

**NOTICE OF INTENT
TO SUBMIT A CLAIM TO ARBITRATION
UNDER SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**

MESA POWER GROUP, LLC

Investor

v.

GOVERNMENT OF CANADA

Party

Pursuant to Article 1119 of the North American Free Trade Agreement (NAFTA), the Investor, **MESA POWER GROUP, LLC**, hereby serves its Notice of Intent to Submit a Claim to Arbitration for breach by Canada of its obligations under the NAFTA.

A. OVERVIEW OF THE CLAIM

1. This case is about unfairness, the abuse of power and process and undue political interference in the regulation of renewable energy in Ontario through the unannounced last-minute imposition of arbitrary measures and through opaque and secret administration and “buy local” contract requirements. The government changed the regulatory framework without notice and without due process, so as directly to curtail and impair market access rights under the established scheme for renewable energy in Ontario.
2. The subject of this unlawful treatment is Mesa Power Group, LLC (Mesa Power), a United States Investor, which participated in Ontario’s renewable energy production program through its ownership of four Ontario wind farm projects, and which has suffered substantial and direct injury, loss and harm as a result of those deliberately contrived governmental measures.
3. Mesa Power is a Delaware limited liability corporation. It owns Mesa Wind, LLC (Mesa Wind), which in turn owns and controls Mesa AWA, LLC (Mesa AWA).
4. Mesa AWA owns and controls the following four wind farm locations in southwestern Ontario:
 - a) TTD Wind Project ULC (TTD) is an unlimited liability corporation incorporated in the Province of Alberta. It is designed to allow for the generation of 150 MW of wind power. It is wholly owned and controlled by Mesa Power.
 - b) Arran Project ULC (Arran) is an unlimited liability corporation incorporated in the Province of Alberta. It is designed for the generation of 115 MW of wind power. It is also wholly owned and controlled by Mesa Power.

-
- c) North Bruce Project ULC (North Bruce) is an unlimited liability corporation incorporated in the province of Alberta. It applied for Power Purchase Agreements under the FIT Program for 200 MW of wind power. It is also wholly owned and controlled by Mesa Power.

 - d) Summerhill Project ULC (Summerhill) is an unlimited liability corporation incorporated in the Province of Alberta. It applied for Power Purchase Agreements under the FIT Program for 100 MW of wind power. It is also wholly owned and controlled by Mesa Power.

Collectively these four wind farms are referred to as the Investments or the Wind Farm Investments.

The FIT Program

- 5. The Ontario legislature enacted the *Green Energy Act* on May 14, 2009.¹ The *Act* created the Feed-In Tariff Program (FIT Program) that encouraged the production of renewable energy in Ontario. The renewable electric power obtained through the FIT Program is sold into the Ontario electrical grid for use by individual customers across Ontario. The Ontario Power Authority, a state enterprise owned and controlled by the Province of Ontario, is responsible for implementing the Program, including the setting of prices and the administration of contracts.

- 6. Through long-term fixed price contracts with the Ontario Power Authority, the Ontario FIT Program guaranteed electrical grid access to renewable energy producers. The renewable energy producers in the Program receive a premium price for renewable energy, and a guaranteed market for the energy they produce.

¹ *Green Energy Act*, 2009, SO 2009, c.12, Sched. A.

-
7. To be considered for the FIT Program, wind power projects were initially required to achieve a minimum of 25% of domestic content.² This level was increased to 50% for power projects that became operational after January 1, 2012.³ Wind power projects over 10kW were also required to obtain a minimum amount of this domestic content from the Province of Ontario.⁴
 8. Wind power projects over 10 MW were further required to be evaluated under the FIT Program. Projects were evaluated against other projects in their geographic electricity transmission zone (which was defined by the Program). The evaluation considered four components: expertise of wind power development, financial capacity, guaranteed access for wind turbine supply and permitting.⁵ The evaluation of these criteria resulted in a priority ranking score. This priority ranking score was then used to award contracts to program applicants within each geographic region.
 9. A successful applicant under the FIT Program would receive a Power Purchase Agreement (PPA) from the Ontario Power Authority, that guaranteed a set purchase price over a twenty year period.⁶ In July 2011, this guaranteed purchase price was 13.5 cents per kilowatt hour.
 10. On January 21, 2010, a Korean-based company, Samsung C&T signed a \$7 billion green energy investment agreement with Ontario's Premier and Ontario's Minister of Energy. While the existence of an agreement was public, the terms of the agreement were secret. This secret agreement granted Samsung significantly better access to supply renewable energy to the provincial energy grid than to other energy providers in the province.

² Feed-In Tariff Program, *FIT Rules Version 1.5*, June 3, 2011, Ontario Power Authority at para. 6.4(a)(i).

³ Feed-In Tariff Program, *FIT Rules Version 1.5*, June 3, 2011, Ontario Power Authority at para. 6.4(a)(i).

⁴ Feed-In Tariff Program, *FIT Rules Version 1.5*, June 3, 2011, Ontario Power Authority at para. 5.4.1(c)(iv).

⁵ In the event of a tie, then preference would be given to the project with the earliest dated wind lease.

⁶ Feed-In Tariff Program, *Program Overview*, August, 2010 at para. 6.4.

11. Samsung received a guaranteed right of first refusal on transmission access in certain transmission zones in the Province of Ontario. For example, Samsung was guaranteed 500 MW of transmission access in the Haldimand, Essex and Chatham-Kent transmission zone, totaling 20% of all available capacity in this region. Samsung was also guaranteed “priority access” to 500 MW of transmission capacity in the Bruce Region of Ontario. No other company was granted such favourable treatment.
12. Initial rankings for projects were issued in December 2010. The results of the ranking raised some concerns about the criteria used for ranking. The Investors were able to meet or exceed the terms of the others who were ranked higher on the listing but there was no transparent way to review the rankings provided by the Ontario Power Authority.
13. Around May 20, 2011, a representative of Mesa Power wrote to the Ontario Power Authority asking for more information about the method used for ranking because of concerns that proper ranking methodology had not been applied.
14. About one month later, an official from the Ontario Power Authority responded. The official refused to provide any substantive explanation or to disclose the ranking methodology. He confirmed the opinion of the Ontario Power Authority that the rankings for two of the wind projects, Arran and TTD Projects, were correct.⁷ The Investor had no way to know how to evaluate the accuracy of the statements made by the Ontario Power Authority in the absence of more information.
15. On Friday, June 3, 2011, the Ontario Power Authority issued, without any prior notice, a new set of rules for awarding FIT Program contracts based on a directive it received from the Ontario Minister of Energy.⁸ The new rules made four fundamental changes:

⁷ Letter from Sean Cronkwright, Ontario Power Authority to Mark Ward, June 17, 2011.

⁸ Directive from Minister of Energy, the Hon. Brad Duguid to Colin Anderson, CEO, Ontario Power Authority, June 3, 2011.

-
- a. The Ontario Power Authority was now 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;⁹
 - 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;¹⁰
 - c. Projects in the Bruce or West of London Regions could change and select an interconnect point outside their own region, and could build long transmission lines outside of their own regions and into neighboring regions; and
 - d. Instead of evaluating projects on the previously published priority rankings for the region, the projects were now to be evaluated on a provincial wide ranking.
16. As a result of the entirely new set of rules, several of the wind projects in the Bruce Region transmission zone lost available transmission capacity in their designated interconnects, and were able to move to other interconnects that did have available transmission capacity.
 17. 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 Region and thereby jump ahead in the priority ranking.
 18. For example, a domestic competitor to Mesa Power, Boulevard Associates Canada, Inc., was able to bring four of its West of London projects, that were 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,

⁹ Feed-In Tariff Program, *FIT Rules Version 1.5*, June 3, 2011, Ontario Power Authority at para. 6.4(a).

¹⁰ *Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects*, June 3, 2011, Ontario Power Generation. Available at: <http://fit.powerauthority.on.ca/allocating-capacity-and-offering-fit-contracts-bruce-milton-enabled-projects>

bumping ahead of the projects that had been in the Bruce Region since the beginning of the FIT Program.

19. On July 4, 2011 the Wind Farm Investments consequently lost their priority ranking and were not offered FIT Program contracts, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects.
20. 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 Mesa Power's property rights and the conduct and operations of its investments. These measures were taken without any consultation or notice to Mesa Power or its investments.
21. The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better treated companies, and were taken in the context of an upcoming Ontario provincial election to be held on October 6, 2011.

International Treaty Violations

22. Canada is a party to the NAFTA. Under NAFTA Article 105, Canada is responsible for actions taken by subnational governments such as the Government of Ontario, including its instrumentalities such as the Ontario Power Authority.
23. As a result of the actions by the Government of Ontario and the Ontario Power Authority, Canada failed to meet its international law obligations contained in Chapter Eleven of the North American Free Trade Agreement. These actions resulted in harm to the Investor.

24. Canada also failed to accord treatment to Mesa Power and its Wind Farm Investments as required by the international law standard of treatment contained in NAFTA Article 1105, by:
 - a. directing the Ontario Power Authority to change the rules for awarding Wind Power Purchase Agreement contracts under the FIT Program. This governmental direction had the result of having the Ontario Power Authority ignore the technical merits of the Investor's wind farms, relying instead on capricious and irrelevant political considerations in the awarding of the contracts; and
 - b. failing to treat Mesa Power fairly by changing the rules governing territorial limits for interconnection arbitrarily, untransparently, without notice and due process and in a discriminatory manner.
25. In addition, Canada imposed a variety of prohibited Canadian and Ontario content requirements, and "buy local" performance requirements, on the Investor and its Investments, as a precondition to obtain approval of commercial contracts under the FIT Program. These requirements violate NAFTA Article 1106.
26. Canada failed to meet its obligations to provide National Treatment (in accordance with NAFTA Article 1102) by providing more favorable transmission treatment to a Canadian company in like circumstances, Boulevard Associates Canada, Inc., and local subsidiaries of Korea-based Samsung, which was also in like circumstances. Canada also violated its Most Favored Nation Treatment obligation (NAFTA Article 1103), when it provided more favorable transmission treatment to the local subsidiary of a company owned by a non-NAFTA party which was in like circumstances, namely Korea-based Samsung, than that provided to the Investor and its Investments.
27. The Ontario Power Authority is a state enterprise that is owned and controlled by the Province of Ontario through the Ontario Minister of Energy. The Ontario Power

Authority had the power to grant licenses and approve commercial transactions in its administration of the FIT Program. Thus, Canada, in addition to the violations of the NAFTA stated above, also did not comply with its obligations under NAFTA Article 1503(2), by failing to ensure through regulatory control, administrative supervision or the application of other measures, that the Ontario Power Authority acted in a manner consistent with Canada's obligations under NAFTA Chapter Eleven, wherever the Ontario Power Authority exercised regulatory, administrative or other governmental authority.

28. The effect of these governmental measures has caused substantial loss and damage to Mesa Power and to the Investor's related business operations. These losses include the consequential losses arising therefrom and from the interference with its establishment, acquisition, expansion, management, conduct, operation and sale of its investments, as a result of unfair and arbitrary governmental actions contrary to the protections of the rule of law, and Chapter 11 of the NAFTA.

B. NAMES AND ADDRESSES OF THE PARTIES

The Investor

29. The Investor, **MESA POWER GROUP, LLC**, is incorporated in the State of Delaware in the United States of America. It owns and controls a variety of wind farm investments in the Province of Ontario.

30. The Investor is located at:

8117 Preston Road Suite 260 West
Dallas, TX 75225 United States

31. The Investments maintain their registered office at:

147 Mahood Johnston Dr.
Kincardine, ON N2Z 3A2 Canada

The Respondent

32. The Respondent is the **Government of Canada (“Canada”)** represented through:

Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8 Canada

C. BREACH OF OBLIGATIONS

33. The Investor claims that Canada has violated at least the following provisions of Section A of NAFTA Chapter 11:

Article 1102 – National Treatment

Article 1103 – Most Favored Nation Treatment

Article 1104 – Standard of Treatment

Article 1105 – International Law Standards of Treatment

Article 1106 – Performance Requirements

Article 1503(2) – State Enterprises

These breaches have resulted in damage to the Investor.

34. The Measures at issue raised in this dispute include, but are not limited to, the following:
- a. the *Electricity Act, 1998*, as amended,¹¹ including in particular Part II.1 (Ontario Power Authority¹²) and Part II.2 (Management of Electricity Supply, Capacity and Demand) thereof, including in particular Section 25.35 (Feed-in tariff program);
 - b. an Act to enact the *Green Energy Act, 2009* and to build a green economy, to repeal the *Energy Conservation Leadership Act, 2006* and the *Energy Efficiency Act* and to amend other statutes (the "*Green Energy and Green Economy Act, 2009*"), including in particular Schedule B amending the *Electricity Act, 1998*;
 - c. an Act to amend the *Electricity Act, 1998* and the *Ontario Energy Board Act, 1998* and to make consequential amendments to other Acts (the "*Electricity Restructuring Act, 2004*"), including in particular Schedule A, Section 28, enacting Part II.1 of the *Electricity Act, 1998*;
 - d. 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 and include a requirement that the applicant submit a plan for meeting the domestic content goals in the FIT rules;
 - e. the FIT Rules, Version 1.3.1 issued on 2 July 2010 and amended on 13 August 2010 by the OPA, and the microFIT Rules, Version 1.5 issued on 25 August 2010;

¹¹ The latest amendment was by: 2010, c.8, s.37.

¹² The Ontario Power Authority ("OPA") is a not-for-profit corporation without share capital, and the governance and the structure by-law may be made only with the approval in writing of the Minister of Energy and Infrastructure (the "Minister"). See, e.g., *Electricity Act, 1998*, Sections 25.1(1) and 25.16(3).

- f. the FIT Contract, Version 1.3.1 (2 July 2010), including General Terms and Conditions, Exhibits, and Standard Definitions, issued by the OPA, and the microFIT Contract, Version 1.5 (25 August 2010), including Appendices, issued by the OPA, as well as individual FIT and microFIT Contracts executed by the OPA with renewable energy suppliers in Ontario;
 - g. the FIT Rules, Version 1.5 issued on 3 June 2011.
 - h. the FIT Application Form (1 December 2009), issued by the OPA;
 - i. the FIT Price Schedule (13 August 2010), issued by the OPA;
 - j. the FIT Program Interpretations of the Domestic Content Requirements (December 14, 2009), issued by the OPA;
 - k. FIT direction dated June 3, 2011, from Brad Duguid, Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing OPA to develop modifications to the FIT Program; and
 - l. any amendments or extensions of the foregoing, any replacement measures, any renewal measures, any implementing measures, and any related measures.
35. The Applicable provisions of the NAFTA are set out in Annex I to this Notice. The applicable provisions of the NAFTA include, but are not limited to, NAFTA Chapters 1, 2, 11 and 15.

D. ISSUES RAISED

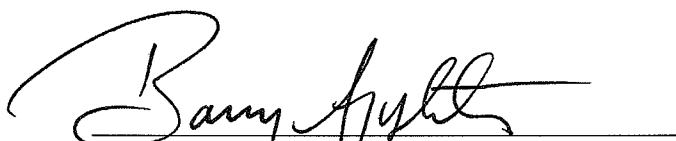
36. Did Canada take measures inconsistent with its obligations under Section A of the NAFTA, including Articles 1102, 1103, 1104, 1105 and 1106 of Chapter 11 of the NAFTA or Article 1503(2)? If so, then what amount of compensation is to be paid to the Investor as a result of Canada's failure to comply with its obligations under the NAFTA?

E. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

37. The Investor respectfully claims:
- a. Damages of not less than CDN\$775 million in compensation for loss, harm, injury, moral damage, loss of reputation, and damage caused by or resulting from Canada's breach of its obligations under Part A of Chapter 11 of the NAFTA;
 - b. Costs of these proceedings, including all professional fees and disbursements;
 - c. Fees and expenses incurred to mitigate the effect of the unlawful governmental measures taken by Canada;
 - d. Pre-award and post-award interest at a rate to be fixed by the Tribunal; and
 - e. Such further relief as counsel may advise and the Tribunal may deem appropriate.

DATE OF ISSUE: July 6, 2011

Appleton & Associates International Lawyers
77 Bloor Street West, Suite 1800
Toronto, ON M5S 1M2
Telephone: (416) 966 8800
Fax: (416) 966 8801


BARRY APPLETON
Counsel for the Investor

SERVED TO: Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8, Canada

Annex I- Applicable NAFTA Provisions

The applicable provisions of the NAFTA include Chapters 1, 2, and 11, and include, but are not limited to the following:

Chapter One: Objectives

Article 102: Objectives

1. *The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:*

a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

b) promote conditions of fair competition in the free trade area;

c) increase substantially investment opportunities in the territories of the Parties;

d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. *The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.*

Article 105: Extent of Obligations

The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.

Chapter Two: General Definitions

Article 201: Definitions of General Application

1. *For purposes of this Agreement, unless otherwise specified:*

Commission *means the Free Trade Commission established under Article 2001(1) (The Free Trade Commission);*

Customs Valuation Code *means the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, including its interpretative notes;*

days means calendar days, including weekends and holidays;

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;

enterprise of a Party means an enterprise constituted or organized under the law of a Party;

existing means in effect on the date of entry into force of this Agreement;

Generally Accepted Accounting Principles means the recognized consensus or substantial authoritative support in the territory of a Party with respect to the recording of revenues, expenses, costs, assets and liabilities, disclosure of information and preparation of financial statements. These standards may be broad guidelines of general application as well as detailed standards, practices and procedures;

goods of a Party means domestic products as these are understood in the General Agreement on Tariffs and Trade or such goods as the Parties may agree, and includes originating goods of that Party;

Harmonized System (HS) means the Harmonized Commodity Description and Coding System, and its legal notes, and rules as adopted and implemented by the Parties in their respective tariff laws;

measure includes any law, regulation, procedure, requirement or practice;

national means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1;

originating means qualifying under the rules of origin set out in Chapter Four (Rules of Origin);

person means a natural person or an enterprise;

person of a Party means a national, or an enterprise of a Party;

Secretariat means the Secretariat established under Article 2002(1) (The Secretariat);

state enterprise means an enterprise that is owned, or controlled through ownership interests, by a Party; and

territory means for a Party the territory of that Party as set out in Annex 201.1.

2. For purposes of this Agreement, unless otherwise specified, a reference to a state or province includes local governments of that state or province.

Chapter Eleven: Investment

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1104: Best Treatment

1. Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

Article 1105: Minimum Standard of Treatment

1. 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.
2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
 - (a) to export a given level or percentage of goods or services;
 - (b) to achieve a given level or percentage of domestic content;
 - (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
 - (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

- (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;*
- (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or*
- (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.*

Article 1116

Claim by an Investor of a Party on Its Own Behalf

1. *An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:*
 - (a) Section A or Article 1503(2) (State Enterprises), or*
 - (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,*

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.
2. *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.*

Chapter Fifteen: Competition Policy, Monopolies and State Enterprises

Article 1503(2): State Enterprises

2. *Each Party shall ensure, through regulatory control, administrative supervision or the application of other measures, that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Party's obligations under Chapters Eleven (Investment) and Fourteen (Financial Services) wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions or impose quotas, fees or other charges.*