

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

MESA POWER GROUP, LLC

Investor

v.

GOVERNMENT OF CANADA

Respondent

INVESTOR'S STATEMENT OF COSTS

March 3, 2015

Appleton & Associates
International Lawyers
77 Bloor St West Suite 1800
Toronto, Ontario M5S 1M2
Tel.: (416) 966-8800
Fax: (416) 966-8801
Counsel for the Investor

Astigarraga Davis Mullins & Grossman, P.A.
1001 Brickell Bay Dr., 9th Fl
Miami, Florida 33131
Tel.: (305) 372-8282
Fax: (305) 372-8201

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. INVESTOR'S COSTS.....	1
A. Total Costs.....	1
1. The Investor's Legal Costs & Lawyers' Disbursements.....	1
2. Expert and Witness Fees and Disbursements	3
3. Mesa's Time and Disbursements.....	3
4. Investor's Payments to the Appointing Authority and to the Permanent Court of Arbitration	4
5. Reasons Investor should be awarded Costs	4
B. Cost Awards	5
1. The Investor Should be Awarded All Arbitration Costs	5
2. The Investor Should be Awarded All Representation Costs.....	5
C. Summary of Investor's Total Expenses	10
III. REPRESENTATION COSTS INCURRED BY THE INVESTOR AS A RESULT OF CANADA'S CONDUCT AND VEXATIOUS ARGUMENTATION	11
A. Canada's Vexatious Argumentation and Conduct	11
1. Canada's Meritless Subsidy Defence	11
2. Canada's Non-Compliance with Document Production.....	13
IV. THE INVESTOR SHOULD NOT BE RESPONSIBLE FOR CANADA'S COSTS.....	18
A. The Investor Should Not be Responsible for Canada's Arbitration Costs.....	18
B. The Investor Should Not be Responsible for Canada's Representation Costs.....	19
V. TOTAL COSTS SOUGHT BY THE INVESTOR	20

I. INTRODUCTION

1. In accordance with paragraph 3 of *Procedural Order No. 16*, the Investor files this “Statement of Costs.”¹ This submission is made pursuant to NAFTA Article 1135(1) and Articles 38 and 40 of the *UNCITRAL Arbitration Rules* with respect to the costs that Mesa reasonably incurred in the course of this arbitration.
2. Part Two of this Statement of Costs submission outlines the total of the Investor’s costs. The Investor’s costs are divided into four categories:
 - a. The Investor’s legal costs and disbursements;
 - b. Expert fees, witness fees, and related disbursements;
 - c. Mesa’s management costs and related disbursements; and
 - d. Institutional costs, including payments made to the Permanent Court of Arbitration acting as the secretariat of the arbitration, and ICSID as the appointing authority.
3. Part Three of this Statement of Costs outlines the costs that should be awarded to the Investor’s, even if the Investor were not to prevail on any claim, as a result of Canada’s conduct which caused the Investor specific and additional costs.
4. Part Four details why the Investor should not, under any circumstance, be held responsible for Canada’s legal costs.
5. Part Five summarizes the costs sought by the Investor.

II. INVESTOR’S COSTS

A. TOTAL COSTS

1. THE INVESTOR’S LEGAL COSTS & LAWYERS’ DISBURSEMENTS

6. The Investor was represented in the arbitration by counsel from a variety of law firms.
7. The following lawyers from the Toronto and Washington, DC offices of Appleton & Associates International Lawyers provided legal assistance over the course of the arbitration to the Investor:
 - a. Barry Appleton
 - b. Alan Alexandroff
 - c. Kyle Dickson-Smith

¹ Hearing Transcript, Day 5, at p. 250, lns 22-23.

- d. Celeste Mowatt
 - e. Josh Scheinert
 - f. Sean Stephenson
 - g. Erik van Eyken
 - h. Mona Pinchis
 - i. Ugo Popadic
 - j. Kyle Hampson
8. Lawyers from Appleton & Associates International Lawyers were supported by the following legal counsel support staff over the course of this arbitration:
- a. Sue Ki, Chief Document Clerk
 - b. John Evers, Research Assistant
 - c. Joshua Hauser, Research Assistant
 - d. April Jangkamolkulchai, Administrative Assistant
 - e. Timofey Pavlov, Legal Assistant
 - f. Nenad Nevajda, International Law Researcher
 - g. Jessica McKeachie, International Law Researcher
 - h. Michael Pogorzelski, Document Assistant
 - i. David Consky, Document Specialist
 - j. Justin Medrano, Document Specialist
 - k. Gigi Van Leeuwen, Research Assistant
 - l. Rebecca Henfrey, Research Assistant
 - m. Jason Weston-Wong, Research Assistant
 - n. Sergey Kukov, Information Technology Specialist
 - o. Vasyl Didukh, Information Technology Specialist
 - p. Ringo Chan, Information Technology Specialist
9. Lawyers from the Miami office of Astigarraga Davis Mullins & Grossman PA provided legal assistance to the Investor and also appeared as co-counsel at the hearing. These lawyers include:
- a. Edward Mullins
 - b. Cristina Cardenas
 - c. Annette Escobar
 - d. Sujey Herrera
10. Lawyers from Astigarraga Davis Mullins & Grossman PA were supported by Cynthia Benavides, a Florida Registered Paralegal.
11. Lawyers from the California based offices of Bryan Cave represented the Investor during local appearances in the courts of the State of California in seeking discovery used in these proceedings.

12. Lawyers from the New Jersey firm of Tompkins, McGuire represented the Investor during local appearances in the courts of the State of New Jersey in seeking discovery used in these proceedings.
13. Professor Robert Howse, of New York University, acted as an international law advisor to the Investor throughout the NAFTA proceedings.
14. Mesa Power Group, LLC made repeated attempts to facilitate consultations and negotiations to settle the dispute as mandated by NAFTA Article 1118. In this process, and with respect to issues related to the reporting structure of Ontario government, Mesa Power was advised by StrategyCorp Inc.
15. Creative Counsel, LLC provided trial graphic services to support legal counsel at the NAFTA hearing. These costs have been included in the legal disbursements for the arbitration.
16. In total, lawyers and legal counsel support staff billed to the Investor a total amount of US\$ 6,819,939.91 including disbursements such as photocopies, translation services, couriers, long distance charges, faxes, and travel and accommodation expenses for hearings and meetings.

2. EXPERT AND WITNESS FEES AND DISBURSEMENTS

17. The Investor retained experts to prepare expert witness statements for submission to the Tribunal and that also attended the hearing as expert witnesses. The Investor also incurred costs in preparing and obtaining the statements of certain fact witnesses. These external experts and witnesses included:
 - a. Robert Low and Richard Taylor of Deloitte LLP;
 - b. Seabron Adamson of Charles River Associates;
 - c. Gary Timm of Deloitte LLP;
 - d. Peter Wolchak; and
 - e. Zohrab Mawani (former Samsung employee);
18. The costs with respect to these experts and witnesses totaled US\$ 1,031,945.16, including disbursements.

3. MESA'S TIME AND DISBURSEMENTS

19. The following members of the management of Mesa Power Group LLC provided instructions and assistance to legal counsel through the course of these proceedings:
 - a. T. Boone Pickens
 - b. Cole Robertson
 - c. Mark Ward

20. Mesa incurred direct disbursement costs with respect to the arbitration in relation to T. Boone Pickens for US\$ 33,172.65. No further costs have been claimed by the Investor for Mr. Pickens' time in instructing counsel in this arbitration or preparing for the hearing.
21. A portion of Cole Robertson's salary that was dedicated to the NAFTA arbitration has been attributed to the costs of these NAFTA proceedings. Mr. Robertson dedicated 80% of his time to the NAFTA Arbitration between July 6, 2011, and December 31, 2012. Thereafter, Mr. Robertson dedicated less than 50% of his time to the NAFTA Arbitration until the end of November 2014. The total cost to the Investor for Mr. Robertson's involvement in the Arbitration is US\$ 356,317.45.
22. From 2013 onwards, staff necessary for the preparation of the arbitration was retained on contract. As a result, the Investor paid Mark Ward in the amount of US\$ 248,977.90 which is attributable to this NAFTA proceeding. An additional US\$ 14,066 was billed in travel expenses for a total of US\$ 263,043.90.
23. The total costs for the management of Mesa Power totaled US\$ 666,700.40.

4. INVESTOR'S PAYMENTS TO THE APPOINTING AUTHORITY AND TO THE PERMANENT COURT OF ARBITRATION

24. The Investor was required to pay US\$10,000 to the ICSID Secretariat as the NAFTA-designated Appointing Authority to enable the constitution of the Tribunal as a result of Canada's failure to provide timely appointments.
25. The Investor also paid a total of US\$ 777,570.55 to the Permanent Court of Arbitration which is acting as secretariat. These fees represented Mesa's share of the administrative arbitration costs.
26. Total amounts paid on account of the Tribunal and international arbitration institution are US\$ 787,570.55.

5. REASONS INVESTOR SHOULD BE AWARDED COSTS

27. NAFTA Article 1135(1) states that "A tribunal may also award costs in accordance with the applicable arbitration rules."
28. Articles 38 and 40 of the UNCITRAL Arbitration Rules ("the Rules") govern the awarding of costs in this proceeding. Article 38 of the Rules gives the Tribunal authority to fix the costs of arbitration while Article 40 sets out the presumptions and tests to be applied by the Tribunal in awarding costs.
29. Articles 38 and 40 of the Rules distinguish representation costs and arbitration costs. Representation costs include legal costs and associated expert fees and management costs. Arbitration costs relate to the cost of the arbitration or institutional fees paid to the Tribunal, the secretariat, and the appointing authority.

30. UNCITRAL Article 40 sets out two separate tests for awarding costs. Paragraph 1 of Article 40 creates a rebuttable presumption that arbitration costs will be paid by the unsuccessful party. Specifically, Article 40(1) states that “the costs of arbitration shall in principle be borne by the unsuccessful party.”
31. The primary circumstance to be taken into account is the degree of success a party has achieved in the arbitration. This will not be known by either party at the date of this cost submission. However, this should be taken into account by the Tribunal.
32. The second test is set out in paragraph 2 of Article 40 of the Rules and gives the Tribunal discretion to apportion representation costs “taking into account the circumstances of the case.”

B. COST AWARDS

1. THE INVESTOR SHOULD BE AWARDED ALL ARBITRATION COSTS

33. If Mesa is successful in any of its claims, then Canada should bear the arbitration costs of this arbitration.²

2. THE INVESTOR SHOULD BE AWARDED ALL REPRESENTATION COSTS

34. If Mesa is successful in any of its claims, then the Tribunal should order Canada to pay Mesa's representation costs in full. In this case, costs should follow the cause. Representation costs as outlined in Article 40(2) are largely left to the Tribunal's discretion based on “the circumstances of the case.”
35. The circumstances of this case require Canada to pay for the costs of Mesa's representation. Given the complexity and novelty of the claim, it is completely reasonable that the Tribunal order Canada to pay the Investor's representation costs.
36. Moreover, representation costs have been awarded by other NAFTA tribunals. For example, representation costs were awarded by the S.D. Myers Tribunal.³
37. Mesa's claim was made in good faith and it was a reasonable action in light of the circumstances of Canada's unfair and non-transparent conduct.
38. Uncontroverted evidence at the hearing confirmed that Ontario always was aware that the Green Energy Investment Agreement (“GEIA”) would be inconsistent with its NAFTA Treaty

² As stated in UNCITRAL Rule 40(1), this is the primary criteria that should be taken into account when awarding arbitration costs and should be followed if that is the case.

³ *S.D. Myers v. Government of Canada*, Final Award (concerning the apportionment of the costs between the Disputing Parties), October 5, 1999, at paras. 48-49 (*Investor's Schedule of Documents at Tab-01*)

- obligations to FIT Program investors,⁴ but, despite this knowledge, Ontario executed the agreement in flagrant disregard of its international law obligations under the treaty. The GEIA was entered into by the Government of the Province of Ontario, and thus, Canada has full responsibility under international law rules and under Article 105 of the NAFTA for the acts taken by the Government of Ontario.
39. Canada had an obligation to carry out its NAFTA treaty obligations in good faith under Article 15 of the *Vienna Convention of the Law of Treaties*. Ontario clearly did not carry out these obligations in good faith as it knowingly violated the NAFTA. Canada did not establish that it had taken any actions to address Ontario's lack of compliance with the NAFTA, despite, for example, Canada's clear knowledge of the existence of NAFTA-non-compliant local content requirements.
40. Additionally, Canada's conduct has consistently prolonged the proceedings and has required additional legal work. For example,
- a. The Investor's claim was needlessly delayed for more than eight months for the constitution of the Tribunal, after filing its Notice of Intent, due to Canada's unilateral assertion that it had not consented to this arbitration and its refusal to appoint an arbitrator in a timely manner.⁵
 - b. During the course of the arbitration proceedings, additional delays occurred, including submissions relating to bifurcation and jurisdiction aimed at bogging down the process, as well as the delay in Canada's document production.
 - c. Canada has consistently not produced documents that have been requested by the Investor. From 2011 onwards, the Investor has persistently highlighted the improper deletion and non-production of documents. These events are set out in the Investor's Reply Memorial at paragraphs 170-181.
 - d. Canada did not cooperate with confidentiality designations for the use of key evidence that the Investor proactively obtained through the 1782 process. This is detailed below.
 - e. Canada summarily objected to the Deloitte Correction letter of October 17th, 2014, while admitting that it did not review the content of the October 17th letter stating that "Canada has only had the chance to briefly review this submission."⁶ At the hearing, it became completely apparent that there was no bona fide reason why

⁴ Testimony of Rick Jennings, Hearing Transcript, Day 2, pp. 286-289, lns 11-17; Handwritten notes of Chris Quirke (MOE) re Domestic Content Consultation-CanSIA, May 15, 2009 (*Investor's Schedule of Exhibits at C-0692*)

⁵ Investor's Letter of January 3, 2012 (*Investor's Schedule of Documents at Tab-02*); Investor's Letter of May 16, 2012 (*Investor's Schedule of Documents at Tab-03*); Investor's Letter of May 28, 2012 (*Investor's Schedule of Documents at Tab-04*)

⁶ Canada's Letter of October 18, 2014, at p. 2 (*Investor's Schedule of Documents at Tab-05*)

Canada's expert could not have assessed the brief correction asserted by the Investor's expert. Canada received the correction letter on October 17th and had until October 30th to analyze the correction before the cross-examination of the Investor's valuation expert occurred. Further, Counsel for the Investor noted that all corrections that were made were made in Canada's favor and in response to Canada's own expert's analysis in his Reply expert report.⁷

41. Such actions caused additional representation costs for the Investor, all of which were borne as a direct result of this arbitration.

a) Obtaining necessary and relevant evidence under Section 1782

42. Further, as a result of Canada's dilatory tactics, the Investor was obliged to obtain documents from third parties through the assistance of US District courts in three US states, pursuant to 28 U.S.C. § 1782 for documents and communications exchanged with Ontario and the Ontario Power Authority relating to the execution and implementation of the GEIA and the FIT program. This relevant evidence was extensively relied upon in these proceedings, in large part because the Investor faced hurdles in obtaining many of the very same documents from Canada. The Investor faced significant opposition from Canada in using this relevant and necessary evidence, resulting in wasted time addressing irrelevant confidentiality and other technical issues relating to the admission of these documents that largely were within the possession and control of Canada.
43. These Section 1782 proceedings were initiated late in 2011 to seek evidence from competitors in the Ontario energy sector who were involved in the events that are at the centre of this NAFTA proceeding. The evidence obtained through these proceedings included documents from Pattern Energy, NextEra, and Samsung, as well as a deposition of Colin Edwards, a representative of Pattern Energy.
44. The evidence that was received through the Section 1782 proceedings has been of critical importance to this arbitration. Prior to the proceedings, for example, Mesa Power had no access to the full terms of the *Green Energy Investment Agreement* or the Power Purchase Agreements entered into by the Korean Consortium, because that information was kept secret by the government despite calls to make those agreements public. The Investor had no way to obtain information about the terms of the *GEIA*, and would not have had any way to seek that document until the NAFTA document request process was underway, which took place in 2013, more than three years after the *GEIA* was signed, and two years after the Notice of Intent was filed.
45. The fact that the Investor had been efficient and proactive in obtaining relevant and material evidence by way of Section 1782 proceedings avoided additional delay in the

⁷ Hearing Transcript, Day 1, at p. 121, lns 6-19

arbitration and protected the Investor's ability to obtain documents. The Investor sought documents from the US to avoid delay, ensure access to documents, and ensure that the arbitration proceedings were able to proceed expeditiously and fairly because it had access to those critical documents.

b) Canada opposed the use of Section 1782 evidence

46. From the outset, Canada sought to prevent the use of any Section 1782 evidence. Canada made submissions before the Tribunal at the First Procedural Hearing requesting that the Investor be prevented from using any evidence obtained through Section 1782 proceedings,⁸ and also filed a Motion to Strike evidence that was obtained through the Section 1782 proceedings,⁹ which was rejected by the Tribunal.¹⁰
47. During the procedural hearing, Canada did not dispute that it was aware that these Section 1782 proceedings were ongoing,¹¹ or that it was formally notified of the proceedings in a July 2012 letter.¹² Canada never took any steps to intervene in the Section 1782 document production process.
48. The documents obtained by the Investor through the Section 1782 process were subject to protective orders issued by various US district courts. These orders complicated the use of the Section 1782 evidence, despite the critical importance of that evidence to the claim, because of potential conflicts between the NAFTA confidentiality order and the terms of the US protective orders. The Investor sought Canada's agreement to reduce the cost of the arbitration proceeding by treating the documents as confidential under the terms of the US Protective orders,¹³ but Canada was unwilling to do so.¹⁴
49. Because the Section 1782 evidence largely consisted of communications that were already in Canada's possession, the Investor also made several requests that Canada produce the Section 1782 evidence in its possession to avoid the problem of rectifying conflicting

⁸ Transcript, Procedural Hearing, October 12, 2012, pp. 174-185, lns 9-1 (*Investor's Schedule of Documents at Tab-06*)

⁹ Canada's Letter of December 9, 2013, at pp. 2-4 (*Investor's Schedule of Documents at Tab-07*)

¹⁰ Tribunal's Letter of December 30, 2013 (*Investor's Schedule of Documents at Tab-08*)

¹¹ Transcript, Procedural Hearing, October 12, 2012, at pp. 174-185, lns 9-1 (*Investor's Schedule of Documents at Tab-06*)

¹² Investor's Letter of July 16, 2012 (*Investor's Schedule of Documents at Tab-09*)

¹³ Investor's Letter of August 30, 2012 (*Investor's Schedule of Documents at Tab-10*)

¹⁴ Canada's Letter of September 7, 2012 (*Investor's Schedule of Documents at Tab-11*)

- confidentiality orders issued by courts and tribunals.¹⁵ Canada consistently opposed requests to simplify the arbitration process by producing those documents.¹⁶
50. Canada's unwillingness to either treat the documents in a manner consistent with the U.S. protective orders or produce the documents independently, threatened to prevent the Investor from using many of these documents. As a result, the Investor was forced to take steps to modify the terms of the Florida protective order, and additional time and resources were wasted addressing the large number of challenges to confidentiality designations that were made by Canada.
 51. Many of the documents that Canada was ordered to produce by the Tribunal overlapped with the Section 1782 evidence because the category included communications between the government and the same competitors that were involved in the Section 1782 proceedings. Canada said that it could not produce certain documents involving third parties, in particular NextEra, because the third party would not consent to the release of the documents for the NAFTA proceedings.¹⁷ Canada said that such consent was required under certain privacy laws.¹⁸ As a result, the Investor was in a position where Canada would not allow any variance from the NAFTA order that would facilitate the Investor's use of the Section 1782 documents, but Canada also maintained that it could not produce communications involving NextEra because the third party would not consent.
 52. Ultimately, the only way that those third party documents could be produced by Canada was if the Investor would agree that the documents involving NextEra would be treated as confidential in their entirety.¹⁹ There was no way for the Investor to obtain those documents from Canada without the Investor agreeing to "blanket designations" that did not comply with the NAFTA confidentiality order. When the Investor sought to use blanket designations to comply with the requirement of NextEra,²⁰ Canada was unwilling to do so.²¹
 53. This Tribunal must take into account Canada's repeated course of conduct, where again and again, Canada refused to take steps to make the arbitration process more efficient. Instead, Canada engaged in conduct designed to delay the arbitration process and make

¹⁵ Transcript, Procedural Hearing, October 12, 2012, at pp. 212-213, lines 1-2 (*Investor's Schedule of Documents at Tab-06*); Investor's Letter of June 19, 2013, at p. 2 (*Investor's Schedule of Documents at Tab-12*)

¹⁶ Transcript, Procedural Hearing, October 12, 2012, at pp. 179-180, lines 22-2 (*Investor's Schedule of Documents at Tab-06*); Canada's Letter of March 21, 2014 (*Investor's Schedule of Documents at Tab-13*); Canada's Letter of November 8, 2013 (*Investor's Schedule of Documents at Tab-19*)

¹⁷ Canada's Letter of December 16, 2013 (*Investor's Schedule of Documents at Tab-14*)

¹⁸ Canada's Letter of January 3, 2014 (*Investor's Schedule of Documents at Tab-16*); Canada's Letter of February 26, 2014 (*Investor's Schedule of Documents at Tab-17*)

¹⁹ Canada's Letter of August 1, 2014 (*Investor's Schedule of Documents at Tab-18*)

²⁰ Investor's Letter of August 30, 2012 (*Investor's Schedule of Documents at Tab-10*)

²¹ Canada's Letter of September 7, 2012 (*Investor's Schedule of Documents at Tab-11*); Canada's Letter of November 8, 2013 (*Investor's Schedule of Documents at Tab-19*)

access to relevant and necessary evidence more difficult. This was made crystal clear when Canada refused to produce Canada’s own governmental documents already obtained in the Section 1782 process – despite clear evidence of their existence and relevance as a result of the Section 1782 process.

54. Many of these and undisclosed related documents *still* have not been produced by Canada despite the fact that they are entirely responsive and relevant to document production requests ordered by the Tribunal.
55. In sum, the Investor requests that the Tribunal order Canada to pay all reasonable representation costs following the principle that “costs follow the award.” This includes ordering Canada to bear the full costs arising from the Section 1782 process, as well as the costs involved in addressing and responding to the large number of confidentiality designations that were raised by Canada.
56. Throughout the Investor’s pleadings, and at the arbitration hearing, it has become clear that but for Ontario’s internationally wrongful actions under the NAFTA, the Investor would have received FIT contracts and no legal action against Canada would have been taken. It is for this reason that Canada should be ordered to pay the Investor’s legal costs if the Investor is successful in its claim.

C. SUMMARY OF INVESTOR’S TOTAL EXPENSES

1. Attorney Fees and Disbursements	US\$	6,819,939.91
2. Witness Costs	US\$	1,031,945.16
3. Management Costs	US\$	356,317.45
4. Fees Paid for Tribunal	US\$	787,570.55
Total:	US\$	9,306,156.02

III. REPRESENTATION COSTS INCURRED BY THE INVESTOR AS A RESULT OF CANADA'S CONDUCT AND VEXATIOUS ARGUMENTATION

57. In the event that the Investor is not successful in any of its arbitration claims, the Investor still should be awarded certain specific and identifiable costs incurred as a result of Canada's vexatious arguments and conduct throughout the course of these proceedings. The Tribunal should grant the Investor costs in any event for those specific instances in which Canada's conduct and argumentation caused the Investor to incur unwarranted additional costs. These claims are made pursuant to Article 40(2) of the UNCITRAL Arbitration Rules.
58. For greater certainty, the costs claimed and outlined in this section are included in the summary of costs above.

A. CANADA'S VEXATIOUS ARGUMENTATION AND CONDUCT

59. Canada's conduct caused the Investor to incur additional unwarranted costs in relation to Canada's conduct with respect to:
 - a. Canada's frivolous assertion of a meritless subsidy defense, and
 - b. Canada's failure to produce documents in a timely and good faith manner.

1. CANADA'S MERITLESS SUBSIDY DEFENCE

60. Notwithstanding that Canada's subsidy defence is less than one sentence long in its Rejoinder Memorial,²² that Canada openly has admitted there is no evidence on the record that would support its subsidy defense,²³ and that the only evidence in the record negated a subsidy defense, Canada consistently has maintained its subsidy defence.
61. Canada had several opportunities prior to its undeveloped Rejoinder Memorial argument on subsidy to raise the issue of subsidy if it truly believed that this was a legitimate defense to any of the claims made in the case at hand. Canada did not utilize these opportunities. Canada did not file a statement of defence to the Investor's Notice of Arbitration. Canada did not raise subsidy as a defence in its Outline of Potential Issues filed on July 31, 2012, or

²² See Canada's Rejoinder Memorial at para 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..."

²³ Canada's Letter of September 15, 2014, at p. 1 (*Investor's Schedule of Documents at Tab-20*); Canada's Letter of October 6, 2014, at p. 2 (*Investor's Schedule of Documents at Tab-21*)

in its Counter-Memorial, despite obviously having canvassed the potential, yet flawed, defenses available.

62. As a precaution, and to make the arbitration proceeding more efficient and economical, the Investor attempted to strike Canada's subsidy defence from the record.²⁴ Canada objected.²⁵ As a result of Canada's objection, the Tribunal ruled on September 4, 2014 (which was subsequently clarified by the Tribunal's September 8 letter)²⁶ allowing further submissions on the issue of subsidy. As a reasonable and prudent litigant, the Investor made a submission on this issue and cross-examined Canada's witnesses on the issue. This submission required both research and drafting by the Investor's legal counsel.
63. The futility and wastefulness of Canada's insistence that the subsidy defense remained a live issue is further highlighted by the fact that Canada made no mention of its subsidy argument at the hearing, other than to state that there is *no* evidence on a subsidy. The only testimony on the subsidy defense came when Canada's own witness, Rick Jennings, completely discounted it.²⁷ Furthermore, it became evident at the hearing, that Canada knew that there would be no subsidy arising from the FIT Program when the program was designed because there was no government funding of FIT contracts, as private ratepayer funds were always used entirely to pay for FIT renewable power contracts.²⁸
64. It is a common arbitration principle that costs be awarded against a party that makes, and continues to assert, frivolous, meritless and vexatious arguments. The Investor consistently has stated that Canada's subsidy argument is frivolous, meritless, and vexatious.
65. It is common sense that any defence must be explained and supported by evidence. Canada merely and incorrectly inferred that statements made in the Investor's submissions were grounds for the Tribunal to rule that the matter at hand was a subsidy. Canada pointed to no documents, witness statements, or any other evidence otherwise to support its position. Canada openly admitted that none exists. For example, in its letter of September 15, 2014 Canada bizarrely stated that not only did no evidence exist of a subsidy if boldly refused to support a defence it carelessly raised:

²⁴ Investor's Motion to Strike, August 12, 2014 (*Investor's Schedule of Documents at Tab-22*)

²⁵ Canada's Letter of August 19, 2014 (*Investor's Schedule of Documents at Tab-23*)

²⁶ Tribunal's Letter of September 4, 2014 (*Investor's Schedule of Documents at Tab-24*); Tribunal's Letter of September 8, 2014 (*Investor's Schedule of Documents at Tab-25*)

²⁷ Testimony of Rick Jennings, Hearing Day 2, at p. 240, lns 14-20:

Q. So, in fact, the Ontario electricity system is not heavily subsidized, is it, sir?

A. No.

Q. In fact, it is not subsidized at all, is it?

A. No, it is not.

²⁸ Testimony of Rick Jennings, Hearing Transcript, Day 4, at p. 240, lns. 14-20; Ministry of Energy and Infrastructure, "Meeting with Solar Consortium to Discuss Demand and Supply of Solar PV Modules" Slideshow, April 28, 2010, at p. 7 (*Investor's Schedule of Exhibits at C-0173*)

The premise of the Claimant's position seems to be that Canada should be required to introduce evidence into the record to prove that the FIT Program is a subsidy. Canada will not do so. The reason is simple, such evidence does not exist.²⁹

66. In these circumstances, it has become clear that Canada's subsidy argument was frivolous, meritless, and vexatious. Even if the Investor is unsuccessful overall in its claims, the Tribunal should order Canada to pay the Investor's costs for this issue as Canada knowingly advanced this argument without any evidence in support of this argument, knowing that it was meritless.
67. The Investor's legal counsel were required to needlessly review the full factual record to prepare for a potential document gathering exercise arising from the last minute assertion of a meritless subsidy defense. Furthermore, counsel and witnesses had to be prepared in the event that the subsidy issue required testimony or argument at the hearing given that Canada had raised the defence and refused to withdraw it. The Investor incurred legal costs in the amount of US\$ 120,000 attributable to Canada's vexatious assertion of the meritless subsidy defense.

2. CANADA'S NON-COMPLIANCE WITH DOCUMENT PRODUCTION

68. In its first document request dated April 17, 2013, the Investor requested the following category of documents:
 - 3(d) Communications between FIT Proponents or their Representatives and the OPA or Ministry of Energy with respect to rule changes before the official announcement of a rule, from September 24, 2009 to June 3, 2011."
69. In deciding on the Investor's first document request, the Tribunal granted request 3(d) in *Procedural Order No. 4*. The Tribunal stated:

The request is **GRANTED** insofar as it relates to items 3(a) and 3(d). The documents have been identified with sufficient precision with respect to timing, parties involved (including the revised definition of "Government Entities" in Annex 1 to Claimant's Reply to Objections of 11 June 2013) and subject matter, so their identification and production should not be unduly burdensome for the Respondent. *Prima facie* at least, the documents appear relevant and material.
70. Paragraph 12.1 of *Procedural Order No. 1* required Canada to produce all documents that are responsive to this request in Canada's "possession, custody, or control". This was an ongoing obligation upon Canada.
71. Despite this obligation, Canada did not produce any documents with respect to Document Request 3(d). Canada certified in its letters of September 13, 2013 and January 16, 2014

²⁹ Canada's Letter of September 15, 2014, at p. 1 (*Investor's Schedule of Documents at Tab-20*)

that it fully produced all documents responsive to the document requests ordered for production.³⁰

72. It is Canada's standard procedure to convey a document index noting all documents responsive to a particular Document Request by Bates number in a particular column.
73. Canada is required to state when a document is responsive to a request. *Procedural Order No. 4* requires a party to identify each document as it relates to each document request. Specifically, paragraph 67(ii)(c) of that Order states:

Each Party shall provide an index of the documents produced with a reference to the respective document production request. Each Party shall also state whether (i) it has produced all responsive documents in its possession, custody or control, (ii) whether responsive documents had previously been submitted as evidence, or (iii) whether no such documents exist;
74. Canada has recognized this requirement, and stated that it complied with this requirement for all document productions that it produced to the Investor, save for one.³¹ For example, in its letter accompanying the document production of January 16, 2014, Canada specifically noted that "[a]s required by *Procedural Order No.4*, we have also indicated on the index the document request to which each produced document responds."³² The one instance where Canada did not make this claim was in their letter dated September 13, 2013 where Canada stated it used its "best efforts" to "identify all of the relevant requests."³³
75. No documents in any index provided with Canada's document productions are listed as responsive to document request 3(d).³⁴
76. Given that a document request was made and granted and no documents were produced, the logical inference may be that no documents exist related to that particular request. If that is the case, the Tribunal's order states that a Party should note that "no such documents exist." Canada did not make such a statement.
77. In fact, in response to other document requests, Canada did produce documents that also were responsive to document request 3(d). These documents involved a communication

³⁰ Canada's Letter of September 13, 2013 (*Investor's Schedule of Documents at Tab-26*); Canada's Letter of January 16, 2014 (*Investor's Schedule of Documents at Tab-15*)

³¹ Canada's Letter of October 16, 2013 (*Investor's Schedule of Documents at Tab-27*); Canada's Letter of December 16, 2013 (*Investor's Schedule of Documents at Tab-14*); Canada's Letter of January 16, 2014 (*Investor's Schedule of Documents at Tab-15*); Canada's Letter of September 17, 2014 (*Investor's Schedule of Documents at Tab-28*)

³² Canada's Letter of January 16, 2014 (*Investor's Schedule of Documents at Tab-15*)

³³ Canada's Letter of September 13, 2013 (*Investor's Schedule of Documents at Tab-26*)

³⁴ See Index to Canada's Document Production, May 21, 2013 (*Investor's Schedule of Documents at Tab-29*); Index to Canada's Document Production, September 13, 2013 (*Investor's Schedule of Documents at Tab-26*); Index to Canada's Document Production, January 16, 2014 (*Investor's Schedule of Documents at Tab-15*)

between a FIT Proponent and the Ministry of Energy, related to rule change and created during the relevant time period. These documents constituted emails from NextEra.³⁵ These documents should have been noted as being responsive to document request 3(d) as well as any other document requests such that Canada would be on record that those all documents constituted the only responsive documents. Instead, Canada just ignored the request altogether.

78. Here, given that documents were produced for other document requests such as Document Request 37, and only relate to NextEra and no additional statements have been made about document production. The logical inference is that no other documents that are responsive to those requests exist.
79. Despite the attestations made by Canada, and the logical inferences arising from those attestations, a different picture unfolded at the arbitration. At the hearing, former Ministry of Energy Assistant Deputy Minister Sue Lo testified that various renewable energy proponents had been in contact with the Energy Ministry. Ms. Lo stated:

Q. Correct. You don't know, sitting here today, whether or not proponents of the FIT program called the Minister of Energy or the OPA about any decisions that the Ministry of Energy was contemplating regarding a connection change point window; correct?

³⁵ See the following exhibits: Ministry of Energy, Meeting Note, August 19, 2010 (*Investor's Schedule of Exhibits at C-0002*) in respect to request 57; Email from Andrew Mitchell (Ministry of Energy) to Craig MacLennan (Ministry of Energy) and Candace Major (Ministry of Energy), December 22, 2010 (*Investor's Schedule of Exhibits at C-0066*) in respect to request 57; Email from Jennifer Wismer (Ministry of Energy) to Michael Maddock (Ministry of the Environment), May 25, 2011 (*Investor's Schedule of Exhibits at C-0069*) in respect to requests 28(c) and 37; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits at C-0090*) in respect to request 37; Email from Bob Lopinski, (Counsel Public Affairs, Inc) to Sonya Rachel, (Ministry of Energy), Konzak, Shantie, (MEI) Prithipal, (MEI), Sue Lo, (MEI), and Rick Jennings (MEI), September 20, 2010 (*Investor's Schedule of Exhibits at C-0094*) in respect to request 57; Email from Samira Viswanathan (Ministry of Energy) to Sunita Chander (Ministry of Energy), June 10, 2011 (*Investor's Schedule of Exhibits at C-0096*) in respect to request 37; Email from Paul Ungerman (Ministry of Energy) to Joanne Lorenzi (Ministry of Energy), April 8, 2010 (*Investor's Schedule of Exhibits at C-0112*) in respect to request 57; Email from Bob Lopinski (Counsel Public Affairs) to Craig MacLennan (Ministry of Energy) et al., April 1, 2010 (*Investor's Schedule of Exhibits at C-0136*) in respect to request 57; Email from Patricia Lightburn (OPA) to Alexandra Wiles (OPA), June 3, 2011 (*Investor's Schedule of Exhibits at C-0156*) in respect to request 34; Email from Chris Benedetti (Sussex Strategy) to Shawn Cronkwright (OPA), June 13, 2011 (*Investor's Schedule of Exhibits at C-0162*) in respect to requests 47 and 48; Ministry of Energy, Briefing Note, "Bruce to Milton Contract Awards", June 15, 2011 (*Investor's Schedule of Exhibits at C-0172*) in respect to requests 16, 28(c), 37, 47, 70 and 71; E-mail from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (Ministry of Energy), February 25, 2011 (*Investor's Schedule of Exhibits at C-0190*) in respect to request 57; Email from Phil Dewan (Counsel Public Affairs) to Rick Jennings (Ministry of Energy), July 19, 2010 (*Investor's Schedule of Exhibits at C-0213*) in respect to request 57; Draft FIT Standard Definitions, July 2, 2010 (*Investor's Schedule of Exhibits at C-0227*) in respect to requests 3(a) and 5(e). Note that other documents were produced in relation to NextEra, however those listed are the only documents contained in the record on this issue.

A. Proponents most certainly did call. I can be confident of that, because our phones were always ringing off the hook.³⁶

80. Almost directly before making such a statement, Ms. Lo had also mentioned email. Ms. Lo stated:

If anyone called, they would have gotten the same message. If anyone e-mailed, they would have gotten the same message.³⁷

81. Given Ms. Lo's testimony, it is not reasonable to assume that NextEra was the only FIT proponent to have contacted the government of Ontario by email. In fact, Sue Lo's statement leads one to believe that numerous proponents were contacting the government through various means, including written emails.

82. Her testimony makes it clear that Canada had received documentation from other proponents that would have met the criteria of the documents request 3(d) which was granted by the Tribunal. Such contacts would have generated records of telephone enquiries to the Government as well as the receipt of emails for direct enquiries. Canada did not disclose or produce any of this documentation.

83. The suppression of such relevant and material evidence prejudiced the ability of the Investor to properly assert its claim with respect to better treatment provided to other investors in like circumstances, and also with respect to the fairness of such treatment. Canada provided no documents despite Ms. Lo's admission on the stand.

84. Moreover, this is not the first time that the Investor has complained about Canada's non-compliance with document production ordered by the Tribunal. On February 18, 2014, the Investor complained about similar non-production.³⁸ The Investor's February 18th letter specifically noted the existence of relevant evidence known to the Investor relating to a meeting and exchange between Ontario and NextEra. Yet, Canada had not produced the documents addressed in that letter. The letter stated :

The Investor's Document Request No. 49 details specific meetings that were known to occur between NextEra and the OPA. Yet, there is a general absence in Canada's production of any meeting minutes, or notes of any kind, from the OPA addressing NextEra's unprecedented request to circumvent the standard limit of transmission capacity that it was experiencing in the West of London region which would be solved if NextEra was able to connect to this powerful 500kv Bruce to Longwood line transmission line located in the geographically adjacent Bruce region.

Canada has not provided the documents responsive to Document Requests arising from meetings between NextEra and the OPA. Decisions in competitive regulatory programs are not made in a vacuum. The Investor reasonably expected that Canada would produce

³⁶ Hearing Transcript, Day 3, at p. 175, lns 14-16.

³⁷ Hearing Transcript, Day 3, at p. 174, lns 6-8.

³⁸ Investor's Letter of February 18, 2014 (*Investor's Schedule of Documents at Tab-30*)

documents from the OPA evidencing NextEra's unprecedented efforts to modify the FIT process. However, the production was lacking in substantive discussions on this issue.

85. As consequence of this non-compliance, the Investor seeks costs by way of a sanction against Canada's failure to act in good faith during the arbitration. Such an action is a violation of the requirement to provide fair and equitable treatment under NAFTA Article 1105, as well as a violation of the good faith requirement contained in Article 15 of the *Vienna Convention of the Law of Treaties*.
86. Similarly, as shown above, Canada's failure to produce the very same documents that the Investor was able to obtain via the Section 1782 proceedings should be sanctioned as well.
87. The Investor submits that the appropriate remedy for non-compliance with a Tribunal's document production order should be to order Canada to pay for 30% of the Investor's overall legal fees even if the Investor is not successful on its claims. This amounts to US\$ 2,791,847.

IV. THE INVESTOR SHOULD NOT BE RESPONSIBLE FOR CANADA'S COSTS

88. In the event the Investor is not successful in this arbitration the Investor should not bear Canada's arbitration or representation costs.

A. THE INVESTOR SHOULD NOT BE RESPONSIBLE FOR CANADA'S ARBITRATION COSTS

89. In the *Azinian v. Mexico* NAFTA arbitration, the Investor's claim was dismissed for lack of merit, however, the Tribunal ordered that each party pay its own arbitration and representation costs. In doing so, the Tribunal focused on four factors:
- i. The novelty of the case,
 - ii. The Investor's professional conduct throughout the proceedings,
 - iii. That the respondent invited litigation through its conduct in related domestic proceedings, and
 - iv. That any award of costs would punish those who had a minor role in the investment.³⁹
90. The Investor contends that the Tribunal should take these factors into consideration.
91. In the present case, several aspects of the claim were novel, such as the substantive application of NAFTA's MFN provision, the correct interpretation of procurement under NAFTA Article 1108, and clarification of claims that may be brought by the Investor, its subsidiaries in other countries as well as its investments in other countries, among others.
92. Moreover, there was no unreasonable or wasteful conduct on the Investor's behalf. All steps taken by the Investor were steps taken to efficiently and effectively resolve the present dispute. In addition, Canada effectively invited this dispute through its preferential treatment of the Korean Consortium and the Consortium's joint venture partners and subsidiaries, which formed the basis of the Investor's claims under NAFTA Articles 1103, 1102, and 1105, alongside its prima facie illegal local content requirements in violation of NAFTA Article 1106, and continuing with its travesty of the the implementation of the FIT program.
93. Further, the Investor has outlined, in the representation costs section of Part 2 above, various instances of Canada's conduct which is no meritorious of any award of costs.

³⁹ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999, at para 125-126 (***Investor's Schedule of Legal Authorities at CL-104***)

94. On the basis of these factors, as well as demonstrated instances of Canada's conduct throughout this arbitration, the Investor submits that it should not be responsible for Canada's arbitration costs.

B. THE INVESTOR SHOULD NOT BE RESPONSIBLE FOR CANADA'S REPRESENTATION COSTS

95. Further, NAFTA jurisprudence is clear that while the Tribunal retains discretion in the award of costs, key considerations including the complexity and novelty of a case, as well as the parties conduct throughout the case, may be determining factors in cost awards. These factors are to be considered alongside overall success of a disputing party for representation costs.
96. The factors stated in the *Azinian v. Mexico* case, are equally applicable to representation costs.⁴⁰ However, such factors are also supported by numerous NAFTA awards.
97. In *GAMI Investments v. Mexico*, the tribunal made no award of costs and ordered the disputing parties to bear the fees of and expenses of the tribunal equally although the claim was dismissed. Here, one of the key considerations the tribunal took into consideration was that GAMI's grievance was serious and raised questions as to the regulatory acts and omissions made by the Respondent.⁴¹
98. In *Loewen*, likewise, though the Investor's claim was dismissed, the Tribunal ordered each party to bear their own costs and pay equally for tribunal costs. That Tribunal noted the difficult and novel questions "of far reaching importance for each party."⁴² Similarly, in *UPS v. Canada*, the Investor's claim was dismissed and the Tribunal ordered that the parties bear their own costs for the arbitration.⁴³ No further reasoning was given by this Tribunal for its decision.
99. As outlined in the arbitration costs section, in the present case, the Investor presented a serious case, raising issues of first instance and in the face of Canada's failure to comply with the terms of the FIT Program with an absence of fairness and transparency. Later evidence also demonstrated the fact that Canada knowingly acted in non-conformity with its NAFTA obligations when it designed the FIT Program. Furthermore, the Investor's claim was conducted in a thoughtful, serious, efficient and professional manner. All steps taken by the Investor were taken to efficiently and effectively resolve the present dispute.

⁴⁰ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999, at para 125-126 (***Investor's Schedule of Legal Authorities at CL-104***)

⁴¹ *GAMI Investments Inc (U.S) v. Mexico (UNCITRAL)* at para 135 (Final Award) (Nov. 15, 2004) (***Investor's Schedule of Legal Authorities at CL-195***)

⁴² *The Loewen Group Inc. (Can) v. United States*, ICSID (W. Bank) ARB(AF)/98/3 at para 240-241 (Award) (June 26, 2003) (***Investor's Schedule of Legal Authorities at CL-121***)

⁴³ *UPS v. Canada*, (UNCITRAL) at para 88 (Award on the Merits) (June 11, 2007) (***Investor's Schedule of Legal Authorities at CL-148***)

Consequently, the Tribunal should consider past NAFTA jurisprudence on this matter and order that Canada be responsible for its own representation costs should the Tribunal find the Investor not to be successful on the merits of its claim.

V. TOTAL COSTS SOUGHT BY THE INVESTOR

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Appleton & Associates International Lawyers
Astigarraga Davis Mullins & Grossman, P.A.