

**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 POST-HEARING SUBMISSION

December 18, 2014

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. THE FACTS 1

A. The Government of Ontario Enters a Special, Secret Deal with the Korean Consortium That Prejudices Other Investors in Similar Energy Programs..... 6

B. While the Deal was Kept Secret from the Public, the OPA Announced the Feed-in Tariff Program, Inducing Investment from Domestic and Foreign Investors Like Mesa 9

1. The Toronto Star Leaks the Negotiations Between Ontario and Samsung for the Building of Manufacturing Plants 12

2. The FIT Program is Launched with an Overwhelming Response from Investors 14

C. Despite Overwhelming Response to the FIT Program, Ontario proceeds to sign the Green Energy Investment Agreement with the Korean Consortium. 17

1. The Press Backgrounder Released by the Ministry of Energy Failed to Disclose Important Information to FIT Proponents. 19

2. The Korean Consortium Breaches the GEIA, Ontario Does not Terminate..... 21

3. The Korean Consortium’s Breaches Resulted From its Wait and See Approach to Acquiring Projects..... 23

4. Ontario Does Not Inform the Public that all the Korean Consortium had to do to be paid an Economic Development Adder is Designate Manufacturers Coming to Ontario..... 25

5. GEIA and FIT Investors Were in Like Circumstances and Entitled to the Same Treatment Under the NAFTA..... 26

D. FIT Proponents Expected Contract Awards Pursuant to FIT Rules 28

1. The OPA Continued to Misrepresent to FIT Proponents that the Korean Consortium Promised to Construct Manufacturing Plants. 30

2. The Korean Consortium Reserves Capacity in the Bruce Region to the Detriment of FIT Proponents Connected in Bruce..... 30

3. Ontario Provided More Favourable Treatment to Another FIT Investor, International Power Canada..... 31

E. NextEra Lobbied for a Change to the Rules to Benefit Its “Six-Pack”, Bumping Mesa’s Projects from Their Place in the Bruce FIT Queue. 33

1. Through the New Rule Change, Ontario Also Held Back Available Capacity from FIT Proponents 38

II. LAW 40

A. Most Favoured Nation 40

1. Like Circumstances 40

i) Investment Agreements Do Not Make Competitors “Unlike” 44

a) Mesa Could Not Have Entered Into A Similar Deal With Ontario 46

ii) No Regulatory Distinction Exists between FIT and GEIA..... 48

a) Canada provided no explanation for any distinct regulatory treatment 48

b) GEIA and other FIT projects are interchangeable 49

iii) Canada’s Stated Policies Do Not Make Competitors “Unlike” 50

a) The GEIA’s Purported Policy Basis Does not Withstand Scrutiny..... 50

b)	The Creation of Jobs and Manufacturing Facilities	50
1)	Job creation and manufacturing are both driven by local content requirements..	51
2)	FIT has contributed more jobs and manufacturing in Ontario than <i>GEIA</i>	51
3)	The <i>GEIA</i> contains no obligation for the Korea Consortium to manufacture anything	52
4)	The <i>GEIA</i> contains no obligation for the Korean Consortium to create jobs.....	53
5)	Ontario was counting the total number of jobs from all renewable energy programs	53
6)	The policy expectation for investors was secret and not clear.....	54
c)	The Korean Consortium as an Anchor Tenant.....	55
2.	Treatment No Less Favourable Than Accorded to Other Investors or Investments.....	57
B.	National Treatment.....	58
1.	Likeness	58
i)	Investment Agreements, Regulatory Measures and the Stated Policy Do Not Make Competitors “Unlike”	59
2.	Treatment No Less Favourable Than Accorded to Other Investors or Investments.....	59
C.	Application of Mesa’s claim as an Investor and through its Investment Under NAFTA Articles 1102 and 1103	61
1.	Appropriate Comparator for Treatment	61
2.	Summary of 1103 and 1102 Claims and Appropriate Comparators	62
D.	International Law Standard of Treatment	62
1.	Conducting the Secret <i>GEIA</i> & FIT in Parallel is an Unjust, Egregious and Abusive Violation of Transparency, Fairness and Investor Expectations	63
i)	Secrecy of the Deal with the Korean Consortium.....	63
2.	The June 3rd Rule Change Directed by the Minister of Energy Denied Mesa Due Process, was Manifestly Arbitrary, and was both Unfair and Unjust.....	67
i)	June 3 rd Direction: Lack of Consultation and Notice	67
ii)	June 3 rd Direction: Rule Change Allowing Change Between Regions	69
iii)	June 3 Direction: Contrary to Developer Expectations, Ontario was Limiting the Capacity it Awarded to Avoid Paying the FIT Prices which Induced Investors to Invest in Ontario	71
E.	Local Content Requirements.....	72
F.	This Tribunal has Jurisdiction to Rule On these claims	73
1.	Canada Consented to this Arbitration	73
2.	Mesa’s Claim Complies with NAFTA’s Time Restrictions	73
3.	NAFTA Protection Extends to Both Pre and Post Investment	75
G.	Attribution.....	75
H.	Subsidy	78
I.	Procurement	79
1.	The Meaning of Procurement in NAFTA Chapter Eleven	79
i)	Procurement Facts	79

ii) Procurement Law	81
2. Procurement and Better Treatment in Other Investment Treaties	82
III. DAMAGES.....	84
A. The Approach to Damages.....	84
B. Comparing Two Valuation Approaches	90
1. The Corrections to Mr. Low’s Damages Valuation	92
C. Articles 1102 and 1103 – Losses Arising from Breaches of Canada’s National Treatment and MFN Obligations	93
1. Causation	95
i) The GEIA Agreement.....	95
ii) Rule Changes Benefited Other Proponents	96
2. Quantification of Losses under Articles 1102 and 1103.....	97
D. Article 1105 – Losses Caused by Canada’s Breach of the International Law Standard of Treatment	100
1. The GEIA Caused Harm to Mesa.....	100
2. The June 3rd Rule Change Caused Harm to Mesa.....	101
3. Combined Damages Resulting from GEIA and Rule Change	103
4. Quantification of Losses Under Article 1105.....	103
E. Article 1106 - Losses Caused by the Local Content Requirements	104
1. FIT Program Local Content Requirement Caused Harm to Mesa.....	104
2. Quantification of Losses under Article 1106	107
F. Sunk Costs	108
1. Mesa Power’s Master Turbine Supply Agreement.....	109
2. Other Costs Incurred	110
G. Pre-Judgment Interest	111
1. Compound Interest in Appropriate in this Case	112
2. The Rate of Interest.....	112
IV. REQUEST FOR RELIEF	113

I. FACTS

1. The testimony heard at the hearing confirmed that secret deals, arbitrary rules, and selective enforcement of the FIT rules predominated the renewable energy investment climate in Ontario. This was all done in the service of political expediency, rather than in the service of public integrity and transparency.
2. The Ontario Minister of Energy signed the *GEIA* without cabinet approval at a ceremony which took place on January 21, 2010, in the face of evidence of the success of the FIT program. By entering into a secret deal with the Korean Consortium, Ontario's investment environment for renewable energy was no longer a transparent process motivated by laudable environmental goals. Instead it was a systematically unfair process replete with favouritism and systemically unfair and producing uneven regulatory conduct.
3. The evidence on the record conclusively demonstrates what really happened:
 - a. The local content requirements imposed by Ontario under the FIT program were always in violation of Canada's NAFTA obligations, and Ontario knew that from the outset. Canada did not defend its conduct in any of its written pleadings, nor at the hearing. When this issue was raised by concerned stakeholders, Ontario's response was not that the requirements were NAFTA compliant, but rather that other Canadian provinces had established these requirements and had not been challenged.¹ The Investor's valuation expert testified that the Investor incurred harm arising from these requirements.² Canada did not rebut this damages evidence, either. The sole issue for the Tribunal is whether the government procurement exception applies to what Canada essentially conceded was otherwise wrongful conduct. It does not.
 - b. The treatment Ontario accorded to the Korean Consortium and its Canadian joint venture partners and other FIT proponents was always more favourable than the treatment provided to Mesa. This treatment was provided before the *GEIA* was negotiated, entered into force, and even when the Korean Consortium was in evident breach of the *GEIA*'s terms.
 - c. The Korean Consortium did not have to meet any requirements of any kind with respect to its guaranteed priority access to the first 500 MW of transmission access – which was accorded to the Korean Consortium in September 2009 – more than three months before the *GEIA* was even signed,³ at a time when Sue

¹ Handwritten notes of Chris Quirke (MOE) re Domestic Content Consultation-CanSIA, at p.1 (*Investor's Schedule of Exhibits C-0692*); Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.285-289, lns.14-17, p.240, lns.18-20

² Testimony of Robert Low, Hearing Transcript, Day 5, at p.106, lns.5-20

³ Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor's Schedule of Exhibits C-0105*)

Lo and Rick Jennings confirm that there was no binding agreement between Ontario and the Korean Consortium.⁴

- d. Canada ignored the fundamental legal duty and responsibility of all public servants, who exercise either statutory or discretionary authority, to perform their duties fairly, reasonably, and in good faith. The Rule of Law applies to the exercise of all public authority. It requires that no public authority be unfettered and that all public authority be exercised fairly and in good faith, on the basis only of relevant considerations – assessed reasonably, honestly, objectively, transparently, and impartially – and only for the purpose for which the authority was granted. Canada's own witnesses recognized those duties,⁵ but the record evidence and testimony shows that Ontario's representatives failed to comply with them when carrying out the renewable energy program.
4. From the first time Mesa engaged with Ontario's FIT Program in 2009, there was a complete lack of transparency and candor on Ontario's part with respect to its dealings with the Korean Consortium.⁶ The *GEIA* was signed to the evident consternation of the administrative body established by Ontario law to implement the FIT Program, which was not even informed or consulted prior to the decision to enter this secret deal, but was forced to implement it.
 5. This was the context in which the Korean Consortium was able to force its way to the front of the line in the Bruce region in September 2010 as transmission capacity was reserved for them,⁷ and in which the FIT rules were disregarded in the allocation of the remaining transmission capacity to award FIT contracts to select FIT proponents.
 6. The evidence proves that politics was the only reason that the agreement with the Korean Consortium went forward was politics. Energy Minister Smitherman, the politician responsible for the deal, quit and his governing party did not want to admit the egregious errors that had been set in motion, although not yet concluded. From the very beginning, the Korean Consortium's "sweetheart deal" was attacked by the press, the Opposition Party, and even the Government's own party.⁸ The Cabinet did not want to (and did not) approve this deal,⁹ and the entire operation was later criticized by the Auditor General.¹⁰

⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.59, Ins.2-6; Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.199, Ins.17-25

⁵ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.13, Ins.8-17

⁶ This secrecy was unrelated to any legitimate commercial confidentiality considerations is highlighted by the evidence that the Samsung group had no objection to the arrangements being made a matter of public record.

⁷ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.97, Ins.6-14

⁸ CTV, 'Smitherman announces Toronto mayoral bid', dated November 8, 2009 (*Investor's Schedule of Exhibits C-0660*)

⁹ CTV, 'Smitherman announces Toronto mayoral bid', dated November 8, 2009 (*Investor's Schedule of Exhibits C-0660*)

¹⁰ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.18, Ins.4-19; Annual Report of the Auditor General of Ontario, 2011 (*Investor's Schedule of Exhibits C-0228*)

7. In the wake of the maladministration of Ontario's renewable energy policy, the Minister and Ministry of Energy, both parts of organs of the Government of Ontario, either directly undertook or directed the OPA to undertake the measures in this arbitration. These actions taken by the Ministry of Energy, directly or by directing the OPA, resulted in egregious breaches of the NAFTA. Canada's closing statement demonstrates there is no disagreement between the Investor and Canada that Ontario's directions to the OPA engage state responsibility. Specifically, Canada has direct state responsibility under the NAFTA for Ontario's breaches of MFN treatment, National Treatment, the international law standard of treatment, and for imposing prohibited local content requirements.
8. By not according to Mesa the best treatment accorded to other investors and investments, Ontario breached the NAFTA's MFN treatment and National Treatment obligations. As Mesa has demonstrated, Mesa was in like circumstances to investors and investments of NAFTA Parties and non-NAFTA Parties and to Canadian investors and their investments. Simply put, they were all investors in Ontario's renewable energy program. No exemptions from these obligations, whether on the basis of investment agreements or policy, should be accepted by this Tribunal. Such distinctions are neither supported by law nor logic.
9. The treatment accorded to other investors and investments of investors and Canadian investors in like circumstances was superior to that accorded to Mesa and is not disputed. Mesa has proven that it failed to receive the same favourable treatment as that afford to investors and investments of investors from a non-NAFTA Party country, investors from the U.S., and companies in Canada. These violations culminated in the loss of four projects.
10. At the same time, Ontario's politically driven decisions violated fundamental principles of fair and equitable treatment by disregarding and disrespecting the basic principles of fairness, due process, transparency, candor, and the expectations of foreign investors like Mesa. It is these precise actions, such as protection from petty local politics, which the NAFTA protects against.
11. Ontario's violation of the international law standard of treatment is multifaceted; however, when looked at as a whole, the facts demonstrate flagrant breaches of fairness and equality of treatment. At the outset, Ontario created a single renewable energy program, and solicited international investment for that program. However, in soliciting such investment, it did not disclose that it had entered into a one-off special deal, a Memorandum of Understanding as a precursor to the *GEIA*, with Samsung reserving nearly a quarter of its total renewable energy capacity, which ultimately made it impossible for Ontario to apply the FIT fairly and even-handedly.
12. At every stage of the deal Ontario had an opportunity to avoid violating the NAFTA, and at each step Ontario chose the wrong path. As Mesa has identified this included:

- a. Entering into a secret MOU without providing avenues for competing investors to participate;¹¹
 - b. Not following the terms of that MOU;¹²
 - c. Entering into the *GEIA* when indisputable evidence demonstrated the *GEIA* was completely unnecessary to meet Ontario's renewable energy goals;¹³
 - d. Misrepresenting the *GEIA*'s terms to the public prior to and after entering the *GEIA*;¹⁴
 - e. Effectively agreeing in the *GEIA* to not provide a similar deal to anyone else and not disclosing even that fact;¹⁵
 - f. Refusing to enter into any similar deal with competing stakeholders;¹⁶ and
 - g. Not terminating the deal when the Korean Consortium was in breach,¹⁷ which would have allowed Ontario to protect FIT stakeholders like Mesa.
13. The Korean Consortium's initial transmission capacity reservation was made in September 2009 in regards to the Chatham-Kent region, before the signing of the *GEIA*. Here, the Korean Consortium was able to step into the front of the line in that region as transmission capacity was reserved for them without prior notice to any other investor and even without having signed the *GEIA*.¹⁸ This practice of allowing the Korean Consortium to skip to the front of the line in exchange for nothing caused damage to Mesa when it was then allowed to occur again in the Bruce region in September of 2010, and was a manifest disregard of the NAFTA's international law standard of treatment.
14. The further reservation of transmission capacity for the Korean Consortium in the Bruce region immediately harmed Mesa. Had Canada stopped there, Mesa would have been able to salvage at least two of its projects as there was sufficient transmission capacity available in the Bruce region for those first two projects to successfully be awarded FIT contracts. But Ontario then began to engage in unfair favouritism amongst FIT applicants for political reasons. This resulted in additional harm to Mesa.

¹¹ Memorandum of Understanding by and among Her Majesty The Queen In Right Of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008 (***Investor's Schedule of Exhibits C-0536***)

¹² Memorandum of Understanding by and among Her Majesty The Queen In Right Of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008 (***Investor's Schedule of Exhibits C-0536***)

¹³ Email from Rick Jennings (MOE) to Guna Deivendran (MOE), Jason Chee-Aloy (OPA), Jennifer Morris (MOE) et al., May 7, 2009 (***Investor's Schedule of Exhibits C-0673***) [**CONFIDENTIAL**]

¹⁴ Letter from JoAnne Butler (OPA) to Chuck Edey regarding the Summerhill project, July 4, 2011 (***Investor's Schedule of Exhibits C-0076***)

¹⁵ Memorandum of Understanding by and among Her Majesty The Queen In Right Of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008 (***Investor's Schedule of Exhibits C-0536***)

¹⁶ Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, (***Investor's Schedule of Exhibits C-0714***)

¹⁷ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.102-103, Ins.16-3

¹⁸ Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), September 17, 2010 (***Investor's Schedule of Exhibits C-0119***)

15. The Ministry of Energy interposed itself in the operation of the selection process of a multi-million dollar award of lucrative FIT contracts. Despite even at the hearing contending that it would be improper for the Ministry of Energy to prefer one applicant over another, the evidence shows that this is exactly what happened. The Ministry had access to confidential rankings of FIT applicants to see how contracts would be given and how changes would affect applicants.¹⁹
16. With Ontario knowing this information, one applicant, NextEra, was given access to high level government officials²⁰ and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change.²¹ Perhaps most disturbingly, as was revealed at the hearing, blatant protection was afforded to International Power Canada, a Canadian company whose executive leadership at the time was a well-known political backer of the Ontario Liberal government.²²
17. The result was a capriciously misapplied process contaminated by selective and improper investor protection, a lack of minimal due process, and a complete lack of transparency and candor. This culminated in a significant rule change that was decided without any consultation with stakeholders, and literally was given a weekend's advance notice.²³ Mesa has also shown that the culmination of all these facts were in complete disregard of the international principles of fair and equitable treatment.
18. The main issue remaining in this case is actually whether Mesa is entitled to damages for two of its wind energy projects as opposed to four, given that Canada's own counsel and expert has conceded that the actions of Ontario allowing the Korean Consortium to have priority access in Mesa's preferred region and the ability of a competitor to change its connection points to Mesa's regions caused it to lose two projects.²⁴ As shown at the hearing, Mesa lost in fact four projects, and is entitled to reparation for the same either because of MFN or the culmination of all the above behavior pursuant to Article 1105.
19. Last, all of Canada's attempts to deter this Tribunal's lawful jurisdiction to rule upon these claims or to justify Canada's internationally wrongful conduct must fail:
 - a. Canada's violations of the NAFTA and, consequentially, the damages Mesa incurred began months before this case was filed. There are no jurisdictional barriers.
 - b. This was not procurement or a subsidy by the government. As testified at the arbitration hearing by Energy Assistant Deputy Minister of Energy Rick Jennings,

¹⁹ Bruce Area Scenario Analysis, Table of results, April 13, 2011 (*Investor's Schedule of Exhibits C-0427*) **[CONFIDENTIAL]**

²⁰ Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0681*) **[CONFIDENTIAL]**

²¹ Email from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), May 31, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0068*) **[CONFIDENTIAL]**

²² Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.263-264, Ins.7-13 **[CONFIDENTIAL]**

²³ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.238, Ins.18-20

²⁴ Canada's Closing Statement, Hearing Transcript, Day 6, at p.277, Ins.16-21

the Ontario ratepayers, rather than the Ontario government, paid for and consumed all the power generated by the renewable energy projects which received FIT contracts under the FIT (or the *GEIA*).²⁵ This was the fact that Ontario relied upon when it concluded that the FIT was not a subsidy during its internal consultations and was a key part of the program's design to insulate the government from responsibility.²⁶ Thus it is absolutely clear that the FIT Program was not government procurement or a government subsidy.

20. Mesa invested millions of dollars into Ontario's renewable energy program. Mesa was excited about Ontario's renewable energy initiative. Mesa had confidence in Ontario as a place to invest based upon the protections afforded by NAFTA. The NAFTA gave Mesa assurance that they would be treated fairly and in accordance with the treaty. However, through treatment that was not equal to the best treatment accorded to others, and through non-transparent, unfair and seemingly politically driven decisions, Mesa suffered significant damages.

A. THE GOVERNMENT OF ONTARIO ENTERS A SPECIAL, SECRET DEAL WITH THE KOREAN CONSORTIUM THAT PREJUDICES OTHER INVESTORS IN SIMILAR ENERGY PROGRAMS

21. In 2008, based on its two previously successful renewable energy programs the Renewable Energy Standard Offer Program ("RESOP") and the Renewable Energy Supply ("RES") requests for proposals²⁷ Ontario knew that there was significant demand for renewable energy in the province.
22. A May 2008 OPA presentation, stated that interest in RESOP significantly outstripped the available transmission capacity and there were "hundreds of applications applying for connection with limited capability to accommodate all of them."²⁸ In addition, the OPA highlighted that more megawatts had been awarded in one year (1300 MW) than had been expected to be developed over 10 years (1,000 MW) through this program.²⁹
23. At the commencement of the FIT, armed with this knowledge, Ontario made no announcements that it would accept bids outside of these programs.
24. As Rick Jennings, Ontario Assistant Deputy Minister of Energy, confirmed during his testimony, Samsung approached the Government of Ontario in August 2008 for a special deal on renewable energy.³⁰

²⁵ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.237, Ins.3-6

²⁶ Handwritten notes of Chris Quirke (MOE) re Domestic Content Consultation-CanSIA (***Investor's Schedule of Exhibits C-0692***); Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.285-289, Ins.14-17, p.240, Ins.18-20

²⁷ Investor's Memorial, at ¶¶5-6

²⁸ OPA Presentation, "Renewable and Clean Energy Supply Procurement Update", at p.6-7 (***Respondent's Schedule of Exhibits R-044***)

²⁹ OPA Presentation, "Renewable and Clean Energy Supply Procurement Update", at 6 (***Respondent's Schedule of Exhibits R-044***)

³⁰ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.251, Ins.17-23; Rejoinder Statement of Rick Jennings, at ¶4

25. At that time, Samsung had no experience with developing wind or solar power and did not operate renewable energy projects anywhere in the world.³¹
26. The Government of Ontario did not analyze the impact of this proposed deal on the programs the OPA was developing or the impact on investors that had been induced to invest in Ontario.³²
27. The Government of Ontario did not even analyze the impact of this deal on the ratepayers, as was later confirmed by the Auditor General. Mr. Jennings admitted during the hearing that Ontario was more interested in protecting the Korean Consortium's offer than investigating whether other companies could provide the same commitments at a better rate for its citizens.³³
28. To Ontario, the need to be transparent to the public and investors and seek the best deal for its citizens was required only when "it was a government initiative... [and] we're going to put it out for tender."³⁴ According to Mr. Jennings,³⁵ when a company comes to Ontario with a private deal, the government's duty of transparency evaporates, and the primary concern becomes the protection of the private company's offer, even at the expense of its citizens and other similarly situated investors.
29. Despite Samsung's lack of experience, Ontario's lack of analysis of the impact of this deal on other renewable programs and ratepayers, and the known interest in renewable energy in Ontario, the Ministry of Energy signed a secret Memorandum of Understanding ("MOU") with Samsung in December 2008.³⁶ The parties agreed to negotiate exclusively with respect to 2500 MW of Ontario's limited transmission capacity and agreed to maintain this agreement as confidential.³⁷ This MOU was not publicly disclosed, nor was the public informed that the Government of Ontario had entered into a MOU.³⁸ The Ministry of Energy did not even disclose this deal to the OPA, the entity that would be required to implement it, until months after the MOU was signed.³⁹
30. During the hearing Mr. Jennings and Ms. Lo testified that this secrecy was necessary and is common in business transactions to protect the private company on the other

³¹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.256, Ins.13-22, p.258, Ins.4-6

³² Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.268, Ins.17-19; Report of the Auditor General of Ontario, 2011, at 91 (***Investor's Schedule of Exhibits C-0228***)

³³ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.256-257, Ins.18-11

³⁴ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.257, Ins.1-11

³⁵ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.257, Ins.1-11, p.259, Ins.9-16

³⁶ Memorandum of Understanding between Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008 (***Investor's Schedule of Exhibits C-0536***)

³⁷ Memorandum of Understanding between Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008, arts.4-5 (***Investor's Schedule of Exhibits C-0536***)

³⁸ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.302, Ins.3-8

³⁹ Report of the Auditor General of Ontario, 2011, at p.91 (***Investor's Schedule of Exhibits C-0228***); Hearing Transcript, Day 2, at p.302-303, Ins.24-3

side of the deal,⁴⁰ but the evidence shows that this testimony was not credible:

- a. Mr. Jennings admitted that MOUs “tend to be public... once they get entered into.”⁴¹
- b. Mr. Jennings also admitted that in February 2009, just a few months after the MOU was entered, Samsung was “looking to” release the MOU.⁴²
- c. Because the deal was not public, the Korean Consortium went as far to require a “comfort letter” explaining the arrangement and its contours.⁴³
- d. Ontario required the Korean Consortium to postpone making public the “various elements of the deal,” such as signing an MOU with an Ontario aboriginal community, until a framework agreement was signed and the terms were made public. This was because any announcement would “elicit more questions from the media” that Ontario was “not in a position to answer publicly yet and will put [it] in a difficult position”:⁴⁴

Hagen – you should not be going ahead with any public announcement on this or any other piece of the deal until we have resolved the issue of the signing of the Framework Agreement. This will simply elicit more questions from the media that we are not in a position to answer publicly yet and will put us in a difficult position. Once the FA is signed, and the terms are public, you will be free to execute the various elements of the deal. Until then, you need to put this on hold for the time being – hopefully only a couple of weeks...⁴⁵

31. The MOU was being kept secret because Ontario did not yet have an acceptable explanation as to why the Korean Consortium was getting this preference.
32. At this time, although this secret deal required confidentiality and exclusive negotiations, it was not otherwise binding and the MOU did not require the parties to enter into a framework agreement. Both Mr. Jennings and Ms. Lo confirmed this during their testimony.⁴⁶ Canada’s counsel further confirmed this during its closing argument when he recognized that when the Ministry of Energy reserved capacity for undisclosed proponents in September of 2009 “the deal [was] not done yet”.⁴⁷

⁴⁰ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.260, Ins.16-18, pp.256-257, Ins.18-11; Hearing Transcript, Day 3, at pp.23-25, Ins.12-19

⁴¹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.311-312, Ins.24-5

⁴² Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.313, Ins.1-5; Email from Pearl Ing (MOE) to Cheryl Carson, Rick Jennings, Garry McKeever, Victoria Vidal-Ribas (MOE), February 23, 2009 (***Investor's Schedule of Exhibits C-0694***)

⁴³ Email from Pearl Ing (MOE) to Cheryl Carson, Rick Jennings, Garry McKeever, Victoria Vidal-Ribas (MOE), February 23, 2009 (***Investor's Schedule of Exhibits C-0694***)

⁴⁴ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.310-311, Ins.20-1; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.74, Ins.2-6 [***CONFIDENTIAL***]; Email from Jennifer Morris (MOE) to Hagen Lee (Samsung), November 13, 2009 (***Investor's Schedule of Exhibits C-0683***)

⁴⁵ Email from Jennifer Morris (MOE) to Hagen Lee (Samsung), November 13, 2009 (***Investor's Schedule of Exhibits C-0683***)

⁴⁶ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.266-267, Ins.10-1; Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.58-59, Ins.19-6

⁴⁷ Canada’s Closing Statement, Hearing Transcript, Day 6, at p.216-217, Ins.10-2

33. Moreover, the parties failed to follow the terms of the MOU. Under the MOU, the parties were to conduct a feasibility study and if the feasibility study supported the deal going forward, then the parties were to enter a conditional agreement.⁴⁸ As was confirmed during the hearing, neither of these things happened.⁴⁹

B. WHILE THE DEAL WAS KEPT SECRET FROM THE PUBLIC, THE OPA ANNOUNCED THE FEED-IN TARIFF PROGRAM, INDUCING INVESTMENT FROM DOMESTIC AND FOREIGN INVESTORS LIKE MESA

34. After signing the MOU in December 2008, Ontario, announced that it was going to create a Feed-in Tariff ("FIT") Program in early 2009, when it announced the *Green Energy and Green Economy Act*. The legislation that envisaged a FIT Program was introduced in February 2009, and passed in May 2009.⁵⁰ Incredibly when the legislation for the FIT was before the assembly and debated, the legislature was kept in the dark about the MOU and other dealings with Samsung and the Korean Consortium. The MOU was not debated in the Ontario legislature and there was no consideration on how a special deal with Korean Consortium might interact with the design and operation of the FIT program on which the legislators were deliberating.
35. Upon the introduction of the FIT Program, Ontario expected investors to begin investing as well as to provide input as to the development of the program. For example, Mr. Jennings, upon being asked whether it "would have been reasonable for stakeholders to recognize that the FIT Program was coming throughout the summer of 2009 and rely on that fact and make an investment [in] your country",⁵¹ responded "Yes, so the legislation was intended to promote it."⁵²
36. Between March and June 2009 Ontario engaged in public consultations regarding the FIT Program.⁵³ These consultations showed that there was "over [REDACTED] of potential renewable energy supply projects and about [REDACTED] of connection availability (i.e. [REDACTED] of existing connection availability [REDACTED] of new connection availability in the Bruce and West of London areas resulting from Bruce-Milton project)."⁵⁴

⁴⁸ Memorandum of Understanding by and among Her Majesty The Queen In Right Of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008, arts. 4-5 (*Investor's Schedule of Exhibits C-0536*)

⁴⁹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.268, Ins.17-19 (no feasibility study was completed) and p.261, Ins.1-11 (no other contracts other than the PPAs, GEIA and MOU between the Korean Consortium and Ontario).

⁵⁰ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.244, Ins.8-11; *Toronto Star* "Industry applauds green plan", February 10, 2009 (*Investor's Schedule of Exhibits C-0509*) (noting that industry groups "heaped praise" on the FIT program "promising to create 50,000 green collar jobs."); *Green Energy and Green Economy Act*, S.O. 2009, c. 12 (*Respondent's Schedule of Exhibits R-057*)

⁵¹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.244, Ins.19-23

⁵² Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.244-45, Ins.24-4

⁵³ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.274, Ins.3-7

⁵⁴ Email from Rick Jennings (MOE) to Guna Deivendran (MOE), Jason Chee-Aloy (OPA), Jennifer Morris (MOE) et al., May 7, 2009 (*Investor's Schedule of Exhibits C-673*) [CONFIDENTIAL]

37. The OPA represented to the public that these available [REDACTED] would be allocated as part of the FIT program. For example, in a May 22, 2009 presentation regarding the design of the FIT Program, the OPA identified the 4,000 MW as “[p]otential FIT Renewable Energy Supply.”⁵⁵
38. In this presentation, the OPA expressed that the “principles” it believed were “appropriate to consider in the assessment of projects include”:
- a. Prioritize more mature projects;
 - b. Be fair and transparent;
 - c. Treat projects without bias in favour of a particular size or technology;
 - d. Avoid arbitrary or subjective decision; and
 - e. Control the launch of the Program to avoid ‘door crashing’ behavior.⁵⁶
39. This presentation also recognized that there was a “[h]igh level of developer interest and expectation” and “[h]igh level of investor / financial sector interest”.⁵⁷
40. Mesa was one of the investors that was attracted to Ontario because of the representations regarding the FIT Program in the spring of 2009. Cole Robertson testified that Mesa started looking at assets in March 2009, and the company then “dove heavy into due diligence and transaction work probably starting in July 2009.”⁵⁸ Mr. Robertson described the due diligence that the company conducted, which included:
- “looking at the market, looking at the Feed-in Tariff program, working[s] at Feed-in Tariffs programs elsewhere around the world and how they were structured and operated, trying to figure out contract link, equipment, suppliers, land leases, [and] all of the due diligence that goes into purchasing an asset and then getting [the] asset ready for application into the Feed-in Tariff programs.”⁵⁹
41. Mesa, amongst other things, signed the “operating agreement of AWA TTD Development LLC, which is a Delaware LLC created for the purpose of purchasing the Twenty-Two Degrees asset, in August of 2009.”⁶⁰ AWA TTD Development LLC then issued a resolution authorizing the company’s authorized persons to execute an Asset Purchase Agreement, Development Agreement, and Earn-Out Agreement, each dated August 14, 2009, between Twenty Two Degree Energy Corp. (“TTD”) and AWA TTD

⁵⁵ OPA Presentation, “Feed-in Tariff Program Design Update”, at p.3 (**Respondent’s Schedule of Exhibits R-060**) [CONFIDENTIAL]

⁵⁶ OPA Presentation, “Feed-in Tariff Program Design Update”, at p.4 (**Respondent’s Schedule of Exhibits R-060**) [CONFIDENTIAL]

⁵⁷ OPA Presentation, “Feed-in Tariff Program Design Update”, at p.4 (**Respondent’s Schedule of Exhibits R-060**) [CONFIDENTIAL]

⁵⁸ Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.198-99, Ins.24-3

⁵⁹ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.198, Ins.12-20

⁶⁰ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.200, Ins.18-22; Limited Liability Company Operating Agreement of AWA TTD Development LLC, August 14, 2009 (**Investor’s Schedule of Exhibits C-0461**)

Development LLC for the purchase of the assets of TTD.⁶¹

42. On September 14, 2009, AWA Arran Development LLC, a Delaware LLC, issued a resolution granting the authorized persons of the company the authority to enter into an Asset Purchase Agreement, Development Agreement, and Earn-Out Agreement, each dated August 14, 2009 between Leader Resources Corp. ("Arran") and AWA Arran Development LLC for the purchase of the assets of Arran.⁶²
43. At these times, Mesa did not know about Ontario's secret negotiations with the Korean Consortium. In fact, in the spring of 2009, the Ministry of Energy still had not informed the OPA of the secret deal with the Korean Consortium,⁶³ and the OPA was not informed until the summer of 2009.⁶⁴ The public did not know anything about a possible deal until September 26, 2009.⁶⁵
44. Jim MacDougall, the Manager of the FIT Program, testified that when he learned about the Korean Consortium deal he was not "terribly pleased by the competing development opportunities that were running in parallel."⁶⁶ Mr. MacDougall was one of the lead spokespeople and architects of the FIT Program. At the hearing, he explained that, even in the summer of 2009 – months before a final agreement was entered – MacDougall realized that the deal with the Korean Consortium negatively impacted FIT Program applicants:

Well, certainly leading into the FIT program design, we knew that there were thousands and thousands of megawatts of interest of project development in Ontario, as witnessed by some of the prior renewable energy procurement activities. So I knew that there would be more demand for FIT contracts than there would be supply of contract capacity. So my professional reaction was this just creates less supply of FIT contracts availability, because a portion of the available grid capacity will necessarily need to be allocated to the Korean Consortium.⁶⁷

45. When presented with this deal, the OPA transmission planners did not know where these 2500 MW would fit in the transmission grid, nor did they know whether the Korean Consortium had projects that could be easily connected. Mr. MacDougall recounted:

In discussions at the time, I recall that the planners didn't know where 2,500 megawatts were going to fit on the grid, on the existing grid, and of course nor whether the Korean

⁶¹ Limited Liability Company Operating Agreement of AWA TTD Development LLC, August 14, 2009, at p.3 (***Investor's Schedule of Exhibits C-0461***) [***CONFIDENTIAL***]

⁶² Written Consent of the Member of AWA Arran Development, LLC, September 14, 2009, at p.3 (***Investor's Schedule of Exhibits C-0236***) [***CONFIDENTIAL***]

⁶³ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.348-349, Ins.25-11

⁶⁴ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.302-303, Ins.24-3; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.273, Ins.20-24

⁶⁵ *Toronto Star* "Ontario eyes green job bonanza" (***Respondent's Schedule of Exhibits R-177***); Ministry of Energy News Release, "Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation" (***Respondent's Schedule of Exhibits R-068***) This Press release expressed their "regret" that the secret deal "bec[a]me known".

⁶⁶ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.275, Ins.11-14

⁶⁷ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.275-76, Ins.21-9 (emphasis added)

Consortium had projects that, you know, were readily available to be developed onto the grid. But certainly the existence of the Korean Consortium commitment through the framework agreement created greater pressure on the FIT program and less capacity available through the FIT program to offer contracts.⁶⁸

46. Mr. MacDougall remembers that the notification of the secret deal with the Korean Consortium “was a surprise”⁶⁹ and a “bit of a disappointment”⁷⁰ because:
- a. The OPA was designing a program “with all of the prioritization mechanisms and knowing there would be a significant amount of competition for the capacity available under the FIT – under the FIT program, that this new effort, this parallel initiative, was going to displace some of that capacity that was to be made available.”⁷¹ And
 - b. The OPA felt like they were “driving the FIT Program, and then the Korean Consortium arrangement was handed” to the OPA “and said, Okay, well, it has to fit within this – with this larger envelope, so find a way to see the two co-exist.”⁷²
47. The *GEIA* displaced capacity which originally had been publicized to attract investors to participate in the FIT Program.⁷³ Almost every witness whom Canada presented in these proceedings, including Canada’s damages and causation expert, recognized that but for the Korean Consortium capacity allocation, more capacity could have been awarded in the FIT program.⁷⁴

1. THE TORONTO STAR LEAKS THE NEGOTIATIONS BETWEEN ONTARIO AND SAMSUNG FOR THE BUILDING OF MANUFACTURING PLANTS

48. The Ministry of Energy directed the OPA to develop the FIT program on September 24, 2009, after Mesa had already begun its investments.⁷⁵ Two days later, on September 26, the *Toronto Star* reported for the **first** time that Ontario was in negotiations with Samsung for a special deal on renewable energy.⁷⁶
49. The information published by the *Star* did not provide a complete or accurate description of the contemplated agreement. This article reported that:

⁶⁸ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.276, Ins.10-20 (emphasis added)

⁶⁹ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.280, ln.22

⁷⁰ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.280, ln.23

⁷¹ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.280, Ins.1-7

⁷² Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.280, Ins.16-21

⁷³ Ontario Power Authority Presentation, “Renewable and Clean Energy Supply Procurement Update”

(Respondent’s Schedule of Exhibits R-044)

⁷⁴ Testimony of Rick Jennings, Hearing Transcript, Day 3, at p.248, Ins.12-13; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.183, Ins.21-23 [**CONFIDENTIAL**]; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.276, Ins.16-20; Testimony of Bob Chow, Hearing Transcript, Day 3, at pp.318-320, Ins.14-2; Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.159, Ins.4-11.

⁷⁵ Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009 (**Investor’s Schedule of Exhibits C-0264**)

⁷⁶ *Toronto Star*, “Ontario eyes green job bonanza” (**Respondent’s Schedule of Exhibits R-177**)

- a. “[t]he Ontario government is in advanced negotiations with South Korean industrial and electronics powerhouse Samsung Group about manufacturing wind turbines and other green-energy gear – including solar panels – in the province”;⁷⁷
 - b. if the deal with Samsung came to “fruition, it would see them [the Consortium] invest several billions of dollars”;⁷⁸
 - c. “[t]he company revealed in April that it planned to enter the wind-turbine market through subsidiary Samsung Heavy Industries. At the time it said it planned to manufacture 200 wind turbines in 2010, growing to 500 units annually by 2015 ... Earlier this month, Samsung Electronics Co. disclosed it had completed its first prototype production line for manufacturing solar cells and planned to become the world’s leading provider of solar power by 2015”;⁷⁹ and
 - d. George Smitherman, then Minister of Energy and Deputy Premier, informed the newspaper that that “Samsung as a developer, will get the same rate as every other developer taking part in the program. But if the company commits to manufacturing its equipment in Ontario, it will get what he called an ‘economic adder’ on top of the 13.5 cents rate. He [Smitherman] wouldn’t say how much that benefit might be.”⁸⁰
50. Contrary to the Canada’s suggestion that it was transparent about the secret deal, in truth Ontario did not want this story to be disclosed. On the same day the news article was published, the Ministry of Energy released a joint statement with Samsung C&T Corporation. That press statement stated that that “information concerning [the] negotiations... has prematurely entered the public domain” and that both parties “regret” that these efforts “have become known.”⁸¹
51. Other than “confirm[ing]” that efforts were progressing towards the signing of a framework agreement and the “substantial scale of the proposed investment,” the joint press release stated that the “contents of the proposed agreement remain commercially sensitive.”⁸²
52. On September 30, 2009, Mr. Smitherman issued a directive to the OPA:
- [T]o hold in reserve 240 MW of transmission capacity in Haldimand County and a total of 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly

⁷⁷ *Toronto Star*, “Ontario eyes green job bonanza”, at p.1 (***Respondent’s Schedule of Exhibits R-177***) (emphasis added).

⁷⁸ *Toronto Star*, “Ontario eyes green job bonanza”, at p.1 (***Respondent’s Schedule of Exhibits R-177***)

⁷⁹ *Toronto Star*, “Ontario eyes green job bonanza”, at p.2 (***Respondent’s Schedule of Exhibits R-177***)

⁸⁰ *Toronto Star*, “Ontario eyes green job bonanza”, at p.2 (***Respondent’s Schedule of Exhibits R-177***) (emphasis added)

⁸¹ News Release, “Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation”, at p.2 (***Respondent’s Schedule of Exhibits R-068***)

⁸² News Release, “Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation”, at p.2 (***Respondent’s Schedule of Exhibits R-068***)

for renewable energy generating facilities whose proponents **have signed** a province-wide framework agreement with the Province.⁸³

This direction further directed the OPA “to reserve 100 MW of the total amount that would have been allocated to the West Region for solar generating facilities whose proponents **have signed** a province-wide framework agreement with the Province.”⁸⁴

53. When Mr. Jennings was asked about this direction during the hearing, he admitted that no agreement had been signed at the time the directive was issued.⁸⁵ Mr. Jennings could not explain why the Ministry of Energy represented to the public that “proponents **have signed** a province-wide framework agreement.”⁸⁶ When pressed, Mr. Jennings contended that he “think[s]” the “have signed” language “should be read so it means being set aside for proponents who enter into a province-wide framework agreement with the province.”⁸⁷
54. The Direction is clear. It is written in the past-tense, referring to proponents who “**have signed**” an agreement. Although no binding agreement had been signed, Ontario felt that it had to set aside 600 MW of capacity before FIT contracts were awarded so that Samsung could proceed with their generation goals.⁸⁸ Taking Mr. Jennings’ explanation at face value, it means that Ontario set aside 600 MW in anticipation of a future contract with apparently uncertain contracting parties.
55. Canada contended during closing that this preferential treatment to the Korean Consortium did not harm Mesa because Mesa’s projects were not situated in these regions.⁸⁹ Canada is wrong. This conduct, as all of Ontario’s conduct when it came to the Korean Consortium, demonstrates the lack of transparency and fairness which Ontario exercised. This conduct also demonstrates that, from the beginning, the interests of investors in the FIT Program, which had been lured with the promise that all of the available capacity would be awarded under the FIT Program, were secondary to the interests of the Korean Consortium.

2. THE FIT PROGRAM IS LAUNCHED WITH AN OVERWHELMING RESPONSE FROM INVESTORS

56. To manage the large number of applications that were anticipated, the OPA designed the FIT Rules to order applications based on timestamp of when they were received.⁹⁰ Applications submitted during the launch period improve their ranking by qualifying for four criteria points and by reducing the time between the Contract Date and the

⁸³ Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor’s Schedule of Exhibits C-0105*) (emphasis added)

⁸⁴ Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor’s Schedule of Exhibits C-0105*) (emphasis added)

⁸⁵ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.315, lns.21-22

⁸⁶ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.316-19, lns.8-16

⁸⁷ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.317, lns.3-6

⁸⁸ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.317, lns.15-24

⁸⁹ Canada’s Closing Statement, Hearing Transcript, Day 6, at pp.142-43, lns.17-4;

⁹⁰ FIT Rules, Version 1.2, November 19, 2009, at §4.2(d) (*Investor’s Schedule of Exhibits C-0143*)

Milestone Date for Commercial Operation, for a maximum of 365 calendar days.⁹¹ The four criteria were:

- a. Being exempt from the Renewable Energy Approval (“REA”) process;
 - b. Owning or executing a contract with an equipment supplier to supply equipment that complied with the domestic content requirement and was needed to generate electricity (“Major Equipment Control”);
 - c. Expertise in wind power development by three (3) full time employees or by members of the Applicant Control Group (“Renewable Energy Expertise”); and
 - d. Financial capacity demonstrated with individual or collective tangible net worth of \$500 or more per kW of proposed contract capacity at the end of the most recent fiscal year (“Financial Capability”).⁹²
57. It is undisputed that the “Major Equipment Control” criterion violated Article 1106 of the NAFTA. Under Article 1106, NAFTA parties are forbidden from imposing local content requirements.
58. Although these criteria affected rankings, they were not requirements for applications to be accepted or for the projects to be ranked. As was explained during the hearing, these were “extra credit” points that merely increased the ranking of projects and, as Canada’s own expert testified, “but for” the set-aside for the Korean Consortium or the ability of NextEra to enter the Bruce Region”, Mesa would have won at least two of its proposed projects.
59. True to the OPA’s expectations, both Mr. Jennings and Ms. Lo admitted during the hearing that the FIT program received an overwhelming response with close to 10,000 megawatts in applications by November 30, 2009, during the launch period.⁹³
60. Mesa submitted applications for two of its projects, Arran and TTD, on November 25, 2009.⁹⁴ Both were located in the Bruce region.⁹⁵
61. As part of these applications, Mesa sought the criteria points for Major Equipment Control, Experience, and Financial Capability. Although Mesa contends that the OPA wrongfully rejected these criteria points based on their subjective determinations,

⁹¹ FIT Rules, Version 1.2, November 19, 2009, at §13.4 (*Investor’s Schedule of Exhibits C-0143*)

⁹² FIT Rules, Version 1.2, November 19, 2009, at §13.4 (*Investor’s Schedule of Exhibits C-0143*)

⁹³ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.271, Ins.15-18; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.86, Ins.20-25; FIT/Micro FIT Announcement, dated December 15, 2009 (*Investor’s Schedule of Exhibits C-0669*) (“We’re seeing a tremendous response to the FIT and microFIT programs, and it signals a very strong future for the development and generation of green energy in Ontario.”).

⁹⁴ Twenty-Two Degrees Wind Project, FIT Application, November 25, 2009 (*Investor’s Schedule of Exhibits C-0364*) [**CONFIDENTIAL**]; Arran Wind Project FIT Application, December 2, 2009 (*Investor’s Schedule of Exhibits C-0129*) [**CONFIDENTIAL**]

⁹⁵ Twenty-Two Degrees Wind Project, FIT Application, November 25, 2009 (*Investor’s Schedule of Exhibits C-364*); Arran Application, (*Investor’s Schedule of Exhibits C-129*) [**CONFIDENTIAL**]; Witness Statement of Cole Robertson, at ¶121

Mesa did not require any of the points in order to receive contract offers. Mesa's TTD and Arran applications were accepted⁹⁶ and ranked 8th and 9th in the Bruce Region.⁹⁷

62. The launch period criteria for major equipment control required a proponent to establish that it had the major equipment and that the equipment would be compliant with the FIT program's Ontario local content requirement. Had Ontario not imposed a local content requirement in blatant violation its NAFTA obligations, Mesa's launch period applications would have qualified for this criteria point, as well as the criteria point for expertise, which Mr. Timm identified as being not properly assessed in Mesa's favour in his expert report.⁹⁸ Mesa potentially would have received better ranking if it had been granted these criteria points.
63. In December 2009, the Ministry of Energy exchanged drafts of a question and answer document regarding FIT Program announcements.⁹⁹ In that document the Ministry of Energy acknowledged:
- a. That it was "seeing a tremendous response to the FIT and microFIT programs";
 - b. That the "first round of FIT projects is expected to create in excess of \$5 billion dollars in green investments and jobs in Ontario and generate about 2500 megawatts of green energy"¹⁰⁰; and
 - c. That the "first round of FIT projects certainly will kick start the creation of 50,000 jobs. We estimated that about 17% of the 50,000 jobs created will be to support FIT/microFIT projects. These jobs will range from design to manufacturing to construction jobs and will also include financial services legal work, and jobs at generating facilities. A number of companies have already responded positively to the GEA/FIT."¹⁰¹
64. Ontario also set out the explanation that it would give to stakeholders to justify the Samsung deal – manufacturing:
35. How can the government justify the Samsung when there are so many others willing to develop renewable energy without extra monetary incentives?

Samsung has proposed something no one else has; the construction of manufacturing plants to produce wind turbine and solar components in Ontario.

⁹⁶ Ontario Power Authority, FIT Application Management Extranet, FIT-FZ2K5LZ – Twenty Two Degree Energy, at 2 (**Respondent's Schedule of Exhibits R-134**); Ontario Power Authority, FIT Application Management Extranet, FIT-FNRGE96 – Arran Wind Energy, at 1 (**Respondent's Schedule of Exhibits R-135**)

⁹⁷ Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (**Investor's Schedule of Exhibits C-0073**)

⁹⁸ Expert Report of Gary Timm, at ¶¶4.11-4.12

⁹⁹ Email from Ceiran Bishop (MOE) to Jesse Kulendran (MOE), dated December 15, 2009 (**Investor's Schedule of Exhibits C-0668**); FIT/Micro FIT Announcement, dated December 15, 2009 (**Investor's Schedule of Exhibits C-0669**)

¹⁰⁰ FIT/Micro FIT Announcement, December 15, 2009, at p.1 (**Investor's Schedule of Exhibits C-0669**)

¹⁰¹ FIT/Micro FIT Announcement, December 15, 2009, at p.7 (**Investor's Schedule of Exhibits C-0669**)

These manufacturing plants' orders will provide a foundation for the green manufacturing sector in Ontario.¹⁰²

65. Even after the launch applications were filed, Ontario was falsely representing that the Samsung deal was different from the FIT Program because Samsung would construct manufacturing plants.
66. What stakeholders were told about the Samsung deal – that to get a deal like Samsung's they had to construct manufacturing facilities – was not true.

C. DESPITE OVERWHELMING RESPONSE TO THE FIT PROGRAM, ONTARIO PROCEEDS TO SIGN THE GREEN ENERGY INVESTMENT AGREEMENT WITH THE KOREAN CONSORTIUM.

67. In January 2010, Ontario had no obligation to sign a framework agreement with the Korean Consortium. Both Mr. Jennings and Ms. Lo confirmed the fact that Ontario could back out of any deal as it was not final until signed.¹⁰³
68. Canada contended during its closing that “while the number – on its face, the number makes – of applications makes the FIT program appear quite successful in January, as Mr. Duffy has explained in his witness statement, approximately 95 percent of the applications would have failed and been rejected.”¹⁰⁴
69. Canada's counsel additionally argued that “[t]here were lots of applications, but they weren't good applications. What did Ontario know in January of 2010? They knew, as Mr. Duffy has explained, that the FIT program was at risk of becoming a massive failure.”¹⁰⁵ The evidence shows that this is not what Ontario believed in January 2010:
 - a. By January 2010, Ontario **knew** that the FIT Program launch applications alone would generate billions of dollars in investment, create 50,000 jobs, and that applications far outstripped the available capacity.¹⁰⁶
 - b. In December 2009, Ontario believed it was “fair to say the number of applications exceeded the expectations of many people. It's turning out to be one of the biggest procurements of energy in Ontario.”¹⁰⁷
 - c. Canada's witness, Ms. Sue Lo, testified that when the FIT program launched, it was very successful:
 - Q. Okay. Now, when the FIT program launched, it was very successful; correct?
 - A. Yes.¹⁰⁸
70. Canada's reference to a 95% failure rate for applications was cited out of context. Mr.

¹⁰² FIT/Micro FIT Announcement, December 15, 2009, at p.10 (*Investor's Schedule of Exhibits C-0669*) [SIC] (emphasis added)

¹⁰³ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.266-267, Ins.10-1; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.58-59, Ins.19-6

¹⁰⁴ Canada Closing Argument, Hearing Transcript, Day 6, at p.228, Ins.15-21

¹⁰⁵ Canada Closing Argument, Hearing Transcript, Day 6, at pp.228-229, Ins.25-5

¹⁰⁶ FIT/Micro FIT Announcement, dated December 15, 2009, at p.1 (*Investor's Schedule of Exhibits C-0669*)

¹⁰⁷ FIT/Micro FIT Announcement, dated December 15, 2009, at p.3 (*Investor's Schedule of Exhibits C-0669*)

¹⁰⁸ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.86, Ins.20-22

Duffy's actual testimony is that 95% of the applications needed additional information to be complete and the OPA in fact implemented a process to ensure that applications were application were complete.¹⁰⁹ Common mistakes included lack of information regarding site access, letters of credit, and identification of connection point information.¹¹⁰ The truth, of course, is that the applications eventually were accepted (as Mesa's were) and the FIT program proceeded with numerous contracts awarded. Certainly, the Korean Consortium was not needed to be an "anchor tenant," as Canada's witnesses testified.¹¹¹ The fact that the agreement was kept a secret until the stakeholders already were preparing their FIT applications contradicts the suggestion that the Korean consortium was needed as an "anchor tenant".

71. Canada has attempted to justify entering into a "sweetheart deal" because the FIT applications "weren't good," when the Korean Consortium **did not have to** present applications, letters of credit, identify connection points or have site access before signing the contract.
72. Ontario did not release this agreement, nor did it get cabinet approval for this document.¹¹²
73. Ms. Lo, who took over the management of the *GEIA* after May 2010,¹¹³ contends that cabinet approval was not secured because it was not required.¹¹⁴ The testimony of Mr. Jennings, the government official who was involved before the agreement was signed, directly contradicts Ms. Lo's position and confirms that the Ministry of Energy believed cabinet approval **was** necessary (and apparently that Mr. Jennings thought approval had been obtained):

For instance, when we talked about it having gone to Cabinet, if ultimately it had not been approved at Cabinet, that would have been where that decision would have been made, then there would not have been a deal.¹¹⁵

74. Mr. Jennings contended that an agreement of this magnitude could not be publically disclosed until cabinet approval was secured:

So, normally it would have gone through the sequence of getting Cabinet approval, once it had Cabinet approval because, in effect, it wouldn't have been an agreement until we had – of this making magnitude, until we had Cabinet approval. The government or Minister on its own wouldn't have been able to approve it. You go to Cabinet and you've you have a communication plan and the communication plan is approved and that's how it's released.¹¹⁶

75. The Ministry of Energy received extreme opposition when it presented the deal to the

¹⁰⁹ Witness Statement of Richard Duffy, at ¶¶17-18

¹¹⁰ Witness Statement of Richard Duffy, at ¶20

¹¹¹ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.90, Ins.5-21

¹¹² Testimony of Sue Lo, Hearing Transcript, Day 3, at p.18, Ins.4-19; Annual Report of the Auditor General of Ontario, 2011, at p.108 (*Investor's Schedule of Exhibits C-0228*)

¹¹³ Testimony of Sue Lo Hearing Transcript, Day 3, at p.26, Ins.18-19

¹¹⁴ Testimony of Sue Lo Hearing Transcript, Day 3, at p.18, Ins.10-11

¹¹⁵ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.277, Ins.19-23, p.261, Ins.21-23 (emphasis added)

¹¹⁶ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.297, Ins.9-17 (emphasis added)

Cabinet,¹¹⁷ and subsequently, the Ministry amended its position, and proceeded to sign the *GEIA* without cabinet approval.¹¹⁸

76. Not only was the *GEIA* signed with the knowledge that the FIT program was a success, but it was done without undergoing a feasibility study, as the MOU required, and in spite of the substantial objections of other government officials.¹¹⁹
77. Ontario's opposition leader requested that the "sweetheart deal" be vetted by the provincial Auditor General before proceeding,¹²⁰ but that was ignored.
78. In 2011, Ontario's Auditor-General released reported that no due diligence had been carried out before the Samsung deal was entered into:

However, we noted that the normal **due diligence process** for an expenditure of this magnitude **had not been followed. For large projects such as the consortium agreement, we expected but did not find that a comprehensive and detailed economic analysis or business case had been prepared.**¹²¹

79. Ultimately, the agreement was entered into but not given to any FIT applicant. Having granted the Korean Consortium a beneficial investment opportunity Ontario was bound under the NAFTA to give treatment no less favourable under the FIT to Mesa.

1. THE PRESS BACKGROUNDER RELEASED BY THE MINISTRY OF ENERGY FAILED TO DISCLOSE IMPORTANT INFORMATION TO FIT PROPONENTS.

80. To circumvent the fact that Mesa was entitled to the same treatment as the Korean Consortium, Canada contends that Mesa should have been on notice that the Korean Consortium was getting a special deal and should have sought a similar deal because of a press backgrounder the Ministry of Energy released in January of 2010.¹²²
81. By the time this press release was issued in January 2010, Mesa and numerous other stakeholders, already had submitted FIT Program applications and invested in the Arran and TTD projects.¹²³
82. This press backgrounder did not disclose the full terms of the *GEIA* and falsely indicated

¹¹⁷ *Toronto Star*, "Tories seek probe into \$7B green energy deal", January 10, 2010 (*Investor's Schedule of Exhibits C-0512*) "[S]everal of McGuinty's own ministers **vehemently opposed** the deal at a rancorous cabinet meeting on Oct. 28" (emphasis added).

¹¹⁸ Report of the Auditor General of Ontario, 2011, at p.108 (*Investor's Schedule of Exhibits C-0228*) The Auditor General stated that "the Ministry indicated that there had been no formal Cabinet approval because it was not required."

¹¹⁹ *Toronto Star*, "Tories seek probe into \$7B green energy deal", January 10, 2010 (*Investor's Schedule of Exhibits C-0512*)

¹²⁰ *Toronto Star*, "Tories seek probe into \$7B green energy deal", January 10, 2010 (*Investor's Schedule of Exhibits C-0512*)

¹²¹ Report of the Auditor General of Ontario, 2011, at p.108 (*Investor's Schedule of Exhibits C-0228*) (emphasis added)

¹²² Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.140-142, lns.8-15

¹²³ Limited Liability Company Operating Agreement of AWA TTD Development LLC, August 14, 2009, at p.3 (*Investor's Schedule of Exhibits C-0461*) [CONFIDENTIAL]; Written Consent of the Member of AWA Arran Development, LLC, September 14, 2009, at p.3 (*Investor's Schedule of Exhibits C-0236*) [CONFIDENTIAL]

that Samsung would directly invest \$7 billion, create 16,000 jobs, and construct four manufacturing plants under the terms of the *GEIA*.¹²⁴ Samsung bolstered this belief through a press release issued on the same day:

Samsung C&T and KEPCO will support the development of local infrastructure for the renewable energy industry by constructing production facilities to provide key components, such as blades, wind towers, solar modules and inverters. Samsung C&T will also encourage component suppliers to build manufacturing facilities in the area. In total, the project is expected to generate more than 16,000 green energy jobs within the province.¹²⁵

83. Cole Robertson testified that Mesa did not seek a similar deal for the simple reason that it was not sure that it “could meet those same conditions.”¹²⁶

[Mesa] at the time... saw the manufacturing commentary in all these releases as actual Samsung manufacturing jobs, and them building the wind turbines and them creating... [s]o, [the FIT] would have been the only way for us to participate outside of something like the Green Energy Investment [Agreement] which we did not feel we were able to get because we were not at the same manufacturing scale as someone like Samsung.”¹²⁷

84. Mr. Robertson further testified that, had Mesa known that there was no manufacturing commitment, it “would have tried... because 2,000-megawatts of wind power contracts at north of 13.5 cents, that’s very, very attractive to any developer.”¹²⁸
85. Ontario also did not disclose the clause which effectively **prohibited** Ontario from entering into any similar agreement unless the terms had a “value and scope comparable to or greater than that provided for in this Agreement [the *GEIA*].”¹²⁹
86. Although Canada’s witnesses testified that the Premier was “all ears” on a similar deal,¹³⁰ the evidence shows that his hands were tied. Ontario rejected all other offers after it signed the *GEIA*,¹³¹ even when the offer presented better terms, such as no

¹²⁴ Ministry of Energy Archived Backgrounder, “Ontario Delivers \$7 Billion Green Investment” (*Respondent’s Schedule of Exhibits R-076*)

¹²⁵ Samsung C&T Press Release, “Samsung C&T to Build World’s Largest Wind, Solar Panel Cluster in Ontario” (*Respondent’s Schedule of Exhibits R-077*) (emphasis added)

¹²⁶ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.144, Ins.9-16

¹²⁷ Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.146-47, Ins.16-14

¹²⁸ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.146, Ins.8-15

¹²⁹ *Green Energy Investment Agreement*, January 21, 2010, art. 8.7 (*Investor’s Schedule of Exhibits C-0322*)

¹³⁰ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.56, Ins.15-18; Canada’s Closing Statement, Hearing Transcript, Day 6, at p.233, Ins.20-22

¹³¹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.327-337, Ins.23-17 [**CONFIDENTIAL**]; Mr. Jennings discussed the rejection of proposals from Recurrent, ATS, and NextEra.; Note from MOE meeting with Recurrent Energy Meeting, December 9, 2009 (*Investor’s Schedule of Exhibits C-0710*); Letter from Anthony Caputo, ATS Automation Systems to Minister Brad Duguid, January 20, 2010 (*Investor’s Schedule of Exhibits C-0711*) [**CONFIDENTIAL**]; Note from MOE meeting with Recurrent Energy Meeting, February 5, 2010 (*Investor’s Schedule of Exhibits C-0712*) [**CONFIDENTIAL**]; Letter from Anthony Caputo, ATS Automation Systems to Minister Brad Duguid, February 24, 2010 (*Investor’s Schedule of Exhibits C-0713*) [**RESPONDENT’S RESTRICTED ACCESS**]; Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, Undated (*Investor’s Schedule of Exhibits C-0714*); Email from Samira Viswanathan (MOE) to Mirrun Zaveri (MOE), December 20, 2010 (*Investor’s Schedule of Exhibits C-0696*)

Economic Development Adder.¹³²

87. Given the success of the FIT, and the fact that the government kept the *GEIA* confidential, this provision effectively gave the Korean Consortium a monopoly for such "sweetheart" deals. In fact, Ontario at one point bluntly stated that it was [REDACTED]

33

2. THE KOREAN CONSORTIUM BREACHES THE GEIA, ONTARIO DOES NOT TERMINATE

88. The Press Backgrounder that Canada purported to rely on during the hearing did not disclose that Ontario could terminate the *GEIA* if the Korean Consortium did not meet its deadlines.
89. Mr. Jennings claimed that one of the reasons Ontario favoured Samsung over its competitors was because it "agreed to do a very aggressive schedule of phases for bringing in the projects, much more quickly than we could expect through the FIT or any other program."¹³⁴
90. The *GEIA* contains a provision which states that time is of the essence:¹³⁵
- 16.10 **Time of the Essence**
- In the performance and observance of the terms and conditions of this Agreement, time shall be of the essence.
91. Ms. Lo admitted during her testimony that the Korean Consortium almost immediately had problems meeting its deadlines for commercial operation of its phase 1 and 2 generation projects.¹³⁶
92. Article 11.1(e) of the *GEIA* required the Korean Consortium to:
- a. "specify Points of Connection to the existing Transmission System or specify project locations for the generation connection for the Generation Facilities for Phase 2 on or before July 30, 2010,..."and
 - b. For Phases 2 to 5 "demonstrate the necessary Access Rights, including Points of Connection, for a Generation Facility at least three years prior to the Targeted Commercial Operation Date for the Phase."¹³⁷ For Phase 2, under the valid agreement in 2010, the target COD was December 31, 2013.¹³⁸
93. The Korean Consortium did not meet these requirements:

¹³² Letter from Anthony Caputo, ATS Automation Systems to Minister Brad Duguid, February 24, 2010 (*Investor's Schedule of Exhibits C-0713*) [**RESPONDENT'S RESTRICTED ACCESS**]

¹³³ Email from Samira Viswanathan (MOE) to Mirrun Zaveri (MOE), December 20, 2010 (*Investor's Schedule of Exhibits C-0696*) [**RESPONDENT'S RESTRICTED ACCESS**] Samira Viswanathan explains that the Ministry of Energy was not in a position to offer other proponents a deal similar to that offered to the Korean Consortium.

¹³⁴ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.275-276, Ins.25-3

¹³⁵ *Green Energy Investment Agreement*, January 21, 2010, art. 16.10 (*Investor's Schedule of Exhibits C-0322*)

¹³⁶ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.96-97, Ins.17-5

¹³⁷ *Green Energy Investment Agreement*, January 21, 2010, art. 11.1(e) (*Investor's Schedule of Exhibits C-0322*)

¹³⁸ *Green Energy Investment Agreement*, January 21, 2010, art. 3.2 (*Investor's Schedule of Exhibits C-0322*)

- a. The Korean Consortium did not specify its connections points or its project locations on or before July 30, 2010,¹³⁹
 - b. It did not “demonstrate the necessary Access Rights, including Points of Connection, for a Generation Facility at least three years prior to the Targeted Commercial Operation Date for the Phase,” which would have been by December 31, 2010.¹⁴⁰
94. Ontario had the right to terminate the *GEIA* if deadlines were not met.¹⁴¹ Had Ontario exercised its contractual right to terminate, more capacity would have been available for the FIT program, including in the Bruce Region. This is not what happened.
 95. Ms. Lo admitted that the Ministry of Energy reviewed with its counsel the leverage Ontario could exercise with the Korean Consortium to renegotiate the favourable agreement,¹⁴² and that this leverage in fact was exercised.¹⁴³ Ontario did not terminate the agreement because, despite its detrimental effect on FIT investors, it did not want the *GEIA* nullified for optical reasons.¹⁴⁴
 96. Instead, Ontario amended the agreement twice: once in July 2011, coinciding with the July 2011 FIT awards;¹⁴⁵ and again in June 2013, coinciding with the termination of the FIT program.¹⁴⁶
 97. Under the first amending agreement, the Economic Development Adder (“EDA”) was reduced in exchange for an extension of the deadlines,¹⁴⁷ and the deadline for specifying Phase 2 connections points was eliminated.¹⁴⁸ Additionally, this agreement provides that “bringing Manufacturing Plants to Ontario includes the use of existing

¹³⁹ Minutes/Agenda, Working Group Meeting, September 9, 2010 (*Investor's Schedule of Exhibits C-0562*) These meeting minutes show that the connection points had not yet been selected.

¹⁴⁰ Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (*Investor's Schedule of Exhibits C-0070*) [**RESPONDENT'S RESTRICTED ACCESS**] (This email shows that the Korean Consortium did not select connection points for its Phase 2 wind projects until January 7, 2011, and that the OPA did not consider those to be final); Ontario Power Authority, News Release, “Power purchase agreements signed with Korean Consortium”, August 3, 2011 (*Investor's Schedule of Exhibits C-0059*) The wind sites used for Phase 2 by the Korean Consortium in August of 2011 were K2 and Armow; Ontario Power Authority, “FIT Car Priority Ranking by Region”, July 4, 2011 (*Investor's Schedule of Exhibits C-0293*) The K2 and Armow projects were in the FIT program in July 2011.

¹⁴¹ *Green Energy Investment Agreement*, January 21, 2010, art. 14.2(d) (*Investor's Schedule of Exhibits C-0322*) Article 14.2 granted Ontario the right to terminate if any of the conditions listed in 11.1 with respect to Phases 2 to 5 are not satisfied.

¹⁴² Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.102-103, Ins.16-3

¹⁴³ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.103, Ins.4-6

¹⁴⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.100, Ins.11-13

¹⁴⁵ *Green Energy Investment Agreement – Amending Agreement*, July 29, 2011 (*Investor's Schedule of Exhibits C-0282*)

¹⁴⁶ Amended and Restated *Green Energy Investment Agreement* (*Respondent's Schedule of Exhibits R-133*)

¹⁴⁷ *Green Energy Investment Agreement – Amending Agreement*, July 29, 2011, at ¶15 (*Investor's Schedule of Exhibits C-0282*)

¹⁴⁸ *Green Energy Investment Agreement – Amending Agreement*, July 29, 2011, at ¶¶9, 17, 19-20 (*Investor's Schedule of Exhibits C-0282*)

facilities for a new purpose.”¹⁴⁹ Under the second amending agreement, the priority capacity granted to the Korean Consortium was reduced from 2500MW to 1369 MW.¹⁵⁰

98. Despite the fact that the *GEIA* specified that “time is of the essence,” Ontario allowed the Korean Consortium to miss its deadlines with impunity. Its justification, as Ms. Lo explained, was that, despite having received a special deal which guaranteed it access to the transmission grid and regulatory assistance, the Korean Consortium wanted the same treatment as FIT proponents,¹⁵¹ when it was to its favour.

3. THE KOREAN CONSORTIUM'S BREACHES RESULTED FROM ITS WAIT AND SEE APPROACH TO ACQUIRING PROJECTS

99. The Korean Consortium would have the opportunity to select a partner to develop its projects. Ontario had no rights pursuant to the *GEIA* to participate in the decision regarding the selection of that partner.¹⁵²

100. The Korean Consortium exercised this right and brought in Pattern Energy.¹⁵³

101. Ms. Lo testified that the Korean Consortium was having trouble meeting its Phase 1 and 2 deadlines because of delays in the regulatory approval process:

I think the Korean Consortium were having trouble meeting the deadlines, but also so many FIT proponents were having trouble meeting the deadlines, too. ... Everybody was having trouble meeting deadlines, because the renewable energy approval process took more time than they would have thought.¹⁵⁴

102. What Ms. Lo did not testify was that the Phase 2 delays, which involved the set aside in the Bruce region, had nothing to do with regulatory approval and everything to do with the Korean Consortium and Pattern's strategy of picking “low hanging fruit” in the FIT process to then convert into *GEIA* projects.

103. Colin Edwards of Pattern testified during a *Section 1782* deposition that this was Pattern's strategy and that it allowed them to buy the projects at significantly lower prices:

Q. And how would that affect your decision, the ranking?

A. We would – parties who were ranked higher on the list would be more likely to stay in the queue in hopes of keeping their project and receiving a FIT contract, knowing that there was transmission capacity coming to this area.

Q. And the lower ones would be low-hanging fruit, right?

¹⁴⁹ *Green Energy Investment Agreement – Amending Agreement*, July 29, 2011, at ¶¶7, 12 (*Investor's Schedule of Exhibits C-282*)

¹⁵⁰ Amended and Restated *Green Energy Investment Agreement*, Art. 3 (*Respondent's Schedule of Exhibits R-133*)

¹⁵¹ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.103, Ins.16-17: The Korean Consortium wanted extensions of their phase 1 and 2 commercial operation dates. This is something that was provided to all FIT proponents in a – by the OPA at the Ministry's request. **So what they wanted was the same treatment as every FIT proponent had received.** (emphasis added).

¹⁵² Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.279-280, Ins.24-12

¹⁵³ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.279, Ins.20-23

¹⁵⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.97-98, Ins.19-2

- A. The lower ranked parties would have a lesser chance to get a FIT contract.
- Q. And it would be more easily able to buy their assets in order to fulfill your obligations under the *GEIA* as a joint venture, correct?
- A. Perhaps.¹⁵⁵

104. Mr. MacDougall confirmed that the OPA knew that this was Pattern's strategy.¹⁵⁶
105. In other words, Pattern waited for the rankings to be released and then, based on these rankings, bought those projects which were advanced in their process but were ranked too low to get a contract at a discounted price.¹⁵⁷ In Mr. Edwards' words, they "had an awareness of where different parties ranked on the publicly available list when [they] made [their] interconnection point selections."¹⁵⁸ These rankings were not made public until December 21, 2010.¹⁵⁹
106. This is the true reason why the Korean Consortium could not meet its 2010 obligations – it had to wait until the rankings were announced to determine which FIT proponents it could attempt to buy out at bottom prices.
107. This is confirmed by the fact that the projects the Korean Consortium used to meet its Phase 2 commitments in the Bruce region, Armow and K2,¹⁶⁰ were low-ranked projects already in the FIT queue in July 2011.¹⁶¹
108. Although the Korean Consortium was poaching the available capacity that originally was promised to FIT proponents, it was in fact buying projects that were seeking FIT contracts to meet its *GEIA* commitments.
109. Canada's witnesses repeatedly testified regarding the importance of "shovel readiness",¹⁶² but the Korean Consortium and Pattern did not have to be shovel ready and in fact were far from it. They had not even acquired projects, but nonetheless were allowed to delay their deadlines to facilitate their predatory buying of lower-ranked FIT projects.

¹⁵⁵ Transcript of Colin Edwards Deposition, August 3, 2012, at p.187, Ins.2-16 (*Investor's Schedule of Exhibits C-0537*)

¹⁵⁶ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.207-08, Ins.9-9. Sue Lo also discussed this strategy: "[i]t would make sense" that the Korean Consortium was purchasing "low-ranked projects that really had no realistic opportunity to become part of the FIT program in order to satisfy their obligations under the *GEIA*" but she was "not aware or unaware". Hearing Transcript, Day 3, at p.96, Ins.2-12

¹⁵⁷ Transcript of Colin Edwards Deposition, August 3, 2012, at p.187, Ins.2-16 (*Investor's Schedule of Exhibits C-0537*)

¹⁵⁸ Transcript of Colin Edwards Deposition, August 3, 2012, at pp.186-187, Ins.24-1

¹⁵⁹ OPA, Priority ranking for First Round FIT Contracts, December 21, 2010, at p.1 (*Investor's Schedule of Exhibits C-0073*)

¹⁶⁰ OPA, News Release, "Power purchase agreements signed with Korean Consortium", August 3, 2011 (*Investor's Schedule of Exhibits C-0059*) The wind projects used for Phase 2 by the Korean Consortium were K2 and Armow.

¹⁶¹ OPA, "FIT Car Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits C-293*) The Armow project was ranked 21st and the K2 or Kingsbridge II project was ranked 24.

¹⁶² Testimony of Sue Lo, Hearing Transcript, Day 3, at p.157, Ins.21-24; Testimony of Sue Jim MacDougall, Hearing Transcript, Day 3, at p.203, Ins.923; S. Witness Statement of Sue Lo, at ¶14; Witness Statement of Jim MacDougall, at ¶15

110. Even Ms. Lo admitted during her testimony that there wasn't "an even playing field" between FIT proponents and the Korean Consortium.¹⁶³ While the FIT proponents invested money and time to obtain access rights, chose connection points, and developed their projects to ensure that they were shovel ready, the Korean Consortium and Pattern could sit back, wait for FIT proponents to do the heavy lifting, and then buy them out when there was not enough capacity available.

4. ONTARIO DOES NOT INFORM THE PUBLIC THAT ALL THE KOREAN CONSORTIUM HAD TO DO TO BE PAID AN ECONOMIC DEVELOPMENT ADDER IS DESIGNATE MANUFACTURERS COMING TO ONTARIO.

111. Even today, Ontario, via Ms. Lo's testimony, contends that under the *GEIA*, while Ontario gave "generation capacity," it got "manufacturing" and the "\$7 billion investment" in return.¹⁶⁴ She eventually admitted that, under the *GEIA*, the Korean Consortium had no actual obligation to actually build manufacturing plants.¹⁶⁵
112. In truth, under the *GEIA*, the Korean Consortium only had to "attract" four manufacturing plants to Ontario.¹⁶⁶ The four companies the Korean Consortium eventually designated were Siemens, CS Wind, SMA and Canadian Solar – none of which are part of the consortium.¹⁶⁷
113. The Consortium's Turbine partner, Siemens, planned to use its factory to "produce all of the wind turbine blades for Siemens projects in the province."¹⁶⁸ Siemens itself had eight projects with a commissioned capacity of approximately 950 MW in Ontario and Manitoba.¹⁶⁹ Thus, Siemens' attraction to Ontario was not solely because of the Korean Consortium.
114. Canadian Solar announced that it would be building a Solar Panel Manufacturing Facility in Ontario on December 3, 2009, before the *GEIA* was signed and years before it was identified as a manufacturing partner of the Consortium.¹⁷⁰ Canadian Solar was not attracted to Ontario by Samsung, but instead came because of the significant interest which was generated as a result of the **FIT program**:

Canadian Solar's manufacturing facility is expected to help drive Ontario's emerging solar industry, which is growing rapidly as a result of the provincial government's **recently**

¹⁶³ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.173, Ins.20-21

¹⁶⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.45, Ins.5-7

¹⁶⁵ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.45-46, Ins.24-1

¹⁶⁶ *Green Energy Investment Agreement*, January 21, 2010, art. 8.3 (***Investor's Schedule of Exhibits C-0322***)

¹⁶⁷ "Samsung Renewable Energy signs manufacturing partnership agreement with Canadian Solar Inc.", June 26, 2013 (***Investor's Schedule of Exhibits C-0593***)

¹⁶⁸ "Siemens selects Tillsonburg, Ontario, as new home for Canadian wind turbine blade manufacturing facility", December 2, 2010, (***Investor's Schedule of Exhibits C-0594***)

¹⁶⁹ "Siemens selects Tillsonburg, Ontario, as new home for Canadian wind turbine blade manufacturing facility", December 2, 2010, (***Investor's Schedule of Exhibits C-0594***)

¹⁷⁰ "Canadian Solar Announces Intention to Build Solar Panel Manufacturing Facility in Ontario", December 3, 2012 (***Investor's Schedule of Exhibits C-0596***); "Samsung Renewable Energy signs manufacturing partnership agreement with Canadian Solar Inc.", June 26, 2013 (***Investor's Schedule of Exhibits C-0593***)

launched feed-in-tariff (FIT) program... [W]ith this facility, our leading-edge photovoltaic technology will be manufactured and readily available in Ontario for those who are ready to take advantage of the FIT programs."¹⁷¹

115. The “manufacturing commitment” of the Korean Consortium that Canada’s witnesses have referenced was nothing more than designating a manufacturer for its components, just as every FIT proponent had to do to comply with Ontario’s unlawful Domestic Content Requirements. There was no true requirement to prove that the any plant was attracted by the Consortium, as opposed to the FIT program. The Consortium shut out FIT proponents, bought their projects at a discount when they were consequently lowly ranked, and was entitled to an Economic Development Adder based on manufacturing partners that were attracted to Ontario because of the FIT program, simply by designating them as the manufacturer for the components it needed to meet its domestic content requirements.

5. GEIA AND FIT INVESTORS WERE IN LIKE CIRCUMSTANCES AND ENTITLED TO THE SAME TREATMENT UNDER THE NAFTA

116. In another attempt to circumvent its NAFTA obligations, Canada has argued that *GEIA* and FIT investors are not in like circumstances because they invested through different programs, and thus Ontario did not have to provide Mesa the same benefits.
117. Canada’s argument makes a mockery of the investment protections intended under the NAFTA. Under Canada’s interpretation, states could, with impunity, discriminate against investors of a NAFTA party by creating a parallel program with the same object but with better benefits, when they wanted to treat one investor or group of investors more favourably than others.
118. There can be no question that both programs attracted the same kind of investors for the same purpose: the transmission of renewable energy in Ontario’s grid.¹⁷²
119. It is undisputed that *GEIA* investors competed with FIT investors. This was confirmed by Canada’s witnesses.¹⁷³ This was also confirmed by Pattern and Samsung.¹⁷⁴ Zohrab

¹⁷¹ “Canadian Solar Announces Intention to Build Solar Panel Manufacturing Facility in Ontario”, December 3, 2012 (*Investor’s Schedule of Exhibits C-0596*)

¹⁷² Canada’s Closing Statement, Hearing Transcript, Day 6, at p.223-224, Ins.19-7 (“There is no dispute that both the Korean Consortium projects and the claimant’s projects would be wind projects. There is no dispute they would produce electricity and that that electricity would be fed into the grid. And there is no dispute that the projects of the Korean Consortium and the projects of the claimant were competing for transmission capacity in the Bruce region..”)

¹⁷³ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.32, Ins.14-21 (the Ministry of Energy did not publicize the *GEIA* because “[i]t is inappropriate to provide the agreement to another competitor at the time that the Korean Consortium was still working on their proposal.”), and pp.82-83, Ins.18-9 (admitting that members of the Canadian Wind Energy Association were representing “competitors of Samsung” when they opposed the special deal); Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.275, Ins.3-14 (admitting that he wasn’t “terribly pleased” by the “competing development opportunities that were running in parallel” because he knew that the *GEIA* investors would “necessarily compete with connection capacity for the broader FIT program and the FIT programs contract award capacity.”); Canada’s Closing Statement, Hearing Transcript, Day 6, at p.223-

Mawani, Samsung Canada's Director of Business Development and Assistant General Manager during the relevant time, stated that:

There is a finite amount of transmission capacity in the province of Ontario and companies that seek PPAs in Ontario are in competition to obtain access to this limited transmission capacity. Samsung Korea competed against these other companies for transmission access in order to sell power under PPAs. Samsung Korea's guaranteed access to transmission capacity under the *GEIA* allowed Samsung Korea to be in a better competitive position than those companies without guaranteed transmission access, like Mesa Power Group.¹⁷⁵

120. Canada's argument that "Contracts under the *GEIA* are not FIT contracts [and that a]ll FIT contracts were the same. The *GEIA* contracts were different. They were under a different program" is unavailing.¹⁷⁶ It is undisputed that the *GEIA* contracts were patterned after the FIT contracts – they were 20 year fixed-rate and fixed-term power purchase agreements,¹⁷⁷ and the base contract price was the same.¹⁷⁸ Canada in fact recognized that "of course they looked alike. That was part of the rule itself, that was part of the *GEIA*, that they be modelled on FIT contracts."¹⁷⁹
121. Canada argued that "[p]eople under the FIT Program are treated differently in terms of the contracts and the rates that they get than under other procurement programs."¹⁸⁰ As shown, this is not accurate. The renewable energy programs administered at the time, the FIT Program and the *GEIA*, were practically identical. They were based on the same contracts and same rate, with the exception of the EDA.
122. The projects were so alike that Pattern was able to move its projects out of FIT Program and include them as Phase 1 *GEIA* projects.¹⁸¹ As discussed, the Korean Consortium and Pattern also bought other low-ranked FIT projects and converted them to *GEIA* projects.¹⁸²

224, Ins.25-7 ("And there is no dispute that the projects of the Korean Consortium and the projects of the claimant were competing for transmission capacity in the Bruce region...")

¹⁷⁴ Transcript of Colin Edwards Deposition, August 3, 2012, at p.63, Ins.20-23 (admitting that Pattern is a competitor of Mesa), pp.64-66, Ins.17-23 (admitting that Samsung, KEPCO and Pattern were competitors of FIT proponents) (*Investor's Schedule of Exhibits C-0537*); Declaration of Zohrab Mawani, August 15, 2013, at ¶10 (*Investor's Schedule of Exhibits C-0406*)

¹⁷⁵ Declaration of Zohrab Mawani, August 15, 2013, at ¶10 (*Investor's Schedule of Exhibits C-0406*)

¹⁷⁶ Canada's Opening Argument, Hearing Transcript, Day 1, at p.224, Ins.8-15

¹⁷⁷ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.55, Ins.16-18

¹⁷⁸ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.55, Ins.19-22

¹⁷⁹ Canada's Opening Argument, Hearing Transcript, Day 1, at p.217, Ins.7-8

¹⁸⁰ Canada's Opening Argument, Hearing Transcript, Day 1, at p.219, Ins.14-17

¹⁸¹ Transcript of Colin Edwards Deposition, August 3, 2012, at p.48, Ins.4-24 (admitting that 5 of Pattern's 10 projects submitted to FIT were incorporated in the Korean Consortium's Phase 1 South Kent project, pp.51-52, Ins.22-12 (admitting that the Merlin project rescinded its FIT contract and was incorporated into the Korean Consortium's Phase 1 South Kent project) (*Investor's Schedule of Exhibits C-537*)

¹⁸² Transcript of Colin Edwards Deposition, August 3, 2012, at p.2-16 (*Investor's Schedule of Exhibits C-0537*);

Additional evidence of the likeness between the *GEIA* and FIT can be found in the Investor's Memorial, at ¶¶513-530; Investor's Reply Memorial, at ¶¶338-368; and the Expert Report of Seabron Adamson, at ¶¶17-89

¹⁸² More evidence of the better treatment provided under the *GEIA* can be found in Investor's Memorial, at ¶¶531-599; Investor's Reply Memorial, at ¶¶361-373; Expert Report of Seabron Adamson, at ¶¶90-112

123. The only difference is that the Korean Consortium and Pattern were granted priority transmission access, an Economic Development Adder, and other favourable terms. The "obligation" to "attract" manufacturing partners was nothing more than Samsung designating the manufacturers for its components, just like every FIT proponent had to do.¹⁸³
124. Canada's contention that the *GEIA* was different from the FIT because *GEIA* investors were treated better is unavailing. It cannot have been the intention of the NAFTA parties to allow States to escape their obligations by benefitting an investor through an identical and parallel program and be able to shield itself from liability by saying that the favourable treatment it denies to other similarly situated investors makes the programs different.¹⁸⁴
125. Had Ontario complied with its NAFTA obligations, amongst other things, all of Mesa's projects would have received priority transmission access, would have been entitled to an EDA, regulatory assistance, and the right to capacity adjustments.

D. FIT PROPONENTS EXPECTED CONTRACT AWARDS PURSUANT TO FIT RULES

126. In April 2010, the OPA released the first round of FIT Contracts for projects that passed the Transmission Availability Test ("TAT") and the Distribution Availability Test ("DAT").¹⁸⁵ The OPA awarded contracts for every region except the Bruce region.¹⁸⁶
127. With respect to the projects in the Bruce region, the OPA released a Backgrounder informing proponents that:
 - a. "1,500 MW of additional transmission capacity for renewable projects will be delivered through the Bruce to Milton transmission project that Hydro One currently has underway."¹⁸⁷ And that
 - b. "Bruce-Milton capacity will be assigned at the beginning of the ECT so some of the Bruce area projects that do not receive a contract in April will receive one in the fall of 2010 as part of the ECT."¹⁸⁸
128. During the hearing, Canada's witnesses tried to contend that regional rankings are irrelevant, and provincial rankings are the only things that matter.¹⁸⁹ As was demonstrated, this is not true and was contradicted by Canada's causation and

¹⁸³ Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.156, Ins.6-20

¹⁸⁴ More evidence of the better treatment provided under the *GEIA* can be found in Investor's Memorial, at ¶¶531-599; Investor's Reply Memorial, at ¶¶361-373; Expert Report of Seabron Adamson, at ¶¶90-112

¹⁸⁵ OPA Backgrounder: "Ontario's Feed-in Tariff Program", April 8, 2010, p.1 (**Respondent's Schedule of Exhibits R-005**)

¹⁸⁶ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.120, Ins.10-15); Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.217, Ins.1-4; Testimony of Bob Chow, Hearing Transcript, Day 3, at p.304, Ins.6-11. (

¹⁸⁷ OPA Backgrounder: "Ontario's Feed-in Tariff Program", April 8, 2010, p.4 (**Respondent's Schedule of Exhibits R-005**)

¹⁸⁸ OPA Backgrounder: "Ontario's Feed-in Tariff Program", April 8, 2010, p.4 (**Respondent's Schedule of Exhibits R-005**)

¹⁸⁹ Testimony of Bob Chow, Hearing Transcript, Day 3, at pp.304-305, Ins.24-8

damages expert Mr. Goncalves.¹⁹⁰

129. Mr. Chow admitted during tribunal questioning that:

- a. The “capability is organized on regional basis”;¹⁹¹
- b. In the OPA’s “judgment, it is useful to do the provincial ranking, at the same time group them into regional rankings, so people have a better view of who is actually competing with them, because a lot of them are there still looking for future capacity to allow them to connect as in the case of the Bruce.”¹⁹² And that;
- c. “[T]here are requirements to test them on the regional capability.”¹⁹³

130. In fact, a contemporaneous OPA document affirmed that ‘Transmission Area Rank’ is a better indicator of whether or not a particular project will be offered a FIT contract as it is specific to the area in which the project is located and would be built.”¹⁹⁴ This document then went on to provide the following example.¹⁹⁵

For example, a 5 MW project located in the Niagara region that is awaiting ECT might have a ‘Transmission Area Rank’ of 25 and a ‘Provincial Rank’ of 200. The viability of the 5 MW project, though, will be based on the need for and the ability to connect that 5 MW in the Niagara region. The ‘Provincial Rank’ is based on the application date of that particular project in relation to all other projects awaiting ECT in the province as a whole – but the assessment of whether the project will pass ECT and receive a contract will be based on regional requirements and limitations only.

131. According to the OPA, the likelihood of getting a contract was based on “*regional* requirements and limitations.”¹⁹⁶ This was confirmed by Mr. Goncalves’ testimony that but for the advantages given to the Korean Consortium and NextEra, Mesa would have been awarded at least the Arran and TTD projects, which were higher ranked in the region comparative to the province.
132. Mesa’s projects Arran and TTD in fact were ranked 8th and 9th in the Bruce region, well within the 1500 MW of capacity which was to become available in the Bruce region and awarded during a province wide ECT to be held in the fall of 2010.¹⁹⁷
133. On May 29, 2010, Mesa filed two more FIT applications for its North Bruce and

¹⁹⁰ Testimony of Christopher Goncalves, Hearing Transcript, Day 3, at pp.157-160, lns.23-9

¹⁹¹ Testimony of Bob Chow, Hearing Transcript, Day 3, at p.344-345, lns.25-1 [CONFIDENTIAL]

¹⁹² Testimony of Bob Chow, Hearing Transcript, Day 3, at p.346-347, lns.23-4 [CONFIDENTIAL]

¹⁹³ Testimony of Bob Chow, Hearing Transcript, Day 3, at p.350-351, lns.25-2

¹⁹⁴ FIT, Application Review Test and Standard Responses, May 9, 2011, at p.33 (*Investor’s Schedule of Exhibits C-0617*); Testimony of Bob Chow, Hearing Transcript, Day 3, at p.356, lns.1-6

¹⁹⁵ FIT, Application Review Test and Standard Responses, May 9, 2011, at p.33 (*Investor’s Schedule of Exhibits C-0617*)

¹⁹⁶ MOE Presentation, Priority Ranking Release: Issues to be Addressed, August 26, 2010, at p.12 (*Investor’s Schedule of Exhibits C-0483*) [CONFIDENTIAL] This presentation shows that both options for the release of the priority rankings involved the release of the “relative rank” which was the regional ranking rather than a provincial rank. (emphasis added)

¹⁹⁷ Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor’s Schedule of Exhibits C-0073*)

Summerhill projects.¹⁹⁸ It was expected that these projects also would be awarded through the ECT process.¹⁹⁹

134. However, the ECT was delayed for the benefit of the Korean Consortium, because the “OPA could not start to assess the transmission availability until the consortium finalized the connection points for phases two and three of its projects.”²⁰⁰

1. THE OPA CONTINUED TO MISREPRESENT TO FIT PROPONENTS THAT THE KOREAN CONSORTIUM PROMISED TO CONSTRUCT MANUFACTURING PLANTS.

135. In April 2010, the OPA prepared “Key Messages and Questions & Answers” in relation to the FIT Program.²⁰¹ As part of these key messages, the OPA again represented to FIT proponents that the “KC has proposed the construction of manufacturing plants to produce both wind turbine and solar components in Ontario” to justify the preferential treatment to the Korean Consortium.²⁰²
136. Mesa only learned after it received a copy of the *GEIA* through legal proceedings that the Korean Consortium was not obligated to “construct” manufacturing plants.

2. THE KOREAN CONSORTIUM RESERVES CAPACITY IN THE BRUCE REGION TO THE DETRIMENT OF FIT PROPONENTS CONNECTED IN BRUCE

137. On September 17, 2010, Ontario announced for the first time that it would be setting aside 500 MW of capacity in the Bruce region for the Korean Consortium.²⁰³ The OPA previously had represented to FIT applicants that this capacity would be awarded to FIT proponents through a province-wide ECT.²⁰⁴
138. By this date, Mesa had already submitted FIT applications for all of its projects, totaling 565 MW of capacity.²⁰⁵ Shortly after the submissions of these applications, on July 7, 2010, Mesa acquired all of GE’s the American Wind Alliance interest.

¹⁹⁸ Summerhill Wind Energy I, FIT Application, May 29, 2010 (*Investor’s Schedule of Exhibits C-0362*) [**CONFIDENTIAL**]; Summerhill Wind Energy II, FIT Application, May 29, 2010 (*Investor’s Schedule of Exhibits C-0363*) [**CONFIDENTIAL**]; North Bruce Wind Energy I, FIT application, May 29, 2010 (*Investor’s Schedule of Exhibits C-0360*) [**CONFIDENTIAL**]; North Bruce Wind Energy II, FIT Application, May 29, 2010 (*Investor’s Schedule of Exhibits C-0361*) [**CONFIDENTIAL**]

¹⁹⁹ Investor’s Memorial, at ¶¶755-756

²⁰⁰ Report of the Auditor General of Ontario, 2011, at p.116 (*Investor’s Schedule of Exhibits C-0228*)

²⁰¹ Feed-in Tariff Program, Key Messages and Questions & Answers, April 6, 2010 (*Investor’s Schedule of Exhibits C-0110*)

²⁰² Feed-in Tariff Program, Key Messages and Questions & Answers, April 6, 2010, at p.3, 10 (*Investor’s Schedule of Exhibits C-0110*)

²⁰³ Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), September 17, 2010 (*Investor’s Schedule of Exhibits C-0119*)

²⁰⁴ Ontario Power Authority, Backgrounder: “Ontario’s Feed-in Tariff Program”, April 8, 2010, at p.4 (*Respondent’s Schedule of Exhibits R-005*)

²⁰⁵ Reply Memorial, at p.224, fn. 907; Reply Witness Statement of Cole Robertson, at ¶¶7, 10; Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.123, Ins.3-25; As set out in the Investor’s Reply Memorial, GE transferred its interest in the Ontario FIT projects on July 7, 2010. Investor’s Reply Memorial ¶ 96. That GE exited the joint venture was confirmed by Cole Robertson during the hearing. C. Robertson, 10/27/14 at 123, Ins. 8-25.

139. Ms. Lo admitted during her testimony that this set aside “reduced the amount of megawatts that could be awarded in the Bruce region in the FIT program.”²⁰⁶
140. Additionally, Ms. Lo testified during the hearing that the “energy planners had always predicted they would have to reserve megawatts in the Bruce because, for most people, they would know that the wind regime in the Bruce area was amongst the strongest in the province.”²⁰⁷ This is not equivalent to FIT proponents knowing that capacity would be excluded from the FIT program for the benefit of the Korean Consortium in the Bruce region, and displacing FIT proponents, especially when the Korean Consortium had not even obtained access rights to any properties in the Bruce region when the GEIA was entered into or when capacity was reserved. This argument indeed ignores that by the time the GEIA was signed, Mesa had already invested in its two Launch Period projects, and had begun investigating the acquisition of its other two projects. Canada’s purported belief that because the Bruce region had the best regime, FIT investors should have been on notice that their rights could be snatched from them at any time is without support. The moment they invested, the NAFTA protected these investments from arbitrary and capricious actions by the government, such as entering into an agreement that jeopardizes their interests, or maintaining that prejudicial agreement even when the other party was in breach.
141. Contrary to Mr. Goncalves’ contention that the reservation of transmission “caused no immediate or direct harm to Mesa”, this is when Mesa’s harm first accrued. On this date, the capacity which could have been allocated in the Bruce region was practically halved. This is when this harm to Mesa first arose. Mr. Goncalves’ testimony to the contrary is in fact contradicted by his other admission that that **but for** this set aside, Mesa would have been awarded contracts for at least two of its projects: Arran and TTD.²⁰⁸ That the harm was not “crystallized” until a later date, does not change that this date (September 17, 2010) was when the harm first occurred. This is fully supported that once the set aside occurred and the rankings were released, the value of any particular project in Bruce was lowered as the project was being pushed aside by the Korean Consortium.

3. ONTARIO PROVIDED MORE FAVOURABLE TREATMENT TO ANOTHER FIT INVESTOR, INTERNATIONAL POWER CANADA

142. Canada argued during its Opening that the “FIT program was administered without regard for who was submitting it, without regard for reputation and name.”²⁰⁹
143. Ms. Lo also testified that although there was not an “even playing field” between the

²⁰⁶ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.137, lns.9-19

²⁰⁷ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.140, lns. 5-11

²⁰⁸ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.159, lns.4-11 (“Turning to the *GEIA* counterfactual, we then take away the breach, which is the 500-megawatt allocation of transmission capacity to the Korean Consortium....TTD and Arran make the cut and get FIT contracts in that scenario.”).

²⁰⁹ Canada’s Opening Argument, Hearing Transcript, Day 1, at p.141, lns.6-8

Korean Consortium and FIT proponents, all FIT proponents were treated the same.²¹⁰

144. Her testimony demonstrates otherwise. When asked about the subject line of the email that confirms that International Power Canada's ("IPC") projects would be protected by Ontario from a Korean Consortium set-aside, [REDACTED]

145. As part of this email, when considering setting aside capacity in the West of London for GEIA projects, Ms. Lo admitted that Ontario's "b'club" wanted to protect [REDACTED] [REDACTED]²¹¹ The [REDACTED] that Ontario wanted to protect from the Korean Consortium set aside were owned by International Power Canada ("IPC"), a Canadian company whose president was the past president of the governing Ontario Provincial Liberal Party, who then became the president of the federal Liberal Party of Canada.²¹²

146. Ms. Lo, upon being questioned on the political connections of IPC's President and CEO, contended that the Ministry "didn't pay attention to the politics,"²¹³ but then admitted that the short time frame for changing connection points was driven by political considerations, specifically wanting "good news" and the ruling government being able to "talk about its millions and millions of dollars in investment that it would attract" for re-election purposes.²¹⁴ These political considerations were also apparent as the timing coincided with the August 2, 2011 direction from the Minister of Energy, to eliminate the FIT contract termination provisions so that any PPA awarded could not be terminated under the existing four-month termination provisions in the FIT Program.²¹⁵

147. The government of Ontario protected a Canadian FIT proponent's projects from a Korean Consortium set aside. It ensured that there would be capacity in the West of London to accommodate IPC's projects under the FIT program before reserving capacity for the Korean Consortium.

148. Under Article 1102 and 1103, this favourable treatment accorded to a Canadian

²¹⁰ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.173, lns.20-23

²¹¹ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.184, lns.6-8 [CONFIDENTIAL]; Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), May 12, 2011 (*Investor's Schedule of Exhibits C-0629*) [CONFIDENTIAL]

²¹² Testimony of Sue Lo, Hearing Transcript, Day 3, at p.171, lns.20-25

²¹³ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.172, lns.1-7

²¹⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.185-186, lns.6-8 [CONFIDENTIAL]

²¹⁵ Letter from the Honourable Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority, August 2, 2011 (*Respondent's Schedule of Exhibits R-016*)

investor should have been accorded to Mesa, as a U.S. investor. Had this treatment, at a minimum, been accorded to Mesa and other FIT proponents, contracts would have been awarded in Bruce first under the FIT program. If this had occurred, Mesa would have received contracts for Arran and TTD. This is undisputed, and supported by Canada's expert.²¹⁶

E. NEXTERA LOBBIED FOR A CHANGE TO THE RULES TO BENEFIT ITS "SIX-PACK", BUMPING MESA'S PROJECTS FROM THEIR PLACE IN THE BRUCE FIT QUEUE.

149. In December 2010, the OPA released the FIT rankings for projects which had not received a contract.²¹⁷ As noted previously, Mesa's projects were ranked 8th and 9th in the region and, even taking into account the 500 MW set aside for the Korean Consortium, Mesa's projects were within the 750 MW that would be allocated in the Bruce region.²¹⁸ NextEra's projects on the other hand were located in the West of London region, and due to the limited capacity which would be activated in this region (300 MW), most of NextEra's projects would not receive a contract.²¹⁹
150. Sue Lo stated that Ontario consulted widely with developers and stakeholders.²²⁰ However, no documents were provided to the Investor about Ontario's consultation with other proponents, which the Investor requested and was granted by the Tribunal in *Procedural Order No. 4*, save for documents relating to Ontario's consultation with NextEra.²²¹
151. Realizing that it would not receive contracts in the West of London region due to the lack of available capacity, NextEra began lobbying the Ontario government for a change to the rules to allow changes in connection points amongst regions.²²²
152. Mr. MacDougall confirmed this, as he testified that, after he left the OPA, he heard that the reason the rules were changed to allow connection point changes between regions

²¹⁶ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.159, Ins.4-11 ("Turning to the *GEIA* counterfactual, we then take away the breach, which is the 500-megawatt allocation of transmission capacity to the Korean Consortium. ...TTD and Arran make the cut and get FIT contracts in that scenario.").

²¹⁷ Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010, at p.1 (*Investor's Schedule of Exhibits C-0073*)

²¹⁸ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at pp.13-24 (after eliminating the connection point change projects, TTD and Arran get contracts).

²¹⁹ Ontario Power Authority, Priority ranking for First Round FIT Contracts, December 21, 2010, at p.6 (*Investor's Schedule of Exhibits C-0073*)

²²⁰ Reply Witness Statement of Sue Lo, at ¶13

²²¹ In *Procedural Order No. 4*, the Investor asked for the following: "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." The Tribunal granted the request "insofar as it relates to items 3(a) and 3(d)."

²²² Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (Ministry of Energy), February 25, 2011 (*Investor's Schedule of Exhibits C-0190*); Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-681*) [*CONFIDENTIAL*]; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits C-0090*).

was because NextEra had lobbied for this result.²²³ Mr. MacDougall explained that NextEra bundled its projects as the NextEra “six-pack approach” to “share a common connection, whose connection would be relatively expensive, but shared across six projects would make a connection economically viable.”²²⁴

153. This is confirmed by contemporaneous documents. Within days of NextEra executives meeting with the [REDACTED], the Ministry] made the decision to allow a connection point window for projects in the West of London and Bruce.²²⁵
154. Prior to these meetings, Ontario had decided that it would not conduct a province-wide ECT and that an alternative allocation process would have to be utilized to award the capacity made available by the Bruce to Milton transmission line.²²⁶ The OPA recommended a modified TAT/DAT for the Bruce region, which would not allow a connection point window.²²⁷
155. To understand the results of the proposed TAT/DAT, the Ministry of Energy requested a “dry run” of the results.²²⁸ This dry run showed that [REDACTED] [REDACTED].²²⁹ Although Mr. Cronkwright had “concerns” about showing the results to the Ministry of Energy,²³⁰ and the document itself says that it should not be shared with the Minister’s Office,²³¹ Mr. Cronkwright confirmed that the OPA showed the results to the Ministry of Energy.²³²
156. Weeks later, Ontario government officials began meeting privately with NextEra. On [REDACTED], NextEra’s Vice President, Al Wiley, personally met with [REDACTED]

²²³ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.231-232, Ins.20-8

²²⁴ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.234, Ins.9-22

²²⁵ Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) (*Investor’s Schedule of Exhibits C-0681*) [CONFIDENTIAL] (calendar posting for meeting with Premier Dalton McGuinty); Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor’s Schedule of Exhibits C-0090*) (referring to meeting that day with Andrew Mitchel of the Ministry of Energy); Rejoinder Witness Statement of Shawn Cronkwright, at ¶21 (explaining that the decision to have a connection point window was made on May 12, 2011); Email from Sue Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011 (*Investor’s Schedule of Exhibits C-0674*) (referring to meeting that day).

²²⁶ Rejoinder Witness Statement of Shawn Cronkwright, at ¶15; Ontario Power Authority, Draft ECT Communications Communications Roll-out, April 28, 2011 (*Investor’s Schedule of Exhibits C-0116*); OPA Draft Memorandum, May 3, 2011 (*Investor’s Schedule of Exhibits C-0439*) [CONFIDENTIAL]

²²⁷ Rejoinder Witness Statement of Shawn Cronkwright, at ¶18; Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.81, Ins.12-16

²²⁸ Rejoinder Witness Statement of Shawn Cronkwright, at ¶19

²²⁹ Bruce Area Scenario Analysis, Table of results, April 13, 2011 (*Investor’s Schedule of Exhibits C-0427*) [CONFIDENTIAL] (the projects ranked 8th and 9th were within 750 MW and would receive contract offers); FIT CAR Priority Ranking by Region, February 24, 2011 (*Investor’s Schedule of Exhibits C-0233*) (Mesa’s Arran and TTD were ranked 8th and 9th).

²³⁰ Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), April 13, 2011 (*Investor’s Schedule of Exhibits C-0642*)

²³¹ Bruce Area Scenario Analysis, Table of results, April 13, 2011 (*Investor’s Schedule of Exhibits C-0427*) [CONFIDENTIAL] (“Confidential – This information is not to be shared in the Minister’s Office, consistent with the OPA/Ministry of Energy Protocol.”) (emphasis added).

²³² Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.56, Ins.2-9

- ██████████.²³³ The next day, on May 11, Mr. Wiley met with Andrew Mitchell, Senior Policy Advisor in the Minister of Energy's Office, and apparently a member of the secret "Breakfast club", to discuss whether a connection point change window would be opened prior to the next round of FIT contract awards, which was a "a very significant issue for NextEra."²³⁴ Then on May 12, the Premier met with the Ministry of Energy, and the decision was made to allow a connection point window change.²³⁵ On May 13, the morning *after* the decision was made, Ms. Lo met with NextEra, and in response to this call, Mr. Wiley sent Ms. Lo the names of the six NextEra projects "remaining in the FIT queue."²³⁶
157. Days later, on May 31, Nicole Geneau of NextEra knew that a connection point change window was opening although no public announcement had been made.²³⁷
158. Ms. Lo contended that all FIT applicants were treated the same, but the documents in the record show that more favourable treatment was given to Pattern, International Power Canada and NextEra. IPC's projects were protected from being shut out by a Korean Consortium set aside, something that was not offered to any other FIT proponent, while NextEra was given insider access to the outcome of the Bruce allocation process. And Pattern was allowed to benefit from the favourable treatment afforded to the Korean Consortium, a benefit which was not given to other FIT proponents like Mesa.
159. Canada attempts to downplay this preferential treatment by contending that the OPA had been advising FIT proponents since 2010 that a change window would be allowed prior to the first ECT.²³⁸ However, this contradicted the FIT Rules, which only allowed connection point changes prior to the first ECT for projects connecting to the distribution system. The FIT rules did not allow for such changes prior to the first ECT for projects connecting to the transmission system, like those of NextEra and Mesa.²³⁹ Therefore a FIT proponent like Mesa, that was relying on the FIT Rules for its understanding of the process, would have reasonably expected that projects like NextEra's would not be able to change connection points prior to the first ECT, or prior to the awarding of contracts in the Bruce region.
160. Furthermore, at no point, in any of these communications, did the OPA advise proponents that projects would be allowed to change their connection points to a different transmission area or that this would be done outside of a province-wide

²³³ Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0681*) [CONFIDENTIAL]

²³⁴ Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits C-0090*)

²³⁵ Rejoinder Statement of Shawn Cronkwright, at ¶121

²³⁶ Email from Sue Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011 (*Investor's Schedule of Exhibits C-0674*)

²³⁷ Email from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), May 31, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0068*) [CONFIDENTIAL]; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.247, lns.16-24

²³⁸ Canada Closing Argument, Hearing Transcript, Day 6, at pp.249-51, lns.1-19

²³⁹ Investor's Reply Memorial, at ¶¶699-703

ECT.²⁴⁰

161. To get around this, Canada contends that if the FIT Rules did not prohibit something, then it was allowed.²⁴¹ This argument is unavailing. The OPA could have held stakeholder consultations to decide what course of action would best represent the understanding of the majority of the affected stakeholders. Had it done so, Ontario would have discovered that more affected stakeholders located in the Bruce region would oppose the change than affected stakeholders in the West of London as the proposed change window benefitted mainly two companies in the West of London, NextEra and Suncor, at the expense of 12 projects already ranked in the Bruce region that were in line for contracts (two of which belonged to Mesa).²⁴²
162. If a change amongst regions was what was originally intended under the FIT rules, and every proponent knew or should have known this, why did NextEra have to lobby for it? The reason is simple: this was not the understanding of FIT proponents at the time.²⁴³ Colin Edwards of Pattern Energy confirmed this during his deposition:
- Q Okay. Do you know if the rules, prior to NextEra doing that, were – do you know if that had been allowed, for a project to go to a new transmission area?
- A My understanding is that when these – when applications were originally made in November of 2009, that they were confined to a given transmission zone, and I've been told that the ministerial directive of June 3, 2011, I believe, **enabled developers to change circuits and to change transmission zones.**
- Q **Was that news to you when it happened? News to Pattern?**
- A **Yes.**
- Q **You had no advanced knowledge that was going on?**
- A **No.**²⁴⁴
163. In contrast to other major rule changes which would substantively affect the rights of proponents,²⁴⁵ there was no advance notice of the June 3 rule change, and no

²⁴⁰ OPA Presentation, "The Economic Connection Test Process", March 23, 2010, at p.14 (*Investor's Schedule of Exhibits C-0034*); OPA, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p.39 (*Investor's Schedule of Exhibits C-0088*); OPA, Priority ranking for First Round FIT Contracts, December 21, 2010 (*Investor's Schedule of Exhibits C-0073*)

²⁴¹ Canada Closing Argument, Hearing Transcript, Day 6, at p.251, Ins.15-19

²⁴² Ontario Power Authority, Priority Ranking by Region, June 3, 2011 (*Investor's Schedule of Exhibits C-0225*); Priority Ranking List Post-Connection Point Amendment and Pre-Contract Offer, June 5, 2010 (*Investor's Schedule of Exhibits C-0506*)

²⁴³ In fact, Mr. MacDougall admitted that the OPA requested a directive for the rule change for "political cover". Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.264, Ins.10-15 If this change amongst regions was already envisioned, there was no need for "political cover." **[CONFIDENTIAL]**

²⁴⁴ Deposition of Colin Edwards, at p.160, Ins.5-21 (*Investor's Schedule of Exhibits C-0537*) (emphasis added)

²⁴⁵ A number of previous rule changes included notice and an opportunity to comment. FIT Program Update, Summary of changes to the FIT Rules, contract and standard definitions, dated July 2, 2010 (*Investor's Schedule of Exhibits C-0685*); FIT Program Update, Summary of changes to the FIT Rules, contract and standard definitions, dated October 21, 2010 (*Investor's Schedule of Exhibits C-0686*); FIT Program Update, December 8, 2010 (*Investor's Schedule of Exhibits C-0687*).

- stakeholder consultations were undertaken.²⁴⁶ Canada's witnesses confirmed that this was not the usual practice and consultations normally were undertaken.²⁴⁷
164. The reason Canada provided at the hearing for denying FIT investors the right to comment on a rule change that would substantively affect their rights was politics.²⁴⁸ Ontario's government wanted to award contracts before the elections in order to promote the success of the program.²⁴⁹ For this purpose, the rights of stakeholders were ignored.
165. The other reason given for not providing stakeholder consultations – the CANWEA letter – is equally unavailing:
- a. This letter was sent on May 27, 2011,²⁵⁰ weeks **after** the decision was made on May 12th.²⁵¹
 - b. Mr. Cronkwright confirmed during his testimony, that he never was informed that the reason for the change to the FIT rules was the CANWEA letter.²⁵²
 - c. Like every other document referencing a window to change connection points, this letter made no reference to changes into a different transmission area.
 - d. This was a wind association, and did not represent other renewable projects, such as solar proponents.
 - e. Finally, this letter would have been sent in the context of a province-wide ECT, not a Bruce-specific allocation process as that was what the rules provided until they were abruptly changed.
166. Accordingly, it cannot be said that this letter fairly represented all of the interested stakeholders in the Bruce allocation process.
167. On June 3, 2011, the Ministry of Energy issued a directive setting out the allocation process that had to be implemented by the OPA for the capacity in the Bruce and West

²⁴⁶ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.241, Ins.5-7

²⁴⁷ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.240-41, Ins.7-17; Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.77, Ins.7-12

²⁴⁸ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.164-165, Ins.21-1 (“**THE CHAIR:** I am not sure. So why did you not give an opportunity to comment to the proponents? **THE WITNESS:** I think at that time, going back to the summer of 2011, what was also happening was that the government really wanted to have those contract awards as soon as possible, and to provide a comment period would have slowed down the awarding of contracts.”)

²⁴⁹ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.164-65, Ins.21-1 (the government wanted the awards as soon as possible); Hearing Transcript, Day 3, at p.185-86, Ins.6-8 (the government wanted to make “a splash in terms of awarding contracts” because they were up for re-election)

²⁵⁰ Letter from Robert Hornung, President of CanWEA, to Brad Duguid, Minister of Energy (*Canada's Schedule of Exhibits R-113*)

²⁵¹ Rejoinder Witness Statement of Shawn Cronkwright, at ¶121; Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at pp.65-66, Ins.9-10

²⁵² Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.71, Ins.11-18

of London Region.²⁵³ This direction provided for a five (5) day connection point window, allowed projects in the West of London transmission area to switch to the Bruce transmission area, identified the capacity which would be allocated in the West of London and Bruce, and provided for generator paid upgrades.²⁵⁴

168. On the same day, a Friday, the OPA published the new rules and advised proponents that the connection point window would begin the following Monday, on June 6 and end on June 10.²⁵⁵ Mr. MacDougall testified that this weekend notice was not adequate.²⁵⁶
169. This rule change, in conjunction with the capacity set aside for the Korean Consortium, resulted in Mesa not receiving any contracts.²⁵⁷ Instead, as a result of the rule change, NextEra was able to get contracts for its "six-pack."²⁵⁸ Then, within less than a week of being awarded these contracts, NextEra made political contributions to the incumbent government of Ontario, which pushed for the rule change to occur without stakeholder consultations.²⁵⁹
170. Canada's expert, Christopher Goncalves, has confirmed that but for these two events, Mesa would have received contracts for at least its TTD and Arran projects.²⁶⁰

1. THROUGH THE NEW RULE CHANGE, ONTARIO ALSO HELD BACK AVAILABLE CAPACITY FROM FIT PROPONENTS

171. During the hearing, it was revealed that Ontario held back available capacity in the Bruce and West of London regions when awarding contracts for political reasons. Ms. Lo testified that "there was a desire not to award all of the contracts that could connect, and that's why we capped the number of megawatts in the Minister's direction. I think it was 750 and 300 megawatts, because if more projects could have connected, **we didn't want to pay** for the additional megawatts that would come on stream."²⁶¹

²⁵³ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits C-0077*)

²⁵⁴ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits C-0077*)

²⁵⁵ Ontario Power Authority, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, June 3, 2011 (*Investor's Schedule of Exhibits C-0140*); Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 (*Investor's Schedule of Exhibits C-0005*)

²⁵⁶ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.226, Ins.7-9

²⁵⁷ Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits C-0293*); Email from Allen Wiley (NextEra) to Colin Andersen (OPA) and JoAnne Butler (OPA), July 12, 2011 (*Investor's Schedule of Exhibits C-0304*) (a NextEra representative thanked the OPA and its staff for their help with the "logistics on getting all of the paperwork in order for the six contracts that have been offered to NextEra.")

²⁵⁸ OPA "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", July 4, 2011 (*Investor's Schedule of Exhibits C-0292*);

²⁵⁹ NextEra's Political Contributions to the Ontario Liberal Party, 2011 (*Investor's Schedule of Exhibits C-522*)

²⁶⁰ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at pp.159-60, Ins.4-7

²⁶¹ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.187, Ins.12-19 (emphasis added) [**CONFIDENTIAL**]

172. This action by Ontario violated the legitimate expectation of the investors. To induce investment, Ontario represented that it would allocate **all** available capacity to FIT proponents.²⁶² For example, in December 2009, the Ontario government was represented that the “basis of the FIT program is having the system built to accommodate **all generators** who wish to connect.”²⁶³
173. The OPA itself recognized that it did not have the authority to hold back available capacity from the FIT program.²⁶⁴
174. Despite this, because Ontario did not want to pay the price it had promised investors when it induced them to invest, it held back otherwise available capacity.²⁶⁵ For example, Ontario only awarded 300 MW of capacity in the West of London region, but contemporaneous emails show that there was 550 MW of available capacity.²⁶⁶ Had more capacity been awarded in the West of London, some high-ranked projects that displaced Bruce region projects would not have switched regions.
175. If Ontario had not been holding back capacity to avoid paying FIT investors then Mesa likely would have received a contract for at least one of its TTD and Arran projects.

²⁶² FIT/Micro FIT Announcement, dated December 15, 2009, at p.3 (*Investor's Schedule of Exhibits C-0669*); Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, February 25, 2010 (*Investor's Schedule of Exhibits C-0215*) [**CONFIDENTIAL**] (“The **Green Energy Act includes the right-to-connect**. If the transmission capacity is not available and projects meet certain technical and economic criteria, the system will be expanded to connect them.”) (emphasis added)

²⁶³ FIT/Micro FIT Announcement, dated December 15, 2009, at p.3 (*Investor's Schedule of Exhibits C-0669*); Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, February 25, 2010 (*Investor's Schedule of Exhibits C-0215*) [**CONFIDENTIAL**]

²⁶⁴ Ministry of Energy presentation, “DRAFT ECT Design Considerations”, at p.8 (*Investor's Schedule of Exhibits C-0657*) [**CONFIDENTIAL**] (“No ability to hold this capacity back”); Ontario Power Authority Draft Presentation, ‘Implications of the Economic Connection Test’, March 8, 2011, at p.3 (*Investor's Schedule of Exhibits C-0702*) (“OPA has little ability to withhold amounts discovered due to wind diversity ... and is obligated to reveal the 150MW of additional capacity in the Bruce when the next steps for ECT are announced”)

²⁶⁵ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.187, lns.12-19 [**CONFIDENTIAL**]

²⁶⁶ Ministry of Energy presentation, “Bruce to Milton Transmission Line – FIT Contract Awards”, May 26, 2011 (*Investor's Schedule of Exhibits C-0626*) [**CONFIDENTIAL**]; Email from Yuna Kim (Ministry of Energy) to Sunita Chander (Ministry of Energy), May 31, 2011 (*Investor's Schedule of Exhibits C-0628*)

II. LAW

176. Canada has acted in an internationally wrongful manner by taking measures inconsistent with four NAFTA obligations:
- a. Most Favoured Nation Treatment (Article 1103)
 - b. National Treatment (Article 1102)
 - c. The International Law Standard of Treatment (Article 1105), and
 - d. The prohibition against imposing performance requirements such as local content requirements (Article 1106).

A. MOST FAVOURED NATION

177. Most Favoured Nation (“MFN”) treatment obligation requires Canada to treat an investor or an investment of investor from the United States as favourably as the most favourably treated investor or investment of an investor from a Non-NAFTA Party or from any other Party.²⁶⁷
178. In this case, to establish a breach of MFN Treatment, it is necessary for the Investor to show that:
- a. The American Investor (or the investments of the American Investor) is in like circumstances with respect to the treatment to another Investor (or investment of an Investor) from a Non-NAFTA Party or any other Party; and that
 - b. The treatment in like circumstances being accorded to the Non-NAFTA Party or other NAFTA Party Investor (or investment) is more favourable than the treatment being accorded by Canada to the complainant.
179. Canada agrees that that these are the two required elements of the MFN Treatment test.²⁶⁸
180. These two steps are the only requirements for establishing MFN Treatment. To be precise, it is clear that there is no requirement that intentional discrimination be established as an element of a violation of MFN treatment. During the opening statement, Canada admitted that it was not necessary to establish proof of intentional discrimination for a violation of national treatment.²⁶⁹ Similarly, there is no such requirement for MFN Treatment either. Intentional discrimination is not a requirement for NAFTA Article 1103 (or for 1102).
181. The only relevance of nationality is the requirement that there be diversity between the host state and the nationality of the Investor who brings the claim. Indeed the NAFTA permits a claim to be brought by a domestic investment against its home state

²⁶⁷ Investor's Memorial, at ¶¶290-326

²⁶⁸ Canada's Counter-Memorial, at ¶352

²⁶⁹ Canada's Opening Statement, Hearing Transcript, Day 1, at p.217, Ins.1-2

if that investment is owned by a qualifying foreign NAFTA investor. This reverses a longstanding general rule of international law that otherwise applies which establishes that a subject cannot bring an international claim against its own home state government. Indeed, the text of the NAFTA makes absolutely clear that the NAFTA always envisioned that claims could be brought by a foreign investor on behalf of harm occurring to its domestic investments or with respect to better treatment which has been provided to domestic investments of other foreign investors.

1. LIKE CIRCUMSTANCES

182. The first part of the MFN test is to demonstrate that Mesa and the Korean Consortium (or its joint venture partner) were in like circumstances. The like circumstances test does not require that identical treatment be given but that all criteria, rules and decisions be applied equally.²⁷⁰
183. The FIT Program contains a comprehensive set of criteria to determine the suitability and ranking of the projects. These criteria were mindful of Ontario's policy goals of manufacturing and job creation as they included local content requirements. Additionally, these criteria took into consideration the capacity and financial soundness of the applicant. Hence, the feasibility of the completion of these projects was considered as well.
184. If the FIT Program had been applied equally to the Korean Consortium and other applicants including Mesa, all of Ontario's policy goals would have been achieved. Ontario could have created an alternative scheme to the FIT that achieved additional goals, but it did not. The better treatment received by the Korean Consortium through the *GEIA* was not based on any objective differences between the *GEIA* and the FIT Program, but was just favouritism. The best justification that Canada could come up with for the *GEIA* is that Samsung is a "big company",²⁷¹ but as President Kaufmann-Kohler commented, there are other big companies.²⁷²
185. All ratepayer-funded wind or solar renewable power energy contracts issued by the OPA between September 2009 and June 2013 were under the FIT program and were issued FIT contracts. Proponents under the *GEIA* and the FIT both sought the very same goal – obtaining a 20-year fixed rate term power purchase agreement backed by the ratepayers of Ontario.²⁷³
186. Canada recognized during the hearing that the FIT and the *GEIA* contracts were the same. Mr. Spellicy stated:

²⁷⁰ *Occidental Exploration and Production Company v. the Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, 2004 WL 3267260 (July 1, 2004) at paras 168- 169, 173-175 (***Investor's Schedule of Legal Authorities at CL-027***)

²⁷¹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.251-252, Ins.24-8

²⁷² Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.358-359, Ins.20-1

²⁷³ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.55, Ins.16-18

[O]f course they looked alike. That was part of the rule itself, that was part of the *GEIA*, that they be modeled on FIT contracts.²⁷⁴

187. The following evidence demonstrates that *GEIA* and FIT investors were essentially like:

- a. Canada's witnesses Sue Lo, Jim MacDougall, and Rick Jennings confirmed that the *GEIA* and FIT are like during the hearing.²⁷⁵
- b. Successful *GEIA* projects received FIT contracts.²⁷⁶
- c. Seabron Adamson, Electricity Expert and Economist, reviewed the contours of both programs and concluded that they were like based on his expertise and upon documentary evidence he reviewed.²⁷⁷ Mr. Adamson also relied upon testimony from Pattern's Colin Edwards and Samsung's Zohrab Mawani admitting that Samsung and Pattern under the *GEIA* were competitors of Mesa and other FIT applicants.²⁷⁸
- d. Colin Edwards further testified that Pattern removed numerous projects from the FIT program to include them as successful *GEIA* projects.²⁷⁹ He also admitted that after the FIT priority rankings were released the Korean Consortium purchased "low hanging fruit" projects that were not likely to obtain contracts from the FIT program.²⁸⁰
- e. The FIT and *GEIA* projects were treated in an interchangeable way by Ontario with respect to priority access to the transmission grid.²⁸¹
- f. Both programs had local content requirements.²⁸² Indeed, the manufacturing requirements of the Korean Consortium under the *GEIA* were revealed to be nothing more than the domestic content requirements for the FIT program, as the only thing the Korean Consortium had to do was designate a manufacturer for its equipment.²⁸³ It did not have to show that the manufacturer was

²⁷⁴ Canada's Opening Statement, Hearing Transcript, Day 1, at p.224, Ins.4-6

²⁷⁵ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.55-56, Ins.12-9; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p. 287, Ins.14-25; Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.248, Ins.3-13
[CONFIDENTIAL]

²⁷⁶ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2010, at p.2 (***Investor's Schedule of Exhibits C-0079***)

²⁷⁷ Expert Report of Seabron Adamson, at ¶¶17-89

²⁷⁸ Expert Report of Seabron Adamson, at ¶80; Transcript of Colin Edwards Deposition, August 3, 2012, at p.63, Ins.20-23 (***Investor's Schedule of Exhibits C-0537***); Declaration of Zohrab Mawani, August 15, 2013, at ¶10 (***Investor's Schedule of Exhibits C-0406***)

²⁷⁹ Transcript of Colin Edwards Deposition, August 3, 2012, at p.48, Ins.4-24 (5 of Pattern's 10 projects submitted to FIT were incorporated in the Korean Consortium's Phase 1 South Kent project), pp.51-52, Ins.22-12 (***Investor's Schedule of Exhibits C-0537***)

²⁸⁰ Transcript of Colin Edwards Deposition, August 3, 2012, at p.187, Ins.2-16 (***Investor's Schedule of Exhibits C-0574***)

²⁸¹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.248, Ins.3-13; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.287, Ins.14-25

²⁸² Testimony of Sue Lo, Hearing Transcript, Day 3, at p.55, Ins.12-15; *Green Energy Investment Agreement*, January 21, 2010, §9.2 (***Investor's Schedule of Exhibits C-0322***)

²⁸³ Expert Report of Seabron Adamson, at ¶¶17-46

“attract[ed]” by the *GEIA* as opposed to the manufacturing opportunities offered by the FIT.²⁸⁴

- g. Ontario did not distinguish between the FIT Program and the Korean Consortium projects when ascertaining the number of jobs created.²⁸⁵
 - h. The OPA recognized immediately that the better terms of the Korean Consortium deal would displace transmission for proponents in the FIT program.²⁸⁶
 - i. More details as to likeness can be found in Mesa's Memorial at paragraphs 513-530 and Reply Memorial at paragraphs 338-360.
188. Nothing about the process Ontario followed suggests that the *GEIA* differs from the FIT. The *GEIA* was merely was a dispensation from Ontario's renewable energy program, the FIT program, based on the Korean Consortium's offer. This is confirmed by the fact that:
- a. No new statute was passed or entered into force to execute the *GEIA* deal;
 - b. No cabinet approval was obtained;²⁸⁷
 - c. *GEIA* contracts were identical to FIT contracts;²⁸⁸
 - d. The *GEIA* restricted Ontario from entering into other dispensations; and
 - e. The *GEIA* was a one-off special deal which made the obligation to apply FIT even-handedly impossible. Contrary to Canada's suggestion, the deal was exclusive, and investment agreements were not a separate track that Canada was offering to any qualified operator. All other investors who expressed interest were turned away.²⁸⁹
189. The facts are uncontroverted. There is no objective basis for presuming that Samsung or KEPCO, Korean investors seeking to develop renewable energy projects utilizing Ontario's limited transmission capacity, are unlike Mesa, an American investor also seeking to develop renewable energy projects utilizing Ontario's limited transmission capacity.

²⁸⁴ Siemens Wesbite, “Siemens selects Tillsonburg, Ontario, as new home for Canadian wind turbine blade manufacturing facility”, December 2, 2010 (*Investor's Schedule of Exhibits C-0594*) (reporting that Siemens planned to use the plant for Siemens projects in the province); Canadian Solar Press Release, “Canadian Solar Announces Intention to Build Solar Panel Manufacturing Facility in Ontario”, December 3, 2012 (*Investor's Schedule of Exhibits C-0596*) (reporting that Canadian Solar intended its facility to complement the rapid growth of the solar industry in Ontario as a result of the “recently launched feed-in-tariff (FIT) program”).

²⁸⁵ Testimony of Susan Lo, Hearing Day 3, at p. 90, Ins.15-21

²⁸⁶ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.287, Ins.14-25

²⁸⁷ Annual Report of the Auditor General of Ontario, 2011 (*Investor's Schedule of Exhibits C-0228*); Testimony of Sue Lo, Hearing Transcript, Day 3, at p.18, Ins.8-19

²⁸⁸ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, April 1, 2010, at p.2 (*Investor's Schedule of Exhibits C-0079*)

²⁸⁹ Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, Undated (*Investor's Schedule of Exhibits C-0714*)

190. For the same reasons that Mesa is in like circumstances to the Korean Consortium, Mesa is also in like circumstances to Pattern Energy, which is an American national, and Pattern Renewable Holdings, a Canadian subsidiary, which benefited from the same preferential treatment provided to the members of the Korean Consortium. Canada was required to provide Mesa with the treatment equal to the most favourable received by an investor from any other Party to NAFTA. Ontario allowed the Korean Consortium to decide who would participate in the *GEIA* program²⁹⁰ and it allowed Pattern Energy to transfer failed and successful projects from the FIT program to the *GEIA* program.²⁹¹
191. Additionally, Canada's valuation expert, Christopher Goncalves admitted in his Rejoinder Report and in his hearing testimony that Mesa's Arran and TTD projects were causally linked to the damages for MFN treatment under Article 1103.²⁹² Indeed in its closing arguments Counsel for Canada stated that this had been Canada's position since the Counter-Memorial.²⁹³
192. Hence, at a minimum, even Canada has admitted for the purposes of MFN treatment under NAFTA Article 1103, that at least two of Mesa's projects (namely the Arran and TTD projects) should be considered to be in like circumstances and that these two projects received less favourable treatment than did projects that received treatment under the *GEIA*.

i) Investment Agreements Do Not Make Competitors "Unlike"

193. The obligations in NAFTA Chapter Eleven apply to all forms of agreements and conduct undertaken by governments and their instrumentalities and agents, unless those measures are specifically excluded from the scope of the NAFTA. This means that the NAFTA Chapter Eleven obligations apply to investment contracts and treaties.
194. The NAFTA Parties were given an opportunity to exempt certain measures and policies from MFN. They did so. These are contained in NAFTA Annex IV and govern the exceptions to MFN in sectoral, bilateral and international agreements. The listing of these sectoral exceptions (and the making of hundreds of detailed MFN reservations) was a sovereign act of Canada as was the resulting agreement to bind Canada to the MFN treatment obligation with respect to items not excluded from the NAFTA.
195. Thus, an investment agreement is not excluded from the coverage of NAFTA's MFN obligations because the treaty itself identifies those situations where scope limitations apply. The *GEIA* is not covered by any of these broad MFN exemptions.

²⁹⁰ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.279-80, Ins.24-4

²⁹¹ Transcript of Colin Edwards Deposition, August 3, 2012, at p.48, Ins.4-24, pp.51-52, Ins.22-12 (*Investor's Schedule of Exhibits C-0537*); Canada's Closing Statement, Hearing Transcript, Day 6, at p.223, Ins.15-18

²⁹² Second Expert Report of Christopher Goncalves, at ¶145; Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.159, Ins.4-12

²⁹³ Canada's Closing Statement, Hearing Transcript, Day 6, at p.277, Ins.16-21. Canada maintained its opposition with respect to the causal link under MFN Treatment to Mesa's other two wind projects (Summerhill and North Bruce).

196. Further, a state's freedom of contract should not render a state's MFN treatment obligation inutile. Yet, it is Canada's position that a further exception should be read into the law. However, Canada relies entirely upon an UNCTAD discussion paper, which itself has no support in international law.
197. This discussion paper does not constitute a source of international law under Article 38 of the *Statute of the International Court of Justice*. No other support for the paper's position has been asserted and no other source of international law supports Canada's new argument that investment agreements constitute a separate class of agreements that are exempt from an MFN provision.
198. There are a number of ways that a state may choose to reconcile a policy of investment agreements with its MFN obligations. For example, where a state chooses to allocate an exclusive privilege or concession through an investment agreement, the various proponents must be able to bid for those exclusive rights in an open and objective process. There would be no violation of MFN if the decision making for the allocation of the rights was even-handed between investors of different nationalities in like circumstances, and if investors were afforded an equal opportunity to have their offer considered.²⁹⁴
199. A second example is where an investment agreement provides certain specified opportunities to a particular investor. For a state to discharge its MFN obligation to another investor, the state would need to ensure treatment as favourable is accorded to an investor or its investments in like circumstances. Such treatment need not be offering identical economic opportunities to that investor and need not mean entering into the same kind of investment agreement with that other investor. Here, investment agreements may be reconciled with the MFN obligation provided the result of treatment no less favourable is fulfilled. In sum, MFN does not give rise to any obligation of conduct to refrain from entering into investment agreements, or to enter into such agreements with other investors; it simply guarantees a result of no less favourable treatment to any investor protected under the MFN clause, and in the case of NAFTA imposes state responsibility in the form of monetary damages for the failure to obtain such a result.
200. Thus, any NAFTA party is free to sign investment agreements. Mesa does not contest this. However, such agreements must provide equal treatment to the signatories of such agreements and other investors in like circumstances. A government entering into an investment agreement does not remove it from its MFN obligations. In fact, when a claim is made that preferential treatment was provided through an investment agreement, a tribunal's first task is to consider whether the comparator is in like circumstances. An investment agreement does not remove a government's obligations to other investors, nor does it by default create circumstances that are not like.

²⁹⁴ *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007) (*Investor's Schedule of Legal Authorities at CL-057*)

201. In this regard, a tribunal's role is not to weigh the wisdom of the decision to enter an agreement, but to determine whether a government provided preferential treatment when it did so. Hence, a tribunal must consider the terms of the agreement in the context of the claim.
202. Moreover, investment agreements, in and of themselves, do not constitute the types of measures that would make investors or investments unlike with other investors or investments which are not covered by their terms. If states could blindly classify certain investments agreements as unlike other investments without any other distinction, and thus place selected investment agreements outside of the coverage of investor-state dispute resolution the very purpose of the MFN and National Treatment obligations would be defied. There must be a real distinction to make those that otherwise are like, unlike. It cannot simply be a label attached to a government program or some non-substantive facial difference in a regulatory program. Otherwise the overall MFN and National Treatment objective of equality of competitive opportunities between investors and investments could never be met.
203. As evidenced by witness testimony at the hearing, Mesa has met the test for a breach of MFN. Mesa's position on this point was reviewed in its Reply Memorial at paragraphs 377 to 409.

a) *Mesa Could Not Have Entered Into A Similar Deal With Ontario*

204. It is not reasonable to presume that Mesa could have sought from Ontario a deal similar to the *GEIA*, given the secrecy of that agreement and its terms.
205. If Mesa had known the terms of the deal, it would have been able to effectively approach Ontario.²⁹⁵ Given the fact that the manufacturing commitments were illusory, any entity with capital, or with the ability to raise capital, would have been in a position to seek such a deal. Mesa, along with its partner, General Electric, had more experience with renewable energy manufacturing and energy production than Samsung. Mesa was not able to effectively seek the same type of deal as that accorded to the Korean Consortium because of the lack of candor arising from Ontario's secret deal (including the non-disclosure of *GEIA* terms which restricted Ontario from making other similar smaller deals for less than 2500 MW in size).
206. Ontario did not announce that contractually, it was only able to provide a similar deal to an investor seeking at least 2500 MW of transmission capacity,²⁹⁶ although the Korean Consortium proved unable to generate this amount of capacity and ultimately reduced its total commitment to 1369MW.²⁹⁷

²⁹⁵ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.144, Ins.9-16, pp.146-47, Ins.16-14 (Mr. Robertson stated Mesa did not approach Ontario because it was not certain it could meet the same conditions publicized Mesa saw all the manufacturing commentary, and interpreted this as direct manufacturing by the Korean Consortium, which it could not do).

²⁹⁶ *GEIA*, art. 8.7 (***Investor's Schedule of Exhibits C-0322***)

²⁹⁷ Amended and Restated *Green Energy Investment Agreement* (***Respondent's Schedule of Exhibits R-133***)

207. It has been suggested by Canada that Mesa should have been on notice that it could not expect to be fairly treated under the FIT Program once some aspects of the Samsung deal had been leaked or at least once, following the leak, the government gave a limited and in material respects misleading account of the deal. Consequently, Mesa should have known that it needed to enter into a comparable agreement to protect its expectation of a successful venture.
208. However, as Mr. Robertson explained, Mesa had conducted a comprehensive business analysis suggesting that, if the FIT were to operate as represented and thus expected, Mesa would earn a favourable rate of return from its projects, and moreover that those projects were likely to be successful in obtaining contracts.²⁹⁸ Mr. Robertson further explained that Mesa had developed its business model based on the expectations created by the FIT.²⁹⁹ Mesa had a legal entitlement under NAFTA to be treated fairly and even-handedly under the general regulatory framework of the FIT, which Ontario had indeed promised would be operated fairly and transparently. Ontario could have shaped the FIT program to accommodate an option for investment agreements in an open and fair way, but it did not do this. That Mesa would have to “buy” protection through a special deal to preserve what was guaranteed to it under NAFTA is at odds with legal security and *pacta sunt servanda*.
209. Even if the contours of the special deal were publicized and Mesa proposed the same deal, it is unlikely that Ontario would have entered into such a deal in light of the success of the FIT Program and the limited transmission capacity.³⁰⁰ Ontario rejected every proposal for a similar deal and ultimately stated it could not enter another “special” deal like the *GEIA*.³⁰¹
210. There is no requirement in international law that an investor must seek the better treatment than is offered to another investor from a Non-NAFTA Party or any other Party in like circumstances.
211. There is no authority, which required Mesa to seek the best treatment being provided from a government – especially treatment that is being provided under undisclosed terms in a secret agreement.

²⁹⁸ Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.8-9, Ins.5-13

²⁹⁹ Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.197-199, Ins.25-3

³⁰⁰ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.63-64, Ins.14-16 (after the FIT program was launched, even if someone offered identical terms it was uncertain a similar deal would be offered because “2500 megawatts is a lot. It is a large amount of generation to procure.”)

³⁰¹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.327-337, Ins.23-17 [**RESPONDENT'S RESTRICTED ACCESS**] (discussing the rejection of Recurrent's, ATS', and NextEra's proposals for a framework agreement like that offered to the Korean Consortium); Letter from Anthony Caputo, ATS Automation Systems to Minister Brad Duguid, January 20, 2010 (**Investor's Schedule of Exhibits C-0711**) [**CONFIDENTIAL**] (requesting *GEIA* like deal for ATS); Letter from Anthony Caputo, ATS Automation Systems to Minister Brad Duguid, February 24, 2010 (**Investor's Schedule of Exhibits C-0713**) [**CONFIDENTIAL**] (requesting *GEIA* like deal for ATS); Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, Undated (**Investor's Schedule of Exhibits C-0714**) (rejecting *GEIA* like deal for ATS); Email from Samira Viswanathan (MOE) to Mirrun Zaveri (MOE), December 20, 2010 (**Investor's Schedule of Exhibits C-0696**) [**CONFIDENTIAL**] (explaining that the Ministry of Energy was “not in the position to offer a special agreement similar to the Korean Consortium's).

212. Moreover, Ontario could not enter into another deal. Ontario was restricted by the *GEIA* in doing so.³⁰² Ontario turned down other deals when approached by other investors.³⁰³
213. This notwithstanding, as Cole Robertson testified, Mesa would have considered entering into such deals if Ontario's actions were transparent and not misleading.³⁰⁴

ii) *No Regulatory Distinction Exists between FIT and GEIA*

214. Canada contends that the *GEIA* and the FIT Program are two different regulatory regimes.³⁰⁵ However, there is no objective regulatory distinction between Ontario's renewable energy program, the FIT, and the one-off *GEIA* deal, exempting the Korean Consortium from the otherwise applicable regulatory program.³⁰⁶

a) *Canada provided no explanation for any distinct regulatory treatment*

215. When questioned by Professor Kaufmann-Kohler on the reasoning behind Ontario's creation of a parallel track to the FIT Program, Mr. Jennings provided no legitimate regulatory distinction that could objectively justify any difference in treatment between FIT proponents and the Korean Consortium. He stated:

So, the context was that the government -- the Minister and the Premier were very interested in having a Green Energy industry in Ontario, and to show that Ontario would be a world leader. And I guess so the fact that this company was talking about -- so 2500-megawatts in the context, there's now in total 2500-megawatts of wind in Ontario, there was virtually none before this --

[...]

If you've got this wind and you wanted to have manufacturing, you have these big projects, so there are five phases of 500-megawatts, and they had strict timelines on for doing the phases, so it was like a huge jump start of the industry.³⁰⁷

216. Further, when questioned about the possible interaction between the *GEIA* and the FIT Mr. Jennings responded:

But the main area, I think where they conflicted was on transmission access. So, this was envisaged early on which is why there was the directive to set aside 500-megawatts even before the agreement was finalized because the agreement wouldn't have been feasible unless you had set it aside. So that was the major area...³⁰⁸

217. When asked, Mr. Jennings provided no basis for distinguishing the *GEIA* and the FIT other than Ontario's stated policy of attracting manufacturing.

³⁰² *GEIA*, art. 8.7 (*Investor's Schedule of Exhibits C-0322*)

³⁰³ Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, Undated (*Investor's Schedule of Exhibits C-0714*)

³⁰⁴ Reply Witness Statement of Cole Robertson, at ¶166

³⁰⁵ Canada's Closing Statement, Hearing Transcript, Day 6, at p.224, Ins.8-15; Canada's Rejoinder, at ¶124

³⁰⁶ Investor's Closing Statement, Hearing Transcript, Day 6, at pp.107-108, Ins.13-8; Investor's 1128 Response, at ¶25

³⁰⁷ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.359, Ins.2-15, 21-24

³⁰⁸ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.362-363, Ins.20-1

218. No objective reason was ever provided by Canada, or by any witness called by either disputing party, justifying the existence of two separate regulatory regimes, or two "tracks". This is because there was no difference between the two tracks on which a regulatory distinction could be made. The *GEIA* was wholly arbitrary, as it was created in a province where a renewable energy program already existed. The *GEIA* and FIT were administered by the same Minister and entities, and involved proponents who created the same product, for the same people, and for the same underlying renewable energy policy reasons.

b) *GEIA and other FIT projects are interchangeable*

219. The lack of regulatory distinction between the FIT and the *GEIA* is specifically evidenced by the interchangeability of FIT and *GEIA* projects. Witness testimony demonstrates that FIT and *GEIA* projects were interchangeable. Low ranking projects initially in the FIT program later changed tracks to receive the more preferential treatment of the *GEIA*. As stated by Colin Edwards in his deposition:

A We would -- parties who were ranked higher on the list would be more likely to stay in the queue in hopes of keeping their project and receiving a FIT contract, knowing that there was transmission capacity coming to this area.

Q And the lower ones would be low-hanging fruit, right?

A The lower ranked parties would have a lesser chance to get a FIT contract.

Q And it would be more easily able to buy their assets in order to fulfil your obligations under the *GEIA* as a joint venture, correct?

A Perhaps.³⁰⁹

220. Similar testimony was repeated by various witnesses at the hearing,³¹⁰ including Shawn Cronkwright who stated:

Q. You understood that Pattern was out looking to buy projects that had essentially ranked low in the FIT process; do you remember that?

A. We understood a lot of developers were doing that.

Q. Pattern was doing that specifically, you remember that; right?

A. It is anecdotal and common that a lot of developers were doing that at the time.

Q. Including Pattern?

A. Presumably, yes.³¹¹

³⁰⁹ Transcript of Colin Edwards Deposition, August 3, 2012, at p.187, Ins.4-16, pp.140-156, Ins.8-16 (*Investor's Schedule of Exhibits C-0574*)

³¹⁰ See Testimony of Jim MacDougall, Hearing Transcript, Day 3, p.219-220, Ins.20-20. Rick Jennings stated the Korean Consortium had an incentive to buy low-ranked FIT projects as they would be brought under the Korean Consortium's reserved transmission capacity and would then receive PPA contracts; see Testimony of Rick Jennings, Hearing Transcript, Day 2, page 282, Ins.2-12.

³¹¹ Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.30, Ins.14-25, Cronkwright also testified that Pattern was able to cancel a FIT contract for its [REDACTED] so that the project could enter into a contract under the *GEIA*; see Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.33-35, Ins.15-2.

iii) Canada's Stated Policies Do Not Make Competitors "Unlike"

a) The GEIA's Purported Policy Basis Does not Withstand Scrutiny

221. Mesa submits that policy should not be taken into account in a likeness analysis.³¹²
222. Canada, as the state seeking to justify its interpretation of the NAFTA, has an obligation to prove the facts upon which it relies. The responding state must clearly demonstrate how a public policy constitutes a legitimate basis for a differentiation in like circumstances between similar investors or investments.
223. In the event that policy is a relevant criteria to include in the like circumstances analysis, then any policy must be analyzed and must withstand objective scrutiny against stated policy goals. The measures in question must objectively relate to, and substantiate, the stated policy goals. Governments must not be able to arbitrarily narrow or withdraw from their NAFTA obligations through the guise or façade of government policy. The reasoning for such policy must be clear and demonstrated throughout its implementation.
224. Canada claims that there are three policy bases for the *GEIA* that distinguish the Korean Consortium from FIT investors. A review of the record demonstrates that none of these policies are rationally connected to the *GEIA* and therefore Canada cannot rely upon any of them to justify its MFN treatment violations.
225. Canada has asserted that the FIT and *GEIA* are not like because the *GEIA* was created to promote job growth, bring manufacturing plants to Ontario at a time of financial crisis, and establish a major company as an anchor tenant.³¹³
226. Ontario's decision to encourage the development of renewable energy is not in dispute as the FIT program achieves the same goal. However, its jobs, manufacturing, and anchor tenant policies cannot objectively justify any differentiation of the *GEIA* from the FIT Program.

b) The Creation of Jobs and Manufacturing Facilities

227. Ontario's stated policy goals of attracting manufacturing and creating jobs are intertwined. That Ontario's local content requirements drove job creation, including jobs manufacturing components for wind and solar projects, was testified to by Sue Lo during the hearing.³¹⁴ Testifying on the same point Seabron Adamson stated:

You are going to build a lot of wind farms. That was going to require equipment which isn't just lying around. Someone has to make it. Making it was, we're going to require employees; that's jobs.³¹⁵

³¹² Investor's Reply Memorial, at ¶380

³¹³ Canada's Opening Statement, Hearing Transcript, Day 1, at p.226, Ins.15-18

³¹⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.12, Ins.13-16, page 49, Ins.15-21

³¹⁵ Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.266, Ins.1-5

228. The goal of creating jobs and manufacturing cannot form the basis for any distinction in the circumstances of *GEIA* and FIT proponents for the following reasons.

- 1) Job creation and manufacturing are both driven by local content requirements

229. Ontario's stated policy of job creation and manufacturing was driven by Ontario's local content requirements. The local content requirements were identical in the *GEIA* and the FIT.³¹⁶ No special or additional commitments with respect to local content were made by the Korean Consortium. Sue Lo recognized this point and testified:

- Q. ...Okay, thank you. Do you agree with me, ma'am, that the FIT program also attracted jobs to Ontario; correct?
- A. Yes.
- Q. And, in fact, there was a local content requirement?
- A. Yes.
- Q. And that was the whole purpose, right, of the local content requirement, to try to attract jobs into Ontario?
- A. Yes.³¹⁷

230. Seabron Adamson testified:

- A. What we have is evidence that both created jobs. Both were designed to create jobs. And they created jobs for the very obvious mechanism that both required demand for equipment.³¹⁸

231. Job creation and manufacturing in Ontario was driven by local content requirements and not by any *GEIA*-specific obligation.

- 2) FIT has contributed more jobs and manufacturing in Ontario than *GEIA*

232. Mr. Adamson testified that the FIT program actually produced more jobs than the *GEIA*:

Now, what's kind of interesting, another feature that's kind of interesting to me, as you say, the *GEIA* had a -- had a job objective, which I -- which I think -- which I think is, you know, an announced job objective, which I think is true, and that the government wanted to create jobs, which I'm sure is true, but the FIT Program was creating many, many jobs, many more jobs, many more jobs by the statement of the OPA.³¹⁹

233. At its height, the *GEIA* constituted 2500MW of a possible 10,700MW of renewable generation as capped by Ontario's Long Term Energy Plan in 2010. Thus more renewable energy would be developed through the FIT, and it would create more jobs than the *GEIA*.

³¹⁶ *Green Energy Investment Agreement*, January 21, 2010, §9.2 (***Investor's Schedule of Exhibits C-0322***)

³¹⁷ Testimony of Sue Lo, Hearing Transcript, Day 4, at p.49, Ins.11-21 [**CONFIDENTIAL**]

³¹⁸ Testimony of Seabron Adamson, Hearing Transcript, Day 4, Public Only at page 268, Ins.14-17

³¹⁹ Testimony of Seabron Adamson, Hearing Transcript, Day 4, Public Only at page 266, Ins.18-25, referencing Ontario Power Authority, "Ontario's Feed-In Tariff Program: Two-Year Review Report", March 19, 2012, at p.6 (***Investor's Schedule of Exhibits C-0609***)

234. Moreover, at the commencement of the FIT and execution of the *GEIA* there were no limitations on renewable energy allocations through the FIT.³²⁰ Any claim that the government's contemporaneous view was that job creation and manufacturing output would be larger under *GEIA* than FIT cannot stand to be true.

3) The *GEIA* contains no obligation for the Korea Consortium to manufacture anything

235. The only manufacturing obligation that the Korean Consortium had under the *GEIA* was to identify manufacturing partners.³²¹ Sue Lo confirmed this:

Q. Thank you. And, in addition, the Korean Consortium also is not required to operate a manufacturing facility. Not only didn't they have to build it, they didn't have to operate it either; right?

A. It was about jobs.

Q. So the answer to my question is, yes, they did not have to operate it; correct?

A. Yes.³²²

236. Additionally Mr. Adamson testified:

[The Korean Consortium's] real requirement was to designate manufacturing partners, which just meant identifying a company that manufactured things, and didn't require the creation of any jobs specifically.

Even later, after they amended it, they put on another reporting requirement but it still didn't say that Korean Consortium had to hire anyone, all they had to do was identify the jobs created by their suppliers.³²³

237. The only obligation that the Korean Consortium had was to designate manufacturing plants. These were manufacturing plants that would manufacture the parts it would use at its projects. Mesa similarly had to enter into supply agreements for the manufacture of domestic content compliant parts that it would use at its projects.

238. These "designated" manufacturing plants were no different than others attracted by the potential of the FIT program – they were manufacturing plants that would provide equipment for all renewable energy generators in the province.³²⁴ From a manufacturer's perspective it would be the only reasonable business decision. There was no exclusive relationship between a particular manufacturer and the Korean Consortium where they would only manufacture equipment for the Korean

³²⁰ FIT/Micro FIT Announcement, December 15, 2009, p. 10 (*Investor's Schedule of Exhibits C-0669*); OPA Presentation, "FIT Program Analysis – Policy Strategy Development", December 23, 2010, pp. 4-6 (*Investor's Schedule of Exhibits C-0445*)

³²¹ *Green Energy Investment Agreement*, January 21, 2010, §8.4 (*Investor's Schedule of Exhibits C-0322*)

³²² Testimony of Sue Lo, Hearing Transcript, Day 3, at p.47, lns.16-24 [**CONFIDENTIAL**]

³²³ Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.156, lns.9-17 (Public Only)

³²⁴ The Ministry of Energy Backgrounder from Jan 21, 2010 states that the manufacturing attracted through the *GEIA* "will help other renewable energy developers meet the Feed-In Tariff (FIT) domestic content requirements" Ministry of Energy Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment", at p.2 (*Respondent's Schedule of Exhibits R-076*)

Consortium. The evidence shows those plants were being used for the FIT program as well.³²⁵

4) The *GEIA* contains no obligation for the Korean Consortium to create jobs

239. There was no obligation under the *GEIA* requiring the Korean Consortium, itself, to create jobs. The *GEIA* only required the Korean Consortium to point to instances in which a manufacturer's employee worked on a wind or solar project that the Korean Consortium was developing. Mr. Adamson clarified this point when he testified:

You did not have to say that – prove that they were new jobs. You wouldn't have to prove that they were jobs that would not have existed anyway for any other reason; you had a commitment to identify manufacturing plans.³²⁶

240. In addition, the Korean Consortium did not have to tender any evidence that their projects specifically created any jobs. There is no such evidence in the record. In fact, this obligation could have been satisfied by any wind developer with a PPA in Ontario as a result of local content requirements.

5) Ontario was counting the total number of jobs from all renewable energy programs

241. The government's policy on job creation was not implemented exclusively through the *GEIA* and the Korean Consortium. This policy extended to all renewable energy programs. Sue Lo testified that the jobs that were actually being counted by government included all "green jobs", not just *GEIA* jobs. She testified:

Q. And you didn't look at what manufacturing jobs were being generated by the FIT program, correct, in comparison?

A. We were tracking jobs in general. We were tracking all sort of jobs using -- using multipliers, and even calling out to companies who indicated to us that they've set up shop in Ontario.

Q. Including proponents of the FIT program?

A. Yes.³²⁷

242. At a time of financial crisis, job creation and manufacturing were not policies that were unique to the *GEIA*. These policies applied to the entire renewable energy program. In fact, Sue Lo testified that Ontario did not count jobs or manufacturing for only the *GEIA* or the FIT, as these programs are interchangeable and serve the same purpose. She testified:

Q. Let me ask you this. There was more megawatts through the FIT program than there was for the *GEIA*; correct?

³²⁵ Siemens's press release states "The factory is expected to produce all of the wind turbine blades for Siemens projects in the province." The Press Release also states that the plant will be Siemens base for North American operations. Siemens Website, "Siemens selects Tillsonburg, Ontario, as new home for Canadian wind turbine blade manufacturing facility", December 2, 2010 (*Investor's Schedule of Exhibits C-0594*)

³²⁶ Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.269, lns.8-12

³²⁷ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.115-116, lns.25-10

- A. I don't know how many more megawatts. It could have been, but they supported each other, too, because if you're in – if you're a FIT proponent and you have your modules coming from the Celestica plant, then how are you supposed to count those jobs if you attribute it to one or the other?
- Q. Fair enough. Good point.³²⁸

6) The policy expectation for investors was secret and not clear

243. As the terms of the *GEIA* were secret, and the only public knowledge of the *GEIA* came through unclear and incomplete press-releases,³²⁹ any reasonable and prudent investor would not have had the necessary information to make an offer on the same terms to the government. Cole Robertson testified:

We didn't know how the jobs were going to be created. We are a wind development and finance entity. We did not have the manufacturing capabilities of someone like Samsung. Had we known [...] You are asking for my reaction to the press release at the time. We were concerned and looking at the scale and what was written and released about the *GEIA*, we weren't sure that we could meet those same conditions.³³⁰

...

But at the time we saw the manufacturing commentary in all these releases as actual Samsung manufacturing jobs, and them building the wind turbines and them creating -- and that, at all, wasn't the terms of the actual *GEIA*.³³¹

244. Mr. Adamson specifically noted the differences in the purported public text and the actual wording of the *GEIA*. Mr. Adamson testified:

It says "creating jobs." There would be more than 16,000 Green Energy jobs. If I thought I had to create 16,000 jobs, I might think that was very costly. Well, what did we find out? Even later, in the restated *GEIA*, I'm only responsible for 765, and I don't even have to employ them.³³²

245. In the end, the only evidence provided of any job created under the *GEIA* was a single page letter with no attachments or additional annexes filed by Samsung to the Minister on February 28, 2014. This document merely states that Samsung averaged 779 workers at its four designated plants in the year 2013.³³³

246. Notably, such letters were not previously filed as required by the *GEIA* Amending Agreement.³³⁴

³²⁸ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.90, Ins.12-22

³²⁹ Ministry of Energy Archived News Release, "Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation", September 26, 2009 (**Respondent's Schedule of Exhibits R-068**); Ministry of Energy Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment" (**Respondent's Schedule of Exhibits R-076**); Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.134, Ins.1-15, pp.141-142, Ins.1-5, p.144, Ins.4-21; Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.292, Ins.8-21

³³⁰ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.144, Ins.7-16

³³¹ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.146, Ins.16-20

³³² Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.222, Ins.10-15

³³³ Letter from Ki-Jung Kim, Executive Vice President of Samsung C&T Corporation to Hon. Bob Chiarelli, February 28, 2014 (**Respondent's Schedule of Exhibits R-192**)

³³⁴ *Green Energy Investment Agreement – Amending Agreement*, July 29, 2011, Article 8.1.3, at ¶10 (**Investor's Schedule of Exhibits C-282**)

247. Taken together there is no basis for concluding that the *GEIA* was created for or implemented policy goals that the FIT did not. From their inception, no objective policy grounds justify any distinction between the FIT Program and *GEIA*.

c) *The Korean Consortium as an Anchor Tenant*

248. In addition, Canada's assertion that an anchor or marquee tenant was necessary to facilitate Ontario's renewable energy initiatives is not consistent with information known by the government of Ontario in 2009. Further, there is scarce contemporaneous evidence demonstrating the existence of an anchor tenant policy at the time of the *GEIA*'s implementation. Most importantly however, Ontario in no way treated the Korean Consortium like an anchor tenant.

249. As admitted by Sue Lo and Rick Jennings, an anchor tenant is like a Macys at a mall,³³⁵ which attracts and benefits smaller tenants. This analogy by Ontario does not withstand any objective scrutiny for the following reasons:

- a. First, Ontario did not use the Korean Consortium as an "anchor tenant" to attract other "tenants". The Ministry of Energy did not make the proposed deal public until right before the initial FIT applications were due.³³⁶ In fact, during the time period that it would logically make sense for Ontario to publicize this supposed anchor tenant policy – when the stakeholders were preparing their FIT applications in 2009, Ontario kept the deal confidential even over the encouragement of Samsung to make it public.³³⁷ The deal only become public, when it was reported by the Toronto Star, and was something Ontario government officials "regretted."³³⁸
- b. The Korean Consortium did not serve as an anchor tenant to benefit other tenants such as the store Macys does when it attracts customers to the shopping mall for the benefit of all stores. The Korean Consortium only hurt other "tenants" like Mesa through its priority access to transmission.
- c. As was made clear during the hearing, there is no evidence that Ontario was seeking an anchor tenant. It was Samsung who approached Ontario to request an exclusive deal.³³⁹ There is no evidence that Ontario sought any such deal prior to Samsung's proposal and Ontario rejected subsequent investment offers.³⁴⁰

³³⁵ Testimony of Rick Jennings, Hearing Day 2, at p.273, Ins.9-11, pp.361-362, Ins 23-6; Testimony of Sue Lo, Hearing Day 3, at pp.78-79, Ins.5-8

³³⁶ Ministry of Energy Archived News Release, "Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation" (***Respondent's Schedule of Exhibits R-068***)

³³⁷ Email from Pearl Ing (MOE) to Cheryl Carson, Rick Jennings, Garry McKeever, Victoria Vidal-Ribas (MOE), February 23, 2009 (***Investor's Schedule of Exhibits C-0694***)

³³⁸ Ministry of Energy Archived News Release, "Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation", September 26, 2009 (***Investor's Schedule of Exhibits C-0414***)

³³⁹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.251, Ins.17-23, p.255 Ins.2-3; Rejoinder Witness Statement of Rick Jennings, at ¶14

³⁴⁰ Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, undated (***Investor's Schedule of Exhibits C-0669***)

Moreover, Ontario did not make any effort to open up any competition to find other so-called anchor tenants, as it would have done had its goal really been to attract investment.

- d. The Ministry of Energy knew of the success and oversubscription of the FIT program in 2009 before it committed to the Korean Consortium.³⁴¹ In 2009 Ontario knew that they did not need a large company to attract other investors and to achieve Ontario's renewable power goals. In fact, Ontario's renewable energy plan was so successful that Ontario had to cap the contribution of renewable energy in its 2010 Long Term Energy Plan.³⁴²
- e. No reliance should be placed on any assertion that an anchor tenant would immediately create demand for manufacturing based on the magnitude of the *GEIA*. Ontario knew that the *GEIA*'s 2500MW commitment was going to be split in five phases and any corresponding attraction of manufacturing and jobs would not occur at the height of the financial crisis.³⁴³ The Korean Consortium obligations for phase 1, which extended to March 31, 2013, only required 400 MW of wind energy production.³⁴⁴ The second phase also only required the production of 400MW of wind energy and extended until December 31, 2013.³⁴⁵ The Korean Consortium's obligations under the *GEIA* would not therefore in itself have generated any immediate manufacturing or employment in 2009, 2010 or even 2011. In fact, what actually occurred, as confirmed by Sue Lo, was that the Korean Consortium reduced its generation commitment by almost half in 2013, to only 1369 MW, due to its failure to meet its requirements, and extended its deadlines for commercial operation.³⁴⁶
- f. Any anchor tenant should logically have experience in the field. As Canada's witnesses testified at the hearing, Samsung, the principal member of the Korean Consortium, did not have any experience in the renewable energy field,³⁴⁷ and in fact did not even manufacture its own turbines.³⁴⁸ Notably, it was Samsung that first approached Canada.³⁴⁹

³⁴¹ FIT/Micro FIT Announcement, December 15, 2009, at p.1 (*Investor's Schedule of Exhibits C-0669*); Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.270-272, Ins.17-21 (Public Only); Testimony of Sue Lo, Hearing Transcript, Day 3, Public Only at p.86-88, Ins.20-6

³⁴² Ontario's Long-Term Energy Plan, Ministry of Energy, November 2010, at p.31 (*Investor's Schedule of Exhibits C-0414*)

³⁴³ Ministry of Energy Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment", January 21, 2010, at p.2 (*Respondent's Schedule of Exhibits R-076*)

³⁴⁴ *Green Energy Investment Agreement*, January 21, 2010, §3.1 (*Investor's Schedule of Exhibits C-0322*)

³⁴⁵ *Green Energy Investment Agreement*, January 21, 2010, §3.2 (*Investor's Schedule of Exhibits C-0322*)

³⁴⁶ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.119-120, Ins.24-3; Amended and Restated Green Energy Investment Agreement, June 20, 2013, §3 (*Respondent's Schedule of Exhibits R-133*)

³⁴⁷ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.253, Ins.15-25

³⁴⁸ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.45-46, Ins.24-8 (Public Only)

³⁴⁹ Testimony of Rick Jennings, Hearing Day 2, at p.251, Ins.17-23; Rejoinder Witness Statement of Rick Jennings, at

- g. Indeed, Canada's "anchor tenant" theory appears to be no more than *post hoc* justification for the preferential treatment of the *GEIA*. There are no documents in the record contemporaneous with the negotiation of the *GEIA* (prior to its execution), or in relation to the MOU, in which the phrase "anchor tenant" appears or is referenced as a policy. This casts serious doubt on the theory that this was a policy underlying Ontario's decision to enter into the *GEIA*.
250. Although governments cannot be held to the unreasonably high standard of successfully implementing all policy goals, they must be accountable for the stated policies and the implementation of those policies. Even assuming there was evidence supporting the anchor tenant theory (which there is not), the theory itself does not pass muster under international law principles. As Sue Lo testified, an anchor tenant is still a tenant that is required to pay rent.³⁵⁰ The Korean Consortium, even if it were an anchor tenant, was in reality getting a FIT contract with preferential terms. To use Canada's flawed analogy, a landlord cannot give preferential treatment to one tenant, anchor or not, when it is required under the law to give the same treatment to other tenants under a best customer clause. Nor may a landlord give preferential treatment to one tenant over another that is unfair and inequitable, especially when the result is that tenants with a reasonable expectation of obtaining a lease are excluded from the mall due to the preferential treatment given to the one tenant.
251. Canada's contention simply does not withstand factual or legal scrutiny.

2. TREATMENT NO LESS FAVOURABLE THAN ACCORDED TO OTHER INVESTORS OR INVESTMENTS

252. Better treatment was provided to the Korean Consortium compared to the treatment received by Mesa.³⁵¹ Canada does not, and cannot, contest the better treatment afforded to the Korean Consortium.
253. Canada has not refuted that better treatment was afforded to the Korean Consortium.
254. Among other things, there is unrefuted evidence that the Korean Consortium and Pattern Renewable Holdings were offered the following more favourable terms under the *GEIA*:
- a. Priority transmission access;³⁵²
 - b. Award of renewable energy power purchase contracts without submitting applications, without having to be ranked, or competing with others;³⁵³
 - c. The benefit of the Economic Development Adder,³⁵⁴

³⁵⁰ Testimony of Sue Lo, Hearing Day 3, at pp.78-79, Ins.16-3

³⁵¹ Expert Report of Seabron Adamson, at ¶¶90-108

³⁵² Expert Report of Seabron Adamson, at ¶¶92-94; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.55, Ins.6-11

³⁵³ Testimony of Seabron Adamson, Hearing Day 4, at p.157, Ins.15-22; Testimony of Sue Lo, Hearing Day 3, at p.47, Ins.11-15

- d. The right to adjust the capacity allocation per phase by 10% without approval from Ontario;³⁵⁵ and
 - e. Assistance with regulatory approvals.³⁵⁶
255. The better treatment received by the Korean Consortium was confirmed by representatives of Samsung and Pattern.³⁵⁷
256. The preferential treatment is specifically reviewed in Mesa's Memorial at paragraphs 531-599 and in its Reply Memorial at paragraphs 361-373 and in its opening remarks.³⁵⁸

B. NATIONAL TREATMENT

257. The test for National Treatment consists of whether an investor from another NAFTA Party or its investments, are in like circumstances with investors or investments of investors from the host state, and whether those investors or investments of investors have been accorded treatment no less favourable than that accorded to that Party's own investors or investments.³⁵⁹ Canada does not contest that these are the elements of the test.³⁶⁰

1. LIKENESS

258. For the purposes of National Treatment, Mesa under the FIT was in like circumstances to the Canadian subsidiary of to the Korean Consortium, Samsung Canada, to the Korean Consortium's Canadian joint venture partner Pattern Renewable Holdings Canada, and also to FIT investors International Power Canada ("IPC"), Boulevard Associates and NextEra.
259. The evidence supporting the National Treatment like circumstances test with respect to Canadian Investments owned by the Korean Consortium is the same as it is for MFN with respect to the foreign parents, as stated above.
260. There is clear evidence in the record to establish that Mesa is in like circumstances with Canadian investments and investors seeking renewable energy power purchase agreements such as Pattern Renewable Holdings Canada.

³⁵⁴ Expert Report of Seabron Adamson, at ¶¶95-96; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.55, Ins.6-11

³⁵⁵ Expert Report of Seabron Adamson, at ¶¶101-104

³⁵⁶ Expert Report of Seabron Adamson, at ¶¶97-100

³⁵⁷ Declaration of Zohrab Mawani, August 15, 2013, at ¶10 (*Investor's Schedule of Exhibits C-0406*) ("Samsung Korea's guaranteed access to transmission capacity under the *GEIA* allowed Samsung Korea to be in a better competitive position than those companies without guaranteed transmission access, like Mesa Power Group."); Transcript of Colin Edwards Deposition, August 3, 2012, at p.193, Ins.25-3 (*Investor's Schedule of Exhibits C-0575*) ("The fact that we signed a joint venture agreement and elected to participate with Samsung is evidence that we thought this was a better opportunity.").

³⁵⁸ Investor's Opening Statement, Hearing Transcript, Day 1, at pp.50-53, Ins.10-16

³⁵⁹ Investor's Memorial, at ¶254

³⁶⁰ Canada's Counter-Memorial, at ¶352

261. Canada admits that Mesa is in like circumstances with all FIT proponents.³⁶¹ As a result of this admission, Canada does not contest that International Power Canada and other FIT proponents are in like circumstances with Mesa. Canada stated in its Counter Memorial that it does not dispute that the treatment accorded to Mesa and the treatment accorded to other FIT applicants, including NextEra, was accorded in like circumstances to the extent that these companies “sought FIT contracts from the OPA in the same regions as Mesa.”³⁶² Canada confirmed this during the hearing.³⁶³
262. As with MFN, Mesa has met the like circumstances test for National Treatment. Mesa and Samsung Canada, the Korean Consortium's Canadian joint venture partner Pattern Canada, and also FIT investors NextEra and International Power Canada are in like circumstances. All of these investors were competing for and received nearly identical PPA contracts.

i) Investment Agreements, Regulatory Measures and the Stated Policy Do Not Make Competitors “Unlike”

263. Canada never previously has taken the position that investment agreements make competitors unlike for the purposes of the National Treatment obligation. It should not be permitted to raise this new argument now. Further, Canada has not identified any authority to support the position that National Treatment excludes investment agreements. In any case, this argument fails for the same reason it fails under MFN.
264. Mesa refers to its previous pleadings and submissions above for National Treatment regarding regulatory measures and policy.

2. TREATMENT NO LESS FAVOURABLE THAN ACCORDED TO OTHER INVESTORS OR INVESTMENTS

265. Better treatment was provided to Samsung Canada and the Korean Consortium's Canadian joint venture partner Pattern Renewable Holdings Energy. Canada does not contest the better treatment afforded to these entities.
266. For the same reasons that Ontario provided better treatment to the Korean Consortium, they provided better treatment for Pattern. Ontario allowed the Korean Consortium to decide who would participate in the *GEIA* program³⁶⁴ and it allowed Pattern's Canadian subsidiaries to transfer failed and successful projects from the FIT program to the *GEIA* program.^{365, 366}

³⁶¹ Canada's Counter-Memorial, at ¶1364

³⁶² Canada's Counter Memorial, ¶1364. Mesa does not admit that Canada's test is correct but it accepts Canada's admission with respect to FIT applicants being in like circumstances. There is no legitimate distinction between regions in Ontario and this could not be a proper basis to restrict likeness.

³⁶³ Canada's Opening Statement, Hearing Transcript, Day 1, at p. 141, Ins.5-7

³⁶⁴ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.279-80, Ins.24-4

³⁶⁵ Transcript of Colin Edwards Deposition, August 3, 2012, at p.48, Ins.4-24, pp.51-52, Ins.22-12 (*Investor's Schedule of Exhibits C-0537*)

³⁶⁶ Canada's Closing Statement, Hearing Transcript, Day 6, at p.223, Ins.15-18

267. Ontario provided better treatment to the FIT investor NextEra. Ontario allowed the NextEra's Canadian subsidiaries to change connection points to a different region before an ECT was run, which was not provided for under the FIT Rules.
268. Under these rules, prior to an ECT, a connection point change was contemplated only for projects connecting to the distribution system, not the transmission system.³⁶⁷ All the other connection point changes contemplated under the FIT rules were permitted only after the running of the first ECT.³⁶⁸
269. NextEra's projects that were connecting to the transmission system were allowed to change connection points from the West of London to the Bruce region before the running of an ECT, and as a result were awarded contracts in the Bruce region.³⁶⁹
270. This change to the Rules was effectuated through a June 3, 2011 Ministerial direction. This change was decided almost a month before, after private meetings with NextEra officials.³⁷⁰
271. NextEra received notice of this rule change before other FIT applicants.³⁷¹
272. International Power Canada, a Canadian company, also received better treatment than Mesa from Ontario.
273. As Sue Lo testified, the Ministry of Energy protected IPC's "high profile" project from the priority access given to the Korean Consortium.³⁷²
274. The preferential treatment afforded by Ontario to these investors is specifically reviewed in Mesa's memorial at paragraphs 614-637, and in its Reply Memorial at paragraphs 417-433.

³⁶⁷ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §5.3(d), compare §5.2 (*Investor's Schedule of Exhibits C-0258*)

³⁶⁸ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §5.5(d), §5.6 (b) (*Investor's Schedule of Exhibits C-0258*)

³⁶⁹ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp. 245-246, Ins.6-22 [*CONFIDENTIAL*]

³⁷⁰ Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0681*) [*CONFIDENTIAL*]; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits C-0090*) (referring to meeting with the Ministry of Energy's Andrew Mitchell about the importance of the connection point change window for NextEra); Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.66, Ins.6-11 (on May 12, 2011 the decision to change connection points was made); Rejoinder Statement of Shawn Cronkwright, at ¶21; Email from Sue Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011 (*Investor's Schedule of Exhibits C-674*).

³⁷¹ Email from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), May 31, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0068*) [*CONFIDENTIAL*]; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits C-0090*) (demonstrating that the Ministry of Energy informed NextEra that the government was internally discussing whether to have a connection point change window, and whether this would be done province-wide or just for the Bruce and West of London regions, facts that were not disclosed to other FIT proponents).

³⁷² Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.183-184, Ins.10-8; Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), May 12, 2011 (*Investor's Schedule of Exhibits C-0629*) [*CONFIDENTIAL*]

C. APPLICATION OF MESA'S CLAIM AS AN INVESTOR AND THROUGH ITS INVESTMENT UNDER NAFTA ARTICLES 1102 AND 1103

275. NAFTA Articles 1116 and 1117 govern how an investor may submit a claim on its own behalf and on behalf of its investments. The terms "Investor" and "Investments" are defined in NAFTA Article 1139. The term "investor of a Party" means a national or enterprise of such Party that seeks to make, is making or has made an investment. The term "investment" is broad and includes many different types of investments including an enterprise, equity or debt, real estate or other property, tangible or intangible acquired in the expectation of economic benefit or other business purpose.³⁷³ Mesa meets each of these three definitions.
276. NAFTA Article 1116 provides that an investor of a Party may on its own behalf submit a claim that another Party has breached the NAFTA. This claim may include damages sustained either to the investor or to its investments.
277. NAFTA Article 1117 provides that an investor of a Party may bring a claim on behalf of an enterprise of another party that the investor owns or controls directly or indirectly. In such a circumstance, a foreign investor is able to bring a claim on behalf of its local subsidiary against the government of that same party.
278. Correspondingly, NAFTA Article 1102(2) and 1103(2) both apply to investments of an investor of a Party. As per NAFTA Article 1139 the term "investment of an investor of a Party" means an investment owned or controlled directly or indirectly by an investor of a Party. The NAFTA is clear that a foreign investor may make a claim on behalf of its domestic investments, even investments that have the same nationality as the host state.
279. Applying these principles specifically to this case, a claim can be brought under Article 1116 by Mesa, a US investor, for its Canadian subsidiaries such as TTD. TTD, an investment enterprise owned and controlled by Mesa, can bring a claim against Canada under Article 1117. The NAFTA contains no language that would impede an investor from the United States to bring a claim on its own behalf, and on behalf of its domestic Canadian investments.

1. APPROPRIATE COMPARATOR FOR TREATMENT

280. The appropriate comparator for treatment under Article 1102 or 1103 may be an investor from a state with a domestic investment from the host state under Article 1102 or 1103.
281. NAFTA Article 1103(1) permits an investor of a NAFTA Party to bring a claim with respect to the more favourable treatment that has been provided to an investor of any other party or from a non-Party. An example of this would KEPCO receiving better treatment from Canada when compared to the treatment afforded to Mesa.

³⁷³ NAFTA Article 1139, definition of investment.

282. NAFTA Article 1102(1) permits an investor of a NAFTA Party to bring a claim with respect to treatment that has been provided more favourably to an investor from the host country. For example, an American investor may bring a claim against Canada for more favourable treatment provided to a Canadian investor when compared to the American investment.
283. NAFTA Article 1102(2) addresses the situation in which the investments of investors of another Party are involved. For example, when a Canadian investment of another Party is treated more favourably than the investments of an American investor, Article 1102(2) applies. The term "another Party" in this example would include a Canadian investment of another American investor.
284. In the present case, the appropriate comparison would be between the treatment of Canadian investments held by any other American or Mexican company against investments held in Canada owned by Mesa.

2. SUMMARY OF 1103 AND 1102 CLAIMS AND APPROPRIATE COMPARATORS

285. In sum, on the basis of NAFTA Articles 1116 and 1117 the following are Mesa's claims under NAFTA Articles 1102 and 1103.
- a. Article 1103(1) is engaged when the Korean Consortium received better treatment from Canada than Mesa receives from Canada as a US investor.
 - b. Article 1103(2) is engaged when the Korean Consortium received better treatment from Canada than TTD, one of Mesa's Canadian investments.
 - c. Article 1103(2) also may be engaged if better treatment is provided by Canada to Samsung Canada than is provided for TTD Canada. As TTD is a Canadian company, the only way that a claim may be brought by TTD Canada is under NAFTA Article 1117. Such a claim is not in issue in this current arbitration claim.
 - d. Article 1102(2) is engaged if Samsung Canada receives better treatment by Canada than Mesa's Canadian investments.
286. The treatment provided to a foreign investor would be a breach of the Article 1103 MFN obligation and at the same time the better treatment provided to the Canadian investments would trigger the NAFTA article 1102 obligation.

D. INTERNATIONAL LAW STANDARD OF TREATMENT

287. The evidence adduced in this arbitration demonstrates that the measures taken by the government of Ontario are inconsistent with the obligations of fair and equitable treatment and full protection and security, which are both explicit elements of the international law standard of treatment in Article 1105.
288. The parties are not in agreement with respect to certain limitations on the meaning of Article 1105 advanced by Canada that modify the meaning of Article 1105. The Investor submits that this modification to the express terms of the treaty exceeds the lawful

authority of the Free Trade Commission under NAFTA Article 1131 and thus requires additional approvals under NAFTA Article 2203 to be effective.³⁷⁴

289. However, the tribunal need not consider this issue given the fact that the evidence in the record demonstrates that the actions taken by Ontario meet Canada's own definition of actions which violate NAFTA Article 1105. In its Counter-Memorial, Canada argued NAFTA Article 1105 is breached in the event of a "manifestly arbitrary, unjust or otherwise egregious" act.³⁷⁵ This standard has been met by the actions of Ontario at issue in this arbitration.

1. CONDUCTING THE SECRET GEIA & FIT IN PARALLEL IS AN UNJUST, EGREGIOUS AND ABUSIVE VIOLATION OF TRANSPARENCY, FAIRNESS AND INVESTOR EXPECTATIONS

290. First, on its face, the act of having a one-off deal alongside Ontario's renewable energy program is a breach in itself of the fair and equitable treatment standard. Ontario created one renewable energy program and then gave a better, special deal to the Korean Consortium, which received preferential treatment in the form of access to the Ontario electricity grid and preferential regulatory treatment. There was no basis to give the Korean Consortium any preference whatsoever. Extraordinarily, the Korean Consortium received the preferential treatment before any binding agreement was signed.
291. The *GEIA* gave the Korean Consortium superior knowledge and an unfair advantage which it acquired and used to convert its projects into successful FIT contracts. As testified by Mr. MacDougall, OPA employee and point person in charge of the FIT program, the *GEIA* and the FIT conflicted to the detriment of FIT investors.³⁷⁶

i) Secrecy of the Deal with the Korean Consortium

292. Despite knowing that it would launch the FIT program and in line with the Ministry of Energy's expectation that it would seek investments in preparation for the launch of the FIT program,³⁷⁷ Ontario signed the secret MOU with the Korean Consortium in December 2008.³⁷⁸
293. Ontario went to serious lengths to keep the MOU and *GEIA* negotiations secret. The OPA, the entity charged with implementing all renewable energy projects, was not informed of the MOU or negotiations toward a special deal with the Korean

³⁷⁴ The international law standard of the treatment was reviewed in Mesa's Memorial at ¶¶329-431, in its Reply Memorial at ¶¶449-639, and in its 1128 Response at ¶¶154-204. More specifically the proper interpretation of the Free Trade Commission's interpretative note was set out in Mesa's Memorial at ¶¶128-138, its Reply memorial at ¶¶558-639, and its 1128 Response at ¶¶155-156.

³⁷⁵ Canada's Counter Memorial, at ¶¶402, 449

³⁷⁶ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.287-289, Ins.17-6

³⁷⁷ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.244-245, Ins.19-4 (recognizing that the FIT legislation intended to promote investment in anticipation of the FIT program).

³⁷⁸ Memorandum of Understanding by and among Her Majesty The Queen In Right Of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008 (*Investor's Schedule of Exhibits C-0536*)

Consortium until the summer of 2009.³⁷⁹ Unaware of the special deal, the OPA began consulting with investors in March 2009 with respect to the FIT Program.³⁸⁰ These consultations showed that the interest in the FIT program exceeded the available capacity in the transmission system.³⁸¹

294. The Ministry of Energy directed the OPA to develop the FIT Program on September 24, 2009.³⁸² At that time, the public had not been informed of the special deal with the Korean Consortium, and Mesa had already invested in Ontario.
295. On September 26th, 2009 *The Toronto Star* leaked the story about negotiations between the Ministry of Energy and Samsung for manufacturing and the development of renewable of energy projects.³⁸³ This article, and Ontario's response to it, were vague and misleading and did not disclose the main contours of the deal, such as priority transmission access.³⁸⁴
296. Days later on September 30th, a ministerial directive was issued containing further misleading language that implied that a framework agreement had already been signed.³⁸⁵
297. By the close of the FIT launch period, the OPA and the Ministry of Energy knew that the FIT program was successful, having received more than 10,000 megawatts in applications in the first two months.³⁸⁶ Any worries that Ontario now claims it had about the contemporaneous investment climate and Ontario's ability to attract investors are inconsistent with the knowledge that it had at that time.
298. It is undisputed that the Ontario government had not entered the *GEIA* by the time the FIT Program launched and thus could have backed out of the negotiations.³⁸⁷ Ontario

³⁷⁹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.302-303, Ins.24-3; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.286, Ins.6-10

³⁸⁰ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.286, Ins.9-10

³⁸¹ Email from Rick Jennings (MOE) to Guna Deivendran (MOE), Jason Chee-Aloy (OPA), Jennifer Morris (MOE) et al., dated May 7, 2009 (*Investor's Schedule of Exhibits C-0673*) [**CONFIDENTIAL**] (reporting that according to surveys there was over [REDACTED] of potential renewable energy projects, and only [REDACTED] of available capacity)

³⁸² Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009 (*Investor's Schedule of Exhibits C-0264*)

³⁸³ The Star News Article, Tyler Hamilton, "Ontario eyes green job bonanza" (*Respondent's Schedule of Exhibits R-177*)

³⁸⁴ The Star News Article, Tyler Hamilton, "Ontario eyes green job bonanza" (*Respondent's Schedule of Exhibits R-177*); Ministry of Energy Archived News Release, "Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation", at p.2 (*Respondent's Schedule of Exhibits R-068*)

³⁸⁵ Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 (*Investor's Schedule of Exhibits C-0105*)

³⁸⁶ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.271, Ins.15-18; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.86, Ins.20-25 (FIT program was very successful at launch with 10,000 megawatts in applications); FIT/Micro FIT Announcement, dated December 15, 2009, at p.1 (*Investor's Schedule of Exhibits C-0669*)

³⁸⁷ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.266-267, Ins.10-1; Testimony of Sue Lo, Hearing Transcript, Day 2, at pp.58-59, Ins.19-6; Canada's Closing Statement, Hearing Transcript, Day 6, at pp.216-217, Ins.10-2

would have still achieved its goals of promoting green energy, job creation and manufacturing.

299. Yet, Ontario entered into the *GEIA* in January 2010, and permitted the *GEIA* and FIT to “compete” against each other for capacity access to a limited transmission system, despite the knowledge dating back to March of 2009, that interest in the FIT Program would exceed renewable energy generation capacity through the FIT Program.³⁸⁸
300. This “competition” was illusory, as the Korean Consortium was guaranteed capacity, did not have to compete for capacity, and was allowed to engage in predatory tactics, such as its wait and see approach to acquire developed FIT projects which were not likely to get contracts and then convert them to *GEIA* projects.³⁸⁹
301. The full terms of the *GEIA* were not even publically released until this arbitration.³⁹⁰ The terms were kept secret to hide the fact that the manufacturing commitments were a sham³⁹¹ and that Ontario agreed that it would not enter a similar deal unless the terms were identical to the *GEIA*.³⁹²
302. Samsung in fact wanted to publicize its MOU with Six Nations, but the Ministry of Energy prohibited it because it did not have answers for the media.³⁹³
303. This grossly unfair and inequitable treatment continued when Ontario did not terminate the *GEIA* when the Korean Consortium continuously failed to meet its obligations to the detriment of investors such as Mesa. The Korean Consortium did not meet the deadlines set in the *GEIA* in 2010. Here, Ontario could have terminated the *GEIA*.³⁹⁴ Ontario, despite knowing that there was substantially more FIT interest than available capacity, did not want to see the *GEIA* nullified and thus did not declare the Korean Consortium in breach.³⁹⁵

³⁸⁸ Testimony of Jim MacDougall, Hearing Transcript, Day 3, pp.287-289, Ins.17-6

³⁸⁹ Transcript of Colin Edwards Deposition, August 3, 2012, at pp.186-187, Ins.20-16 (*Investor's Schedule of Exhibits C-0574*); Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp. 219-221, Ins.20-13; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.96, Ins.1-16 (“[i]t would make sense that the Korean Consortium was purchasing “low-ranked projects that really had no realistic opportunity to become part of the FIT program in order to satisfy their obligations under the *GEIA*” but she was “not aware or unaware”).

³⁹⁰ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.35, Ins.4-21; Sue Lo testified that the Amended *GEIA* was released in 2011, but what was released did not contain all of the *GEIA* terms. It only contained the actual amendments to the *GEIA* without disclosing *GEIA* terms that were not being amended. Hence, the terms of the *GEIA* were not public in 2011, and it was not until it was produced by Pattern after a federal lawsuit was filed in the U.S., when it was disclosed to the public.

³⁹¹ *Green Energy Investment Agreement*, January 21, 2010, art. 8.3 (*Investor's Schedule of Exhibits C-0322*) Korean Consortium only had to “attract” plants, not build the plants.

³⁹² *Green Energy Investment Agreement*, January 21, 2010, art. 8.7 (*Investor's Schedule of Exhibits C-0322*)

³⁹³ Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.310-311, Ins.20-1; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.74, Ins.2-6 [**CONFIDENTIAL**]; Email from Jennifer Morris (MOE) to Hagen Lee (Samsung), dated November 13, 2009 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0683*)

³⁹⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.108, Ins.12-22

³⁹⁵ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.100, Ins.11-13

304. Instead of terminating the agreement to allow that capacity to go to the FIT Program, Ontario amended the *GEIA* on two occasions to extend the deadlines for commercial operation and to reduce the generation capacity that the Korean Consortium would develop.³⁹⁶
305. Specifically, the Korean Consortium did not meet its obligations under s.11.1(e) of the original *GEIA* for the designation of connection points and access rights by July 30, 2010, and December 31, 2010, respectively.³⁹⁷
306. In sum, Ontario kept the *GEIA* secret, even though the negotiations for the *GEIA* and the preparatory work for the FIT effectively were being undertaken at the same time, because Ontario could not explain its actions to the public. As a result of Ontario keeping the *GEIA* negotiations secret FIT investors invested in Ontario under false pretenses. In 2009, FIT investors did not know that there was a second half of Ontario's renewable program that would constitute 23% of the total megawatts available for all renewable projects in Ontario,³⁹⁸ and that the Korean Consortium could take projects to any region in the province and receive priority transmission access. As testified by Mr. MacDougall even the OPA was unaware of these negotiations.³⁹⁹
307. Sue Lo testified that one of Ontario's goals for the FIT Program was to allow for a fair and open process,⁴⁰⁰ one that did not permit any "gaming" of the system by proponents.⁴⁰¹ However, by entering into the *GEIA*, Ontario created a process whereby the Korean Consortium did exactly that. The *GEIA* was brought to Ontario by an unsolicited group of investors, and gave those investors preferential treatment and exclusive access to nearly a quarter of the renewable energy in the province.
308. As confirmed by Ontario's Auditor General, Ontario did not even look into the merits of the deal, it just signed it.⁴⁰² The *GEIA* itself restricted Ontario's ability to enter into any

³⁹⁶ *Green Energy Investment Agreement – Amending Agreement*, July 29, 2011 (***Investor's Schedule of Exhibits C-282***); Amended and Restated *Green Energy Investment Agreement (Respondent's Schedule of Exhibits R-133)*

³⁹⁷ Minutes/Agenda, Working Group Meeting, September 9, 2010 (***Investor's Schedule of Exhibits C-0562***) Action item, "KC to provide the OPA and ENERGY with possible "bundle" scenarios for connection points for Phases 2 and 3 wind and solar."; Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro One), January 11, 2011 (***Investor's Schedule of Exhibits C-0070***) The Korean Consortium did not select connection points for its Phase 2 wind projects until January 7, 2011, and that the OPA did not consider these final.; Ontario Power Authority, News Release, "Power purchase agreements signed with Korean Consortium", August 3, 2011 (***Investor's Schedule of Exhibits C-0059***) Wind sites used for Phase 2 by the Korean Consortium in August of 2011 were K2 and Armow.; Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 (***Investor's Schedule of Exhibits C-0293***) Wind sites used by the Korean Consortium in August 2011 to meet its Phase 2 obligations were in the FIT program in July 2011.

³⁹⁸ The LTEP capped the total amount of renewable energy at 10, 700MW in November of 2011. As confirmed by Sue Lo, the LTEP target responded to the fact that renewable energy was too costly and as a result Ontario decided to cap the total amount. Testimony of Sue Lo, Hearing Transcript, Day 3, p.121, Ins.8-19

³⁹⁹ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.293, Ins.8-12

⁴⁰⁰ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.12-13, Ins.21-4, p.179, Ins.7-9

⁴⁰¹ Email from JoAnne Butler (OPA) to Sue Lo (Ministry of Energy) and Shawn Cronkwright (OPA), May 12, 2011 (***Investor's Schedule of Exhibits C-0444***)

⁴⁰² Annual Report of the Auditor General of Ontario, 2011, p. 108 (***Investor's Schedule of Exhibits C-0228***)

GEIA-like deal given the success of the FIT program.⁴⁰³ Indeed, at the time, Ontario admitted that it was not in the position to enter a “special” deal with any other competitor of the consortium.⁴⁰⁴ And key operational terms of the GEIA were always kept secret from competitors such as Mesa, which made it impossible for Mesa to comprehend the full meaning of the GEIA or to seek similar terms from Ontario.

309. These actions are egregiously unfair, non-transparent and when viewed against the public terms available to other FIT proponents clearly breached the international law standard of treatment.

2. THE JUNE 3RD RULE CHANGE DIRECTED BY THE MINISTER OF ENERGY DENIED MESA DUE PROCESS, WAS MANIFESTLY ARBITRARY, AND WAS BOTH UNFAIR AND UNJUST

310. The available transmission capacity in the Bruce region was unfairly allocated as NextEra lobbied for and obtained unprecedented rule changes allowing for connection point changes between regions against the normal OPA process with practically no notification and consultation. Furthermore, there was no clear limits to which Ontario would go in bending the regulatory process to accommodate the Korean Consortium, leading to fundamental uncertainty and non-transparency as to the actual rules of the game. Ontario's determination to make the FIT work for its preferred companies at virtually any cost made ordinary regulatory fairness impossible.
311. The combination of arbitrary and prejudicial favourable treatment to NextEra and the Korean Consortium, lack of consultation and adequate notice period prior to the June 3 Direction, and allowing a rule change between regions contrary to investor expectations constitute a second breach of article 1105.

i) June 3rd Direction: Lack of Consultation and Notice

312. The FIT Rules identified under what circumstances, projects could change connection points.⁴⁰⁵ Under these rules, prior to an ECT, a connection point change was only contemplated in relation to projects connecting to the distribution system, not the transmission system.⁴⁰⁶ All the other connection point changes contemplated under the FIT rules were permitted only after the running of the first ECT.⁴⁰⁷

⁴⁰³ *Green Energy Investment Agreement*, January 21, 2010, art. 8.7 (***Investor's Schedule of Exhibits C-322***)

⁴⁰⁴ Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, Undated (***Investor's Schedule of Exhibits C-0714***)

⁴⁰⁵ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §§5.3, 5.5 & 5.6 (***Investor's Schedule of Exhibits C-258***).

⁴⁰⁶ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §5.3(d) (***Investor's Schedule of Exhibits C-258***).

⁴⁰⁷ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §5.5(d), §5.6 (b) (***Investor's Schedule of Exhibits C-258***)

313. NextEra's projects which were connecting to the transmission system were allowed to change connection points from the West of London to the Bruce region before the running of an ECT, and as a result were awarded contracts.⁴⁰⁸
314. This was effectuated through a June 3, 2011 rule change which was decided almost a month before, after private meetings with NextEra officials.⁴⁰⁹
315. NextEra's Al Wiley met with [REDACTED] and high-level officials within the Ministry of Energy on [REDACTED] with respect to the importance of a window to change connection points amongst regions.⁴¹⁰
316. Shawn Cronkwright confirmed that the decision was made by the Premier and the Ministry of Energy and communicated by the Ministry of Energy to the OPA on May 12, 2011.⁴¹¹
317. The amount of notice provided by Ontario for the Rule Change was inadequate and inequitable. For example, NextEra received notice of this rule change before other FIT applicants,⁴¹² while other FIT applicants received notice on Friday, June 3, 2011, that the window would be opening the following Monday, June 6.⁴¹³
318. Jim MacDougall admitted that a weekend was not adequate notice.⁴¹⁴

⁴⁰⁸ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp. 245-246, Ins.6-22 (NextEra bundled its projects to get contracts in Bruce in July 2011).

⁴⁰⁹ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits C-0077*); Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0681*) [CONFIDENTIAL]; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits C-0090*) (discussing with the Ministry of Energy's Andrew Mitchell about the importance of the connection point change window for NextEra); Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.66, Ins.6-11 (May 12, 2011 the decision to change connection points was made); Rejoinder Statement of Shawn Cronkwright, at ¶21; Email from Sue Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011 (*Investor's Schedule of Exhibits C-0674*)

⁴¹⁰ Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0681*) [CONFIDENTIAL]; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits C-0090*) (referring to meeting with the Ministry of Energy's Andrew Mitchell about the importance of the connection point change window for NextEra)

⁴¹¹ Testimony of Shawn Cronkwright, Hearing Transcript, Day 3, at p.6, Ins.6-11 (admitting that on May 12, 2011 the decision to change connection points was made); Rejoinder Statement of Shawn Cronkwright, at ¶21; Email from Sue Lo (MEI) to JoAnne Butler, May 12, 2011 (*Investor's Schedule of Exhibits C-0604*)

⁴¹² Email from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), May 31, 2011 (Section 1782 Evidence) (*Investor's Schedule of Exhibits C-0068*) [CONFIDENTIAL] ("knowing that the 'window' is opening"); Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 (*Investor's Schedule of Exhibits C-0090*) (the Ministry of Energy informed NextEra that the government was internally discussing whether to have a connection point change window, and whether this would be done province-wide or just for the Bruce and West of London regions, facts that were not disclosed to other FIT proponents).

⁴¹³ Ontario Power Authority, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, June 3, 2011 (*Investor's Schedule of Exhibits C-0140*); Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 (*Investor's Schedule of Exhibits C-0005*)

⁴¹⁴ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.238, Ins.18-20 [CONFIDENTIAL]

319. There was also no consultation with stakeholders or opportunity to comment on the rule prior to the release of the June 3rd Direction on any of the issues relating to the direction.⁴¹⁵ This was a departure from standard practice in the OPA.⁴¹⁶
320. In fact for other major rule changes, FIT investors were given the right to comment.⁴¹⁷
321. Canada's witness, Mr. MacDougall, admitted that the June 3 rule change was a major rule change.⁴¹⁸
322. However, because of the Ontario government's urgency to award contracts before the writ dropped for "good news" and to benefit the incumbent government's public image, the process was rushed, and normal stakeholder consultations were dispensed with.⁴¹⁹
323. It is foreseeable that if there had been a public comment period consistent with due process and transparency for the proposed June 3 rule change, that opposition to the proposed change by investors in the Bruce region could have resulted in the change not taking place.

ii) June 3rd Direction: Rule Change Allowing Change Between Regions

324. Prior to the June 3rd directive, the FIT proponents expected that a province-wide ECT would occur.⁴²⁰ This was the process set out in the FIT rules.⁴²¹ This did not happen.⁴²²

⁴¹⁵ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.252-253, Ins.18-21

⁴¹⁶ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.253, Ins.2-15, p.296, Ins.2-5 (more from an optics perspective, from a perception perspective, we preferred to have a greater notice period, and then a greater opportunity to act... certainly in making decisions around FIT rules or FIT contract language that was not time-sensitive or urgent, we preferred to post a draft and seek comment, and then implement 20 days, 20 days, 20 business days each."); Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.77, Ins.7-12 ("Generally speaking, our approach would be to have materials out in advance, to have lots of time for people to comment on them, to run a very, you know, long stretched-out process and from the behind the scenes processing perspective, that also helps our team.").

⁴¹⁷ FIT Program Update, Summary of changes to the FIT Rules, contract and standard definitions, dated July 2, 2010 (***Investor's Schedule of Exhibits C-0685***) (referencing review of comments providing for wind turbines with gearless pitch and gearless drive systems); FIT Program Update, Summary of changes to the FIT Rules, contract and standard definitions, dated October 21, 2010 (***Investor's Schedule of Exhibits C-0686***) (referencing review of comments for hub and hub casing); FIT Program Update, December 8, 2010 (***Investor's Schedule of Exhibits C-0687***) (OPA announcement advising it will accept comments to proposed rule that would include connection capacity assessments as part of the application process).

⁴¹⁸ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.252-253, Ins.21-1

⁴¹⁹ Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.185-186, Ins.6-8

⁴²⁰ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.139, Ins.9-12; Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.98, Ins.16-19; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p.39 (***Investor's Schedule of Exhibits C-0088***)

⁴²¹ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §§5.3, 5.5 & 5.6, compare §5.2 (***Investor's Schedule of Exhibits C-0258***)

⁴²² Testimony of Sue Lo, Hearing Transcript, Day 3, at p.129, Ins.8-17; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.228, Ins.15-20

325. The FIT rules did not contemplate permitting applicants connected to the transmission system to change connection points prior to the first ECT.⁴²³
326. Further, the FIT rules are silent on changes between regions.⁴²⁴ Contracts were awarded by region.⁴²⁵
327. It is clear from FIT related documents that FIT contracts would be awarded on a regional basis.
328. For example, Canada produced an OPA document from the "FIT Team" clarifying that what mattered for a proponent's chances of getting a contract was its regional ranking and not its provincial ranking.⁴²⁶ Canada's witness, Mr. Bob Chow, confirmed that the document was accurate during the hearing.⁴²⁷
329. It is also clear that the FIT rules as designed did not contemplate proponents being able to change connection points to different regions and bump out other projects.
330. Canada in fact produced a Ministry of Energy presentation from August 2010 which discusses how the FIT rankings should be published.⁴²⁸ This document shows that in August 2010, around the time the ECT was scheduled to begin originally, the Ministry of Energy contemplated releasing only regional rankings to applicants, and not the provincial ranking.⁴²⁹ This is important because without knowing everyone's provincial ranking, it would be risky and potentially useless to change connection points as the proponent would not know its ranking in comparison to other projects in the target region.
331. Accordingly, as of August 2010, and after announcing that there would be a window before the first ECT to do so, the Ministry of Energy and OPA were not contemplating changes between regions.
332. If the designers of the FIT program did not contemplate inter-region connection point changes, it is unreasonable for Canada to now purport that this was always intended.

⁴²³ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §5.3(d) (*Investor's Schedule of Exhibits C-0258*)

⁴²⁴ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §5.3(d) (*Investor's Schedule of Exhibits C-0258*)

⁴²⁵ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.120, Ins.12-15, pp.152-153, Ins.25-7 [*CONFIDENTIAL*];

Testimony of Bob Chow, Hearing Transcript, Day 3, at p.359, Ins.18-23

⁴²⁶ FIT, Application Review Test and Standard Responses, May 9, 2011, at p.33 (*Investor's Schedule of Exhibits C-0617*)

⁴²⁷ Testimony of Bob Chow, Hearing Transcript, Day 3, at p.373, Ins.4-10

⁴²⁸ MOE Presentation, Priority Ranking Release: Issues to be Addressed, August 26, 2010, at p.12 (*Investor's Schedule of Exhibits C-0483*) [*CONFIDENTIAL*]

⁴²⁹ MOE Presentation, Priority Ranking Release: Issues to be Addressed, August 26, 2010, at p.12 (*Investor's Schedule of Exhibits C-0483*) [*CONFIDENTIAL*]

333. This is confirmed by Pattern's Colin Edwards who testified in a deposition that he was surprised by the news that NextEra was allowed to change connection points to another region.⁴³⁰
334. Canada's contention that the rule change best approximated developer expectations is unavailing.
335. To begin with, Ontario never attempted to actually ascertain these expectations.
336. Second, the June 3rd directive limited the regional ECT to the Bruce and West of London regions, coincidentally benefitting NextEra, harming FIT proponents in line for contracts in the Bruce region, and excluding proponents from other regions.⁴³¹ If the rule change was not intended to benefit NextEra, then nearby regions should have been permitted to connect to the Bruce transmission area.

iii) June 3 Direction: Contrary to Developer Expectations, Ontario was Limiting the Capacity it Awarded to Avoid Paying the FIT Prices which Induced Investors to Invest in Ontario

337. It is undisputed that with the June 3rd Direction, Ontario capped the megawatts which could be awarded with FIT contracts.⁴³² Ms. Lo in fact testified that "there was a desire not to award all of the contracts that could connect, and that's why we capped the number of megawatts in the Minister's direction. I think it was 750 and 300 megawatts, because if more projects could have connected, **we didn't want to pay** for the additional megawatts that would come on stream."⁴³³
338. This, amongst other portions of the Direction, went against developer expectations. Canada's witnesses admitted that this was why the OPA needed a Direction.⁴³⁴ After having promised investors that it would award all available capacity through the FIT program to induce them to invest,⁴³⁵ it was not within the OPA's power to restrict the contract awards. A government directive was needed.

⁴³⁰ Transcript of Colin Edwards Deposition, August 3, 2012, at 160, Ins.5-21 (*Investor's Schedule of Exhibits C-0574*)

⁴³¹ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.131, Ins.19-25 [**CONFIDENTIAL**]; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.240, Ins.18-23; Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits C-0077*)

⁴³² Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits C-0077*)

⁴³³ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.200, Ins.2-7 (emphasis added)

⁴³⁴ Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.93, Ins.18-23

⁴³⁵ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.248, Ins.18-22 [**CONFIDENTIAL**] ("there were certainly very expansive statements made at the time when that [FIT program] was launched" to the effect that the program was originally designed to connect as many renewable energy projects as possible); FIT/Micro FIT Announcement, dated December 15, 2009, at p.3 (*Investor's Schedule of Exhibits C-0669*) ("The basis of the FIT program is having the system built to accommodate all generators who wish to connect. If transmission and/or distribution capacity is not available and a project meets certain economic and technical criteria, the system will be expanded to connect the project") (emphasis added); Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, February 25, 2010 (*Investor's Schedule of Exhibits C-0215*) [**CONFIDENTIAL**] ("The Green Energy Act includes the right-to-connect. If the transmission capacity is not available and projects meet certain technical

339. The aforementioned conduct shows that Canada managed the FIT program in an arbitrary, grossly unfair, unjust, idiosyncratic, and discriminatory manner, in addition to depriving FIT applicants like Mesa of its due process rights by making changes to the FIT program without consultation and by engaging in secret, special deals which have harmed FIT applicants which otherwise would have been entitled to FIT contracts.
340. In sum, any expectation of due process that Mesa had was shattered when the Minister of Energy arbitrarily intervened in an OPA run process to direct a rule change with effectively no notice period and no consultation, during which the required studies could not be completed, and which was designed to benefit proponents who already had completed the work required for change. Further, the directed rule change allowing connection point changes was in itself unjust and unfair and was inconsistent with representations made to the public about the FIT rules.
341. These actions taken collectively result in a gross and egregious violation of the fair and equitable treatment expected by any investor under the NAFTA, and resulted in Mesa not receiving FIT contracts for its projects.

E. LOCAL CONTENT REQUIREMENTS

342. Canada has admitted that it imposed local content requirements upon all applicants seeking a FIT Contract, including those applying under the *GEIA*. A given percentage of Ontario minimum local content was required under:
- a. The *Green Energy and Green Economy Act*;⁴³⁶
 - b. A September, 2009 Direction from the Minister of Energy to the OPA requiring 25% local content in 2011 and 50% local content in 2012;⁴³⁷ and
 - c. The terms of the FIT power purchase agreements, which refer to local content requirements⁴³⁸
343. Canada filed no substantive defense to the Investor's allegations of a breach of Article 1106, and has provided no evidence to refute this claim.
344. Canada did not provide any factual evidence to rebut the fact that it imposed prohibited local content requirements in violation of NAFTA Article 1106(1) in its closing arguments.⁴³⁹

and economic criteria, the system will be expanded to connect them.”) (emphasis added); Ministry of Energy presentation, “DRAFT ECT Design Considerations”, at p.8 (*Investor's Schedule of Exhibits C-0657*) [CONFIDENTIAL] (); Ontario Power Authority Draft Presentation, ‘Implications of the Economic Connection Test’, March 8, 2011, at p.3 (*Investor's Schedule of Exhibits C-0702*) [CONFIDENTIAL] (“OPA has little ability to withhold amounts discovered due to wind diversity ... and is obligated to reveal the 150MW of additional capacity in the Bruce when the next steps for ECT are announced”).

⁴³⁶ *Green Energy and Green Economy Act*, S.O. 2009, c. 12, at §25.35(3) (*Respondent's Schedule of Exhibits R-057*)

⁴³⁷ Letter from George Smitherman (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009, at p.3 (*Investor's Schedule of Exhibits C-0051*)

⁴³⁸ FIT Contract Version 1.1, Exhibit D (*Respondent's Schedule of Exhibits BRG-009*)

⁴³⁹ Canada's Closing Statement, Hearing Day 6, at p.209, Ins.18-22

345. The evidence produced in the record demonstrates that Ontario had knowledge before the start of the FIT Program that the local content requirements were inconsistent with its NAFTA obligations and could pose an issue but that even with this knowledge, Ontario proceeded to act in a manner directly inconsistent with the NAFTA.⁴⁴⁰
346. Mesa has provided a full review of this breach at paragraphs 237-243, and 487-513 of its Memorial, and at paragraphs 271 to 291 of its Reply Memorial.
347. Canada has offered no 1106 defense outside of the NAFTA's Article 1108(1) exemption. It has become clear that Canada only relies on the procurement exception as a defense to its breaches of the local content prohibitions. In its closing Canada made this clear when it stated that "they were the requirements that govern the procurement."⁴⁴¹

F. THIS TRIBUNAL HAS JURISDICTION TO RULE ON THESE CLAIMS

1. CANADA CONSENTED TO THIS ARBITRATION

348. Canada has consented to this arbitration through the terms of NAFTA Article 1122.⁴⁴² Moreover, any objection to consenting to arbitrate is negated by Canada's expert witness Mr. Goncalves who admitted harm caused by Canada's actions.⁴⁴³ Further, there are no procedural defects or irregularities with Mesa's claim and in any event the ADF Tribunal dismissed the contention that a procedural irregularity results in an impediment to the consent to arbitrate.⁴⁴⁴ Canada's arguments simply fail.
349. Canada's consent to this arbitration was specifically demonstrated at paragraphs 818 to 869 of the Investor's Memorial, paragraphs 809 to 816 of its Reply Memorial, and paragraphs 115 to 127 of its 1128 Submission.

2. MESA'S CLAIM COMPLIES WITH NAFTA'S TIME RESTRICTIONS

350. The events giving rise to Mesa's NAFTA Claim arose more than six months before the filing of the Notice of Arbitration on October 4, 2011. The events giving rise to this claim arose on the following dates:
- a. The events giving rise to the Article 1106 claim began August 5, 2010,⁴⁴⁵ with a possibility that such events began as early as July 7, 2011, fifteen months before the NAFTA arbitration filing. These were the first dates upon which the Investor obtained knowledge of a loss as a result of Canada's minimum Ontario local

⁴⁴⁰ Handwritten notes of Christopher Quirk (MOE) re: Domestic Content Consultation – CanSIA (**Investor's Schedule of Exhibits C-0692**)

⁴⁴¹ Canada's Closing Statement, Hearing Day 6, page 182, Ins.9-16

⁴⁴² Further, the UNCITRAL Rules do not require the parties to take any further steps to consent to arbitration.

⁴⁴³ Second Expert Report of Christopher Goncalves, at ¶145; Testimony of Christopher Goncalves, Hearing Transcript, Day 5, Public Only, at pp.227-228, Ins.19-1

⁴⁴⁴ *ADF Group Inc. v. United States*, Award, 2003 WL 24083234 (January 9, 2003) ("*ADF Group - Award*"), at ¶¶130-133 (**Investor's Schedule of Legal Authorities CL-072**)

⁴⁴⁵ Email from Michael Volpe to Mark Ward, August 5, 2010 (**Investor's Schedule of Exhibits C-0107**)

content measures.⁴⁴⁶ Both are well before 6 months prior to the October 4, 2011 Notice of Arbitration.

- b. The events giving rise to NAFTA Article 1103, 1102 and 1105 claims, arose more than twelve months in advance of the October 4, 2011 filing of the Notice of Arbitration. On September 17, 2010, Mesa learned through a Direction issued by the Ontario Minister of Energy to the Ontario Power Authority that one-third of the transmission capacity that had been reserved to all FIT applicants in the Bruce region was being given in priority to the members of the Korean Consortium under the *GEIA*.⁴⁴⁷ The effect of this measure taken by the Ontario Minister of Energy was to immediately reduce the value of Mesa's projects that were all located in the Bruce Region as the completion risk increased on account of significantly more limited transmission access.
351. NAFTA Article 1120 does not require that every breach arise more than six months before the claim is submitted to arbitration. Article 1120 requires only that events giving rise to "a claim" first arise in that period of time. The afore-mentioned breaches continued in force until Ontario terminated the FIT Program for large projects on June 12, 2013.⁴⁴⁸
 352. In order to comply with 1120 an investor must make a good faith reasonable judgment as to the point at which its rights under NAFTA have now been violated. This determination is what establishes the beginning point of the six month waiting period. Logically, for a finding on jurisdiction the timing of the breach first must be understood from the Investor's understanding of the facts and law. It is this impetus upon which any claim is made.
 353. Practical and efficient approaches should be preferred by NAFTA Tribunals to best serve the NAFTA's objectives to enhance the resolution of disputes in the NAFTA region.⁴⁴⁹
 354. The timeliness of Mesa's claim was reviewed fully in the pleadings and the oral argument.⁴⁵⁰

⁴⁴⁶ Email from Michael Volpe to Mark Ward, July 7, 2010 (***Respondent's Schedule of Exhibits BRG-123***) [***CONFIDENTIAL***]. This email informed the Investor that the 1.6 MW turbines, Mesa's preferred turbines, would not conform to the NAFTA prohibited FIT local content requirements required by Ontario for deployment in 2011.

⁴⁴⁷ Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), September 17, 2010 (***Investor's Schedule of Exhibits C-0119***)

⁴⁴⁸ Letter from Bob Chiarelli (Minister of Energy) to Colin Andersen (OPA), Direction to the OPA, June 12, 2013 (***Investor's Schedule of Exhibits C-0248***)

⁴⁴⁹ Ethyl Corp - Jurisdiction Award - *Ethyl Corp. v. Canada*, Jurisdiction Award, ICSID, 1998 WL 34334636 (24 June 1998), at ¶183 (***Investor's Schedule of Legal Authorities CL-013***)

⁴⁵⁰ Investor's Memorial, at ¶¶870-923; Investor's Reply Memorial, at ¶¶817-849; Investor's Opening Statement, Hearing Transcript, Day 1, pp.65-69, Ins.14-23; Investor's Closing Statement, Hearing Transcript, Day 6, at pp.78-81, Ins.14-16

3. NAFTA PROTECTION EXTENDS TO BOTH PRE AND POST INVESTMENT

355. The NAFTA applies to periods both “pre” and “post” investment. This was expressly negotiated by the Parties and distinguishes the NAFTA from other investment treaties. Specifically, the NAFTA extends its protections to the periods where an investor of a party “seeks to make, is making or has made an investment.” Mesa made its initial investments in Canada by August 14, 2009.⁴⁵¹ As testified by Cole Robertson, Mesa actually began looking to invest in Ontario in March 2009, and began due diligence and transaction work in July 2009.⁴⁵² NAFTA’s protection extends to Mesa in August 2009.
356. Should the Tribunal nonetheless determine that Mesa’s investments were made only in November 2009, when Mesa’s project companies were incorporated in Canada,⁴⁵³ the NAFTA provisions also extend to Mesa’s August 2009 acquisitions as NAFTA Article 1139 extends to the period where an investor of a party are “seeking to make an investment.” At a minimum this language extends to a situation in which an investor has purchased a good or service in the country of another state party but has yet to formally incorporate such investment.
357. In both situations it is clear that Mesa’s protections under the NAFTA extend at a minimum to August 2009. In any event, Ontario continued its wrongful acts begun before August 2009 through to 2011, well after Mesa invested. For example, Ontario did not enter the *GEIA* until January 2010, after Mesa filed its initial FIT applications.

G. ATTRIBUTION

358. The disputing parties largely have agreed upon the attribution of the measures at issue as being acts of the Government of Ontario for which Canada admits responsibility. Canada has admitted that measures taken by Ontario are acts for which Canada is responsible under the NAFTA. Canada also admits that there is no attribution issue with regards to Mesa’s claims under NAFTA Articles 1103, 1102, and 1106. As stated in Canada’s closing:

You will recall I also took you to a slide in the opening where we had those measures listed, and you will recall the measures that were being challenged were: One, the domestic content requirement of the FIT program; two, the treatment accorded to the Korean Consortium under the Green Energy Investment Agreement; and, three, the June 3rd Ministerial direction with respect to the allocation of the Bruce-to-Milton line capacity. I

⁴⁵¹ Certificate of Correction, AWA TTD Development LLC, August 14, 2009 (*Investor’s Schedule of Exhibits C-0457*); Limited Liability Company Operating Agreement of AWA TTD Development LLC, August 14, 2009 (*Investor’s Schedule of Exhibits C-0461*) [**CONFIDENTIAL**]

⁴⁵² Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.198-199, Ins.24-3 [**RESTRICTED CONFIDENTIAL**]

⁴⁵³ Certificate of Incorporation for 22 Degree Holdings ULC, under the Alberta Business Corporations Act, November 17, 2009 (*Investor’s Schedule of Exhibits C-0026*); Certificate of Incorporation for Arran Holdings ULC under the Alberta Business Corporations Act, November 17, 2009 (*Investor’s Schedule of Exhibits C-0047*); Certificate of Incorporation for Arran Wind Project ULC under the Alberta Business Corporations Act, November 17, 2009 (*Investor’s Schedule of Exhibits C-0049*); Certificate of Incorporation for TTD Wind Project ULC under the Alberta Business Corporations Act, November 17, 2009 (*Investor’s Schedule of Exhibits C-0087*)

want to be clear right at the start, [...] **there is no dispute, never has been, that these measures are attributable to the Government of Ontario. These are government actions.**⁴⁵⁴

359. Canada has admitted that measures taken by the Ontario Power Authority under the direction of the Ontario Government are acts for which Canada is responsible under the NAFTA. With respect to NAFTA Article 1105, Canada admits that all Directions and actions correspondingly taken to implement those Directions are attributable to Canada. In this regard, Canada has stated:

In this regard, if the claimant is challenging the June 3rd, 2011 direction, of course this is attributable to Canada. It was a measure carried out by Ontario in order of Canada. The same applies to the Minister's direction to the OPA to negotiate power purchase agreements with KC, for example.⁴⁵⁵

360. The one potentially "live" issue for the Tribunal to consider only is the following: whether Canada is responsible for fairness and due process violations taken in relation to the ranking of Mesa's investments.

361. The answer to this question is simple. Canada has admitted that it is responsible for all matters arising from the direction of Ontario.

a. The Minister of Energy has powers to direct the OPA under section 25.32 and 25.35 of the *Electricity Act*. Section 25.32(4) provides for a general delegation of governmental authority:

"...the Minister may direct the OPA to assume, as of such date as the Minister considers appropriate, responsibility for exercising all powers and performing all duties of the Crown."⁴⁵⁶

b. As a matter of international law, Canada is responsible for all matters related to ILC Article 8 through the ILC's Articles on State Responsibility.⁴⁵⁷

c. Ontario's Ministerial Direction of September 24, 2009 directed the OPA to "develop a feed-in tariff ("FIT") program."⁴⁵⁸ That same Direction directed the OPA to create rules that "[p]roponents will have to comply with"⁴⁵⁹

d. The Ontario Ministerial Direction specified that it was the Minister's "expectation that the OPA will establish appropriate policies and procedures with respect to the administration of the Programs."⁴⁶⁰

⁴⁵⁴ Canada's Closing Statement, Hearing Transcript, Day 6, at pp.139-140, Ins.12-2 (emphasis added)

⁴⁵⁵ Canada's Closing Statement, Hearing Transcript, Day 6, at pp.159-160, Ins.23-4

⁴⁵⁶ *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8 (***Investor's Schedule of Exhibits C-0401***).

⁴⁵⁷ Investor's Closing Statement, Hearing Transcript, Day 6, at p.120, Ins.1-6, pp.121-123, Ins.22-8

⁴⁵⁸ Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009, at p.1 (***Investor's Schedule of Exhibits C-0264***)

⁴⁵⁹ Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009, at p.1 (***Investor's Schedule of Exhibits C-0264***)

⁴⁶⁰ Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), September 24, 2009, at p. 7 (***Investor's Schedule of Exhibits C-0264***). Testimony of Sue Lo, Hearing Transcript, Day 3, at p.17, Ins.21-23

- e. The OPA created the FIT rules and administered the program and rankings under these specific directions.
362. The creation and compliance of the OPA with the ranking process was required by the Minister's direction. This process was in line with the expectations in the Direction. The rankings were an exercise of delegated governmental authority made under section 25.35 of the *Electricity Act*. All of the OPA rules, including the OPA ranking process entirely is attributable to Canada through the Ministerial direction. Accordingly, Canada has admitted attribution of its conduct when it directed the OPA through Ministerial directions. In any event, this is conduct for which Canada is responsible under the operation of ILC Article 8.
363. In essence, ILC Article 8 confirms the responsibility of the organs of the state for actions they direct. This ILC Article speaks to the government behavior in ordering others to do things. This is different from Chapter Fifteen, which attributes responsibility for the ordinary questions of state enterprises or monopolies.
364. ILC Article 8 is not affected by the terms of NAFTA Chapter Fifteen. The provisions of Chapter Fifteen of the NAFTA do not create a *lex specialis* that displaces state attribution under ILC Article 8. As stated in ILC Article 55, a *lex specialis* governs only a situation to the extent of the special rule in question.⁴⁶¹ The provisions of NAFTA Chapter Fifteen create a *lex specialis* that excludes the application of ILC Article 5, as both rules govern the same situation. All other situations, such as ILC Article 8, that are not governed by the situations envisioned by Chapter Fifteen thus are not covered by the *lex specialis*.
365. ILC Article 5 and NAFTA Article 1503(2) govern situations in which an entity in question has been empowered to exercise governmental authority and the conduct in question constitutes such an exercise. They both govern this situation, and thus the more specific rule contained in the NAFTA, the contested treaty, must be applied. Contrarily, ILC Article 8 governs attribution in which an organ is giving a specific direction or instruction to be carried out by a state enterprise or an employee of a state enterprise.⁴⁶²
366. Therefore, the OPA rankings are clearly attributable through ILC Article 8 as a specific Ministerial direction directed the actions of the OPA to create the FIT program and its corresponding rules and ranking criteria.

⁴⁶¹ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (New York: Cambridge University Press, 2002) ("Crawford (2002)"), at 140 (***Investor's Schedule of Legal Authorities CL-006***)

⁴⁶² Investor's Closing Statement, Hearing Transcript, Day 6, at pp.121-122, Ins.19-23

H. SUBSIDY

367. As Canada admitted, no evidence in the record exists that demonstrates the existence of any government subsidy through the FIT Program in any form. In fact the evidence shows the opposite.⁴⁶³
368. Mesa's response to Canada's subsidy argument has been reviewed thoroughly in Mesa's subsidy pleading filed with the Tribunal on September 22, 2014, and in Mesa's opening statement.⁴⁶⁴ To be clear, this is a defense that Canada has claimed that it is pleading.⁴⁶⁵ Consequently, Canada bears the burden of proof for this defense,⁴⁶⁶ but it completely failed to do so.
369. Further, it is erroneous in law and in logic to state, as Canada has, that Mesa's characterization of the FIT Program equates to a subsidy should the Tribunal determine that the measure not constitute procurement.⁴⁶⁷ There is simply no legal basis that that should be the case.
370. More pointedly evidence on the record states the opposite. The Ministry of Energy's contemporaneous internal documentation demonstrates Ontario's own understanding that the FIT program was not a government subsidy.⁴⁶⁸ The reasoning behind this determination was because this is a rate-payer driven system. This was explained to government officials at the time.
371. Rick Jennings admitted at the hearing that the renewable energy program was not a subsidy. When specifically questioned on this topic Mr. Jennings testified:
- Q. So, in fact, the Ontario electricity system is not heavily subsidised, is it, sir?
- A. No.
- Q. In fact, it is not subsidised at all, is it?
- A. No, it is not.⁴⁶⁹

⁴⁶³ Letter from Canada to the Tribunal, October 6, 2014, at p. 2; Letter from Canada to the Tribunal, September 15, 2014

⁴⁶⁴ Investor's Observations on Canada's Subsidies Defense Exception, September 22, 2014; Investor's Opening Statement, Hearing Transcript, Day 1, at pp.75-78, Ins.18-18

⁴⁶⁵ Canada's Rejoinder, at ¶165

⁴⁶⁶ Investor's Observations on Canada's Subsidies Defense Exception, ¶17, citing Kazazi, Motajaba, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunal 1996*, (Martinus Nijhoff Publishers, 1996), at 221 (**Investor's Schedule of Legal Authorities CL-393**); *William A. Parker v. United Mexican States*, US-Mexico Claims Commission (1926) IV RIAA 35, March 31, 1926, at pp.39-41 (**Investor's Schedule of Legal Authorities CL-394**); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, at p.437, at ¶101 (**Investor's Schedule of Legal Authorities CL-395**); *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, (December 22, 1986), ICJ Reports 1986 ("Frontier Dispute"), at pp.587-588 (**Investor's Schedule of Legal Authorities CL-418**)

⁴⁶⁷ Canada's Rejoinder, at ¶165

⁴⁶⁸ 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 C-0173**)

⁴⁶⁹ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.240, Ins.14-20

372. The subsidy defense Canada asserted is entirely frivolous and Canada always knew that this defence was not valid when it asserted it. Canada has engaged in a needless and wasteful exercise of the Tribunal's resources as well as Mesa's resources. The evidence demonstrates that Canada has always known that this defense was without merit and it was not made in good faith.

I. PROCUREMENT

1. THE MEANING OF PROCUREMENT IN NAFTA CHAPTER ELEVEN

373. Ontario's renewable energy programs, including the *GEIA* and the *FIT*, do not constitute procurement as the term is understood in the *NAFTA*.

i) Procurement Facts

374. The facts relating to procurement are reviewed in the Investor's Memorial at paragraphs 456-457, the Reply Memorial at paragraphs 202-206, in the Investor's 1128 Response at paragraphs 98-106 and during the Investor's opening at pages 86-89 of the transcript.⁴⁷⁰

375. Factually, the story is clear. Electricity is produced by the generators, paid for by the rate-payers, consumed by the rate-payers.⁴⁷¹ The *OPA* simply acts as a pass through to transfer funds to the generators.⁴⁷²

376. As stated by Mr. Jennings:

....so the ratepayers -- so the consumers ultimately are billed each month. Those bills are paid by them and that covers the electricity that they consumed⁴⁷³

377. Numerous other witnesses confirmed this same understanding throughout the hearing.⁴⁷⁴

378. The *FIT* is not a governmental subsidy because the ratepayers paid for all the electricity generated. For the same reasons, the *FIT* cannot constitute governmental procurement. Ontario's involvement was as a regulator attempting to create a green

⁴⁷⁰ Investor's Memorial, at ¶¶456-457; Investor's Reply Memorial, at ¶¶202-206; Investor's 1128 Response, at ¶¶98-106; Investor's Opening Statement, Hearing Transcript, Day 1, at pp.86-89, Ins.15-7

⁴⁷¹ Expert Report of Seabron Adamson, at ¶68; "Overview of the Electricity System in the Province of Ontario", by William W. Hogan, March 28, 2013, at p.27 (*Investor's Schedule of Exhibits C-0320*); *Canada - Renewable Energy - Panel Report*, at ¶¶7.204, 7.206 (*Investor's Schedule of Legal Authorities CL-001*); Canada's Counter-Memorial, at ¶277: "[T]he *OPA* is funded by ratepayers in the Province of Ontario, and not through public funds"; Annual Report of the Auditor General of Ontario, 2011, at ¶¶89-95 (*Investor's Schedule of Exhibits C-0228*) "The government's renewable energy initiatives have been successful in rapidly increasing the amount of renewable power available over the next few years. At the same time, however, wind and solar renewable power will add significant additional costs to ratepayers' electricity bills." (at p. 89, emphasis added)

⁴⁷² Expert Report of Seabron Adamson, at ¶114

⁴⁷³ Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.237, Ins.3-6

⁴⁷⁴ Testimony of Sue Lo, Hearing Transcript, Day 3, Public Only, at pp.27-28, Ins.24-1, p.149, Ins.23-25; Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.154, Ins.13-17, p.220, Ins.14-17

energy market between two parties in a commercial transaction. The government does not purchase anything in this instance. In this regard, Canada would like to use NAFTA's protection under the procurement exception under Chapter Eleven yet it did not actually use its ability to procure.

379. Moreover, Canada clearly has taken the position that the OPA does not form part of the government. The only OPA officials who testified at the hearing made it clear that the OPA is not part of government. When questioned OPA employee Mr. Cronkwright stated:

Q. And you then agree that if the -- the OPA -- you said that -- you are basically saying that the OPA is not the government, per se?

A. That's right.⁴⁷⁵

380. Similarly, Mr. Chow, an OPA employee, stated:

Q. What about the government side? Were you the only government person involved in the group?

A. I'm not a government person I'm from the OPA.⁴⁷⁶

381. In sum, the electricity is not paid for or consumed by government. The electricity is both paid for and consumed by consumers. The contracts that are entered into for electricity generation are entered into by the OPA, which Canada contends is not the government, and generators, which are private third parties. No tangible or non-tangible good or service ever is acquired or used by the government.

382. Further, both Canada and the witnesses that testified on its behalf characterized the *GEIA* as a "commercial agreement."⁴⁷⁷ This is in line with Ontario's Auditor General report which characterized that agreement not as procurement but as an investment agreement. Neither the OPA nor Ontario disagreed with this characterization in their comments to the report.⁴⁷⁸

383. Hence, electricity generation and consumption, which is identical under the *GEIA* and the FIT, only involves government to the extent that government regulates the process between a third party generator which creates the electricity, and the consumer who consumes and pays for the electricity.

⁴⁷⁵ Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.21, Ins.3-7

⁴⁷⁶ Testimony of Bob Chow, Hearing Transcript, Day 3, at pp.325-326, Ins.22-1

⁴⁷⁷ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.41, ln.21, p.84, ln.19. For Canada's characterization of the *GEIA* as a "commercial deal", see Canada's Opening Statement, Hearing Transcript, Day 1, at p.139, ln.21, p.171, ln.10, p.173, ln.10; Canada's Closing Statement, Hearing Transcript, Day 6, at p.200, ln.23, p.214, ln.11, p.215, ln.19

⁴⁷⁸ Annual Report of the Auditor General of Ontario, 2011, at p. 108 (*Investor's Schedule of Exhibits C-0228*)

ii) Procurement Law

384. The meaning of procurement in Chapter Eleven has been established by two other NAFTA Tribunals by applying the definition of procurement contained in NAFTA Chapter 10.⁴⁷⁹ This approach is consistent with the rules of treaty interpretation.
385. As Mesa has stated procurement in the NAFTA means government procurement. Using the term “procurement” to mean any purchasing activity by anyone, as Canada does, is not the same as characterizing a measure a procurement by a party or a state enterprise within the meaning of Article 1108.
386. This approach is consistent with the position advocated by Canada itself in the UPS claim.⁴⁸⁰ Canada has failed completely to explain in the present proceeding why its position in UPS, that the relevant approach is to use the definition in Chapter Ten, should not now be followed.
387. In defining “procurement,” Canada selectively references the WTO panel decision in Canada Renewable Energy.⁴⁸¹ Canada relies on the WTO panel analysis of the word “procurement.” However, it neglects to take into account the subsequent analysis in that decision which requires that procurement be for governmental purposes. In doing so Canada does not mention that the Panel ultimately rejected the procurement argument as the measures in question did not relate to governmental purposes.⁴⁸²
388. In further support of this argument Canada raised two examples in their closing argument. First, Canada claims a Party would no longer be able to insist that domestic steel be used to construct a toll road, since a toll road would not “be for the government” and as it is a toll road the government would not be paying for it.⁴⁸³ Second, Canada uses an example of a public-private partnership (“PPP”) stating that it would not have title to such a road. Both such examples are deeply flawed.⁴⁸⁴
389. In its first example, the case of a public toll road, the government may build a road or direct an entity that would finance and build the road on its own in exchange for a portion of the toll profits over a period of time. The government, however, would have title over the road and a toll could be exacted from users of the road by the government itself, or from a private party contracted out to do so. This would be a direct form of government taxation used for the upkeep, management or financing of the road. In the event that a government procures this service this might be an example of government procurement. This is not analogous to what occurred in the case at hand.

⁴⁷⁹ *United Parcel Service v. Canada*, Counter Memorial, June 22, 2005, at ¶¶564-565 (***Investor's Schedule of Legal Authorities CL-207***); *ADF Group Inc. v. United States*, Award, 2003 WL 24083234 (January 9, 2003) (“*ADF Group - Award*”), at ¶161-162 (***Investor's Schedule of Legal Authorities CL-072***)

⁴⁸⁰ *United Parcel Service v. Canada*, Counter Memorial, June 22, 2005, at ¶¶564-565 (***Investor's Schedule of Legal Authorities CL-207***)

⁴⁸¹ Canada's Closing Statement, Hearing Transcript, Day 6, at pp.175-176, Ins.22-3

⁴⁸² *Canada - Renewable Energy - Panel Report*, at ¶¶ 7.145, 7.151 (***Investor's Schedule of Legal Authorities CL-001***)

⁴⁸³ Canada's Closing Statement, Hearing Transcript, Day 6, p.178, Ins.3-11

⁴⁸⁴ Canada's Closing Statement, Hearing Transcript, Day 6, p.178, Ins.11-16

390. In Canada's second example, it suggests the use of a hypothetical PPP to manage a road. Here, the wording used in the example is key. Canada stated "assume that the government gave the road to a PPP to manage."⁴⁸⁵ In this situation, the very assumption that Canada puts forth is that the government has title to a road. The government then contracts out the management of the road to a private party. Nowhere in this example would government lose title to the road, which is consistent with PPP contracting. This might be another example of government procurement. Yet, again, this is not analogous to the case at hand.
391. Moreover, in respect to services, Canada asserts that it is impossible to obtain a title or to consume a service, and they reference the UPS case, where a Tribunal determined that a service contracted by Canada Post was procurement. This is an imperfect analogy, and should be rejected. In UPS, Canada Post obtained or acquired the service. The service was not paid for and provided to another party. It was obtained and paid for only by the government.
392. Lastly, contrary to Canada's assertions, none of Mesa's characterizations support the conclusion that the FIT program is procurement.⁴⁸⁶ In its closing Canada attempts to selectively weave various portions of Mesa's Memorial together and claims that Mesa's characterization of the FIT is procurement. That is false. What Mesa is referring to in paragraphs 180, 181 and 194 of its Memorial was the competition to enter into 20-year contract. In this sense Ontario was not using its procurement powers as it was not using its purchasing power and was never receiving title to the subject of the contract. Ontario was engaging in market building.
393. In this regard, the mere existence of competition and a government awarding contracts does not lead to a conclusion that procurement exists in the legal sense of the term under the NAFTA. Ontario did not buy electricity produced. The contract entered into by the government is simply an assurance from the government that the ratepayers will pay the agreed upon rates that were advertised by the province.
394. The Investor has set out this approach in the Memorial at paragraphs 445- 479, in the Reply Memorial at paragraphs 182-270, in the 1128 response at paragraphs 61-114 and in our opening⁴⁸⁷ and closing.⁴⁸⁸

2. PROCUREMENT AND BETTER TREATMENT IN OTHER INVESTMENT TREATIES

395. More favourable treatment offered by a Treaty Party in a treaty with a non-treaty Party invokes MFN treatment obligations. A decision to the contrary would render the MFN obligation inutile.
396. Canada negotiated and completed treaties with both the Czech Republic and Slovakia which provide better treatment relating to procurement exemptions.⁴⁸⁹ These more

⁴⁸⁵ Canada's Closing Statement, Hearing Transcript, Day 6, at p.176, Ins.16-17

⁴⁸⁶ Canada's Closing Statement, Hearing Transcript, Day 6, at pp.169-170, Ins.21-9

⁴⁸⁷ Investor's Opening Statement, Hearing Transcript, Day 1, at pp.81-86, Ins.6-8

⁴⁸⁸ Investor's Closing Statement, Hearing Transcript, Day 6, at pp.82-83, Ins.22-22

- favourable terms should be extended to Mesa. They were not extended to Mesa in that it is not being provided a procurement exception. To be clear, this argument is not premised on any substantive procurement argument, rather it focuses exclusively on the better treatment that was negotiated, offered, and afforded in another treaty. When the better treatment that was provided in these treaties was not offered to Mesa, Canada breached its MFN obligation under the NAFTA.⁴⁹⁰
397. Contrary to what Canada asserts, the NAFTA procurement carve-out does not apply to this argument. Procurement in and of itself is not central to this MFN argument. This argument is premised on the negotiation and completion of a treaty with more preferential terms. It is the negotiation and completion of a treaty with more preferential terms that was not extended to NAFTA Parties by Canada that is central to this complaint. Procurement is only relevant to the outcome of this argument, which would provide the better treatment offered and accorded under the Czech and Slovak treaties to Mesa as a result of the fulfillment of Canada's MFN obligation.
398. Canada contemplated that treatment accorded by another bilateral investment treaty could give rise to MFN treatment obligations as Canada made a specific exception to Article 1103 for treatment offered and afforded under all bilateral or multilateral international agreements in force or signed prior to the NAFTA.⁴⁹¹ The NAFTA Parties all recognized that treatment "accorded" under another bilateral or multilateral international agreement would give rise to MFN treatment obligations if the treatment offered to investment or investors in like circumstances was more favourable.
399. Canada has chosen not to address this argument in any of its pleadings or in any portion of the hearing. Instead, Canada presents an argument that is not responsive to the Investor's argument.
400. In sum, the exception in NAFTA Article 1108(7)(a) cannot be relied upon by Canada in the current arbitration because of the more favourable treatment offered and accorded by Canada to investors in like circumstances under other treaties from Canada with non-NAFTA Parties.

⁴⁸⁹ *Agreement Between Canada and the Czech Republic for the Promotion And Protection of Investments* (2009) ("Canada-Czech BIT") (**Investor's Schedule of Legal Authorities CL-134**); *Agreement Between Canada and The Slovak Republic For the Promotion And Protection of Investments* (**Investor's Schedule of Legal Authorities CL-358**); The Czech and the Slovak bilateral investment treaties were signed after the January 1, 1994 entry into force of the NAFTA and thus are not affected by Canada's international agreement exceptions in the NAFTA.

⁴⁹⁰ Mesa has previously raised this argument in its Reply Memorial, at ¶¶185-188; Investor's 1128 Submission, at ¶¶63-81

⁴⁹¹ See NAFTA Annex IV.

III. DAMAGES

A. THE APPROACH TO DAMAGES

401. Canada and the Investor both agree that the Chorzow Factory case sets out a statement of the international law on damages. It requires Canada to pay full reparations in the event of a breach of the NAFTA.⁴⁹² Both disputing parties agree that the role for the Tribunal is to have damages compensate for the harm by putting the injured party back to the position it would have been in but for the wrongful act.
402. Canada's valuation expert and the Investor's valuation expert are in agreement on the general approach to calculate damages with respect to breaches of Articles 1105 and 1106.
403. The fundamental damages question facing this tribunal is in regard to evaluating damages under the most favoured nation clause and the national treatment clause where the Party's breach involves the failure of that Party to provide a better level of treatment as mandated by the Treaty. The question for the Tribunal to address is whether a party should be given the most favourable treatment as required by the treaty article when assessing "but for" damages calculations.
404. Longstanding principles of international law answer this question in the affirmative. The International Law Commission Articles on State Responsibility explain the international law dealing with damages and compensation. Article 31 of the ILC Articles makes clear that reparations are necessary. Article 31 states:
- Article 31. Reparation**
1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.
405. The Commentary to Article 31 demonstrates that the ILC relied on the *Chorzow Factory* case as a leading statement of the law of damages.
406. Commentary (4) to Article 31 discusses the fact that the rights of the claimant arise automatically upon the commission of the breach and in a multilateral context, Commentary (4) says:
4. The general obligation of reparation is formulated in article 31 as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of an injured State or States. This formulation avoids the difficulties that might arise where the same obligation is owed simultaneously to several, many or all States, only a few of which are specially affected by the breach. But quite apart from the questions raised when there is more than one State entitled to invoke responsibility, the general obligation of reparation arises automatically upon commission of an internationally wrongful act

⁴⁹² Canada's Rejoinder, at ¶¶224; Canada's Closing Statement, Hearing Transcript, Day 6, pp.263-264

and is not, as such, contingent upon a demand or protest by any State, even if the form which reparation should take in the circumstances may depend on the response of the injured State or States.

407. ILC Article 34 provides guidance on how full reparation can be made. It provides that:

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

408. Commentary 2 to ILC Article 34 clarifies that wiping out all the consequences of the wrongful act (as required under the *Chorzów Factory* doctrine) may require different forms of reparation. Commentary 2 gives guidance on what a Tribunal should do if “re-establishment of the situation which existed before they breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. the injury flowing from the loss of the use of property wrongfully seized).”

409. The ILC Comment says:

- (2) In the *Factory at Chorzów* case, the injury was a material one and PCIJ dealt only with two forms of reparation, restitution and compensation. In certain cases, satisfaction may be called for as an additional form of reparation. Thus, full reparation may take the form of restitution, compensation and satisfaction, as required by the circumstances. Article 34 also makes it clear that full reparation may only be achieved in particular cases by the combination of different forms of reparation. For example, re-establishment of the situation which existed before the breach may not be sufficient for full reparation because the wrongful act has caused additional material damage (e.g. injury flowing from the loss of the use of property wrongfully seized). Wiping out all the consequences of the wrongful act may thus require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused.

410. Re-establishment of the situation which existed before the breach cannot be sufficient when the internationally wrongful conduct under the treaty is about the failure to provide a required level of treatment. Thus, in such circumstances, the Tribunal must ensure that damages are paid to compensate the Investor for the failure of the government to provide the required level of treatment under the treaty. In the present case, this means a requirement to provide treatment equal to the most favourable treatment accorded in like circumstances to investors from non-NAFTA Parties or any other NAFTA Party under MFN Treatment, or treatment equal to the most favourable treatment accorded in like circumstances to an investor or investment from Canada under National Treatment.

411. In the present case, this means a requirement to provide treatment equal to the most favourable treatment accorded in like circumstances to investors from non-NAFTA Parties or any other NAFTA Party under MFN Treatment, or treatment equal to the most favourable treatment accorded in like circumstances to an investor or investment from Canada under National Treatment. The treatment that should have been afforded to Mesa is the best treatment offered by Canada to another investor in Ontario.

412. The primary obligation for NAFTA Articles 1102 and 1103 requires that a government provide a certain level of treatment to a qualifying NAFTA Party foreign Investor or its investment.
413. This is precisely the approach proposed by the Investor at the hearing, in response to questions from the Tribunal.⁴⁹³ The *Cargill* case provides support for including the better treatment as a remedy for the breach of the MFN obligation. *Cargill* addressed the breach of NAFTA Article 1102 – an obligation similar to Article 1103 where the internationally wrongful behavior is based upon the failure of a state to provide a certain level of treatment.
414. In *Cargill*, the tribunal agreed with the Claimant that for a failure to provide treatment as favourable, the appropriate measure of damages was “the overall damage to the economic success of the investor arising from the measure” whereby the investor was treated less favourable than domestic investors in like circumstances.”⁴⁹⁴ Here, it should be noted that that the claimant in *Cargill* sought “damages for the net lost cash flow that Cargill and Cargill de Mexico ‘would have garnered from Cargill de Mexico’s HFCA sales in Mexico from January 2002 through 2007 but for Mexico’s unlawful conduct.”⁴⁹⁵ A similar approach was taken by the ADM Tribunal where the Tribunal acknowledged that reasonably anticipated lost profits should be awarded.⁴⁹⁶ In Mesa’s situation the overall economic damage includes damages from not receiving the best treatment available.
415. Canada acknowledged in its closing that the damages test in *Cargill*, which is to provide probable and reasonable damages, is the appropriate standard.⁴⁹⁷
416. There is ample support for providing the better treatment when remedying an MFN treatment breach. As stated in a 2010 UNCTAD publication on MFN:
- In most MFN treatment claims, tribunals have been directly applying the allegedly better treatment as opposed to finding a violation and compensating for the damage created by this violation.⁴⁹⁸
417. International tribunals have found that the remedy to an MFN breach is to provide the benefit of the better treatment. For example:
- a. In *MTD v. Chile*, the Tribunal rules that the MFN provision allowed the Claimant to utilize better substantive obligations contained in Chile’s bilateral investment treaties with Croatia and with Denmark,⁴⁹⁹

⁴⁹³ Investor’s Closing Statement, Hearing Transcript, Day 6, at pp.101-103, Ins.23-10

⁴⁹⁴ *Cargill - Award - Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, at ¶432, 344, 347 (**Respondent’s Schedule of Legal Authorities RL-045**)

⁴⁹⁵ *Cargill - Award - Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, at ¶432 (**Respondent’s Schedule of Legal Authorities RL-045**)

⁴⁹⁶ Investor’s Closing Statement, Hearing Transcript, Day 6, p. 103, lines 20-25

⁴⁹⁷ Canada’s Closing Statement, Hearing Transcript, Day 6, p.141-142, Ins.18-1

⁴⁹⁸ United Nations Conference on Trade and Development, *Most Favoured Nation Treatment*, UNCTAD Series on Issues in International Investment Agreements II at p. 5 (New York and Geneva: 2010) (**Investor’s Schedule of Legal Authorities CL-066**)

- b. In *I.C.S. Inspection and Control v. Argentina*, the Investor successfully relied on 41 different bilateral investment treaties signed by Argentina which offered more favourable access to dispute settlement than that provided under the governing UK – Argentina bilateral investment treaty.⁵⁰⁰
- c. In *White Industries v. India*, the Investor under the Australia- India bilateral investment treaty successfully relied on a more favourable treaty provision where India was offering “effective means of asserting claims and enforcing rights” in the India-Kuwait treaty.⁵⁰¹
- d. In *Gas Natural v. The Argentine Republic*, the Investor asserted that the large majority of the over 50 bilateral investment treaties that Argentina had entered into provided more favourable recourse to arbitration than the Argentina-Spain treaty at issue. The Tribunal specifically relied upon the provisions of the Argentina-United States treaty in its decision to afford the Investor the more favourable provisions.⁵⁰²
- e. In *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* the Investors successfully relied on the Argentina-France bilateral investment treaty which afforded them more favourable recourse to arbitration than the provisions in the Argentina-Spain treaty.⁵⁰³
- f. In *RosInvest Co v. Russian Federation*, the Investor successfully relied on more favourable provisions in the Denmark-Russia investment treaty to broaden the scope of the Tribunal from that provided under the Russian Federation-United Kingdom treaty.⁵⁰⁴
- g. In *Daimler v. Argentina*, the Tribunal considered the existence of a variety of treaties entered into by Argentina which offered more favourable treatment and did not require that the Investor prove that the treatment available under each treaty actually was provided as a pre-condition to extending MFN treatment to the Investor.⁵⁰⁵

⁴⁹⁹ *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Chile*, Award, ICSID 2004 WL 3254661 (25 May 2004) (“MTD Equity - Award”), at ¶¶103-104 (**Investor's Schedule of Legal Authorities CL-060**)

⁵⁰⁰ *ICS Inspection - Jurisdiction - ICS Inspection and Control Services Limited (United Kingdom) v. The Argentine Republic*, PCA Case No. 2010-09, Award on Jurisdiction (10 February 2012) (“ICS Inspection - Jurisdiction”) (**Investor's Schedule of Legal Authorities CL-068**)

⁵⁰¹ *White Industries - Award - White Industries Australia Limited v. The Republic of India*, Final Award (30 November 2011) (“White Industries-Award”) (**Investor's Schedule of Legal Authorities CL-062**)

⁵⁰² *Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Preliminary Questions on Jurisdiction (17 June 2005) (**Investor's Schedule of Legal Authorities CL-257**)

⁵⁰³ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction (16 May 2006) (**Investor's Schedule of Legal Authorities CL-278**)

⁵⁰⁴ *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction (October 2007) (**Investor's Schedule of Legal Authorities CL-259**)

⁵⁰⁵ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Dissenting Opinion of Judge Charles N. Brower (15 August 2012) (**Investor's Schedule of Legal Authorities CL-330**)

418. These cases demonstrate that international tribunals have awarded the better level of treatment (that was previously not provided to the Claimant) to the Claimant under MFN Treatment.
419. Moreover, the purpose of damages under ILC 36 is to compensate for the failure of the government to accord better treatment and thus to value the loss incurred to the Investor (or investment) as a result of not receiving that treatment.
420. ILC Article 36 addresses the issue of compensation in a situation where damage cannot be made good by restitution:
- Article 36. Compensation**
1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.
421. This Tribunal must take ILC Article 36 into account which requires that “any financially assessable damage including loss of profits insofar as it is established” be provided as compensation with respect to the internationally wrongful action. The internationally wrongful actions taken in this claim are:
- a. The failure to provide treatment to Mesa as favourable as that provided to investors and investments in like circumstances from Canada under NAFTA Article 1102;
 - b. The failure to provide treatment to Mesa as favourable as that provided to investors and investments in like circumstances from non-NAFTA Parties or from any other NAFTA Party under NAFTA Article 1103
 - c. The failure to provide treatment in accordance with the international law standard of treatment with respect to the process for awarding transmission access to the Ontario electricity grid and 20 year long renewable power purchase agreements issued by the OPA and backed by the ratepayers of Ontario; and
 - d. The imposition of prohibited local content requirements upon Mesa and others who sought such 20 year long renewable power purchase agreements.
422. The FIT Program was terminated by Canada in the summer of 2013⁵⁰⁶ and thus the breaches at issue in this arbitration cannot be addressed by restitution. Under ILC Article 36, Canada is required to compensate Mesa with respect to the losses suffered by Mesa as a result of Canada’s internationally wrongful actions in violation of the NAFTA.
423. At paragraph 27 of his Reply Valuation Report, Mr. Goncalves stated that he did not take the NAFTA obligations into account when coming to his valuation amounts. His report stated:

⁵⁰⁶ The termination of the program means that no new FIT Contracts will be awarded, but existing ones are being honoured for the full period.

27. The theory underlying Deloitte's assumptions is essentially a matter of the legal interpretation of the NAFTA. Deloitte assumes "[g]iven the breaches of Articles,[sic] 1102, 1103 and 1104, Mesa Power would be entitled to the profits that would have been realized had it also been granted the terms of the Amended *GEIA*."13 We offer no opinion on the interpretation of NAFTA.
28. Our analysis of the cause and quantum of damages is independent of NAFTA and based on standard practices for assessing damages in international arbitration.
424. Mr. Goncalves stated in his Reply Valuation report at paragraphs 42 and 43 that:
- We were asked by Canada to assume that the treatment of KC and Mesa Power breached Canada's MFN obligation under the NAFTA"
425. At paragraph 43 Mr. Goncalves stated that "this interpretation is not relevant from a damages perspective".⁵⁰⁷
426. When cross-examined on this position, Mr. Goncalves admitted that he had no external support for his position that damages should not take into account the treaty obligations.⁵⁰⁸ He said that this was his personal view that had no other support and that he had been requested to take such a view by counsel as well.⁵⁰⁹
427. The ILC makes clear that damages valuation is required to take into account the primary treaty obligations. Thus, Mr. Goncalves admits that his approach is inconsistent with the ILC rules when he failed to take the NAFTA obligations into account when assessing damages.
428. Commentary (7) to ILC Article 36 says:
- (7) As to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, an evaluation of the respective behaviour of the parties and, more generally, a concern to reach an equitable and acceptable outcome.
429. By comparison, Mr. Low explicitly took the primary obligations into account when assessing his damages valuation.
430. Accordingly, "but for" damages must return the qualifying investor to where they should have been but for the breach. In the case of national treatment and MFN treatment, this requires calculating damages for the failure to receive the treatment that Canada was obligated to provide under the NAFTA.
431. The ILC approach and the approach taken by the *Cargill* Tribunal addresses the issue posed by the Investor during its Closing Argument in its hypothetical. Canada's valuation approach with respect to NAFTA Article 1103 can be dismissed as illogical by the following hypothetical:
- a. Company ABC is interested in **accessing** the Ontario wind market and wants to enter into a business arrangement similar to that of the Korean Consortium.

⁵⁰⁷ Second Expert Report of Christopher Goncalves, at ¶143

⁵⁰⁸ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.206, lns.19-23

⁵⁰⁹ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.206, lns.19-23, pp.215-216, lns.25-21

- b. Company ABC can **attract** the manufacturing facility for the province of Ontario.
 - c. Company ABC is **not participating** in the FIT program.
 - d. Under Canada's approach to damages, the elimination of the wrongful action by Canada, would leave Company ABC in a position of not receiving a long term fixed price contract or any relief whatsoever.
 - e. Canada thus would have breached its NAFTA's MFN obligations with respect to ABC Corp., but ABC would receive **no** compensation for that breach.
432. Of course, Canada's approach cannot give effect to the requirement of ILC Article 36 and it simply does not make sense as effectively it renders the meaning of the national treatment and MFN treatment obligations inutile.
433. In sum, the only damage approach that gives effective meaning to the Most Favoured Nation Treatment principle is the approach adopted by Mesa's valuation expert Bob Low, which is that the most favourable treatment provided in like circumstances by the state be provided to the Investor (and its investments).

B. COMPARING TWO VALUATION APPROACHES

434. Valuation expert Robert Low has provided written and oral testimony regarding the damages that resulted from the NAFTA breaches involved in this claim.⁵¹⁰ Mr. Low's valuation of the losses suffered by the Investor are informed by his expertise, which includes over 35 years of work exclusively in the field of business valuation, certification as a chartered business valuator, and certification as a chartered accountant.⁵¹¹ Mr. Low reached his conclusions together with Richard Taylor, who shares similar qualifications.⁵¹²
435. Canada's expert, Christopher Goncalves has challenged the conclusions contained in the valuation reports and testimony offered by Mr. Low.
436. Mr. Goncalves has more limited experience in damages valuation than Mr. Low.⁵¹³
437. More importantly, Mr. Goncalves admitted during his testimony that the theory of valuation that is the underlying basis for his reports is based on nothing more than his own opinion.⁵¹⁴

⁵¹⁰ Expert Report of Taylor and Low, at pp.24-45; Mr. Low explained at length in his expert reports the basis for his conclusions relating to the calculation of the discount rate, the size risk premium and the ability to get financing, as well as the other inputs to his damages valuation. Reply Expert Report of Taylor and Low, at pp.22-29. The Investor incorporates by reference these analyses by Mr. Low.

⁵¹¹ Testimony of Robert Low, Hearing Transcript, Day 5, at p.6, Ins.15-19. Mr. Low's qualifications are set out in his CV at pages 62-64 of his first report.

⁵¹² Testimony of Robert Low, Hearing Transcript, Day 5, at p.5, Ins.14-23

⁵¹³ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at pp.174, Ins.8-11. He does not have an educational degree in finance or accounting, and is not a qualified accountant.; Testimony of Robert Low, Hearing Transcript, Day 5, at pp.6-7, Ins.25-4. Mr Low has testified regarding damages and valuation in approximately 60 matters.; Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at pp.177, Ins.21-24. Mr. Goncalves has testified in just two disputes.

438. Significantly, Mr. Goncalves admits that the actions of Ontario caused harm to Mesa. Mr. Goncalves admits the *GEIA*, as well as the June 3, 2011 FIT rule changes resulted in losses to Mesa. As a result, if those measures are found to be in breach of the NAFTA, Mesa should be compensated.
439. The valuation experts both agree that a Discounted Cash Flow (DCF) approach is the appropriate methodology to determine Mesa Power's losses.⁵¹⁵ Mr. Low noted that the reason a DCF approach is appropriate is because this is a scenario where "revenues can be forecast with a relatively high degree of confidence" because of the availability of wind study data, fixed 20-year contract terms, stable operating costs and contract-based capital costs.⁵¹⁶ The fact that Ontario waived the termination for cause provisions in the FIT Contracts further increases the confidence of the damages.⁵¹⁷
440. In his presentation to the Tribunal Mr. Low summarized the two issues that account for the nearly all of the difference between the conclusion contained in his reports, and the valuation conclusions of Mr. Goncalves. These two differences are the methodology that was adopted to compensate for a breach of the Most Favoured Nation treatment obligation, and the discount rate that was applied.
441. Regarding the Investor's losses under NAFTA Article 1103 and 1102, Mr. Low noted, that "the best treatment awarded should be compensated to Mesa."⁵¹⁸ Mr. Low calculated damages by providing Mesa's wind projects with the benefit of the most favourable treatment.
442. In contrast, Mr. Goncalves, limited the damages available to Mesa, conducted his analysis "independent of the NAFTA"⁵¹⁹ and admitted during his testimony that he had no basis for concluding that MFN did not provide the benefit of the better treatment.⁵²⁰ Mr. Goncalves has not provided any assessment of the value of Mesa's losses if it is entitled to the better treatment provided to the Korean Consortium, and would have to "recalculate damages" to determine Mesa's losses in that scenario.⁵²¹ The difference between the valuation conclusions arising from the MFN approach alone is approximately \$500 million.⁵²²

⁵¹⁴ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.206, Ins.19-23. The terms of Mr. Goncalves' engagement reflect that in exchange for up to [REDACTED] (page 1); Engagement Letter of Christopher Goncalves, Confidential, (February 7, 2013). Mr. Goncalves is required to provide [REDACTED]. Mr. Goncalves' reports do not disclose his obligation to provide an alternative conclusion.

⁵¹⁵ Testimony of Robert Low, Hearing Transcript, Day 5, at p.12, Ins.12-23; Expert Report of Christopher Goncalves, at ¶194

⁵¹⁶ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.11-12, Ins.13-20

⁵¹⁷ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Anderson (OPA), Direction to the OPA, August 2, 2012 (*Investor's Schedule of Exhibits C-0084*)

⁵¹⁸ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.13-14, Ins.25-2

⁵¹⁹ Expert Report of Christopher Goncalves, at ¶28

⁵²⁰ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.202, Ins.10-24

⁵²¹ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.202, Ins.16-24

⁵²² Testimony of Robert Low, Hearing Transcript, Day 5, p.21, Ins.15-19

443. The other significant difference between the valuation experts was the discount rate, and more specifically the cost of equity that was used by each of the experts. Mr. Low's approach considered the analysis of the OPA and other benchmarks when determining an appropriate cost of equity. The FIT Program contract rate that was selected by the OPA considered development stage projects.⁵²³ A presentation made by the OPA stated that the FIT rate is intended to encourage efficient project "development"⁵²⁴ and considers a number of development-related factors including capital costs, reasonable project development, construction and equipment costs.⁵²⁵ The presentation demonstrates that the OPA was considering development stage projects and project risks in its determination of a reasonable rate of return.
444. Mr. Goncalves ignored this information and selected a cost of equity approximately double the rate identified by the OPA.⁵²⁶ Mr. Low described this approach as "not even in the ballpark of reasonable."⁵²⁷ The difference between the conclusions arising from the unsupported cost of equity used by Mr. Goncalves is approximately \$120 million.⁵²⁸

1. THE CORRECTIONS TO MR. LOW'S DAMAGES VALUATION

445. Mesa stands by the damages calculation originally presented. The corrections on October 17, 2014 to the expert valuation reports were all to the benefit of Canada. Messrs. Low and Taylor initially identified these corrections to their report in advance of the hearing pursuant to *Procedural Order No. 14*. Canada has objected to the admission of these corrections, and their use was not permitted during the October 2014 hearing.
446. It is a normal practice for experts to address new evidence, and it is important that experts have the opportunity to provide candid testimony "in accordance with [their] belief,"⁵²⁹ including revisions or modifications to their approach when required. During his presentation, Mr. Low summarized specific corrections to his conclusions,⁵³⁰ but did not discuss those changes in detail during his testimony.
447. In order to preserve the equality of the parties and ensure a fair outcome, the panel either has to accept the numbers that have already been provided by the investor's expert, or allow an opportunity for the experts to provide additional evidence on the quantification of the losses. If the evidentiary record on damages is not complete, then

⁵²³ OPA presentation, "Proposed Feed-in Tariff Price Schedule: Stakeholder Engagement - Session 4", April 7, 2009 (***Investor's Schedule of Exhibits C-0353***)

⁵²⁴ OPA presentation, "Proposed Feed-in Tariff Price Schedule: Stakeholder Engagement - Session 4", April 7, 2009, at p.5 (***Investor's Schedule of Exhibits C-0353***)

⁵²⁵ OPA presentation, "Proposed Feed-in Tariff Price Schedule: Stakeholder Engagement - Session 4", April 7, 2009, at p.22 (***Investor's Schedule of Exhibits C-0353***)

⁵²⁶ Testimony of Robert Low, Hearing Transcript, Day 5, at p.22, Ins.7-16

⁵²⁷ Testimony of Robert Low, Hearing Transcript, Day 5, at p.22, Ins.15-16

⁵²⁸ Testimony of Robert Low, Hearing Transcript, Day 5, p. 22, Ins.17-19

⁵²⁹ Sworn Oath of Robert Low, Hearing Transcript, Day 5, at p.4, In.24

⁵³⁰ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.24-28, Ins.8-24

there should be an opportunity for the Investor's expert to provide his view on damages that result from the NAFTA breaches.

448. The Investor has identified the breaches causing harm as follows:

- a. **Most Favoured Nation Treatment (Article 1103)** – Ontario failed to provide treatment as favourable as that accorded to the members of the Korean Consortium on September 17, 2010, when the Minister of Energy announced the fact that 500MW of priority transmission grid access was reserved for the Korean Consortium in the Bruce Region.⁵³¹ This treatment was not accorded to Mesa which was in like circumstances in seeking access to the Ontario transmission grid. On this day, Mesa first became aware of the harm and it also suffered harm by having to compete for a reduced amount of transmission availability.
- b. Mesa's valuation expert, Robert Low noted during his testimony that Mr. Goncalves, identified a minor computational error in Mr. Low's valuation model arising from the failure to update two criteria in the investor's valuation mode.⁵³² This was a minor error dealing with a modification of date. Mr. Low testified that the date in the model actually reflected the correct valuation date and that the date in the model did not need to be changed.⁵³³
- c. NAFTA Article 1104 requires that the Tribunal provide Mesa with the best treatment provided in Ontario under either Article 1103 or 1102.
- d. **National Treatment (Article 1102)** – Ontario failed to provide treatment as favourable as that being accorded to Canadian investments who were given treatment as partners or investments of the Korean Consortium on September 17, 2010, when the Minister of Energy announced the fact that 500MW of priority transmission grid access was reserved for the Korean Consortium in the Bruce Region.⁵³⁴ Examples of companies receiving this better treatment are Samsung Canada and Pattern Renewable Holdings Inc. This treatment was not accorded to Mesa which was in like circumstances in seeking access to the Ontario transmission grid. As with MFN Treatment, on this day, Mesa first became aware of the harm and it also suffered harm by having to compete for a reduced amount of transmission availability.
- e. Other national treatment violations also took place in Ontario after the Investor first became aware of this breach.

⁵³¹ Reply Valuation Report, paragraph 2.3(a).

⁵³² Testimony of Robert Low, Hearing Transcript, Day 5, at p.24, lns.16-17

⁵³³ Mr. Low described this correction in his presentation: Hearing Transcript, Day 5, at p.24, lns.16-17. In particular, Mr. Low noted that the rectification of this error, which was identified in Mr. Goncalves' Rejoinder Valuation Report, would reduce the damages slightly.

⁵³⁴ Reply Valuation Report, paragraph 2.3(b).

- f. The Investor's valuation expert testified that the dates with respect to valuing the national treatment violation were the same as for Most Favoured Nation Treatment.⁵³⁵
- g. **International Law Standard of Treatment (Article 1105)** – The date upon which the Investor's valuation expert calculated damages for Canada's breach of its international law standard of treatment violations was set out in the Reply Valuation Report as December 21, 2010.
- h. This date was modified by Mr. Low in the October 17, 2014 correction letter, but that modification was not substantively addressed during the hearing.⁵³⁶ Other corrections to the Article 1105 valuation to remove the GEIA benefits were discussed generally by Mr. Low.⁵³⁷
- i. **Local Content Requirements (Article 1106)** – Ontario imposed prohibited local content requirements as a part of the FIT program in violation of NAFTA Article 1106(1). Damages arising from this breach have been measured from August 5, 2010, when Mesa Power received an email from GE confirming that the 2.5xl turbines would not be domestic content compliant in 2011, when Mesa anticipated placing a turbine order for its Ontario projects. Mr. Low noted in his testimony that Mesa had already incurred damage as a result of the Article 1106 violation.⁵³⁸ As noted by both Mesa's counsel and by Mr. Low, there has been no modification to the date of the Article 1106 breach during the arbitration.⁵³⁹

⁵³⁵ Reply Valuation Report, paragraph 2.3(b).

⁵³⁶ Testimony of Robert Low, Hearing Transcript, Day 5, at p.94, Ins.2-13. In response to questions from Canada's Counsel and from Professor Kaufmann-Kohler, Mr. Low noted that the 1105 breach date had been modified in the correction letter to September 17th, 2010, but that the change in the 1105 valuation date was not one of the issues to be addressed during the hearing: "There was -- I'm not sure where I should be going with this, because it's been the subject of debate for the last three or four days, in that it was -- the date of 1105 was December 21, 2010. We had wanted to change it to September 17, 2010 had proposed that. That was among the things that were initially rejected, and I think in the last round of what I was allowed to speak to, that change of valuation date to September 2010 was not included."

⁵³⁷ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.25-27 Ins.18-4

⁵³⁸ Testimony of Robert Low, Hearing Transcript, Day 5, at p.106, Ins.5-20

⁵³⁹ Submission by Mr. Mullins, Hearing Transcript, Day, 1, p.123, Ins.23-24 ("We are perfectly happy to keep the date that our expert originally picked."). Testimony of Mr. Low, Hearing Transcript, Day 5, pp.94-95, Ins.25-1. "Yes, so we did not change [the valuation date for] 1106"

C. ARTICLES 1102 AND 1103 – LOSSES ARISING FROM BREACHES OF CANADA'S NATIONAL TREATMENT AND MFN OBLIGATIONS

1. CAUSATION

i) *The GEIA Agreement*

449. Canada breached NAFTA Article 1103 when it provided preferential treatment to Samsung and KEPCO – both Korean companies, and their American development partner Pattern Energy Group.
450. Canada breached NAFTA Article 1102 by providing better treatment to the Canadian subsidiaries of Samsung and Pattern – Samsung Renewable Energy and Pattern Canada, which benefitted from the better treatment that was provided through the *GEIA*.
451. Mesa was entitled to receive the same treatment afforded to the Korean Consortium. The better treatment provided to the Korean Consortium included priority access to the transmission grid,⁵⁴⁰ the Economic Development Adder,⁵⁴¹ a Capacity Expansion option,⁵⁴² regulatory assistance,⁵⁴³ and direct access to the government through the Working Group.⁵⁴⁴ It is Canada's responsibility to reconcile its commitments to the Korean Consortium, its joint venture partners and other companies such as NextEra with its obligation to Mesa to provide treatment no less favourable under the FIT. Canada did not discharge this responsibility.
452. The harm to Mesa arising from this better treatment was confirmed on September 17, 2010, when Mesa learned that 500MW of transmission access would be reserved for the Korean Consortium in the Bruce Region.⁵⁴⁵
453. If Canada had provided Mesa the most favourable treatment, transmission capacity would have been guaranteed, all four of Mesa's projects would have received 20 -year fixed price contracts. Moreover, Mesa would have received additional benefits of the *GEIA*: the economic development adder, the capacity expansion option, and governmental assistance with project development.
454. The fact that all of Mesa's projects would have been eligible to receive contracts through the *GEIA* is demonstrated by the wind power contracts that the Korean Consortium received in August 2011. For example, the Korean Consortium received a contract for the Kingsbridge II project ("K2"). The K2 project, like Mesa's four projects, was located in the Bruce Region and did not receive a contract offer on July 4th, 2011,

⁵⁴⁰ *Green Energy Investment Agreement*, January 21, 2010, Article 3 (*Investor's Schedule of Exhibits C-0322*)

⁵⁴¹ *Green Energy Investment Agreement*, January 21, 2010, Article 9.3 (*Investor's Schedule of Exhibits C-0322*)

⁵⁴² *Green Energy Investment Agreement*, January 21, 2010, Article 3.4 (*Investor's Schedule of Exhibits C-0322*)

⁵⁴³ *Green Energy Investment Agreement*, January 21, 2010, Article 5.2 (*Investor's Schedule of Exhibits C-0322*)

⁵⁴⁴ *Green Energy Investment Agreement*, January 21, 2010, Article 5.2 (*Investor's Schedule of Exhibits C-0322*)

⁵⁴⁵ Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), September 17, 2010 (*Investor's Schedule of Exhibits C-0119*)

because there was not sufficient transmission capacity available.⁵⁴⁶ The Korean Consortium could receive contracts for a project like K2, regardless of the project's rank in the FIT program, and deliberately targeted this "low hanging fruit".⁵⁴⁷ Mesa's projects would also have received contracts with this better treatment.

455. Canada's expert, Mr. Goncalves, in the context of the MFN violation, admits that the reservation of 500MW in the Bruce for the Korean Consortium caused Mesa to lose out on FIT contracts for two of its projects.⁵⁴⁸ Therefore, at a minimum, Mesa is entitled to be compensated for the loss of power purchase agreements for 265 MW in relation to the TTD and Arran projects. This was also confirmed by Mr. Spelliscy on behalf of Canada.⁵⁴⁹
456. In addition to the 500MW that Mr. Goncalves notes, the Korean Consortium had the ability to unilaterally increase the size of the projects located in the Bruce Region, beyond the 500MW that had already been reserved. Effectively, the unilateral 10% capacity expansion right under the *GEIA* enabled the Korean Consortium to receive up to 550MW of priority transmission access in the Bruce region.⁵⁵⁰
457. As a result of the better treatment in the *GEIA* and the reservation of priority access by Ontario, confirmed in the September 17, 2010 ministerial direction, if Mesa were to receive treatment as favourable as the Korean Consortium, it would be entitled to receive priority transmission access to 550 MW in the Bruce region. Mesa only sought FIT contracts for 565 MW in the Bruce region for its four projects. Thus, this priority access would cover nearly the entirety of the four Mesa renewable power projects seeking FIT contracts in the Bruce region.

ii) Rule Changes Benefited Other Proponents

458. Canada acted in a manner inconsistent with its obligations to provide treatment equivalent to the most favourable treatment provided in the jurisdiction when it took steps to protect NextEra's ability to obtain FIT contracts. [REDACTED]

[REDACTED] Shawn Cronkwright testified that information about the successful candidates from the dry run was provided to Sue Lo and to the Minister's office before the decision was made to protect NextEra's commercial interests by permitting a last minute rule change to take place. The changes that were imposed were lobbied for by NextEra.

⁵⁴⁶ Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 (*Investor's Schedule of Exhibits C-0293*)

⁵⁴⁷ Transcript of Colin Edwards Deposition, August 3, 2012, at p.187, Ins.2-16 (*Investor's Schedule of Exhibits C-0574*)

⁵⁴⁸ Second Expert Report of Christopher Goncalves, at ¶145; Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.159, Ins.4-12

⁵⁴⁹ Canada's Closing Statement, Hearing Day 6, at p.277, Ins.16-21

⁵⁵⁰ *Green Energy Investment Agreement*, January 21, 2010, Article 3.4 (*Investor's Schedule of Exhibits C-0322*); Testimony of Robert Low, Hearing Transcript, Day 5, at pp.99-100, Ins.16-14

459. The last minute Minister of Energy Direction protecting NextEra's commercial interests constituted a violation of NAFTA Article 1103.
460. During her testimony, Ms. Lo faced questions regarding her communications with NextEra. Evidence demonstrates that NextEra met with senior officials in the Ontario government, and lobbied for a connection point window that would allow it to connect certain projects into the Bruce Region.⁵⁵¹ Ms. Lo acknowledged that she personally had discussions with NextEra regarding its projects that changed into the Bruce Region at the same time that the rule change decision was made by the Ministry of Energy.⁵⁵²
461. The Ministry of Energy provided special consideration to certain proponents and adopted changes to the FIT rules that benefitted those particular proponents. If that special consideration had not been provided, Mesa's TTD and Arran projects would have been within the top 750MW available in the Bruce Region, and would have received contracts.
462. Mr. Goncalves admits that the Direction allowing West of London projects to change into the Bruce Region caused Mesa to lose out on FIT contracts for two of its projects.⁵⁵³
463. Furthermore, since the action of Ontario was also to the benefit of NextEra's Canadian subsidiary, Boulevard Power, this constituted a violation of NAFTA Article 1102.
464. International Power Canada, a Canadian company, also benefitted from the rule changes. Ms. Lo admitted during her testimony that the Ministry of Energy was concerned about [REDACTED], and considered those projects when deciding how the FIT Rules would be changed.⁵⁵⁴ The president and CEO of International Power Canada was at that time president of the Provincial Liberal Party, and the projects of that company received better treatment as its investments were protected during the rule change process.
465. If Mesa Power had been provided the same preferential treatment (protection) as competitors like International Power Canada and NextEra, Mesa's entitlement to FIT contracts for two of its projects would have been protected.

2. QUANTIFICATION OF LOSSES UNDER ARTICLES 1102 AND 1103

466. If the most favourable treatment had been provided the economic success of the Investor can be reliably and reasonably predicted based on the actual treatment that

⁵⁵¹ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, page 206, Ins.19-23

⁵⁵² Testimony of Christopher Goncalves, Hearing Transcript, Day 5, page 216, Ins.10-21

⁵⁵³ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, page 159, Ins.13-24.

⁵⁵⁴ Testimony of Susan Lo, Hearing Transcript, Day 3, pp. 183-184, Ins.10-8 [CONFIDENTIAL]; Email from Sue Lo to Andrew Mitchell, May 12, 2011 (*Investor's Schedule of Exhibits C-0629*) [CONFIDENTIAL]

was provided through the *GEIA* and the PPAs that were signed. The valuation conclusion contained in the Reply valuation report is summarized below.⁵⁵⁵

- a. **Guaranteed Transmission Access**- The *GEIA* guaranteed priority transmission access for 2000MW of wind projects, and 500MW of solar projects.⁵⁵⁶ Mesa's 564MW fit within this cap – and all four would have been eligible for guaranteed transmission access. This would have guaranteed them PPAs.
- b. **Contract Terms** –The Korean Consortium PPA's were based on the FIT contract terms,⁵⁵⁷ with a fixed rate for a 20-year period and the experts agree that these losses can be valued with a high degree of certainty. For all four projects, the present value of the losses is the range of \$301,000,000 and \$343,000,000.⁵⁵⁸
- c. **Capacity Expansion** –The Korean Consortium was entitled to increase or decrease any phase of the *GEIA* by 10% by providing notice to the Government, within the overall limit of 2500MW.⁵⁵⁹ If Mesa had received this treatment it would have been entitled to increase the capacity of its four projects, which were less than 2500MW, by up to 10%. The losses relating to the Capacity Expansion option are in the range of \$34,000,000 to \$38,000,000.⁵⁶⁰
- d. **Economic Development Adder** – Initially offered as a benefit of \$437 million dollars, the Economic Development Adder was decreased to \$110 million dollars by the *GEIA* Amending Agreement. That treatment was not offered to Mesa. These losses are in the range of \$21,000,000 to \$23,000,000 for all four projects, based on the base case,⁵⁶¹ and Mesa would receive an additional economic development adder for the additional power generated totalling approximately \$2,000,000.⁵⁶²
- e. **Discount Rate** – The *GEIA* reduced risk involved with project development by providing access to governmental officials, and governmental assistance with project development.

467. The losses are set out comprehensively in the following table from page 30 of the Reply Report of Messrs. Low and Taylor.

⁵⁵⁵ This valuation does not reflect any of the corrections set out in Mr. Low's letter of October 17, 2014 – which does not form part of the record.

⁵⁵⁶ *Green Energy Investment Agreement*, January 21, 2010, Recitals (B) (*Investor's Schedule of Exhibits C-0322*)

⁵⁵⁷ *Green Energy Investment Agreement*, January 21, 2010, Article 9.1 (*Investor's Schedule of Exhibits C-0322*)

⁵⁵⁸ Reply Expert Report of Low and Taylor, April 29, 2014, at 1.3

⁵⁵⁹ *Green Energy Investment Agreement*, January 21, 2010, Article 3.4 (*Investor's Schedule of Exhibits C-0322*)

⁵⁶⁰ Reply Expert Report of Low and Taylor, April 29, 2014, at 7.20

⁵⁶¹ Reply Expert Report of Low and Taylor, April 29, 2014, at 7.20

⁵⁶² Reply Expert Report of Low and Taylor, April 29, 2014, at 7.20

	Notes	Economic Losses		
		Low	Midpoint	High
NAFTA 1102, 1103 & 1105				
Base Case				
Twenty-two degrees	[F1]	88,300	94,425	100,550
Arran	[F2]	51,960	56,035	60,110
Summerhill	[F3]	59,300	63,260	67,220
North Bruce	[F4]	101,250	108,375	115,500
<i>Total (rounded)</i>		<u>301,000</u>	<u>322,000</u>	<u>343,000</u>
Economic Development Adder ("EDA")				
Twenty-two degrees	[F1]	6,100	6,345	6,590
Arran	[F2]	4,480	4,655	4,830
Summerhill	[F3]	3,680	3,840	4,000
North Bruce	[F4]	7,180	7,470	7,780
<i>Total (rounded)</i>		<u>21,000</u>	<u>22,000</u>	<u>23,000</u>
Capacity Expansion				
Twenty-two degrees	[F1]	10,210	10,835	11,460
Arran	[F2]	6,390	6,825	7,260
Summerhill	[F3]	6,790	7,210	7,630
North Bruce	[F4]	10,330	11,055	11,780
<i>Total (rounded)</i>		<u>34,000</u>	<u>36,000</u>	<u>38,000</u>
EDA applicable to capacity expansion				
Twenty-two degrees	[F1]	610	635	660
Arran	[F2]	410	430	450
Summerhill	[F3]	340	360	380
North Bruce	[F4]	620	650	680
<i>Total (rounded)</i>		<u>2,000</u>	<u>2,000</u>	<u>2,000</u>
Past costs incurred	[F5]	8,100	8,100	8,100
GE contract penalty	[F6]	156,833	156,833	156,833
NAFTA 1106		106,200	110,750	115,300
Total Economic Losses under NAFTA Article 1102, 1103 & 1105	[F7]	<u>629,133</u>	<u>657,683</u>	<u>686,233</u>
Pre-judgment interest		75,000	78,500	82,000
Total Economic Losses (Including pre-judgment interest)	[F7]	<u>704,133</u>	<u>736,183</u>	<u>768,233</u>

468. Mr. Low testified that a correction was required for the calculation of the losses for 1102 and 1103.⁵⁶³ In particular, there was an error in the quantification in the Reply Report as the date of the valuation was modified in the report, but that change was not reflected in the valuation models for the wind projects.⁵⁶⁴ This discrepancy was noted in the Rejoinder Report of Mr. Goncalves at paragraphs 197 and 204.
469. As a result, the quantification of the losses that were incurred still requires the technical correction that Mr. Low briefly described during his presentation to the Tribunal.⁵⁶⁵ This correction for the 1102 and 1103 losses simply requires revisions to specific inputs in the model based to reflect the change in the date of breach from January 21, 2010 to September 17, 2010, which impacts the Weighted Average Cost of Capital (WACC).
470. If the Tribunal adopts Canada's approach to compensation under Article 1103, then the Investor would be entitled to recover the losses that were suffered for two projects – TTD and Arran – based on the FIT contract term.
471. Mesa does not agree with Canada's expert analysis that Mesa is only entitled to damages for two of its projects if there is an MFN violation. But if the Tribunal concludes that compensation is due for only two projects under Article 1103, the Deloitte report identifies the losses suffered for each individual project, such that the

⁵⁶³ This issue was initially raised in the letter that Mr. Low filed on October 17, 2014, which does not form part of the record in this arbitration.

⁵⁶⁴ Letter from the Investor to the Tribunal, October 1, 2014 enclosing a Letter from Robert Low to Barry Appleton, October 27, 2014. This letter was filed with the Tribunal further to the instructions of the President issued during the NAFTA hearing: see Testimony of Robert Low, Hearing Transcript, Day 5, at pp.24-25, Ins.8-11

⁵⁶⁵ Testimony of Robert Low, Hearing Transcript, Day 5, at p.120, Ins.2-9

individual project models provide a means to determine the project specific losses for those two projects.

	Low	Midpoint	High
TTD– Base Case	\$88,300	\$94,425	\$100,550
Arran – Base Case	\$51,960	\$56,035	\$60,110

472. Furthermore, if the Tribunal adopts the damages methodology of Mr. Goncalves, the quantification of the losses he has identified would be wholly inadequate to compensate the investor for the probable and reasonable damages that would result if Mesa had received a FIT contract, because of the inappropriate discount rate.⁵⁶⁶

D. ARTICLE 1105 – LOSSES CAUSED BY CANADA’S BREACH OF THE INTERNATIONAL LAW STANDARD OF TREATMENT

1. THE GEIA CAUSED HARM TO MESA

473. The implementation of the *GEIA* was a breach of NAFTA Article 1105 that directly harmed the Investor. Ontario entered into an agreement that unfairly diminished the prospects for investors that were already participating in the renewable energy program, by blocking off capacity for the Korean Consortium that had originally been intended for FIT applicants was unfair, and caused harm to Mesa. Further, Ontario failed to act with fairness and candour by providing inaccurate and incomplete information about the *GEIA* to the public when it was signed. Ontario also failed to disclose key aspects of the *GEIA* which would be necessary for any of its competitors to fairly understand their position in the Ontario renewable energy market in comparison with the Korean Consortium.
474. Prior to the launch of the program, Ontario projected that the FIT program would be highly successful, and negotiated the *GEIA* in secret as other companies began to invest in Ontario. The *GEIA* was entered into after the FIT Program had already been launched by the OPA, and Ontario knew that the FIT Program was highly successful,⁵⁶⁷ even though the government was under no obligation to sign the agreement.
475. Moreover, when the *GEIA* was signed, the Korean Consortium was put in a position where it would be able to benefit from and prey upon investor projects in the FIT program.⁵⁶⁸
476. Ontario entered into the *GEIA* knowing it would negatively impact projects that had already submitted applications.⁵⁶⁹

⁵⁶⁶ See discussion of discount rate *infra*.

⁵⁶⁷ Testimony of Sue Lo, Hearing Transcript, Day 3, p.86, Ins.20-22

⁵⁶⁸ Testimony of Sue Lo, Hearing Transcript, Day 3, at p.95-96, Ins.16-12

⁵⁶⁹ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.288, Ins.13-20

477. Ontario lied about the *GEIA*, by publishing misleading and inaccurate information. Ontario prevented Investors like Mesa from knowing that the 'manufacturing' commitments under the *GEIA* were not materially different from the local content requirements under the FIT program,⁵⁷⁰ or from understanding how the members of the Korean Consortium would be able to secure priority transmission access at specific connection points,⁵⁷¹ or in what transmission areas the Korean Consortium would be entitled to reserve transmission capacity.⁵⁷²

478. During his testimony, Cole Robertson noted that the information that was provided regarding the *GEIA* was misleading:

...we then started learning that the manufacturing commitment was nothing more than allocating partners or if we'd have known that, would we have done that? I guarantee you we would have tried. I mean because 2,000-megawatts of wind power contracts at north of 13.5 cents, that's very, very attractive to any developer. But at the time we saw the manufacturing commentary in all these releases as actual Samsung manufacturing jobs, and them building the wind turbines and them creating -- and that, at all, wasn't the terms of the actual *GEIA*.⁵⁷³

479. Canada's expert admits that the *GEIA* caused harm to Mesa. Mr. Goncalves testified that but-for the reservation of 500MW under the *GEIA*, Mesa would have received FIT Contract offers for the TTD and Arran wind projects:⁵⁷⁴

MR. BROWER: Your testimony basically is, as an expert appearing on behalf of Canada in this case, you have no doubt but that if *GEIA* were found to be a breach, we may proceed on the basis that Arran and TTD were home free; they got their contracts?

THE WITNESS: Or in other words that they were harmed, yes.⁵⁷⁵

Canada also admitted this fact in its closing.⁵⁷⁶

480. Mr. Low noted during his testimony that there was a possibility for all four projects to receive contract offers.⁵⁷⁷

2. THE JUNE 3RD RULE CHANGE CAUSED HARM TO MESA

481. The June 3rd the Ministerial Direction requiring that the OPA implement a rule change allowing connection point changes between regions from the West of London region into the Bruce Region and done without effective consultation caused harm to Mesa.⁵⁷⁸

⁵⁷⁰ Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.156, Ins.6-12

⁵⁷¹ Testimony of Seabron Adamson, Hearing Transcript, Day 4, at p.153, Ins.7-12

⁵⁷² Testimony of Sue Lo, Hearing Transcript, Day 3, at p.140, Ins.5-11. Lo testified that the decision to reserve transmission capacity for the Korean Consortium in the Bruce Region was made much earlier than the September 17, 2010 direction.

⁵⁷³ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.146, Ins.9-20

⁵⁷⁴ Testimony of Mr. Goncalves, Hearing Transcript, Day 5, at p.159, Ins.4-12; Expert Report of Christopher Goncalves, Attachments, at p.29; Canada's Closing Statement, Hearing Transcript, Day 6, at p.276, Ins.5-17

⁵⁷⁵ Testimony of Mr Goncalves, Hearing Transcript, Day 5, at p.227-228, Ins.19-1

⁵⁷⁶ Canada's Closing Statement, Hearing Transcript, Day 6, at p.276, Ins.5-15

⁵⁷⁷ Testimony of Robert Low, Hearing Transcript, Day 5, at p.53, Ins.3-10

482. Mr. MacDougall testified that after he left the OPA he heard that the reason the rules were changed to allow projects to connect to points in different regions was because NextEra had lobbied for this result.⁵⁷⁹ The OPA's official communication policy stated that the projects would be awarded contracts based on regional rankings.
483. This policy for connection point changes contradicted the FIT Rules. The FIT Rules allowed for connection point changes prior to the first ECT only for projects connecting to the distribution system. It did not allow for such changes for larger projects like NextEra's and Mesa's connecting to the transmission grid.⁵⁸⁰ Therefore a FIT proponent like Mesa, that was relying on the FIT Rules for its understanding of the process would not have expected these rules changes prior to the awarding of contracts in the Bruce region.
484. Canada's expert admits that but-for the rule change Mesa would have received a FIT contract for the TTD and Arran projects based on transmission capacity in the Bruce region and the high regional ranking of those two projects:⁵⁸¹
- THE WITNESS: [I]f the connection point change had not been implemented, if it had not happened, then [projects from West of London] wouldn't be in the Bruce. The transmission capacity would still be 750, because I'm not making the *GEIA* adjustment here.
- MR. BROWER: Right.
- THE WITNESS: And TTD and Arran also in this scenario would have gotten FIT contracts. They would have been harmed.⁵⁸²
485. Canada admitted this fact in its closing.⁵⁸³
486. During its closing, Canada argued that the lack of consultation regarding the rule changes, and the short length of the connection point window, did not cause any harm to Mesa. That is not the case. Had the Ministry of Energy followed the OPA's established practice of consulting with developers, there may not have been a rule change permitting West of London projects to change into the Bruce region. Further to Mr. Goncalves' testimony, without such a change TTD and Arran would have received contract offers.
487. Canada similarly argued in closing that the decision to not allow developers that were located outside of the Bruce and West of London Regions to change connection points did not cause any harm to Mesa because even more developers would have moved into the region. To the contrary, Mesa does not contend every region should have been allowed to change connection points to another region. This was not contemplated by the rules, and was added to benefit NextEra at the expense of Bruce region projects in line for contracts pursuant to the FIT rules which induced Mesa and other investors to

⁵⁷⁸ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 (*Investor's Schedule of Exhibits C-0077*)

⁵⁷⁹ Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.244, Ins.6-10

⁵⁸⁰ See Investor's Reply Memorial, at ¶¶699-703

⁵⁸¹ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at p.159, Ins.13-24

⁵⁸² Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at pp.229-230, Ins.20-4

⁵⁸³ Canada's Closing Statement, Hearing Transcript, Day 6, at p.277, Ins.16-21

invest. Further, this is evidence that the change imposed by the Minister's direction with no consultation under a very short time frame, was arbitrary and capricious, and not in line with developer expectations as Canada has suggested.

488. What is clear however is Mr. Goncalves admitted that the ability of NextEra being able to connect to the Bruce transmission area caused Mesa to lose contracts it would otherwise be entitled to for its two launch period projects. But, that change required a direction done in the face of numerous internationally wrongful actions, including, but not limited to, improper protection of a Canadian entity, IPC, improper knowledge by the Ministry of Energy as to the effect of its decision-making on the stakeholders, and improper access by NextEra to confidential information as to the Ministry's intent on rule changes.

3. COMBINED DAMAGES RESULTING FROM GEIA AND RULE CHANGE

1. Mr. Goncalves considered the cumulative impact of the *GEIA*, and the June 3, 2011, changes to the FIT Program Rules admitted to the Tribunal that Mesa would have received contract offers for TTD and Arran but for those two breaches:

Finally we've then combined both of those breaches, the *GEIA* breach and the connection point change window, so that you have the additional transmission capacity, as well as the removal of the west of London projects, so you now have 1,250 of transmission. And in that scenario, as well, TTD and Arran both get FIT contracts...⁵⁸⁴

4. QUANTIFICATION OF LOSSES UNDER ARTICLE 1105

489. The damages from the breaches of Article 1105 should be measured from September 17, 2010, when the Minister of Energy directed the OPA to reserve 500MW of transmission capacity in the Bruce Region for the Korean Consortium.⁵⁸⁵
490. The Tribunal heard testimony from Mr. Low as to changes to the valuation for 1105, all of which would benefit Canada. During his testimony, Mr. Low noted that "the benefits of the *GEIA* should not be included in the 1105 damages".⁵⁸⁶ Mr. Low summarized the modifications that would be required to eliminate the beneficial treatment of the *GEIA* from the 1105 analysis.
491. Removing the better treatment under the *GEIA* has the effect of eliminating any losses related to the economic development adder and the capacity expansion option, as well as impacting the discount rate because the *GEIA* agreement slightly reduced project risks.
492. **Article 1105 Base Case:** The base case that is set forth in the valuation reports is based on the FIT contract terms alone. The base case excludes the *GEIA* benefits. The Article

⁵⁸⁴ Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at pp.159-160, Ins.25-7

⁵⁸⁵ Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), September 17, 2010 (*Investor's Schedule of Exhibits C-0119*)

⁵⁸⁶ Testimony of Robert Low, Hearing Transcript, Day 5, at p.26, Ins.3-4

1105 Base Case Economic Losses are provided in the table on page 30 of the Reply Valuation Report.

	Notes	Economic Losses		
		Low	Midpoint	High
NAFTA 1102, 1103 & 1105				
Base Case				
Twenty-two degrees	[F1]	88,300	94,425	100,550
Arran	[F2]	51,960	56,035	60,110
Summerhill	[F3]	59,300	63,260	67,220
North Bruce	[F4]	101,250	108,375	115,500
<i>Total (rounded)</i>		<u>301,000</u>	<u>322,000</u>	<u>343,000</u>
Economic Development Adder ("EDA")				
Twenty-two degrees	[F1]	6,100	6,345	6,590
Arran	[F2]	4,480	4,655	4,830
Summerhill	[F3]	3,680	3,840	4,000
North Bruce	[F4]	7,160	7,470	7,780
<i>Total (rounded)</i>		<u>21,000</u>	<u>22,000</u>	<u>23,000</u>
Capacity Expansion				
Twenty-two degrees	[F1]	10,210	10,835	11,460
Arran	[F2]	6,390	6,825	7,260
Summerhill	[F3]	6,790	7,210	7,630
North Bruce	[F4]	10,330	11,055	11,780
<i>Total (rounded)</i>		<u>34,000</u>	<u>36,000</u>	<u>38,000</u>
EDA applicable to capacity expansion				
Twenty-two degrees	[F1]	610	635	660
Arran	[F2]	410	430	450
Summerhill	[F3]	340	360	380
North Bruce	[F4]	620	650	680
<i>Total (rounded)</i>		<u>2,000</u>	<u>2,000</u>	<u>2,000</u>
Past costs incurred	[F5]	8,100	8,100	8,100
GE contract penalty	[F6]	156,833	156,833	156,833
NAFTA 1106		106,200	110,750	115,300
Total Economic Losses under NAFTA Article 1102, 1103 & 1105	[F7]	<u>629,133</u>	<u>657,683</u>	<u>686,233</u>
Pre-judgment interest		75,000	78,500	82,000
Total Economic Losses (including prejudgment interest)	[F7]	<u>704,133</u>	<u>736,183</u>	<u>768,233</u>

E. ARTICLE 1106 - LOSSES CAUSED BY THE LOCAL CONTENT REQUIREMENTS

1. FIT PROGRAM LOCAL CONTENT REQUIREMENT CAUSED HARM TO MESA

493. The domestic content requirements that were imposed by Ontario caused harm to the Investor. The requirements were mandated by the *Green Energy and Green Economy Act*⁵⁸⁷ and the Minister's Direction establishing the FIT Program⁵⁸⁸, and were detailed in Exhibit D to the FIT Contract.⁵⁸⁹
494. Mesa would have used the 2.5xl turbine, however, as a consequence of Ontario's local content requirements Mesa was forced to use the 1.6xle turbine. Mr. Low testified that Mesa "incurred higher costs...at the dates of the breach" that resulted from the local

⁵⁸⁷ *Green Energy and Green Economy Act*, S.O. 2009, c. 12, at. s. 25.35(3) (**Respondent's Schedule of Legal Authorities at RL-025**)

⁵⁸⁸ Letter from George Smitherman (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009 (**Investor's Schedule of Exhibits C-0051**)

⁵⁸⁹ Ontario Power Authority, Feed-in Tariff Contract Version 1.1, September 30, 2009, Exhibit D (**Investor's Schedule of Exhibits C-0109**)

content requirements imposed by Ontario which forced Mesa to select the 1.6xle turbine.⁵⁹⁰

495. To meet Ontario's local content requirements, Mesa was required to select the turbine model at the project development stage. As Mr. Robertson testified "for planning and development purposes Mesa needed to pick a turbine and move forward."⁵⁹¹ This is supported by the following reasons:
- a. There was a global scarcity of turbines,⁵⁹² and Mesa, like all FIT proponents, needed to make supply arrangements to ensure that it could obtain turbines that would comply with FIT timelines and Ontario's local content requirements by having manufacturers willing to build factories in Ontario, on the basis that they could anticipate orders from generators once contracts were offered.⁵⁹³
 - b. The FIT rules recognized the importance for proponents to have an agreement for the purchase of critical project related "equipment components". This required proponents to enter into turbine supply agreements early to ensure they could obtain the limited equipment available to quickly implement their projects.⁵⁹⁴
 - c. Section 13.4(b) of the FIT Rules required proponents to develop projects on an accelerated schedule.⁵⁹⁵ For example, the ranking criteria were designed to prioritize "shovel ready" projects that could be constructed quickly.⁵⁹⁶ Mesa, like other FIT proponents, did everything it could to be "shovel ready" including re-negotiating its supply agreement.
 - d. The terms of the FIT Contract set the terms of the accelerated schedule by requiring that projects be operational within a fixed time period, or FIT proponents risked termination of the contract.⁵⁹⁷
496. During the development stage Mesa conducted an analysis to determine which of the two turbine models would be more desirable for the Ontario projects. The independent wind studies completed by Garrad Hassan concluded that the [REDACTED]

⁵⁹⁰ Testimony of Robert Low, Hearing Transcript, Day 5, at p.106, Ins.5-20; Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.186, Ins.2-10 Mr Robertson testified that Mesa would meet the domestic content requirements through use of turbines, as well as through engineering and the use of local contractors.

[CONFIDENTIAL]

⁵⁹¹ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.194, Ins.18-20 **[CONFIDENTIAL]**

⁵⁹² Reply Witness Statement of Cole Robertson, at ¶21

⁵⁹³ Canada argued for the first time in its closing argument that Mesa could have used turbines from another supplier in place of the 1.6xle, but that Mesa was locked into GE because of the MTSA which was signed for a different project. Canada's Closing Statement, Hearing Transcript, Day 6, at p.274, Ins.4-18 **[CONFIDENTIAL]**

⁵⁹⁴ Witness Statement of Richard Duffy, at ¶32; Witness Statement of Jim MacDougall, at ¶23

⁵⁹⁵ Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011, at §13.4(b)(i) (***Investor's Schedule of Exhibits C-0005***)

⁵⁹⁶ Witness Statement of Richard Duffy, at ¶¶9-13; Witness Statement of Jim MacDougall, at ¶¶15-20; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.215-218, Ins.20-4

⁵⁹⁷ Ontario Power Authority, Feed-in Tariff Contract Version 1.1, September 30, 2009, ss. 2.5, 9.1(j), Exhibit A (***Investor's Schedule of Exhibits C-0109***)

██████████.⁵⁹⁸ In addition, management determined that the capital and operating costs would be lower in the aggregate if the 2.5xl turbine were used for the projects.⁵⁹⁹ The 2.5xl was a better model for the project both because it would be less expensive and would generate higher revenues.

497. Mesa renegotiated its turbine supply agreement with General Electric in November 2009 to meet the profile of its Ontario projects.⁶⁰⁰ One of the amendments to the agreement was the addition of the 2.5xl model, which would prospectively be available for use at the Ontario projects.⁶⁰¹ Mr. Robertson noted that Mesa would have used the 2.5xl model for the Ontario projects if allowed.⁶⁰² Under the Amended MTSA Mesa had the possibility of using either the 1.6xle or the 2.5xl.⁶⁰³

498. Mesa was informed that the 2.5xl model would not be domestic content compliant in ██████████ by its turbine supplier General Electric.⁶⁰⁴ On this basis Mesa determined that it had to use the 1.6xle turbine, rather than the 2.5xl turbine. When questioned on this topic Mr. Robertson testified that operational requirements included in the FIT rules and ranking criteria such as the accelerated schedule required turbine selection at an early stage. Mr. Robertson testified:

Q. So it's your testimony that you were forced to meet these local content requirements and you were forced to use the 1.6-megawatt turbine because of your anticipation of when you would receive contracts?

A. Yes, we anticipated getting contracts and therefore we had to plan our projects accordingly.

There's a lot that goes into developing a wind project, right? When you are having to make determinations on turbines, you have to decide how many turbines you are going to have and then you have to do archaeological studies, you have to do wind studies, you have to do electrical studies based on the layout of your wind farm. So, yes, we had to eventually make a determination of which turbine we were going to go with to be able to plan to have the projects ready.⁶⁰⁵

499. Accordingly, Mesa proceeded in its project development on the basis that the 1.6xle turbine would be used, and with the knowledge that this would result in future losses, including higher Engineering, Procurement and Construction (EPC) costs and lower revenues.

⁵⁹⁸ Garrad Hassan Canada Inc., Assessment of the Energy Production of the Proposed Arran Wind Energy Project, June 25, 2010 (*Investor's Schedule of Exhibits C-0374*) [CONFIDENTIAL]; Garrad Hassan Canada Inc., Assessment of the Energy Production of the Proposed Twenty-Two Degree Wind Energy Project, November 9, 2010 (*Investor's Schedule of Exhibits C-0378*) [CONFIDENTIAL]; Reply Witness Statement of Cole Robertson, at ¶122

⁵⁹⁹ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.16-17, Ins.24-15 This analysis was based on cost estimates provided by General Electric and other contractors that would be used.

⁶⁰⁰ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.162, Ins.3-6 [CONFIDENTIAL]

⁶⁰¹ Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.158-159, Ins.15-1 [CONFIDENTIAL]

⁶⁰² Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.156, Ins.13-14, page 183, Ins.19-23 [CONFIDENTIAL]

⁶⁰³ Testimony of Cole Robertson, Hearing Transcript, Day 2, pp.158-159, Ins.16-1 [CONFIDENTIAL]

⁶⁰⁴ Email from Michael Volpe to Cole Robertson dated August 5, 2010 (*Investor's Schedule of Exhibits C-0107*) [CONFIDENTIAL]

⁶⁰⁵ Testimony of Mr. Robertson, Hearing Transcript, Day 2, at p.188, Ins.8-25 [CONFIDENTIAL]

2. QUANTIFICATION OF LOSSES UNDER ARTICLE 1106

500. The damages quantified by Mr. Low reflect the damages that would result from construction of the wind projects using the 1.6xle turbine rather than the 2.5xl turbine.
501. These losses compensate Mesa for the wrongful inclusion of a domestic content requirement, which has been separately quantified from all of the other breaches. Mr. Low noted in his presentation to the Tribunal that the losses from the 1106 breach are separate and additive to the losses resulting from the breaches of 1102, 1103 and 1105, which were calculated based on the assumption that Mesa would be required to use the 1.6xl turbine.⁶⁰⁶
502. As stated by Mr. Low, Mesa was required to develop its projects based on the 1.6xle turbine, and not the preferred model, the 2.5xl.⁶⁰⁷
503. Mesa was aware of its losses under Article 1106 on August 5, 2010.⁶⁰⁸ Canada subsequently has relied on a document, Exhibit BRG 123, which demonstrates that Mesa was aware July 7, 2010. For the purpose of valuation date, Mesa will rely on the valuation date as it was originally valued.⁶⁰⁹
504. Mesa would have been subject to the domestic content requirements under either the FIT Program Rules, or the terms of the *GEIA*. Accordingly the base case that was used to form the damages conclusion for the breaches of 1102, 1103, and 1105 assumed the use of the 1.6xle turbine, and not the 2.5xl turbine.
505. Mr. Low explained during his presentation how the use of the 1.6xle would result in losses to Mesa.⁶¹⁰ Mr. Low's calculations are based on the following factors:
- a. **Efficiency:** The 2.5xl turbine was more efficient at the project sites resulting in a greater overall output within the maximum capacity allocated through the FIT Program contract when compared to the 1.6xle turbine.⁶¹¹ Consequently, Mr. Low stated the use of the 2.5xl turbine would generate more revenue.⁶¹² This increased revenue was based on the wind studies and 13.5 cent offer of the FIT contracts.⁶¹³
 - b. Fewer 2.5xl turbines were required. This had two effects:
 - i. **Operating Costs:** the construction and maintenance on the fewer turbines resulted in cost savings when compared to the same activities using the 1.6xle turbines.⁶¹⁴

⁶⁰⁶ Testimony of Robert Low, Hearing Transcript, Day 5, at pp148-150, Ins.7-4

⁶⁰⁷ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.15-16, Ins.18-5

⁶⁰⁸ Reply Expert Report of Taylor and Low, April 29, 2014, at 7.11

⁶⁰⁹ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.94-95, Ins.21-4

⁶¹⁰ Presentation of Robert Low, October 30, 2014, at pp.5-7

⁶¹¹ Testimony of Robert Low, Hearing Transcript, Day 5, at pp.131-132, Ins.21-14, pp.134-135, Ins.17-12; Reply Expert Report of Low and Taylor, April 29, 2014, at 4.5

⁶¹² Testimony of Robert Low, Hearing Transcript, Day 5, at p.16, Ins.14-23

⁶¹³ Testimony of Robert Low, Hearing Transcript, Day 5, at p. 11, Ins.13-25

⁶¹⁴ Testimony of Robert Low, Hearing Transcript, Day 5, at pp. 16-17, Ins.24-7

- ii. **Capital Costs:** Using the 2.5xl required the use of fewer turbines for the higher electricity output. Even while being more expensive on an electrical output basis the additional 1.6xle turbines required were needed which resulted in a net benefit.⁶¹⁵

506. This was specifically identified in Deloitte's Reply Report at 7.20 where it demonstrates that the use of the 1.6xle turbine over the preferred 2.5xl turbine resulted in damages amounting to \$106.2 million to \$115.3 million with a midpoint of \$110.8 million.⁶¹⁶ Hence, the 2.5xl was more economical in the aggregate when considering the cost of the turbine, construction, and maintenance.⁶¹⁷
507. In sum, the breach of 1106 resulted in harm to the Investor during the project development, and future losses of up to \$115 million.⁶¹⁸

F. SUNK COSTS

508. Mesa incurred substantial costs in the development of its Ontario projects, relying on the FIT Program Rules. Mesa actively developed the Ontario projects to ensure that it would be in a position to develop its projects in a timely fashion when contract awards were made based on the Rules.⁶¹⁹
509. Mr. Low noted during his presentation that in the base case, the entire cost of acquiring the turbines, including the deposit amount, was deducted to determine the lost profits.⁶²⁰ In order to fully compensate the Investor for its losses, the total amount of the turbine deposit should be recovered because that deposit would not have been lost if it had not been for the wrongful conduct of Canada.
510. The costs that have been incurred by the Mesa in developing in the projects have been separately quantified in Mr. Low's analysis, and should be awarded together with the losses. Mr. Goncalves agreed that the sunk costs should be added to the other losses:

163. The Deloitte Report adds the development costs and the forfeited GE deposit to the future losses damages. Deloitte says this is justified because the sunk costs were deducted in the determination of the future losses (i.e., in the DCF analysis), were incurred by Mesa Power, and therefore cannot be avoided. In other words, the amortization of these sunk costs was deducted from the value in the DCF analysis and therefore *needs to be added back*.

164. We concur with this reasoning, but note that a more common approach would be to exclude sunk costs from the DCF (increasing the valuation of the project) because sunk costs were already incurred and thus unavoidable. Because Deloitte did not exclude sunk costs from the DCF calculations, adding them back to the NPV

⁶¹⁵ Testimony of Robert Low, Hearing Transcript, Day 5, at p. 17, line 8-15

⁶¹⁶ For a breakdown of this calculation see Reply Expert Report of Low and Taylor, April 29, 2014, at p.31

⁶¹⁷ Testimony of Robert Low, Hearing Transcript, Day 5, at p.16, Ins.14-23

⁶¹⁸ Presentation of Robert Low, October 30, 2014, at p.5; Reply Expert Report of Taylor and Low, April 29, 2014, at 1.3

⁶¹⁹ Reply Witness Statement of Cole Robertson, April 28, 2014, at ¶157(a)

⁶²⁰ Testimony of Robert Low, Hearing Transcript, Day 5, at p.18, Ins.14-20

damages appropriate, but only to the extent that the value of the prior investments was actually impaired by the alleged violations.⁶²¹

1. MESA POWER'S MASTER TURBINE SUPPLY AGREEMENT

511. Mesa made a [REDACTED] deposit for wind turbines under a Master Turbine Supply Agreement (MTSA) with General Electric.⁶²² As testified by Mr. Robertson, the MTSA always was intended to supply turbines for multiple projects, and the agreement contemplated that these projects would be located throughout North America.⁶²³
512. Shortly after the launch of the FIT Program, the MTSA was renegotiated to match the profile of the Ontario wind projects. The modifications included reducing the overall number of turbines from [REDACTED] turbines to [REDACTED] turbines,⁶²⁴ and incorporating the 2.5xl model turbine into the agreement.
513. Mesa allocated all of the turbines under these new terms to projects located in Ontario, and developed those projects in the anticipation that contracts would be offered in accordance with the FIT Rules.
514. The Amended MTSA guaranteed Mesa access to wind turbines, so that once Mesa received a contract offer it would be in a position to place an order for turbines that complied with the domestic content requirements and that could be available within the time restrictions in the FIT Rules.⁶²⁵
515. Even if Mesa had received contract offers for only two projects, forfeiture of the entire deposit likely would have been avoided, because the parties to the agreement would have been in a different position. Mesa has shown proof that GE was willing to renegotiate the contract: the contract was renegotiated multiple times as evidenced by the various change orders that were set out in the timeline in our closing. There is no reason to believe that if Mesa had orders worth more than \$300 million for the turbines for TTD and Arran, it would not have had the leverage to amend the contract to avoid the forfeiture of the remaining portion of the deposit.
516. Mesa took steps to mitigate the damages resulting from the loss of the turbine deposit. Mesa negotiated a number of change orders in order to push back the deadlines in the MTSA.⁶²⁶

⁶²¹ Second Expert Report of Christopher Goncalves, at ¶¶163-164 (emphasis added)

⁶²² General Electric, Invoice to Mesa Power, LP, May 12, 2008 (*Investor's Schedule of Exhibits C-0381*)
[CONFIDENTIAL]

⁶²³ Testimony of Cole Robertson, Hearing Transcript, Day 2, at pp.154-155, Ins.16-16; Reply Witness Statement of Cole Robertson, at ¶48

⁶²⁴ In total, the four Ontario projects would require 347 turbines. The MTSA included a provision that would allow Mesa to order additional turbines beyond the [REDACTED] included in the Amended MTSA, see Testimony of Mr Robertson, Hearing Transcript, Day 2, at pp.216-217, Ins.25-7 [CONFIDENTIAL]

⁶²⁵ Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, at §6.4(a)(i) (*Investor's Schedule of Exhibits C-0258*)

⁶²⁶ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.168, Ins.9-10, p.171, Ins.9-19 [CONFIDENTIAL]

517. Mr. Robertson also testified that Mesa actively pursued other development projects where it could potentially use the turbines as an alternative.⁶²⁷ Mesa also continued to develop the Ontario projects, even after the July 4, 2011 contract awards, so it would be in a position to move forward if additional FIT contracts were offered.
518. The total losses for the turbine deposit were \$156,833,000.⁶²⁸ These losses would not have occurred if Mesa's wind projects had received the treatment available under the *GEIA*, or if Mesa had not been harmed by the FIT Program Rule changes, and received contract offers.
519. Mr. Goncalves does not take into consideration the evidence in the record described *infra*, showing that General Electric would have been willing to negotiate an extension of the deadlines and thus, if only, for example, two projects were awarded contracts, it is possible that GE would have been willing to negotiate its turbine deposit. GE did not extend the deadline for ordering the turbines because Mesa was not in a position to immediately order turbines directly due to the fact that Mesa was improperly not awarded any contracts in the FIT program. It is purely speculative for Mr. Goncalves to assume that if only two projects went forward, GE would have argued that Mesa was in partial default. There is no support in the contract language for Mr. Goncalves' methodology.
520. Even if the Tribunal accepted the unsupported methodology of Mr. Goncalves, his logic fails facially. If anything, one would expect that if Mesa had been awarded two contracts, it would not have lost the deposit for the turbines that would have been installed at these two projects.⁶²⁹

2. OTHER COSTS INCURRED

521. Other costs that were incurred related to the development of the Ontario wind projects including "professional fees, rents on the lands and development costs."⁶³⁰ These costs were increased because of the inclusion of the domestic content requirements.⁶³¹
522. The costs that were incurred in project development are reflected in the Financial Statements of the projects⁶³² and are detailed in Schedule 1 B of the First Report of

⁶²⁷ Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.172, Ins.12-15, at pp.173-174, Ins.13-1
[CONFIDENTIAL]

⁶²⁸ Presentation of Robert Low, October 30, 2014, at p. 7

⁶²⁹ Expert Valuation of Richard Taylor and Robert Low, at ¶¶2.13-2.14. The deposit can be apportioned to cover the loss suffered for those two projects alone based on the number of turbines that would have been used for those projects. The Amended MTSA establishes the per unit price for the [REDACTED] turbines. The TTD project would have used 90 turbines, and the Arran project would have used 72 turbines of the [REDACTED] turbines that were covered by the deposit. The deposit can be divided to represent 20% of the purchase price for those 162 1.6 model turbines.

⁶³⁰ Testimony of Robert Low, Hearing Transcript, Day 5, at p.38, Ins.13-15

⁶³¹ Testimony of Robert Low, Hearing Transcript, Day 5, at p.106, Ins.5-20

⁶³² Testimony of Robert Low, Hearing Transcript, Day 5, at p.12, Ins.1-7

Messrs. Taylor and Low.⁶³³ The total incurred development costs from the Ontario wind projects is \$8,100,000.⁶³⁴ Together with the turbine deposit, the total cost incurred in the development of the Ontario projects is \$165million.⁶³⁵

G. PRE-JUDGMENT INTEREST

523. NAFTA Chapter 11 specifically provides for an award of “any applicable interest” in Article 1135.⁶³⁶ The Investor has consistently claimed interest in the submissions filed in this arbitration.⁶³⁷ There is no question that an award of pre judgment and post judgment interest is appropriate in this dispute.
524. “Any applicable interest” includes pre-judgment interest. Pre-judgment interest is part of full and fair reparation for an internationally wrongful act.⁶³⁸ There is no legal authority that requires a claimant to have to justify interest.
525. Article 38 of the ILC Articles on State Responsibility and the commentary indicate that interest is an entitlement where damage has been found.⁶³⁹ The commentary to the ILC articles does not state that pre-judgment interest has to be independently justified because it is not an “autonomous form of reparation.”⁶⁴⁰ Interest stems from a sum due as a result of the damage that was found by a court or tribunal. The ILC Articles state that “as a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation.”⁶⁴¹

⁶³³ Expert Report of Taylor and Low, November 18, 2013, at Schedule 1B, p.52

⁶³⁴ Expert Report of Taylor and Low, November 18, 2013, at ¶1.29

⁶³⁵ Testimony of Robert Low, Hearing Transcript, Day 5, at p.19, Ins.16-19

⁶³⁶ Article 1135, entitled Final Award states that a Tribunal may award “monetary damages and any applicable interest”. (NAFTA at Article 1135 (1)(a))

⁶³⁷ Notice of Arbitration, at ¶73; Notice of Intent, at ¶37; Investor's Memorial, at ¶¶943-948; Investor's Reply Memorial, at ¶886(e)

⁶³⁸ *Metalclad* (2000) – Award, at para. 128 (***Investor's Schedule of Legal Authorities CL-098***); *Compañía del Desarrollo de Santa Elena* – Award, at paras. 96-110 (***Investor's Schedule of Legal Authorities CL-115***); Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice, at p. 151 (***Investor's Schedule of Legal Authorities CL-417***); Kantor, M. *Valuation For Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Alphen aan den Rijn: Kluwer, 2008), at p.267 (***Investor's Schedule of Legal Authorities CL-417***)

⁶³⁹ Article 38 of the Draft Articles states the following: “Interest: 1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result. 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”

⁶⁴⁰ *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (“*ILC Articles with Commentaries*”), at p. 107 (***Investor's Schedule of Legal Authorities CL-008***)

⁶⁴¹ *International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 (“*ILC Articles with Commentaries*”), at p. 107 (***Investor's Schedule of Legal Authorities CL-008***)

526. The only question as to the investor's right to claim interest in this dispute relates to the type of interest, the applicable rate, and the date from which interest should be awarded.

1. COMPOUND INTEREST IN APPROPRIATE IN THIS CASE

527. Mr. Low's valuation report provides for compound interest. Mr. Goncalves accepts that interest should be compounded annually.⁶⁴² It is very common to award compound interest in international arbitration.⁶⁴³ Notably, international law does not provide any rule prohibiting payment of compound interest and more recent awards provide for compound interest.⁶⁴⁴ The argument for using a compound interest was forcefully set out in the *Santa Elena* case at paragraphs 98 to 103 in a five-fold argument.⁶⁴⁵

2. THE RATE OF INTEREST

528. As there is no standard interest rate applicable in international law or international arbitration,⁶⁴⁶ an appropriate rate must be selected that is consistent with the goal of ensuring full reparation. Mr. Low adopted 2.8% - the Bank of Canada's prime interest rate at the approximate date of the breaches, which they assumed were the same.⁶⁴⁷ Mr. Goncalves accepts this interest rate, if prejudgment interest is accepted.⁶⁴⁸ This is an appropriate rate to compensate the Investor for its losses.

529. Mr. Low has calculated the pre-judgment interest on Mesa's losses which range from \$75 million to \$82 million. This is appropriate to fully compensate the Investor for its losses arising from the breaches that resulted from the maladministration of the FIT Program.

⁶⁴² Second Expert Report of Christopher Goncalves, at p. 7, 49, ¶167

⁶⁴³ Colon, M. Jeffrey & Michael S. Knoll, *Prejudgment Interest in International Arbitration*, Institute for Law & Economics, University of Pennsylvania Law School, Research Paper No. 07-32, Fordham University Legal Studies, Research Paper No. 1029710, October 29, 2007, at p. 7 (**Investor's Schedule of Legal Authorities CL-419**); Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*, at p.152 (**Investor's Schedule of Legal Authorities CL-417**)

⁶⁴⁴ Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*, at p.152 (**Investor's Schedule of Legal Authorities CL-417**)

⁶⁴⁵ *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Case No. ARB/96/1, Final Award (February 17, 2000) ("*Compañía del Desarrollo de Santa Elena - Award*"), at ¶¶98-103 (**Investor's Schedule of Legal Authorities CL-115**)

⁶⁴⁶ Colon, M. Jeffrey & Michael S. Knoll, *Prejudgment Interest in International Arbitration*, Institute for Law & Economics, University of Pennsylvania Law School, Research Paper No. 07-32, Fordham University Legal Studies, Research Paper No. 1029710, October 29, 2007, at p. 10 (**Investor's Schedule of Legal Authorities CL-419**).

⁶⁴⁷ Reply Expert Report of Taylor and Low, at p.29

⁶⁴⁸ Second Expert Report of Christopher Goncalves, at p.7, 49, ¶167

IV. REQUEST FOR RELIEF

530. In view of the facts and law set out in the written submissions and during the oral hearing, the Investor respectfully requests that the Tribunal grant the following relief:
- a. To dismiss Canada's admissibility and jurisdictional objections in their entirety;
 - b. A Declaration that Canada has acted in a breached its obligations under NAFTA Articles 1102, 1103, 1104, 1105 and 1106;
 - c. An award of damages for the losses that were caused by those breaches of the NAFTA, for moral damages and for pre and post-award interest compounded at a rate to be determined by the Tribunal; and
 - d. An award in favour of the Investor for its costs, disbursements and expenses incurred in the arbitration for legal representation and assistance, plus interest, and for the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Appleton & Associates International Lawyers

Date: December 18, 2014