referring to a specific section of the circuit only (between Biddulph Jct and Grand Bend East DS), and not the L7S circuit as a whole.<sup>398</sup> Similarly, the Claimant points to an email from Hydro One to the OPA indicating that if projects were to connect at L7S it would result in overloading.<sup>399</sup> However, this email is also speaking to only one segment of L7S, not the entire circuit.<sup>400</sup> As previously explained, different capacity existed at different parts of the circuit, with the TAT table only reflecting the weakest part of the circuit.<sup>401</sup>

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<sup>394</sup> Claimant's Reply Memorial, ¶¶ 769-776.

<sup>395</sup> Claimant's Reply Memorial, ¶¶ 150, 774-775; Adamson Report, ¶¶ 123-129.

<sup>396</sup> C-0292, July 4, 2011 Contract Offers; RWS-Chow-2, ¶ 20.

<sup>397</sup> C-0474, Hydro One – OPA SW Transmission Meeting (Feb. 10, 2010), p. 2; Claimant's Reply Memorial, ¶ 770.

<sup>398</sup> C-0474, Hydro One – OPA SW Transmission Meeting (Feb. 10, 2010).

<sup>399</sup> C-0475, E-mail from Kun Xiong, Ontario Power Authority to Bob Chow, Ontario Power Authority (May 19, 2011); Claimant's Reply Memorial, ¶ 773.

<sup>400</sup> C-0475, E-mail from Kun Xiong, Ontario Power Authority to Bob Chow, Ontario Power Authority (May 19, 2011).

<sup>401</sup> RWS-Chow, ¶ 32.



217. The Claimant also points to an exchange of emails with respect to NextEra.<sup>402</sup> However this chain of emails is referring to an entirely different connection point in the West of London Region (W2S) and is therefore not relevant at all to a discussion about the L7S connection point.<sup>403</sup>

218. Ultimately, Article 1105 cannot be breached simply because the Claimant had an incorrect understanding of the electrical system in Ontario or that it failed to understand information that was made available to all FIT applicants.

## **THE CLAIMANT HAS FAILED TO PROVE ITS CLAIM FOR DAMAGES**

### **I. Summary of Canada's Position**

219. An investor may recover damages under NAFTA Article 1116 for alleged breaches of Articles 1102, 1103, 1105 and 1106 only for the actual losses it incurred because of the breaches in question.<sup>404</sup> The losses must be both actual and caused by the alleged breaches because awards are meant to place an aggrieved investor back into the position it would have been had the breach not occurred. In its Reply Memorial, the Claimant first appears to agree with these principles of law.<sup>405</sup> However, it then seeks to recover losses that it did not actually suffer as well as losses that were not caused by the measures it alleges breached NAFTA. In fact, it asks that the Tribunal put it not in the position that it would have been in had the alleged breaches not occurred, but rather in a position that would provide it with a windfall to which it is not entitled.

220. As Canada has established in its Counter-Memorial, and further shows above, none of the measures challenged by the Claimant breached Canada's obligations under NAFTA. However, even if they did, the only impact they had was on the Claimant's applications to develop the TTD and Arran projects. None of the measures challenged as breaches of Canada's obligations under

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<sup>402</sup> C-0476, E-mail from Bob Chow  
, Ontario Power Authority to John Sabiston, Hydro One (Mar. 4, 2011); Claimant's Reply Memorial, ¶ 776.

<sup>403</sup> In fact, NextEra did not select this connection point in the end. The only project to be awarded a FIT contract at W2S was Suncor Energy's Adelaide Wind Power Project.

<sup>404</sup> NAFTA, Article 1116.

<sup>405</sup> Claimant's Reply Memorial, ¶¶ 882, 888, and 886.

NAFTA could have caused any actual losses with respect to the Claimant's North Bruce and Summerhill projects.

221. Further, the actual losses that the Claimant alleges for its TTD and Arran projects are over-inflated. First, any alleged future losses are far too speculative to be recovered by the Claimant, especially considering that the Claimant has not mounted a single turbine or obtained the approvals needed to begin operating. Second, the Claimant's damages claim contains errors and misstatements. It also fails to meet the burden of proof required for such claims. As demonstrated in the initial report of BRG, and confirmed in their subsequent report, the only reasonably certain damages suffered by the Claimant would be its sunk costs for the TTD and Arran projects. However, the Claimant has failed to introduce any evidence to substantiate the damages it claims in this respect, and thus, has failed to prove its damages claim in the entirety.

## **II. The Claimant Can Only Recover as Damages Actual Losses Caused by the Alleged Wrongful Conduct**

222. In its Reply Memorial, the Claimant at first appears to agree with Canada that at international law, a damages award can only be issued in order to wipe out the consequences of the illegal act and put the claimant back into the situation that would have most likely occurred but for the wrongful conduct.<sup>406</sup> Yet, the Claimant then fails to apply this principle, and instead baldly asserts that it is entitled to receive damages which would give it "treatment equivalent to the best treatment provided in the jurisdiction."<sup>407</sup>

223. The Claimant cites no legal authority to support its proposition as to how damages should be calculated. Indeed, the Claimant does not provide a citation to a single case that calculates damages in the way that the Claimant suggests. No such case or other authority exists.

224. As far back as 1928 in the *Factory at Chorzów* case, international law recognized that an award of damages should repair the wrongful conduct by returning the claimant to the position it

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<sup>406</sup> Claimant's Reply Memorial, ¶ 882.

<sup>407</sup> Claimant's Reply Memorial, ¶ 900.

would have been in absent the wrongful conduct.<sup>408</sup> The NAFTA Parties adopted this principle in Article 1116 when they provided that a claim for arbitration can only be brought if an “investor has incurred loss or damage by reason of, or arising out of” a substantive breach of Chapter 11.<sup>409</sup> As the Tribunal in *Feldman* recognized, this means that a Chapter 11 tribunal can only “direct compensation in the amount of the loss or damage actually incurred.”<sup>410</sup>

225. Outside of the NAFTA context, other tribunals have reached the same conclusion. For example, the Tribunal in *Duke Energy* succinctly summarized this principle explaining that “any award should as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”<sup>411</sup> Similarly, the Tribunal in *LG&E*, citing the *Lusitania* case, noted that: “[t]he fundamental concept of ‘damage’ is [...] reparation for a loss suffered; a judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.”<sup>412</sup> And in *Biwater Gauff*, the Tribunal ruled that a state that is responsible for an internationally wrongful act “is under an obligation to make restitution, that is to re-establish the situation which existed before the wrongful act was committed, to the extent that it is possible or proportionate to do so.”<sup>413</sup>

226. Thus, the proper issue for consideration here is one of causation. The *LG&E* Tribunal recognized this in holding that the appropriate question to ask in a damages analysis is: what did the investor lose by reason of the unlawful act?<sup>414</sup> Said differently, the issue that the Tribunal

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<sup>408</sup> **CL-169**, *Case Concerning the Factory at Chorzów (Germany v. Polish Republic)* P.C.I.J., 13 September 1928, (Ser.A) No. 17, p. 47.

<sup>409</sup> NAFTA, Article 1116.

<sup>410</sup> **CL-040**, *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Final Award, 16 December 2002, ¶ 194.

<sup>411</sup> **RL-048**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 468.

<sup>412</sup> **RL-097**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID ARB/02/1) Award, 25 July 2007, ¶ 42 (“*LG&E – Award*”).

<sup>413</sup> **CL-092**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶ 774.

<sup>414</sup> **RL-097**, *LG&E – Award*, ¶ 45.

must resolve is, assuming a breach has occurred, what is “the situation which would, in all probability, have existed” if “all consequences of” the breach are “wiped out”.<sup>415</sup>

227. In light of the lack of support for the position that it offers, the Claimant has had to resort to completely misconstruing Article 1104 of NAFTA to support its claims.<sup>416</sup> Pursuant to Article 1104, “an investor of another NAFTA Party is entitled to claim the benefit of the best standard of treatment which the NAFTA party affords to its own nationals under Article 1102 and even to a non-party under Article 1103 (2).”<sup>417</sup> This obligation ensures that the better of national or most-favoured-treatment is afforded to NAFTA investors. It has absolutely no relevance to the damages that are recoverable for a breach of Chapter 11. In particular, contrary to what the Claimant suggests, Article 1104 does not mean that this Tribunal should do more than wipe out all the consequences of the illegal act and it does not mean that this Tribunal should calculate damages by establishing a hypothetical situation which would not have existed if the allegedly wrongful act had not been committed. In short, nothing in Article 1104 entitles the Claimant to a windfall.

228. In its Counter-Memorial, Canada demonstrated how the Claimant had failed to show how certain substantial losses it claimed had been caused by Canada's alleged wrongdoing.<sup>418</sup> Below Canada explains in greater detail how most of the alleged breaches could not have caused *any* loss to the Claimant, while certain other alleged breaches could only reasonably relate to losses associated with the TTD and Arran projects.

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<sup>415</sup> **RL-048**, *Duke Energy – Award*, ¶ 468. Canada also notes that in *Merrill & Ring Forestry L.P.*, the claimant alleged that Canada's log export restraint regime violated Articles 1102, 1103, 1105, 1106 and 1110 of NAFTA. Employing Mr. Low of Deloitte as its valuator, the claimant alleged that its past and future revenues from the export of logs should be assessed on the basis that but for Canada's wrongful log export regime, it should be operating without those constraints, but that its principle and larger competitors should still be subject to that regime. The tribunal in *Merrill & Ring Forestry L.P.* ruled that one cannot selectively place different log exporters in different categories of the but for scenario. Thus, the Tribunal in that case recognized that the damages scenario posited by the claimant was not a scenario that would re-establish the situation as if the wrongful act had not been committed. **RL-059**, *Merrill & Ring - Award*, ¶ 260.

<sup>416</sup> Claimant's Reply Memorial, ¶ 911.

<sup>417</sup> **CL-072**, *ADF - Award*, ¶ 137.

<sup>418</sup> Canada's Counter-Memorial, ¶¶ 453-477.

**A. The Claimant Has Failed to Prove that Many of the Challenged Measures Resulted in any Actual Losses to any of Its Four Projects**

**1. The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of the Domestic Content Requirements in the FIT Program**

229. Canada showed in its Counter-Memorial that the Claimant's alleged Article 1106 damages related to the FIT Program's domestic content requirements only arise, if at all, in the context of a failure to obtain FIT Contracts as a result of alleged breaches of Articles 1102, 1103 or 1105.<sup>419</sup> In its Reply Memorial, the Claimant's expert has argued in response that the domestic content requirements are an independent form of loss because "[a]lthough the losses related to Article 1106 would be more significant if a FIT Contract was obtained, we note that prior to the time Mesa Power would have obtained FIT Contracts, it incurred higher costs due to the Domestic Content Requirements."<sup>420</sup> The Claimant's experts explain their conclusion by saying that the domestic content requirements "forced Mesa Power to use less efficient and more expensive turbines and a more expensive contractor."<sup>421</sup>

230. To justify their statement, the Claimant's experts rely exclusively on the testimony of Mr. Robertson. According to Mr. Robertson, the Claimant incurred additional costs because of the domestic content requirements when GE was unable to confirm that the Claimant's preferred GE 2.5 MW XL turbines could meet those requirements.<sup>422</sup> Mr. Robertson claims that this forced the Claimant to agree to use the less effective GE 1.6 MW XLE turbines and incur additional costs.<sup>423</sup> As shown below, it is factually incorrect to claim that any actual losses were incurred by the Claimant as a result of the FIT Program's domestic content requirements.

231. In particular, regardless of whether or not it is true that the Claimant planned to use the GE 1.6 MW XLE turbines because of the domestic content requirements of the FIT Program (and there is no convincing evidence to show that it is), there is no evidence at all that the

<sup>419</sup> Canada's Counter-Memorial, ¶ 456.

<sup>420</sup> Expert Reply Valuation Report of Deloitte, 29 April 2014, ¶ 4.1 (emphasis added) ("Deloitte Reply Report").

<sup>421</sup> Deloitte Reply Report, ¶ 4.1.

<sup>422</sup> CWS-Robertson-2, ¶ 26.

<sup>423</sup> CWS-Robertson-2, ¶ 29.

Claimant spent any additional money as a result of that decision. By August 5, 2010, the Claimant had already paid its deposit to GE for the turbines in question.<sup>424</sup> At no point did the Claimant ever pay any additional money to GE as a result of deciding to use the GE 1.6 MW XLE turbine. In fact, there is no evidence that the Claimant ever paid a single additional cent to GE after the deposit was made in 2008 (months before the FIT Program even existed) in respect of its failed Pampa project.

232. As a result, the Claimant has failed to demonstrate that any alleged violation of Article 1106 independently caused it any actual loss. Without any evidence, all that is left is a theoretical loss based on the Claimant's argument that it would have earned higher profits at its four projects if it had been able to use its allegedly preferred GE 2.5 MW XL turbines. As discussed in Section III.C below and at length in the BRG Rejoinder Report, there is no evidence to suggest that this theoretical loss would have been incurred by the Claimant.

## **2. The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of Certain Aspects of the GEIA**

233. In its arguments with respect to Articles 1102,<sup>425</sup> 1103,<sup>426</sup> and 1105,<sup>427</sup> the Claimant argues that numerous aspects of Ontario's conduct in negotiating the GEIA with the Korean Consortium and in adhering to the obligations thereunder violated NAFTA. However, what it has not shown, and cannot show, is how any of these measures actually caused it to suffer a loss that is compensable at international law.

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<sup>424</sup> **R-042**, Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP (May 9, 2008), Attachment 3 Price, Payment and Termination Charges.

<sup>425</sup> See, for example, Claimant's Reply Memorial, ¶¶ 417-425.

<sup>426</sup> See, for example, Claimant's Reply Memorial, ¶¶ 292-315, 333, 338-360, 368-373.

<sup>427</sup> See, for example, Claimant's Reply Memorial, ¶¶ 655- 660.

**(a) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of the Confidential Negotiation of the GEIA**

234. First, the Claimant alleges that the confidential negotiations of the GEIA between Ontario and the Korean Consortium breached Canada's obligations under Article 1105.<sup>428</sup> However, the Claimant has failed to show how the confidentiality of the negotiations caused it any losses. It has failed to do so for a simple reason – the Claimant knew of the GEIA and its terms prior to investing in Ontario and applying to the FIT Program.<sup>429</sup> Thus, the Tribunal need not even speculate about the world that might have existed if the Claimant had known about the GEIA prior to making its investments – that is the world that actually existed. The Claimant made its investments with knowledge of the GEIA and what the broad parameters of its terms were. Thus, even assuming that the confidential nature of the negotiations was somehow a breach of NAFTA, and it is not, the Claimant suffered no loss as a result.

**(b) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of Ontario's Agreement to Offer the Korean Consortium an Economic Development Adder**

235. The Claimant also alleges that the EDA negotiated with the Korean Consortium violated NAFTA Article 1103.<sup>430</sup> However, it is unclear how such an alleged violation of Article 1103 could have been the cause of any loss suffered by the Claimant. The Claimant has made absolutely no attempt to link this allegation of wrongdoing to specific losses it suffered. Nor can it. As Ms. Lo explains in her witness statement, the Korean Consortium has not – to date – earned an EDA.<sup>431</sup> Moreover, even if it had, it would have had no effect on whether or not the Claimant obtained contracts under the FIT Program, or what it could have earned in respect of its investments. Benefits to the Korean Consortium in terms of the amount it would be paid for its electricity do not translate into losses for the Claimant.

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<sup>428</sup> Claimant's Reply Memorial, ¶¶ 655-660.

<sup>429</sup> See *supra*, ¶ 155; R-177, The Star News Article, Tyler Hamilton, "Ontario eyes green job bonanza" (Sep. 26, 2009). Available at: [http://www.thestar.com/business/2009/09/26/ontario\\_eyes\\_green\\_job\\_bonanza.html](http://www.thestar.com/business/2009/09/26/ontario_eyes_green_job_bonanza.html).

<sup>430</sup> Claimant's Reply Memorial, ¶¶ 122, 313, 350-354, 367, 369.

<sup>431</sup> RWS-Lo-2, ¶ 5, fn. 2.

**(c) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of Ontario's Agreement to Provide the Korean Consortium with the Capacity Expansion Option**

236. The Claimant also alleges that the capacity expansion option in the GEIA violates Canada's obligations under Article 1103.<sup>432</sup> However, similar to its claims discussed above, what it has not shown is how such a benefit for the Korean Consortium caused the Claimant any loss. Under the terms of the GEIA, the Korean Consortium had the right to increase the capacity it would generate in one phase by up to 10 percent of the targeted generation capacity of that phase (i.e. 500 MW) if it reduced the capacity it would generate in another phase by the same amount.<sup>433</sup> No additional electricity generation capacity is permitted beyond the agreed upon total generation for the entire agreement (i.e. 2,500 MW).<sup>434</sup> The Korean Consortium did not elect to use the capacity expansion option with respect to the allocation provided to it in the Bruce region in 2010.<sup>435</sup> As the Claimant's projects all connected in that region, even if the Korean Consortium elected to use this option in other regions, that would have no effect at all on the Claimant. As a result, this alleged violation of NAFTA could not have affected any of the Claimant's projects.

**3. The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of Its Call with Minister Papatello**

237. The Claimant appears to allege that statements made by Minister Papatello during an April 2011 phone call violated Article 1105.<sup>436</sup> Again, however, the Claimant has not even attempted to explain how that phone call could have caused it any losses. In particular, the phone call with Minister Papatello happened months after the Claimant had made all of its investments

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<sup>432</sup> Claimant's Reply Memorial, ¶¶ 335(a), 367(5) and 369(d); Deloitte Reply Report, ¶¶ 2.5(b).

<sup>433</sup> See **C-0322**, Green Energy Investment Agreement (Jan. 21, 2010), Art. 3.4. The Amended and Restated GEIA reduced the targeted generation capacity downward from 2,500 MW over five phases to 1,069 MW over three phases. See **R-133**, Amended and Restated GEIA, Art. 3.4 (Jun. 20, 2013). Under the later agreement the Capacity Expansion Option operates in the same fashion, only with the amended total capacity of 1069 MW.

<sup>434</sup> *Ibid.*

<sup>435</sup> **C-0046**, Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA (Jun. 3, 2011).

<sup>436</sup> Claimant's Reply Memorial, ¶¶ 87, 91.



in Ontario.<sup>437</sup> The Claimant has failed to introduce any evidence to show that it made any investment after this phone call that was actually and reasonably induced by the general investment promotion statements allegedly made by Minister Papatello in 2011.

**4. The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of Certain Aspects of the Bruce to Milton Allocation**

238. In its arguments on Articles 1102, 1103 and 1105, the Claimant also alleges that numerous aspects of the Bruce to Milton allocation violated Canada's obligations under NAFTA.<sup>438</sup> As with its arguments discussed above, the Claimant has failed to show how many of the alleged breaches actually caused it to suffer any loss. In understanding the Claimant's allegations and how the challenged measures might have affected its projects, it is necessary to also recall that the Government of Ontario imposed a cap of 750 MW on the capacity to be procured from the Bruce region and allowed changes in connection points between regions.<sup>439</sup> For the purposes of what follows, the only relevant question is whether, independent of that cap on procurement or the change in connection point window, any of the challenged measures caused the Claimant losses. As shown below, they did not.

**(a) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of Ontario's Decision Not to Run an ECT To Allocate the Bruce to Milton Capacity**

239. The Claimant continues to allege that not running the ECT to allocate the capacity on the Bruce to Milton Line, and relatedly, that not including the second phase of the ECT as originally designed, in the Bruce to Milton allocation, violated Canada's obligations under NAFTA.<sup>440</sup> Canada demonstrated in its Counter-Memorial that it is not credible to claim that the failure to run the ECT actually caused the Claimant's alleged losses.<sup>441</sup> As Canada explained then, and as

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<sup>437</sup> *Ibid.*

<sup>438</sup> Claimant's Reply Memorial, ¶¶ 123-136; 137-163; 640-711.

<sup>439</sup> In what follows, Canada has made the assumption that if a project fell within the 750 MW cap set by Ontario, it would have been offered a contract. As explained in the first witness statement of Bob Chow, that is not necessarily true, because it would depend on other tests as well. However, such an assumption operates to the benefit of the Claimant as it eliminates other possible reasons for its failure, and thus we have included it here. RWS-Chow, ¶ 21.

<sup>440</sup> Claimant's Reply Memorial, ¶¶ 640-711.

<sup>441</sup> Canada's Counter-Memorial, ¶¶ 468-471.

it further explains above, once the Bruce to Milton Line came online, there was no other additional transmission capacity that would have been economically viable to develop in the Bruce region.<sup>442</sup> Indeed, the 2010 LTEP had already considered what transmission projects around the province would be economically justifiable in the then-existing context.<sup>443</sup> Additional expansion to accommodate more renewable energy in the Bruce region was not identified as such a project.<sup>444</sup> Thus, the Claimant has failed to prove that the running of an ECT, or even just the second phase of the ECT for the Bruce region, would have resulted in additional transmission capacity being found to be economical. As a result, it has not shown how the decision not to run an ECT, or at least the second phase of the ECT for the Bruce region, caused the Claimant any loss.

**(b) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of NextEra Connecting to the L7S Circuit**

240. The Claimant alleges that NextEra's ability to connect certain projects to the L7S circuit during the Bruce to Milton allocation breached Canada's obligations under NAFTA.<sup>445</sup> Even assuming that this was a breach, the Claimant has not demonstrated that such a breach was the proximate cause of any losses it has actually suffered. Nor can it. There was only one project in the Bruce region that received a contract offer that connected at the L7S circuit - NextEra's Goshen Project.<sup>446</sup> This project has a nameplate capacity of 102 MW.<sup>447</sup> If the Goshen project was not offered a contract, this capacity would have been allocated to other FIT applicants' projects in the order of their provincial ranking. In particular, both the Cedar Point Wind Power Project Phase I (50 MW) and Skyway 127 project (100 MW) were ranked ahead of the Claimant's TTD and Arran projects.<sup>448</sup> If the Goshen project was not offered a contract through

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<sup>442</sup> *Supra*, ¶¶ 182-186.

<sup>443</sup> *Supra*, ¶¶ 182-186.

<sup>444</sup> *Supra*, ¶ 184.

<sup>445</sup> Claimant's Reply Memorial, ¶¶ 150, 765-776.

<sup>446</sup> C-0292, July 4, 2011 Contract Offers.

<sup>447</sup> *Ibid*.

<sup>448</sup> C-0073, OPA Priority Ranking for first-round FIT Contracts (Dec. 21, 2010). Provincially, the Cedar Point Wind Power Project Phase I was ranked 39<sup>th</sup>, Skyway 127 was ranked 64<sup>th</sup>, TTD was ranked 91<sup>st</sup> and Arran was ranked 96<sup>th</sup>.

the Bruce to Milton allocation, then the 50 MW Cedar Point Wind Power Project Phase I, which changed its connection point from the West of London region into the Bruce region during the Bruce to Milton allocation, would have been.<sup>449</sup> Once that contract was offered, there would have been a total of 671.5 MW of contracts offered in the Bruce region, and only 78.5 MW of capacity remaining.<sup>450</sup> This would not have been enough capacity to offer a contract even to Skyway 127, let alone TTD, Arran, North Bruce and Summerhill. Thus, the fact that the Goshen project was offered a contract did not cause any loss to the Claimant. As a simple matter of fact, it had no effect on the outcome of the Bruce to Milton allocation for the Claimant's proposed projects.

**(c) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of the Decision of Ontario to Allow Generator Paid Upgrades as Part of the Bruce to Milton Allocation**

241. The Claimant also alleges that allowing generator paid upgrades as part of the Bruce to Milton allocation violated Canada's obligations under NAFTA.<sup>451</sup> Again, even if this is correct, the Claimant cannot show how permitting such upgrades caused it any actual losses. As a matter of fact, only one project took advantage of the ability to propose to connect at a point which would have required a generator paid upgrade to get a contract offer during the Bruce to Milton allocation and that was a project in the West of London region.<sup>452</sup> No projects in the Bruce region that received contract offers during the Bruce to Milton allocation would have required a generator paid upgrade.<sup>453</sup> As a result, even if generator paid upgrades had not been permitted, no additional transmission capacity would have been available for any of the Claimant's projects in the Bruce region. Therefore, permitting generator paid upgrades did not cause the Claimant any losses.

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<sup>449</sup> C-0293, Ontario Power Authority, "FIT Contract Priority Ranking by Region" (Jul. 4, 2011); C-0292, July 4, 2011 Contract Offers; C-0073, OPA Priority Ranking for first-round FIT Contracts (Dec. 21, 2010).

<sup>450</sup> *Ibid.*

<sup>451</sup> Claimant's Reply Memorial, ¶¶ 150, 774-775.

<sup>452</sup> C-0292, July 4, 2011 Contract Offers; RWS-Chow-2, ¶ 20.

<sup>453</sup> C-0292, July 4, 2011 Contract Offers; RWS-Chow-2, ¶ 20.

**(d) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of Enabler Requested Projects Being Able to Select Connection Points During the Bruce to Milton Allocation**

242. The Claimant alleges that the fact that projects which elected to be “enabler requested” when they submitted their FIT applications were allowed to select a specific connection point during the Bruce to Milton allocation violated Canada’s obligations under NAFTA.<sup>454</sup> However, even if this was a breach of NAFTA, no actual losses were suffered by the Claimant as a result. NextEra’s Bluewater and Jericho wind projects, of 60 MW and 150 MW, respectively, originally elected to be enabler requested.<sup>455</sup> During the Bruce to Milton allocation, they selected connection points in the Bruce region.<sup>456</sup> If they had not been allowed to do so, there would have been an additional 210 MW of capacity in the Bruce region.<sup>457</sup> As noted above, this capacity would have been awarded to other FIT applicants’ projects in the order of their provincial ranking. Both the 50 MW Cedar Point Wind Power Project Phase I and the 100 MW Skyway 127 project were ranked ahead of the Claimant’s TTD and Arran projects.<sup>458</sup> Thus, if Bluewater and Jericho had not been able to select connection points, the effect would have been that the Cedar Point (Phase I) and Skyway projects would have received contract offers, after which there would have been only 86.5 MW remaining to be allocated in the Bruce region.<sup>459</sup> That would not have been enough capacity to offer a contract to either of the Claimant’s TTD and Arran projects, let alone its Summerhill and North Bruce projects.

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<sup>454</sup> Claimant’s Reply Memorial, ¶¶ 708-711.

<sup>455</sup> C-0073, OPA Priority Ranking for first-round FIT Contracts (Dec. 21, 2010).

<sup>456</sup> C-0292, July 4, 2011 Contract Offers.

<sup>457</sup> *Ibid.*

<sup>458</sup> C-0293, Ontario Power Authority, “FIT Contract Priority Ranking by Region” (Jul. 4, 2011); C-0292, July 4, 2011 Contract Offers; C-0073, OPA Priority Ranking for first-round FIT Contracts (Dec. 21, 2010).

<sup>459</sup> *Ibid.*

**(e) The Claimant Has Failed to Prove that It Suffered any Actual Losses as a Result of the Connection Point Change Window in the Bruce to Milton Allocation Being Only Five Days in Length**

243. Finally, the Claimant also now alleges that allowing only a five day connection change window, as opposed to the three weeks originally contemplated for the full ECT process, violated NAFTA.<sup>460</sup> However, again, the Claimant never attempts to show how the duration of the change window caused it any specific loss.

244. The fact is that the Claimant's projects were already proposed to be connecting in the Bruce region.<sup>461</sup> As a result, a short connection point change window, which would operate to prevent more applicants from changing into the Bruce region, was actually to its benefit. Indeed, even if the connection point change window was three weeks, there is no reason to assume that any of the projects ranked higher than the Claimant's projects that switched their connection point into the Bruce region during the five day window would not have done so during a three week window. Accordingly, the brief duration of the connection point change window was not the but for cause of any losses suffered by the Claimant.

**B. The Claimant Has Failed to Prove that any of the Challenged Measures Resulted in any Actual Losses with Respect to Its Summerhill and North Bruce Projects**

245. The Claimant has asserted that it has suffered damages arising from the fact that its Summerhill and North Bruce wind projects did not receive FIT Contract offers. In fact, \$268.5 million of its pre-interest claim for damages are alleged to have been suffered with respect to the its Summerhill and North Bruce projects.<sup>462</sup> As shown above, many of the challenged measures did not have any effect on whether any of the Claimant's projects were awarded a FIT Contract.<sup>463</sup> Moreover, while it is not disputed that certain of the measures challenged by the Claimant resulted in the Claimant's TTD and Arran projects not receiving a FIT Contract, none

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<sup>460</sup> Claimant's Reply Memorial, ¶¶ 645-647.

<sup>461</sup> C-0073, OPA Priority Ranking for first-round FIT Contracts (Dec. 21, 2010).

<sup>462</sup> BRG Rejoinder Report, ¶ 177b.

<sup>463</sup> See Section II.A.

of the alleged violations of NAFTA caused any loss with respect to the Claimant's Summerhill and North Bruce projects.

**1. The Claimant Has Failed to Prove that the Priority Access Granted to the Korean Consortium Resulted in It Not Obtaining Contracts for Its Summerhill and North Bruce Projects**

246. The Claimant alleges that the priority access to the transmission system granted to the Korean Consortium under the GEIA constitutes a violation of Article 1103 of NAFTA.<sup>464</sup> Pursuant to the obligations in the GEIA, Ontario directed the OPA to set aside 500 MW of transmission capacity in the Bruce region for the Korean Consortium.<sup>465</sup> However, as Canada has demonstrated in its Counter-Memorial, even if this amount of transmission capacity had not been set aside for GEIA purposes, there is no possible world in which the Claimant's North Bruce and Summerhill projects (ranked between 287-290 in the province) would have received FIT Contracts.<sup>466</sup> For those projects to obtain FIT Contracts, it would have required an additional 750 MW of capacity than was available in the Bruce region.<sup>467</sup>

**2. The Claimant Has Failed to Prove that the OPA's Alleged Errors in Scoring its Launch Period Applications Resulted in It Not Obtaining Contracts for Its Summerhill and North Bruce Projects**

247. The Claimant also alleges that the OPA's rankings "did not fairly or reasonably assess projects", that evidence was "disregarded", and that in sum the evaluation was "arbitrary".<sup>468</sup> However, these allegations all concern OPA's evaluation of launch period applications. The Summerhill and North Bruce applications were submitted by the Claimant after the close of the launch period.<sup>469</sup> It is undisputed that both of these projects were ranked appropriately according

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<sup>464</sup> Claimant's Reply Memorial, ¶¶ 48, 78, 333, 369.

<sup>465</sup> C-0322, GEIA (Jan. 21, 2010), Art. 3; C-0119, Letter (Direction) from Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority (Sep. 17, 2010).

<sup>466</sup> Canada's Counter-Memorial, ¶¶ 459-460.

<sup>467</sup> BRG Report, ¶¶ 38-39; Canada's Counter-Memorial, ¶ 460.

<sup>468</sup> Claimant's Reply Memorial, ¶ 713.

<sup>469</sup> Canada's Counter-Memorial, ¶ 132; C-0360, North Bruce Wind Energy I, FIT Application (May 29, 2010); C-0361, North Bruce Wind Energy II, FIT Application (May 29, 2010); C-0362, Summerhill Wind Energy I, FIT Application (May 29, 2010); C-0363, Summerhill Wind Energy II, FIT Application (May 29, 2010).

to the time at which they were received by the OPA.<sup>470</sup> Accordingly, the OPA's evaluation of the Claimant's two launch period applications, even if in error, did not result in any harm to the Claimant's Summerhill and North Bruce projects.

**3. The Claimant Has Failed to Prove that any Aspect of the Bruce to Milton Allocation Resulted in It Not Obtaining Contracts for Its Summerhill and North Bruce Projects**

248. The Claimant has challenged virtually every aspect of the Bruce to Milton allocation as a violation of NAFTA, from its design to its implementation.<sup>471</sup> However, even if the Tribunal were to accept any or all of these allegations, the Claimant has not and cannot show how this could have affected the ability of its Summerhill and North Bruce projects to obtain FIT Contracts. As a matter of fact, only applications that had applied during the FIT Launch Period were offered contracts as a result of the Bruce to Milton allocation.<sup>472</sup> Again, as Canada and BRG pointed out in the Counter-Memorial and first expert report, for Summerhill and North Bruce to have obtained FIT Contracts, an additional 750 MW of transmission capacity would have had to be available in the Bruce region.<sup>473</sup> It simply was not. Thus, the way in which the Bruce to Milton allocation was designed and implemented did not cause any losses with respect to the Summerhill and North Bruce projects.

**4. The Claimant Has Failed to Prove that the Connection of Projects to the Bruce to Longwood Line Resulted in It Not Obtaining Contracts for Its Summerhill and North Bruce Projects**

249. The Claimant alleges that the OPA's decision to give contract offers to projects proposing to connect on the Bruce to Longwood Line violated Canada's obligations under NAFTA.<sup>474</sup> As part of the Bruce to Milton allocation, the Jericho, Bornish, Cedar Point (Phase II) and Adelaide wind farm projects connected to the Bruce to Longwood Line. This represented

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<sup>470</sup> The Claimant has only alleged the OPA improperly ranked its TTD and Arran projects. See Claimant's Reply Memorial, ¶¶ 712-719.

<sup>471</sup> Claimant's Reply Memorial, ¶¶ 682-711.

<sup>472</sup> C-0073, OPA Priority Ranking for first-round FIT Contracts (Dec. 21, 2010); C-0292, July 4, 2011 Contract Offers.

<sup>473</sup> BRG Report, ¶¶ 38-39; Canada's Counter-Memorial, ¶ 460.

<sup>474</sup> Claimant's Reply Memorial, ¶¶ 661-674.

a total of 383.5 MW.<sup>475</sup> Even assuming that such projects should not have been offered FIT Contracts, there would still have been insufficient capacity for the Claimant's Summerhill and North Bruce projects to receive a FIT Contract offer.<sup>476</sup> As explained above, an additional 750 MW of capacity in the Bruce region would have been needed for North Bruce and Summerhill projects to be offered FIT Contracts.

**C. The Claimant Has Failed to Prove that any of the Losses Associated with the Cancellation of the MTSA Were Caused By Canada**

250. The Claimant continues to assert that Canada is somehow responsible for the full amount of its losses associated with the termination of its Second Amended and Restated Master Turbine Sales Agreement ("MTSA") with GE.<sup>477</sup> In making its claims, the Claimant's experts actually agree with Canada's experts that the GE deposit was "initially related to Mesa Power's Pampa wind farm in Texas", but disagree that alleged violations of NAFTA did not cause the forfeiture of the deposit.<sup>478</sup> The Claimant's experts assert that had the Claimant's projects received FIT Contracts, then more than ██████████ would have been purchased under the Amended MTSA and the deposit would not have been lost.<sup>479</sup> Furthermore, they claim that the Claimant's four projects would have used ██████████ – more than the ██████████ the Claimant was obliged to purchase under the Amended MTSA. As a result, they argue that no proportional allocation should be attributed to any other projects the Claimant might have had elsewhere.<sup>480</sup> However, they cite absolutely no evidence whatsoever for their assertions.

251. In making these arguments, the Claimant's experts continue to misconstrue how damages should be assessed. The question, again, is whether a specific violation of NAFTA is the proximate cause of any specific alleged loss. In this case, the Claimant's deposit was put at risk not due to the Claimant's FIT applications, but due *entirely* to the failed Pampa project.

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<sup>475</sup> C-0292, July 4, 2011 Contract Offers.

<sup>476</sup> C-0073, OPA Priority Ranking for first-round FIT Contracts (Dec. 21, 2010); C-0292, July 4, 2011 Contract Offers.

<sup>477</sup> Deloitte Reply Report, ¶¶ 6.1-6.3.

<sup>478</sup> Deloitte Reply Report, ¶ 6.1.

<sup>479</sup> *Ibid.*

<sup>480</sup> Deloitte Reply Report, ¶ 6.2.



Moreover, as Canada and BRG have demonstrated, the actual proximate cause of the forfeiture was also not the failure to obtain FIT Contracts, but the termination of the Second Amended and Restated MTSA of ██████████ ██████████<sup>481</sup> It was only after the failure of the Claimant to repurpose these turbines for use in Minnesota and for yet another smaller project in Texas, that the deposit was lost.<sup>482</sup> Therefore, the allegations of wrongdoing by Canada are not the but for cause of the loss of the GE deposit.

252. Ultimately, if Ontario had never put a FIT Program into place, the Claimant still would have had to forfeit its deposit under the MTSA. In seeking to recover the costs of the GE deposit in this arbitration, the Claimant is seeking to place the financial burden of its risky and bad business decisions on Canada. This is not the purpose of investment treaties.

### **III. The Claimant Has Failed to Establish that It Is Entitled to the Damages that It Claims for the TTD and Arran Projects**

253. If the Tribunal does find that Canada has breached NAFTA, the Claimant has still failed to meet its burden of establishing that it is entitled to the damages that it seeks for the TTD and Arran projects. First, the Claimant has failed to prove that it is entitled to 100 percent of alleged losses because it has continued to fail to prove its 100 percent ownership of the projects. Second, if the Claimant is entitled to any damages, they should in principle be limited to its proportionate share of the sunk costs related to the TTD and Arran projects. However, in this case, the Claimant has offered no evidence whatsoever of the approximately \$6.4 million that it alleges it has invested into the TTD and Arran projects.<sup>483</sup> As such, it has failed to meet its burden of proof and should not be entitled to any damages for sunk costs. Finally, to the extent that the Tribunal does consider future losses related to the TTD and Arran wind projects, the Claimant's analysis is unreliable, exaggerated and based on inappropriate assumptions.

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<sup>481</sup> Canada's Counter-Memorial, ¶¶ 474-477; BRG Report, ¶¶ 128-130, 190 and Attachment VI.

<sup>482</sup> See BRG Report, Attachment VI, ¶¶ 63-67; BRG Rejoinder Report, ¶ 91.

<sup>483</sup> Rejoinder BRG Report, ¶ 183.

**A. The Claimant Has Failed to Provide Evidence that All Damages Suffered by the Enterprise Were Suffered by the Claimant Itself**

254. In an arbitration brought pursuant to Article 1116, the Claimant bears the burden of proving that it, and not some other enterprise, has suffered the damages which it seeks to recover.<sup>484</sup> As the Tribunal in *Grand River* ruled:

Under NAFTA Article 1116, an investor of a Party may submit to arbitration a claim that another NAFTA Party has breached specified NAFTA obligations “and that the investor has incurred loss or damage by reason of, or arising out of, that breach.” Under UNCITRAL Rule 24(1) (which applies in this proceeding), a claimant has the burden of proving both the breach and the claimed loss or damage.<sup>485</sup>

255. Accordingly, this Tribunal may only award damages in proportion to the Claimant's ownership in the alleged investments at the time the damages occurred.<sup>486</sup> In its Counter-Memorial, Canada pointed to numerous exhibits which demonstrated that GE, through its membership in the American Wind Alliance (“AWA”), owned 50 percent of the TTD, Arran, North Bruce and Summerhill wind projects at the relevant time.<sup>487</sup>

256. In its Reply, the Claimant failed to address the specific exhibits submitted by Canada. Instead, it relied solely upon an unsubstantiated assertion in the witness statement of Mr. Robertson that the Claimant and GE Global Development and Strategic Initiatives “collaboratively managed the American Wind Alliance which was co-owned by these two American companies until GE sold its interest to Mesa on [REDACTED].”<sup>488</sup> The Claimant has provided no evidence in support of Mr. Robertson's assertion that GE sold its interest to the

<sup>484</sup> **CL-033**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶ 316; **RL-079**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/05) Decision on the Requests for Correction, Supplementary Decision and Interpretation, 10 July 2008, ¶ 38; **CL-041**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 237 (“*Grand River – Award*”).

<sup>485</sup> **CL-041**, *Grand River – Award*, ¶ 237 (emphasis added).

<sup>486</sup> Canada's Counter-Memorial, ¶ 478. As noted by Canada in its Counter-Memorial and Reply on Jurisdiction, the Claimant has brought this arbitration pursuant to Article 1116 and under that Article, a Claimant may only bring a claim for loss or damage that it as “the investor as incurred.” See NAFTA, Article 1116.

<sup>487</sup> Canada's Counter-Memorial, ¶¶ 478-481.

<sup>488</sup> CWS-Robertson-2, ¶ 7 (emphasis added). See also ¶ 10 which states that the “arrangement continued until [REDACTED] when [the Claimant] acquired all of General Electric's interest in American Wind Alliance [...]”

Claimant on that date. The same allegation is made in the Claimant's Reply Memorial, again without citing to any documentary exhibit in support.<sup>489</sup>

257. It is simply not credible that such a "sale" could have occurred without a documentary trail. According to the Claimant, in July 2010, when this transaction allegedly occurred, both the TTD and Arran projects were in line to receive a FIT Contract. In fact, the Claimant alleges expressly that it expected an ECT to award contracts in the Bruce region to be run in August 2010,<sup>490</sup> and that if it was, the Arran and TTD projects would have received FIT Contracts.<sup>491</sup> As such, according to the Claimant, in July 2010 its TTD and Arran wind farm investments would have had value – which the Claimant alleges to be approximately \$389 million.

258. In July 2010, GE owned 50 percent of this alleged asset.<sup>492</sup> Yet, according to the Claimant, GE walked away just when it was anticipated that the projects were about to be awarded contracts. The Claimant does not allege that it paid GE a single cent for GE's 50 percent share in this allegedly valuable asset. Further, Canada has been unable to find any record of the sale of GE's ownership interest in AWA to the Claimant in any public filings of General Electric.<sup>493</sup> If this transaction did occur, there should be documents evidencing it – an agreement, correspondence on the negotiations, a record of the sale and the price paid by GE to allegedly "acquire" the Claimant's interests in these projects.

259. It was the Claimant's burden to introduce reliable and contemporaneous documentary evidence to prove the facts on which it relies. Indeed, arbitral tribunals have given little weight should be afforded to "uncorroborated witness testimony"<sup>494</sup> and the testimony of "witness[es]

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<sup>489</sup> Claimant's Reply Memorial, ¶ 96.

<sup>490</sup> Claimant's Reply Memorial, ¶ 124.

<sup>491</sup> Claimant's Reply Memorial, ¶ 690(a).

<sup>492</sup> Canada's Counter-Memorial, ¶ 482. *See also* Claimant's Reply Memorial, ¶ 93.

<sup>493</sup> All SEC Filings of General Electric are available at: <http://www.ge.com/investor-relations/shareholder-services/personal-investing/sec-filing/general-electric-company>. **R-176**, SEC Filings: General Electric Company (Undated).

<sup>494</sup> **RL-107**, Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004) ("Redfern & Hunter") pp. 307-308: ("In general, arbitral tribunals tend to give less weight to uncorroborated witness testimony than to evidence contained in contemporaneous documents."). *See also* **RL-095**, Mark Kantor, *Valuation For Arbitration: Compensation Standards, Valuation Methods and Expert*

who ha[ve] a clear interest in the result of the case, when documents should exist.”<sup>495</sup> Even where statements from witnesses with allegedly direct knowledge have been presented, tribunals have refused to sustain claims on the basis of such testimony to the extent it is uncorroborated by contemporaneous documentary evidence.<sup>496</sup> This should be the case here especially where such documents must exist and have not been provided by the Claimant.<sup>497</sup>

260. For the above reasons, the Claimant has not satisfied its burden of proof to demonstrate that it wholly-owned the alleged investments at the time when the damages were allegedly suffered. Its failure to do so should lead the Tribunal to assume that AWA retained a 50 percent ownership share of the wind projects at issue in this arbitration over the entire relevant time period. In recognition of this, the Tribunal must reduce any damages awarded accordingly so as to ensure that the Claimant is not unjustly enriched by obtaining more in damages than the losses it allegedly suffered. In particular, as Canada explained in its Counter-Memorial, the Claimant's damages should be reduced by 50 percent in respect of any measure which occurred and caused the Claimant harm.

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*Evidence* (Alphen aan den Rijn: Kluwer, 2008), p. 280 (giving the following advice to the “careful arbitrator” engaged in valuing an asset: “Documents are better than verbal assertions/confirmations. Documents prepared by an independent third party are *better* than those prepared by the claimant/insured/defendant/insurer. Documents prepared contemporaneously (and prior to/immediately following the loss event) are better than those prepared after the date the claim was submitted. Documents prepared absent any prospect of a claim are better than those created in response to (or with knowledge of) the extant claim.”) (emphasis in original).

<sup>495</sup> **RL-107**, Redfern & Hunter, pp. 307-308 (stating that “the untested evidence of a witness who has a clear interest in the result of the case may be given less evidentiary weight than the evidence of a witness who is truly independent.”). See also, **RL-086**, Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press: 2006), pp. 309 (“Bin Cheng”) (stating that “the mere *ex parte* statements of the facts by [an] interested party in a dispute are not considered as evidence and do not constitute sufficient proof of the facts alleged.”).

<sup>496</sup> **RL-109**, *Hussein Numan Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7) Award, 7 July 2004, ¶¶ 34, 50, 78; **RL-093**, *Europe Cement Investment & Trade S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award, 13 August 2009, ¶ 145; **RL-046**, *Cementownia “Nowa Huta” S.A. v. Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009, ¶ 149.

<sup>497</sup> **RL-086**, Bin Cheng, p. 320: (“Where documentary evidence should be available, this must be produced. The party whose negligence has resulted in failure to produce documentary evidence must bear the consequences of such non-production.”); **RL-082**, *Roy P.M. Carlson v. Government of the Islamic Republic of Iran and Mellī Industrial Group*, (1991) 26 Iran-US CTR 193, Award (May 1, 1991), ¶ 31.

**B. The Claimant Has Failed to Prove its Claims for its Sunk Costs Related to Its Share of TTD and Arran**

261. As Canada explained in its Counter-Memorial, where a project is not operating and has no history of profits or revenues, it is too speculative as a matter of law to consider awarding any damages related to potential future losses.<sup>498</sup> This is especially the case here since the Claimant has yet to mount a single turbine, and experience has shown that even with a FIT Contract, projects are subject to a significant amount of development risk.<sup>499</sup>

262. As Canada has pointed out in its Counter-Memorial, the Claimant has failed to produce any evidence to substantiate the alleged \$6.42 million investments that it made in the TTD and Arran wind farms.<sup>500</sup> In fact, the Claimant has failed to produce a single invoice, bill, financial statement or any other document to support its claims for expenditures. It was the Claimant's burden of proof to provide this evidence to the Tribunal,<sup>501</sup> and it must bear the consequences of its failure to meet that burden. As a result of this failure, the Tribunal should find that the Claimant has not sufficiently proven any losses associated with its sunk costs, and should deny these claims.

**C. To the Extent Future Losses Related to TTD and Arran Are Permitted, the Claimant's Damages Analysis Is Exaggerated and Based on Inappropriate Assumptions**

263. Canada explained in its Counter-Memorial that even if this Tribunal were to consider the speculative future losses of the TTD and Arran wind projects, the Claimant's future loss analysis contains flawed assumptions and is based on biased calculations.<sup>502</sup> The numerous errors in the Claimant's claim are exhaustively dealt with by BRG in both its first expert report and in its Rejoinder Report. Canada will not repeat them here, but will instead highlight some significant ones here. In particular, (1) the Claimant and its experts have misconstrued the Capacity Expansion option; (2) made speculative assumptions about the availability of its preferred wind

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<sup>498</sup> Canada's Counter-Memorial, ¶¶ 484-486.

<sup>499</sup> BRG Report, ¶¶ 75-81.

<sup>500</sup> Canada's Counter-Memorial, ¶ 490.

<sup>501</sup> NAFTA, Article 1116(1).

<sup>502</sup> Canada's Counter-Memorial, ¶¶ 491-507.

turbines; and (3) made numerous inappropriate assumptions, calculation errors and omissions inflating the claim.

### **1. The Claimant Misconstrues the Capacity Expansion Option**

264. The Claimant continues to misconstrue the GEIA's Capacity Expansion option and use it as a basis to inflate its claims by \$36 million. The Claimant and its damages expert have entirely ignored Canada's explanation of how the Capacity Expansion Option works in the GEIA. The Government of Ontario and the Korean Consortium originally negotiated a generation commitment for a total of 2,500 MW produced over five phases of 500 MW each. As Canada explained in its Counter-Memorial<sup>503</sup> and as is clear in the terms of the GEIA,<sup>504</sup> the Capacity Expansion Option permitted the Korean Consortium to transfer up to 10 percent of the capacity of one phase to another phase while maintaining the overall 2,500 MW commitment for all five phases.

265. The Claimant and Deloitte interpret this to mean that the Claimant should be entitled to increase its total production capacity by 10 percent and therefore add the value of that extra generation capacity to its losses. Even if it were entitled to the Capacity Expansion Option – which it is not – all this would mean is that the Claimant would be entitled to reduce the generation capacity of one of its projects and increase the generation capacity of another project by the same amount, maintaining the total generation capacity for all its projects. As a result, the Claimant would not produce any more electricity in total, even if it was entitled to the Capacity Expansion Option. Consequently any inflation of damages is unwarranted.

### **2. The Claimant Continues to Make Speculative Assumptions about the Availability and Economics of Its Preferred Wind Turbines**

266. The Claimant and its experts continue to assert a claim pursuant to NAFTA Article 1106 for between \$106.2 and \$115.3 million associated with its alleged ability to use its preferred larger and allegedly more efficient GE 2.5 XL wind turbines. Canada and its experts BRG, have already shown that the Claimant failed to provide any evidence that the GE 2.5 MW XL turbines

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<sup>503</sup> Canada's Counter-Memorial, ¶¶ 495-496.

<sup>504</sup> C-0322, GEIA, Article 3.4.

were available for use on its projects, at what price GE was willing to supply them, or how much they would have cost to maintain.<sup>505</sup> Using publicly available information on contemporaneous wind farms known to use the GE 2.5 MW XL turbines and two estimates of installed costs, BRG also demonstrated that there was a small margin for error in terms of the cost versus economic benefit of using the larger turbines.<sup>506</sup>

267. In its Reply Memorial, the Claimant continues to assert this alleged loss, but now relies on new testimony by Mr. Robertson as well as unspecified and unproduced “publicly available information”.<sup>507</sup> Mr. Robertson’s testimony is that the Claimant was forced to use the less economically beneficial GE 1.6 MW XLE turbine because it “did not receive confirmation from General Electric that these turbines [i.e., the GE 2.5 MW XL turbines] would meet the requirements of Ontario’s domestic content requirements.”<sup>508</sup> As BRG notes, the evidence upon which Mr. Robertson relies to assert the claims in no way confirms that the GE 2.5 MW XL turbines were, in fact, available.<sup>509</sup> Nor does it prove that the GE 2.5 MW XL turbine could not meet the domestic content requirements of the FIT Program.<sup>510</sup> Finally, the document cited by Mr. Robertson actually implies that [REDACTED]

[REDACTED]<sup>511</sup>

268. Ultimately, in seeking to increase its damages to reflect its commercial decision as to which turbine to use, the Claimant apparently expects this Tribunal to simply accept its assertions without proof. By contrast, Canada and BRG have relied on the Claimant’s actual contractual obligations under its MTSA with GE, the correspondence between the Claimant and GE, public information from GE, and from actual projects using the GE 2.5 MW XL or comparable turbines.<sup>512</sup> This evidence demonstrates that not only has the Claimant failed to

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<sup>505</sup> Canada’s Counter-Memorial, ¶ 499, BRG Report, ¶¶ 87-91 and Attachment VII.

<sup>506</sup> BRG Report, ¶¶ 87-91 and Attachment VII ¶¶ 72-73.

<sup>507</sup> Deloitte Reply Report, ¶ 4.3.

<sup>508</sup> CWS-Robertson-2, ¶ 25.

<sup>509</sup> BRG Rejoinder Report, ¶¶ 56-62.

<sup>510</sup> *Ibid.*

<sup>511</sup> **C-0107**, E-mail from Michael Volpe (GE Energy) to Cole Robertson and Mark Ward (Aug. 5, 2010).

<sup>512</sup> See Canada’s Counter-Memorial, ¶¶ 497-500; BRG Rejoinder Report, ¶¶ 56-80.

prove that its alleged preferred turbines were available but for the domestic content requirements, but that it is also very unlikely that these turbines presented any economic benefit to the Claimant over the GE 1.6 MW XLE turbines.

**3. The Claimant's Experts Continue to Make Numerous Inappropriate Assumptions, Calculation Errors and Omissions in their Base Case Scenario**

269. In its first report, BRG outlined the numerous inappropriate assumptions and calculation errors and omissions in the valuation report prepared by the Claimant's experts. In reply, the Claimant's experts make mostly cosmetic adjustments to certain aspects of their flawed calculations while continuing to employ numerous inappropriate assumptions and to make even further calculation errors and omissions. BRG itemizes these flaws in detail in the BRG Rejoinder Report. Taken together with the inappropriate assumptions and calculation errors and omissions in its first report, these continued problems with Deloitte's analysis call into question the overall value and objectivity of its testimony.

270. In particular, Deloitte assumes that the Claimant's projects faced essentially no development and completion risks. As BRG explains in its Rejoinder Report, there is no justification for this continued unreasonable assumption. All projects prior to operation, even if they have contract offers, are subject to significant completion risks. Despite Deloitte's efforts to argue otherwise, nothing about the Claimant's particular situation mitigated, let alone, eliminated, these risks.<sup>513</sup> As BRG correctly concludes "[a]ny analysis of damages must have a realistic view of the impact of these risks on valuation."<sup>514</sup> In this light, Deloitte's adjustment of its discount rate downwards by 3.0 percent, which resulted in an inflation of the Claimant's damages claim by \$51.5 million dollars for the TTD and Arran projects, is unjustified.

271. Deloitte also continues to inappropriately employ an unrealistic size risk premium for the Claimant's projects. This makes the Claimant's projects seem less risky than they are because it assumes that they are the projects of a large more well-established company. As BRG explains, the argument that Deloitte offers in response to the criticism in BRG's first report of this

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<sup>513</sup> BRG Rejoinder Report, ¶¶ 99-112.

<sup>514</sup> BRG Rejoinder Report, ¶ 111.



adjustment is “circular and self-fulfilling.”<sup>515</sup> This adjustment by Deloitte wrongfully inflates the Claimant’s claim for damages by \$40.2 million for the TTD and Arran projects.

272. Further, in its Reply Report, allegedly based on its “further review of the documents and discussions with Counsel and Management”, Deloitte now employs three different valuation dates than it did in its first report.<sup>516</sup> It now uses September 17, 2010 as the date on which the Claimant “became aware of the better treatment” given to the Korean Consortium through the transmission set aside allegedly in violation of Articles 1102, 1103 and 1105. For its Article 1105 claim, it also now proposes December 21, 2010 because this was the date on which FIT priority rankings were publicly available. Finally for its Article 1106 claim, Deloitte now uses August 5, 2010, the alleged date on which “GE was unable to provide certainty that the GE 2.5 MW XL turbines would meet the domestic content rules.”<sup>517</sup>

273. As was the case with its first set of valuation dates, Deloitte’s new valuations dates are flawed. As explained by BRG, the fact is that none of the alleged breaches had, or could have had, any actual economic impact prior to the first day on which the Claimant could have possibly received a contract for any of its projects – July 4, 2011.<sup>518</sup> These valuation dates wrongfully inflate the Claimant’s claim for damages by \$42.9 million for the TTD and Arran projects.

274. In addition to the above-identified major errors, the Claimant’s experts make numerous other errors in their analysis – all of which BRG corrects in its report.<sup>519</sup> The ultimate result is that taking into account the inappropriate theory of causation, flawed assumptions and numerous calculation errors and omissions, Deloitte has overstated the damages suffered by the Claimant by at least \$638 million. Using a more reasonable approach, and assuming that the Claimant offers proof of its sunk costs (which it has not done), BRG assesses the possible damages at no more than \$19,383,000 for sunk costs and future losses.

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<sup>515</sup> BRG Rejoinder Report, ¶ 147.

<sup>516</sup> Deloitte Report ¶¶ 1.18, 1.22 and 1.27; Deloitte Reply Report, ¶ 7.11

<sup>517</sup> *Ibid.*

<sup>518</sup> BRG Rejoinder Report, ¶¶ 126-127, 139.

<sup>519</sup> BRG Rejoinder Report, ¶¶ 185-198.

#### **IV. The Claimant Has Not Proven that It Is Entitled to Pre-Judgment Interest**

275. Under NAFTA, a tribunal has discretion to award “any applicable interest”. However, with the exception of Article 1110 claims – which are not raised in this case<sup>520</sup> – both NAFTA and the UNCITRAL Arbitration Rules are silent on the terms of such awards. The guiding principle under international law is that interest is only necessary to ensure full reparation, but that there is no automatic right to it.<sup>521</sup> As a result, the Claimant bears the burden of proving that the circumstances of this case justify an award of interest to ensure full reparation. It has failed to do so. Moreover, the Claimant bears the burden of proving each element of an award of interest, including the appropriateness of its preferred dates of accrual for each alleged cause of loss;<sup>522</sup> its preferred interest rate; and its application of compound over simple interest. The Claimant has failed to address any of these factors.

276. To ensure that its assessment of alleged damages is complete, Canada has asked its expert BRG to assess pre-judgment interest, compounded on an annual basis at the prevailing Bank of Canada Business Prime rate from the only probable date of harm – July 4, 2011 – the date the TTD and Arran projects were not offered FIT Contracts.<sup>523</sup> However, it is neither Canada's nor the Tribunal's responsibility to make the Claimant's case for it. Therefore, should the Tribunal find a breach of NAFTA, and determine that damages are appropriate, Canada asks the Tribunal to deny the Claimant's request for pre-judgment interest.

#### **CONCLUSION AND PRAYER FOR RELIEF**

277. For the foregoing reasons, and for the reasons in Canada's Counter-Memorial, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with

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<sup>520</sup> Canada notes that the Claimant's experts wrongly invoke Article 1110 as justification for an award of interest. See Deloitte Reply Report, ¶ 7.19.

<sup>521</sup> **CL-008**, ILC Articles, Article 38(1) and Commentary 1, p. 107.

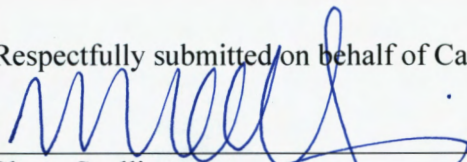
<sup>522</sup> Canada notes that while the Claimant and its experts assert four different valuation dates for its alleged damages, it calculates pre-judgment interest accruing from only one date. This is an incorrect way of assessing interest. While NAFTA is silent on the issue, the ILC has commented that where applicable, “[i]nterest runs from the date when the principle sum should have been paid until the date the obligation to pay is fulfilled”. See ILC Articles, Article 38, Commentary 2. While Canada has contested the inappropriate valuation dates asserted by the Claimant, even if those dates were correct, it is still improper for the Claimant to calculate interest from only one of the valuation dates.

<sup>523</sup> BRG Rejoinder Report, ¶¶ 126-127.

prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

July 2, 2014

Respectfully submitted on behalf of Canada,



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