PUBLIC VERSION

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

MESA POWER GROUP, LLC

Investor

v.

GOVERNMENT OF CANADA

Respondent

INVESTOR'S SUBMISSION ON THE *BILCON V. CANADA* AWARD

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1. The Investor wrote to the Tribunal advising of the release of the NAFTA Liability and Jurisdiction Award in *Bilcon of Delaware, Inc. et al. v. Canada* (*Bilcon)* on April 6, 2015.[1] The Investor notified the Tribunal of the award but did not file any detailed comments on the award. The Investor simply pointed out areas of argument in its Post Hearing Submission that related to issues that were considered within the *Bilcon* award. The Investor stands by these April 6, 2015, comments and incorporates them by reference into this submission.
2. On May 4, 2015, the Tribunal invited both parties to make submissions on the NAFTA Tribunal award in *Bilcon* by May 14, 2015.
3. This submission contains the Investor's submissions with respect to the relevance of the *Bilcon* award, and including observations on the dissenting opinion of Prof. Donald McRae.
4. This submission will address the following areas:
    a. The clarification of the law of National Treatment;
    b. The International Minimum Standard of Treatment in the NAFTA;
    c. State Responsibility.

I. FACTUAL SUMMARY OF BILCON

5. The Tribunal in *Bilcon* carefully reviewed the facts presented by both parties and concluded that Canada's conduct was inconsistent with the international law standard of treatment in NAFTA Article 1105. The *Bilcon* Tribunal also concluded that Canada provided better treatment to others in like circumstances in contravention of the NAFTA national treatment obligation in NAFTA Article 1102.
6. Bilcon of Delaware (and its controlling American shareholders, collectively referred to in this submission as Bilcon) owned an existing gravel quarry in the Canadian province of Nova Scotia through a local company. The US Investors sought to expand its quarry for the purpose of obtaining gravel for its American operations.
7. The Investors were encouraged by officials of the provincial government to invest in Nova Scotia, and were led to believe by the officials that the project was appropriate for the location it had chosen.
8. Bilcon complied with all local environmental requirements, which included the requirement to obtain permits for its quarry expansion. The permit application was referred to an ad-hoc three person fact finding panel known as a Joint Review Panel (JRP). The JRP members were non-governmental officials appointed jointly by the Canadian federal and provincial governments and operated under the terms of Canadian law and by terms in a special agreement governing this particular permit request.

[1] Appleton & Associates International Lawyers acted as legal counsel for the Investors in the *Bilcon* claim. The comments made in this submission made by Appleton & Associates International Lawyers are solely in their capacity as legal counsel for Mesa Power Group. These comments are not to be construed, in any way, as constituting statements attributable to the Investors in the *Bilcon* claim.

9. The Investors were subject to an array of arbitrary and seemingly politically motivated decisions prior to the JRP process and decision, to which the Investor included in its claim including the referral to the JRP process itself. While the Tribunal considered the factual elements of these actions, the Tribunal decided that breaches arising at this time frame were completed acts that fell outside of the three year limitation period contained in the NAFTA.

10. The *Bilcon* Tribunal found that the JRP did not dispose of the Investors' environmental assessment on the basis of the stated criteria – which was the federal or provincial law on environmental assessment or the JRP's own Terms of Reference. Instead, the Bilcon Tribunal identified the JRP's reliance in its report entirely on what the JPR termed "community core values", which was a concept not part of the relevant legal and regulatory framework.[2]

11. The majority NAFTA award held that the Investor had no advance notice about the employment of this extralegal analytic or any opportunity to confront it.[3] At the same time, the majority found the JRP also failed to analyze Bilcon's proposed environmental mitigation measures, a requirement pursuant to Canadian environmental legislation.[4]

12. On this basis, the JRP recommended that the quarry project would cause "significant adverse environmental effects"; a recommendation that was subsequently accepted by ministerial act by both the relevant Nova Scotia and Canadian Federal government ministers.[5]

13. The *Bilcon* Tribunal thus found that the Bilcon was treated unfairly throughout the JRP process.

14. The *Bilcon* Tribunal also reviewed the differences in treatment provided by governments in Canada to applicants for environmental permissions in similar circumstances. The *Bilcon* Tribunal considered all those who sought environmental permissions to be in like circumstances with the American Investors in *Bilcon*. After carefully reviewing a number of other environmental approval processes, the *Bilcon* Tribunal identified other environmental review procedures in which more favourable treatment had been provided to Canadian applicants in like circumstances, especially with respect to reliance on applicable Canadian environmental law, and the ability of the companies to provide environmental mitigation plans. The *Bilcon* Tribunal concluded that the evidence of such better treatment to Canadian companies in like circumstances to Bilcon, constituted a violation of national treatment under NAFTA Article 1102.

II. CLARIFICATION OF THE NATIONAL TREATMENT TEST UNDER NAFTA ARTICLE 1102

15. The *Bilcon* Tribunal carefully reviewed the jurisprudence with respect to the NAFTA National Treatment obligation in Article 1102. Its award was carefully reasoned and it

[2] *Bilcon* Award at ¶503.
[3] *Bilcon* Award at ¶534.
[4] *Bilcon* Award at ¶535.
[5] *Bilcon* Award at ¶220.

provides a helpful approach to making determinations in regards to the consistency of government measures with the National Treatment obligation.

16. In relation to the legal test applicable to National Treatment, the Tribunal decision is unanimous.

17. The approach to NAFTA National Treatment applied by the *Bilcon* Tribunal is relevant to how this Tribunal should analyze the Most Favoured Nation Treatment analysis under NAFTA Article 1103.

1. LEGAL DETERMINATIONS IN RELATION TO NATIONAL TREATMENT IN BILCON

i) No Requirement to Establish Discriminatory Intent

18. The *Bilcon* Tribunal states in no uncertain terms that National Treatment under the NAFTA does not require any "demonstration of discriminatory intent."[6] The Tribunal stated that this was the test elaborated in the *Feldman* decision, and confirmed in the *UPS* decision.[7]

19. The Investor made similar arguments in the *Mesa Power* case. In its Memorial[8] and Reply Memorial,[9] the Investor argued that that National Treatment under the NAFTA does require any proof of discriminatory intent. Specifically, the Investor relied upon the *Feldman* award while noting that National Treatment under NAFTA contains no distinction between *de facto* and *de jure* discrimination.

20. A finding in this arbitration that a violation of National Treatment under the NAFTA does not require any demonstration of discriminatory intent would be consistent with awards in *Feldman*, *UPS* and now *Bilcon*. As the Investor noted in its pleadings this also would be consistent with WTO law.[10]

ii) Onus of Proof

21. The *Bilcon* Tribunal sets out the appropriate onus of proof at each stage of a National Treatment analysis. The *Bilcon* Tribunal stated that

> ...once a *prima facie* case is made out under the three-part *UPS* test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances that an apparently discriminatory measure is in fact compliant with the "national treatment" norm set out in Article 1102.[11]

22. Hence, once it is established that a local comparator (an investor or investment) is in like circumstances to the investor/ investment based on the nature of the regulatory framework, and that the host state has afforded objectively less favourable

[6] *Bilcon* Award at ¶719.
[7] *Bilcon* Award at ¶719.
[8] Investor's Memorial at ¶¶272-288 and 678- 684.
[9] Investor's Reply Memorial at ¶¶280-281 and 442-447.
[10] Investor's Memorial at ¶279.
[11] *Bilcon* Award at ¶723.

treatment to an investor/investments in relation to domestic investors/investments in like circumstances, the onus shifts to the Respondent state to show that detrimental treatment can be explained as required by legitimate policy objectives.[12]

23. Similarly, in this case, the Investor also argued that the onus shifted to Canada once a *prima facie* case was made by it. Given the nature of investor-state cases, this is the appropriate and principled analysis. The Investor pleaded in paragraph 280 and 281 of the Memorial in *Mesa* that:

> After an investor has demonstrated that the different results stem from different competitive opportunities, the evidentiary burden shifts to the Government to excuse the *prima facie* violation of national treatment. And the burden on the government is a strict one. It requires the government to show that the less favorable treatment was necessary.
>
> So, where there is different treatment in like circumstances, the burden is on Canada to show that the different treatment was not less favourable, or not necessary.[13]

24. Such an approach is consistent with the National Treatment test in the *Feldman*, *Pope & Talbot* awards and now the *Bilcon* award.[14] Further, the Investor noted that such a test is supported by WTO jurisprudence.[15]

iii) The Test for Like Circumstances is Broadly Applied

25. In carrying out its National Treatment analysis, the *Bilcon* Tribunal noted that in finding investors and investments 'in like circumstances' that the NAFTA's language is "not restricted as it is in some other trade liberalizing agreements, such as those that refer to 'like-products.'"[16]

26. More specifically, the *Bilcon* Tribunal noted:

> Article 1102 refers to the way in which either the investor or investment is treated, rather than confining concerns over discrimination to comparisons between similar articles of trade.985 Moreover, the operative word in Article 1102 is "similar", not "identical". In addition to giving the reasonably broad language of Article 1102 its due, a Tribunal must also take into account the objects of NAFTA, which include according to Article 102(1)(c) "to increase substantially investment opportunities in the territories of the Parties".[17]

27. In determining the comparators for its Article 1102 analysis, the *Bilcon* majority noted that likeness required a consideration of "all enterprises affected by the environmental assessment regulatory process," but in this case specifically focused on projects presented by the Investor.[18] The Tribunal rejected Canada's attempts to narrow categories of comparators relating to specific project differences.[19]

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[12] *Bilcon* Award at ¶723.
[13] Investor's Memorial at ¶¶280-281.
[14] *Bilcon* Award at ¶¶ 719-723, referring to *Pope & Talbot Inc. v. Government of Canada* at ¶ 78 ***(Investor's Schedule of Legal Authorities at CL-273)*** and *Marvin Feldman v. United Mexican States* at ¶ 181 ***(Investor's Schedule of Legal Authorities at CL-40).***
[15] Investor's Memorial at ¶¶282-285.
[16] *Bilcon* Award at ¶692.
[17] *Bilcon* Award at ¶692.
[18] *Bilcon* Award at ¶695.
[19] *Bilcon* Award at ¶701.

28. After determining that at least three projects were in like circumstances with Bilcon's project, and that all such projects were afforded better treatment, the Tribunal found that Canada could in no way justify the treatment that Bilcon received.

29. A similar approach should be adopted in this arbitration. The task is much simpler in this case. Canada, as it must, has admitted that the Investor is in like circumstances with all FIT proponents.[20] Yet, this is too narrow an admission in light of the facts and the *Bilcon* Tribunal's analysis. The *Bilcon* approach to likeness establishes that the proper comparator that should be adopted by this Tribunal for the purposes of both National Treatment and MFN; that all proponents seeking renewable energy contracts from Ontario (such as FIT Contracts awarded under the GEIA or the FIT) are in like circumstances.

2. THE DISSENT AGREES WITH THE NATIONAL TREATMENT LEGAL TEST

30. Professor McRae dissented from the majority view on National Treatment and Most Favoured Nation Treatment but only on how to apply the law to the facts. In relation to these two NAFTA obligations, the dissent is only one paragraph long.

31. This short statement is based on a difference between the dissenting arbitrator and the majority on the application of the specific facts to the law in the *Bilcon* claim. Professor McRae makes no mention of, or disagreement with, the legal test set out by the majority for National Treatment. He says:

> …the actions of the JRP could not constitute a violation of Articles 1102 and 1103. In my view, the Claimants were treated in accordance with Canadian law, which all investors are entitled to expect, and thus there is no basis for a claim that there has been a violation of obligations of national treatment or most-favored nation treatment.[21]

32. Professor McRae's continues to say:

> In all other matters I agree with the results reached by my colleagues and thus have nothing further to add.[22]

33. Hence, the Bilcon Tribunal was unanimous in setting out the legal test for National Treatment. In particular, all three arbitrators on the *Bilcon* Tribunal confirmed that the appropriate legal test for National Treatment and for Most Favoured Nation Treatment under the NAFTA has the following elements:

    a. A broad conceptualization of "likeness"

    b. A requirement that the Respondent state has the burden of proof once a *prima facie* case is made by the Investor; and

    c. A complete absence to prove a governmental intention to discriminate to establish a violation of National Treatment or Most Favoured Nation Treatment.

[20] Investor's Post Hearing Brief at ¶261 referencing Canada's Counter Memorial at ¶364.
[21] *Bilcon* Dissenting Opinion of Donald McRae at ¶53.
[22] *Bilcon* Dissenting Opinion of Donald McRae at ¶54.

3. APPLICATION OF THE BILCON AWARD ON NATIONAL TREATMENT IN MESA POWER V. CANADA

34. In the *Mesa* claim, the Investor has demonstrated a *prima facie* case. As the Investor established,[23] and as Canada has admitted,[24] the Investor is in like circumstances with all FIT proponents.[25] Hence, there is no question that the Investor is, at a minimum, in like circumstances with the following FIT proponents:

    a. International Power Canada (IPC);

    b. Boulevard Associates;

    c. NextEra Energy Canada (the Canadian subsidiary of NextEra).

35. Proponents seeking FIT renewable energy contracts who sought contracts outside of the FIT process but through the GEIA also were in like circumstances with Mesa. All were competing for the same limited pool of available electricity transmission capacity which was necessary to obtain FIT contracts. Thus the following are also in like circumstances with Mesa for the purposes of National Treatment.

    a. Samsung Canada, the Canadian subsidiary of the Korean Consortium;

    b. Pattern Renewable Holdings Canada, the Canadian joint venture partner of the Korean Consortium.

36. For the same reason, the following are also in like circumstances with Mesa for the purposes of Most Favoured Nation Treatment:

    a. Samsung C&T and KEPCO, the Korean parties to the Korean Consortium;

    b. Pattern Energy, the American joint venture partner of the Korean Consortium;

    c. NextEra.

37. There is no question that Ontario afforded all such proponents better treatment than it did to the Investor. In relation to Boulevard Associates, and NextEra Energy Canada, Canada admitted they were afforded better treatment to the extent that these companies "sought FIT contracts from the OPA in the same regions as Mesa."[26]

38. Sue Lo confirmed in her sworn cross-examination testimony at the NAFTA hearing that Ontario government was [redacted] at the time of the June 2011 rule change.[27]

39. Similarly, the better treatment provided to Samsung Canada through the GEIA is uncontested. As pleaded throughout this arbitration, the GEIA does not differentiate the Korean Consortium from others also seeking FIT contracts. It simply is better

[23] Investor's Post-Hearing Submission at ¶258.
[24] Investor's Post-Hearing Submission at ¶261 citing Canada's Counter Memorial at ¶364.
[25] Investor's Post-Hearing Submission at ¶¶258-262.
[26] Canada's Counter Memorial at ¶364.
[27] Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.183-184, lns.9-10; Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), May 12, 2011 ***(Investor's Schedule of Exhibits C-0629) [CONFIDENTIAL].***

treatment. Pattern Renewable Holdings Canada similarly benefitted from that better treatment.[28]

40. On the basis of the National Treatment test in *Bilcon*, and as supported by the *Feldman*, and the *Pope & Talbot* awards, the onus then shifts to Canada to justify the preferential treatment that it afforded to those proponents.

41. Canada has provided no principled, or reasonable, justification for the difference in treatment. As canvassed throughout the Investor's pleadings, at the hearing and in the Post-Hearing Submission, nothing that Canada asserts plausibly could be considered anything but an after-the-fact attempt to insert a form of distinction into a regulatory system where there was none.

42. Applying the approach set forth in the *Bilcon* Award, the positions taken by the Investor in its Post Hearing Submission, that it was not afforded similar treatment in like circumstances, are even more clear:

    a. Investment Agreements do not make competitors unlike. In fact, the Investor's competitor, Pattern, treated the programs as two paths to the same result both in its own investment and with respect to other competing investors;[29]

    b. The GEIA and FIT were regulated in the same manner. The projects ran contemporaneously and, throughout the life of the FIT program, FIT and GEIA projects were interchangeable;[30]

    c. The obligations imposed on the Korean Consortium through the GEIA did not achieve any of Canada's stated policy objectives. There was no actual requirement to build manufacturing plants in Ontario in the GEIA and jobs were going to be created by both programs and would, as admitted by Canada's witnesses, be produced by both programs simultaneously without distinction- as they relate to green economy manufacturing- not to any particular regulatory stream. The Korean Consortium failed to meet the obligations in any event and suffered no true repercussions as further evidence of the programs' likeness under *Bilcon*.[31]

    d. Canada's attempt to distinguish the programs – that the Korean Consortium was an anchor tenant- does not survive the factual scrutiny used in *Bilcon*. The Korean Consortium was not an anchor tenant. The MOU, and GEIA were effectively kept secret. Ontario was not seeking such a deal, and this deal did not benefit other FIT proponents. The Korean Consortium had no experience in the field, and nothing contemporaneous supports this assertion.[32]

43. The less favourable treatment afforded to Mesa's investments was a result of Ontario allowing for two regulatory systems to exist for the same purpose, with one being exclusive and both facially and substantially preferential. This is a clear and non-justifiable violation of the National Treatment obligation under the *Bilcon* analysis.

[28] Investor's Post-Hearing Submission at ¶¶266.
[29] Investor's Post-Hearing Submission at ¶¶193-203; ¶263.
[30] Investor's Post-Hearing Submission at ¶¶214-220; ¶264.
[31] Investor's Post-Hearing Submission at ¶¶227-242.
[32] Investor's Post-Hearing Submission at ¶¶248-249.

III. THE INTERNATIONAL LAW STANDARD OF TREATMENT UNDER NAFTA ARTICLE 1105

44. The majority of the *Bilcon* Tribunal found that Canada had taken measures that were inconsistent with Canada's obligations in NAFTA Article 1105. The Tribunal was unanimous in its statement on the meaning of NAFTA 1105.[33]

45. The *Bilcon* Tribunal unanimously made significant determinations in relation to the standard of NAFTA Article 1105, the FTC Statement of Interpretation, and the elements of NAFTA Article 1105.

1. SIGNIFICANT LEGAL DETERMINATIONS ABOUT ARTICLE 1105 MADE BY THE BILCON TRIBUNAL

i) NAFTA Article 1105 Threshold

46. The *Bilcon* Tribunal unanimously re-affirmed that the appropriate standard for a breach of NAFTA Article 1105 is that which is set out by the *Waste Management II* Tribunal.[34] After quoting the relevant passage from that case, the majority of the *Bilcon* Tribunal stated:

> While no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105, the Tribunal finds this quote from *Waste Management* to be a particularly apt one. Acts or omissions constituting a breach must be of a serious nature. The *Waste Management* formulation applies intensifying adjectives to certain items—but by no means all of them – in its list of categories of potentially nonconforming conduct. The formulation includes "grossly" unfair, "manifest" failure of natural justice and "complete" lack of transparency.
>
> The list conveys that there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour. The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach.[35]

47. While coming to this conclusion, the majority of the Tribunal specifically stated that "NAFTA tribunals have . . . tended to move away from the position more recently expressed in *Glamis*, and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors."[36]

48. In rejecting the standard set out in *Glamis* the *Bilcon* majority referred to both *ADF* and *Merill & Ring* stating:

> Thus, the NAFTA tribunal in *ADF Group* in 2003 held that the customary international law referred to in Article 1105(1) is not "frozen in time" and that the minimum standard of

[33] While Professor McRae differed on the application of the law to the specific factual situation in *Bilcon*, the Tribunal was unanimous in its legal determinations
[34] *Bilcon* Award, at ¶442.
[35] *Bilcon* Award at ¶¶443-444.
[36] *Bilcon* Award at ¶435.

> treatment does evolve. The tribunal in *Merrill & Ring*, in 2010, referred to practice, decisions and commentary within both NAFTA and in the wider world...[37]

49. In this arbitration, the Investor made similar submissions in its pleadings advocating for the standard ultimately adopted in *Bilcon*. In its Memorial, the Investor noted that "Many other Tribunals – NAFTA and non-NAFTA alike"[38] have moved away from the *Neer* standard, relying on a significant amount of case law which supports a standard based on the reasonableness of conduct, while noting that the test is a flexible one to be applied in the circumstances as stated by the *Waste Management II* Tribunal[39]

50. In its Reply Memorial, the Investor, similar to the *Bilcon* Tribunal, set out as stated in *Merill & Ring* as well as *Waste Management II*, noting that the Article 1105 standard is an evolutionary standard to be applied as customary international law applies "as it stands today."[40]

ii) FTC Interpretive Note Confirms Broad Protections for Investors

51. The *Bilcon* Tribunal found that the International Law Standard of Treatment in NAFTA Article 1105 did not limit NAFTA Tribunals to conclude that only outrageous conduct constituted a violation of Article 1105.[41]

52. The Tribunal concluded, as did other NAFTA Tribunals, that the basis to establish a violation of NAFTA Article 1105 provides more protection to Investors. The *Bilcon* Tribunal held:

> In light of the FTC Notes and in the specific context of NAFTA Chapter Eleven in which this Tribunal operates, "fair and equitable treatment" and "full protection and security" cannot be regarded as "autonomous" treaty norms that impose additional requirements above and beyond what the minimum standard requires.
>
> NAFTA Article 1105 is, then, identical to the minimum international standard. The crucial question—on which the Parties diverge—is what is the content of the contemporary international minimum standard that the tribunal is bound to apply. NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.[42]

53. The *Bilcon* Tribunal went further to state that:

> In light of the FTC Notes, it is important to emphasize that the trend in the wider world outside NAFTA is only relevant to the extent that such trend has affected the international minimum standard under customary international law. There have been different abstract formulations of the kind of conduct that constitutes a breach of the international minimum standard. Yet all authorities agree that the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard.[43]

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[37] *Bilcon* Award at ¶435.
[38] Investor's Memorial at ¶423.
[39] Investor's Memorial at ¶424- 431.
[40] Investor's Reply Memorial at ¶525; see also Investor's Reply Memorial at ¶¶524 to 53; Investor's Memorial at ¶¶336 to 344, 423.
[41] *Bilcon* Award at ¶433.
[42] *Bilcon* Award at ¶432-433.
[43] *Bilcon* Award at ¶436.

54. In this arbitration, the Investor advanced a similar position in its Memorial where it relied on the *Pope & Talbot*, *Mondev, Tecmed* and *Merill & Ring* awards to argue that the NAFTA Article 1105 standard was not static but rather evolved in relation to contemporaneous standards.[44]

iii) Elements of NAFTA Article 1105 Breached in Bilcon

55. The overall decision in respect to NAFTA Article 1105 in *Bilcon* is summarized by the *Bilcon* Tribunal at paragraphs 588 to 604. There, the majority of the Tribunal clearly states that the basis of the violations of NAFTA Article 1105 are:

a. A breach of the Investors' legitimate expectations; and

b. Procedural and substantive unfairness and arbitrariness.

a) *Breach of Legitimate Expectations*

56. The Bilcon Tribunal confirmed the *Waste Management* standard on legitimate expectations which considers "representations made by the host state which an investor relied on to its detriment."[45] The Tribunal confirmed that "what is needed are specific representations" rather than an abstract or general statement.[46]

57. Throughout their decision, the majority noted the following specific representations and encouragement that was given to Bilcon:

a. The official public policy of Nova Scotia was to welcome investment in mining.[47]

b. Bilcon's local Nova Scotia representative, Paul Buxton met with Nova Scotia Cabinet Minister Gordon Balser who encouraged the quarry project and stressed the need for new jobs in the area.[48]The minister made available to the investors Nova Scotia government investment promotional material stating that "Nova Scotia was open for business."[49]

c. In a letter to the Investors, Nova Scotia Minister Balser specifically stated "I hope that you and your company will continue to move the project forward as I feel it had potential to benefit both you and our area.[50]

d. The Nova Scotia Premier personally told the Claytons (the investors who owned Bilcon) that Nova Scotia was "open for business" and was supportive of the quarry.[51]

e. Specific criteria in the law and regulations of Nova Scotia were to be taken into account.

[44] Investor's Memorial at ¶¶128-138.
[45] *Bilcon* Award at ¶589.
[46] *Bilcon* Award at ¶589.
[47] *Bilcon* Award at ¶456.
[48] *Bilcon* Award at ¶466.
[49] *Bilcon* Award at ¶468.
[50] *Bilcon* Award at ¶468.
[51] *Bilcon* Award at ¶469.

f. Nova Scotia officials referred Bilcon's geologist Mr. Lizak to a document entitled "Industrial Minerals in Nova Scotia," which promoted the quality of production in Nova Scotia.[52]

g. Nova Scotia technical officials gave "tremendous encouragement" for the quarry project.[53]

h. A 1996 policy statement by the Nova Scotia government on minerals which "extols the benefits of mineral exploration and production" to be Nova Scotia economy, including jobs and tax revenues.[54]

i. The Nova Scotia policy also states, "The provincial government 'will promote the province's mineral resource potential at the community level and encourage municipalities and local economic development groups to consider exploration and mining as positive components in local economic development.'"[55]

58. In *Bilcon*, these representations made in various government documents and by governmental officials gave the Investor a specific expectation as to how it and its investments would be treated, or *should be* treated, by Canada.

59. The *Bilcon* majority noted that it was fundamentally unfair for the government officials to encourage the pursuit of the project while other officials later determine that development could not take place. The Tribunal held:

> Viewing the actions of Canada as a whole, it was unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a "no go" zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits."[56]

60. The majority therefore concluded that the Investor's legitimate expectation formed part of those interests which were protected as part of the international law standard of treatment under NAFTA Article 1105.

61. Here, in this arbitration, the Investor made submissions in relation to legitimate expectations at paragraph 395 of the Memorial and paragraph 681 of the Reply Memorial and in the witness statement[57] and subsequent testimony of T. Boone Pickens and Cole Robertson.

62. Mr. Pickens testified at the hearing that he expected "above board and transparent" treatment in Canada as a result of the NAFTA. He stated:

> I remember I sat on the front row and I listened to what they had to say and it made a great deal of sense to me, NAFTA did, that we would work back and forth in North America, and I think from there, that was where I started to think about the North American Energy Alliance, that North America could work together and cut out a lot of red tape and everything else if

[52] *Bilcon* Award at ¶461.
[53] *Bilcon* Award at ¶¶463 and 464.
[54] *Bilcon* Award at ¶457.
[55] *Bilcon* Award at ¶458.
[56] *Bilcon* Award at ¶592.
[57] Witness Statement of T. Boone Pickens at ¶¶17-19.

> they -- if everything was above board and transparent, to companies that wanted to work back and forth.[58]

63. More specifically, in relation to this particular project he stated "I felt that we were going to be treated fairly."[59]

64. Similarly, Cole Robertson testified, in response to a question by arbitrator Landau that he expected a rule based system that would follow a fair course. He stated:

> I thought that the Feed-in Tariff process was the best avenue for us, to receive Feed-in Tariff contracts, because of the process that was defined in the rules, and we thought it was, quite frankly, a very complete set of rules and would be followed, based on the rules that were established and we felt good about that process.[60]

65. Mesa identified the following examples of legitimate expectations that would fit within those identified by the *Bilcon* Tribunal:

    a. FIT rules would be followed fairly and without preferential treatment;[61]

    b. Contracts would be awarded on the basis of the rule of law;[62]

    c. Boone Pickens relied upon his knowledge of the NAFTA's investment protections in making his investment in Ontario;[63]

    d. Ontario Deputy Premier Pupatello confirmed in a call to Boone Pickens that Ontario was a good place to invest.[64]

66. It is clear that all of these legitimate expectations were breached by Ontario's subsequent measures and actions. Similar to the investor in *Bilcon*, Mesa invested millions of dollars in the FIT program and would have been awarded valuable FIT contracts pursuant to the procedures of those programs but for preferences given to its competitors noted above including the Korean Consortium, NextEra, and IPC, a domestic competitor.

b) *Procedural & Substantive Fairness and Protection Against Arbitrariness*

67. The *Bilcon* majority confirmed that both procedural and substantive fairness form part of NAFTA Article 1105 and that both were breached by Canada in the *Bilcon* case.[65]

68. Specifically, assessment criteria of "core community values" used by the JRP as the basis to outright reject Bilcon's environmental assessment plan was not a criteria in either federal or provincial law or regulations regarding environmental assessments. Neither was it part of the Terms of Reference provided to the Joint Review Panel for the assessment.

69. In this regard, the *Bilcon* majority stated:

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[58] Testimony of T. Boone Pickens, Hearing Transcript, Day 1, p. 263-4, lines 22-6.
[59] Testimony of T. Boone Pickens, Hearing Transcript, Day 1, p. 264, lines 15-16.
[60] Testimony of Cole Robertson, Hearing Transcript, Day p. 93 lines 18-25.
[61] Investor's Memorial at ¶807. Witness Statement of T. Boone Pickens at ¶17.
[62] Investor's Memorial at ¶815; Witness Statement of T. Boone Pickens at ¶20.
[63] Witness Statement of T. Boone Pickens at ¶20.
[64] Witness Statement of T. Boone Pickens at ¶18; Testimony of T. Boone Pickens, Hearing Transcript, Day 1 at p.264, lns. 10-15.
[65] *Bilcon* Award at ¶590.

> Bilcon was denied a fair opportunity to know the case it had to meet. It had no reason to expect, under the law or any notice provided by the JRP, that "community core values" would be an overriding factor; that this factor would pre-empt a thorough "likely significant adverse effects after mitigation" analysis of the whole range of project effects; and that this factor would contain elements that would effectively preclude any real possibility that an application could succeed, even if Bilcon showed in each and every respect mentioned in the EIS Guidelines that the project would, after mitigation, likely have no significant adverse effects on environmental, social and economic conditions.[66]

70. More specifically, the *Bilcon* majority stated that such action by Canada

> ...was a serious breach of the law on procedural fairness that Bilcon was denied reasonable notice of the "community core values" approach as taken by the Tribunal, and the opportunity to seek clarification and respond to it. In that case, the "community core values" approach was not a criteria in the law and was not previously communicated to Bilcon prior to a recommendation being issued by an environmental assessment panel and adopted as final by both Canadian federal and provincial ministers.[67]

71. Further, the majority noted that, at the JRP hearing itself, Bilcon and its expert were ignored.[68]

72. The majority determined that such measures constituted a clear breach of fairness.[69]

73. With respect to arbitrariness, the *Bilcon* majority of a NAFTA tribunal found that an environmental assessment panel acted arbitrarily when basing their recommendation to the government minister who were to make the final decision on allowing a project on a criteria that was not existent in the law, while at the same time not considering key criteria that were required in the environmental review legislation.[70]

74. Here, the Investor made submissions in relation to procedural and substantive fairness at paragraphs 350-374 of the Memorial and paragraphs 675-739 of the Reply Memorial and in the Post Hearing Submissions.[71]

75. The Investor made submissions in relation to arbitrariness at paragraph 366 of the Memorial and paragraph 471 of the Reply Memorial and in the Post Hearing Submissions.[72]

2. DISSENTING OPINION OF PROFESSOR MCRAE

i) The Tribunal is Unanimous on the Waste Management Standard

76. Professor McRae dissents from the majority of the Tribunal only in regards to their analysis of whether the Article 1105 threshold was met under the facts in *Bilcon*. Professor McRae agrees with the majority that the standard as set out in *Waste*

[66] *Bilcon* Award at ¶590.
[67] *Bilcon* Award at ¶534.
[68] *Bilcon* Award at ¶553-554.
[69] *Bilcon* Award at ¶590.
[70] *Bilcon* Award at ¶591.
[71] Investor's Memorial at ¶350-374; Investor's Reply Memorial at ¶675-739; Investor's Post-Hearing Submission at p. 62-71.
[72] Investor's Memorial at ¶366; Investor's Reply Memorial at ¶471; Investor's Post-Hearing Submission at ¶¶310-311.

Management is the appropriate standard against which governmental action should be assessed.[73]

77. Therefore, the Tribunal is unanimous in their adoption of the *Waste Management* standard of NAFTA Article 1105.

ii) The Majority's Determination is Based on the NAFTA – Not Domestic Law

78. The majority made their determinations on the basis of their assessment of the facts in relation to international law obligations in the NAFTA.

79. In coming to his conclusions on the application of the test, Professor McRae suggests that the majority should not have considered domestic law in coming to their conclusion about fairness. For Professor McRae, a breach of domestic law does not necessarily constitute a breach of the *Waste Management* standard.

80. The Investor respectfully disagrees with Professor McRae's position and suggests the majority's position is the better reasoned view.

81. It is common place for international tribunals to consider domestic laws and regulations.[74] Domestic laws and regulations are considered regularly in the course of WTO disputes for example.[75] In this circumstance, it is not surprising to find that a foreign investor legitimately would expect that the rule of law would be followed in Canada and one could argue that such laws are the best examples of what expectations are legitimate. It is not inappropriate for a foreign investor investing in Canada to expect the rule of law to be applied. The failure of Canadian authorities to properly follow the law and act in such a non-transparent and unfair manner in such a respect was not only a breach of applicable Canadian laws but also itself a clear breach of international law to the extent that by failing to satisfy the domestic law the government necessarily has not met the legitimate expectations of the investor. It was upon that basis that the *Bilcon* majority came to its decision.

82. As was done by the majority of the *Bilcon* Tribunal, the domestic laws and regulations were considered from an international law perspective, or more specifically as they relate to the NAFTA breaches claimed by the Investor. In this context, an international tribunal does not displace a domestic decision maker, but considers the laws and

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[73] See *Bilcon* Dissenting Opinion of Donald McRae at ¶32 "am in agreement with the majority that the appropriate standard to apply in the application of Article 1105 is that set out in *Waste Management"*

[74] See, for example, *GAMI Investments v Mexico*, in which the tribunal held that maladministration of a government's own laws would likely violate Article 1105 ***(Investor's Schedule of Legal Authorities at CL-195)***.

[75] For example in *US – Shrimp*, the U.S. import prohibition of shrimp and shrimp products from certain countries violated *GATT* Art. XI and could not be saved by *GATT* Art. XX(g) ***(Investor's Schedule of Legal Authorities at CL-083)***; In *US – Tuna,* the Appellate Body found the U.S. "dolphin safe" labeling regulation was inconsistent with *TBT* Art. 2.1 ***(Investor's Schedule of Authorities at CL-047)***; In *Brazil – Retreaded Tyres*, Brazilian regulations on the importation, marketing, transportation, and storage of retreaded tyres was inconsistent with *GATT* Arts. XI, III:4, and could not be justified under Art. XX(d) ***(Investor's Schedule of Legal Authorities at CL-359);*** In *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, the domestic content requirements of Ontario's FIT program violated *TRIMS Agreement* Art. 2.1 and *GATT* Art. III:4 ***(Investor's Schedule of Legal Authorities at CL-002).***

regulations in a separate forum and through a separate lens than would a domestic court or regulatory body.

83. Such an approach is necessary for any international tribunal or adjudicative body, to make a decision on the laws and regulations in relation to a state's international obligations.

84. The *Bilcon* majority carefully addressed this point raised by the dissenting arbitrator. We believe that it is best to leave it in their words. The majority stated:

> 738. It may bear reiterating, therefore, the Tribunal's view that under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish. Errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors. The trigger for international responsibility in this particular case was the very specific set of facts that were presented, tested and established through an extensive litigation process.
>
> 739. In the present case the evidence shows that some of the individual factual elements were highly unusual in their own right. The unprecedented nature of the JRP's approach is confirmed by remarks of the Chair of the Panel. Extensive and detailed expert testimony confirmed that the approach was not only at variance with the existing legal framework, but also with the actual treatment provided in comparable cases. The comparators included situations involving coastal mining and marine terminals as well as situations where a local community was politically divided over the project.
>
> 740. The distinctive and exceptional overall set of facts that came together to produce a finding of liability in this particular case include:
>
> - representations from state officials that welcomed investors to pursue coastal quarry and marine terminal projects, and to these investors specifically to do so at the particular site;
> - reliance by the Investors on those encouragements to devote very substantial resources to engaging in the statutorily mandated environmental assessments, including the attempt to design the project to meet all legal requirements concerning environmental protection;
> - an approach to the assessment by the JRP that effectively found the area to be a "no go" zone for projects of this kind, rather than including, as at least a major part of its work, a proper assessment of likely significant adverse effects on the environment and of the means by which these effects might have been mitigated;
> - lack of prior notice to the investor of the unprecedented approach the JRP was going to adopt, thereby denying the investor a fair opportunity to seek clarification and respond;
> - the role of the JRP in the overall system as legislated includes providing in its report an impartial and thorough assessment of facts and of mitigation options that can be used by the ultimate decision makers in government and that can inform public opinion.

iii) The NAFTA Does Not Require the Exhaustion of Local Remedies

85. The NAFTA does not contain any provision requiring the exhaustion of local remedies if that is what is suggested by Professor McRae in his dissent.

86. Professor McRae suggests that the panel would have benefitted from a decision of a Canadian court or that the Investor could have pursued this option.[76] However, such a suggestion does not properly consider the specific process taken in the NAFTA which does not require exhaustion of local remedies, unlike the customary international law regarding the state espousal of claims or other investment agreements.

87. This is clear within the text of the NAFTA which in Article 1121 requires an Investor to waive rights to seek damages before domestic courts as a pre-condition for arbitration. All Investors must file such waivers along with their consents to arbitration to initiate a claim. When this waiver is added to the existing and relatively short three-year time limitation in the NAFTA, this effectively represents an election of remedy for an investor.

88. The Investor had the option of pursuing rights domestically or through international processes. Both were viable options which provided for different processes and with the potential for differing remedies. The Investor made a choice to seek an independent and impartial review by an international tribunal following international law. Professor McRae would punish Bilcon for making the election to obtain international law review. Bilcon was required to make this election under the terms of the NAFTA and it should not be deprived of its treaty remedy simply on account of the fact that it followed the mandatory terms of the treaty.

IV. THE SCOPE OF STATE RESPONSIBILITY FOR CANADA UNDER NAFTA ARTICLE 105

89. The *Bilcon* Tribunal properly applied the international law of state responsibility in establishing responsibility for Canada for actions taken by a three-person fact finding panel (the Joint Review Panel). That panel was composed of non-governmental members but reported to Government ministers for eventual governmental decision. The *Bilcon* Award concluded that:

    a. the Joint Review Panel was a *de jure* organ of the government and thus there was state responsibility for Canada under Article 4 of the *ILC Articles of State Responsibility*,[77]

    b. Even if the Joint Review Panel was not a *de jure* organ of the state, it was alternatively a de facto agency of the state that was exercizing a governmental foundation and thus there was state responsibility for Canada under Article 5 of the *ILC Articles of State Responsibility*,[78] and

    c. Federal Canadian and Nova Scotia Cabinet Ministers specifically ratified recommendations of the Joint Review Panel, resulting in state responsibility for Canada under Article 11 of the *ILC Articles of State Responsibility*.[79]

[76] *Bilcon* Dissenting Opinion of Donald McRae at ¶¶34, 42, 47.
[77] *Bilcon* Award at ¶319.
[78] *Bilcon* Award at ¶319.
[79] *Bilcon* Award at ¶319.

1. THE BILCON AWARD'S APPLICATION TO THE MESA POWER CASE

90. The approach taken to state responsibility by the *Bilcon* Tribunal confirms that Canada has state responsibility for the types of specific activities of the Ontario Power Authority at issue in the *Mesa Power* arbitration. This is a much more simpler case on this point than *Bilcon*.

91. Canada has assumed responsibility under NAFTA Article 105 for all measures taken by subnational and local governments in Canada. Measures taken by the government of Ontario are subnational government measures.

92. The *Electricity Act, 1998* empowers the Minister to issue binding mandatory directives and directions to the Ontario Power Authority.[80]

93. The measures at issue all were done at the direction of the Ontario Minister of Energy pursuant to the *Ontario Electricity Act*. As a result of the operation of Ontario law, the Ontario Power Authority had no option but to comply with the terms of the Ontario Energy Minister. This mandatory instruction included all actions taken under an Ontario government directive or direction. Through such instructions, the Minister compelled the Ontario Power Authority to implement the FIT program and to carry out the other measures at issue, including the GEIA, the last minute rule change.[81]

94. Canada has admitted, as it must, that Canada has state responsibility for all measures taken by the Government of Ontario.[82]

95. Measures taken by the Ontario Power Authority under the mandatory direction of the Ministry of Energy pursuant to the *Electricity Act* constitute measures taken by the Government of Ontario. Canada also admits state responsibility for such measures.[83]

96. Canada contends that the ranking decisions made by the Ontario Power Authority were not acts in furtherance of a government instruction, but such a position is illogical, and contrary to the evidence. The Minister issued a directive to the Ontario Power Authority to create a FIT Program and to issue FIT contracts.[84] The Minister also issued a directive limiting the amount of transmission that could be awarded for FIT Contracts.[85] Rick Jennings admitted in his cross-examination at the hearing that the Ministry of Energy was aware that there were substantially more applications for FIT Contracts than available capacity.[86] Accordingly, there can be no question that the government instruction to issue FIT contracts in a transmission-constrained market resulted in an

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[80] Ontario *Electricity Act*, *1998*, ss. 25.32, 25.35 ***(Investor's Schedule of Legal Authorities at CL-247)***.
[81] Investor's Post-Hearing Submission at ¶¶358 – 359.
[82] Investor's Post-Hearing Submission at ¶¶358 – 359 relying upon Canada's admissions in its Closing Statement.
[83] Investor's Post-Hearing Submission at ¶¶358 – 359 relying upon Canada's admissions in its Closing Statement.
[84] Letter from Minister George Smitherman (Minister of Energy) to Colin Anderson (OPA), Direction to the OPA, dated September 24, 2009 (***Investor's Schedule of Exhibits, C-0051).***
[85] The Minister of Energy directed the OPA to limit priority access for FIT contracts in the Bruce and West of London transmission areas to 750 MW and 300 MW, respectively. See letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, June 3, 2011 ***(Investor's Schedule of Exhibits, C-0046)***.
[86] Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.162, lns. 22-25; Testimony of Sue Lo, Hearing Transcript, Day 3, at p. 78, lns 7-14; FIT/Micro FIT Announcement, December 15, 2009, p. 10 ***(Investor's Schedule of Exhibits at C-0669)***.

instruction to create a priority system (which would include a ranking) and in fact the Ministry of Energy later specifically would intervene in the ranking process with the respect to the Bruce Region

97. Accordingly, there can be no question that all aspects of the FIT process at issue in this arbitration are government measures for which Canada has state responsibility. There are no longer any remaining "open questions" with respect to state responsibility. Canada is fully responsible for all the measures at issue in the Mesa claim.

98. The OPA should thus be properly regarded as an organ of Canada and consequently Canada must under international law have state responsibility for the actions at issue in this arbitration.

V. CONCLUSION

99. In respect to the case at hand, the determinations made in *Bilcon* are important. The *Bilcon* award may assist the Mesa Power Tribunal in respect with the following:

    a. Canada is responsible for all actions at issue in this arbitration. While Canada has admitted responsibility for the majority of its actions, it is specifically responsible for the OPA and its actions.

    b. Canada breached its National Treatment obligations. The test set out by the *Bilcon* Tribunal is logical and clarifies the National Treatment legal test in respect to the Article 1105 standard, the onus of proof, and a broader like circumstances analysis. All proponents seeking renewable energy contracts from Ontario should be considered to be in like circumstances with Mesa. Once that determination is made, it is clear that the specific comparators identified were given preferential treatment. The burden should then shift to Canada to justify its actions.

    c. The Investor's legitimate expectations were breached. The Investor expected a fair and rule based system. It did not expect a web of secret deals and special treatment to its competitors. Canada's conduct violated the Investor's legitimate expectation. Further, at the hearing it became clear that the June 3, 2011 directive in which Ontario limited the capacity awarded to avoid paying FIT prices which was the Investor's original, main incentive to invest in Ontario also breached the Investor's legitimate expectations. This was clearly set out in the Investor's Post-hearing brief at paragraphs 337-41.

    d. There was a flagrant violation of procedural and substantive fairness to the FIT proponents. As has been noted by the Investor on numerous occasions, creating one competitive renewable energy program and then giving one proponent a significantly better deal to access contracts in that program is fundamentally unfair. This was argued by the Investor throughout its pleadings,[87] at the

[87] Investor's Memorial at ¶¶685, 763-776; Investor's Reply Memorial at ¶¶655-660.

hearing,[88] and in its post-hearing brief.[89] The *Bilcon* decision simply confirms the importance of substantive fairness as an element of NAFTA Article 1105.

e. There is a substantial breach of procedural fairness. This is without question, as it was admitted by Canada's own witnesses that there were significant and substantial procedural irregularities in the period before the contract awards in the Bruce region on July 4, 2011.[90] This was clearly laid out in the Investor's Post Hearing Submission at paragraphs 310 to 341.

f. Moreover, the special access and unfairly beneficial treatment given to NextEra and the protection afforded to a local Canadian competitor which also obtained special treatment, IPC, constituted an additional violation of the NAFTA Article 1105 standard of substantive fairness.

g. Ontario acted in a completely arbitrary manner in relation to the contract awards in the Bruce region. This was detailed in the Investor's Post-Hearing Submission at paragraphs 310 to 336.

100. For the reasons set up above, this Tribunal should consider and apply the approach advanced by the *Bilcon* Tribunal when deciding the matters at issue in the *Mesa* Claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Date: May 14, 2015

[88] Investor's Opening Statements, Hearing Transcript, Day 1, at p. 66, lns. 17-25. Among others, this was confirmed in the Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp. 207, lns. 8-23.
[89] Investor's Post-Hearing Submission at ¶¶290-291.
[90] Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p. 66-67, lns. 23-9 and p. 80, lns. 9-24; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p. 219, lns. 17-19 and p. 271, lns. 2-4 and p. 273, lns. 4-9.