IN THE MATTER OF AN ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES AND THE TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

Tennant Energy LLC.

INVESTOR

v.

Canada

RESPONDENT

MEMORIAL OF THE INVESTOR

August 7, 2020

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I. OVERVIEW

1. This arbitration involves the blatant disregard of fairness in the allocation of multi-million-dollar renewable energy contracts. It involves the protection of companies owned by political cronies to the detriment of investments owned by American investors. This rampant protectionism for the most politically connected entities is why NAFTA investment protections were created. The NAFTA prohibits such unfair practices, which disrupt commercial certainty and cross-border investment.

A. What is this Arbitration about?

2. Skyway 127 Energy Inc. ("*Skyway 127*") was an applicant in Ontario's Feed-In-Tariff (FIT) Program in which the Government solicited investors from around the world, including those such as Skyway 127. Applicants were promised premium rates from Ontario and its agency, the Ontario Power Authority (OPA), and applicants, such as Skyway 127, expected the award process to be fair, transparent, and divorced from local politics.

3. Skyway 127 was a formidable applicant. Backed by the General Electric Corporation, the project had the experience, the know-how, and the resources to obtain one of the coveted 20-year Power Purchase Agreements, or FIT Contracts. Not surprisingly, Skyway 127 delivered. When the OPA did its test run for applicants, by transmission area - the way it had done for already awarded contracts - Skyway 127 made the cut. It was going to obtain a 20-year FIT Contract.

4. Then, the bottom fell out. In a series of decisions that smacked of political expediency, the Ontario officials stepped in to ignore fairness, transparency, and due process and devastate Skyway 127's project.

   (a) First, Ontario determined that, instead of terminating its politically embarrassing sweetheart deal that it provided to a single group, the so-called Korean Consortium, it took away transmission access away from

the Bruce region where Skyway 127 was located, and provided it to the Korean Consortium.

(b) Second, Canada's next move was equally bad. After conducting a fair test run of the applications, the Ontario Ministry discovered that a politically connected applicant, would lose if the FIT Program were fairly and objectively run. In action simply unexpected from a NAFTA Party, Ontario manipulated the system to project this applicant with absolutely no regard to applicants who were playing by the rules and who were not politically connected, like Skyway 127. The officials met and decided to find a way to reward a political crony of the Government who had lost its FIT Application in another transmission zone. The specially favored applicant was a high-ranking Liberal Party member and a secret group of officials met to find ways to protect his business opportunities.

5. Taken from a page of a lazy movie script, this decision to violate the NAFTA actually was made after a secret meeting in the middle of May 2011 of the highest-ranking government officials and political officials. This cabal met as an unofficial, secret "breakfast club" set up to protect friends of the Government from problems. The "last minute" changes to the FIT Program were announced on June 3, 2011. They involved allowing changes to connection points and a total cap on power transmission for further FIT Contracts of 1050 MW.

6. The Government agreed in the FIT Program to have Ontario ratepayers purchase power for all available power transmission in each transmission zone. Ontario had announced that there was at least 1200 MW of transmission capacity in the Bruce Region. [redacted].

7. After over one year of operation of the FIT Program, the Government decided that its announced approach was going to be expensive. One of the fundamental new

changes imposed by the Minister of Energy's June 3, 2011 order was to reduce the amount of power that Ontario would buy under the FIT Program in total and a significant reduction in transmission allocation to the Bruce transmission zone.

8. The OPA recognized that the FIT Proponents were relying on the terms of the FIT Program Rules and that Ontario was expected to award all available transmission in FIT Contracts. To avoid its obligations, Ontario's energy minister created a mandatory order that set a new and arbitrary limit of 1050 MW of transmission capacity.

9. The reduction of available transmission was made through a mandatory government order issued by the Ontario Minister of Energy on June 3, 2011. This order was inconsistent with what was set out in the FIT Program. Ontario was obligated to buy at least the 1200 MW of available transmission capacity in the Bruce Region. Under the terms of the FIT Program, FIT Proponents were relying on the Government's commitment to purchase renewable power. Ontario induced applicants to invest hundreds of thousands of dollars in their applications to be eligible for the FIT Program.

10. In making its June 3. 2011 mandatory order, the Minister of Energy unilaterally broke faith with its early practices and promises. The Ministry of Energy issued an order that had Ontario cease to follow the policy and practices under the FIT Program Rules. Ontario repudiated its underlying promises to all the applicants in the Bruce transmission zone. All the FIT applicants in the Bruce Transmission zone were yet to have their power applications considered for the first time – they had complied with the terms of the announced program – but the government did not.

11. Ontario then further reduced the transmission by allocating almost 30% of the remaining available transmission to the West of London zone, another region that already had its FIT power contracts awarded.

12. The surprise modification also had a surprising result – the FIT Contract went to International Power Canada ("IPC"), a company, which as noted was run by a close

crony and political supporter of the Ontario Government. IPC had already lost out on a FIT Contract when that transmission zone's contracts were awarded earlier. Through the last-minute change, IPC was able to obtain lucrative non-cancellable twenty-year duration fixed price energy contracts. The biggest loser in this process was Skyway 127 – who followed the rules throughout the process but was not a political player.

(a) Had the Government awarded all the available transmission in the last remaining zone, Skyway 127 would have had a FIT Contract.

(b) Had the Government awarded the 1050 MW of available transmission to the last remaining zone for contracts – then Skyway 127 would have had a FIT Contract.

13. The Tennant NAFTA Claim is about:

(a) Special business opportunities provided to a politically connected local favourite, IPC.

(b) The "Breakfast Club" cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.

(c) Ontario's decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127.

(d) The delay of the award of contracts because of Korean Consortium's failure to comply with its contractual obligations.

(e) The conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.

B. The Difference between this claim and Mesa Power's Claim

14. At the outset of this Memorial, it is essential to address how the Tennant Energy NAFTA Arbitration relates to the *Mesa Power Group* NAFTA Arbitration. The earlier *Mesa Power Group v. Canada* arbitration was heard in October 2014, in which an award, and a dissenting opinion was rendered in 2016.

15. The principal allegations in the *Mesa Power Group* NAFTA arbitration were about the breach of NAFTA obligations concerning national treatment, most favored nation (MFN), and performance requirements and the international law standard of treatment. The international law standard of treatment (NAFTA Article 1105) issues raised in the *Mesa Power Group* arbitration primarily were regarding the Korean Consortium having unfair access to government information (which it used in anti-competitive ways to predate upon FIT Applicants) and the last-minute rule change which allowed Boulevard Power (owned by NextEra) to obtain transmission access for projects physically located in the West of London transmission zone to a transmission line in the Bruce transmission zone though a last-minute rule changes.

16. While both NAFTA arbitrations deal with the questionable operation of the Ontario FIT Program, this Tennant Energy arbitration is different from the *Mesa Power* arbitration.

17. The first three NAFTA breaches in the *Mesa Power* arbitration - namely the breach of national treatment, MFN, and performance requirements - are not raised at all within this arbitration.

18. The specific NAFTA Article 1105 issues raised in the *Mesa Power* arbitration were not raised as actionable breaches by Tennant Energy. Tennant Energy references these matters to show the atmosphere of patent unfairness, the existence of a conspiracy, and the systemic violations underway in the Province of Ontario. These systemic issues were not raised as issues in the *Mesa Power* claim but are essential issues in the Tennant Energy claim.

19. The Tennant Energy NAFTA claim discusses the admitted governmental systemic process that was used to manipulate the FIT Program rules to favor political friends at the cost of the ordinary applicants. The existence of this systemic and coordinated set of measures is based on actual admissions of misconduct made by Ontario Public Officials in the previously secret testimony in the *Mesa Power* Claim. The first part of that sealed testimony became available to the public on August 15, 2015. However, much of the testimony remained unavailable to the public due to Canada's widespread use of confidentiality designations on the evidence and the hearing. As a result, the Investor did not become aware of the extent of these issues until the Investor discovered additional information, previously thought to be confidential, once it was available in public hearing videos.[1] As described in the witness statement of John C. Pennie, the Investor became first aware of this additional evidence in the summer of 2020.[2]

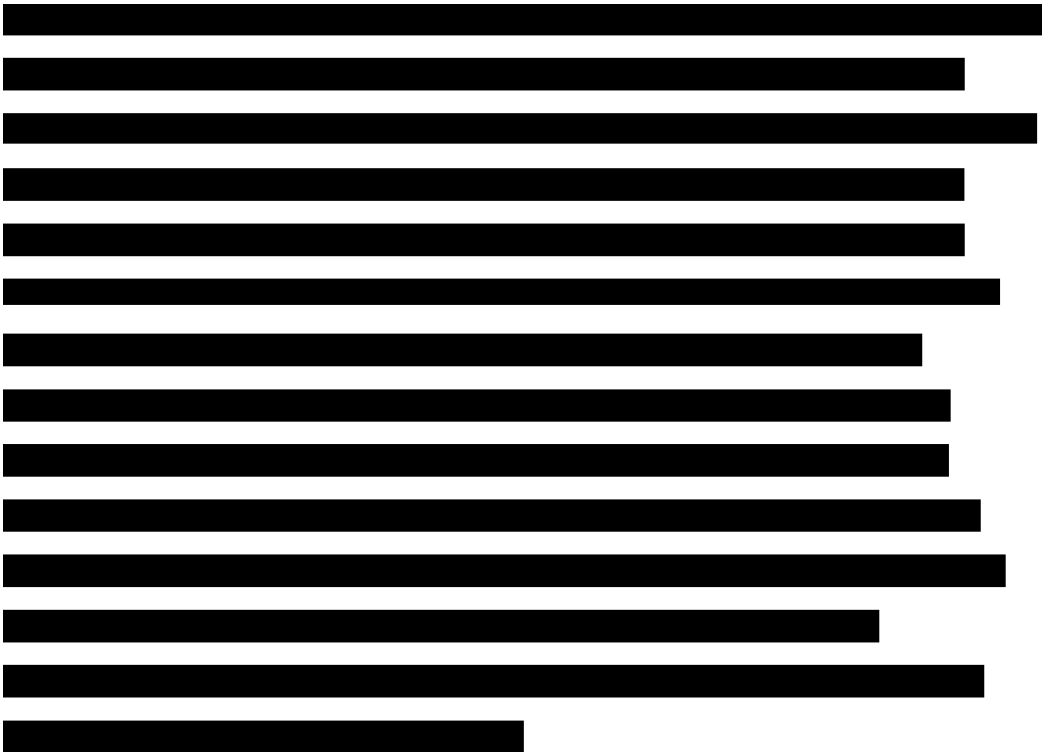
20. Tennant's claims before the Tribunal are that:

(a) IPC received special protection to ensure that its previously unsuccessful FIT Launch period wind application for its two West of London transmission zone wind facilities would be granted lucrative non-cancellable long-term power contracts in a new previously unannounced "consolation prize" do-over round.

(b) The Ontario Government awarded almost all its Launch period (first round FIT contracts). It still had one zone left awaiting contracts, but Ontario changed the rules right near the end of the process.

(c) [redacted]

[1] The videos of the Mesa Power NAFTA Hearing that were available to the public on the Permanent Court of Arbitration's Mesa Power Group v Canada website have been submitted into the current hearing record as the following exhibits : **C-107, C-201, C-204, C-205, C-206, C-208** and **C-224 to C-243** inclusive.
[2] **CWS-1,** Witness Statement of John C. Pennie at ¶¶99, 102. (**CWS-1**)



(d) There was a one-year delay between the next announcement of FIT Contracts in the Bruce Transmission zone and the earlier announcement in all the other transmission zones in the province of Ontario. The reason for the delay became known for the first time at the *Mesa Power* hearing – the Korean Consortium had failed to meet their contractual commitment to designate their transmission needs for the Bruce Region. The Government asked the Korean Consortium to comply twice, but they remained non-conforming by not notifying the Government of requested transmission. The Korean Consortium also was in breach of other provisions of their secret sole-sourced 18 billion energy deal – but it seemed that the Government still would accommodate them. This information about the Korean Consortiums ongoing non-compliance with its obligations was not known until after the *Mesa Power* NAFTA hearing. It is understandable as the Ontario Government found the issue

embarrassing – and the Auditor General later was very critical of these arrangements.

21. There was no basis under the rules for issuing a consolation prize by awarding a second additional tranche of power transmission to another transmission region. There were no do-overs in the FIT Program. Ontario gave a large portion of that scarce new electricity transmission limit to a key political supporter, who lost in the FIT Launch Round in the West of London transmission region, but who publicized his ties with the Liberals on his website.

22. And the do-over in the West of London transmission zone came at the cost of the total amount of power contracts to be granted to all remaining FIT Proponents in the Bruce Region.

23. None of these specific issues in the Tennant arbitration were raised in the *Mesa Power* NAFTA case as a claim – because Mesa Power, like other FIT Applicants, was not aware of them at the time it filed. However, because of the release of information from the *Mesa Power* hearing and post-hearing briefs, these are the claims made by Tennant Energy in this arbitration.[3]

24. Ontario took steps to conceal public knowledge about its cronyism and maladministration of the FIT Program. It was only with the release of admissions from senior government officials occurring in the release of information from the *Mesa Power* arbitration that the Investor could have obtained knowledge of the breaches of the NAFTA outlined in this claim.

25. Information regarding steps taken by senior government officials to protect the commercial opportunities of IPC to obtain FIT Contracts was not made public until the

[3] Conspiracy and systemic violations are relevant to demonstrate a composite breach under Article 15(2) of the ILC Articles of State Responsibility.

public release of the *Mesa Power* Investor's Post Hearing brief on August 15, 2015. Before this time, Canada suppressed this information from public release.

26. Not one of these issues was known to the public before the release of information from the *Mesa Power* hearing in 2015, nor could it be known in the absence of evidence available to the public.

27. Canada nevertheless argues that Skyway 127 should have known about Ontario's violations. However, Ontario concealed and suppressed public disclosure of damaging information about its cronyism and unfair and arbitrary control of the FIT Program.

28. The three-year limitation in the NAFTA (Article 1116(2)) requires that no more than three years elapse between the date of the filing of the claim and the date upon which the Investor knew of the breach of the NAFTA and of the loss or damage arising from that particular breach. The Tennant Energy claim was filed on June 1, 2017 – so the three-year limitation threshold ran on June 1, 2014.

29. Before June 1, 2014, Tennent Energy could not have known of the specific NAFTA violations at issue. Ontario took a concerted effort to conceal its improper behavior, and the information disclosing this wrongful conduct was not made available to the public until after June 1, 2014.

30. The date when the two necessary elements of the NAFTA claim first transpired at the earliest was August 15, 2015. This was more than one year after the June 1, 2014 threshold limitation period and less than two years before the NAFTA claim was filed. Thus, the Tennant Energy NAFTA claim was brought within three years of the release of this incriminating evidence.

C. Materials Supporting this Memorial

31. Tennant Energy submits together with its Memorial:

(a) Factual exhibits **C-025 to C-245** together with the Investor's consolidated list of exhibits;

(b) Legal authorities **CLA-099 to CLA-235**, together with the Investor's consolidated list of legal authorities;

(c) The **Witness Statement of John C. Pennie**. (**CWS-1**) Tennant Energy's chief executive officer and the CEO of Skyway 127. Mr. Pennie addresses operational matters in connection with Skyway 127, Tennant Energy and the FIT Program applications.

(d) The **Expert Valuation Report of Richard Taylor and Larry Andrade from Deloitte LLP**, (**CER-1**) a team of certified business valuators who prepared a report on the valuation of damages that concludes that the midpoint value of damages solely arising from Canada's wrongful actions (contrary to Treaty Article 1105) is not less than **CDN$ 219,012,000**, comprised of economic losses of not less than $184,012,000 (mid-point value) and the Investor's claim for moral damages of $35,000,000.

D. General Overview of the FIT Program

32. The production of renewable power requires significant amounts of private investment to fund the building of wind facilities and to enable their connection to the transmission grid. With such large-scale investments at stake, investors and their investments need to be assured that the rule of law is followed, and that Power Purchase Agreements are awarded and administered in a fair, non-arbitrary, and transparent manner. That did not happen here.

33. The Ontario FIT Program was announced in 2009 as a rules-based transparent, competitive process. Pricing for wind power under the FIT Program was designed to give investor's an 11% return on capital. This was significantly more than other market-based programs. The FIT Contracts were lucrative non-cancelable twenty-year

fixed price power contracts. Not surprising, thousands of applicants applied under the FIT Program rules for twenty-year fixed rate contracts.

34. *Skyway 127* participated in Ontario's government-led renewable power FIT program with the expectation that it would be a transparent process. Skyway 127 sought access to the Ontario transmission grid to be able to qualify for a twenty-year-long renewable energy Feed-in Tariff Power Purchase Agreement for a wind generation investment that it owned near the Lake Huron shores in Ontario, Canada. Skyway 127 had a seasoned development team with experience with Wind Power development in Ontario, in Europe and with General Electric, one of world's great industrial and financial companies. Skyway 127 was willing, ready and able to construct a 100 MW wind facility on lands that it had leased and prepared in advance of making its application.

35. What Skyway 127 did not know was that the quality of its project was less important in Ontario than the quality of its friendships with the provincial Liberal Government. Skyway 127 was highly ranked based on the objective criteria of the FIT Program, but it had no rank with the coterie of political apparatchik's and civil servants who ran the program. The complaints raised by the Skyway 127 address extraordinary events involving manipulation of the FIT Contract process. The case deals with admissions by senior officials of systemic manipulation of the FIT Application process. Compliance with the expressed FIT Rules were ignored by Ontario. In contrast, wholly irrelevant considerations such as cronyism and political support for the current Ontario government were considered and the rules contorted at the last minute to reward the friends at the expense of the other applicants like Skyway 127.

36. Under the NAFTA, Canada was required to provide Skyway 127 and its investors with fair and equitable treatment. The evidence in this arbitration demonstrates that Ontario failed to follow due process and fairness in the awarding of transmission access and FIT Contacts.

37. The Investor asserts the following NAFTA measures were breached as a direct result of the government's conduct implementing and administering the Ontario renewable energy Feed-In Tariff (FIT) Program. The specifics of these actions are laid out in detail below in this Memorial. Even more astonishing is the fact that government officials have already admitted that they systemically acted in an unfair and unbalanced manner – which directly resulted in the circumstances where Skyway 127 was not awarded a FIT Contract.

E. Secret and non-transparent actions

38. Ontario kept the exact nature of the preferential treatment secret at the time it was provided and "under wrap" and away from the public until well after the FIT Process was over in June 2013. Indeed, it was not until the public release of the post-hearing pleadings in January 2015 that information about these egregious acts was released to the public.

39. Fundamentally, Ontario has taken a well-considered energy policy, a Feed-in Tariff regime, and perverted it through the predominance of national politics over sound public policy and international trade.

40. First, Ontario entered into a secret deal with the members of the Korean Consortium, part of which formed the *Green Energy Investment Agreement* (*GEIA*) and part of which is still secret under the terms of a Memorandum of Understanding signed between certain Korean Companies and Ontario in 2008. That agreement appears to have been expressed in a Framework Agreement which was executed in the fall of 2009. The terms of this secret Framework Agreement have not been disclosed by Ontario, but the Memorandum of Understanding made clear that this was a binding exclusive partnership between Ontario and the Korean Companies.

41. By the summer 2011, Ontario was not operating the FIT Program in a fair and non-arbitrary manner. By that time, the political fortunes of the incumbent Liberal Party had turned sour and it appeared that the Party's electoral prospects for re-election were

very uncertain. At that time, Ontario political leaders in charge of the government sought to reward their political supporters. Also, it appears that renewable energy Power Purchase Agreements could be obtained in exchange for promises of support for the governing political party. Unfair access to business opportunities was made available to "friends and family" of the Ontario government at the cost of those who properly and faithfully followed the Ontario FIT Program guidelines. Such irrelevant political considerations in the operation of Ontario's energy policy resulted in capricious modifications to and abusive administration of the FIT Program rules.

42. Officials publicly told proponents that the rules were being followed, but privately the officials were providing preferred bidders with inside information. This abuse of process favored better-treated proponents over those like Skyway 127 who believed that reliance on the rules and fairness would be the basis upon which contract decisions would be based.

43. The context of the Investor's complaints demonstrate that the paramount concern of the Government of Ontario was not about compliance with the rule of law, but instead with the retention of political power by the existing Ontario government.

44. Skyway 127 treatment was highly unusual relative to ordinary regulatory practice and was substantially different from the treatment afforded to other projects. The difference in treatment was politically motivated, arbitrary, discriminatory, and contrary to the rule of law. It clearly fell below the minimum standard of treatment required under NAFTA 1105.

45. Ontario's Ministry of Energy, through the OPA , initiated the FIT Program in 2009 by offering to purchase renewable energy from private parties for transmission to its power grid.[4] OPA divided Ontario's regions into transmission zones and announced how much energy the OPA would offer contracts through the FIT Program.

[4] OPA, *FIT Rules Version 1.5*, 3 June 2011, ¶1.1, **C-129**.

46. Under the program's public rules, renewable energy producers were required to submit project proposals. Each proponent was required to identify, among other things, where and how its renewable energy was produced, which zone or region of Ontario it proposed to serve, its intended connection points to Ontario's grid, and the infrastructure the proponent would use to transmit energy from the production site to the grid connection point.

47. Ontario was required to rank project proposals in accordance with objective criteria stated in the FIT Program's rules. Ontario promoted this selection process as "standardized, open, and fair." Skyway 127 relied upon those representations.

48. Under the FIT Program's rules, Ontario would award the top-ranked projects in each zone with a Power Purchase Agreement ("*FIT Contract*"), which afforded the recipient a guaranteed right to supply Ontario with renewable energy at a fixed price for 20 years.

49. Ontario announced the amount of energy to be purchased by each FIT zone. Projects would receive FIT Contracts in accordance with their ranking priority until the sum of energy produced by the selected projects would satisfy the energy allotted to the FIT zone in which they were ranked. Thus, if a transmission zone had an announced capacity of 1,000 MW, then projects would receive FIT Contracts by ranking priority until the capacity to be supplied by those projects totaled 1,000 MW. This announced process allowed competitors to know that the capacity awarded would be distributed in a fair and transparent manner.

50. Because Ontario is a subnational of Canada, its agencies (including the Ministry of Energy and the OPA) were required under NAFTA to administer the FIT Program fairly and impartially, affording due process to proponents and participants, including by awarding FIT Contracts in accordance with the standardized ranking criteria mandated by the program's rules. Instead, Ontario's political leaders withheld critical information and manipulated the rules to benefit themselves, causing the Investor, Tennant

Energy LLC ("*Tennant*"), and its Skyway 127 investment to suffer massive financial losses. Tennant brings this action to correct that injustice.

51. The Investment, Skyway 127, submitted a FIT Project proposal for the Skyway 127 wind power project to supply Ontario with renewable energy. In its November 27, 2009 application, Skyway 127 sought 100 MW of transmission access for the purpose of obtaining a twenty-year renewable energy Power Purchase Agreement under the FIT Program.[5]

52. Skyway 127 was designed to generate 101.8MW of wind power using 37 2.75xle turbines, representing the type of turbine that would have met the Domestic Content Requirements of the FIT program. This project is located in the Municipality of Arran-Elderslie, Bruce County Ontario and situated on agricultural land. Development of the project started in 2008 when the first land option contract was signed and has been ongoing. The project had 39 properties comprising 6,617 acres under option as at September 2011

53. The Skyway 127 wind site was next to Lake Huron in the Bruce Transmission zone. It sat adjacent to one of the four wind sites operated by Texas-based Mesa Power Group.

54. The Bruce to Milton Transmission Project would allow successful applicants to receive contracts in the region from Bruce County to Milton, Ontario. There was supposed to be 1,200 MW of renewable energy contracts offered for this transmission area.

55. The passage of the *Green Energy and Economy Act* in the Spring of 2009, and the subsequent announcement of the FIT Program in September 2009, confirmed that Ontario was serious about renewable energy.[6]

[5] CWS-1 –- Witness Statement of John C. Pennie, ¶25. (**CWS-1**)
[6] CWS-1 –- Witness Statement of John C. Pennie, ¶43. (**CWS-1**)

56. There was an expectation among the proponents that the process for awarding renewable energy FIT Contracts through the FIT Program and Ontario's regulatory regime, would be conducted fairly and consistently.[7]

57. The Windrush Group was the developer of the Skyway 127 project. This wind developer had an earlier successful experience in the development of a number of wind projects under the predecessor of the FIT Program, the RESOP program.[8] This experience with Ontario in the wind power sector grounded expectations that Ontario would act reasonably and follow the announced program rules.

58. The partners behind the Skyway 127 project had the experience, financial capability, and a guaranteed turbine supply to meet the criteria for a renewable-energy PPA in the FIT Program.[9]

59. The first round of priority ranking took place on December 21, 2010. Skyway 127 was highly ranked. The project was within the June 6, 2011 transmission limits according to the publicly issued documents outlining the Transmission Access Test ("*TAT*") and the Economic Connection Test ("*ECT*") documents.[10]

60. Skyway 127 obtained sixth ranking in the priority position for transmission access (and thus contracts) in the Bruce to Milton Transmission area. Even with the five other applicants ahead of it, Skyway 127 was in a very strong position to obtain a FIT Contract for 100 MW as it was well within the allotment.

61. Skyway 127 was slated to receive a FIT Contract because the only five companies ranked higher would together require only 280 MW of the 1200 MW of available

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[7] CWS-1 –- Witness Statement of John C. Pennie, ¶113 (**CWS-1**)
[8] CWS-1 – Witness Statement of John C. Pennie, ¶¶16,17 (**CWS-1**)
[9] CWS-1 –- Statement of John C. Pennie, ¶¶16-23, 56. (**CWS-1**)
[10] CWS-1 –- Witness Statement of John C. Pennie, ¶31. (**CWS-1**), TAT Position Skyway 127 B28S, 6 June 2011, **C-120**.

transmission in the Bruce region that the OPA announced it would purchase under the FIT.

62. Skyway 127 had won the hard-fought race for a coveted FIT Contract on the merits of its project and the objective criteria that were supposed to determine success under the FIT Program rules. Thus, relying on Ontario's representations—including that the FIT Program's objective ranking criteria would govern the award of FIT Contracts and that OPA would award contracts in the Bruce transmission zone for the purchase of 1200 MW through the FIT Program.

63. But, unbeknownst to Skyway 127 and its Investors, Ontario's leaders had engaged in a series of machinations designed to benefit themselves and their political allies, preventing Skyway 127 from obtaining the FIT Contract it had earned under the program's rules.

64. Ontario's wrongful and secret manipulation of the FIT Program occurred in two stages.

65. In the first stage, Ontario intentionally withheld and misrepresented critical information about a so-called Green Energy Investment Agreement ("*GEIA*") between Ontario and certain Korean companies, and its ill effects on the FIT Program and projects like Skyway 127. Ontario's misconduct was motivated by a desire to make the GEIA appear successful in advance of upcoming elections. Ontario's secret machinations during this first stage allowed the Korean companies to monopolize the FIT Program. But, in addition to displacing companies like Skyway 127, which had earned a FIT Contract under the program's rules, those machinations pushed projects owned by political allies out of the running for FIT Contracts.

66. Accordingly, Ontario's second stage of manipulations were designed to displace higher ranking programs like Skyway 127, so the OPA could award the remaining FIT Contracts to well-connected domestic political benefactors instead.

67. A year before Tennant obtained its sixth-place FIT ranking, Ontario entered the GEIA. Though the existence of the GEIA was public knowledge, its terms and Ontario's repeated modification of them throughout the FIT Program were secret.

68. Pursuant to the GEIA, OPA agreed to purchase from Samsung C&T Corporation and Korea Power Corporation (together, the "*Korean Consortium*" or "C*onsortium*") 2,500 MW of renewable energy before obtaining any supply from other sources.

69. To fulfill its obligations under the GEIA, the Korean Consortium needed to establish connections to Ontario's power grid. Each of Ontario's regions has grid connection points, which can be constructed by energy producers or accessed by contracting with another party with rights to a connection point. Each connection point has a maximum capacity. Thus, the number of connection points needed to fulfill a production obligation depends on the amount of energy the producer agreed to supply.

70. Under the GEIA, the Korean Consortium was required to identify its connection points in the Bruce Region.[11] The Consortium breached this obligation, which was caused to terminate the GEIA. But Ontario's leaders had a political interest in ensuring that the GEIA appeared successful to the public. Thus, instead of terminating the GEIA, Ontario rewarded GEIA's breach by secretly allowing the Consortium to delay choosing its connection points until after the FIT Program rankings were published. This was a ploy to give the Consortium an unconscionable advantage over FIT proponents, including Skyway 127.

71. The publication of the FIT rankings in December 2010 had revealed which projects were slated to receive FIT Contracts and which would not. Predictably, projects not positioned to receive FIT Contracts drastically diminished in value, making them easy prey for the Korean Consortium, which purchased several low-ranking projects and their connection points at *de minimus* prices. In turn, those projects used the

[11] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶¶92, 94, **C-017.**

Consortium's undisclosed priority under the GEIA to obtain FIT Contracts, monopolize the limited energy supplies slated for purchase by each region, and leapfrog over higher-ranked bidders, including Skyway 127, which did not receive a FIT Contract as a result.

72. In short, the Ontario hijacked and manipulated the FIT Program's bidding and ranking processes, along with its supposedly "standardized" criteria and "fair" and "open" administration, to expose and devalue low-ranking projects for the Korean Consortium to acquire and advance past projects like Skyway 127, which had earned its ranking and right to a FIT Contract under the program's rules.

73. Ontario never disclosed this predatory scheme or even that Consortium projects would be eligible to compete for (let alone monopolize) the limited energy capacity to be purchased for each FIT zone. Indeed, these machinations only came to light during the confidential sessions of a NAFTA investment treaty claim, NAFTA *Mesa Power Group v Canada*.

74. Thus, Skyway 127 was justified in believing that its project would receive a FIT Contract based on its high sixth-place ranking and the fact that the five companies ranked ahead of it could only receive 280 MW of the 1200 MW of transmission access for which the OPA would issue FIT Contracts.

75. Despite Ontario's and the Consortium's predatory scheme, Skyway 127 remained in the running for a FIT Contract, albeit on a waiting list instead of in sixth place. But Ontario's scheme had created another political problem, which lead Ontario to implement the second stage of manipulations intended to limit the unintended political consequences of the first. This manipulation turned fatal to Skyway 127.

76. In addition to displacing projects like Skyway 127, the Korean Consortium's dominance of the FIT Program—fueled by its cheap acquisition of lower-ranked projects and secret priority under the GEIA—incredibly had displaced not only foreign investor projects such as Skyway 127 that had participated via the rules but also

projects owned by two powerful political donors. Accordingly, the Ministry of Energy suddenly, drastically, and unilaterally changed the rules of the FIT Program, tailoring them to ensure that the remaining FIT Contracts were awarded to its political allies over projects that had earned higher rankings.

77. For example, under the FIT Program's rules, project proposals were zone-specific, such that a proposal submitted in one zone (like the West of London zone) required a connection point in that zone. As a result, such proposals were not eligible for consideration in another zone (like Bruce). But the Ministry of Energy, in an extraordinary unilateral move, secretly ordered OPA to manipulate the rules of the FIT Program to allow proponents that had not ranked high enough for FIT Contracts in West of London, to transfer their proposals to Bruce, where the Ministry had delayed the selection process to buy time for those proposals to displace Skyway 127 and other projects slated to receive FIT Contracts. To make its scheme work, the Ministry also had to lift restrictions limiting the allowable distance from the production site to the connection point.

78. ***Qui Bono***? Two politically connected companies benefited from this sudden and drastic rule changes.

79. One company that benefited was IPC. IPC was run by the former president of the Ontario Liberal Party and the federal Liberal Party of Canada, Michael Crawley. Mr. Crawley was a longstanding Liberal Party operative, who was previously on staff for the leader of the Ontario Liberal Party. Indeed, he boasted of his political connections on his personal website.[12]

80. Evidence obtained from senior Ontario officials administering the FIT Program confirmed that the FIT Program rules were secretly manipulated to guarantee that IPC received FIT Contracts from the government.

[12] Meet Mike, mikecrawley.ca, 2012, **C-166.**

81. Even more astonishing is the fact that several years prior, in 2004, Mr. Crawley was the president of yet another renewable energy company, AIM PowerGen, which was awarded yet another massive contract (totaling $475 million) by the Ontario Liberals.[13] This deal resulted in public opprobrium from the Leader of the Opposition in the Ontario legislature.[14]

82. The steps to protect IPC (at the direct expense of Skyway 127) were discussed by high-level government and political officials at a clandestine coordination meeting known as the "Breakfast Club." The purpose was to protect the political friends of the government at the expense of others, such as Skyway 127, who were applicants under the FIT Program following the rules.

83. Canadian Senator Bob Runciman, a longstanding former member of the Ontario Provincial Parliament, made the following statement about the deplorable behaviour of the government after this information became public in 2015. Writing in December 2015, he wrote:

> Mike Crawley, former president of the Liberal Party of Canada and senior adviser to former provincial Liberal leader Lyn McLeod, managed to secure nearly half a billion dollars in long-term electricity contracts for wind- power generation as president and CEO of AIM PowerGen Corp. It's also public knowledge that other well-connected Liberals, including one former MP, have profited mightily after securing green energy contracts**.**[15]

84. Another company that benefitted was Boulevard Associates Canada, Inc., which was owned by NextEra, which was a powerful donor and supporter of the Liberal Party administering the FIT Program through the Ministry of Energy. Boulevard Associates Canada had bid four projects under the FIT Program to provide energy to the West of

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[13] *First Session, 38th Parliament*, Legislative Assembly of Ontario, (25 November 2004), p.4461**, C-165.**
[14] *First Session 38th Parliament*, Legislative Assembly of Ontario, 25 November 2004, pp.4461-446, **C-165.**
[15] The Hon. Senator Bob Runciman, *Public Inquiry Needed on Green Energy Act*, Toronto Sun, 1 December 2015, **C-169.**

London. None of Boulevard Associates Canada's West of London projects ranked high enough to receive a FIT Contract because the Korean Consortium had monopolized most of that capacity in that zone. But, with the new rule changes, Boulevard Associates Canada was able to infiltrate the Bruce region and obtain FIT Contracts for all four of its failed West of London projects, further displacing Skyway 127 and its opportunity to obtain a FIT Contract under the program's originally-stated, "standardized" rules.

85. NextEra also benefited from Ontario's sudden changes to the FIT Program. In fact, it was NextEra that directly directed the Ministry of Energy to make those changes.

86. NextEra's projects were not ranked high enough to obtain FIT Contracts in West of London. On May 11, 2011, NextEra's Vice President personally met with high-level officials at the Ministry of Energy to lobby for a brief window to change their connection points before more FIT Contracts were awarded. Though the deadline to select a connection point long had passed under the FIT Program rules, the Ministry subsequently announced a connection point change window and delayed the award of FIT Contracts in Bruce.

87. Critically, the Ministry of Energy opened the connection point window for only five days. This was by design. Changing a connection point is a lengthy process, requiring extensive planning. It cannot be accomplished in five days. Thus, only projects owned by political allies like Boulevard Associates Canada and NextEra, who were given advance warranting that the connection point window was coming, could possibly have had sufficient time to change their connection points to allow them to bid in the Bruce region. Projects like Skyway 127, which did not know about the five-day change window until it was announced, would not and did not have sufficient time to make changes that would allow them to compete or preserve their place on the waiting list. Thus, Ontario, through its leaders at the Ministry of Energy, was successful in rigging the FIT Program, causing financial losses to foreign investors such as Skyway 127,

which relied on Ontario's misrepresentations that FIT Contracts would be awarded in accordance with the program's supposedly "standardized, fair, and open" procedures.

88. The foregoing allegations, and those set forth in greater detail below, are not mere conjecture. They are supported by new evidence and testimony from OPA insiders that only recently came to light during a hearing in a related action (*Mesa Power Group LLC v. Government of Canada*) and provided a glimpse into the Ministry's malleable, secretive, and unfair scheme to award FIT Contracts on a *quid pro quo* basis instead of under the FIT Program's rules and criteria. To make matters worse, the Ministry of Energy attempted to conceal and even destroy evidence of their malfeasance.

89. In summary, and as explained in this Memorial, there are four key measures that give rise to this claim:

(a) Ontario unfairly **manipulated the award of access to the electricity transmission grid**, resulting in unfair treatment to the Investment.[16]

(b) Ontario unfairly manipulated the program information under the FIT Program to the specific detriment of Skyway 127.[17]

(c) Ontario unfairly manipulated the awarding of Contracts under the FIT Program to Skyway 127's detriment.[18]

(d) Senior officials **improperly destroyed necessary and material evidence** of their internationally unlawful actions in an attempt to avoid liability for their misconduct.[19]

[16] Investor's Response to Bifurcation, ¶27, Notice of Arbitration, ¶¶58-67.
[17] Investor's Response to Bifurcation, ¶27, Notice of Arbitration, ¶83.
[18] Investor's Response to Bifurcation, ¶27, Notice of Arbitration, ¶¶60-68.
[19] Investor's Response to Bifurcation, ¶27, Notice of Arbitration, ¶¶84-89.

90. The meaning of the international standard of treatment in NAFTA Article 1105 is well known, and has been well canvassed by international tribunals, including NAFTA tribunals. In these proceedings, Canada purports to advance a meaning of the international law standard of treatment that is narrow and simply not in keeping with the text of the Treaty. Canada suggests a threshold standard of breach that is also inconsistent with the principles of state responsibility set out by the International Law Commission and by previous international investor-state tribunals. If Canada's approach were to be followed, there would be no effective protection for rule of law and fundamental fairness issues within the NAFTA.

91. Ministry of Energy Assistant Deputy Minister Sue Lo testified in the *Mesa Power* hearing that one of Ontario's goals for the FIT Program was to allow for a fair and open process,[20] [21]

92. In any event, a simple review of the facts of this claim indicates that, by any measure, there was a lot of "gaming" of the FIT Program by the Government Officials. Indeed, the treatment imposed by Canada upon the Investor was egregiously unjust and discriminatory and falls below the threshold for fair and equitable treatment, even under the standard as argued by Canada.

93. The same governmental actions also resulted in according special business access to contracts to other companies who received renewable FIT contracts through capricious, abusive and arbitrary acts taken by Ontario. These improprieties included the arbitrary and capricious application of the FIT Program rules and ranking criteria; and unfair rule changes designed to prefer certain favoured investments over ordinary

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[20] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.12-13, lns.21-4, and p.169, lns.5-7**, C-121.**

[21] Email from JoAnne Butler (OPA) to Sue Lo (Ministry of Energy) and Shawn Cronkwright (OPA), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 401 to ¶307, **C-017.**

applicants. What has become clear is that there is nothing about the nature of renewable power energy purchases in Ontario that were normal or ordinary.

94. The measures impugned in this claim are contrary to the core of modern international law, which is reflected in the obligations in Section A of NAFTA Chapter Eleven. The Investor relies on this law, which is the very reason why the NAFTA was put in place, on its signature in December 1992, by the NAFTA Parties.

95. The broader context of the conduct complained of in this dispute is that of a provincial government which has been repeatedly found to have engaged in political manipulation and interference in regulatory processes when it suited its own partisan interests. This systemic wrongful conduct culminated in the resignation of the then-Ontario premier in disgrace, after the exposure of attempts to frustrate an inquiry into the massive misuse of government funds to appease local interests through the deceptive withholding or destruction of subpoenaed documents related to another energy project in Ontario.[22] The Premier of Ontario had also gone to lengths such as proroguing the province's legislature to block a parliamentary inquiry.[23] The actions of this government received public and judicial censure. The Premier eventually resigned and his chief of staff was subjected to criminal conviction for the wanton destruction of thousands of government documents relating to Ontario energy policy.

96. Neither Skyway 127 nor Tennant had knowledge of Ontario's malfeasance, which first came to light with the public release of information arising from a NAFTA arbitration in *Mesa Power Group v. Canada*. Because of redactions in the pleadings, only a very small amount of information became publicly available on June 4, 2014. It would not be until August 15, 2015 when the first significant information first became available to the public with the redacted public release of post-hearing submissions from the *Mesa Power* NAFTA case.

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[22] Dalton McGuinty staffers broke law by deleting gas plant emails, CBC News, 5 June 2013, **C-183.**
[23] Kelly McParland, Kelly McParland: Here lies the wreckage of Dalton McGuinty's self-serving gas plant decisions, National Post, 9 October 2013, **C-184.**

97. The Claimant first became aware of the facts giving rise to the NAFTA breaches raised in this arbitration claim well after June 1, 2014.[24]

98. In the submissions that follows, Tennant will do the following:

(a) Articulate its view of the proper standard of treatment under NAFTA 1105, and the corresponding threshold of international responsibility.

(b) Demonstrate that the threshold of international responsibility appropriate to treaty-based investor protection.

(c) Demonstrate that Canada failed to act in accordance with the international standard of treatment with respect to the misadministration of the FIT Program and the actions taken by Ontario Ministry of Energy and other officials in the Government of Ontario.

(d) Demonstrate the basis for its contentions of systemic wrongfulness on the part of Ontario.

99. Tennant emphasizes that it is not challenging any laws of general application. Nor is it inviting the Tribunal to impugn the general standards of rule of law and administrative fairness that exist in the Canadian state. Tennant's claim is based specifically on Skyway 127's treatment under the FIT Project and the systemic actions of senior officials abusing the process. The standard of treatment asserted by Tennant applies to those acts of misconduct and would in no way put in question the normal or proper operation of Canada's laws, regulations, or policies.

[24]CWS-1 –- Witness Statement of John C. Pennie, ¶99. (**CWS-1**)

F. The Tribunal has jurisdiction to rule on these claims

100. As set out in below in this Memorial, the Tribunal has full jurisdiction to hear all the Investor's claims. The measures which gave rise to the claim arose within the three-year period before the filing of the Notice of Arbitration on June 4, 2017.

101. To meet this requirement under the NAFTA, the Investor was required to have both knowledge of the NAFTA breach and knowledge of the loss after June 1, 2014.

102. This Tribunal has jurisdiction to decide on all the issues raised in the Investor's claim. To this end, the Investor notes:

103. Canada clearly has given its consent to this arbitration and this consent is set out in the NAFTA. The issue of consent is not a question of jurisdiction but is a question of admissibility. In any event, the Tribunal need not bother to address Canada's consent complaint raised in its Statement of Defense,[25] no matter whether it be a question of jurisdiction or admissibility, There can be no question as the consent to arbitration is clearly present;

104. As set out below, Tennant is an American investor that owns and controls Skyway 127, an investment located in the territory of Canada.

105. The majority of the actions in this claim arise from actions taken by public officials of the Government of Ontario. As a matter of the NAFTA Treaty and as a matter of international law, Canada is responsible for the measures taken by these officials, including actions taken at their direction or by their agents.

106. Canada is also responsible for actions taken by the Independent Electricity System Operator ("*IESO*") as it is a state enterprise controlled by Ontario and the government of Ontario.

[25] Canada's Statement of Defense, ¶2.

107. Further, Ontario directs the operations of the Ontario Power Authority under the *Energy Act* by way of mandatory directives and directions. Such actions subject Canada to state responsibility for the actions of the OPA and the IESO.

108. The Investor has raised a claim under NAFTA Article 1116 and pleaded that the government measures at issue relate to the Investor or its investments and that these measures are inconsistent with obligations contained in Section A of NAFTA Chapter Eleven.

109. Ontario always had a responsibility to ensure that the obligations of the NAFTA were carried out by its organs, its agents, by those subject to its direction and by its state enterprises.

110. As further set out in the Jurisdiction section below, Ontario took steps to conceal public knowledge about its cronyism and misadministration of the FIT Program. It was only with the release of admissions from senior government officials occurring in the release of information from the *Mesa Power* arbitration that the Investor could have obtained knowledge of the breaches of the NAFTA outlined in this claim. Information regarding systemic steps taken by senior government officials to protect the commercial opportunities of International Power Canada to obtain FIT Contracts was not made public until the public release of the *Mesa Power* Investor's Post Hearing brief on the August 15, 2015. Before this time, Canada suppressed this information from public release, and Ontario continued in its policy to conceal it.

111. Canada nevertheless argues that Skyway 127 should have known about Ontario's violations even though Canada and Ontario concealed and suppressed public disclosure of damaging information about its cronyism and unfair and arbitrary control of the FIT Program. This claim was brought within three years of the release of this incriminating evidence and based on those admissions. As a result, there can be no question that this claim was brought in a timely manner and is entirely consistent with the requirements of NAFTA Article 1116.

1. Tennant Energy is an American Investor

112. The Investor, Tennant, is a California Limited Liability Corporation.[26] Tennant directly owns and controls Skyway 127, a wind project located in the province of Ontario, Canada. Skyway 127 was designed to produce 100 MW of wind power.

113. Tennant is the successor in interest to two U.S. nationals—namely, General Electric Energy LLC ("*GE Energy*") and John Tennant—who transferred their equity in Skyway 127 to Tennant. GE is a limited liability corporation incorporated in the state of Delaware, and Mr. Tennant is a US citizen.

114. GE Energy acquired its initial equity investment in Skyway 127 as of November 25, 2009.[27]

115. John Tennant acquired his initial equity investment in Skyway 127 on June 20, 2011. Mr. Tennant held this interest as a bare trustee and then transferred the shares to his holding company, that would eventually be renamed Tennant Energy.[28]

116. Tennant acquired [redacted] of the shares in Skyway 127 on January 15, 2015, in a corporate reorganization.[29]

117. As discussed further in the Jurisdiction Section below, the NAFTA claim first arose under NAFTA Article 1116 on August 15, 2015. At that time, Tennant Energy was effectively controlling Skyway 127, and it effectively owned [redacted] of the shares of Skyway 127.[30]

118. Tennant Energy owns and controls the investment, Skyway 127. At all material times in respect to this claim, Tennant Energy, GE Energy, Tennent, and John

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[26] Articles of Organization, 10 September 2001, **C-111.**
[27] Shareholder's Ledger Skyway 127, 25 November 2009, **C-118.**
[28] Shareholder's Ledger Skyway 127, 20 June 2011, **C-117.**
[29] Shareholder's Ledger Skyway 127, 15 January 2015, **C-115.**
[30] CWS-1 – Witness Statement of John C. Pennie ¶66. (**CWS-1**)

Tennant have been American nationals. Since June 2011, Tennent Energy has effectively controlled the investment.

119. [redacted] was a Dutch energy investment corporation with extensive experience in the development of wind power in Europe. The company was keenly interested in renewable energy development and the Ontario Feed In Tariff program. [redacted] had worked on a vast number of wind projects in Europe, America, and Canada. [31]

120. **GE Energy LLC Share Ownership in Skyway 127:** GE Energy was a US corporate subsidiary of General Electric. GE Energy was an original partner in the Skyway 127 project. At the time of the making of the FIT Application in 2009, there was a global scarcity of wind turbines. GE Energy was able to rely upon General Electric's financial and technological capabilities. GE was to be the supplier of our wind turbines.[32]

121. On Nov 25, 2009 [redacted] gave [redacted] common shares to GE Energy.[33] Then on June 9, 2011, [redacted] gave [redacted] common and common B shares to GE Energy.[34]

122. GE Energy acquired its equity in Skyway 127 as follows:

(a) GE physically received shares evidencing its [redacted] interest in the share equity in Skyway 127 on November 25, 2009.[35] On November 24, 2009, General Electric, the corporate parent of GE Energy issued a letter of guarantee to the Ontario Power Authority for the entire project. The Guarantee confirmed its [redacted] interest in the Skyway 127 project.[36]

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[31] CWS-1 – Witness Statement of John C. Pennie ¶52. (**CWS-1**)
[32] CWS-1 – Witness Statement of John C. Pennie ¶¶54-56. (**CWS-1**)
[33] Shareholder's Ledger, Skyway 127, 25 November 2009, **C-118.**
[34] Shareholder's Ledger, Skyway 127, 9 June 2011, **C-116.**
[35] Shareholder's Ledger, Skyway 127, 25 November 2009, **C-118.**
[36] GE Corporate Guarantee, 24 November 2009, **C-030.**

(b) GE Energy acquired a further [redacted] interest in the share equity in Skyway 127 on June 9, 2011.[37]

123. John **Tennant's Share Ownership in Skyway 127:** Derek Tennent was the President of Skyway Energy Inc. ("*Skyway 127*"). Skyway 127 was an Ontario business corporation. Derek Tennent and John Pennie were two of the original directors of Skyway 127.[38] Derek Tennent is the brother of Napa, California-based John Tennant.

124. John Tennant is an American citizen.[39] He acquired his brother Derek's [redacted] shares in Skyway 127 on June 20, 2011. Derek's interest was held in his holding company, [redacted][40]

125. Derek Tennant was the President of Skyway 127 Energy Inc and worked on projects with Windrush Energy, an Ontario wind developer, and had a financial interest in this project through [redacted].[41] [redacted] was an initial investor in the Skyway 127 project.

126. Tennant Energy was initially a tourism-based investment operated by Jim Tennant. Jim's brother John Tennant is a US citizen, resident in California. John Tennant held the Skyway 127 shares as a bare trustee and then used the existing California limited liability corporation to hold the investment in Skyway 127.[42]

127. After that, the shares were registered into the holding company, then known as Tennant Travel Services, LLC.[43] This company was later renamed Tennant Energy in

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[37] Shareholder's Ledger, Skyway 127, 9 June 2011, **C-116.**
[38] Skyway 127 Ontario Incorporation Documents and initial directors' information, **C-223**
[39] John H Tennant US Citizenship Document, 19 August 1993 to 14 September 2019, **C-119.**
[40] Shareholder's Ledger, Skyway 127, 20 June 2011, **C-117.**
[41] CWS-1 – Witness Statement of John C. Pennie ¶46. (**CWS-1**)
[42] CWS-1 – Witness Statement of John C. Pennie ¶¶48-49. (**CWS-1**)
[43] Shareholder's Ledger, Skyway 127, 20 June 2011, **C-117.**

2015. Tennant Energy's registered office is at 27 Edgefield Ct, Napa, California, 94558.[44]

128. Later in 2011, John Tennant received a further [redacted] interest in the Skyway 127 share equity on December 30, 2011.[45] At this time, Tennant Energy held a [redacted] interest in the Skyway 127 wind project. On January 15, 2015, Tennant Travel Services, LLC received [redacted] of the shares in Skyway 127.[46] Tennant Travel Services renamed itself after receiving these shares.

129. John Tennant, Jim Tennant, and John Pennie are members of Tennant Energy's Board of Management. Derek Tennant was the President of Skyway 127 and John Pennie was a member of the Skyway 127 board.[47]

130. The Skyway 127 wind project was very desirable. Other competitors for FIT Contracts were interested in obtaining this wind project. Samsung and KEPCO (the Korean Consortium) were interested in obtaining it. A land swap agreement was entered into with the Korean Consortium's local wind partner (Pattern Renewable Holdings Canada ULC) on December 10, 2010 to acquire the Skyway 127 project. This deal was subsequently terminated by Pattern.[48] When this deal fell apart, [redacted] was no longer prepared to continue the project, and after a debt settlement between [redacted] and GE, GE became a [redacted] partner on December 30, 2011.[49]

131. GE Energy and the remaining Skyway 127 investors patiently waited for a resolution of the FIT Contract. GE Energy wanted to supply the wind turbines to the project and supported the development of this renewable energy project.

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[44] CWS-1 – Witness Statement of John C. Pennie, ¶49. (**CWS-1**)
[45] Shareholder's Ledger, Skyway 127, 30 December 2011, **C-114.**
[46] Shareholder's Ledger, Skyway 127, 15 January 2015, **C-115.**
[47] CWS-1 –- Witness Statement of John C. Pennie, ¶50. (**CWS-1**)
[48] CWS-1 –- Witness Statement of John C. Pennie, ¶59. (**CWS-1**)
[49] CWS-1 –- Witness Statement of John C. Pennie, ¶59. (**CWS-1**)

132. Meanwhile, GE Energy's operations were wound up in a major global corporate restructuring of General Electric.[50]

133. Tennant Energy acquired a more significant position in the Skyway 127 project in January 2015, In June 2016, Tennant acquired the remaining shares held by GE Energy in exchange for an irrevocable commitment to purchase wind turbines from General Electric.[51]

134. Tennant Energy thus is the successor in interest to the equity investments of I.Q. Properties and GE Energy. Effectively Tennant Energy owned and controlled Skyway 127 before the date when the Investor knew of the breach of the NAFTA that give rise to this claim. Tennant Energy owned and controlled it later. [52]

135. Tennant Energy and GE Energy were always US corporations at all times during the period that they held investments in Skyway 127. [53]

136. The predecessors in interest of Tennant Energy owned and controlled most of the shares of the company before damage was suffered by the Investment, and before the Investor knew of the breach of the NAFTA that give rise to this claim.

137. **Windrush Group** was the wind developer behind Skyway 127. Windrush Group was based in Ontario. John C. Pennie was a senior executive responsible for the day to day operations of the Skyway 127 Wind Power project at issue in this NAFTA Arbitration.

138. Windrush Group developed and identified wind development sites in Ontario. It obtained land leases from local landowners and site plans. It would then continue the project with the FIT Application filing, or it would sell the project to a third party.

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[50] CWS-1 –- Witness Statement of John C. Pennie, ¶64. (**CWS-1**)
[51] CWS-1 –- Witness Statement of John C. Pennie, ¶67. (**CWS-1**)
[52] CWS-1 –- Witness Statement of John C. Pennie, ¶66. (**CWS-1**)
[53] CWS-1 –- Witness Statement of John C. Pennie, ¶69. (**CWS-1**)

Windrush Group developed many wind farm projects in Ontario that were sold before completion. [54]

139. Windrush Group developed the Flesherton Wind Energy Inc., a 10 MW (RESOP 10042, March 6, 2007) project, known as Silver Spring Wind. It was developed to the Evaluation Service Report (ESR) approval stage and then sold to Energy Farming.[55]

140. Windrush Group sold two other projects to Energy Farming. Skyway 124 Windrush Energy Inc was a 10 MW (RESOP 10480, March 26, 2008) and Skyway 8 Wind Energy Inc, another 10 MW – (RESOP 10030, March 6, 2007). The Skyway 8 Project was eventually completed with the installation of two Vesta 2.0 MW turbines by Capstone Infrastructure. [56]

141. The 100 MW Skyway 9 Wind project was a large project for which the investors assembled 4,400 acres of land leases. Windrush Group entered into a letter of agreement to sell this site to the Samsung Consortium (Pattern Renewable Holdings Canada ULC) on July 26, 2010. They paid a large deposit to purchase the company but did not go through with it when they decided to develop an adjoining project due to transmission constraints in the Orangeville areas. As a result, the Skyway 9 project did not proceed. [57]

142. Another project, Skyway 125 Wind Energy Inc., a 10 MW project (F-000579-WIN-130-601 April 20, 2010), was unsuccessful. [redacted] investment in the project was acquired by GE Energy on August 23, 2011. However, the project was unsuccessful because the investors subsequently failed to meet a FIT Contract deadline.[58]

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[54] CWS-1 –- Witness Statement of John C. Pennie, ¶¶16-18. (**CWS-1**)
[55] CWS-1 –- Witness Statement of John C. Pennie, ¶18(a). (**CWS-1**)
[56] CWS-1 –- Witness Statement of John C. Pennie, ¶18(b). (**CWS-1**)
[57] CWS-1 –- Witness Statement of John C. Pennie, ¶19. (**CWS-1**)
[58] CWS-1 –- Witness Statement of John C. Pennie, ¶20. (**CWS-1**)

143. Windrush Group successfully the Skyway 126 Wind Energy Inc., a 10 MW wind project (F-000606-WIN-130-601 April 23, 2010), was sold to a public company, Wind Works Power Canada Inc. on October 19, 2009. The project was successfully developed into a wind project in 2016 under a joint venture development with Capstone Infrastructure. [59]

144. Windrush Group's best wind project was the 100 MW Skyway 127 project which is the subject of this arbitration.

2. The Respondent

145. Canada is a Party to the NAFTA. The Province of Ontario is a subnational government of Canada. Canada is responsible for Ontario's observance of the NAFTA pursuant to NAFTA Article 105.

146. Many of the internationally wrongful measures in this arbitration were taken by officials of the Government of Ontario. Others were taken at the direction of the Government of Ontario. As a matter of International Law, Canada is internationally responsible for these actions taken by Ontario. Ontario is also responsible for instrumentalities carrying out delegated governmental or other authority under the established principles of international law and practice, including the International Law Commission Draft Rules on State Responsibility.[60]

147. The Ontario Minister of Energy directs Energy policy in Ontario through the Ministry of Energy. The Minister of Energy directed a controlled instrumentality, the OPA to implement the FIT Program. This implementation took place by mandatory directives from the Ministry of Energy. As a matter of Ontario law, the OPA was

[59] CWS-1 –- Witness Statement of John C. Pennie, ¶21. (**CWS-1**)
[60] See *ILC Draft Articles on State Responsibility* at Articles 4,5,8 and 11, **CLA-185**,

required to carry out the directions and directives received from the Minister of Energy.[61]

148. As directed by the Ministry of Energy under powers conferred by Ontario law, the OPA is responsible for implementing the FIT Program, including the setting of prices and the administration of contracts. The defined power purchase rates are paid for under the contracts between the OPA and electricity generators.[62]

149. The measures at issue that Ontario took, either directly by its Ministry of Energy, or at the direction of its Ministry of Energy by the OPA, were under mandatory provisions of Ontario's *Electricity Act*.

150. As a result of the actions by the Government of Ontario, Canada failed to meet its international law obligations contained in Chapter Eleven of the NAFTA. These actions resulted in harm to the Investor.

G. The FIT Program

151. In Ontario, electricity is privately generated and distributed. Energy is instantaneously connected from the energy generator to the Ontario Transmission Grid and then to consumers.

[61] The Mesa Power NAFTA Tribunal concluded that the OPA and the IESO (Independent Electricity System Operator) were state enterprises as defined by NAFTA Article 1505 (See *Mesa Power Group, LLC v. Government of Canada* (PCA Case No. 2012-17), Award ("*Mesa, Award"*), 24 March 2016, ¶356-357*,* **CLA-232.** However, when the OPA is directed to take an action (as set out in the Ontario Energy Act, then the state responsibility directly flows to Ontario pursuant to ILC Article 8. Actions taken by a state enterprise give rise to claims under NAFTA Article 1116 and for the avoidance of doubt, are specifically pleaded as included within this arbitration claim. See *ILC Draft Articles on State Responsibility* at Articles 4,5,8 and 11, **CLA-185**, While the Investor believes that the wrongful conduct in this claim is covered through Ontario's direct responsibility (and thus Canada's under NAFTA Article 105), the Investor reserves the right to amend its claim to include a claim under NAFTA Article 1503(2) in the event the Tribunal considers it necessary to fully address the wrongful actions taking place in this claim, including the systemic acts described in this Memorial.

[62] OPA, *FIT Rules Version 1.5*, 3 June 2011, ¶1.2, **C-129.**

152. Ontario's government launched its FIT Program in 2009.[63] The various government directives, orders, rules, programs, and practices that comprised the FIT Program are set out in Annex A to this Claim.

153. Through long-term fixed-price contracts with the OPA, the Ontario FIT Program guaranteed electrical grid access to renewable energy producers. As a green energy supplier, Tennant Energy needed to enter into contractual relations with the OPA to have the opportunity to conduct business with the local distribution companies and the transmission asset owners with whom electricity generators benefited from connecting to the network.

154. All renewable energy produced by a generator under a FIT Contract is supplied into the Ontario Transmission Grid.

155. A successful applicant under the FIT Program would receive a Power Purchase Agreement by way of a FIT Contract from the OPA, which guaranteed a set purchase price over twenty years.[64] This guaranteed purchase price was based on 13.5 cents per kilowatt-hour plus escalators.

156. The Bruce to Milton Transmission Project was a key element to enable power production in the Bruce Region under the FIT Program. This project was designed to allow the OPA to offer contracts under the FIT Program in the region from Bruce County to Milton, Ontario. The process was to offer 1,200 MW of renewable energy contracts within this region of Ontario.

157. A proponent will only be offered a FIT Contract if there is sufficient transmission capacity available to connect the project. To determine whether the necessary connection resources were available to the applicant, the OPA provided tools designed to identify connection availability. Provided that the project was not exempt

[63] OPA, *FIT Rules Version 1.1*, 30 September 2009, ¶1.1, **C-162.**
[64] Feed In Program, Program Overview, August 2010, ¶6.4, **C-127.**

from the OPA's project capacity allocation, then all proposed projects were to be assessed within sixty days of a complete application.

158. On November 27, 2009, Skyway 127 initiated an application for 100 MW of wind power in the Bruce Transmission zone during the launch-period of the FIT Program.[65]

159. On December 21, 2010, the OPA issued its Launch round priority ranking, and indicated that priority ranking was based on the acceleration – shovel-readiness criteria.[66] Skyway 127 ranked in the sixth priority position in the Bruce Transmission area based on the publicly released rankings. The Ontario Power Authority stated that there was 1200 MW of electricity transmission available to projects in the Bruce Region.[67] The five projects ranking in priority ahead of Skyway 127 would consume only 280 MW of this 1200 MW of available transmission access. Skyway 127 thus had a very successful ranking.[68]

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[65] Skyway 127 FIT Application, 27 November 2009, p.3, **C-026.**

[66] Feed in Tariff Program, Program Update, *Priority ranking for First Round FIT Contracts*, 21 December 2010, **C-128.**

[67] OPA, *Priority ranking for First Round FIT Contracts*, 21 December 2010, **C-131;** *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, ¶892, **C-133;** *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, **C-201;** *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, Screenshot at 0:49:19, **C-209.**

[68] OPA, Priority ranking for First Round FIT Contracts, 21 December 2010, **C-131.**

II. THE GENERAL NATURE OF THE CLAIM

A. Unfair Special Opportunities for International Power Canada

160. At the *Mesa* NAFTA hearing, it was revealed that special business interests were protected to the detriment of investments of foreign investors like Skyway 127. Ontario government officials took steps to give better treatment to selected privileged Canadian FIT proponents to protect these projects from the set-aside that was going to be provided to the Korean Consortium.

161. In the *Mesa NAFTA* hearing, the post hearing briefs confirm otherwise-secret testimony with statements from senior Ontario government officials. Ministry of Energy Assistant Deputy Minister Sue Lo admitted that there was not an "even playing field" between all the FIT proponents.[69]

162. When asked about an email the Assistant Deputy Minister had written about the administration of the FIT Program, this senior Ontario official confirmed that two projects owned by International Power Canada were given special treatment to protect against the effects of the last minute FIT Program changes (that ultimately would He had a history of close collaboration with political leaders in the Ontario Liberal government. Mr. Crawley was a former political staffer, and an officer with the Liberal Party, at the time he was the former President of the Liberal Party and a long-time Liberal Party operative supporting the Liberal Party at the federal and provincial level.[70] Indeed, Mr. Crawley boasted of his political connections on his website.[71]

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[69] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶110, **C-017.**

[70] LPC Biennial Convention Delegate Guide to the Candidates, 2012, p.3, **C-168;** *Mesa Power Group v. Government of Canada*, Hearing Transcript Day 6: Closing Statements (Public Version), 31 October 2014, p.284, lns.11-16, **C-125.**

[71] Meet Mike, mikecrawley.ca, 2012, **C-166.**

163. Evidence obtained from senior Ontario officials administering the FIT Program confirmed that the FIT Program rules were secretly modified in such a way as to guarantee that IPC received FIT Contracts from the government.[72]

164. Even more astonishing is the fact that, less than a decade before, the Liberal government helped his investments by shielding IPC's projects from the Korean Consortium set-aside, Mr. Crawley worked at a different renewable energy company and obtained yet another renewable power contract from the Liberal Government.[73] This awarding of the contract resulted in public opprobrium from the Leader of the Opposition in the Ontario legislature.[74]

165. The Investor's Post-Hearing Brief in the *Mesa Power* action disclosed evidence of covert meetings of powerful officials providing direct protection afforded to Mr. Crawley's company by the government.

166. Skyway 127 was the most highly ranked project in the FIT Project process described below. The OPA released a public list of projects tin December 2010, setting out the projects that had available transmission access.[75] This was known as the "dry run." Companies with projects within the available amount of transmission access would obtain FIT Contracts when they were awarded. Skyway 127 had placed into the group of successful candidates during the "dry run," but it did not award the FIT Contract.

167. One of the purposes of the "dry run" was to determine the projects that would receive contracts under the OPA's preferred scenario. In an email to OPA CEO Colin Andersen, Shawn Cronkwright (Director, OPA, Renewables Procurement) expressed

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[72] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶¶145-147, **C-017.**
[73] First Session 38th Parliament, Legislative Assembly of Ontario, 25 November 2004, p.4461, **C-165.**
[74] First Session 38th Parliament, Legislative Assembly of Ontario, 25 November 2004, pp.4461-4465**, C-165.**
[75] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶149, **C-017.**

concerns about providing the results to the Ministry of Energy.[76] Ultimately, the decision was made for sharing the results with the Ministry only if necessary during a meeting, and on a one-time-only basis.[77] In fact, the dry run results were so sensitive that they were marked with the notation that they were not to be shared with the Minister's Office. Despite this restriction, Mr. Cronkwright admitted under oath at the Mesa Power NAFTA hearing that the OPA shared the results of the FIT standings secretly with the Energy Ministry.[78]

168. Information first became available to the public about the special treatment provided to International Power Canada with the release of the Investor's Post-Hearing Brief in the *Mesa Power* arbitration. The non-confidential version of this pleading information was published online by the Permanent Court of Arbitration website on **August 15, 2015.**[79] The Post Hearing Brief confirmed that senior government officials admitted that the FIT Program was not fairly operated and that 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.[80]

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[76] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), 13 April, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 171 to ¶153, **C-182.**

[77] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), 14 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 172 to ¶153, **C-182.**

[78] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Testimony of Shawn Cronkwright, Hearing Transcript Day 4 at p. 56: lns.2-9. **C-122**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No, 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶155, **C-017.**

[79] August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing a number of post-hearing procedural documents after the end of day on August 14, 2015, **C-124.**

[80] Notice of Arbitration, ¶107; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶16, **C-017**.

169. The public version of the *Mesa Power* Investor's Post Hearing Brief states: "International Power Canada, a Canadian company, also benefitted from the rule changes."[81]

170. The *Mesa Power* Investor's Post-Hearing Brief earlier confirms that:

> "The government of Ontario protected a Canadian FIT proponent's [IPC'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."[82]

171. As the *Mesa Power* Investor's Post-Hearing Brief states, "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," including Skyway 127.

172. There can be no question that Skyway 127 was not treated with the same process as International Power Canada. In comparison to the special protection and business opportunities granted to IPC, Tennant Energy was treated unfairly.[83]

173. Ontario's protection of IPC was for personal and political purposes and not because of the objective ranking and the operation of the FIT Program. The Ontario Government wanted to reward their friends – a valued political ally. In so doing, Ontario ignored the basic principles of fairness and due process to achieve that desired result.

174. IPC's projects received FIT contracts from the transmission allotment that would have been available to Skyway 127. Without similar protection from Ontario, Skyway 127 lost its position in the queue and thus its proper opportunity for FIT contracts.

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[81] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶464, **C-017**.
[82] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶147, **C-017**.
[83] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶158, **C-017**.

175. Information first became available to the public about the special treatment provided to International Power Canada with the release of the Investor's Post-Hearing Brief in the *Mesa Power* arbitration. The redacted public hearing transcripts and the video from the *Mesa Power* NAFTA hearing was available to the public on **April 30, 2015**.[84] The non-confidential version of this submission was first published online by the Permanent Court of Arbitration on its Mesa Power website on **August 15, 2015.**[85] The Post Hearing Brief confirmed that senior government officials admitted during the hearing that the FIT Program was not fairly operated and that blatant protection was afforded to International Power Canada.[86]

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> "The government of Ontario protected a Canadian FIT proponent's [IPC's] projects from a Korean Consortium set aside. It ensured that there would be

[84] April 30, 2015 Letter from Hanno Wehland, Legal Counsel, PCA to counsel for disputing parties, regarding publication of public video recordings and public transcripts have now been uploaded to the PCA's website and can be accessed at the following web address. The letter also references the issuance of a news release by the PCA, but that news release is no longer available on the PCA website, **C-135.**

[85] August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing a number of post-hearing procedural documents after the close of business on August 14, 2015 - namely i) Claimant's Statement of Costs dated 3 March 2015 ii) Respondent's Submission on Costs dated 3 March 2015 iii) Claimant's Reply Statement of Costs dated 26 March 2015 iv) Respondent's Reply to Claimant's Submission on Costs dated 26 March 2015 v) Claimant's Submission on the Bilcon v. Canada Award dated 14 May 2015 (Public version) vi) Respondent's Observations on the Bilcon v. Canada Award dated 14 May 2015 vii) United States of America's letter to the Tribunal dated 14 May 2015 viii) Mexico's letter to the Tribunal dated 14 May 2015 ix) Claimant's letter to the Tribunal re Non-Disputing Parties' Comments on Bilcon v. Canada Award dated 19 May 2015 x) Second Submission of the United States of America dated 12 June 2015 xi) Second Submission of Mexico dated 12 June 2015 xii) Claimant's Response to the Second Submissions of the Non-Disputing Parties dated 26 June 2015 (Public version) xiii) Respondent's Response to the Second Submissions of the Non-Disputing Parties dated 26 June 2015, **C-124.**

[86] Notice of Arbitration, ¶107; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶16, **C-017.**

[87] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶464, **C-017.**

> capacity in the West of London to accommodate IPC's projects under the FIT program before reserving capacity for the Korean Consortium."[88]

178. As the Post-Hearing Brief states, "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," including Skyway 127.

179. There can be no question that Skyway 127 was not treated with the same process as International Power Canada. In comparison to the special protection and business opportunities granted to IPC, Tennent Energy was treated unfairly.[89]

180. Ontario's protection of IPC was for personal and political purposes and not because of the objective ranking or the legitimate operation of the FIT Program. The Government wanted to reward their friends – a valued political ally. In so doing, Ontario ignored the basic principles of fairness and due process to achieve that desired result.

181. As outlandish as the impropriety between International Power Canada and the Government of Ontario sounds, it is even more shocking to realize that this is **not** the first time that the Provincial Ontario Liberals awarded a lucrative contract to a company run by well-known and connected Liberal insider Mike Crawley. Quite simply, the Ontario Liberal government has provided Mike Crawley by special treatment on several occasions. This special treatment flies directly in the face of due process and fair and open procurement processes.

182. Mike Crawley was elected as the President of the Federal Liberal Party of Canada in 2012.[90] Before that, he served as the President of the Liberal Party of Canada

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[88] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶147, **C-017.**

[89] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶158, **C-017.**

[90] Liberals elect Mike Crawley as new party president, National Post, 15 January 2012, **C-164.**

(Ontario) and in other capacities that brought him into close connection with the political leadership in Ontario.[91]

183. Additionally, Mr. Crawley had extensive experience with the federal and provincial Liberals includes stints as the Vice-President of the Liberal Party of Canada, a staffer on Parliament Hill, a staffer in the Ontario Liberal Party Leader's Office, a Riding Associate Executive, and the former top assistant to former Ontario Liberal leader Lyn McLeod.[92] He also served as the president of the youth wing of the Ontario Liberal Party. Mike Crawley is, by every definition of the terms, a deep and seasoned Liberal political insider. His connections with both the Ontario provincial and federal Liberal parties are extensive. [93]

184. In 2004, Mr. Crawley was the president of AIM PowerGen. AIM PowerGen, was awarded a new $475 million energy contract by the Ontario Liberal government. Opposition politicians decried the deal as a massive favor done for a fellow Liberal insider.[94] The deal and the surrounding circumstances present a clear and indisputable picture:

185. In 2004, the Ontario Liberal Government bypassed due process and fairness to award a lucrative contract to a Liberal insider. The Ontario Liberal government acted capriciously and unfairly in order to ensure that their political ally, Mike Crawley, gained at the expense of hard-working qualified, but otherwise ordinary bidders.

186. In November 2004, the Ontario Liberal Government awarded AIM PowerGen's Erie Shores Wind Farm a 20-year, $475 million wind energy contract. As part of the contract, the fixed a price for the energy was set at eight cents per kilowatt hour, roughly 60% higher than the fixed price consumers paid at the time. Already,

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[91] Liberal Party of Canada (Ontario) 2010 Annual General Meeting, 2010, **C-167.**
[92] LPC Biennial Convention Delegate Guide to the Candidates, 2012, **C-168.**
[93] Liberal insider gets wind-power contract, CBC News, 26 November 2004, **C-163.**
[94] Liberal insider gets wind-power contract, CBC News, 26 November 2004 **C-163.**

opposition politicians viewed the deal was viewed as being unreasonably rich and unnecessarily broad.

187. Worse still, the Erie Shores Wind Farm appears not to have followed the Request for Proposal guidelines. The RFP guidelines specified that bidders were not to have contact with decision makers during the RFP process. The RFP was issued on June 24 and closed on August 25. Within that timeframe, on July 27, Mr. Crawley sent an email to various persons encouraging their attendance at the energy minister's August 23rd fundraiser at $5000 a seat. These facts paint quite the disturbing story.

188. The Government of Ontario eschewed fairness and due process to benefit a Liberal elite in 2004. They did so again in 2013. This is a pattern. These are not one-off examples of impropriety. The Ontario Liberal government under former Premiers Dalton McGuinty and Kathleen Wynne had a habit of benefitting companies and individuals who they had close personal and political ties to.

189. In both 2011 under the FIT, and again in 2013, the Ontario government and its agencies engaged in manifestly unfair policies. Ontario did not act in good faith. Ontario acted capriciously and with an abuse of process. Honest bidders lost. And local insiders, like Mike Crawley, won by obtaining unfair preferential access to lucrative contracts through public tendering processes.

190. Even more astonishing is the fact that Mr. Crawley was able to trade on his political connections when IPC purchased AIMCO after the first FIT Contract was awarded, and then obtained yet another renewable power contract from the Liberal Government, this time resulting in public opprobrium from the Leader of the Opposition in the Ontario legislature.[95]

[95] First Session, 38th Parliament, Legislative Assembly of Ontario, 25 November 2004, pp.4461-4465, **C-165.**

191. And when the special secret benefits to IPC became known in 2015 after the information from the *Mesa Power* hearing became public, political figures were astonished.

192. Canadian Senator Bob Runciman, a longstanding former member of the Ontario Provincial Parliament, made the following statement about the deplorable behaviour of the government after this information became public in 2015. Writing in December 2015, Senator Runciman wrote:

> Mike Crawley, former president of the Liberal Party of Canada and senior adviser to former provincial Liberal leader Lyn McLeod, managed to secure nearly half a billion dollars in long-term electricity contracts for wind- power generation as president and CEO of AIM PowerGen Corp. **It's also public knowledge that other well-connected Liberals, including one former MP, have profited mightily after securing green energy contracts."**[96]

B. If there was Transmission, Ontario had to issue FIT Contracts

193. Ontario explicitly promised FIT Program Applicants that there would be transmission available for all applicants who met economic and technical criteria of the Program. The December 2009 FIT Program announcement stated:

> 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.[97]

194. During the *Mesa Power* Hearing, this clear and express obligation on Ontario to make transmission capacity available to FIT Applicants was clear. The Investor's Post

[96] The Hon. Senator Bob Runciman, *Public Inquiry Needed on Green Energy Act*, Toronto Sun, 1 December 2015, **C-169.**

[97] FIT/Micro FIT Announcement, 15 December 2009, p.3, **C-175.**

Hearing brief indicates that the issue was described as "No ability to hold capacity back").[98]

> 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.[99]

195. The public version of the *Mesa Power* Investor's Post-Hearing Brief confirms that the Government of Ontario was aware that there was even more transmission available in the Bruce Transmission zone than the 1200 MW initially reported as being available before it decided to reduce the amount of available transmission in the Bruce Region:

> 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. [100]

196. The OPA recognized the nature of the legitimate expectations that were created about this announcement for FIT Proponents under the Ontario Government's energy

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[98] Day 3 Part 4 Hearing Video (Public Version), Discussed at 0:27:35: ("No ability to hold capacity back"), **C-201**; referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017**.

[99] Mesa Power Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017**: Ministry of Energy presentation, "DRAFT ECT Design Considerations", p.8 ***[CONFIDENTIAL]*** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), Discussed at 0:27:35: ("No ability to hold capacity back"), **C-201**; referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017;** Ontario Power Authority Draft Presentation, 'Implications of the Economic Connection Test', 8 March 2011, p.3 ***[CONFIDENTIAL]***, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), **C-201**; *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, Screenshot at 0:36:43, **C-216**: ("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"); referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017.**

[100] *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, **C-201;** *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, Screenshot at 0:36:43, **C-216**: Also Referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017.**

plan. The OPA promised investors in the FIT Program that Ontario would award all available transmission capacity through the FIT program to induce them to invest,[101]

1. The OPA warned the government about transmission cuts in the Bruce

197. The June 2011 Ontario Ministry Direction to reduce the amount of available transmission for the FIT Program went entirely against FIT Program Proponent expectations including those of Skyway 127.[102]

198. According to testimony at the Mesa Power NAFTA Hearing, it was not within the OPA's Power to restrict the contract awards without a mandatory order from the government of Ontario ordering it to reduce transmission access. Canada's witnesses at the *Mesa Power* hearing admitted that this was why the OPA needed a Direction.[103]

199. Had Ontario issued FIT Contracts for available transmission, Skyway 127 would have obtained a FIT Contract. Any additional transmission capacity would have gone to Skyway 127 as it was the next project in the priority queue.

200. Had Ontario not diverted 300 MW of the available transmission in the Bruce transmission region to the West of London Region to facilitate a FIT Contract for IPC,

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[101] Referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017;** FIT/Micro FIT Announcement, 15 December 2009, p.3, C-175 Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, 25 February 2010 [CONFIDENTIAL], referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Mesa Power Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017**: Ministry of Energy presentation, "DRAFT ECT Design Considerations", p.8 [CONFIDENTIAL] referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), Discussed at 0:27:35: ("No ability to hold capacity back"), C-201; referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017;** Ontario Power Authority Draft Presentation, 'Implications of the Economic Connection Test', 8 March 2011, p.3 ***[CONFIDENTIAL]***, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, **C-201**; *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, Screenshot at 0:36:43, **C-216**.

[102] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Anderson, CEO, Ontario Power Authority, 3 June 2011, **C-176.**

[103] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Hearing Transcript Day 4 (Public Version): Testimony of Shawn Cronkwright, 29 October 2014, p.80, lns.19-24, **C-122.**

Skyway 127 would have obtained a FIT Contract. Skyway 127 was the next project in the priority queue.

201. This breach of legitimate expectation was further to the impropriety of removing transmission that should have been available in the Bruce transmission zone and giving new business opportunities to political cronies who had failed FIT Launch period applications in entirely different transmission zones.

C. The Korean Consortium's Green Energy Investment Agreement

202. On January 21, 2010, two Korean-controlled companies, Samsung C&T Corporation and Korea Electric Power Corporation, signed a $7 billion green energy investment agreement with Ontario's Premier and with Ontario's Minister of Energy (the Agreement is known as the Green Energy Investment Agreement).[104] The secretly negotiated GEIA granted the Korean Consortium 2500 MW of privileged transmission access for renewable energy generated projects anywhere in Ontario. The existence of the agreement was public, but its terms and conditions were kept secret. The secret agreement granted Samsung C&T and Korea Electric Power Corporation significantly better access to renewable energy transmission and generation than to other energy providers in the province of Ontario including other companies participating in the FIT Program.

203. The Korean Consortium was able to obtain FIT Contacts for their projects under the terms of the GEIA rather than under the terms of the FIT Program.

1. Delay and the Korean Consortium's Predatory Activity

204. In April 2010, the Ontario Power Authority awarded FIT Contracts to FIT Proponents in all Ontario Transmission zones other than the Bruce and the West of London zones. Skyway 127's projects did not receive a contract in this round at this

[104] Samsung C&T Press Release, 21 January 2010, **C-132**. The Press release also indicates that Samsung C&T is currently engaged in renewable energy projects in Korea, Italy, Greece, Turkey, Costa Rica and the United States.

time because all FIT Contract awards in the Bruce zone were delayed. Two more stages of awarding contracts were planned but a proponent required transmission capacity and an availability tests still to be conducted, such as a Transmission Availability Test ("*TAT*") for the second round of contract awards and an Economic Connection Test ("*ECT*") for the third round of contract awards, for which Skyway 127 was competing.[105] For such tests to be performed it was required that proponents had have to have chosen their connection points.

205. The OPA gave specific assurances to individual proponents that the first ECT would begin in August 2010.[106] In a webinar in May 2010, the OPA confirmed that the results of the August 2010 ECT "will be available in early 2011."[107] It is further reasonable to expect that, as set out in the FIT Rules, the ECT would be run every six months thereafter.[108]

206. For reasons unexplained, the Korean Consortium, knowing that it had guaranteed and priority transmission access, delayed choosing its transmission points. The OPA allowed the Korean Consortium to delay, and subsequently the OPA delayed the testing process and contract awards for all FIT proponents.

207. Ontario's Auditor General confirmed that the ECT could not be run because the Korean Consortium had not finalized connection points for its projects under the GEIA, which granted the Consortium priority access to transmission capacity.[109]

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[105] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, ¶¶565-566, **C-133**: the running of the ECT was dependent on the OPA completing the TAT round.
[106] Letter from JoAnne Butler (OPA) to Charles Edey (Leader Resources), 8 April 2010, **C-134.**
[107] OPA Presentation, "The Economic Connection Test - Approach, Metrics and Process", 19 May 2010, p.39, **C-136.**
[108] OPA, *FIT Rules Version 1.2,* 19 November 2009, s. 5.4(a), **C-137.**
[109] Office of the Auditor General of Ontario, Annual Report 2011, Chapter 3, 2011, p.116, **C-138.**

208. Ontario and the OPA never notified the FIT proponents that the reason that the scheduled ECT was delayed was to accommodate the wishes of the Korean Consortium and its projects under the GEIA.

209. From the text of the GEIA (which was unavailable until more than 4 years after its signature), it is clear that the Korean Consortium was required to identify and commence development of its wind projects on a timely basis and in a manner consistent with the deadlines in the GEIA.

210. The GEIA set out specific deadlines for renewable energy projects. Phase 1 of the *Green Energy Investment Agreement* was to provide for Targeted Generation Capacity of 400 MW of wind power and 100 MW of solar power with the targeted commercial operation date as of March 31, 2013.[110]

211. To satisfy Phase 1 of the *Green Energy Investment Agreement*, the Ontario Ministry of Energy directed the OPA on September 30, 2009 to hold in reserve 240 MW of transmission capacity in Haldimand County, Ontario and a total 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities with respect to proponents that signed province-wide framework agreements.[111] Because of the *Green Energy Investment Agreement*, the Korean Consortium received a guaranteed right of the first refusal on transmission access in these transmission zones in the Province of Ontario.

212. Ministry of Energy Assistant Deputy Minister Susan Lo admitted during her *Mesa Power* NAFTA testimony that almost immediately the Korean Consortium had

[110] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010, **C-139.**

[111] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010, **C-139.**

problems meetings its deadlines for commercial operation of its phase 1 and 2 generation projects.[112]

213. Article 11.1(e) of the GEIA required the Korean Consortium to:

> "[S]pecify 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
>
> 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."[113] For Phase 2, under the valid agreement in 2010, the target COD was December 31, 2013.[114]

214. The Korean Consortium did not meet either of these requirements.[115] As a result, Ontario was not required to hold any transmission capacity back in the Bruce Transmission region for the Korean Consortium after July 30, 2010.

215. Ontario had the right to terminate the GEIA if deadlines were not met.[116] Yet, despite that these deadlines were not met, Ontario did not terminate the GEIA. Had Ontario terminated the agreement, more capacity would have been available for the FIT program, including in the Bruce Region.

216. Susan Lo admitted in her testimony at the *Mesa Power* NAFTA Hearing that the Ministry of Energy reviewed with its legal counsel the leverage that Ontario could

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[112] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp. 94-95, lns.23-2, **C-121.**

[113] Green Energy Investment Agreement, Art. 11.1(e), 21 January 2010, **C-210***.*

[114] Green Energy Investment Agreement, Art. 3.2, 21 January 2010, **C-210***.*

[115] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶¶92-93, references the following: GEIA Working Group Meeting, Minutes/Agenda, 9 September 2010, (Footnote 139 to ¶93), **C-017***.* These meeting minutes show that the connection points had not yet been selected; Ontario Power Authority, News Release, "Power purchase agreements signed with Korean Consortium", 3 August 2011, **C-211.** 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", 4 July 2011, **C-212.** The K2 and Armow projects were in the FIT program in July 2011.

[116] Green Energy Investment Agreement, Art. 14.2(d), **C-210.** 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

exercise with the Korean Consortium to renegotiate a more favourable agreement,[117] and that this leverage was exercised.[118] Ontario did not terminate the agreement, however, despite the benefits of doing so to the FIT stakeholders, because it did not want the GEIA nullified for political reasons.[119] Instead, Ontario excused the Korean Consortium's breaches, amending the GEIA twice: once in July 2011, coinciding with the July 2011 FIT awards,[120] and again in June 2013, coinciding with the termination of the FIT program.[121]

217. Under the first amendment, the Economic Development Adder ("EDA") was reduced in exchange for an extension of the deadlines,[122] and the deadline for specifying Phase 2 connections points was eliminated entirely.[123] Additionally, this amendment provided that "bringing Manufacturing Plants to Ontario includes the use of existing facilities for a new purpose."[124] Further, on August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to the Korean Consortium.[125] The Minister gave a one-year extension to the Consortium to create jobs in Ontario.

218. Under the second amending agreement, the priority capacity granted to the Korean Consortium was reduced from 2500 MW to 1369 MW.[126]

219. Even though 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

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[117] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, p.94, lns.8-5, **C-121.**
[118] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, p.94, lns.16-18, **C-121.**
[119] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, p.91, lns.19-25, **C-121.**
[120] Green Energy Investment Agreement Amending Agreement, 29 July 2011, **C-221.**
[121] Amended and Restated Green Energy Investment Agreement, 20 June 2013, **C-141.**
[122] Green Energy Investment Agreement Amending Agreement, 29 July 2011, ¶15, **C-221.**
[123] Green Energy Investment Agreement Amending Agreement, 29 July 2011, ¶¶9, 17, 19-20, **C-221.**
[124] Green Energy Investment Agreement Amending Agreement, 29 July 2011, ¶12, **C-221.**
[125] Ministry of Energy, Statement from Minister of Energy, the Honourable Brad Duguid, 3 August 2011, **C-147.** (Elaborating on changes to the generous terms granted to Samsung C&T and its Consortium Partners)
[126] Amended and Restated Green Energy Investment Agreement, 20 June 2013, Art. 3, **C-141.**

testified, was that, despite having received its own special deal, the Korean Consortium ironically wanted the same treatment as FIT proponents,[127] when it was to its favour.

220. While the OPA was delaying contract awards for the Korean Consortium, on December 21, 2010, the OPA issued its first-round priority ranking. Priority ranking was based on the acceleration on account of the project's shovel-readiness and other FIT Program criteria.[128]

221. The OPA's public release of the December 2010 rankings allowed the Korean Consortium to determine which projects would receive FIT contracts. With guaranteed transmission access and a lack of shovel-ready projects to fulfill their obligations under the GEIA, this knowledge proved critical for Pattern Energy and the Korean Consortium who then could approach promising developments that were not in a position to obtain FIT contracts with offers well below the market pricing.

222. Evidence from the *Mesa Power* NAFTA hearing revealed that the Korean Consortium, and its joint venture partner Pattern Energy, had delayed notifying connection points and used the delay, to pick "low hanging fruit" – projects ranked too low to obtain a FIT contract – in the FIT process to then convert into GEIA projects.

223. At the *Mesa Power* hearing, the manager of the OPA's FIT Program, Jim MacDougall, testified that the OPA knew about the predatory strategy Pattern Energy (on behalf of the Korean Consortium) was using to obtain FIT Contracts from projects that would otherwise not succeed under the FIT Program.[129]

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[127] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, pp.94-95, lns.23-4, **C-121.** 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)

[128] OPA, FIT Priority Ranking List, 21 December 2010, **C-131.**

[129] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, pp.200-01, lns.19-19. **C-121.** Sue Lo also discussed this

224. Hence, 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," all the while the Korean Consortium and Pattern could sit back, wait for FIT proponents to do the heavy lifting, and then buy them out to satisfy their own GEIA commitments. Evidence at the *Mesa Power* NAFTA hearing showed that the Korean Consortium (through its joint venture partner) bought numerous low-ranked projects. This occurred even though the Korean Consortium was given a special, "sweetheart" deal based on its public non-binding representations that it would create jobs.

225. Meanwhile, buying viable, but low-ranked, projects for salvage value and converting them to successful FIT Projects effectively meant the Korean Consortium did not meet its 2010 obligations – it had waited until the regional FIT rankings were announced to determine which FIT proponents it could attempt to buy out at rock-bottom prices. Despite its breach, Ontario never held the Korean Consortium in default and provided all of the benefits of the GEIA to the Korean Consortium.

226. As noted in Judge Brower's separate and dissenting award in the *Mesa Power* case:

> By August 2011, the Korean Consortium had acquired two low-ranked projects in the Bruce region that never stood a chance of obtaining a FIT Contract but were nevertheless granted PPAs under GEIA. First, the Korean Consortium acquired the Amrow project from Acciona, which was ranked 21st in the Bruce region. Second, the Korean Consortium acquired the K2 wind project from Capital Power, which was ranked 24th in the Bruce region. Thus, these projects were well behind TTD and Arran, which had been ranked 3rd and 4th respectively.[130]

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": *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, p.87, lns.13-24, **C-121.**

[130] Mesa Power Group, LLC v. Government of Canada, Dissenting and Concurring Opinion of Judge Charles Brower ("*Mesa*, Dissenting and Concurring Opinion of Judge Charles Brower"), 25 March 2016, ¶15, **CLA-055.**

227. Correspondingly, had the Korean Consortium not been given a 500 MW reservation, and taking into consideration the combined kW of the projects ranked ahead of Skyway 127 at the time of the December 2010 ranking (280 MW), it was highly likely that Skyway 127 would have received a FIT contract based upon the MW available in that region and Skyway's rank in priority list for receiving contracts.

2. Ontario cloaked the GEIA in secrecy

228. The issue of public transparency of the GEIA was canvassed in the Mesa Power NAFTA arbitration. That Tribunal concluded that only the following aspects of the GEIA were publicly known, from the minimal press releases and news stories available at the time:

> These facts appear to indicate that the Ministry worked towards two parallel renewable energy programs – the GEIA and the FIT Program – without fully informing the public and other stakeholders of one of them, namely the GEIA. Be that as it may, prior to the Claimant's investment in November 2009, the following information was publicly available and known to the Claimant: (i) the negotiations with the Korean Consortium were at an "advanced stage"; (ii) pursuant to those negotiations, the Korean Consortium would get an "economic adder" or EDA in addition to the regular rate "if [it] commit[ted] to manufacturing its equipment in Ontario"; (iii) the OPA had been instructed to hold in reserve transmission capacity for "generating facilities whose proponents have signed a province-wide framework agreement"; and (iv) the agreement with the Korean Consortium "would give them priority access to Ontario['s] grid space".[131]

229. This summary expresses the totality of all public information regarding the GEIA at that time as determined by that Tribunal. There was no indication as to how the GEIA would interact with the FIT Program, that stakeholders who otherwise would be eligible for a FIT contract could be bumped by the Korean Consortium after-the-fact or what obligations the Korean Consortium had undertaken. The decisions made by the

[131] *Mesa Power Group, LLC v. Government of Canada* (PCA Case No. 2012-17), Award ("*Mesa,* Award"), ¶607 (footnotes omitted), **CLA-232.**

government afterward relating to the GEIA's management were equally non-transparent.

230. Pattern Energy Group LLC. ("Pattern Energy") is an independent, fully-integrated energy company that develops, constructs, owns and operates renewable energy and transmissions assets in the United States, Canada and Latin America.[132] On April 18, 2011, Pattern Energy joined the Korean Consortium to acquire wind projects in Ontario.

231. Pattern Energy joined into the benefits of the *Green Energy Investment Agreement*, by jointly acquiring land from two wind development projects in the Regional Municipality of Chatham-Kent.[133]

232. A few days later, on April 26, 2011, Pattern Energy collaborated with Samsung Renewable Energy to acquire wind power projects in Ontario.[134] Samsung noted that this successfully "secured dedicated transmission capacity for these initial projects."[135]

3. The July 4, 2011 Contract Awards

233. On Friday, June 3, 2011, the OPA, without any prior notice, and contrary to its established practice, issued a new set of rules for awarding FIT Program contracts based on a directive from the Ontario Minister of Energy[136] The new rules made four fundamental changes:

[132] Pattern Energy has a head office in San Francisco, California, and offices in Houston, New York, and Toronto. Pattern Energy Press Release, 18 April 2011, p.2, **C-142.**
[133] Pattern Energy Press Release, 18 April 2011**,** p.1, **C-142.**
[134] Pattern Energy Press Release, 26 April 2011**, C-193.**
[135] Pattern Energy Press Release, 26 April 2011**,** p.1, **C-193.**
[136] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 3 June 2011, **C-176.**

(a) The OPA was directed to award 750 MW of FIT Program contracts in the Bruce Region transmission zone, and 300 MW in the West of London Region transmission zone:[137]

(b) Each project was now to be provided the opportunity to change its interconnect point during a five-day period commencing Monday, June 6, 2011;[138]

(c) Projects in the Bruce or West of London Regions could change and select an interconnect point outside their region, and could build long transmission lines outside of their regions and into neighboring regions; and

(d) Instead of evaluating projects on the previously published priority rankings for the region, the projects now were now to be evaluated on a provincial-wide ranking.

234. Because of these last-minute new rules, several existing wind projects in the FIT Program queue in the Bruce Region transmission zone no longer were able to receive transmission capacity at their specific designated locations (their transmission interconnect points).

235. On July 4, 2011, Skyway 127 was not offered a FIT Program Contract, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity. Skyway 127 was put on the priority waitlist. This left Skyway 127 in the position that theoretically, it might be awarded a FIT Contact until June 12, 2013, when the program was disbanded.

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[137] OPA , FIT Rules Version 1.5, 3 June 2011, ¶5.4.1(c)(iv), **C-129**; Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 3 June 2011, **C-176**.

[138] Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, IESO Public News Release, 3 June 2011, **C-143.**

236. Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with Skyway 127's rights. These measures were taken without any consultation or notice to the Tennant Energy or its investments and in defiance of its expectations of a fair and transparent process.

237. The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better-treated, politically connected companies and were taken in the context of an Ontario provincial general election to be held on October 6, 2011.

238. Projects in the West of London region, which had a higher provincial-wide priority ranking, could now build long transmission lines to interconnect in the Bruce Region and thereby jump ahead in the priority ranking. But this result was only because of Ontario's manipulation of the process to protect politically connected proponents.

239. For example, a domestic competitor to the Claimant, Boulevard Associates Canada, Inc., was able to bring four of its West of London region projects, that were previously not eligible to receive contracts because of the 300 MW limit in that region, over to the Bruce Region. This allowed Boulevard Associates Canada, Inc. to jump to the front of the priority line, bumping ahead of the projects that had been in the Bruce Region since the beginning of the FIT Program, including the Skyway 127 project.

240. In contrast to numerous other rule changes that changed the substantive rights of the parties, the FIT stakeholders were not given notice beforehand.[139] At the *Mesa Power* NAFTA hearing, Government witnesses testified that this was unusual.[140] For

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[139] A number of previous rule changes included notice and an opportunity to comment. OPA, *FIT Rules Version 1.3.1*, 2 July 2010, **C-144;** OPA*, FIT Rules Version 1.3.2*, 29 October 2010, **C-145;** OPA, "Proposed rule change for capacity allocation exempt (CAE) FIT Applications", 8 December 2010, **C-146**. *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*)*, Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.235, lns.3-8, **C-121.**

[140] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*)*, Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.234, lns.4-14, **C-121**; *Mesa Power Group*

this purpose, due process rights of stakeholders were ignored in favour of advancing a non-transparent agenda that was inconsistent with the publicly-announced objectives of the FIT Program.[141]

241. As a result of the June 2011 Ministerial Direction and the newly incorporated Section 5.4.1 to the FIT Rules, wind projects located in the West of London region were able to connect to the Bruce Region transmission capacity. Consequently, several of the wind projects in the Bruce Region transmission zone, including Skyway 127, lost available transmission capacity in their designated interconnects.

242. Skyway 127 effectively lost its opportunity for an eventual FIT contract as a result, but Skyway 127 did not know the real reason for its loss at this time because the real reason was cloaked in secrecy by Ontario.

243. Projects included in the assessment announced on June 3, 2011, were required to be on the FIT Priority Ranking list for either the Bruce or West of London transmission areas. The OPA posted the ranking alongside the June 3, 2011 announcement.

244. On July 4, 2011, Skyway 127 consequently lost its priority ranking and was not offered a FIT Contract because of the arbitrary, politically motivated 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects.

LLC v. Government of Canada (PCA Case No. 2012-17*)*, Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.59, lns.14-21, **C-121.** *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*),* Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.156, lns.5-13, **C-121**. ("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.")**.**

[141] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*),* Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.158, lns.4-5, (the government wanted the awards as soon as possible); p.178, lns.24-25 (the government wanted to make "a splash in terms of awarding contracts" because they were up for re-election), **C-121**.

245. On August 2, 2011, the OPA announced that it would modify the termination provisions of the FIT Program to allow a Supplier to obtain a waiver of the OPA's termination rights.[142]

246. On August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to Samsung C&T and its Consortium Partners.[143] The Minister gave a one-year extension to the Consortium.

D. SKYWAY 127 and the Bruce to Milton Transmission

247. As a result of the unprecedented June 3, 2011, rule changes, projects in the West of London area that had a higher provincial-wide priority ranking could now build long transmission lines to interconnect in the Bruce Transmission Region, and thereby trump projects such as Skyway 127' that has a higher ranking in the area.

248. As noted, a domestic competitor to Skyway 127, Boulevard Associates, was able to move four of its unsuccessful West of London projects over to the Bruce Region as a result of the rule change, even though the Boulevard projects would take many years to build and at least one of the projects did not even have a wind turbine agreement. The Ministerial Direction of June 2011 allowed Boulevard Associates to jump to the front of the priority line for the Bruce Transmission Region and bump ahead some of the projects, including Skyway 127, that had been in the top six in that area since the launch of the FIT Program.[144]

249. On July 4, 2011, the Skyway 127 project was not offered a FIT Contract, despite that it ranked 6th in the ECT, and there was sufficient transmission capacity to permit it

[142] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 2 August 2011, **C-155.**
[143] Public News Release from Ontario Minister of Energy, the Honourable Brad Duguid, 3 August 2011, **C-147.**
[144] OPA FIT CAR Priority Ranking by Region, 3 June 2011, **C-148.**

to obtain a FIT Contract at that time. The OPA told Skyway 127 that it remained in the running for a contract.[145]

1. NextEra and the Bruce to Milton Transmission

250. Looking at Skyway's competitors, a different story emerges.

251. In 2010, IPC already had lost in its FIT Launch round application for FIT Contracts in the West of London zone. However, it was given a second chance at contracts with 300 MW of available transmission from the OPA.

252. On the published ECT report from the OPA prior to June 4, 2010, NextEra's projects were located in the West of London region and not shown in the Bruce transmission area. Due to the limited capacity that would be activated in this region (300 MW), most of NextEra's projects would not have received a contract in the West of London region.

253. Realizing this, NextEra began lobbying the Ontario government for a change to the rules to allow changes in connection points amongst regions.

254. Jim MacDougall, the former FIT Program manager at the OPA, confirmed during the *Mesa* NAFTA hearing that, after he left his employment at the OPA, he had heard that the reason the rules were changed to allow connection point changes between regions was because NextEra had lobbied for this result.[146] He explained that NextEra had bundled its projects as the NextEra "six-pack approach," which he interpreted to mean that there were six projects that would "share a common connection, whose connection would be relatively expensive, but shared across six projects would make a connection economically viable."[147] NextEra accomplished this through ties with the Ontario government. After a concerted lobbying campaign, NextEra utilized its was

[145] Letter from JoAnne Butler (OPA) to John Pennie (Skyway 127), 4 July 2011, **C-149.**
[146] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p. 225, lns.5-9, **C-121.**
[147] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.228 lns.1-7, **C-121.**

given preferential access to government officials to better its position to the detriment of competitors such as Skyway 127.

255. NextEra's Vice President, Al Wiley, personally met with high-level officials, including [redacted].[148] On May 11, 2011, Mr. Wiley met with Andrew Mitchell, Senior Policy Advisor in the Minister of Energy's Office, 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."[149]

256. NextEra's efforts worked. On May 12, 2011, the Premier met with the Ministry of Energy, and the decision was made to allow a connection point window change.[150] The *Mesa Power* Investor's Post-Hearing Brief notes that:

257. On May 13, Mr. Wiley sent Ms. Lo the names of the six NextEra projects "remaining in the FIT queue. [151]

258. As a result of the change to the FIT Rules on June 3, 2011, all of NextEra's six projects were granted FIT contracts. The FIT Program is Terminated. The FIT program was ended on June 12, 2013.[152] With the termination of the FIT Program, Skyway 127's place on the priority waiting list for a FIT Contract also was terminated.

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[148] Email from Al Wiley (NextEra), 10 May 2011 ***[CONFIDENTIAL]***, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014), Discussed at 1:25:35, **C-204**

[149] Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), 12 May 2011, referenced in: *Mesa Power Group LLC v.* Government of Canada, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204*;*** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21**, C-213.**

[150] *Mesa Power Group LLC v. Government of Canada,* Rejoinder Witness Statement of Shawn Cronkwright, 2 July 2014, ¶21, **C-151.**

[151] Email from Sue Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 326 to ¶156, **C-017.**

[152] Direction from Minister of Energy Bob Chiarelli to Colin Anderson, OPA, 12 June 2013, **C-152**.

259. Ontario unfairly manipulated the dissemination of information under the FIT Program Ontario arbitrarily modified the FIT Program Rules in a manner that disadvantaged Skyway 127 the Investment to the benefit of other proponents, including those politically connected.

260. The Investor's Post-Hearing Brief in *Mesa Power* revealed the following evidence on these points:

> That the Ministry of Energy interposed itself in the operation of the selection process of a multi-million-dollar award of lucrative FIT contracts to satisfy political cronies. Despite that even at the Mesa Power hearing, Ontario's energy officials admitted 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.
>
> Shawn Cronkwright from the OPA testified at the Mesa Power Hearing that he had "concerns" about showing the results of the Dry run to the Ministry of Energy and the document itself said that it should not be shared with the Ministers Office. Despite knowing that sharing this information with the political staff at the Energy Minister's office was prohibited, Mr. Cronkwright admitted under oath that the OPA shared the results of the FIT standings secretly with the Energy Ministry.[153]
>
> Ontario simply decided that despite what was set out in the FIT Program Rules, that it would reduce the amount of FIT Contracts awarded by arbitrarily capping transmission access to a total of 1050 MW in its final FIT Launch period contracts announcements in July 2011. Ministry of Energy Assistant Deputy Minister Sue Lo explained this decision in her testimony before the Mesa Power NAFTA Hearing. She 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,

[153] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Testimony of Shawn Cronkwright, Hearing Transcript Day 4 at p. 56: lns.2-9. **C-122**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No, 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶155, **C-017.**

> **we didn't want to pay** for the additional megawatts that would come on stream.[154]

Blatant and complete protection of business opportunities was afforded to International Power Canada, a Canadian company whose exclusive leadership at the time was a well-known political backer of the Ontario Liberal government.155 While the company had been unsuccessful in its bid for FIT Launch round contracts, a special tranche was of 300 MW of transmission was carved out from the 1050 MW that the OPA would award for a second round in the West of London region – that International Power Canada would win. The 198 MW awarded to IPC came from the 1050 MW of total FIT Contracts that the OPA was prepared to pay. But For the award to IPC, Skyway 127 would have received a FIT Contract.

With Ontario knowing this information, one applicant, NextEra Energy, was given access to high-level government officials and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change.

261. The result was a capriciously misapplied process contaminated by selective and improper political protectionism, a lack of 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. These governmental actions were simply in complete disregard of the international law principles of due process and fair and equitable treatment.[156]

E. Spoliation of Evidence

262. Tennant Energy, along with other FIT proponents, were only were able to ascertain the full story of what occurred well after the termination of the FIT Program due to the non-transparent administration of the FIT Program.

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[154] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.180-181, lns.22-4 *[emphasis added]*, **C-121.**

[155] *Mesa Power Group LLC v. Government of Canada* (PCA Case 2012-17), Hearing Transcript Day 6: Closing Statements (Public Version), p. 284, lns.11-16, **C-125.**

[156] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*)*, Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p. 234, lns.1-20 and p. 235 lns. 1-11, **C-121**.

263. The Government of Ontario actively concealed the terms of the GEIA were actively suppressed by the Government of Ontario. The GEIA was, and were not released until a judicial intervention was filed in the United States, where a US Court ordered an American company with a copy of the GEIA to turn it over to Mesa Power, another FIT Proponent who had commenced an international arbitration claim against Canada. Only in this specific and unusual circumstance did any FIT Proponent obtain a copy of the GEIA – and only in relation to seeking US domestic assistance with an international arbitration. Yet, this document was subject to a confidentiality order and was not available at that time to be shared with other FIT Proponents.

264. In 2011, Trillium Wind Power Corporation, another FIT Program wind proponent, filed a domestic lawsuit in Ontario against the Government of Ontario. Among other claims, Trillium Wind made claims for misfeasance in public office.[157] In 2015, the Ontario Court of Appeal, overruled the objections of Ontario and allowed the claims for consideration on the issues of misfeasance in public office, as well as for spoliation of evidence, which became apparent after the discovery phase of the case took place.[158] The spoliation aspects of this case were upheld by the Ontario Court of Appeal, and as of the date of filing this Memorial in August 2020, the underlying case is still pending for determination before the Ontario Courts.[159] The basis for this claim related to documents not disclosed by Ontario in Trillium Wind's domestic case.

265. Further, in May 2014, the Ontario Provincial Police launched a criminal probe over the alleged destruction of documents by government officials about Trillium's case.[160]

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[157] *Trillium Power Wind Corporation v. Ontario* (Natural Resources), 2013 ONCA 683, 22 March 2013, ¶2, **CLA-099**.

[158] *Destruction of Evidence Motion against Government of Ontario Granted by* Court, Trillium Power Wind Corporation media release, 22 June 2015, **C-153.**

[159] The last public decision was a January 8, 2020 decision on an interlocutory costs matter related to a motion. The Trillium Power case is still before the Ontario Courts.

[160] David Reevely, *OPP probes wind-farm records*, Ottawa Citizen, 4 May 2016, **C-154.**

266. Senior officials in the Office of the Premier were criminally charged for the destruction and non-disclosure of evidence about another large energy project in Ontario.

267. On September 13, 2012, the Ontario Legislature issued a preliminary ruling against the Minister of Energy, Chris Bentley, and declared him in contempt of the legislature for refusing to disclose all the documents relating to the cancellation of the gas plant. In 2013, the Chief of Staff and the Deputy Chief of Staff to the Premier of Ontario were charged with breach of trust, mischief about data, and misuse of a computer system about the alleged destruction of documents of the canceled two gas plants.

268. In January 2018, the former Chief of Staff to the Ontario Premier was criminally convicted of the wanton destruction of the evidence relating to Ontario Energy policy.[161]

[161] Rob Ferguson, *Toronto Star*, "Former McGuinty chief of staff found guilty of deleting documents in wake of power plants cancellation," 19 January 2018, **C-009.**

III. THE INTERNATIONAL LAW STANDARD OF TREATMENT

269. A breach of the international law standard of treatment does not require anything more than a finding of inconsistency with that standard on the part of a NAFTA Party. It is within a Tribunal's authority to make an enquiry as to whether a government measure is in accordance with its laws or previously announced rules.

270. NAFTA Article 1105 explicitly includes fair and equitable treatment as part of the international law standard of treatment. Fair and equitable treatment must inherently mean that a tribunal can have regard to the fundamental concepts of legality, due process, and adherence to the rule of law. A Tribunal determination based on evidence that a previously announced regulatory or administrative regime was not followed is entirely within the proper exercise of an international tribunal's jurisdiction when considering fair and equitable treatment.

271. The Oxford English Dictionary defines the word "fair" as "just, unbiased, equitable, impartial, according to rules".[162]

272. Fair and Equitable Treatment includes the protection of due process, a presumption of legality, fairness, and protection of an investor's reasonable expectations. Protection of the reasonable expectations of investors must include the fundamental concept that governments will follow the rules. This is a cornerstone of a predictable commercial framework for business planning and investment, which is explicitly protected within NAFTA's Preamble.

273. Tennant Energy, the Investor in this arbitration, notes that there may be situations, not applicable to the operation of the Ontario FIT Program, where a reasonable investor would expect that, in extraordinary situations, such as novel threats to public

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[162] The Oxford English Dictionary, Second ed., Volume V (New York: Oxford University Press, 1989), "fair" [Excerpt, at p.673], **CLA-109**; Patrick Dumberry, *The Fair and Equitable Treatment Standard, A Guide to NAFTA Case Law on Article 1105* ("Patrick Dumberry, The Fair and equitable Treatment Standard"), Kluwer Law International, 2013, p.57 **CLA-093**. This treatise is relied upon by the United States in its Second Article 1128 Submission.

health, the environment, fundamental economic crises, or national security emergencies, governments might be temporarily required to depart from the existing legal framework for a short period of time. Fair and equitable treatment requires that such departures be justified under the rule of law and not result in a disproportionate burden on the investor that is unjustified by the objective situation being responded. They are not justified by political expediency.

274. Such extraordinary circumstances are covered by extensive exceptions and reservations in the NAFTA, and Article 25 of the International Law Commission (ILC) Articles of State Responsibility and are not applicable to the situation in this claim--a situation, where in the words of the *Cargill* Tribunal, the host state "grossly subverts a domestic law or policy for an ulterior motive".[163]

A. The Proper Meaning to Be Given to NAFTA Article 1105

275. It has been long been established that the Fair and Equitable treatment standard protects against unfair and arbitrary changes of government policies which have the effect of harming the interests of foreign investors. The measures that breach NAFTA Article 1105 in this arbitration all fit within the longstanding content of NAFTA Article 1105.

276. Decisions taken in the 1930s by international tribunals, including under the customary law of the diplomatic protection of aliens, demonstrate that changes to regulations ostensibly taken to achieve legitimate public welfare objectives resulted in international liability where the changes were not taken in a fair or equitable manner, and in particular where elements of arbitrariness, lack of due process, and/or discrimination were present.

[163] *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF/05/2), Award, ("*Cargill,* Award"), 18 September 2009, ¶296, **CLA-217**.

277. The US-Panama Claims Commission in 1933 had to consider the impact of a sudden change in process for foreign investors in the *de Sabla* case.[164] In this case, as a result of agrarian reforms in Panama, there was a sudden change in the requirements necessary to register real estate. Under the new reforms, the government provided only a two-week window for landowners to register real property holdings, otherwise, others could claim the property. Mrs. de Sabla, a foreigner, was not able to reach the registry office. The Tribunal concluded that Panama's lack of a fair process violated due process and thus the loss of Mrs. de Sabla's property was ruled to be an expropriation.[165]

278. A more recent consideration of the same point was undertaken by the US-Iran Claims Tribunal in *International Technical Products Corp v Iran*.[166] There, the US Iran Claims Tribunal was prepared to consider the effect of insufficient notification time by the state as a breach of international law but could not due to jurisdictional issues. The lack of due process simply was an arbitrary act that never could be consistent with the "fair and equitable treatment" standard in international law.

279. Similarly, the US – Turkey Claims Commission in the 1936 *Pandaleon* case[167] concluded that arbitrary acts could result in the requirement of the state to pay damages to the foreign investor. Abuse of discretion arises in administrative practice when arbitrary action results in harm. The position of customary international law set out in international tribunal decisions since the beginning of the twentieth century has been consistent. The abuse of discretion necessarily is included within the concept of

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[164] *Marguerite de Joly de Sabla (United States) v. Panama*, Dissenting Opinion of Panamanian Commissioner ("*de Sabla*, Dissenting Opinion of Panamanian Commissioner"), 28 AJIL 602; (1933) 6 RIAA 358), 29 June 1933, pp.358-359, **CLA-133**.

[165] *de Sabla*, Dissenting Opinion of Panamanian Commissioner, pp.358-359, **CLA-133.**

[166] *International Technical Products Corp. v. Iran* (Case No. 302), Award (" International Technical Products, Award"), 24 October 1985, pp. 240-241**, CLA-124**.

[167] The United States of America on Behalf of Costa Andrew Pandaleon and George Andrew Pandaleon Doing Business as Pandaleon Brothers v. The Republic of Turkey, Opinions and Report ("Pandaleon, Nielson"), Fred K. Nielson, p.333, **CLA-160.**

abuse of rights. There is no requirement for there to be any intent to harm, only the existence of arbitrary behavior.[168]

1. Reasonable Expectations

280. The *Bilcon* Tribunal's found that the reasonable expectations of an investor are protected under customary international law under Fair & Equitable Treatment.[169]

281. It was fully within the *Bilcon* Tribunal's authority to make determinations that Canada's actions constituted egregious and gross unfairness arising from the breach of specific promises made to the *Bilcon* Claimant that were not followed. In this regard, the *Bilcon* Tribunal applied customary international law principles expressly contained in NAFTA Article 1105 and applied them to the facts as they determined it. That was a proper exercise of the authority of a NAFTA Tribunal.

282. In any event, the *Bilcon* Tribunal says that it applied international law in coming to this determination and this is part of the governing law of the Tribunal as set out in NAFTA Article 1131.[170]

283. Here, Skyway 127's expectations were frustrated by the exercise of administrative fiat in a manner inconsistent with the established previous practice that failed to provide the minimum protections that an investor legitimately would have expected to receive.[171]

284. International law recognizes that an investor may expect certain "conditions of competition" that ensure fairness and transparency when making an investment.[172] In

[168] Panizzon M., Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement, Studies in International Law, (Portland: Hart Publishing, 2006, ("Panizzon (2006)") p.31, **CLA-148.**

[169] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, and Bilcon of Delaware, Inc. v. Canada* (PCA Case No. 2009-04), Award on Jurisdiction and Liability ("*Bilcon*, Award"), 17 March 2005, ¶¶428-429, 435-436, 441, **CLA-208**.

[170] *Bilcon*, Award, ¶¶738-739, **CLA-208.**

[171] CWS-1 – Witness Statement of John C. Pennie, ¶¶ 70, 113. (**CWS-1**)

[172] Panizzon (2006), p.134, **CLA-148**.

Skyway 127's case, it was expected that the conditions of competition in Canada would permit investors to be treated fairly and equally and have their projects assessed impartially within the application administrative and regulatory framework and not be thwarted on the grounds of political expediency. This did not happen and therefore the conditions of competition in Canada did not correspond to Skyway 127's legitimate expectations.

285. Prof. Panizzon argues that treaty goals can prove the basis for a "claim of frustration of expectations."[173] Trade between State Parties to the NAFTA would be severely frustrated and hindered if investors could not legitimately expect that their investments would benefit from fair and transparent treatment at the hands of regulators and not be subject to political cronyism. Any standard but that would lead to unpredictability, risk, and distrust that would work against securing the NAFTA's stated objectives of increasing trade and economic opportunity.

286. A view of legitimate expectations that encompasses these basic procedural safeguards also is in line with international practice.

287. Domestic legal guarantees of stable and predictable legal order based on the rule of law are relevant considerations in assessing legitimate expectations that an Investor should expect. As Professor Gabrielle Kaufmann-Kohler has observed, "the rule of law essentially requires predictability through rules that are general, prospective, and clear."[174]

288. The *Paushok* Tribunal noted that other tribunals, including that in *Rumeli v Kazakhstan*,[175] have found that "respect of the investor's reasonable and legitimate

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[173] Panizzon (2006), p.158, **CLA-148.**

[174] Kaufmann-Kohler G., *Interpretive Powers of the Free Trade Commission and the Rule of Law,* Fifteen Years of NAFTA Chapter 11 Arbitration, 2011, ("Kaufmann-Kohler (2011)") p.186, **CLA-098.**

[175] Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan (ICSID Case No. ARB/05/16), Award ("Rumeli, Award"), 29 July 2008, ¶609, **CLA-131.**

expectations" are part of the definition of the fair and equitable treatment standard.[176] Therefore, one cannot disassociate legitimate expectations with the other factors that make up the Fair and Equitable Treatment standard, which include, "transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety." [177]

2. Fairness

289. The *Bilcon* Tribunal determined that the fair and equitable treatment standard in NAFTA Article 1105 addressed both procedural and substantive fairness. [178] The Tribunal concluded that based on its evaluation of the evidence that "Bilcon was denied a fair opportunity to know the case it had to meet" and that this failure to understand the process to which it was subjected was unfair.[179]

290. The fair and equitable treatment obligation includes basic elements of fairness. The *Bilcon* Tribunal made clear that knowing the criteria that one has to meet, or more aptly stated in terms of the *Bilcon* decision, not basing decisions on criteria *not* stated in the law, forms part of the customary international standard of fairness.

291. The *Bilcon* Tribunal considered that "reasonable notice" was a part of a general fairness standard under international customary law.[180] Here, in discussing the NAFTA Article 1105 standard, the *Bilcon* Tribunal explicitly states that the Article 1105 standard as stated in customary international law recognizes "injustice in either procedures or outcomes can constitute a breach."[181]

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[176] Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia (UNCITRAL), Award on Jurisdiction and Liability ("Paushok, Award on Jurisdiction and Liability"), 28 April 2011, ¶253, **CLA-163**.
[177] *Paushok*, Award on Jurisdiction and Liability, ¶253, **CLA-163**.
[178] *Bilcon*, Award, ¶590, **CLA-208.**
[179] *Bilcon*, Award, ¶590, **CLA-208.**
[180] *Bilcon,* Award clearly addressed this issue at ¶444, **CLA-208**.
[181] *Bilcon*, Award, ¶444, **CLA-208**.

292. Indeed, as already discussed above, the 1933 US- Panamanian Mixed Claims Commission decision in *de Sabla* came to the same conclusion as the *Bilcon* Tribunal that lack of reasonable notice was inconsistent with fair and equitable treatment.[182] This is not, a question about denial of justice. It is clearly a question of fairness and protection against arbitrariness. A similar position was taken by the US – Iran Claims Tribunal in *International Technical Products*.[183]

293. It is under this element of the NAFTA Article 1105 fair and equitable treatment standard that majority of the *Bilcon* Tribunal found that Canada had breached the fair and equitable treatment terms of NAFTA Article 1105. The lack of reasonable notice provided to Bilcon simply was the underlying factual circumstances that led most of the Tribunal to conclude that there was a breach of international law.

294. The *Bilcon* Tribunal expressly applied the governing law set of in NAFTA Article 1131 (the treaty and applicable rules of international law) in formulating its award. The *Bilcon* Tribunal determined that Canada breached the international law minimum standard through the patent and manifest unfairness in Canada's failure to follow its own domestic law procedures that the Claimant expected Canada to follow.[184] In making this determination, the NAFTA Tribunal determined facts and applied them to the NAFTA and to applicable rules of international law. In these circumstances, this is the application of the proper law of the arbitration.

3. Authority to Consider Legality under Municipal Law

295. An international tribunal has the authority to consider the legality of a Party's measures under its own law if those actions are relevant to the determination of fairness or legitimate expectations. Obviously, any judgment about legality under municipal law must be related closely to the tribunal's task of applying the applicable

[182] *de Sabla,* Dissenting of Panamanian Commissioner, pp.363, 366, **CLA-133**.
[183] International Technical Products, Award, pp.240-241, **CLA-124.**
[184] *Bilcon v. Canada*, Dissenting Opinion of Prof Donald McRae ("*Bilcon*, Dissenting"), 10 March 2015, ¶39, **CLA-182.**

law, in this case under NAFTA Article 1105. Not every breach of municipal law is *per se* an internationally wrongful act under NAFTA. But, it hardly follows from this truism that departures from municipal law could not in particular cases constitute a breach of NAFTA Article 1105 when they are of a fundamental nature, as the *Bilcon* Tribunal found was true in that case, and when they entail basic violations of due process and undermine the rule of law itself. Making it impermissible for an international tribunal to make determinations that a State has departed from its own legal standards significantly would eviscerate the role of international tribunals. not only in addressing denial of justice, but as guardians of the values of rule of law and due process.

296. In *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice observed:

> The Court is certainly not called upon to interpret the Polish law as such: but there is nothing to prevent the Court's giving judgment on the question whether or not in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[185]

297. In the *India-Patents* case, the Appellate Body of the WTO, citing the *Upper Silesia* decision, agreed with the position of the United States in that dispute that it is appropriate for an international tribunal to examine municipal law for purposes of determining consistency with international obligations, and that a tribunal should not engage in "unquestioning acceptance" of a State's own determinations of the meaning and requirements of its municipal law.[186]

298. The principal fashion in which deference has been shown in international law to the self-correcting mechanisms of municipal systems is through a requirement of exhaustion of local remedies or at least that the claimant pursue justice in the domestic legal system for a defined period before having recourse to international

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[185] *Case Concerning Certain German Interests in Upper Silesia* (PCIJ, Series A, No. 7), Merits, ("Certain German Interests in Polish Upper Silesia, Merits"), 25 May 1926, p.19, **CLA-134**.

[186] *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products* (AB-1997-5), WT/DS50/AB/R, Appellate Body Report, ("*India-Patents*, Report"), 19 December 1997, ¶17, **CLA-168**.

remedies. The NAFTA Parties did not include any such requirement in NAFTA Chapter Eleven. Other treaties that protect the procedural and substantive rights of non-state parties have included such a requirement. However, this was not the choice that the NAFTA Parties agreed upon. There is no requirement to go to a domestic court under the NAFTA.

4. There is no burden of proof on the law

299. International law is the governing law of this Tribunal under NAFTA Article 1131 and there is no need for any party to prove the governing law of the arbitration. The Tribunal is deemed to know the law. Neither side is required to prove the governing law. As the International Court of Justice held in the *Fisheries Jurisdiction* case:

> [T]he burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.[187]

300. The requirement on the Investor is to prove its claim. There is also a burden on the Respondent to prove its defense (including exceptions to the Treaty).

301. The test for a breach of international law is clearly set out in the ILC Articles on State Responsibility. Article 2 states that:

> Article 2 -- Elements of an internationally wrongful act of a State
>
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (i) is attributable to the State under international law; and
>
> (ii) Constitutes a breach of an international obligation of the State.

[187] *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Merits ("Fisheries Jurisdiction, Merits"), Judgment of 25 July 1974, I.C.J. Reports 1974, p.9, ¶17, **CLA-169**.

302. In the case of NAFTA Chapter Eleven, international responsibility is engaged, and the jurisdiction of the tribunal under the treaty established, with the submission of the claim to arbitration under NAFTA Article 1120.[188]

5. The Threshold for the International Standard of Treatment

303. The factual determination of treatment that amounts to a violation of the "fair and equitable treatment" standard necessarily is specific to each case. Admittedly, there is yet no general agreement on the precise content and scope of the customary standard of "fair and equitable treatment." This stems from the inherently supple nature of the standard. There is no easy formula that can apply to all cases. As the *Waste Management* Tribunal noted, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[189] Again, this reinforces why the decisions of tribunals applying the standard in individual situations are of such considerable importance in determining the contemporary content of the standard.

304. While this may lead to a certain level of uncertainty as to exactly what constitutes a violation of "fair and equitable treatment", there is at least this much that is certain: the more grievous and numerous the violations of these various indicia, the more likely there is to be a violation of the duty to provide "fair and equitable treatment". What also is certain is that the trend has for some time now been evolving towards a higher customary law standard of investment protection from Prof. Schreuer terms "state

[188] There may be situations where there is a preliminary burden of proof on a complaint to establish the jurisdiction of the tribunal or to show that international responsibility is engaged. For instance, under the *Statute of the International Court of Justice*, the contentious jurisdiction of the ICJ may only be engaged where there is an international legal dispute. To establish jurisdiction, the claimant state might have to show the existence of an international legal rule is pertinent to the dispute. In a very different context, the *Alien Tort Claims Act* gives jurisdiction to the US federal courts for torts in violation of the law of nations. In such a circumstance, in meeting its preliminary burden to establish the jurisdiction of the federal court, the plaintiff would normally have to point to the existence of a rule of the Law of Nations that the allegedly tortuous conduct violates. In sum there could be situations where the normal burden of proof would entail a Claimant establishing, as a preliminary matter, the existence of a rule of customary international law.

[189] *Waste Management Inc. v United Mexican States (II)* (Case No. ARB(AF)/00/3), Award, ("*Waste Management II,* Award"), ICSID 2004 WL 3249803, April 30, 2004, ¶99, **CLA-126.**

interference".[190] As a result, there is without questions a higher customary law standard of treatment, incorporating modern notions of administrative fairness and due process of law.

305. Bearing all this in mind, all this Tribunal needs to ask itself is this: in light of all the circumstances of this case, with a view to all the relevant sources of international law, and in the understanding that there has in recent years been a rapid convergence between the autonomous treaty standard of "fair and equitable treatment" and the customary international law standard, did Canada violate its obligation to accord Skyway 127 the type of "fair and equitable treatment" guaranteed by NAFTA Article 1105(1)?

306. As straightforward as this question may seem, at this point in the discussion it remains somewhat abstract. As the *Mondev* Tribunal pointed out:

> A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[191]

307. And as the Tribunal in *Rumeli* put it:

> The precise scope of the [fair and equitable treatment] standard is…left to the determination of the Tribunal which "will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."[192]

308. Canada as the Respondent has a burden to establish that, on the balance of probabilities every challenged measure in this case is the result of reasonable, rational, fair and good faith policy decisions. This is the issue to which the Tribunal is

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[190] See, for example, Schreuer C., *Fair and Equitable Treatment in Arbitral Practice*, 6:3 The Journal of World Investment & Trade, 357, June 2005, ("Schreuer (2005)"), p.370, where he states that there is an "evolving trend towards a higher standard of protection against State interference." **CLA-161.**

[191] *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award ("*Mondev, Award*"), 11 October 2002, ¶118, **RLA-083.**

[192] *Rumeli*, Award, ¶610, **CLA -131.**

directed to address itself in applying the standard of treatment under NAFTA Article 1105.

B. NAFTA Article 1105 and the FIT Program

309. Tennant Energy claims that Canada has violated at least Article 1105 of Section A of NAFTA Chapter Eleven. These breaches have resulted in damage to it.

310. There are four categories of wrongful actions arising in this claim:

(a) Ontario unfairly and for improper reasons manipulated the awarding of Contracts under the FIT Program.

(b) Ontario unfairly and for improper reasons manipulated the award of access to the electricity transmission grid, resulting in unfair treated to the Investment.

(c) Ontario unfairly and for improper reasons manipulated the dissemination of program information under the FIT Program; and

(d) Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions to avoid liability for their wrongfulness.

311. Officials from the Government of Ontario, its agents or those under its direction or control such as the Independent Electrical System Operator (IESO) or the OPA took these governmental measures. The Ontario government also directed the OPA and the IESO to act ,and in this fashion, the OPA and the IESO were also agents of Ontario. NAFTA Article 105 makes Canada responsible for the actions of subnational governments.[193]

[193] Canada is responsible under NAFTA Article 1503(2) to ensure that state enterprises act in a manner consistent with the obligations of NAFTA Chapter Eleven whenever the state enterprise exercises any

312. NAFTA Article 1105(1) sets out the international law standard of treatment that a Party is obliged to accord to investments of investors of another Party:

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

313. The international law standard is a composite standard; it subsumes various duties, including the duty to provide fair and equitable treatment and the duty to provide full protection and security to investments.[194]

314. The express wording of NAFTA Article 1105, "*in accordance with international law"*, confirms that Canada is obligated to provide investments of foreign investors of another Party treatment that accords with the rules and principles established by the four sources of international law as enumerated in Article 38 of the *Statute of the International Court of Justice*. The meaning of "international law standard" is therefore determined by reference to customary international law principles and practices, and the many decisions of international tribunals in respect of the overarching international law obligation to act in good faith.

315. Article 38(1) of the *Statute of the International Court of Justice* ("*ICJ Statute*") sets out the sources of international law:

> (a) International conventions.
>
> (b) International custom, as evidence of a general practice accepted as law;

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regulatory, administrative, or other governmental authority delegated to it. Under international law, this obligation is in addition to the state responsibility for actions where a state directs a party. The Investor notes these issues subject to the discussion contained in Footnote 61 above, For avoidance of doubt, the Investor's claim under NAFTA Article 1116 for the breach of NAFTA Article 1105 is inclusive of the breach of Canada's obligations under NAFTA Article 1503(2), but not limited to such breach. Further, the breaches arising from acts of government employees, agents and those under the direction or control of the state are direct violations of the Treaty under Article 1116.

[194] *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Award ("*Azurix*, Award") 14 July 2006, ¶408, **CLA-100**; *National Grid PLC v. Argentine Republic*, Award ("*National Grid*, Award"), 3 November 2008, ¶¶ 187-189, **CLA-101.**

(c) General principles of law; and

(d) Judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

316. The *Vienna Convention on the Law of Treaties* rules are drafted in mandatory language. Article 31 of the *Vienna Convention* requires a treaty to be interpreted "in good faith" and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." Article 31(2) sets out the context of a treaty as encompassing the preamble of the treaty, and its annexes.

317. Article 31 of the *Vienna Convention* requires the interpretation of a treaty to also take into account:

(a) any subsequent agreement regarding the interpretation of a treaty.

(b) any subsequent practice in the application of the treaty; and

(c) and relevant rules of international law applicable.[195]

318. Under NAFTA Article 1131(1), the Tribunal is therefore required to apply all the principles of treaty interpretation, including the rules embodied in Articles 31 and 32 of the *Vienna Convention.*

319. NAFTA Article 1131 states:

> Governing Law
>
> 1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

[195] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 23 May 1969, Article 31(3)(a), (b) and (c)**, RLA-031.**

320. NAFTA Article 1105 sets out a standard of treatment that includes, at a minimum, a requirement that Canada follow customary international law.

321. By their agreement to be bound by customary international law in NAFTA Article 1105, the NAFTA Parties accepted and incorporated customary international law into the NAFTA. The content of the international law standard is not simply a matter of custom. It entails drawing on tribunal decisions that have addressed the content of the obligation, which includes custom, and custom that has been similarly incorporated into other treaties such as Bilateral Investment Treaties.

322. In adopting this approach, the *Mondev* Tribunal said:

> ... the question is not that of a failure to show opinio juris or to amass sufficient evidence demonstrating it. The question rather is: what is the content of customary international law providing for fair and equitable treatment and full protection and security in investment treaties?[196]

323. The *Mondev* Tribunal went on to say that "the standard of treatment, including fair and equitable treatment, and full protection and security, is to be found by reference to the normal sources of international law determining the minimum standard of treatment of foreigners."[197] The subsequent *ADF* NAFTA Tribunal specifically endorsed the *Mondev* Tribunal's holding that the content of customary international law can be sourced through international tribunal decisions and that it is not necessary to prove the elements of practice and opinio juris specifically.[198]

324. International tribunal decisions are, therefore, a primary source of the content of customary international law.

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[196] *Mondev*, Award, ¶113, **RLA-083.**

[197] *Mondev*, Award, ¶120, **RLA-083.**

[198] *ADF Group Inc. v. United States* (ICSID Case No. ARB(AF)/00/1), Award ("*ADF Group*, Award"), 9 January 2003, ¶184,: "We understand Mondev to be saying - and we would respectfully agree with it - that any general requirement to accord 'fair and equitable treatment' and 'full protection and security' must be disciplined by being based upon State practice and judicial or arbitral case law or other sources of customary or general international law." **CLA-102.**

325. Tribunals, NAFTA and non-NAFTA alike, have also recognized that the customary international law standard has been influenced by the many bilateral investment treaties obliging states to provide fair and equitable treatment and full protection and security. The *Mondev* Tribunal, for example, said:

> In holding that Article 1105(1) refers to customary international law, the FTC interpretations incorporate current international law, whose content is shaped by the conclusion of more than two thousand bilateral investment treaties and many treaties of friendship and commerce. Those treaties largely and concordantly provide for 'fair and equitable' treatment of, and for 'full protection and security' for, the foreign investor and his investments.[199]

326. The *Mondev* Tribunal's comments echo those of the *Pope & Talbot* NAFTA Tribunal, which said:

> i. Canada's views on the appropriate standard of customary international law for today were perhaps shaped by its erroneous belief that only some 70 bilateral investment treaties have been negotiated; however, the true number, now acknowledged by Canada, is in excess of 1800. *Therefore, applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by those treaties.*[200]

327. NAFTA tribunals have generally adopted a similar view about the content of the minimum standard.[201] As observed by the tribunal in the recent *Bilcon* decision:

> NAFTA tribunals have, however, tended to move away from the position more recently expressed in Glamis, and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors. Thus, the NAFTA tribunal in ADF Group in 2003 held that the customary international law referred to in Article 1105(1) is not "frozen in time" and that the minimum standard of treatment does evolve.[202]

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[199] *Mondev*, Award, ¶ 125, **RLA-083.**

[200] *Pope & Talbot Inc v. Government of Canada*, Award on Damages ("*Pope & Talbot*, Award on Damages"), 31 May 2002, ¶62 [emphasis added], **CLA-103.** There are many more bilateral investment treaties than when the Tribunal made this statement – UNCTAD estimates over 3000.

[201] See, e.g., *Merrill & Ring Forestry L.P.v. Canada* (ICSID Case No. ARB(AF)/05/2), Award ("*Merrill & Ring*, Award"), 31 March 2010, ¶213 **CLA-167**; *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award ("*Cargill*, Award"), 18 September 2009, ¶281,**CLA-217**.

[202] *Bilcon* (PCA Case No. 2009-04), Award on Jurisdiction and Liability (], 17 March 2015, ¶435 **RLA-003**.

328. The CAFTA Tribunal in *Railroad Development v. Guatemala*, analyzing substantially the same language contained in Article 1105(1) of NAFTA, endorsed the position of NAFTA tribunals on the evolution of the minimum standard:

> This matter has been dealt with extensively by previous tribunals in cases under NAFTA. The Tribunal refers positively in particular to the *ADF* award which accepts the evolution of customary international law noted in *Mondev* and records the NAFTA parties' views in this respect: "[...] it is important to bear in mind that the Respondent United States accepts that the customary international law referred to in Article 1105(1) is not 'frozen in time' and that the minimum standard of treatment evolves. The FTC Interpretation of 31 July 2001, in the view of the United States, refers to customary international law 'as it exists today'. It is equally important to note that Canada and Mexico accept the view of the United States on this point even as they stress that 'the threshold [for violation of that standard] remains high.' Put in slightly different terms, what customary international law projects is not a static photograph of the minimum standard of treatment of aliens as it stood in 1927 when the Award in the *Neer* case was rendered. For both customary international law and the minimum standard of treatment of aliens it incorporates, are constantly in a process of development." The Tribunal adopts this reasoning in *ADF* and shares the conclusion that the minimum standard of treatment is "constantly in a process of development," including since *Neer's* formulation.[203]

329. The *CMS v. Argentina* Tribunal reached a similar conclusion, holding that the customary international law standard of treatment mandated "fair and equitable treatment", and "full protection and security." The Tribunal said "... the Treaty standard of fair and equitable treatment ... is not different from the international law minimum standard and its evolution under customary law."[204] Numerous other tribunals reached the same conclusion.[205]

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[203] *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award, 29 June 2012, ¶218, **CLA-178**.

[204] *CMS Gas Transmission Company v. Argentine Republic*, Award ("CMS Gas, Award"), 12 May 2005, ¶284, **CLA-104.**

[205] *See*, *e.g.*, *Occidental Exploration & Production Company v. Republic of Ecuador* (LCIA Case No. UN 3467), Final Award ("*Occidental*, Final Award"), 1 July 2004, ¶¶ 188-90, **CLA-139**; *Rumeli*, Award, ¶611 **CLA-131**; *Biwater Gauff v. Tanzania* (ICSID Case No. ARB/05/22), Award, ("*Biwater Gauff,* Award"), 24 July 2008, ¶¶592-593**, CLA-127**; *BG Group plc v. Argentina* (UNCITRAL) Final Award, 24 December 2007, ¶292, **CLA-219**.

330. Judge Stephen Schwebel, former President of the International Court of Justice, has expressed the same view, stating that "when BITs prescribe treating the foreign investor in accordance with customary international law, they should be understood to mean the standard of international law embodied in the terms of some two thousand concordant BITs."[206]

C. Fair and Equitable Treatment

1. The Duty to Act in Good Faith

331. The duty to act in good faith is "the" fundamental norm underpinning international legal responsibility.[207] The International Court of Justice acknowledged that the good faith principle is "one of the basic principles governing the creation and performance of legal obligations..."[208] Not surprisingly, the overarching duty of good faith is the touchstone for much of the content of the international law standard.[209]

332. Article 26 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*)", entitled "*Pacta sunt servanda*", provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[210] The *Vienna Convention* preamble notes: "that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized", and Bin Cheng has noted the *pacta sunt servanda* principle is founded in good faith. He said that the principle is

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[206] Schwebel S., Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law, *The American Society of International Law Proceedings* of the 98th Annual Meeting, 2004, ("Schwebel (2004)") pp. 29-30, **CLA-105**.

[207] Franck, T. Fairness in International Law and Institutions (Oxford: Clarendon Press, 1995), ("Franck (1995)"), extract pp. 42-43, **CLA-106.**

[208] *Nuclear Tests (Australia v. France)* (I.C.J. Reports 1974, 253), Judgment ("*Nuclear Tests*, Judgment") ¶46, **CLA-107** ("One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. … Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration").

[209] O'Connor, J. F., *Good Faith in International Law* (Brookfield: Dartmouth, 1991), extract p. 107, **CLA-112.**

[210] Vienna Convention on the Law of Treaties (1969), Article 26, **RLA-031.**

"but an expression of the principle of good faith which above all signifies the keeping of faith, the pledged faith of nations, as well as that of individuals."[211]

333. The duty of good faith and the duty to provide fair and equitable treatment are inter-related as fundamental principles of the international law standard. Dr. Mann describes it as the pre-eminent substantive standard in investment treaties:

> … it is submitted that the right to fair and equitable treatment goes much further than the right to most-favored-nation and to national treatment .... So general a provision is likely to be almost sufficient to cover all conceivable cases, and it may well be that other provisions of the Agreements affording substantive protection are no more than examples of specific instances of this overriding duty.[212]

334. Investor-state tribunals have endorsed Dr. Mann's views. The *S.D. Myers* Tribunal, for example, said of the fair and equitable treatment standard that:

> Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, *obligations of good faith* and natural justice.[213]

335. Other tribunals have considered the central principle of good faith in the interpretation of the fair and equitable treatment standard:

336. The *TECMED* Tribunal said that "the commitment of fair and equitable treatment included in Article 4(1) of the [Spain-Mexico] Agreement is an expression and part of the *bona fide* principle recognized in international law."[214]

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[211] Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (Grotius: Cambridge, 1987) ("Cheng (1987)"), p. 113 **CLA-108.**

[212] Mann, F.A., British Treaties for the Promotion and Protection of Investments, 52 British Yearbook of International Law 241, 1981, ("Mann (1981)"), p. 243 **CLA-110.**

[213] *S. D. Myers Inc. v. Government of Canada, First* Partial Award ("*S.D. Myers*, First Partial Award"), ¶134 [emphasis added], **CLA-111.**

[214] Tecnicas Medioambientales TECMED S.A. v. The United Mexican States (Case No. ARB (AF)/00/2, Award ("TECMED, Award"), ¶153, **CLA-113.**

337. The *Eureko v. Poland* Tribunal endorsed the *TECMED* Tribunal's reliance on the good faith principle in interpreting the obligation to provide fair and equitable treatment.[215]

338. The Tribunal in *Saluka v. The Czech Republic* held that a foreign investor was entitled to expect that a State:

> … implements its policies *bona fide* by conduct that is, as far as it affects the investor's investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination [emphasis added].[216]

339. NAFTA Article 1105 contains an explicit reference to the "fair and equitable treatment" standard, and thereby confirms that treatment must be in accordance with the requirements of *jus aequum* – fairness and reasonableness.

340. The principles of fair and equitable treatment have been considered by the Appellate Body of the World Trade Organization, and the United Nations Human Rights Committee. The U.N. Human Rights Committee considering application of the *International Covenant on Civil and Political Rights*, held that for a regulatory scheme not to be considered arbitrarily imposed, it must be specific, fair and reasonable, and its application must be transparent.[217]

341. In the *Shrimp –Turtle* case, the Appellate Body decided:

> For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at

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[215] *Eureko B.V. v. Republic of Poland*, Partial Award ("*Eureko*, Partial Award"),19 August 2005 ¶235, **CLA-114:** "The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the guarantee of fair and equitable treatment according to international law means that: " ... this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment..."

[216] *Saluka Investments BV v. The Czech Republic*, Partial Award, ("*Saluka*,Partial Award"), 17 March 2006, ¶307, **CLA-115.**

[217] *Robert W. Gauthier v. Canada,* Communication No 633/1995, U.N. Doc. CCPR/C/65/D/633/1995, 5 May 1999, ¶13.6, **CLA-116.**

> the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in United States – Gasoline, WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfill their obligations and respect the rights of other Members under the WTO Agreement.[218]

342. The Appellate Body further indicated that if a regulatory measure is applied too rigidly or inflexibly, that in itself may constitute "arbitrary discrimination".[219]

343. The obligation of good faith and legitimate expectations is also reviewed in *Bilcon v. Canada*.[220]

344. The broad applicability of the fair and equitable treatment standard, consequently, has linked the standard with international law principles, and has connected the standard with other absolute principles, such as Most Favored Nation Treatment, and National Treatment. In their treatise on bilateral investment treaties, Dolzer and Stevens state that investment treaties which refer to international law, in addition to the fair and equitable treatment, "reaffirm that international law standards are consistent with, but complementary to, the provisions of the [treaty]."[221] The concepts of fairness and equity are at the core of international law. The Permanent Court of Justice observed that what are "widely known as principles of equity have long been considered to constitute part of international law, and as such they have often been applied in international tribunals."[222]

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[218] *United States-Import Prohibitions of Certain Shrimp and Shrimp Products (US-Shrimp)*, Report of the Appellate Body, WT/DS58/AB/R (October 12, 1998) ("*US - Shrimp* - AB Report"), ¶186 **CLA-117.**

[219] *US - Shrimp* - AB Report, ¶ ¶177-180 **CLA-117.**

[220] *Bilcon*, Award on Jurisdiction and Liability, ¶357, **CLA-208*;*** Legitimate Expectations are also reviewed in *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, Award*, ICSID Case No. ARB/14/3 27 December 2016 at 365- 374, **CLA-209*.***

[221] "Dolzer, R. & Stevens, M., *Bilateral Investment Treaties* (London: Martinus Nihoff Publishers, 1995) ("Dolzer (1995)") at 60, **CLA-118.**

[222] *Diversion of Water from the Meuse Case* (Netherlands v. Belgium). [1937], P.C.I.J. (Ser. A/B) No. 70 ("*Diversion of Water*"), p. 321, **CLA-119.**

345. Prof. Kenneth J. Vandevelde, an author of several US Model Bilateral Investment Treaties which formed the drafting foundation of the NAFTA, wrote a treatise examining the investment treaty practice of the United States. In relation to NAFTA Article 1105, Prof. Vandevelde said:

> … the standard is breached not only by acts of bad faith, but by any conduct that is not fair and equitable. Even the weakest reading of the terms "fair and equitable would seem to require more than a mere avoidance of outrage and bad faith. In the absence of the reference to fair and equitable treatment, Article 1105 might have been interpreted to prohibit only outrageous conduct.[223]

346. The *Pope & Talbot* Tribunal found that the "fair and equitable treatment" standard was a standard separate to that provided by international law, to be interpreted according to the ordinary meaning of the words. According to the *Pope & Talbot* Tribunal, fair and equitable treatment obliged the NAFTA Parties to provide the international law standard, as well as to act fairly and equitably.[224]

347. Prof. Vandevelde notes that the principle of reasonableness "requires that host State treatment of covered investment be reasonably related to a legitimate public policy objective".[225] The concept of "reasonableness" prescribes that treaty protection of an Investor's interests will be violated by arbitrary, discriminatory conduct, particularly if it is motivated by animus against the Investor's investment.[226]

348. The Tribunal in *Genin* clarified that "a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith" is a failure legitimate regulatory conduct.[227] In *ADF Group*, the NAFTA Tribunal observed that it

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[223] Kenneth J. Vandevelde, *Bilateral Investment Treaties, History, Policy, and Interpretation* (Oxford: Oxford University Press, 2010), extracts ("Vandevelde (2010)"), p. 193, **CLA-120.**
[224] *Pope & Talbot*,Award on Merits of Phase 2, ¶ ¶ 111 and 113, **CLA-121.**
[225] Kenneth J. Vandevelde, "A Unified Theory of Fair and Equitable Treatment", (2010) 43 *New York University Journal of International Law and Politics* 43 ("Vandevelde I (2010)"), p. 104, **CLA-122.**
[226] Vandevelde I (2010), p. 104, **CLA-122.**
[227] Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia, Award, 2001 WL 34788584 (June 25, 2001) ("Genin - Award"), ¶367, **CLA-123.**

was examining the conduct of the host State for actions that are "idiosyncratic or aberrant and arbitrary" and that are "grossly unfair and unreasonable."[228]

349. As to the meaning of the "reasonableness" standard, the Tribunal in *Saluka Investments* said:

> The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination". The standard of "reasonableness" therefore requires, in this context as well, a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.[229]

350. The *Saluka* Tribunal concluded that in applying the "fair and equitable treatment standard" under an investment treaty, it would have "due regard to all relevant circumstances" to protect a foreign investor's interests, because a host State cannot act in a way that is "manifestly inconsistent, non-transparent, unreasonable (*i.e.* unrelated to some rational policy), or discriminatory (*i.e.* based on unjustifiable distinctions)."[230]

351. As to conduct motivated by anti-investor animus, the NAFTA Tribunal in *Chemtura* said that "thwart[ing] or improperly influenc[ing]" a regulatory review process would violate the international law standard of treatment under NAFTA Article 1105.[231]

352. The NAFTA Tribunal in the *Waste Management (II)* case provided a summary of the jurisprudence regarding the meaning of fair and equitable treatment:

> ...fair and equitable treatment is infringed by conduct attributable to the state and harmful to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic*, is *discriminatory* and exposes the claimant to *sectional or racial*

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[228] *ADF Group* - Award, ¶ ¶ 188,189 **CLA-102.**
[229] *Saluka*, Partial Award, ¶460**, CLA-115.**
[230] *Saluka*, Partial Award, ¶309, **CLA-115.**
[231] *Chemtura Corporation v. Government of Canada*, Award (3 August 2010) ("*Chemtura*, Award"), ¶160, **CLA-125.**

> *prejudice*, or involves a *lack of due process* leading to an outcome that *offends judicial propriety* - as might be the case with a *manifest failure* of natural justice in judicial proceedings or a complete *lack of transparency and candour in an administrative process*. In applying this standard, it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the claimant.[232]

353. Other tribunals, including the CAFTA Tribunal in *Railroad Development*, have endorsed this articulation of the minimum standard.[233]

354. The *Biwater Gauff* Tribunal considered a dispute arising under the United Kingdom-Tanzania BIT. It held that fair and equitable treatment includes the protection of legitimate expectations, good faith, transparency, consistency and non-discrimination.[234] The Tribunal outlined the components of the standard of fair and equitable treatment:[235]

> 1. Denial of justice
>
> 2. Protection of legitimate expectations, such as the reasonable and legitimate expectations taken into account by the foreign investor to make the investment and were relied upon by the investor to make the investment.[236]
>
> 3. Good faith, which includes the general principle as recognized in international law whereby all contracting parties must act in good faith, although a violation of this principle would not require bad faith on the part of the State.[237]

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[232] *Waste Management II,* Award, ¶98 [emphasis added]**, CLA-126.**
[233] *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012, ¶219, **CLA-178**.
[234] *Biwater Gauff, Award,* **CLA-127.**
[235] *Biwater Gauff, Award*, ¶602, **CLA-127.**
[236] *Waste Management II,* Award, ¶305, **CLA-126.**
[237] *Waste Management II*, Award, ¶138, **CLA-126;** *Saluka*, Partial Award, ¶303 **CLA-115.**

4. Transparency, consistency, non-discrimination, which implies that the conduct of the State must be transparent,[238] consistent[239] and non-discriminatory, that is, "not based on unjustifiable distinctions or arbitrary.[240]

355. In *Rumeli Telekom v. Kazakhstan*, the Tribunal observed the parties had agreed that the fair and equitable treatment standard encompasses certain clear principles:

(a) The state must act in a transparent manner.

(b) The state is obliged to act in good faith.

(c) The state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process;

(d) The state must respect procedural propriety and due process.[241]

356. The *Rumeli* Tribunal also held that fair and equitable treatment included an obligation that the State respect the investor's reasonable and legitimate expectations.[242]

357. International investment tribunals have interpreted the fair and equitable treatment standard as requiring adherence to five core principles: reasonableness, security, non-discrimination, transparency, and due process.[243] These five principles have been interpreted as requiring treatment consistent with *the rule of law*.[244]

a) Treatment Free from Arbitrary Conduct

[238] *Saluka* - Partial Award, at para. 164 **CLA-115**; *CME Czech Republic B.V. v. Czech Republic*, Final Award, 2003 WL 24070172 (March 14, 2003) ("*CME* - Award"), ¶ 611, **CLA-128**; *Maffezini* – Award, at ¶83 **CLA-129**; *Metalclad Corporation v. The United Mexican States* Award, 2000 WL 34514285 (August 30, 2000) ("*Metalclad* (2000) - Award ") **CLA-130.**

[239] *Saluka* - Partial Award, ¶164 **CLA-115**; *CME* - Award, ¶611 **CLA-128.**

[240] *Saluka* - Partial Award, ¶164 **CLA-115**; *Waste Management II* - Award, ¶98 **CLA-126**; *CME* - Award, ¶611 **CLA-128.**

[241] *Rumeli*, Award, ¶609**, CLA-131.**

[242] *Rumeli*, Award, ¶609**, CLA-131.**

[243] Vandevelde I (2010), p.105, **CLA-122.**

[244] Vandevelde I (2010), p.105, **CLA-122**

358. A state breaches customary international law obligations when it acts arbitrarily. A state, therefore, breaches its customary international law obligation when it acts on "prejudice or preference rather than on reason or fact."[245] As stated by the Tribunal in the *CMS v. Argentina* Award, "[t]he standard of protection against arbitrariness … is related to that of fair and equitable treatment. Any measure that might involve arbitrariness … is in itself contrary to fair and equitable treatment."[246]

359. The United States – Panama Claims Commission in the *de Sabla* case held that a country fails to accord a minimum standard of treatment to a foreign national when it imposes a measure affecting private interests that was not transparent or properly administered.[247] Arbitrariness either by design or in application is a hallmark of a violation of the customary international law standard of treatment owed by countries to foreign nationals operating within their territory.

360. NAFTA Tribunals consistently have found arbitrary measures to constitute a breach of the international law standard. The *Waste Management (II)* NAFTA Tribunal stated:

> Taken together, the *S.D. Myers, Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed... if the conduct is arbitrary...[248]

361. The *Metalclad* NAFTA Tribunal considered a claim that Mexico breached its fair and equitable treatment obligation through the actions of one of its municipalities. The municipality in question was legally allowed to consider only construction issues when granting or denying building permits. The municipality exceeded that authority and breached its obligation when it refused the investor's permit on environmental

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[245] *Lauder v. Czech Republic*, Final Award, 2001 WL 34786000 (3 September 2001) ("*Lauder* - Final Award"), ¶ 221 **CLA-132.**
[246] *CMS Gas* - Award, p. 290 **CLA-104.**
[247] *Marguerite de Joly*, pp. 362-363, **CLA-133.**
[248] *Waste Management II*, Award, ¶98, **CLA-126.**

grounds.[249] In finding that this conduct amounted to a breach of the fair and equitable treatment standard, the NAFTA Tribunal said:

> None of the reasons [for refusing the permit] included a reference to any problems associated with the physical construction of the landfill or to any physical defects therein. The Tribunal therefore finds that the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility.[250]

362. In finding that Mexico breached the international law standard of treatment, the *Metalclad* NAFTA Tribunal also held that arbitrary conduct breaches international law obligations when the conduct is based on *improper* or *irrelevant considerations*.[251] For example, the Tribunal noted that "the construction permit was denied without any consideration of, or specific reference to, construction aspects or flaws of the physical facility."[252] With respect to irrelevant considerations, the *Metalclad* NAFTA Tribunal held:

> ... the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations ... was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site.[253]

363. The *S.D. Myers* NAFTA Tribunal found that a violation of Article 1105 occurs "when it is shown that an investor has been treated in such an *unjust or arbitrary*

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[249] The Metalclad tribunal said at ¶ 86: "Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site." *Metalclad* (2000) - Award, **CLA-130.**

[250] *Metalclad* (2000) - Award, at ¶¶ 92, 93 [emphasis added], **CLA-130.**

[251] *Metalclad* (2000) - Award, ¶ 86, **CLA-130.**

[252] *Metalclad* (2000) - Award, ¶ 93, **CLA-130.**

[253] *Metalclad* (2000) - Award, ¶ 86, **CLA-130.**

manner that the treatment rises to the level that is unacceptable from the international perspective."[254] The Award in *S.D. Myers* indicated:

> In some cases, the breach of international law by a host Party may not be decisive in determining that a foreign investor has been denied '*fair and equitable treatment*', but the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to weigh heavily in favor of finding a breach of Article 1105 [emphasis in original].[255]

364. Other investor-state tribunals have similarly concluded that a state acts arbitrarily when it proceeds based on prejudice or preference, and not on reason or fact.

365. In *Lauder v. Czech Republic*, for example, the ICSID Tribunal found an arbitrary measure to be something founded on prejudice or preference rather than reason or fact.[256] The Tribunal held:

> ... The measure was arbitrary because it was not founded on reason or fact, nor on the law ... but on mere fear reflecting national preference.[257]

366. The *Pope & Talbot* NAFTA Tribunal also found Canada breached the international law standard by acting on prejudice rather than on reason or fact. Canada breached the obligation by threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting SLD's requests for information."[258]

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[254] *S. D. Myers,*First Partial Award, ¶ 263, **CLA-111.**
[255] *S. D. Myers,*First Partial Award, ¶ 264, **CLA-111.**
[256] *Lauder*, Final Award, ¶ 232, **CLA-132*,*** at ¶ 221 the Tribunal said: "The Treaty does not define an arbitrary measure. According to Black's Law Dictionary, arbitrary means 'depending on individual discretion; ... founded on prejudice or preference rather than on reason or fact'...."
[257] *Lauder*, Final Award, ¶ 232, **CLA-132.**
[258] *Pope & Talbot*, Award on Merits of Phase 2, ¶¶ 177-181, **CLA-121** (The SLD referenced in the citation was the Government of Canada's Softwood Lumber Division).

367. In finding that Poland failed to provide fair and equitable treatment, the Tribunal in the *Eureko B.V. v. Republic of Poland* case found that Poland "acted not for cause but for purely arbitrary reasons ..."[259]

368. The *Occidental* Tribunal also found that Ecuador breached its obligation to provide fair and equitable treatment by acting in an arbitrary manner.[260]

369. The Tribunal in *National Grid v. Argentina* held that the words "arbitrary" and "unreasonable" are coterminous, and that they mean "something done capriciously, without reason."[261]

370. These cases demonstrate comprehensive agreement among tribunals that the fair and equitable treatment obligation includes an independent obligation not to act arbitrarily against investors from other NAFTA parties.

371. As to the factors that may constitute arbitrary action, the Tribunal in *Genin* observed that a violation of the obligation would occur when any procedural irregularity amounted to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action.[262]

372. The NAFTA Tribunal in *Metalclad* held that the denial of a construction permit to the Investor was a breach of the fair and equitable treatment standard, because the "permit was denied at a meeting of the Municipal Town Council of which Metalclad had received no notice, to which it received no invitation, and at which it was given no opportunity to appear."[263]

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[259] *Eureko* - Partial Award, ¶ 233 **CLA-114.**
[260] *Occidental* - Final Award, ¶163, **CLA-139**, finding that "the investor: ... was confronted with a variety of practices, regulations and rules dealing with the question of VAT ... this resulted in a confusing situation ... it is that very confusion and lack of clarity that resulted in some form of arbitrariness ..." See also *International Thunderbird Gaming Corporation v. United Mexican State*, Award, 2006 WL 247692 (January 26, 2006) ("*Thunderbird v. Mexico* - Award") ***CLA-136***; *Metalclad* (2000) - Award, ¶ 99 **CLA-130**; *CMS Gas* - Award, at ¶ 290 ***CLA-104***; *TECMED* - Award, ¶154, **CLA-113.**
[261] *National Grid* - Award, ¶197, **CLA-101.**
[262] *Genin* - Award, ¶ 371, **CLA-123.**
[263] *Metalclad* (2000) - Award, ¶ 88, **CLA-130.**

373. At its core, the International Law Standard is a standard of conduct of the State with respect to foreign investments. The duty to act in good faith is the "fundamental norm underpinning international legal responsibility."[264] Several NAFTA and non-NAFTA Awards have recognized that the duty to act in good faith is an independent obligation within the International Law Standard.[265]

2. Good faith is an integral part of the international law standard of treatment.

374. For instance, the *S.D. Myers* Tribunal said, "Article 1105 imports into the NAFTA the international law requirements of due process, economic rights, *obligations of good faith* and natural justice."[266] Similarly, the *Tecmed* Tribunal said that "the commitment of fair and equitable treatment included in Article 4(1) of the [Spain-Mexico] Agreement is an expression and part of the *bona fide* principle recognized in international law."[267]

375. In the *de Sabla* case, the United States – Panama General Claims Commission held that a state does not provide treatment in accord with the International Law standard of treatment when the design and application of an administrative process is deficient. Panama's deficiency in the *de Sabla* case centered on a sudden change in the regulatory process with respect to land registration, giving rise to an unreasonably brief response period for the Claimant and resulting in damage to her. The US-Panama Claims Commission determined that the application of the administrative

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[264] Franck, T. *Fairness in International Law and Institutions* (Clarendon Press, 1995), pp.42-43 **CLA-106**

[265] *Técnicas Medioambientales, TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 2003 WL 24038436 (May 29, 2003) ("*TECMED*"), ¶153, **CLA-113**; *Eureko B.V. v. Republic of Poland,* Partial Award, 2005 WL 2166281 (19 August 2005) ("*Eureko*"), at ¶235 : "The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the guarantee of fair and equitable treatment according to international law means that:... this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment..." **CLA-114;** *TECMED*, ¶154, **CLA-113.**

[266] *S.D. Myers,* First Partial Award, ¶134 [emphasis added], **CLA-111.**

[267] *TECMED*, Award, ¶153 **CLA-113.**

process violated the international minimum standard of treatment, notwithstanding that the sudden change in regulatory was of general application.[268]

376. Similarly, in the recent CAFTA-DR Tribunal decision in *Teco v Guatemala*, the CAFTA-DR Tribunal found that an energy regulatory body's failure to follow its own public procedural rules was inconsistent with the customary international law minimum standard of treatment of aliens.[269]

377. It has been well-established by NAFTA Tribunals that arbitrary measures constitute a breach of the international law standard under NAFTA Article 1105:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed... if the conduct is *arbitrary*...[270]

378. A state breaches customary international law obligation when it acts arbitrarily. A state, therefore, breaches its customary international law obligation when it acts on "prejudice or preference rather than on reason or fact."[271]

379. The subsequent *GAMI* NAFTA decision adopted the *Waste Management* Tribunal's description of the standard.[272] In finding that Mexico breached Article 1105 by refusing on irrelevant grounds to issue a permit to construct a landfill, the *Metalclad*

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[268] *Marguerite de Joly de Sabla (United States) v. Panama* (1934) 28 AJIL 602; (1933) 6 RIAA 358 ("*Marguerite de Joly*"), pp. 363,366, **CLA-133,**The US – Panama General Claims Commission stated "the period allowed for opposition by the laws, 15 days after a 30-day positing of the edicto, also seems unreasonably brief"

[269] *Teco Guatemala Holdings, LLC v The Republic of Guatemala* (ICSID Cas No. ARB/10/17), Award ("*Teco*, Award"), 19 December 2013, ¶¶457, 583, 588 **CLA-181,** whereby the Tribunal determined that Guatemala violated Article 10.5 of the CAFTA-DR by relying on and adopting a report on tariff calculations by rather than the expert determination completed under the established regulatory process. The Tribunal found that Article 10.5 was breached, despite that fact that the government regulator was not bound by the expert determination.

[270] *Waste Management, Inc. v. United Mexican States* (Case No. ARB(AF)/00/3), Award ("*Waste Management*, Award"), 30 April 2004, ¶98 **CLA-126**.

[271] *Lauder v. The Czech Republic*, Final Award ("*Lauder*, Final Award"), 3 September 2001, ¶221 **CLA-132.**

[272] *GAMI Investments, Inc. v. The Government of the United Mexican States*, Final Award ("GAMI, Final Award"), 15 November 2004, at ¶95, **CLA-135.**

decision also applied the principle that arbitrary conduct breaches Article 1105.[273] In the *Metalclad* award, the Tribunal decided Mexico breached its NAFTA Article 1105 obligation by acting on the basis of irrelevant considerations.[274]

380. The *Pope & Talbot* NAFTA Tribunal also found Canada breached Article 1105 by acting on prejudice rather than on reason or fact. Canada breached the obligation by threatening the investor, denying its "reasonable requests for pertinent information" and requiring the investor "to incur unnecessary expense and disruption in meeting SLD's requests for information."[275]

381. Both the *Waste Management* and *GAMI* Tribunals recognized an independent obligation under Article 1105 to not act in an arbitrary or discriminatory manner. The *GAMI* Tribunal quoted the following passage from *Waste Management*:

> Taken together, the *S.D. Myers*, *Mondev, ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is *arbitrary*, grossly unfair, unjust or idiosyncratic, is *discriminatory* and exposes the claimant to sectional or racial prejudice.[276]

382. In the *Thunderbird* NAFTA claim, the Tribunal characterised "manifest arbitrariness in administration of proceedings" as "constituting proof of an abuse of right."[277] Similarly, the *Azinian* Tribunal noted that "clear and malicious misapplication of the law" constitutes denial of justice and abuse of rights.[278]

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[273] *Metalclad Corporation v. The United Mexican States,* Award ("*Metaclad*, Award"), 30 August 2000*)*, ¶¶86,101, **CLA-130,** "the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations. was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site. The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105."

[274] *Metalclad*, Award, ¶92, **CLA-130.**

[275] *Pope & Talbot,* Award on the Merits Phase 2, ¶¶177-181, **CLA-121.**

[276] *GAMI,* Final Award, ¶89 [emphasis added], **CLA-135**.

[277] International Thunderbird Gaming Corporation v. The United Mexican States, Award ("Thunderbird, Award"), 26 January 2006, ¶197, **CLA-136.**

[278] Robert *Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2), Award ("*Azinian,* Award"), 1 November 1999, ¶103, **CLA-137.**

383. The NAFTA Tribunal in *Loewen found*:

> Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the [FTC] Interpretation according to its terms.[279]

384. The *Metalclad* Tribunal considered a claim that Mexico breached its Article 1105 obligations through the actions of one of its municipalities. The municipality in question was only legally allowed to consider construction issues when granting or denying building permits. The municipality exceeded that authority when it refused the investor's permit on environmental grounds.[280] In finding that this conduct amounted to a breach of Article 1105, the Tribunal said:

> *Metalclad* was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105.[281]

385. The Tribunal, therefore, found a breach of Article 1105 because Mexico acted on the basis of irrelevant considerations.

386. In *Bilcon*, the Tribunal quoted the *Merrill & Ring* decision for the proposition that "[c]onduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA Tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention…."[282] The Tribunal

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[279] The *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award ("*Lowen*, Award"),26 June 2003, ¶132 [emphasis added] **CLA-138.**

[280] *Metalclad*, Award, ¶86, **CLA-130**: "Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper, as was the municipality's denial of the permit for any reason other than those related to the physical construction or defects in the site."

[281] *Metalclad*, Award, ¶101, **CLA-130.**

[282] *Bilcon*, Award on Jurisdiction and Liability, ¶435, **CLA-208**.

then went on to find Canada's conduct arbitrary because the State "effectively created, without legal authority or fair notice to *Bilcon*, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law".[283]

387. These cases demonstrate comprehensive broad support among NAFTA tribunals for finding that NAFTA Article 1105 is inclusive of an independent obligation not to act arbitrarily or discriminate against investors from other parties.

388. Non-NAFTA tribunal decisions also demonstrate that the International Law standard requires states to avoid acting arbitrarily. As observed by the *CMS* Tribunal "[a]ny measure that might involve arbitrariness... is in itself contrary to fair and equitable treatment."[284] Similarly, in finding that Poland failed to provide fair and equitable treatment, the *Eureko* Tribunal said Poland "acted not for cause but for purely arbitrary reasons..."[285] The *Occidental* Tribunal likewise found that Ecuador breached its obligation to provide fair and equitable treatment by acting in an arbitrary manner.[286]

389. Numerous other authorities support the conclusion of these tribunals that "if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, the fair and equitable standard has been violated."[287]

390. Fundamentally, both international human rights law and international investment law "contain rules regarding the treatment of individuals within a State."[288] International human rights law is "a relevant rule for the purposes of interpretation of treaty rules or

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[283] *Bilcon*, Award on Jurisdiction and Liability, ¶591 **CLA-208**.
[284] *CMS Gas*, Award, ¶290, **CLA-104.**
[285] *Eureko*, Award, ¶233, **CLA-114.**
[286] *Occidental,* Final Award, at ¶163, **CLA-139,** finding that the investor: "was confronted with a variety of practices, regulations and rules dealing with the question of VAT... this resulted in a confusing situation. it is that very confusion and lack of clarity that resulted in some form of arbitrariness."
[287] *Fair and Equitable Treatment*, Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (vol III) (1999), p. 37, ***CLA*-222**.
[288] Martinas Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment*, Oxford University Press, 2013, ("Paparinskis (2013)") p. 176, **CLA-140.**

would provide an appropriate source of analogy," that "may enter the interpretative process" because "human rights rules may contain functionally analogous obligations regarding the treatment of investors and investment." [289] It is for this reason that multiple international investment tribunals have drawn on international human rights case law.[290]

391. The protection of individuals from arbitrariness is an objective of international human rights[291] as well as constituting an integral part of the international law standard of treatment within NAFTA Article 1105.The decisions of the European Court of Human Rights support the fact that state conduct will be arbitrary in "the absence of a legitimate aim."[292] It is in this vein that courts have treated procedural safeguards "as elements of lawfulness."[293] The jurisprudence supports the conclusion that "restrictive measures must have some basis in domestic law, and be accessible and foreseeable."[294]

392. Arbitrary state conduct is not tolerated under international human rights law. Despite a wide ambit for public policy considerations, judges closely scrutinize "*ad hoc* abuses and formal and procedural safeguards."[295]

393. When scrutinizing the conduct in question to protect procedural safeguards, decisions arising from international human rights tribunals should be seen as one of the valid "interpretative authorities" to assist international investment treaty tribunals

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[289] Paparinskis (2013), p. 175, **CLA-140.**
[290] *Mondev,* Award, ¶141, **RLA-083**; *International Thunderbird Gaming Corporation v. The United Mexican States*, Separate Opinion of Thomas Wälde, December 2005, ¶13, **CLA-141**; *Total S.A. v. The Argentine Republic (*ICSID Case No. ARB/04/01), Decision on Liability ("*Total S.A*., Decision on Liability"), 27 December 2010, ¶129, **CLA-142.**
[291] Paparinskis (2013), p. 232, **CLA-140:** "The recent case law has also elaborated the obligations of States to follow their legislative policies, and to ensure that the form of the measures and the procedural safeguards protect from arbitrariness."
[292] Paparinskis (2013), p. 233, **CLA-140.**
[293] Paparinskis (2013), p.236, **CLA-140.**
[294] Paparinskis (2013), pp. 235-236, **CLA-140.**
[295] Paparinskis (2013), p.237, **CLA-140.**

when assessing the administration of justice as protected by "a treaty obligation to provide fair and equitable treatment."[296]

394. Rights protected in international human rights law as related to the administration of justice have been endorsed by international investment tribunals as necessary of protection in the investment context.

395. In *Thunderbird,* the Tribunal spoke of a "failure to provide due process (constituting an administrative denial of justice)."[297] In contrast to the international human rights law concept of denial of justice, *Thunderbird* supports the proposition that administrative denials of justice in international investment law can be found in the absence of the exhaustions of domestic remedies. Mr. Paparinskis describes this as follows:

> The better view of this practice is that parties and Tribunals used 'denial of justice' not as a term of art of the primary rule on the administration of judicial justice but as a descriptive reference to breaches of procedural propriety.[298]

396. Prof. Paparinskis continues that the cases fall "within the international standard's requirements for compliance with certain procedural criteria, but situated outside the international standard's rules on the administration of justice, and therefore do not require full exhaustion of judicial remedies."[299]

3. The protection against abuse of rights

397. Canada has an obligation within the international law standard of treatment to protect against the abuse of rights which harm the investments of against foreign investors. The *Azinian* NAFTA decision[300] and the writings of eminent scholars such as

[296] Paparinskis (2013), p. 181, **CLA-140.**
[297] *Thunderbird* Award, ¶197, **CLA-136.**
[298] Paparinskis (2013), p. 209, **CLA-140.**
[299] Paparinskis (2013), p. 209, **CLA-140.**
[300] *Azinian,* Award, ¶103, **CLA-137.**

Prof. Bin Cheng[301] and Sir Hersch Lauterpacht,[302] reinforce this rule as a standalone obligation under customary international law.

398. In his treatise about the central role general principles of law within international law, Professor Bin Cheng has explained that the obligation to act in good faith includes an obligation on the state not to abuse powers. He further explained that:

> [T]he theory of abuse of rights (*abus de droit*), recognised in principle both by the Permanent Court of International Justice and the International Court of Justice is merely an application of this principle [of good faith] to the exercise of rights.[303]

399. This long-standing principle also applies within the context of abuses of administrative authority. The roots of the principle of abuse of rights date to the foundations of modern international law. In the *Bering Fur Seals* case, the Tribunal accepted that the malicious exercise of a right was an abuse of a state's authority.[304]

400. In considering similar early developments of the law, Sir Hersch Lauterpacht effectively tied the concept of abuse of rights to the flexible evolution of international law.[305] He demonstrates that the principle allows for international tribunals to ensure that the actions of states are judged in accordance with modern views of morality.[306] As such, from the beginning, the concept of abuse of rights is reasonably similar to an evolving customary international standard.

401. In the context of the international law standard of treatment, the abuse of rights arises in three principal ways, namely:

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[301] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1987: Cambridge University Press) ("Cheng (1987)"), p.123, **CLA-108.**
[302] H. Lauterpacht, *The Function of Law in the International Community* (Oxford University Press, 1933), ("Lauterpacht (1933)"), p. 289, **CLA-147.**
[303] Cheng (1987), p. 121, **CLA-108.**
[304] Cheng (1987), pp.121-122, **CLA-108**.
[305] Lauterpacht (1933), p. 287, **CLA-147.**
[306] Lauterpacht (1933), p. 287, **CLA-147.**

(a) A state exercises powers in such a way as to hinder an investor in the enjoyment of their rights, resulting in injury to the investor;

(b) A fictitious exercise of a right; or

(c) An abuse of discretion in the exercise of governmental powers.[307]

402. The NAFTA should be read as preserving and affirming the right to regulate for legitimate purposes but each of these manifestations of governmental action is a fundamental violation of the most longstanding part of the international law standard of treatment.

403. Alexandre Kiss in his article on Abuse of Rights in the *Encyclopedia of Public International Law* agrees with this type of three-part abuse of rights taxonomy and concludes that no proof of intention to cause harm is necessary when there is an abuse of discretion in the exercise of governmental powers. [308] However, such intent is necessary when looking at the fictitious exercise of a right (such as where a right is exercised intentionally for an end that is different from that for which that right was created). [309]

404. The *Azinian* Tribunal confirmed how protection against the abuse of rights was contained within the international law standard guaranteed under NAFTA Article 1105. It stated:

> There is a fourth type of denial of justice, namely clear and malicious misapplication of the law. This type of wrong doubtless overlaps with the notion of "pretense of form" to mask a violation of international law.[310]

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[307] Panizzon (2006), p. 30, **CLA-148.**
[308] Alexandre Kiss, "Abuse of Rights," *Max Plank Encyclopedia of Public International Law* (vol 1), ¶¶5-6, **CLA-150.**
[309] Cheng (1987), p. 123, **CLA-108.**
[310] *Azinian*, Award, ¶103, **CLA-137.**

405. Patent abuses of administrative decision-making will violate the "fair and equitable treatment" standard. In his Separate Opinion for *Impregilo v Argentina*, Judge Charles Brower carefully examined a series of actions by Argentina that were "nothing less than deliberate abuse of administrative power with a political motive."[311]

406. In *Impregilo v Argentina,*[312] the investor was an indirect minority shareholder in AGBA, a company that operated a water and sewerage services concession in the Province of Buenos Aires. The provincial authorities had terminated the contract and transferred the concession to a state-owned entity, listing a host of contract breaches by AGBA as justification for its decision. In response, Impregilo initiated an arbitration under the Argentina-Italy BIT, alleging that various actions by provincial authorities frustrating and terminating AGBA's performance of the concession breached provisions of the BIT, including the obligations on fair and equitable treatment and expropriation.

407. In his Separate Opinion, Judge Brower described a "behavioral pattern": a series of unreasonable legislative and regulatory burdens, delays, unduly extensive information requests and cost-raising tactics on the part of the Province of Buenos Aires – acts that transcended mere "contractual violations" and constituted substantial and undue interference with the investment.[313]

408. In another example, the Tribunal in *PSEG Global, Inc. v. Turkey* observed that the fair and equitable treatment was essential towards the obligation to afford a stable and predictable legal framework. As such, the fair and equitable treatment obligation was

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[311] *Impregilo S.p.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Separate Opinion of Judge Charles N. Brower ("*Impregilo*, Separate Opinion of Judge Charles N. Bower"), 21 June 2011, at ¶7, **CLA-152**: Judge Brower concurred with the majority of the Tribunal that had accepted Impregilo's arguments on "fair and equitable treatment." However, he disagreed with the deferential attitude towards government actions, which he believed constituted further violations of Argentina's "fair and equitable treatment" obligations under the treaty.

[312] *Impregilo S.P.A. v. Argentine Republic* (ICSID Case No. ARB/07/17), Award, 21June 2011, **CLA-153.**

[313] *Impregilo*, Separate Opinion of Judge Charles N. Bower, ¶¶12-15, **CLA-152:** Judge Brower further described events that "fit into the pattern of the Province [of Buenos Aires] disruptive actions," and emphasized how a "series of steps" can culminate into a breach of the "fair and equitable treatment" standard.

breached due to the abuse of authority displayed by certain State organs and by the delivery of inconsistent administrative acts.[314]

4. Corruption & Freedom from Coercion and Harassment

409. International investment tribunals long have accepted that fair and equitable treatment standard includes freedom from coercion and harassment.

410. For example, in the *Saluka v. Czech Republic* case, that Tribunal stated:

> Finally, it transpires from arbitral practice that, according to the "fair and equitable treatment" standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from **coercion or harassment** by its own regulatory authorities.[315]

411. Moreover, the prohibition against corruption is well established in many countries through domestic anti-corruption statutes such as the Foreign Corrupt Practices Act and further emboldened in the international legal system throughout, a myriad of anti-corruption conventions and codes including but not limited to the 1996 The Organization of American States' Inter-American Convention Against Corruption,[316] the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,[317] the 1999 Council of Europe's Criminal Law Convention on Corruption,[318] and Civil Law Convention on Corruption,[319] the African Union Convention on Preventing and Combatting Corruption[320], and more recently the 2003 United Nations Convention Against Corruption.[321]

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[314] *PSEG GLOBAL, INC., The North American Coal Corporation, And Konya Ingin Electrik Uretim Ve Ticaret Limited Sirketi V. Turkey*, ICSID Case No. ARB/02/5, Award (January 19, 2007) ("*PSEG*"), at ¶¶246-256, particularly ¶¶247-248, **CLA-154.**

[315] *Saluka Investments BC (the Netherlands) v. The Czech Republic,* Partial Award, March 17, 2006, at para. 308 (emphasis added), **CLA-115**.

[316] The Organization of American States' Inter-American Convention Against Corruption, **CLA-210**.

[317] OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, **CLA-211**.

[318] Council of Europe's Criminal Law Convention on Corruption, **CLA-212**.

[319] Civil Law Convention on Corruption, **CLA-213**.

[320] African Union Convention on Preventing and Combatting Corruption, **CLA-214**.

[321] United Nations Convention Against Corruption, **CLA-215**.

412. Corrupt acts have been interpreted to breach the fair and equitable treatment standard.

413. For example, example, in *Desert Line v. Yemen* the Tribunal concluded that a corrupt act would breach the fair and equitable treatment standard. That Tribunal stated:

> The settlement agreement according to which the prevailing party in an arbitral proceeding renounces half of its rights without due consideration can only be valid if it is the result of an authentic, fair and equitable negotiation. In the case at hand, the rejection of the outcome of a mechanism for the resolution of the claims rendered in a local arbitration by two arbitrators selected by the Parties, and assisted in their deliberations by a local Yemeni magistrate; coupled with the subjection of the Claimant's employees, family members, and equipment to arrest and armed interference, as well as the subsequent peremptory "advice" that it was "in [his] interest" (Exh. CM-113) to accept that the amount awarded be amputated by half, falls well short of minimum standards of International law and cannot be the result of an authentic, fair and equitable negotiation.[322]

5. Transparency

414. "Transparency is considered to enhance the predictability and stability of the investment relationship and thus to represent an incentive for the promotion of investment."[323] Chapter 18 of the NAFTA is largely dedicated to the importance of transparency. The fair and equitable treatment standard also requires that Canada provide investors with a transparent and fair business environment. The NAFTA Tribunal in *Metalclad* defined the host State's obligation for transparency as including:

> … all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of

[322] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, 6 February 2008, ¶179, **CLA-206**.

[323] Roland Klager, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, 2011), at 228, **CLA-155.**

another Party. There should be no room for doubt or uncertainty on such matters.[324]

415. The customary international law standard is also breached when a party acts without transparency. As stated by the NAFTA Tribunal in the *Waste Management (II)* dispute, where the "minimum standard of treatment of fair and equitable treatment is infringed... if the conduct... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with... a complete lack of transparency and candour in an administrative process."[325]

416. Basic notions of administrative due process entail transparency in the administrative rules applicable to an investment and notice of impending acts affecting a legal or property right.[326] It was for this reason that the Tribunal in *Bilcon* found that Canada breached NAFTA Article 1105 after finding that "[t]he Investors were given no reasonable notice" of Canada's impending conduct "and therefore had not opportunity to seek to clarify or contest it."[327]

417. The duty of transparency is a broad one, explained by Martins Paparinskis as conduct which is "in apparent breach of domestic law, or justified only by sparse reasoning and sometimes addressing the choice of different means, matters may be reasonably expected or procedural improprieties."[328] After completing a review of the general concept and application of the obligation, Mr. Paparinskis summaries the appropriate test as one in which an investor needs to be provided with "sufficient

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[324] *Metalclad,* at ¶76, ***CLA-130*****:** This transparency obligation was vacated by a reviewing domestic law court which held that transparency was not an independent ground of the international law standard of treatment.
[325] Waste Management II, at ¶98, **CLA-126.**
[326] See Middle East Cement v. Egypt, ¶143, ***CLA*-198**; Tecmed v. Mexico*,* ¶162, ***CLA*-113**; Metalclad v. Mexico, ¶91, ***CLA*-130**.
[327] *Bilcon v. Canada*, Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2005, ¶451, ***CLA-208.***
[328] Paparinskis, at 248, at fns.270-274, citing Maffezini, Rumeli, Vivendi II, Tecmed, Saluka, and PSEG, **CLA-140.**

accessibility in light of local practices, where the investor has relied on competent assistance."[329]

418. Roland Klager also undertakes a significant analysis of transparency obligations under international law, and considers that the "notion of transparency in this context is concerned with the openness and clarity of the host state's legal regime and procedures."[330] This is not surprising as "number of international investment agreements have expressly incorporated transparency obligations" into investment treaties.[331]

6. Procedural Fairness

419. Due process is another essential feature of the investment environment required by the fair and equitable treatment standard. The tribunal in *Waste Management v. Mexico* remarked that "a complete lack of transparency and candour in an administrative process" would result in a lack of due process in violation of the fair and equitable treatment standard.[332] Basic notions of administrative due process entail transparency in the administrative rules applicable to an investment and notice of impending acts affecting a legal or property right.[333]

420. In *Lauder*, the Tribunal observed that the obligation to provide full security and protection extends beyond physical security to ensure that the "judicial system has remained fully available to the claimant."[334] The obligation to provide procedural fairness requires a State to act in a manner that is in accordance with its obligation of good faith as secured by treaty protections or general international law. The Appellate

[329] *Paparinskis,* at 249, Footnote 287, **CLA-140.**
[330] *Klager*, at 228, **CLA-155.**
[331] *Klager*, at 228, **CLA-155.**
[332] *Waste Management, Inc v. United Mexican States* (ICSID Case No. ARB(AF)/98/2) Award, 30 April 2004, ¶98 , ***CLA*-126**.
[333] See Middle East Cement v. Egypt, **CLA-198**, para 143; Tecmed v. Mexico*,* ¶162, **CLA-113**; Metalclad v. Mexico, ¶91, ***CLA*130**.
[334] *Lauder* - Final Award, ¶314, **CLA-132.**

Body in *Thailand-Cigarettes* recently elaborated on the importance of due process in procedures adopted by an administrative panel:

> Due process is a fundamental principle of WTO dispute settlement. It informs and finds reflection in the provisions of the DSU. In conducting an objective assessment of a matter, a panel is "bound to ensure that due process is respected". *Due process is intrinsically connected to notions of fairness,* impartiality, and the rights of parties to be heard and to be afforded an adequate opportunity to pursue their claims, make out their defenses, and establish the facts in the context of proceedings conducted in a *balanced and orderly manner*, according to established rules.[335]

421. A number of tribunals have focused on whether in the "totality of the circumstances", the host State provided an "orderly process and timely disposition" and a "transparent and predictable framework" for an investor's business planning and investment, thereby, treating the investor "*fairly and justly* in accordance with the NAFTA."[336]

422. The *Methanex* NAFTA Tribunal implicitly recognized that NAFTA Article 1105(1) includes due process by concluding that "[i]f Article 1105(1) had already included a non-discrimination requirement, there would be no need to insert that requirement in Article 1110(1)(b), for it would already have been included in the incorporation of Article 1105(1)'s due process requirement."[337]

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[335] *Thailand - Customs and Fiscal Measures on Cigarettes from the Philippines*, Report of the Appellate Body, WT/DS371/AB/R (17 June 2011) ("*Thailand - Cigarettes* - AB Report"), at ¶ 147, **CLA-156.** The Appellate Body has held that "the protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU", and that "due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings". (Appellate Body Reports, Canada – Continued Suspension / US – Continued Suspension, at ¶433; and Appellate Body Report, Thailand – H-Beams, at ¶88, respectively).

[336] *Metalclad* (2000) - Award, at ¶ 99 [emphasis added], **CLA-130.**

[337] *Methanex*, Award on Jurisdiction, ¶15, **CLA-158**; Tudor, I., The Fair and Equitable Treatment Standard in the International Law of Foreign Investment (Oxford: Oxford University Press, 2008), extract ("Tudor (2008)"), p.178, **CLA-157.**

423. The Tribunal in *Genin* observed that a violation of the investment treaty would occur when any procedural irregularity present amounted to bad faith, a wilful disregard of due process of law, or an extreme insufficiency of action.[338]

424. The NAFTA Tribunal in *Metalclad* considered whether the denial of a construction permit to the Investor was a breach of the fair and equitable treatment standard. The Tribunal observed that the "permit was denied at a meeting of the Municipal Town Council of which Metalclad had received no notice, to which it received no invitation, and at which it was given no opportunity to appear",[339] and noted that, beyond that requirement of transparency, the "absence of any established practice or procedure as to the manner of handling applications for a municipal construction permit" contributed to its reasons for finding a breach of NAFTA Article 1105(1).[340]

425. The customary international law standard is also breached when a party acts without transparency. As noted by the NAFTA Tribunal in *Waste Management (II)*, the "minimum standard of treatment of fair and equitable treatment is infringed ... if the conduct ... involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with ... a complete lack of transparency and candour in an administrative process."[341]

426. The NAFTA Tribunal in *Metalclad* defined the host State's obligation for transparency as including:

> … all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of

[338] *Genin* - Award, ¶ 371, **CLA-123.**
[339] *Metalclad* (2000), Award, ¶ 91, **CLA-130.**
[340] *Metalclad* (2000), Award, ¶ 88, **CLA-130.**
[341] *Waste Management II* - Award, ¶ 98, **CLA-126.**

another Party. There should be no room for doubt or uncertainty on such matters.[342]

427. The NAFTA Tribunal in *Bilcon* found due process to be lacking because the Investors were not apprised of the factors needed for their project to go forward and encountered a lack of interest from Canadian authorities in a hearing to review that decision.[343]

7. Legitimate Expectations

428. The fair and equitable treatment obligation includes the obligation to protect legitimate expectations. Numerous tribunals interpreting modern investment treaties have affirmed that a state fails to meet the international law standard of treatment when it fails to fulfil the legitimate expectations of investors.[344]

429. Such expectations can arise from a variety of sources,[345] including contracts with the State and "assurances explicit or implicit, or on representations made by the State which the investor took into account in making the investment."[346]

430. The tribunal in *Lemire v. Ukraine* further observed that tribunals applying the fair and equitable treatment standard have recognized that legitimate expectations "can be defined on a general and on a specific level."[347] Thus, in addition to specific

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[342] *Metalclad* (2000) - Award, ¶76, **CLA-130** This transparency obligation was vacated by a reviewing domestic law court which held that transparency was not an independent ground of the international law standard of treatment.

[343] *Bilcon,* Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2005, ¶590 **CLA-208**.

[344] *TECMED*, Award, **CLA-113**, *Metalclad* (2000) - Award, **CLA-130**, *MTD Equity* – Award **CLA-159*;*** *Occidental - Final Award **CLA-139*** and *CMS Gas* - Award **CLA-104**; *Saluka v. Czech Republic*, ¶¶301-302 **CLA-115** (calling legitimate expectations the "dominant element" of the fair and equitable treatment standard); *Suez v. Argentina*, at ¶¶203 ***CLA-223-224, 226, 228-231*** .

[345] C.F. Dugan, D. Wallace, N.D. Rubins and B. Sabahi, *Investor-State Arbitration* (2008), p. 513, **CLA-224** ("The legitimate expectations of the investor as formulated by *Tecmed* and further described by other tribunals encompass a wide array of governmental conduct and/or measures").

[346] *Azurix v. Argentina*, ¶ 318, **CLA-100**; see also Newcombe & Paradell, pp. 280-281, **CLA-230** (referring to the terms of administrative acts such as licenses permits or contracts as a source of legitimate expectations).

[347] *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Award, 28 March 2011 (Lemire v. Ukraine), ¶ 69, **CLA-223**. See also Ron Fuchs v. The Republic of Georgia, ICSID Case No. ARB.07.15, Award, 3 March 2010, ¶441, **CLA-229** (distinguishing between the "specific assurances" of the investor and the investor's legitimate expectations for the investment environment provided by the State).

expectations such as those arising from a contract with an organ of a State, investors may legitimately expect a host State to provide an appropriate investment environment. Professors Reisman and Sloane recognized this in the following terms:

> [I]n a BIT regime, the host State must do far more than open its doors to foreign investment and refrain from overt expropriation. It must establish and maintain an appropriate legal, administrative, and regulatory framework, the legal environment that modern investment theory has come to recognize as a *conditio sine qua non* of the success of private enterprise.[348]

431. By emphasizing that "ensur[ing] a predictable commercial framework for business planning and investment" among NAFTA's goals, the NAFTA Parties recognized that the provision of an appropriate investment environment is essential for achieving the level of investment protection required under NAFTA.[349] The tribunal in the first *Occidental v. Ecuador* arbitration interpreted similar preambular language in the investment treaty between the United States and Ecuador to conclude that "[t]he stability of the legal and business framework is thus an essential element of fair and equitable treatment."[350]

432. As part of its duty to provide an appropriate investment environment, a State must also treat foreign investment in a manner that is consistent, predictable, and transparent.[351] As the award in *Tecmed v. Mexico* stated, a state's obligation to act consistently includes acting

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[348] Reisman W., Sloane R., Indirect Expropriation and its Valuation in the Bit Generation, P. 117, **CLA-225**.
[349] NAFTA, **CLA-226**, Preamble (Sixth Recital).
[350] Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN 3467, Final Award, 1 July 2004, ¶ 183, **CLA-139**. See also Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 339, **CLA-227**; LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. Argentine Republic (ICSID Case No. ARB/02/1) Decision on Liability, 3 October 2006, ¶¶ 124-125, **CLA-164**; CMS v. Argentina, ¶ 274, **CLA-104**.
[351] *Metalclad v. Mexico*, ¶99, **CLA-130**; *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶267, **CLA-228**.

> without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.[352]

433. In *Tecmed*, the Tribunal observed that the "fair expectations of the Claimant were that the Mexican laws applicable to such investment, as well as the supervision, control, prevention and punitive powers granted to the authorities in charge of managing such system, would be used for the purpose of assuring compliance with environmental protection, human health and ecological balance goals underlying such laws."[353] The Tribunal noted the evidence revealed "inconsistencies" between this stated purpose and the governmental authority's actions,[354] and conclude the government's decision to not renew the investor's permit was "actually used to permanently close down a site whose operation had become a nuisance due to political reasons relating to the community's opposition expressed in a variety of forms…".

434. Interference with the regulatory process that is motivated by the "social and political" pressures was held to be inconsistent with the obligation to provide fair and equitable treatment under the treaty, and was also "objectionable from the perspective of international law."[355] The *Tecmed* Tribunal said:

> ... in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.[356]

435. The *Tecmed* Tribunal also noted that legitimate expectations included the expectation that the state will conduct itself in a coherent manner, without ambiguity,

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[352] *TECMED v. Mexico,* ¶¶ 153-154, **CLA-113**. (Emphasis added.)
[353] *TECMED*, Award, ¶ 157, **CLA-113.**
[354] *TECMED*, Award, ¶163, **CLA-113.**
[355] *TECMED*, Award, ¶163, **CLA-113.**
[356] *TECMED*, Award, ¶ 154 **CLA-113.**

and transparently, so as to enable the investor to plan its activities, and to adjust its conduct to the governing statutes, regulations, policies and administrative directions.[357]

436. The *Metalclad* NAFTA Tribunal similarly held that Mexico failed to fulfil its obligation because it acted contrary to Metalclad's legitimate expectations:

> Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.[358]

437. Recent investor-state arbitration tribunal decisions are to the same effect. In *MTD v. Chile*, after expressly adopting the *Tecmed* standard, the Tribunal found that Chile failed to meet that standard by "authorizing an investment that could not take place for reasons of its urban policy."[359]

438. The NAFTA Tribunal in *Bilcon* found that Canada breached the Investors' legitimate expectations through representing that they were free to pursue their coastal quarry and marine terminal project at a site that was later classified as a "no go" zone for such projects.[360]

439. Similarly, the *Occidental v. Ecuador* Tribunal found that, after Occidental had made investments, Ecuador changed its tax law "without providing any clarity about its meaning and extent" and that the state's "practice and regulations were also inconsistent with [the] changes [to the law]."[361] The Tribunal concluded these actions

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[357] *TECMED,* Award, ¶ 154 **CLA-113.**

[358] *Metalclad* (2000) - Award, at ¶ 99, ***CLA-130*:** The Metalclad Award was subsequently partially set aside by the Supreme Court of British Columbia NAFTA Chapter 18 exhaustively addressed transparency within the NAFTA. However, only the Tribunal's incorporation of transparency in the international standard of treatment was set aside. Metalclad Award (2000), at ¶99, **CLA-130.** Their remaining comments on the standard were not questioned.

[359] *MTD Equity*, Award, ¶¶ 114- 115, 188, **CLA-159.**

[360] *Bilcon v. Canada*, Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2005, ¶589 **CLA-208**.

[361] *Occidental* - Final Award, ¶ 184, **CLA-139.**

fell below the standard established in the *Tecmed* case, and accordingly found a breach of the BIT. The *Occidental* Tribunal thereby also recognized a state may breach its obligation to treat an investor fairly and equitably by failing to follow its own laws.

a) Treatment Free from Political Motivation

440. Conduct motivated by political animus also will violate the reasonableness principle contained in the obligation to provide fair and equitable treatment. For example, in *Eureko v. Poland,* the Tribunal found that Poland violated the fair and equitable treatment standard under the Netherlands-Poland bilateral investment treaty, because Poland refused to honor its commitment for "purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character."[362]

441. The NAFTA Tribunal in *Loewen* observed that the trial court "permitted the jury to be *influenced by persistent appeals to local favoritism* as against a foreign litigant."[363] The NAFTA Tribunal then held that the lower court jury trial was "improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment."[364]

442. Prof. Kenneth Vandevelde has observed that "[t]ribunals have found violations of the reasonableness principle where the host state's conduct was politically motivated; that is, where government action was not motivated by legitimate public policy considerations, but by animus toward the investment or investor." [365]

443. The *Biwater Gauff* case involved a dispute about contractual performance under a water and sewage services contract for the city of Dar es Salaam. The Minister of Water and Livestock Development was campaigning at the time for the office of prime

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[362] *Eureko*, Partial Award, ¶233, **CLA-114.**
[363] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award ("*Lowen*, Award") 26 June 2003, at ¶136 [emphasis added], **CLA-138.**
[364] *Loewen*, Award, ¶137, **CLA-138.**
[365] Vandevelde I (2010), p. 59 **CLA-122,** (see the detailed discussion of the cases discussed by Dean Kenneth Vandevelde below)

minister and called a press conference terminating the investment's contract. Four days after this announcement, the Minister confirmed the termination at a political rally. The Tribunal held that these actions were "an unreasonable disruption of the contractual mechanisms … and motivated by political considerations."[366] The Tribunal observed that the public statements constituted "an unwarranted interference" which "inflamed the situation, and polarised public opinion still further", thereby ensuring that the process could not follow a normal contractual course.[367] The Tribunal found this political action to violate the fair and equitable treatment standard.[368]

444. The Biwater *Gauff* Tribunal concluded:

> In the Arbitral Tribunal's view, as a matter of principle, the failure to put in place an independent, impartial regulator, insulated from political influence, constitutes a breach of the fair and equitable treatment standard, in that it represents a departure from BGT's legitimate expectation that an impartial regulator would be established to oversee relations between City Water and DAWASA.[369]

445. Dean Kenneth Vandevelde reviewed cases where Tribunals have fouind that making decisions for political considerations violated the fair and equitable treatment standard. Dean Vandevelde considered the Biwater Gauff case and the following:

446. In *Tokios Tokeles v. Ukraine*,[370] the tribunal held that retaliation against an investment for supporting a political candidate was a violation of the fair and equitable treatment standard.[371]

447. In *Azurix v Argentina*,[372] the Tribunal held that political actions taken by the state blaming the investor for actions which arose from the state's maladministration and

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[366] *Biwater Gauff* - Award, ¶500, **CLA-127**
[367] *Biwater Gauff* - Award, ¶ 627, **CLA-127**
[368] *Biwater Gauff* - Award, ¶628, **CLA-127**
[369] *Biwater Gauff* - Award, ¶615, **CLA-127.**
[370] *Tokios Tokeles v. Ukraine*, ICSID Case No. ARB/02/18, Award (Tokios, Award), 26 July 2007, **CLA-234.**
[371] *Tokios*, Award, ¶122 at p.52.
[372] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, at ¶ 3 (July 14, 2006), **CLA-100.**

futher politicizing the issues in dispute were violations of fair and equitable treatment.[373]

448. In *Eureko v Poland*,[374] the state's decision to not follow through with the terms of a privatization for political reasons was found to be a breach of fair and equitable treatment.[375] Dean Vandevelde concludes that the "tribunal found that Poland had violated the fair and equitable treatment standard by refusing to honor its commitment for "purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character".[376]

449. In *Eastern Sugar B.V. v. Czech Republic*,[377] the Tribunal concluded that the Czech Republic had punished the Investor for politically unpopular actions and that this violated the fair and equitable treatment standard. [378]

450. Dean Vandevelde also relies upon the finding in the *Pope & Talbot* Tribunal[379] that the Tribunal concluded that the lack of transparency and a lack of a reasonable basis for the government measure constituted a violation of NAFTA Article 1105's fair and equitable treatment standard. [380]

451. After reviewing these cases, Dean Vandevelde concludes

> "Ultimately, the wrong rested on adopting measures for reasons other than the pursuit of legitimate public policies, such as the foreign ownership of the investment." [381]

b) The Test is a Flexible One

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[373] *Azurix Corp. v. Argentine Republic*, Award, at ¶ 3 (July 14, 2006), ¶¶ 74-75, **CLA-100.**
[374] *Eureko,* Partial Award (Aug. 19, 2005), **CLA-114.**
[375] *Eureko,* Partial Award (Aug. 19, 2005), ¶ 233, **CLA-114.**
[376] *Eureko,* Partial Award (Aug. 19, 2005), ¶ 233, **CLA-114.**
[377] *Eastern Sugar B.V. v. Czech Republic* (SCC Case No. 088/2004), Partial Award, 27 March 2007, **CLA-235**.
[378] *Eastern Sugar*, Partial Award, ¶¶ 335 – 337, **CLA-235.**
[379] Vandevelde I (2010), p. 59, **CLA-122.**
[380] *Pope & Talbot*, Award on Merits Phase II, ¶¶ 177 – 181, **CLA-121.**
[381] Vandevelde I (2010), p. 59 ***CLA-122,*** *Biwater Gauff,* **CLA-127.**

452. What amounts to a violation of the "fair and equitable treatment" standard is necessarily specific to the circumstances of each case. As the *Waste Management* Tribunal noted, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[382] And as the *Mondev* Tribunal pointed out:

> A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[383]

453. While this may lead to a certain level of uncertainty as to exactly what constitutes a violation of "fair and equitable treatment," there is at least this much that *is* certain: the more grievous and numerous the violations of these various indicia, the more likely there is to be a violation of the duty to provide "fair and equitable treatment." What is also certain is that for some time now the trend has for some time now been evolving towards a higher customary law standard of investment protection from Prof. Schreuer[384] As a result, there is without questions a higher customary law standard of treatment, incorporating modern notions of administrative fairness and due process of law.

454. Bearing all this in mind, all this Tribunal needs to ask itself is this: in light of all the circumstances of this case, with a view to all the sources of international law, and in the understanding that there has in recent years been a rapid convergence between the autonomous treaty standard of "fair and equitable treatment" and the customary international law standard, has Canada violated its obligation to accord the Investor the type of "fair and equitable treatment" guaranteed by NAFTA Article 1105(1)?

455. As straightforward as this question may seem, at this point in the discussion it still remains somewhat abstract. As the *Mondev* Tribunal pointed out:

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[382] *Waste Management II* - Award, ¶99, **CLA-126.**
[383] *Mondev* – Award, ¶118, **RLA-083.**
[384] See, for example, Schreuer, C., "Fair and Equitable Treatment in Arbitral Practice" (June 2005) 6:3 *The Journal of World Investment & Trade,* 357 ("Schreuer (2005)") at 370, where he states that there is an "evolving trend towards a higher standard of protection against State interference." **CLA-161.**

> A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[385]

456. And as the Tribunal in *Rumeli* put it:

> The precise scope of the [fair and equitable treatment] standard is…left to the determination of the Tribunal which will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.[386]

457. For all the above reasons, this Tribunal should consider itself at liberty to interpret the meaning of "fair and equitable treatment" as contained in NAFTA Article 1105(1) as an autonomous standard in accordance with all the normal and well-accepted sources of international law – not just customary international law.

458. Pervasive political interference in the ordinary working of the regulatory process, with key decisions such as whether and when to change rules, and internal practices, contractual requirements and rules for the protection of the electoral interests of particular politicians, with political staffers and handlers regularly running interference with the normal channels of regulatory decision making and normal hierarchical processes, these are the type of actions that constitute a violation of NAFTA Article 1105.

D. Full protection and security

459. NAFTA Article 1105 contains explicitly the obligation of full protection and security. The obligation to provide full protection and security includes an obligation upon governments to provide a stable legal and business environment to foreign investors. For example, the *Azurix v. Argentina* Tribunal noted that the obligation to provide full protection and security includes an obligation to provide a "secure investment environment," noting:

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[385] *Mondev*, ¶118, **RLA-083.**
[386] *Rumeli*, ¶610, **CLA-131.**

> It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.[387]

460. The Tribunal went on to note that the qualifier "full" supports its interpretation of protection and security going beyond the physical realm.[388]

461. Full protection and security must be read to include protection for the rule of law and fundamental fairness, and the legitimate expectation of an investor to be afforded full protection and security in a manner corresponding to this understanding. This understanding was endorsed by the Tribunal in *Metalclad*.

> Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.[389]

462. The Tribunal in *CMS Gas v. Argentina* said "[t]here can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment."[390]

463. The *Occidental v. Ecuador* Tribunal found that, after Occidental had made investments, Ecuador changed its tax law "without providing any clarity about its meaning and extent" and that the state's "practice and regulations were also inconsistent with [the] changes [to the law]."[391] The *Occidental* Tribunal, therefore, recognized a state may act inconsistently with an investor's legitimate expectations and breach its obligation to treat an investor fairly and equitably, by failing to adhere to the rule of law by not following its own laws.

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[387] *Azurix,* Award, ¶408, **CLA-100.**
[388] *Azurix,* Award, ¶408, **CLA-100.**
[389] *Metalclad*, ¶99, **CLA-130.**
[390] *CMS Gas* - Award, ¶274, **CLA-104.**
[391] *Occidental*, at ¶84 **CLA-139.**

464. An interpretation of full protection and security to include an investor's legitimate expectation to benefit from full protection and security such that it reaches beyond the physical security of the investment, to include the rule of law and due process, is consistent with international law.[392]

465. In *Opel Austria*[393], the European Court of First Instance (CFI) took the opportunity to identify that individuals will have their legitimate expectations protected. As Prof. Panizzon comments:

> In *Opel Austria*, the CFI explicitly used general public international law to support its conclusion that the individual economic operator, Opel Austria was entitled to protection of its legitimate expectations and that Austria was entitled to oppose according to the principle of good faith, the creation of a regulation that would become illegal within the few days of Austria's entry into the EEA.[394]

466. The *Paushok v Mongolia* Tribunal noted that other tribunals, including that in *Rumeli*, found that "respect of the investor's reasonable and legitimate expectations" are part of the definition of the fair and equitable treatment standard.[395] Therefore, one cannot disassociate legitimate expectations with the other factors that make up the Fair and Equitable Treatment standard, which include, "transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety."[396]

467. At its core, reasonable expectations related to process is rooted in fairness.[397] The framework for assessing whether or not the expectations were met is set out by an analysis of whether or not the rule of law has been followed. The Tribunal in *LG&E Energy Corp. v. Argentina* said as much when it described legitimate expectations as such:

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[392] *Paparinskis*, at 252-253, **CLA-140.**
[393] *Opel Austria GmbH v Council* [1997], Case T-115/94, ECR-II-39, **CLA-162.**
[394] *Panizzon*, at 19 **CLA-148.**
[395] *Paushok*,at ¶253, **CLA-163.**
[396] *Paushok*,at ¶253, **CLA-163**
[397] *Klager*, at 167, **CLA-155.**

> [The expectations] are based on the conditions offered by the host state at the time of the investment; they may not be established unilaterally by one of the parties; they must exist and be enforceable by law; in the event of infringement by the host state, a duty to compensate the investor for damages arises except for those caused in the event of state of necessity; however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns.[398]

468. Furthering the argument that an investor's legitimate expectations relate to the legal environment, and its proper operation, the Tribunal in *Parkerings-Compagniet AS* v. *Lithuania* said,

> In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.[399]

469. International law at the WTO also has expressed a connection between an investor's legitimate expectations and the requirements of full protection and security and how those translate into a stable and fair environment guided by a commitment to due process.

470. In the *US Section 301* case, the Tribunal looked to the WTO treaty's preamble to stress the critical role of full protection and security to fulfill the multilateral trade objectives of the WTO. The Panel stated:

> 7.75 Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble…

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[398] *LG&E Energy Corp and others v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006), ¶130, **CLA-164.**

[399] *Parkerings-Compagniet AS* v. *Lithuania*, ICSID Case No. ARB/05/8, Award (September 11, 2007), ¶333, **CLA-165.**

> 7.76 The security and predictability in question are of "the multilateral trading system." The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators.[400]

471. Marion Panizzon argues that treaty goals can prove the basis for a "claim of frustration of expectations."[401] Trade between State Parties to the NAFTA would be severely frustrated and hindered if investors could not legitimately expect that their investments would benefit from fair and transparent treatment at the hands of regulators. Any standard but that would lead to an unpredictability and risk that would work against securing the NAFTA's stated objectives of increasing trade and economic opportunity.

E. Non-discrimination

472. NAFTA Tribunals have found that the protections provided to investments of Investors from other NAFTA Parties in NAFTA Article 1105 extend to the protection against nationality-based discrimination: "It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice."[402]

473. In a passage from *Merrill & Ring* quoted favorably by the Tribunal in *Bilicon*, the Tribunal stated that "[c]onduct which is … discriminatory … has also been noted by NAFTA Tribunals as constituting a breach of fair and equitable treatment".

474. As a matter of plain meaning, "if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, the fair and equitable standard has been violated."[403] According to the award in *CMS*

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[400] United States – Sections 301-310 of the Trade Act of 1974, Report of the Panel, 22 December 1999, WT/DS152/R, **CLA-166.**

[401] Panizzon, at 158 **CLA-148**

[402] See *Loewen*, ¶123, **CLA-138**; see also Waste Management II, ¶98, **CLA-126.**

[403] UNCTAD, "Fair and Equitable Treatment," Series on Issues in International Investment Agreements, UNCTAD/ITE/IIT/11 (vol III) (1999), **CLA-222**, p. 37. See also Joseph Charles Lemire v. Ukraine (ICSID Case No. ARB/06/18) Decision on Jurisdiction and Liability, 14 January 2010, ¶259, ***CLA*-228**.

v. Argentina: "[a]ny measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."[404]

475. In addition, Mr. Klager addresses the place of non-discrimination in his treatise as an "essential element that is inherent in the concept of fair and equitable treatment," that is "strongly supported by arbitral tribunals as an element of fair and equitable treatment."[405] He notes that "the word can be employed neutrally to mean mere differentiation" or it can be taken to mean "an unfair, arbitrary or unreasonable distinction," which he states is the more predominate interpretation in international law.[406]

476. In his scholarly treatise about the meaning of the international standard of treatment, Prof. Martins Paparinskis says that non-discrimination is an essential element of the classical international law meaning of the international law standard. He states:

> In the classical international law, the obligation to treat persons and property of aliens in a non-discriminatory manner was well-established....., the historical narrative, starting from the prominent prohibitions of discriminatory administration of justice in particular and the discriminatory conduct in general, suggests that when new rules are developed, they go with, rather than against, the grain of non-discrimination. There are no obvious examples of other customary rules on the treatment of aliens that would permit discrimination. If non-discrimination is accepted as constituting a non-exhaustive core of the international standard of the first half of the twentieth century, the proper question to ask is whether subsequent practice and *opinio juris* in favour of lawfulness of discriminatory conduct have changed the rule.[407]

477. After reviewing the historical development of the law, Prof. Paparinskis concludes that non-discrimination has been and still is part of the international law standard under customary international law. He opines:

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[404] *CMS v. Argentina*, ¶290, **CLA-104**.
[405] *Klager*, at 187, 195 **CLA-155.**
[406] Klager, at 188 **CLA-155.**
[407] *Paparinskis,* at 246 (footnotes omitted), **CLA-140.**

> On balance, the role of non-discrimination in the classical law was so great that very clear and consistent practice and *opinio juris* regarding lawfulness of discriminatory conduct would be required to change it. While the treaty-making practice suggests a shift in that direction, it has not yet been expressed in an appropriate form to affect and change customary law. The better view therefore is that discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases. In any event, at least some instances of discrimination may trigger other aspects of the international standard. Conduct motivated by bias and prejudice may be too arbitrary to qualify as undertaken for a public purpose. The same factors could breach the minimal requirements of form. Finally, discrimination may be relevant in terms of procedural propriety; for example, when a State favours another investor in negotiations.[408]

478. For instance, in the *Loewen* NAFTA arbitration, the Tribunal recognized the principle of non-discrimination and held that this meant conduct that was "free of sectional or local prejudice."[409] The *Waste Management II* Tribunal adopted the language of *Loewen* and referred to a customary law prohibition on conduct that "is discriminatory and exposes the claimant to sectional or racial prejudice."[410]

F. The threshold for international responsibility

479. The *Merrill & Ring* Tribunal noted:

> A requirement that aliens be treated fairly and equitably in relation to business, trade, and investment […] has become sufficiently part of widespread and consistent practice so as to demonstrate that it is reflected today in customary international law as *opinio juris*.[411]

480. The Tribunal continued, and held:

> customary international law has not been frozen in time … it continues to evolve in accordance with the realities of the international community.[412]

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[408] *Paparinskis,* at 247 (footnotes omitted), **CLA-140.**
[409] *Loewen*, ¶123, **CLA-138.**
[410] Waste Management II, ¶98, **CLA-126.**
[411] *Merrill & Ring Forestry L.P.v. Canada*, UNCITRAL Arbitration, Award, March 31 2010 ("Merrill & Ring"), ¶213, **CLA-167.**
[412] *Merrill & Ring*, ¶193, **CLA-167.**

481. This evolutionary approach was also endorsed by *Waste Management II*,[413] as well as the recent decision in *Bilcon*.[414]

482. NAFTA Tribunals have determined that for the purpose of NAFTA Article 1105(1), to the extent that customary law is to be applied, it is to be applied as it stands today.[415]

483. Indeed, a range of investment arbitral awards and decisions seem less interested in the theoretical discussion on the relationship between the "fair and equitable treatment" and the customary international law standard of treatment, and instead, have turned their attention to the content of the "fair and equitable treatment" and "full protection and security" obligations.[416]

484. Judge Stephen Schwebel has remarked that the *Neer* formula is quite "far from" the International Law Standard.[417] He has stated that in his experience as an official of the U.S. Government at the time when the NAFTA was negotiated, there was "no whisper" about the *Neer* criteria.[418] He elaborated on his view that the *Neer* claim was an unpersuasive authority for the interpretation of the International Law Standard:

> The United States, Canada and Mexico apparently rely on the award of the Claims Commission in *Neer* as setting a standard for the interpretation of NAFTA Article 1105. The Claims Commission was an international tribunal. Why should its terse, barely reasoned opinion – which examines no State practice at all – be

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[413] *Waste Management*, ¶93 **CLA-126.**

[414] *Bilcon*, Award on Jurisdiction and Liability, (PCA) Case No. 2009-04, March 17, 2005, ¶435, **CLA-208**.

[415] *ADF*, ¶179, **CLA-102**; *Loewen*, ¶133, **CLA-138.**

[416] *Rumeli*, ¶611, **CLA-131**; *CMS Gas*, ¶284, **CLA-104**; Stephan Schill summarized the reasons for a "convergence" on the content of fair and equitable treatment and the customary standard, remarking: "First, some tribunals consider that the inclusion of the fair and equitable treatment in the vast web of investment treaties has transformed the standard itself into customary international law. Second, even in the absence of such an explicit transformation, other tribunals interpret the international minimum standard as an evolutionary concept that has developed since the days of traditional international law, thus leveling possible differences between treaty and custom." *See* Stephan Schill, *Fair and Equitable Treatment, the Rule of Law and Comparative Public Law, in International Investment Law and Comparative Public Law*, Stephan Schill, ed. (Oxford University Press, 2010), at 153, **CLA-170.**

[417] Judge Stephen M. Schwebel, "Is Neer Far from Fair And Equitable?" Remarks at the International Arbitration Club, London, May 5, 2011, **CLA-171.**

[418] Judge Stephen M. Schwebel, "Is Neer Far from Fair and Equitable?" Remarks at the International Arbitration Club, London, May 5, 2011, **CLA-171.**

> the fount of customary international law as respects what is an international delinquency, while the judgments of contemporary international tribunals do not influence the content of customary international law in that regard? How is it that the governments of these States in their pleadings in the International Court of Justice invoke prior judgments of the Court, and, if my recollection is correct, awards of international arbitral tribunals but hold them of no account in the evolution of customary international law in the NAFTA context?[419]

485. Many other Tribunals – NAFTA and non-NAFTA alike – have taken a similar approach, confirming that a violation of "fair and equitable treatment" need not be triggered by an act that can be characterized as "outrageous" or "egregious."[420]

486. Several tribunals have determined that a violation of "fair and equitable treatment" may be triggered by behaviour that is simply "unreasonable."[421] The Tribunal in *Saluka* drew a close relationship between "reasonableness" and "fair and equitable treatment:"

> The standard of "reasonableness" has no different meaning in this context than in the context of the "fair and equitable treatment" standard with which it is associated; and the same is true with regard to the standard of "non-discrimination." The standard of "reasonableness" therefore requires…a showing that the State's conduct bears a reasonable relationship to some rational policy, whereas the standard of "non-discrimination" requires a rational justification of any differential treatment of a foreign investor.[422]

487. The nexus between "fair and equitable treatment" and the duty to act "reasonably" was affirmed by the Tribunal in the award in *Continental Casualty*, which stated:

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[419] Judge Stephen M. Schwebel, "Is Neer Far from Fair And Equitable?" Remarks at the International Arbitration Club, London, May 5, 2011, **CLA-171.**

[420] *Pope & Talbot*, Award on the Merits of Phase II, ¶118, **CLA-121**; *ADF*, ¶181, **CLA-102**; *Waste Management II*, ¶98, **CLA-126**; *GAMI*, ¶95, **CLA-135.**

[421] *Iurii Bogdanov, Agurdino-Invest Ltd., Agurdino-Chimia and JSC v Republic of Moldova*, 2004 WL 235957, SCC Arbitration, Arbitral Award, 22 September 2005, at 10, **CLA-173**; *Eureko*, ¶234, **CLA-114.**

[422] *Saluka,* Partial Award, ¶460, **CLA-115.**

> …the fair and equitable standard is aimed at assuring that the normal law-abiding conduct of the business activity by the foreign investor is not hampered without good reasons by the host government and other authorities.[423]

488. The Tribunals in *MTD Equity*, *Azurix*, and *Siemens* all affirmed that, in the context of "fair and equitable treatment" analysis, what is required is "treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment."[424] Where the treatment in question is seen to be unjust or not even-handed, there may be a violation of "fair and equitable treatment."

[423] *Continental Casualty Company v. Argentine Republic,* ICSID Case No. ARB/03/9, Award (September 5, 2008), ¶254, **CLA-172.**

[424] *MTD Equity,* ¶113, **CLA-159**; *Azurix,* ¶360, **CLA-100**; and *Siemens*, Award, ¶290, **CLA-174.**

IV. FACTS APPLIED TO THE LAW

489. Both independently, and even more so cumulatively, the wrongs Ontario committed constituted breaches of Canada's obligations under NAFTA Article 1105.

A. Ontario's secret arrangements breached Article 1105

1. Ontario granted special privileges to IPC

490. On more than one occasion, Ontario gave preferential treatment to some companies over others for reasons that had nothing to do with the quality or strength of their respective bids. Ontario arbitrarily changed the FIT rules to ensure that certain projects succeeded, while others faltered. These blatant examples of favoritism represent clear violations of Canada's obligations under NAFTA Article 1105.

491. As was revealed in documents published *after* the *Mesa Power* NAFTA hearing, "International Power Canada, a Canadian company, benefitted from government protection through the last-minute FIT rule changes."[425]

492. As the *Mesa Power* Investor's Post-Hearing Brief states,

> The government of Ontario protected a Canadian FIT proponent's [IPCS'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.[426]

493. As the Mesa Power Investor's Post-Hearing Brief continues,

> 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," including

[425] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶464, **C-017.**

[426] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶147, **C-017.**

> Tennant. Tennant was treated different and less favourably than IPC. That cannot be argued.[427]

494. Though it is already stunning that Ontario would single out a local national entity, IPC, to protect from the capacity to be allotted to the Korean Consortium, Ontario's conduct becomes even more abhorrent once one considers that the President and CEO of IPC was a former senior Ontario Liberal party staff member, a former campaign advisor and a high-ranking member and then president of the Liberal Party.[428]

495. Ontario officials admitted that they knew to protect Mike Crawley and his company, IPC. This protection was done through the rule changes. The allocation of 300 MW of unscheduled transmission in the West of London region allowed Mr. Crawley's projects, which already had failed in the FIT process, to be given a second chance. This rule change caused projects such as Skyway 127, which did not have such political favor, to lose its ranking and a FIT Contract.

496. However, Sue Lo admitted at the *Mesa Power* NAFTA hearing that the government wished to limit the number of new contracts that it would give out. To do so, the Ontario government changed its policy to the detriment of the legitimate expectations of investors such as Skyway 127.

497. Previously, Ontario would award FIT Contracts for all available transmission access. There was at least 1200 MW of available transmission in the Bruce Region. Sue Lo admitted that Ontario cut back on the amount of transmission access for the Bruce Region. Instead of awarding 1200 MW, Ontario issued contracts for only 700 MW.

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[427] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶158, **C-017.**

[428] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, ¶464, **C-017.**

498. However, while Ontario was cutting back contracts for the first-time applicants in the Bruce transmission zone, it also was rewarding the previously failed applicants run by Mike Crawley in the West of London zone.

499. This resulted in awarding fewer contracts, especially in the Bruce Region. Protection of IPC was for personal and political purposes: the Government wanted to protect the investment of their friend and political ally and ignored basic principles of fairness, transparency, and due process in order to achieve that desired result.

500. Ontario did not treat Skyway 127 and other foreign investors fairly and equitably. Ontario did its best to benefit IPC and other politically protected investments for personal and political reasons, to the disbenefit of innocent investors who were simply following the published FIT Program rules.

B. Advanced Notice to NextEra breached Article 1105

501. The change to the FIT Process because of the five-day connection point change window in June 2011 constituted a sudden, significant, and arbitrary departure from the established FIT Process. Before the last-minute change window was announced, Skyway 127 had no reason to suspect that such a fundamental change would be announced, without notice or consultation. Until that point, Skyway 127 was following the existing process and procedure that had been laid out in the FIT Rules. The change that was announced came without any advanced notice or consultation to Skyway 127, constituted a fundamental change to the FIT Program, and provided Skyway 127 with a very short time to engage in substantial changes to its applications. In the circumstances, it was an unforeseen, arbitrary, and unfair change to the FIT Program.

502. From the launch of the FIT Program in 2009, until June 3, 2011, the established process for awarding contracts was an ECT. The ECT was a region-specific test, which determined whether there was sufficient transmission capacity available to connect projects. Regions were clearly defined by Transmission Availability Tables

and the FIT Priority Rankings.[429] However, on June 3, 2011, Ontario suddenly changed the FIT process such that, within days, certain politically connected proponents that wanted to change their selected regions could do so. That process not only was unprecedented, but it undermined the entire purpose of awarding contracts to proponents that were "shovel-ready."[430]

503. In his Expert Report filed in the *Mesa Power* case, Seabron Adamson reviewed the process leading to the announcement of the connection point change in the FIT Program on June 3, 2011. Mr. Adamson concluded that the five-day period of time was wholly-inadequate to permit such a substantial modification of this Feed-in Tariff program.[431] According to Mr. Adamson, only those proponents who had actively prepared in advance of the announcement possibly could do the required technical engineering and planning work necessary to know whether connection point changes involving new transmission corridors could safely or economically be accomplished. Given the massive amount of time and money that would need to be expended on such an effort, only a proponent with advance knowledge could reasonably be expected to do this type of work.[432]

504. The Investor does not dispute that, in advance of the ECT, a connection point window was scheduled to occur within designated regions.[433] However, the connection point window that was planned for the ECT in 2010 was markedly different from the 2011 amendment to the rules that allowed connection point changes between the West of London and Bruce regions. The ECT connection point change window

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[429] TAT Position Skyway 127 B28S, 6 June 2011, **C-120;** FIT CAR Priority Ranking by Region, 24 February 2011**, C-200.**

[430] OPA Briefing Note, FIT Program Launch Logistics, 19 May 2009, referenced in: *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 644 to ¶646, **C-182.**

[431] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Expert Report of Seabron Adamson, 27 April 2014, ¶¶133-135, **C-185.**

[432] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Expert Report of Seabron Adamson, 27 April 2014, ¶134, **C-185.**

[433] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, ¶700, **C-133.**

was described in detail in two presentations provided by the OPA in March and May 2010. That window was announced several months in advance and proponents were informed that they would have several weeks to change connection point. In contrast, the June 2011 window and the accompanying rule changes were announced with apparently no consultation the OPA gave only days advance notice to FIT applicants.

505. Notice of the connection point window was reduced from several weeks to just two days and the window to change itself was reduced from several weeks to five days.

506. Officials tasked with implementing the Bruce to Milton process at Hydro One expressed some concern that the five-day window was a "very short period."[434] Officials from the OPA expressed frustration with the compressed timeline.[435]

507. Previous rule changes of less significance and impact were preceded by advance public consultation. The June 3, 2011 rule change however, lacked public consultation.

508. Canada admits that the Ministry of Energy directed the sudden change.[436]

509. Usually, the Ministry of Energy and the OPA sought input through webinars for proposed changes to the FIT process. But, that was not the case for the connection point change window.[437] The Ministry and the OPA did not seek out public input and

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[434] Email from Bing Young to Patricia Lightburn, 6 June 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor, 30 April 2014, Footnote 648 to ¶650, **C-182.**

[435] Email from Tracy Garner (OPA) to Bob Chow (OPA), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor, 30 April 2014, Footnote 649 to ¶650, **C-182.**

[436] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Sue Lo, 28 February 2014, ¶50, **C-180.** Ontario Power Authority, Internal Document, "Bruce to Milton Capacity Allocation, Internal Use Only,
Questions and Answers," 27 May 2011, p.11, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor, 30 April 2014, Footnote 651 to ¶652**, C-182.**

[437] Charles Edey was a member of the Canadian Wind Energy Association (CanWEA). Mr. Edey informed that organization that he did not support a connection point change window and wrote a letter to the Minister of Energy stating that the view expressed by the association "does not reflect the majority of [FIT] applicants

implemented a window that allowed Proponents significantly less time to plan and prepare changes to their applications.

510. NextEra's advanced knowledge of the connection point changes enabled it to strategically plan so that all of its projects could receive contracts, to the detriment of Skyway 127. Leading up to the June 3rd, 2011 rule change, NextEra and its agents were in regular communications with representatives of the Ministry of Energy, the OPA, Hydro One and the IESO to advocate for a connection point window[438] to allow it to connect to the Bruce to Longwood line.

C. Ontario granted special privileges to Samsung

511. The agreements Ontario concluded with the Korean Consortium, culminating with the *GEIA*, constituted unfair and non-transparent violations of the international law standard. While Skyway 127 was involved in a public regulatory competition for FIT contracts and FIT Contracts, Ontario was providing the same FIT Contracts to the Korean Consortium. The non-transparent nature of the negotiations and the agreements provided the Korean Consortium an unfair benefit over Skyway 127, which was competing for exactly what Ontario provided through the *GEIA*, namely guaranteed transmission and revenue.

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with MWs on the current queue list." Letter from Charles Edey, Leader Resources to Brad Duguid, Minister of Energy, May 30, 2011, referenced in: *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Reply Memorial of the Investor, 30 April 2014, Footnote 652 to ¶653**, C-182.**

[438] Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo (Ministry of Energy), and Rick Jennings (Ministry of Energy), September 20, 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor, 30 April 2014, Footnote 653 to ¶654. **C-182**; Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (Ministry of Energy), 25 February 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor, 30 April 2014, Footnote 653 to ¶654, **C-182**; Email from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204**; *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21, **C-213.**

1. Secrecy of the Deal with the Korean Consortium

512. 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,[439] Ontario signed the secret MOU with the Korean Consortium in December 2008.[440]

513. Ontario went to severe 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 Consortium until the summer of 2009.[441] Unaware of the special deal, the OPA began consulting with potential investors in March 2009 concerning the FIT Program.[442] These consultations showed that the interest in the FIT program exceeded the available capacity in the transmission system.[443]

514. Any notion that the secrecy was to protect the Korean Consortium is untrue. In fact, Samsung actually wanted to publicize its MOU with the Six Nations it obtained for

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[439] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 2 (Public Version): Testimony of Rick Jennings, 27 October 2014, p.141, lns.7-17 (recognizing that the FIT legislation intended to promote investment in anticipation of the FIT program), **C-170.**

[440] 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, referenced in: *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 378 to ¶292, **C-017.**

[441] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 2 (Public Version): Testimony of Rick Jennings, 27 October 2014, p.194, lns.6-10, **C-170*;*** *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.261, lns.6-10, **C-121.**

[442] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.261, lns.6-22, **C-121.**

[443] Email from Rick Jennings (MOE) to Guna Deivendran (MOE), Jason Chee-Aloy (OPA), Jennifer Morris (MOE) et al., dated May 7, 2009 (reporting that according to surveys there was over [redacted] of potential renewable energy projects, and only [redacted] of available capacity), referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 2 Part 5 Hearing Video (Public Version), 27 October 2014; **C-205**; *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 2 Part 5 Hearing Video (Public Version), 27 October 2014, Screenshot at 0:41:25, **C-214.**

purposes of the secret deal, but the Ministry of Energy prohibited it because it did not have answers for the media about the FIT program.[444]

515. The Ministry of Energy nonetheless directed the OPA to develop the FIT Program on September 24, 2009.[445] At that time, the public had not been informed of the special deal with the Korean Consortium. This was after Skyway 127 already started to make its investment in Ontario.

516. On September 26, 2009, *The Toronto Star* broke the story about negotiations between the Ministry of Energy and Samsung for manufacturing and the development of renewable energy projects.[446] This article and Ontario's response to it were vague and misleading. They did not disclose the main contours of the deal, such as priority transmission access or the Consortium, in fact, had no true obligations to create manufacturing jobs.[447]

517. Days later, on September 30, a ministerial directive was issued containing further misleading language that implied that a framework agreement already had been signed.[448]

518. 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

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[444] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 2 (Public Version): Testimony of Rick Jennings, 27 October 2014, p.200, lns.18-24, **C-170*;*** Email from Jennifer Morris (MOE) to Hagen Lee (Samsung), 13 November 2009 (Section 1782 Evidence), referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 1 Hearing Video (Public Version), 28 October 2014 **C-206*;*** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 1 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:12:47, **C-215 *[CONFIDENTIAL]***; *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 393 to ¶302, **C-017.**

[445] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, 24 September 2009, **C-174.**

[446] Tyler Hamilton, *Ontario eyes green job bonanza*, Toronto Star, 26 September 2009, **C-171.**

[447] Tyler Hamilton, Ontario eyes green job bonanza, Toronto Star, 26 September 2009, **C-171;** Ministry of Energy Archived News Release, Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation, 26 September 2009, p.1, **C-172.**

[448] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, 30 September 2009, **C-186.**

applications in the first two months.[449] Any worries that Ontario now claims it had about the contemporaneous investment climate, and Ontario's ability to attract investors for the FIT program, are inconsistent with the knowledge that it had at that time.

519. Even then, the Government had ample opportunity to correct its course of conduct. It is undisputed that the Ontario government had not entered the GEIA by the time the FIT Program launched. Thus, it could have backed out of the negotiations and refused to execute the final GEIA.[450] Ontario still would have achieved its goals of promoting green energy, job creation, and manufacturing.

520. Yet, Ontario entered the GEIA in January 2010 and permitted the GEIA and FIT to "compete" against each other for the limited capacity for renewable energy for the transmission system. Ontario did so, despite knowing as far back as March 2009 that interest in the FIT Program would exceed renewable energy generation capacity through the FIT Program.[451]

521. This "competition" was completely one-sided. The Korean Consortium was guaranteed capacity, did not have to compete with any other investor for capacity, and was allowed to engage, without any government supervision, in predatory tactics, such as its wait-and-see approach to acquire at low prices developed, but low-ranked, FIT projects that were unlikely to get contracts and convert them to GEIA projects.[452]

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[449] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 2 (Public Version): Testimony of Rick Jennings, p.162, lns.22-25, **C-170** *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, p.78, lns.7-14, **C-121:** (FIT program was very successful at launch with 10,000 megawatts in applications); FIT/Micro FIT Announcement, 15 December 2009, p.1, **C-175.**

[450] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 2 (Public Version): Testimony of Rick Jennings, pp.157-158, lns.17-8, **C-170**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimont of Sue Lo, pp.58-59, lns.19-6 ***C-121***; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 6 (Public Version): Canada's Closing Statement, 31 October 2014, pp.215-216, lns.21-6, **C-125.**

[451] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, pp.262-264, lns.17-6, **C-121.**

[452] Transcript of Colin Edwards Deposition (Public Version), 3 August 2012, pp.186-187, lns.20-16***,*** **C-173**.

522. The full terms of the GEIA were not even publicly released until a third party produced it in ancillary discovery in support of the *Mesa Power* arbitration.[453] The terms were kept secret to hide, among other things, the fact that the manufacturing commitments were a sham[454] and that Ontario had agreed that it would not enter a similar deal unless the terms were identical to the GEIA, thereby ensuring that no other competing investor would be able to obtain a deal that matched the favorable terms provided the Consortium.[455]

523. 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 Skyway 127. The Korean Consortium did not meet the deadlines set in the GEIA in 2010. Ontario could have terminated the GEIA for this failure.[456] Yet, Ontario, despite knowing that there was substantially more FIT interest than available capacity, did not want to see the GEIA nullified to avoid a political embarrassment and thus did not declare the Korean Consortium in breach.[457]

524. Instead of terminating the agreement to allow that capacity to go to the FIT Program and protect the FIT investors, Ontario amended the GEIA on two occasions

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[452] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, pp.200-202, lns.19-12, **C-121**; Mesa Power Group v. Government of Canada (PCA Case No. 2012-17), Hearing Transcript Day 2 (Public Version): Testimony of Sue Lo, 28 October 2014, p.87-88, lns.13-3, **C-121**: ("[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").

[453] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.35, lns.4-21, **C-121**: 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.

[454] *Green Energy Investment Agreement*, January 21, 2010, art. 8.3, **C-210**: Korean Consortium only had to "attract" plants, not build the plants.

[455] Green Energy Investment Agreement, January 21, 2010, at art. 8.7, **C-210.**

[456] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.99-100, lns.24-9, **C-121.**

[457] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.91, lns.23-25, **C-121.**

to extend the deadlines for commercial operation and actually to reduce the generation capacity that the Korean Consortium would develop.[458]

525. 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.[459]

526. 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 the second half of Ontario's renewable program that would constitute 23% of the total megawatts available for all renewable projects in Ontario [460] and that the Korean Consortium could take projects to any region in the province and receive priority transmission access and thereby knock their investments from the program. As Mr. MacDougall

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[458] Green Energy Investment Agreement – Amending Agreement, 29 July 2011, **C-221**; Amended and Restated Green Energy Investment Agreement, 20 June 2013, **C-141.**

[459] Minutes/Agenda, Working Group Meeting, 9 September 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 397 to ¶305), **C-017**: 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), 11 January 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 397 to ¶305), **C-017**: [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", 3 August 2011**, C-211**: 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", 4 July 2011, **C-212**: Wind sites used by the Korean Consortium in August 2011 to meet its Phase 2 obligations were in the FIT program in July 2011.

[460] 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. *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.112-113, lns.20-6, **C-121.**

testified in the *Mesa Power* hearing, even the OPA was unaware of these negotiations.[461]

527. Sue Lo testified in the *Mesa Power* hearing that one of Ontario's goals for the FIT Program was to allow for a fair and open process,[462] that did not permit any "gaming" of the system by proponents.[463] 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 Ontario gave those investors preferential treatment and exclusive access to nearly a quarter of the renewable energy capacity in the province.

528. As confirmed by Ontario's Auditor General, Ontario did not even look into the merits of the deal; it just signed it.[464] The GEIA itself restricted Ontario's ability to enter into any other GEIA-like deal given the success of the FIT program.[465] 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.[466] And key operational terms of the GEIA always were kept secret from competitors such as Skyway 127, which made it impossible for Skyway 127 and other proponents to comprehend the full meaning of the GEIA or to seek similar terms from Ontario, which contractually was prohibited to provide in any event.

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[461] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, at p.268, lns.8-12, **C-121.**
[462] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.12-13, lns.21-4, and p.169, lns.5-7**, C-121.**
[463] Email from JoAnne Butler (OPA) to Sue Lo (Ministry of Energy) and Shawn Cronkwright (OPA), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 401 to ¶307, **C-017.**
[464] Annual Report of the Auditor General of Ontario, 2011, p.108**, C-138.**
[465] Green Energy Investment Agreement, January 21, 2010, art. 8.7, **C-210.**
[466] Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, Undated, referenced in: *Mesa Power Group LLCv. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 404 to ¶308, **C-017.**

529. These actions, and the others that have been briefed in detail, are egregiously unfair, non-transparent, and, when viewed against the public terms available to other FIT proponents breached the international law standard of treatment.

530. The secret sole-source contractual arrangements made with the members of the Korean Consortium, and the other non-transparent arrangements made with NextEra, were grossly unfair to applicants who followed the established rules for access to the Ontario transmission grid, such as the Investor.

531. In addition, to the extent that the *GEIA* was publicly discussed, the government of Ontario made material misrepresentations at the highest levels as to the content and terms of the *GEIA*. These representations were fundamentally misleading as to the opportunities available to access the renewable energy market in Ontario, as well as to the conditions that access could be obtained.

532. There is yet another secret deal in place between Ontario and the members of the Korean Consortium. Canada has produced emails between the Ministry of Energy and Hagan Lee from Samsung which indicated that on a "Framework Agreement" was ready for signature and that a signing was to take place on October 24, 2010.[467] A negotiating draft of this document from September 2010 was produced by Samsung under the Section 1782 process as a Highly Confidential document.[468]

533. The Memorandum of Understanding (MOU) that Samsung produced was reviewed by Energy Economist Seabron Adamson in his Expert Statement filed in the *Mesa Power* arbitration[469] OBJ This exclusive partnership appears to still be in force and no

[467] Email from Mohamed Dhanani (MEI) to Hagan Lee (Samsung) on October 1, 2009, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 654 to ¶658, **C-182.**

[468] Draft Framework Agreement by and Among Her Majesty The Queen in Right of Ontario, Korean Electric Power Corporation and Samsung C&T Corporation, 25 September 2009, Article 1(1.1), referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 655 to ¶658, **C-182.**

[469] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Expert Report of Seabron Adamson, 27 April 2014, ¶¶21-22, **C-185.**

evidence to show that this arrangement has lapsed while the FIT Program was in operation.

534. Similarly, Zohrab Mawani, a former Samsung employee who worked on the negotiation of FIT Contracts under the terms of the *GEIA,* swore in a declaration made under oath for use in the courts of the State of New Jersey in 2013 that there was a Framework Agreement, and that Samsung had not complied with the terms of the Section 1782 subpoena by not producing this Framework document.[470]

D. The Minister's June 3 Rule Change Denied Skyway 127 Due Process

535. 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.

536. Furthermore, there were 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, such as IPC, at virtually any cost made ordinary regulatory fairness impossible.

537. The combination of arbitrary and prejudicial favorable treatment to IPC, NextEra, and the Korean Consortium, lack of consultation and adequate notice period before the June 3 Direction, and allowing a rule change between regions contrary to investor expectations constitute the second breach of Article 1105.

1. June 3rd Direction: Lack of Consultation and Notice

538. The FIT Rules identified under what circumstances projects could change connection points.[471] Under these rules, before an ECT, a connection point change

[470] Declaration of Zohrab Mawani, 15 August 2013, ¶47**, C-207.**
[471] OPA, Feed-in Tariff Program, FIT Rules Version 1.1, 30 September 2009, §§5.3, 5.5 & 5.6, **C-162.**

was contemplated only regarding projects connecting to the distribution system, not the transmission system.[472] All the other connection point changes contemplated under the FIT rules were permitted only after the running of the first ECT.[473]

539. 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.[474]

540. This was effectuated through a June 3, 2011 rule change, which was decided almost a month before, after private meetings with NextEra officials.[475]

541. NextEra's Al Wiley met with high-level officials within the Ontario Government and with the Ministry of Energy with respect to the importance of a window to change connection points amongst regions.[476]

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[472] OPA, Feed-in Tariff Program, FIT Rules Version 1.1, 30 September 2009, §5.3(d), **C-162.**

[473] OPA, Feed-in Tariff Program, FIT Rules Version 1.1, 30 September 2009, §5.5(d), §5.6 (b), **C-162.**

[474] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, p.226, lns.5-12 (NextEra bundled its projects to get contracts in Bruce in July 2011), **C-121.**

[475] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, 3 June 2011, **C-176*;*** Email from Al Wiley (NextEra), 10 May 2011 ***[CONFIDENTIAL]****,* referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014), Discussed at 1:25:35 **C-204**; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204;** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21**, C-213**: (discussing with the Ministry of Energy's Andrew Mitchell about the importance of the connection point change window for NextEra); *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Hearing Transcript Day 4 (Public Version): Testimony of Shawn Cronkwright, 29 October 2014, p.66, lns.6-11: (May 12, 2011 the decision to change connection points was made), **C-122**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Rejoinder Statement of Shawn Cronkwright (Public Version), 2 July 2014, ¶21, **C-151**; Email from Sue Lo (MOE) to Al Wiley (NextEra), dated 13 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 409 to ¶314, **C-017.**

[476] Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) ***[CONFIDENTIAL]****,* referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17)*,* Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 410 to ¶315, **C-017**; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), 12 May 2011: referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204;** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video

542. Shawn Cronkwright confirmed that the Premier and the Ministry of Energy made the decision. The Ministry of Energy communicated the decision to the OPA on May 12, 2011.[477]

543. The amount of notice Ontario provided for the Rule Change was inadequate and inequitable. For example, NextEra received notice of this rule change before other FIT applicants,[478] while other FIT applicants received notice on Friday, June 3, 2011, that the window would be opening the following Monday, June 6.[479]

544. The OPA's Jim MacDougall admitted that a weekend was not adequate notice.[480]

545. There was also no consultation with stakeholders or the opportunity to comment on the rule before the release of the June 3 Direction on any of the issues relating to the

(Public Version), 28 October 2014, Screenshot at 1:27:21**, C-213**: (referring to meeting with the Ministry of Energy's Andrew Mitchell about the importance of the connection point change window for NextEra).

[477] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Hearing Transcript Day 4 (Public Version): Testimony of Shawn Cronkwright, 29 October 2014, pp.55-56, lns.22-2 (admitting that on May 12, 2011 the decision to change connection points was made), **C-122**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Rejoinder Statement of Shawn Cronkwright (Public Version), 2 July 2014, ¶21, **C-151***;* Email from Sue Lo (MEI) to JoAnne Butler, May 12, 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17)*,* Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 411 to ¶316**, C-017.**

[478] Email from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), 31 May 2011 (Section 1782 Evidence) ***[CONFIDENTIAL]*** ("knowing that the 'window' is opening"), referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17)*,* Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 412 to ¶317**, C-017;** Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), 12 May 2011: referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204***; Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21**, C-213:** (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).

[479] OPA, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, 3 June 2011, **C-143***;* OPA, FIT Rules Version 1.5, 3 June 2011, **C-129.**

[480] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.219, lns.17-19, **C-121.**

direction.[481] This was a departure from standard practice in the OPA for other rule changes.[482]

546. In fact, for other major rule changes, ones with much less impact than this one, FIT investors were provided the right to comment.[483]

547. During the *Mesa Power* NAFTA hearing, Canada's witness, OPA FIT Program official, Mr. MacDougall, admitted that the June 3 rule change was a major rule change.[484]

548. The lack of consultation and expedited implementation improperly benefitted one Investor – NextEra. Canada's expressed reason for failing to provide the customary comment period provided an even more nefarious motive: 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.[485]

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[481] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, pp.234-235, lns.4-2, **C-121.**

[482] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.234, lns 1-14, and p.271, lns.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."), **C-121;** *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Hearing Transcript Day 4 (Public Version): Testimony of Shawn Cronkwright, 29 October 2014, pp.66-67, lns.23-3 ("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."), **C-122.**

[483] FIT Program Update, Summary of changes to the FIT Rules, contract and standard definitions, dated 2 July 2010, **C-144:** (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, 29 October 2010, **C-145**: (referencing review of comments for hub and hub casing); FIT Program Update, 8 December 2010, **C-146**: (OPA announcement advising it will accept comments to proposed rule that would include connection capacity assessments as part of the application process)

[484] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, pp.233, lns.17-25, **C-121.**

[485] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.179, lns.9-14, and p.180, lns.17-21, **C-121.**

549. 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 Transmission Region could have resulted in the change not taking place. One never will know because the rule was changed to assist one proponent and to assist the incumbent government's re-election goals.

2. June 3rd Direction: Allowing Change Between Regions

550. Until this point, Ontario had awarded FIT Contracts by region and that is how the FIT proponents competed.[486]

551. Prior to the June 3rd directive, the FIT proponents such as Skyway 127 expected that a province-wide ECT would occur only if necessary.[487] This was the process set out in the FIT rules.[488] This did not happen.[489] Instead, the OPA conducted a special run with only two regions, allowing investor NextEra to change its connection point first.

552. The FIT Rules did not contemplate permitting applicants connected to the transmission system to change connection points prior to the first ECT.[490] Further, the FIT Rules are silent on changes between regions.[491]

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[486] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Bob Chow, 28 October 2014, p.329, lns.12-18, p.304, lns.12-18, **C-121.**
[487] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.130, lns.21-24, **C-121**; *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 2 (Public Version): Testimony of Cole Robertson, p.45, lns.10-18, **C-170***;* Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", 19 May 2010, p.39, **C-136.**
[488] OPA, Feed-in Tariff Program, FIT Rules Version 1.1, 30 September 2009, §§5.3-5.6, compare §5.2, **C-162.**
[489] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.121, lns.1-4, 21-24, **C-121.**
[490] Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, 30 September 2009, §5.3(d), **C-162.**
[491] OPA, Feed-in Tariff Program, FIT Rules Version 1.1, 30 September 2009, §5.3(d), **C-162.**

553. It is clear from FIT- related documents that FIT contracts would be awarded on a regional basis or via an ECT, not a hybrid method in which only two areas would be examined and applicants in those areas could change their connection points.

554. For example, in the *Mesa Power* Claim, 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 province-wide ranking.[492] Canada's witness, Mr. Bob Chow, confirmed during the Mesa Power hearing that the document was accurate.[493]

555. 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.

556. Canada in fact produced a Ministry of Energy presentation from August 2010 which discusses how the FIT Rankings should be published.[494] 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.[495] This is important because without knowing everyone's province 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.

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[492] FIT, Application Review Test and Standard Responses, 9 May 2011, p.33, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 426 to ¶328, **C-017.**

[493] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Bob Chow, 28 October 2014, pp.329-330, lns.19-2, **C-121.**

[494] MOE Presentation, Priority Ranking Release: Issues to be Addressed, 26 August 2010, p. 12, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 428 to ¶330, **C-017.**

[495] MOE Presentation, Priority Ranking Release: Issues to be Addressed, 26 August 2010, p. 12, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 428 to ¶330, **C-017.**

557. 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.

558. Canada's contention in the *Mesa Power* case that the rule change best approximated developer expectations is unavailing. To begin with, Ontario never attempted to ascertain these expectations.

559. Second, the June 3 Ministerial directive limited the regional ECT to the Bruce and West of London regions, coincidentally benefitting IPC and NextEra, harming FIT proponents in line for contracts in the Bruce region, and excluding proponents from other regions.[496] If the rule change was not intended to benefit favored supporters and government friends such as IPC and NextEra, then nearby regions also should have been permitted to connect to the Bruce transmission area.

560. Third, the position is contradicted by an actual developer, Pattern Energy's Colin Edwards, who testified in a deposition taken in support of the *Mesa Power* action that he was surprised by the news that NextEra was allowed to change connection points to another region.[497]

3. Avoiding Paying the FIT Prices which Induced Investors to Invest in Ontario

561. It is undisputed that with the June 3 Direction, Ontario capped the megawatts which could be awarded with FIT contracts.[498] 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

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[496] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.123, lns.6-12, **C-121***; Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.221, lns.18-23, **C-121***;* Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, 3 June 2011, **C-176.**

[497] Transcript of Colin Edwards Deposition, August 2012, at p.160, lns.5-21, **C-106.**

[498] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, 3 June 2011, **C-176.**

megawatts, because if more projects could have connected, **we didn't want to pay** for the additional megawatts that would come on stream."[499]

562. This, amongst other portions of the Direction, went against developer expectations including those of Skyway 127. Canada's witnesses at the *Mesa Power* hearing admitted that this was why the OPA needed a Direction.[500] After having promised investors that it would award all available capacity through the FIT program to induce them to invest,[501] it was not within the OPA's power to restrict the contract awards without a direction or directive from the Government.

563. It was simply astonishing that Ontario was making 300 MW of transmission available in the West of London region while severely curtailing the amount of access for the Bruce. The West of London regional already had run its FIT evaluation and awarded contracts. The Bruce Region had not run the program – forcing applicants to patiently wait for another year. And then, Ontario reduced the total amount of MW of

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[499] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.180-181, lns.22-4 *[emphasis added]*, **C-121.**

[500] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Hearing Transcript Day 4 (Public Version): Testimony of Shawn Cronkwright, 29 October 2014, p.80, lns.19-24, **C-122.**

[501] FIT/Micro FIT Announcement, 15 December 2009, p.3, **C-175**: ("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, 25 February 2010 ***[CONFIDENTIAL],*** referenced in: *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338*,* **C-017**: (["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]***;** Ministry of Energy presentation, "DRAFT ECT Design Considerations", p.8 ***[CONFIDENTIAL]*** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), Discussed at 0:27:35: ("No ability to hold capacity back"), **C-201**; referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017;** Ontario Power Authority Draft Presentation, 'Implications of the Economic Connection Test', 8 March 2011, p.3 ***[CONFIDENTIAL]***, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, **C-201**; *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, Screenshot at 0:36:43, **C-216**: ("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"); referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 435 at ¶338, **C-017.**

FIT Contracts available (by reducing transmission access). This was a zero-sum game. The Government was prepared to pay only for 1050 MW of additional FIT Contracts. Under the FIT Program Rules, all of the available transmission access in the Bruce should be been used to issue contracts. If 1200 MW was available, it should have been allocated in the Bruce Region, not in the already-awarded London Region to benefit a political crony. If the government had a legitimate reason to curtail the amount of FIT Contracts offered (which Tennant Energy denies), then at a minimum, 1050 MW of the available transmission access should have been offered to the Bruce Region applicants who had been awaiting their contract review under the FIT Rules.

564. The decision to reduce contracts in the Bruce while offering contracts in the West of London operated to benefit IPC, and its CEO, Liberal Party insider Mike Crawley.

565. Law abiding and compliant applicants in the Bruce Region lost the 300 MW of transmission access. Under the FIT Program Rules – all available transmission access should have been allocated. Any of that 300 MW (allocated to the West of London zone) would have been available for Skyway 127's 100 MW project – as it was the next in line for FIT Contracts.

566. The aforementioned conduct shows that Canada managed the FIT Program in an arbitrary, grossly unfair, unjust, idiosyncratic, political and discriminatory manner, in addition to depriving FIT applicants like Skyway 127 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.

567. In sum, any expectation of due process and fairness that Skyway 127 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 a

proponent who already had completed the work required for change and to reduce transmission access in one region to benefit a politically connected proponent in one region. Further, the directed rule change allowing connection point changes was unjust and unfair and was inconsistent with representations made to the public about the FIT Rules.

568. These actions taken collectively resulted in a gross and egregious violation of the fair and equitable treatment expected by any investor under the NAFTA and resulted in Skyway 127 not receiving FIT Contracts for its projects.

E. NextEra's special privileges - Connection to the Special-Purpose Bruce to Longwood line

569. Permitting NextEra's projects to connect to the Bruce to Longwood 500kV line was unfair to Skyway 127 because the connection points should not have been available, as they were not listed on the TAT Table of June 3, 2011.[502] It is unfair to permit one applicant in a public regulatory competition to select connection points that are unpublished and off-limits. In these circumstances, allowing NextEra to select the unpublished B562L and B563L connection points provided it with an unfair advantage as compared to Skyway 127, which simply followed established FIT Rules. Bob Chow acknowledged om the *Mesa Power* hearing that after a previous project was given permission to connect those points, "the IESO had been reluctant to allow connections to this line because it is a critical back up line for a Bruce Nuclear Facility when it is operating the full capacity."[503]

[502] OPA, Draft ECT Communications Roll-out, 28 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 659 to ¶661, **C-182.**

[503] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Bob Chow, 28 October 2014, ¶47, **C-178**.

570. Three of NextEra's Projects and one of Suncor's projects connected to the Bruce to Longwood 500kV line at Connection Point B562L or B563L.[504] These were:

(a) Bornish (NextEra)

(b) Jericho (NextEra)

(c) Adelaide (NextEra)

(d) Cedar Point II (Suncor)

571. These projects previously either had selected the S2N connection point, or were "enabler requested."[505] In early 2010, Hydro One and the IESO determined that Bornish and Adelaide, which had identified S2N as their preferred connection point, were "not technically feasible."[506] The decision to allow these projects to move from S2N to the 500kV Bruce to Longwood line reinforces the pattern of preferential treatment that Ontario afforded to NextEra, and calls into question the impartiality of the OPA.

572. Moreover, this announcement was made on June 3, 2011 – a Friday; only three days before the June 6, 2011 Connection Point Amendment Window was opened. This was the first time that the Transmission Availability Table contained any information about connections to the 500kV line. This short time frame was insufficient for a proponent such as Skyway 127 to do all the necessary planning to successfully connect to this line, particularly given the "complicated technical requirements and financial costs of connecting to a 500kV line."[507] Awarding contracts to projects that

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[504] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, ¶662, **C-182.**

[505] NextEra's Bornish and Adelaide projects both listed S2N as their preferred connection points. Jericho was enabler requested. Cedar Point II originally requested to connect at N21W

[506] Hydro One – OPA Southwest Transmission Meeting, 10 February 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 663 to ¶663, **C-182.**

[507] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Bob Chow, 28 October 2014, ¶47, **C-178.**

required significant and costly transmission upgrades to be developed and constructed with the project is inconsistent with the stated goal of awarding contracts to projects that were the most "shovel-ready."[508]

573. Mr. Chow testified in the *Mesa Power* arbitration hearing that another project, Kingsbridge II, was granted approval to connect to the Bruce to Longwood line at connection point B562L, referencing an IESO System Impact Assessment (SIA) from February 9, 2007.[509] Later, however, a briefing note from July 8, 2009 on transmission and distribution considerations for the Korean Consortium, who later brought the K2 project under the *GEIA*, was discussed in redacted Mesa Power pleading. [510] The conclusion from the review of the redacted information was that connecting at B562L or B563L was not a feasible option.

574. Numerous internal communications between the IESO, Hydro One, and the OPA demonstrate that connecting to the Bruce to Longwood 500kV line was undesirable and made the system unreliable.

575. In a June 15, 2011 email, for example, Gabriel Adam of the IESO mentioned that the IESO team "will evaluate the feasibility of having unbalanced injections into the two 500kV lines."[511]

576. On July 4, 2011, an internal Hydro One email says that 400MW of projects will be connecting to the Bruce to Longwood 500kV line. John Sabiston of Hydro One then says: "the work to conduct the assessments for these and the associated connection

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[508] OPA Briefing Note, FIT Program Launch Logistics, 19 May 2009, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 668 to ¶665, **C-182.**

[509] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow (Public Version), 28 February 2014, ¶46, **C-178**. Kingsbridge II was owned by Capital Power, and was subsequently subsumed into the *GEIA* by the Korean Consortium.

[510] Briefing Note, Transmission and Distribution Considerations for Korean Consortium, Purchase of Existing Projects Proposal, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 670 to ¶666), **C-182.**

[511] Email from Gabriel Adam to Mike Falvo, June 15, 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 671 to ¶667, **C-182.**

work will be a major work effort over the next two to three years in the department."[512] In allowing NextEra's projects to connect to the Bruce to Longwood 500kV line, a disproportionate amount of Hydro One and IESO resources went to securing the fate of the four NextEra projects.

(a) Only two days after the contract awards, on July 6, 2011, a Southwestern Ontario Transmission Study is referenced in the Mesa Power pleadings in redacted form.[513] The conclusion from the redacted information was that mentions that NextEra ended up connecting more than 235MW to that line, (they connected 283MW).[514] Additional comment on this is again redacted in the Mesa Power pleadings.

(b) On August 16, 2011, emails were circulated between Hydro One and the OPA. Summarizing the meeting, Kun Xiong of Hydro One mentioned that Hydro One informed NextEra that "T-tap to 500kV is not allowed."[515]

(c) There is no report or study to demonstrate that it was feasible to connect to the Bruce to Longwood line.

577. These government communications demonstrate that connecting NextEra's projects to the 500kV Bruce to Longwood line diverted a significant amount of resources from the IESO and Hydro One to the detriment of other FIT proponents and resulted in a series of technical complications.

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[512] Email from John Sabiston to Hydro On**e**, IESO, OPA, 4 July, 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 672 to ¶667, **C-182.**

[513] Southwestern Ontario Transmission Study, 6 July 2011, p.2, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 673 to ¶667), **C-182.**

[514] Email from Bob Chow to Kun Xiong, June 10, 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 674 to ¶667, **C-182**.

[515] Email from Bob Chow to Kun Xiong, 16 August 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 675 to ¶667, **C-182**.

578. The decision to allow connection point changes and generator paid upgrades, together with NextEra's authorization to connect to L7S and the Bruce to Longwood 500kv line demonstrates a pattern of preferential treatment to IPC and to NextEra. Without a change to the FIT Rules, a revision of the Transmission Availability Table, and a shift in policy from prohibiting the connection of renewable projects to the Bruce to Longwood line, IPC and NextEra would not have been able to obtain contracts for all of its projects. As Skyway 127 reasonably expected, Skyway 127 would have received these contracts. Additional transmission would have been available in the Bruce transmission region for the Skyway 127 project, which did not require transmission upgrades, and which had sufficient and available transmission capacity.

579. Clearly, Ontario did not treat Skyway 127 fairly and equally. The lack of fairness when coupled with the lack of candour to those following the rules resulted in a program in which fairness was simply not a relevant consideration. Such behaviour has long been found to fall below the minimum standard of treatment required to be provided to a foreign investor under international law. Accordingly, such actions constitute a violation of NAFTA Article 1105.

F. Ontario failed to act in a fair and transparent manner

580. The behavior by government employees and administrative decision makers contravened basic precepts of Canadian administrative law and violated the procedural safeguards that should have been followed. This led to an unjust regulatory and administrative process that violated Skyway 127's right to be treated in accordance with the common-law principles of procedural fairness and natural justice.[516] The entire process amounted to "an arbitrary exercise of delegated powers."[517]

[516] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 ("Dunsmuir"), at ¶129 **CLA-175**

[517] Dunsmuir, at ¶104 **CLA-175**

581. Skyway 127 expected to be treated in a fair and transparent manner in Ontario with respect to obtaining access to the Ontario transmission grid and with respect to obtaining power purchase agreements under a feed-in-tariff program. Other Proponents such as Mesa Power Group expected the same treatment from the public process.[518]

582. The OPA through its administration of the FIT Program owed Skyway 127 a duty of fairness. This is a longstanding principle of Canadian administrative law that the OPA was bound to follow. In *Cardinal v. Director of Kent Institution* the Supreme Court of Canada held,

> [T]here is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual.[519]

583. The Supreme Court has found that the obligation to act fairly depends on three circumstances:

> (i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights.[520]

584. Canada did not behave in a manner that corresponded to this obligation. In the circumstances, Skyway 127 was owed a high degree of fairness.

585. The OPA made critical decisions about Skyway 127's business activities and had the ability to decide if it would or would not be able to proceed with its investment in

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[518]CWS-1 – Witness Statement of John C. Pennie, ¶114. (**CWS-1**) *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Cole Robertson (Public Version), 19 November 2013, ¶¶57-58**, C-187.**

[519] *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 ("Cardinal"), at p.653 **CLA-176** affirmed in *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 ("Baker"), ¶20 **CLA-177.**

[520] *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 ("Knight v. Indian Head School"), p.669, **CLA-179**

Ontario; a decision that Skyway 127 was not able to appeal.[521] Skyway 127, like all other ordinary FIT Proponents, was entirely dependent on the process established by the OPA to secure its FIT contract and proceed with the investments in Ontario. These proponents expected the process to be followed and, in these circumstances, the Supreme Court of Canada states, "it will generally be unfair for [administrative decision makers] to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."[522] However, when administering the FIT Program and dealing with Skyway 127, the OPA did just that.

586. By administering the FIT Program in the manner that it did, the OPA further contravened its own Code of Conduct, which sets out that one of the OPA's "core values" and "general principles" is "accountability."[523] The actions of Ontario public servants, including those employed by the Ministry of Energy, were in contravention of the Ontario Public Service *Guide to Public Service Ethics & Conduct*.[524] Their conduct was not in conformity with the requirements to uphold the public trust by acting with "fairness and equity" and "openness and transparency" as required by the *Guide*.[525]

587. These violations of Canadian administrative law amounted to a breach of Skyway 127's right to be treated fairly and equitably as expected in a stable business environment such as Ontario.

588. The following sections demonstrate how the administration of the FIT Program constituted an abuse of process that violated the international law standard and Skyway 127's right to a fair, reasonable, and transparent regulatory competition that

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[521] *Baker*, at ¶24, states that the lack of an appeal adds to the importance of the duty of fairness owed, **CLA-177.**
[522] *Baker*, at ¶26 **CLA-177**
[523] OPA Code of Conduct for Employees, 14 September 2011, **C-192.**
[524] Ontario Public Service Guide to Public Service Ethics & Conduct, 29 April 2013, **C-188.**
[525] Ontario Public Service Guide to Public Service Ethics & Conduct, 29 April 2013, s.3, **C-188.**

was in line with its legitimate expectations of a stable and predictable business environment.

1. The OPA failed to run an ECT as required by the FIT Rules, and the process was materially different

589. Contrary to repeated and clear representations made to the Skyway 127 and the other FIT applicants, and contrary to the FIT Rules, Ontario did not run the ECT as scheduled. Regulators reached a decision not to conduct an ECT, but never communicated this to the Investor. The failure of the OPA to communicate what it knew without question is a violation of the promise of transparency, basic notions of fairness, and any semblance of due process to which Skyway 127 was entitled as it participated in Ontario's FIT Program. The delay of the ECT and eventual decision not to run an ECT denied Skyway 127 an opportunity to obtain contracts for two of its projects.[526]

590. Prior to the June 3rd rule change, the OPA made repeated and consistent representations to FIT applicants that the next step in the FIT program would be an Economic Connection Test or ECT. All of the proponents expected that an ECT would be the next step in the FIT program and at no point did the OPA indicate that there would be a departure from the ECT process to award contracts

591. Yet, Canada in the *Mesa Power* NAFTA arbitration admits that.[527] The failure to run an ECT every six months as required by Section 5.4(a) of the FIT Rules constituted an arbitrary failure by regulators to follow the same rules by which Skyway 127 was required to abide. Ontario made the decision not to run the ECT, which was publicly slated to be run, on a non-transparent basis, depriving Skyway 127 and other FIT

[526] It should be noted that, even if the FIT Rules permitted the OPA to make changes to the FIT Program, the sections of the Rules regarding the ECT, such as s. 5.4(a), were not amended until FIT Rules v. 2.0 in August 2012. Therefore, from the commencement of the FIT Program in September 2009 until August 2012, the OPA was under an obligation to run an ECT every six months, yet it failed to run even a single ECT. Canada has not denied that the OPA's failure to run an ECT was in violation of the FIT Rules.

[527] *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Canada's Counter-Memorial (Public Version), 28 February 2014, ¶¶429-431, **C-177.**

applicants of any indication to expect the fundamental change to the FIT Program design it constituted. Ultimately, not running the ECT as required by the FIT Rules deprived Skyway 127 of due process.[528]

592. The Bruce to Milton allocation process was materially different from the ECT process established in the FIT Rules and cannot mitigate the fact that an ECT never was run. The changes imposed by the Minster's direction constituted an arbitrary modification of the FIT Program and the resulting process was inconsistent with the ECT in several significant ways:

593. First, the ECT did not include a cap on the amount of transmission capacity allocated.[529] In the Bruce to Milton Allocation Process, a cap of 750MW in Bruce Region and 300MW in West of London was imposed.[530]

594. Second, the ECT included a step to assess the feasibility of expansions to the transmission system.[531] This phase was an essential component of an ECT as contemplated in the FIT Rules and as publicly communicated to FIT proponents.[532]Unlike the ECT, the Bruce to Milton process did not include a phase for proposing and assessing new expansions to the transmission system to accommodate additional FIT projects.

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[528] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, ¶¶760-762, **C-133.**

[529] OPA presentation, "FIT Program Analysis – Policy Strategy Development," 23 December 2010, pp.4-5, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 693 to ¶685, **C-182.**

[530] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 3 June 2011, **C-176.**

[531] OPA, Presentation, "The Economic Connection Test - Approach, Metrics and Process," 19 May 2010, pp.13-34 **C-136**, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 695 to ¶685, **C-182.**

[532] OPA, Feed-In Tariff Program, FIT Rules, Version 1.2, 19 November 2009, s. 5.4(a) **C-137**; Ontario Power Authority, Presentation, "The Economic Connection Test – Approach, Metrics and Process," 19 May 2010, pp.13-34, **C-136,** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 696 to ¶685, **C-182.**

595. The Connection Point Window that was scheduled to take place as part of the ECT was to occur over the course of several weeks, and was limited to allowing specific projects to change connection points.[533] The Ministerial direction provided almost no advance notice to proponents of the opportunity to change connection points and allowed a very limited amount of time for proponents to be able to assess the feasibility of connection point options.

596. The ECT process was regional, and at no point prior to the June 3rd rule change did Ontario indicate to proponents that connection point changes would be allowed between regions. The Bruce to Milton process allowed changes between regions at the direction of the Minister of Energy.[534]

2. The decision to not conduct an ECT

597. In *Mesa Power*, Canada provided an explanation of the primary cause of the delay and eventual cancellation of the ECT as relating to objectives set out in the Ministry of Energy's Long-Term Energy Plan (LTEP), which Canada released in November 2010.[535] Canada's explanation ignores the fact that it was supposed to run the ECT in August 2010, several months prior to the release of the LTEP. It also ignores the OPA's specific representation to FIT Proponents such as Mesa that "the ECT process will be initiated in August 2010".[536]

598. Ontario internally adopted the position that the LTEP "compet[ed] and potentially conflict[ed]" with the objectives set out in the FIT Rules,[537] and would require a change

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[533] OPA, Presentation, "The Economic Connection Test – Approach, Metrics and Process", 19 May 2010, p.39, **C-136**, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 697 to ¶685, **C-182.**

[534] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 3 June 2011, **C-176.**

[535] *Mesa Power Group LLC v. Canada* (PCA Case No, 2012-17), Witness Statement of Sue Lo, 28 February 2014, ¶¶39-40, **C-180.**

[536] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, 8 April 2010, **C-134.**

[537] OPA presentation, "FIT Program Analysis – Policy Strategy Development," 23 December 2010, p.14, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 701 to ¶687, **C-182.**

in the FIT Program's approach.[538] Ontario never communicated this decision to Skyway 127 and the other FIT applicants.[539] Skyway 127 continued to rely on the justified belief that an ECT was both necessary and forthcoming as this is what the OPA had expressly stated.[540]

599. More than six months after the ECT process was scheduled to start, the OPA and Ministry of Energy were actively considering alternative options to award FIT contracts in the Bruce and West of London regions instead of the ECT.[541] In the course of these discussions, the OPA noted that "clear communication to the industry" would be necessary to inform them that the ECT would not be conducted as expected.[542] To the contrary, FIT Proponents were being told by the OPA that the ECT was going to occur.[543]

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[538] The presentation specifically noted that the outcome of the ECT would "need to recognize LTEP targets." OPA presentation, "FIT Program Analysis – Policy Strategy Development," 23 December 2010, p.30, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 702 to ¶687, **C-182*;*** At slide 29 of the presentation, the OPA suggested that the Two-Year Review of the FIT Program be advanced from the fall of 2011 to Jaunary 2011 which potentially could have resolved the tension between the LTEP and ECT

[539] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Witness Statement of Cole Robertson, 28 April 2014, ¶57, **C-189.**

[540] Letter from JoAnne Butler, Ontario Power Authority, to Charles Edey, April 8, 2010, **C-134**; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010***,*** **C-136*,*** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 704 to ¶687, **C-182.**

[541] For example, a February 7, 2011 meeting between the OPA and Ministry of Energy officials discussed changing the ECT from a province-wide process to one conducted on a regional basis and eliminating the preliminary Individual Project Assessment (IPA) portion of the ECT for all regions except those enabled by the Bruce to Milton line. Handwritten Notes, Karen Slawner (Ministry of Energy), February 7, 2011, referenced at: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 705 to ¶688, **C-182**.

[542] OPA presentation, "Economic Connection (ECT) & Program Evolution," 21 March 2011, pp.13-14, referenced at: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 706 to ¶688, **C-182**. The OPA also noted that the FIT Rules would have to be amended to reflect the changes to the ECT.

[543] Letter from JoAnne Butler, OPA, to Charles Edey, 8 April 2010, **C-134**; OPA, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010***,*** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 707 to ¶688, **C-182.**

600. If the ECT had been run as expected by May 2011, Skyway 127 would have received contracts for its project.

601. The transmission capacity enabled by the Bruce to Milton line in the Bruce and West of London regions was to be allocated through the first ECT, regardless of whether the Bruce to Milton line had received final approval by that time.[544] If the line had received approval prior to an ECT, then the projects enabled by the line would have been immediately offered FIT contracts. If the line had not received approval prior to an ECT, then projects enabled by the line would have been moved to the FIT Production Line until the line received approval, at which time these projects would be offered FIT contracts.[545]

602. As the Bruce to Milton line received its final approval in May 2011,[546] there were two scenarios which led to the same outcome of Skyway 127 receiving a FIT contract:

(i) If an ECT were was carried out in August 2010, Skyway 127 would have secured a place in the FIT Production line, in which case Skyway 127 was in a promising position to receive a FIT contract.[547]

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[544] Email from Tracy Garner (OPA) to Bob Chow (OPA), 20 September 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 708 to ¶689, **C-182**; Draft letter from Tracy Garner (OPA), September 20, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 708 to ¶689, **C-182**; Email from Ceiran Bishop (Ministry of Energy) to Samira Viswanathan (Ministry of Energy) and Faruq Remtulla (Ministry of Energy), 18 November 2010 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 708 to ¶689, **C-182.**

[545] Feed-In Tariff Program, FIT Rules, Version 1.2, November 19, 2009, s. 5.4(c)(i), **C-137**; Draft letter from Tracy Garner (OPA), September 20, 2010 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 709 to ¶689, **C-182**; Email from Ceiran Bishop (Ministry of Energy) to Samira Viswanathan (Ministry of Energy) and Faruq Remtulla (Ministry of Energy), 18 November 2010**,** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 709 to ¶689, **C-182.**

[546] Ministry of Natural Resources, Notice of Decision made under the provision of the *Niagara Escarpment Planning and Development Act*, R.S.O. 1990 (May 10, 2011), referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 711 to ¶690, **C-182.**

[547] The placement of Skyway 127 in the FIT priority Production Line and the subsequent awarding of contracts in May 2011 would have preceded any of NextEra's projects changing connection points from West of London to Bruce.

(ii) If the ECT had been run at the time of the Bruce to Milton line's final approval in May 2011, then the Skyway 127 project would have been awarded a FIT contract.

603. In either case, had the established ECT process been carried out as it was expected and promised, and no later than July 4, 2011, the Skyway 127 project would have received a FIT contract.

3. Ontario's cap on transmission capacity departed from the established ECT process

604. The ECT process under the FIT Rules did not contemplate any limits on transmission capacity allocation to FIT projects other than those necessarily set by the physical limitations of the electricity transmission system. Skyway 127 expected that the OPA would offer contracts to proponents as long as there was sufficient transmission capacity available for the project to connect to the transmission system and there was transmission available to it.

605. However, because of the change made by the Ministerial Direction of June 3rd, less capacity was allocated to FIT projects through the Bruce to Milton process than was physically enabled in both the Bruce and West of London regions. Specifically, the caps on allocations imposed by the Minister had the effect of withholding capacity that was physically enabled in both regions by the Bruce to Milton line.[548]

606. Ministry of Energy Assistant Deputy Minister Sue Lo testified that the reason for the cap was financial – and not based on other reasons. She testified at the *Mesa Power* Hearing 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

[548] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 3 June 2011, **C-176.**

> 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."[549]

607. The Minister of Energy's direction of June 3 imposed a cap of 750MW on allocations in the Bruce Region. However, a study carried out by the OPA in July 2011, revealed that the physical limit for Transmission in the Bruce transmission zone was actually greater than the 750MW cap.[550]

608. The caps imposed by the Minister's June 3rd direction departed from the established procedures of an ECT, and were contrary to the purpose of the FIT Program. Early in the FIT process, the OPA characterized the FIT Program as an "open ended program" that included "no MW cap" and was designed to secure "as many MW as possible on the existing transmission system" for renewable energy projects.[551] Moreover, officials were clearly reluctant to impose a cap and considered alternative approaches that expressly avoided doing so.[552]

609. In addition, the Minister of Energy set an artificial cap of 300MW in the West of London region, which negatively impacted Skyway 127 in the Bruce Region.[553] Prior to June 3, 2011, the Bruce to Milton line was projected to physically enable 550MW of transmission capacity in West of London,[554] and officials were fully aware that

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[549] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.180-181, lns.22-4 *[emphasis added]*, **C-121.**

[550] "Bruce Area Test for BxM Capacity Allocation," prepared by Kun Xiong (OPA), 26 July 2011, *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 714 to ¶694, **C-182.**

[551] OPA presentation, "FIT Program Analysis – Policy Strategy Development," 23 December 2010, pp.4, 6, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 715 to ¶695, **C-182**; At page 8, the OPA also states that the FIT Rules were designed to ensure "[p]rogram certainty" for the FIT Program for its first two years.

[552] Email from Sunita Chander (Ministry of Energy) to Ceiran Bishop (Ministry of Energy), 13 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 716 to ¶695, **C-182.**

[553] If the 300MW cap on allocations in West of London had not been imposed, and all of the 550MW physically enabled in the region had been allocated through the Bruce to Milton process, several projects in the West of London that moved their connection point during the change window to the Bruce region likely would not have moved into the Bruce Region, where there was more transmission capacity available.

[554] Ministry of Energy presentation, "Bruce to Milton Transmission Line – FIT Contract Awards," 26 May 2011, p.3,referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 718 to ¶696, **C-182.**

imposing a cap of only 300MW withheld a significant amount of available capacity from FIT proponents.[555]

610. 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."[556]

611. This restriction may have been imposed for the benefit of the Korean Consortium. Prior to June 3, authorities had planned to set aside a certain amount of capacity in the West of London for the Korean Consortium but the Korean Consortium repeatedly failed to notify Ontario of how much transmission capacity it needed in the Bruce transmission zone.[557]

612. The Ministerial Direction of June 3 achieved this by imposing the cap and thereby holding back 250MW which could be used for the Korean Consortium's project.[558]

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[555] A draft Ministerial Direction prepared on May 27, 2011 set the cap for the West of London region of 550MW. The final draft of the Direction circulated on May 31 reduced this number to 300MW, which caused Ministry of Energy officials to question what had happened to the remaining 250MW of transmission capacity. Email from Yuna Kim (Ministry of Energy) to Sunita Chander (Ministry of Energy), 31 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 719 to ¶696, **C-182.**

[556] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2102-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.180-181, lns.22-4 *[emphasis added]*, **C-121.**

[557] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, at ¶711, **C-133**; Ministry of Energy, Presentation, "Bruce to Milton Transmission Line: FIT Contract Awards," Undated, p.4, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 721 to ¶697, **C-182**; Email from Sunita Chander (Ministry of Energy) to Ceiran Bishop (Ministry of Energy), 16 May 2011**,** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 721 to ¶697, **C-182.**

[558] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, at ¶714, **C-133**; Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), 19 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 722 to ¶697, **C-182.**

613. As the expected ECT process would not have involved any caps on the amount of capacity, but would instead have resulted in the allocation of all capacity physically enabled by the line, Skyway 127 would have had the opportunity to obtain a FIT contract through the ECT. That opportunity was unfairly and arbitrarily removed on the direction of the Minister's direction to the OPA capping transmission for improper reasons.

4. The FIT Rules only allowed limited connection point changes prior to the ECT

614. Only specific categories of projects were permitted to change connection points prior to an ECT under the FIT Rules.

615. In particular, Sections 5.3(d), 5.5(b), 5.5(d) and 5.6(b) of the FIT Rules did not allow NextEra's projects (or any other transmission connected projects) to change connection points prior to an ECT.[559]

616. In particular: Section 5.3(d) only applies to projects connected to the distribution system that are required undergo a Distribution Availability Test, which does not apply to NextEra's projects. There is no similar provision for a connection change window prior to an ECT for projects that connect to the Transmission system;[560]

(a) Section 5.5(b) of the FIT Rules does not contain any information regarding connection point changes;[561]

[559] Contrary to: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow, 28 February 2014, fn 15, ¶29 **C-178**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Sue Lo, 28 February 2014, ¶46, **C-180**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Jim MacDougall, 28 February 2014, ¶44, **C-190**; *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Canada's Counter-Memorial (Public Version), 28 February 2014, ¶425, **C-177.**

[560] See: FIT Rules Version 1.1 Section 5.2, **C-162.**

[561] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow, 28 February 2014, fn 15, **C-178.**

(b) Sections 5.5(d) and 5.6(b) of the FIT Rules apply only to projects that are in the FIT Production Line and the FIT Reserve.[562]

617. Connection point changes could be made as part of the ECT process to the *distribution* system. Tennant Energy does not take issue with this process. Yet, the FIT Rules did not allow a FIT applicant to change connection points if the applicant had requested to connect to the *transmission* system.

618. Such a process did not conform to the connection point change procedure contemplated in the FIT Rules.

619. If the Bruce to Milton connection point change window was consistent with the FIT Rules, none of NextEra's projects would have been permitted to change connection points, and Skyway 127 would have still been within the top 750MW of projects in the Bruce Region that would have received a FIT contract.

a) Connection point changes were not allowed between regions prior to June 3, 2011

620. The FIT Rules explicitly stated to proponents that the process for awarding contracts through an ECT was regional. Prior to the June 3, 2011 rule change the word "region" appeared in the FIT Rules twice - Section 5.1(b) and Section 5.4(a).[563] Each reference to "region" in the FIT indicates that the ECT will be run, separately, for every region of the province every six months.

621. Indeed, from August 2010, the Ministry of Energy considered sending each individual applicant their regional ranking only, and not the provincial ranking.[564] In

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[562] As of June 2011, there were no projects in either the FIT Production Line or the FIT Reserve. A project could only be placed into the FIT Production Line or FIT Reserve after an ECT had been completed. Because no ECT had ever occurred, none of the projects in either the Bruce or West of London region could have been in the FIT Reserve or FIT Production Line in 2011.

[563] The word region also appears twice in Exhibit B to the FIT Production Line. OPA, *FIT Rules Version 1.3*, 9 March 2010, **C-159.**

[564] Ministry of Energy presentation, "Priority Ranking Release: Issues to be Addressed," 26 August 2010, p.12, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 729 to ¶705, **C-182.**

fact, Ontario considered that an applicant's regional ranking was "a better indicator of whether or not a particular project will be offered a FIT contract" than its provincial ranking.[565]

622. Not a single document, rule, or presentation demonstrate that applicants were informed that they would be allowed to change connection points into another region.[566] Neither the OPA's webinar presentations to FIT proponents in March and May 2010, nor the presentation by Bob Chow from November 2010 referenced in the expert report of Steve Dorey, state that connection point changes between regions would be permitted.[567]

623. If NextEra could not change connection points from the West of London region into the Bruce Region, Skyway 127's projects would have been within the top 750MW of capacity and would have received a FIT contract.

b) The FIT Rules did not permit enabler requested projects to select a connection point prior to the ECT

624. There was no provision in the FIT Rules or any other document that states that projects that did not select connection points in their original application - "enabler

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[565] FIT – Application Review Text and Standard Responses, 9 May 2011, p.33, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 730 to ¶705, **C-182**; OPA, Appendix A –Standardized Text, May 2011, p.31, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 730 to ¶705, **C-182*;*** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, **C-209*;*** *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Day 3 Part 4 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:10:20, **C-217.**

[566] Canada cites only the Bob Chow's Witness Statement, and his observation that not allowing changes between regions "would have made no sense whatsoever" from a technical electrical standpoint. *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow, 28 February 2014, ¶30, **C-178.**

[567] OPA Presentation, "The Economic Connection Test Process," 23 March 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 733 to ¶706, **C-182**; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process," 19 May 2010**, C-136***;* Bob Chow, *FIT Status and the ECT Process*, Presentation to 2010 APPrO Conference, November 17, 2010, cited in *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Expert Report of Steve Dorey, 28 February 2014, ¶108, **C-191.**

requested" projects - would be allowed to select connection points in advance of an ECT.[568]

625. Indeed, while projects that originally selected a connection point were permitted to change their status to enabler requested during a connection point change window, the OPA did not provide for projects to change from enabler requested to identifying a connection point.[569]

626. The decision to permit enabler-requested projects to identify connection points during the change window enabled two of NextEra's projects, Bluewater and Jericho, to participate in the Bruce to Milton allocation process. Both of these projects identified connection points in the Bruce region and consequently jumped ahead of Skyway 127's projects in the rankings to earn FIT contracts in that region.[570] Officials knew that permitting enabler requested projects to identify connection points would be beneficial to NextEra.[571]

627. If the Bruce to Milton process had been run pursuant to the ECT procedures established in the FIT Rules, then NextEra's Bluewater and Jericho projects would not have been eligible to receive contracts through the Bruce to Milton allocation process.[572]

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[568] The Bruce to Milton allocation process deviated from the procedures contemplated in the FIT Rules by allowing enabler requested projects to identify connection points during the connection point change window. See: *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, at ¶¶722, 728, **C-133.**

[569] OPA, Presentation, "The Economic Connection Test - Approach, Metrics and Process," 19 May 2010, p.46, **C-136.**

[570] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, at ¶¶729, 730, **C-133.**

[571] Ministry of Energy Briefing Note, "Bruce to Milton Contract Awards," 15 June 2011, p.2 referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 737 to ¶710, **C-182.**

[572] Enabler requested projects were explicitly excluded by the OPA from the Bruce to Milton process. OPA, "Questions and Answers, Bruce to Milton Contract Allocation Process," 8 June 2011, p.1, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 738 to ¶711, **C-182.**

628. This arbitrary change allowed two of NextEra's projects that otherwise would not have been eligible to participate in the Bruce to Milton process. As such, an additional 210MW would have been available in the Bruce region, which potentially could have been allocated entirely to the Skyway 127 and other proponents.

G. Pervasive political influence

629. The modification of the FIT Program on account of political influences constitutes an unfair, arbitrary, and non-transparent interference in a public regulatory program.

630. Skyway 127 had the right to be treated impartially throughout the FIT Program. Instead, the FIT Program's administration denied its right to participate in a fair and transparent regulatory competition with all applicants being equal.

1. FIT Changes designed to protect IPC and to benefit NextEra

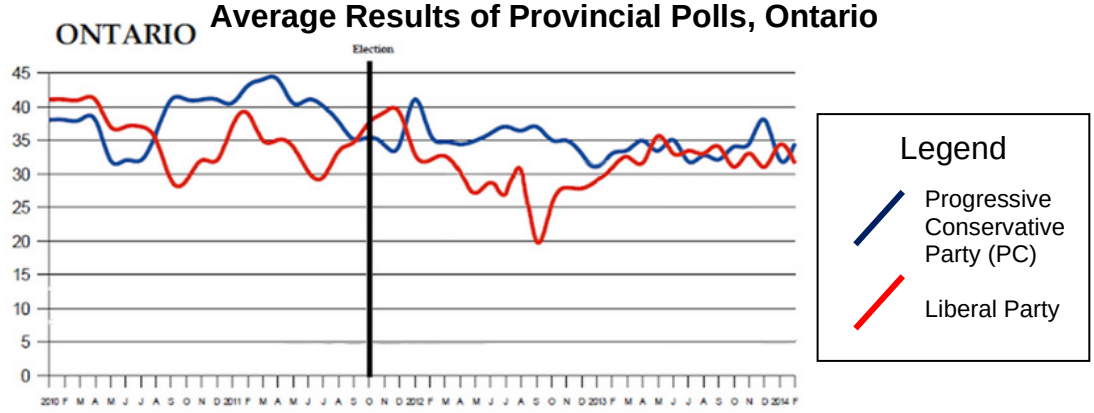
631. Journalist Peter Wolchak filed a witness statement in the *Mesa Power* Arbitration. Mr. Wolchak notes that the relationship between NextEra and the Government of Ontario was not one-sided. The evidence demonstrates clearly that NextEra received significant beneficial treatment from the Government of Ontario in connection with its energy business. This business included the benefits it received in being able to connect its previously unsuccessful, West of London region projects into the transmission grid in the Bruce region.[573]

632. Mr. Wolchak reports from public records that in 2011 NextEra made corporate donations to the Ontario Liberal Party around the time of the June 3, 2011 rule changes, which reached the maximum donation amount permitted under Ontario

[573] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, ¶778, **C-182**.

law.[574] This was at the same time when the Liberals were trailing in provincial polls behind the Progressive Conservative Party, as shown in the chart below:[575]

Average Results of Provincial Polls, Ontario



Source: ThreeHundredEight.com[576]

633. The Bruce to Milton allocation process was designed to benefit projects owned by NextEra.[577] The Investor has received additional evidence confirming that authorities developed a process for awarding contracts that favoured NextEra, and that the government improperly changed the rules to allow NextEra to obtain Power Purchase Agreements to the detriment of other proponents. The evidence demonstrates that the modifications to the FIT Program benefitting NextEra originated within the Ministry of Energy.

H. Development of the Bruce to Milton allocation process

[574] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Peter Wolchak, 28 April 2014, ¶30, **C-203**.
[575] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, ¶778, **C-182**.
[576] Average Results of Provincial Polls, Ontario, http://www.threehundredeight.com/p/ontario.html, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 817 to ¶778, **C-182**.
[577] *Mesa Power Group LLC v. Government of* Canada (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, ¶¶711-726, **C-133.**

634. The transmission capacity enabled by the new Bruce to Milton line was initially intended to be allocated to FIT proponents through the first ECT.[578] However, because officials decided not to proceed with the ECT as contemplated in the FIT Rules, the allocation of Bruce to Milton capacity required the development of a separate process.[579]

635. At the request of the Ministry of Energy, the OPA began developing a discrete Bruce to Milton process in the spring of 2011. The Ministry directed the OPA to design a process that allocated a limited amount of capacity to meet the LTEP's target of 10,700MW for renewable allocations.[580] The Ministry expressed no requirement that the process developed by the OPA conform to the procedures of an ECT.

636. With these instructions from the Ministry of Energy in mind, the OPA developed a process for Bruce to Milton allocation that officials referred to as a "special TAT."[581] This process was so-called because it would have determined contract awards for projects based on the connection points identified in their original applications. The

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[578] Email from Andrew Mitchell (Ministry of Energy) to Andrew Mitchell (Ministry of Energy) and Sue Lo (Ministry of Energy), referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 148 to ¶137, **C-182**; Draft letter from Tracy Garner (OPA), September 20, 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 148 to ¶137, **C-182**.

[579] *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Canada's Counter-Memorial (Public Version), 28 February 2014, ¶¶194-196, **C-177.**

[580] OPA presentation, "Economic Connection Test (ECT) & Program Evolution," 21 March 2011, p.3, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 150 to ¶138, **C-182**; referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 4 Part 1 Hearing Video (Public Version), 29 October 2014, **C-208*;*** referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 4 Part 1 Hearing Video (Public Version), 29 October 2014, Screenshot at: 1:30:21, **C-218.**

[581] Handwritten notes, "Our Recommendations – BxM Contract Awards," 26 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 151 to ¶139. **C-182*;*** OPA Draft Memorandum, 3 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 151 to ¶139, **C-182.**

process would not have involved connection point changes[582] or generator-paid upgrades.[583]

637. The OPA cited several considerations in favor of its proposed TAT approach to Bruce to Milton allocation.

638. First, officials recognized that performing the Bruce to Milton allocation through a TAT would require only minor changes to the FIT Rules and would not require a Ministerial Direction from the OPA.[584]

639. Second, using a process that did not resemble an ECT would enable authorities to defer decisions regarding changes to the ECT until the Two-Year Program Review, to be conducted later in 2011.[585]

640. Finally, the special TAT process would have aligned with the LTEP's target for renewable allocations. By not permitting generator-paid upgrades and connection point changes, a special TAT process would have resulted in fewer capacity allocations than alternative approaches.[586]

641. Although the Ministry of Energy was considering other options for Bruce to Milton allocation at this time, Ministry officials appear to have been supportive of the OPA's

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[582] OPA Draft Memorandum, 3 May 2011, p.2, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 152 to ¶139, **C-182.**

[583] Handwritten notes, "Our Recommendations – BxM Contract Awards," 26 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 153 to ¶139, **C-182.**

[584] Ministry of Energy presentation, "DRAFT – Bruce to Milton Next Steps," 28 April 2011, p.8, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 154 to ¶140, **C-182**; Ministry of Energy presentation, "REVISED DRAFT – Bruce to Milton Next Steps," 6 May 2011, p.8, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 154 to ¶140, **C-182.**

[585] Ministry of Energy presentation, "DRAFT – Bruce to Milton Next Steps," 28 April 2011, p.8, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 155 to ¶140, **C-182.**

[586] OPA Draft Memorandum, 3 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 156 to ¶140, **C-182.**

proposed plan. For example, in an email sent on April 26, 2011 Ministry official Tiffany Chow suggested that the Ministry's working slide deck on Bruce to Milton allocation be revised "to more firmly recommend a TAT-like process."[587]

642. Despite the OPA's recommendation of a special TAT process and the support the plan enjoyed among Ministry officials, and despite the fact that the process largely conformed to the existing FIT Rules and would not have required a Ministerial Direction, the Bruce to Milton allocation process did not occur through a special TAT. The process used for Bruce to Milton allocation was a "regional ECT-like process."[588] Unlike the OPA's proposed process, the agreed-upon Bruce to Milton process permitted both connection point changes and generator-paid upgrades.

643. The decision to proceed with an ECT-like process instead of a special TAT was made following an intervention by the Minister of Energy and the Premier in May 2011.

644. On May 11, Ministry of Energy officials received a request from the Minister of Energy's Office and the Premier's Office to develop a new Bruce to Milton process in advance of its meeting the following day. The process that the Ministry was instructed to develop included both a connection point change window and generator-paid upgrades.[589]

645. At the meeting on May 12, the Minister of Energy's Office and the Premier's Office expressed their desire for a Bruce to Milton process that included connection point

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[587] Email from Tiffany Chow (Ministry of Energy) to Ceiran Bishop (Ministry of Energy), 26 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 157 to ¶141, **C-182.**

[588] *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Canada's Counter-Memorial (Public Version), 28 February 2014, ¶412, ***C-177***; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow (Public Version), 28 February 2014, ¶41, **C-178**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Shawn Cronkwright (Public Version), 28 February 2014, ¶17, **C-181**; *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Sue Lo (Public Version), 28 February 2014, ¶46, **C-180.**

[589] Email from Sunita Chander (Ministry of Energy) to Shawn Cronkwright (OPA), 11 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 159 to ¶143), **C-182.**

changes.[590] This process that the Ministry of Energy and Premier's Office advocated for contrasted with the OPA's preferred route.

646. In her Witness Statement in the *Mesa Power* arbitration, Sue Lo confirmed that the compressed timeline associated with the connection-point change window was due to the Premier's Office.[591]

647. Once the decision was made to adopt the plan advanced by the Minister of Energy and the Premier, the OPA worked to implement a Bruce to Milton process that included both a connection point change window and generator-paid upgrades.[592]

648. The request by the Minister of Energy's Office and the Premier's Office on May 11 came only hours after a meeting between NextEra's Senior VP, Al Wiley, and the Minister of Energy's Director of Policy, Andrew Mitchell. The topic of the May 11 meeting was whether a connection point change window would be opened prior to the next round of FIT contract awards. This was said to be "a very significant issue for NextEra."[593]

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[590] Email from Sue Lo (Ministry of Energy) to Pearl Ing (Ministry of Energy), et al., 12 May 2011, referenced in: Mesa Power Group LLC v. Government of Canada (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 160 to ¶144, **C-182**; Email from Sue Lo (Ministry of Energy) to JoAnne Butler (OPA), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 160 to ¶144, **C-182.**

[591] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Sue Lo (Public Version), 28 February 2014, ¶50, **C-180**; Email from Jason Chee-Aloy to Colin Anderson, JoAnne Butler, Michael Lyle, et. al., 14 January 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 161 to ¶145, **C-182**.

[592] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow (Public Version), 28 February 2014, ¶45, **C-178**; Email from Kristin Jenkins (OPA) to Sue Lo (Ministry of Energy), 16 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 162 to ¶146. **C-182.**

[593] Email from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), 11 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 163 to ¶147, **C-182**; referenced in: *Mesa Power LLC Group v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204*;*** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21**, C-213**.

649. NextEra used this meeting to ensure that its projects stood the best chance of receiving contracts. In the absence of a *GEIA*-like agreement, which it preferred[594], its strategy was to push for individual changes to the FIT Program that would benefit its projects.

650. One week after the Premier and Ministry of Energy imposed their preferred process for Bruce to Milton allocation, an OPA analyst stated to her colleague that the Ministry of Energy "expects a very specific outcome" from the Bruce to Milton allocation.[595] Specifically, she suggested that the Ministry advocated including connection point changes and generator-paid upgrades to ensure that certain projects would be awarded contracts.[596]

651. The records of the Ontario Electoral Commission reveal that NextEra made the maximum permissible political donations to the Ontario Liberal Party in 2011.[597]

652. During the change window, four of NextEra's projects moved their connection points from the West of London to the Bruce transmission zone and were awarded contracts in the latter. Furthermore, one of NextEra's projects in the Bruce region, Goshen – a 102MW project, received a contract based on its commitment to pay for

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[594] Email from Bob Lopinski (Counsel Public Affairs) to Craig MacLennan (Ministry of Energy) et al., 1 April 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 164 to ¶148, **C-182**; Email from Christopher Quirke (Ministry of Energy) to Petra Fisher (Ministry of Energy), 30 April 2010, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 164 to ¶148, **C-182.**

[595] Email from Tracy Garner (OPA) to Bob Chow (OPA), 18 May 2011 [emphasis added], referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 165 to ¶149, **C-182;** referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 4 Part 1 Hearing Video (Public Version), 29 October 2014, **C-208**; *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 4 Part 1 Hearing Video (Public Version), 29 October 2014, Screenshot at 1:14:32, **C-219.**

[596] Email from Tracy Garner (OPA) to Bob Chow (OPA), 18 May 2011 [emphasis added], referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 165 to ¶149, **C-182;** referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 4 Part 1 Hearing Video (Public Version), 29 October 2014, **C-208**; *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 4 Part 1 Hearing Video (Public Version), 29 October 2014, Screenshot at 1:14:32, **C-219.**

[597] NextEra's Political Contributions to the Ontario Liberal Party, 2011, **C-220**.

upgrades at its connection point, L7S, whose published transmission capacity was only 30MW.[598] Without prior knowledge that it would have been able to include generator-paid upgrades, NextEra's Goshen project would not have connected to L7S because its published capacity was significantly lower than what Goshen required. When the change window was announced, NextEra was prepared with a very comprehensive technical document to change its connection point for Goshen to L7S that day and filed its transmission license application.[599]

653. If a connection point change window and generator-paid upgrades had not been part of the Bruce to Milton process, that is, if Bruce to Milton allocation had occurred through the special TAT process advocated by the OPA, then only one of NextEra's projects would have received a Bruce to Milton contract.

654. In mid-April 2011, the OPA was requested by the Ministry of Energy to perform a "dry run" of the Bruce to Milton allocation process.[600] The parameters of the test included no connection point change window and no generator-paid upgrades; as such, the test effectively simulated the OPA's proposed "special TAT" process.[601]

655. One of the purposes of the "dry run" was to determine the projects that would receive contracts under the OPA's preferred scenario. In an email to OPA CEO Colin Andersen, Shawn Cronkwright (Director, OPA, Renewables Procurement) expressed concerns about providing the results to the Ministry of Energy.[602] Ultimately, the

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[598] OPA, FIT Program, Transmission Availability Table, 6 June 2011, **C-120.**

[599] Application for Transmission License, Upper Canada Transmission, 3 June 2011, referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 168 to ¶150, **C-182.**

[600] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), 13 April 2011**,** referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 169 to ¶152, **C-182.**

[601] Bruce Area and West of London Area Scenario Analysis, 15 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 170 to ¶152, **C-182.**

[602] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), 13 April, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 171 to ¶153, **C-182.**

decision was made for sharing the results with the Ministry only if necessary during a meeting, and on a one-time-only basis.[603]

656. The *Mesa Power* Reply Memorial references that the OPA performed a dry run which demonstrated who would be awarded FIT Contracts in the Bruce Transmission region. The results were redacted but it appears that they indicated that Skyway 127 wind projects would have been given contracts. So, too, would Arran (the wind power site adjacent to Skyway 127) and TTD would receive contracts, as Skyway 127 was two places higher up the priority list on the public results.[604]

657. At the time the dry run was conducted, proponents like Skyway 127 were not aware of its results. Furthermore, Skyway 127 was not aware that a process for awarding Bruce to Milton contracts was being developed that reversed the purpose of the FIT Rules, which was to have shovel-ready projects.

658. The Bruce to Milton process was materially different from the ECT that had been represented to FIT proponents as the next step of the FIT Program. First, unlike an ECT, the Bruce to Milton process did not include a Network Planning phase which would have assessed proposed expansions to the transmission system.[605]

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[603] Email from Shawn Cronkwright (OPA) to Colin Andersen (OPA), 14 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 172 to ¶153, **C-182.**

[604] Bruce Area and West of London Area Scenario Analysis, 14 April 2011, referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 173 to ¶154, **C-182**; Bruce Area Scenario Analysis, Table of results, 14 April 2011: {redacted}, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 173 to ¶154, **C-182**. Bruce Area Scenario Analysis, Table of results, 14 April 2011: {redacted}, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 174 to ¶154, **C-182.**

[605] *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Canada's Counter-Memorial (Public Version), 28 February 2014, ¶104, **C-177.**

659. Second, the Bruce to Milton process included caps on the amount of capacity allocated in the Bruce and West of London regions, respectively.[606] There was never any such cap envisioned as part of an ECT.

660. Furthermore, more capacity was physically enabled (and thus available) in the Bruce region than the 750MW made available through the Bruce to Milton process.[607] Thus, Skyway 127 could have received contracts if no cap had been imposed in the region.

661. The Bruce to Milton process also altered the FIT process by permitting projects to connect to the 500kV blackstart line. The 500kV line had previously been unavailable to proponents because its sole purpose was to support the Bruce nuclear facility.

662. The 500kV line was not meant to be an available connection point, and the TAT Tables did not publish it as one, leaving off its specific B562L and B563L connection points from available options. NextEra made a specific inquiry with the OPA about connecting to the 500kV line, and eventually gained approval to connect to the unpublished connection points.[608]

663. After NextEra gained approval to connect to B562L and B563L, internal discussions between the IESO, Hydro One, and OPA acknowledged that connection to the 500kV line was problematic.[609] Information from the Korean Consortium, whose K2 project was previously approved to connect to B562L and B563L, demonstrates

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[606] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA 3 June 2011, **C-176.**

[607] "Bruce Area Test for BxM Capacity Allocation," by Kun Xiong (OPA), 26 July 2011, p.1, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 178 to ¶159, **C-182.**

[608] OPA, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process," July 4, 2011, **C-025.**

[609] Email from Bob Chow to Kun Xiong, August 16, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 180 to ¶162, **C-182**; Email from Gabriel Adam to Mike Falvo, 15 June 2011 referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 180 to ¶162, **C-182**; Email from John Sabiston to Hydro One, IESO, OPA, 4 July 2011**,** referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 180 to ¶162, **C-182.**

the severe technical complications that went along with connecting these projects to the Bruce to Milton 500kV line.[610]

664. The Premier's Office also intervened regarding the allocation of capacity in the West of London Region. The Premier's Office directed the Ministry of Energy to tailor its plan in respect of projects in the West of London region in a way that directly benefitted certain projects, including those of NextEra.[611]

665. The Ministry of Energy's initial plan for the Bruce to Milton allocation process called for splitting the West of London region into two regions, West of London and London/London East, and then setting aside all of the capacity available in the new West of London region (200MW) for the Korean Consortium.[612] However, this plan would have resulted in the exclusion of all projects located in the new West of London region, including four of NextEra's projects, from the Bruce to Milton process, and the Premier's Office overruled it.[613]

666. As an alternative to setting aside the capacity in the new West of London region, the Premier's Office instructed the Ministry of Energy to explore setting aside capacity in the new London/London East region instead.[614] In this connection, Sue Lo observed that:

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[610] Briefing Note, "Transmission and Distribution Considerations for Korean Consortium – Purchase of Existing Projects Proposal," July 2009, referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 181 to ¶162, **C-182.**

[611] Reply Memorial of the Investor (Public Version), 30 April 2014, at ¶786, **C-182.**

[612] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, ¶¶711, **C-133**; Ministry of Energy, Presentation, "Bruce to Milton Transmission Line: FIT Contract Awards," Undated, at p.4, referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 831 to ¶787, **C-182.**

[613] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Memorial (Public Version: 15 May 2014), 20 November 2013, ¶712, **C-133.**

[614] Email from Sue Lo (Ministry of Energy) to Pearl Ing, Mirrun Zaveri, Sunita Chander and Samira Viswanathan (Ministry of Energy), 12 May 2011**,** referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 833 to ¶788, **C-182.**

[redacted]

667. The initial plan to reserve transmission capacity for the Korean Consortium in the new West of London Region was abandoned because it would have disadvantaged certain "high profile" projects in the region, such as four of NextEra's projects. The fact that officials were willing to alter a central aspect of their plan solely on the basis of its anticipated consequences for certain projects, including NextEra's, speaks to the extent to which improper considerations entered into its decision-making leading up to the June 3rd rule change

668. The Ministerial Direction that instituted the Bruce to Milton allocation process ultimately did not call for a split of the West of London region, nor did it include any reservation of capacity for the Korean Consortium.[616] As a result, all of NextEra's projects in the West of London region were able to participate in the Bruce to Milton process, and all of them received contracts through that process.

669. The intervention of the Premier's office and Minister's office to develop a process that was different from the recommendations of the OPA, demonstrates that the "ECT-like" process used for Bruce to Milton allocation was chosen for the improper purpose of advancing particular projects. No evidence exists that the approach that the Minister's Office was imposed was based on fair, proper considerations. The recommendations of the Ontario Power Authority, which was tasked with implementing the process, were disregarded in favour of instructions from political

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[615] Email from Sue Lo (Ministry of Energy) to Andrew Mitchell (Ministry of Energy), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204*;*** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:39:25, **C-179*.***

[616] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Memorial (Public Version), 20 November 2013, ¶713, **C-133**; Letter from Minister Brad Duguid to Colin Andersen (OPA), Direction to the OPA, 3 June 2011, **C-176*.***

actors within the Ontario Government who were motivated by a desire to satisfy the demands of certain projects.

670. In summary, Fair and Equitable Treatment protects good faith, and ensures fairness. What amounts to a violation of the "fair and equitable treatment" standard is necessarily specific to each case. However, there are clear patterns**,** in that there are certain kinds of improper conduct attributable to government that have been repeatedly found, either singularly or cumulatively, by arbitral panels of distinguished jurists to violate the obligation of fair and equitable treatment. For instance, conduct tainted by, or connected to, political interference or manipulation of the regulatory process, consistently has been held to violate the standard, as has misrepresentation of material legal and regulatory facts to an investor. Such conduct, in and of itself, represents serious impropriety. There simply is no easy formula that can apply to all case as the *Waste Management* tribunal noted.[617]

671. This fundamental obligation needs to be considered in the context of the highly developed legal and regulatory framework in North America, where citizens have a basic expectation of fairness, transparency, and the applicability of the rule of law.

672. The CAFTA –DR Tribunal in *Teco v. Guatemala*, found Guatemala's non-transparent and non-rules-based administration of its electricity regime to constitute a violation of the customary international law minimum standard of treatment. [618] According to the *Teco* Tribunal, state conduct that demonstrates "a complete lack of candor in the conduction of the regulatory process" or actions by a state that "are taken in manifest disregard of the applicable legal rules and in breach of due process in regulatory matters" amount to a violation of the International Law Standard.[619]

[617] Waste Management, ¶99, **CLA-126.**
[618] *Teco v. Guatemala*, ¶483, **CLA-181.**
[619] *Teco v. Guatemala*, ¶¶492-493, **CLA-181.**

673. In addition, contemporary notions of administrative fairness and due process of law form part of the content of the customary standard.

674. The *RDC v Guatemala* Tribunal considered situations of abuse of rights in the administrative context and related the issues to the applicable standards of treatment under the equivalent to Article 1105 of the NAFTA. In that case, the state imposed circular requirements that an investor meet certain conditions as a pre-requisite for other conditions, and then the state refused to allow the investor to meet the first pre-requisite conditions.[620] The same standard applies to Canada's treatment of Skyway 127. The lack of transparency and candor were the norm, not the exception, and this lack was most glaring where the Investor had the most at stake. Skyway 127 was subjected to treatment that was arbitrary and unfair, in addition to lacking in transparency and candor.

675. In order not to be arbitrary, "restrictive measures must have some basis in domestic law, and be accessible and foreseeable."[621] Many tribunals have found that the guarantee of full protection and security extends beyond physical security, and is similar to the protection provided by fair and equitable treatment, and is meant to ensure a stable environment for investors.[622] The tribunal in *Eureko*, found that Poland:

> acted for purely arbitrary reasons linked to the interplay of Polish politics and nationalistic reasons of a discriminatory character.[623]

676. The *Biwater Gauff* Tribunal held that the content of the full security and protection standard "may extend to matters other than physical security."[624] The failure to do so is

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[620] The *Railway Development Corporation* (RDC) claim was decided under customary international law as the CAFTA has included limitations on the international law standard of treatment similar to those purportedly imposed by the NAFTA Free Trade Commission Note of Interpretation, **CLA-178.**

[621] Paparinskis, p.235, **CLA-140.**

[622] *Azurix*, ¶408, **CLA-100.**

[623] *Eureko B.V. v Republic of Poland,* Partial Award and Dissenting Opinion, August 19, 2005, ¶333, **CLA-114.**

[624] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania,* Award, ICSID Case No. ARB/05/22 (July 24, 2008), ¶729, **CLA-127.**

a manifest violation of the obligation of full protection and security owed to the investor.

677. The measures which applied to the FIT Program were:

(a) The *Electricity Act, 1998*, as amended, including, in particular, Section 25.35 (Feed-in tariff Program),[625] which provided the statutory authority to the Minister of Energy and the Ontario Power Authority to design, implement, and administer the Ontario FIT Program;

(b) The *Green Energy Act, 2009,* as enacted on May 14, 2009;[626]

(c) the FIT Direction dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing OPA to develop a FIT Program;[627]

(d) The August 2010 decision not to run the Economic Connection Test required by the FIT Rules.[628] The decision to delay the ECT was because the Korean Consortium had yet to select connection points for its projects;[629]

(e) Private meetings and communications between the OPA and FIT competitors that began on October 5, 2010 and continued through

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[625] *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8, **C-160.**
[626] *Green Energy Act*, S.C. 2009 c.12, Schedule. A, **C-126.**
[627] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), 30 September 2009, **C-223.**
[628] OPA, Presentation, "The Economic Connection Test - Approach, Metrics and Process", 19 May 2010, p.39, **C-136**; FIT Rules v.1.1., s.5.4(a), **C-162.**
[629] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow, 28 February 2014, ¶38, **C-178.**

February and May 2011, which led to the FIT Program and Rules being modified to benefit certain FIT applicants;[630]

(f) The February 17, 2011 direction from Ontario Minister of Energy Brad Duguid directing the OPA to plan for 10,700MW of renewable energy capacity, excluding hydroelectric, by 2018, which set a cap on the amount of transmission capacity the OPA could make available under the FIT Program;[631]

(g) The June 3, 2011 direction from Ontario Energy Minister Brad Duguid to the OPA setting a cap on the transmission capacity of FIT contracts of 750MW in the Bruce region and 300MW in the West of London region;[632] and

(h) All versions of the FIT Rules, Version 1.1-2.1, issued and amended by the OPA from September 30, 2009-December 14, 2012.[633]

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[630] Email from Bob Lopinski (Counsel Public Affairs) to Sonya Rachel Konzak (Ministry of Energy), Shantie Prithipal (Ministry of Energy), Sue Lo, and Rick Jennings (Ministry of Energy), 20 September 2010, referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 849 to ¶798, **C-182;** Email from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (MEI), February 25, 2011**,** referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 849 to ¶798, **C-182**; The Ministry of Energy also met with NextEra on May 11 and May 13, 2011. Email from Phil Dewan (Counsel Public Affairs) to Sue Lo (Ministry of Energy), 12 May 2011, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204*;*** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21**, C-213**; Email, Update NextEra Meeting, October 5, 2010; Email from Samira Viswanathan to Christopher Quirke, September 20, 2010, referenced in: *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, Footnote 849 to ¶798, **C-182.**

[631] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 17 February 2011*,* **C-222.**

[632] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 3 June 2011**, C-176.**

[633] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 3 June 2011**, C-176;** and FIT Rules Version 1.1 – 30 September 2009, **C-162**; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.2, 19 November 2009, **C-137**; FIT Rules Version 1.3, 9 March 2010, **C-159**; FIT Rules Version 1.3.1, 2 July 2010, **C-144*;*** Ontario Power Authority, Feed-In Tariff Program, FIT Rules Version 1.3.2, 29 October 2010, **C-145**; FIT Rules Version 1.4, 8 December 2010, **C-158**; Ontario

678. This was the general legal framework and reference to other practices in which the breaches of NAFTA Article 1105 took place.

679. All of the Investor's investments were again affected in August 2010 when the ECT was not run as required by the FIT Rules, because the Korean Consortium had not finalized its selection of connection points.[634] This decision prevented the Skyway 127 Project from receiving FIT contracts.

680. Due to the non-transparent nature of how the FIT Program was administered, many of the breaches of NAFTA 1105, including violations of fairness, systemic violations and violations of the rule of law, were unknown to Skyway 127 and Tennant Energy, including the measures taken by senior officials to protect IPC from effects of competition. While Skyway 127 was not aware of Canada's breach of its NAFTA obligations at that time, Skyway 127 was able to connect its June 12, 2013 loss of a contract to the breaches of the NAFTA raised in the Claim. Canada concealed the NAFTA breach which was the reason for Skyway 127's loss and this information was not discoverable until the release of information arising from the Mesa Power NAFTA hearing on August 15, 2015.

V. JURISDICTION

A. Introduction:

681. Canada has raised objections regarding the Tribunal's jurisdiction to preside over this case in its Statement of Defense, arguing that the Investor's claim is time-barred as it violates Article 1116(2) of the NAFTA.[635]

682. NAFTA Article 1116(2) states:

Power Authority, FIT Rules Version 1.5, 3 June 2011 **C-129**; FIT Rules Version 1.5.1, 15 July 2011, **C-057**; Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 2.0, 10 August 2012 **C-157**; FIT Rules Version 2.1, 22 March 2013, **C-156.**

[634] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Witness Statement of Bob Chow, 28 February 2014, ¶38, **C-178.**

[635] Canada's Statement of Defence, 2 July 2019, ¶¶ 2, 29.

> An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

683. Under NAFTA Article 1116, for a claim to be commenced, an investor must have **both** knowledge of the NAFTA breach and knowledge of harm or loss arising from that particular NAFTA breach. No claim may be filed without both conditions being present.

684. Canada argues that the Investor filed its Notice of Arbitration more than three years after it first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it incurred loss or damage as a result of the breach.[636]

685. Canada bases its argument on the suggestion that the Investor's current claim is similar in substance to the claim brought forward by Mesa in the *Mesa Power Group, LLC v. Government of Canada* NAFTA arbitration. Specifically, Canada alleges in its Request for Bifurcation that "Mesa's Notice of Arbitration, dated October 4, 2011, included nearly identical allegations to those being put forth by the Tennant Energy in this arbitration Claim."[637] Canada's contention strays far from the truth.

686. However, the *Mesa* arbitration and the *Tennant* arbitration are two distinct and separate claims. Canada has continuously conflated the two proceedings into one – even making the totally unfounded allegation in a procedural hearing that, secretly, Mesa Power and Tennant Energy were commonly controlled by the same entity.[638] Canada had no support for that outlandish assertion – which was patently untrue.

687. This Tribunal must understand that the claims brought forth by Tennant Energy the Investor are unique and distinct from the claims brought forward by the Claimant in the *Mesa* dispute.

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[636] Canada's Statement of Defence, 2 July 2019, ¶¶ 2, 29.
[637] Canada's Request for Bifurcation, 23 September 2019, ¶18.
[638] At the January 14, 2020 Procedural Hearing, Counsel for the Investor addressed this matter directly – see: Day 1 Transcript at 65: line 21 to page 67: line 1.

688. It is not that *Mesa Power* is completely irrelevant to this proceeding. As noted, Tennant Energy relies on evidence revealed in that arbitration proceeding in support of its claim here. The issue on jurisdiction as Canada tries to frame it, is whether Tennant Energy knew of its NAFTA claim in the same manner that Mesa Power did. But Canada ignores the fact that the Tennant Energy claim is different from the Mesa Power NAFTA Claim. The Tennant Energy claim focuses on Canada's breach of NAFTA Article 1105 due to the manipulations that Ontario took to pervert the FIT Program to benefit its political cronies. Ontario took steps to keep this subterfuge hidden from the public. Neither Skyway 127 nor any FIT proponent could have known about these claims because Ontario kept them hidden from the public.

689. Ontario took steps to prevent the public from knowing about its cronyism and misadministration of the FIT Program. It was only with the release of evidence of admissions from senior government officials occurring in the release of information from the *Mesa Power* arbitration that Tennant Energy could have obtained knowledge of the breaches of the NAFTA outlined in this claim.

690. For example, information regarding steps taken by senior Ontario government officials to protect the commercial opportunities of IPC to obtain FIT Contracts were not made public until the summer of 2015. This information was suppressed by Canada from public release.

691. Another example is that the operative reason for the arbitrary steps taken to reduce Ontario's financial commitment during the FIT Launch time period that reduced the total available amount of FIT Contracts from the amount of available transmission to an arbitrary 1050 MW total was unknown.

692. Canada cannot suppress public release of incriminating information and then attempt to claim that the public should have known about the content of this suppressed information. This claim was brought in a timely manner within three years of the release of this incriminating evidence and based on those admissions. As a

result, there can be no reasonable question that this claim was brought in a timely manner and is fully consistent with the requirements of NAFTA Article 1116.

693. Contrary to Canada's allegations, Tennant Energy's knowledge of the government's breaches and its subsequent losses arose after June 1, 2014 and are thus **not** time-barred by NAFTA Article 1116(2).

B. International law and the time of breach

694. Under Article 12 of the ILC *Articles on State Responsibility,* a breach of an international obligation occurs when a State fails to act in conformity with international law. In most circumstances, all that is required for a breach of a treaty is non-conformity with the Treaty.

695. However, under NAFTA Article 1116, the Treaty establishes a special rule setting up a limitation period which set up a three-year period of time from when the breach arise and from when the investor incurred loss by reason of the breach.

696. Thus, NAFTA Article 1116 requires the establishment of two elements for bringing a claim – knowledge of the breach and knowledge of the loss arising from that breach. This requirement of knowledge of the particular reason for the loss can be called the requirement for "discoverability".

697. Concealment of knowledge of NAFTA-inconsistent measures cannot prevent a claim from arising once that information is known. The NAFTA imposes a due process rule – there must be three years of clear knowledge of the wrongful measure and from the loss arising from that wrongful measure for a limitation to apply.

698. According to NAFTA Article 102, transparency (along with national treatment and most favored nation treatment) is an operative principle of the entire NAFTA and it is to be considered as an objective when interpreting the NAFTA under NAFTA Article 102(2). Thus, transparency failures on the part of government augment other measures. Ontario's concealment and dishonesty in the administration of the public

program supports the claim for moral damages in addition to the economic losses at issue in this case. This must be considered when considering when a claim arises.

699. The ILC Rules need to be read in conformity with the primary obligation (including NAFTA Article 1116) as to the time when a claim arises.

700. This rule applies regardless of whether the breach qualifies as an instantaneous, continuing or composite act.[639] Articles 13, 14 and 15 of the ILC Articles build on this definition in Article 12.[640]

701. A composite act requires a systematic policy or practice to allow a series of actions or omissions defined in aggregate as wrongful. Accordingly, a composite breach can only occur when a series of actions or omissions, when grouped together, cumulatively amount to a breach of an obligation – and not at any earlier point in time. Article 15(2) provides that a composite breach occurs at the first point in time when the conditions for breach occur. In the case of a breach of NAFTA Article 1116, this would be the first time that the two conditions (knowledge of the breach and loss arising from that breach occur). Conduct that can be characterized as composite is subject to the rule of Article 12 of the ILC Articles, as reflected in Article 15(1) – a composite breach "occurs when the action … is sufficient to constitute the wrongful

[639] ILC Draft Articles on State Responsibility, p.54, **CLA-185**, ("It must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States. In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration.")

[640] ILC Draft Articles on State Responsibility, **CLA-185**, ("Chapter III, therefore, begins with a provision specifying in general terms when it may be considered that there is a breach of an international obligation (Art. 12). The basic concept having been defined; the other provisions of the chapter are devoted to specifying how this concept applies to various situations.").

act."[641] In this case, the earliest date meeting these requirements would be August 15, 2015 when the post hearing briefs were given public release by the PCA.

702. The ILC Rules specific that discrimination contrary to the terms of a trade agreement would constitute the type of act that would give rise to a composite breach. Certainly, actions that were unfair, egregious, and manifestly in violation of the announced public order (such as the terms of a public bid) would also constitute the type of action that would meet the test for a composite breach.

1. The systemic practice and the Composite Act

703. A series of acts or omissions can be defined in aggregate as wrongful under Article 15(1) of the ILC Articles when there is a systematic State policy or practice that justifies treating that systematic conduct as more than the sum of its individual parts. State conduct can be "defined in aggregate as wrongful" if composed of "systematic policy or practice."

704. The actions taken by Ontario constitute a 'systematic State practice in breach of an obligation" under the law of State responsibility. A "composite" act under Article 15 requires "series of acts or omissions defined in aggregate as wrongful".

705. All of the ILC examples of composite acts refer to conduct that will give rise to a wrongful act if committed systematically, including acts whose systematic repetition generate a more serious wrong ("systematic acts of racial discrimination, **systematic acts of discrimination prohibited by a trade agreement**"). As also noted in the ILC commentary, a "special treatment in Article 15" is justified, because they correspond to some "of the most serious wrongful acts in international law.[642]

706. The systematic practice required for a composite act stands in contrast to simple repeated acts, which may form a practice but remain unconnected by a systematic

[641] ILC Draft Articles on State Responsibility, p.63, ***CLA-185***, ("Similar considerations apply as for completed and continuous wrongful acts in determining when a breach of international law exists;")
[642] ILC Articles, p.62, **CLA-185** (emphasis added).

policy. In that case, there is no basis under international law to cumulate the effect of the conduct, as there is not "a different legal animal from the several acts that comprise it."[643]

707. A breach of fair and equitable treatment contrary to NAFTA Article 1105 could result from a composite act. For example, in *Rompetrol v. Romania*, a combination of acts could be considered a composite act, as "there must be 'some link of underlying pattern or purpose between them' in contrast to a 'scattered collection of disjointed harms.'"[644]

708. The systematic policy or practice linking all disjointed conduct is a condition *sine qua non* to establish a composite act under ILC Article 15. This systemic policy, which can be seen in this arbitration from the secret Breakfast Club senior officials coordinating meeting also constitutes a breach of legitimate expectations. The actions taken by the government officials, admitted by Canada's witness in cross-examination in the Mesa Power claim offers ample direct evidence that the Ontario officials met in secret and pursued a series of different actions pursued on different paths by different actors are linked together by a common and coordinated purpose.

C. The Facts regarding the Critical Dates

709. The critical date regarding jurisdiction is June 1, 2014. This marks three years before the date on which the Investor filed their Notice of Arbitration, which occurred on June 1, 2017.

710. As discussed above, a claim will be time-barred by Article 1116(2) of the NAFTA only if the Investor knew, or ought to have known, about the alleged breach **and**

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[643] *Pac Rim Cayman LLC v. Republic of El Salvador (*ICSID Case No. ARB/09/12), Decision on Respondent's Jurisdictional Objections, 1 June 2012, p. 52 (¶2.88), **CLA-226**.

[644] *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013, p. 147 (¶273) (emphasis added), **CLA-216**; see also *Georg Gavrilović and Gavrilović D.O.O. v. Republic of Croatia* (ICSID Case No. ARB/12/39), Award, 26 July 2018, p. 309 et seq. (¶1135) **CLA-218**, ("… the Tribunal remains of the view that there is no violation of any legitimate expectation. The Claimants have not made out an 'illegitimate' or 'deliberate' campaign on the part of the Respondent against the Claimants.").

knowledge of the damage suffered as a result of the breach more than three years before the filing of the Notice of Arbitration.

711. Canada alleges that Tennant Energy's allegations are nearly identical to those of Mesa Power.[645] Since Mesa Power knew of the government's supposed breaches and the subsequent damages suffered when it filed its Notice of Arbitration on October 4, 2011, Canada's logic goes, then Tennant Energy should have known about their alleged mistreatment and losses as well. Ergo, since October 4, 2011 predates the critical date of June 1, 2014, Canada argues that the Investor's claims are time-barred by Article 1116(2) of the NAFTA.

712. This demonstrates a clear misrepresentation of Tennant Energy's claims in the current dispute by Canada.

713. Tennant Energy's claims in the current dispute arose out of information that became public over the course of the *Mesa Power* arbitration, after the critical date of June 1, 2014.

714. The Tribunal has jurisdiction to hear this claim as information upon which this claim is based

(a) arose **after** June 1, 2014,

(b) it is **not** time-barred by NAFTA Article 1116(2).

715. As set out below, the Tennant Energy NAFTA claim first arose under NAFTA Article 1116 on August 15, 2015. August 15, 2015 was the first date where the two specific necessary conditions under NAFTA Article 1116 were met. Only on August 15, 2015 was Skyway 127 and Tennant Energy able to:

[645] Canada's Statement of Defence, ¶¶ 26-27; Notice of Arbitration, ¶ 91.

(a) obtain knowledge of Ontario's special conduct that gave IPC special business opportunities in the FIT Process; and

(b) associate losses from the failure to obtain a contract under the FIT Program to the knowledge of a NAFTA breach.

716. The August 15, 2015 date of a breach under NAFTA Article 1116 remains the same whether the breach was to be considered as a single act, a continuous act or as part of a composite act involving systemic state practice as the disclosure of the systemic practice also first occurred on August 15, 2020. In this regard, the provision of new information from the Mesa Power Hearing video to the Investor documenting additional NAFTA violations does not alter the August 15, 2020 date for the IPC claim. It simply provides relevance for the inclusion of the other violations which form a part of Ontario's systemic violations.

717. As has been explained throughout this Memorial, Tennant Energy asserts four NAFTA measures were breached as a direct result of the government's conduct implementing and administering the Feed-In Tariff (FIT) Program:

(a) Ontario unfairly manipulated access to the electricity transmission grid to IPC and other companies resulting in unfair treatment to the Skyway 127;

(b) Ontario unfairly and abusively manipulated program information under the FIT Program to aid protected FIT Contract Proponents such as IPC;

(c) Ontario unfairly manipulated the awarding of Contracts under the FIT Program to protect favored applicants (such as IPC) over those who simply followed the public FIT Program Rules; and

(d) Senior governmental officials improperly destroyed necessary and material evidence of their internationally unlawful actions to avoid liability for their wrongfulness.

718. Tennant Energy only gained knowledge of each of these specific breaches, and the subsequent loss to its Investment, because of information that became public because of the *Mesa Power* arbitration. As further described in this Memorial, all of this information became publicly available only **after** the critical threshold date of June 1, 2014.

D. The Investor was unaware until after the critical date of June 1, 2014

719. While Tennant Energy was aware that it was not awarded a FIT Contract before June 1, 2014, it did not know **why** it was unsuccessful until **after** June 1, 2014 (when information and documents from the *Mesa Power* arbitration first became available to the public). Before that time, Ontario and Canada were able effectively to keep this information away from public release. Based on the knowledge that the Tennant Energy acquired after June 1, 2014, it realized that it had not suffered a loss due to straightforward business and legitimate public policy reasons, but rather because of the capricious, unfair, politically motivated and secretive actions of Ontario.

720. In the Notice of Arbitration of June 1, 2017, the Investor provided particulars of its knowledge of the NAFTA breach in the Notice of Arbitration:

> 126. On the time when the Investor and Investment became aware of the various breaches, the Investor advises of the following particulars:
>
> (a) While the Investment was aware of the delay in the awarding of transmission access in the Bruce and the West of London Regions in 2010 and 2011. However, the Investor did not have knowledge that the reason for the delay in awarding FIT Contracts in 2010 was Ontario's covert decision to benefit the Korean Consortium over FIT Proponents (as the Korean Consortium had not yet identified project locations in the Bruce and West of London regions). The Korean Consortium then used the financial pressure caused by its delay in a predatory fashion to acquire wind projects in the Bruce and West of London in financial distress caused by the transmission delay. The Investor did not obtain knowledge of Ontario's covert actions until sometime after March 16, 2015 when Skyway 127's representatives first met with legal counsel about the applicability of the evidence adduced from the Mesa Power NAFTA claim.

(b) The Investor did not have knowledge of the breach caused by the unfair preferential dissemination of FIT Program information until sometime after March 16, 2015 when Skyway 127's representative first met with legal counsel about the applicability of the evidence from the Mesa Power NAFTA claim. On this breach, this information first was disclosed confidentially on October 28, 2014 in the testimony of Susan Lo, an Assistant Deputy Minister from the Government of Ontario at pages 172. However, while the hearing transcript of this testimony was apparently declassified by Canada, it was not disclosed to the public and thus not reproduced in the transcript that was released by the PCA on April 30, 2015.The first disclosure of information about this measure (but without any disclosure of the actual testimony) arose in the Mesa Power Investor Post-Hearing Brief (Released on January 9, 2015), however the Investor was not aware of this information until sometime after March 16, 2015.

(c) The Investor did not have knowledge of the breach caused by Ontario's unfair administration and arbitrary awarding of FIT Contracts until it reviewed the Mesa Power Investor's Post-Hearing Brief. This occurred sometime after March 16, 2015. The Investor's Post-Hearing Brief made reference to actual testimony (not reproduced and subject to confidentiality). This testimony confirmed that IPC received better treatment that other FIT Proponents.

(d) The Investor did not have knowledge of the breach caused by the spoliation of documents until after April 30, 2015. Because of the serious and pervasive nature of this wrongful behavior, the extent of the breach cannot be identified until interrogatories or the Tribunal in this claim can order other investigation.[646]

721. The Notice of Arbitration referenced the date upon which the Investor first met with legal counsel about the NAFTA Matter. The Notice of Arbitration stated in paragraph 126(a) that the date was sometime after March 16, 2015.[647]

722. The Notice of Arbitration became available to the public through release on the PCA website. This date can be established from correspondence from the PCA.

723. On May 16, 2014, Ben Craddock, the case manager for the PCA emailed the Mesa Power disputing parties with a letter from Aloysius P. Llamzon, Senior Legal Counsel at the PCA. The letter informed the parties that the PCA, pursuant to the order of the

[646] Notice of Arbitration at ¶ 126. (footnotes omitted).
[647] Notice of Arbitration at ¶ 126 at paragraphs (a), (b) and (c). (footnotes omitted).

NAFTA Tribunal, was setting up a website to make information from the Mesa Power arbitration available to the public. According to Mr. Llamzon' s May 16th letter, the new website would include publication of the Mesa Power Notice of Intent, the Notice of Arbitration and the various Memorial submissions of each side, along with procedural orders issued by the Tribunal.[648] The PCA sought comments from the parties regarding the proposed posting and with respect to confidentiality issues on what was to be posted.

724. The disputing parties had some technical observations regarding information to be posted and confidentiality issues. The PCA Mesa Power NAFTA website did not get information posted until after **June 4, 2014**.[649]

725. Aloysius Llamzon, Legal Counsel, PCA contacted Jennifer Montfort at Appleton & Associates regarding publication of Investor's Memorial (Public), Expert Valuation Report and Witness Statement of Cole Robertson by the PCA. The publication of the materials took place shortly thereafter June 4, 2014.[650]

726. The Investor's representative first sought an appointment to discuss the Mesa Power Group NAFTA case with Barry Appleton from the Appleton law firm on June 1, 2015.[651] The actual date that Skyway 127 obtained information from the Mesa Power Hearing was June 16, 2015.[652]

727. Tennant Energy realized that it had suffered a loss due to international wrongs Ontario committed when it became aware of information contained in several

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[648] May 16, 2014, Letter from Aloysius P. Llamzon, Senior Legal Counsel, PCA to counsel to disputing parties, regarding the creation of a website at the PCA for public information about the Mesa Power Group NAFTA claim, **C-112**.

[649] June 4, 2014 Email from Aloysius Llamzon, Legal Counsel, PCA to Jennifer Montfort, Appleton & Associates regarding publication of Investor's Memorial (Public Version), Expert Valuation Report and Witness Statement of Cole Robertson by the PCA, **C-130.**

[650] June 4, 2014 Email from Aloysius Llamzon, Legal Counsel, PCA to Jennifer Montfort, Appleton & Associates regarding publication of Investor's Memorial (Public Version), Expert Valuation Report and Witness Statement of Cole Robertson by the PCA, **C-130.**

[651] CWS-1 – Witness Statement of John C. Pennie at ¶5. (**CWS-1**)

[652] CWS-1 – Witness Statement of John C. Pennie at ¶91. (**CWS-1**)

documents, all of which were published **after** the critical date of June 1, 2014. The information revealing that Tennant Energy's project, Skyway 127, had been a victim of Canada's egregious, malicious, and capricious conduct, and the dates on which it became publicly available, are the following:

(a) The full claims from the *Mesa Power* arbitration, which were published by the Permanent Court of Arbitration onto its website on or after **June 4, 2014**;[653]

(b) The complete terms of the previously secret Green Energy Investment Agreement ("GEIA") between Ontario and the two Korean companies, Samsung C&T Corporation and Korea Electric Power Corporation, which were publicly disclosed during the *Mesa Power* arbitration sometime between **June 4, 2014** and **April 30, 2015**;

(c) The *Mesa Power* evidentiary hearing transcript, which was published by the Permanent Court of Arbitration on its website on **April 30, 2015**;[654]

728. The Post-Hearing Brief submissions and other post hearing submissions submitted in the *Mesa Power* arbitration, which were published by the Permanent Court of Arbitration onto its website after **August 15, 2015**. Ben Craddock, the case manager for the PCA wrote to the parties to confirm that the Mesa Power Investor's Post Hearing brief, would be made public after the close of business on August 14, 2015 on the PCA website. This was the source for the Investor's knowledge referenced in

[653] June 4, 2014 Email from Aloysius Llamzon, Legal Counsel, PCA to Jennifer Montfort, Appleton & Associates regarding publication by the PCA of Investor's Memorial (Public Version), Expert Valuation Report and Witness Statement of Cole Robertson, **C-130.**

[654] April 30, 2015, Letter from Hanno Wehland, Legal Counsel, PCA to counsel for disputing parties, regarding publication of public video recordings and public transcripts have now been uploaded to the PCA's website and can be accessed at the following web address. The letter also references the issuance of a news release by the PCA, but that news release is no longer available on the PCA website, **C-135.**

paragraph 126(c) of the Notice of Arbitration.[655] This was also the date upon which the following documents were released to the public:

(i) Claimant's Statement of Costs dated 3 March 2015

(ii) Respondent's Submission on Costs dated 3 March 2015

(iii) Claimant's Reply Statement of Costs dated 26 March 2015

(iv) Respondent's Reply to Claimant's Submission on Costs dated 26 March 2015

(v) Claimant's Submission on the Bilcon v. Canada Award dated 14 May 2015 (Public version

(vi) Respondent's Observations on the Bilcon v. Canada Award dated 14 May 2015

(vii) United States of America's letter to the Tribunal dated 14 May 2015

(viii) Mexico's letter to the Tribunal dated 14 May 2015

(ix) Claimant's letter to the Tribunal re Non-Disputing Parties' Comments on Bilcon v. Canada Award dated 19 May 2015

(x) Second Submission of the United States of America dated 12 June 2015

(xi) Second Submission of Mexico dated 12 June 2015

(xii) Claimant's Response to the Second Submissions of the Non-Disputing Parties dated 26 June 2015 (Public version)

[655] August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing a number of post-hearing procedural documents after the close of business on August 14, 2015 - - namely i) Claimant's Statement of Costs dated 3 March 2015 ii) Respondent's Submission on Costs dated 3 March 2015 iii) Claimant's Reply Statement of Costs dated 26 March 2015 iv) Respondent's Reply to Claimant's Submission on Costs dated 26 March 2015 v) Claimant's Submission on the Bilcon v. Canada Award dated 14 May 2015 (Public version) vi) Respondent's Observations on the Bilcon v. Canada Award dated 14 May 2015 vii) United States of America's letter to the Tribunal dated 14 May 2015 viii) Mexico's letter to the Tribunal dated 14 May 2015 ix) Claimant's letter to the Tribunal re Non-Disputing Parties' Comments on Bilcon v. Canada Award dated 19 May 2015 x) Second Submission of the United States of America dated 12 June 2015 xi) Second Submission of Mexico dated 12 June 2015 xii) Claimant's Response to the Second Submissions of the Non-Disputing Parties dated 26 June 2015 (Public version) xiii) Respondent's Response to the Second Submissions of the Non-Disputing Parties dated 26 June 2015, **C-124**.

(xiii) Respondent's Response to the Second Submissions of the Non-Disputing Parties dated 26 June 2015.

729. The *Windstream Energy Award,* which was published on the Permanent Court of Arbitration website on **December 6, 2016.**

730. This information was not available to it before August 15, 2015 and thus could not support Canada's misplaced temporal objections.

731. Even after the filing of this arbitration in 2017, information that had been previously concealed, became available to Tennant Energy. John C. Pennie in his witness statement confirms that in July 2020. while preparing for his witness statement in this arbitration, he became aware that there was a difference between the information available in the public version of *Mesa Power* hearing transcript and the video of the *Mesa Power* Hearing posted on the Permanent Court of Arbitration Website. Mr. Pennie reviewed the video from that website and confirmed that he was able to view the unredacted testimony of the witnesses before the *Mesa Power* NAFTA hearing, including the testimony that had been redacted from the transcripts and emails that had been projected during the hearing with content that had been removed from the public versions of various post-hearing submissions.[656]

732. Mr. Pennie confirmed that the video on the PCA website also contained information about the misadministration of the Ontario FIT Program that had not been made available in the written transcripts that he had seen in June 2015 when he first became aware of the nature of the NAFTA breaches arising in this arbitration claim.[657]

733. It appears that the Permanent Court of Arbitration was broadcasting the unredacted versions of the openings and the witness testimony from the *Mesa Power* NAFTA case to the public. Almost all of the closing argument also was available to the public.

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[656] CWS-1 – Witness Statement of John C. Pennie, ¶99. (**CWS-1**)
[657] CWS-1 – Witness Statement of John C. Pennie, ¶99. (**CWS-1**)

734. Mr. Pennie confirms in his witness statement that he relied upon the public transcripts from the *Mesa Power* NAFTA hearing (which were redacted) for his information about the breaches of the NAFTA.[658] He only discovered that additional and significant information supporting Tennant Energy's NAFTA claims, in July 2020 when preparing for his witness statement.

735. As is clear from the foregoing, all the information on which the Investor bases its current claim became public knowledge not earlier than August 15, 2015, which is long **after** the critical threshold date of June 1, 2014.

736. It was impossible for Tennant Energy to have known the admissions of wrongful and unfair administration of the FIT Program prior to June 1, 2014.

737. Mr. Pennie testifies in his witness statement that he first inquired to Barry Appleton, on June 1, 2015 and only met Mr. Appleton on or about June 16, 2015. He states that he learned about the material available to the public on the *Mesa Power* case when he met Mr. Appleton.[659] He then became aware of materials that had been put on the Permanent Court of Arbitration website in August 2015 – when the *Mesa Power* Investor's Post Hearing Brief and the Investor's response on the Second NAFTA Article 1128 Submissions were made available to the public. These documents contained information that had not been made available in earlier materials with greater evidence and support of the unfair manipulation of the FIT Program rules to favor friends of the government at the expense of complaint FIT Program Proponents.

738. Together the information in the submissions filed after the hearing and the fully disclosed material from the NAFTA hearing available to Tennant in 2020 give direct evidence of systemic actions taken by Ontario to manipulate the FIT Program to enrich the friends and supporters of the government, at the cost of those who followed the Program Rules.

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[658] CWS-1 – Witness Statement of John C. Pennie, ¶99. (**CWS-1**)
[659] CWS-1 – Witness Statement of John C. Pennie, ¶¶90, 91. (**CWS-1**)

739. Since Tennant Energy could have gained knowledge about Ontario's wrongful conduct only on June 4, 2014 at the **absolute earliest**, its filing of its Notice of Arbitration on June 1, 2017 (three years after June 1, 2014) was done in a timely manner, and its could not be time-barred by the operation of NAFTA Article 1116(2).

E. Specific information that became public after June 1, 2014

740. The Investor could not have brought its claim prior to June 4, 2017 at the **absolute earliest** because it had no way of knowing about certain wrongful conduct Ontario committed which was revealed only during the *Mesa* arbitration and only public months later. The specific information that became public in this time frame, and how it relates to the Investor's current claims, will now be discussed.

741. The following will outline how each of Tennant Energy's four claims in the current arbitration (that Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the Investment, that Ontario unfairly manipulated the dissemination of program information under the FIT Program; that Ontario unfairly manipulated the awarding of Contracts under the FIT Program; and that Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness) arise out of information that was only made public **after** the critical date of June 1, 2014.

742. First, it first became public for the first time in the Investor's Post-Hearing Brief from the *Mesa* arbitration (published on the PCA website on **August 15, 2015**) that Ontario provided blatant protection to IPC, a Canadian company whose executive leadership at the time was a well-known political backer of the Ontario Liberal government.[660]

[660] Notice of Arbitration, 1 June 2017, ¶ 107; Mesa Power Group LLC v. Government of Canada (PCA Case No. 2012-17),Investor's Post Hearing Brief, 18 December 2014, at ¶ 16, **C-017**.

743. This information lends support for Tennant Energy's first claim, namely that Ontario unfairly manipulated the award of access to the electricity transmission grid in favor of IPC, resulting in unfair treatment to the Investment.

744. Second, the Investor's Post-Hearing Brief in the *Mesa Power* arbitration (once again published on **August 15 2015**) made it public knowledge for the first time that "Ontario granted special transmission privileges to the members of the Korean Consortium despite the fact that the Korean Consortium was non-compliant with the binding terms of the GEIA … between Ontario and the Korean Consortium in 2011".[661]

745. This information also supports the Investor's first claim that Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in benefit to IPC (and other supporters of the government) and in unfair treatment to the Investment.

746. Third, Tennant Energy's Post-Hearing Brief in the *Mesa Power* arbitration (published on the PCA website on **August 15, 2015**) also revealed that NextEra "was given access to high-level government officials and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change."[662]

747. Tennant Energy's first claim that Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the Investment is also evidence by this information revealed during the *Mesa Power* arbitration.

748. Fourth, Tennant Energy's Post-Hearing Brief in the *Mesa Power* arbitration (published on the PCA website on **August 15, 2015**) made it public that "Ontario provided selective advance access to information and program decision makers to the

[661] Notice of Arbitration, 1 June 2017, ¶¶ 99-101.
[662] Notice of Arbitration, 1 June 2017, ¶ 106.

Canadian subsidiary of NextEra and subsequently arbitrarily modified the FIT Program rules in a manner that disadvantaged the Investment".[663]

749. Tennant Energy could not have brought its second claim, namely that Ontario unfairly manipulated the dissemination of program information under the FIT Program, without the above information gleaned from the *Mesa* Power post hearing brief.

750. Fifth, the Investor's Post-Hearing Brief (published on the PCA website on **August 15, 2015** and referencing several other documents from the *Mesa Power* arbitration) revealed how Ontario provided certain better treatment to IPC and the Korean Consortium.[664] Relating to the better treatment afforded to IPC by Ontario, the Investor's Post Hearing Brief stated:

> 143. Ms. Lo also testified that although there was not an "even playing field" between the Korean Consortium and FIT proponents, all FIT proponents were treated the same[665]
>
> 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 confidential information]
>
> 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 confidential The ["redacted confidential"] 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.[666]

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[663] Notice of Arbitration, 1 June 2017, ¶ 109.
[664] Notice of Arbitration, 1 June 2017, ¶¶ 111-112
[665] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p. 186, lns.5-8, **C-121.**
[666] See: *Mesa Power Group LLC v. Government of Canada* (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Discussed from 1:39:25 - 1:48:28, **C-204***; Mesa Power Group LLC v. Government of Canada* (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:39:25, **C-179***; Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17),

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,"[667] 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.[668] 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.[669]

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 favorable treatment accorded to a Canadian 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.[670]

751. With respect to the admission from Canada's expert at the *Mesa Power* hearing, Mesa Power had two projects with priority rankings of 8 and 9 – both were behind Skyway 127. So, if Canada's expert admitted that Mesa Power would have obtained

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Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.182-185, lns.8-3, **C-121.**

[667] This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015): *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.184, lns.16-17, **C-121.**

[668] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, p.179, lns.5-8, **C-121.**

[669] Letter from the Honourable Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority, 2 August 2011, **C-155.**

[670] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 5 (Public Version): Testimony of Christopher Goncalves, 30 October 2014, pp.143-144, lns.21-4, **C-123** ("Turning to the GEIA counter factual, 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").

FIT Contracts – then certainly Skyway 127 would have received a contract as it was higher up in the priority list for the Bruce Transmission zone.

752. In reference to the better treatment accorded to the Korean Consortium, the Investor's Post-Hearing Brief in *Mesa Power* revealed:

> 101. Ms. Lo testified that the Korean Consortium was having trouble meetings its Phase 1 and two 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.
>
> 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?
>
> 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.
>
> [...]

> 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."
>
> [...]
>
> 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.[671]
>
> 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 that were not likely to get contracts and then convert them to GEIA projects[672]

753. The above information from the Investor's Post-Hearing Brief in *Mesa Power* provided Tennant Energy in the current dispute with the knowledge it needed to realize that Ontario unfairly manipulated the awarding of Contracts under the FIT Program, which is Tennant Energy's third claim in this arbitration.

754. Finally, documents from the *Mesa Power* arbitration as well as the *Windstream* Award (published on the PCA website on December 6, 2016) revealed that Ontario had conducted the FIT Program in an unfair and non-transparent manner, granting preference to other proponents for capricious and arbitrary reasons.

755. This relates to the Investor's fourth claim that senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness because said spoliation of evidence is the only

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[671] This is referenced in the *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014 as follows: Testimony of Jim MacDougall, Mesa Hearing Transcript, Day 3, p.262, lns.14-20, **C-121.**

[672] *Mesa Power Group LLC v. Government of Canada,* (PCA Case No. 2012-17) Investor's Post-Hearing Brief (Public Version) 18 December 2014, ¶¶101-103, 134, 299-300, **C-017;** Released on the PCA Website on January 9, 2015.

reason why Tennant Energy has gained knowledge supporting its preceding three claims only as a result of public disclosure of information from the *Mesa* and *Windstream* arbitrations. In other words, without the spoliation of evidence, the exact terms of the GEIA (which only came into the public eye following a judicial intervention filed in the United States), amongst other evidence, would have been made available to Tennant Energy sooner.

756. The above discussion therefore indicates that Skyway 127 was not able to acquire any of the above information before it became public, all of which occurred **after** the critical date of June 1, 2014.

757. Additionally, none of Tennant Energy's claims can be supported with information that was available **before** the critical date of June 1, 2014.

758. Specifically, prior to **June 1, 2014**, the Investor had:

(a) no knowledge of the fact that the Korean Consortium was granted a contract under the FIT Program even though it failed to fulfil its obligations under the GEIA;

(b) no knowledge of the fact that the Korean Consortium was given more time to complete the transmission availability test, which was mandatory according to the rules of the FIT Program;

(c) no knowledge of the fact that NextEra had preferential contact with high-level government officials that led to rule changes in May 2011, which allowed it to obtain six FIT Contracts; and

(d) no knowledge of the fact that Ontario protected IPC from the adverse effects of the FIT set-aside for the benefit of the Korean Consortium because of IPC's close connections to the governing political party.

759. Therefore, there is no way that Tennant Energy could have known about Canada's internationally wrongful conduct and how it caused a loss to the Investment before the critical date of **June 1, 2014**, which is three years prior to the Investor's submission of its NOA.

F. Tennant's claims are not the same as Mesa Power's claims

760. Canada no doubt will continue to argue that Tennant Energy's claims are simply a carbon copy of those espoused by Mesa Power in the *Mesa Power* arbitration.

761. However, this is clearly and undeniably **not** the case.

762. As has been demonstrated, Tennant Energy is **not** Mesa Power Group. Tennant's claims are based on information that only became publicly available **throughout** the *Mesa* arbitration. Further, all this information became public **after** the critical date of June 1, 2014.

763. The Claims asserted by Tennant Energy are different from the *Mesa Power* Claims. *Mesa Power* asserted breaches of national treatment, most favoured nation treatment. and performance requirements that are totally absent in the Tennant Energy claim.

764. The *Mesa Power* Claim and the Tennant Power claims both deal with the Ontario FIT Program – but they are different claims. While both Tennant Energy and Mesa Power both raised fairness claims under NAFTA Article 1105, as noted above the claims raised by Tennant deal with different matters than those raised by Mesa Power. More precisely, the Tennant Energy claims focus on matters that first became known to the public after the *Mesa Power* arbitration was completed.

765. As a result, Tennant Energy's claim is not time-barred by Article 1116(2) of the NAFTA, and the Tribunal thus has jurisdiction to adjudicate the claim.

G. Standing

766. Canada alleges at paragraphs 42 to 45 of its Statement of Defence that Tennant Energy does not have standing to commence this claim under NAFTA Article 1116. This is simply not accurate.

1. Skyway 127 was an Investment

767. The NAFTA uses the terms "enterprise" and "enterprise of a Party". NAFTA Article 1139 defines an enterprise to be an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise. NAFTA Article 201 says that "enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association."

768. NAFTA Article 1139 defines the term "enterprise of a Party". It means "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there".

769. There can be no question that Skyway 127 Energy Inc. was an enterprise of a Party. Skyway 127 was the applicant under the FIT Program. A an Ontario corporation, Skyway 127 Energy Inc. meets the definition of an enterprise under Canadian law.[673]

770. The term "investment" is expressly defined in paragraph (h) of NAFTA Article 1139 to include shares and other equity investments.

2. Tennant was an Investor

771. The definition of an investor is set out in NAFTA Article 1139. An investor of a Party means "a national or an enterprise of such Party, that seeks to make, is making or has made an investment". An "investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party".

[673] Skyway Wind Energy Inc. incorporation documents,18 October 2007, **C-113.**

772. Tennant is an investor of a NAFTA party that "seeks to make, is making or has made an investment". Tennant Energy, an American national, owns and controls shares, a form of equity security, in Skyway 127.

773. This makes Tennant Energy an investor as defined by paragraph (b) of the definition of "Investment" in NAFTA Article 1139.

(a) At the time of making the NAFTA Claim, Tennant Energy controlled Skyway 127.[674]

(b) Tennant also owned more than a majority of the shares when it made it claim.

(c) Tennant owned shares in Skyway 127 before the date that the claim arose on August 15, 2015.[675]

(d) Tennant continued to own shares at the time that the claim was filed, and holds shares today.[676]

774. General Electric Energy is an American corporation. It held shares in Skyway 127 at the time that Skyway 127 became aware of the breach of Chapter Eleven of the NAFTA giving rise to this claim. GE Energy later transferred its shares to Tennant in exchange for consideration including the irrevocable right to sell wind turbines to it if Skyway 127 is awarded a renewable energy contract by Ontario.[677]

3. Tennant has jurisdictional Standing

775. Canada has raised non-jurisdictional issues with respect to the time when Tennant Energy acquired shares in Skyway 127. Since Tennant Energy acquired its shares from John Tennant, an American citizen, in June 2011, there can be no issue that

[674] CWS-1 – Witness Statement of John C. Pennie, ¶ 66. (**CWS-1**)
[675] CWS-1 – Witness Statement of John C. Pennie, ¶ 66. (**CWS-1**)
[676] CWS-1 – Witness Statement of John Pennie, ¶ 66. (**CWS-1**)
[677] CWS-1 – Witness Statement of John Pennie, ¶ 67. (**CWS-1**)

there has been continuous American nationality of the ownership of the shares from before the time that the claim arose to the current date.

776. Tennant Energy is an American corporation. Tennant's shareholding in Skyway 127 qualifies as an investment under the NAFTA definition.

777. There can be no question that Tennant Energy is an Investor as defined by the express terms of NAFTA Article 1139.

778. The Investor notes that the principal shareholders at the time that the claim arose, Tennant Energy and General Electric Energy are American corporations that held equity investments in Skyway 127. Both Tennant and GE Energy had been shareholders of Skyway 127 since before they acquired knowledge of the wrongful measures of Canada.

779. From June 2011, onwards Tennant Energy's management effectively controlled the Investment and this factual situation continued at the time that the NAFTA Claim arose in August 2015, notwithstanding that it only held [redacted] of the equity in the company, and at the time that the claim was issued in June 2017 when it held nearly all of the equity.[678]

780. The 2016 transfer of GE Energy's shareholding to Tennant Energy continued the relationship between GE and Tennant in the Skyway 127 project. Tennant Energy continues to control the investment and to own the majority of its equity.

781. Thus, Tennant Energy can establish that it both owns and controls the investment, Skyway 127. Accordingly, Tennant Energy has standing to bring this claim regarding its investment, Skyway 127.

[678] CWS-1 – Witness Statement of John Pennie, ¶¶ 50, 66. (**CWS-1**)

VI. EVIDENCE OF SYSTEMIC UNFAIRNESS BY ONTARIO

A. Introduction

782. Ontario has had a history of improper and unfair maladministration of public programs, resulting in a private gain for friends of the government. The Ontario Auditor General has outlined examples of these matters. The Government of Ontario has time and again disrespected the rights of potential bidders and suppressed information during procurements and programs, to the detriment of potential investors.

783. The following examples from the Ontario Auditor general demonstrate a pattern of unfairness and arbitrary action. Further, the government was aware of these shameful actions but took no steps to protect the public.

1. IESO – Market Oversight and Cybersecurity

784. In 2017, the Auditor General of Ontario detailed in its annual report how the IESO, a Crown corporation that administers Ontario's electricity market, made decisions that affected the electricity market that were not free from bias. Instead, some decisions were tainted by the promise of personal gain.

785. As the Auditor General's 2017 Report states:

> There is little representation of ratepayers' interests on the working group that is helping to determine the future design of the electricity market through the IESO's Market Renewal Initiative. **Some members of this group have been, or are being, investigated for benefitting financially from existing market design problems.**[679]

786. Additionally, "the process at the IESO to change market rules is influenced by gas generators and others that have a direct and substantial financial interest in the current market design."[680]

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[679] Office of the Auditor General of Ontario, *Annual Report 2017*, Volume 1, pp.19-20, **C-194.**
[680] Office of the Auditor General of Ontario, *Annual Report 2017*, Volume 1, p.20, **C-194.**

787. Just as the Ontario government did to the FIT Program, the audit reveals that rules were changed because of outside influence, and not for valid reasons related to the investments themselves.

788. The conduct of the IESO demonstrates again that many decisions made by those on behalf of the Government of Ontario are not straightforward, open, or for the benefit of the public. This acts as another example of Ontario not following fair and transparent procedures in its decision making.

2. Sidewalk Labs (Waterfront Toronto)

789. In March 2017, Waterfront Toronto, a tri-governmental organization of the Government of Canada, the Province of Ontario, and the City of Toronto, issued a Request for Proposal (RFP) to seek potential bids for the development of a portion of Toronto's waterfront, called the Quayside area[681]. Later that year, Sidewalk Labs, a company of Google's parent company, Alphabet, was awarded the contract to develop the sought-after real estate in September 2017.[682] One of the reasons cited for Sidewalk Labs' success was that its proposal was by far the most comprehensive.[683] As will be discussed shortly, Sidewalk Labs' advanced preparation was no accident.

790. In the years since, the reality of how the selection process that culminated with Sidewalk Labs' success played out has come to light.

791. In 2018, the Auditor General of Ontario released its annual report. It contained details of how the process was rigged from the beginning to give Sidewalk Labs an advantage over other bidders, while the government did its best to masquerade the RFP as an open and competitive process.

792. Among other details, the Auditor General's report noted that:

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[681] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.31, **C-195.**
[682] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.618, **C-195.**
[683] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, pp.651-652, **C-195.**

793. Waterfront Toronto provided information to Sidewalk Labs in advance of the issuance of the RFP in March 2017;[684]

794. Respondents to the RFP were given relatively short notice (six weeks) to respond to the proposal (compared to 10 weeks, at minimum, given for similar projects in the area);[685] and

795. Waterfront Toronto revised its procurement policy in 2018 to allow for procurements to be more easily run without a competitive tender process.[686]

796. First, in an egregious example of favouritism, Waterfront Toronto was in constant communication with Sidewalk Labs prior to the issuance of the RFP. As the 2018 Auditor General of Ontario's Annual Report explains:

> Between June 2016 and the issuance of the RFP, there were frequent communications between Waterfront Toronto and Sidewalk Labs. As well, Waterfront Toronto provided Sidewalk Labs with surveys, drawings, topographic illustrations of the waterfront area including Eastern waterfront, and other materials. Sidewalk Labs architects signed a digital data license agreement with Waterfront Toronto to allow Sidewalk Labs to use the information it was provided.[687]

797. Further still, it was the Chief Planning and Design Officer of Waterfront Toronto who, in June 2016, emailed the CEO of Sidewalk Labs stating: "My new CEO and I are very interested in what you are doing at Google and would like to talk to you about a potential pilot in Toronto".[688]

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[684] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.31, **C-195.**
[685] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.690, **C-195.**
[686] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.693, **C-195.**
[687] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.689, **C-195.**
[688] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.689, **C-195.**

798. Additionally, in August 2016, still more than half a year prior to the issuance of the RFP, Waterfront Toronto signed a non-disclosure agreement with Sidewalk Labs to receive information from it.[689]

799. Two months later, in September 2016, Waterfront Toronto met with a delegation from Sidewalk Labs and provided a site visit and tour of the waterfront area.[690]

800. Waterfront Toronto attempted to defend its conduct, arguing that Sidewalk Labs was not the only bidder to receive inside information, and that: "this sharing of information was […] part of their regular market sounding process where they were trying to gauge market interest in the Quayside project."[691]

801. While Waterfront Toronto apparently believed that blatantly admitting that providing inequal access to potential bidders as being part of their usual process was a good defence, the Auditor General disagreed, stating in its report that "[such practice] **raises the risk of an unfair and unequal advantage to all parties that would be responding to the RFP. Fair practice and equal treatment would suggest that all potential bidders receive the same information at the same time."**[692]

802. Second, only six weeks was provided for Respondents to submit detailed bids for the Quayside area RFP. Such short notice was not standard practice, the Auditor General notes, as Waterfront Toronto has in the past given much longer time frames to respond to more traditional tenders, including 10 weeks for public art projects, 11 weeks for a construction manager for Port Lands flood protection, and as much as 25 weeks for a developer to lead construction of a single office building.[693]

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[689] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.689, **C-195.**
[690] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.689, **C-195.**
[691] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.689, **C-195.**
[692] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.690, **C-195.**
[693] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.690, **C-195.**

803. Seemingly frustrated by the lack of notice, unsuccessful bidders alleged to the Auditor General that six weeks was too short notice for a project of this magnitude.[694]

804. In the end, Sidewalk Labs used their advanced notice and information to submit the most detailed and comprehensive plan, which was one of the reasons that their proposal was selected as the winning bid.[695]

805. Clearly, Waterfront Toronto wanted Sidewalk Labs to be the successful bidder, and used the time frame of the RFP to ensure that other potential bidders did not have enough time to submit bids that would even come close to rivalling that of Sidewalk Labs.

806. Thirdly, the Auditor General also disclosed that the procurement process itself was at odds with the *Province's Broader Public Sector Procurement Directive.*[696]

807. Specifically, "in issuing the original RFP for a funding and innovation partner for the smart city project, Waterfront Toronto did not ask the City to review the RFP or be involved in the evaluation and selection of the successful bidder."[697]

808. Further, "Waterfront Toronto had revised its procurement policy in June 2018, making it easier to procure goods and services without a competitive tender process and no requirement to document the rationale for awarding the contract to a single or sole supplier. That change in procurement policy was not presented to the Board after the CEO approved it."[698]

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[694] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.690, **C-195.**
[695] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, pp.651-652, **C-195.**
[696] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.693, **C-195.**
[697] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.693, **C-195.**
[698] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.693, **C-195.**

809. Such a policy is in direct contravention of the Province's Broader Public Sector Procurement Directive. Only after the Auditor General brought this up with Waterfront Toronto did they reinstate their original procurement policy.[699]

810. Surely, Ontario knew that what it was doing was wrong. Its procurement policy change in June 2018 flew in the face of the government's own procurement directive. Ontario wanted a specific outcome and manipulated the process to ensure that this was the case.

811. Ontario's conduct before, during, and after the RFP process for the Quayside area is nothing short of shocking.

812. The rights owed to bidders were callously discarded when the government chose to give advanced information and time to Sidewalk Labs (as well as a few other evidently favoured bidders), ensuring that one of their favoured bids would be successful in the procurement.[700]

813. This is not an example of a government running a fair and open procedure. This is a textbook case of a government favouring some bidders over others and manipulating information and the process itself to get the result that they want.

814. Just as Ontario provided Sidewalk Labs with access to information, allowed them to meet with key decision makers, and formulated the rules of the process itself to assist their bid, Ontario similarly favoured the Korean Consortium and other favoured investments over Skyway 127 in the current case. Ontario has a history of shirking the rules to benefit parties that they would rather see succeed

3. Ministry of Transportation – Road Infrastructure Construction Awarding and Oversight

[699] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.693, **C-195.**
[700] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, p.652, **C-195.**

815. The road construction industry in Ontario is mainly represented by two groups: the Ontario Road Builders' Association (ORBA) and the Ontario Hot Mix Producers Association (OHMPA), both of which the Ontario Ministry of Transportation regularly consults.[701] The Auditor General of Ontario has criticized that this relationship negatively has impacted the openness and impartiality with which the Ministry made its decisions.[702]

816. In response to the Ministry considering setting up a committee with the ORBA to discuss an internal audit report, Ministry staff expressed concerns because such a committee would "allow ORBA to strongly influence how the report's recommendations should be implemented, which was an internal operational matter."[703] The Ministry ignored these concerns and set up the committee anyways.[704] The Auditor General's report even listed several policy decisions the Ministry made that the ORBA directly influenced by.[705] Often times, as the report notes, these decisions are not in the best interests of the taxpayers.[706]

817. This is yet another example of Ontario using an opaque and unfair procedure when it makes its decisions and demonstrates once again that government Ministries can be easily influenced to change their policies and procedures without fair or open consultations.

4. Hydro One Inc. Acquisition of Goods and Services

818. Hydro One is a Crown corporation of the Government of Ontario and is an electricity transmission and distribution utility.[707] The corporation's procurement

[701] Office of the Auditor General of Ontario, *Annual Report 2016*, Volume 1, p.50, **C-196.**
[702] Office of the Auditor General of Ontario, *Annual Report 2016*, Volume 1, p.51, **C-196.**
[703] Office of the Auditor General of Ontario, *Annual Report 2016*, Volume 1, p.52, **C-196.**
[704] Office of the Auditor General of Ontario, *Annual Report 2016*, Volume 1, p.52, **C-196.**
[705] Office of the Auditor General of Ontario, *Annual Report 2016*, Volume 1, pp.52-53, **C-196.**
[706] Office of the Auditor General of Ontario, *Annual Report 2016*, Volume 1, pp.519, 537-538, **C-196.**
[707] Office of the Auditor General of Ontario, *Annual Report 2006*, Entire Report, p.161, **C-197.**

policies were subject to an audit, the results of which were published in the Auditor General of Ontario's 2006 Annual Report.

819. The audit reports that while Hydro One's policy encourages the establishment, through a competitive process, of Blanket Purchase Orders (BPOs) for the procurement of goods and services, this does not always happen.[708]

820. On the contrary, the report noted that "the BPOs […] examined **had not always been established through a competitive procurement process or** had no documentation available to verify that a competitive process had been used."[709]

821. As this audit demonstrates, Ontario's procurement goods and services falls well short of being a fair and open process.

822. The procurement process here, as with the FIT Program, suffered from a lack of transparency, allowing government decision makers to take actions that had no basis in fairness, and which did not support a competitive process.

5. Go Transit

823. GO Transit is a regional public transit service. Their Board of Directors are appointed by the province, and report to the Ministry of Transportation.[710] In its 2007 audit, the Auditor General of Ontario criticized Go Transit's procurement practices in a number of cases as not being open and transparent.[711]

824. The audit notes that many suppliers are not selected using a competitive process, including over $8.6 million for 170 single-sourced consultant contracts.[712]

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[708] Office of the Auditor General of Ontario, *Annual Report 2006*, Entire Report, p.15, **C-197.**
[709] Office of the Auditor General of Ontario, *Annual Report 2006*, Entire Report, p.15, **C-197.**
[710] Office of the Auditor General of Ontario, *Annual Report 2007*, Entire Report, p.158, **C-198.**
[711] Office of the Auditor General of Ontario, *Annual Report 2007*, Entire Report, pp.160-161, **C-198.**
[712] Office of the Auditor General of Ontario, *Annual Report 2007*, Entire Report, p.161, **C-198.**

825. Once again, the Go Transit audit shows Ontario's refusal to follow fair and correct procedures when awarding contracts.

826. Along with the Hydro One example above, this example highlights how, as with the FIT Program, Ontario has exhibited a pattern of not running fair and open procurements.

6. Economic Development and Employment Programs

827. The government of Ontario provides multi-year grants and interest-free loans to businesses to support economic development and boost employment in the province.[713] The 2015 Auditor General of Ontario's Annual Report took aim at the secret processes by which billions of dollars had been granted.

828. The Auditor General, for example, expressed concern about how special access is usually given to select bidders:

> There is a need for more transparency in how invitation-based funding is awarded. Since 2010, about 80% of approved funding was committed through non-publicly advertised processes, in which only select businesses were invited to apply. The Ministry determined internally which businesses were to be invited, but it could not provide us with the criteria it used to identify the businesses it invited to apply, or a list of those whose applications were not successful.[714]

829. It is stunning that Ontario has subverted the public's expectations that grants and loans will be offered in a fair and even-handed manner by acting in such a secretive and opaque manner.

830. Further support that the government's actions were capricious lies in the fact that the funding decisions were often baseless and without merit, as projects that did not require the governmental assistance were granted loans and grants regardless:

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[713] Office of the Auditor General of Ontario, *Annual Report 2015*, Entire Report, p.21 **C-199.**
[714] Office of the Auditor General of Ontario, *Annual Report 2015*, Entire Report, p.22**, C-199.**

> Past funding was often awarded without a proper needs assessment. **The Ministry almost never assessed whether businesses needed public funding in order to achieve the proposed project.** Furthermore, some projects were approved for funding even though there was evidence they would have proceeded without government help.[715]

831. This audit also demonstrated the lack of transparency that Ontario provided to the public. The audit notes how Ontario kept the public in the dark regarding the project results, refusing to disclose the amounts funded in exchange for investments for which companies received funding.[716]

832. Additionally, the audit found that, when Ontario did release information to the public, it was sometimes misleading. For example, over the last 10 years, Ontario publicly announced almost $1 billion **more** of economic development and employment-support funding projects by re-announcing the same available funding under different program names.[717]

833. Discussing Ontario's plan to use an invitation-based approach to funding, the Auditor General stated:

> [T]his approach **lacks transparency, fairness and equitable access** for the businesses that may want to apply for funding...[718]

834. The Government of Ontario doubtlessly has been dishonest with the public about how billions of dollars of funding has been awarded, and it has gone out of its way to make the procedure opaque and capricious, to the disbenefit of bidders.

835. Ontario's conduct in awarding grants and funds closely resembles the Government's conduct in running the FIT Program: the Government formulated the process in such a way that it would favour bidders that it internally preferred over

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[715] Office of the Auditor General of Ontario, *Annual Report 2015*, Entire Report, p.22, **C-199.**
[716] Office of the Auditor General of Ontario, *Annual Report 2015*, Entire Report, pp.190-191, **C-199.**
[717] Office of the Auditor General of Ontario, *Annual Report 2015*, Entire Report, p.23, **C-199.**
[718] Office of the Auditor General of Ontario, *Annual Report 2015*, Entire Report, p.191, **C-199.**

others, and has done its best to keep information about the program quiet and out of the public eye.

B. Ontario's Pattern of Wrongful Procedure

836. The foregoing makes one thing clear: Ontario has a documented history of engaging in capricious, unfair, and non-transparent procedures.

837. The way that Ontario treated Tennant's Investment is simply a symptom of a larger problem: Ontario refuses to accord due respect and transparency to bidders and the public when awarding contracts and funding.

838. The above analysis demonstrates that, just as they did to the Skyway 127 project, Ontario often gives favour to private parties at the expense of other bidders and conducts their procedures in non-transparent fashions.

839. Additionally, Ontario must know that their conduct is wrong, as the Auditor General of Ontario's Annual Reports recommend, year after year, that Ontario should make its procedures more transparent. Still, as the Waterfront Toronto example (which serves as the most recent example of Ontario's misconduct) demonstrates, Ontario continues to demonstrate this conduct.[719]

840. As several of the above examples demonstrate, Ontario often had correct procedures, yet defied these guidelines when it was advantageous for them to do so. This provides further proof that Ontario knew the correct way to act yet did not do so. Their misconduct was no accident.

841. Further, Ontario did not make public its lack of transparency and secret deals with select bidders. This information all came into the public eye as a result of the Auditor General's Annual Reports. The government would rather their secret dealing, and improper procedural conduct be hidden from the public.

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[719] Office of the Auditor General of Ontario, *Annual Report 2018*, Volume 1, pp.688-694, **C-195.**

C. *Mesa* Testimony - another example of Ontario's misconduct

842. In the *Mesa Power* NAFTA arbitration, it was revealed that Ontario had engaged in capricious and unfair conduct in its administration of the FIT Program (actions which Tennant and Mesa both suffered from) similar to that demonstrated in the examples above.

843. The Investor's Post-Hearing Brief from *Mesa Power* detailed some of the witness testimony from the hearing. This testimony, straight from the mouths of government officials themselves, evidences the fact that Ontario's conduct exemplified in the above examples was not done by chance, but was part of a larger pattern of corrupt and malicious conduct.

844. At the *Mesa Power* NAFTA hearing, it was revealed that favourable treatment had been afforded to the investment owned by NextEra, to the detriment of investors who had followed the rules, such as Mesa and Tennant. Initially, most of NextEra's projects would not have received a contract in the West of London Region.[720] To avoid this, NextEra lobbied the Ontario government, and the rules were subsequently amended to allow for connection point changes, which allowed more of NextEra's projects to be awarded contracts.[721] This was confirmed by the former FIT Program manager at the OPA, Jim MacDougall, during his testimony at the *Mesa* hearing.[722]The NextEra example weaves beautifully into the narrative spun by the audits from the Auditor General's reports. Simply put, NextEra wanted to change the rules solely for its benefit and lobbied to get access to high ranking government officials. As opposed to following the rules of the procurement and the fundamental concept of due process, Ontario gave in to the lobbying efforts and made the change requested by NextEra – all to the detriment of innocent bidders who had followed the rules. This type of

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[720] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version) 18 December 2014, ¶149, **C-017.**

[721] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version) 18 December 2014, ¶150, **C-017.**

[722] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version) 18 December 2014, ¶152, **C-017.**

lobbying is awfully similar to that ORBA used against the Ministry of Transportation in the example discussed above. Both cases demonstrate that the government has been lobbied to change rules and policies when it benefits private parties preferred by the Government. This is also what happened with the FIT Program. It is a pattern.

845. Further testimony from the *Mesa* hearing revealed that preferential treatment was given to International Power Canada ("IPC"). Susan Lo testified that investments owned by IPC were protected from the Korean Consortium power set aside. The president of IPC happened also to be the past president of the governing Ontario Provincial Liberal Party, who then became the president of the federal Liberal Party of Canada.[723]

846. Ontario preferred one investment over another for reasons that had nothing to do with the investment itself. This type of conduct can be seen in the Road Infrastructure Construction Awarding and Oversight, Independent Electricity System Operator, and Economic Development and Employment Programs described above. In all four of these cases, the Ontario government deviated from acceptable practices and tainted its procedures for reasons that clearly violate due process and fairness.

847. In the Road Infrastructure Construction Awarding and Oversight example, favouritism was showed to ORBA, and policies were changed to benefit this group, to the disbenefit of the public. In the Independent Electricity System Operator case, market rules were adjusted by those who would personally gain from such alterations. The Economic Development and Employment Programs were tainted as a result of Ontario awarding grants and funding without due regard for the needs of the applicants, and because Ontario usually selected who would receive the funding privately, without opening up the process to the public.

[723] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17) Investor's Post-Hearing Brief (Public Version) 18 December 2014, ¶145, **C-017.**

848. All three of these cases, combined with the IPC example, illustrate how Ontario had a pattern of changing or setting the rules of a program or procedure for capricious reasons.

849. The testimony from the *Mesa Power* NAFTA hearing reinforces that pattern gleaned from the Auditor General audits that Ontario frequently conducts itself in an unfair and non-transparent manner when awarding contracts, grants, and policy. These are not one-off instances. There is a central theme that runs through each of the examples cited above. If you try to contract with the Government of Ontario, there is a decent chance that you will be subject to unfair and capricious treatment unless you have special government connections. This does not accord with the principles of fairness or due process. It is not right. It is alarming.

VII. DAMAGES

850. The Treaty sets out the standard of compensation only for breaches of the expropriation obligation under Article 1110. It does not set out the standard for breaches of other provisions of the Treaty, such as a breach of NAFTA Article 1105. To determine the standard of compensation for breaches of other Treaty provisions, recourse must be had to the sources of international law.

851. This Memorial is supported by a valuation report prepared by Richard Taylor and Larry Andrade from Deloitte.[724] The valuation report has a range of values.[725] The valuators recommend that the Tribunal consider the mid-point of the damages, in Table 2.1.2 as follows:

Economic Losses	$ 184,012,000
Moral Damages	35,000,000
Total	**$ 219,012,000**

[724] Deloitte Valuation Report, 7 August 2020, **CER-1**
[725] Deloitte Valuation Report, 7 August 2020 at ¶ 2.1.2, **CER-1**

A. The Obligation to Pay Damages

852. International law requires that parties be compensated for the entirety of their loss and to be put back into the position they would have been in but for the internationally unlawful behaviour.

853. The principle of full reparation is provided in Art. 38(1) of the ILC Draft *Articles on State Responsibility*. The Commentary to the Draft *Articles on State Responsibility* states that:

> 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.

854. The international law standards for compensation requires that parties be compensated for the entirety of their losses and put back into the position they would have been in but for the internationally unlawful behaviour. The *Chorzów Factory* decision provides:

> The essential principle contained in the actual notion of an illegal act ... is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it - such are the principles which should serve to determine the amount of compensation for an act contrary to international law.[726]

855. In *Chorzów Factory*, the Permanent Court of International Justice stated that any award must make the claimant whole as if it had suffered no loss.[727] Where the loss is quantifiable, any award should ensure that the claimant is compensated for the entire

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[726] *The Factory At Chorzów* (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928, ¶125 [emphasis added], **CLA-192.**

[727] *Factory At Chorzów* (Claim for Indemnity) (The Merits), Germany v. Poland, Judgment, 13 September 1928 ¶125, **CLA-192.**

amount of the loss. Thus, an investor should be able to recover all damages caused to it by the government's wrongful conduct. These damages would extend to all proximate damages, including consequential damages or lost profits.

856. Judge Brower in his Concurring Opinion in *Amoco* clarified the decision of the *Chorzow Factory* case in the context of a modern valuation and business analysis:

> In my view Chorzow Factory presents a simple scheme: If an expropriation is lawful, the deprived property is to be awarded damages equal to 'the value of the undertaking' which it has lost, including any potential future profits, as of the date of taking; in the case of an unlawful taking, however, either the injured party is to be actually restored to enjoyment of his property, or, should this be impossible or impractical, he is to be awarded damages equal to the greater of (i) the value of the undertaking at the date of loss (again including lost profits), judged on the basis of information available as of that date, and (ii) its value (likewise including lost profits) as shown by its probable performance subsequent to the date of loss and prior to the date of the award, based on actual post-taking experience, plus (in either alternative) any consequential damages. Apart from the fact that this is what Chorzow Factory says, it is the only set of principles that will guarantee just compensation to all expropriated properties.[728]

857. Hence, a Tribunal should assess the extent of the economic harm suffered by Tennant Energy and the Investment, including the extent of economic benefits foregone "in all probability".

858. As is the case with domestic proceedings, all losses must naturally flow from the treaty violation. Damages that may arise before the operation of the treaty (such as damages arising before the treaty came into force or pre-existing damage that arises before the acquisition of an investment) will not be compensable, unless they stem from a continuous or composite breach.

B. The Standard of Compensation

[728] *Amoco International Finance Corp.* and *The Government of the Islamic Republic of Iran, et al.* (1987) 15 Iran- US CTR 189, Concurring Opinion of Judge Brower ("*Amoco v. Iran,* Concurring Opinion of Judge Brower"), at 300–02, ¶¶ 17–19, **CLA-184.**

859. The Treaty contains rules in Article 1110, which address the process for compensation in the event of expropriation.

860. If for whatever reason, the Tribunal does not find that an expropriation took place, then it will be able to award damages with respect to the breach of fair and equitable treatment under Treaty Article 1105.

861. The *ILC's articles on State Responsibility* summarize the international law on the matter stating:

> 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.[729]

862. Damages arising for a breach of a NAFTA Chapter Eleven obligation such as Article 1105 will essentially be calculated on the same basis. The international law principle of compensation requires Canada to compensate the Investor for all loss caused to the Investor and its Investment resulting from Canada's violation of its international law obligations.

863. The main legal and accounting principles of valuation are:

(a) **The But For test** – Once a violation has been established, the remedial objective of an international tribunal is to place the injured Investor and its Investments in the position they would have been in but for the illegal conduct. In the words of the *S.D. Myers* NAFTA Tribunal, "Compensation should undo the material harm inflicted by a breach of an international obligation."[730]

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[729] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts at art. 36, **CLA-185.**
[730] *S. D. Myers* - First Partial Award, ¶315, **CLA-111.**

(b) **Consequential damages** - In *Sapphire International Petroleum Arbitration*, the Tribunal held that:

> This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.[731]

(c) **Lost Profits** - Damages for lost profits includes loss that is a foreseeable consequence of the breach, where the lost profits can be calculated with reasonable certainty.[732]

(d) **Mitigation** - The duty of mitigation is a general principle of law, which forms part of the principles of international law.[733] The duty of mitigation is also reflected in the Commentary to Article 31 of the *ILC Articles*. The Commentary to Article 31 notes that mitigation of damage is an element affecting the scope of reparation.[734]

(e) **Interest and Costs** - International tribunals have broad discretion to take into account all relevant circumstances, including equitable considerations on a case by case basis, to ensure that full compensation ensues.[735] These types of considerations usually take the form of an

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[731] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Arbitral Award, March 15, 1963, 35 ILR 136 ("*Sapphire* - Award"), at p.186, CLA-194

[732] In J. Gillib Wetter and Stephen Schwebel "Some Little-Known Cases on Concessions - The Greek Telephone Company Case" (1964) *40 British Yearbook of International Law* 216 ("Gillib and Schwebel (1964)"), at 221, the Tribunal found that Greece must compensate the investor for the lost profits "for what it would have obtained" had the concession contract been implemented by the State, **CLA-195**; In *Sea-Land Service, Inc. v. Iran*, Iran, Award 135-33-1, June 20, 1984 (1984) 6 Iran-US CTR 149, **CLA-183** the Tribunal cited its decision in *Pomeroy et al. v. Iran*, Iran - United States Claims Tribunal, Case No. 40, Award No. 50-40-3, 2 Iran-US CTR 372 (June 8, 1983,) ("Pomeroy - Award") as a basis for this determination, **CLA-197**.

[733] *Middle East Cement Shipping and Handling Co. S.A. v. The Arab Republic of Egypt*, ICSID ARB/99/6, Award (April 12, 2002) ("Middle East Cement - Award"), at ¶167, **CLA-198**.

[734] James Crawford, The International Law Commission's Articles on State Responsibility, (2002), p.205 **CLA-199.**

[735] *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Case No. ARB/96/1, Final Award (February 17, 2000) ("Compañia del Desarrollo de Santa Elena - Award"), ¶90-92, **CLA-200**. This view was

award dealing with opportunity loss (that is, interest of some form) and awards of costs.

C. Interest

864. In addition to the sunk costs and future profits. interest also may be claimed on any sum awarded by an international tribunal. Interest may be claimed on both a pre- and post- judgment basis. Interest is to ensure that a claimant receives full compensation. Interest must be applied from the time at which damage occurs until any compensation paid is due.

865. The law is settled that interest must be paid on damages for losses arising from the internationally wrongful conduct of a state.[736] Furthermore, it is settled that interest is awarded on a compound basis.[737]

866. Although simple interest has been used in international arbitration, there is a growing tendency to use a compound interest rate.[738] Notably, more recent awards provide for compound interest.[739]

867. The Deloitte Valuation Report sets out interest calculations in Table 2.1.2.[740]

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also maintained by a number of Iran-US Claims Tribunal awards such as Phillips Petroleum Co. Iran v. Iran, Iran - United States Claims Tribunal, Case No. 39, Award 425-39-2, 29 June 1989, 21 Iran-US CTR 79 ("Phillips Petroleum - Award"), at ¶¶111-112, 157, **CLA-202**.

[736] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts at art. 38, **CLA-185.**

[737] Gold Reserve Inc. v. Bolivarian Republic of Venezuela, Award, ICSID Case No. ARB(AF)/09/1, September 22, 2014 at ¶ 854, **CLA-186;** Occidental Petroleum Corporation, Occidental Exploration and Production Company (OEPC) v. Ecuador, Award, October 5, 2012, ¶ 834 **CLA-187;** see generally Compania de Aguas Del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, Case No. ARB/97/3, August 20, 2007 at 9.2, **CLA-188.**

[738] Jeffery Colon and Michael Knoll, Prejudgment Interest in International Arbitration, Fordham University Legal Studies Research Paper No. 1029710 at 10 **CLA-189;** Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice (New York, Oxford University Press: 2011) 152, **CLA-190.**

[739] Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice (New York, Oxford University Press: 2011) at 152, **CLA-190.**

[740] Deloitte Valuation Report, 7 August 2020, at ¶ 2.1.2. **CER-1**

D. Damages Calculations

868. Chartered Business Valuators, Richard Taylor, and Larry Andrade, from Deloitte LLP prepared a valuation report for the Claimant. Both Mr. Taylor and Mr. Andrade are chartered business valuators and professional accountants.

869. The Valuation Report sets out an independent expert calculation of the quantification of the damage sustained by the Investor and its Investment. As more fully set out in the *Valuation Report*, the Investor has suffered a substantial loss. The midpoint of total economic losses is US $184.012 million.[741] Also, moral damages of $35 million (which the experts note are being sought but upon which they did not calculate) bring the total losses to $219,012,000.[742]

870. Under international law, Tennant Energy is entitled to full compensation from Canada for all harm caused to it and its investments resulting from Canada's unlawful actions. The purpose of damages is to restore the investment to the position it would have been in "but for" Canada's internationally wrongful actions. The well-established international law compensation principle is that damages should wipe out the consequences of the wrongful act and put the harmed party back to the *status quo*.[743] The calculation of damages also needs to take into account what would have been earned by the Investment but for Canada's unlawful actions.

871. In *CMS v Argentina*, the Tribunal commented on the appropriateness of applying discounted cash flow analysis. The Tribunal stated:

> This leaves the Tribunal with the DCF method, and it has no hesitation in endorsing it as the one which is the most appropriate in this case. TGN was and is a going concern. DCF Techniques have been universally adopted, including

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[741] Deloitte Valuation Report, 7 August, 2020 at ¶ 2.1.2 . **CER-1**

[742] Deloitte Valuation Report, 7 August 2020, at Table 2.1.1 **CER-1**

[743] *Case Concerning the Factory at Chorzów,* Merits Award, Permanent Court of International Justice, September 13, 1928, PCIJ, Series A, No. 17 ("*Chorzów* - Merits Award"), p.47, **CLA-192**; *Amco Asia Corp. v. Indonesia*, Award, ICSID Reports Volume 1, 413 (November 20, 1984) ("*Amco Asia* - Award"), ¶267, **CLA-191**; adopted the reasoning of the Chorzow Factory Case, **CLA-192**, calling it the "basic precedent" in international law on compensation.

> by numerous arbitral tribunals, as an appropriate method for valuating business assets.[744]

872. In *S.D. Myers v Canada*, the Canada considered the same type of income valuation approach followed by Messrs. Taylor and Andrade. The *S.D. Myers* Tribunal held in relation to the losses suffered by S.D. Myers International (SDMI) that:

> The Tribunal concludes that compensation should be awarded for the overall economic losses sustained by SDMI that are a proximate result of Canada's measure, not only those that appear on the balance sheet of its investment.[745]

873. The Tribunal later reiterated its decision stating "As stated above, the Tribunal has determined that the appropriate compensation is the value of SDMI's lost net income stream" [746]

E. Damages Legal issues

874. The international law principle of compensation requires Canada to compensate Tennant Energy for all loss caused to the Investment resulting from Canada's violation of its international law obligations.

875. The main legal and accounting principles of valuation are:

876. **The But For test** – Once a violation has been established, the remedial objective of an international tribunal is to place the injured Investor and its Investments in the position they would have been in but for the illegal conduct. In the words of *the S.D. Myers* Tribunal, "Compensation should undo the material harm inflicted by a breach of an international obligation."[747]

877. **Consequential damages** - In *Sapphire International Petroleum Arbitration*, the Tribunal held that:

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[744] *CMS Gas* - Award, ¶416, **CLA-104.**
[745] *S.D. Myers v. Government of Canada*, (Second Partial Award),21 October 2002) ¶122, **CLA-193.**
[746] *S.D. Myers v. Canada*, (Second Partial Award), ¶174, **CLA-193.**
[747] *S. D. Myers* - First Partial Award, ¶315, **CLA-111.**

> This compensation includes the loss suffered (*damnum emergens*), for example the expenses incurred in performing the contract, and the profit lost (*lucrum cessans*), for example the net profit which the contract would have obtained. The award of compensation for the lost profit or the loss of a possible benefit has been frequently allowed by international arbitral tribunals.[748]

878. **Lost Profits** - Damages for lost profits includes loss that is a foreseeable consequence of the breach, where the lost profits can be calculated with reasonable certainty.[749]

879. **Mitigation** - The duty of mitigation is a general principle of law, which forms part of the principles of international law.[750] The duty of mitigation is also reflected in the Commentary to Article 31 of the *ILC Articles*. The Commentary to Article 31 notes that mitigation of damage is an element affecting the scope of reparation.[751]

880. **Interest and Costs** - International tribunals have broad discretion to take into account all relevant circumstances, including equitable considerations on a case by case basis, to ensure that full compensation ensues.[752] These types of considerations

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[748] Sapphire International Petroleums Ltd. V. National Iranian Oil Company, Arbitral Award, March 15, 1963, 35 ILR 136 ("Sapphire – Award"), p.186, **CLA-194.**

[749] In J. Gillib Wetter and Stephen Schwebel "Some Little-Known Cases on Concessions - The *Greek Telephone Company Case*" (1964) 40 *British Yearbook of International Law* 216 ("Gillib and Schwebel (1964)"), at 221, the Tribunal found that Greece must compensate the investor for the lost profits "for what it would have obtained" had the concession contract been implemented by the State, **CLA-195.** In *Sea-Land Service, Inc. v. Iran*, Iran, Award 135-33-1, June 20, 1984 (1984) 6 Iran-US CTR 149, p.204, **CLA-196**, the Tribunal cited its decision in *Pomeroy et al. v. Iran,* Iran - United States Claims Tribunal, Case No. 40, Award No. 50-40-3, 2 Iran-US CTR 372 (June 8, 1983,) ("*Pomeroy* - Award"), **CLA-197,** as a basis for this determination.

[750] Middle East Cement Shipping and Handling Co. S.A. v. The Arab Republic of Egypt, ICSID ARB/99/6, Award (April 12, 2002) ("Middle East Cement - Award"), ¶167, **CLA-198.**

[751] Crawford (2002), p.205, **CLA-199.**

[752] *Compañia del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, Case No. ARB/96/1, Final Award (February 17, 2000) ("*Compañia del Desarrollo de Santa Elena* - Award"), ¶90-92, **CLA-200.** This view was also maintained by a number of Iran-US Claims Tribunal awards such as those in the *American International Group, Inc. v. Iran*, Iran - United States Claims Tribunal, Case No. 2, Award 93-2-3, December 19, 1983, 4 Iran-US CTR 96 ("*AIG*- Award"), p.109, **CLA-201**; *Phillips Petroleum Co. Iran v. Iran*, Iran - United States Claims Tribunal, Case No. 39, Award 425-39-2, 29 June 1989, 21 Iran-US CTR 79 ("*Phillips Petroleum* - Award"), ¶¶111-112, 157, **CLA-202**; and *Starrett Housing Corp.v. Iran*, Iran - United States Claims Tribunal, Award, 32-24-1, 4 Iran-US CTR 112 (December 19, 1983) ("*Starrett Housing* - Award"), ¶157, **CLA-203.**

usually take the form of an award dealing with opportunity loss (that is, interest of some form) and awards of costs.

F. Summary of Valuation Report

881. The Investor's losses arising from Canada's failure to act in accordance with its Treaty Obligations have been calculated by Richard Taylor and Larry Andrade in the *Valuation Report*. On the basis of the international law of damages, the Investor's compensable losses include:

(a) Economic Losses;

(b) Moral Damages;

(c) Interest; and

(d) Professional fees and costs of this arbitration.

882. The award of interest is to compensate the Investor and the Investment from the time of the breach through to the date of the award.

883. The valuation methodology considers the investments on a going concern basis. It then applied a discounted cash flow approach. [753] In so doing, the valuators considered the specific attributes of the project and the FIT Program. The valuators also noted the widespread use of DCF approaches in this business sector:

> Based on our experience, project developers would use a DCF approach to evaluate wind projects and purchasers would use a DCF approach to determine the price they would be willing to pay to acquire a wind project such as the Project. [754]

884. Prejudgment Interest and Moral damages of $35 million claimed by Tennant Energy have then been added to these Economic losses.

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[753] Deloitte Valuation Report, 7 August 2020, at §§ 7.2.9 to 7.2.14. **CER-1**
[754] Deloitte Valuation Report, 7 August 2020, at §7.2.12. **CER-1**

885. The *Valuation Report* calculates the total damage resulting from Canada's actions that were inconsistent with its Treaty obligations.

886. Messrs. Taylor and Andrade used the discounted cash flow approach (DCF) for economic loss, which was considered the most appropriate and reliable. Cash flows are identified for a period into the future and discounted to the date of the analysis by an appropriate discount rate.

887. The *Valuation Report* calculates future losses using Skyway 127's Business Forecast. It uses the DCF approach to determine the economic losses sustained over the future loss period. The DCF approach calculates the present value of future losses by converting the losses to their present value equivalent. The discount rate used to convert the future losses to their present value equivalent reflects both the time value of money and the perceived risk of the loss arising as forecast. The DCF approach is based on a projection of future cash flows that would have been realized from the ongoing operations of the affected investment.[755] The cash flows to be discounted are determined on an after-tax, after interest and after debt repayment basis. In arriving at the discounted cash flows, Deloitte identified the revenue that would be generated from the investments under the contract.

888. In arriving at the discounted cash flows, Deloitte adjusted the after-tax equity rate of return to be applied to those cash flows having regard to the cost of equity as set out in the Valuation Report.[756] The cost of equity represents the after-tax cost of equity. The Valuation Report determined the cost of equity between 8.50 to 11.00%.[757]

889. The *Valuation Report* concludes the midpoint damages of the Economic loss is $184 million and Moral Damages are 35 million for a total of 219,012,000:[758]

[755] Deloitte Valuation Report, 7 August 2029, at Schedule 7. **CER-1**
[756] Deloitte Valuation Report, 7 August 2020, at Schedule 7. **CER-1**
[757] Deloitte Valuation Report, August 2020, ¶ 7.3.55. **CER-1**
[758] Deloitte Valuation Report, 7 August 2020, Table 2.1.2 and ¶2.1.2. **CER-1**

890. Legal costs have not been included in this total and are an appropriate addition at the discretion of the Tribunal.

891. Messrs. Taylor and Andrade's calculations are set out in detail in a summary table at paragraph 2.1.2 in the Valuation Report and with detailed calculations in the schedules.

G. Moral Damages

892. To this total, $35 million has been attributed to moral damages.[759] Moral damages can consider the wrongful effects of the conspiracy and other wrongful actions taken by the Government against Skyway 127. No pre-judgment interest has been ascribed to the moral damages.

893. This is an arbitration where moral damages should be awarded by the Tribunal.

894. Tennant Energy is entitled to the moral damages for the reputational, psychological, and emotional harm suffered by Tennant Energy due to the internationally wrongful measures taken by Canada, including those involved in the systemic violations arsing from the covert and coordinated meetings of senior officials manipulating the FIT Program to benefit cronies and friends of the government.

895. Mr. Pennie gives evidence of the suffering and harm caused to the corporate management arising from the internationally wrongful conduct in this arbitration in his Witness Statement at paragraphs 114 – 117 (CWS-1). .

896. As the *Luisitania* tribunal explained, moral damages are appropriate where there is "an injury inflicted resulting in mental suffering, injury to [the claimant's] feelings,

[759] Deloitte Valuation Report, 7 August 2020, Table 2.1.2. **CER-1**

humiliation, shame, degradation, loss of social position or injury to his credit or reputation."[760]

897. The Commentary to the *ILC Articles on State Responsibility* also provides an illustration of the types of moral damages for which an individual can be compensated:

> Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home, or private life.[761]

898. In the present claim, there is evidence of widespread, egregious, and outrageous deviations from the rule of law. Such actions are an affront to due process and fairness and can form the basis for an award of moral damages relation to anxiety and physiological suffering caused to the corporate officials.

899. Indeed, an award of moral damages is not uncommon in investment arbitrations. In *Desert Line v. Yemen,*[762] the tribunal awarded $1 million in moral damages to the claimant on account of the physiological suffering, stress, and anxiety that their corporate officials suffered due to the actions of Yemen. Similarly, in *Al-Kharafi v Libya*, the tribunal awarded $30 million for the loss of reputation caused by Libya.[763]

H. Arbitration & Legal Costs

900. The 1976 UNCITRAL Arbitration Rules permit the awarding of costs to the successful party. Costs are typically considered separately from professional fees, which are often treated in a similar manner. These are claimed in a separate submission after award or partial award has been rendered.

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[760] Rep. Int'l Arbitral Awards, Mixed Claims Commission, *United States - Germany*, *Opinion in the Lusitania Cases,* Vol. VII pp. 32-44, November 1923 - October 1939, p.40, **CLA-204;** See also P. Dumberry and S. Cusson, Journal of Damages in International Arbitration, *Wrong Direction: Exceptional Circumstances and Moral Damages in Int'l Investment Arbitration*, 2014, **CLA-205.**

[761] Yearbook of the International Law Commission, Int'l Law Commission Draft Articles of State Responsibility for Internationally Wrongful Acts with commentaries, Vol. II, Part Two, 2001, Commentary on Article 36, ¶16, **CLA-185.**

[762] *Desert Line Projects v Yemen*, ICSID Arb/05/17, ¶286, **CLA-206.**

[763] *Mohammed Al-Kharafi & Sons v Libya,* Final Arbitral Award, March 22, 2013, p. 392, **CLA-207.**

901. Articles 38 to 40 of the UNCITRAL Arbitration Rules provide for the awarding of costs related to the expenses and fees of the Tribunal, experts, witnesses, the appointing authority, and legal representation of the successful party. Article 38(e) explicitly provides that the Tribunal may in its discretion award costs to the successful party in respect of costs for legal representation:

902. The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself under Article 39 of the UNCITRAL Arbitration Rules.

(b) The travel and other expenses incurred by the arbitrators.

(c) The costs of expert advice and of other assistance required by the arbitrators.

(d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal.

(e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribune determines that the amount of such costs is reasonable.

(f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

903. In Article 40 of the UNCITRAL Arbitration Rules, it is provided that the overall costs of the arbitration should “in principle” be borne by the unsuccessful disputing party, but that the Tribunal has the discretion in light of the circumstances of the case to apportion legal costs as it sees fit. Article 40 states:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle, be borne by the unsuccessful party. However, the arbitral tribunal may apportion

each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

VIII. RELIEF REQUESTED

904. For the reasons set out in this Memorial, without limitation and reserving Tennant Energy's right to supplement this request for relief in accordance with Rule 20 of the (1976) UNCITRAL Arbitration Rules, Tennant Energy respectfully requests that the Tribunal grant the following relief:

(a) A Declaration that Canada has acted in a manner inconsistent with its Treaty obligations under NAFTA Article 1105.

(b) An award for Economic Loss Damages not less than the amount of CDN$ 184,012,000

(c) An award for Moral Loss Damages in the amount of CDN$ 35,000,000 plus interest from August 15, 2011, at a rate set by the Tribunal.

(d) Post-Judgment interest on all amounts.

(e) An award in favour of the Investor for their costs, disbursements and expenses incurred in the arbitration for legal representation and assistance, plus interest, and for the costs of the Tribunal.

(f) Such other relief as relevant and necessary in relation to the matters raised herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of August 2020.

Appleton & Associates International Lawyers LP

Reed Smith LLP