

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

BETWEEN:

MESA POWER GROUP, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

REPLY TO THE CLAIMANT'S SUBMISSION ON COSTS

March 26, 2015

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I. INTRODUCTION

1. The Claimant has failed to prove that it is entitled to any of its costs in this arbitration. Its request for costs is based on unsupported allegations with respect to various procedural matters that have already been decided by the Tribunal in Canada's favour. For this reason alone, the Claimant's request should be denied in its entirety regardless of the outcome of this arbitration. In addition, the Claimant's request should also be rejected on other grounds. In particular, the Claimant asks that the Tribunal award it costs to which it is not entitled under the UNCITRAL Arbitration Rules, for which it has not provided the required supporting detail, and which are excessive and unreasonable. As Canada explained in its Submission on Costs, Canada should be awarded all of its costs in this arbitration, including both its share of the Tribunal's fees and expenses, and the reasonable costs of its legal representation and assistance.¹

II. THE CLAIMANT IS NOT ENTITLED TO ANY COSTS IN THIS ARBITRATION

2. The Claimant argues that it should be awarded its costs in this arbitration because Canada's conduct resulted in prolonged proceedings and required additional costs to be incurred.² However, the arguments that it offers in support of these claims are frivolous and merely ask the Tribunal to reconsider issues that have already been decided in Canada's favour. The Claimant may disagree with the decisions of the Tribunal, but that is no justification for asking that it be awarded its costs. In short, the Claimant should not be entitled to any costs in this arbitration regardless of the outcome.

3. As an initial matter, the Claimant appears to argue that it should be awarded its costs merely because Canada defended itself in this arbitration.³ Indeed, the Claimant claims that

¹ Canada's Submission on Costs, ¶ 39.

² Claimant's Submission on Costs, ¶ 40.

³ Claimant's Submission on Costs, ¶ 38. The Claimant alleges that Ontario was always aware that the Green Energy Investment Agreement ("GEIA") would be inconsistent with the NAFTA but executed the agreement nonetheless. In support of this, the Claimant points to exhibit C-0692 and the testimony of Mr. Rick Jennings at the hearing. However, the Claimant is, as it has done on numerous occasions, entirely misconstruing the evidence. As Mr. Jennings noted at the hearing, exhibit C-0692 did not relate at all to the GEIA. The GEIA's enactment was not a

Canada's decision to defend itself was an act of bad faith which violated Article 15 of the *Vienna Convention on the Law of Treaties* ("VCLT").⁴ First, the argument that the defence of a claim in arbitration amounts, in and of itself, to bad faith is frivolous. A State is not guilty of bad faith merely because it refuses to accept the allegations made by the Claimant – especially where, as is the case here, those allegations are meritless. Second, the Claimant's argument appears confused. Article 15 of the VCLT relates to a State's consent to be bound by a treaty through accession. It has absolutely no relevance to anything at issue in this arbitration, and Canada is at a loss to understand why the Claimant has cited it here.⁵

4. The Claimant also alleges that it is entitled to its costs because Canada (1) delayed in constituting the Tribunal and wasted further time by requesting that the proceedings be bifurcated because of the Claimant's failure to respect Article 1120, (2) wasted time and resources by pointing out that the logical conclusion of the Claimant's arguments on the nature of the FIT Program was that the Program constituted a subsidy, (3) failed to produce documents (which do not exist or are not in Canada's control) in a timely manner, (4) failed to cooperate during the Claimant's *ex parte* 1782 proceedings in the U.S. Courts, and (5) objected to the Claimant's submission of a new damages analysis a few days before the beginning of the hearing. None of these allegations have any merit, nor do they justify an award of costs against Canada.

5. First, any alleged delays at the beginning of this arbitration resulted solely from the Claimant's own failure to respect the conditions of Canada's consent to arbitration in Article 1120. Canada is under no obligation to constitute a Tribunal where it has not consented to arbitrate a dispute. Similarly, it was entirely appropriate for Canada to request an initial phase to

breach of the NAFTA and there is no evidence to suggest it was (See testimony of Rick Jennings, October 27, 2014, pp. 284:17-289:17).

⁴ Claimant's Submission on Costs, ¶ 39.

⁵ Article 15 of the VCLT, titled "Consent to be Bound by a Treaty Expressed by Accession," provides as follows: "The consent of a State to be bound by a treaty is expressed by accession when: (a) The treaty provides that such consent may be expressed by that State by means of accession; (b) It is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or (c) All the parties have subsequently agreed that such consent may be expressed by that State by means of accession."

assess the consequences of the Claimant's failure to submit this dispute to arbitration in accordance with the procedures laid out in Chapter 11. As Canada explained in its Submission on Costs, it is the Claimant that should bear all of the costs associated with its failure to respect Article 1120, not Canada.⁶

6. Second, as Canada also explained in its Submission on Costs, the subsidy issue was created entirely by the Claimant because of the manner in which it chose to argue its case.⁷ Nevertheless, the Claimant asks the Tribunal to award it US \$120,000 for costs that it alleges were incurred researching and drafting submissions and cross-examination questions on the issue.⁸ However, as the record shows, the Claimant spent hardly any time at all on the issue at the hearing, and in particular, asked almost no questions during the cross-examinations of Canada's witnesses.⁹ It is the Claimant who should bear the costs of both parties associated with this issue, not Canada.

7. Third, over the course of this arbitration, the Claimant has repeatedly argued that Canada has failed to meet its document production obligations. Each time the Tribunal has ruled otherwise.¹⁰ Yet, in its request for costs, the Claimant ignores the Tribunal's prior rulings and continues to argue that Canada did not comply with its obligations to produce all responsive documents in its custody.¹¹ It also argues that Canada has not complied with its obligations because Canada failed to identify all of the specific requests to which each document responded in its document production index. Neither of these claims have merit, and neither justify an award of costs against Canada.

⁶ Canada's Submission on Costs, ¶12.

⁷ Canada's Submission on Costs, ¶ 36.

⁸ Claimant's Submission on Costs, ¶ 67.

⁹ The Claimant cross-examined one witness on the issue of subsidy, Mr. Rick Jennings (Hearing Transcript, October 27, 2014, pp. 239:25-240:25). The Claimant itself admits that this was the only testimony given on the subsidy issue at the hearing. See Claimant's Submission on Costs, ¶ 63.

¹⁰ Procedural Order No. 4, ¶67(i); Procedural Order No. 5, ¶31(iv),(v); Procedural Order No. 7, ¶27; Letter from the Tribunal dated March 19, 2014.

¹¹ For example, the Claimant points to its letter of February 18, 2014 as proof that Canada did not produce all relevant documents. However, the Tribunal already ruled on the request raised in that letter, stating that it had "no reason to doubt [Canada's] statement" that all responsive documents had been produced.¹¹

8. Confusingly, the Claimant again argues that Canada's alleged failure here is a breach of Article 15 of the VCLT. As Canada explained above, that Article is completely irrelevant and Canada cannot understand why the Claimant refers to it in this context. The Claimant also claims that Canada's alleged non-compliance with its document production obligations violated Canada's obligations under NAFTA Article 1105.¹² Leaving aside the fact that it is completely inappropriate to allege a new violation of NAFTA Chapter 11 in the context of a cost submission, this claim is absurd as a matter of law. The Claimant offers no proof that a State is required to produce documents in an international arbitration because of the customary international law minimum standard of treatment.

9. Further, and most importantly, the Claimant's allegations that Canada has not respected its obligations with respect to document production are entirely false. This is shown by the very evidence that the Claimant offers to support its claims. In its arguments, the Claimant specifically refers to Canada's response to Document Request No. 3(d) ("DR 3(d)").¹³ However, the Claimant's own submissions show that Canada did produce documents responsive to DR 3(d)¹⁴ and that it did label documents as responsive to DR 3(d) on its index. Moreover, of the small handful of specific documents that the Claimant alleges should also have been labelled as responsive to DR 3(d) by Canada, a *prima facie* review shows Canada acted appropriately. For example, many of these documents are not even captured in the date range of the document request proposed by the Claimant. Of course, Canada does not claim, and has never claimed, that the indexes that it produced were perfect in this regard.¹⁵ Canada made best efforts to identify the relevant requests to which a document responded, and the Claimant's own evidence shows that, for the most part, Canada was successful in those efforts. To the extent that a document could have been identified as responsive to another request on Canada's index, the Claimant has not

¹² Claimant's Submission on Costs, ¶¶ 85.

¹³ Claimant's Submission on Costs, ¶¶ 68-78.

¹⁴ Claimant's Submission on Costs, ¶ 77.

¹⁵ Indeed, Canada's own document production index alerted the Claimant to this fact and the Claimant did not object. (See for example, Letter from Canada to the Claimant dated September 13, 2013 indicating "[w]here a document responds to a number of different requests, Canada has made best efforts to identify all of the relevant requests.").

explained how such a failure could possibly have resulted in additional costs since it was incumbent upon the Claimant to review all of the documents Canada produced anyways.

10. Fourth, the Claimant argues that it should be awarded costs because Canada refused to accept and participate in its *ex parte* applications to the U.S. Courts under Section 1782. It claims that it was left no choice but to seek assistance from the U.S. Courts to obtain documents in this proceeding “as a result of Canada’s dilatory tactics.”¹⁶ The facts, however, are to the contrary. The Claimant initiated its Section 1782 proceedings prior to the constitution of the Tribunal.¹⁷ During this period, Canada was still requesting that the Claimant enter into consultations.¹⁸ The Claimant has offered no reason at all why Section 1782 proceedings were necessary at that stage of the proceedings. In fact, it is clear that the Claimant decided to use Section 1782 prior to the constitution of the Tribunal in order to avoid the Tribunal’s scrutiny of its fishing expeditions and so that it could benefit from the broad view of discovery in the U.S. Courts. As Canada has explained in its Submission on Costs, the Claimant should bear all of the costs associated with these burdensome, unnecessary, unauthorized and *ex parte* proceedings, not Canada.

11. Finally, the Claimant contends that it should be awarded costs because Canada objected to the Claimant’s October 17, 2014 attempt to submit a new damages theory from Deloitte mere days before the hearing. Once again, the Claimant ignores the rulings of the Tribunal in this regard. Indeed, despite the Tribunal’s conclusion that the Claimant’s letter was not a correction as allowed in Procedural Order No. 14,¹⁹ the Claimant continues to argue it was. Canada will not belabour the issue any further except to re-emphasize that any costs arising out of this are due to the Claimant’s own tactics and as a result, speak to why Canada should be awarded costs in this arbitration, not the Claimant.²⁰

¹⁶ Claimant’s Submission on Costs, ¶ 42.

¹⁷ Canada’s Letter to the Tribunal dated October 5, 2012, p. 7 and Tab 12.

¹⁸ Letter from Canada to the Claimant dated December 30, 2011.

¹⁹ Letter from the Tribunal dated October 20, 2014.

²⁰ Canada’s Submission on Costs, ¶ 33.

III. THE CLAIMANT IS NOT ENTITLED TO RECOVER THE COSTS THAT IT SEEKS

12. As Canada has shown above, the Claimant has offered no justification for why it should be awarded any of its costs in this arbitration, regardless of the outcome. However, even if this Tribunal were to further examine the Claimant's request, it is clear that many of the specific costs that the Claimant seeks to recover are inappropriate and must be denied for other reasons as well. In particular, as explained in more detail below, the Claimant attempts to recover costs which cannot be recovered under the UNCITRAL Arbitration Rules, fails to provide sufficient specific details with respect to its alleged costs, and claims unreasonable amounts for certain fees and disbursements.

1. The Claimant Attempts to Recover Costs to Which It Is Not Entitled Under the UNCITRAL Arbitration Rules

13. Article 38 of the 1976 UNCITRAL Arbitration Rules defines the term "costs" to include only:

- a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- b) The travel and other expenses incurred by the arbitrators;
- c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

14. The Claimant ignores this definition and attempts to recover costs which are not included in the exclusive list of categories set out in Article 38. In particular, the Claimant has asked the Tribunal to award costs for the Claimant's own time and disbursements in bringing this claim.

Under the category of “management costs” the Claimant requests that costs for the time spent instructing counsel by Mr. Cole Robertson, Vice President of Finance for Mesa Power Group, LLC and Mr. Mark Ward, Chief Development Officer and Executive Vice-President of Mesa Power Group, LLC, be awarded to the Claimant along with additional costs incurred by the Claimant directly to hire staff on contract for the preparation of the arbitration.²¹ The Claimant cannot recover such costs. Article 38 of the UNCITRAL Arbitration Rules does not permit a Claimant to recover the salaries of its own employees, nor does it allow the Claimant to recover the costs of staffing new positions in its own organization.

2. The Claimant Has Failed to Provide the Required Detail to Recover Its Costs

15. Despite asking the Tribunal to award it “specific and identifiable costs” in this arbitration, the Claimant has failed to provide the basic details necessary for the Tribunal to assess the reasonableness of the Claimant’s costs. For example, the Claimant has asked the Tribunal to award it its alleged legal costs and disbursements in this arbitration totalling US\$ 6,819,939.91.²² These legal costs allegedly capture not just the work done by Appleton & Associates International Lawyers and Astigarraga Davis Mullins & Grossman PA, who appeared for the Claimant in this arbitration, but also lawyers it retained for its *ex parte* Section 1782 proceedings before the U.S. Courts in California and New Jersey, as well as the costs associated with hiring Professor Robert Howse, Strategy Corp Inc., and Creative Counsel LLC.²³ However, the Claimant has failed to provide the Tribunal with a breakdown of the hours worked for each of the relevant individuals or the rates charged – indeed, it has not itemized a single cost even at the firm or organizational level. Absent any breakdown of the specific legal costs and disbursements incurred, and in particular, the hours spent on this matter and the hourly rates charged, it is impossible for Canada and the Tribunal to determine whether any of these costs are reasonable.

²¹ Claimant’s Submission on Costs, ¶¶ 19-23.

²² Claimant’s Submission on Costs, ¶ 16.

²³ Claimant’s Submission on Costs, ¶ 13-15.

16. Similarly, the Claimant is also seeking a total of US \$1,031,945.16 for costs allegedly related to its experts and witnesses, and US \$356,317.45²⁴ in costs allegedly relating to the time and disbursements incurred by members of its own management team. As explained above, the Claimant is not entitled to recover the latter costs,²⁵ but even if it were the Claimant has once again failed to provide the necessary information for the Tribunal to assess whether or not any of the claimed costs are reasonable.²⁶

17. Finally, the Claimant requests that, “in the event it is not successful on any of its claims in this arbitration”, the Tribunal award it US \$2,791,847 in costs “based on Canada’s vexatious argumentation and conduct” which allegedly caused “specific, identifiable, and unnecessary costs”.²⁷ The Claimant indicates that this number amounts to 30% of its “overall legal fees”.²⁸ It further requests that the Tribunal award it US \$120,000 for Canada’s “vexatious assertion of the meritless subsidy defence.”²⁹ The Claimant offers no explanation as to how it arrives at these numbers and percentages – in fact they appear completely arbitrary. As such, there is no basis on which the Tribunal can assess their reasonableness.

3. The Fees and Costs that the Claimant Seeks to Recover are Unreasonable

18. While the Claimant has not provided sufficient detail for Canada and the Tribunal to fully assess whether the specific amounts of the costs claimed by the Claimant are reasonable, it is

²⁴ Canada notes that the Claimant has made a computational error in its calculation of management costs. On page 10 of its Submission on Costs, it indicates management costs in the amount of US \$356,317.45; however, it claims a total of US \$666,700.40 in ¶ 23 of its submission. When adding up the costs identified in ¶¶ 20-23, Canada calculates a total of US \$652,534.

²⁵ See ¶ 14 above.

²⁶ The Claimant has failed to provide a breakdown of the hours worked and the rates billed for both Mr. Robertson and Mr. Ward. In addition, the Claimant has failed to provide amounts of the specific disbursements incurred by Mr. Pickens.

²⁷ Claimant’s Submission on Costs, ¶ 102.

²⁸ Claimant’s Submission on Costs, ¶ 87.

²⁹ Claimant’s Submission on Costs, ¶ 67.

clear that some of the categories of costs that the Claimant seeks to recover are *prima facie* unreasonable and should be rejected.

A. The Claimant's Legal Fees and Disbursements are Unreasonable

19. As noted above, the Claimant asks the Tribunal to award it costs associated with its legal representation not just in this arbitration, but also in the *ex parte* Section 1782 proceedings that it began without the authorization of the Tribunal before the U.S. Courts in California and New Jersey.³⁰ However, as Canada discussed in its Submission on Costs, the Claimant inappropriately ignored the authority of the Tribunal to control the collection of evidence in this arbitration by making applications for judicial assistance of U.S. Courts *prior to the constitution of the Tribunal* on an *ex parte* basis. As such, any costs arising out of these proceedings should be borne by the Claimant alone.³¹ Indeed, it is entirely inappropriate and unreasonable for the Claimant to seek to recover legal fees for counsel that never appeared on its behalf in this arbitration, and who in fact, only appeared in U.S. Court proceedings where Canada was not even present.

20. The Claimant's legal fees for counsel who appeared for it in this arbitration are also unreasonable. The Claimant seeks costs for the services of ten lawyers from Appleton & Associates International Lawyers, four lawyers from Astigarraga Davis Mullins & Grossman PA, and 17 support staff.³² The number of lawyers and support staff who billed time on this matter – 31 in total - is excessive. Indeed, the Claimant appears to have required over four times as many support staff as Canada.³³ Not only did this result in unreasonable legal fees, but it also led to the Claimant having an unreasonable number of breakout rooms at the Arbitration Place, thus unnecessarily increasing the arbitration costs.

³⁰ Claimant's Submission on Costs, ¶¶ 11-12.

³¹ Canada has more fully addressed the issues with respect to the Claimant's *ex parte* use of discovery proceedings in the U.S. in its Submission on Costs at ¶¶ 13-15.

³² Claimant's Submission on Costs, ¶¶ 7-10.

³³ Canada's submission on Costs at Annex I.

21. Finally, the Claimant's request for costs for the fees it paid to StrategyCorp, a lobbying firm hired by the Claimant to allegedly facilitate consultations and negotiations pursuant to Article 1118 of the NAFTA, is also unreasonable. Negotiations and consultations never occurred in this arbitration because the Claimant refused Canada's offers to consult.³⁴ As such, the Claimant should not be able to recover any of its costs in this regard.

B. The Claimant's Expert and Witness Fees and Disbursements are Unreasonable

22. The Claimant has also asked the Tribunal to order Canada to pay the costs of its expert witnesses and fact witnesses. However, during the course of the arbitration, the Claimant put forward expert reports and witness statements that served no purpose and were merely wasteful of the parties and Tribunal's time. For example, the Claimant filed the witness statement of Mr. Peter Wolchak with its Reply submission. Mr. Wolchak's witness statement is cited only four times in the Claimant's legal arguments of the Reply.³⁵ Moreover, Mr. Wolchak's entire witness statement simply recites information that can be found in publicly available documents and news articles, making his witness statement entirely unnecessary.

23. The Claimant also provided an expert report by Mr. Gary Timm in support of its allegation that the ranking of its TTD and Arran projects by the Ontario Power Authority during the launch period violated Article 1105. However, Mr. Timm's report failed to contain a single conclusion on this point – indeed, as was confirmed by Mr. Timm on cross-examination,³⁶ it failed to

³⁴ Canada's Objection to Jurisdiction, ¶ 37 citing correspondence from the Department of Foreign Affairs and International Trade to Barry Appleton dated July 13, 2011, September 21, 2011, September 30, 2011, October 28, 2011 and December 30, 2011.

³⁵ Claimant's Reply Memorial, ¶¶ 170, 171, 778, and 784.

³⁶ Transcript Testimony of Gary Timm, October 29, 2014, Tr. pp. 113:5-115:8, 118:12-120:3, 130:15-131:2 (admitting that while the LEI report caused him to question the fairness of the launch period review, he did not conclude any actual fairness related issues existed); Tr. pp. 116:15-117:8 (admitting that he did not conclude that the Claimant should have been awarded the prior experience criteria point); Tr. pp. 115:9-116:14 (admitting that he did not conclude that the Claimant should have been awarded the financial capacity criteria point); Tr. p. 114:16-23 (admitting that even though the Claimant asked him to provide comments on the OPA's award of each of the criteria points the Claimant applied for, he did not have any comments with respect to the OPA's evaluation of the major equipment control criteria point).

conclude anything at all. Further, at the hearing and in its post-hearing submissions, the Claimant failed to advance any arguments in support of its claim that relied on Mr. Timm's report.³⁷ Mr. Timm's expert report was of no use, was entirely unnecessary, and demonstrates the excessive nature of the Claimant's costs in this arbitration.

24. The Claimant also submitted a report from Mr. Seabron Adamson that contained parts that were clearly beyond his expertise and of no assistance in this arbitration. In particular, while Mr. Adamson is an economist, his report commented on the engineering aspects of electrical transmission in Ontario—subjects well outside his expertise.³⁸ In fact, Mr. Adamson himself noted that Canada's own technical witness, Mr. Bob Chow, "could explain better."³⁹

25. The Claimant also seeks to recover costs related to testimony given by Mr. Zohrab Mawani, a former Samsung employee, not in this arbitration but rather as part of the Claimant's Section 1782 proceedings in the U.S. Courts.⁴⁰ As discussed above, Canada should not be required to cover any of the costs associated with proceedings that were outside this arbitration and were entirely unnecessary. The use of the word "witness" in Article 38(d) of the UNCITRAL Arbitration Rules is intended to cover witnesses in the arbitral proceeding only.

26. Finally, the Claimant seeks to recover US \$47,238.65 in travel and disbursement costs solely for Mr. Pickens and Mr. Ward⁴¹, even though the latter was not even a witness in these proceedings. The Claimant has provided no details to justify such an excessive cost for travel for just two individuals. Canada notes that these costs are more than the travel costs that Canada

³⁷ Hearing Transcript, October 31, 2014, Tr. pp. 135:15-137:11, 159:3-7, 160:22-161:4, 164:21-165:4.

³⁸ Expert Report of Seabron C. Adamson, ¶¶121-135.

³⁹ Hearing Transcript, October 29, 2014, p. 165:16-17. More generally, see pp. 163:13-177:14.

⁴⁰ Claimant's Submission on Costs, ¶ 17(e).

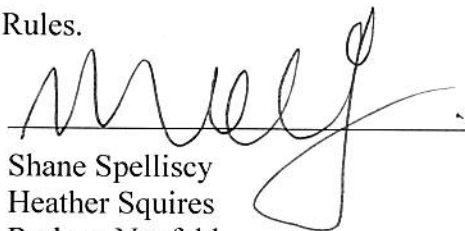
⁴¹ Claimant's Submission on Costs, ¶¶ 20, 22.

seeks to recover for its entire legal team in this arbitration.⁴² In short, such a claim is not reasonable.

IV. CONCLUSION

27. The Claimant's Submission on Costs continues its pattern of wasting the time of Canada and this Tribunal by re-arguing points it has already lost and by attempting to recover costs for actions it took outside the context of this arbitration. The Claimant's tactics throughout this proceeding resulted in confusion and wasted resources. Such tactics made this arbitration inefficient and needlessly complex. In short, the Claimant's Submission on Costs reinforces Canada's position that the Tribunal should award Canada all its costs pursuant to NAFTA Article 1136 and Article 40 of the UNCITRAL Arbitration Rules.

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⁴² Canada's Submission on Costs, Annex II (Travel costs for Canada totalling CDN \$46,339.97).