

**IN THE MATTER OF AN ARBITRATION UNDER  
ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT (“CUSMA”),  
CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (“NAFTA”),  
AND THE 2013 UNCITRAL ARBITRATION RULES**

**-between-**

**WINDSTREAM ENERGY LLC  
(the “Claimant”)**

**-and-**

**GOVERNMENT OF CANADA  
(the “Respondent”)**

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**GOVERNMENT OF CANADA’S COUNTER-MEMORIAL ON JURISDICTION, MERITS,  
AND DAMAGES**

**December 12, 2022**

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## TABLE OF ABBREVIATIONS<sup>1</sup>

Abbreviation	Definition
Adjournment Agreement	IESO and WWIS Agreement to adjourn the Domestic Application
AOR	Applicant of Record
APRD	Approval and Permitting Requirements Document for Renewable Energy Projects
BRG	Berkeley Research Group
CAD	Canadian Dollar
COD	Commercial Operation Date
CUSMA	Canada-United States-Mexico Agreement
DCF	Discounted Cash Flow
Domestic Application	Application by WWIS to the Ontario Superior Court of Justice for an Order restraining the IESO from terminating the FIT Contract
EA	Environmental Assessment
EAASIB	Environmental Approvals Access and Service Integration Branch
ERPP	Emerging Renewable Power Program
FC	Financial Close
FET	Fair and Equitable Treatment
FID	Final Investment Decision
FIT	Feed-in Tariff
FTC	Free Trade Commission
GBS	Gravity Base Structure
GEGEA	<i>Green Energy and Green Economy Act, 2009</i>
ICJ	International Court of Justice
IESO	Independent Electricity System Operator
ILC	International Law Commission
IRR	Internal Rate of Return
KBCM	KeyBanc Capital Markets
Letter of Credit	Security Deposit
LRP	Large Renewable Procurement
LTEP	Long-Term Energy Plan
MCOD	Milestone Date of Commercial Operation
MEI	Ministry of Energy and Infrastructure
MEUR/MW	Million Euros/MegaWatt
MNR	Ministry of Natural Resources
MOE	Ministry of Environment
MW	MegaWatt
NAFTA	North American Free Trade Agreement
NDA	Non-disclosure Agreement

<sup>1</sup> For ease of the Tribunal's reference, Canada has consolidated our Table of Abbreviations to include abbreviations used in both the *Windstream I* and *Windstream II* proceedings.

NOA	Notice of Arbitration
NOI	Notice of Intent
NTP	Notice to Proceed
OPA	Ontario Power Authority
OPO	Ontario Planning Outlook
PCIJ	Permanent Court of International Justice
PDR	Project Description Report
PLA	<i>Public Lands Act</i> , R.S.O. 1990, c. P.43
PPA	Power Purchase Agreement
Project	WWIS' project
REA	Renewable Energy Approval
REA Regulation	<i>Environmental Protection Act</i> , R.S.O. 1990, c. E.19, O. Reg. 359/09
RFP	Request for Proposal
RFQ	Request for Qualifications
WEI	Windstream Energy Inc.
WWIS	Windstream Wolfe Island Shoals, Inc.

## I. INTRODUCTION

1. In February 2016, Canada and Windstream Energy LLC (“Windstream” or “the Claimant”) appeared before a NAFTA Chapter Eleven tribunal in *Windstream v. Canada* (“*Windstream I*”) to argue whether measures of the Government of Ontario (“Ontario” and “Ontario Government”) breached certain obligations of the North American Free Trade Agreement (“NAFTA”), including Articles 1105 (Minimum Standard of Treatment) and 1110 (Expropriation). The measures at issue in that arbitration included Ontario’s imposition of a moratorium on offshore wind development and its continued application over the span of five years. Also at issue in that arbitration was Ontario’s failure to “freeze”, “defer” or put “on hold” the Claimant’s Feed-in Tariff Contract (“FIT Contract”) so as to insulate the Claimant’s offshore wind project (“the Project”) from the effects of the moratorium. The Claimant argued that its Project, including its FIT Contract, had been *de facto* cancelled and rendered valueless as a result of these measures. Its reliance on a discounted cash flow (“DCF”) methodology to claim damages between \$277.8 million and \$369.5 million was rejected by the tribunal, which awarded it \$25 million in damages for the Project’s inability to proceed.

2. Six years later, the Claimant is back for more. Once again, it claims breaches of NAFTA Articles 1105 and 1110 due to Ontario’s continued application of the moratorium and its failure to ensure that its FIT Contract was not terminated, or amended in a manner that would insulate its Project from the moratorium’s effects. Despite having been fully compensated for its losses in the *Windstream I* proceedings, the Claimant remains unsatisfied. It argues that the *Windstream I* Award (the “Award”) did not bring finality to the dispute, and claims, once again, damages of \$333 million based on a DCF methodology for its Project’s inability to proceed.

3. Despite the obvious overlap in its two claims,<sup>2</sup> the Claimant goes to lengths to assure the Tribunal that its new NAFTA claim does not seek to reopen or re-litigate matters already decided in the Award. It argues that its claims relate to “a series of measures which all occurred after the

<sup>2</sup> Canada set out its arguments on *res judicata*, collateral estoppel and abuse of process in its Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility, 12 May 2022 (“*Windstream II – Canada’s Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*”), ¶¶ 47-97.

*Windstream I* award,” giving rise to a new breach and additional loss.<sup>3</sup> It professes to have been “encouraged by the tribunal’s decision that the FIT Contract was still in force and Canada’s representations” that the moratorium was temporary,<sup>4</sup> and argues that it emerged from the proceedings with an expectation that its Project had a bright future.<sup>5</sup>

4. The Claimant’s arguments have no merit. All of its allegations of breach are based on the Claimant’s unreasonable expectations, which are founded on its own distorted and incorrect interpretation of the Award and by taking Canada’s representations during the *Windstream I* proceedings out of context. The six years that have passed have witnessed no post-Award measure that could possibly have fed any reasonable expectation that the Project would proceed. There has been no change to Ontario’s plan to move away from large, long-term FIT contracts, no change to the unfinished regulatory framework for offshore wind development, no lifting of the moratorium, no progress on the scientific work to lift it, and no change to the lacking approvals process for site access to Crown Land, which was the reason the Project entered *force majeure* in 2010.

5. Likewise, there have been no changes to the Claimant’s Project or FIT Contract up until its termination on February 18, 2020. The FIT Contract remained in a constant state of *force majeure*, the Project continued to lack financing, and it did not have any of the estimated 40 provincial and federal permits and approvals needed for the Project to proceed. Most importantly, neither Ontario nor the Independent Electricity System Operator (“IESO”) communicated any intention of reactivating or renegotiating the FIT Contract. On the contrary, when the Claimant met with the IESO, on January 12, 2017, the IESO bluntly confirmed that it would not extend the FIT Contract or waive its right to terminate it.

6. The Claimant’s Memorial reveals that it agrees with Canada that nothing has changed since the Award. First, the Claimant submits that the Government of Ontario did not undertake the work

<sup>3</sup> *Windstream Energy, LLC v. Government of Canada (II)* (UNCITRAL) Claimant’s Response to Canada’s Request for Bifurcation, 16 June 2022 (“*Windstream II – Claimant’s Response to Canada’s Request for Bifurcation*”), ¶ 2; Procedural Order No. 2, ¶¶ 45, 50.

<sup>4</sup> *Windstream II – Claimant’s Response to Canada’s Request for Bifurcation*, ¶ 6; Procedural Order No. 2, ¶ 11.

<sup>5</sup> *Windstream Energy, LLC v. Government of Canada (II)* (UNCITRAL) Claimant’s Memorial, 18 February 2022 (“*Windstream II – Claimant’s Memorial*”), ¶ 224.

necessary to lift the moratorium, and, second, that the moratorium has continued to apply to its Project. Third, it asserts that Ontario decided not to direct the IESO to reactivate or renegotiate the FIT Contract to reactivate the Project or put in on hold. In fact, these are the very measures that the Claimant presents as breaches of Articles 1105 and 1110 of the NAFTA.

7. In other words, what Canada sets out as the reason no value has been created in the Claimant's worthless FIT Contract and the reason no breach could have occurred, are the three measures that the Claimant relies on to allege a breach. The false dichotomy that the Claimant presents – that Ontario could either have breathed new life into the FIT Contract or breached the NAFTA – must be rejected. After all, Ontario had every right to reject the Claimant's lobbying to reactivate or renegotiate the FIT Contract after the *Windstream I* Award, without it amounting to a breach of the NAFTA.

8. The post-Award events of the past six years reveal a concerted but unsuccessful lobbying campaign by the Claimant to put value back into its FIT Contract. Its attempts to reactivate or renegotiate the FIT Contract fell flat, though it managed to forestall the termination of the FIT Contract for nearly three years. It did this by having its enterprise, Windstream Wolfe Island Shoals, Inc. ("WWIS"), bring a court application for an order restraining the IESO from acting on its termination right on March 27, 2017 (the "Domestic Application"). The Claimant's lobbying persisted over that three-year period, and to this day. But the Claimant's failed lobbying efforts do not amount to the development of its Project, and their failure to create value in the FIT Contract is not the result of a measure violating the NAFTA.

9. Far from acting in violation of the NAFTA, the Government of Ontario has responded to the Claimant's persistent lobbying efforts by consistently referring the Claimant to the IESO, the FIT Contract counterparty, but also to counsel dealing with the NAFTA dispute. Yet, Claimant's counsel never made known its skewed interpretation of the Award to Canada's counsel, even though they were in regular contact over the correction, redaction and payment of the Award. The Claimant waited until after December 6, 2016, when the tribunal was *functus officio*, to disclose its view that

the \$25 million in damages and the return of its \$6 million security deposit would not compensate it for the full value of its investments.<sup>6</sup>

10. As Canada has already laid out in its *Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, this claim constitutes an abuse of process. It should never have been brought. The Claimant may be unhappy with the damages it was awarded in *Windstream I*, but it cannot use the NAFTA as a means of further recovery. The Tribunal must also reject the claim because it is inadmissible according to the international law principles of *res judicata* and collateral estoppel. The Tribunal cannot accept the Claimant's improper view that reactivation or renegotiation was an obligation, as opposed to an "option" that was "still open", as the Award determined.<sup>7</sup> A finding otherwise would lead to an impermissible re-opening and overturning the Award's clear and final determinations. One determination was that the FIT Contract had no value at the time of the Award. Another determination was that the Claimant would be fully compensated for the fair market value of its investment once it received payment for the Award and its \$6 million security deposit, should the IESO decide to terminate the FIT Contract, as was its right as of May 5, 2017.

11. The Tribunal need look no further than Canada's arguments in its *Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility* to dismiss the claim in its entirety. However, even if the Tribunal feels the need to inquire further, the Claimant has also failed to establish the Tribunal's jurisdiction because its claim was filed outside the strict three-year limitation period found in NAFTA Articles 1116(2) and 1117(2).<sup>8</sup> These provisions require a Claimant to submit its claim to arbitration within three years of the investor or enterprise first acquiring knowledge of the alleged breach and loss or damage arising out of that breach. The Claimant had actual knowledge of all three of the measures that it now alleges as breaches of Articles 1110 and 1105 well in advance of the critical date of December 22, 2017 – three years before it filed its Notice of Arbitration ("NOA") in

<sup>6</sup> *Windstream II – Claimant's Memorial*, ¶ 27.

<sup>7</sup> **RL-109**, *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016 ("*Windstream I – Award*"), ¶¶ 290, 483.

<sup>8</sup> As this defence overlaps significantly with Canada's primary defence on the grounds of abuse of process, *res judicata*, and collateral estoppel, Canada did not raise it together with its *Request for Bifurcation*, leaving it in accordance with the Schedule to Procedural Order No. 1 to be argued in this submission. The Schedule provides for the filing of Canada's "Counter-Memorial on Merits and Damages, including any jurisdictional objections to which the Respondent did not Request Bifurcation with Witness Statement(s) and Expert Report(s)".

this proceeding. Indeed, all three measures were challenged in the *Windstream I* proceedings – clearly demonstrating the Claimant had knowledge of the alleged breach and loss outside the limitations period. As other NAFTA tribunals have consistently held, the continued application of a measure does not reset the limitation period. Therefore, the Claimant has squarely not met its burden to establish this Tribunal’s jurisdiction.

12. The Claimant’s position also fails on the merits. Its claim that its investment was indirectly expropriated contrary to Article 1110 defies logic. To begin with, the revenue stream of the FIT Contract, the only asset it has valued for the purposes of its damages submission, is not an investment capable of being expropriated. At the time of the alleged breach, the FIT Contract merely conferred contingent rights to a revenue stream. It did not entitle the Claimant to a demonstrable economic benefit. The Claimant’s expropriation claim fails on that ground alone.

13. The Claimant has also failed to prove that its investment or any part of it, including its Project, had any value at the time of the alleged breach. Its arguments to the contrary fly in the face of the position it advanced in *Windstream I* that its Project was “worthless” and “would not recover in value”,<sup>9</sup> as well as the tribunal’s determination of the same.<sup>10</sup> Nor did the Claimant’s investment gain value after the *Windstream I* Award. The Claimant’s attempt to rely on alleged “prospective partners” to demonstrate an increase in Project value is of no use to this Tribunal. Not a single one of these alleged partners provided a valuation of the Project, and as Canada’s expert Jérôme Guillet notes, the email exchanges relied on by the Claimant demonstrate the inherent lack of value these third parties saw in the Project. Ultimately, the measures complained of could not have substantially deprived the Claimant of its investment in contravention of NAFTA Article 1110 because its investment had no value on the date of the alleged expropriation.

14. Additionally, the measures did not interfere with any reasonable investment-backed expectations, since the Claimant’s expectation that its Project would proceed was wholly unreasonable. The Claimant was fully aware that Ontario would not be expeditiously lifting the moratorium. Even if Ontario had, the Project still could not be financed within the terms of the FIT

<sup>9</sup> *Windstream I – Claimant’s Memorial*, ¶¶ 2, 15.

<sup>10</sup> **RL-109**, *Windstream I – Award*, ¶¶ 379, 483.

Contract, which Ontario had no obligation to direct the IESO to reactivate or renegotiate, especially in light of the outcome of the *Windstream I* arbitration and the fact that the Claimant was already compensated fully. Further, the measures did not even amount to a contract breach, let alone have the character of an expropriation.

15. The Claimant's Article 1105 claim also fails. None of the three measures identified by the Claimant come close to breaching the high threshold contained in the customary international law minimum standard of treatment. The continued post-Award application of these measures, in the context of the Claimant's Project, being worthless, and the Claimant's \$6 million security deposit having since been returned to the Claimant, resulted in no violation. There was nothing manifestly arbitrary or discriminatory about Ontario's decision to keep the moratorium in place or not to direct the IESO to reactivate or renegotiate the FIT Contract. Nor did Ontario's actions involve any repudiation of a post-Award promise. The promises and statements upon which the Claimant professes to have relied, including Canada's statement that the moratorium is temporary, did not occur after the Award; they predated it. The Claimant cannot base its expectations on its unreasonable interpretation of the *Windstream I* Award either. In the end, all Ontario did following the Award was to allow the IESO to act within the terms of the FIT Contract.

16. Although the challenged measures did not amount to a breach of Canada's NAFTA obligations, even if they did, the Claimant is not entitled to any damages. The measures at issue were not the cause of any loss or damage to the Claimant's investment. Any loss or damage suffered by the Claimant arose out of the measures at issue in the *Windstream I* arbitration, for which the Claimant has been fully compensated. The Claimant was already awarded over \$25 million in damages in the *Windstream I* Award, and the IESO has returned the Claimant's \$6 million security deposit following the termination of the FIT Contract. Together, this amounts to the full fair market value of its investment, and all of the compensation the Claimant was owed. Any further compensation to the Claimant would result in an impermissible double recovery. Further, at the time of the alleged breach, the Claimant's investment was already valueless on its own admission. Any measures which post-date the *Windstream I* Award could not cause loss to an investment that already had no value.

17. Lastly, even if causation can be proven, the Claimant's chosen method of quantifying its damages, a DCF analysis, is wholly inappropriate for a pre-operational, first-of-a-kind Project that has not reached financial close. The Project simply faced too many risks and uncertainties. As the *Windstream I* tribunal already determined, a DCF analysis must be rejected. Further, the Claimant's market comparables analysis cherry-picks comparable projects to create a distorted and unrealistic valuation. A correct market comparables analysis, like the one undertaken by Canada's expert, Jérôme Guillet, demonstrates that but for the alleged breach, the Claimant's investment had the same value it did at the time of the Award. When appropriate deductions are then made for the compensation already paid to the Claimant pursuant to the Award, the Claimant is not entitled to any further damages in this arbitration.

## II. MATERIALS SUBMITTED BY THE RESPONDENT

18. Along with this Counter-Memorial and the attached exhibits and authorities, Canada submits the following documents:

- **Factual Chronology:** Annexed to this submission is a chronology of key events and communications relevant to the *Windstream II* arbitration.
- **Witness Statement of Michael Lyle:** Mr. Lyle is the General Counsel and Vice President of Legal Resources and Corporate Governance of the IESO. He is also the Chair of IESO's Technical Panel and Chief Reliability Compliance Officer. Since October 30, 2017, he has been responsible for overseeing the Contract Management group of the IESO, including the management of FIT contracts such as the one subject to this arbitration. Mr. Lyle was involved in the decision to terminate the WWIS' FIT Contract. He also provided an affidavit in the Domestic Application.
- **Expert Report of Jérôme Guillet:** Mr. Guillet's expert report confirms and provides updates to the Expert Report of Green Giraffe filed on behalf of Canada in the *Windstream I* arbitration, which Mr. Guillet also authored. In this report, Mr. Guillet concludes that, when correct market comparables are used, analysis demonstrates that the Project had no material value at the time of the alleged breach. Mr. Guillet also provides his expert opinion on the

development of offshore wind farms and their valuation at different stages of development. He also refutes the Secretariat's use of the DCF methodology for the Project.

### III. THE FACTS

#### A. Facts Leading to the *Windstream I* Award

##### 1. Windstream Wolfe Island Shoals, Inc. FIT Contract

19. Canada extensively laid out the facts that arose prior to the *Windstream I* Award in paragraphs 36-299 of its Counter-Memorial in the *Windstream I* proceeding. As a matter of efficiency, Canada summarizes some of the salient points in the following paragraphs.

20. On October 1, 2009, the Ontario Power Authority ("OPA") launched the Feed-in-Tariff ("FIT") Program.<sup>11</sup> On April 8, 2010, it announced that it would be offering 184 standard form FIT contracts for large-scale renewable energy projects totaling 2,500 megawatts ("MW").<sup>12</sup> One of these was for a 300 MW, 130-turbine offshore wind project,<sup>13</sup> offered to WWIS.

21. Only one other proponent, SouthPoint Wind, had applied for FIT contracts for offshore wind, but each of the projects it envisaged was 30 times smaller than WWIS' 300 MW project.<sup>14</sup> The fact that there were only two offshore wind applicants out of 930 applications to the FIT Program was telling. It was also telling that 35 other offshore wind projects had previously applied for Crown land access to conduct feasibility studies,<sup>15</sup> and, unlike WWIS, seven of those proponents had been granted Applicant of Record status by the time of the FIT program launch, and yet they did not apply for a FIT Contract.<sup>16</sup> The fact that there were so few applications, and the complete absence of applications

<sup>11</sup> **C-0208**, Report (OPA), Ontario's Feed-In Tariff Program - Backgrounder (April 8, 2010), p. 1; **RL-109**, *Windstream I – Award*, ¶ 97. For a detailed overview of the FIT Program, see Canada's Counter-Memorial in *Windstream I*, ¶¶ 19-30.

<sup>12</sup> **C-0206**, News Release (OPA), Ontario Announces 184 Large Scale Renewable Energy Projects (April 8, 2010). The Claimant has inaccurately characterized this OPA press release as a Ministry of Energy press release (*Windstream I – Claimant's Memorial*, ¶ 173).

<sup>13</sup> **C-0206**, News Release (OPA), Ontario Announces 184 Large Scale Renewable Energy Projects (April 8, 2010).

<sup>14</sup> **R-0093**, Ministry of Energy, Information Note - Offshore Wind Power (March 31, 2010), p. 2.

<sup>15</sup> **C-0219**, Presentation (MNR), Offshore Wind Power Development (April 19, 2010); **R-0110**, Ministry of the Environment, House Note – Offshore Windpower Environmental Registry Posting (May 26, 2010); RWS-Lawrence, ¶ 12.

<sup>16</sup> RWS-Lawrence, ¶ 12.

by world-leading developers for offshore wind, reflected the nascent, unknown, and highly speculative nature of offshore wind development in Ontario. Indeed, the lack of interest is not surprising given that the province had yet to establish the technology-specific rules and requirements for the regulatory approvals process applicable to offshore wind. It is especially not surprising given that a FIT contract made the applicant (referred to as the “Supplier”) responsible to acquire the necessary permits and bring its offshore wind project into commercial operation within four years.<sup>17</sup>

22. It was not the OPA’s responsibility to assess whether a project could be permitted or brought into operation. Its offers depended solely upon basic eligibility criteria, including evidence that the applicant had applied for site access and that it had identified a connection point with sufficient capacity for its project.<sup>18</sup> It is the supplier that had the responsibility under the FIT contract to ensure that its project would reach its Milestone Date of Commercial Operation (“MCO”).<sup>19</sup>

23. Thus, an offer of a FIT contract was not a guarantee that a project would proceed to development, let alone reach commercial operation. Accepting an offer, which not every proponent did, was no guarantee nor did it make it any more likely that a project would be permitted, constructed, or generate electricity.<sup>20</sup> In fact, of the FIT program’s 930 launch period applications, 184 FIT contract offers were made (including 47 onshore wind facilities), 181 offers were accepted, and, of those, only 124 have reached commercial operation (28 onshore wind facilities).<sup>21</sup>

24. The Claimant itself also recognized that “[o]f course it is true that a FIT contract did not ‘guarantee’ that a project would be built”,<sup>22</sup> which helps to explain why it was so reluctant to sign

<sup>17</sup> **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, Exhibit A - Technology-Specific Provisions (Type 8); The OPA later granted the Claimant and all future offshore wind projects an extra year to reach their MCO. *See* RWS-Cecchini, ¶ 13.

<sup>18</sup> **R-0077**, Ontario Power Authority, Feed-in Tariff Program Overview, v. 1.1, s. 5; **R-0091**, Ontario Power Authority, Feed-in Tariff Program Rules, v. 1.3, s. 5.

<sup>19</sup> When entering into a FIT Contract with the OPA, a Supplier expressly acknowledges that “time is of the essence to the OPA with respect to obtaining Commercial Operation [...] by the [MCO] set out in Exhibit A”. *See* **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, s. 2.5.

<sup>20</sup> **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, s. 2.4; **R-0429**, Ontario Power Authority website excerpt, “Notice to Proceed”.

<sup>21</sup> **RWS-Lyle** ¶19.

<sup>22</sup> *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Reply Memorial of the Claimant, 22 June 2015 (“*Windstream I – Claimant’s Reply Memorial*”), ¶ 79, referred to in **RL-109**, *Windstream I – Award*, ¶ 167.

back the contract. When the OPA informed WWIS of its FIT Contract offer,<sup>23</sup> it was clear that pursuant to Section 2.4 of the FIT Contract, WWIS would not be able to obtain a Notice to Proceed (“NTP”) and begin construction of its Project “until all necessary regulatory approvals and permits are obtained and provided to the OPA”, including the Renewable Energy Approval (“REA”), federal approvals and any other environmental and site plan approvals required.<sup>24</sup> Obtaining the necessary permits and approvals would prove problematic because “the requirements for offshore wind projects under the REA Regulation remained incomplete.”<sup>25</sup>

25. Prior to signing the FIT Contract, WWIS’ project manager, ORTECH, informed it of the challenges the Project would face, such as the “tight NTP and MCOD milestones under the FIT Contract” and the “uncertainty associated with REA permitting”.<sup>26</sup> ORTECH specifically cautioned that “the regulatory agencies do not have well-established guidelines for off-shore projects adding to the uncertainty of the REA process” and “many of the rules governing off-shore projects have yet to be written”.<sup>27</sup>

26. When the OPA issued WWIS an Offer Notice for its FIT Contract on May 4, 2010, with a MCOD of four years following the Contract Date,<sup>28</sup> WWIS delayed signing back the FIT Contract due to the known regulatory risks at the time. In a letter to the OPA, Ian Baines, president of WWIS, stated that WWIS was “struggling with considerable regulatory uncertainty caused by unknown setback requirements for off-shore wind, uncertainty in the site release process for Crown land, and uncertainty in the detailed requirements of the REA on the other.”<sup>29</sup> WWIS also asked the OPA whether the *force majeure* provisions of the FIT Contract would apply to the difficulties WWIS

<sup>23</sup> C-0207, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (April 8, 2010).

<sup>24</sup> C-0207, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (April 8, 2010), p. 1.

<sup>25</sup> RL-109, *Windstream I – Award*, ¶ 199. See also ¶¶ 132, 146, 196-199, 366, 376.

<sup>26</sup> C-0218, Letter from Roeper, Uwe (ORTECH) to Baines, Ian (WEI) (April 18, 2010).

<sup>27</sup> R-0105, ORTECH Consulting, Project Management Plan for the Wolfe Island Shoals Wind Farm, Rev. 0.; C-0246, Letter from Butler, Joanne (OPA) to Baines, Nancy (WWIS) (May 4, 2010); C-0348, Feed-in Tariff Contract, (OPA) (May 4, 2010); C-0348, Feed-in Tariff Contract, (OPA) (May 4, 2010).

<sup>28</sup> C-0348, Feed-in Tariff Contract, (OPA) (May 4, 2010).

<sup>29</sup> C-0262, Letter from Baines, Ian (WEI) to Killeavy, Michael (OPA) (May 16, 2010).

anticipated could occur in obtaining the permits, certificates, approvals, impact assessments, and licences required to develop and bring the Project into operation.<sup>30</sup>

27. Between May 17, 2010 to August 12, 2010, the Claimant sought five extensions to the signing of its FIT Contract, given that the Ministry of the Environment (“MOE”) had “not yet published its approvals process for offshore wind”.<sup>31</sup> On August 18, 2010, the OPA agreed to extend the MCOB for offshore wind projects from four to five years following the Contract Date through a revised Offer Notice and the addition of Schedule 2 Special Terms and Conditions to the Contract for WWIS.<sup>32</sup>

28. Despite these known risks, WWIS ultimately executed the FIT Contract on August 20, 2010.<sup>33</sup> The Contract Date start date remained May 4, 2010.<sup>34</sup> With the additional year granted by the OPA to reach commercial operation, WWIS’ MCOB became May 4, 2015.<sup>35</sup>

29. However, signing the FIT Contract did nothing to assuage WWIS’ concerns. Ten days after, Ian Baines reiterated to Windstream’s Board of Directors his concerns over the absence of “established guidelines for access and control of off-shore property rights available for renewable energy projects, adding to the uncertainty of the REA process.”<sup>36</sup>

<sup>30</sup> *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial on Jurisdiction, 20 January 2015 (“*Windstream I – Canada’s Counter-Memorial*”), ¶ 203; **C-0260**, Email from Killeavy, Michael (OPA) to Baines, Ian (WEI) (May 14, 2010), p. 1.

<sup>31</sup> **C-0265**, Email from Chamberlain, Adam (BLG) to Baines, Nancy (WEI) et al (May 17, 2010); **R-0107**, E-mail from Sheri Bizarro, Ontario Power Authority to Perry Cecchini and Bojana Zindovic, Ontario Power Authority (May 17, 2010); **C-0284**, Email from Baines, Nancy (WEI) to Bizarro, Sheri (OPA) (June 15, 2010); **C-0305**, Email from Bizarro, Sheri (OPA) to Baines, Nancy (WEI) (June 29, 2010); **C-0313**, Email from Butler, JoAnne (OPA) to Chamberlain, Adam (BLG) (July 8, 2010); **RL-109**, *Windstream I – Award*, ¶ 127.

<sup>32</sup> **C-0347**, Email from Baines, Nancy (WEI) to Baines, Ian (WEI) et al (August 19, 2010); **C-0349**, Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) (August 18, 2010); **C-0348**, Feed-in Tariff Contract, (OPA) (May 4, 2010), p. 1; **C-0243**, Schedule 2 (OPA), FIT Contract, Special Terms and Conditions Wind (OffShore) Facilities (May 4, 2010); **RL-109**, *Windstream I – Award*, ¶ 136.

<sup>33</sup> **C-0251**, Feed-in Tariff Contract (OPA) and WWIS (May 4, 2010); **RL-109**, *Windstream I – Award*, ¶ 137.

<sup>34</sup> RWS-Cecchini, ¶ 13; **RL-109**, *Windstream I – Award*, ¶ 137.

<sup>35</sup> **RL-109**, *Windstream I – Award*, ¶ 137.

<sup>36</sup> **RL-109**, *Windstream I – Award*, ¶ 196; **R-0138**, Windstream Energy LLC, Report to the Board of Directors, Windstream Energy Wolfe Island Shoals Wind Project, Eight Month Work Schedule and Budget (Aug. 30, 2010), p. 13.

## 2. WWIS' *Force Majeure* Under the FIT Contract

30. Knowing that the technology-specific rules and requirements for offshore wind projects had yet to be established and that public consultations were ongoing in this regard, WWIS turned to the Ministry of Natural Resources (“MNR”). It sought approval to swap its Crown land applications for new applications of land outside of the projected setback distances from noise receptors, property lines, and land-based transportation corridors. WWIS wrote to MNR to request site access at Charity Shoals, and on September 9, 2010, it met with MNR officials to discuss.<sup>37</sup>

31. During this meeting, MNR officials notified WWIS of the pending updates to technical guidance documents on coastal impacts, birds and bats, and reminded it that “there was no policy or procedure in place for offshore development”.<sup>38</sup> Officials also noted that testing facilities would not be permitted. Anchoring a platform, erecting a test turbine, or attaching any other test facility to the lake bed for more than sixteen days required a temporary land use permit, which WWIS could not obtain without first having approval.<sup>39</sup>

32. On December 10, 2010, WWIS submitted a claim for *force majeure* to the OPA due to its lack of crown land access.<sup>40</sup> WWIS took the position that an additional period of one year ought to be granted to it on account of the lack of regulatory assistance from MNR and MOE.<sup>41</sup>

33. The OPA subsequently determined that the delays faced by WWIS with respect to the Crown land site release process constituted a valid *force majeure* event commencing on November 22, 2010, and advised WWIS accordingly.<sup>42</sup> The OPA also indicated that it would determine the appropriate

<sup>37</sup> C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010); RL-109, *Windstream I – Award*, ¶ 139.

<sup>38</sup> C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010), p. 2.

<sup>39</sup> RWS-Lawrence, ¶ 42; C-0357, Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting (September 9, 2010).

<sup>40</sup> C-0408, Form of Notice of Force Majeure, OPA and WWIS (December 10, 2010) FIT Contract, OPA and WWIS (December 10, 2010); C-0406, Exhibit “A” Force Majeure Notice (December 10, 2010); RL-109, *Windstream I – Award*, ¶ 142.

<sup>41</sup> C-0408, Form of Notice of Force Majeure, OPA and WWIS (December 10, 2010) FIT Contract, OPA and WWIS (December 10, 2010), p. 8.

<sup>42</sup> C-0550, Letter from Killeavy, Michael (OPA) to Baines, Nancy (WWIS) (September 9, 2011).

relief to be granted following notice of termination of the *force majeure* event.<sup>43</sup> The FIT Contract remained in a status of *force majeure* up until its termination, which is discussed further below.

### 3. Ontario's Decision to Defer the Development of Offshore Wind Projects

34. On February 11, 2011, the Government of Ontario announced that “Ontario is not proceeding with any development of offshore wind projects until the necessary scientific research is completed and an adequately informed policy framework can be developed.”<sup>44</sup> This meant that applications for offshore wind projects in the FIT Program would no longer be accepted and that existing applications were suspended.<sup>45</sup> This announcement reflected the Minister of the Environment’s decision, based on the information available at the time and applying the precautionary principle, that Ontario lacked the science necessary to inform the regulatory changes required to allow large-scale offshore wind development to proceed while ensuring the protection of human health and the environment.

35. Ontario Government representatives invited the Claimant to meet with OPA representatives to reach a suitable arrangement within the existing framework of the FIT Contract to ensure that its Project was not terminated, but frozen,<sup>46</sup> and specifically pointed to contractual flexibility around *force majeure*, security deposits and the termination rights associated with *force majeure*.<sup>47</sup> No suitable arrangement was reached, and the Claimant ultimately abandoned the discussions with the OPA and pursued its first NAFTA claim.

### 4. The Claimant's First NAFTA Claim

36. On January 28, 2013, the Claimant filed a NOA pursuant to Articles 1116, 1117, and 1120 of the NAFTA. The Claimant argued that the Respondent had breached its obligations under Chapter Eleven of the NAFTA, specifically Articles 1105 (Minimum Standard of Treatment), 1110

<sup>43</sup> *Ibid.*; **RL-109**, *Windstream I – Award*, ¶ 157.

<sup>44</sup> See **C-0725**, Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Off-shore Wind Facilities - An Overview of the Proposed Approach, EBR Registry Number: 011-0089 (February 2, 2011); **C-0482**, Decision on Policy (MNR), Offshore Windpower: Consideration of Additional Areas to be Removed from Future Development (February 11, 2011); **C-0480**, Article, Ontario Rules Out Offshore Wind Projects (February 11, 2011); **RL-109**, *Windstream I – Award*, ¶ 147.

<sup>45</sup> These FIT applications were eventually cancelled. **C-0480**, Article, Ontario Rules Out Offshore Wind Projects (February 11, 2011).

<sup>46</sup> **RL-109**, *Windstream I – Award*, ¶¶ 149-160.

<sup>47</sup> *Ibid.*

(Expropriation and Compensation), 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment) and, to the extent that the OPA was a state enterprise as defined in Article 1505, Article 1503(2) (State Enterprises), through the following measures:

- (a) the imposition by the Ontario Government of the February 11, 2011 moratorium on offshore wind development;
- (b) the failure of the Ontario Government, or alternatively its state enterprise the OPA, to comply with the commitment made by the government, through Ministry of Energy and Infrastructure (“MEI”), to Windstream to take steps to ensure that Windstream’s investments would not be impacted negatively by the moratorium;
- (c) the failure of the Ontario Government, or alternatively its state enterprise the OPA, to keep Windstream “whole” following the moratorium, as it did with TransCanada following the cancellation of its project; and
- (d) the failure of the Ontario Government, or alternatively of its state enterprise the OPA, to award a solar project to Windstream rather than to Samsung.<sup>48</sup>

37. According to the Claimant, these alleged breaches “caused Windstream to lose the entire value of its investments”, entitling it to damages between \$375.5 million and \$486.6 million based on a DCF methodology.<sup>49</sup>

## **B. The *Windstream I* Award**

38. On September 30, 2016, the *Windstream I* tribunal released its Award. The tribunal held that Canada had breached its obligation under Article 1105 of the NAFTA. The tribunal also held that Canada had not breached Articles 1110, 1102 and 1103. The tribunal awarded the Claimant \$25,182,900 in damages to its investment based on a method of comparable transactions and a valuation that had been put forward by Canada’s expert, Green Giraffe.

### **1. Minimum Standard of Treatment (Article 1105)**

39. In the *Windstream I* arbitration, the Claimant contended that the imposition of a moratorium on the development of offshore wind was contrary to the representations and commitments made by Canada (i.e. Ontario and the OPA) when the Claimant invested in the development of offshore wind

<sup>48</sup> *Windstream I – Claimant’s Memorial*, ¶ 505.

<sup>49</sup> *Windstream I – Claimant’s Memorial*, ¶¶ 646, 681, 691.

in Ontario. It also alleged that Ontario failed to respect its alleged promise to ensure that the moratorium would not penalize the Claimant. In the end, the tribunal found that the imposition of the moratorium itself did not breach Article 1105. It noted that:

The Tribunal is unable to find that the Government of Ontario's decision to impose a moratorium on offshore wind development, or the process that led to it, were in themselves wrongful. The Tribunal notes that, while the conduct of the Ontario Government during the period leading up to the moratorium could have been more transparent, and although Windstream was kept in the dark as to the evolving policy position of the Government while Windstream continued to invest in the Project, the Government's evolving position was at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects.<sup>50</sup>

40. However, the tribunal held that it was the Government of Ontario's failure to address the contractual and legal limbo during its continued imposition of the moratorium that amounted to a breach of Article 1105. The tribunal found that, following the moratorium, "the Government on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium."<sup>51</sup> In its words:

Most importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium. While the regulatory framework continued to envisage the development of offshore wind, additional and more detailed regulations governing offshore wind specifically were never developed. The Government let the OPA conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so under the GEGEA (a power it had exercised when introducing the FIT program). As a result, as the negotiations between the OPA and Windstream failed to produce results, by May 2012 the Project had a [*sic*] reached a point at which it was no longer financeable. Nonetheless, the Government failed to clarify the situation, either by way of promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract, or by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy and terminating Windstream's FIT Contract in accordance with the applicable law. For these reasons, the Tribunal

<sup>50</sup> **RL-109**, *Windstream I – Award*, ¶ 376.

<sup>51</sup> **RL-109**, *Windstream I – Award*, ¶ 378.

finds that the Government's conduct vis-à-vis Windstream during the period following the imposition of the moratorium was unfair and inequitable within the meaning of Article 1105(1) of NAFTA.<sup>52</sup>

41. The tribunal found that the failure of the Government of Ontario to take “the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of the NAFTA.”<sup>53</sup> According to the tribunal, this clarity could have been provided by “promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract” or by “terminating Windstream's FIT Contract in accordance with the applicable law”.<sup>54</sup>

## 2. Expropriation (Article 1110)

42. In the *Windstream I* proceedings, the Claimant also alleged that Canada had breached Article 1110 of the NAFTA when it indirectly expropriated its investments (the Project and FIT Contract) through the imposition of the moratorium and Canada's alleged “failure to fulfill its promise [made during a conference call on 11 February 2011] to take positive steps to ensure that Windstream was not penalized as a result of [the moratorium].”<sup>55</sup> The Claimant alleged that both of these measures rendered its Project and the FIT Contract substantially worthless.<sup>56</sup>

43. The tribunal disagreed with the Claimant. It held that the Claimant's investment had not been “taken” because it had not been substantially deprived of its value, given that WWIS' security deposit had not been taken or rendered worthless.<sup>57</sup> It also determined that the Claimant's sunk costs did not “substantially exceed, if at all, the value of the security payment”, meaning that the \$6 million security deposit was substantial when compared to the overall value of the investment.<sup>58</sup> As the OPA could

<sup>52</sup> **RL-109**, *Windstream I – Award*, ¶ 379.

<sup>53</sup> **RL-109**, *Windstream I – Award*, ¶ 380.

<sup>54</sup> **RL-109**, *Windstream I – Award*, ¶ 379.

<sup>55</sup> *Windstream I – Claimant's Memorial*, ¶ 555.

<sup>56</sup> *Windstream I – Claimant's Memorial*, ¶ 555.

<sup>57</sup> **RL-109**, *Windstream I – Award*, ¶ 290.

<sup>58</sup> **RL-109**, *Windstream I – Award*, ¶ 291.

not terminate the Claimant's FIT Contract without the return of this security, the tribunal did not agree that the Claimant had been substantially deprived of its investment.<sup>59</sup> The termination of the FIT Contract (even prior to the OPA's s.10.1(g) right arising) would not have altered the tribunal's determination that the Claimant's investment had not been expropriated, provided the OPA or the IESO returned WWIS' security deposit.

44. The tribunal also found that the FIT Contract was still formally in force and had not been unilaterally terminated by the OPA, but it also held that the Project cannot be completed before its MCOD of May 4, 2015.<sup>60</sup> Although it stated that "it continues to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium",<sup>61</sup> it did not insinuate that Ontario had an obligation to make this happen.

### **3. National Treatment (Article 1102) and MFN Treatment (Article 1103)**

45. The Claimant further alleged that the Government of Ontario gave preferential treatment to TransCanada, Samsung, "other applicants for Crown lands" and "other developers of large-scale projects" contrary to Articles 1102 and 1103.<sup>62</sup> The *Windstream I* tribunal found no breach of these Articles and determined that Windstream had been treated the same as all other offshore wind projects, "which were the only proponents that could be said to have been in 'like circumstances'".<sup>63</sup>

### **4. Damages**

46. As a result of its finding that Canada had breached Article 1105, the *Windstream I* tribunal awarded the Claimant CAD \$25,182,900 in damages. The tribunal conclusively determined that, since no expropriation had been found, the Claimant was entitled only to the damage to its investment, rather than the full value of its investment, given that "the CAD 6 million letter of credit is still available to the Claimant and has not been lost or taken".<sup>64</sup> It therefore adjusted down the full value

<sup>59</sup> **RL-109**, *Windstream I – Award*, ¶ 290.

<sup>60</sup> **RL-109**, *Windstream I – Award*, ¶ 290.

<sup>61</sup> **RL-109**, *Windstream I – Award*, ¶ 290.

<sup>62</sup> *Windstream I – Claimant's Memorial*, ¶ 624.

<sup>63</sup> **RL-109**, *Windstream I – Award*, ¶ 414.

<sup>64</sup> **RL-109**, *Windstream I – Award*, ¶ 473.

of the investment by CAD 6 million.<sup>65</sup> However, it did not make adjustments to reflect the fact that the FIT Contract was still formally in place because it had not been reactivated or renegotiated.<sup>66</sup> Consequently, at the time of the Award, the FIT Contract itself was determined to have no value, not only by the Claimant but also by the *Windstream I* tribunal.<sup>67</sup>

47. The tribunal also held that the fact that the Project was in the early stage of development meant the DCF method of valuation was inappropriate.<sup>68</sup> It applied a comparable transactions methodology put forward by Canada,<sup>69</sup> valuing the Project in accordance with the range provided by Canada's expert, Green Giraffe, for similar projects in Europe.<sup>70</sup>

48. In calculating the value to be awarded to the Claimant, the tribunal noted:

While the Tribunal considers that this is the proper valuation of the Project, it should be kept in mind that, as determined above, the Claimant is not entitled to compensation for the full value of its investment: the Claimant has not lost the letter of credit, which is still in place, and the FIT Contract is still in force and could, in theory, be still revived and renegotiated if the Parties so agreed. Consequently, in order to quantify the damage caused by the Respondent's breach to the value of the Claimant's investment, a further adjustment must be made to reflect the value of the letter of credit (CAD 6 million). On the other hand, the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value. (It is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them.)<sup>71</sup>

<sup>65</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

<sup>66</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

<sup>67</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

<sup>68</sup> **RL-109**, *Windstream I – Award*, ¶ 475.

<sup>69</sup> **RL-109**, *Windstream I – Award*, ¶ 476.

<sup>70</sup> There are no comparable projects in the North American market. See **RL-109**, *Windstream I – Award*, ¶ 482.

<sup>71</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

49. As such, as of the date of the Award, the Tribunal valued Windstream's Project at a fair market value of \$31,182,900, less the \$6 million security deposit. As discussed further below, Canada paid the Award in full, with interest, on March 14, 2017.

### **C. Facts Following the *Windstream I* Award**

#### **1. Introduction**

50. By September 2016, Ontario's long-term energy plans had changed. It was moving away from long-term, fixed-payment, large-scale contracts, such as those offered to FIT applicants, in part because it had its complement of renewable energy. Coupled with the Claimant having been fully compensated for the impact the moratorium had on its investment by the *Windstream I* Award, Ontario had no need to direct the IESO to reactivate or renegotiate WWIS' FIT Contract. The Government of Ontario maintained its position that it would not lift the moratorium until the requisite scientific work was undertaken. However, there was also no need for Ontario to conduct the scientific work necessary to establish the technology-specific rules and requirements for offshore wind projects, amend existing regulations or lift the moratorium. It did not announce any timeline regarding the lifting of the moratorium either. It was not ready to assess and approve offshore wind projects in 2010; it is still not now.

51. It is within this context that Windstream found itself when it unsuccessfully attempted to reactivate its FIT Contract. As a result, on March 27, 2017, five weeks before the IESO was in a position to terminate the FIT Contract pursuant to s.10.1(g), the Claimant commenced a Domestic Application against the IESO to prevent the termination of the FIT Contract. Nearly three years later, it abandoned the Domestic Application to commence this NAFTA claim.

#### **2. The Context Around the Issuance, Finalization, and Payment of the *Windstream* Award (September 2016 – March 2017)**

##### **(a) The Amalgamation of the OPA and the IESO**

52. By the time the Award was issued, the OPA ceased to exist. On January 1, 2015, amendments to the *Electricity Act, 1998* came into force amalgamating the OPA and the IESO and transferring the

OPA's objects, powers, and contracts to a new entity continued under the IESO name.<sup>72</sup> The IESO is a statutory, not-for-profit, corporate entity without share capital, but is not an agent of the Crown.<sup>73</sup> It is composed of the members of its board of directors who are appointed by the Minister of Energy and act independently to oversee its business and affairs.<sup>74</sup>

53. The *Electricity Act, 1998* also sets out the Minister's directive powers over IESO's planning and procurement activities. It stipulates that the Minister may issue directives to the IESO setting out requirements respecting the implementation of the Ministry of Energy's Long-Term Energy Plan ("LTEP"); to enter into contracts for the procurement of, among other things, electricity supply, capacity or storage; and to undertake any request for proposal, any other form of procurement solicitation or any other initiative or activity that relates to electricity supply, capacity or storage.<sup>75</sup>

#### **(b) Ontario Stopped Pursuing Long-Term Electricity Contracts**

54. In September 2016, well after the OPA had been directed to stop entering into long-term FIT contracts over 0.5 MW,<sup>76</sup> the IESO released the Ontario Planning Outlook ("OPO"). The OPO stipulated that "Ontario [was] in a strong starting position to reliably address any of the demand outlooks" and that "Ontario's existing, committed and directed resources would be sufficient to meet the flat demand outlook".<sup>77</sup> Within a year, Ontario announced its move away "from relying on long-term electricity contracts" altogether, preferring a "market-based approach to reduce electricity supply costs".<sup>78</sup>

55. Up until that time, Ontario's renewable electricity resources had been obtained through the FIT Program but more recently through a competitive Large Renewable Procurement ("LRP")

<sup>72</sup> C-0003, *Electricity Act*, 1998, S.5(1), S.O. 1998, C. 15, Sched. A., s. 5(1).

<sup>73</sup> *Ibid.*, ss. 6(2), 8.

<sup>74</sup> *Ibid.*, ss. 5(3), 10.

<sup>75</sup> *Ibid.* ss. 25.30(1), 25.32(2)(5).

<sup>76</sup> C-0661, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 12, 2013).

<sup>77</sup> C-2035, IESO Ontario Planning Outlook – A technical report on the electricity system (September 1, 2016), p.8-9; The OPO, later referred to as the Annual Planning Outlook, is an independent, public report that sets out planning scenarios for Ontario's energy needs.

<sup>78</sup> C-2061, Ontario's Long-Term Energy Plan (2017), p. 35.

procurement process, which the Minister of Energy had directed the OPA to undertake.<sup>79</sup> This direction, which came in 2013, occurred at the same time the Minister of Energy directed the OPA to end the procurement of electricity from large-scale FIT projects. The first round of the LRP (LRP-I) was initiated in 2014 and resulted in the award of 16 contracts in March 2016.

56. On September 27, 2016, the Minister of Energy directed the IESO to suspend the planned LRP-II and the electricity from the Waste Standard Offer Program, given “Ontario’s strong energy position and in the interest of maintaining an affordable electricity system”.<sup>80</sup> This decision halted the further procurement of over 1,000 MW of solar, wind, hydroelectric, bioenergy, and energy from waste projects, saving Ontario “up to \$3.8 billion in electricity system costs”.<sup>81</sup>

### (c) The Uncorrected Award Is Released on September 30, 2016

57. On September 30, 2016, the *Windstream I* tribunal sent the uncorrected Award, dated September 27, to the disputing parties.<sup>82</sup> It underwent a 30-day period of review and corrections<sup>83</sup> and a longer period for redacting confidential information. The disputing parties’ counsel remained engaged with each other over this period, including with respect to remarks about the Award made by Claimant’s counsel at a conference in mid-October, which caused the press to pick up the story about the *Windstream I* Award.<sup>84</sup> The Award was ultimately finalized and released to the public on December 6, 2016.<sup>85</sup>

<sup>79</sup> **C-0661**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 12, 2013); **R-0769**, Letter from Bob Chiarelli (MOE) to Colin Anderson (OPA) Re: Moving Forward with Large Renewable Energy Projects (December 16, 2013).

<sup>80</sup> **R-0770**, Directive from the Minister regarding LRP II RFQ Process and EFWSOP Cancellation (September 27, 2016) (web version, accessed on December 7, 2022); **R-0771**, News Release, Ontario Suspends Large Renewable Energy Procurement, Decision Will Reduce Electricity Costs for Consumers (September 27, 2016); **R-0772**, Letter from Glenn Thibeault (MEI) to Bruce Campbell (IESO) Re: Directive from Minister (September 27, 2016).

<sup>81</sup> **R-0770**, Directive from the Minister regarding LRP II RFQ Process and EFWSOP Cancellation (September 27, 2016) (web version, accessed on December 7, 2022); **R-0771**, News Release, Ontario Suspends Large Renewable Energy Procurement, Decision Will Reduce Electricity Costs for Consumers (September 27, 2016); **R-0772**, Letter from Glenn Thibeault (MEI) to Bruce Campbell (IESO) Re: Directive from Minister (September 27, 2016).

<sup>82</sup> **R-0773**, Letter from Jennifer Nettleton (Permanent Court of Arbitration) to the Parties (September 30, 2016).

<sup>83</sup> UNCITRAL Rules, Article 38 provides for the correction of the Award within 30 days of its release to the parties.

<sup>84</sup> **R-0774**, E-mail from Rodney Neufeld (Global Affairs Canada) to Myriam Seers (Torys) (October 13, 2016).

<sup>85</sup> **R-0775**, E-mail from Claire de Tassigny Schuetze (Permanent Court of Arbitration) to the Parties Re: Confirming Publishing of Windstream Award (December 6, 2016).

58. The first matter that arose between counsel was the timing of the payment of the Award. Canada explained to the Claimant that it was in discussions with Ontario regarding payment, and would not be able to meet the Award's 30-day deadline for payment.<sup>86</sup> Canada also noted that it was still reviewing the Award, as it was still within the three-month period available to bring a set-aside application.<sup>87</sup> The Claimant brought a motion on October 18, 2016, raising its "serious doubt[s] as to whether Canada will comply with the Tribunal's order" to pay compensation within 30 days, and asking for an award setting interest for late payment at 2.7 %.<sup>88</sup> The disputing parties reached an agreement on a post-award interest rate of 2.7 percent, compounded annually.<sup>89</sup> As part of the agreement, the Claimant dropped its motion of October 18, 2016.<sup>90</sup>

59. At the same time, the Claimant was lobbying the Government of Ontario about its Project. In October and November 2016, Chris Benedetti, Windstream's Government Relations consultant, spoke to Andrew Teliszewsky, chief of staff to the Minister of Energy, and the Minister himself, to solicit a meeting.<sup>91</sup> Both the Minister and Mr. Teliszewsky responded that the Ministry's lawyers were still analyzing the *Windstream I* Award and given that, the Minister's office would not engage with Windstream at that time. Instead, the Claimant was referred to legal counsel for Canada in the NAFTA proceedings. The Claimant failed to reach out to Canada.

60. On October 17, 2016, news of the *Windstream I* Award, created by the remarks of Claimant's counsel at a conference and a news release that the Claimant issued,<sup>92</sup> gave rise to questions in the Ontario Legislative Assembly. In response to a question posed during legislative debate, the Premier

<sup>86</sup> **RL-109**, *Windstream I – Award*, ¶ 485; **R-0776**, E-mail exchange between Rodney Neufeld (Global Affairs Canada) and Myriam Seers (Torys) Re: Payment of Award (October 2016).

<sup>87</sup> **R-0776**, E-mail exchange between Rodney Neufeld (Global Affairs Canada) and Myriam Seers (Torys) Re: Payment of Award (October 2016); **R-0777**, Commercial Arbitration Act R.S.C., 1985, c. 17 (2nd Supp.), Article 34(3).

<sup>88</sup> **R-0778**, Letter to Dr. Heiskanen ad Members of Tribunal from John Terry (Torys) Re: Claimant's Motion (October 18, 2016).

<sup>89</sup> **R-0779**, Letter from Rodney Neufeld (Global Affairs Canada) to Myriam Seers (Torys) Re: Agreeing to Post-Award Interest (October 27, 2016).

<sup>90</sup> **R-0780**, Email from Veij Heiskanen (Lalive) to Myriam Seers (Torys) Re: Claimant's Withdrawal of Motion (October 27, 2016).

<sup>91</sup> CWS-Benedetti-2, ¶ 5 (a), (c) and (d).

<sup>92</sup> **R-0781**, PRNewswire, Press Release, "Windstream Energy awarded \$28 million in damages and costs for inequitable treatment by Ontario; largest NAFTA award against Canada" (October 13, 2016).

of Ontario, Kathleen Wynne, confirmed that the Government of Ontario was continuing to take a “cautious and reasonable approach to offshore wind to allow for the development of research and coordination”.<sup>93</sup> This was the reason “why there’s a moratorium on offshore wind development”.<sup>94</sup> The Premier also noted that “the Minister of the Environment is finalizing research on the issue, including decommission requirements and noise over water”, but she did not indicate how long that would take.<sup>95</sup> The two preliminary studies she mentioned had been commissioned in 2014,<sup>96</sup> and had always contemplated additional work, including relating to field measurements, validation testing, and potentially purchasing an offshore wind noise model.<sup>97</sup> The Premier confirmed Ontario’s commitment to clean energy, but until the necessary scientific work was undertaken, Ontario would not be lifting the moratorium.<sup>98</sup> The Minister of Energy at the time, Mr. Glenn Thibeault, similarly declared: “[t]he decision to place a moratorium on offshore wind is one our government still believes is correct, and that’s why we’re going to continue to take a cautious approach to offshore wind.”<sup>99</sup>

61. The Claimant’s lobbying efforts grew after this announcement. On October 26, 2016, Jessica Georgakopoulos of Navigator Ltd. registered as the Claimant’s lobbyist. Her objective was to “meet with the Ontario Government “to better understand and encourage resolution on the Ontario government’s offshore wind power moratorium, especially in relation to Windstream’s contract” and

<sup>93</sup> **C-2041**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, (October 17, 2016), p. 720.

<sup>94</sup> **C-2041**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, (October 17, 2016), p. 720.

<sup>95</sup> **C-2041**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, (October 17, 2016), p. 720.

<sup>96</sup> **R-0383**, Merx Opportunity Abstract, “Technical Evaluation to Predict Offshore Wind Farm Noise Impacts in Ontario” (Sep. 9, 2014) (“Noise Study RFP”); **R-0384**, Merx Opportunity Abstract, “Assessment of Offshore Wind Farm Decommissioning Requirements” (Sep. 9, 2014) (“Decommissioning Study RFP”).

<sup>97</sup> **R-0383**, Noise Study RFP.

<sup>98</sup> **C-2041**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, (October 17, 2016), p. 720.

<sup>99</sup> **C-2041**, Official Report of Debates (Hansard) Transcript – English, Legislative Assembly of Ontario, (October 17, 2016), p. 723.

“whether it will change in light of a NAFTA ruling against the Government of Canada related to this project.”<sup>100</sup> Two additional Navigator lobbyists registered on November 15, 2016.<sup>101</sup>

62. On November 23, 2016, the Claimant wrote to the Minister of the Environment to “request an update regarding the offshore wind-related research that the Ministry of the Environment is in the process of finalizing” and “on the anticipated timing of the release of the finalized research as well as the updated policy framework referred in the [February 11, 2011] decision notice”.<sup>102</sup> On December 23, 2016, the MOE responded to the Claimant with two desktop studies that were released to the public.<sup>103</sup> These studies, the same ones mentioned by the Premier in the Legislative Assembly, looked at noise propagation over water, and how to decommission and remove offshore wind turbines at the end of their life cycle without stirring up and polluting the lakebed. Media lines for the press gallery accompanying their release confirmed that the studies “provide real value in understanding some of the challenges [of freshwater offshore wind], they are but one of the many steps necessary to allow for all of the proper research to take place first”.<sup>104</sup> The media lines concluded that “[g]iven this reality, the responsible choice is to keep the moratorium on offshore wind development in effect until all the potential impacts are fully understood.”<sup>105</sup>

63. On November 28, 2016, David Mars wrote to the Minister of Energy to request a meeting with him to discuss the next steps with its offshore wind project and the impact of the delays caused by

<sup>100</sup> **R-0782**, Office of the Integrity Commissioner, "Lobbyists Registration", Search Results for Jessica Georgakopoulos (accessed on December 11, 2022).

<sup>101</sup> Andrew Galloro’s objective was equally to “meet with members of the government and opposition in order to better understand and encourage resolution on the Ontario government’s offshore wind power moratorium; especially, in relation to Windstream’s contract with the Ontario government for 300 MW of offshore wind power off the coast of Wolfe Island, and whether it will change in light of a NAFTA ruling against the Government of Canada related to this project”. Randi Rahamim’s objective was to: “Information sharing regarding Windstream energy’s contract with the Ontario government to supply offshore wind energy.” On February 28, 2017, Lanny Cardow of Navigator Ltd. registered as Windstream’s lobbyist with the same objective as Andrew Galloro. **R-0783**, Office of the Integrity Commissioner, "Lobbyists Registration", Search Results for Andrew Galloro, Randi Rahamim, and Lanny Cardow (accessed on December 11, 2022).

<sup>102</sup> **R-0784**, Letter from David Mars (WEI) to Glen. R. Murray (MOE) re Finalization of Offshore Wind Research (November 23, 2016).

<sup>103</sup> **R-0785**, Email from Sarah Paul (MOE) to David Mars (WEI) (December 23, 2016) (also found as Exhibit 80 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>104</sup> **R-0786**, E-mail from MECP Re: Offshore wind reports are now live (December 22, 2016) and DRAFT Offshore Wind Technical Studies Q&A (December 21, 2016).

<sup>105</sup> *Ibid.*

the need to finalize the research identified in the February 11, 2011 decision notice.<sup>106</sup> In its December 6, 2016 response to the Claimant, the Minister of Energy noted that “the Ministry of Energy is not in a position to discuss matters related to individual Feed-in-Tariff (FIT) contracts” and that the IESO “is the counterparty to all FIT contracts”.<sup>107</sup> It further indicated that “Ontario is carefully reviewing the Tribunal’s decision in the NAFTA Chapter 11 dispute”, since the period for set-aside had not yet expired,<sup>108</sup> so “it would not be appropriate to meet”.<sup>109</sup>

**(d) The Final Award’s Release on December 6, 2016**

64. On December 6, 2016, the tribunal publicly released the finalized Award and the tribunal, therefore, became *functus officio*.<sup>110</sup> The Award’s release brought further media attention.

65. In response to media questions about the newly released Award, Minister Thibeault became flustered. First, he incorrectly stated that a “government appeal of the Windstream decision could still happen”, and then when asked if the government could just let the wind farm be built, he said “Yes.”<sup>111</sup> Neither of those statements were accurate, since, as the same press article notes, the “ruling raises some questions about how the company’s project could still happen”.<sup>112</sup> It specifically noted the Claimant’s affirmation that the project had “effectively been cancelled” and the *Windstream I* tribunal’s observation that “even if the Respondent were to lift the moratorium, the Project could no

<sup>106</sup> **C-2049**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) (November 28, 2016).

<sup>107</sup> **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016) (also found as Exhibit 83 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>108</sup> **R-0777**, Commercial Arbitration Act R.S.C., 1985, c. 17 (2nd Supp.), Article 34(3).

<sup>109</sup> **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016) (also found as Exhibit 83 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>110</sup> **R-0775**, E-mail from Claire de Tassigny Schuetze (Permanent Court of Arbitration) to the Parties Re: Confirming Publishing of Windstream Award (December 6, 2016).

<sup>111</sup> **R-0788**, Article, “Energy minister says all options still being considered in offshore wind power case” (December 6, 2016) (also found as Exhibit 79 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>112</sup> **R-0788**, Article, “Energy minister says all options still being considered in offshore wind power case” (December 6, 2016) (also found as Exhibit 79 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

longer be built before the [IESO]’s right to terminate the FIT Contract would be triggered”.<sup>113</sup> However, little should be read into those comments by the Minister, since they were made in the context of his primary response that “we’re still considering all of our options.”<sup>114</sup> He said that “the important thing is for us to do our due diligence and get this right”, adding “that’s what the lawyers are doing”.<sup>115</sup>

66. On December 15, 2016, the Claimant wrote again to Minister Thibeault to request a meeting.<sup>116</sup> Its letter stated that “given that the ongoing moratorium is not within the sphere of the IESO’s responsibility or power to resolve, we do not believe that meeting with the IESO alone would be productive in achieving a resolution”. The Claimant referred specifically to the *Windstream I* Award, citing paragraphs 379 and 380, disclosing for the first time its skewed interpretation of the Award. It argued that its contractual limbo continued to “hold true” and that it was “for the Government of Ontario, including where necessary by way of directing the IESO (...) to resolve the situation that has prevailed due to the actions of the Government of Ontario such that [Windstream] may either move forward with the project or negotiate a reasonable resolution”.<sup>117</sup> The Minister responded on February 21, 2017, reiterating that “the Ministry is not in a position to discuss matters related to individual Feed-in-Tariff (FIT) contracts” and that the IESO, “as the administrator of the FIT program and counterparty to all FIT contracts, would be the appropriate contact on such matters”.<sup>118</sup>

<sup>113</sup> **R-0788**, Article, “Energy minister says all options still being considered in offshore wind power case” (December 6, 2016) (also found as Exhibit 79 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>114</sup> **R-0788**, Article, “Energy minister says all options still being considered in offshore wind power case” (December 6, 2016) (also found as Exhibit 79 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>115</sup> **R-0788**, Article, “Energy minister says all options still being considered in offshore wind power case” (December 6, 2016) (also found as Exhibit 79 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>116</sup> **C-2055**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) re Response to Ministry of Energy Letter of December 6, 2016 (December 15, 2016).

<sup>117</sup> **C-2055**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) re Response to Ministry of Energy Letter of December 6, 2016 (December 15, 2016).

<sup>118</sup> **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).

**(e) The IESO Refused to Reactivate or Renegotiate the FIT Contract**

67. On January 12, 2017, WWIS and the IESO met to discuss the FIT Contract.<sup>119</sup> In that meeting, the WWIS indicated that it was prepared to build the Project and did not want the FIT Contract to be terminated. In response to Perry Cecchini's comment that "IESO treats all contract holders the same", WWIS' counsel requested whether IESO had an appetite to consider WWIS "in a class by itself".<sup>120</sup> WWIS asked if its FIT Contract could be amended to prevent it from being terminated, since this would not set a "precedent for other projects".<sup>121</sup> The IESO indicated clearly that it would not waive its s.10.1(g) right to terminate the FIT Contract, and that it had no intention of extending any of the milestone dates under the FIT Contract.<sup>122</sup>

68. FIT Contract s. 10.1(g) provides that if, by reason of *force majeure*, commercial operation of the Project is delayed by more than 24 months after MCOB, either party may terminate the Contract without costs or payments of any kind, and the supplier's security deposit shall be returned. As explained by Perry Cecchini, who was the IESO's Manager, Contract Managements, and a witness in the *Windstream I* arbitration, s.10.1(g) is "an important tool available to the OPA/IESO to enforce [the] timelines and to ensure that the FIT contracts do not disrupt the efficient planning of electricity in Ontario and do not impose unnecessary costs on ratepayers by requiring the OPA/IESO to purchase electricity at a set price beyond the term contemplated in the FIT contract".<sup>123</sup>

69. On February 9, 2017, the IESO confirmed by letter that: i) it was "not prepared to amend the FIT Contract to provide an extension of the [MCOB] or the date that would be an event of default under Section 9.1(j)"; ii) it would not "waive any of its rights under the FIT Contract, including its rights to terminate the FIT Contract pursuant to Section 10.1(g)" and; iii) it had "not made a decision whether to exercise its termination right",<sup>124</sup> which was slated to arise in three months time.

<sup>119</sup> C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

<sup>120</sup> C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

<sup>121</sup> C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

<sup>122</sup> C-2067, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

<sup>123</sup> C-2477, Affidavit of Perry Cecchini (June 5, 2017), pp. 16-17; Michael Lyle has reviewed Perry Cecchini's Affidavit and his Witness Statement in *Windstream I*, and confirms the contents of those statements; RWS-Lyle ¶ 6.

<sup>124</sup> R-0662, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream), (February 9, 2017) (also found as Exhibit 82 in C-2471, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

**(f) The Claimant Filed for Enforcement of the Award Despite Having Reached an Agreement with Canada over Payment**

70. While the Claimant's letter-writing campaign to Ontario, and its meetings with the IESO were taking place, discussions between Canada and the Claimant were ongoing over payment of the Award. Since the Claimant had filed its claim, like in the current arbitration, under both NAFTA Articles 1116 and 1117, questions remained about which entity should be paid the damages.<sup>125</sup>

71. By the time the parties became aware of this issue, the tribunal was *functus officio*. As a result, they agreed that, in light of the reasoning of the Award, Canada would pay damages to Windstream Energy LLC, no later than July 8, 2017, and WWIS would waive its rights to seek any portion of the damages award.<sup>126</sup>

72. Just before formalizing this agreement, on February 21, 2017, counsel for the Claimant wrote to inform Canada that its client had "lost patience and confidence with this process and have asked us to file an enforcement application" in Ontario Superior Court, which it did that day.<sup>127</sup> At the same time, the Claimant issued a news release that included a quote from David Mars, indicating that the "Canadian government's failure to pay the award granted to Windstream by the NAFTA tribunal is unprecedented," and the "Canadian government has shown complete disregard for its NAFTA obligations."<sup>128</sup> Although the press release did not mention the agreement reached between the disputing parties on an interest rate, it did provide that the "award began to bear interest at a rate of 2.7 percent, compounded annually, from November 1, 2016 to the date of payment."<sup>129</sup>

<sup>125</sup> The NAFTA requires damage awards made pursuant to Article 1117(1) to be paid to the enterprise. See NAFTA Article 1135(2). The Claimant argued that, even though the Award did not specify the Article under which damages were awarded, payment should go to Windstream Energy LLC rather than WWIS. See **R-0790**, E-mail from Nick Kennedy (Torys) to Rodney Neufeld (Global Affairs Canada) Re: Payment (February 5, 2017).

<sup>126</sup> **R-0792**, E-mail Exchange between Rodney Neufeld (Global Affairs Canada) and John Terry, Myriam Seers, and Nick Kennedy (Torys) Re: Agreement to Payment (February 3, 2017).

<sup>127</sup> **R-0791**, E-mail Exchange between Rodney Neufeld (Global Affairs Canada) and John Terry, Myriam Seers, and Nick Kennedy (Torys) Re: Settlement Letter (February 21, 2017).

<sup>128</sup> **R-0793**, CNW, Press Release, "Windstream Energy files enforcement application with the Ontario Superior Court after Canada defaults on NAFTA award payment" (February 21, 2017).

<sup>129</sup> **R-0793**, CNW, Press Release, "Windstream Energy files enforcement application with the Ontario Superior Court after Canada defaults on NAFTA award payment" (February 21, 2017).

**(g) The Claimant Filed Its “Updated REA” with the Ministry of the Environment Regardless of the Moratorium and Its Inability to Reactivate or Renegotiate the FIT Contract**

73. On February 13, 2017, the Ministry of the Environment indicated again that the moratorium on offshore wind in Ontario would continue. Consistent with this, it also noted that it would “follow the impact of North America’s first offshore wind pilot project in Lake Erie – a project authorized by the State of Ohio”, in order to “have a better grasp of any potential environmental and health challenges posed by freshwater offshore wind developments”.<sup>130</sup>

74. Two days later, the Claimant submitted what it referred to as an “updated REA” to the MOE. It filed it to “fulfil its obligations under the FIT contract and bring the project into operation”,<sup>131</sup> despite the moratorium remaining in place, its Project not having site access and being in *force majeure*, and the IESO confirming it would not reactivate or renegotiate the FIT Contract.

75. According to Ian Baines, the “updated REA” represented its third submission to the MOE.<sup>132</sup> However, the Ministry of Environment had “no record of receiving [any previous] submissions”<sup>133</sup> and none had been brought to the *Windstream I* tribunal’s attention. The *Windstream I* Award provides that “the Claimant’s knowledge of the underdeveloped state of offshore REA requirements is likely the reason why the Claimant never formally initiated the process for applying for an REA – because it had difficulty discerning what information it would have to submit.”<sup>134</sup>

<sup>130</sup> **R-0794**, The Globe and Mail, Article, “Ontario signals moratorium on offshore wind projects will continue for years” (February 13, 2017); **C-2072**, “Ontario signals offshore wind moratorium will continue for years” – Chat News Today (February 13, 2017).

<sup>131</sup> **C-2073**, Letter from Ian Bains (WWIS) to Ministry of Environment and Climate Change (MOECC) – “Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130-602” (February 15, 2017), p. 2.

<sup>132</sup> **C-2073**, Letter from Ian Bains (WWIS) to Ministry of Environment and Climate Change (MOECC) – “Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130-602” (February 15, 2017), p.2.

<sup>133</sup> **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017) (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn October 23, 2018 with exhibits).

<sup>134</sup> **RL-109**, *Windstream I – Award*, ¶ 196.

76. In response to Ian Baines' suggestion that a "considerable amount of work done to move the Project forward during the previous seven years",<sup>135</sup> the MOE responded that the "documents that you describe as studies [...] are not the reports required to be prepared under O.Reg. 359/09 as part of an application for a REA".<sup>136</sup> This is because the documents submitted were a repackaging of the expert reports that the Claimant had filed to make its damages claim in the *Windstream I* arbitration.<sup>137</sup> The MOE's letter also provided that Ontario still had not "developed an offshore wind policy framework on approval requirements" nor "a process for obtaining Crown land site access under the *Public Lands Act*" and that, as a result, it was not able to "confirm whether or when Ontario will be revisiting the February 2011 decision".<sup>138</sup> In essence, nothing had changed with respect to the regulatory framework.

77. Without site access, which was the very reason the Claimant's FIT Contract was in *force majeure* to begin with, the Claimant did not have access to the proposed Project site. It could not undertake the studies or perform the work necessary, even if there had been an approvals framework in place and it knew which studies needed to be undertaken. Regarding the studies submitted by Windstream, the MOE's response indicated:

The Ministry has not published any final guidelines or policies specific to offshore wind. As a result, the Ministry does not endorse any of the studies that you have conducted in the absence of any provincial framework on offshore wind. Any studies you carry out are entirely at your own risk. The studies may not meet the standards set out in the provincial guidelines and policies should these be developed.<sup>139</sup>

<sup>135</sup> **C-2073**, Letter from Ian Bains (WWIS) to Ministry of Environment and Climate Change (MOECC) – "Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130-602" (February 15, 2017).

<sup>136</sup> **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017) (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn October 23, 2018 with exhibits).

<sup>137</sup> Other than WWIS' wind, grid connection and geophysical studies completed in 2010-2011, the remainder of its "studies" were completed as part of its Memorial or Reply Memorial in *Windstream I*. See **C-2075**, ORTECH Status Report: Summary of Engineering and Environmental Studies in Support of the Wolfe Island Shoals Offshore Wind Farm (15 February 2017), Table 1, pp.10-14.

<sup>138</sup> **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017) (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn October 23, 2018 with exhibits).

<sup>139</sup> **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017) (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn October 23, 2018 with exhibits).

78. Finally, the MOE provided a list of aboriginal communities for the purposes of section 14 of O. Reg. 359/09, as requested by the Claimant. It also specified that “doing so does not imply approval or support of this project or the contents of the draft [project development report] or any other studies that [Windstream has] prepared”. As per usual business practices, the MOE would write to these aboriginal communities regarding the Project, and would “advise them that the policy framework governing offshore wind has yet to be developed and that no decisions have been made granting [Windstream] access to Crown land under the *Public Lands Act* for [its] proposed project location.”<sup>140</sup>

79. In addition to being unable to take material steps to advance its Project, the Claimant did not take any of the steps it could have either. The next steps for a proponent to advance a project would have been to consult with aboriginal communities, hold public meetings, publish drafts of the prescribed technical reports and seek the input of other regulatory agencies, both provincial and federal, in order to be eligible to apply to the MOE for a REA.<sup>141</sup> However, the Claimant did not follow through on any of those steps.

#### **(h) The Claimant Received Payment for the Award**

80. On March 14, 2017, Windstream Energy LLC received payment of the *Windstream I* Award plus the agreed-upon interest. As a result, Windstream withdrew its enforcement application.<sup>142</sup>

### **3. The Claimant’s Efforts to Postpone the Termination of Its FIT Contract while also Attempting to Find a Partner (March 2017 - November 2017)**

#### **(a) The Claimant’s Domestic Application to Prevent IESO from Terminating the FIT Contract**

81. The IESO’s termination rights under s. 10.1(g) of the FIT Contract arose on May 5, 2017. Six weeks prior to this, however, and only 13 days after payment of the *Windstream I* Award by Canada, WWIS filed its Domestic Application against the IESO, on March 27, 2017. It requested, *inter alia*,

<sup>140</sup> **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017) (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn October 23, 2018 with exhibits).

<sup>141</sup> **R-0796**, Renewable Energy Approvals Under Part V.0.1 of the Act (Ontario Regulation 359/09), ss.15-31.

<sup>142</sup> **R-0797**, Notice of Discontinuance between Windstream Energy Inc. and the Attorney General of Canada (April 3, 2017).

an order restraining the IESO from exercising any of its termination rights under the FIT Contract and a declaration that the IESO could not rely on the moratorium, or pre-moratorium delays, to exercise any of those termination rights.<sup>143</sup>

82. On the same day, WWIS counsel wrote to the IESO requesting confirmation that it would “not take any steps to terminate our client’s FIT contract before the application is decided”.<sup>144</sup> Given that it had not made the decision on whether to terminate the FIT Contract on or after May 5, 2017, the IESO agreed to defer its decision pending the hearing of the Domestic Application.<sup>145</sup> However, it reserved its s.10.1(g) termination right if circumstances changed, upon a 30-day notice.<sup>146</sup> Over the course of those proceedings, the IESO met with WWIS on several occasions with their respective legal counsel, including for the cross-examinations of Ian Baines and David Mars, and Perry Cecchini and Michael Killeavy, Director, Contract Management, IESO.<sup>147</sup>

**(b) The Claimant’s Unsuccessful Attempts to Sell or Find a Partner to Develop the Project**

83. On March 1, 2017, the Claimant announced the launch of its official website to market its Project.<sup>148</sup> Despite having no expectation it would renegotiate or reactivate its FIT Contract or that the moratorium would be lifted, the website provided that “Windstream’s 300 MW Wolfe Island offshore wind power project was approved through the Government of Ontario’s Feed-in-Tariff (FIT) program” and it “will create 300 MW of energy through 130 turbines”.<sup>149</sup> The website also noted the Project’s “significant delays” due to a “politically-motivated moratorium”, and that a “NAFTA

<sup>143</sup> **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits.

<sup>144</sup> **R-0663**, Letter from John Terry (Torys) to John Rattray and Michael Boll (IESO) (March 27, 2017).

<sup>145</sup> **C-2083**, Email from Melanie Ouanounou (Goodmans LLP) to Emily Sherkey (Torys LLP) re WWIS/IESO (April 28, 2017).

<sup>146</sup> **C-2083**, Email from Melanie Ouanounou (Goodmans LLP) to Emily Sherkey (Torys LLP) re WWIS/IESO (April 28, 2017).

<sup>147</sup> **C-2478**, Transcript from the Cross-Examination of Ian Baines held on October 2, 2017; **C-2479**, Transcript from the Cross-Examination of Perry Cecchini held on October 3, 2017; **C-2480**, Transcript from the Cross-Examination of Michael Killeavy held on October 4, 2017; **C-2481**, Transcript from the Cross-Examination of David Mars held on October 10, 2017.

<sup>148</sup> **R-0798**, Windstream's Twitter Page (accessed on November 28, 2022).

<sup>149</sup> **R-0799**, Windstreamenergy.ca homepage (accessed on December 8, 2022).

tribunal awarded Windstream \$28 million for damages and legal costs – the largest NAFTA award against Canada – and declared Windstream’s contract to be valid and in force.”<sup>150</sup>

84. In May of 2017, the Claimant engaged KeyBanc Capital Markets Inc. to act as its exclusive financial advisor and placement agent,<sup>151</sup> as the Claimant thought “there could be great value and benefit to finding a partner as part of [its] efforts to move [the Project] forward”.<sup>152</sup> Despite having testified during the *Windstream I* proceedings that the “entire investment in WWIS, the Project and the FIT Contract is now substantially worthless” and that “no prudent equity or debt investor [...] would want to join this Project”,<sup>153</sup> David Mars engaged with as many companies as he could in an effort to find an investor or a partner for the Project. KeyBanc assisted with these efforts starting in June 2017, managing to execute only five NDAs by July 2017 to be able to provide access to a newly opened data room with detailed documents.<sup>154</sup>

85. A few months later, KeyBanc presented a Marketing Update Report to Windstream. The report indicated that a total of seven companies had executed full NDAs and had been given access to the data room. The report further indicated that “the marketing process had been paused due to the delay in the *force majeure* hearing. As a result, other high-value buyers ( [REDACTED] [had] not been seriously engaged”.<sup>155</sup> It is not clear what hearing this document referred to, or how the Project’s situation was any different at that point than it was in June 2015. That is when David Mars testified that “I have reviewed our revised project plan and [it] still holds true” that “our contract

<sup>150</sup> **R-0800**, Windstreamenergy.ca Project description page (accessed on December 8, 2022).

<sup>151</sup> Note that the Claimant has referred to KeyBanc as its “investment bankers” since April 2010. The *Windstream I* Memorial provides that “from April 2010 to February 2011, in conjunction with its investment bankers, KeyBanc, Windstream met with numerous different parties in relation to the Project. The delay in entering into a transaction revolved almost solely around finalization of the set-back rules”, ¶ 230.

<sup>152</sup> **C-2085**, KeyBanc Capital Markets Engagement Letter (“KBCM – Windstream I EL – Fully Executed) (May 1, 2017) (Confidential); CWS-Mars-3, ¶ 12; CER-Secretariat, ¶ 4.15.

<sup>153</sup> CWS-Mars-1 ¶¶ 106-107.

<sup>154</sup> **C-2104**, Email from Tyler Nielsen (KeyBanc) to David Mars (WEI) re Windstream Buyers (July 6, 2017) (Confidential).

<sup>155</sup> **C-2122**, WWIS Marketing Update (KeyBank Capital Markets) Presentation (September 28, 2017) (Confidential).

was effectively worthless” by May 2012.<sup>156</sup> After all, the FIT Contract had not been reactivated or renegotiated and the moratorium was still in place and, as the potential partners recognized.<sup>157</sup>

**4. The Agreement to Adjourn the Domestic Application to Allow IESO to Make its Decision on Whether to Terminate the FIT Contract (November 2017 – March 2018)**

86. On or around October 31, 2017, the IESO and WWIS agreed to an adjournment of the Domestic Application (the “Adjournment Agreement”) to allow the IESO to make a decision regarding the exercise of its termination right pursuant to s. 10.1(g) of the FIT Contract. The Adjournment Agreement provided that WWIS would be permitted to serve a Notice of Return to continue the Domestic Application in order to challenge the IESO’s decision once it was taken.<sup>158</sup> Following this, the IESO made the decision to terminate the FIT Contract and this decision was communicated to WWIS on February 20, 2018.

**(a) IESO’s Requests for Information to Inform Its Decision on Termination**

87. As a part of its decision-making process leading up to the termination of the FIT Contract, the IESO requested certain information from WWIS, as well as other information WWIS considered relevant to inform the IESO’s determination. Over the next three months, WWIS sent information to the IESO that had been produced for, or was the subject of, the *Windstream I* arbitration.

<sup>156</sup> CWS-Mars-2, ¶ 65.

<sup>157</sup> *Windstream II – Memorial*, ¶¶ 224-225, 229: “As explained by Mr. Mars, it was clear that there was a lot of interest in the Project, but that most of these parties required clarity regarding the moratorium before they would pay a significant upfront purchase price or substantially invest in the Project”; *See also* ¶ 228 (f) [REDACTED] and (g) [REDACTED]

[REDACTED] In addition, the Claimant’s January 2018 application to Canada’s Emerging Renewable Power Program for support for its Project was rejected as not being ready for funding under Phase 1. *See C-2164*, Letter from Natural Resources Canada to Ian Baines (WWIS) Subject: ERPPPOW-16 Windstream Wolfe Island Shoals Offshore Wind Farm (July 13, 2018).

<sup>158</sup> **R-0664**, Adjournment Agreement between IESO and Windstream, (October 31, 2017).

88. On November 10, 2017, the IESO requested that WWIS provide, within 14 days, information related to the Project.<sup>159</sup> This included communications the Claimant had had with Ontario after July 14, 2017, concerning the moratorium and the site release process, the Project’s reasonably anticipated hourly energy production profile based on ten years of measured wind data, the Project schedule, a list of all outstanding municipal, provincial and federal approvals and permits, a list of any impact assessments required to obtain grid access, an outline of any anticipated delays or impediments and any other information WWIS considered relevant to the IESO’s determination under s. 10.1(g).<sup>160</sup>

89. On November 29, 2017, WWIS provided a list of the work it had undertaken as part of its *Windstream I* damages claim and other documents submitted as evidence in that dispute in an attempt to satisfy the requests of the IESO. It also indicated that it anticipated it would bring its Project into commercial operation within 63 months of the end of the *force majeure*.<sup>161</sup> This was despite the Claimant only having 60 months (5 years) to reach commercial operation under the terms of the FIT Contract.

90. As part of its response, WWIS made the following proposal:

- Allow the IESO to exercise whatever rights it has under section 10.1(g) of the FIT Contract if the FIT Contract has remained under *force majeure* as a result of the current Force Majeure event and the Moratorium for the period beginning November 22, 2010, and ending on the date that is ten years from the date the IESO accepts WWIS’ offer;
- Not exercise whatever rights it has under s. 10.1(g) of the FIT Contract during the ten-year period described in the bullet above; and
- Leave in place its fully-cash collateralized \$6 million Completion and Performance Security in accordance with the terms of the FIT Contract.<sup>162</sup>

<sup>159</sup> **C-2125**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) re Feed-in Tariff Contract #F-000681-WIN-130-602 (the “FIT Contract”) between the Independent Electricity System Operator (the “IESO”) and Windstream Wolfe Island Shoals Inc. (the “Supplier”) dated May 4, 2010 (November 10, 2017).

<sup>160</sup> **C-2125**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) re Feed-in Tariff Contract #F-000681-WIN-130-602 (the “FIT Contract”) between the Independent Electricity System Operator (the “IESO”) and Windstream Wolfe Island Shoals Inc. (the “Supplier”) dated May 4, 2010 (November 10, 2017).

<sup>161</sup> **R-0801**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (November 29, 2017) (also found as Exhibit B in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>162</sup> **R-0801**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (November 29, 2017) (also found as Exhibit B in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

91. In essence, after having already been in *force majeure* for seven years, WWIS asked the IESO to allow its Project to remain in *force majeure* for another ten years without the ability of the IESO to terminate the FIT Contract as it had the right to do under its terms. The second part of the WWIS' proposal required the IESO to also agree to extend the MCOB to reflect the length of the moratorium and the length of the *force majeure* event in the event the moratorium is lifted and the *force majeure* event ended within the ten-year "stand-still period". In other words, WWIS asked for 10 more years of *force majeure* protection and if the moratorium were lifted within those 10 years, WWIS asked that the FIT Contract's MCOB be extended well beyond the 10-year period as well.

92. Over the following weeks, the IESO and WWIS communicated about the anticipated hourly energy production profile, which WWIS was never in a position to provide. In a December 15, 2017 letter, the IESO noted that WWIS had provided an anticipated hourly energy production profile based on a single 24-hour period of wind data, but to review the energy production profile required measured wind data for at least a one-year period, preferably longer. If WWIS did not have this data, it was asked to provide an explanation.<sup>163</sup> Further, the IESO requested copies of certain correspondence between WWIS and the MOE.<sup>164</sup>

93. WWIS provided copies of the correspondence requested by the IESO on December 22, 2017.<sup>165</sup> Regarding the hourly energy production profile, WWIS indicated that multiple wind resource assessments from Long Point and Wolfe Island were provided to the IESO but that providing the anticipated hourly energy production profile, as requested by the IESO, was not common practice

<sup>163</sup> **R-0803**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (December 15, 2017) (also found as Exhibit C in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>164</sup> **R-0803**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (December 15, 2017) (also found as Exhibit C in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>165</sup> **R-0802**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) with attachments (December 22, 2017) (also found as Exhibit D in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

and would require significant work.<sup>166</sup> It also provided a letter enclosing a screening level estimate of the hourly energy output averaged across the year.<sup>167</sup>

94. On January 8, 2018, the IESO responded to WWIS, explaining the basis for its anticipated hourly energy production profile request and informed WWIS that in the absence of the requested information, it would use proxy data in any modelling it decided to do in relation to this resource.<sup>168</sup> As always, the IESO reiterated the reservation of its unfettered right under s. 10.1(g), thereby rejecting the Claimant's offer for its *force majeure* to be extended another ten years.

95. The parties held a call on January 15, 2018.<sup>169</sup> Following this, WWIS wrote to acknowledge it had no energy production profile, to express its concern that the requested profile would be too imprecise, and to complain that the IESO had not clearly explained why it was required.<sup>170</sup>

96. On January 25, 2018, the IESO wrote to WWIS in order to address "a number of errors in [its] letter". The IESO stated it had explained on the conference call why the data was required, that David Mars understood this, and that at no time had the IESO agreed that it was not normal practice for developers to produce this type of data. Finally, it indicated that the wind resource assessments provided by WWIS were, in their vast majority, not directly relevant to the IESO's modelling. Since WWIS had confirmed it could not provide the information requested, the IESO advised it would proceed with proxy data for its modelling based on the single 24-hour period provided by WWIS.<sup>171</sup>

97. On January 31, 2018, WWIS wrote to provide the IESO with a series of unredacted internal correspondence and other documents generated by Ontario between January and February 2011,

<sup>166</sup> **R-0802**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) with attachments (December 22, 2017) (also found as Exhibit D in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>167</sup> **R-0802**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) with attachments (December 22, 2017) (also found as Exhibit D in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>168</sup> **R-0804**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (January 8, 2018) (also found as Exhibit E in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>169</sup> **R-0806**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (January 25, 2018) (also found as Exhibit G in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>170</sup> **R-0805**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (January 23, 2018) (also found as Exhibit F in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>171</sup> **R-0806**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (January 25, 2018) (also found as Exhibit G in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

which allegedly showed “it was the intention of the Ontario government that the FIT Contract be ‘frozen’ for the duration of the Moratorium, that WWIS’ FIT Contract should be insulated from the effects of the Moratorium and that WWIS should be kept ‘whole’ for the duration of the Moratorium”.<sup>172</sup> WWIS submitted that these documents, the very documents used as evidence in the *Windstream I* arbitration, were “highly relevant to IESO’s determination about whether or not to exercise its termination right”.<sup>173</sup>

**(b) IESO’s Decision to Terminate the FIT Contract**

98. On February 16, 2018, Michael Killeavy presented a s. 10.1(g) Analysis Memorandum (the “Memorandum”) to Michael Lyle, IESO’s General Counsel and Vice-President, Legal Resources and Corporate Governance, recommending that [REDACTED]

[REDACTED]<sup>174</sup> The Contract Management’s analysis was guided by [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>176</sup>

99. Based on the application of the [REDACTED]  
[REDACTED] to WWIS’ situation, Contract Management’s recommendation was that [REDACTED]  
[REDACTED]<sup>177</sup> It noted that the *force majeure* event commenced in November 2010, three months after the contract execution, prior to WWIS ever obtaining access to its proposed site, that WWIS had yet to commence the approval process, and still had to go through a path that involved first completing the Crown land site access process and obtaining over 40 approvals or

<sup>172</sup> **R-0807**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (January 31, 2018) (also found as Exhibit H in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>173</sup> *Ibid.*

<sup>174</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>175</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>176</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>177</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

permits from over ten different government entities.<sup>178</sup> It also noted that [REDACTED] and the fact that “through the NAFTA arbitration, Windstream [had] been awarded compensation for the lost value of its investment”.<sup>179</sup>

100. The Memorandum further noted that [REDACTED]  
[REDACTED]  
[REDACTED]. The WWIS’ FIT Contract was [REDACTED]  
[REDACTED] 180

101. The IESO further considered whether [REDACTED]  
[REDACTED]  
[REDACTED] 181

102. In coming to its decision, the IESO also considered [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] 182

103. Finally, the Memorandum indicated the IESO [REDACTED]  
[REDACTED]

<sup>178</sup> The Memorandum also refers to a February 2, 2018 Ministry of Environment letter saying that it was “not in a position to confirm whether or when Ontario will be revisiting the February 2011 decision” and that “at this point in time, Ontario has not developed an offshore wind policy framework on approval requirements, nor has it developed a process for obtaining Crown land site access under the Public Lands Act”. See **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>179</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>180</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>181</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>182</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

[REDACTED]

It also noted the OPA [REDACTED]

[REDACTED]

[REDACTED]

183

104. [REDACTED]

184 [REDACTED]

[REDACTED] On February 20, 2018, the IESO informed WWIS of its decision to exercise its termination right.<sup>185</sup> As a result, and in accordance with the Adjournment Agreement made between the IESO and WWIS in the context of the Domestic Application<sup>186</sup>, WWIS then had 60 days to notify the IESO if it wanted to recommence the Domestic Application for the purpose of challenging that decision, in which case the termination decision would not be effective pending the outcome of that proceeding.

105. Three days later, the Claimant requested that the IESO provide all documents and information it considered in making its termination decision.<sup>187</sup> In a March 2, 2018 letter, the IESO noted that, under the Adjournment Agreement, the delivery of such information was only contemplated once WWIS had decided whether to object to the termination decision. Nonetheless, it provided WWIS with a list of the principal documents and information it considered in making its decision.<sup>188</sup>

##### **5. The Claimant Further Delayed the Termination of the FIT Contract (April 2018 – January 2020)**

106. Pursuant to the Adjournment Agreement, the IESO's decision to terminate the FIT Contract did not take effect immediately. The Claimant's decision to challenge the decision within Ontario

<sup>183</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>184</sup> **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

<sup>185</sup> **R-0665**, Letter from Michael Lyle (IESO) to Nancy Baines (Windstream Wolfe Island Shoals Inc.) (February 20, 2018).

<sup>186</sup> **R-0664**, Adjournment Agreement between IESO and Windstream, (October 31, 2017).

<sup>187</sup> **R-0809**, Letter from Nancy Baines (WWIS) to Michael Lyle (IESO) (February 23, 2018) (also found as Exhibit N in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

<sup>188</sup> **R-0810**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS) with attachments (March 2, 2018) (also found as Exhibit O in **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits).

courts ultimately delayed the effectiveness of the IESO's termination decision by almost two years, during which time Ontario elected a new government, and the Claimant kept up its lobbying efforts.

**(a) Continuation of the Claimant's Domestic Application**

107. On April 20, 2018, WWIS delivered a Notice of Return to recommence its Domestic Application against the IESO challenging its decision to exercise its s. 10.1(g) termination right.<sup>189</sup> The Amended Notice of Application sought “a declaration that the IESO may not rely on the Moratorium or the pre-Moratorium delays (...) to exercise any of its termination rights under the FIT Contract because its decision to do so is inconsistent with the IESO's obligations to exercise a discretionary contractual right in good faith and in a manner consistent with Canada's international obligations under [NAFTA]”.<sup>190</sup>

108. The Domestic Application progressed slowly due to procedural issues<sup>191</sup> around WWIS' reliance on hearsay evidence<sup>192</sup> and concerns about Michael Killeavy, a former IESO employee, acting as a witness for WWIS.<sup>193</sup> Once those issues were resolved,<sup>194</sup> WWIS' Domestic Application sat idle from March 2019 until WWIS abandoned it in January 2020.<sup>195</sup>

<sup>189</sup> **C-2482**, Cost Submissions of IESO dated July 24, 2020, p. 231, Attachment I.

<sup>190</sup> **C-2482**, Cost Submissions of IESO dated July 24, 2020, p. 231, Attachment I.

<sup>191</sup> After WWIS and the IESO set out a schedule, which saw the IESO file Michael Lyle and Perry Cecchini's affidavits on June 1 and June 5, 2018, (**C-2477(1)** and **C-2477(2)**), the parties revised their schedule repeatedly. After sitting on the IESO's affidavit evidence for over four months, and unilaterally delaying the submission of its own evidence, WWIS ultimately filed its supplementary affidavit evidence of David Mars (**C-2474**), Jason Chee-Aloy (**C-2476**), and Michael Killeavy (**C-2475**) in October 2018.

<sup>192</sup> **R-0811**, E-mail from Melanie Ouanounou (Goodmans) to John Terry and Nick Kennedy (Torys) Re: Windstream v. IESO – Motion to Strike (December 21, 2018).

<sup>193</sup> **R-0669**, E-mails regarding Confidentiality Undertaking between Melanie Ouanounou (Goodmans) and Nick Kennedy (Torys) (2019).

<sup>194</sup> WWIS agreed to remove the hearsay from the Mars' affidavit, and on March 18, 2019, the IESO agreed to proceed, provided that: i) Michael Killeavy confirmed his understanding that the IESO's privileged information was covered by his existing and ongoing confidentiality obligations under the *IESO Code of Conduct*; and ii) neither Torys (WWIS' counsel) nor Windstream had sought or received any privileged information either directly or indirectly from Michael Killeavy, nor would they do so in the future. Torys never provided the requested confirmations to the IESO. The IESO counsel wrote to remind WWIS of its willingness to proceed in April and September 2019, but to no avail. WWIS' Domestic Application sat idle from March 2019 until it was abandoned by WWIS in January 2020. **R-0669**, E-mails regarding Confidentiality Undertaking between Melanie Ouanounou (Goodmans) and Nick Kennedy (Torys) (2019).

<sup>195</sup> **R-0669**, E-mails regarding Confidentiality Undertaking between Melanie Ouanounou (Goodmans) and Nick Kennedy (Torys) (2019).

109. In the meantime, the Claimant continued to lobby the Ontario Government. A new Windstream lobbyist registered with the Integrity Commissioner's Office in October 2018,<sup>196</sup> and in follow-up to his meeting requests, David Mars met with Mitchell Davidson and Patrick Sackville of the Ontario Premier's Office on October 12, 2018.<sup>197</sup> Two new lobbyists registered with the Integrity Commissioner's office in May and June 2019.<sup>198</sup>

110. On November 26, 2019, the Claimant wrote to the then Minister of Energy, Greg Rickford, threatening a new NAFTA claim if he did not "exercise [his] powers, both formal and informal, to direct the IESO to take certain steps regarding WWIS' Feed-in Tariff Contract with the IESO".<sup>199</sup> In response, the Minister of Energy informed the Claimant that "Ontario [had] decided not to intervene in this matter" and reiterated that "it is more appropriate for [Windstream] to engage with the IESO, given that the IESO is the administrator of the FIT program and counterparty to all FIT contracts, and [Windstream's] request relates to Windstream's individual FIT contract".<sup>200</sup>

#### (b) The Ford Government Election

111. On June 7, 2018, seventeen months after the IESO told WWIS it would not reactivate or renegotiate the FIT Contract, and almost 4 months after the IESO communicated its decision to terminate the FIT Contract, Ontario elected a new Government, replacing Premier Wynn's Liberals with Premier's Fords Conservatives.

<sup>196</sup> **R-0812**, Office of the Integrity Commissioner, "Lobbyists Registration", Search Results for Patrick Harris (accessed on December 8, 2022). On October 2, 2018, Patrick Harris of Rubicon Strategy Inc. registered as Windstream's lobbyist with the objective of "Working with the government to modify the types of resources that are procured for energy going forward based upon the current contracts".

<sup>197</sup> **R-0813**, E-mail exchange between David Mars (White Owl Capital) and Patrick Sackville (Ontario Premier's Office) (October 2018).

<sup>198</sup> Kory Teneycke and Christine Simundson of Rubicon Strategy Inc. registered on May 28, 2019 and June 25, 2019, respectively, as Windstream's lobbyist with the objective of "Working with the government to modify the types of resources that are procured for energy going forward based upon the current contracts". **R-0814**, Office of the Integrity Commissioner, "Lobbyists Registration", Search Results for Kory Teneycke and Christine Simundson (accessed on December 9, 2022).

<sup>199</sup> **C-2249**, Letter from David Mars (WEI) to Greg Rickford (MEI) re Windstream Wolfe Island Shoals offshore wind energy facility (November 26, 2019).

<sup>200</sup> **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).

112. On July 5, 2018, the Minister of Energy issued a directive to the IESO to immediately take all steps necessary to “(i) wind down all FIT 2, 3, 4 and 5 contracts where the IESO [had] not issued a Notice to Proceed; and (ii) wind down all LRP I contracts where the IESO [had] not notified the LRP I proponent that all Key Development Milestones have been met”.<sup>201</sup> Pursuant to that directive, the Minister of Energy directed the IESO to wind down over 750 renewable energy contracts for projects that had not yet reached significant development milestones.<sup>202</sup>

113. On December 6, 2018, Ontario passed the *Green Energy Repeal Act*, which:

repealed the *Green Energy Act, 2009* and re-introduced conservation and energy efficiency initiatives in the *Electricity Act, 1998*;

changed the *Planning Act* to restore municipal authority over siting renewable energy projects; and,

enhanced authority in the *Environmental Protection Act* to prohibit the issuance of renewable energy approvals including where demand for electricity is not demonstrated.<sup>203</sup>

114. On May 30, 2019, the REA regulation (O. Reg. 359/09) was amended to among other matters, add eligibility requirements related to electricity demand. Following the amendments, considering Ontario’s strong supply situation, current and future applicants for renewable energy approvals need to show that the proposed project fulfills a need for the electricity produced.<sup>204</sup>

<sup>201</sup> **R-0815**, Directive from the Minister of Energy to IESO Regarding the Wind Down of Feed-in Tariff and Large Renewable Procurement Contracts (July 13, 2018).

<sup>202</sup> **C-2162**, Order in Council and Directive of the Minister of Energy, Northern Development and Mines to the IESO entitled “Wind Down of Feed-in Tariff and Large Renewable Procurement Contracts”; **C-2163**, Ontario Newsroom News Release entitled “Ontario to Cancel Energy Contracts to Bring Hydro Bills Down” (July 13, 2018).

<sup>203</sup> **R-0816**, Amendments to the Renewable Energy Approvals Regulation (Ontario Regulation 359/09), Environmental Registry of Ontario (June 11, 2019).

<sup>204</sup> **R-0816**, Amendments to the Renewable Energy Approvals Regulation (Ontario Regulation 359/09), Environmental Registry of Ontario (June 11, 2019).

## 6. The Termination of the FIT Contract

115. On January 15, 2020, WWIS submitted a Notice of Abandonment of the Domestic Application to pursue a NAFTA claim against the Government of Canada.<sup>205</sup> On January 22, 2020, Windstream delivered a Notice of Intent to submit a claim to arbitration against the Government of Canada.

116. On February 18, 2020, the IESO notified WWIS of the effective termination of its FIT Contract:

In light of the Supplier's abandonment of the [Domestic Application] pursuant to the Notice of Abandonment dated January 15, 2020 and pursuant to the terms of the Adjournment Agreement, the termination of the FIT Contract is effective on February 18, 2020. All Completion and Performance Security will be returned or refunded (as applicable) to the Supplier.<sup>206</sup>

117. On February 20, 2020, the IESO directed that Windstream's bank cancel the \$6 million security deposit,<sup>207</sup> which was returned to WWIS on March 26, 2020.<sup>208</sup>

118. On November 2, 2020, Windstream delivered a NOA to the Government of Canada. Due to an error on part of the Claimant, the NOA was properly filed on December 22, 2020.

119. On October 13, 2022 and November 14, 2022, over nine months after the filing of their Memorial in this arbitration, David Mars wrote to the Minister of Energy with a request to meet "as expeditiously as possible" to discuss options for Windstream to build a 300-600 MW offshore wind project in eastern Lake Ontario.<sup>209</sup> The Ministry's Legal Director responded on November 29, 2022 that as the "correspondence relates to an ongoing NAFTA claim initiated by Windstream [...] Ontario is not in a position to comment further, and respectfully declines your meeting invitation" and that

<sup>205</sup> **C-2482**, Cost Submissions of IESO dated July 24, 2020, Tab 1, Schedule J.

<sup>206</sup> **C-2289**, Letter from Michael Lyle (IESO) to Nancy Baines re Feed-in Tariff Contract F-000681-WIN-130-602 between IESO and the Supplier dated May 4, 2010 - Notice of Termination pursuant to Section 10.1(g) (February 18, 2020).

<sup>207</sup> **C-2291**, Letter from Daryl Yahoda (IESO) to Bank of Montreal Global Trade Operations re Irrevocable Standby Letter of Credit No. BMT0494154OS (February 20, 2020).

<sup>208</sup> **C-2082**, Windstream Payouts (April 21, 2017-December 31, 2020).

<sup>209</sup> **R-0817** Letters from David Mars (WEI) to Todd Smith Todd (Minister of Energy) (October 13 and November 14, 2022).

any future correspondence “should occur through Canada as counsel of record or directly to me”.<sup>210</sup> The Claimant has failed to reach out to Canada and has not yet responded to the Legal Director.

#### **IV. WINDSTREAM HAS FAILED TO ESTABLISH THE TRIBUNAL’S JURISDICTION UNDER NAFTA CHAPTER ELEVEN**

##### **A. Summary of Canada’s Objections to Jurisdiction**

120. Canada has already demonstrated how Windstream’s claims must fail due to the international law principles of *res judicata*, collateral estoppel, and abuse of process, and due to the Claimant’s failure to show that it incurred *prima facie* damages.<sup>211</sup> As such, the Tribunal’s analysis should end there. However, even if the Claimant can surpass the hurdles presented in Canada’s *Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, the Tribunal’s jurisdictional analysis does not end there. As explained in the sections that follow, the Claimant has completely ignored the preclusive effect of the strict three-year limitation periods under Articles 1116(2) and 1117(2) of the NAFTA, which also serves as a prerequisite to engaging Canada’s consent to arbitrate under Article 1122(1). In accordance with the Procedural Order No. 1,<sup>212</sup> Canada did not raise its objection to the Tribunal’s jurisdiction *ratione temporis* for bifurcation purposes, leaving it to be argued as part of this Counter-Memorial.

##### **B. The Tribunal Has No Jurisdiction *Ratione Temporis* under Articles 1116(2) and 1117(2) as the Notice of Arbitration Was Not Submitted Within the Three-Year Limitation Period**

###### **1. Summary of Canada’s Position**

121. As Canada has already demonstrated,<sup>213</sup> an investor bringing a claim under NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions precedent to commencing

<sup>210</sup> **R-0789**, Letter from Donna Glassman (MOE) to David Mars (WEI) Re: Response to Letters of October 13, October 20, and November 14 (November 29, 2022).

<sup>211</sup> *Windstream II - Canada’s Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility* ¶¶ 47-133.

<sup>212</sup> The Schedule to Procedural Order No. 1 provides for the filing of Canada’s “Counter-Memorial on Merits and Damages, including any jurisdictional objections to which the Respondent did not Request Bifurcation with Witness Statement(s) and Expert Report(s)”.

<sup>213</sup> *Windstream II – Canada’s Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*.

arbitration and that the tribunal has jurisdiction over the dispute.<sup>214</sup> One such pre-condition is the time limitation requirements of Article 1116(2) and 1117(2).<sup>215</sup> As the tribunals in *Resolute*, *Apotex*, *Mesa*, *Bayview*, *Methanex*, *Grand River*, and *Gallo* have all found, the Claimant bears the burden of proving that its claims are timely in order to ground jurisdiction over a claim.<sup>216</sup> The limitation period in

<sup>214</sup> The corollary of a finding that Article 1116(1) constitutes a jurisdictional requirement is that, unless all conditions under Article 1116(1) are satisfied to the requisite standard of proof, the Tribunal has no jurisdiction to hear the present claim. This fundamental principle was also confirmed in *Mesa v. Canada* where the tribunal held that “[i]t is for the Claimant to establish the factual elements necessary to sustain the Tribunal’s jurisdiction over the challenged measures.” In so holding, the *Mesa* tribunal followed earlier NAFTA tribunals, including those in *Apotex v. United States*, *Methanex v. United States*, *Bayview v. Mexico*, *Grand River v. United States*, and *Gallo v. Canada*, which have consistently affirmed that it is for the claimant to establish that its claims fall within the scope and coverage of NAFTA Chapter Eleven and within the tribunal’s jurisdiction. **RL-006**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013 (*Apotex – Award on Jurisdiction*), ¶ 150, citing **RL-135**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009 (“*Phoenix Action – Award*”), ¶¶ 58-64: (summarizing previous decisions, and concluding that “if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase.”); **RL-009**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007 (“*Bayview – Award*”), ¶¶ 63, 122: (finding that “Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven” and rejecting Claimant’s submission that “Respondent bears the burden of demonstrating that the Tribunal should not hear the claim”); **CL-054**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011 (“*Grand River – Award*”), ¶ 122: (holding that “Claimants must [...] establish an investment that falls within one or more of the categories established by that Article [1139]”); **RL-136**, *Vito G. Gallo v. The Government of Canada* (UNCITRAL) Award, 15 September 2011 (“*Gallo – Award*”), ¶ 328: (stating that “[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.”)

<sup>215</sup> **RL-024**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award and Dissenting Opinion, 16 December 2002 (“*Feldman – Award*”), ¶¶ 46-47: (“In its Award, the Feldman tribunal noted that it identified five “preliminary jurisdictional questions” on which the parties were to submit written pleadings, including “[w]hether the Respondent was entitled to raise any defense on the basis of the time limitation set forth in NAFTA Article 1117(2).”)

<sup>216</sup> See **CL-153**, *Mesa Power Group v. Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”), ¶ 236; **RL-006**, *Apotex – Award on Jurisdiction*, ¶ 150; **RL-135**, *Phoenix Action – Award*, ¶¶ 58-64: (summarizing previous decisions, and concluding that “if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase.”); **RL-009**, *Bayview – Award*, ¶¶ 63, 122: (finding that “Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven” and rejecting claimant’s submission that “Respondent bears the burden of demonstrating that the Tribunal should not hear the claim”); **CL-054**, *Grand River – Award*, ¶ 122: (holding that “Claimants must [...] establish an investment that falls within one or more of the categories established by that Article [1139]”); **RL-136**, *Gallo – Award*, ¶ 328: (stating that “[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.”). See also *Windstream I – Canada’s Counter-Memorial*, ¶ 60 and fns. 135 and 136, where it affirms that the principle that a claimant bears the burden of proving all facts necessary to establish a tribunal’s jurisdiction is well established in international investment arbitration more generally and cites to numerous cases where this principle has been recognized.

Articles 1116(2) and 1117(2) begins to run when a claimant first acquires knowledge of the alleged breach and loss or damage arising out of that breach.<sup>217</sup>

122. The Claimant has failed to demonstrate that it first acquired such knowledge within the three years before it submitted its claim to arbitration. Despite submitting that it is challenging “a series of measures which all occurred **after** the *Windstream I* Award”,<sup>218</sup> each of the three measures that the Claimant challenges as breaches of Article 1110 and 1105<sup>219</sup> were adopted more than three years prior to the critical date of **December 22, 2017**, i.e. three years before the Claimant properly filed its NOA on December 22, 2020.<sup>220</sup> Every alleged breach arose, and the Claimant had knowledge of such, prior to that date: i) Ontario’s decision to continue to apply the moratorium; ii) its failure to complete the work necessary to lift the moratorium, and iii) its failure to direct the IESO to amend the FIT Contract to ensure that the Project would be “deferred”, “frozen” and “on hold” for the duration of the moratorium.<sup>221</sup> Although the Claimant has pointed to the termination of the FIT Contract as a measure within the meaning of Article 1101 of the NAFTA,<sup>222</sup> it does not challenge

<sup>217</sup> It is undisputed that the present dispute was submitted to arbitration on 22 December 2020, making 22 December 2017 the critical date for purposes of determining the Claimant’s compliance with NAFTA Articles 1116(2) and 1117(2) (the “Critical Date”). See also **RL-138**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Corrected Interim Award, 30 May 2017 (“*Spence – Corrected Interim Award*”), ¶ 245: (“In the face of this extensive pre-1 January 2009, pre-10 June 2010 conduct, the Tribunal considers that Claimants have failed to show [...] that they first acquired, or must be deemed to have first acquired, knowledge of the breaches and losses that they now allege only after 10 June 2010. The appreciations that lie at the core of every allegation that the Claimants advance can be traced back to pre-10 June 2010 conduct, and indeed to pre-1 January 2009 conduct, by the Respondent. The claims thus fall at the first acquisition of knowledge requirement of Article 10.18.1.”); **RL-110**, *Mobil Investments Canada v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018 (“*Mobil II – Decision*”), ¶ 147: (“the Tribunal accepts Canada’s argument that the fact that the limitation period begins to run when a would-be claimant first acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot first acquire knowledge of the same matter on more than one occasion.”)

<sup>218</sup> As noted by the Tribunal in Procedural Order No. 2, ¶ 45; *Windstream II – Claimant’s Response to Canada’s Request for Bifurcation*, ¶ 2.

<sup>219</sup> *Windstream II – Claimant’s Memorial*, ¶ 458.

<sup>220</sup> See *Windstream II – Claimant’s Memorial*, Arguments on NAFTA Article 1105 or Article 1110.

<sup>221</sup> *Windstream II – Claimant’s Memorial*, ¶ 7, 10, 18, 428. *Windstream II – Notice of Arbitration*.

<sup>222</sup> *Windstream II – Claimant’s Memorial*, ¶ 428.

this decision of the IESO as a breach of either Article 1105 or 1110, nor did its damages crystallize out of this measure.<sup>223</sup>

123. As explained below, each of these measures had already been put before the *Windstream I* tribunal as early as 2012 and Windstream claimed damages as a result, thus demonstrating the Claimant's actual knowledge of the alleged breaches and loss or damage arising out of those breaches, well before the critical date.<sup>224</sup> The continued application of these measures following the *Windstream I* Award does not re-set the limitation periods, nor does it cure the clear jurisdictional defects of the claim.

## 2. NAFTA Articles 1116 and 1117 Impose a Strict Three-Year Time Limitation Period for Submitting a Claim to Arbitration

124. Article 1116(2) provides that “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.”<sup>225</sup>

125. The standard articulated in NAFTA Articles 1116(2), like 1117(2), is a strict limitation period that forms one of the fundamental bases of Canada's consent to arbitration disputes under NAFTA Chapter Eleven.<sup>226</sup> This is consistent with the very purpose of limitation period provisions, which

<sup>223</sup> As the Claimant itself argued in the *Windstream I* proceedings, its damages had already crystallized at the time of the *Windstream I* proceedings. See *Windstream I – Claimant's Reply Memorial*, ¶ 483 and *Windstream I – Claimant's Memorial*, ¶ 318.

<sup>224</sup> Throughout this submission when referring to the time when the Claimant incurred loss or damage sufficient to trigger the limitations period in Articles 1116(2) and 1117(2), Canada does not agree or concede that the Claimant has incurred any compensable damage under NAFTA Chapter Eleven.

<sup>225</sup> NAFTA Article 1116(2) (“An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.”)

<sup>226</sup> **RL-024**, *Feldman – Award*, ¶ 63: (“[T]he Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension [...], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years [...]). See also **RL-137**, *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility (January 30, 2018) (“*Resolute – Decision on Jurisdiction and Admissibility*”), ¶ 153: (the Resolute tribunal stating when referring to Article 1116(2), “this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period [...]); **RL-166**, *Grand River Enterprises Six Nations and others v. United States of America* (UNCITRAL) Decision on Jurisdiction, 20 July 2006 (“*Grand River – Decision on Jurisdiction*”), ¶ 29; **RL-006**, *Apotex – Award on Jurisdiction*, ¶ 327.

provide legal predictability and certainty by ensuring that States are not forced to defend stale claims for which evidence may no longer be readily available or which require witnesses to recollect events long past.<sup>227</sup> The limitation period provisions ensure that any allegation of a breach of a NAFTA obligation will be addressed promptly rather than allowed to linger. This, in turn, creates certainty and stability for both NAFTA Parties and their investors.<sup>228</sup>

126. NAFTA Chapter Eleven tribunals have described the three-year limitation period as a “clear and rigid” defence, and held that the time limitation is “not subject to any suspension, prolongation or other qualification”.<sup>229</sup> For example, in *Resolute v. Canada*, the tribunal held it agreed with the NAFTA Parties that “this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period”.<sup>230</sup> The tribunal in *Mobil II v. Canada* also noted that this requirement plays a very important role within the scheme of Chapter Eleven, guaranteeing for all three States a degree of certainty and finality and that early NAFTA arbitrations made “clear the importance which [the NAFTA Parties]... attach to that guarantee while the awards themselves highlight that the limitation period is “clear and rigid”.<sup>231</sup>

127. The NAFTA Parties do not consent to arbitrate claims submitted to arbitration after the expiry of the three-year limitation period, and a tribunal has no jurisdiction *ratione temporis* over such

<sup>227</sup> This is consistent with one of the NAFTA’s objectives: to create effective procedures for the resolution of disputes. See NAFTA, Article 102(1)(e).

<sup>228</sup> **RL-110**, *Mobil II – Decision*, ¶ 146. See also **RL-167**, *The Renco Group, Inc. v. Republic of Peru* (UNCITRAL) Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 226: (where the tribunal, in discussing the equivalent limitation period provision in the United States-Peru Trade Promotion Agreement, remarked: “The Parties seem to agree, as does this Tribunal, that one of the objectives of the Treaty is to provide a predictable legal framework, and that Article 10.18.1 in particular aims at providing legal predictability by protecting State respondents against late claims, not least to ensure that claims will be resolved when evidence is reasonably available and fresh.”)

<sup>229</sup> **RL-024**, *Feldman – Award* (emphasis added and citation omitted). See also **RL-168**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016 (“*Corona – Award on Preliminary Objections*”), ¶¶ 192, 199 citing *Feldman – Award* with approval in interpreting equivalent the three-year limitations period in the DR-CAFTA as “strict” and not susceptible to suspension or tolling. **RL-166**, *Grand River – Decision on Jurisdiction*, ¶¶ 103-104.

<sup>230</sup> **RL-137**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 153.

<sup>231</sup> **RL-169**, *Mobil Investments Canada Inc. v. Canada (II)* (ICSID Case No. ARB/15/6) Award, 4 February 2020 (“*Mobil II – Award*”), ¶ 146.

untimely claims.<sup>232</sup> Indeed, several NAFTA Chapter Eleven tribunals have dismissed claims on the basis of the Claimant’s failure to comply with this strict three-year limitation period.<sup>233</sup>

### 3. The Limitation Period Begins on the Date the Claimant First Acquires or Should Have First Acquired Knowledge of the Alleged Breach and that It Has Incurred Loss or Damage

128. The limitation period begins running from the date on which the claimant “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] has incurred loss or damage.”<sup>234</sup> A claimant cannot merely assert when it “first acquires” knowledge. The acquisition of knowledge is a question of fact, and sufficient evidence must be provided.<sup>235</sup> The limitation period thus begins to run once a claimant has acquired either actual or constructive knowledge of both the alleged breach and the loss or damage.<sup>236</sup> The notion of actual knowledge accounts for what an

<sup>232</sup> **RL-137**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 83: (“Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.”)

<sup>233</sup> See for example, **RL-166**, *Grand River – Decision on Jurisdiction*, ¶¶ 103-104. The only claim the tribunal reserved for consideration on the merits was one based on separate and distinct legislation adopted by individual States after March 12, 2001 (i.e., within the applicable three-year limitation period); **RL-006**, *Apotex – Award on Jurisdiction*, ¶¶ 314-335; **CL-134**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada*, Permanent Court of Arbitration (PCA) Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon – Award*”), ¶¶ 258-282; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev – Award*”), ¶ 87.

<sup>234</sup> NAFTA Article 1116(2) (emphasis added).

<sup>235</sup> In this case, the Claimant must prove with evidence that it “first acquired” knowledge of the alleged breach and of incurred loss on a specific date on or after June 1, 2014, and the task of this Tribunal is to determine based on the evidence provided whether the Claimant has met its burden. If the evidence shows that the Claimant “first acquired” or “should have first acquired” knowledge of breach and loss before June 1, 2014, the Tribunal must conclude that the Claimant’s NOA was submitted after the expiration of the limitation period and that it has no jurisdiction to hear the claim. See **RL-166**, *Grand River – Decision on Jurisdiction*, ¶ 54: (“This is foremost a question of fact.”). With the exception of constructive knowledge, which is imputed; **RL-138**, *Spence – Corrected Interim Award*, ¶ 163: (“If the Claimants cannot establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after 10 June 2010, they fall at the first hurdle. To surmount this obstacle, each claimant must show, in respect of each property claim, that they have a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which they first became aware in the period after 10 June 2010.”). See also ¶ 166, 239; **RL-170**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on Respondent’s Jurisdictional Objections, 1 June 2012, ¶ 2.9.

<sup>236</sup> **RL-166**, *Grand River – Decision on Jurisdiction*, ¶¶ 53, 58; **CL-134**, *Bilcon – Award*, ¶ 273. See also **RL-168**, *Corona Materials – Award on Preliminary Objections*, ¶¶ 193, 217; **RL-138**, *Spence – Corrected Interim Award*, ¶ 170.

investor subjectively knew.<sup>237</sup> In contrast, the notion of constructive knowledge accounts for what an investor objectively ought to have known.

129. Articles 1116(2) and 1117(2) deliberately use the phrase “first acquired knowledge” to place a specific marker on when the three-year limitations period for commencing arbitration must begin. The use of the term “first” means “earliest in occurrence, existence.”<sup>238</sup> As Professor Michael Reisman stated, it “takes great effort to misunderstand” the ordinary meaning of Article 1116(2). He notes that “the challenge of the compatibility of the measure must be made within three years of *first* acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred.”<sup>239</sup>

130. The inclusion of “first” to modify the phrase “acquired knowledge” was a deliberate drafting choice, intended to mark the beginning of the time when knowledge of breach and loss arises, or should have arisen, and not the middle or end of a continuous event or period. As noted by the *Mobil II* tribunal, “[t]he fact that the limitation period begins to run when a would-be claimant *first* acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot *first* acquire knowledge of the same matter on more than one occasion.”<sup>240</sup> The task of a NAFTA tribunal is thus straightforward: it must determine the specific date that a claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of incurred loss or damage arising out of that breach. This interpretation has been consistently upheld by NAFTA

<sup>237</sup> See for example, **RL-168**, *Corona Materials – Award on Preliminary Objections*, ¶ 217: (“As already noted above, DR-CAFTA Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage: actual knowledge – what the Claimant did in fact know at a given time – and constructive knowledge – what the Claimant should have known at a given time.”) The tribunal in *Grand River* qualified the existence of actual knowledge as a question of fact (**RL-166**, *Grand River – Decision on Jurisdiction*, ¶ 54).

<sup>238</sup> *Shorter Oxford English Dictionary*, 5<sup>th</sup> ed., (New York: Oxford University Press, 2002), at p. 965.

<sup>239</sup> **RL-171**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1) Opinion on Merrill & Ring's Claim, 22 April 2008, ¶ 28 (emphasis in original).

<sup>240</sup> **RL-110**, *Mobil II – Decision*, ¶ 147 (emphasis in original). See also **RL-172**, *Nissan Motor Co., Ltd. v. Republic of India* (PCA Case No. 2017-37) Decision on Jurisdiction, 29 April 2019, ¶ 325: (“Bearing these provisions in mind, the Tribunal agrees with India on a threshold proposition: that once an investor has knowledge that it has been harmed by a particular State act alleged to breach a CEPA obligation, additional conduct relating to the same underlying harm ‘cannot without more renew the limitation period’ for the filing [sic] a claim seeking redress. If the three years have elapsed from first knowledge, then that particular investment dispute cannot be revived.”)

tribunals<sup>241</sup> and affirmed by all three NAFTA Parties.<sup>242</sup> It has similarly been upheld by other tribunals interpreting the equivalent provision in the CAFTA-DR.<sup>243</sup>

131. Further, the proper interpretation of Articles 1116(2) and 1117(2) also makes it clear that regardless of whether a measure is continuing or not, a NAFTA claim must be brought within three years of the claimant having first acquired knowledge of breach and loss. The United States, Mexico, and Canada have been united in their views that a continuous course of conduct does not renew the limitations period. This interpretation has been affirmed before several NAFTA tribunals, including *Bilcon v. Canada*,<sup>244</sup> *Mercer v. Canada*,<sup>245</sup> and *Eli Lilly v. Canada*<sup>246</sup>. In *Grand River v. United States*, the tribunal observed:

<sup>241</sup> **CL-134**, *Bilcon – Award*, ¶ 281 (establishing that the three-year cut-off date is June 17, 2005); **RL-006**, *Apotex – Award on Jurisdiction*, ¶ 315 (establishing that the three-year cut-off date is June 5, 2006); **RL-166**, *Grand River – Decision on Jurisdiction*, ¶ 53 (establishing that the three-year cut-off date is March 12, 2001).

<sup>242</sup> **RL-173**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (ICSID Case No. UNCT/07/1) Submission of the United States of America, 14 July 2008, ¶ 5: (“An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular ‘date.’ Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.” (emphasis in original)); **RL-174**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 14 February 2014, ¶ 22: (“As Canada has demonstrated, all three NAFTA Parties have agreed that the term ‘first acquired’ means that the time limitation starts when an investor first acquires knowledge of an alleged breach and loss at a particular moment in time.”); **RL-175**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Reply of the Government of Canada to NAFTA Article 1128 Submissions, 3 March 2014 ¶ 33: (“The NAFTA three-year time limitation provision exists to ensure claims are brought within a finite period of time from the moment an investor first acquired knowledge of the breach and loss.”)

<sup>243</sup> **RL-138**, *Spence – Corrected Interim Award*, ¶¶ 208, 299. The interpretation and approach was also affirmed by the CAFTA tribunal in *Corona Materials v. Dominican Republic*. See **RL-168**, *Corona Materials – Award on Preliminary Objections*, ¶ 200: (“Article 10.18.1 requires the Tribunal to determine the date on which the Claimant ‘*first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.*’ A comparison of that date with the ‘critical date’ will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant’s Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant’s claims.”)

<sup>244</sup> **RL-199**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL), Submission of the United States of America, 19 April 2013, ¶ 12 (“*Bilcon – U.S. 1128 Submission*”). In the footnote following this paragraph, the United States noted: (“The United States’ views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case *Merrill & Ring Forestry, L.P. v. Canada*.”)

<sup>245</sup> **RL-186**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States of America, 8 May 2015, ¶ 5; **RL-200**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Canada’s Rejoinder Memorial, 31 March 2015, ¶¶ 223-228.

<sup>246</sup> **RL-165**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of the United States of America Pursuant to NAFTA Article 1128, 18 March 2016, ¶ 4; **RL-197**, *Eli Lilly and Company v. Government of Canada*

An analysis that led to not one limitations period, but many...[would] render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.<sup>247</sup>

132. The *Apotex v. United States* tribunal also noted, while dismissing all claims that were untimely, that “nothing in the text or jurisprudence of NAFTA Chapter Eleven suggests that a party can evade NAFTA’s limitation period” by asserting that the measure at issue was “part of a ‘continuing breach’ by the United States, or ‘part of the same single, continuous action’.”<sup>248</sup>

133. The limitations period in Articles 1116(2) and 1117(2) starts to run at the moment the Claimant first acquires knowledge of the alleged breach and alleged loss arising from that breach even if the effects of that measure continue on past that moment in time. The ordinary meaning, context and object, and purpose of Articles 1116(2) and 1117(2) lend to no other interpretation.

#### **4. Knowledge of the Full Extent of the Loss or Damage Incurred Is Not Required to Start the Time Limitation in Articles 1116(2) and 1117(2)**

134. NAFTA tribunals have also consistently held that concrete knowledge of the actual amount of loss or damage incurred is not a pre-requisite to the running of the limitations period under NAFTA Chapter Eleven.<sup>249</sup> As such, simple knowledge that loss or damage has been caused, even if its extent or quantification is still unclear, is sufficient to trigger the limitation period.<sup>250</sup> This principle has been confirmed in *Mobil II v. Canada*, *Grand River v. United States*, *Mondev v. United States*, *Apotex v. United States* and *Bilcon v. Canada*.<sup>251</sup> Similarly, the *Bilcon* tribunal “agree[d] with the reasoning

(UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶¶ 7-8; **RL-198**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Canada’s Observations on NAFTA Article 1128 Submissions, 22 April 2016.

<sup>247</sup> **RL-166**, *Grand River – Decision on Jurisdiction*, ¶ 81.

<sup>248</sup> **RL-006**, *Apotex – Award on Jurisdiction*, ¶ 325.

<sup>249</sup> **CL-066**, *Mondev – Award*, ¶ 87; **RL-166**, *Grand River – Decision on Jurisdiction*, ¶¶ 77-78; **RL-006**, *Apotex – Award on Jurisdiction*, ¶ 303; **CL-134**, *Bilcon – Award*, ¶ 275.

<sup>250</sup> **CL-066**, *Mondev – Award*, ¶ 87; *Grand River – Decision on Jurisdiction*, ¶¶ 77-78; **RL-006**, *Apotex – Award on Jurisdiction*, ¶ 303; **CL-134**, *Bilcon – Award*, ¶ 275.

<sup>251</sup> **RL-110**, *Mobil II – Decision*, ¶ 155; **RL-166**, *Grand River – Decision on Jurisdiction*, ¶¶ 77-78; **CL-066**, *Mondev – Award*, ¶ 87; **RL-006**, *Apotex – Award on Jurisdiction*, ¶¶ 318-320, 324-325; **CL-134**, *Bilcon – Award*, ¶¶ 271-275.

of its predecessors” that “[t]he plain language of Article 1116(2) does not require full or precise knowledge of loss or damage”.<sup>252</sup>

135. The above-noted NAFTA decisions on this point were also endorsed by the tribunal in *Rusoro Mining Limited v. Venezuela*, which was interpreting a provision similar to that in NAFTA Article 1116(2).<sup>253</sup> The *Rusoro* tribunal found that the claimant’s claim based on measures adopted in 2009 was barred because it had admitted knowledge of its loss more than three years before bringing the arbitration. The tribunal concluded that “what is required is simple knowledge that loss or damage has been caused, even if the extent and quantification are still unclear”.<sup>254</sup>

### **5. The Claimant Knew of the Alleged Breach of Articles 1105 and 1110 Prior to the Critical Date of December 22, 2017**

136. As already outlined by Canada,<sup>255</sup> the Claimant seeks to reintroduce to this Tribunal, as new breaches of Articles 1105 and 1110 of the NAFTA, the following three Government of Ontario measures:

- (a) its failure to complete in a timely manner the work it considered necessary in order to lift the moratorium;
- (b) its decision to continue to apply the moratorium to WWIS, despite knowing that its continued application as against WWIS would create the conditions that would allow the IESO to terminate the FIT Contract; and
- (c) its failure to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be “deferred”, “frozen” and “on hold.”<sup>256</sup>

137. The Claimant’s entire claim is based on the Ontario government’s decision to continue to apply the moratorium, the continued failure to complete the work necessary to lift the moratorium, and the continued refusal to direct the IESO to “to amend the FIT Contract to ensure that the Project would

<sup>252</sup> **CL-134**, *Bilcon – Award*.

<sup>253</sup> **RL-176**, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016 (“*Rusoro – Award*”), ¶¶ 204-205, interpreting Article XII.3(d) of the *Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments*.

<sup>254</sup> **RL-176**, *Rusoro – Award*, ¶ 217.

<sup>255</sup> See *Windstream II – Canada’s Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*.

<sup>256</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 7, 458, 487.

be “deferred”, “frozen” and “on hold” for the duration of the moratorium”. Despite alleging that it is challenging “a series of measures which all occurred after the *Windstream I* Award”,<sup>257</sup> none of these allegedly new measures are in fact new.<sup>258</sup> They are the continued application of the measures first known to the Claimant at the time of the *Windstream I* arbitration. Every measure complained of by the Claimant was documented in the *Windstream I* proceedings, well before the critical date of December 22, 2017. The Claimant cannot “first acquire” knowledge of these measures simply because they continue to exist, and the continued application of these measures does not toll the three-year limitation period set out in NAFTA Articles 1116(2) and 1117(2).

138. First, the Claimant seeks to reintroduce to this Tribunal, as a new measure that breaches NAFTA Articles 1105 and 1110: the imposition of the moratorium following the *Windstream I* Award.<sup>259</sup> In particular, the Claimant submits that, following the *Windstream I* Award, the moratorium created the conditions that allowed the IESO to terminate the FIT Contract.<sup>260</sup> However, it is clear that the Claimant “first acquired” knowledge of the moratorium as an allegedly breaching measure in February 2011, over nine years before it filed its NOA in this arbitration. It is uncontested that on February 11th, 2011, Ontario announced that the Province would not proceed with offshore wind development until further science, regulatory work, and coordination with US partners was complete.<sup>261</sup> The moratorium is not a new measure; nor is its continuing nature, which was already continuing for five years on the date of the *Windstream I* Award. Indeed, in the *Windstream I* proceedings, the Claimant went so far as to argue that the moratorium on its Project was for an “Indefinite-Term”,<sup>262</sup> that there was no evidence that the Ontario Government was contemplating lifting the moratorium,<sup>263</sup> and that Ontario had not given “any indication as to when – and indeed

<sup>257</sup> As noted by the Tribunal in Procedural Order No. 2, ¶ 45; *Windstream II – Claimant’s Response to Canada’s Request for Bifurcation*, ¶ 2.

<sup>258</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 7, 458, 487.

<sup>259</sup> *Windstream II – Claimant’s Memorial*, ¶ 7.

<sup>260</sup> *Windstream II – Claimant’s Memorial*, ¶ 293. See also, *Windstream I – Claimant’s Memorial*, ¶ 560.

<sup>261</sup> **C-0481**, Announcement (OPA), Offshore Windpower Not Proceeding (February 11, 2011), as cited in *Windstream I – Claimant’s Memorial*, ¶ 268.

<sup>262</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 257: (“The policy decision that MOE announced on February 11, 2011 is best described as an indefinite-term moratorium on offshore wind development.”); ¶ 369 (“It was therefore important to Windstream that any negotiated solution reflect that the moratorium did not have a defined term.”)

<sup>263</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 411.

whether – the moratorium might be lifted”.<sup>264</sup> The continued application of that moratorium cannot change the fact that the Claimant “first acquired” knowledge of the measure well before the critical date of December 22, 2017, and as such the requirements of Article 1116(2) and 1117(2) have not been met.

139. Second, in its Memorial, the Claimant points to Ontario’s continued refusal to complete the work necessary to lift the moratorium following the *Windstream I* Award.<sup>265</sup> However, the Claimant not only fails to establish how a continued failure to complete this work following the *Windstream I* Award constitutes a breach of the NAFTA, but it also neglects to indicate how it “first acquired” knowledge of this as a breaching measure within the strict three-year time limit – indeed, it is the very measure that the *Windstream I* tribunal found was a breach of Article 1105. As the record of the *Windstream I* proceedings indicate, Ontario’s alleged failure to complete the work, including the research and studies it had identified as necessary to lift the moratorium, was a core measure put forward by the Claimant in that arbitration.<sup>266</sup>

140. Finally, the Claimant points to Ontario’s failure to direct the IESO to amend the FIT Contract to ensure that the Project would be deferred, frozen, or on hold following the *Windstream I* Award.<sup>267</sup> However, in the *Windstream I* proceedings, the Claimant already put before the Tribunal alleged promises by Ontario that the Claimant’s Project would be allowed to continue,<sup>268</sup> and that Ontario should have taken steps to ensure that the Claimant was not penalized as a result of the moratorium.<sup>269</sup>

<sup>264</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 357.

<sup>265</sup> *Windstream II – Claimant’s Memorial*, ¶ 7.

<sup>266</sup> This included allegations that the Ontario Government has conducted very little research since announcing the moratorium, that it had failed to meet the timelines in every research plan it has developed, that the studies it has disclosed were either irrelevant to the Project or minimally relevant to the stated rationale for the moratorium. The Claimant repeatedly raised the lack of progress in completing this work before the *Windstream I* tribunal, and highlighted its role in delaying the lifting of the moratorium. The Claimant had submitted to the *Windstream I* tribunal that MOE had failed to complete “this research in the four years and four months since issuing the policy decision”, and that it was clear that “MOE considered that any research it conducted during the indefinite-term moratorium would have no or limited application to Windstream’s Project. See *Windstream I – Claimant’s Reply Memorial*, ¶¶ 261, 409-426.

<sup>267</sup> *Windstream II – Claimant’s Memorial*, ¶ 7.

<sup>268</sup> These include promises that its Project would be “frozen”, “deferred” or “on hold” rather than cancelled, and that the Claimant would be kept whole. See **RL-109**, *Windstream I – Award*, ¶¶ 149-160.

<sup>269</sup> *Windstream I – Claimant’s Memorial*, ¶ 563-564: (“Ontario could have fulfilled its promises and taken steps to ensure that Windstream was not penalized as a result of the moratorium. For example, pending the lifting of the moratorium, the MEI could have directed the OPA to remove the *force majeure* limitation that kept the clock running

As a result, the record in *Windstream I* makes abundantly clear that the Claimant “first acquired” knowledge of these breaching measures well before the critical date, and it cannot now resurrect these representations and promises made by Ontario in 2011.

141. For each of these measures, the Claimant had already “first acquired” knowledge of the alleged breach well before the strict three-year limitations period set out in NAFTA Articles 1116(2) and 1117(2). The continued application of these measures, which the Claimant first acquired knowledge of before the critical date of December 22, 2017, does not reset the limitations period. The Claimant has already brought one NAFTA case over these very measures, and as a result, necessarily “first acquired” knowledge of the alleged breach to bring those claims at that time. The limitation period does not reset by the continued application of these measures following the *Windstream I* Award.<sup>270</sup>

#### **6. The Claimant Knew of the Alleged Loss or Damage Prior to the Critical Date of December 22, 2017**

142. As noted above, the limitation period in Article 1116(2) and 1117(2) begins to run from the date on which the claimant first acquires, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage arising out of that breach. Canada has demonstrated above that the Claimant first acquired knowledge of the alleged breach prior to the critical date. The Claimant also knew of alleged loss or damage arising out of that alleged breach prior to the critical date of December 22, 2017. As such, it is abundantly clear that the loss or damage the Claimant identified in these proceedings crystallized well before this critical date.

143. The Claimant’s own words demonstrate that it first acquired knowledge of loss or damage arising out of the alleged breach at the time of the *Windstream I* Award, well before the critical date. In the *Windstream I* proceedings, the Claimant argued:

on Windstream’s deadline to bring the Project into commercial operation, constrained the OPA’s termination rights for the Project, and returned Windstream’s security in the meantime. That would have had the effect of “freezing” the Project, as Ontario had promised to do. Or Ontario could have replaced the Project with an alternative, equivalent project as Windstream proposed on many occasions and as Ontario did for TransCanada after the government made a political decision to cancel TransCanada’s Oakville gas plant. The OPA could have taken those steps even without direction from the MEI.”); **RL-109**, *Windstream I – Award*, ¶ 185.

<sup>270</sup> As described further below, this is true even though the FIT Contract was not terminated until February 2020.

There is no indication on the record that the Ontario Government truly intends to lift the moratorium in the near future, or at all. It has never provided even an approximate “end date” for the moratorium [...]. The fact is that the moratorium may never be lifted. But even if the moratorium is not permanent, Windstream’s loss is”.<sup>271</sup>

144. At the time of the *Windstream I* Award, the Claimant argued that, regardless of whether the moratorium was temporary or would be lifted at a date in the future, it had had the effect of “permanently depriv[ing] Windstream of the value of its investments”.<sup>272</sup> Windstream also acknowledged in the *Windstream I* proceedings that, even if the Moratorium was lifted, “[i]n light of the period that would be required to re-start the Project, confirm regulatory requirements, obtain the required approvals, complete development work and build the Project, as of May 4, 2012 it was no longer feasible to expect that the Project could achieve that commercial operation date.”<sup>273</sup> Indeed, in its Memorial for *Windstream I*, the Claimant argues it has been “permanently deprived” of the value of its investment as a result of the moratorium. At this time, it stated that:

[Ontario] allowed the moratorium to cause delays so drastic that the Project cannot be developed in time to meet the May 4, 2017 deadline. It is no longer financeable. As a result, the Project has effectively been cancelled and is now substantially worthless, as are Windstream’s investments in WWIS and the FIT Contract.<sup>274</sup>

145. David Mars’ testimony states clearly that “our entire investment in WWIS, the Project and the FIT Contract is now substantially worthless” and the “damage irreparable”,<sup>275</sup> which the Claimant’s Memorial re-iterates.<sup>276</sup> The fact that the Claimant had knowledge of loss or damage arising out of the alleged breach can sufficiently be established by the Claimant’s own assertions that its Project was “substantially worthless”, “de facto cancelled” and “deprived [...] of the value of its investments” as a result of the moratorium.<sup>277</sup> Given the above, it is clear that, by the time of the

<sup>271</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 485.

<sup>272</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 483.

<sup>273</sup> *Windstream I – Claimant’s Memorial*, ¶ 318.

<sup>274</sup> *Windstream I – Claimant’s Memorial*, ¶ 14.

<sup>275</sup> CWS-Mars-1, ¶¶ 106-107.

<sup>276</sup> *Windstream I – Claimant’s Memorial*, ¶ 560: “As a direct consequence of the moratorium, Windstream’s investments in WWIS, the Project and the FIT Contract are now substantially worthless”; “[b]ecause of the moratorium, Windstream has lost the entire value of investments [...] as it could not meet its deadlines under the FIT Contract.

<sup>277</sup> See *Windstream I – Claimant’s Reply Memorial*, ¶ 473: (“Windstream’s investments in WWIS, the FIT Contract and the Project are now substantially worthless. As a result of the drastic delays caused by the moratorium, the Project no

*Windstream I* proceedings, the Claimant had “first acquired” the requisite knowledge of both the alleged breach and the alleged loss or damage arising out of it.

## V. CANADA HAS NOT VIOLATED ITS NAFTA OBLIGATIONS

### A. The Claimant Has Failed to Demonstrate that Canada Has Expropriated Any of the Claimant’s Investments in Violation of Article 1110

#### 1. Summary

146. The Claimant alleges that Canada has indirectly expropriated its investment in contravention of Article 1110 of the NAFTA.<sup>278</sup> It defines its investment as the Project, which includes the FIT Contract, the security deposit,<sup>279</sup> as well as other items, such as a meteorological tower, data that the Claimant has collected, and land leases it concluded in connection with the Project.<sup>280</sup> In its damages analysis, however, the Claimant ascribes “nominal value” for these other items,<sup>281</sup> leaving only the FIT Contract to make up its expropriation and damages claim.<sup>282</sup> Canada has already demonstrated that this claim is barred by, among other things, the doctrine of *res judicata*,<sup>283</sup> and the limitations period in Article 1116(2) and 1117(2) of the NAFTA. However, even if the Tribunal should proceed to consider it, this claim must be dismissed because the Claimant has failed to demonstrate a violation of Article 1110. The Claimant’s arguments are inconsistent, not based on applicable legal rules, and not supported by any relevant evidence before this Tribunal.

longer has any hope of achieving commercial operation by the deadlines set out in the FIT Contract. Under the FIT Contract, the OPA has the right to terminate the FIT Contract if it does not achieve commercial operation by May 4, 2017, even though the FIT Contract is currently under force majeure. The OPA refused to waive this right, and has on the contrary gone so far as to reserve all of its right under the FIT Contract. This has rendered the Project unfinanceable. Thus, even if the moratorium was lifted and the Project allowed to proceed, the Project could not continue. It has been de facto cancelled. The moratorium therefore has deprived Windstream of the value of its investments.”)

<sup>278</sup> *Windstream II - Claimant’s Memorial*, ¶¶ 450-475.

<sup>279</sup> Also referred to as a “Letter of Credit” by the *Windstream I* tribunal.

<sup>280</sup> *Windstream II - Claimant’s Memorial*, ¶ 417.

<sup>281</sup> The Claimant stated that “nominal value may be attributed to past costs incurred related to certain assets of the Project, including the meteorological tower and the studies performed”. See *Windstream I – Award*, ¶ 192.

<sup>282</sup> *Windstream II – Claimant’s Memorial*, ¶ 531.

<sup>283</sup> *Windstream II – Canada’s Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*. We note that the same measures form the *Windstream I* proceeding are now replicated in Windstream’s claims for expropriation following the *Windstream I* Award. However, the *Windstream I* tribunal already examined these measures and determined that they did not amount to expropriation. See **RL-109**, *Windstream I – Award*, ¶ 291; *Windstream I - Claimant’s Reply Memorial*, ¶¶ 447, 453 and *Windstream II – Claimant’s Memorial*, ¶ 458.

147. First, the Claimant has failed to demonstrate that the FIT Contract is an investment capable of being expropriated. The FIT Contract, at the time of the alleged breach, gave rise to a contingent interest in a potential future revenue stream. The Claimant's attempt to distract the Tribunal by focusing on the existence and validity of its FIT Contract is misleading. Rights under the FIT Contract could only have been expropriated if those rights had vested such that they provided a demonstrable economic benefit or asset of value. As the right to a guaranteed revenue stream had not vested at the time in question, the FIT Contract was not capable of being expropriated. Second, the Claimant has failed to demonstrate that the Claimant's investment has been substantially deprived in any way. In the *Windstream I* proceedings, the Tribunal dismissed the Claimant's expropriation claim on the basis that it had not been substantially deprived of its investment since the Claimant's \$6 million security deposit was a significant amount compared the overall value of the investment, and it had not been taken.<sup>284</sup> The same remains true today.

148. The Claimant has failed to indicate how, subsequent to the *Windstream I* Award, it was substantially deprived of anything, given that, by its own admission, its FIT Contract and Project had no value as of the *Windstream I* Award,<sup>285</sup> and the security deposit was returned to it.<sup>286</sup> The *Windstream I* tribunal accepted the Claimant's argument, determining that the Claimant's Project was no longer financeable, could no longer be developed under the terms of the FIT Contract, and could not "be considered to have any value".<sup>287</sup> Moreover, the Claimant has failed to demonstrate that the FIT Contract gained any value following that Award. Indeed, all of the Claimant's investments were worthless at the time of the alleged breach. It is illogical for the Claimant to argue that it has been substantially deprived of an investment that has no value.

149. Third, no expropriation could have taken place because the measures identified by the Claimant did not interfere with any reasonable investment-backed expectations that it could have had. Indeed, the Claimant's expectations were entirely unreasonable. Any claim otherwise is refuted

<sup>284</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

<sup>285</sup> The Claimant described its investment as "substantially worthless". See for example, *Windstream I – Claimant's Memorial*, ¶ 14; CWS-Mars-1, ¶¶ 106-107.

<sup>286</sup> **R-0659**, Letter from Darryl Yahoda (IESO) to Bank of Montreal (February 20, 2020).

<sup>287</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

by the nature of the communications between the IESO, Ontario, and the Claimant following the *Windstream I* decision. The Claimant’s unilateral efforts to advance a project that it was unable to finance, marred in considerable risk, and that it could not bring into commercial operation before the IESO was in a position to terminate the FIT Contract cannot give rise to reasonable, investment-backed expectations. The statement by the *Windstream I* tribunal that “it remains open for the Parties to reactivate and, as appropriate, renegotiate the FIT Contract”,<sup>288</sup> did not and could not create any reasonable expectations that the Claimant’s Project had a path forward, nor could it create any obligations for the Government to reactivate or renegotiate the FIT Contract.

## 2. The Claimant Misstates the Test for Indirect Expropriation

150. NAFTA Article 1110(1) provides that “[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment” except if certain conditions are met.<sup>289</sup>

151. The NAFTA does not define the term “expropriation”. As a result, tribunals have interpreted it in accordance with customary international law.<sup>290</sup> In this regard, NAFTA tribunals have generally

<sup>288</sup> **RL-109**, *Windstream I – Award*, ¶ 290.

<sup>289</sup> See NAFTA Article 1110, These conditions are set out as follows:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

<sup>290</sup> **CL-023**, *Archer Daniels Midland Company v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007 (“*ADM – Award*”), ¶ 237: (“The key terms in Article 1110 – ‘nationalization,’ ‘expropriation,’ and ‘measures tantamount thereto’ – are not defined in the NAFTA. The interpretation of these terms requires an analysis of the applicable rules of international law, in accordance with Article 1131 of the NAFTA.”); **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 (“*S.D. Myers – Partial Award*”), ¶ 280: (“The term ‘expropriation’ in Article 1110 must be interpreted in the light of the whole body of state practice, treaties and judicial interpretations of that term in international law cases.”); **CL-053**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009 (“*Glamis – Award*”), ¶ 354: (“The inclusion in Article 1110 of the term ‘expropriation’ incorporates by reference the customary international law regarding that subject”); **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 (“*Waste Management II – Award*”), ¶ 177: (referring to “the international law of expropriation as reflected in Article 1110”). See also the positions of the NAFTA Parties on this issue: **RL-177**, *Metalclad Corporation v. The United Mexican States*, (ICSID Case No. ARB(AF)/97/1) Submission of the Government of the United States of America, 9 November 1999, ¶ 10: “The United States Government believes that it was the intent of the Parties that Article 1110(1) reflect customary international law as to the categories of expropriation.”; **RL-178**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Second Submission of Canada Pursuant to NAFTA Article 1128, 6 July 2001, ¶¶ 64-65: defining “expropriation” in Article 1110 with reference to

applied a three-step analysis to determine whether a Party's measures have breached Article 1110.<sup>291</sup> First, the Tribunal must identify an investment that is capable of being expropriated. Second, the Tribunal must determine whether that investment has been expropriated. Third, if an expropriation is found, the Tribunal will determine whether it was lawful under Article 1110(1).<sup>292</sup>

152. Determining whether a measure constitutes an indirect expropriation requires a case-by-case, fact-based inquiry. The NAFTA Parties' common understanding of what constitutes an indirect expropriation under customary international law is reflected in Annex 14-B (Expropriation) of the Canada-United States-Mexico Agreement ("CUSMA"), to which all three NAFTA Parties are party.

153. That Annex, as well as similar annexes found in other treaties entered into by the NAFTA Parties,<sup>293</sup> provides that an indirect expropriation occurs where "an action or series of actions" or a

international law; **RL-080**, *Methanex Corporation v. The United States of America* (UNCITRAL) Mexico Fourth Submission pursuant to NAFTA Article 1128, 30 January 2004, ¶ 13: "Article 1110, which must be interpreted in accordance with the applicable rules of customary international law, incorporates the principle that States generally are not liable to compensate aliens for economic loss resulting from non-discriminatory regulatory measures taken to protect the public interest, including human health."

<sup>291</sup> See **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010 ("*Chemtura – Award*"), ¶ 242.

<sup>292</sup> **RL-025**, *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award, 17 July 2006 ("*Fireman's Fund – Award*"), ¶ 174: ("[T]he conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110."); **RL-024**, *Feldman – Award*, ¶ 98; **CL-037**, *Chemtura – Award*, ¶ 242.

<sup>293</sup> This annex, as well as similar annexes in other treaties entered into by NAFTA Parties,<sup>293</sup> provides useful guidance to interpret and applying NAFTA Article 1110,<sup>293</sup> and do not change the nature of the substantive obligations that existed under [...] prior agreements; instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties' intent in agreeing to those obligations". See **CL-053**, *Glamis Gold – Award*, ¶ 356: "[T]he tribunal referred to the Annex of the United States model treaty to decide whether the impugned measure was expropriatory. See **RL-078**, *Methanex Corporation v. United States of America* (UNCITRAL) Amended Statement of Defence of Respondent United States of America, 5 December 2003, ¶ 405, fn. 636; **RL-067**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Counter-Memorial of the United States of America, 19 September 2006, pp. 159-160, fn. 740; **RL-068**, *Grand River Enterprises v. United States of America* (UNCITRAL) Counter-Memorial of the United States of America, 22 December 2008, p. 147, fn. 524; *Windstream Energy, LLC v. Government of Canada* (UNCITRAL), Canada's Rejoinder Memorial, 6 November 2015 ("*Windstream I – Canada's Rejoinder Memorial*"), ¶ 9: "[T]he lack of such an annex in the NAFTA is irrelevant. These annexes merely explain what the NAFTA Parties mean and have always meant by the term 'indirect expropriation', as affirmed by other submissions."; *Windstream I – Canada's Counter-Memorial*, ¶ 475: "[W]hile the NAFTA does not contain the same annex, the factors laid out in these recent interpretative texts provide useful guidance to assess whether there has been an indirect expropriation in this case."; **RL-179**, *Odyssey Marine Exploration, Inc. v. United Mexican States* (ICSID Case No. UNCT/20/1) Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 2 November 2021, ¶¶ 28, 31 and fns. 39, 45. See also **RL-035**, Andrea J. Menaker, "Benefiting From Experience: Developments in the United States' Most Recent Investment Agreements" (2006), 12:1 U.C. Davis J. Int'l L. Pol'y, p. 122: Ms. Menaker is former

“measure or series of measures” has “an effect equivalent to direct expropriation without formal transfer of title or outright seizure”.<sup>294</sup> The shared understanding of the CUSMA Parties is that an inquiry into whether there has been an indirect expropriation should consider, among other things:

- (i) the economic impact of the government action or measure,
- (ii) the extent to which the government action or measure interferes with distinct, reasonable investment-backed expectations, and
- (iii) the character of the government action or measure, including its object, context, and intent.

154. Although the Claimant does not acknowledge the guidance provided by these annexes, it does recognize, as it had before the *Windstream I* tribunal,<sup>295</sup> that an indirect expropriation requires a “taking” of fundamental ownership rights that causes a substantial deprivation of the economic value of the investment.<sup>296</sup> Despite this, the Claimant has put forward an incorrect two-step test for determining whether an indirect expropriation has taken place.<sup>297</sup> The Claimant has entirely ignored the preliminary step of determining whether there is an investment capable of being expropriated.

### 3. The FIT Contract Is Not an Asset Capable of Expropriation

155. A crucial inquiry for analyzing whether there has been a breach of Article 1110 is to identify the specific property right or interest alleged to have been expropriated, and whether it has vested in

Chief of the NAFTA Arbitration Division in the Office of the Legal Adviser for the U.S. Department of State; **RL-061**, Andrew Newcombe, “Canada’s New Model Foreign Investment Protection Agreement” (August 2004), pp. 5-6.

<sup>294</sup> CUSMA, Annex 14-B(3); *See also* **RL-012**, *Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments* (entered into force October 1, 2014) at Annex B.10 (Expropriation), 1: (“Indirect expropriation results from a measure or series of measures of a Contracting Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure”); **RL-055**, *Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment*, November 2005, at Annex B (Expropriation), 4: (“The second situation addressed by Article 6(1) is known as indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.”)

<sup>295</sup> *Windstream I - Claimant’s Memorial*, ¶¶ 542-554; *Windstream II - Claimant’s Memorial*, ¶ 451.

<sup>296</sup> **CL-074**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Interim Award, 26 June 2000 (“*Pope & Talbot - Interim Award*”), ¶ 102: (“[...] under international law, expropriation requires a ‘substantial deprivation [...]’”); **CL-054**, *Grand River - Award*, ¶ 148: (“Other NAFTA Tribunals have regularly construed Article 1110 to require a complete or very substantial deprivation of owners’ rights in the totality of the investment [...]”); **CL-053**, *Glamis Gold - Award*, ¶ 357.

<sup>297</sup> *Windstream II - Claimant’s Memorial*, ¶ 452.

order for it to be capable of being expropriated.<sup>298</sup> As the *Generation Ukraine v. Ukraine* tribunal held, “it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred”.<sup>299</sup> Commentators have noted the fundamental nature of this inquiry, and cautioned against a broad interpretation of the scope of economic interests capable of being expropriated, as this may deviate from the original intention of the Parties, clash with domestic tradition and complicate the process of valuation.<sup>300</sup>

156. The NAFTA Parties have also “confirm[ed] their shared understanding” that there can be no expropriation unless the investment is capable of being expropriated in CUSMA Annex 14-B

<sup>298</sup> **RL-057**, *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003 (“*Generation – Award*”), ¶ 8.8: (“[T]here cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place.”); **CL-037**, *Chemtura – Award*, ¶ 258: (“The first issue is whether the Claimant had an investment in Canada capable of being expropriated.”); **CL-159**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Award (April 4, 2016) (“*Crystallex – Award*”), ¶ 659: (“The Tribunal starts its analysis on expropriation with the threshold question as to whether the Claimant had rights capable of being expropriated.”); **RL-161**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2) Decision on Respondent’s Application for Bifurcation, 13 June 2013 (“*Emmis – Decision on Bifurcation*”), ¶ 43: (“[T]he Tribunal would need to determine the nature and incidents of the rights held by Claimants that may be considered as investments capable of enjoying the protection of international law against expropriation before deciding whether Respondent’s conduct had in fact caused any such expropriation.”); **RL-022**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v. Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014 (“*Emmis – Award*”), ¶ 159: (“In view of the fact that the only cause of action within the Tribunal’s jurisdiction is that of expropriation, Claimants must have held a property right of which they have been deprived. This follows from the ordinary meaning of the term.”); **RL-140**, *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5) Award, 3 June 2021 (“*Infinito – Award*”), ¶¶ 705-706: (“[T]he Tribunal must first determine whether the Claimant [...] held rights capable of being expropriated. If no valid rights exist under domestic law, there can be no expropriation.”); **RL-180**, *Lone Pine Resources, Inc. v. Government of Canada* (ICSID Case No. UNCT/15/2) Non-Disputing Party Submission of the United States of America Pursuant to NAFTA Article 1128, 16 August 2017.

<sup>299</sup> **RL-057**, *Generation – Award*, ¶ 6.2; **CL-026**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009 (“*Bayindir – Award*”), ¶ 442: (“The first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated.”)

<sup>300</sup> **RL-161**, *Emmis – Decision on Bifurcation*, ¶ 43: (“[I]t is of fundamental importance that the Tribunal identify precisely whether, and if so which investments of Claimants are capable of giving rise to their expropriation claim.”); **RL-157**, *Accession Mezzanine et al. v. Hungary* (ICSID Case No. ARB/12/3) Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 39(2)(a): (“The Tribunal is required to identify whether and which investments of Claimants may properly give rise to an expropriation claim[.]”); UNCTAD Series on International Investment Agreements II, “Expropriation: A Sequel”, (2012), p. 131: (“Broad interpretation of the scope of economic interests capable of being expropriated may deviate from the original intention of the contracting States, clash with domestic tradition and complicate the process of valuation.”)

(Expropriation): “[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right<sup>301</sup> or property interest in an investment.”<sup>302</sup>

157. The Claimant argues, for the purposes of establishing jurisdiction under Article 1139(g) and (h), that the FIT Contract is an investment and “WWIS’s most important property right and asset”, and that “[i]t would have constituted WWIS’s most significant source of revenue”.<sup>303</sup> Then, as part of its Article 1110 claim, it argues that “[n]umerous tribunals have confirmed that expropriation may occur not only with respect to property rights, but also where the host state interferes with the investor’s contractual rights.”<sup>304</sup> The Claimant buries this statement in a footnote, adding that the “principle dates back to the *Chorzów Factory* Case and has been applied in a large number of investment treaty cases,” citing *Crystallex v. Venezuela*, *Southern Pacific*, *Deutsche Bank v Sri Lanka*, *Wena Hotels*, *Vivendi v. Argentina*, *Eureko*, and *CME v. The Czech Republic*.<sup>305</sup> However, the Claimant’s focus on contractual rights illustrates its misunderstanding not only of the expropriation test, but also of the principles at issue in NAFTA Article 1110.<sup>306</sup>

158. Simply because something might constitute an asset related to an investment does not make it an asset capable of expropriation. Even if the asset is an intangible property right acquired in the expectation of economic benefit, as the Claimant alleges,<sup>307</sup> it is necessary to discern what that

<sup>301</sup> CUSMA, Annex 14-B: Expropriation, fn. 18: (“For greater certainty, the existence of a property right is determined with reference to a Party’s law.”)

<sup>302</sup> CUSMA, Annex 14-B: Expropriation, ¶ 1.

<sup>303</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 419-425.

<sup>304</sup> *Windstream II – Claimant’s Memorial*, fn. 552.

<sup>305</sup> *Windstream II – Claimant’s Memorial*, citing **CL-034**, *Case Concerning the Factory at Chorzów* (Germany v. Poland), 1928 P.C.I.J. (ser. A) No. 17 (September 13, 1928) (“*Chorzów Factory*”), p. 44. See also **CL-159**, *Crystallex – Award*, fn. 941; **CL-083**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3) Award on the Merits, 20 May 1992, ¶ 164; **CL-043**, *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/02) Award, 31 October 2012, ¶ 506; **CL-092**, *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award, 8 December 2000 (“*Wena – Award*”), ¶ 98; **CL-041**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007, (“*Vivendi – Award*”) ¶¶ 7.5.4, 7.5.22-7.6.2; **CL-049**, *Eureko B.V. v. Poland* (UNCITRAL) Partial Award, 19 August 2005, ¶ 151; **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006 (“*Thunderbird – Award*”), ¶ 208, ¶¶ 238-243; **CL-039**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶¶ 173, 270-271, 591.

<sup>306</sup> See *Windstream I – Canada’s Counter-Memorial*, ¶¶ 464-473, where both the issue and its application were previously argued. The arguments were not addressed by the tribunal.

<sup>307</sup> *Windstream I – Claimant’s Memorial*, ¶ 420.

intangible property right is. If the asset is an interest arising from the commitment of capital, as the Claimant also alleges,<sup>308</sup> it is equally necessary to discern what the property interest is. The Claimant must also prove that the specific rights in question under the FIT Contract have vested such that they are capable of being expropriated, and that there was an expropriation.<sup>309</sup>

159. Both NAFTA and international investment tribunals have maintained that an investment capable of being expropriated excludes a potential property right or one that is conditional, in that it may or may not materialize depending on a future event.<sup>310</sup> Rights that are contingent or that have not been acquired are not capable of being expropriated.<sup>311</sup> As the Tribunal in *Merrill & Ring Forestry LP v. Canada* noted:

[t]he right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the *Feldman* tribunal's conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.<sup>312</sup>

<sup>308</sup> *Ibid.*

<sup>309</sup> **RI-181**, *European Media Ventures SA v. Czech Republic* (UNCITRAL) Partial Award on Liability, 8 July 2009: (“[T]he questions (a) whether the contractual rights on which Claimant relies constitute an investment within Article 1 of the Treaty; (b) whether those rights are capable of expropriation under Article 3; and (c) whether they were in fact expropriated, to be three entirely separate questions.”)

<sup>310</sup> **RL-024**, *Feldman – Award*, ¶¶ 118 and 152; **CL-049**, *Eureka B.V. v. Poland* (UNCITRAL) Partial Award, 19 August 2005, ¶ 151; **CL-057**, *Thunderbird – Award*, ¶ 208; **CL-061**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case) Award, 31 March 2010 (“*Merrill & Ring – Award*”), ¶ 142. See also **RL-022**, *Emmis – Award*, ¶ 168; **RL-182**, *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) Award, 4 September 2020, ¶ 470: (“[A] finding of expropriation must be premised on a showing that ‘Claimants must have held a property right of which they have been deprived. The property right or asset in question ‘must have vested (directly or indirectly) in the claimant for him to seek redress.’”) and ¶ 472: (“[A]bsent any *established right* that was abrogated by Government interference, the fact that Government conduct may have impacted a company business plan does not itself amount to expropriation, even if the end result ultimately is that the company was unable to survive financially.”) (emphasis in original)

<sup>311</sup> *Windstream II - Canada's Counter-Memorial*, ¶ 468; **RL-024**, *Feldman – Award*, ¶ 152: (“However, as with S.D. Myers, it may be questioned as to whether the Claimant ever possessed a ‘right’ to export that has been ‘taken’ by the Mexican government.”); **CL-057**, *Thunderbird – Award*, ¶ 208: (“[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”); **CL-061**, *Merrill & Ring – Award*, ¶ 142: (“The right concerned would have to be an actual and demonstrable entitlement of the investor to a certain benefit under an existing contract or other legal instrument. This reasoning underlies the *Feldman* tribunal's conclusion that an investor cannot recover damages for the expropriation of a right it never had. Expropriation cannot affect potential interests.”)

<sup>312</sup> *Windstream I – Canada's Counter-Memorial*, ¶¶ 465-473; **CL-061**, *Merrill & Ring – Award*, ¶ 142.

160. The *Feldman* tribunal stated that although the impugned measure prevented the claimant from exporting cigarettes, it was unclear whether the investor had ever possessed a vested right to export cigarettes, so it found that there was no expropriation.<sup>313</sup> Similarly, the *Thunderbird* tribunal explained that there can be no expropriation of an investment giving rise to compensation “where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited”.<sup>314</sup>

161. The arbitral awards rendered under other investment treaties are to the same effect. The tribunal in *Infinito* noted that it “must first determine whether the Claimant [...] held rights capable of being expropriated. If no valid rights exist under domestic law, there can be no expropriation”.<sup>315</sup> The *Generation Ukraine* tribunal stated that “[t]here cannot be an expropriation of something to which the Claimant never had a legitimate claim.”<sup>316</sup> The tribunal in *Emmis* concluded:

the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. [...] Contractual or other rights accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.<sup>317</sup>

162. It similarly concluded that it “follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress”.<sup>318</sup>

163. The *Emmis* tribunal also stated that “it is important to emphasize that the protection from expropriation in relation to rights conferred under contract still requires identification of a property interest or asset held by the Claimant.”<sup>319</sup> Indeed, the tribunal held that the question for the purposes of an expropriation claim is what rights conferred under a contract were allegedly taken and whether

<sup>313</sup> **RL-024**, *Feldman – Award*, ¶ 152.

<sup>314</sup> **CL-057**, *Thunderbird – Award*, ¶ 208.

<sup>315</sup> **RL-140**, *Infinito – Award*, ¶¶ 705-706.

<sup>316</sup> **RL-057**, *Generation – Award*, ¶ 22.1.

<sup>317</sup> **RL-022**, *Emmis – Award*, ¶ 169.

<sup>318</sup> **RL-022**, *Emmis – Award*, ¶ 168.

<sup>319</sup> **RL-022**, *Emmis – Award*, ¶ 165.

they were actual property interests or assets held at the relevant time by the Claimant.<sup>320</sup> Based on the facts in that case, the tribunal concluded that while property rights under Hungarian law included intangible assets, the specific broadcasting agreement at issue did not confer any rights for the relevant period constituting valuable assets capable of expropriation.<sup>321</sup>

164. As demonstrated by the above cases, it is not sufficient to identify the existence and validity of the FIT Contract. Before this Tribunal can proceed to determining whether an illegal expropriation occurred, the Claimant must also prove that the specific rights in question under the FIT Contract have vested such that they are capable of being expropriated. The Claimant has not, and cannot, meet this burden.

165. The Claimant has failed to identify any vested right under the FIT Contract and the demonstrable economic benefit or asset of value that has been taken. Rather, it identifies its investment as “a guaranteed revenue stream over a 20-year period with a credit worthy counterparty”,<sup>322</sup> and argues that, with the FIT Contract’s termination, it has lost its full value since “there is no longer any possibility for the Project to move forward or for WWIS to sell electricity to the IESO at an indexed fixed price over a 20-year period.”<sup>323</sup> However, the possibility of operating commercially is not a property right. The FIT Contract did not give the Claimant a vested right – an actual and demonstrable entitlement – to a certain benefit of being able to generate and sell electricity at an indexed fixed price over a 20-year period. The FIT Contract is expressly conditioned on the Claimant acquiring all of the permits and approvals needed to develop, construct and operate its proposed Project.<sup>324</sup> Payment under the FIT Contract is also expressly conditioned upon the Claimant’s Project being in operation and producing electricity by a specific deadline, the MCOB.<sup>325</sup>

166. If the Claimant’s Project did not obtain even one of the permits or approvals it required to proceed, it would not have reached commercial operation, and the Claimant would have no right to

<sup>320</sup> **RL-022**, *Emmis – Award*, ¶¶ 150, 158-177.

<sup>321</sup> **RL-022**, *Emmis – Award*, ¶¶ 192, 221.

<sup>322</sup> *Windstream II – Claimant’s Memorial*, ¶ 8.

<sup>323</sup> *Windstream II – Claimant’s Memorial*, ¶ 462.

<sup>324</sup> **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, Schedule 1, s. 2.4.

<sup>325</sup> **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, Schedule 1, s. 2.4.

the fixed-price revenue stream under the FIT Contract. At the time of the alleged expropriation, the Claimant had no permits or approvals, no site access to undertake the work, and no financing – it was far from obtaining the required NTP from the IESO to begin construction, let alone becoming operational by the MCOB required in the FIT Contract.

167. As Canada’s experts have indicated, both in these proceedings and in the *Windstream I* proceedings, the Claimant was and is unreasonably optimistic about its Project and has failed to adequately account for the many risks that surrounded the advancement of the Project. Canada has already submitted to the *Windstream I* tribunal that the Project’s lack of development, inability to get financing, unavoidable risks, and high costs made it unviable within the constraints imposed by the FIT Contract.<sup>326</sup> Indeed, the Green Giraffe Report, provided in the context of the *Windstream I* proceedings, noted a number of items that would make its financing more difficult, and its valuation accordingly lower, such as lack of supply chain or lack of financing experience and availability. Canada’s expert, Mr. Guillet has confirmed the same in this arbitration.<sup>327</sup>

168. The contingent nature of the FIT Contract, and the fact that the Claimant had no guarantee it would ever obtain the revenue stream it contemplated, have not changed in any way following the *Windstream I* Award. The FIT Contract provided the Claimant with no vested right and as such, is not an investment capable of being expropriated.<sup>328</sup>

#### **4. The Claimant’s Investments Have Not Been Expropriated**

169. While the FIT Contract is not an investment capable of being expropriated, Canada does not dispute that the Claimant has made some investments in Canada, including its enterprise, WWIS, that

<sup>326</sup> *Windstream I – Canada’s Counter-Memorial*, ¶ 481. See also *Windstream I – Canada’s Rejoinder*, ¶ 529-556.

<sup>327</sup> RER- Jérôme Guillet, ¶¶ 81-105.

<sup>328</sup> Note that, though the IESO’s right to terminate the FIT Contract arose as of May 5, 2017 (2 years after the original MCOB of May 4, 2015), the Claimant managed, through domestic litigation, to hold on to its FIT Contract for two more years, until February 18, 2020. Following the abandonment of the Domestic Application initiated by WWIS, this termination decision took effect, and it never obtained the right to develop and operate its Project or sell the energy it generated. However, the Claimant has known, since before the *Windstream I* proceedings, that if it was not operational by MCOB, then it had no right to any payment under the FIT Contract. The Tribunal in *Windstream I* agreed with the Claimant on this point, and ultimately found that, given that the FIT Contract could no longer be completed by requisite two years after the MCOB. See **RL-109**, *Windstream I – Award*, ¶ 290.

are, in theory, investments capable of being expropriated. However, the Claimant ascribes no value to the enterprise or to other assets in its damages analysis. In any event, even if the Tribunal was to consider the Claimant's other investments, or indeed even if the Tribunal considered the FIT Contract to be an investment capable of being expropriated, the Claimant's claim must still fail. None of the Claimant's investments have been expropriated in violation of NAFTA Article 1110.

170. In its Memorial, the Claimant has identified three measures that it alleges caused the expropriation of its investments.<sup>329</sup> These three measures are the Ontario Government's:

- failure, following the *Windstream I* Award, to conduct any further studies to address the scientific uncertainty surrounding offshore wind;
- imposition of the moratorium following the *Windstream I* Award, "knowing that [the moratorium] would create the conditions that would allow IESO to terminate the FIT Contract"; and
- failure, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that the Project would be "deferred", "frozen" and "on hold".<sup>330</sup>

171. Taking into consideration: (1) the economic impact of each of these measures, (2) the extent to which any of these measures interferes with distinct, reasonable investment-backed expectations, and (3) the character of each of these measures, it is not possible to conclude that the Claimant's investment was expropriated.

**(a) The Economic Impact of the Alleged Measures Do Not Amount to an Expropriation as the Investments Had No Value at the Time of the Alleged Breach**

172. An expropriation requires a "taking" of fundamental ownership rights that causes a substantial deprivation of the economic value of an investment.<sup>331</sup> The threshold claimants have to meet to

<sup>329</sup> *Windstream II – Claimant's Memorial*, ¶ 428.

<sup>330</sup> *Ibid.*

<sup>331</sup> **CL-074**, *Pope & Talbot – Interim Award*, ¶ 102: ("[...] under international law, expropriation requires a 'substantial deprivation [']"); **CL-061**, *Merrill & Ring – Award*, ¶ 145: ("The standard of substantial deprivation identified in *Pope & Talbot*, and followed by many other decisions, both in the context of NAFTA and other investment protection agreements, is the appropriate measure of the requisite degree of interference."); **CL-054**, *Grand River – Award*, ¶ 148; **CL-053**, *Glamis Gold – Award*, ¶ 357.

illustrate substantial deprivation is high.<sup>332</sup> It has been characterized as a “significant”, “fundamental”, “radical” or “serious” deprivation. As the NAFTA tribunal in *Fireman’s Fund* indicated:

[t]he taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).<sup>333</sup>

173. However, when an investment has already lost its economic value prior to the alleged expropriation, a State cannot deprive it of value, since it had no value to begin with.<sup>334</sup> This was the situation for the claimant’s shares in *Infinito*, which could not have been expropriated because “they were already worthless prior to the challenged measures.”<sup>335</sup>

174. The Claimant has itself submitted to the *Windstream I* tribunal that its investment was worthless at the time of that proceeding. The *Windstream I* tribunal summarized the Claimant’s position:

The Claimant contends that, while the Project is currently under force majeure, there is no longer any realistic prospect that the Project can reach commercial operation by May 4, 2017. Consequently, the Project is no longer financeable and has effectively lost all of its value. It argued that this is the case even if the IESO were to waive its right to terminate the FIT Contract as the conduct of the Ontario Government has created such uncertainty around the offshore wind industry in Ontario that no potential investor would be prepared to invest in the Project.”<sup>336</sup>

<sup>332</sup> **CL-091**, *Waste Management II – Award*, ¶ 160: “It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a *virtual taking or sterilising of the enterprise*.” (emphasis added); **RL-025**, *Fireman’s Fund – Award*, ¶ 176(c): “The taking must be a *substantially complete* deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it *approaches total impairment*).” (emphasis added) and fn. 157: “A number of tribunals employ the adjective ‘significant,’ ‘fundamental,’ ‘radical’ or ‘serious’.”; **CL-040**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005, ¶ 262: “The essential question is [...] to establish whether the enjoyment of the property has been *effectively neutralized*.”

<sup>333</sup> **RL-025**, *Fireman’s Fund – Award*, ¶ 176(d); **CL-053**, *Glamis Gold – Award*, ¶ 360. See also **RL-048**, Christoph Schreuer, “*The Concept of Expropriation under the ETC and Other Investment Protection Treaties*”, May 2005, pp. 28-29 and generally at p. 29: (“The deprivation would have to be permanent or for a substantial time.”)

<sup>334</sup> **RL-057**, *Generation – Award*, ¶ 20.30.

<sup>335</sup> **RL-140**, *Infinito – Award*, ¶¶ 719.

<sup>336</sup> **RL-109**, *Windstream I – Award*, ¶ 288.

175. The tribunal in *Windstream I* agreed with the Claimant, and found that, absent reactivation or renegotiation, the Project could no longer be completed by the MCOB,<sup>337</sup> and that the FIT Contract could not be considered to have any value.<sup>338</sup>

176. The *Windstream I* tribunal found it appropriate to adjust its valuation of the Project to account for the fact that the Claimant had not lost its \$6 Million security deposit, but the tribunal did not find it necessary to make any such adjustment for the fact that the Contract was still in force and had not yet been terminated, because it was without value.<sup>339</sup> The tribunal noted:

Consequently, in order to quantify the damage caused by the Respondent's breach to the value of the Claimant's investment, a further adjustment must be made to reflect the value of the letter of credit (CAD 6 million). On the other hand, the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value.<sup>340</sup>

177. As the *Windstream I* tribunal clearly and conclusively determined, the fact that the FIT Contract had not formally been terminated had no impact on the valuation of the Claimant's investment. The tribunal conclusively determined that the Claimant's Project was no longer financeable,<sup>341</sup> could no longer be developed under the terms of the FIT Contract,<sup>342</sup> and that the FIT Contract could not "be considered to have any value".<sup>343</sup> Accordingly, the Claimant's investments had no post-Award value

<sup>337</sup> **RL-109**, *Windstream I – Award*, ¶ 290.

<sup>338</sup> **RL-109**, *Windstream I – Award*, ¶ 483. ("[A]lthough the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value. It is another matter that the Parties can create such value by reactivating and renegotiating the FIT Contract after the award, which option is still open to them".) As Canada has already submitted, this determination is *res judicata*, the valuation of the FIT contract is *res judicata*. Indeed, the *Windstream I* tribunal's award of compensation relies on its determination that the Project became impossible to finance by May 2012 and that the FIT Contract had no value.

<sup>339</sup> **RL-109**, *Windstream I – Award*, ¶¶ 290, 483.

<sup>340</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

<sup>341</sup> **RL-109**, *Windstream I – Award*, ¶ 374.

<sup>342</sup> **RL-109**, *Windstream I – Award*, ¶ 374.

<sup>343</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

to lose, with the exception of the security deposit, which has been returned.<sup>344</sup> Therefore, the Claimant has not been substantially deprived of its investment.

178. Further, following the *Windstream I* Award, the Claimant's investment did not obtain any value. Its extensive lobbying efforts to the Government of Ontario to reactivate or renegotiate the FIT Contract produced no results. The same is true of the efforts it claims to have made to advance its Project. The Claimant's expert, Secretariat, opines that "[s]ubsequent to the First NAFTA Award, WWIS made efforts to move the Project forward, which included completing research studies to address the concerns raised in relation to the Moratorium."<sup>345</sup> However, the ORTECH Report,<sup>346</sup> which Secretariat relies upon for that statement, does not reference a single study completed after the Award.<sup>347</sup> It is nothing but a repackaging of studies undertaken prior to the moratorium or as part of the Claimant's damages claims in the *Windstream I* arbitration.

179. The Claimant's geophysical and bathymetric survey and application to Canada's Emerging Renewable Power Program ("ERPP") did not create post-Award value for the Project either. The bathymetric survey was based on 2010 data, work undertaken prior to the moratorium, and lodging an unsuccessful application to another government renewable energy program (the ERPP) added no value. Like the ORTECH report, neither the Geological Assessment nor the ERPP application demonstrate any Project value following the *Windstream I* Award.

<sup>344</sup> The amount of the security deposit paid by the Claimant was already determined by the *Windstream I* tribunal not to "substantially exceed, if at all, the value of the security payment". See **RL-109**, *Windstream I – Award*, ¶ 291. Indeed, the tribunal determined that the security deposit was "substantial" when compared to the overall value of the investment. **RL-109**, *Windstream I – Award*, ¶ 291. This determination is *res judicata*, and must be equally applicable to the Claimant's investment today. See *Windstream II – Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, ¶¶ 82-85.

<sup>345</sup> CER-Secretariat, ¶ 4.14.

<sup>346</sup> **C-2075**, ORTECH Status Report: Summary of Engineering and Environmental Studies in Support of the Wolfe Island Shoals Offshore Wind Farm (15 February 2017).

<sup>347</sup> The ORTECH report also accompanied the Claimant's submission of an "updated REA" to the Ministry of the Environment. See **C-2073**, Letter from Ian Bains (WWIS) to Ministry of Environment and Climate Change (MOECC) – "Re: Updated Project Description for the Wolfe Island Shoals Offshore Wind Farm FIT Contract F-000681-WIN-130-602" (February 15, 2017).

180. The same is true of the Claimant’s website launch on March 1, 2017,<sup>348</sup> which proclaimed that the WWIS Project had been “approved through the Government of Ontario’s Feed-in-Tariff (FIT) program” and it “will create 300 MW of energy through 130 turbines” as its contract was “valid and in force”.<sup>349</sup> The creation of a website, with the Claimant’s skewed view of reality, does not create or demonstrate Project value. This is also true for the discussions the Claimant had with allegedly interested third parties following the *Windstream I* Award. The Claimant engaged Keybank in May 2017<sup>350</sup> to find potential funders or purchasers for its Project, despite David Mars’ testimony in 2014 that “there is no prudent equity or debt investor that would want to join this Project at this stage.”<sup>351</sup> The post-Award exchanges with third parties consist of half-hearted inquires and meeting invites. Even David Mars describes the interest of that these partners show as being based on the “potential” value of the Project, or the value contingent upon resolving the uncertainty of the moratorium.<sup>352</sup> As an early-stage project, with a moratorium in place, its potential partners recognized what Windstream would not, that there was no value in the Project at the time.<sup>353</sup> Indeed, not a single valuation was put forward by any of these entities.<sup>354</sup> Documents showing limited outreach and limited interest from third parties cannot serve to illustrate nor create any actual value.

**(b) The Measures at Issue Did Not Significantly Interfere with Any “Distinct, Reasonable, Investment-Backed Expectations” Held by the Claimant**

181. Another relevant factor to be considered in determining whether there has been an indirect expropriation is a claimant’s distinct investment-backed expectations.<sup>355</sup> This analysis must be

<sup>348</sup> **R-0798**, Windstream's Twitter Page (accessed on November 28, 2022).

<sup>349</sup> **R-0799**, Windstreamenergy.ca homepage (accessed on December 8, 2022).

<sup>350</sup> **C-2085**, KeyBanc Capital Markets Engagement Letter (“KBCM – Windstream I EL – Fully Executed”) (May 1, 2017) (Confidential); CWS-Mars-3, ¶ 12; CER-Secretariat, ¶ 4.15.

<sup>351</sup> CWS-Mars-1, ¶ 106.

<sup>352</sup> CWS-Mars-3, ¶¶ 7, 16.

<sup>353</sup> *Windstream II – Memorial*, ¶¶ 224-225, 229: “As explained by Mr. Mars, it was clear that there was a lot of interest in the Project, but that most of these parties required clarity regarding the moratorium before they would pay a significant upfront purchase price or substantially invest in the Project”; *See also* ¶ 228 (f) [REDACTED]

and (g) [REDACTED]

<sup>354</sup> *See below*, ¶¶ 252-255.

<sup>355</sup> **CL-053**, *Glamis Gold – Award*, ¶ 356 and fn. 704.

undertaken in light of, *inter alia*, “the regulatory regime in place at the time of investment”.<sup>356</sup> Article 1110 does not eliminate the normal commercial risks of a foreign investor, or place on a NAFTA Party the burden of compensating a foreign investor for the failure of a business plan that was not prudent in the circumstances.<sup>357</sup>

182. The Claimant’s situation following the *Windstream I* Award was particularly precarious. The Claimant was aware that the regulatory framework for offshore wind development was unfinished, a moratorium was in place with no indication of lifting, and the FIT Contract termination right would be triggered within a few months. As in *Nelson v. Mexico*, the Claimant here “had, at best, a business opportunity, a bet based on its own interpretations and speculations, that was proven wrong”.<sup>358</sup> Just as the claimant in that dispute, *Windstream* has no basis to ask the Tribunal to hold the state liable for its own incorrect expectations and speculations.

183. The Claimant professes to have had an expectation that its Project would proceed following the *Windstream I* Award. However, it fails to demonstrate the reasonableness of these expectations. Indeed, it is not reasonable for the Claimant to conclude from the *Windstream I* tribunal’s statement that the parties had the option of renegotiating or reactivating the FIT Contract,<sup>359</sup> that it expected Ontario would do so. An option is not an obligation.

184. In the *Windstream I* proceedings, the Claimant acknowledged that “[t]here is no indication on the record that the Ontario Government truly intends to lift the moratorium in the near future, or at

<sup>356</sup> **RL-016**, Jack Coe, Jr., and Noah Rubins, “Regulatory Expropriation and the Tecmed Case: Context and Contributions”, in Todd Weiler, Ed., “International Investment Law and Arbitration: Leading Cases From The ICSID, NAFTA, Bilateral Treaties And Customary International Law”, (2005) p. 624.

<sup>357</sup> **CL-091**, *Waste Management II – Award*, ¶ 160: “It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilising of the enterprise”, and ¶ 177: “[I]t is not the function of the international law of expropriation as reflected in Article 1110 to eliminate the normal commercial risks of a foreign investor, or to place on Mexico the burden of compensating for the failure of a business plan which was, in the circumstances, founded on too narrow a client base and dependent for its success on unsustainable assumptions about customer uptake and contractual performance.”; **RL-025**, *Fireman’s Fund – Award*, ¶¶ 184, 218: “The NAFTA, like other free trade agreements and bilateral investment treaties, does not provide insurance against the kinds of risks that FFIC assumed [...]”.

<sup>358</sup> **RL-183**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States* (ICSID Case No. UNCT/17/1) Final Award, 5 June 2020, ¶ 281.

<sup>359</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

all. It has never provided even an approximate “end date” [...]. The fact is that the moratorium may never be lifted. But even if the moratorium is not permanent, Windstream’s loss is”.<sup>360</sup>

185. Following the *Windstream I* Award, though the Claimant made numerous attempts to reactivate or renegotiate its FIT Contract, neither the Ministry of Energy nor the MOE ever led Windstream to believe that a path forward existed for the Project. Both Ministries as well as the Premier stated within days of the release of the Award to the disputing parties that the moratorium would not be lifted until the necessary research was completed.<sup>361</sup> The MOE redirected the Claimant’s requests to counsel and to the IESO, and the IESO unequivocally communicated to the Claimant that it was not prepared to amend the FIT Contract or waive its s.10.1(g) termination right.<sup>362</sup> MOE also indicated clearly to Windstream that Ontario still had “not developed an offshore wind policy framework on approval requirements”, that Ontario had not “developed a process for obtaining Crown land site access under the *Public Lands Act*”, that the “Ministry has not published any final guidelines or policies specific to offshore wind” and that it did “not endorse any of the studies that [Windstream] has conducted in the absence of any provincial policy framework on offshore wind.”<sup>363</sup>

186. In the end, the Claimant’s true expectations were made clear when its enterprise lodged the Domestic Application for an order restraining the IESO from terminating the FIT Contract.<sup>364</sup> The Claimant itself admitted that, by May of 2012, its Project could not be financed and was “effectively cancelled” in light of the period that would be required to re-start the Project, confirm regulatory requirements, obtain the required approvals, complete development work and build the Project.<sup>365</sup> The Claimant’s persistent efforts, both in lobbying the Ontario government and pursuing domestic

<sup>360</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 485.

<sup>361</sup> **C-2471**, Excerpt from the Ontario Legislative Assembly Official Report of Debates (Hansard), 41st Parl, 2nd Sess, No 15 (17 October 2016); **C-2072**, “Ontario signals offshore wind moratorium will continue for years” – Chat News Today (February 13, 2017).

<sup>362</sup> **R-0662**, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream) (February 9, 2017).

<sup>363</sup> **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017) (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn October 23, 2018 with exhibits).

<sup>364</sup> **R-0660**, *Windstream Wolfe Island Shoals Inc. v. Independent Electricity System Operator*, S.C.J. Court File No. CV-17-11745-00, Notice of Application (March 27, 2017) (“OSCJ - Notice of Application”).

<sup>365</sup> *Windstream I – Claimant’s Memorial*, ¶ 318; *Windstream I – Claimant’s Reply Memorial*, ¶ 405.

litigation, indicate that it was well aware of the status of its Project and the real and tangible likelihood that IESO would exercise its termination right.

187. Finally, Canada maintains its objection to the Claimant's reliance on alleged promises and representations that predate the *Windstream I* Award<sup>366</sup> to challenge "a series of measures which all occurred after the Award".<sup>367</sup> The Claimant cannot now resurrect these ten-year-old promises to found its post-Award expectations that its project would advance. Indeed, these promises and representations also cannot be divorced from the *Windstream I* tribunal's determination that no expropriation had occurred at the time of its Award, and from the compensation that the Claimant has already received in *Windstream I*.

**(c) The Character of the Measures Is Not Consistent with there Being an Indirect Expropriation**

188. Another factor for tribunals to consider is the character of the measure in question to determine whether it can amount to an indirect expropriation requiring compensation.<sup>368</sup> Many types of government regulation will have effects on an investment, and potentially even significant and negative effects without amounting to an expropriation. The prohibition against indirect expropriation does not function so as to limit the policy space of governments to such an extent that they are handcuffed in their ability to regulate in the public interest. As the tribunal in *Feldman* explained:

[G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, the granting or withdrawal of government subsidies, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable governmental regulation of this type cannot be

<sup>366</sup> *Windstream II – Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, ¶ 48. See also, for the Claimant's reliance on these alleged promises and representations following the *Windstream I* Award, *Windstream II – Claimant's Memorial*, ¶¶ 458-461.

<sup>367</sup> As noted by the Tribunal in Procedural Order No. 2, ¶ 45; *Windstream II – Claimant's Response to Canada's Request for Bifurcation*, ¶ 2.

<sup>368</sup> **CL-084**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, ¶¶ 115, 122; **RL-024**, *Feldman – Award*, ¶ 103; **CL-081**, *S.D. Myers – Partial Award*, ¶ 281; **CL-023**, *ADM – Award*, ¶ 250; **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 ("*Methanex – Final Award*"), ¶ 7.

achieved if any business that is adversely affected may seek compensation, and it is safe to say that customary international law recognizes this.<sup>369</sup>

189. In *Suez InterAgua v. Argentina*, the tribunal ruled that “[...] in evaluating a claim of expropriation it is important to recognize a State’s legitimate right to regulate and to exercise its police power in the interests of public welfare and not to confuse measures of that nature with expropriation.”<sup>370</sup> NAFTA tribunals have approached and applied the doctrine the same way. In *Chemtura v. Canada*, a manufacturer of a lindane-based pesticide challenged the ban on lindane introduced by Canada as an expropriation in violation of Article 1110. In addition to finding that the measures did not amount to a substantial deprivation of the claimant’s investment, the tribunal held that the state agency “took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation.”<sup>371</sup>

190. Given this framework, the Claimant’s arguments fail to identify any measures that could constitute indirect expropriation. The Claimant objects to the Ontario Government’s decision to allow the FIT Contract to be terminated in accordance with the applicable law.<sup>372</sup> However, the Ontario Government was of the view following the *Windstream I* Award that the Claimant had been compensated for the full value of its investment less the CAN\$6 million security deposit.<sup>373</sup> Given that the Claimant had already been compensated, Ontario’s decision not to intervene to ensure reactivation or renegotiation rather than termination lacks an expropriatory character. After all, Article 1110 of the NAFTA does not require the State to put value back into an investment that was rendered worthless and then fully compensated for its loss.

<sup>369</sup> **RL-024**, *Feldman – Award*, ¶ 103.

<sup>370</sup> **RL-050**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17), Decision on Liability, 30 July 2010, ¶ 128.

<sup>371</sup> **CL-037**, *Chemtura – Award*, ¶ 266.

<sup>372</sup> *Windstream II – Claimant’s Memorial*, ¶ 471.

<sup>373</sup> This security deposit was also returned to the Claimant. See **R-0659**, Letter from Darryl Yahoda (IESO) to Bank of Montreal (February 20, 2020).

191. The Claimant also submits that the Ontario Government’s failure to apply its own regulations and continued failure to address this legal limbo demonstrates a lack of due process.<sup>374</sup> However, the Ontario government and the IESO have both been transparent with the Claimant following the *Windstream I* Award, and their actions did serve to address the status of the Project. The right to terminate the FIT Contract was a right embedded in the contract and belonged to both WWIS and the IESO. The IESO demonstrated immense restraint in exercising its right, allowing the Domestic Application to run its course.<sup>375</sup> The Claimant is responsible for the delays to the s. 10.1(g) decision and the termination itself, not the IESO or Ontario.<sup>376</sup> In the end, Ontario allowed the IESO to terminate the FIT Contract in accordance with the terms of the FIT Contract. This certainly did not have the character of an expropriation.

## **B. Canada Has Not Breached the Minimum Standard of Treatment (Article 1105)**

### **1. Summary of Canada’s Position**

192. The Claimant alleges that Canada breached its obligations under Article 1105 to accord its investments treatment in accordance with the customary international law minimum standard of treatment. Specifically, the Claimant argues that Canada violated Article 1105(1) through the Government of Ontario’s failure to:

- conduct the studies necessary to lift the moratorium, which remains in effect to this day;<sup>377</sup>
- uphold its promises and representations to keep the Claimant’s FIT Contract “frozen”, “on hold” or insulated from the effect of the moratorium;<sup>378</sup>
- direct IESO not to terminate or to amend the FIT Contract.<sup>379</sup>

<sup>374</sup> *Windstream II – Claimant’s Memorial*, ¶ 474.

<sup>375</sup> *See above*, ¶¶ 107-110.

<sup>376</sup> *See above*, ¶¶ 107-110.

<sup>377</sup> *Windstream II – Claimant’s Memorial*, ¶ 487: (“The Government has also failed to conduct the scientific studies which were the purported premise of the moratorium, which remains in effect to this day.”)

<sup>378</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 484-491: (“In light of the tribunal’s findings and Canada’s representations, it was reasonable for Windstream to anticipate that the Ontario Government would operate transparently, in good faith, and would seek to uphold its promises and representations after the Award in *Windstream I*.”)

<sup>379</sup> *Windstream II – Claimant’s Memorial*, ¶ 487: (“[T]he Ontario Government did nothing to prevent the termination of the FIT Contract or require the IESO (the OPA’s successor) to renegotiate the FIT Contract’s terms in a manner consistent with the Ontario Government’s promises.”); ¶ 489: (“Despite its ability to direct the IESO not to terminate or to renegotiate Windstream’s Contract (as it has done on multiple occasions with respect to other power purchase agreements, set out at paragraphs 353 to 358 above), and the *Windstream I* tribunal’s findings that its previous failure to provide

193. These same measures have already been pled by the Claimant, and conclusively determined by the *Windstream I* tribunal. The Claimant plead that Ontario had violated Art. 1105(1) through its:

- decision to apply the moratorium and failure to conduct the necessary work to lift the moratorium;<sup>380</sup>
- failure to fulfill its promise to ensure that the Project would be “frozen” so that the moratorium would not penalize the Claimant;<sup>381</sup>
- failure to direct the OPA to amend Windstream’s FIT Contract or to constrain OPA’s termination rights.<sup>382</sup>

194. Canada has already demonstrated that these claims are barred by, among other things, the doctrine of *res judicata* and the limitation period in Articles 1116(2) and 1117(2) of the NAFTA. In any case, even if the claim is allowed to proceed past the many jurisdictional and admissibility hurdles it faces, none of the measures amount to a breach of Article 1105 of the NAFTA.

directions to the OPA had breached the FET standard, the Ontario Government refused to take any action that would make good on its promises to Windstream.”)

<sup>380</sup> *Windstream I – Claimant’s Memorial*, ¶ 604: (“Because it was an abrupt reversal of Ontario’s promises to support offshore wind and the Project, the moratorium was arbitrary, grossly unfair and contrary to Ontario’s commitments and representations and to Windstream’s legitimate expectations, and therefore amounts to a breach of Article 1105(1).”); ¶ 620: (“[...] very little has been done since the moratorium to advance scientific research. Indeed, efforts by lower-level staff to engage in research projects have been left unapproved and unfunded.”)

<sup>381</sup> *Windstream I – Claimant’s Memorial*, ¶ 623: (“The devastating effects of the moratorium on Windstream were compounded by Ontario’s failure to take steps to ensure that Windstream was not penalized as a result of the moratorium, in breach of the promises it made to do that very thing. [...] Ontario could have followed through on its promise to ensure that the Project was “frozen” and not “cancelled” by removing the contractual deadlines that applied even though Windstream could no longer meet the deadlines because of the moratorium. It could also have given Windstream an alternative project, like it did for TransCanada after Ontario decided to cancel TransCanada’s project for political reasons. Instead, Ontario chose to breach its further commitments to Windstream, on which Windstream relied in continuing to invest to develop the Project even after the moratorium was announced.”); ¶ 624: (“Ontario’s conduct is all the more shocking when compared to its preferential treatment of TransCanada, Samsung, other applicants for Crown land and the other developers of large-scale projects who were awarded FIT contracts at the same time as Windstream. Ontario’s discriminatory treatment of Windstream further breaches Canada’s obligations to grant fair and equitable treatment to Windstream’s investments.”)

<sup>382</sup> *Windstream I – Claimant’s Memorial*, ¶ 629: (“Meanwhile, Ontario should have been carrying out its promises to ensure that Windstream’s project was “frozen” and not “cancelled” following the moratorium and to create a solution acceptable to Windstream [sic]. Although those promises are reflected in the OPA’s internal correspondence, the government never directed the OPA to modify Windstream’s FIT Contract to address the commercial realities created by the moratorium or to constrain OPA’s termination rights under the Contract. As a result, the FIT Contract continues to require that the Project be brought into commercial operation by May 4, 2017 at the latest. Nor did Ontario grant Windstream an alternative project, as it did for TransCanada.”)

195. Taken together, the Claimant's Article 1105 claims are distilled down to its expectation that Ontario should have directed the IESO to not terminate the FIT Contract, or otherwise intervene to save a Project that the Claimant itself had repeatedly stated was no longer viable.<sup>383</sup> The Claimant contends that Ontario's failure to do so "was unfair, inequitable, arbitrary, discriminatory, and in breach of representations reasonably relied on by Windstream's investment."<sup>384</sup> However, it fails to substantiate any of these characterizations of Ontario's post-Award conduct.

196. First, contrary to the Claimant's arguments, Ontario's conduct was not manifestly arbitrary or grossly unfair. As a result of the *Windstream I* Award or otherwise, Ontario was under no obligation to insulate the Claimant from the effects of the moratorium, nor to reactivate or renegotiate the FIT Contract following the Award. The contractual counterparties exercised their respective rights under the FIT Contract; Ontario did not intervene. That is not a breach.

197. Second, the Claimant has failed to demonstrate that the minimum standard of treatment under customary international law protects investors against the sort of discrimination it alleges to have suffered. Indeed, the Claimant's discrimination allegations wrongly rely on Article 1105 as a national treatment standard. The Claimant fails to identify any sectional, racial, gender or religious prejudice to ground an application of Article 1105.

198. Third, the Claimant has failed to demonstrate that Article 1105 obligates Canada to respect all of the Claimant's expectations. It does not. The Claimant has failed to identify any specific commitments or representations by Ontario that could reasonably have been relied on by the Claimant

<sup>383</sup> *Windstream II – Claimant's Memorial*, ¶ 487: ("Despite its promises to Windstream and the tribunal's determination [...], the Ontario the Ontario Government did nothing to prevent the termination of the FIT Contract or require the IESO (the OPA's successor) to renegotiate the FIT Contract's terms in a manner consistent with the Ontario Government's promises."); ¶ 488: ("In making the deliberate decision not to act, Ontario created the conditions that led to the termination of the FIT Contract."); ¶ 489: ("The Ontario Government had the power to direct the IESO to amend the FIT Contract to implement the promise to freeze and/or not to terminate the FIT Contract based on delays caused by the Government, namely the moratorium. [...] Despite its ability to direct the IESO not to terminate or to renegotiate Windstream's Contract [...], and the *Windstream I* tribunal's findings that its previous failure to provide directions to the OPA had breached the FET standard, the Ontario Government refused to take any action that would make good on its promises to Windstream."); ¶ 491: ("Instead, notwithstanding the *Windstream I* tribunal's findings that the Ontario Government's conduct breached the FET standard by failing to take any measures (including by directing the OPA) to resolve the legal and contractual limbo it had created for Windstream, the Ontario Government adopted an explicit policy of refusing to take any steps to prevent the IESO from acting as it eventually did.")

<sup>384</sup> *Windstream II – Claimant's Memorial*, ¶ 489.

in deciding to invest in Ontario or to expect its Project to proceed. Further, the Claimant has made no investment in Ontario following the *Windstream I* Award.

199. Article 1105 obligates Canada to refrain from egregious conduct that would shock the judicial conscience. The NAFTA does not guarantee that every legitimate policy decision made by a government will operate to the benefit of foreign investors. Every measure in this dispute, considered in its appropriate context, was carried out in accordance with Canada's Article 1105 obligations.

## 2. Article 1105(1) Requires that Canada Accord the Customary International Law Minimum Standard of Treatment of Aliens

200. NAFTA Article 1105(1) provides:

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.

201. The proper interpretation of Article 1105(1) was confirmed by the NAFTA Free Trade Commission ("FTC") in its binding Note of Interpretation of July 31, 2001, which states:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).<sup>385</sup>

<sup>385</sup> **CL-010**, NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions (31 July 2001), s. 2 ("NAFTA, Note of Interpretation"); Pursuant to NAFTA Article 1131(2), "[a]n interpretation by the [FTC] of a provision of this Agreement shall be binding on a Tribunal established under [Section B of Chapter Eleven]." NAFTA tribunals have invariably acknowledged the binding nature of the FTC Note. *See for example*, **CL-053**, *Glamis Gold – Award* ¶ 599; **CL-057**, *Thunderbird – Award* ¶ 192; **CL-063**, *Methanex – Final Award*, ¶ 20; **CL-066**, *Mondev – Award*, ¶¶ 100-101, 120-122; **CL-060**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003 ¶ 126; **CL-091**, *Waste Management II – Award*, ¶¶ 90-97; **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 135, 267-268; *ADF – Award*, ¶ 176; **RL-184**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017, ¶¶ 105-106; **CL-153**, *Mesa – Award*, ¶¶ 478-480; **RL-109**, *Windstream I – Award*, ¶¶ 348-350.

202. The threshold for proving a violation of the customary international law minimum standard of treatment under Article 1105(1) is extremely high. The tribunal in *Glamis Gold* summarized the customary international law minimum standard of treatment prescribed by Article 1105(1) as follows:

[A] violation of customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105.<sup>386</sup>

203. This standard has been upheld by various tribunals, including the *Waste Management II* tribunal, which found that in order for there to be a breach of Article 1105, the impugned conduct must have been “arbitrary, grossly unfair, unjust or idiosyncratic” or “involve[ ] a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings...”<sup>387</sup> Citing with approval this exacting standard, the tribunal in *Cargill v. Mexico* confirmed again that a measure must be of serious gravity to breach the threshold protected by Article 1105.<sup>388</sup> There is no such conduct at issue here.

**(a) The Treatment of the Claimant’s Investments Was Neither Manifestly Arbitrary nor Grossly Unfair**

204. NAFTA tribunals have consistently affirmed that a violation of the minimum standard of treatment under customary international law will not be found unless there is evidence of egregious

<sup>386</sup> **CL-053**, *Glamis Gold – Award*, ¶ 627 (emphasis added).

<sup>387</sup> See **CL-091**, *Waste Management II – Award*, ¶ 98: (“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, or involves a lack of due process leading to an outcome which 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.”)

<sup>388</sup> **CL-031**, *Cargill – Award*, ¶ 296: (“To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained-of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected or shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.”)

or shocking conduct, such as serious malfeasance, manifestly arbitrary behaviour, or denial of justice by the respondent NAFTA Party.<sup>389</sup>

205. Ontario's non-intervention in the IESO's termination of the FIT Contract was neither manifestly arbitrary nor grossly unfair. To use the words of the International Court of Justice ("ICJ") in the *ELSI* case, not only was Ontario's decision not "opposed to the rule of law", it respected every legal rule and in no way constituted "a wilful disregard of due process of law", or amounted to "an act which shocks, or at least surprises, a sense of juridical propriety".<sup>390</sup> Ontario's actions fall far short of the kind of conduct required for a breach of Article 1105.<sup>391</sup>

206. The Government was under no obligation to ensure the Claimant was insulated from the post-Award continuation of the moratorium. The Claimant fails to provide any evidence of an obligation on Ontario to direct the IESO to reactivate the FIT Contract or any post-Award commitment by Ontario that it would take steps to direct the IESO to reactivate or renegotiate the FIT Contract or agree to a perpetual *force majeure*. Its position also flies in the face of the \$25 million in damages it was awarded for its inability to develop the Project. The Claimant argues that the *Windstream I*

<sup>389</sup> NAFTA tribunals since the FTC *Note of Interpretation* was issued in July 2001 have confirmed that the threshold for a violation of Article 1105 is high and requires an action that amounts to gross misconduct or manifest unfairness such that it breached the international minimum standard of treatment. See **CL-066**, *Mondev – Award*, ¶ 127: ("In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable [...]"). The *ADF* Tribunal held that "something more than simple illegality or lack of authority under the domestic law of a State is necessary" to establish a violation of Article 1105(1) (**CL-022**, *ADF – Award*, ¶ 190). In summarizing the consideration of what constituted a breach of the minimum standard of treatment, the *Waste Management* Tribunal indicated that the standard would be breached by conduct that is "arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves lack of due process leading to an outcome which 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 the administrative process." (**CL-091**, *Waste Management II – Award*, ¶ 98).

<sup>390</sup> **RL-021**, *Case Concerning Elettronica Sicula S.p.A. (US v. Italy)*, [1989] I.C.J. Rep., Judgment, 20 July 1989, ¶ 128.

<sup>391</sup> **CL-081**, *S.D. Myers – Partial Award*, ¶ 263: (a treatment that "rises to the level that is unacceptable from the international perspective"); **CL-091**, *Waste Management II – Award*, ¶ 115: ("wholly arbitrary" conduct); **CL-057**, *Thunderbird – Award*, ¶ 194: (requiring proof of "manifest arbitrariness failing below international standards"); **CL-053**, *Glamis Gold – Award*, ¶ 617: (requiring "something greater than mere arbitrariness, something that is surprising, shocking, or exhibits a manifest lack of reasoning"); **CL-031**, *Cargill – Award*, ¶ 293: ("The Tribunal thus finds that arbitrariness may lead to a violation of a State's duties under Article 1105, but only when the State's actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy's very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.")

tribunal's finding that "[Ontario's] previous failure to provide directions to the OPA had breached the FET standard" created an obligation that can now form the basis of a new breach of Article 1105.<sup>392</sup> This must be rejected. Even if the *Windstream I* tribunal had wanted to create an obligation on Ontario to act, which it did not, a NAFTA tribunal has no such power.<sup>393</sup>

207. Further, rather than refusing to meet,<sup>394</sup> the Government of Ontario met with WWIS' lobbyists<sup>395</sup> and answered WWIS' numerous letters,<sup>396</sup> either referring WWIS to legal counsel, in the context of the *Windstream I* ongoing litigation, or to the IESO, WWIS' FIT Contract counterparty. Redirecting somebody to counsel when a dispute is ongoing is normal practice. Also, there is nothing untoward about the Ministry of Energy's policy of not dealing with individual FIT contract-holders, given that their contractual relationship is with the IESO.<sup>397</sup> In doing so, the Government of Ontario offered a consistent and clear message to the Claimant that it did not intend to interfere with IESO's contractual rights under the FIT Contract. The Government of Ontario never directed the IESO to terminate WWIS' FIT Contract or deliberately create the post-Award conditions leading to the termination of the FIT Contract, as the Claimant alleges.<sup>398</sup> These conditions already existed since 2012. The mere fact that the Ontario Government had the "ability to direct the IESO not to terminate

<sup>392</sup> *Windstream II – Claimant's Memorial*, ¶ 489.

<sup>393</sup> Article 1135(1) of the NAFTA provides, in part, that "[w]here a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution."

<sup>394</sup> *Windstream II – Claimant's Memorial*, ¶ 487.

<sup>395</sup> CWS-Benedetti-2; **R-0813**, E-mail exchange between David Mars (White Owl Capital) and Patrick Sackville (Ontario Premier's Office) (October 2018).

<sup>396</sup> **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016) (also found as Exhibit 83 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits); **R-0785**, Email from Sarah Paul (MOE) to David Mars (WEI) (December 23, 2016) (also found as Exhibit 80 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits); **C-2076**, Affidavit of Jason Chee-Aloy sworn October 19, 2018 with exhibits; **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017) (also found as Exhibit 3 to **C-2474**, Supplementary Affidavit of David Mars sworn October 23, 2018 with exhibits); **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).

<sup>397</sup> It is normal practice for the Ministry of Energy to direct FIT contract holders to the IESO, its FIT contract counterparty. See for example the letters found in **R-0819**, Letters from Ministry of Energy to individual FIT contract holders (January 16, 2015; May 28, 2014; December 9, 2014; April 19, 2017).

<sup>398</sup> *Windstream II – Claimant's Memorial*, ¶ 488.

or to renegotiate Windstream's Contract"<sup>399</sup> but decided not to save a project that has not been viable since 2012<sup>400</sup> cannot be evidence of unfair and arbitrary treatment.

208. In addition, contrary to what the Claimant affirms,<sup>401</sup> any legal and contractual limbo in which WWIS could have found itself was not caused by Ontario or the IESO, but rather are the result of its own actions. The only reason that the IESO did not make its s.10.1(g) decision when it arose is because the Claimant did everything in its power to prevent or delay it from doing so. On March 27, 2017, the Claimant brought a Domestic Application requesting an order restraining the IESO from exercising any of its terminations right under the FIT Contract.<sup>402</sup> In response, the IESO committed to not exercising its termination right pending the determination of the Domestic Application. After months of affidavit-writing, examinations, and cross-examinations of witnesses, the IESO and WWIS agreed on or around October 31, 2017, to an Adjournment Agreement to allow the IESO to finally make its decision on whether to terminate the FIT Contract pursuant to s.10.1(g).<sup>403</sup> The IESO informed WWIS of its decision to terminate the Project on February 20, 2018,<sup>404</sup> and on April 20, 2018, the Claimant brought a Notice of Return of its Domestic Application.<sup>405</sup> From March 2019, WWIS did not take steps to move its Domestic Application forward,<sup>406</sup> despite periodic reminders by IESO counsel.<sup>407</sup> It eventually abandoned its Domestic Application on January 22, 2020, when it elected to pursue a new NAFTA claim. In the end, the Claimant has no basis to argue that its Project remained in contractual limbo after March 27, 2017.

<sup>399</sup> *Windstream II – Claimant's Memorial*, ¶ 489.

<sup>400</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

<sup>401</sup> *Windstream II – Claimant's Memorial*, ¶ 491: (“[...] notwithstanding the *Windstream I* tribunal's findings that the Ontario Government's conduct breached the FET standard by failing to take any measures (including by directing the OPA) to resolve the legal and contractual limbo it had created for Windstream, [...]”) (emphasis added).

<sup>402</sup> **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits.

<sup>403</sup> **C-2482**, Cost Submissions of IESO dated July 24, 2020, Attachment H.

<sup>404</sup> **R-0665**, Letter from Michael Lyle (IESO) to Nancy Baines (Windstream Wolfe Island Shoals Inc.) (February 20, 2018).

<sup>405</sup> **R-0667**, Notice of Return dated April 20, 2018.

<sup>406</sup> RWS-Lyle, ¶ 14.

<sup>407</sup> **R-0669**, E-mails regarding Confidentiality Undertaking between Melanie Ouanounou (Goodmans) and Nick Kennedy (Torys) (2019).

209. By accepting the FIT Contract offer, the Claimant committed to its terms, including bearing the risks associated with getting its Project permitted and meeting the MCOB, irrespective of the status of a regulatory path forward for the Project. The FIT Contract conferred on both parties the right under s. 10.1(g) to unilaterally terminate the FIT Contract if by reason of *force majeure* the commercial operation date is delayed by more than 24 months after the MCOB, which arose on May 5, 2017. In the end, the Government of Ontario’s decision not to intervene, and allow the counterparties to the FIT contract to exercise their contractual rights in accordance with the terms of the FIT Contract, also brought an end to any contractual limbo. This decision, rather than accepting the Claimant’s position for the terms of the FIT Contract to be rewritten, cannot be considered “opposed to the rule of law”, nor does it “shock or surprise a sense of juridical propriety”.<sup>408</sup>

**(b) The Treatment of the Claimant’s Investments Was Not Discriminatory**

210. The Claimant alleges that the “Ontario Government’s failure to take any action is discriminatory because it is contrary to the actions it has taken in respect of other investments in the energy sector by other proponents”.<sup>409</sup> However, Article 1105 does not prohibit differential treatment amongst investors. The Claimant cites no authority or legal rationale to support its claim that Article 1105(1) protects against the type of discrimination it allegedly suffered. The tribunals in *Waste Management II* and *Mobil*, cited by the Claimant,<sup>410</sup> both referred to discriminatory conduct that “exposes the claimant to sectional or racial prejudice.”<sup>411</sup> The type of manifestly wrongful discrimination one might contemplate being captured would be on the grounds of gender, race, or religious beliefs. None of that type of prejudice is present, or even alleged, here.

211. The Claimant’s attempt to shoehorn national treatment protections into Article 1105, would nullify the existence and application of Articles 1102 and 1103, and must be rejected.<sup>412</sup> The *Grand*

<sup>408</sup> **RL-021**, *Case Concerning Elettronica Sicula S.p.A. (US v. Italy)*, [1989] I.C.J. Rep., Judgment, 20 July 1989, ¶ 128.

<sup>409</sup> *Windstream II – Claimant’s Memorial*, ¶ 490.

<sup>410</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 478, 480.

<sup>411</sup> **CL-091**, *Waste Management II – Award*, ¶ 98 (emphasis added).

<sup>412</sup> Even if Article 1105 did protect against differential treatment amongst investors, the Claimant’s inappropriate comparison to TransCanada Energy, a Request for Proposal (“RFP”) contract holder, in no way proves nationality-based discrimination. The contract to which it was party was not the standard form FIT Contract that WWIS entered into, and

River tribunal noted that “neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investments.”<sup>413</sup> The *Methanex* tribunal stated that Article 1105 “does not support the contention that the ‘minimum standard of treatment’ precludes government differentiation between nationals and aliens.”<sup>414</sup> The *Mercer* tribunal concluded that “the Claimant’s claims for ‘discriminatory treatment’ under NAFTA Article 1105(1) can add nothing to the Claimant’s claims under NAFTA Articles 1102 and 1103.”<sup>415</sup> The three NAFTA Parties expressed the concordant view that less favourable treatment between domestic and foreign investors is not prohibited by Article 1105(1).<sup>416</sup>

**(c) The Treatment of the Claimant’s Investments Was Not in Breach of Any Legitimate Expectations**

212. Finally, and contrary to what the Claimant alleges,<sup>417</sup> the mere failure to fulfil a commitment does not, without more, fall below the standard of treatment required by NAFTA Article 1105. NAFTA tribunals have confirmed that a State’s failure to comply with an investor’s legitimate expectations will not, in itself, constitute a breach of the minimum standard of treatment.

213. At most, legitimate expectations are “a factor to be taken into account by a tribunal when assessing an allegation of breach of another element of the standard.”<sup>418</sup> The *Waste Management II*

as the *Windstream I* Award acknowledged, “the moratorium and the related measures did not apply to TransCanada”. **RL-109**, *Windstream I – Award*, ¶ 414. See also *Windstream I – Canada’s Counter-Memorial*, ¶¶ 349-354, 443-444.

<sup>413</sup> **CL-054**, *Grand River – Award*, ¶ 209.

<sup>414</sup> **CL-063**, *Methanex – Final Award*, Part IV, Ch. C, ¶ 14; See also **CL-053**, *Glamis – Award*, fn. 1087.

<sup>415</sup> **RL-185**, *Mercer International Inc. v. Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018, ¶ 7.60.

<sup>416</sup> **RL-186**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States of America, 8 May 2015, ¶¶ 21-23; **RL-187**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of Mexico, 8 May 2015, ¶ 20; **RL-188**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Reply of the Government of Canada to NAFTA Article 1128 Submissions, 12 June 2015, ¶¶ 43-46.

<sup>417</sup> *Windstream II – Claimant’s Memorial*, ¶ 486: (“In light of the tribunal’s findings and Canada’s representations, it was reasonable for Windstream to anticipate that the Ontario Government would operate transparently, in good faith, and would seek to uphold its promises and representations after the Award in *Windstream I*.”) (emphasis added); ¶ 489: (“The Government’s conduct was unfair, inequitable, arbitrary, discriminatory, and in breach of representations reasonably relied on by Windstream’s investments.”) (emphasis added).

<sup>418</sup> **RL-189**, Dumberry, Patrick. “The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105”, *Journal of International Arbitration* (2014), 31(1); 47-74, p. 49, referring to **CL-064**, *Mobil – Decision on Liability and on Principles of Quantum*, ¶ 152; **CL-091**, *Waste Management, Inc. v. Mexico* (ICSID No. ARB(AF)/00/3) Award, 30 April 2004 (“*Waste Management – Award*”), ¶ 98.

tribunal, cited by the Claimant,<sup>419</sup> only went as far as to say that a breach of representations made by the host State, which were reasonably relied on by the investor, was “relevant” as to whether the NAFTA Party acted in a way that was “grossly unfair, unjust or idiosyncratic” or exhibited “a complete lack of transparency and candour in an administrative process.”<sup>420</sup> It did not hold that a simple breach of representations constitutes a breach of Article 1105. The *Mobil* tribunal, upon which the Claimant also relies,<sup>421</sup> found that clear and explicit representations made [...] to induce the investment” and which were objectively and reasonably relied upon by the investor was a “relevant factor” for a breach of Article 1105, but only when it amounts to “egregious behaviour.”<sup>422</sup>

214. Moreover, as the tribunal in *Glamis Gold* held, “a violation of Article 1105 based on the unsettling of reasonable, investment-backed expectations, requires as a threshold circumstances, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.”<sup>423</sup> Such assurances from the State to the investor, in order to induce its investment, would have had to be “definitive, unambiguous and repeated”.<sup>424</sup>

215. Therefore, even if this Tribunal was to consider the Claimants’ alleged legitimate expectations as a “relevant factor” in its analysis, these legitimate expectations must be based on specific assurances given by Ontario to them in order to induce investment. Nothing of the sort has been identified nor alleged by the Claimant.

216. The Claimant points back to the promises that were previously litigated, the *Windstream I* Award itself, and representations Canada made during the *Windstream I* proceedings. It points to no representation whatsoever made after that Award. Rather, it argues that those old promises, coupled with Ontario’s refusal to direct the re-activation or renegotiation of the FIT Contract, constitutes the breach.<sup>425</sup> The Claimant’s reliance on the *Windstream I* Tribunal’s finding that the FIT Contract could

<sup>419</sup> *Windstream II – Claimant’s Memorial*, ¶ 478.

<sup>420</sup> **CL-091**, *Waste Management II – Award*, ¶ 98.

<sup>421</sup> *Windstream II – Claimant’s Memorial*, ¶ 480.

<sup>422</sup> **CL-064**, *Mobil – Decision*, ¶¶ 152-153.

<sup>423</sup> **CL-053**, *Glamis Gold – Award*, ¶ 766.

<sup>424</sup> **CL-053**, *Glamis Gold – Award*, ¶ 802.

<sup>425</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 487, 491; CWS-N.Baines, ¶ 16.

have been renegotiated as a basis for its expectations that it would be renegotiated is completely unrealistic, particularly after being paid the damages they were owed.

217. In the fall of 2016, the disputing parties were wrapping up years of costly arbitration, and the Claimant was trumpeting the largest Award ever ordered against Canada.<sup>426</sup> By December 6, 2016, the same day the Award was finalized, the Energy Minister told Windstream that the Ministry is not in a position to discuss matters related to individual FIT contracts.<sup>427</sup> By January 12, 2017, the IESO indicated it was not prepared to amend the FIT Contract to provide an extension of the MCOB, and nor would it waive its termination rights under the FIT Contract.<sup>428</sup> By March 27, 2017, less than two weeks after the payment of the *Windstream I* Award, the Claimant's true expectations and motivations were made clear when it initiated the Domestic Application in a last-ditch effort to prevent what it saw as inevitable: the termination of its FIT Contract.<sup>429</sup> Indeed, this was the most rational expectation the Claimant could have had after having been awarded over \$25 million in damages, representing the value for its Project, less the security deposit, as conclusively determined by the *Windstream I* Tribunal. After all, the moratorium remained in place, the technical specifications for offshore wind development had yet to be developed, and there was no indication when any of that would change. In its own words, the Claimant's Project had long been recognized as "substantially worthless" and "de facto cancelled" as a result of the moratorium.<sup>430</sup>

<sup>426</sup> **R-0781**, PRNewswire, Press Release, "Windstream Energy awarded \$28 million in damages and costs for inequitable treatment by Ontario; largest NAFTA award against Canada" (October 13, 2016); **R-0788**, Article, "Energy minister says all options still being considered in offshore wind power case" (December 6, 2016) (also found as Exhibit 79 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>427</sup> **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016) (also found as Exhibit 83 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits); *See also* **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).

<sup>428</sup> **C-2067**, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017); *See also* **R-0662**, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream), (February 9, 2017) (also found as Exhibit 82 in **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits).

<sup>429</sup> **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits.

<sup>430</sup> *See Windstream I – Claimant's Reply Memorial*, ¶ 473 ("Windstream's investments in WWIS, the FIT Contract and the Project are now substantially worthless. As a result of the drastic delays caused by the moratorium, the Project no longer has any hope of achieving commercial operation by the deadlines set out in the FIT Contract.")

218. Any expectation on the part of the Claimant that its Project would proceed was not reasonable or even logical in these circumstances. The Claimant has failed to demonstrate how Ontario's conduct was in breach of any "representations reasonably relied on by Windstream's investment".<sup>431</sup>

## **VI. THE CLAIMANT IS NOT ENTITLED TO THE DAMAGES IT SEEKS FOR THE ALLEGED VIOLATIONS OF THE NAFTA**

### **A. Summary of Canada's Position**

219. To be entitled to any damages in this arbitration, the Claimant bears the burden of proving both that the alleged breaches actually caused its losses, as well as the specific quantum of those losses. The Claimant has not, and indeed cannot, meet its burden in this case.

220. Even if the Tribunal's jurisdiction is established and the challenged measures are in breach of Canada's obligations under NAFTA Chapter Eleven, though Canada maintains the Claimant has not met its burden on either point, those measures were not the cause of any loss or damage to the Claimant's investment. The loss suffered by the Claimant was caused, by the Claimant's own admission and by the conclusive determination of the *Windstream I* Award, by measures that had already taken place prior to the Award for which the Claimant has already been fully compensated.

221. No additional damage could have, or indeed did arise following the *Windstream I* Award. The Claimant may not be satisfied with the amount of compensation it was awarded, but it cannot use this arbitration as a means of seeking compensation for damages arising out of measures that were at issue in that arbitration. Any further compensation to the Claimant would result in an impermissible double recovery. Even if an alleged breach had arisen out of post-*Windstream I* measures, it could not have caused the Claimant any loss or damage, by the Claimant's own admissions. The Claimant admitted on numerous occasions that its investment had no value at the time of the *Windstream I* Award. It is illogical for the Claimant to now argue that any subsequent breach caused it to suffer loss or damage.

222. However, even if causation could be established, the Claimant has not met its burden with respect to the quantum of damages. It has failed to establish that the DCF methodology it proposes is

<sup>431</sup> *Windstream II – Claimant's Memorial*, ¶ 489.

appropriate given the early-stage of development of the Project. Indeed, the *Windstream I* tribunal already found that such an approach was not appropriate for the Claimant's Project, which has not advanced since that time. When a correct market comparables analysis is utilized, it reveals that but for the alleged breaches, the Claimant's investment would have the same value it had at the time of the *Windstream I* Award. Canada's expert, Mr. Jérôme Guillet, the author of the Green Giraffe valuation report from the *Windstream I* Arbitration, confirms that valuation continues to apply in this arbitration, despite the passage of time.<sup>432</sup> The Claimant has been awarded over \$25 million in damages by the *Windstream I* Award, and the IESO has refunded the value of the security deposit the Claimant held with respect to its FIT Contract. The Claimant has thus already been compensated the full fair market value of its investment and it is not entitled to any further compensation.

223. Ultimately, whether the Tribunal finds the Claimant has failed to prove that post-Award events caused its loss or it has failed to demonstrate that there is any quantifiable monetary value associated with its investment at the time of those events, this is "a difference in analysis, not result".<sup>433</sup> As the tribunal stated in *Biwater Gauff*, "[w]hichever approach is adopted, the conclusion is the same, namely that the Claimant has failed to demonstrate compensable monetary damages or loss".<sup>434</sup>

## **B. The Standard of Compensation Under NAFTA Chapter Eleven**

224. Canada agrees with the Claimant that the purpose of compensation is to re-establish the situation that would have existed absent the unlawful act.<sup>435</sup> This is the standard that the NAFTA Parties adopted in Articles 1116 and 1117 by providing that a claim for arbitration can be brought only if an "investor has incurred loss or damage by reason of, or arising out of" a substantive breach of a Party's Chapter Eleven obligations.<sup>436</sup> It is also the standard applied in investor-State arbitration

<sup>432</sup> RER- Jérôme Guillet, ¶ 110.

<sup>433</sup> **RL-010**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶ 806 ("Biwater Gauff – Award").

<sup>434</sup> **RL-010**, *Biwater Gauff – Award*, ¶ 806.

<sup>435</sup> *Windstream II – Claimant's Memorial*, ¶¶ 507-512.

<sup>436</sup> NAFTA Article 1116 (emphasis added).

more generally,<sup>437</sup> following the decision of the Permanent Court of International Justice (“PCIJ”) in the *Chorzów Factory* case.<sup>438</sup>

225. Other than with respect to Article 1110, NAFTA Chapter Eleven does not have an express provision that deals with the standard of compensation for breaches. As a result, tribunals have sought guidance from principles of international law in the application of Article 1135 which allows only monetary damages or restitution of property.<sup>439</sup>

226. At international law, an award of monetary damages should address the wrongful conduct by returning the Claimant to the position it would have been absent that wrongful conduct. As the PCIJ explained in *Chorzów Factory*, damages should “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.”<sup>440</sup> As recognized by the *LG&E v. Argentina* Tribunal, the appropriate question to ask in a damages analysis is: what did the investor lose by reason of the unlawful act?<sup>441</sup> Said differently, the issue the Tribunal must resolve is, assuming a breach has occurred, what is “the situation which would, in all probability, have existed” if “all consequences of” the breach are “wiped out”?<sup>442</sup>

<sup>437</sup> See for example, **RL-010**, *Biwater Gauff – Award*, ¶¶ 776-778; **CL-044**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008 (“*Duke Energy – Award*”), ¶ 468.

<sup>438</sup> **CL-034**, *Chorzów Factory*, p. 47.

<sup>439</sup> NAFTA Article 1135, ¶ 1(a)-(b).

<sup>440</sup> **CL-034**, *Chorzów Factory*, p. 47.

<sup>441</sup> **RL-070**, *LG&E Energy Corp. et al v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007 (“*LG&E Energy – Award*”), ¶ 45.

<sup>442</sup> **CL-044**, *Duke Energy – Award*, ¶ 468. Canada also notes that in *Merrill & Ring*, the claimant alleged that Canada’s log export restraint regime violated Articles 1102, 1103, 1105, 1106 and 1110 of NAFTA. Employing Mr. Low of Deloitte as its valuator, the claimant alleged that its past and future revenues from the export of logs should be assessed on the basis that but for Canada’s wrongful log export regime, it should be operating without those constraints, but that its principle and larger competitors should still be subject to that regime. The tribunal in *Merrill & Ring* ruled that one cannot selectively place different log exporters in different categories of the but for scenario. Thus, the Tribunal in that case recognized that the damages scenario posited by the claimant was not a scenario that would re-establish the situation as if the wrongful act had not been committed. **CL-061**, *Merrill & Ring – Award*, ¶ 260.

227. The standard for expropriation expressed in Article 1101 of the NAFTA codifies the standard of restitution found at international law. In particular, Article 1110(2) of the NAFTA provides that the compensation for an alleged breach of Article 1110:

shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”), and shall not reflect any change in value occurring because the intended expropriation had become known earlier.

228. Since an expropriation requires the substantial deprivation of the entire investment, restitution requires compensation equal to the fair market value of the entire investment on the date immediately before the expropriation took place or became known. Assessing damage based on the fair market value of the investment may also be appropriate for a breach of Article 1105, provided that the breach directly caused the total loss of the investment.<sup>443</sup>

229. With respect to a breach of Article 1110, the value of the investment should be established as of the date of the breach, because that is the value that was lost when the State adopted the measure in question. In other words, that is the specific loss for which the State is responsible. The Claimant argues that it should be permitted to choose between a valuation as of the expropriation date and as of the date of the award, based on whichever valuation is higher.<sup>444</sup> The Claimant is wrong. The Claimant points to no NAFTA award that adopts such an unbalanced and biased rule.

230. All of the cases the Claimant cites (*Yukos v. Russia*, *Quiborax v. Bolivia*, *Pezold v. Zimbabwe*, *ADC v. Hungary*, *Siemens v. Argentina*, *El Paso Energy v. Argentina*, *Unglaube v. Costa Rica*, and *Kardassopoulos v. Georgia*<sup>445</sup>) fail to support its position and can easily be distinguished on the facts or law. A correct reading of *Siemens* demonstrates that the tribunal used the valuation at the date of the expropriation, not the date of the award.<sup>446</sup> The same is true with respect to the decision in

<sup>443</sup> **RL-024**, *Feldman – Award*, ¶ 194.

<sup>444</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 517-519.

<sup>445</sup> *Windstream II – Claimant’s Memorial*, fn. 632.

<sup>446</sup> **CL-082**, *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Award, February 6, 2007 (“*Siemens – Award*”), ¶¶ 377, 379-385.

*Kardassopoulos*,<sup>447</sup> as well as *Unglaube*.<sup>448</sup> In the latter, the tribunal assessed the value of the investment (a piece of land) on a date prior to the award, and then awarded interest on that value up to the date of the award.<sup>449</sup> Only the *Pezold*, *Yukos* and *ADC* tribunals used dates subsequent to the expropriation for valuation purposes, but in those cases, either the investments were already in operation at the time of the expropriation and continued to operate afterward, or there were benefits accruing to the owner from the investment.<sup>450</sup> That is not the case here. At the time of the alleged breach, all the Claimant had was a concept. It had been unable to develop its Project since 2011. Further, in *Pezold*, *Yukos* and *ADC*, intervening events justified a later valuation date in order to prevent unjust enrichment of the State.<sup>451</sup> Again, that is not the case here.

231. There is no reason for the Tribunal to allow the Claimant to, with hindsight, apply a “best of both worlds” approach to valuation, an approach that has been deemed “unacceptable”.<sup>452</sup> It should not be for the Claimant to, on one hand reap the benefits of an increase, while on the other hand, if the value of the investment has decreased following the alleged expropriation, ask for the higher valuation on the date of expropriation. According to Arbitrator Stern:

The solution suggested by *ADC* and *Yukos* is biased in favor of the investors and that the solution which systematically applies the harshest damages on the Respondent State resembles punitive damages, which are excluded in international

<sup>447</sup> **CL-122**, *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, (ICSID Case Nos. ARB/05/18 and ARB/07/15) Award, 3 March 2010, ¶ 517.

<sup>448</sup> **CL-147**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, (ICSID Case Nos ARB/08/1 and ARB/09/20) Award, 16 May 2012, ¶¶ 318-319.

<sup>449</sup> **CL-147**, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, (ICSID Case Nos ARB/08/1 and ARB/09/20) Award, 16 May 2012, ¶¶ 318-319.

<sup>450</sup> **CL-093**, *Yukos Universal Limited (Isle of Man) v. the Russian Federation* (PCA Case No. AA 227) Final Award, 18 July 2014 (“*Yukos – Award*”), ¶¶ 1766-1769; **CL-021**, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16) Award of the Tribunal, 2 October 2006 (“*ADC – Award*”), ¶¶ 483-494. Further, the tribunal in *ADC* noted that a valuation date of the award is to be used only in exceptional circumstances, only where the value of the property has considerably increased between the date of the expropriation and the date of the award; **CL-141**, *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, ¶¶ 763-764.

<sup>451</sup> **CL-093**, *Yukos – Award*, ¶¶ 1766-1769; **CL-021**, *ADC – Award*, ¶¶ 483-494; **CL-141**, *Bernhard von Pezold and others v. Republic of Zimbabwe* (ICSID Case No ARB/10/15) Award, 28 July 2015, ¶¶ 763-764.

<sup>452</sup> **RL-084**, *Quiborax S.A., Non Metallic Minerals S.A., Fosc Kaplún v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Partially Dissenting Opinion of Professor Brigitte Stern, 7 September 2015, ¶ 53 (“*Quiborax – Partial Dissent*”).

law. A legal solution cannot just be based on what is more favorable to one of the parties.<sup>453</sup>

232. In the end, the Tribunal need not even engage in such an analysis. The Claimant cannot point to any factual events that demonstrate a change in the value of the Project. The Project was in the very early stages of development and, as explained further below,<sup>454</sup> the Claimant has not demonstrated that the value of its investment has increased at all since the date of the alleged expropriation. Indeed, the difference in valuation from February 18, 2020 (the date of termination/the Valuation Date) to December 31, 2023 (the theoretical date of the Award) relied upon by the Claimant relates only to the different time value of money, and no other factor.<sup>455</sup> The Claimant's Project never came into operation and did not increase in value at any point after the alleged wrongful expropriation. As such, the appropriate valuation date that should be used by the Tribunal for an alleged breach of Article 1110 is the date of the alleged breach.

### **C. The Claimant Has Failed to Prove the Alleged Breach Caused it the Alleged Losses It Seeks**

233. The Claimant alleges that “a series of measures which all occurred after the *Windstream I* award” caused its losses.<sup>456</sup> In the Claimant's view, post-*Windstream I* Award measures constitute new and additional breaches of the NAFTA which have given rise to losses that have not been compensated to date.<sup>457</sup> These arguments must fail. In the *Windstream I* arbitration, the Claimant received over \$25 million in damages arising out of the same measures that are at issue in this arbitration – the measures alleged to breach the NAFTA in this arbitration are nothing more than the continued application of the measures which were before the tribunal in *Windstream I*, and for which the Claimant received full compensation. As Canada explains fully below, the Claimant has failed to demonstrate how the continued application of the measures at issue in *Windstream I* caused new damages to its investment.

<sup>453</sup> **RL-084**, *Quiborax – Partial Dissent*, ¶ 56.

<sup>454</sup> See ¶¶ 281-286.

<sup>455</sup> CER-Secretariat, ¶¶ 2.17(iii), 5.4(iii).

<sup>456</sup> *Windstream II – Claimant's Response to Canada's Request for Bifurcation*, ¶ 2.

<sup>457</sup> See for example, *Windstream II – Claimant's Memorial*, ¶ 30.

234. Further, the Claimant has not explained how the measures at issue in this arbitration, to the extent they can even be considered new measures, caused any damage to its investment. The Claimant itself admitted on numerous occasions in the *Windstream I* proceedings that its investments had no value. The *Windstream I* tribunal agreed. It is impossible for measures to cause loss or damage to an investment that had no value to start with. As such, the Claimant has not put forward any theory of causation that proves it should be entitled to a windfall of damages it seeks.

**1. The Claimant Bears the Burden of Proving that the Alleged Breaches of the NAFTA Caused It Actual Specific Losses**

235. The Claimant has not demonstrated how any specific measures it alleges breach Articles 1105 and 1110 of the NAFTA caused the specific harm that it claims. Indeed, it spends no effort on causation at all and appears to simply assume that if the Tribunal finds a breach, it is entitled to compensation. That is insufficient to meet its burden.

236. For any alleged breach of the NAFTA, whether it is Article 1105 or 1110, the burden is on the Claimant to show that the alleged breach caused it an actual and specific loss. Specifically, Articles 1116(1) and 1117(1) require that the Claimant demonstrate that it “has incurred loss or damage, *by reason of, or arising out of*” a breach of the NAFTA.<sup>458</sup> As explained by several NAFTA tribunals, this language requires a “sufficient causal link”<sup>459</sup> or an “adequate[ ] connect[ion]”<sup>460</sup> between the alleged breach of the NAFTA and the loss sustained by the investor. As the *Deutsche Telekom v. India* tribunal noted, in reliance on the *Bilcon* decision, this is a high standard for a claimant to meet:

The second step requires showing a causal link between the breach and the alleged injury. In this respect, the Tribunal agrees with the tribunal in *Bilcon* that “[a]uthorities in public international law require a high standard of factual certainty to prove a causal link between breach and injury: the alleged injury must ‘in all probability’ have been caused by the breach (as in *Chorzów*), or a conclusion with

<sup>458</sup> NAFTA Articles 1116 and 1117.

<sup>459</sup> **RL-047**, *S.D. Myers Inc. v. Canada (UNCITRAL) Second Partial Award*, 21 October 2002 (“*S.D. Myers – Second Partial Award*”), ¶ 140. *See also* **RL-010**, *Biwater – Award*, ¶ 779: (“Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].”)

<sup>460</sup> **RL-024**, *Feldman – Award*, ¶ 194.

a ‘sufficient degree of certainty’ is required that, absent a breach, the injury would have been avoided (as in [the] Genocide [case decided by the ICJ])”.<sup>461</sup>

237. The tribunal in *Biwater Gauff v. Tanzania* explained that causation in international investment law “comprises a number of different elements, including, inter alia; (1) a sufficient link between the wrongful act and the damage in question; and (2) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote”.<sup>462</sup> Other investment tribunals have relied on this same principle.<sup>463</sup> Thus, in order to be awarded damages in international arbitration, it is necessary that the Claimant establish that no intervening cause for the alleged damage exists.<sup>464</sup> In accordance with these principles, international arbitral tribunals have refused to award damages in situations where the investment had already failed by the time of the impugned measures, or where the claimant has failed to properly establish legal causation with the specific loss claimed, even if a discrete treaty breach has been found.<sup>465</sup> For example, in the *Biwater Gauff v. Tanzania* arbitration, the tribunal concluded that there was no factual link between the damage claimed and the breach of the investment treaty at issue because the claimant’s investment had lost all of its value before the date of the breach. Similarly, in *ELSI*, the ICJ concluded there were no damages to be awarded because the company was worthless before the allegedly wrongful act by the host State.<sup>466</sup>

238. In short, investment treaties such as the NAFTA are not tools to be used by claimants to recover money arising out of the failure of their businesses due to other factors unrelated to the alleged breach of the NAFTA.<sup>467</sup> In order for the Claimant to be entitled to damages, it must prove specifically how

<sup>461</sup> **RL-190**, *Deutsche Telekom v. Republic of India* (PCA Case No. 2014-10) Final Award, 27 May 2020, ¶ 121 (footnotes omitted) (emphasis added).

<sup>462</sup> **RL-010**, *Biwater – Award*, ¶ 785; **CL-044**, *Duke Energy – Award*, ¶ 468.

<sup>463</sup> See for example, **CL-052**, *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, part XI, p. 8; **RL-070**, *LG&E Energy – Award*, ¶¶ 41-45; **CL-159**, *Crystallex – Award*, ¶ 860; **RL-191**, *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) Award, 6 May 2013, ¶190; **CL-023**, *ADM – Award*, ¶ 282 (emphasis added).

<sup>464</sup> See for example, **CL-058**, *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 234.

<sup>465</sup> See for example, **RL-192**, *Nordzucker v. Poland (UNCITRAL) Third Partial Final Award, 23 November 2009*, ¶ 64; **RL-193**, *Pawlowski AG and Projekt Sever S.R.O. v. Czech Republic* (ICSID Case No. ARB/17/11) Award, 1 November 2021, ¶ 737; **RL-010**, *Biwater – Award*, ¶ 798.

<sup>466</sup> **RL-021**, *Case Concerning Elettronica Sicula S.p.A. (US v. Italy)*, [1989] I.C.J. Rep., Judgment, 20 July 1989, ¶ 101.

<sup>467</sup> **CL-091**, *Waste Management II – Award*, ¶ 114; See also **RL-034**, *Emilio Maffezini v. Spain* (ICSID Case No. ARB/97/7) Award on the Merits, 13 November 2000, ¶ 64; See also **RL-015**, *CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8) Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, ¶ 29.

each of its alleged losses was caused by one or more of the alleged breaches of the NAFTA at issue in this specific arbitration. It is not enough for the Claimant to simply identify alleged breaches, and then to identify alleged losses. NAFTA, and international law, require more than this.

**2. The Cause of Any Losses Suffered by the Claimant Were the Measures that Took Place Prior to the Windstream I Award, for Which the Claimant Has Already Been Compensated**

239. In the *Windstream I* Award, the tribunal summarized the measures of Canada found to be offside Article 1105 of the NAFTA as follows:

Most importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium. While the regulatory framework continued to envisage the development of offshore wind, additional and more detailed regulations governing offshore wind specifically were never developed. The Government let the OPA conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so under the GEGEA (a power it had exercised when introducing the FIT program). As a result, as the negotiations between the OPA and Windstream failed to produce results, by May 2012 the Project had reached a point at which it was no longer financeable. Nonetheless, the Government failed to clarify the situation, either by way of promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract, or by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy and terminating Windstream's FIT Contract in accordance with the applicable law. For these reasons, the Tribunal finds that the Government's conduct vis-à-vis Windstream during the period following the imposition of the moratorium was unfair and inequitable within the meaning of Article 1105(1) of NAFTA.<sup>468</sup>

240. In paragraph 7 of its Memorial, the Claimant lays out the measures of the Ontario Government that allegedly resulted in its investment being “destroyed”, and that are allegedly the source of new damages in this arbitration.<sup>469</sup> It lists these measures as the Government of Ontario's:

- failure to complete in a timely manner the work it considered necessary in order to lift the moratorium, in order to ensure that the moratorium would not further prejudice WWIS by causing further delays to the Project. Indeed,

<sup>468</sup> **RL-109**, *Windstream I – Award*, ¶ 379 (emphasis added).

<sup>469</sup> *Windstream II – Claimant's Memorial*, ¶ 7.

the Ontario Government has not conducted any of the studies that were the stated pretense of the application of the moratorium, and does not appear to be taking any steps to lift the moratorium;

- decision to continue to apply the moratorium to WWIS, despite knowing that its continued application against WWIS would create the conditions that would allow the IESO to terminate the FIT Contract (in direct contradiction with its promise to protect the Project from the effects of the moratorium); and
- failure to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be “deferred”, “frozen” and “on hold.”<sup>470</sup>

241. Despite listing seven measures at issue in this dispute,<sup>471</sup> the Claimant refers only to the above three measures as the cause(s) of the breaches of Article 1105<sup>472</sup> and 1110<sup>473</sup>, and the source of its loss. Yet, none of these measures arose after the *Windstream I* arbitration. In fact, these measures are the continued application of the measures which were already at issue in *Windstream I* and not a new source of damages upon which the Claimant can argue causation. The overlap of these measures with the ones previously found to breach Article 1105 is clear on its face:

<b><i>Windstream I</i> - Claimant's Reply Memorial</b>	<b><i>Windstream I</i> - Award ¶ 329</b>	<b><i>Windstream II</i> - Claimant's Counter-Memorial, ¶ 7</b>
By the time the hearing in this arbitration begins on February 15, 2016, five years will have passed since the Ontario Government imposed the moratorium. At the time of writing, there is no evidence that the Ontario Government is contemplating lifting the moratorium or that it is serious	the Government failed to clarify the situation, [...] by way of promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract;	[Ontario's] failure to complete in a timely manner the work it considered necessary in order to lift the moratorium, in order to ensure that the moratorium would not further prejudice WWIS by causing further delays to the Project. Indeed, the Ontario Government has not conducted any of the

<sup>470</sup> *Windstream II – Claimant's Memorial*, ¶ 7. See also ¶ 293 where these measures are repeated.

<sup>471</sup> *Windstream II – Claimant's Memorial*, ¶ 428.

<sup>472</sup> *Windstream II – Claimant's Memorial*, ¶¶ 487-492.

<sup>473</sup> *Windstream II – Claimant's Memorial*, ¶ 458(a)-(c).

<p>about conducting the research MOE claims is necessary for offshore wind development.<sup>474</sup></p>		<p>studies that were the stated pretense of the application of the moratorium, and does not appear to be taking any steps to lift the moratorium;<sup>475</sup></p>
<p>As of the date of filing this reply, four years and four months have passed since Ontario imposed the moratorium. Ontario has not given any indication as to when – and indeed whether – the moratorium might be lifted. As described in paragraphs 416 to 426 below, MOE has failed to meet the time frames set out under each and every research plan it has prepared. The most recent research plan produced to Windstream does not even contemplate a date for lifting the moratorium.<sup>476</sup></p>	<p>Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium;</p>	<p>[Ontario’s] decision to continue to apply the moratorium to WWIS, despite knowing that its continued application as against WWIS would create the conditions that would allow the IESO to terminate the FIT Contract (in direct contradiction with its promise to protect the Project from the effects of the moratorium); and</p>
<p>MEI did not ensure that the OPA amended the FIT Contract to insulate Windstream from the effects of the moratorium. The OPA refused to amend the FIT Contract to ensure that it would remain under <i>force majeure</i> – and not subject to termination by the OPA – while the moratorium remains in effect.<sup>477</sup></p>	<p>The Government let the OPA conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so under the GEGEA.</p>	<p>[Ontario’s] failure to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be “deferred”, “frozen” and “on hold.”</p>

242. Further, the manner in which the Claimant describes the measures it complains of in its pleadings reveals it is merely targeting the continued application of measures already found to have

<sup>474</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 411.

<sup>475</sup> *Windstream II – Claimant’s Memorial*, ¶ 7.

<sup>476</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 357.

<sup>477</sup> *Windstream I – Claimant’s Reply Memorial*, ¶ 372.

caused it damage in the *Windstream I* arbitration – the Claimant refers to the Ontario Government’s decision to “continue to apply the moratorium”<sup>478</sup> after the *Windstream I* Award and Ontario’s “continued mistreatment of Windstream”.<sup>479</sup> Indeed, in its Memorial, the Claimant states “Windstream did not expect the government to continue the very conduct that was already found to breach the NAFTA”.<sup>480</sup> Mr. Baines, the Claimant’s witness confirms the same:

I did not expect Ontario to continue to maintain the course of conduct that had led to the original finding of wrongdoing by the tribunal in *Windstream I*.<sup>481</sup>

243. Even the Ontario government’s decision to not direct the IESO to not terminate the FIT Contract such that the Project would be “‘deferred’, ‘frozen’ and ‘on hold’” was at issue in the *Windstream I* arbitration, and the Claimant was awarded damages in connection with this measure.<sup>482</sup>

244. The fact that that termination right formally materialized after the *Windstream I* Award does not give rise to separate damages from those the Claimant had already suffered by September 2016 when the Award was issued. The Claimant stated clearly and often in the *Windstream I* proceedings that its FIT Contract had effectively been canceled and was rendered worthless by the time of the *Windstream I* Award. This was the very basis of its damages claim.<sup>483</sup>

245. There is no new source of damages in this arbitration. Canada cannot be held liable twice for damages arising out of the same measure that continues to be applied. The Claimant has not identified a single new measure in this arbitration that gives rise to damages that are separate and distinct from the damages already deemed to have caused the Claimant injury in the *Windstream I* arbitration.

246. There is no evidence that the measures at issue in this arbitration, sparse as they are, resulted in adverse economic effects that were not already existent at the time of the alleged breach, and for which Windstream has already been compensated. To apply the words of the *Biwater* tribunal, “the

<sup>478</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 7(b), 25(b), 293(b), 303, 330, 331, 428(b).

<sup>479</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 35(b).

<sup>480</sup> *Windstream II – Claimant’s Memorial*, ¶ 244 (emphasis added).

<sup>481</sup> *Windstream II – Claimant’s Memorial*, ¶ 292; CWS-Baines-3, ¶¶ 52-55.

<sup>482</sup> **RL-109**, *Windstream I – Award*, ¶ 379. See also *Windstream II – Claimant’s Memorial*, ¶ 487(b).

<sup>483</sup> *Windstream I – Claimant’s Memorial*, ¶¶ 14, 477, 564, 574, 586, 611, 626; *Windstream I – Claimant’s Reply Memorial*, ¶¶ 24, 399, 473, 474, 475, 480, 609, 618.

actual, proximate or direct causes of the loss and damage for which the Claimant now seeks compensation were acts and omissions that had already occurred”<sup>484</sup> by the time of the *Windstream I* Award. In other words, none of the alleged breaches put forward by the Claimant in this arbitration caused the loss or damage in question or broke the chain of causation that was already in place, and for which the Claimant received over \$25 million in compensation in early 2017. The continued application of these measures cannot be the basis upon which causation is found in this arbitration.

### **3. The Claimant Has Not Explained How the Measures at Issue in his Arbitration Could Cause Damage to its Investment Given Its Investment Had No Value at the Time of the *Windstream I* Award**

247. An investment that has no value as a result of measures that took place in 2011-2016 cannot be said to have lost value as a result of measures that were allegedly adopted or maintained from 2016-2020. As explained more fully below, the Claimant has not addressed the *Windstream I* tribunal’s finding that the FIT Contract had no value at the time of that Award,<sup>485</sup> or that the Claimant itself admitted the Project was no longer financeable, and as such, had no value, as of May 2012.<sup>486</sup> Notably, the Claimant argued in *Windstream I* that:

The moratorium and Ontario’s related actions have had devastating and drastic effects on Windstream’s investments in Ontario, which are now effectively worthless and have no prospect of recovering in value even if the moratorium is lifted.<sup>487</sup>

248. The Claimant reiterated its view that its investments had no value at the time of the *Windstream I* arbitration numerous times.<sup>488</sup> It argued that the Project could no longer be financed, and thus had no value since the FIT Contract was subject to a termination right by the [IESO].<sup>489</sup> It contended that,

<sup>484</sup> **RL-010**, *Biwater Gauff – Award*, ¶ 798.

<sup>485</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

<sup>486</sup> **RL-109**, *Windstream I – Award*, ¶ 288.

<sup>487</sup> *Windstream I – Claimant’s Memorial*, ¶ 2 (emphasis added).

<sup>488</sup> *Windstream I – Claimant’s Memorial*, ¶¶ 2, 14, 34, 299, 316, 317-318, 320-321, 555, 608, 661, 666, 677; *Windstream I – Claimant’s Reply Memorial*, ¶¶ 24, 34, 400, 407-408, 472-478, 729; **C-2461**, Day 1 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 15, 2016) (Confidential), pp. 89:6, 90:23-24, 98:9-20; CER-Taylor/Low, s. 5; **RL-109**, *Windstream I – Award*, ¶¶ 192, 235.

<sup>489</sup> See for example, *Windstream I – Claimant’s Memorial*, ¶¶ 317, 319; **RL-109**, *Windstream I – Award*, ¶ 288.

as a result of the deferral and Ontario's refusal to insulate the Claimant against its consequences, the Project had become substantially worthless and not financeable.<sup>490</sup>

249. The *Windstream I* tribunal also summarized the status of the Project as of that Award:

The Claimant contends that, while the Project is currently under force majeure, there is no longer any realistic prospect that the Project can reach commercial operation by 4 May 2017. Consequently, the Project is no longer financeable and has effectively lost all of its value. This is the case even if the OPA were to waive its right to terminate the FIT Contract as the conduct of the Ontario Government has created such uncertainty around the offshore wind industry in Ontario that no potential investor would be prepared to invest in the Project.<sup>491</sup>

250. These statements were made by the Claimant in 2014-2016, and the *Windstream I* tribunal in 2016, well before the alleged breaches at issue in this arbitration even took place, yet the Claimant now argues that events that postdate the 2016 *Windstream I* Award are the reason its investments have no value. This is completely illogical.

251. The Claimant also appears to ignore the fact that, in addition to its findings with respect to the Project, the *Windstream I* tribunal agreed with the Claimant that the FIT Contract had no value as of the date of the *Windstream I* Award:

On the other hand, the Tribunal does not consider it appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value.”<sup>492</sup>

252. The Claimant's backtracking on these statements in this arbitration should be given no weight. The Claimant asserts that it was approached “by a number of third parties who were interested in

<sup>490</sup> *Windstream I – Claimant's Memorial*, ¶¶ 14, 608; *Windstream I – Claimant's Reply Memorial*, ¶ 407; **C-2461**, Day 1 - Confidential Condensed Transcript of the Arbitration Hearing of *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (February 15, 2016) (Confidential), pp. 89:6 and 90:23-24.

<sup>491</sup> **RL-109**, *Windstream I – Award*, ¶ 288; See also ¶ 190 citing *Windstream II – Claimant's Memorial* at ¶ 320 (emphasis added).

<sup>492</sup> **RL-109**, *Windstream I – Award*, ¶ 483.

partnering with Windstream to develop the Project after the moratorium was lifted”.<sup>493</sup> In the Claimant’s view, these parties “shared Windstream’s understanding that following the Award, the Project and the FIT Contract had a future and substantial potential value.”<sup>494</sup> However, these arguments do nothing more than demonstrate the Claimant’s continually shifting self-serving storyline that it has presented over the course of this arbitration and the last. It is incongruous that the same Project and FIT Contract that the Claimant alleged had no value in 2014, now has value, despite there having been no changes in the status of the FIT Contract, the continuation of the moratorium in Ontario, no further advancements to the Project, and no changes to the regulatory framework.

253. The evidence the Claimant has put forward in support of its assertion fails to demonstrate that any third-party saw any value in the Project or the FIT Contract after the *Windstream I* Award. The Claimant has not put forward a single valuation of the Project made by these entities. In fact, none of the entities had completed the due diligence required to ascribe value to the Project (or ascribe no value). As Mr. Guillet notes, the arguments put forward by the Claimant do not demonstrate that these entities ascribed any value to the Project and FIT Contract at the time of the alleged breach.<sup>495</sup> Instead, these were merely potential investors interested in learning more. Mr. Guillet, who has extensive experience in project financing, indicates that:

This is standard commercial wording to express curiosity about a project but has no relation whatsoever with any intent to purchase, let alone providing a valuation.<sup>496</sup>

[...]

fact that 4 out of 9 did not even deem it interesting enough to warrant looking at the information is already a significant data point as to the lack of attractiveness of the Project or Ontario as a potential offshore wind market at the time.<sup>497</sup>

254. These documents are nothing more than meeting invites and inquiries. They say nothing about the value of the Project or the FIT Contract, or that the Claimant would have been able to successfully develop its Project. Indeed, there is not a single document that indicates a valuation for the Project,

<sup>493</sup> *Windstream II – Claimant’s Memorial*, ¶ 224.

<sup>494</sup> *Windstream II – Claimant’s Memorial*, ¶ 224.

<sup>495</sup> RER-Jérôme Guillet, ¶¶ 255-267.

<sup>496</sup> RER-Jérôme Guillet, ¶ 257.

<sup>497</sup> RER-Jérôme Guillet, ¶ 260.

or that anyone was seriously interested in pursuing the Project at that time. Meeting invites and inquiries do not illustrate how the Claimant's project gained any value following the *Windstream I* Award. As Mr. Guillet notes:

The data presented does not lead to these conclusions at all. All they say is that if there hadn't been a moratorium, industry players would have looked at how to develop projects in Ontario, and would have talked to Windstream as an existing actor. It says nothing about the fact that the asset had any meaningful value nor that it would have successfully concluded the development process.<sup>498</sup>

255. The Claimant has not explained how the measures at issue in this arbitration can be the cause of loss or damage to an investment that the Claimant alleged had no value in 2016, and which did not increase in value after the *Windstream I* Award. There were no intervening events between that decision and the filing of the NOA in this arbitration that changes that determination. The Claimant has not put forward any evidence that the FIT Contract, which continued to be in *force majeure* status with the IESO in a position to terminate, increased in value after the *Windstream I* Award up until it was cancelled by the IESO on the Valuation Date, such that it could, in turn, suffer compensable damages. While the *Windstream I* tribunal noted that value could be created by reactivating and renegotiating the FIT Contract after the award, the reality is this did not happen. As such, the Claimant has not proven causation, and its claim with respect to damages in this arbitration must be dismissed.

**D. In the Alternative that Causation is Proven, the Claimant Is Not Entitled to the Quantum of Damages It Seeks**

256. Even if the Claimant has proven that the challenged measures caused the Claimant to suffer the losses it claims, the Claimant is still not entitled to its claim for lost profits. The Claimant argues that the Project's "expected future cash flows can be reliably forecast", that any project risks can be appropriately reflected in the cash flows themselves, and that the "DCF methodology best reflects the price that would be negotiated by a prudent and arms' length notional buyers and sellers".<sup>499</sup> However, the Claimant has not put forward a single authority that supports the use of the DCF for an early-stage, non-operational investment, with no record of profits. A DCF is simply not appropriate in such circumstances. Indeed, the *Windstream I* tribunal already made this finding with respect to

<sup>498</sup> RER- Jérôme Guillet, ¶ 267.

<sup>499</sup> CER-Secretariat, ¶ 2.22.

the Claimant's investment. Further, as Canada's expert, Mr. Guillet explains, offshore wind projects in the early stage of development are valued on a market comparables analysis due to their inherent high level of risk. When such an analysis is carried out using the proper comparables, and appropriate deductions made to account for the damages already paid in the *Windstream I* arbitration, the Claimant is not entitled to any damages in this arbitration.

**(a) The Claimant Bears the Burden of Establishing the Quantum of Damages It Seeks**

257. Both the Claimant and Canada agree that the Claimant bears the burden of establishing the quantum of damages.<sup>500</sup> The Claimant further argues that this Tribunal should be guided by the decision in *Charles Lemire v. Ukraine* in assessing the proof required to establish the quantum of damages in this case.<sup>501</sup> As that tribunal noted, a claimant must provide a basis upon which a tribunal “can, with confidence, estimate the extent of the loss.”<sup>502</sup> However, this does not mean that uncertainty is part of the standard of proof for damages. As the tribunal in *Al-Bahloul v. Tajikistan* held:

While, on the one hand, total certainty should not be required in order to assess damages if the existence of damages has been established, on the other hand, the assessment of damages cannot be based on conjecture or speculation. A persuasive factual basis for the assessment must be shown.<sup>503</sup>

258. Thus it is for the Claimant to demonstrate that the quantum of damages it seeks are not based on speculation. As discussed further below, the Claimant has not met its burden in this regard.

**(b) A DCF Is Not the Appropriate Valuation Methodology for an Early-Stage, Offshore Wind Project**

259. International tribunals have consistently confirmed that where an investment is still in the pre-operational stage or has no history of profits, awarding any amount for future profits would require

<sup>500</sup> *Windstream II – Claimant's Memorial*, ¶ 524.

<sup>501</sup> *Windstream II – Claimant's Memorial*, ¶ 524.

<sup>502</sup> **CL-123**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, ¶ 246.

<sup>503</sup> **RL-194**, *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan* (SCC Case No. V064/2008) Final Award, 8 June 2010, ¶ 39.

an impermissible degree of speculation.<sup>504</sup> As the *Windstream I* tribunal noted, with reference to the Claimant's Project specifically:

The Project must therefore be considered an early-stage project. Accordingly, based on the evidence of Dr Guillet, which the Tribunal accepts, the DCF method is not an appropriate method of valuation for the Project, given its early development stage and the related risks and uncertainties.<sup>505</sup>

260. The Claimant's Project has not advanced any further than it was at the time of the *Windstream I* Award. It does not have a single permit, nor does it have site control. Despite this, the Claimant persists in its attempts to re-argue a position with respect to the valuation methodology for damages, which it so clearly lost in the *Windstream I* arbitration.<sup>506</sup> There is no support, both on the law and in real-world examples, that should lead this Tribunal to a different decision than the one conclusively arrived at by the *Windstream I* tribunal. For the sake of completeness, however, Canada responds directly to the Claimant's arguments, which Canada notes, are largely repetitive of the position both parties took, and arguments they made, in the *Windstream I* arbitration, where the Claimant was unsuccessful.

**(i) International Law Does Not Support the Use of a DCF Methodology to Value an Early-Stage Development Offshore Wind Project**

261. International tribunals have consistently upheld the notion that projects in the early stage of development, with no history of profits, should not be valued on the basis of a DCF. This is because, as the Claimant notes, the appropriate valuation methodology will depend “on the circumstances of

<sup>504</sup> See for example, **CL-062**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1) Award, 30 August 2001 (“*Metalclad – Award*”), ¶ 122; **CL-082**, *Siemens – Award*, ¶¶ 355, 368-370; **CL-092**, *Wena – Award*, ¶¶ 123-125; **CL-061**, *Merrill & Ring – Award*, ¶ 264; **RL-195**, *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13) Award, 27 September 2017, ¶ 1131; **RL-196**, *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain* (ICSID Case No. ARB/14/11) Decision on Jurisdiction, Liability and Quantum Principles, 12 March 2019, ¶ 647.

<sup>505</sup> **RL-109**, *Windstream I – Award*, ¶ 475 (footnotes omitted).

<sup>506</sup> *Windstream II – Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, ¶¶ 30-34.

each individual case.”<sup>507</sup> When the future profits of an investment are highly speculative, or when the project is in the early development phase, the use of the DCF methodology is inappropriate.

262. For instance, in *Metalclad v. Mexico*, despite the fact that the investor had purchased, permitted, financed, and constructed a waste disposal facility in Mexico whose operation was thwarted by a local governor’s Ecological Decree, the tribunal ruled that since the landfill was never operational, the “fair market value is best arrived at [...] by reference to Metalclad’s actual investment in the project”.<sup>508</sup> In *Wena Hotels v. Egypt*, the company at issue had operated one of its hotels for less than 18 months and had not completed the construction of the other.<sup>509</sup> The tribunal awarded only the investment costs of the enterprise.<sup>510</sup> In *Vivendi v. Argentina*, the enterprise was not a going concern and had never turned a profit.<sup>511</sup> The tribunal in that case awarded investment value as the “closest proxy” for fair market value.<sup>512</sup> In *Siemens v. Argentina*, the business was not a going concern, and the tribunal awarded only the investor’s sunk costs.<sup>513</sup> Finally, in *PSEG v. Turkey*, the tribunal recognized that the parties had never finalized the terms of the contract at issue. It further noted lost profits were normally reserved for compensation of investments that are substantially made and have a record of profits and that tribunals are “reluctant to award lost profits for a beginning industry and unperformed work”.<sup>514</sup>

263. Further even the limited authorities put forward by the Claimant do not support its position that it should be entitled to lost profits, as none of the cases are analogous to the case at hand.<sup>515</sup> For example, the Claimant cannot prove that “its project would have been more likely than not to become operational absent [Ontario’s] conduct” as noted in the *Oil Company Sapphire Award*.<sup>516</sup> Canada and

<sup>507</sup> **CL-159**, *Crystallex – Award*, ¶ 886; *Windstream II – Claimant’s Memorial*, ¶ 528.

<sup>508</sup> **CL-062**, *Metalclad – Award*, ¶¶ 121-122.

<sup>509</sup> **CL-092**, *Wena – Award*, ¶ 124.

<sup>510</sup> **CL-092**, *Wena – Award*, ¶ 123.

<sup>511</sup> **CL-041**, *Vivendi – Award*, ¶ 8.3.5.

<sup>512</sup> **CL-041**, *Vivendi – Award*, ¶ 8.3.13.

<sup>513</sup> **CL-082**, *Siemens – Award*, ¶¶ 362-389.

<sup>514</sup> **CL-076**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 310-319.

<sup>515</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 531-533.

<sup>516</sup> **CL-072**, *Oil Company Sapphire International Petroleum, Ltd. v. National Iranian Oil Company* (35 ILR(1967) 136) Award, 15 March 1963.

the Claimant spent millions of dollars arguing this point in the *Windstream I* arbitration. The speculative nature of such an argument led the Tribunal to determine that a DCF was not appropriate for the Project.<sup>517</sup> Similarly, there is no proven track record of profitability by Windstream or others in similar circumstances, as was noted in the *Vivendi II Award*,<sup>518</sup> nor has the state “recognized the project’s potential profitability” as in the *Oil Company Sapphire International Award*.<sup>519</sup> The Claimant has not put forward a single case where an international tribunal used the DCF method to value an investment in the same stage of development and risk as the Claimant’s Project. The reason for this is simple – none exist.

264. Like in the *Windstream I* arbitration, the Claimant has put forward numerous expert reports to argue that “but for the actions of the government of Ontario, Windstream would have brought the project to commercial operation on time.”<sup>520</sup> It does so first, to convince the Tribunal that its actions were not the cause of any of its losses, and second, in support of its assertion that a DCF is an appropriate methodology for quantification of damages. Canada has already addressed the question of causation as it relates to this case above. Whether or not the Project could be built before its commercial operation date (Canada has maintained since its pleadings in *Windstream I* that it could not<sup>521</sup>) does not change the fact that the Claimant’s damages were caused by the measures complained of in the *Windstream I* arbitration.

265. Further, on the Claimant’s own schedule in this arbitration, the Project would not have met commercial operation within the timelines required by the FIT Contract. While the Claimant argues that the Project could have reached commercial operation after 58 months in its “but for” world, the reality is the Claimant did not have 58 months to develop its Project. The Claimant’s schedule ignores the fact that the Claimant already used over 6 months of its allotted five years prior to the time it entered *force majeure* status on November 22, 2010, as a result of delays the Project faced with

<sup>517</sup> **RL-109**, *Windstream I – Award*, ¶ 475.

<sup>518</sup> **CL-041**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007.

<sup>519</sup> See *Windstream II – Claimant’s Memorial*, ¶ 532.

<sup>520</sup> See *Windstream II – Claimant’s Memorial*, ¶¶ 493-495.

<sup>521</sup> See, for example, Canada’s Counter-Memorial in *Windstream I*, ¶¶ 529-547.

respect to the Crown land site release process.<sup>522</sup> This means that Windstream had only 55 months, until July 2024 to reach commercial operation.<sup>523</sup> This alone demonstrates the inherent riskiness of the Claimant's investment and why a DCF is not appropriate.

266. Even leaving that glaring issue aside, the Claimant's but for world, which assumes away all risk related to the Project to achieve a 58-month project schedule, is entirely unreasonable. As Canada's expert Mr. Guillet notes, the list of assumptions put forward by the Claimant in their but for world "can only be described as heroic".<sup>524</sup> As he further states:

most of [the Claimant's assumptions] are not related to the Alleged Breaches, as they relate to the subsequent behavior of regulatory authorities, with the expectation of "best-in-class" support (despite the absence of any political support for that in Ontario at the time), and the assumption of no factual obstacles of any kind within the project (for a first of its kind project in a sensitive area in terms of water, shipping lanes, fauna, and near the international border). The absence of certain regulatory obstacles (the Alleged Breaches) does not automatically translate into a successful development process. Even in countries with very favorable and established offshore wind regulatory frameworks, not all projects get their permits and not all those that do get them achieve that in their hoped-for timetable.<sup>525</sup>

267. The reality is, the FIT Contract itself did not provide a guarantee that the Project would be permitted, developed, and reach Commercial Operation.<sup>526</sup> The Claimant had no guaranteed right to any of the necessary permits and approvals, and the failure to obtain just one could have resulted in substantial costs, delays, or the failure of the Project altogether. While the Claimant has hired numerous experts in this arbitration in an attempt to demonstrate that it would have received the required permits, these reports do not remove the Project's risk and the inherent speculation in the

<sup>522</sup> C-0550, Letter from Killeavy, Michael (OPA) to Baines, Nancy (WWIS) (September 9, 2011).

<sup>523</sup> The Claimant's FIT Contract was signed August 20, 2010 with an effective date of May 4, 2010. Based on the FIT Contract terms, the Claimant had 5 years (1827 days) to bring its Project into commercial operation, making the MCOD at the time of FIT Contract signing May 4, 2015. From November 22, 2010 onwards, the Claimant's FIT Contract was in *force majeure* status. As of this point, just over 6 months have past between the signing and the FM event, or 202 days specifically, during which the Claimant could have been advancing its Project. In a but for world, where the Claimant's FIT Contract is not terminated on the Valuation date (February 18, 2020) and it is permitted to move ahead with the Project (on the assumption it is no longer in *force majeure* status), there are 1625 days left before MCOD (1827 days – 202 days). This means the new MCOD for the Project would be July 31, 2024.

<sup>524</sup> RER-Jérôme Guillet, ¶¶ 34, 123.

<sup>525</sup> RER-Jérôme Guillet, ¶¶ 34, 123.

<sup>526</sup> RWS-Cecchini, ¶ 6; RER-BRG-1, ¶ 77; RER-BRG-2, ¶¶ 27-28, 93, 119-123.

Claimant's damages assessment. Canada demonstrated in the previous *Windstream* arbitration the numerous issues with the Claimant's arguments in this regard,<sup>527</sup> and Mr. Guillet further explains the issues with the Claimant's approach of assuming away all risk from an industry-wide perspective:

While I cannot comment specifically on each of the individual assumptions, the assumption that no issues would come out of the normal permitting processes and technical studies (environmental impact assessment, detailed subsea soil conditions, wind studies, spatial planning, discussions with all stakeholders, including indigenous stakeholders) is hugely optimistic. As noted before in paragraph 51 and discussed again further in paragraph 228 – even in a highly favourable jurisdiction, more than half of the projects identified in UK Round 3 (after more than a few preliminary studies to identify suitable sites) had to be abandoned due to issues discovered during the development phase.<sup>528</sup>

268. Indeed, the Claimant's understanding of the FIT Contract fails to take into account any of the requirements built therein. The Claimant seems to entirely ignore, for example, the fact that the IESO will not issue a NTP until a supplier has, among other things, the required permitting and financing at both the federal and provincial level.<sup>529</sup> The Claimant had neither, and as a result, it is inappropriate to assume away the risk that the Project would not only fail to reach NTP but also meet Commercial Operation. As Canada argued in the *Windstream I* arbitration, and as Mr. Lyle confirms here, for many FIT Contract holders, these risks can and do materialize.<sup>530</sup> The same is true for offshore wind projects more generally:

More generally, having a regulator that allows offshore wind projects to proceed under applicable rules does not mean that each project will automatically get all permits in the shortest conceivable time. In other words, regulatory risk cannot be assumed away even if we assume there is no longer a Moratorium. Even in regulations with a thriving offshore wind industry, not all projects successfully navigate the permitting phase, and those that do often require more time than desired or expected.<sup>531</sup>

269. Further, the Claimant has no experience developing offshore wind projects, and despite its claims, it pointed to no evidence of a proven track record of successfully developing, financing, and

<sup>527</sup> See for example, *Windstream I – Canada's Rejoinder*, ¶¶ 275-289.

<sup>528</sup> RER-Jérôme Guillet, ¶¶ 34, 154.

<sup>529</sup> **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, s. 2.4(a); RER-URS-2, ¶ 27.

<sup>530</sup> See *Windstream I – Canada's Rejoinder*, ¶ 294; RWS-Lyle, ¶¶ 18-19.

<sup>531</sup> RER-Jérôme Guillet, ¶ 160.

building large-scale energy projects in the offshore sector.<sup>532</sup> The fact is, the Claimant was actively seeking this experience elsewhere in the market, or indeed looking for an investor to acquire the Project to develop it in its entirety.<sup>533</sup> As Mr. Guillet noted in the first *Windstream* arbitration:

we do not see in [the Claimant’s background] the relevant offshore wind experience that would have allowed them to run the full development, contracting and financing process within the required timelines. We can only underline that this is a very high risk investment, with a high risk of the funds being stranded for years and never returned to the investors.<sup>534</sup>

270. The “heroic” assumptions taken by the Claimant to discount the high level of risk associated with its Project are further exposed by considering the Project from the perspective of financing. Mr. Guillet notes:

Along with ignoring the Moratorium and normal development risks, the most unrealistic assumption is that they could reach FC just 40 months before the cliff-like milestone for successful operations (at >90% capacity) of the Project. As noted in paragraphs 95 and 124 above, this is an aggressive assumption from a project development, financing, and ultimately valuation perspective, as banks would simply not accept that risk.<sup>535</sup>

[...]

Altogether, the Project’s schedule can only be described as highly optimistic, probably unrealistic and definitely unacceptable to project finance lenders.<sup>536</sup>

271. The Project was essentially unfinanceable and would not have reached financial close according to the Claimant’s own schedule. As Mr. Guillet notes, the lack of buffer for unforeseen events in the schedule, and the “cliff effect” of the MCOD deadline in the FIT Contract, is “not something that would ever be acceptable to lenders, even in the more experienced period of today.”<sup>537</sup>

272. Additionally, the Claimant’s own inputs into its DCF analysis show the inherent riskiness of its use in this arbitration. Mr. Guillet has pointed out issues with numerous financial inputs used by

<sup>532</sup> *Windstream II – Claimant’s Memorial*, ¶ 537.

<sup>533</sup> CWS-Mars-3, ¶¶ 6-7.

<sup>534</sup> RER-Green Giraffe, ¶ 135.

<sup>535</sup> RER-Jérôme Guillet, ¶ 155.

<sup>536</sup> RER-Jérôme Guillet, ¶ 197.

<sup>537</sup> RER-Jérôme Guillet, ¶ 124.

the Claimant's expert, Secretariat, that cannot stand. For example, he notes issues with the numbers used for upfront cash considerations,<sup>538</sup> contingent considerations,<sup>539</sup> CAPEX,<sup>540</sup> O&M costs,<sup>541</sup> insurance premiums,<sup>542</sup> debt quantum,<sup>543</sup> and IRR<sup>544</sup> to name a few. As Mr. Guillet notes, the conclusion reached by the Claimant's expert with respect to the Project value is not realistic:

Essentially, using the 15% number that Secretariat suggests and the highly optimistic development schedule they propose (with less than 3 years to get to FC), the Secretariat Report argues that a project which has no formal site control, none of its permits, and no confirmed grid access is worth 66% of its value as a fully permitted, fully contracted and fully funded project at FC, and that's just not realistic.<sup>545</sup>

273. On the Claimant's valuation date of February 18, 2020, the WWIS project was an undeveloped project without a single permit – the project remained a highly speculative and entirely conceptual endeavor, that was in *force majeure* status, not due to the moratorium at all, but due to issues with the Crown land site release process. It was in exactly the same place it was in at the time of the *Windstream I* Award with respect to development.

274. The bottom line is simple: As made clear in Canada's submissions in the *Windstream I* arbitration,<sup>546</sup> the risks associated with the development of this Project were, and remain, significant, and it is unreasonable to conclude that it would be able to reach Commercial Operation in the time periods required by the FIT Contract such that a DCF would be appropriate – the level of risk related to the Project is too high. The Claimant's arguments with respect to the likelihood of reaching commercial operation are entirely speculative, and fail to support the use of a DCF in this case.

<sup>538</sup> RER-Jérôme Guillet, ¶ 140.

<sup>539</sup> RER-Jérôme Guillet, ¶ 141.

<sup>540</sup> RER-Jérôme Guillet, ¶¶ 200-202.

<sup>541</sup> RER-Jérôme Guillet, ¶¶ 204-205.

<sup>542</sup> RER-Jérôme Guillet, ¶¶ 206-207.

<sup>543</sup> RER-Jérôme Guillet, ¶¶ 210-212.

<sup>544</sup> RER-Jérôme Guillet, ¶¶ 220-225.

<sup>545</sup> RER-Jérôme Guillet, ¶ 225.

<sup>546</sup> See for example, *Windstream I – Canada's Rejoinder*, ¶¶ 293-302.

**(ii) Industry Realities Do Not Support the Use of a DCF Methodology to Value an Early-Stage Development Offshore Wind Project**

275. The Claimant’s arguments in support of the DCF methodology to value damages are also completely divorced from the industry valuation of offshore wind projects. While the Claimant has argued that “market participants favour the use of a DCF methodology for valuing offshore wind projects”, and that “the DCF method is the most appropriate and reliable approach for quantifying Windstream’s losses”, such a position is incorrect and misleading. With respect to the offshore wind industry specifically, a DCF valuation is not used for projects at the same stage of development as the Claimant’s. Specifically, with respect to the Claimant’s valuation, Mr. Guillet indicates:

In any case, I am not aware of any project in the world that has received 2/3 of full FC/FID DCF value 2.5 years prior to FC without permits or political support or without highly unusual circumstances, so the number coming out of Secretariat’s DCF methodology is not realistic, and is not consistent with standard methodologies used in the industry – indeed it is higher by an order of magnitude [...].<sup>547</sup>

276. The Claimant has put forward no market evidence in support of the use of the DCF methodology to value offshore wind farms in the early stages of development. As Mr. Guillet noted in his report in the *Windstream I* arbitration, based on his extensive transactional experience in the offshore wind sector, the opposite is actually the case:

projects prior to FC/FID are not usually valued on the basis of future cash flows, as these are still viewed as highly speculative due to the absence of FC/FID, up to the actual date for such event.<sup>548</sup>

277. Mr. Guillet confirms that this is still the case.<sup>549</sup> Indeed, he responds directly to the Claimant’s expert’s arguments to the contrary, that in their view, “the DCF method is an appropriate and necessary valuation methodology for the Project at the Valuation Date”<sup>550</sup>:

<sup>547</sup> RER-Jérôme Guillet, ¶ 38. *See also*, RER-Jérôme Guillet, ¶¶ 136-138, 218-225 and 227-229.

<sup>548</sup> RER-Green Giraffe, ¶ 94.

<sup>549</sup> RER-Jérôme Guillet, ¶¶ 35, 52, 172.

<sup>550</sup> CER-Secretariat, ¶ 2.22.

This paragraph is in contradiction with my experience that projects under development are valued on the basis of multiples, and as noted in paragraph 116, this was not Mr. Tetard's practice when we worked together on that topic.<sup>551</sup>

278. Mr. Guillet goes on to note:

DCF is one element of background which is taken into account as it provides an outer limit to the possible value but it does not drive valuation. This was already explained in detail in paragraph 94 of the Green Giraffe Report [...].

[...].

One reason why DCF is not used prior to FC/FID is that it is very difficult to identify the right discount factor to take into account the risks prior to FID/FC. In my experience, the discount factor tends to be determined ex-post as a result of identifying the value via other means and then calculating the relevant corresponding return on capital. With the high discount rate numbers that are typical of the pre-FC period, and even more so of the early development phase, and somewhat long periods, even small changes to the discount factor tend to cause very large variations in valuation (due to the exponential nature of the calculations), making this methodology too imprecise.<sup>552</sup>

279. Further, the comment made by Mr. Tetard, the Claimant's expert, that "the only situation when an offshore wind project would not be valued using a DCF methodology is the market is when no information is available to evaluate the potential cash flow generated by a Project"<sup>553</sup> is incorrect and misleading. As Mr. Guillet notes:

This is plainly incorrect as pretty much all early generation projects under development in Europe had known revenue streams by law and were not valued on the basis of DCF, but on multiples [...].<sup>554</sup>

280. Canada has already successfully argued in the *Windstream I* arbitration, in light of the Project's speculative nature and early stage of development, the known development and construction risks, and the questions surrounding the Claimant's ability to secure the necessary debt and equity investment financing, there is no reason why the Tribunal should depart from the decision of the *Windstream I* tribunal and the well-established approach to damages for non-operating projects, both

<sup>551</sup> RER-Jérôme Guillet, ¶ 130.

<sup>552</sup> RER-Jérôme Guillet, ¶¶ 172-173.

<sup>553</sup> CER-Secretariat, ¶ 5.28.

<sup>554</sup> RER-Jérôme Guillet, ¶ 180.

in jurisprudence and industry practice, and accept the use of the DCF methodology in the circumstances of this particular case.

**(c) Canada’s Expert’s Market Comparables Analysis Shows the Proper Valuation of the Project on February 18, 2020**

281. Contrary to the Claimant’s assertion that a comparable transactions methodology would lead to essentially the same damages valuation as its DCF methodology,<sup>555</sup> real-world experience demonstrates that absent access to Crown land and given the Claimant’s lack of progress towards obtaining environmental permits, the Project had no material value on the marketplace.<sup>556</sup> As Canada’s expert, Mr. Guillet notes, the value ascribed to an offshore wind project is highly dependent on its stage of development and on whether the project has reached certain milestones, such as site control, permits, a revenue regime, and grid access.<sup>557</sup> A project with all of these items has more value than a project that has only some, or none of these.<sup>558</sup>

282. Based on market evidence, a project like the Claimant’s, which is in the early stages of permitting, is stuck in an unpredictable regulatory process with no well-defined path to permitting, and would be the first to go through the process in a given country, has no material value.<sup>559</sup> Mr. Guillet confirms that he is not aware of a single market transaction where value has been ascribed to a project that did not have the exclusive right to the site on which it wishes to operate.<sup>560</sup>

283. Despite this knowledge, the Claimant has put forward a market comparable analysis that fails to appreciate the stage of development of the Project, and therefore utilizes comparable projects that are of no relevance to exaggerate its damages claim. It made this mistake in *Windstream 1*,<sup>561</sup> and failing to learn from its mistake there, continues to do so in this arbitration. Mr. Guillet notes the

<sup>555</sup> See *Windstream II – Claimant’s Memorial*, ¶ 551.

<sup>556</sup> RER-Jérôme Guillet, ¶¶ 30, 49, 58, 256; See also RER-Green Giraffe, ¶¶ 132, 144, 178.

<sup>557</sup> RER-Jérôme Guillet, ¶ 48; See also RER-Green Giraffe, ¶¶ 68-86.

<sup>558</sup> RER-Jérôme Guillet, ¶¶ 52-55; See also RER-Green Giraffe, ¶¶ 69-70, 94-102.

<sup>559</sup> RER-Jérôme Guillet, ¶¶ 30, 49, 58, 256; See also RER-Green Giraffe, ¶¶ 23, 94.

<sup>560</sup> RER-Jérôme Guillet, ¶ 58; See also RER-Green Giraffe, ¶ 97.

<sup>561</sup> **RL-109**, *Windstream I – Award*, ¶ 479: “As noted above, Messrs Taylor and Low did not consider early stage projects”.

problem with the Claimant’s approach that cherry-picks projects to inflate its market comparables analysis:

The reality is that most of these were at very different stages of development compared to the Project and thus their valuation gives no relevant information as to the Valuation of the Project [...] <sup>562</sup>

284. The result is that the compensation claimed in this case is “highly inflated and completely unrealistic”<sup>563</sup>:

Benchmarks are highly relevant and are the primary tool for the valuation of projects under development – as a starting point for a finer analysis by the buyer of the progress under the various development milestones, where credit can be given to progress made towards a milestone, if the probability of reaching it is deemed better than if no effort had been expended. But the projects relied on by Secretariat and presented in Secretariat’s Figure 7-1 are simply not comparable to the Project.<sup>564</sup>

285. Any market comparables analysis must take into account other projects that are in a similar stage of development and only those. When proper comparables are used, the Claimant’s Project is worth substantially less than that claimed by the Claimant, and even a value of up to 0.07 MEUR/MW for the Project, as adopted by the *Windstream I* tribunal, is “relatively optimistic”.<sup>565</sup> As M. Guillet concludes, based on a proper comparables analysis:

The conclusion from past data, as shown above, is that early stage projects are valued from 0.01 MEUR/MW for projects with only site control to 0.1 MEUR/MW for projects in an advanced stage of the permitting process, and with less uncertainty on grid access or access to the tariff regime.<sup>566</sup>

286. The FIT Contract is a single milestone on a path toward value for the Project. By comparing itself to late-stage projects much further along in their road to commercial operation, or those projects’ highly unique circumstances, the Claimant has presented a highly skewed valuation. The Claimant’s approach to damages must therefore be rejected.

<sup>562</sup> RER-Jérôme Guillet, ¶ 232.

<sup>563</sup> RER-Jérôme Guillet, ¶ 41.

<sup>564</sup> RER-Jérôme Guillet, ¶ 244.

<sup>565</sup> RER-Jérôme Guillet, ¶ 111.

<sup>566</sup> RER-Jérôme Guillet, ¶ 55.

**(d) Any Award of Damages Must Be Reduced by the Award of Damages in *Windstream I***

287. The Claimant's arguments that it did not get the FMV of its investment in *Windstream I* because the Tribunal found no illegal expropriation had taken place does not mean that the Claimant should be entitled to more damages in this arbitration should the Tribunal find a breach of Article 1110. The FMV of the Project has not changed since the *Windstream I* Award, and should this Tribunal find a breach of the NAFTA, the FMV of its investment is all the Claimant is entitled to. Further, as the Claimant itself acknowledges,<sup>567</sup> any damages awarded in this arbitration must be offset by the amount the Claimant received in the *Windstream I* arbitration. When a correct valuation of the Claimant's investment is used, and the appropriate deduction for the *Windstream I Award* is made, the result is that the Claimant is not entitled to any damages.

288. As explained above, the valuation of the Claimant's investment provided by Mr. Guillet in this arbitration (a range of 0.01 MEUR/MW to 0.1 MEUR/MW for a project in the early stage of development, like the Project) remains the same as it did in the *Windstream I* arbitration. The *Windstream I* tribunal accepted this valuation, awarding the Claimant damages within this range of 0.07 MEUR/MW.<sup>568</sup> When the *Windstream I* Award is therefore deducted from Mr. Guillet's valuation, nothing remains to be awarded to the Claimant in this arbitration. All that would remain owing to the Claimant would be the value of the \$6 million security deposit.<sup>569</sup> Yet the Claimant was refunded this amount by the IESO upon the termination of the FIT Contract in 2020.<sup>570</sup> As such, the Claimant is not entitled to any damages in this arbitration.

**VII. THE CLAIMANT HAS NOT PROVEN IT IS ENTITLED TO PRE-JUDGEMENT INTEREST**

289. With the exception of Article 1110 claims, NAFTA, like the UNCITRAL Arbitration Rules, is silent on the rate of interest an Award bears, while also providing the Tribunal with the discretion to

<sup>567</sup> *Windstream II – Claimant's Memorial*, ¶ 503.

<sup>568</sup> **RL-109**, *Windstream I – Award*, ¶¶ 482-484.

<sup>569</sup> See **RL-109**, *Windstream I – Award*, ¶¶ 478-480.

<sup>570</sup> CWS-N.Baines, ¶ 73; **C-2291**, Letter from Daryl Yahoda (IESO) to Bank of Montreal Global Trade Operations re Irrevocable Standby letter of Credit No. BMT0494154OS (February 20, 2020).

award “any applicable interest” when awarding monetary damages.<sup>571</sup> The guiding principle under international law is that interest is only necessary to ensure full reparation, but there is no automatic right to it.<sup>572</sup> As a result, the Claimant bears the burden of proving that the circumstances of this case justify an award of interest to ensure full reparation. The Claimant has failed to meet this burden. The Claimant fails to establish why, given the circumstances of the case, full reparations can only be met with an award of interest – indeed, the Claimant fails to mention a single fact at all.<sup>573</sup> It does not cite to a single document or any evidence whatsoever that demonstrates why its claim to compensation is not fully satisfied without interest.

290. It is neither Canada nor the Tribunal’s responsibility to make the Claimant’s case for it. Therefore, should the Tribunal find a breach of NAFTA, and determine that damages are appropriate, Canada asks the Tribunal to deny the Claimant’s request for pre- and post-award interest. However, Canada provides the following comments on the specific interest rate proposed by the Claimant nonetheless.

291. The Claimant argues that it is entitled to an interest rate of the Canada Three Month Interbank Rate plus 2%, compounded annually.<sup>574</sup> The Claimant relies on its expert, Secretariat, to support its argument that this is “a common and widely accepted reference point for financing or investment decisions in Canada” and that it is appropriate because it “approximates the cost of debt for the Project.”<sup>575</sup> However, Mr. Guillet points out the numerous problems with the debt funding plan proposed by Secretariat.<sup>576</sup> More importantly, neither the Claimant nor the Secretariat report provides any evidence of the use of this rate in the context of pre- or post-judgment interest in investment arbitration. And, in any event, Secretariat’s expert opinion is moot, given that it was instructed by the Claimant to use this rate.

<sup>571</sup> NAFTA, Article 1135(1)(a).

<sup>572</sup> **R-0818**, International Law Commission, Articles of State Responsibility, Supplement No. 10 A/56/10 August 2001, Article 38(1).

<sup>573</sup> *Windstream II – Claimant’s Memorial*, ¶¶ 556-562.

<sup>574</sup> *Windstream II – Claimant’s Memorial*, ¶ 562.

<sup>575</sup> *Windstream II – Claimant’s Memorial*, ¶ 562; CER-Secretariat, ss. 2.17(iii), 9.3.

<sup>576</sup> RER- Jérôme Guillet, ¶¶ 93-105.

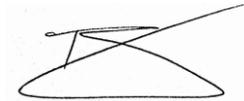
292. It would be more appropriate for this Tribunal to base any award of pre- or post-award interest on the value used in previous investment arbitrations, or more specifically, that which was agreed to by Canada and the Claimant following the *Windstream I* arbitration. That value was an interest rate of 2.7 percent, compounded annually.<sup>577</sup>

### VIII. CONCLUSION AND PRAYER FOR RELIEF

293. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

December 12, 2022

Respectfully submitted on behalf of Canada,



Rodney Neufeld  
Heather Squires  
Azeem Manghat  
Catherine Menard

Trade Law Bureau

<sup>577</sup> **R-0779**, Letter from Rodney Neufeld (Global Affairs Canada) to Myriam Seers (Torys) Re: Agreeing to Post-Award Interest (October 27, 2016).

## ANNEX - FACTUAL CHRONOLOGY

Date	Event	Details	Exhibit
1 Oct 2009	OPA launches FIT Program	930 applications; 2 offshore wind applicants	C-0208
8 Apr 2010	OPA announces FIT Offers	184 offers (47 for on-shore wind, 1 for offshore wind) 124 will reach commercial operation (28 on-shore wind)	RWS-Lyle, ¶ 18-19
4 May 2010	FIT Contract Offer	The OPA issues Offer Notice to WWIS	C-0246
16 May 2010	WWIS (I. Baines) writes to OPA (Killeavy) with concerns	WWIS explains it is struggling with the considerable regulatory uncertainty; asks if the <i>force majeure</i> provision would apply to such circumstances; notes its investors' concerns around the OPA's right to terminate	C-0262
18 Aug 2010	Revised FIT Contract Offer to WWIS	The OPA agrees to extend the MCOB for offshore wind projects from four to five years, moving WWIS' MCOB from 4 May 2014 to 4 May 2015	C-0349 C-0348 C-0243
20 Aug 2010	FIT Contract signed	WWIS executes FIT Contract with Contract Date of 4 May 2010 and MCOB of 4 May 2015	C-0251
22 Nov 2010	WWIS enters <i>force majeure</i>	<i>Force majeure</i> granted due to regulatory delays caused by the absence of a Crown land site release process	C-0408 C-0550
11 Feb 2011	Ontario announces offshore wind moratorium	Ontario announces that it will not proceed with offshore wind projects while scientific research is to be conducted regarding potential effects on Great Lakes	C-0725 C-0482
28 Jan 2013	<i>Windstream I</i> NOA	Windstream files NAFTA claim	
12 Jun 2013	Energy Directive ends large-scale FIT	Energy Minister directs IESO to end the procurement of new FIT Program capacity over 0.5 MW	C-0661
1 Jan 2015	Amalgamation of the OPA and the IESO	The OPA's objects, powers and contracts transfer to a new entity continued under the IESO name	C-0003
1 Sept 2016	Ontario Planning Outlook report	IESO reports publicly that Ontario is in a strong position to meet energy demand with existing resources	R-0771
27 Sept 2016	Energy Directive suspends LRP-II	Energy Minister directs the IESO to suspend the procurement of 1,000 MW of renewable energy	R-0770
30 Sept 2016	<i>Windstream I</i> Award	Release of uncorrected Award of 27 September 2016	R-0773
6 Oct 2016	Windstream lobbies Energy Minister's Chief of Staff	Chief of Staff (Teliszewsky) responds to Lobbyist (Benedetti, Sussex Strategy Group) that any discussions should take place between the parties' legal counsel	CWS-Benedetti-2 ¶ 5(a)
13 Oct 2016	Windstream lobbies Minister of Energy	Energy Minister (Thibault) tells lobbyist (Benedetti, Sussex Strategy Group) that discussions must take place between parties' legal counsel	CWS-Benedetti-2 ¶ 5(b)

## ANNEX - FACTUAL CHRONOLOGY

Date	Event	Details	Exhibit
16 Oct 2016	Windstream lobbies Energy Minister's Chief of Staff	Chief of Staff (Teliszewsky) tells Lobbyist (Benedetti) that Energy's lawyers are still analysing the Award	CWS-Benedetti-2 ¶ 5(c)
17 Oct 2016	Ontario not ready to lift moratorium	Premier Wynne and Minister Thibeault state in Legislative Assembly that Ontario is still finalizing the scientific research, and will not lift the moratorium	C-2471, Exhibit 78
26 Oct 2016	New Windstream lobbyist registers with Integrity Commissioner	Goal of lobbyist (Jessica Georgakopoulos, Navigator Ltd.) is to "encourage resolution on the Ontario government's offshore wind power moratorium" and understand "whether it will change in light of the NAFTA ruling"	R-0782
27 Oct 2016	Agreement between Canada and Claimant	Parties agree on late payment of the <i>Windstream I</i> Award and interest rate of 2.7 percent	R-0779
9 Nov 2016	Windstream lobbies Energy Minister's Chief of Staff	Chief of Staff (Teliszewsky) informs Lobbyist (Benedetti, Sussex Strategy Group) that Energy Ministry has been advised by counsel not to engage with Windstream	CWS-Benedetti-2 ¶ 5(d)
15 Nov 2016	New Windstream lobbyist registers with Integrity Commissioner	Goal of lobbyist (Andrew Galloro, Navigator Ltd.) is to "encourage resolution on the Ontario government's offshore wind power moratorium" and understand "whether it will change in light of the NAFTA ruling"	R-0783
15 Nov 2016	New Windstream lobbyist registers with Integrity Commissioner	Goal of lobbyist (Randi Rahamim, Navigator Ltd.) is "Information sharing regarding windstream energy's contract with the Ontario government to supply offshore wind energy"	R-0783
23 Nov 2016	Windstream (Mars) writes Environment Minister (Murray)	Windstream requests an update on offshore research and on an updated policy framework.  Environment (Paul) informs Windstream (Mars) on December 23, 2016 of release of two desktop studies on offshore wind, "one of the many steps necessary to allow for all of the proper research to take place first"	R-0784  R-0785
28 Nov 2016	Windstream (Mars) writes to Energy Minister (Thibeault)	Windstream requests a meeting with the Ministry of Energy to discuss next steps with the Project  Minister responds on December 6, 2016 that the Ministry does not discuss matters related to individual FIT Contracts, that IESO is the FIT Contract counterparty, and that Ontario is still reviewing the <i>Windstream I</i> Award	C-2049  R-0787
6 Dec 2016	<i>Windstream I</i> Award	Release of finalized Award of 27 September 2016	R-0775

## ANNEX - FACTUAL CHRONOLOGY

Date	Event	Details	Exhibit
15 Dec 2016	Windstream (Mars) writes to Energy Minister (Thibeault)	<p>Windstream requests meeting to discuss next steps for the Project, asks for meeting to move the Project forward or negotiate a reasonable resolution</p> <p>Minister responds on 21 February 2017 that the Ministry does not discuss matters related to individual FIT Contracts, and refers Windstream to IESO</p>	C-2055  C-2076
12 Jan 2017	Meeting between IESO and WWIS	Windstream asks IESO to amend the FIT Contract and extend the MCOB; IESO responds that it will not waive its s. 10.1(g) termination right or extend the MCOB.	C-2067
9 Feb 2017	IESO (Killeavy) writes to WWIS (N. Baines)	IESO indicates it will not extend the FIT Contract's MCOB or waive its 10.1(g) termination right, and that it has not yet made a decision to exercise the termination right under s. 10.1(g)	R-0789
13 Feb 2017	Ontario not ready to lift the moratorium	Environment Ministry indicates to the press it will "follow the impact of North America's first offshore wind pilot project in Lake Erie – a project authorized by the State of Ohio", in order to "have a better grasp of any potential environmental and health challenges posed by freshwater offshore wind developments", and that the "moratorium will not be lifted until research findings are understood and concerns surrounding offshore wind projects are addressed"	R-0794 C-2072
15 Feb 2017	WWIS (I. Baines) submits an updated Project Description to the Environment Ministry	<p>WWIS provides what it calls an "updated REA" to "fulfill [WWIS'] obligations under the FIT Contract and bring the project into operation". It repackages <i>Windstream I</i> expert reports on damages as work done over the previous seven years to "move the Project forward"</p> <p>The Ministry responds on August 25, 2017 that the studies in the submission are not the reports required for an REA application, and states it cannot confirm whether or when Ontario will lift the moratorium</p>	C-2073  R-0795
21 Feb 2017	Windstream applies to enforce Award	Windstream files an application in Ontario Superior Court of Justice to enforce the <i>Windstream I</i> Award	R-0793
28 Feb 2017	New Windstream lobbyist registers with Integrity Commissioner	Goal of lobbyist (Lanny Cardow, Navigator Ltd.) is to "encourage resolution on the Ontario government's offshore wind power moratorium" and understand "whether it will change in light of the NAFTA ruling"	R-0783
1 Mar 2017	WWIS launches official website	Website offers info on the Project which "was approved through the Government of Ontario's FIT program"	R-0798 R-0799 R-0800
14 Mar 2017	Payment of Award	Windstream Energy LLC receives payment plus interest	

## ANNEX - FACTUAL CHRONOLOGY

Date	Event	Details	Exhibit
27 Mar 2017	Domestic Application  WWIS' counsel (Terry) writes to IESO (Rattray and Boll)	WWIS initiates application in Ontario Court for an order restraining IESO from exercising its termination rights  WWIS threatens to schedule an interlocutory injunction unless IESO confirms it will not terminate the FIT Contract before the Domestic Application is decided	C-2471  R-0663
17 Apr 2017	IESO agrees to a 30-day notice period prior to termination	Emails between IESO counsel (Ouanounou) and WWIS counsel (Sherkey) confirm agreement to notify prior to exercising 10.1(g) termination right	C-2083
3 Apr 2017	Notice of Discontinuance	Windstream withdraws its application to enforce the <i>Windstream I</i> Award in Ontario Court	R-0797
1 May 2017	KeyBanc agreement with Windstream to sell or find a partner for the Project	Keybanc Capital Markets Inc. agrees to act as exclusive financial advisor and placement agent in connection with any proposed sale transaction of the Project; it began to reach out to companies in June and opened a data room in mid-July	C-2085 CER-Secretariat ¶ 8.7
5 May 2017	Termination right under s. 10.1(g) of the FIT Contract arises	Either party may exercise its right to terminate the FIT Contract if <i>force majeure</i> event has delayed Commercial Operation Date by more than 24 months beyond original MCOB of May 4, 2015	C-0348 C-0243
May-Oct 2017	Domestic Application proceedings	IESO meets with WWIS on several occasions, with their respective legal counsel. Ian Baines and David Mars are examined by the IESO and Michael Killeavy and Perry Cecchini are examined by WWIS	C-2478 C-2479 C-2480 C-2481
Oct 2017	Ontario Long-Term Energy Plan	Ontario announces a move away from “relying on long-term energy contracts” to a “market-based approach”	C-2061
31 Oct – 1 Nov 2017	Adjournment Agreement	WWIS and IESO adjourn the Domestic Application to allow IESO to make a decision regarding the exercise of its termination right under s. 10.1(g) of the FIT Contract	R-0664
Nov 2017 – Feb 2018	WWIS and IESO exchange information to inform s.10.1(g) termination decision	As a part of its s.10.1(g) decision-making process, the IESO requests certain information from WWIS, as well as other information WWIS considers relevant to inform the IESO's determination	C-2125 R-0801 to R-0807
26 Jan 2018	IESO seeks update on moratorium from Environment Ministry	IESO (Lyle) writes to Environment (Goyette) to inquire about current status of moratorium  Goyette responds on 2 Feb 2018 that no offshore wind policy framework has been developed, there is still no process for obtaining Crown land site access in place, and it does not know whether or when Ontario will revisit its February 2011 moratorium decision	C-2477, Exhibit J, K

## ANNEX - FACTUAL CHRONOLOGY

Date	Event	Details	Exhibit
[REDACTED]	IESO's s.10.1(g) Analysis Memo	[REDACTED]	R-0808
20 Feb 2018	IESO informs WWIS of s. 10.1(g) decision	IESO (Lyle) informs WWIS (N. Baines) of its decision to exercise its s.10.1(g) termination right	R-0665
20 Apr 2018	Notice of Return	WWIS provides a Notice of Return and Amended Notice of Application in the Domestic Application	R-0667
20 Apr 2018 to Feb 2019	Domestic Application proceedings	IESO files affidavits of Michael Lyle and Perry Cecchini; WWIS files a supplementary affidavit of David Mars and affidavits of Michael Killeavy and Jason Chee-Aloy	C-2474 to C-2477
7 June 2018	Provincial Election in Ontario	The Conservative Party is elected, with Doug Ford as Premier	
13 July 2018	Energy Directive winds down FIT	Energy Minister directs IESO to wind down all FIT 2 to 5 contracts that had not been issued a Notice to Proceed	C-2162
2 Oct 2018	New Windstream lobbyist registers with Integrity Commissioner	Goal of lobbyist (Patrick Harris, Rubicon Strategy Inc.) is: "Working with the government to modify the types of resources that are procured for energy going forward based upon the current contracts"	R-0812
Oct 2018	Windstream meets with Ontario Premier's Office (PO)	Windstream (Mars) meets with PO (Davidson and Sackville) on 12 October 2018 to renegotiate and exchange of 31 Oct 2018 and 1 Nov 2018 emails follows	R-0813
6 Dec 2018	<i>Green Energy Repeal Act, 2018</i>	The Act repeals the <i>Green Energy Act, 2009</i> , and regulations restore municipal authority over the siting of projects, gives the Lieutenant Governor in Council the authority to prohibit the issuance of REAs in certain circumstances	R-0816
Mar 2019 to Jan 2020	Domestic Application proceedings	WWIS takes no steps to move its Domestic Application along	RWS-Lyle ¶14
28 May 2019	New Windstream lobbyist registers with Integrity Commissioner	Goal of lobbyist (Kory Teneycke, Rubicon Strategy Inc.) is "Working with the government to modify the types of resources that are procured for energy going forward based upon the current contracts"	R-0814
30 May 2019	Amendment to the <i>Renewable Energy Approval</i> regulations (O. Reg. 359/09)	Eligibility requirements related to electricity demand are added, current and future applicants for renewable energy approvals now need to show that the proposed project fulfills a need for the electricity produced	R-0816

25 June 2019	New Windstream lobbyist registers with Integrity Commissioner	Goal of lobbyist (Christine Simundson, Rubicon Strategy Inc.) is “Working with the government to modify the types of resources that are procured for energy going forward based upon the current contracts”	R-0814
26 Nov 2019	Windstream asks Minister of Energy to direct IESO not to terminate the FIT Contract	Windstream (Mars) threatens new NAFTA claim for \$560 million if Minister Rickford does not direct IESO to withdraw the FIT Contract termination letter	C-2249
10 Dec 2019	Energy Ministry responds to Windstream that it will not intervene	The Energy Ministry (Rickford and Walker) responds to Windstream (Mars) that Ontario has decided not to intervene regarding its FIT Contract, which is subject to ongoing litigation between Windstream and IESO, referring Windstream to IESO	C-2253
15 Jan 2020	WWIS files a Notice of Abandonment of Domestic Application	Claimant discontinues its Domestic Application to pursue a NAFTA claim against Canada, triggering termination of the FIT Contract	C-2482, Tab 1, Schedule J
22 Jan 2020	<i>Windstream II</i> NOI	Windstream initiates second NAFTA claim	
18 Feb 2020	FIT Contract termination is effective	IESO (Lyle) writes to WWIS (N. Baines) to inform WWIS of the effective termination of its FIT Contract following WWIS’ Notice of Abandonment	C-2289
26 Mar 2020	Security deposit is returned	Bank of Montreal returns WWIS’ \$6 million completion and performance security deposit pursuant to 20 February 2020 request by IESO (Yahoda)	C-2082 C-2291
22 Dec 2020	<i>Windstream II</i> NOA	Windstream files second NAFTA claim	
13 Oct 2022	Windstream (Mars) writes to Minister of Energy (Smith)	Windstream provides a proposal to assist increasing Ontario’s energy supply	R-0817
14 Nov 2022	Windstream (Mars) writes to Minister of Energy (Smith)	Windstream follows up on its proposal to assist increasing Ontario’s energy supply	R-0817