IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE 2013 UNCITRAL ARBITRATION RULES

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

REPLY MEMORIAL OF THE CLAIMANT WINDSTREAM ENERGY LLC

August 14, 2023

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PART ONE – INTRODUCTION

I. OVERVIEW

1. This case is about a deliberate decision by the Government of Ontario to continue a course of conduct that a previous tribunal found breached Canada's obligations under the NAFTA. In that Award, the tribunal found that:

a) the Government of Ontario had breached its obligation to treat the Claimant, Windstream Energy LLC, in accordance with the fair and equitable treatment standard by leaving it in a "legal and political limbo" and failing to direct the legislatively-created contractual counterparty, the Ontario Power Authority (the "**OPA**") (now the Independent Electricity System Operator, the "**IESO**"), to make good on the promises made by the Ontario Government to protect Windstream's project (the "**Project**") from a moratorium on all offshore wind projects (the "**Moratorium**");

b) Windstream's investment had not been expropriated because its Feed-in-Tariff Contract (the "**FIT Contract**") with the IESO was still valid and in force, and could still be renegotiated by the parties to implement the promises made the Ontario Government; and

c) as a result, Windstream was only awarded compensation reflecting the measure of damage to its investment by virtue of Ontario's wrongful conduct – approximately C$25 million.

2. If Ontario had wished to avoid liability for any future damage to Windstream's still extant investment, the *Windstream I* tribunal's findings should have caused it to reflect and change course. It did not. Instead, Ontario determined that it would continue its policy of refusing to engage with Windstream and refusing to direct the IESO to take the steps necessary to affect the Ontario Government's promise that the Project would be insulated from the effects of the Moratorium. In light of the lack of direction from the Ontario Government, the IESO refused to renegotiate the FIT Contract and ultimately terminated it, effective February 18, 2020. Notably, in making its termination decision, the IESO relied upon the Ontario Government's lack of direction.

3. The Ontario Government's deliberate decision "not to intervene" on Windstream's behalf to ensure the FIT Contract was renegotiated, and its creation of the circumstances that ultimately led to the FIT Contract's termination, was arbitrary and grossly unfair. There is no legitimate reason for Ontario's refusal to act or to even meet with Windstream. In an era of climate change, Windstream was looking to build a renewable energy project that would assist Ontario in its efforts to transition to green energy. Ontario is also facing a serious energy crisis; it is projecting a substantial electricity supply shortfall and the Ontario Government is procuring long-term contracts for projects just like Windstream's to address this energy deficit. Windstream has put forward expert evidence addressing the benefits the Project would provide to Ontario in this current energy climate. Indeed, just one month ago, the Ontario Government released a new plan outlining the actions it will be taking to address its serious need for electricity supply, including procuring long-term contracts for renewable energy projects.

4. Despite its desperate need for energy and the fact that it is seeking out long-term contracts just like the Project, Ontario has provided no rationale for why it persisted in the wrongful conduct that allowed the IESO to terminate the FIT Contract. The only rationale it provided at the time (Canada has not provided a different one in this proceeding) was that Ontario will not intervene in the IESO's contractual relationships. But this is patently untrue. The evidence demonstrates that the Ontario Government regularly intervenes in the IESO's contractual relationships. It frequently directs the IESO, both formally and informally, to enter into, amend and/or terminate power purchase agreements to reflect promises that the Ontario Government has made to the proponent. Windstream seems to be the only party for whom Ontario has decided not to intervene politically to fulfill the promises made to it. It is notable that Canada provided no evidence in response to this issue – it has simply chosen to ignore it.

5. The differential treatment does not end there. When the Ontario Government has terminated other FIT contract holders, it has ensured the project proponents were paid out, with the Government paying hundreds of millions of dollars for those terminated projects. Indeed, the Ontario Government has reportedly paid out the owner of the only other FIT 1 Contract holder, the White Pines project, over $100 million for the cancellation of its FIT contract for a 60MW onshore wind farm (of which 18.5 MW was ultimately useable; by contrast, Windstream's project

was 300MW). Despite its clear acknowledgment that compensation is due to other proponents, the Ontario Government maintains it owes nothing to Windstream.

6. In this proceeding, Windstream is challenging the deliberate decision by the Ontario Government not to intervene on Windstream's behalf with the IESO and its conduct that created the circumstances that permitted the IESO to terminate the FIT Contract. This termination was in direct contradiction of the promises Ontario had made to Windstream that its Project would be insulated from the effects of the Moratorium. Windstream's Memorial on the Merits dated February 18, 2022 (the "**Memorial**") sets out in detail the background that led to these second NAFTA proceedings.

7. This Reply Memorial responds to the arguments raised in Canada's Counter-Memorial dated December 13, 2022 (the "**Counter-Memorial**"). At its core, Canada's response raises two arguments that permeate each of its purported bases for dismissing Windstream's claim. Both arguments misapprehend the tribunal's award in *Windstream I* (the "**Award**") and Canada's obligations to investors under the NAFTA and at international law.

8. First, relying on a flawed interpretation of the tribunal's Award in the *Windstream I* proceedings, Canada suggests that Windstream was already fully compensated for the losses to its investment. Canada relies heavily on arguments that Windstream made before the *Windstream I* tribunal, as Windstream had argued that it had lost the entire value of its investment. The problem with Canada's dependence on these statements is that they were ultimately not accepted by the *Windstream I* tribunal.

9. Instead, the *Windstream I* tribunal found that there had been no expropriation under Article 1110 of the NAFTA, as the "FIT Contract [was] still formally in force and ha[d] not been unilaterally terminated by the Government of Ontario" and that "it continue[d] to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium."[1] The tribunal declined to award damages based on the full value of Windstream's investment on the basis that the FIT Contract had not been cancelled, opting instead to award

[1] **C-2040**, *Windstream Energy LLC v. Canada*, PCA Case No. 2013-22, Award (September 27, 2016), ¶ 291 ("*Windstream I* Award").

damages based on the damage to Windstream's unexpropriated investment arising from the "legal and contractual limbo" that Ontario had left it in through the imposition of the Moratorium and the failure to direct the OPA to renegotiate the contract to reflect the impact of the Moratorium.[2]

10. As Windstream explained in the Memorial, the finding by the *Windstream I* tribunal that the FIT Contract had not been expropriated (together with Canada's multiple representations in the *Windstream I* proceeding that the FIT Contract was "frozen" and the Moratorium was temporary) underpinned Windstream's expectation that the value in the FIT Contract could be realized and that the Project could proceed. Indeed, internal documents reveal that Ministry of Energy ("**MEI**") officials shared Windstream's interpretation of the *Windstream I* Award: "[the tribunal] determined that the Claimant hasn't lost the entire value of its investment (i.e., its project) as there was no expropriation: the contract is still in force."[3] It is unsurprising that MEI and Windstream shared this interpretation; the Award is clear on this point.

11. Although Ontario appears to have shared Windstream's understanding of the Award, Ontario inexplicably determined that it should do nothing to end the legal and political limbo that the *Windstream I* tribunal had determined had breached the FET standard. This was not a matter that simply escaped the Government's notice: it was explicitly considered and determined that Ontario should not engage with Windstream. Within mere days of the release of the *Windstream I* award, one senior government official sent an email "strongly [suggesting] that no political government representative engage in dialogue with Windstream."[4]

12. Canada's second argument is that Ontario's decision to do nothing is unobjectionable because Ontario had no obligation to do *anything* following the Award in *Windstream I*. This submission necessarily fails if this Tribunal finds that Windstream was not fully compensated for its losses, because, in that case, Ontario is responsible for the loss of the entirety of Windstream's investment flowing from the FIT Contract's termination.

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[2] **C-2040**, *Windstream I* Award, ¶¶ 290, 378-379.

[3] **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016).

[4] **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada* (October 5, 2016).

13. Further, this Tribunal should not countenance Canada's suggestion that Ontario was entitled to double down and continue the conduct that the tribunal in *Windstream I* determined had breached the NAFTA. Amongst other things, this submission is fundamentally wrong in law: states are obliged to cease continuing conduct that breaches international law. The fact that a prior tribunal has awarded some measure of compensation reflecting the damage done to a party's investment does not give the state license to continue that conduct and cause further damage to the investment. This case exemplifies the principle that a state's decision to continue conduct that breached its international legal obligations can give rise to further damage to an investment: where, after the *Windstream I* Award, Windstream once had a valid FIT Contract and a promising project that was attracting interest from significant players in the renewable energy sector, it now has a terminated FIT Contract and an investment that the parties agree is now valueless.

14. These two flawed arguments permeate each of Canada's responses in its Counter-Memorial. In whatever form they arise, they should be rejected.

15. ***Canada's Jurisdictional Challenges are Without Merit.*** Canada raises three objections to the Tribunal's jurisdiction. Each depend heavily upon a skewed interpretation of the *Windstream I* Award and the measures that Windstream raises in these proceedings.

a) First, Canada says that the Tribunal lacks jurisdiction based upon the principles of *res judicata*, collateral estoppel and abuse of process. These arguments mischaracterize the *Windstream I* Award and Windstream's claim in these proceedings. This case is not about Ontario's 2011-2012 conduct that was at issue in *Windstream I*. It is about Ontario's deliberate decision to continue the very conduct that the *Windstream I* tribunal determined gave rise to a breach of the FET standard. This new post-Award conduct resulted in the termination of the FIT Contract and further substantial damage to Windstream's investment. Windstream is not seeking to relitigate the *Windstream I* Award: it is seeking to rely upon its findings. In reality, it is Canada that has in its Counter-Memorial attempted to re-open a number of issues that were resolved against it by the *Windstream I* tribunal. This Tribunal should not permit Canada to do so.

b) Second, relying again on its mischaracterization of the case, Canada repeats an argument set out in its bifurcation request: that Windstream has not shown that it incurred *prima facie* damages. This argument is not appropriate for the merits stage – the parties have already put in extensive evidence on the issue of damages, and the Tribunal should assess that evidence in rendering a decision. As set out below, when that evidence is assessed on its merits, it establishes that Windstream has suffered the loss of its entire investment as a result of Ontario's wrongful conduct.

c) Lastly, Canada asserts that the Tribunal lacks jurisdiction as Windstream's claims are time-barred. This argument, too, depends upon Canada framing Windstream's claim as a continuation of the same measures that were before *Windstream I*. It is not. Ontario's breach in this case occurred upon the termination of Windstream's FIT Contract, on February 18, 2020. This is the date when Windstream first knew that Ontario had breached the NAFTA and that it had sustained damage by virtue of that breach. That date is well within the three-year limitation window.

16. ***Windstream's Investment was Expropriated.*** As a result of Ontario's conduct, the FIT Contract was terminated and Windstream was substantially deprived of the value of its investments, in contravention of Article 1110 of the NAFTA. The expropriation was unlawful as it did not meet the requirements of Article 1110, including that compensation was not paid for the taking. Canada's arguments that the investments could not be expropriated because they have no value turns on the argument that the *Windstream I* tribunal fully compensated Windstream for the loss of its investment. It is wrong.

17. Canada also argues that the FIT Contract was not an investment capable of being expropriated because it was merely a contingent right depending on a future event. This is an attempt to relitigate issues that were already argued and determined in the *Windstream I* proceedings. In any event, it is also incorrect. Canada admits that Windstream Wolfe Island Shoals Inc. ("**WWIS**") and the Project are each an investment capable of being expropriated. Furthermore, Canada has led no evidence to support its position that the FIT Contract is not a property right capable of being expropriated. It simply asserts that is the outcome the Tribunal should accept. In contrast, in response to this argument in *Windstream I*, Windstream put forward

expert evidence establishing that the FIT Contract is a valuable asset under Ontario law. It is not a contingent right. Having failed to put forward any responding evidence of its own, Canada's argument must (again) fail.

18. ***Ontario Failed to Treat Windstream Fairly and Equitably.*** Ontario's conduct has breached Canada's obligations under Article 1105(1) by failing to accord Windstream fair and equitable treatment. The FET standard was violated by Ontario continuing the very course of conduct already found to be unfair and inequitable, *i.e.*, the failure to act and rectify the "legal and contractual" limbo Ontario had created for Windstream. Ontario's failure to do so created the conditions that led to the wrongful termination of the FIT Contract. This was contrary to the promises made to Windstream and the representations made to the *Windstream I* tribunal that the Project was only on hold and could proceed once the temporary Moratorium was lifted. Ontario's conduct was also arbitrary and capricious: it had no valid reason, particularly in light of Ontario's increasing energy needs and the manner in which other FIT contract holders have been treated.

19. ***Windstream is Entitled to Damages Arising from Canada's Breaches.*** Windstream is entitled to damages arising from Canada's breaches of NAFTA. Canada is obliged to provide compensation to Windstream that, to the extent possible, reestablishes the situation that would have existed in the absence of its wrongdoing.

20. The parties agree that the appropriate approach to damages is to determine the fair market value of the investment that Windstream lost. The fair market value of Windstream's investment is best determined using a Discounted Cash Flow ("**DCF**") methodology, which is the most reliable method for determining the value of Windstream's investment but-for Canada's conduct and is the preferred approach of market participants for projects like Windstream's that have revenue certainty.[5] Although Canada's expert, Dr. Jerome Guillet, suggests that the Project faced too many future risks to be valued under a DCF approach, this ignores the specific characteristics of the Project (including its revenue certainty through the FIT Contract, which makes it particularly appropriate for a DCF approach) and the fact that accounting for future risk is at the very heart of the DCF analysis.

[5] CER-Secretariat, ¶ 2.22.

21. In the opinion of Secretariat, Windstream's quantum experts, Windstream's losses arising from Canada's NAFTA breaches are between $291.4 million and $333 million as of the date of the cancellation of the FIT Contract, February 18, 2020. However, Secretariat has not just relied upon a DCF methodology: it has also conducted a valuation by benchmarking the project against other comparable projects, resulting in a Project valuation of $284.7 million to $299.1 million (which is broadly consistent with the fair market value determined through a DCF approach).

22. Instead of providing its own DCF analysis, Canada pins its entire damages case on a single, cherry-picked comparables analysis conducted by Dr. Guillet. The analysis has several flaws. For example, Dr. Guillet's analysis overlooks the specific features of the Project and instead lumps projects into two broad categories: "early stage" and "late stage", despite the fact that key milestones in a project (including obtaining price certainty) often occur at different stages depending on the applicable regulatory framework. Further, none of the projects that Dr. Guillet relies on as "comparable" to the Project had the revenue certainty that the Project did, despite the fact that Dr. Guillet agrees that that this the "single most important" factor in financing renewable projects.[6] Dr. Guillet also relies on projects that significantly pre-date the Project's valuation date, including projects relied upon for his opinion in the *Windstream I* proceedings, despite the fact that he has acknowledged that the offshore wind industry has advanced significantly since that time, and that offshore wind valuations have increased.

23. Finally, Dr. Guillet has not conducted any other analysis to confirm his opinion, despite his recognition that it is typical for market participants to conduct "secondary" confirmatory analyses (including, in some circumstances, a DCF approach).[7] By contrast, Secretariat has prepared three separate principal analyses (two income approaches to value and one comparables approach) which each confirm the value that the Project would have had but for Canada's breach of the NAFTA. These analyses are themselves supported by several other ancillary analyses that confirm the reasonableness of Secretariat's conclusions. Their approach should be preferred over

[6] **C-2464**, Day 4 - Confidential Condensed Transcript of the Arbitration Hearing of *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (February 18, 2016) (Confidential).
[7] RER-Guillet-1, ¶ 181-183.

Canada's standalone comparables analysis, and compensation paid to Windstream in accordance with Secretariat's opinion.

II. WINDSTREAM'S REPLY EVIDENCE

24. In support of its Reply Memorial, Windstream has submitted witness statements from:

a) ***Mr. David Mars:*** Mr. Mars is the co-founder and President of Windstream. Mr. Mars provides evidence in response to assertions in Canada's Counter-Memorial and the expert report of Dr. Guillet. In particular, Mr. Mars responds to Canada's attempts to dismiss discussions Mr. Mars had with potential partners who expressed strong interest in investing in the Project after the *Windstream I* Award.[8]

b) ***Ms. Nancy Baines:*** Ms. Baines is the Director, Administration of Windstream Energy Inc. Like Mr. Mars, Ms. Baines provides evidence in response to certain statements in Canada's Counter-Memorial, including Canada's assertions about Windstream's expectation after the *Windstream I* Award that the Project could proceed, and Canada's updated Renewable Energy Approval submission made in February 2017.[9]

25. Windstream has also submitted reply expert reports from the following experts:

a) ***Chris Millburn and Edward Tobis of Secretariat***: Messrs. Millburn and Tobis are Certified Public Accountants and Certified Business Valuators with over 35 years of combined experience in business valuations, damage quantification, financial litigation, and corporate finance-related matters. Their report responds to the report of Canada's expert, Dr. Jerome Guillet, which in turn comments on Messrs. Millburn and Tobis's first report quantifying Windstream's losses resulting from Canada's breaches of NAFTA.[10]

[8] CWS-Mars-4.
[9] CWS-N.Baines-2.
[10] CER-Secretariat-2.

b) ***Pierre Antoine Tetard***: Mr. Tetard is a professional economist with over 15 years' experience in the energy industry (with over 14 years of experience specifically in renewable energy, and the last seven years focused on offshore wind). Mr. Tetard now leads the emerging markets team at Blue Float Energy, a renewable energy firm focused on offshore wind. As a co-author of the Secretariat report, Mr. Tetard responds to the aspects of Dr. Guillet's report relating to the financeability of the Project but for the moratorium and cancellation of the FIT Contract.[11]

c) ***Jason Chee-Aloy of Power Advisory LLC***: Mr. Chee-Aloy is Managing Director of Power Advisory, a consulting firm with a focus on the electricity sector and extensive experience in Ontario's renewable generation market. Mr. Chee-Aloy updates the report he delivered with Windstream's Memorial respecting Ontario's energy capacity requirements in response to assertions by Canada about the state of Ontario's energy needs.[12]

d) ***Ian Irvine:*** Mr. Irvine, an engineer with over 30 years' experience in the renewable energy industry, is the former principal of Wood Group's predecessor, SgurrEnergy. His report responds to certain assertions made in Dr. Guillet's report about the technical feasibility of the Project and its schedule.[13]

PART TWO – THE FACTS

I. FACTS LEADING TO THE *WINDSTREAM I* AWARD

26. In its Memorial, Windstream summarized the facts that led to the *Windstream I* proceeding to provide the necessary background for the measures leading to the current arbitration. Windstream made clear it was relying on the factual findings of the *Windstream I* tribunal.[14] It was not – and is not – re-arguing issues that were addressed by the *Windstream I* tribunal.

27. In its Counter-Memorial, Canada did not take this approach in addressing the pre-*Windstream I* facts. Instead, Canada directs the Tribunal to the facts as laid out in its *Windstream I*

[11] CER-Secretariat-2.
[12] CER-PowerAdvisory-3.
[13] CER-Two Dogs-2.
[14] Windstream's Memorial on the Merits, ¶¶ 38, 86.

counter-memorial and then "summarizes some of the salient points."[15] In so doing, Canada has attempted to re-raise propositions it raised before the *Windstream I* Tribunal, but which the tribunal did not accept. It is not open to Canada to re-litigate these factual issues.

28. There are three factual issues Canada re-argues in its Counter-Memorial that were already decided against Canada by the *Windstream I* tribunal:

a) Canada re-argues that, prior to WWIS signing the FIT Contract on August 20, 2010, there was regulatory uncertainty and the offshore wind industry was speculative;

b) Canada re-argues the reasons for the Ontario Government's imposition of the February 2011 Moratorium; and

c) Canada asserts that WWIS "abandoned" discussions with the OPA following the imposition of the Moratorium to pursue the *Windstream I* arbitration.

29. The *Windstream I* tribunal specifically noted in its decision that the above three issues were "disputed" between the parties, and addressed those issues in its award.[16] These three issues, and the *Windstream I* tribunal's findings in relation to each, are addressed in turn below.

A. The *Windstream I* Tribunal Rejected Canada's Arguments Regarding Regulatory Uncertainty

30. One of the key issues between the parties in *Windstream I* was the extent to which there was regulatory uncertainty in Ontario relating to offshore wind development at the time Windstream invested in Ontario and caused WWIS to execute the FIT Contract.[17]

31. In its Counter-Memorial, Canada does not address the *Windstream I* tribunal's findings on this contested issue. Instead, it simply repeats arguments it made in its *Windstream I* materials. These arguments include that: (a) there were few FIT applicants for offshore wind, which was "telling," and offshore wind was a "nascent" and "speculative" industry;[18] (b) the lack of interest

[15] Canada's Counter-Memorial on the Merits, ¶ 19.
[16] **C-2040**, *Windstream I* Award, pp. 38-46, 48-55.
[17] See Windstream's Memorial on the Merits, ¶ 88.
[18] Canada's Counter-Memorial on the Merits, ¶ 21. See **C-2040**, *Windstream I* Award, ¶¶ 193-194.

was not surprising, as specific rules and requirements for the regulatory approvals process for offshore wind were not developed;[19] (c) Windstream was reluctant to and delayed signing back the FIT Contract due to the "known regulatory risks at the time" and that it signed the FIT Contract "despite these known risks."[20]

32. Windstream's detailed responses to each of these issues can be found in the *Windstream I* materials and will not be repeated here.[21] However, it is important to note the relevant findings of the *Windstream I* tribunal. The tribunal did not accept any of these arguments by Canada. Rather, the tribunal found that the Ontario Government promoted investment in offshore wind, and that it was only after the FIT Contract was signed that the Government "gradually grew more ambiguous to offshore wind" due to concern about political support.[22] Canada fails to mention these findings in its Counter-Memorial. More specifically, these findings include the following:

a) In 2008, Ontario lifted the deferral on offshore wind. In doing so, Wind Policy 4.10.04 was updated and reissued to include offshore wind and guidelines were published regarding the application of the Policy.[23] The Minister of Natural Resources was quoted as saying "Ontario was 'open for business' when it comes to offshore wind."[24]

b) In the spring of 2009, Ontario announced the *Green Energy and Green Economy Act, 2009* ("**GEGEA**"), which introduced the FIT program. The Deputy Premier stated that the GEGEA meant that Ontario would "offer an attractive price for renewable power, including wind – onshore and offshore…and we'll guarantee the price for decades." The same Minister also said that there were "wonderful opportunities for offshore wind" and the Government had been "making sure we'll move those proposals along."[25]

[19] Canada's Counter-Memorial on the Merits, ¶ 21. See **C-2040**, *Windstream I* Award, ¶¶ 193-199.
[20] Canada's Counter-Memorial on the Merits, ¶¶ 21-28. See **C-2040**, *Windstream I* Award, ¶¶ 198-205.
[21] See *Windstream I* Reply Memorial dated June 22, 2015, ¶¶ 56-253.
[22] **C-2040**, *Windstream I* Award, ¶ 366.
[23] **C-2040**, *Windstream I* Award, ¶ 92.
[24] **C-2040**, *Windstream I* Award, ¶ 93. [emphasis added].
[25] **C-2040**, *Windstream I* Award, ¶ 94. [emphasis added].

c) The *Windstream I* tribunal did not accept Canada's argument, asserted again in this arbitration, that the specific rules and requirements for the regulatory approvals process for offshore wind were not developed. Instead, the tribunal recognized that the two key regulatory documents related to the FIT Program were the Renewable Energy Approval Regulation ("**REA Regulation**") and the Approval and Permitting Requirements Document for Renewable Energy Projects ("**APRD**"). Both documents set out specific requirements for all types of wind facilities, "including offshore wind projects."[26] The REA Regulation specified that proponents of offshore wind projects would be required to submit an offshore Wind Facility Report, identifying potential negative environmental impacts which would result from proposed projects and mitigation measures. Similarly, the APRD specified the requirements for completing the Offshore Wind Facility Report needed under the REA Regulation.[27] Between June 2009 and June 2010, the Ministry of the Environment, Conservation and Parks ("**MOE**") posted four notices regarding the REA Regulation and the regulatory framework that was to be developed for offshore wind. The FIT application process was identical for onshore and offshore wind projects.[28]

d) The tribunal acknowledged the fact raised by Canada that "offshore wind projects accounted for only a few applications" to the FIT process.[29] However, the tribunal did not accept Canada's argument that this was "telling." To the contrary, the tribunal noted that the Ontario Government had made public assurances about the inclusion of offshore wind in the FIT program. This included a speech by the Minister of Natural Resources where she stated, "Ontario is the first jurisdiction in North America to set a price for offshore windpower, reflecting our strong support for exploring offshore potential."[30] The tribunal also cited a letter from the Assistant Deputy Minister from the Ministry of Northern Development, Mines, Natural

[26] **C-2040**, *Windstream I* Award, ¶¶ 103-104. [emphasis added].
[27] **C-2040**, *Windstream I* Award, ¶ 105.
[28] **C-2040**, *Windstream I* Award, ¶¶ 103-105.
[29] **C-2040**, *Windstream I* Award, ¶ 105.
[30] **C-2040**, *Windstream I* Award, ¶ 108. [emphasis added].

Resources, and Forestry ("**MNR**") stating that FIT proponents "will be given highest priority to the Crown land sites applied for."[31]

e) The tribunal summarized the events leading to the signing of the FIT Contract. The tribunal noted Canada's argument (asserted again in this arbitration) that the delay in signing was "due to the regulatory risk" that Windstream perceived and sought to resolve.[32] Importantly, the tribunal did not accept this argument. Instead, the tribunal set out the history of how Government officials sought to work with Windstream and told Windstream that the Project was "special."[33] After several discussions, the OPA agreed to extend the Milestone Commercial Operation Date ("**MCOD**") by one year. Windstream then executed the FIT Contract.[34]

f) Following the signing of the FIT Contract on August 20, 2010, the tribunal found that "the position of the Government of Ontario grew gradually more ambiguous towards the development of offshore wind. Thus, while the Government appeared to have envisaged still in August 2010 that the relevant regulatory framework, including setback requirements, would be in place possibly as early as January 2011 but at the latest in January 2012, its position started changing in the fall of 2010."[35] This change coincided with the receipt of information from the public indicating "an increasing resistance to the development of offshore wind."[36]

B. The *Windstream I* Tribunal Rejected Canada's Arguments that the Moratorium was Imposed Solely Due to the Precautionary Principle

33. In its Counter-Memorial, Canada seeks to re-argue the reasons the Moratorium was imposed. It asserts that the imposition of the Moratorium was a decision taken by the Minister of

[31] **C-2040**, *Windstream I* Award, ¶ 109.
[32] **C-2040**, *Windstream I* Award, ¶ 126.
[33] **C-2040**, *Windstream I* Award, ¶ 130.
[34] **C-2040**, *Windstream I* Award, ¶¶ 127-137.
[35] **C-2040**, *Windstream I* Award, ¶ 366. [emphasis added].
[36] **C-2040**, *Windstream I* Award, ¶ 366.

the Environment based on the precautionary principle.[37] This is identical to the argument it unsuccessfully made before the *Windstream I* tribunal:[38]

Canada's Argument in this Arbitration	**Canada's Argument in *Windstream I***
The Moratorium "reflected the Minister of 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."[39]	The Moratorium "reflected the Minister of the Environment's opinion that his Ministry 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." The decision was "grounded in the precautionary principle."[40]

34. The *Windstream I* tribunal did not accept this argument. The tribunal held that the decision to impose the Moratorium "was not only driven by the lack of science." The tribunal accepted Canada's position that the lack of science was a *partial* explanation for the Moratorium: "the Government [of Ontario's] evolving position [on offshore wind] was at least driven in part by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects." However, the tribunal further held that the decision to impose the Moratorium was also driven by the impact of offshore wind on electricity costs in Ontario and the upcoming provincial elections in November 2011.[41]

35. Canada did not mention any of these findings in its Counter-Memorial.

C. The *Windstream I* Tribunal Found Canada Violated the NAFTA Due to the Manner of the OPA's Negotiations with Windstream

36. In its Counter-Memorial, Canada properly recognizes that, after imposing the Moratorium, the Ontario Government promised Windstream that the Project was "not terminated, but frozen." However, Canada then wrongly claims that Windstream "ultimately abandoned the discussions

[37] Canada's Counter-Memorial on the Merits, ¶ 34.
[38] **C-2040**, *Windstream I* Award, ¶¶ 206-207.
[39] Canada's Counter-Memorial on the Merits, ¶ 34.
[40] *Windstream I* Canada's Counter-Memorial, ¶ 397. See also **C-2040**, *Windstream I* Award, ¶ 207.
[41] **C-2040**, *Windstream I* Award, ¶¶ 376-377. [emphasis added]. See also ¶¶ 368-375.

with the OPA and pursued its first NAFTA claim."[42] This is factually incorrect and is inconsistent with the findings of the *Windstream I* tribunal.

37. The Government of Ontario failed to implement the promise to freeze the Project and insulate it from the impact of the Moratorium. The history of events regarding the failure to implement the promises made to Windstream is summarized in Windstream's Memorial and in the *Windstream I* award.[43] In short, Windstream never "abandoned" negotiations with the OPA, as Canada asserts. Indeed, the *Windstream I* tribunal found that the failure of the Government of Ontario to direct the OPA in these negotiations is part of the conduct that led to the breach of Article 1105 of the NAFTA. The tribunal also expressly rejected Canada's argument that Windstream failed to negotiate a reasonable settlement with the OPA.

38. On this issue, the *Windstream I* tribunal found:

a) On February 11, 2011, officials from MEI, the MOE, the MNR and the OPA held a conference call with Windstream to inform Windstream about the Moratorium. During that call, the official from MEI acknowledged that Windstream's "project is unique in that it has a FIT Contract" and that MEI has "asked that the OPA sit down with you to negotiate a number of pieces including the force majeure provisions, the two-year force majeure termination clause associated with those provisions and the security deposits…"[44]

b) After the announcement of the Moratorium, Windstream engaged in without-prejudice settlement negotiations with the OPA over its FIT Contract terms, which provided that WWIS had to bring the Project into commercial operation by May 4, 2017 and maintain the CAD $6 million security deposit. In those negotiations in 2011, the OPA would only extend the MCOD by five years at the maximum. It

[42] Canada's Counter-Memorial on the Merits, ¶ 35.
[43] **C-2040**, *Windstream I* Award, ¶¶ 149-160.Windstream's Memorial on the Merits, ¶¶ 162-172.
[44] **C-2040**, *Windstream I* Award, ¶ 146.

maintained this position even though the Government of Ontario did not expect to complete research on offshore wind development before the end of 2016.[45]

c) Windstream tried to find other solutions to end the contractual limbo in which it had been left by the Ontario Government. Windstream offered alternative solar projects, which were rejected by the OPA. Windstream also offered to accept the five year extension, provided that the force majeure could be further extended if the force majeure conditions were not resolved in that timeframe. Windstream also renewed its efforts to have the Project proceed as a pilot project and to proceed with testing at the Project site.[46] The OPA refused to accept any alternatives and maintained its position on the five-year extension.[47]

39. Windstream never "abandoned" these negotiations – it was the OPA that refused to renegotiate the FIT Contract beyond a five-year extension.

40. The failed negotiations with the OPA formed part of the conduct that led to a violation of Article 1105. The tribunal held that the Government of Ontario "let the OPA conduct the negotiations with Windstream even [though] 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."[48]

41. The *Windstream I* tribunal concluded that there was a breach of Article 1105 due to "the failure of the Government of Ontario to take 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

[45] **C-2040**, *Windstream I* Award, ¶¶ 149, 151, 155-156.
[46] **C-2040**, *Windstream I* Award, ¶¶ 151-154, 158-159.
[47] **C-2040**, *Windstream I* Award, ¶¶ 155-156, 160.
[48] **C-2040**, *Windstream I* Award, ¶ 379. [emphasis added].

development of the Project created by the moratorium."[49] The tribunal went on to find that it was the Government of Ontario that imposed the moratorium, not the OPA, "so it cannot be said that the resulting regulatory and contractual limbo was a result of the Claimant's own failure to negotiate a reasonable settlement within the OPA. The regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium was a result of acts and omissions of the Government of Ontario, and as such is attributable to the Respondent."[50]

42. Canada's argument that Windstream "abandoned" these negotiations is contrary to these findings. Notably, Canada fails to mention these findings in its Counter-Memorial.

II. FACTS FOLLOWING THE *WINDSTREAM I* AWARD

43. A summary of the relevant facts following the *Windstream I* award is set out in Windstream's Memorial. The following section responds to assertions made in Canada's Counter-Memorial about the events that occurred during this period.

A. Windstream's Enforcement Application After Canada Fails to Pay the *Windstream I* Award

44. In the Counter-Memorial, Canada has included a section entitled "The Claimant Filed for Enforcement of the Award Despite Having Reached an Agreement with Canada over Payment."[51] It is not clear why this issue is relevant to the current proceedings. Canada is clearly suggesting that Windstream's application was improper. Canada inaccurately represents the relevant events. Windstream brought an enforcement application only after Canada had defaulted on the payment of the *Windstream I* Award. Canada was almost four months overdue for payment and the parties' attempted negotiations to reach an agreement kept getting delayed by Canada. As a result of the enforcement application, Canada fast-tracked the decision to make payment. After Canada paid the amounts owing, Windstream withdrew the application.

45. The *Windstream I* tribunal released the Award to the parties on September 30, 2016. The *Windstream I* Award ordered that compensation be paid "to the Complainant," which was

[49] **C-2040**, *Windstream I* Award, ¶ 380.
[50] **C-2040**, *Windstream I* Award, ¶ 380. [emphasis added].
[51] Canada's Counter-Memorial on the Merits, p. 28.

Windstream Energy LLC, within 30 days, *i.e.*, by October 31, 2016.[52] The tribunal held that it did not need to decide interest, as it "cannot contemplate that the Respondent will not comply with the award and therefore it does not fix an interest for late payment."[53]

46. On October 18, 2016, Windstream wrote to the tribunal and sought an order imposing post-award interest.[54] It did so after counsel for Canada advised that Canada would not meet the 30-day deadline and refused to agree to pay post-award interest.[55]

47. On October 27, 2016, Canada agreed that if the Award was not paid by October 31, 2016, it would bear interest at a rate of 2.7%, compounded annually, from November 1, 2016 until the date that it was paid.[56] That same day, Windstream withdrew its motion.[57]

48. Canada did not pay the damages by October 31, 2016. On November 3, 2016, Counsel for Windstream sent a demand letter[58] and followed up on November 29, 2016.[59]

49. As a result, of document productions in this arbitration, Windstream is now aware that on December 21, 2016, Ontario (MEI) sent a letter to Canada requesting that Canada "promptly notify" Windstream that Canada would pay the damages and costs ordered by the *Windstream I*

[52] **C-2040**, *Windstream I* Award, ¶ 485.
[53] **C-2040**, *Windstream I* Award, ¶ 486.
[54] **R-0778**, Letter to Tribunal from Torys (October 18, 2016). In its Counter-Memorial, Canada references that at this point of time, Windstream's counsel made remarks about the Award at a conference. See ¶¶ 57, 60. Windstream's counsel informed Canada that she was speaking at a conference and intended to mention "the result of the case, though of course not the detail and certainly not any confidential information." Canada's counsel suggested that this was outside the Confidentiality Order. Windstream's counsel disagreed. There was never any further discussion of this point. **R-0774**, E-mail from Rodney Neufeld (Global Affairs Canada) to Myriam Seers (Torys) (October 13, 2016). The documents produced by Canada in this arbitration do not reveal any internal concern about the brief comments made at the conference. On the contrary, an internal Ontario email indicates Ontario's view that the bottom line of the decision can be made public and Windstream could go to the public with that outcome. See **C-2640**, Email from Pauline Desroches to Kate Jordan re: *Windstream Energy v. Canada* - Tribunal Award released on September 30, 2016 (September 30, 2016).
[55] **R-0776**, E-mail exchange between Rodney Neufeld (Global Affairs Canada) and Myriam Seers (Torys) Re: Payment of Award (October 2016).
[56] **R-0779**, Letter from Rodney Neufeld (Global Affairs Canada) to Myriam Seers (Torys) Re: Agreeing to Post-Award Interest (October 27, 2016).
[57] **R-0780**, Email from Veij Heiskanen (Lalive) to Myriam Seers (Torys) Re: Claimant's Withdrawal of Motion (October 27, 2016).
[58] **C-2653**, Letter from Myriam Seers to Rodney Neufeld (November 3, 2016).
[59] **C-2655**, Email from Rodney Neufeld to John Terry (November 29, 2016).

tribunal and requesting that Canada make the payment as soon as possible.[60] Despite this letter, payment to Windstream was not made promptly.

50. On December 22, 2016, counsel for Canada reached out to counsel for Windstream and proposed an agreement whereby Canada would agree to not apply to set aside the Award if Windstream gave Canada sufficient time to go through its Treasury Board approval process before taking any enforcement action. Canada's counsel estimated that would be a six-month process, although he would not commit to Canada making payment within that six-month period.[61]

51. At this point, Canada was already two months late in paying the Award and would not commit to what final deadline would be met.

52. On January 12, 2017, counsel for Windstream sent draft materials reflecting a proposed resolution of the issue. Canada responded that it would get back to Windstream the following week.[62] That did not happen. Counsel for Windstream followed up on January 16, 2017, January 18, 2017, January 20, 2017, January 25, 2017, and January 26, 2017.[63]

53. On February 1, 2017, Canada's counsel finally provided a response.[64] The next day, the parties agreed to an outside date of July 7, 2017 for Canada's payment to Windstream.[65] On February 3, 2017, counsel for Windstream provided revised materials to reflect that agreement.[66] In response, for the first time, Canada took the position that the payee should be WWIS, not Windstream. The parties then engaged in discussions on that issue.[67]

[60] **C-2661**, Letter from Ministry of Energy to Ministry of International Trade (December 21, 2016).
[61] **C-2662**, Email from John Terry to David Mars (December 22, 2016); **C-2663**, Email from John Terry to David Mars (December 29, 2016).
[62] **C-2665**, Email from Myriam Seers to Rodney Neufeld re: Windstream - draft agreement and order (January 12, 2017); **C-2666**, Email from Rodney Neufeld to Myriam Seers (January 13, 2017).
[63] **C-2669**, Email from Rodney Neufeld to Nick Kennedy (January 23, 2017); **C-2670**, Email from Rodney Neufeld to John Terry (January 26, 2017).
[64] **C-2672**, Email from Rodney Neufeld to Myriam Seers (February 1, 2017).
[65] **C-2673**, Email from Nick Kennedy to Rodney Neufeld (February 3, 2017).
[66] **C-2674**, Email from Nick Kennedy to Rodney Neufeld (February 3, 2017).
[67] **C-2675**, Email from Myriam Seers to Rodney Neufeld re: Agreement (February 6, 2017).

54. The parties exchanged communications about this newly raised concern between February 7-17, 2017.[68] Windstream warned Canada on multiple occasions that it required a quick resolution otherwise it will move to enforcement.[69] On February 17, 2017, following continued delays by Canada's counsel to get instructions, Windstream informed Canada, "We've run out of time. Please get any clearance you need this [afternoon]."[70]

55. On February 21, 2017, Windstream still had not heard from Canada. Windstream advised that it had "lost patience and confidence with this process" and had instructed its counsel to file an enforcement application that day.[71] The application was issued before the Ontario courts that day.[72]

56. Cabinet then fast-tracked the decision for Ontario to pay the *Windstream I* tribunal's Award.[73] On March 15, 2017, months ahead of when Canada previously stated it would provide payment, Canada paid Windstream the amounts ordered in the Award.

B. Following the *Windstream I* Award, Windstream and Ontario Shared the View that the Project Could Proceed

57. In its Counter-Memorial, Canada disputes that it was reasonable for Windstream to expect that the Project could proceed after the *Windstream I* Award.[74] This section responds to those assertions and sets out the documents produced by Canada that show Ontario had the same understanding as Windstream.

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[68] **C-2678**, Email from Myriam Seers to Rodney Neufeld re: Agreement (February 8, 2017); **C-2679**, Email from Rodney Neufeld to Myriam Seers re: Agreement (February 8, 2017); **C-2680**, Email from Myriam Seers to Rodney Neufeld re: Agreement (February 9, 2017); **C-2681**, Email from Myriam Seers to Rodney Neufeld re: Agreement (February 9, 2017); **C-2682**, Email from Myriam Seers to Rodney Neufeld re: Agreement (February 14, 2017); **C-2684**, Email from Lucy Tavares to Myriam Seers re: Voicemail message from Rodney Neufeld – February 15, 2017, Attachment: Transcribed voicemail from Rodney Neufeld – February 15, 2017; **C-2683**, Email from Rodney Neufeld to Myriam Seers re: Satisfaction Piece (3) (February 15, 2017); **C-2685**, Email from John Terry to Rodney Neufeld re: Satisfaction Piece (3) (February 16, 2017); **C-2687**, Email from Myriam Seers to Rodney Neufeld re: Windstream - settlement letter (February 17, 2017); **C-2688**, Email from Rodney Neufeld to Myriam Seers re: Windstream - settlement letter (February 17, 2017); **C-2689**, Email from Myriam Seers to Rodney Neufeld re: Windstream - settlement letter (February 17, 2017).

[69] **C-2676**, Email from Rodney Neufeld to Myriam Seers re: Agreement (February 7, 2017); **C-2685**, Email from John Terry to Rodney Neufeld re: Satisfaction Piece (3) (February 16, 2017).

[70] **C-2690**, Email from Rodney Neufeld to John Terry, Myriam Seers (February 17, 2017).

[71] **C-2691**, Email from Rodney Neufeld to John Terry, Myriam Seers (February 21, 2017).

[72] **C-2692**, Email from Nick Kennedy to Rodney Neufeld re: Windstream - settlement letter (February 21, 2017).

[73] **C-2695**, Email from Jane Mallen to Carolyn Calwell re: Messaging on Windstream article (February 23, 2017).

[74] Canada's Counter-Memorial on the Merits, ¶¶ 4-5.

1. Windstream's Expectation

58. In the Counter-Memorial, Canada asserts that "the six years that have passed [since the *Windstream I* Award] have witnessed no post-Award measure that could possibly have fed any reasonable expectation that the Project could proceed."[75] As explained in Ms. Baines' first witness statement and Windstream's Memorial, after the *Windstream I* Award was released, Windstream felt optimistic about the future of the Project.[76] This was for several reasons:

a) the *Windstream I* tribunal recognized that the FIT Contract was in force and could still be renegotiated so that the Project was not impacted by the Moratorium;

b) Canada stated during the *Windstream I* arbitration that the Project was only "frozen" and "on hold" and could proceed once the Moratorium was lifted; and

c) Following the *Windstream I* Award, the Ontario Government stated that offshore wind research would soon be "finalized" and that the Government could let the Project be built.[77]

59. Additionally, following the *Windstream I* Award, the IESO did not return the CAD $6 million security credit that WWIS had provided. As Ms. Baines explains, if the FIT Contract was effectively terminated at this time and had no future, she expected that security would have been returned to them.[78]

60. Windstream's contemporaneous documents following the release of the *Windstream I* Award demonstrate that this expectation was genuinely held.[79] These documents are summarized in the second witness statement of Ms. Baines:

[75] Canada's Counter-Memorial on the Merits, ¶¶ 4-5.
[76] CWS-N. Baines, ¶¶ 15-17. See Windstream's Memorial on the Merits, ¶ 206.
[77] CWS-N. Baines-2, ¶ 4(d).
[78] CWS-N. Baines-2, ¶ 5.
[79] CWS-N. Baines-2, ¶ 6.

a) On October 14, 2016, Mr. Ian Baines responded to an inquiry about the Award and stated "the Tribunal found that the contract remained valid and in force. So Windstream is planning to move the project forward." [80]

b) On October 19, 2016, Mr. Baines sent an email to Andrew Roberts, who had provided an expert opinion in the *Windstream I* arbitration. He thanked Mr. Roberts for his help and stated "[w]e look forward to proceeding now and actually building it."[81]

c) On November 21, 2016, Mr. Baines emailed other expert witnesses from *Windstream I* to thank them for their assistance in the arbitration. He wrote, "Now that this is behind us we are working to move the project forward to the next stage. Our contract remains in place and our investors are keen to see the project built." He then asked them about their knowledge of a potential partner for the Project. As Mr. Baines explained, "[t]he benefit to a potential partner at this point is that they get a seat at the table as we figure out how to move forward. This is a real project with a long term contract and very good profit potential. It requires a few more months, or maybe even a year of dealing with Ontario in order to remove the impediments put in place. We are looking beyond the current situation to where we actually get it back on track." [82]

d) On December 7, 2016, Mr. Mars emailed Windstream's investor group. He explained that "we have been actively progressing the project. We are in process with a number of activities including, but not limited to, pushing forward our environmental approval, negotiating with several multinational conglomerates to

[80] CWS-N. Baines-2, ¶ 6(a); **C-2645**, Email from Tom Adams to Ian Baines (WWIS) re More media coverage (October 14, 2016) [emphasis added].
[81] CWS-N. Baines-2, ¶ 6(b); **C-2648**, Email from Ian Baines (WEI) to Andrew Roberts (WSP) re NAFTA Award (October 19, 2016) [emphasis added].
[82] CWS-N. Baines-2, ¶ 6(c); **C-2654**, Email from Ian Baines (WEI) to Ian Irvine and Bill Follett (SgurrEnergy) re A request for input (November 21, 2016) [emphasis added].

join us in the project and potentially bringing on a First Nations partner. All of which continue to further grow the value of the project."[83]

61. In the *Windstream I* arbitration, Canada stated that the Project was "frozen" and could proceed once the Moratorium was lifted.[84] In its Counter-Memorial, Canada claims that these statements are taken "out of context."[85] They are not. Canada's statements to the *Windstream I* tribunal speak for themselves. They clearly illustrate that Canada's position was that the Moratorium was a temporary measure, the Project was "merely 'frozen'" and had not been terminated:

Source	Canada's Representations to the *Windstream I* Tribunal
Counter-Memorial	"Ultimately, the Government of Ontario decided to cancel all Crown land applications for offshore wind sites with the exception of the Claimant's. Given the Claimant's unique position as the only FIT Contract holder for offshore wind, **its contract was frozen** until the regulatory framework could be finalized."[86]
Counter-Memorial	"Ontario has not abandoned its efforts to complete the science required to move forward with offshore wind development. In fact, it is still undertaking the work required in order to allow it to develop the required regulatory framework, with additional studies being commissioned and money continuing to be spent on new science."[87]
Counter-Memorial	The February 11, 2011 announcement of the moratorium "was specifically worded such that **the Claimant's Project would not be cancelled. It was merely 'frozen'** until the necessary scientific research was completed and an adequately informed policy framework had been developed."[88]
Counter-Memorial	During the February 11, 2011 phone call with Windstream, officials explained the moratorium and that "given the Claimant's unique position as the only FIT Contract holder for an offshore wind project, its contract would be 'frozen' until the regulatory framework on offshore wind was finalized. The Claimant's project would be on hold until the release of the REA requirements for offshore wind. All other site release applications for lakebed would be cancelled."[89] While it was made clear "that 'there will be no further movement on offshore wind development for anybody,' and

[83] CWS-N. Baines-2, ¶ 6(d); **C-2658**, Email from David Mars (WEI) to Ken Hannan et al. re Windstream Update: Confidential and Privileged (December 7, 2016).
[84] See **C-2040**, *Windstream I* Award, ¶¶ 216-218; *Windstream I* Counter-Memorial of Canada, ¶¶ 21, 260, 265, 266, 268, 353, 486-487.
[85] Canada's Counter-Memorial on the Merits, ¶ 4.
[86] *Windstream I* Counter-Memorial of Canada, ¶ 21. [**emphasis** added]. [emphasis in original].
[87] *Windstream I* Counter-Memorial of Canada, ¶ 22. [**emphasis** added].
[88] *Windstream I* Counter-Memorial of Canada, ¶ 260.
[89] *Windstream I* Counter-Memorial of Canada, ¶ 265. [emphasis added].

	'all other projects are essentially quashed or cancelled,' the Claimant's Project was 'deferred' or 'frozen.'"[90]
Counter-Memorial	Canada argued that Windstream's Project received more favourable treatment than any other offshore wind proponent in Ontario subject to the moratorium. "Whereas the FIT applications and the Crown land applications of all other offshore wind proponents were cancelled, **the Claimant's Project was merely frozen and could continue after the necessary science is conducted and an adequate policy framework can be developed.**"[91]
Counter-Memorial	"**To date, the Claimant's FIT Contract continues to be 'frozen' and has not been 'cancelled' as a result of the deferral or any other action of the Government of Ontario.**"[92]
Counter-Memorial	The moratorium - or as Canada called it, the 'deferral' - "is intended to last only as long as necessary to conduct the scientific research and develop and implement an adequately informed framework for offshore wind projects in Ontario." Since the announcement of the deferral decision, "the Government of Ontario has been working to conduct the required scientific studies."[93] As such, "the Government of Ontario continues to complete the work required to develop the regulatory rules and requirements for offshore wind facilities, **demonstrating that the deferral is a temporary measure.**"[94]
Counter-Memorial	Canada disagreed with Windstream's argument that the Project has been *de facto* cancelled. "**This assertion misrepresents the current status of the Project.** While the Claimant has experienced delays as a result of the deferral, the Government of Ontario and the OPA have been more than accommodating in attempting to mitigate the effects of these delays on the Claimant and to allow it to maintain the possible benefits of its FIT Contract."[95] "**The Claimant has been repeatedly informed that its project is on hold until the regulatory rules and requirements for offshore wind projects are developed. This is in contrast to all other offshore projects.** Rather than being 'essentially quashed or canceled' like one other FIT application and a number of other Crown land applications, the Claimant's project was 'deferred,' 'frozen' or 'kept alive.'" "**The fact is that the Claimant's Project was merely 'frozen' and can continue to be developed once the necessary science, rules and policies for offshore wind are in place.**"[96]
Counter-Memorial	"The decision to merely freeze or pause the Claimant's FIT Contract while work was ongoing is a proportionate response to the legitimate public policy purpose of the government. Both the Government of Ontario and

[90] *Windstream I* Counter-Memorial of Canada, ¶ 266. [emphasis added].
[91] *Windstream I* Counter-Memorial of Canada, ¶¶ 360, 445. [**emphasis** added].
[92] *Windstream I* Counter-Memorial of Canada, ¶ 455. See also ¶ 457. [**emphasis** added].
[93] *Windstream I* Counter-Memorial of Canada, ¶¶ 483-484.
[94] *Windstream I* Counter-Memorial of Canada, ¶ 485. [**emphasis** added].
[95] *Windstream I* Counter-Memorial of Canada, ¶ 486. [**emphasis** added].
[96] *Windstream I* Counter-Memorial of Canada, ¶ 487. [**emphasis** added].

	the OPA attempted to ensure that the Claimant was not overly negatively affected by the deferral."[97]
Hearing	"**So the Claimant's contract remains in force majeure to this day.** That is the legal status of the contract. […] From the government's point of view, **nothing prevents the Claimant from going through the Crown land site release process and from applying for a REA once the policy framework is finally in place.**"[98]

62. In the Award, the *Windstream I* tribunal also set out Canada's position on the "current status of the Project." Consistent with the many statements outlined above, the tribunal summarized Canada's position as being that the Project was 'merely' frozen' and still 'kept alive.'[99] Canada did not ask the tribunal to clarify or correct this portion of the Award.

63. Ultimately, the *Windstream I* tribunal accepted Canada's representations about the status of the FIT Contract and the potential future for the Project, and found that the FIT Contract had not been expropriated. Given Canada's statements to the tribunal that the Project was "merely 'frozen'" and "can continue to be developed once the necessary science, rules and policies for offshore wind are in place"[100] – statements the *Windstream I* tribunal accepted and relied upon – it was entirely reasonable for Windstream to expect, even after the Award, that the Project had a future. Windstream did not expect Ontario to renege on Canada's representations during the *Windstream I* proceedings.[101] As Ms. Baines explained:

> More specifically, we expected that the Ontario government would speak to us, in good faith, about the FIT Contract to fulfil their promise to freeze the Project from the effects of the moratorium. We did not expect the government to maintain the conduct that was already found to be a breach of its international obligations.[102]

2. Ontario's Shared Expectation

64. Representatives of the Ontario Government shared the same understanding as Windstream. This is shown in the documents produced by Canada in this arbitration. For example, in one

[97] *Windstream I* Counter-Memorial of Canada, ¶ 504.
[98] **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. 203-204.
[99] **C-2040**, *Windstream I* Award, ¶¶ 216-218.
[100] *Windstream I* Counter-Memorial of Canada, ¶ 487.
[101] CWS-N. Baines-2, ¶ 4(b).
[102] CWS-N. Baines-2, ¶ 4(c).

internal email communication between MEI officials, dated October 25-26, 2016, a question was asked about the discrepancy between the *Windstream I* tribunal's determination of the value of the Project (approximately $31 million) and the reported value of the FIT Contract (approximately $5.2 billion, which is the total contract value). MEI officials provided the following answer:

> Windstream has claimed that the value over the life of the contract is $5.2 billion. This is what they believe they would have earned if the project had generated electricity for the life of the contract.
>
> However, the Tribunal did not consider the value of the contract, only the specific damages to Windstream's project that company incurred as a result of the moratorium. **They determined that the Claimant hasn't lost the entire value of its investment (i.e., its project) as there was no expropriation: the contract is still in force**.
>
> The Tribunal noted that the purpose of damages is to make the Claimant "whole," keeping in mind that the contract is still in force […].[103]

65. MEI officials shared Windstream's view that the *Windstream I* tribunal awarded specific damages to Windstream and that Windstream had not lost the entire value of its investment because the FIT Contract was still in force.

66. Other documents in Canada's productions are consistent with this interpretation. In those productions, Ontario Government officials state that the FIT Contract was still in force and effect at the time and that "[t]he outcome of Windstream's arbitration claim does not change the status of its contract with the IESO."[104] This is consistent with the fact that the IESO did not return the CAD $6 million security credit to WWIS.

67. Windstream's expectation that the Project had a future was consistent with public statements made by the Ontario Government. As set out in Windstream's Memorial, in December 2016, the Minister of Energy was asked if the Ontario Government could let Windstream's Project

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[103] **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016) [**emphasis** added].

[104] **C-2643**, Independent Electricity System Operator Issues Note: Windstream NAFTA Claim (October 6, 2016); **C-2667**, Email from Adam Hendy to Dan Moulton re: Media Call Summary: January 13, 2017 (January 13, 2017). See also **C-2641**, MNRF House Note Issue: Windstream Energy Offshore Wind Power NAFTA Claim (September 30, 2016), **C-2649**, Email from Katrina Xavier to Richard Blackwell re: Globe&Mail query (October 20, 2016).

be built; his answer was a straightforward "yes."[105] In its Counter-Memorial, Canada asserts that this answer should be disregarded because the Minister was "flustered" when he gave this "inaccurate" answer. Canada says that little should be read into the Minister's comments because they were made in the context of his primary response that "we're still considering all of our options."[106] This unsubstantiated attempt to explain away the Minister's comments should be rejected.

68. Canada has not provided a witness statement to support its bald assertion that the Minister was "flustered" when he made this statement. There is no basis to accept this characterization of the evidence. The statement by the Minister of Energy in December 2016, over two months after the *Windstream I* Award was issued, was clear – Ontario could permit the Project to be built. As Ms. Baines explained, Windstream was "very reassured" by this statement,[107] which was consistent with the representations Canada made throughout the *Windstream I* arbitration.

69. In its Counter-Memorial, Canada asserts that Windstream waited until December 15, 2016, after the *Windstream I* tribunal was *functus officio*, to disclose its view that it had not been fully compensated for the full value of its investment. This is false: Windstream began reaching out to MEI to arrange meetings to discuss advancing the Project as early as October 6, 2016, within days after the release of the *Windstream I* Award.[108]

70. In addition, on November 28, 2016 – before the tribunal became *functus*[109]– Windstream sent a letter to the Minister of Energy to "discuss the next steps with [its] offshore wind project." Windstream referred to the tribunal's finding that the "FIT contract remain[ed] in force" and stated that it looked "forward to working with the IESO regarding the FIT Contract's terms to ensure that they reflect the anticipated timing for the lifting of the moratorium. We remain committed to

[105] Windstream's Memorial on the Merits, ¶ 204; **C-2471**, Article, Energy Minister Says all Options Still Being Considered in Offshore Wind Power Case (6 December 2016), Exhibit 79 to the Affidavit of David Mars.
[106] Canada's Counter-Memorial on the Merits, ¶ 65.
[107] Windstream's Memorial on the Merits, ¶ 204; CWS-N. Baines, ¶ 25.
[108] See Windstream's Memorial on the Merits, ¶ 236.
[109] According to Canada, this was on December 6, 2016: Canada's Counter-Memorial on the Merits, ¶ 64.

making this project a success, working cooperatively with the Government of Ontario and the IESO."[110]

C. Windstream's Efforts to Move the Project Forward

71. In its Memorial, Windstream set out its efforts to move the Project forward following the *Windstream I* Award. In summary, Windstream: (a) filed an updated REA submission; (b) undertook additional engineering work, including additional geophysical and bathymetric surveys of the lakebed; (c) applied for the Canadian Government's Emerging Renewable Power Program or ERRP; (d) engaged in negotiations with potential partners who were interested in the Project; and (e) attempted to meet with MEI, and met with the IESO, to renegotiate the FIT Contract.[111] This section addresses Canada's criticisms of these efforts.

1. Windstream Updated its REA Submission and Conducted Additional Engineering Work

72. In light of the *Windstream I* tribunal's findings regarding the status of the FIT Project, Windstream wanted to ensure it took all necessary steps to keep advancing the Project. The Ontario Government did not amend the regulatory framework to implement the Moratorium; the REA Regulation continued (and continues to this day) to apply to offshore wind projects.[112] On February 15, 2017, Windstream submitted an updated REA submission to MOE.[113] In its Counter-Memorial, Canada made several inaccurate assertions about this submission. They are addressed below.

73. ***Timing of the REA Submission***. Canada refers to the fact that two days before Windstream's REA submission, on February 13, 2017, a media article was published that indicated the Moratorium would be extended and further studies were needed but had not been

[110] See Windstream's Memorial on the Merits, ¶ 237; **C-2049**, Letter from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project (November 28, 2016).
[111] Windstream's Memorial on the Merits, ¶¶ 208-252.
[112] Windstream's Memorial on the Merits, ¶ 209; **C-2040**, *Windstream I* Award, ¶ 379; CER-Powell-3, ¶¶ 89-91.
[113] Windstream's Memorial on the Merits, ¶ 211. **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).

commissioned.[114] As explained by Ms. Baines, if Canada is suggesting that there was a temporal connection between the article and Windstream's REA submission, Canada is wrong.[115]

74. Immediately after receiving the *Windstream I* Award, WWIS began taking steps to develop the Project. On October 21, 2016, Windstream re-engaged Ortech – which had been the Project manager – to assist with next steps "in order to move the Project forward."[116] Ortech provided a quote for support services during the initial development stages of the Project restart.[117] As explained by Ms. Baines, WWIS would not have agreed to undertake this work and pay these fees if it was not serious about moving the Project forward.[118] On December 16, 2016, Ortech provided a draft of the REA submission.[119]

75. WWIS thus began preparing the REA submission months before the February 13, 2017 article was published. At the time WWIS began this work, the Ontario Government was stating publicly that the research required to lift the Moratorium was being "finalized"[120] and the Ontario Government could let the Project be built.[121]

76. In any event, it is not clear what connection Canada is seeking to draw between the February 13, 2017 article and the REA submission. If anything, the contents of the REA submission illustrate that the continued application of the Moratorium was based on political concerns, not due to genuine scientific uncertainties (which purported uncertainties Ontario has never pursued to a conclusion). The REA submission included 47 environmental and technical studies undertaken over the prior six years by internationally renowned experts, which do not

[114] Canada's Counter-Memorial on the Merits, ¶¶ 73-74.
[115] CWS-N. Baines-2, ¶ 18.
[116] CWS-N. Baines-2, ¶ 18(a); **C-2651**, Email from Uwe Roeper from Ian Baines (WWIS) (October 22, 2016).
[117] CWS-N. Baines-2, ¶ 18(b); **C-2656**, Letter from Ciara DeJong to Nancy Baines re Wolfe Island Shoals Wind Farm Support Services ORTECH Reference No. 70802-1 (December 1, 2016); **C-2657**, Email from Ian Baines (WWIS) to Ciara DeJong (Ortech) re Project Description and REA restart proposal from ORTECH (December 5, 2016).
[118] CWS-N. Baines-2, ¶ 18(b).
[119] CWS-N. Baines-2, ¶ 18(c); **C-2660**, Email from Ciara DeJong (Ortech) to Ian Baines (WWIS) re Initial Draft of the Draft Project Description (December 16, 2016); **C-2659**, Email from Ciara DeJong to Ian Baines and Nancy Baines re REA submission (December 15, 2016).
[120] Windstream's Memorial on the Merits, ¶¶ 201-203; **C-2045**, Official Report of Debates (Hansard) Transcript - English, Legislative Assembly of Ontario, Standing Committee on Estimates (October 26, 2016).
[121] **C-2471**, Article, Energy Minister Says all Options Still Being Considered in Offshore Wind Power Case (6 December 2016), Exhibit 79 to the Affidavit of David Mars (WWIS) (June 2, 2017).

identify any adverse environmental impact from the Project.[122] As explained in an email dated February 16, 2017 from Ms. Baines to Windstream's government relations advisor:

> Windstream has accomplished a couple of things by our application. Firstly, we showed them that the project is still alive, we have spent a lot of money and time following their rules and we are not going away.
>
> Secondly, and more importantly, we have put on file all the engineering and environmental work (they are tied) that showed that the project has no adverse environmental impact. We have answered all of the stated scientific uncertainties that the government relied upon. We have completed all of the studies that government said were needed. And we have done it while the government sat on its hands and did nothing.
>
> The third party experts that we relied upon are all internationally accepted gurus in their field, the MOE uses most of them for their own work. The experts clearly indicated that there is no cause for concern.
>
> As Ontario announces that no further studies are being done and the moratorium will be extended – we are announcing that we have done the work and shown no good reason to delay.[123]

77. ***Record of Prior Submission***. The updated REA submission explains that this was Windstream's third submission, and that WWIS never received a response to the first two submissions, respectively made on October 8, 2010 and January 27, 2012.[124] In its Counter-Memorial, Canada claims that MOE has no record of those submissions and that none had been submitted in *Windstream I*.[125]

78. These prior submissions were made to MNR.[126] They were not included as exhibits in the *Windstream I* arbitration. However, they were in the possession of both parties.[127]

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[122] **C-2696**, CNW "Windstream calls for an end to politically-motivated moratorium; urges Premier Wynne to come clean with taxpayers (March 1, 2017).

[123] CWS-N. Baines-2, ¶ 20; **C-2686**, Email from Nancy Baines (WWIS) to Randi Rahamim re Windstream Update (February 16, 2017).

[124] **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).

[125] Canada's Counter-Memorial on the Merits, ¶ 75.

[126] **C-2560**, Email from Leah Deveaux (Ortech) to Eric Prevost (October 8, 2010); **C-2576**, Letter from Ian Baines (WWIS) to Kenneth Durst (January 27, 2012).

[127] The copies of these prior submissions included in this arbitration are documents that were produced to Windstream by MNR pursuant to Freedom of Information requests. In other words, they were produced to Windstream by MNR.

79. ***Engineering Work Conducted***. In its Counter-Memorial, Canada states that the documents submitted with the REA submission "were a repackaging of the expert reports that [Windstream] had filed to make its damages claim in the *Windstream I* arbitration."[128] If Canada is suggesting that these reports do not show the considerable amount of work done to progress the Project, that is demonstrably false.

80. As explained by Mr. Baines, Windstream had employed a number of world class engineering and environmental firms to complete various technical studies. These studies related to wind resource measurement, grid connection, geophysical and geotechnical conditions, coastal processes, waves, ice, shipping, navigation, noise, sediments, drinking water, underwater cables, birds, bats, fish, electromagnetic fields and cultural heritage.[129]

81. The fact that these reports were submitted in the arbitration does not change the nature of their findings or the significant work that was undertaken in support of those conclusions. These are engineering and environmental reports completed by leading experts in the field relating to the feasibility and engineering components of the Project and/or assessing the environmental impact of the Project. This work would have been relied upon by Windstream if the Moratorium had been lifted as expected.[130]

82. The engineering and environmental work done to progress the Project both before and after the Moratorium is significant:

a) Prior to the Moratorium and the force majeure status of the FIT Contract, WWIS undertook the following work:[131]

[128] Canada's Counter-Memorial on the Merits, ¶ 76.
[129] CWS-I. Baines-3, ¶ 35.
[130] CWS-I. Baines-3, ¶ 35.
[131] This is summarized in **C-2477**, November 29, 2017 Letter, IESO Responding Application Record, Exhibit B. See also *Windstream I* Windstream's Memorial on the Merits, ¶¶ 306-315.

Wind resource/energy yield testing

i) Obtaining wind resource and energy yield testing from leading firms, including Helimax (May 2009),[132] Zephyr North,[133] and Ortech.[134]

ii) Erecting a meteorological tower and sodar equipment on Wolfe Island.[135]

Electrical design

iii) Obtaining a "preliminary protection and operating philosophy" for the project, which also contained a high-level outline of the electrical design and a map showing the proposed interconnection, from Genivar in May 2010.[136]

iv) Obtaining a System Impact Assessment and Customer Impact Assessment from the IESO and Hydro One Networks Inc. in November 2010.[137]

Lake bottom investigation

v) Obtaining a study by Canadian Seabed Research Ltd. ("**CSR**") of the regional bathymetry and geophysical conditions of the turbine area (essentially a study of the topography and physical nature of the lake bottom).[138]

vi) Obtaining a detailed bathymetry study, co-sponsored by Windstream and conducted by the Canadian Hydrographic Services, of areas of Lake Ontario that overlap with parts of the proposed export cable routes for the Project.[139]

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[132] **C-0139**, Report (Helimax Energy Inc.), Meteorological and Energy Yield Report (September 24, 2009).
[133] **C-0259**, Report (Zephyr North Ltd.), Offshore Wind Speeds from Boundary Layer Modelling (May 13, 2010).
[134] **C-0324**, Report (Ortech), Wolfe Island Shoals Offshore Wind Report (July 30, 2010); **C-0511**, Report (Ortech), Updated Wolfe Island Shoals Offshore Wind Report (March 7, 2011)**.**
[135] CWS-Roper, ¶ 63.
[136] **C-0274**, Report (Genivar), Wolfe Island Shoals Wind Farm 300 MW Project, Preliminary Project and Operating Philosophy (May 27, 2010); **C-0275**, Geographic Map, Genivar, Wolfe Island Shoals Proposed Interconnection (May 27, 2010).
[137] **C-0381**, System Impact Assessment Report (IESO), Wolfe Island Shoals Wind Generation Station, Connection Assessment & Approval Process (Final Report) (November 8, 2010).
[138] **C-0514**, Report, Canadian Seabed Research Ltd., 2010 Preliminary Site Investigation, Lake Ontario Wind Farm and Cable Route Survey (March 28, 2011).
[139] **C-0173**, Report (Canada Hydrographic Service) Final Field Report, Charity Shoal and Upper Gap of Adolphus Reach Survey (Fall 2010).

Financial

vii) Obtaining a cost assessment prepared by UK engineering firm Mott MacDonald in May 2010 using industry-typical values for offshore wind projects.[140]

viii) Obtaining a project feasibility analysis prepared by Ortech in May 2010 (which was updated in July 2010 to reflect a reconfiguration of the Project based on MOE's proposed 5 km shoreline exclusion zone for offshore wind projects).[141]

ix) Issuing a request for proposals for environmental permitting work, and selecting Stantec Consulting to conduct environmental permitting work for the Project.[142]

b) Since the Moratorium and the *force majeure* status of the FIT Contract, WWIS obtained the following reports from several pre-eminent engineering consultants:[143]

i) AWS Truepower, a leading offshore wind measurement firm, regarding the long-term wind resource and energy production potential for the Project. SgurrEnergy relied on AWS' report in support of its conclusion that the Project had taken the appropriate steps to determine energy yield.[144]

ii) WSP Canada Inc., a leading environmental consultant, regarding the permitting of the Project. WSP's report established that there were no material impediments to the Project obtaining a REA, other necessary permits, and the requisite Crown land tenure within the FIT Contract timelines.[145]

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[140] **C-0244**, Mott MacDonald, Instruction and Notes on Use of Preliminary Cost Plan (PCP), (May 4, 2010).
[141] **C-0257**, Report (ORTECH), Wolfe Island Shoals Wind Farm Project Feasibility Analysis (May 12, 2010); **C-0310**, Letter from ORTECH to Baines, Ian (WEI) (July 6, 2010).
[142] **C-0374**, Request for Proposal (ORTECH), Wolfe Island Shoals Offshore Windfarm Permitting Field Investigation Services (October 8, 2010); **C-0473**, Letter from Deveaux, Leah (Ortech) to Baines, Ian (WEI) (February 8, 2011); **C-0466**, Meeting Agenda, Deveaux, Leah (ORTECH) to Rowland, Rob (Stantec) (January 27, 2011).
[143] This is summarized in **C-2477**, November 29, 2017 Letter, IESO Responding Application Record, Exhibit B.
[144] CER-SgurrEnergy, pp. 42, 52-64.
[145] CER-WSP.

iii) SgurrEnergy, one of the world's leading offshore wind engineering firms, regarding, among other things, the engineering of the Project. SgurrEnergy's Report was prepared with input from COWI Marine North America and Weeks Marine Inc., leading offshore wind project foundation designers and construction experts. SgurrEnergy's report established that there were no material impediments to developing and constructing the Project within the timelines of the FIT Contract.[146]

iv) Aercoustics Engineering Ltd. and HGC Engineering, leading noise experts who operate regularly in the renewal energy sector. These reports established that the Project would comply with applicable noise requirements.[147]

v) W.F. Baird & Associates Coastal Engineers, a leading oceans, lakes, fisheries and coastal engineering firm in Ontario. Baird's report establishes that there are no drinking water, navigation, ice, wind and wave, and fisheries issues that would have served as an impediment to the permitting and construction of the Project.[148]

vi) Dr. Paul Kerlinger, an expert in birds, regarding the Project's potential impact on birds. Dr. Kerlinger's report established that it was highly improbable that the Project would cause biologically significant impacts to birds that would require mitigation or that would otherwise impede the development of the Project.[149]

vii) Dr. Scott Reynolds, an expert in bats, regarding the Project's impact on bats. Dr. Reynolds' report established that the Project would have very little anticipated indirect impact on bats, and that any direct impact, though low, could be mitigated.[150]

[146] CER-SgurrEnergy.
[147] CER-Aercoustics; CER-HGC-2.
[148] CER-Baird.
[149] CER-Kerlinger.
[150] CER-Reynolds.

viii) February 2017, Ortech prepared the updated Project Description Report that was submitted to MOE and, in the spring of 2017, also prepared an updated wind resource assessment.[151]

ix) Also in 2017, CSR updated its report on the regional bathymetry and geophysical conditions of the turbine area.[152]

83. ***WWIS' First Nation Consultation Plans***. In the updated REA submission, WWIS requested that MOE provide the Aboriginal Consultation List pursuant to the REA Regulation.[153] Six months later, MOE responded to WWIS and provided that list.[154] In its Counter-Memorial, Canada asserts that Windstream did not take the steps available to it to advance the Project, including "consult[ing] with aboriginal communities, hold[ing] public meetings, publish[ing] drafts of the prescribed technical reports and seek[ing] the input of other regulatory agencies, both provincial and federal, in order to be eligible to apply to the MOE for a REA."[155]

84. WWIS did not consult with the affected Indigenous communities because, as explained by Ms. Baines, WWIS did not believe that it would be respectful to engage with those communities while it endeavoured to get clarity on the Project from Ontario. At the time WWIS received the Aboriginal Consultation List from MOE on August 25, 2017, the IESO had informed WWIS that it would not renegotiate the terms of the FIT Contract and MEI had consistently refused to meet with WWIS. As a result, on March 27, 2017, WWIS had commenced an Ontario court application seeking to restrain the IESO from exercising its termination right after May 4, 2017 (the "**Ontario Application**"). Out of respect for those communities, WWIS did not want to engage in discussions until it received clarity about the Project.[156]

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[151] **C-2074**, ORTECH Report: Project Description - Wolfe Island Shoals Offshore Wind Farm (February 15, 2017); CWS-N. Baines-2; **C-2713**, Email from Hank Van Bakel to Tyler G. Nielsen, David Mars et al. re Windstream Contract and WRA (June 30, 2017).
[152] See Windstream's Memorial on the Merits, ¶ 219; **C-2143**, CSR 2017 Geological Assessment Report Project Number 1714 (February 27, 2018).
[153] **C-2073**, Letter from Ian Bains (WWIS) to Ministry of Environment and Climate Change (MOECC) (February 15, 2017).
[154] **C-2474**, Letter Goyette Dolly (MOE) to Baines, Ian (August 25, 2017), Exhibit 3 to the Affidavit of David Mars.
[155] Canada's Counter-Memorial on the Merits, ¶ 79.
[156] CWS-N. Baines-2, ¶ 26.

85. Nevertheless, WWIS took steps to advance the Project and the plan for such consultation efforts. For example, Windstream prepared a First Nation and Métis consultation process, which it submitted as part of its application under the ERPP in April 2018.[157] WWIS also undertook additional engineering work, described above (such as the updated CSR report and the updated Ortech wind resource assessment). This was not inexpensive work to undertake.[158]

2. Windstream's Negotiations with Potential Partners

86. In its Memorial, Windstream sets out that, following the release of the *Windstream I* Award, it was approached by a number of third parties who were interested in partnering with Windstream to develop the Project after the Moratorium was lifted. The Memorial explains the negotiations Windstream had with these potential partners over the course of 2016 and 2017.[159] Canada makes several allegations in response to these negotiations.

87. ***The Value of the Project Following the* Windstream I *Award***. Canada claims that Windstream's efforts to find a partner for the Project are inconsistent with the testimony of Windstream's witnesses in *Windstream I* that the Project was "substantially worthless" and that "no prudent equity or debt investor […] would want to join this Project."[160] Canada makes this assertion without referring to Windstream's evidence explaining why its expectations about the future of the Project after *Windstream I* is not inconsistent with this prior testimony.

88. As Mr. Mars explains, he testified in *Windstream I* that the Project was effectively worthless as of May 2012 because, by that time, the Project could not achieve commercial operation by the FIT Contract's May 2017 termination date. However, the *Windstream I* tribunal did not agree with that view and found that the FIT Contract was "still formally in force" and that it remained open to Windstream and Ontario to "reactivate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium."[161]

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[157] CWS-N. Baines-2, ¶ 25. **C-2149**, Cover letter from Ian Baines (WWIS) to ERPP "Re Windstream Wolfe Island Shoals Inc. Project Application Form for the Wolfe Island Shoals Offshore Wind Farm" (April 20, 2018), pp. 27-33.
[158] **C-2718**, Purchase Order 179; **C-2720**, Email from Patrick Campbell (Marine) to Nancy Baines, Ian Baines re: Proposal for further study of the bottom using existing data.
[159] Windstream's Memorial on the Merits, ¶¶ 224-230.
[160] Canada's Counter-Memorial on the Merits, ¶ 84.
[161] CWS-Mars-4, ¶ 5(b); CWS-Mars-3, ¶¶ 4-6.

89. Based on the tribunal's findings, Mr. Mars' expectations respecting the value of the Project shifted. He came to believe there was a means to realize the true value of the Project through the renegotiation of the FIT Contract, as the tribunal had stated was possible. If that happened, Windstream would be able to develop the Project and obtain further investment and financing. The value of the Project would be significantly more than what was awarded by the *Windstream I* tribunal.[162]

90. Furthermore, Mr. Mars' view during the *Windstream I* proceedings that investors would not want to join the Project was proven wrong after the *Windstream I* Award. Following the *Windstream I* Award, numerous parties with significant offshore wind experience came forward and expressed an interest in partnering with Windstream to develop the Project after the Moratorium was lifted.[163]

91. Canada asserts that it is not clear "how the Project's situation was any different [in 2017] than it was in June 2015," when Mr. Mars' testified that the FIT Contract was effectively worthless by May 2012. "After all, the FIT Contract had not been reactivated or renegotiated and the moratorium was still in place […]."[164] As explained by Mr. Mars, in June 2015, the *Windstream I* Award had not been released. Once it was released, it became clear that that the *Windstream I* tribunal did not agree that the full value of the FIT Contract was lost and, on that basis, did not grant Windstream the relief it was seeking for the expropriated value of the FIT Contract.[165]

92. Ultimately, the FIT Contract was not reactivated or renegotiated and was terminated, because Ontario refused to meet with Windstream and made a deliberate decision not to intervene in the negotiations with the IESO to implement the promises Ontario made. As a result, once the FIT Contract was terminated, the full value of the FIT Contract was lost. That is the key change from what happened in June 2015 and February 2020, when the termination of the FIT Contract took effect.[166]

[162] CWS-Mars-4, ¶ 6.
[163] CWS-Mars-3, ¶¶ 6, 12.
[164] Canada's Counter-Memorial on the Merits, ¶ 85.
[165] CWS-Mars-4, ¶¶ 6-8.
[166] CWS-Mars-4, ¶¶ 6-8.

93. ***Canada Mischaracterizes the Process with KeyBanc and Potential Partners***. Canada makes a number of assertions in its Counter-Memorial that are inaccurate and mischaracterize the negotiation process Windstream had with potential partners for the Project.

94. First, in its Counter-Memorial, Canada states that Mr. Mars "engaged with as many companies as he could in an effort to find an investor or a partner for the Project."[167] Mr. Mars explains that his goal was not to engage with as many companies as possible. Rather, he had meetings with select potential partners that had expressed an interest in the Project and other select potential partners that had the right background and interest in a Project of this kind.[168]

95. Further, Mr. Mars disagrees with the suggestion that this process was one-sided and there was not genuine developer interest. Canada appears to ignore that, as Mr. Mars explains in his third witness statement, Windstream was proactively approached by several parties who were interested in developing the Project after the Moratorium was lifted. This included outreach from [redacted].[169] Windstream did not solicit these companies; they reached out to Windstream following the public release of the *Windstream I* Award to express their genuine interest in the Project.[170]

96. Second, Canada characterizes Windstream's negotiation process with potential partners as "half-hearted inquiries and meeting invites."[171] This is not an accurate characterization of the evidence before the Tribunal:

a) Windstream's efforts were not "half-hearted." As Mr. Mars explains, he would not have engaged the services of KeyBanc if he were not genuinely pursuing a possible transaction involving the Project. Windstream allocated substantial time and resources to this process. It had meetings with numerous potential partners ([redacted]). KeyBanc sent NDAs to interested parties. A

[167] Canada's Counter-Memorial on the Merits, ¶ 84.
[168] CWS-Mars-4, ¶ 13.
[169] CWS-Mars-4, ¶¶ 13-18; CWS-Mars-3, ¶ 13.
[170] CWS-Mars-4, ¶ 12.
[171] Canada's Counter-Memorial on the Merits, ¶ 180.

data room was launched on a specialized platform that contained over 30,000 pages of documents. This all took place over a period of a year.[172]

b) Similarly, KeyBanc's efforts were not "half-hearted." KeyBanc was retained entirely on a contingency basis, *i.e.*, it would not be paid for its extensive work unless a transaction was completed. KeyBanc would not agree to run a process if it did not believe it would be compensated for the substantial work that went into running that process. That would be a waste of time and resources, and an investment bank of the calibre of KeyBanc does not act commercially unreasonably.[173]

c) The interest of the potential partners in the Project was not "half-hearted." A number of leading developers in offshore wind projects proactively reached out to Windstream to express their strong interest in the Project. For example, [redacted][174]

d) Lastly, there was reputational risk to Windstream's management, directors and investors in running a "half-hearted" process. These individuals have conducted transactions with an aggregate value in the billions of dollars, and currently have over CAD $500 million invested in controlling stakes in a range of energy and technology companies. They would not risk their reputation within this industry by running a process that was not credible or genuine. The same is true for KeyBanc.[175]

97. Third, in its Counter-Memorial, Canada alleges that the potential investors did not see value in the Project. It asserts that "[a]s an early-stage project, with a moratorium in place, its potential

[172] CWS-Mars-4, ¶ 16.
[173] CWS-Mars-4, ¶ 14.
[174] CWS-Mars-4, ¶ 17.
[175] CWS-Mars-4, ¶¶ 18-19.

partners recognized what Windstream would not, that there was no value in the Project at the time. Indeed, not a single valuation was put forward by any of these entities."[176]

98. Canada's assertion is inconsistent with the interest these potential partners presented to Windstream. This is detailed in Mr. Mars' witness statement. In summary, between October 2016-September 2017, numerous leading developers of offshore wind projects proactively reached out to Windstream to share their interest in the Project. These developers expressed strong interest in the Project. For example, [redacted] expressed the view that the Project was both highly constructible and financeable.[177] This outreach undermines any suggestion by Canada that these potential partners did not see value in the Project. They would not have invested the time to meet with Windstream and explore the opportunity if they believed it was worthless.[178]

99. The potential partners did indicate that they required clarity regarding the Moratorium before they would substantially invest in the Project. As explained by Mr. Mars, that does not mean they viewed the Project as worthless; that just means that value would not be unlocked before the uncertainty was resolved.[179]

100. Mr. Mars further explains in his witness statement that it is inappropriate to draw conclusions from the fact that these potential partners had not delivered valuations. As Mr. Mars states, "[w]e had, quite simply, not reached that stage of negotiations."[180] Mr. Mars was the one who ultimately decided to halt the negotiations with these parties in and around September 2017. Even after he concluded the process, several potential partners continued to reach out to express interest in the Project.[181]

101. Fourth, in its Counter-Memorial, Canada suggests that there was not strong interest in the Project because only seven companies executed NDAs and were given access to the data room.[182] Mr. Mars explains that seven NDAs does show strong interest in the Project. The seven companies

[176] Canada's Counter-Memorial on the Merits, ¶ 180.
[177] CWS-Mars-4, ¶ 21(b).
[178] CWS-Mars-4, ¶ 22.
[179] CWS-Mars-4, ¶ 22.
[180] CWS-Mars-4, ¶ 23.
[181] CWS-Mars-4, ¶ 23; CWS-Mars-3, ¶ 17.
[182] Canada's Counter-Memorial on the Merits, ¶¶ 84-85.

that signed the NDAs are leading developers in the offshore industry globally and in North America.[183] They expressed serious interest in investing in the Project and were serious enough to each sign an NDA and conduct due diligence. These buyers have a combined total of more than 16.5 GW of operating and developing offshore wind projects, and nearly 16 GW of operating renewable assets. Mr. Mars expects that Windstream would have had more serious engagement with these potential partners and others had he not chosen to put the process on pause.[184]

3. Windstream's Lobbying Efforts

102. In its Counter-Memorial, Canada refers several times to Windstream's "lobbying efforts" and refers to the registration of lobbyists at various points of time.[185] It argues that Windstream's lobbying efforts "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."[186]

103. In her second witness statement, Ms. Baines addresses why Windstream retained two government relations firms to assist in its dealings with the Ontario Government. The registered lobbyists Canada refers to are part of the firms and mandates described by Ms. Baines.

104. Shortly after receiving the *Windstream I* Award, in October 2016, Windstream retained Navigator Ltd. to assist Windstream in its dealings with the Ontario Government. Navigator offers a full suite of government relations services across Canada.[187] As explained by Ms. Baines,

> [We] believed that the Project could proceed following the *Windstream I* Award. We also understood that to do this, the Ontario Government needed to agree to direct the IESO to renegotiate the FIT Contract to adjust it to the terms of the moratorium. That is why we tried, on numerous occasions, to meet with the MEI to discuss this and the path forward for the Project. However, dealings and negotiations with a government are a complex exercise. We retained a government relations firm, Navigator Ltd., to assist us in engaging with Ontario. We wanted to take all steps we could to obtain

[183] CWS-Mars-4, ¶ 25.
[184] CWS-Mars-4, ¶¶ 26, 27.
[185] Canada's Counter-Memorial on the Merits, ¶¶ 8, 59, 61, 109, 186.
[186] Canada's Counter-Memorial on the Merits, ¶ 186.
[187] CWS-N.Baines-2, ¶¶ 12-13.

> a successful result, and hiring experts who understand the complexities of approaching a government seemed to be a logical step.[188]

105. Navigator was retained in October 2016 to provide strategic communications counsel and media relations support to Windstream in relation to the release of the *Windstream I* Award. Navigator was to assist Windstream in trying to renegotiate the FIT Contract or otherwise reaching a settlement of the dispute.[189]

106. On October 12, 2016, WWIS prepared a document for Navigator summarizing key background facts. That document stated that "the [*Windstream I*] tribunal also found that the FIT contract remains valid. Windstream now intends to proceed with the development of the offshore wind project expediently."[190]

107. In and around July 2018, Windstream retained Rubicon Strategy Inc., another government relations firm, to provide strategic advice and to deal with the Ontario Government with respect to the FIT Contract. At this point of time, the IESO had communicated to WWIS its decision to terminate the FIT Contract, and the Ontario Application was ongoing. Doug Ford had also been elected as Premier of Ontario on a platform that included the cancellation of outstanding wind projects.[191] As explained by Ms. Baines, it was in this context that Windstream [redacted].[192]

4. MEI's Refusal to Meet with Windstream

108. As set out in Windstream's Memorial, following the *Windstream I* Award, Windstream attempted to meet with MEI to discuss a path forward for the Project, including renegotiating the FIT Contract to adjust it to the terms of the Moratorium, as promised. However, MEI refused to meet with Windstream and to direct the IESO in its negotiations with Windstream. As a result, the IESO refused to renegotiate the FIT Contract and ultimately exercised its right to terminate the

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[188] CWS-N.Baines-2, ¶ 12.
[189] CWS-N.Baines-2, ¶ 14; **C-2646**, Navigator and Windstream Energy LLC. Service Agreement (October 14, 2016).
[190] CWS-N.Baines-2 ¶ 15; **C-2644**, Email from David Mars (WEI) to Randi Rahamim (NAV) re "FW: Key Points for Navigator" (October 13, 2016).
[191] CER-Powell-2, ¶ 83.
[192] CWS-N. Baines-2 ¶ 16; **C-2734**, Email from David Mars (WEI) to [redacted] (July 18, 2018).

FIT Contract, a right that would never have arisen but for the conduct of the Ontario Government. This was not just a failure to act. To the contrary, MEI told Windstream that it had decided "not to intervene" in this matter at all.[193]

109. ***MEI's Refusal to Engage was a Deliberate Decision***. The documents produced by Canada in this arbitration confirm that the Ontario Government made a deliberate decision not to deal with Windstream. In an email dated October 5, 2016, MEI's Chief of Staff, Andrew Teliszewsky sent an email to officials at multiple ministries about the *Windstream I* Award.[194] In this email, Mr. Teliszewsky wrote:

> IMPT [Important]: Windstream has a contract with OPA/IESO that had been put in abatement during this proceeding and now we are in the process of determining what the implications will be on that contract. <u>It will probably lead to direct IESO <-> Windstream negotiations about how the outcome of the trial will impact on their legacy/LARGE FIT contract</u>.
>
> Earlier today, I was contacted by a consultant/lobbyist on behalf of Windstream attempting to engage on this file and the implications on the IESO Contract. I advised that individual that Windstream Legal Counsel should outreach via appropriate channels to IESO Legal and that political/Government intervention is not expected to occur at point.
>
> Given that the bulk of the NAFTA proceeding surrounded allegations of political intervention impacting on the contractual relationship, Energy strongly suggests <u>that no political government representative engage in dialogue with Windstream</u> or their consultant/lobbyists at this time.[195]

110. There are a few points to note about this email. First, MEI "strongly" recommended that no one from the Ontario Government should engage in dialogue with Windstream. This was a deliberate decision not to engage. Second, MEI did not express the view that Windstream was fully compensated and that there was no future for the Project. Mr. Teliszewsky recognized that the

[193] Windstream's Memorial on the Merits, ¶ 233; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) (December 10, 2019).
[194] **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada* (October 5, 2016).
[195] **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada* (October 5, 2016). [<u>emphasis</u> added].

contract was still in force and that there would be negotiations between IESO and Windstream. This is consistent with the other internal MEI email, summarized at paragraph 64 above.[196]

111. Other internal MEI emails repeat the message that MEI would not agree to meet with Windstream. For example, in an email to multiple Ontario ministries dated February 21, 2017, Mr. Teliszewsky responded about how to address a media question about when the Government would meet with Windstream to determine their next steps. He stated, "Ontario is NOT a counterparty to the contracts. The OPA/IESO is. We will not today, nor ever be sitting down with them." He then told his colleagues to stay away from this question in the press.[197]

112. In another email dated February 22, 2017, Ontario officials summarized the content of a media call. The reporter had asked if MEI was in contact with Windstream to discuss potentially moving forward with Windstream's contract. The reporter noted that MEI was refusing to meet with Windstream because the contract was with the IESO, however, the reporter "just got off the phone with the IESO and they [said] the contract [was] in force majeur[e] because of the government's moratorium and there [was] not much they can do. If Windstream want[ed] to renegotiate the terms of the contract they [could] talk to IESO, but if they want[ed] guidance on moving forward with the contract that [was] an issue for the ministry."[198]

113. This email reveals the key issue with Ontario's conduct. Neither IESO nor MEI were taking responsibility for the FIT Contract. The Ontario Government was telling Windstream to deal with the IESO as the contractual counterparty. But the IESO was saying that it had not made the Moratorium decision and issues about how the Project should proceed should go to the Ontario Government. This left Windstream frozen in the contractual and legal limbo that the *Windstream I* tribunal had found breached Article 1105.

114. ***Canada Provides No Evidence to Respond to this Key Issue***. This failure to act is a key measure and aspect of Windstream's case. Yet, in its Counter-Memorial, Canada provides no

196 **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016). [emphasis added].
197 **C-2693**, Email from Andrew Teliszewsky to Colin Nekolaichuk re: NAFTA/Windstream (February 21, 2017). [emphasis added].
198 **C-2694**, Email from Adam Hendy to Meaghan Coker re: Media Call Summary: February 22, 2017 (February 22, 2017). [emphasis added].

witness statement to respond to this issue. There is no evidence before the Tribunal explaining why Ontario refused to meet with Windstream to implement the promises that Ontario had made to Windstream. The silence is notable.

115. Despite this lack of evidence, Canada has made several assertions about negotiations with Windstream in its Counter-Memorial.

116. First, in October and November 2016, Windstream's consultant, Mr. Benedetti, spoke to Mr. Teliszewsky and the Minister of Energy to facilitate a meeting with Windstream. In its Counter-Memorial, Canada asserts that *both* officials referred Mr. Benedetti to legal counsel for Canada in the NAFTA proceedings and that Windstream failed to reach out to Canada. It provides no evidence to support that statement.[199]

117. There is no evidence suggesting that, at this time, Windstream was referred to Canada's counsel in the NAFTA proceedings. Mr. Benedetti provided a witness statement in this arbitration summarizing his discussions with Mr. Teliszewsky and the Minister of Energy in October and November 2016. He makes no mention of being referred to Canada's NAFTA counsel. Rather, his evidence is that in his one discussion with the Minister, on October 13, 2016, the Minister advised him that he was not willing to talk to Windstream. There is no indication that the Minister referred him to legal counsel at all. On November 9, 2016, Mr. Teliszewsky informed Mr. Benedetti that "MEI had been advised by their counsel not to engage with Windstream."[200] This is consistent with MEI's later correspondence with Windstream, where it refuses to meet with Windstream and refers Windstream instead to the IESO.[201] According to Mr. Teliszewsky's contemporaneous email summarized at paragraph 109 above, he spoke with Mr. Benedetti on October 5, 2016 and informed Mr. Benedetti that Windstream should reach out to the IESO's legal counsel.[202] Windstream did reach out to and met with the IESO, as set out in the Memorial.[203]

[199] Canada's Counter-Memorial on the Merits, ¶ 59.
[200] CWS-Benedetti-2.
[201] **C-2471**, Letter from Glenn Thibeault (MEI) to David Mars (December 6, 2016), Exhibit 83 to the Affidavit of David Mars; **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).
[202] **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada* (October 5, 2016).
[203] Windstream's Memorial on the Merits, ¶¶ 245-252.

118. Second, Canada has characterized Windstream's efforts to meet with MEI as a "letter-writing campaign to Ontario."[204] This attempt to demean Windstream's real efforts to move the Project forward underlines the problematic and dismissive attitude that Windstream has been subjected to by the Ontario Government.

119. WWIS was granted a FIT Contract with the IESO to build the Project. It expected that contract to be honoured. When WWIS was negotiating that contract with the OPA, Ontario Government officials were engaged with WWIS and MEI officials spoke to the OPA and other ministries to support Windstream.[205] MEI did not take the position then that WWIS should only speak to the OPA, the contractual counterparty. The Ontario Government then imposed the Moratorium and promised Windstream that its Project would be insulated from the effects of the Moratorium.[206] It was at this juncture that the Ontario Government began, for the first time, to hide behind the excuse that the decisions taken (or improperly deferred) with respect to the Project were those of the contractual counterparty alone, and that Ontario had no obligation or intention of dealing with Windstream. Ontario failed to fulfil the promise it made to Windstream upon the imposition of the Moratorium and failed to direct the OPA in its negotiations with Windstream to implement that promise, part of the wrongdoing found by the *Windstream I* tribunal.[207] Despite the fact that the *Windstream I* tribunal found this course of conduct breached Canada's obligations under the NAFTA, Ontario persisted in its approach after the *Windstream I* Award.

120. Following the *Windstream I* Award, Windstream tried to meet with MEI. It did so through its government relations representative, Mr. Benedetti, who had initial discussions with MEI in October and November of 2016. Mr. Benedetti was told MEI was not willing to engage in discussions with Windstream.[208] In light of that refusal, Windstream sent formal letters to request meetings and made its position clear: the FIT Contract was in force and the ongoing Moratorium is not within the sphere of the IESO's responsibility or power to resolve. Rather, it was for the

[204] Canada's Counter-Memorial on the Merits, ¶ 70.
[205] See Windstream's Memorial on the Merits, ¶¶ 126-138.
[206] See Windstream's Memorial on the Merits, ¶¶ 154-161.
[207] **C-2040**, *Windstream I* Award, ¶ 379.
[208] See Windstream's Memorial on the Merits, ¶ 236; CWS-Benedetti-2.

Government of Ontario, including where necessary by way of directing the IESO, to resolve the situation it created.[209]

121. The Government of Ontario never meaningfully responded to this correspondence. MEI simply said it would not meet with Windstream and that Windstream should meet with the IESO.[210] MEI never explained why it would not meet with Windstream or why meeting with the IESO would be productive, given the IESO had no responsibility for the Moratorium or the Ontario Government's promises to Windstream. Both Mr. Baines and Ms. Baines explain that this lack of engagement was frustrating and disrespectful.[211]

122. In its Counter-Memorial, Canada does not respond meaningfully to this issue. It provides no witness statement from the Ontario Government and provides no explanation for Ontario's refusal to engage with Windstream. Instead, it points the finger at Windstream as though it has done something unreasonable by trying to engage with the Ontario Government to discuss the promises Ontario made to Windstream. Canada characterizes these attempts as "lobbying efforts" and a "letter-writing campaign," but does not engage on the actual merits of the issue of the Government's decision to ignore Windstream. This dismissive tone is reflective of the treatment Windstream has received since the *Windstream I* Award, and is particularly remarkable given the *Windstream I* tribunal's ruling that Canada breached the NAFTA by disregarding its obligations to Windstream. Rather than attempting to correct its improper conduct, the Ontario Government doubled down on its mistreatment of Windstream.

D. WWIS Commences the Ontario Application to Protect its Rights

123. The IESO's termination right under Section 10.1(g) of the FIT Contract arose on May 4, 2017. On March 27, 2017, WWIS commenced the Ontario Application seeking to restrain the IESO from exercising its termination right. WWIS sought a declaration that the IESO could not

[209] See Windstream's Memorial on the Merits, ¶¶ 237-241. See **C-2049**, Letter from David Mars (WEI) to Glenn Thibeault (MEI) dated November 28, 2016.
[210] See Windstream's Memorial on the Merits, ¶¶ 237-241. See **C-2471**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) December 6, 2016, Exhibit 83 to the Affidavit of David Mars.
[211] See Windstream's Memorial on the Merits, ¶¶ 291-292; CWS-N. Baines, ¶ 75; CWS-I. Baines-3, ¶¶ 52-55.

rely on the Moratorium or other delays caused by Ontario to exercise its termination right.[212] This section of the Reply addresses Canada's allegations in respect of the Ontario Application.

1. Windstream's Initiation of the Application

124. In its Counter-Memorial, Canada asserts that "the Claimant's true expectations were made clear when its enterprise lodged the [Ontario] Application for an order restraining the IESO from terminating the FIT Contract. […] The Claimant's persistent efforts, both in lobbying the Ontario government and pursuing domestic litigation, indicate that it was well aware of the status of the Project and the real and tangible likelihood that IESO would exercise its termination right."[213]

125. As explained above, following the *Windstream I* Award, Windstream felt optimistic about the future of the Project: the tribunal recognized the FIT Contract was in force and could be renegotiated; Canada had represented throughout the *Windstream I* arbitration that the Project could proceed once the Moratorium was lifted; and public statements by Ontario following the Award stated that research would soon be "finalized" and the Project could be built. Windstream's contemporaneous emails confirm this expectation.[214]

126. However, as May 4, 2017 approached, Windstream was in a tough position. On February 9, 2017, the IESO informed Windstream that it would not renegotiate the terms of the FIT Contract.[215] On December 6, 2016 and February 21, 2017, the Minister of Energy had informed Windstream that he would not meet with them and refused to intervene to direct the IESO in its negotiations with Windstream.[216] Windstream brought the Ontario Application to ensure its rights under the FIT Contract were not lost.[217]

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[212] Windstream's Memorial on the Merits, ¶ 265.
[213] Canada's Counter-Memorial on the Merits, ¶ 186.
[214] See ¶¶ 58-60 above.
[215] **C-2471**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) (February 9, 2017), Exhibit 82 of the Affidavit of David Mars (June 2, 2017). See also Windstream's Memorial on the Merits, ¶ 249.
[216] **C-2471**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) December 6, 2016, Exhibit 83 to the Affidavit of David Mars; **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017). See also Windstream's Memorial on the Merits, ¶¶ 235-244.
[217] Windstream's Memorial on the Merits, ¶¶ 264, 266; CWS-N. Baines-2, ¶ 26.

2. Windstream's Continuation of the Application

127. On February 20, 2018, the IESO informed Windstream of its decision to terminate the FIT Contract (the "**Termination Decision**").[218] The Ontario Application had been adjourned while this decision was made. Following the Termination Decision, on April 20, 2018, WWIS re-initiated the Ontario Application and sought a declaration restraining the IESO from exercising its termination right due to delays caused unilaterally by the Ontario Government. While the Ontario Application was pending, the Termination Decision did not take effect.[219]

128. In its Counter-Memorial, Canada claims that, once resumed, the Ontario Application progressed slowly due to procedural issues – suggesting WWIS was the cause of those procedural issues – and then sat idle from March 2019 until it was discontinued in January 2020.[220] This mischaracterizes the events.

129. Between May 2018 to March 2019, the parties exchanged materials and then had communications about how to address certain evidence that had been filed. Contrary to Canada's suggestion, Windstream was not the cause of the procedural issues that arose. Rather, between May and October 2018, the parties' exchanged documents and evidence further to the schedule they negotiated. Following this, WWIS waited two months to hear from the IESO on the timeline for its reply evidence. In December 2018, the IESO raised two issues to be addressed before it would deliver reply evidence and set a schedule for the remainder of the proceeding. Neither issue impacted the ability of the IESO to deliver reply evidence. Between December 2018 to March 2019, the parties exchanged correspondence seeking to resolve the issues raised by the IESO.[221]

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[218] Windstream's Memorial on the Merits, ¶ 275; **C-2477**, Letter from Michael Lyle (IESO) to Nancy Baines (WWIS) (February 20, 2018), Exhibit M to the Affidavit of Michael Lyle (1 June 2018).
[219] Windstream's Memorial on the Merits, ¶¶ 277-278.
[220] Canada's Counter-Memorial on the Merits, ¶ 108.
[221] Further to the parties' agreed schedule, on May 3 and 4, 2018, the parties exchanged answers to undertakings following the cross-examinations that had occurred in the fall and then, on June 1, 2018, the IESO provided further affidavit evidence. See **C-2725**, Email from Emily Sherkey to David Mars re FW: WWIS' Answers to Undertakings (May 3, 2018); **C-2705**, Email from Melanie Ouanounou to John Terry, Nick Kennedy re: IESO Answers to Undertakings (May 04, 2017); CWS-N. Baines, ¶ 64; **C-2477**, IESO Responding Application Record.
In the Counter-Memorial, fn 191, Canada misrepresentedly states that WWIS filed its supplementary affidavit evidence in October 2018 "[a]fter sitting on the IESO's affidavit evidence for over four months and unilaterally delaying the submission of its own evidence:" The parties' agreed that WWIS' evidence would be due October 5, 2018, *after* the IESO's supplementary productions were made. WWIS' evidence was provided on October 19, 2018

130. [redacted].[222]

131. [redacted], in January 2020, WWIS discontinued the Ontario Application to pursue the NAFTA claim.[223] On February 18, 2020, the Termination Decision took effect.[224]

E. IESO's Decision to Terminate the FIT Contract After the Ontario Government Fails to Direct it Not to Do So

132. On February 20, 2018, the IESO informed Windstream of the Termination Decision (although, as set out above, the decision did not take effect until February 18, 2020). MEI refused to intervene and direct the IESO not to make the Termination Decision. The details of this are set

(a two-week delay beyond the parties' agreed schedule). See **C-2738**, Email from Nick Kennedy to Alan Mark, Melanie Ouanounou re: Revised Schedule (October 19, 2018).
Following this, it was up to IESO to decide the timeline it needed for reply evidence, which depended on whether the IESO decided to retain an expert. For almost 7 weeks, WWIS heard nothing. On December 5, 2018, IESO's counsel raised two preliminary issues to be addressed before it would deliver reply evidence and set a schedule for the remainder of the proceeding: (1) it sought to bring a motion to strike portions of the affidavit of David Mars on the basis of hearsay and improper expert evidence, and (2) it sought assurances that Michael Killeavy, a former IESO employee who provided an affidavit on WWIS' behalf, has not and will not divulge confidential or privileged information. Neither of these issues impacted the ability of the IESO to deliver reply evidence, but the IESO never provided such further evidence. See **C-2740**, Email from Melanie Ouanounou to Nick Kennedy re: Windstream v. IESO - Windstream's Responding Materials (December 5, 2018) Attachment: Windstream Undertaking re: privilege and confidentiality.pdf; **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).
On the first issue, over the next couple of months, the parties engaged in correspondence about how to resolve that issue. By mid-March 2019, they agreed to a revised version of Mr. Mars' affidavit. See **C-2744**, Email from Melanie Ouanounou to Nick Kennedy re: Voice Message From: Melanie Ouanoun, 1 (416) 8496919 (February 8, 2017); **R-0669**, E-mails regarding Confidentiality Undertaking between Melanie Ouanounou (Goodmans) and Nick Kennedy (Torys) (2019).
With respect to the second issue, the requested undertaking, WWIS' counsel stated that Mr. Killeavy was subject to a confidentiality agreement with the IESO and has complied with his obligations. IESO still insisted a further undertaking was required. The parties exchanged communications on this issue between December 2018-March 2019. See **C-2744**, Email from Melanie Ouanounou to Nick Kennedy re: Voice Message From: Melanie Ouanoun, 1 (416) 8496919 (February 8, 2017); **R-0669**, E-mails regarding Confidentiality Undertaking between Melanie Ouanounou (Goodmans) and Nick Kennedy (Torys) (2019).

[222] WS-Mars-4, ¶ 29.

[223] Windstream's Memorial on the Merits, ¶¶ 279-280; **C-2482**, Letter from John Terry (Torys LLP) to Alan Mark (Goodmans LLP) (15 January 2020), Schedule J to the Costs Submissions of the IESO.

[224] Windstream's Memorial on the Merits, ¶¶ 279-280; **C-2289**, Letter from Michael Lyle (IESO) to Nancy Baines (February 18, 2020).

out in the Memorial.[225] This section of the Reply Memorial deals with the assertions made in Canada's Counter-Memorial respecting the Termination Decision.

133. ***Lack of Transparency Regarding IESO's Process***. During the cross-examination of the IESO's witnesses in the Ontario Application, Windstream learned for the first time that the IESO had a decision-making process regarding whether to exercise its Section 10.1(g) termination right. The IESO had never previously mentioned that process and Windstream had no (and still has no) transparency into what that process is.[226]

134. Notably, Canada does not provide any of that transparency in its Counter-Memorial or in any of the document productions made by it. It provides no documents or information about the IESO's process for exercising its s. 10.1(g) termination right. It provides none of this information, even though Canada asserts in its Counter-Memorial that the IESO's decision to terminate the FIT Contract was guided by the "general framework" created by the IESO for such decisions[227] and even though it has put forward a witness statement from an IESO representative. No documents from the IESO were produced relating to this issue (indeed, the IESO produced no responsive documents to the document requests at all beyond correspondence with Windstream).

135. ***Information Exchanged Between WWIS and IESO***. Between November 10, 2017 to February 6, 2018, WWIS and the IESO exchanged correspondence about the information Windstream was to provide the IESO while the IESO undertook the process to decide whether to terminate the FIT Contract.[228] In its November 29, 2017 letter to the IESO, WWIS provided a list of the work it had done to advance the Project and indicated that it anticipated that it would bring its Project into commercial operation within 63 months of the end of the *force majeure*.[229] In its Counter-Memorial, Canada asserts this was despite Windstream only having 60 months to reach MCOD.[230]

[225] Windstream's Memorial on the Merits, ¶¶ 271-336.
[226] Windstream's Memorial on the Merits, ¶¶ 270-271.
[227] Canada's Counter-Memorial on the Merits, ¶ 98.
[228] Windstream's Memorial on the Merits, ¶¶ 271-272.
[229] **R-0801**, Letter from Nancy Baines (WWIS) to Michael Killeavy (IESO) (November 29, 2017).
[230] Canada's Counter-Memorial on the Merits, ¶ 89.

136. There was expert evidence in *Windstream I* that the Project, more likely than not, would have been developed, permitted, and constructed in 63 months, assuming a Project restart in February 2011, consistent with the constraints of the FIT program.[231] In this arbitration, Windstream has again provided expert evidence on the Project schedule. Wood Group concludes that, assuming a February 2020 Project restart, the Project would be complete within 58 months.[232] Canada has not provided any responding engineering evidence on this issue.

137. ***IESO Terminated the Contract Based on Circumstances Created by the Moratorium***. In its Counter-Memorial, Canada summarizes the reasons the IESO decided to terminate the FIT Contract.[233] In doing so, Canada ignores the point, raised by Windstream, that the factors relied upon by the IESO were based on circumstances and delays created by the Moratorium and the conduct of the Ontario Government. In summary:[234]

a) [redacted].[235]

b) [redacted][236]

[231] *Windstream I* Reply Memorial, ¶ 733; Sgurr June 2015 Report, p. 15.
[232] Windstream's Memorial on the Merits, ¶ 545; CER-Wood, s. 10.2.
[233] Canada's Counter-Memorial on the Merits, ¶¶ 98-103.
[234] Windstream's Memorial on the Merits, ¶¶ 308-329; **C-2477**, Memorandum Re Section 10.1(g) Analysis (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).
[235] Windstream's Memorial on the Merits, ¶¶ 311-313. **C-2477**, Memorandum Re Section 10.1(g) Analysis (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).
[236] Windstream's Memorial on the Merits, ¶¶ 314-320. **C-2477**, Memorandum Re Section 10.1(g) Analysis (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).

[redacted].[237]

c) [redacted].[239] Mr. Killeavy, the IESO official who had written the recommendation to terminate the FIT Contract, testified that he was not aware of the flaws in the PSPG Analysis when he made his recommendation. He testified that, if he knew of those flaws, he does not believe that he would have made that recommendation.[240]

d) [redacted].[241]

138. The IESO has recognized that the status of the FIT Contract is not the fault of Windstream. For example, in an internal email between MEI staff dated January 13, 2017, a summary of a media call with the IESO was reported. According to that report, the IESO told the media that "[t]he contract with Windstream [was] still in effect and [was] current in force majeure. FM [force majeure] was invoked because circumstances affecting the project's development were outside of what was contemplated in the contract and beyond the contract holder's control."[242]

[237] Windstream's Memorial on the Merits, ¶¶ 321-322.
[238] Windstream's Memorial on the Merits, ¶¶ 314-320. **C-2477**, Memorandum Re Section 10.1(g) Analysis (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).
[239] Windstream's Memorial on the Merits, ¶ 323; **C-2476**, Affidavit of Jason Chee-Aloy sworn October 19, 2018.
[240] Windstream's Memorial on the Merits, ¶ 324; **C-2475**, Affidavit of Michael Killeavy sworn October 18, 2018.
[241] Windstream's Memorial on the Merits, ¶ 329. **C-2477**, Memorandum Re Section 10.1(g) Analysis (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).
[242] **C-2667**, Email from Adam Hendy to Dan Moulton re: Media Call Summary: January 13, 2017 (January 13, 2017). [emphasis added].

139. The IESO's ability to terminate the FIT Contract arose only because of the Moratorium and the conduct of the Ontario Government, including its refusal to direct the IESO in its negotiations with Windstream. Canada has not provided any response in its Counter-Memorial to these important points. They speak for themselves.

140. ***Ontario Failed to Direct the IESO When it Had the Authority to do So***. In its Memorial, Windstream set out the failure of the Ontario Government to take steps to direct the IESO not to terminate its termination right:[243]

a) Ontario, through MEI, promised Windstream that its FIT Contract would be "frozen" from the effects of the Moratorium and that the Moratorium would not mean its Project was terminated. Throughout the *Windstream I* arbitration, Canada stated that the Project was "frozen" and could resume once the temporary Moratorium (which Canada called the "deferral") was lifted.

b) As a result, the *Windstream I* tribunal found that the FIT Contract was still in force and could be renegotiated to implement those promises. In finding a breach of the FET standard, the tribunal found that Ontario "let the OPA conduct the negotiations with Windstream even [though] the decision on the moratorium had been taken by the Government and not the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so."[244]

c) Yet, following the *Windstream I* award, Ontario, through MEI, continued this same course of conduct. MEI did nothing to direct the IESO to renegotiate the FIT Contract with WWIS and then did nothing to stop the FIT Contract's termination, despite its promises to Windstream. Instead, MEI refused to meet with Windstream. This inaction was deliberate. MEI informed Windstream that "Ontario ha[d] decided <u>not to intervene</u> in this matter."[245]

[243] Windstream's Memorial on the Merits, ¶¶ 332-358.
[244] **C-2040**, *Windstream I* Award, ¶ 379.
[245] Windstream's Memorial on the Merits, ¶ 335; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019). [<u>emphasis</u> added].

d) [redacted].[246]

e) MEI had the power to direct the IESO to amend the FIT Contract to implement the promise to freeze.[247] Windstream has provided extensive factual and expert evidence of the Ontario Government's formal and informal control over the IESO through the Expert Report of Sarah Powell, and the witness statements of Michael Killeavy and George Smitherman. These witnesses explain how the IESO could have directed the IESO to freeze the FIT Contract, either through its formal directive power or its informal control powers over the IESO.[248]

141. Canada has not responded to this evidence or this issue. Its silence is notable, given that the Ontario Government's failure on this issue is one of the key measures challenged.

F. The Ontario Government Created the Conditions that Gave Rise to the Termination of the FIT Contract

142. In its Memorial, Windstream explained how the Ontario Government created the conditions that gave rise to the termination of the FIT Contract. In summary:[249]

a) Following *Windstream I*, the Ontario Government failed to complete in a timely manner the work it considered necessary in order to lift the Moratorium. The Government stopped conducting *any* research, despite that this research was the pretense for the Moratorium. It is not taking any steps to lift the Moratorium.

b) The delay caused by the Moratorium, and the lack of certainty as to when the Moratorium will be lifted, was one of the bases used by the IESO to terminate the FIT Contract.

[246] Windstream's Memorial on the Merits, ¶¶ 329-331. **C-2477**, Memorandum Re Section 10.1(g) Analysis (February 16, 2018), Exhibit L to the Affidavit of Michael Lyle (1 June 2018).
[247] **C-2040**, *Windstream I* Award, ¶¶ 379-380.
[248] Windstream's Memorial on the Merits, ¶¶ 337-358.
[249] Windstream's Memorial on the Merits, ¶¶ 293-294, 308-329.

c) Following the *Windstream I* Award, the Ontario Government failed to direct the IESO not to terminate the FIT Contract or to renegotiate the FIT Contract to fulfill the promise to "freeze."

143. As a result of the continued application of the Moratorium to WWIS, combined with the failure to direct the IESO, the Ontario Government created the conditions that allowed the IESO to terminate the FIT Contract, in direct contradiction to its promise to "freeze" the Project from the effects of the Moratorium. The Section 10.1(g) right would not have become available had the Ontario Government not taken these actions (or, perhaps more aptly, inactions).

144. In its Counter-Memorial, Canada asserts that "[b]y 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." As a result, Canada argues that "Ontario had no need to direct the IESO to reactivate or renegotiate WWIS' FIT Contract," and there was no need for Ontario to conduct the scientific work necessary to lift the Moratorium.[250]

145. This assertion raises two separate issues: (1) Ontario's energy supply needs; and (2) its decision not to conduct scientific research. They are addressed in turn below.

1. Ontario's Energy Supply Needs

146. Canada asserts that there was no need for Ontario to direct the IESO to renegotiate the FIT Contract because, by September 2016, Ontario had shifted away from long-term, fixed-payment, large-scale contracts. This mischaracterizes the true state of Ontario's energy needs during the relevant period.

147. First, this argument relies on the IESO's 2017 Long-Term Energy Plan, but is unsupported by any witness statement.[251] Canada provided a witness statement from an IESO representative, but chose not to include any evidence on Ontario's energy supply needs. Canada has provided no evidence to support its bald assertion that this temporary shift away from long-term contracts had

[250] Canada's Counter-Memorial on the Merits, ¶¶ 50, 54-56.
[251] Canada's Counter-Memorial on the Merits, ¶¶ 50, 54-56.

any bearing on the reasons Ontario refused to meet with Windstream and refused to direct the IESO in its negotiations with Windstream. The absence of such evidence is telling. Indeed, the contemporaneous documents indicate this is not true, as set out at paragraphs 109 to 112 above.

148. Second, Windstream has provided expert evidence, through Power Advisory, that following September 2016, Ontario had (and continues to have) need for further power to meet its capacity needs and the Project would have been beneficial to Ontario in this regard:[252]

a) In the 2018 Power Advisory Report, [redacted].”[253] [redacted].

b) In the 2022 Power Advisory Report, Mr. Chee-Aloy concludes that the recent events since his 2018 report have further confirmed his conclusions. The IESO reverted back to using long-term contracts to meeting Ontario’s supply needs to address the forecasted electricity supply shortfall: “Not only has the IESO reverted back to the use of long-term contracts, the IESO is clearly using or planning to use contracts through multiple procurement initiatives (e.g., RFPs, one-on-one negotiations) to re-contract existing generators post expiry of their contracts to ensure continued operations and to facilitate construction of new generation projects or secure specific supply resources.”[254]

149. Canada does not respond to the evidence of Mr. Chee-Aloy in its Counter-Memorial.

150. In his third expert report delivered with this Reply Memorial, Mr. Chee-Aloy updates his 2022 Report with the events that have occurred in the interim. He explains that the events that have transpired since his last report further support his conclusions. He continues to opine that Ontario

[252] See Windstream’s Memorial on the Merits, ¶¶ 359-366.
[253] **C-2476**, Expert Report by Power Advisory LLC (October 17, 2018), p. 5.
[254] CER-Power Advisory-2, pp. 2, 12.

requires additional electricity supply in the early to mid-2020s, and beyond, and the IESO has engaged in a number of recent long-term contracting initiatives that demonstrate the IESO has reverted back to the use of long-term contracts to help meet Ontario's forecasted electricity supply shortfall.[255]

151. On July 10, 2023, the Ontario Government released its Powering Ontario Growth Plan, which outlines the actions the Ontario Government is and will be taking to meet increasing demand for electricity supply through the 2030s and 2040s. One of the action items specifies that competitive procurement (*i.e.*, RFPs and associated long-term contracts) will be planned and then administered to procure non-emitting electricity resources, including wind projects.[256]

152. This evidence underscores that government policies on electricity procurement are constantly changing. For a brief period of time, the policy under the 2017 Long-Term Energy Plan was to shift away from long-term contracts. When WWIS signed the FIT Contract, the policy was heavily focused on procuring electricity resources using long-term contracts. Now, once again, the current policy is focused on procurement through long-term contracts.[257]

2. Ontario Conducts No Further Research

153. In its Counter-Memorial, Canada has confirmed that Ontario has stopped conducting research and is not taking any steps to lift the Moratorium. It states there was "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."[258]

154. Throughout the *Windstream I* arbitration, Canada emphasized that Ontario was conducting this research and the Moratorium (or "deferral") was only temporary.[259] Following the *Windstream I* Award, the Ontario Government continued to publicly announce that it was

[255] CER-Power Advisory-3.
[256] CER-Power Advisory-3, s. 2.3.3.
[257] Windstream's Memorial on the Merits, ¶¶ 314-320.
[258] Canada's Counter-Memorial on the Merits, ¶ 50.
[259] See ¶ 61 above.

conducting the research to lift this temporary Moratorium and that the research was being "finalized."[260] The entire stated rationale for the Moratorium was that Ontario needed to conduct further scientific research.[261]

155. Now Canada asserts that there is "no need" for Ontario to conduct this research. Again, Canada has made this assertion without evidence. It has put forward no witness statement addressing the reasons Ontario has seemingly changed its mind and decided not to conduct the research it represented was ongoing throughout the *Windstream I* proceedings. Without such evidence, Canada has no basis to assert what the reasons were for its failure to do so.

156. In its document requests in this arbitration, Windstream sought and Canada agreed to provide documents from MOE, MEI, MNR, the Cabinet Office and the Premier office from September 30, 2016 to February 20, 2018, related to "(a) offshore wind research; and (b) the moratorium on offshore wind, including any discussions of lifting the moratorium. Canada has not produced documents showing any detailed discussions about the "need" to conduct this research or the relationship between Ontario's energy supply needs and the research purportedly required to lift the Moratorium.

G. Windstream's Continued Efforts to Use its Project to Meet Ontario's Energy Supply Needs

157. In its Counter-Memorial, Canada references Windstream's October 13, 2022 and November 14, 2022 letters to the Minister of Energy to discuss options for Windstream to build the Project in light of Ontario's urgent need for new power generation. Canada states that on November 29, 2022, the Ministry's Legal Director responded that MEI had declined the meeting invitation and that any future correspondence should occur "through Canada as counsel of record or directly to me." Canada then asserts that "[t]he Claimant has failed to reach out to Canada and has not yet responded to the Legal Director."[262]

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[260] **C-2045**, Official Report of Debates (Hansard) Transcript - English, Legislative Assembly of Ontario, Standing Committee on Estimates (October 26, 2016).
[261] **C-2040**, *Windstream I* Award, ¶ 147; **C-0485**, News Release (MOE), Ontario Rules Out Offshore Wind Projects (February 11, 2011).
[262] Canada's Counter-Memorial on the Merits, ¶ 119. [emphasis added].

158. First, Canada is incorrect. On January 10, 2023, Windstream (through counsel) sent a letter to Canada's counsel in response to the November 29th letter. [redacted][263]

159. [redacted].[264]

160. [redacted]

161. [redacted]ory.[266]

162. In light of the Powering Ontario Growth Plan released in July 2023, which calls for the procurement of renewable energy projects to address Ontario's energy needs at set out at paragraph 151 above, [redacted]."[267]

[263] **C-2811**, Letter from John Terry (Torys LLP) to Rodney Neufeld (Global Affairs Canada) (January 10, 2023).
[264] **C-2814**, Letter from Rodney Neufeld (Global Affairs Canada) to John Terry (Torys LLP) (February 16, 2023).
[265] **R-0817**, Letters from David Mars (WEI) to Todd Smith Todd (Minister of Energy) (October 13 and November 14, 2022).
[266] See ¶¶ 148 to 151 above.
[267] **C-2828**, Letter from John Terry (Torys LLP) to Rodney Neufeld (GAC) re *Windstream LLC v. Government of Canada* (July 31, 2023) [redacted].

H. Windstream Has Been Treated Inconsistently with Other FIT Contract Holders

163. There are two key ways in which Windstream has been treated differently (and worse) than other FIT Contract holders: (1) MEI's refusal to direct the IESO in this case is inconsistent with its approach in other cases; and (2) Canada's position that the FIT Contract has no value is inconsistent with the amounts Ontario has paid out to other FIT Contract holders.

1. MEI's Use of its Formal and Informal Control over the IESO

164. MEI has refused to meet and engage with Windstream and has instead referred Windstream to the IESO. MEI's purported reason for doing so is that it will not interfere in contracts to which it is not a party.[268] This is inconsistent with the way MEI has used its control powers over the IESO with respect to other Projects, as set out in the Memorial on the Merits.[269] In summary:

a) With respect to the TransCanada project, the Ontario Government promised the project developer that its project would be "kept whole" and then informally directed the OPA to negotiate with the developer to fulfil that promise.[270]

b) With respect to the Greenfield South project, the Ontario Government promised the project developer that it would receive a new contract for a plant in a new location and then informally directed the OPA to relocate the plan, which it did.[271]

c) With respect to Bruce Power, the OPA provided Bruce Power nearly $60 million for the electricity that was not produced after it had asked Bruce Power to dial back the amount of power it was producing. The OPA did so because Mr. Smitherman, the Minister of Energy at that time, asked it to do so.[272]

[268] See **C-2471**, Letter from Glenn Thibault (MEI) to David Mars (WEI) December 6, 2016, Exhibit 83 to the Affidavit of David Mars (June 2, 2017); **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) (December 10, 2019).
[269] Windstream's Memorial on the Merits, ¶¶ 242, 339.
[270] Windstream's Memorial on the Merits, ¶ 353(a); CWS-Killeavy, ¶¶ 29-34; CWS-Smitherman, ¶ 12; **C-0671**, Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs (October 2013).
[271] Windstream's Memorial on the Merits, ¶ 353(b); CWS-Killeavy, ¶ 44; **C-0655**, Legislative Assembly of Ontario, Official Report of Debates (Hansard) Standing Committee of Justice Policy (June 4, 2013), pp. JP-581 to JP-582.
[272] Windstream's Memorial on the Merits, ¶ 353(c); CWS-Smitherman, ¶ 14(a).

d) MEI has on several occasions directed the IESO to grant FIT Contract relief to FIT contract holders subject to delays caused by the Government of Ontario:

i) After being requested to do so by the Deputy Minister of Energy, the OPA extended the MCOD by one year for existing FIT Contracts to account for permitting delays caused by MOE.[273]

ii) The Minister of Energy also directed the OPA to offer a four-year extension to the MCOD for existing Large FIT Contracts for Aboriginal Participation Projects where generating facilities are located on reserve lands to acknowledge their unique and significant land control challenges. This direction only impacted one project that fell within its scope.[274]

iii) The Minister of Energy directed the OPA to offer a 3-year extension to the MCOD for existing FIT contracts for waterpower projects to acknowledge their unique regulatory approval requirements.[275]

165. Canada provides no response to this differential treatment in its Counter-Memorial. It has not provided any evidence responding to this detailed evidence from Ms. Powell, Mr. Killeavy or Mr. Smitherman. As set out above, it has provided no witness statement from the Ontario Government explaining why it refused to meet with Windstream, and instead referred Windstream to the IESO, when that is in stark contrast to how it has treated other FIT contract holders. In these other cases, MEI did not take the position that the IESO was the contracting party and that the Ministry plays no role in these contractual affairs.

[273] Windstream's Memorial on the Merits, ¶ 242, **C-1966**, Letter from David Lindsay (MEI) to Colin Andersen (OPA) re Extension for FIT and microFIT Contracts (January 28, 2011); **C-1967**, Printout from OPA website entitled "One-year extension of Milestone Date for Commercial Operation available for FIT contract holders" – OPA Feed-in Tariff Program (February 9, 2011).
[274] Windstream's Memorial on the Merits, ¶ 242, **C-2471**, Letter from Bob Chiarelli (MEI) to Colin Andersen (OPA) (June 12, 2013), Exhibit 8 to the Affidavit of David Mars.
[275] Windstream's Memorial on the Merits, ¶ 242, **C-2471**, Letter from Chiarelli, Bob (MEI) to Andersen, Colin (OPA) (June 26, 2013), Exhibit 9 to the Affidavit of David Mars; **C-2471**, New Hydroelectric Project Direction Extends FIT Contracts for Waterpower Projects – OPA (June 26, 2013), Exhibit 10 to the Affidavit of David Mars.

2. The Value Paid to Other FIT Contract Holders

166. Windstream was awarded approximately $25 million by the *Windstream I* tribunal for the harm it suffered by virtue of Canada's breach of the FET standard. This was an award for the *damages* Windstream suffered, but does not reflect the full value of the Project. As set out at paragraph 64 above, MEI officials shared this view following the *Windstream I* Award.

167. Canada's position in this arbitration is that the FIT Contract has no value and Windstream was fully compensated for the full value of the Project. This is inconsistent with Ontario's internal documents about the value of WWIS' FIT Contract and is inconsistent with the value Ontario has paid to other FIT contract holders for the termination of their projects. Ontario's conduct demonstrates that it does not see the FIT Contract as "valueless".

168. First, as set out at paragraph 64 to 66 above, Ontario's own documents demonstrate that it saw the FIT Contract as having value following the *Windstream I* Award:

a) Following the release of the *Windstream I* Award, MEI's internal communications stated that "the Tribunal did not consider the value of the contract, only the specific damages to Windstream's project that company incurred as a result of the moratorium."[276] Ontario understood that the FIT Contract was in force and that the outcome of *Windstream I* did not change the status of the FIT Contract.[277]

b) Consistent with that belief that there was a valid contract with value, immediately after the release of the *Windstream I* Award, MEI officials sent emails calculating the expected value of the FIT Contract to be $2.76 billion over its 20-year term.[278]

[276] **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016).
[277] **C-2643**, Independent Electricity System Operator Issues Note: Windstream NAFTA Claim (October 6, 2016) and **C-2667**, Email from Adam Hendy to Dan Moulton re: Media Call Summary: January 13, 2017 (January 13, 2017). See also **C-2641**, MNRF House Note Issue: Windstream Energy Offshore Wind Power NAFTA Claim (September 30, 2016), **C-2649**, Email from Katrina Xavier to Richard Blackwell re: Globe&Mail query (October 20, 2016).
[278] **C-2638**, Email from Emma Ferner to Sam Colalillo re Windstream Contract Value Estimate (September 30, 2016); **C-2529**, Windstream Contract Value Estimate.xlsx; **C-2639**, Email from Sam Colalillo to Daniel Cayley re "FW: Windstream Contract Value Estimate" (September 30, 2016); **C-2650**, Email from Mirrun Zaveri to Erin Thompson re: Wind Contract Value (October 21, 2016); **C-2638,** Email from Emma Ferner to Sam Colalillo re Windstream Contract Value Estimate (September 30, 2016); **C-2529**, Windstream Contract Value Estimate.xlsx; **C-2639**, Email from Sam Colalillo to Daniel Cayley re "FW: Windstream Contract Value Estimate" (September 30, 2016); **C-2650**, Email from Mirrun Zaveri to Erin Thompson re: Wind Contract Value (October 21, 2016).

This is much lower than Windstream's calculation of over $5.2 billion, but demonstrates that the total contract value is magnitudes more than zero dollars.

169. Second, when the IESO has terminated other FIT Contracts as a result of a directive or the conduct of the Ontario Government, the Ontario Government has ensured that the contract holders were compensated. In other words, the Government has recognized the contracts have value. There are two key examples of this.

170. First, Doug Ford campaigned on cancelling renewable energy contracts and became Premier in June 2018. One of his first steps once in office was to fulfil this promise.[279] On July 13, 2018, the Minister of Energy issued a directive to the IESO to wind down all FIT 2, 3, 4, and 5 contracts that had not yet received a Notice to Proceed, among others. This resulted in 758 contracts being terminated.[280] Ontario reportedly spent **$231 million** to pay for those cancelled contracts.[281]

171. Importantly, unlike Windstream's FIT 1 contract,[282] the IESO had not granted these FIT 2, 3, 4 and 5 contracts a waiver of the IESO's contractual right to terminate the FIT Contract prior to the issuance of a Notice to Proceed (NTP) upon refunding the security and compensating the contract holder for a portion of its pre-construction development costs, up to a liability limit. As a result, the termination liability with respect to these contracts was limited. Yet, there was still value paid to each of these contract holders upon the termination of their FIT contracts.

172. Second, around the same time, in July 2018, the Ontario Government cancelled the White Pines 60 MW onshore wind energy project in Prince Edward County, Ontario. The contract capacity was for an 18.45MW project with nine wind turbines.[283] Importantly, like WWIS' FIT Contract, White Pines held a FIT 1 contract and the IESO had waived the pre-NTP termination right. Consequently, like WWIS, the IESO had no right to terminate the White Pines project using

[279] **C-2735**, Ontario Newsroom News Release entitled "Promises Made, Promises Kept: Ontario's Government for the People Concludes Summer of Unprecedented Activity" (August 16, 2018).
[280] **C-2733**, Canadian Press News Release entitled "Ontario government cancels 758 renewable energy contracts, says it will save millions (July 13, 2018).
[281] **C-2760**, CBC News Article entitled "Doug Ford government spends $231M to scrap green energy projects" (November 19, 2019).
[282] **C-0549**, Waiver Agreement OPA and WWIS re Pre-NTP Termination Right (August 29, 2011).
[283] **C-2533**, wpd think energy Article entitled "White Pines Wind Project" (Undated).

s. 2.4 of the FIT Contract. As a result, on July 25, 2018, the Ontario Government issued legislation that terminated the project.[284] Following this, Ontario and WPD, which owns the White Pines project, reached a negotiated settlement for the termination of the project.

173. In this arbitration, Windstream sought (and the tribunal ordered) documents from MEI relating to the White Pines termination, including the amount paid to WPD. No such documents were produced by Canada. However, public articles estimate that the settlement amount is upwards of **$100 million**.[285]

174. The White Pines project was partially built. However, it is magnitudes smaller in size to WWIS' Project (300 MW vs. 18MW). WPD was compensated for the cancellation of its FIT Contract with a payment of over $100 million, yet Canada claims in this arbitration that WWIS' FIT Contract had no value.

I. The Project Was and is Technically FeasibleB.2

175. In its Memorial on the Merits, Windstream has set out in detail why the Project was feasible and could have been brought into commercial operation by the deadlines set out in the FIT Contract. Windstream retained a series of experts who assessed the Project's technical, regulatory and financial viability.[286]

176. Canada has produced no responding expert evidence from any technical, regulatory or engineering expert.

177. In the single witness statement Canada produced (which is four pages long), Mr. Lyle asserts that "[i]t is not uncommon for FIT contract holders not to be able to bring their projects into commercial operation." He states that of the 181 FIT contract offers made, 124 projects have achieved commercial operation.[287] If it is Canada's suggestion from this generalized evidence that the Project was not viable, then that is wrong. Canada has put forward no evidence to contradict

[284] **C-2741**, White Pines Wind Project Termination Act, 2018, S.O. 2018, c.10, Sched.2.
[285] **C-2759**, CityNews Article entitled "Ford government spending $231M to cancel renewable energy projects" (November 19, 2019); **C-2751**, Global News Article entitled "Ontario to compensate White Pines wind turbine developers for cancelled contract" (updated July 11, 2019).
[286] Windstream's Memorial on the Merits, ¶¶ 367-400.
[287] RWS-Lyle, ¶¶ 18-19.

or undermine the findings of Windstream's experts, who conducted a detailed analysis of the Project's viability.

PART THREE – THE TRIBUNAL HAS JURISDICTION OVER WINDSTREAM'S CLAIMS

178. Canada raises three objections to the Tribunal's jurisdiction. First, mischaracterizing the case as a re-litigation of the issues already decided in *Windstream I*, Canada says that the Tribunal lacks jurisdiction based upon the principles of *res judicata*, collateral estoppel and abuse of process. Second, relying on that same mischaracterization, Canada maintains its argument from its bifurcation request that Windstream has not shown that it incurred *prima facie* damages. That is not an issue that needs to be resolved at the merits stage and in any event, has no merit. Last, Canada asserts the Tribunal lacks jurisdiction as the claims are time-barred. This argument similarly relies on Canada's mischaracterization of Windstream's claim as a continuation of the same measures that were before *Windstream I*. These jurisdictional objections are each without merit. They are addressed in turn below.

I. WINDSTREAM'S CLAIMS ARE NOT BARRED BY RES JUDICATA, COLLATERAL ESTOPPEL OR ABUSE OF PROCESS

179. There is no dispute between the parties that the principles of *res judicata* (including collateral estoppel)[288] and abuse of process are established rules of international law. The question is whether the requirements of each of these doctrines have been met in the present case. In Windstream's submission, the requirements have demonstrably *not* been met.

180. The question before the Tribunal is whether it is barred from hearing the claims submitted to it by virtue of the findings of the *Windstream I* tribunal. The matters at issue in this arbitration have not been determined by the *Windstream I* tribunal. Indeed, the measures raised in this arbitration could not have been raised in the *Windstream I* proceedings, since they all took place after the issuance of the *Windstream I* Award.

[288] While Canada relies on collateral estoppel as a distinct principle, collateral estoppel is simply one branch of *res judicata*. See ¶¶ 186-187 below. See also **RL-110**, *Mobil Investments Canada v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 177 ("*Mobil II*").

181. The *Windstream I* tribunal found that there was no expropriation because the FIT Contract remained in place and had not been terminated. For that reason, it declined to award Windstream compensation for the loss of its investment, and instead awarded Windstream damages for the harm to its investment.[289] The FIT Contract has now been terminated. This new measure only took effect in February 2020. The issue of whether the Ontario Government is liable under the NAFTA for that termination was not and could not have been determined by the *Windstream I* tribunal, nor has the question of what damages flow from that new measure.

182. Canada bears the burden of establishing that the requirements of *res judicata*, collateral estoppel, and abuse of process are made out.[290] The threshold is high. As explained by the tribunal in *Chevron v. Ecuador (I)*, "[i]t is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce a resulting claim."[291]

183. Windstream does not dispute that the *Windstream I* Award carries *res judicata* effect. Indeed, as set out in the Facts section of this Reply Memorial, Windstream is relying on the *Windstream I* tribunal's findings. It is Canada that is seeking to re-litigate issues decided in *Windstream I*, as set out at paragraphs 26 to 42 above.

A. The Issues Raised in this Arbitration are Not Barred by *Res Judicata*

184. This section sets out the principles applicable to establishing *res judicata*, and then addresses why the high burden for establishing *res judicata* has not been met in this case.

1. The Principles Applicable to Establishing *Res Judicata*

185. *Res judicata* is a well-established principle of international law that applies to a Chapter 11 NAFTA dispute. The principle prevents the relitigation of matters where "a right, question or fact [was] distinctly put in issue and directly determined by a court of competent jurisdiction."[292]

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[289] See **C-2040**, *Windstream I* Award, ¶¶ 290, 483.
[290] **CL-183**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador*, UNCITRAL, Interim Award (December 1, 2008) ("*Chevron I*"), ¶ 139.
[291] **CL-183**, *Chevron I*, ¶ 143.
[292] **RL-110**, *Mobil II*, ¶ 188. [emphasis added].

186. Collateral estoppel, also known as issue estoppel, is not a separate doctrine from *res judicata*, as Canada suggests.[293] As Canada previously recognized in the *Mobil v. Canada II* proceeding, collateral estoppel is a branch of *res judicata*.[294]

187. There are two branches of *res judicata*, described in further detail below:

a) Cause of action estoppel bars the effect of bringing a second claim where the triple identity test (identity of persons, cause of action, and object) is met.

b) Collateral estoppel prevents the relitigation of specific issues that were decided upon by a previous tribunal.

188. ***Cause of Action Estoppel***. There are two steps for determining whether cause of action estoppel applies. First, the tribunal must determine if the triple identity test is met. The triple identity test requires:

a) identity of the parties: the prior award must have been rendered between the same parties as the parties in the further arbitration proceedings;

b) identity of the cause of action: the claims sought in the further arbitration proceedings must be based on the same cause of action as in the prior arbitration proceedings (*i.e.*, the same legal arguments are relied upon); and

c) identity of the object: the same relief must be sought in the further arbitration proceedings.[295]

189. Second, as Canada acknowledges,[296] the tribunal must assess what was actually determined.[297] The triple identity test is a necessary but not sufficient condition. If it is met, it

[293] Canada's Memorial Objecting to Jurisdiction and Admissibility, May 12, 2022, ¶¶ 49, 54.
[294] **RL-110**, *Mobil II*, ¶ 177.
[295] **RL-110**, *Mobil II*, ¶ 192.
[296] See Canada's Memorial on Jurisdiction, ¶ 52 ("*Res judicata* will bar a legal issue from being reconsidered by a new tribunal if that legal issue was (i) distinctly put in issue by the parties in the prior dispute and (ii) distinctly decided by the tribunal in the prior dispute"). [emphasis added].
[297] **RL-110**, *Mobil II*, ¶¶ 191-193.

becomes necessary to ascertain the *content* of the decision, and not just look at what the parties argued in the earlier proceeding. As the International Court of Justice explained:

> 59. It is not sufficient, for the application of *res judicata*, to identify the case at issue, characterized by the same parties, object and legal ground; it is also necessary to ascertain the content of the decision, the finality of which is to be guaranteed. The Court cannot be satisfied merely by an identity between requests successfully submitted to it by the same Parties; it must determine whether and to what extent the first claim has already been definitively settled.
>
> 60. The Court underlined in its Judgment of 26 February 2007, rendered in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), that "[i]f a matter has not in fact been determined, expressly or by necessary implication, then no force of res judicata attaches to it; and a general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it" […].[298]

190. Multiple tribunals have confirmed that for *res judicata* to apply, the issue must actually have been decided by the prior tribunal.[299]

191. ***Collateral Estoppel***. If the "triple identity test" is not satisfied, it is still possible that specific issues that have been determined by a prior tribunal are *res judicata*. This branch of *res judicata* is known as collateral or issue estoppel.

192. Windstream agrees with Canada that in the event of a subsequent arbitration claim between the same parties or privies of those parties, the test for establishing issue estoppel is the one set out by the tribunal in *RSM Production Corporation and others v. Granada*: "a finding [of a prior competent tribunal] concerning a right, question or fact, may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to

[298] **RL-110**, *Mobil II*, ¶ 191, citing *Nicaragua v. Colombia*, I.C.J. Reports 2016, p. 126. [emphasis added].
[299] **RL-110**, *Mobil II* ¶ 193; **RL-113**, *Amco Asia Corp. v. Republic of Indonesia* (ICSID Case No. ARB/81/1) Resubmitted Case, Decision on Jurisdiction, 10 May 1988, ¶ 30; **RL-126**, *RSM Production Corporation and others v. Grenada* (ICSID Case No. ARB/10/6) Award, 10 December 2010, ¶ 7.1.1 ("*RSM*"); **RL-111**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Decision of the Tribunal on Mexico's Preliminary Objection concerning the Previous Proceedings, 26 June 2002, ¶ 45; **RL-005**, *Apotex Inc. v. United States of America* (UNCITRAL) Award, 25 August 2014, ¶ 7.20.

resolve the claims before that court or tribunal" (*i.e.*, it does not apply to statements made by tribunal in *obiter dicta*).[300]

193. Under both cause of action estoppel and issue estoppel, one of the necessary elements is that the issue in question must actually have been decided by the prior tribunal. That is the key element for the purposes of this case. As set out below, the issues raised in this arbitration were not decided by the *Windstream I* tribunal. For the reasons that follow, Canada has failed to meet the high burden of showing the issues raised in this arbitration are *res judicata*. Neither branch of *res judicata* (cause of action estoppel or collateral estoppel) applies.

2. Cause of Action Estoppel Does Not Apply

194. As set out at paragraphs 188 to 189 above, in order to establish cause of action estoppel, the Tribunal must determine that the triple identity is met: (a) same parties; (b) same cause of action; and (c) same relief. The same matters must not just have been raised in both proceedings, but actually determined in the first proceeding.

195. It is not disputed that the parties in *Windstream I* and the present case are the same. However, the other two branches of the triple identity test are not established. Cause of action estoppel is thus not established.

196. ***No Identity of Cause of Action.*** Canada must demonstrate that the two proceedings are based on the same cause of action. However, it cannot do so.

197. With respect to the requirement for identity of cause of action, the relevant question is whether the prior decision concerns the same claims based on the same factual and legal bases.[301] The ILA Report on *Res Judicata* suggests a definition of identity of cause of action as meaning "all facts and circumstances arising from a single event and relying on the same evidence which

[300] Canada's Memorial on Jurisdiction, ¶¶ 56-57, citing **RL-126**, *RSM*, ¶ 7.1.1. [emphasis added]. See also **CL-192**, *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, (UNCITRAL, PCA Case No. 2017-30) Award (November 28, 2019), ¶ 219 ("*Victor Pey Casado*").

[301] **CL-190**, *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (February 7, 2011), ¶ 103; **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, ¶ 494 ("*Caratube*").

are necessary to give rise to a right of relief.[302] In other words, the prior decision must relate to the same claims arising from the same measures and set of facts.

198. The impugned measures and legal grounds in the two arbitrations are distinct. Windstream is not challenging or seeking to relitigate any of the measures that were determined by the *Windstream I* tribunal. All of the measures at issue arose after the *Windstream I* arbitration. Therefore, Windstream's cause of action in this case that these measures violate the NAFTA cannot be *res judicata*, as they did not exist at the time the *Windstream I* award was issued.

199. Cause of action in *Windstream I*. The following are the two relevant measures at issue in *Windstream I*, all of which occurred in and around 2011 to 2012:

a) The imposition by the Ontario Government of the February 11, 2011 Moratorium.

b) The failure of the Ontario Government, or alternatively its state enterprise the OPA, to comply with the commitment made by the Government, through MEI, to Windstream to take steps to ensure that Windstream's investments would not be impacted negatively by the Moratorium.

200. Windstream argued that Canada violated Articles 1110 (expropriation) and 1105 (FET) of the NAFTA. Windstream argued that these two measures rendered WWIS, the Project, and the FIT Contract substantially worthless because there was no prospect of the Project reaching commercial operation by May 4, 2017.[303] Windstream argued that the imposition of the Moratorium, and the failure to freeze the FIT Contract to account for the Moratorium, was politically motivated and was a stark reversal of Ontario's repeated commitment to offshore wind and the representations made to Windstream.[304]

201. As set out at paragraph 189 above, it is not enough to look at what Windstream argued, but also what the *Windstream I* tribunal decided.

[302] **RL-112**, ILA Final Report on Res Judicata and Arbitration, Seventy-second International Law Conference on International Commercial Arbitration, Toronto, Canada, 4-8 June 2006, p. 76, fn 18.
[303] *Windstream I* Windstream's Memorial on the Merits, ¶¶ 555-560.
[304] *Windstream I* Windstream's Memorial on the Merits, ¶¶ 604-607, 616-622; **C-2040**, *Windstream I* Award, ¶ 235.

202. With respect to Article 1110, the tribunal found that there was no expropriation because the "FIT Contract [was] still formally in force and ha[d] not been unilaterally terminated by the Government of Ontario; consequently, while the tribunal agree[d] with the Claimant that the Project could no longer be completed by the MCOD, 4 May 2017, it continue[d] to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium." The tribunal additionally found that the $6 million security deposit was still in place and had not been taken or rendered worthless.[305] Accordingly, while Windstream *argued* that the FIT Contract and its investments were substantially worthless, that is not what the *Windstream I* tribunal ultimately *determined*.

203. With respect to Article 1105, the *Windstream I* tribunal agreed with Windstream that the imposition of the Moratorium was not only driven by the lack of scientific research on the issue but was also politically motivated. However, it found that the imposition of the Moratorium was not itself wrongful and a breach of Article 1105.[306] The tribunal then found that the conduct of the Government of Ontario vis-à-vis Windstream "during the period following the imposition of the moratorium" violated Article 1105.[307] More specifically, the tribunal found that the Government of Ontario did little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the Moratorium, and did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the Moratorium. The regulatory framework continued to envisage offshore wind, but additional and more detailed regulations governing offshore wind were never developed. The Government of Ontario let the OPA conduct the negotiations with Windstream even though "the decision on the moratorium had been taken by the Government and not the OPA, and without providing any directions to the OPA for the negotiations although it had the authority to do so …"[308]

204. The tribunal concluded that Article 1105 was breached by "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

[305] **C-2040**, *Windstream I* Award, ¶ 290. [emphasis added].
[306] **C-2040**, *Windstream I* Award, ¶¶ 376-377.
[307] **C-2040**, *Windstream I* Award, ¶ 379.
[308] **C-2040**, *Windstream I* Award, ¶¶ 378-379.

regulatory uncertainty surrounding the status and the development of the Project created by the moratorium."[309]

205. The determinations made by the *Windstream I* tribunal related to measures that arose "during the period following the imposition of the moratorium."[310] The Government of Ontario failed to take measures to resolve the legal and contractual limbo in which Windstream found itself. However, the FIT Contract remained in force and it was open to the parties to re-activate and renegotiate the terms of the FIT Contract to adjust it to the terms of the Moratorium. By contrast, it is the post-Award conduct relating to the subsequent termination of the FIT Contract on which the measures in this new claim are based.

206. Cause of action in this arbitration. All of the measures challenged in this arbitration arose after the *Windstream I* Award was issued. The measures challenged in this arbitration are:

a) the Ontario Government's failure, following the *Windstream I* Award, to complete in a timely manner the work it considered necessary in order to lift the Moratorium;

b) the Ontario Government's continued application of the Moratorium to WWIS, following the *Windstream I* Award, despite its knowledge that the continued application of the Moratorium to WWIS would create the conditions necessary to allow the IESO to terminate the FIT Contract;

c) the Ontario Government's failure, following the *Windstream I* Award, to direct the IESO not to terminate the FIT Contract;

d) the Ontario Government's failure, following the *Windstream I* Award, 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;

e) the decision of the IESO, a state enterprise exercising delegated governmental authority, to terminate the FIT Contract; and

[309] **C-2040**, *Windstream I* Award, ¶ 380.
[310] **C-2040**, *Windstream I* Award, ¶ 379.

f) the failure of the IESO, following the *Windstream I* Award, to amend the FIT Contract to ensure that the Project would be "deferred, "frozen" and "on hold" for the duration of the moratorium, contrary to the Ontario's Government promise to Windstream and WWIS.[311]

207. In its Memorial Objecting to Jurisdiction, Canada claims that the six measures impugned in this arbitration boil down to two complaints of a NAFTA breach: (i) the continued application of the Moratorium and (ii) the termination of the FIT Contract, as opposed to its deferral or amendment. Canada claims this reflects the same claim that was the subject of the *Windstream I* arbitration.[312]

208. Windstream's complaint in this arbitration is that the failure to lift and the continued application of the Moratorium to WWIS created the conditions necessary to allow the IESO to terminate the FIT Contract. Windstream argues that these measures, and the resulting termination of the FIT Contract, violate Articles 1110 and 1105 of the NAFTA. This cause of action was not determined by the *Windstream I* tribunal, most obviously because the FIT Contract remained in place at the time (which is a finding that the tribunal made).

209. In *Windstream I*, Windstream *argued* that the FIT Contract was *de facto* cancelled because it could no longer be brought into commercial operation by the MCOD date. But, as explained above, that is not what the *Windstream I* tribunal *determined*. Rather, the tribunal expressly found there was no expropriation because the FIT Contract remained in force "and ha[d] not been unilaterally terminated by the Government of Ontario."[313]

210. The opposite is now true. The FIT Contract has been terminated; that is the basis of this second arbitral proceeding. This proceeding is thus based on new facts and measures that were not – and could not have been – before the *Windstream I* tribunal. There cannot be an identity of the cause of actions between the two arbitrations.

[311] Windstream's Memorial on the Merits, ¶ 428.
[312] Canada's Memorial on Jurisdiction, ¶ 68.
[313] **C-2040**, *Windstream I* Award, ¶ 290.

211. A useful case to consider is *Caratube v. Kazakhstan II*. In that case, the claimants had commenced an earlier ICSID arbitration (*Caratube I*) under the Kazakhstan-United States bilateral investment treaty, which was dismissed for lack of jurisdiction. The claimants then commenced a second arbitration under the parties' contract and Kazakhstan's Foreign Investment Law. Unlike in this case, the claimant's second arbitration was based upon the same facts and measures as the first arbitration, but relied upon different legal instruments. Kazakhstan argued that this arbitration was *res judicata* as the "facts underlying the two cases are identical" and the claimant chose not to bring all their claims at once for no explicable reason.[314] This was rejected by the tribunal.

212. The tribunal found that there was no cause of action preclusion because the cause of actions were distinct (one claim was based on a breach of the treaty and the other based on a breach of different instruments).[315] The tribunal also found there was no collateral estoppel because the *Caratube I* tribunal's findings that there was no "investment" under the definition of the treaty was not identical to the issues in the second arbitration, including whether there was jurisdiction under the contract.[316]

213. The tribunal's analysis illustrates that the application of *res judicata* is strict. In that case, the underlying facts in both proceedings were identical and there was still no *res judicata*. Here, by contrast, the underlying measures alleged to breach the NAFTA are distinct and relate to different (subsequent) facts.

214. ***No identity of Object***. As there is no identity of cause of action, the Tribunal does not need to determine if this third branch of the test has been met. Even if it has (which is denied), there can still be no cause of action estoppel.

215. Regarding the requirement for identity of object, the relevant question is whether the relief sought and determined in both proceedings is identical.[317]

[314] **RL-195**, *Caratube*, ¶ 336.
[315] **RL-195**, *Caratube*, ¶¶ 491-495.
[316] **RL-195**, *Caratube*, ¶¶ 470-475, 491-495.
[317] **RL-195**, *Caratube*, ¶ 492.

216. Windstream does not deny that it *argued for* the same relief in *Windstream I* as the relief it seeks in this arbitration: Windstream sought and seeks compensation for the loss of the full value of its investment, in other words for the loss of the Project. However, while Windstream *sought* compensation for the loss of the full value of its investment, the *Windstream I* tribunal rejected this relief. The tribunal instead awarded Windstream compensation for the *damage* to its investment, and not the *full value* of its investment, because the FIT Contract was still in force:

a) In determining what damages flow from the breach of Article 1105, the tribunal recognized that the purpose of the compensation to be awarded was to make Windstream "whole," "keeping in mind the Tribunal's determination that [Windstream] ha[d] not lost the entire value of its investment as the FIT Contract [was] still formally in force (albeit under an extended force majeure) and, accordingly, as the CAD 6 million letter of credit [was] still available to [Windstream] and ha[d] not been lost or taken by the Government."[318]

b) As a result, the tribunal held that the compensation awarded must "reflect [Windstream's] loss (damage to the investment) rather than the full value of the investment. This latter would be relevant only if [Windstream] ha[d] lost the entirety of its investment as a result of an expropriation," which the tribunal found was not the case in *Windstream I*.[319]

c) The tribunal then sought to determine the quantum of Windstream's loss, *i.e.*, the *damage to the investment* rather than the *full value of the investment*. The tribunal determined the value of the Project as at the date of the Award, September 27, 2016, was EUR 21 million.[320] The tribunal further found that Windstream "[was] not entitled to compensation for the full value of its investment: [Windstream] ha[d] not lost the letter of credit, which [was] still in place, and the FIT Contract [was]

[318] **C-2040**, *Windstream I* Award, ¶ 473 [emphasis added].
[319] **C-2040**, *Windstream I* Award, ¶ 473 [emphasis added].
[320] **C-2040**, *Windstream I* Award, ¶¶ 474, 482, 484.

still in force and could, in theory, [could] still be revived and renegotiated if the Parties so agreed."[321]

d) The tribunal adjusted the valuation downward by CAD $6 million to reflect the value of the letter of credit, but declined to make any adjustments to reflect the fact that the FIT Contract was still in place because, factually, the parties had not renegotiated its terms. Therefore, as of the date of the Award, the FIT Contract did not have any value. However, the tribunal noted that "[it was] another matter that the Parties [could] create such value by reactivating and renegotiating the FIT Contract after the award, which option [was] still open to them."[322]

217. In its Memorial Objecting to Jurisdiction, Canada claims that Windstream "fails to acknowledge that it was compensated for the full value of its investment less the CAN$6 million security deposit."[323] In so arguing, Canada relies heavily on the tribunal's finding that the FIT Contract, as at the date of the Award, had no value.[324] There are several issues with this submission.

218. First, Canada ignores the *Windstream I* tribunal's findings that it was only awarding Windstream compensation for the damage to its investment rather than the full value of the investment. This is a theme throughout Canada's submissions, which selectively highlight and remove context from the tribunal's findings that it likes and ignore the findings which do not support its assertions.

219. Second, Canada's suggestion that Windstream's claim arises from a "misleading interpretation" of the *Windstream I* Award[325] is without merit because the Ontario Government apparently shared Windstream's understanding of the tribunal's findings. As set out at paragraph 64 above, shortly after the Award was released, MEI officials exchanged emails and set out that the *Windstream I* tribunal "did not consider the value of the contract, only the specific damages to Windstream's project that the company incurred as a result of the moratorium. They

[321] **C-2040**, *Windstream I* Award, ¶ 483 [emphasis added].
[322] **C-2040**, *Windstream I* Award, ¶ 483.
[323] Canada's Memorial on Jurisdiction, ¶ 27.
[324] Canada's Memorial on Jurisdiction, ¶¶ 33-34.
[325] Canada's Memorial on Jurisdiction, ¶ 12.

determined that the Claimant hasn't lost the entire value of its investment (i.e., its project) as there was no expropriation: the contract is still in force. The Tribunal noted that the purpose of damages is to make the Claimant "whole," keeping in mind that the contract is still in force."[326]

220. Other internal Ontario documents recognized that "[t]he outcome of Windstream's arbitration claim does not change the status of [WWIS'] contract with the IESO."[327] Indeed, one document recognized that if IESO were to terminate the FIT Contract, there was a possibility that Windstream could bring a lawsuit against the IESO.[328] These documents reflect the reality that the FIT Contract was alive and Windstream still had rights pursuant to it.

221. If the *Windstream I* tribunal had granted the full value of the Project, there would be no surviving rights in the FIT Contract. But that is not how Ontario conducted itself (consistent with the interpretation of the *Windstream I* Award circulated within the Ontario Government just after it was issued). Indeed, the IESO did not return the $6 million letter of credit until after the FIT Contract was terminated in February 2020.

222. Third, Canada's argument depends on the *Windstream I* tribunal's finding that, as at the date of the *Windstream I* award, the FIT Contract had no value. Canada claims that because of this finding, Windstream was awarded the full value for the Project.[329]

223. Essentially, Canada's argument is that there is no value in the Project beyond what was already awarded by the *Windstream I* tribunal. *First*, the *Windstream I* tribunal recognized that there was value beyond what was awarded that could be created if the FIT Contract was renegotiated. That unlocked value was taken when the FIT Contract was terminated. *Second*, in any event, that is a merits-based argument, not a jurisdictional one. Windstream has put forward extensive evidence to demonstrate the value that was lost by virtue of the termination of the FIT Contract, which is value well beyond what was awarded by the *Windstream I* tribunal. As

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326 **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016), Attachments: RE: Wind Contract value. [emphasis added].
327 **C-2643**, Independent Electricity System Operator Issues Note: Windstream NAFTA Claim (October 6, 2016) and **C-2667**, Email from Adam Hendy to Dan Moulton re: Media Call Summary: January 13, 2017 (January 13, 2017). See also **C-2641**, MNRF House Note Issue: Windstream Energy Offshore Wind Power NAFTA Claim (September 30, 2016), **C-2649**, Email from Katrina Xavier to Richard Blackwell re: Globe&Mail query (October 20, 2016).
328 See footnote above.
329 Canada's Memorial on Jurisdiction, ¶¶ 33-34.

explained in Windstream's Memorial, the value of the Project when it was terminated in 2020 is much higher than the value of the Project in 2016. Canada has not paid Windstream this amount.[330]

224. The *Windstream I* tribunal never determined the value of the Project in the context of the termination of the FIT Contract. Canada may argue that there is no delta between what was awarded in *Windstream I* and what the value is in 2020, but that is a matter of quantum, not a matter of jurisdiction. As it relates to *res judicata*, the answer is that the *Windstream I* tribunal never determined that question.

225. *Mobil v. Canada II* is a helpful example. In that NAFTA case, Canada argued that Mobil's claims were identical to those advanced in the *Mobil I* proceeding, with the same cause of action and a claim for the same relief. The only difference was that the claim in *Mobil I* for damages sustained between 2012-2015 was advanced as a claim for future losses whereas in *Mobil II*, the claim was for damages already incurred.[331] In *Mobil I*, the tribunal did not award damages for these future damages, finding that the matter was "not ripe for determination." Canada argued this finding precluded Mobil from seeking such damages in a new arbitration, because the tribunal considered this claim and found the evidence advanced in support of it insufficient.[332] Mobil argued that while it sought the same relief in both proceedings, the *Mobil I* tribunal did not decide the question of damages for the period 2012-2015 and so there was no *res judicata*.[333]

226. The *Mobil II* tribunal recognized that the *Mobil I* tribunal did assess the evidence of future damages before it and indeed commented on it, highlighting the uncertainty of the evidence.[334] However, the *Mobil II* tribunal agreed with the claimant that, after reading the decision closely, the *Mobil I* tribunal did not in fact arrive at a definitive settlement of the claim. As such, even though the claimant advanced the same claim for relief in both arbitrations, the matter was not *res judicata* because the tribunal did not definitely determine that issue.[335]

[330] Canada's Memorial on Jurisdiction, ¶¶ 33-34.
[331] Windstream's Memorial on the Merits, ¶ 467.
[332] **RL-110**, *Mobil II*, ¶¶ 176, 195.
[333] **RL-110**, *Mobil II*, ¶ 183.
[334] **RL-110**, *Mobil II*, ¶ 196.
[335] **RL-110**, *Mobil II*, ¶ 197.

227. The same is true here. The *Windstream I* tribunal did not determine what relief should be awarded as a result of the termination of the FIT Contract (not could it have, since it found that the FIT Contract had not been terminated). Canada's argument that there is no delta between the amount awarded by the tribunal in *Windstream I* and the damage Windstream has suffered to its investment is a matter that goes to quantum, not to jurisdiction. The evidence before the Tribunal is that the value of the Project lost as a result of the measures at issue in this case is between $291.4 million and $333 million.[336]

3. Collateral Estoppel Does Not Apply

228. As set out at paragraph 192 above, the parties agree on the test applicable to determine if collateral estoppel applies: "a finding [of a prior competent tribunal] concerning a right, question or fact, may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolve the claims before that court or tribunal."[337]

229. In its Memorial Objecting to Jurisdiction, Canada identifies four issues that it claims Windstream is barred from re-litigating.[338] None of these arguments have merit.

a) Windstream is not Barred from Challenging the Continued Imposition of the Moratorium

230. One of the measures challenged in this arbitration is the Ontario Government's failure, following the *Windstream I* Award, to complete in a timely manner the work it considered necessary to lift the Moratorium. Canada claims this measure cannot amount to a breach of the NAFTA without reopening the *Windstream I* tribunal's finding that the decision to impose the Moratorium was not wrongful.[339]

231. Canada mischaracterizes Windstream's position as to why this measure breaches the NAFTA. Windstream is not seeking to re-argue the issue of whether the decision to impose the Moratorium was wrongful. The *Windstream I* tribunal found it was not. Windstream is arguing

[336] CER-Secretariat, ¶ 2.40; CER-Secretariat-2, ¶ 2.7, 4.44.
[337] Canada's Memorial on Jurisdiction, ¶¶ 56-57, citing **RL-126**, *RSM*, ¶ 7.1.1.
[338] Canada's Memorial on Jurisdiction, ¶¶ 70-91.
[339] Canada's Memorial on Jurisdiction, ¶ 71.

that keeping the Moratorium in place after the *Windstream I* Award was issued and failing to do any of the research required to lift the Moratorium breaches the NAFTA, *in combination with the other impugned measures*, as it created the conditions that led to the termination of the FIT Contract. In summary:

a) Expropriation. Immediately following the *Windstream I* Award, the Ontario Government announced that the research required to lift the Moratorium was being 'finalized.'[340] Ontario then decided to stop conducting any of the scientific studies that were the stated pretense for applying the Moratorium. There is no credible basis for refusing to advance the research that was the pretense for the Moratorium more than a decade ago.[341] The Ontario Government continued to apply the Moratorium to WWIS knowing that this would create the conditions that would allow the IESO to terminate the FIT Contract, in direct contradiction of its promise to protect the Project from the effects of the Moratorium. The Ontario Government made the deliberate decision "not to intervene in this matter" and refused to direct the IESO not to terminate the FIT Contract or to amend the FIT contract to fulfil the promise the Project would be "frozen."[342] As a result, the IESO's termination right arose because of the actions of the Ontario Government. The Government sought to use the Moratorium delays as a pretext to terminate a Project it no longer wanted for political reasons.[343]

b) FET. Windstream's FET argument is based on the "composite effect [Ontario's actions] have on Windstream's investments."[344] In summary, the Ontario Government did nothing to prevent the termination of the FIT Contract or require the IESO to renegotiate the FIT Contract's terms in a manner consistent with the Ontario Government's promises. MEI refused to meet with Windstream and made

[340] See Windstream's Memorial on the Merits, ¶ 199; **C-2471**, Excerpt from the Ontario Legislative Assembly Official Report of Debates (Hansard), 41st Parl, 2nd Sess, No. 15 (17 October 2016), Exhibit 78 of the Affidavit of David Mars; **C-2045**, Legislative Assembly of Ontario – Official Report of Debate (Hansard) Standing Committee on Estimates (26 October 2016), p. E-159.
[341] Windstream's Memorial on the Merits, ¶¶ 295-302.
[342] Windstream's Memorial on the Merits, ¶ 335.
[343] Windstream's Memorial on the Merits, ¶¶ 458-459.
[344] Windstream's Memorial on the Merits, ¶ 484.

> the deliberate decision not to intervene in Windstream's negotiations with IESO. The Government "also failed to conduct the scientific studies which were the purported premise of the Moratorium, which remains in effect to this day."[345]

232. Contrary to Canada's suggestion, Windstream is not arguing that the continued application of the Moratorium to the Project is in and of itself a breach of the NAFTA. Rather, Windstream is arguing that the Ontario Government is liable under the NAFTA for the termination of the FIT Contract. The measures that make it liable not only include the failure to direct the IESO to renegotiate the FIT Contract and/or not to terminate the FIT Contract, but also the Ontario Government's creation of the conditions that allowed the IESO to terminate the FIT Contract in the first place. Those measures do not involve re-arguing the issue of whether the decision to impose the Moratorium in February 2011 violated the NAFTA.

233. Canada claims that the *Windstream I* tribunal did not just find that Ontario's decision to impose the Moratorium did not breach the NAFTA. Canada goes further and claims the tribunal also determined whether the continued imposition of the Moratorium breached the NAFTA.[346] Canada mischaracterizes the issues argued and determined by the *Windstream I* tribunal.

234. The tribunal first found that the "decision to impose a moratorium on offshore wind development, or the process that led to it, were [not] in themselves wrongful." However, the "[Ontario] 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."[347] The tribunal found that Article 1105 of the NAFTA was breached by the failure of the Ontario Government to take necessary measures "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."[348]

235. As a result, Windstream was compensated for that breach of Article 1105 and the period of contractual and legal limbo it found itself in from February 11, 2011 to September 27, 2016, the

[345] Windstream's Memorial on the Merits, ¶ 487.
[346] Canada's Memorial on Jurisdiction, ¶¶ 72-74.
[347] **C-2040**, *Windstream I* Award, ¶¶ 376, 378.
[348] **C-2040**, *Windstream I* Award, ¶ 380.

date of the Award. However, the *Windstream I* tribunal did not address whether the continued application of the Moratorium to the Project after September 27, 2016 was wrongful. The tribunal did not determine whether the continued application of the Moratorium is one of the composite measures that led to the wrongful termination of the FIT Contract. Nor could the tribunal have addressed that matter, as all of these facts arose after the *Windstream I* Award.

b) Windstream Not Barred from Challenging the Termination of the FIT Contract

236. The FIT Contract was not terminated until February 20, 2020, over three years after the *Windstream I* Award was released. Yet, Canada argues that Windstream is barred from challenging this new measure in this arbitration on the basis that the issue has somehow already been addressed by the *Windstream I* Award.[349] It was not (nor could it have been).

237. In *Windstream I*, Windstream argued that, as of May 2012, the FIT Contract was effectively cancelled because the Project could not meet the MCOD date of May 4, 2017. The tribunal agreed that "in the absence of any further amendment to the FIT Contract to address the suspension, as of [May 4, 2012] the Project effectively became non-financeable."[350] Canada claims the tribunal awarded damages on that basis and that therefore the issue of the cancellation of the FIT Contract cannot be relitigated.[351] There are two key problems with this argument.

238. ***Canada's Argument Conflates What Was Argued with What Was Decided by the Tribunal.*** In addressing this argument, the first question for the Tribunal is whether Windstream's argument that the termination of the FIT Contract violates the NAFTA is an issue that has already been decided. The answer is plainly no. On the contrary, in *Windstream I*, the tribunal held that there was no expropriation because "the FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario."[352] While the tribunal agreed with Windstream that the Project could no longer be completed by the MCOD, this still did not amount

[349] Canada's Memorial on Jurisdiction, ¶ 75.
[350] **C-2040**, *Windstream I* Award, ¶ 374.
[351] Canada's Memorial on Jurisdiction, ¶¶ 77, 81.
[352] **C-2040**, *Windstream I* Award, ¶ 290. [emphasis added].

to an expropriation because "it continue[d] to remain open to the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium."[353]

239. Canada's collateral estoppel position relies on Windstream's *arguments* before the *Windstream I* tribunal. Windstream acknowledges that it argued the FIT Contract was *de facto* cancelled. However, that is not what the tribunal *determined*. Rather, the tribunal accepted Canada's position in the arbitration that the FIT Contract was only "frozen," the Project could proceed, and the Moratorium was just a temporary measure.[354] The issue that was determined and is *res judicata* is the tribunal's finding that the FIT Contract has not been terminated and is in force, and it remained open for the parties to re-activate and renegotiate the FIT Contract to adjust its terms to the Moratorium.

240. Therefore, the issue of whether the termination of the FIT Contract breaches the NAFTA was not considered by the *Windstream I* tribunal and that issue is not *res judicata*.

241. ***Canada's Raises a Merits-Based Damages Argument.*** Canada's central argument on this issue is one of damages. Canada argues that Windstream was compensated for the full value of the Project; that compensation was awarded based on the *Windstream I* tribunal's finding that the FIT Contract could not be completed by the MCOD.[355] For the reasons set out at paragraphs 216 to 227 above, the *Windstream I* tribunal did not award Windstream compensation for the full value of the Project. The *Windstream I* tribunal did not find what damages flowed from the termination of the FIT Contract, as that measure was not before it.

242. Canada also claims that Windstream "resurrects" the promises Ontario made to Windstream that the Project would be "frozen" from the impacts of the Moratorium and that Windstream is barred from relying on these representations. It does not cite any cases that support any such finding, Canada simply asserts that these representations cannot be divorced from the compensation "it has already received to make it whole again."[356]

[353] **C-2040**, *Windstream I* Award, ¶ 290.
[354] See ¶ 63 above.
[355] **C-2040**, *Windstream I* Award, ¶ 290.
[356] Canada's Memorial on Jurisdiction, ¶¶ 77-79.

243. There is no factual dispute between the parties that Ontario made this promise to Windstream. In addition to this promise, as set out at paragraph 61 above, throughout the *Windstream I* arbitration, Canada made the same representations that the Project was "frozen" and on hold while the temporary Moratorium was in place. If the *Windstream I* tribunal had found that these promises were not made, then that would be a factual determination that could not be re-litigated. However, the tribunal did not make any such findings; to the contrary, the tribunal found that these promises had in fact been made and relied upon them in finding Canada liable for a breach of Article 1105, as Canada recognizes. That does not make the subsequent actions by Canada or Ontario that breach these promises *res judicata*. The question now is how these background facts contribute to the allegations that the new measures, which post-date the *Windstream I* Award, breach the NAFTA.

244. Following the *Windstream I* Award, Windstream formed the expectation that the Project could go ahead and that the original promise made in 2011 could be fulfilled. Windstream's expectation was not based on the 2011 promises alone, but on new facts, including:

a) the *Windstream I* tribunal's finding that the FIT Contract was in force and able to be renegotiated;

b) the *Windstream I* tribunal's finding that Ontario's conduct in failing to fulfil the promise, and failing to direct the IESO, amounted to a breach of the NAFTA;

c) Canada's representations in *Windstream I* that the Project was "frozen" and could proceed once the temporary Moratorium was lifted;

d) public statements by the Ontario Government following the *Windstream I* Award that offshore wind research would soon be "finalized" and a statement that the Government could let the Project be built; and

e) following the *Windstream I* Award, the IESO did not return the $6 million security credit.[357]

[357] See ¶¶ 58 to 60 above.

245. Windstream did not expect the Ontario Government to continue the very conduct that was already found to breach the NAFTA. Rather, it expected that if Ontario did not want to continue to breach the NAFTA, it would work with Windstream to implement the promises made.[358] Whether or not this new conduct, and the termination of the FIT Contract, violates the NAFTA was not and could not have been determined by the *Windstream I* tribunal.

c) Windstream Not Barred from Arguing it Has Been Substantially Deprived of Its Investment

246. Windstream argues that due to the termination of the FIT Contract, it has been substantially deprived of the value of its investments.[359] Canada claims Windstream is barred from making this argument because of the *Windstream I* tribunal's finding that $6 million security deposit constituted a substantial portion of the value of the FIT Contract. Canada claims because of that finding, as that amount was returned to Windstream, there can be no finding that it was substantially deprived of its investment.[360]

247. The *Windstream I* tribunal was tasked with determining the value of the Project with a valuation date in 2016, as at the date of the Award. Based on that value, it concluded that the $6 million security deposit is a substantial portion of the value of the investment. However, the tribunal did not determine what value was lost as a result of the 2020 termination of the FIT Contract. There has been no determination of whether it has been substantially deprived from the loss of that value, taking into account that Windstream received its $6 million security deposit.

d) Windstream Not Barred from Seeking Compensation for the Damages Flowing from the Termination of the FIT Contract

248. According to Canada, Windstream is barred from arguing that following the *Windstream I* Award, the Project had value and this value was taken following the termination of the FIT Contract.[361] Canada provides three reasons this issue is *res judicata*. None of them have merit.

[358] See CWS-N. Baines, ¶ 16.
[359] Windstream's Memorial on the Merits, ¶¶ 456-457.
[360] Canada's Memorial on Jurisdiction, ¶¶ 82-85.
[361] Canada's Memorial on Jurisdiction, ¶ 86.

249. First, Canada argues that the *Windstream I* tribunal found that, at the time of the *Windstream I* Award, the Project was valued at $31 million and Windstream was awarded damages "to make it whole again." Canada claims Windstream is barred from asserting the Project "had additional value at the time of the *Windstream I* Award, or anytime afterwards, unless such value was created subsequent to the Award."[362]

250. Windstream is not seeking to re-argue the question of what the value of the Project was at the time of the *Windstream I* Award. However, as set out extensively above, Windstream was not awarded compensation for the full value of the investment, but for damages to its investment. The new question is determining the value of the Project as of the 2020 valuation date, less the amount already awarded reflecting the harm to the Project the *Windstream I* tribunal found had occurred.

251. Second, Canada argues that the *Windstream I* tribunal determined that the FIT Contract had no value at the time of the Award and Windstream cannot re-argue that determination. Canada claims that since the FIT Contract was not renegotiated, no further value was created.[363]

252. The *Windstream I* tribunal recognized that had the FIT Contract been renegotiated, there was additional value in the FIT Contract that could be created. That value was not available to Windstream at the time of the *Windstream I* Award without renegotiating the contract, and so the tribunal did not consider that value in compensating Windstream for the damages to its investment. However, now that the FIT Contract has been terminated, that additional value had the FIT Contract been renegotiated is gone. It is gone because of the Ontario Government's failure to do anything in response to Windstream's efforts to engage with it, including directing the IESO not to terminate the FIT Contract and to renegotiate the FIT Contract. Canada relies on the fact that the FIT Contract was never renegotiated to argue that there was no value created, but in so arguing, it is seeking to rely on the very wrongdoing that is alleged to breach the NAFTA.[364]

253. Third, Canada argues that the *Windstream I* tribunal held that the DCF method of valuation was inappropriate and, at the time of the FIT Contract's termination, the Project had not been

[362] Canada's Memorial on Jurisdiction, ¶ 87.
[363] Canada's Memorial on Jurisdiction, ¶¶ 88-89.
[364] A party cannot rely on its own breaches to escape liability: see **CL-052**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3) Award, 16 June 2008 ¶ 13-92.

further developed.[365] The *Windstream I* tribunal did not determine what the value of the Project was at the time it was terminated in February 2020. Thus, its prior finding that the DCF method of valuation was not appropriate in determining the damage to the Project as of 2016, that flowed from the measures at issue in that case, is not *res judicata*. While it may be considered by the tribunal (amongst other decisions on the issue that Windstream submits favour a DCF approach), it is an *obiter* finding on the issue before this Tribunal. There is no *res judicata* with respect to *obiter* findings.[366]

B. Abuse of Process is Inapplicable in this Case

254. Canada asserts that the doctrine of abuse of process is also applicable. However, in its Memorial on Jurisdiction, Canada simply sets out what the principle of abuse of process is, and does not explain why the principle is applicable in this case.[367] It is not.

255. Canada and Windstream agree that abuse of process is a recognized principle of public international law and that it is a tool used to weed out abusive claims.[368] However, abuse of process is not intended to be a tool for parties that are unable to meet the test for establishing *res judicata*.[369] As described below, it has no application to the present circumstances.

256. As described by the ILA Interim Report on *Res Judicata*, international law recognizes a doctrine of abuse of process, but it is extremely rarely applied.[370] The burden to establish an abuse of process is high, given "the seriousness of a charge of bad faith amounting to abuse of process."[371] The tribunal in *Chevron v. Ecuador (I)* recognized that it is an "extraordinary remedy" and it is only in "very exceptional circumstances" that a claim is barred.[372]

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[365] Canada's Memorial on Jurisdiction, ¶ 91.
[366] **RL-126**, *RSM* ¶ 7.1.1. See also **CL-192,** *Victor Pey Casado*, ¶ 219.
[367] Canada's Memorial on Jurisdiction, ¶¶ 61-66.
[368] **RL-195**, *Caratube*, ¶ 372.
[369] As explained in this section, it has been used where *res judicata* does not apply due to procedural manipulation by the claimant. For example, in **RL-130**, *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) Award, 31 May 2017 ("*Orascom*"), where there was no prior binding decision but the claimant was trying to re-litigate issues it had previously settled.
[370] **RL-117**, Interim Report: "Res Judicata" and Arbitration, International Law Association, Berlin Conference (2004), p. 22. See also **RL-195**, *Caratube*, ¶ 377.
[371] **CL-183**, *Chevron I*, ¶ 143.
[372] **CL-183**, *Chevron I*, ¶¶ 143, 146. See also **CL-193**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award (January 9, 2015), ¶ 186.

257. Abuse of process often arises in the context of corporate restructuring, where an investor manipulates its corporate structure to gain jurisdiction under an investment treaty after a dispute has become foreseeable. Abuse of process has also been invoked where a claimant concurrently commences multiple proceedings in different forums to resolve the same dispute in order to maximize its chances of success. For example:

a) In *Orascom v. Algeria*, Algeria was notified of three disputes under different treaties by different but related claimants. Two concurrent arbitrations were commenced, one of which settled. All three disputes "concern[ed] the same measures or events" taken by Algeria and the dispute was "effectively one and the same."[373] The pursuit of the second arbitration after the first one settled was an abuse of process. *Res judicata* could not apply because there was no reasoned final award, the claimants were different, and the treaties were different (so the legal causes of action were not identical). But the claimant was seeking duplicative relief in relation to the same investment, the same measures, and the same harm. This was an abuse of the system of investment protection.[374]

b) In *Ampal v. Egypt*, shareholders at different levels of a chain of companies initiated two duplicative investment treaty arbitrations against Egypt under separate investment treaties. They did so to multiply their chances of obtaining recovery. The tribunal did not find the claimant acted in bad faith in doing so, but held that the claimant had to cure the abuse by choosing one forum.[375]

258. These examples are a far cry from what is alleged here, where Canada attempts to use abuse of process as back-up to its *res judicata* argument. Canada has not cited a single case that supports the way it is using it here.[376]

[373] **RL-130**, *Orascom*, ¶¶ 485, 486, 488.
[374] **RL-130**, *Orascom*, ¶¶ 543, 545.
[375] **RL-131**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11) Decision on Jurisdiction, 1 February 2016. ¶¶ 331-339.
[376] Canada's Memorial on Jurisdiction, ¶¶ 65-66.

259. In *Caratube II*, the tribunal rejected the argument that there was an abuse of process and held that it was to take a "cautious approach" to such arguments.[377] The tribunal recognized that the claimants could have raised their claims in *Caratube I* but was not persuaded they deliberately omitted to do so "in a bad faith attempt to preserve such claims for further arbitration proceedings" should the *Caratube I* arbitration not go in their favour and to misuse the arbitration "to get a second bite at the cherry."[378] The tribunal thus confirmed how high the bar is for abuse of process. It is not an alternative to the requirements for *res judicata*.

260. Canada has not proven that the abuse of process doctrine applies to this proceeding, nor could it. The matters at issue in this arbitration were never determined by the *Windstream I* tribunal. In such circumstances, where the issues before this Tribunal have not previously been determined or settled between the parties, abuse of process is inapplicable.

II. WINDSTREAM HAS ESTABLISHED A *PRIMA FACIE* DAMAGES CLAIM

261. In its Request for Bifurcation, Canada asserted that Windstream failed to establish a *prima facie* damages claim. Canada was subsequently denied bifurcation. However, in its Counter-Memorial on the Merits, Canada maintains this argument.[379] Canada's argument is premised on the same mischaracterizations raised as part of its *res judicata* objection. For the reasons already set out extensively above, this argument must fail.

262. It is atypical for this argument to come up at the merits stage given the low threshold for establishing a *prima facie* case. The question is whether the alleged facts, taken as true, are *capable* of breaching the NAFTA and *may* have caused a loss. That standard is undoubtedly met in this case. Windstream pleads that the measures – all of which arose after the *Windstream I* Award – caused it loss beyond what it was compensated for by *Windstream I*. That is all it needs to do to establish a *prima facie* case. In any event, the proceeding is now at the merits phase and Windstream has put forward expert evidence proving that it has suffered damages because of the challenged measures. This is a complete answer to Canada's argument.

[377] **RL-195**, *Caratube*, ¶ 379.
[378] **RL-195**, *Caratube*, ¶¶ 381, 383.
[379] Canada's Counter-Memorial on the Merits ¶ 120.

A. Windstream has Surpassed the Low Threshold to Establish a *Prima Facie* Damages Claim

263. Article 1116(1) of the NAFTA provides that an investor of a Party may bring a claim on its own behalf on the grounds that "the investor has incurred loss or damage." Article 1117(1) provides that an investor of a Party may bring a claim on behalf of an enterprise that the investor owns or controls on the grounds that "the enterprise has incurred loss or damage." There is no dispute that compliance with Articles 1116(1) and 1117(1) constitute a jurisdictional requirement in respect of which Windstream bears the burden of proof.[380]

264. Canada alleges that Articles 1116(1) and 1117(1) have not been complied with because Windstream has not established a *prima facie* case that it or WWIS have incurred loss or damages by reason of, or arising out of, the alleged breach of the NAFTA. It is not disputed that the other requirements of Article 1116(1) and 1117(1) have been met in this case.

265. It is a *low* threshold to establish on a *prima facie* basis that the claimant or its enterprise has suffered loss or damage by reason of, or arising out of, the alleged breach of the NAFTA. The question is whether the facts, as alleged, *may* constitute a loss. Numerous cases have recognized this threshold as a low bar.[381] For example, in *Tennant v. Canada*, the tribunal held that "[t]he Claimant need not prove the extent of such loss or damage suffered, given that these facts necessarily relate to the Claimant's case on the merits."[382]

266. In *UPS v. Canada*, Canada argued that UPS had not met the jurisdictional requisite of showing it had suffered damages from the alleged breaches of the NAFTA. In rejecting that argument, the tribunal held that "Canada mistakes as well the nature of the demonstration that the

[380] **CL-197**, *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Final Award (October 25, 2022), ¶ 349 ("*Tennant Energy*").
[381] **CL-197**, *Tennant Energy*, ¶ 357; **CL-088**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on the Merits, 24 May 2007 ("*UPS v. Canada*"), ¶¶ 37-38; **CL-178**, *Infinito Gold Ltd. v. Republic of Costa Rica* (ICSID Case No. ARB/14/5), Decision on Jurisdiction, 4 December 2017, ¶ 255 ("*Infinito*"). **RL-030**, *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3), Decision on Jurisdiction, 22 April 2005, ¶¶ 237, 254; **CL-184**, *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador* (UNCITRAL, PCA Case No. 2009-23), Third Interim Award on Jurisdiction and Admissibility (February 27, 2012), ¶ 4.11; **CL-195**, *Siemens A.G. v. The Argentine Republic*, (ICSID Case No. ARB/02/8), Decision on Jurisdiction (August 3, 2004), ¶ 180; **RL-008**, *Bayindir Insaat Turizm Tacaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, ¶ 197.
[382] **CL-197**, *Tennant Energy*, ¶ 357. [emphasis added].

claimant must make under Article 1116." The tribunal did not engage with the debate between the parties' experts and simply noted that UPS and its experts had adduced enough evidence to state a *prima facie* case of damage. The tribunal recognized that the standard is different what assessing, on the merits, what damage has been sustained and what remedy is appropriate. "Evaluation of the damage actually incurred is not, however, apposite to disposition of Canada's objection here."[383]

267. In *Infinito v. Costa Rica,* the tribunal held that what matters for the purposes of a *prima facie* test on damages is that the facts as alleged may constitute a loss. What act may constitute a breach (if any) and whether that act can have caused the damages claimed are different questions which exceed the limited scope of the *prima facie* test and must be dealt with at the merits stage.[384]

268. Canada cites *Westmoreland v. Canada* as a recent example where the tribunal held the claimant had not made out a *prima facie* damages claim.[385] This is entirely different from the present case. In that case, which was bifurcated, it was not disputed that the claimant was not in existence at the time of the challenged measures. As a result, the losses were incurred by a different entity. The tribunal held that the claimant must be the entity that owned or controlled the investment at the time of the alleged breach, and that the claimant was not the legal successor of that entity.[386] None of the challenged measures arose after the claimant came into existence. There were thus no alleged facts that could give rise to a claim and losses with respect to the claimant.

269. In contrast, the challenged measures in this case all arose after *Windstream I*. Windstream has pleaded facts and measures that post-date *Windstream I* and has pleaded that it has suffered damages that are distinct from what the *Windstream I* tribunal awarded. That is all that is required to establish a *prima face* case.

270. In any event, as Canada failed on its bifurcation request, the Tribunal now has a merits-based record before it. Windstream has put forward expert evidence from Secretariat that establishes that it has suffered damage and that the damage suffered was caused by Canada's

[383] **CL-088**, *UPS v. Canada*, ¶¶ 37-38 [emphasis added].
[384] **CL-178**, *Infinito,* Decision on Jurisdiction, ¶ 255.
[385] Canada's Memorial on Jurisdiction, ¶ 97.
[386] **RL-139**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022, ¶¶ 194, 212, 230-237.

breaches of the NAFTA. Putting that merits-based issue to one side, the expert evidence certainly demonstrates a *prima facie* case of damage to Windstream from Canada's actions at issue in this proceeding. That showing is all that is required to proceed to a consideration of the merits.[387]

B. Canada's Argument is Premised on the *Res Judicata* Objection

271. Canada raises three arguments as to why Windstream has not met the low bar of establishing a *prima facie* damages claim. Each of these arguments is premised on the same mischaracterization of Windstream's claim and the *Windstream I* Award as it asserts on the *res judicata* objection. For the reasons already set out above, those arguments must fail.

272. First, Canada argues that Windstream is barred from asserting that its investments have any value.[388] This argument has already been addressed above at paragraphs 249 to 250. For those reasons, Windstream is not estopped from arguing the Project had value that was taken by the termination of the FIT Contract; that was not determined by the *Windstream I* tribunal. The subsequent question of *what* value was taken from Windstream is a merits-based determination. Windstream's facts, taken as true, allege that value beyond what the *Windstream I* tribunal ordered was taken. This clearly surpasses the low bar of establishing *prima facie* damages.

273. Second, Canada argues that Windstream's position that its investments had value would require opening up an issue already determined by the *Windstream I* tribunal, including that (a) Windstream was "made whole" by the *Windstream I* award, (b) the FIT Contract had no value at the time of the Award, (c) the FIT Contract and Project would only obtain value if the parties jointly opted to renegotiate and reactivate the FIT Contract, (d) the Project was no longer financeable, and (e) the DCF method of evaluation is unavailable. In light of these findings and the fact that the FIT Contract was not renegotiated, Canada claims that the termination could not have resulted in any additional loss to Windstream.[389]

274. Each of these arguments repeat Canada's *res judicata* objection. In summary, as set out at paragraphs 216 to 227 above, the *Windstream I* tribunal did not award damages for the full value

[387] **CL-088**, *UPS v. Canada*, ¶ 37.
[388] Memorial Objecting to Jurisdiction and Admissibility, ¶¶ 98-103.
[389] Memorial Objecting to Jurisdiction and Admissibility, ¶¶ 104-108.

of the investment. As set out at paragraph 252 above, the *Windstream I* tribunal recognized that there could be further value created in the FIT Contract. Canada deprived Windstream of that additional value by its continued wrongful conduct and the termination of the FIT Contract. Paragraphs 236 to 240 above address Canada's arguments regarding the financeability of the Project and paragraph 253 addresses the availability of the DCF method of valuation.

275. Contrary to Canada's assertions, the *Windstream I* tribunal did not find that additional value could only be obtained if the FIT Contract was renegotiated and reactivated, nor did it find that the parties had to "jointly opt" to do so.[390] In declining to find an expropriation and to award Windstream the full value of its investment, the tribunal recognized that the parties could create value "by reactivating and renegotiating the FIT Contract after the award, which option is still open to them."[391] Canada asserts that it had the option to renegotiate the FIT Contract but no obligation to do so. Windstream's position is that, to comply with Canada's ongoing obligations under the NAFTA, Ontario was obligated to renegotiate the FIT Contract to implement the promises made to Windstream, consistent with the promises it made to Windstream when it implemented the Moratorium, the representations made in the *Windstream I* arbitration, and the findings of the *Windstream I* tribunal. That is an issue for this Tribunal to determine and is set out in more detail below in the Liability section.

276. Furthermore, the *Windstream I* tribunal recognized that, through renegotiating the FIT Contract, there was additional value that could be created. It did not award Windstream that value because, in 2016, that value had yet to be unlocked. However, when the FIT Contract was terminated in 2020, that value was taken from Windstream. Canada's reliance on the fact that the FIT Contract was not renegotiated to argue there was no additional value created relies on the very wrongdoing that is alleged to breach the NAFTA.[392]

277. Third, Canada argues that Windstream's damages originate from the measures that occurred prior to May 4, 2012, when its Project was prevented from proceeding, not the measures

[390] Canada's Memorial on Jurisdiction, ¶¶ 104-108.
[391] **C-2040**, *Windstream I* Award, ¶¶ 290, 483.
[392] A party cannot rely on its own breaches to escape liability: see **CL-052**, *Gemplus*, ¶¶ 13-92.

identified in this claim.[393] Again, this argument depends on the same arguments raised above and in its *res judicata* objection. In summary:

a) Canada's argument that none of the six impugned measures are freestanding causes of action that are separate from those asserted in *Windstream I* must fail.[394] This repeats the same *res judicata* argument that Windstream is barred from challenging the termination of the FIT Contract. That is addressed at paragraphs 236 to 245 above. The termination of the FIT Contract was not before the *Windstream I* tribunal. The question of what loss flows from that breach is a merits-based determination.

b) Canada's argument that Windstream claims the same losses as *Windstream I* must similarly fail.[395] As set out at paragraphs 216 to 227 above, the *Windstream I* tribunal did not award Windstream the losses for the full value of its investment.

278. Essentially, the heart of this jurisdictional objection is the same as the one raised by the *res judicata* objection. Did the *Windstream I* Award make Windstream whole for the loss of the Project, as Canada claims, or did the Award only provide Windstream damages for the harm to its investment as of the date of the *Windstream I* Award, as Windstream claims? If it did not make Windstream whole, then it necessarily follows that Windstream has *prima facie* damages flowing from the termination of the FIT Contract. It is that loss of the value of the Project that was taken and was not awarded by the *Windstream* I tribunal that are sought in this proceeding.

III. WINDSTREAM FILED ITS CLAIM IN ACCORDANCE WITH THE NAFTA'S LIMITATION PERIOD

279. Article 1116(2) and Article 1117(2) of the NAFTA provide 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

[393] Canada's Memorial on Jurisdiction, ¶ 109.
[394] Canada's Memorial on Jurisdiction, ¶ 116.
[395] Canada's Memorial on Jurisdiction ¶ 126.

incurred loss or damage. Canada alleges that Windstream's claim in this arbitration is barred because it was not brought within this three-year period. Canada is wrong.

280. There are three questions that must be answered in order to determine whether a claim has been made in accordance with the NAFTA's limitation period: (a) what is the cut-off date for the three-year limitation period; (b) did Windstream first know, or should it have known, about the breaches before the cut-off date; and (c) did Windstream first know, or should it have known, that it incurred loss or damage before the cut-off date?[396]

281. With respect to the first question, the parties agree that the critical date is December 22, 2017, three years before Windstream filed its Notice of Arbitration on December 22, 2020.[397]

282. In assessing the second and third questions, the Tribunal must consider Windstream's claim as pleaded, and not Canada's recharacterization of its claim.[398] Windstream first became aware that the FIT Contract was being terminated by the IESO on February 20, 2018, although that decision did not take effect until February 18, 2020. Both of those dates are well within the limitation period. Windstream only became aware of its damages – the loss of the remaining value of the Project – following the termination of the FIT Contract.

283. There is no credible argument that this claim is beyond the limitation period. Notably, Canada makes no mention of its limitation period argument in its Response to the Notice of Arbitration or its Memorial Objecting to Jurisdiction and Admissibility. This late-breaking argument should be disregarded entirely. Like the other two jurisdictional objections, it is based on mischaracterizations of Windstream's arguments.

[396] **CL-178**, *Infinito*, Decision on Jurisdiction, ¶ 330.
[397] Canada's Counter-Memorial on the Merits, ¶ 122. Windstream filed its Notice of Arbitration on November 2, 2020. Canada raised issues with respect to that NOA and a supplementary one was filed on December 22, 2020. Windstream does not agree that its original NOA was not valid. However, nothing turns on the difference between November 2, 2020 and December 22, 2020, and a resulting cut off date of either November 2, 2017 or December 22, 2017.
[398] **CL-178**, *Infinito*, Decision on Jurisdiction ¶ 332.

A. Windstream First Knew that Canada Breached the NAFTA, and that Windstream Suffered Damages, No Earlier than February 2018

284. The question for the Tribunal is when did Windstream first know, or should have known, about the alleged breach of the NAFTA?[399] To establish when Windstream first acquired actual or constructive knowledge of an alleged breach, the Tribunal must start by identifying when the alleged breach occurred. The next question is when Windstream first acquired knowledge that it has suffered loss or damage that flow from that alleged breach.[400]

285. ***Expropriation***. Windstream's investments were expropriated when the FIT Contract was terminated. As explained in Windstream's Memorial, and summarized at paragraph 231(a) above, the IESO's termination right arose because of the actions of Ontario and it was only with the termination of the FIT Contract that Windstream was deprived of the value of its investments.[401] It is at that point of time that the expropriation occurred. Windstream was first informed of the Termination Decision on February 20, 2018.[402] The Termination Decision did not take effect until February 18, 2020, when the Ontario Application was discontinued.[403] The earliest date Windstream could have been aware of the breach was therefore February 20, 2018, which is after the cut-off date of December 22, 2017.

286. The next question is when Windstream first became aware of its losses. The answer is on February 18, 2020, when the Termination Decision took effect. It is at that point of time that there was 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. Windstream thus lost the full value of its investment in WWIS, the Project and the FIT Contract and was not compensated for that loss. As of February 20, 2018, Windstream was aware of the *potential* loss, but the losses had not crystallized. The investment jurisprudence is clear that the limitation period does not run simply

[399] **CL-178**, *Infinito*, Decision on Jurisdiction, ¶ 330.
[400] **RL-140**, *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award (3 June 2021), ¶¶ 221, 223; **RL-110**, *Mobil II*, ¶ 148.
[401] Windstream's Memorial on the Merits, ¶¶ 458-462.
[402] **C-2477**, Letter from Michael Lyle (IESO) to Nancy Baines (February 20, 2018), Exhibit M to the Affidavit of Michael Lyle.
[403] **C-2289**, Letter from Michael Lyle (IESO) to Nancy Baines (February 18, 2020).

because a loss and breach is foreseeable.[404] The alleged breach and losses only crystallized when the termination took effect on February 18, 2020. (As set out in more detail below, the same is true of Canada's arguments that Windstream "should have anticipated" that Ontario would in time permit the cancellation the FIT Contract, and that the IESO would in turn cancel it – in addition to being false, these suppositions are not enough to trigger the limitation period). Practically, it does not matter whether the applicable date is February 20, 2018 or February 18, 2020, as both are within the limitation period.

287. ***FET***. Windstream's FET claim is based on the composite effect of the challenged Measures.[405] Like expropriation, the FET claim crystallizes with the termination of the FIT Contract and the alleged breach arises from that event, as summarized at paragraph 231(b) above. Windstream's claim is based on the failure of the Ontario Government to take any steps to prevent the termination of the FIT Contract and/or to require the IESO to renegotiate the FIT Contract in a manner consistent with the promises made. Instead, MEI refused to meet with Windstream and made the deliberate decision to not intervene in this matter. The Ontario Government created the conditions that led to the termination of the FIT Contract, including by failing to intervene with the IESO and failing to conduct any studies to lift the Moratorium. This conduct is unfair, inequitable, arbitrary, discriminatory and in breach of representations reasonably relied on by Windstream.[406]

288. As a result, like the expropriation argument, the alleged breach of the FET requirement took place upon the termination of the FIT Contract. It is only at that point in time that Windstream's losses arose. As stated clearly in Windstream's Memorial, "The termination of the FIT Contract – and Windstream's loss of its investment – is the direct result of that deliberate and unfair inaction. As a result, Canada, through the actions of the Ontario Government which are

[404] **RL-184**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017, ¶¶ 167 and 170 ("An investor cannot be obliged or deemed to know of a breach before it occurs." In that case, the limitation period did not begin to run until the Supreme Court of Canada, the country's highest appellate court, denied Eli Lilly leave to appeal. The *potential* losses were known with the lower court decision but did not crystallize until the decision took *effect*).
[405] Windstream's Memorial on the Merits, ¶ 484.
[406] Windstream's Memorial on the Merits, ¶¶ 485-492.

attributable to it, failed to accord Windstream's investments [FET], contrary to Article 1105(1) of the NAFTA."[407]

B. There is No Basis to Accept Canada's Recharacterization of Windstream's Claim

289. The parties do not dispute the applicable test for determining whether a claim is within the treaty's limitation period. Rather, the issue between the parties is a factual one as to when Windstream first became aware of the alleged breaches and claimed losses. Canada's argument is premised upon mischaracterizations of what those breaches and losses are.

290. ***Canada Ignores What is Alleged to Breach the NAFTA***. Canada alleges that the challenged measures are not "new" measures but are the continued application of the measures first known to Windstream at the time of the *Windstream I* arbitration.[408] In particular, Canada asserts that Windstream "first acquired" knowledge of the Moratorium as an alleged measure in February 2011 and that the failure to complete the work necessary to lift the Moratorium was the measure found to breach the NAFTA by the *Windstream I* tribunal.[409] Canada also asserts that the failure of the Ontario Government to direct the IESO to amend the FIT Contract was an issue before the *Windstream I* tribunal and so Windstream had knowledge of it before the cut-off date.[410]

291. Canada's assertions about what Windstream "knew" is divorced from the analysis of what is <u>*alleged* to have breached the NAFTA</u>. As explained by the tribunal in *Infinito v. Costa Rica* dealing with an identical limitation period provision, the treaty refers to "knowledge of the <u>alleged *breach*, and not to knowledge of the *facts* that make up the alleged breach</u>. In other words, the limitations period only starts to run once the breach (as a legal notion) has occurred."[411]

292. Windstream has not alleged that the continued application of the Moratorium to the Project is itself a breach of the NAFTA. Windstream has not alleged that the failure to do the work necessary to lift the Moratorium is itself a breach of the NAFTA. Those measures are part of the conduct that makes Ontario liable *for the termination of the FIT Contract* – Ontario created the

[407] Windstream's Memorial on the Merits, ¶¶ 491-492. [<u>emphasis</u> added].
[408] Canada's Counter-Memorial on the Merits, ¶ 137.
[409] Canada's Counter-Memorial on the Merits, ¶¶ 138-139.
[410] Canada's Counter-Memorial on the Merits, ¶ 140.
[411] **RL-140**, *Infinito*, Award ¶ 220. (<u>underlining</u> added) (*italics* in original).

circumstances that allowed the IESO to terminate the FIT Contract and that is what is alleged to be a breach of the NAFTA.

293. It is not open to Canada to recharacterize Windstream's claim. As put by the tribunal in *ECE Projektmanagement v. The Czech Republic*:

> [I]t is for the investor to allege and formulate its claims of breach of the relevant treaty standards as it sees fit. It is not the place of the respondent State to recast those claims in a different manner of its own choosing and the Claimants' claims accordingly fall to be assessed on the basis of which they are pleaded.[412]

294. The Tribunal must determine the point in time in which an act is capable of constituting an international wrong.[413] In this case, there is no treaty breach alleged divorced from the termination of the FIT Contract. It was only once the FIT Contract was terminated that these individual measures, taken together, became internationally wrongful.

295. The *Mobil v. Canada II* decision is a helpful example. In that case, Canada raised an almost identical limitation argument, which was rejected by the tribunal. In *Mobil I*, the tribunal found that Canada had breached Article 1106 of the NAFTA by implementing certain guidelines in 2004 and enforcing them against Mobil. Mobil commenced another proceeding seeking damages as a result of Canada's *continued enforcement* of the 2004 guidelines.[414] Canada argued that the relevant breach was the promulgation of the 2004 guidelines, which was out of time and Mobil could not avoid that time limit by portraying the breach as a "continuing" one.[415]

296. In rejecting that argument, the *Mobil II* tribunal held that Canada "misunderst[ood] the nature of the breach on which Mobil's claim is based."[416] Once the *Mobil I* tribunal had decided that the imposition and enforcement of the 2004 guidelines breached the NAFTA, "Canada was

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[412] **CL-185**, *ECE Projektmanagement International GMBH and Kommanditgesellschaft Panta Achtundsechzigste Grundstöcksgesellschaft MBH & Co v. The Czech Republic* (UNCITRAL, PCA Case No. 2010-5) Award (September 19, 2013), ¶ 4.743. See also **CL-178**, *Infinito*, Decision on Jurisdiction, ¶ 185; **RL-184**, *Eli Lilly and Company v. Canada* (UNCITRAL) Final Award, 16 March 2017, ¶¶ 162-165; **CL-198**, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, (ICSID Case No. ARB/07/26), Decision on Jurisdiction (December 19, 2012), ¶¶ 235-237.
[413] **RL-140**, *Infinito*, Award, ¶ 231.
[414] **RL-110**, *Mobil II*, ¶¶ 6, 162.
[415] **RL-110**, *Mobil II*, ¶¶ 100-101.
[416] **RL-110**, *Mobil II*, ¶ 150.

obliged to cease enforcing them against Mobil." When the guidelines continued to be applied to Mobil, there was a fresh breach.[417] In other words, even though the underlying facts in both arbitrations overlapped, the limitations period ran from knowledge of the *alleged breach*, not from knowledge of the underlying facts.

297. Similarly here, the limitation period does not run from the promulgation of the Moratorium or any of the earlier measures. Like in *Mobil II*, those measures are not what is alleged to breach the NAFTA. Rather, there is a new breach that arose when the FIT Contract was terminated. Canada's suggestion that the limitation period runs from the time Canada continued to apply the Moratorium misses the point – though the continued application of the Moratorium in part created the conditions that gave rise to the breach (i.e., the termination of the FIT Contract), it is not itself the breach from which the limitation period runs.

298. ***Canada Ignores the Alleged Losses***. Canada claims that Windstream first knew of the alleged loss or damage prior to the cut-off date, relying exclusively on Windstream's argument in *Windstream I* that it was deprived of the value of its investments as of May 4, 2012.[418] This continues to repeat the same mischaracterization of Windstream's losses that Canada made in its other jurisdictional objections, detailed above. As set out at paragraphs 216 to 220 above, the tribunal did not award Windstream the damages it sought in *Windstream I* because the FIT Contract was not terminated and could be renegotiated. As a result, following the *Windstream I* Award, Windstream sought to move the Project forward.[419] It was only upon learning that the IESO intended to exercise its termination right – on February 20, 2018 – that Windstream first knew the FIT Contract would be taken. As a result of WWIS' ongoing Ontario Application, the Termination Decision did not take effect until the Ontario Application was discontinued in January 2020. As a result, the Termination Decision became effective on February 18, 2020.

299. Throughout its Counter-Memorial, Canada asserts Windstream always knew that the FIT Contract would be terminated and alleges that this is why WWIS brought the Ontario Application.[420] WWIS brought the Ontario Application in March 2017 to preserve its rights under

[417] **RL-110**, *Mobil II*, ¶¶ 162, 172.
[418] Canada's Counter-Memorial, ¶¶ 142-145.
[419] See ¶¶ 58 to 63, 71 above.
[420] Canada's Counter-Memorial, ¶ 186.

the FIT Contract and to prevent the breach that is being addressed in these proceedings from occurring.[421] There is no dispute that WWIS was concerned the IESO would exercise that right. The fact that Windstream commenced the Ontario Application to prevent the termination of the FIT Contract underscores that the limitation period had not yet commenced running by this date, because the breach alleged now (the termination of the FIT Contract) had not yet occurred, and Windstream was taking steps to prevent it from occurring. Windstream cannot be faulted for taking steps locally to prevent a potential expropriation from turning into an actual expropriation.

300. Concern or suspicion that something may happen is not the same as knowing that something has happened. The limitation period is only triggered with the latter. As explained by the tribunal in *Mobil II*:

> Even if it is possible to read the requirements in Articles 1116(2) and 1117(2) that the investor must have acquired knowledge that loss or damage *has been* incurred as embracing a case in which the investor knows that loss or damage *will be* incurred, the time limit imposed in those provisions could not start to run until the investor had *knowledge* that it would suffer such loss or damage. To suspect that something will happen is not at all the same as knowing that it will do so. Knowledge entails much more than suspicion or concern and requires a degree of certainty.[422]

301. The earliest Windstream could have learned that it *would* incur loss or damage flowing from the alleged breach was February 20, 2018, when it learned of the Termination Decision. That loss and damage was then only *incurred* on February 18, 2020 when the decision took effect. Both dates are well within the limitation period.

PART FOUR – CANADA IS LIABLE FOR BREACHES OF THE NAFTA

302. In the Memorial on the Merits, Windstream established that Canada violated two provisions of the NAFTA: Article 1110 by unlawfully expropriating Windstream's investments and Article 1105(1) by failing to accord Windstream's investments fair and equitable treatment. In the following sections, Windstream responds to Canada's defences to the substantive liability provisions of the NAFTA.

[421] CWS-N. Baines, ¶ 45.
[422] **RL-110**, *Mobil II*, ¶ 155 (*emphasis* in original) [emphasis added].

I. CANADA HAS UNLAWFULLY EXPROPRIATED WINDSTREAM'S INVESTMENTS IN VIOLATION OF ARTICLE 1110

303. As set out at paragraphs 456 to 462 of Windstream's Memorial, the Ontario Government has indirectly expropriated Windstream's investments in contravention of Article 1110 of the NAFTA. As a result of the Ontario Government's unilateral termination of the FIT Contract following the *Windstream I* Award, Windstream has been substantially deprived of the value of its investments. The expropriation was unlawful as it did not meet the requirements of Article 1110, including that compensation was not paid for the taking.

304. In its Counter-Memorial, Canada has raised four arguments which it says show why there was no expropriation: (a) Windstream did not have rights capable of expropriation; (b) Windstream has not been substantially deprived of its investment because the $6 million security deposit was not taken; (c) there is no expropriation because the impugned measures did not interfere with any reasonable investment-backed expectations held by Windstream; and (d) the character of the impugned measures do not give rise to an expropriation.[423] None of these arguments have merit.

305. Canada misstates the test for expropriation and repeats the same arguments it made before the *Windstream I* tribunal. The arguments were not accepted then and should not be accepted now. Its argument seeks to import new obligations into Article 1110, which have been rejected by other tribunals. The applicable test for expropriation is set out below, followed by Windstream's responses to each of Canada's four arguments.

A. The Applicable Test for Expropriation

306. As set out in the Memorial, the *Windstream I* tribunal held that there are two steps for determining whether an indirect expropriation occurred: (a) as a factual matter, has an effective or *de facto* taking of property that is attributable to the State taken place (*i.e.*, has the investor been substantially deprived of the value of its investment); and (b) if so, was that taking lawful.[424] The

[423] Canada's Counter-Memorial, ¶¶ 146-191.
[424] Memorial on the Merits, ¶¶ 452-453; **C-2040**, *Windstream I* Award, ¶¶ 284-285.

Windstream I tribunal recognized that this is the test applied by numerous investment arbitration tribunals, including NAFTA tribunals.[425]

307. Canada claims that Windstream "[m]istates the [t]est."[426] It raises two arguments in support of its assertion on the proper test.

308. First, Canada asserts that Windstream "put forward an incorrect two-step test for determining whether an indirect expropriation has taken place."[427] It makes this argument without addressing the fact that Windstream set out the test laid out by the *Windstream I* tribunal and applied by numerous other tribunals.

309. Canada argues that there is a three-step test, and the first step is whether there is an investment capable of being expropriated. It then agrees that the remaining two steps are the ones set out by the *Windstream I* tribunal.[428] It argued for this same three-step test before the *Windstream I* tribunal.[429] The *Windstream I* tribunal did not accept Canada's argument that this is an independent first step. However, practically speaking, the parties do not disagree on the applicable test. It is not disputed that as a threshold matter, Windstream must have rights capable of being expropriated.[430] As a practical matter, it is irrelevant whether that is an independent first step or subsumed as part of the first step in the test set out by the *Windstream I* tribunal.

310. Second, Canada summarizes Annex 14-B to the United States–Mexico–Canada Agreement ("**CUSMA**") and claims Windstream did not acknowledge the guidance provided by this annex in interpreting Article 1110 of the NAFTA.[431] Canada's reliance on the Annex must fail.

311. Annex 14-B is inapplicable. Canada is seeking to import into Article 1110 language that is not there. Annex 14-B was not incorporated by the CUSMA Parties into legacy claims brought under the NAFTA; rather, it only applies to claims that allege a breach of Article 14.8 of the

[425] **C-2040**, *Windstream I* Award, ¶ 285.
[426] Canada's Counter-Memorial on the Merits, p. 61
[427] Canada's Counter-Memorial on the Merits, ¶ 154.
[428] Canada's Counter-Memorial on the Merits, ¶ 151.
[429] *Windstream I* Canada's Counter-Memorial, ¶ 463; **C-2040**, *Windstream I* Award, ¶¶ 257-259.
[430] **CL-159**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, Award (April 4, 2016), ¶ 659.
[431] Canada's Counter-Memorial on the Merits, ¶¶ 152-153.

CUSMA.[432] Article 14.8 is not at issue in this case. The Annex has no bearing on the Tribunal's interpretation of Article 1110 of the NAFTA. It is not open to Canada to attempt to use the CUSMA to retroactively re-write the NAFTA when the NAFTA state parties did not themselves believe they should apply this Annex to legacy NAFTA claims.

B. Windstream Has Investments Capable of Being Expropriated

312. Canada argues that the FIT Contract is not an investment capable of being expropriated because it is a contingent right depending on a future event.[433] There are three reasons this argument should be rejected: (1) Canada put forward this argument in *Windstream I*, and it was rejected; (2) in any event, Canada admits that WWIS and the Project are investments capable of being expropriated and so it does not matter if the FIT Contract, individually, is an investment capable of being expropriated; and (3) in the alternative, the FIT Contract is such an investment.

1. Canada is Seeking to Re-Litigate the Issue that was Before the *Windstream I* Tribunal

313. Canada made this argument in *Windstream I* and Windstream put forward expert evidence from Ms. Powell in response showing that the FIT Contract is intangible personal property under Ontario law.[434]

314. The *Windstream I* tribunal summarized Canada's argument on this issue and ultimately did not accept it.[435] When it found there was no expropriation, it did so on the basis that the "FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario."[436] In so finding, it rejected Canada's argument that the FIT Contract was not capable of

[432] Article 14 of the CUSMA, like Chapter 11 of the NAFTA, lays out the investment protections. Article 14.8 sets out the expropriation protect and it expressly provides that "This Article shall be interpreted in accordance with Annex 14-B." Therefore, a party bringing a claim under the CUSMA and alleging a breach of Article 14.8 would then have the Annex 14-B guiding principles apply. For example, Annex 14-D provides for investment disputes between Mexico and the United States. Article.D.3 provides for a claimant to submit a claim to arbitration that would allege the breach *of Article 14.8 of the CUSMA*. In that situation, it is clear that Annex 14.B applies. However, the CUSMA parties did not use similar language with respect to legacy claims under Annex 14-C. Windstream is not alleging that Article 14.8 of the CUSMA is violated; it is alleging Article 1110 of the NAFTA is violated. The CUSMA Parties did not include *any* language in Annex 14-C indicating that the provisions in the NAFTA should be interpreted with reference to Annex 14-B. That would have been a very simple provision to include had they intended to do so.
[433] Canada Counter-Memorial on the Merits, ¶¶ 155-168.
[434] See **C-2040**, *Windstream I* Award, ¶¶ 257-259; *Windstream I* Windstream's Reply Memorial, ¶¶ 454-471.
[435] **C-2040**, *Windstream I* Award, ¶¶ 257-259.
[436] **C-2040**, *Windstream I* Award, ¶ 290.

being expropriated. If it was not capable of being expropriated, then it would not have mattered if it was in force or not. That finding is not open for re-litigation. Despite its many attempts to do so in its Counter-Memorial, Canada cannot cherry-pick the aspects of the Award it likes and discard the parts that it does not.

2. WWIS and the Project are Investments Capable of Being Expropriated

315. In any event, even if this issue is open for re-litigation in this arbitration, Canada's argument must fail. Canada admits that WWIS is an investment of Windstream and is an investment capable of being expropriated.[437] With the exception of the FIT Contract, Canada does not dispute that the Project is an investment capable of being expropriated.

316. Canada cannot isolate one aspect of the investment. The test of expropriation applies *to the investment as a whole*. The question is whether the investment as a whole has become unviable. The measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return.[438]

317. For example, the issue in *Electrabel v. Hungary* concerned Hungary's termination of a power purchase agreement regarding the Dunamenti power plant, which was owned by Electrabel. The tribunal found that the agreement constituted an investment but there had been no expropriation because the investment as a whole – *i.e.*, Electrabel's "aggregate collection of interests in Dunamenti" – was not expropriated. It held that the PPA was an intrinsic and inseparable part of Electrabel's investment as a whole. The tribunal found that notwithstanding the termination of the power purchase agreement, Electrabel was not deprived of the use of its power plant, equipment or other real property, and the business was not rendered financially worthless as it has continued as an economic concern competing in Hungary's electricity market, with the plant still operational and operated by Dunamenti.[439]

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[437] Canada counter-memorial, ¶ 169.
[438] **CL-029**, *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012, ¶ 398; **CL-196**, *Telenor Mobile Communications A.S. v. The Republic of Hungary*, (ICSID Case No. ARB/04/15), Award (September 13, 2006), ¶ 67;
[439] **CL-048**, *Electrabel S.A. v. Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶¶ 6.53-6.64.

318. The opposite is true here. As a result of the termination of the FIT Contract, Windstream's investment as a whole in WWIS and the Project was rendered substantially worthless. Unlike in *Electrabel*, there is no power plant. There is no remaining right to build and operate an offshore wind farm. There is no ability to compete the market. The Project and investment are over.

3. The FIT Contract is an Investment Capable of Being Expropriated

319. In the further alternative, even if this issue is open for re-litigation and even if Canada can isolate the FIT Contract from the broader investment, Canada's argument must still be dismissed. The FIT Contract is an investment capable of being expropriated under Article 1110.

320. As described at paragraphs 419 to 425 of Windstream's Memorial, the FIT Contract is an "investment" under the NAFTA. The FIT Contract is WWIS's most important property right and asset. Had the Project proceeded as planned, it would have constituted WWIS's most significant source of revenue.[440] It is an investment held by Windstream indirectly through WWIS.

321. Canada claims that the FIT Contract is conditional or contingent and there is no vested right under the FIT Contract. Canada claims that Windstream has identified its investment as "a guaranteed revenue stream over a 20-year period with a credit worthy counterparty" and the "*possibility* of operating commercially is not a property right." Rather, because the FIT Contract was conditioned on obtaining permits and approvals, and reaching the MCOD, the right was not vested.[441] This argument must be rejected: it misstates the nature of Windstream's investment, and it improperly characterizes the FIT Contract as a contingent or non-vested interest.

322. ***Canada Misstates Windstream's Investment***. Canada raised this identical argument in *Windstream I*. As Windstream stated then, Canada's argument "beats a straw man; Canada has constructed an argument that Windstream did not make, and proceeds to refute that argument while failing to address Windstream's actual position."[442] Canada cherry-picks a single sentence from paragraph 8 of Windstream's overview that states as a matter of background that the FIT Contract gives WWIS the right to a guaranteed revenue stream over a 20-year period. Canada then claims

[440] CER-Powell, ¶ 111.
[441] Canada Counter-Memorial on the Merits, ¶¶ 158, 164, 165.
[442] *Windstream I* Reply Memorial, ¶ 457.

that is the investment and invites the Tribunal to conclude that such an investment is contingent on other events having occurred.

323. Windstream does not claim its investment is an operating wind farm with a guaranteed revenue stream over a 20-year period. Windstream's investments defined in its Memorial are WWIS, the Project and the FIT Contract. As Windstream stated in its *Windstream I* Reply Memorial, if Windstream asserted its investment included an operational wind farm with a guaranteed revenue stream from the sale of electricity, its damages would be orders of magnitude greater than they are.[443]

324. ***The FIT Contract is a Vested Property Right under Ontario Law***. The FIT Contract satisfies both Article 1139(g) and (h) of the NAFTA: it is an "interest arising from the commitment of capital or other resources in the territory of [Canada] to economic activity in the territory" and is also intangible property "acquired in the expectation or used for the purpose of economic benefit or other business purposes." Canada has not disputed that Windstream committed capital to acquire the FIT Contract (including its $6 million in security, among other capital) or that it did so with the expectation or for the purpose of economic benefit or for other business purposes.

325. Rather, Canada's argument is that the FIT Contract is neither "intangible property" nor an "interest" within the meaning of Article 1139 because it is a contingent interest. Canada's argument that it is contingent in nature is based on its mischaracterization that the investment is the guaranteed revenue stream. The investment is the FIT Contract. The question is whether *the FIT Contract* is intangible property.

326. It is well-recognized that contract rights may be expropriated.[444] Windstream does not dispute that the property right or asset in question must have vested for the claimant to seek

[443] *Windstream I* Reply Memorial, ¶ 458.

[444] **CL-034**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, 1928 P.C.I.J (ser. A) No. 17 (September 13, 1928), p. 44 ("Chorzów Factory"). See also **CL-159**, *Crystallex*, 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/09/2) 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, ¶ 98; **CL-041**, *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) Award, 20 August 2007 (ICSID Case No. ARB/97/3) Award, 20 August 2007, ("*Vivendi II*") ¶¶ 7.5.4, 7.5.22-7.6.2; **CL-049**, Eureko B.V. v. Republic of Poland (Ad Hoc Arbitration) Partial Award,

redress.[445] The question of whether there is a vested property right is one made in reference to the host state's law, here Canadian law. As explained by the tribunal in *Emmis v. Hungary*, "[p]ublic international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law."[446]

327. In *Windstream I,* Windstream put forward expert evidence from Sarah Powell that established that the FIT Contract is in and of itself intangible personal property under Ontario law. Under Ontario law, the FIT Contract is a valuable asset and constitutes intangible personal property which could be the subject matter of a security interest, and which would be transferable on bankruptcy to the trustee-in-bankruptcy of WWIS.[447] The FIT Contract may be the subject of a change of control. It may also be mortgaged, charged or otherwise encumbered to the benefit of a secure creditor.[448]

328. As Ms. Powell explained, the FIT Contract is not a "contingent" or "potential" interest under Ontario law.[449] It was a valid and binding contract which creates a long list of obligations and rights. Under s. 2.5 of the FIT Contract, WWIS was required to bring the Project into commercial operation in a timely manner and by the MCOD. WWIS was also required to maintain in good standing the $6 million letter of credit it posted as security.[450] If WWIS was in default under the contract, the IESO had the right to retain WWIS' $6 million in security.[451] Once the Project achieved commercial operation, the IESO had the obligation to pay WWIS for all electricity generated by the Project.

329. Canada is wrong when it says the FIT Contract is "expressly conditioned on the Claimant acquiring all of the permits and approvals needed to develop, construct and operate its proposed

19 August 2005, ¶¶ 238-243; **CL-039**, *CME Czech Republic B.V. v. The Czech Republic* (UNCITRAL) Partial Award, 13 September 2001, ¶¶ 173, 270-271, 591.

[445] **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, ¶ 168 ("*Emmis*").

[446] **RL-022**, *Emmis*, ¶¶ 162, 169. See also **CL-189**, *Lion Mexico Consolidated LP v. United Mexican States*, (ICSID Case No. ARB (AF)/15/2), Decision on Jurisdiction (July 30, 2018), ¶ 231.

[447] CER-Powell, ¶ 130.

[448] CER-Powell, ¶¶ 118, 126-129; CER-Powell-2, ¶ 81.

[449] CER-Powell-2, ¶¶ 79-86.

[450] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 5.1

[451] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 9.2(d)(ii)

Project."[452] Canada cites s. 2.4 of the FIT Contract. Section 2.4 provided that the IESO may not issue a Notice to Proceed under the FIT Contract until a REA and other permits necessary for the construction of the Contract Facility to commence have been provided. It does not state that the FIT Contract was "conditional" upon all approvals being obtained such that the contract was somehow not binding if the permits are not obtained. The contrary is true. WWIS' security could have been forfeited if WWIS failed to bring the contract into commercial operation on time. Its security would also have been forfeited if WWIS exercised its right to terminate the FIT Contract before the Notice to Proceed was issued.[453] In other words, there were legally binding obligations under the FIT Contract that were not conditional.

330. Ms. Powell rejected this same argument by Canada in her *Windstream I* expert report. She explained that Canada appears to be conflating the FIT Contract's Notice to Proceed pre-requisites with the FIT Contract itself.[454] She stated, "although the issuance of a [Notice to Proceed] was conditional on WWIS obtaining the required permits, the FIT Contract itself was not conditional on such permits or on the issuance of an [Notice to Proceed], but from the outset was a valid, enforceable and valuable contract."[455] The Notice to Proceed pre-requisites were not true condition precedents to there being an enforceable contract.[456]

331. Canada's argument that the FIT Contract was not a vested right is not supported by the terms of the contract itself nor by any expert evidence. Canada has had possession of Ms. Powell's report on this identical argument since June 2015. It has once again raised the same argument and still not provided any expert evidence to support it, even though the analysis requires a finding of whether the FIT Contract is a vested property right under Ontario law. It would not have been difficult for Ontario to submit expert evidence from an Ontario energy lawyer about this topic. It is telling that it provided no such evidence. Its unsupported argument should be given no weight.

[452] Canada Counter-Memorial on the Merits, ¶ 165.
[453] **C-0245**, OPA Feed-In Tariff Contract (FIT Contract) Schedule 1, General Terms and Conditions, Version 1.3.0 (May 4, 2010), s. 2.4(a)(ii).
[454] CER-Powell-2, ¶ 82.
[455] CER-Powell-2, ¶¶ 79, 86. [emphasis added].
[456] CER-Powell-2, ¶ 84.

332. ***Canada's Authorities Do Not Support Its Argument***. Further, none of the cases Canada cites in its Counter-Memorial are relevant to the applicable analysis.[457] None involve situations where, as here, the investment alleged to have been expropriated was itself a contract. The rights alleged to have been expropriated in those cases were: (a) a right to a broadcasting licence (that the tribunal found did not arise from the relevant contract under Hungarian law);[458] (b) a gambling operation which the claimant did not operate pursuant to any permit or contract;[459] (c) an alleged right to export cigarettes to which the claimant had no right under a contract or otherwise;[460] (d) an alleged right to the solar power revenue guarantee arising from legislation;[461] (e) an alleged right to use a neighbouring property as a construction staging area (which the tribunal found would be a "flagrant breach of Ukrainian land law" to recognize); [462] and (f) a "potential interest" in exporting logs "that may or may not materialize under contracts the Investor *might* enter into with its foreign customers."[463] In that last case, the tribunal specifically recognized that a right to export logs would be a property right subject to expropriation "if an existing contract for a certain volume of logs, at a certain price, had been interfered with by the government to the requisite extent."[464]

333. The only case cited by Canada involving a contract was *Eureko v. Poland*. In that case, the tribunal found that Eureko's investments included its contractual rights to an IPO under a share purchase agreement, which would have led it to acquire a majority control in a Polish entity, PZU.[465] The tribunal held that Eureko had not been deprived of its shares in PZU, which it continues to hold and on which it receives dividends. However, Poland's conduct deprived Eureko

[457] Canada's Counter-Memorial on the Merits, ¶¶ 159-168.
[458] **RL-022**, *Emmis*, ¶ 221.
[459] **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Arbitral Award, 26 January 2006, ¶ 221.
[460] **RL-024**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award and Dissenting Opinion, 16 December 2002, ¶ 152.
[461] **RL-182**, *Eskosol S.p.A. in liquidazione v. Italian Republic* (ICSID Case No. ARB/15/50) Award, 4 September 2020, ¶¶ 471-472.
[462] **Rl-057**, *Generation Ukraine Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶¶ 18.59, 22.1.
[463] **CL-061**, *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case) Award, 31 March 2010, ¶ 139-140 ("*Merrill & Ring*").
[464] **CL-061**, *Merrill & Ring*, ¶ 149.
[465] **CL-049**, *Eureko*, ¶ 232.

of its contractual rights and they were expropriated.[466] The tribunal rejected Poland's arguments that these contractual rights were contingent based on the language of the contract.[467]

C. Windstream's Investments Have Been Expropriated

334. As set out at paragraphs 456 to 475 of Windstream's Memorial, Windstream was substantially deprived of the value of its investments when the FIT Contract was unilaterally terminated as a consequence of the conduct of the Ontario Government.

335. In its Counter-Memorial, Canada relies on the three interpretative factors set out in Annex 14-B of the CUSMA as though they lay out a binding test and indicating that each one of these factors must be met for there to be an expropriation (they do not). The three factors are the economic impact of the measures, the extent to which the measures interfere with distinct, reasonable investment-backed expectations, and the character of the measures.[468] Canada then addresses why each of those factors are not met, as opposed to applying the actual test for an indirect expropriation as laid out in Article 1110 of the NAFTA.

336. For the reasons set out above, Annex 14-B of the CUSMA does not apply and even if it did, it would merely provide guidance to the Tribunal in assessing whether an expropriation took place. The test before the Tribunal is well-established. As set out by the *Windstream I* tribunal, the first question is whether there has been a *de facto* taking. To answer that, the question is whether the investor has been substantially deprived of the value or economic viability of its investment.[469] Arbitral tribunals have generally applied the "sole effects" test.[470] In other words, the focus is entirely on the economic impact of the measure on the investor. An intent to expropriate is not a precondition. As explained in *Vivendi II*, this is because the focus is on the *effect* of the measure.[471]

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[466] **CL-049**, *Eureko*, ¶¶ 238-240.
[467] **CL-049**, *Eureko*, ¶¶ 151-160.
[468] Canada's Counter-Memorial on the Merits, ¶ 171.
[469] **C-2040**, *Windstream I* Award, ¶¶ 284-285.
[470] **CL-029**, *Burlington*, ¶¶ 396-398; **CL-023**, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007, ¶ 240; **CL-070,** *Occidental Exploration and Production Company v. The Republic of Ecuador* (UNCITRAL, LCIA Case No. UN3467) Final Award, 1 July 2004, ¶¶ 87-88; **CL-062**, *Metalclad Corporation v. The United Mexican States* (ICSID Case No.ARB(AF)/97/1) Award, 30 August 2001, ¶ 108; **CL-081**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000, ¶ 283.
[471] **CL-041**, *Vivendi II*, ¶ 7.5.20; **CL-068**, *National Grid plc v. The Argentine Republic* (UNCITRAL) Award, 3 November 2008, ¶ 147.

Canada wrongly suggests that any other factor other than the effect of the measure is relevant to establishing whether the first step of the test is met.

337. If there has been a *de facto* taking, the next question is whether that taking is lawful.[472] Article 1110 lays out the requirements for a lawful taking. The taking must be (a) for a public purpose, (b) on a non-discriminatory basis, (c) in accordance with due process of law, and (d) on payment of compensation for the fair market value of the investment. These factors do not contain a broad public policy purpose exemption from the expropriation protection.

338. For the reasons that follow, this test has not been met, and Canada's attempts to adjust the test to suit its defences should be rejected.

1. Windstream was Substantially Deprived of the Economic Value of its Investments

339. The parties agree that for there to be an indirect expropriation, the investor must be substantially deprived of the economic value of the investment. The question for the Tribunal is whether that standard has been met on the facts.

340. Canada claims that Windstream has not been so deprived because the FIT Contract had no value to begin with. It repeats the same arguments that ground its *res judicata* objection: since the *Windstream I* tribunal found that the FIT Contract had no value, there was nothing left to lose except the security deposit, which was returned.[473]

341. As set out at paragraphs 251 to 252 above in response to Canada's *res judicata* objection, the *Windstream I* tribunal recognized that there was value beyond what was awarded that could be created if the FIT Contract were renegotiated. It did not award Windstream damages for that value as at the 2016 valuation date but recognized it was there if the FIT Contract were renegotiated. That additional value was taken when the FIT Contract was terminated, and the *Windstream I* tribunal never determined the value of the Project in the context of the termination of the FIT

[472] Memorial on the Merits, ¶¶ 452-453; **C-2040**, *Windstream I* Award, ¶¶ 284-285.
[473] Canada's Counter-Memorial on the Merits, ¶¶ 173-175.

Contract. Windstream has put forward expert evidence that the value of what was taken from Windstream as a result of the measures in this case is between $291.4 million and $333 million.[474]

342. Canada cannot rely on the fact that the value was never created because the FIT Contract was not renegotiated. That failure to renegotiate the contract is part of the wrongful conduct that has breached the NAFTA. Canada cannot rely on its own breaches to escape liability.[475]

343. Canada's position that the FIT Contract had no value when it was terminated is also inconsistent with Ontario's documents relating to the FIT Contract and its treatment of other FIT contract holders. As set out at paragraphs 64 to 66 above, following the release of the *Windstream I* Award, MEI stated internally that "the Tribunal *did not consider the value of the contract*, only the specific damages to Windstream's project that the company incurred as a result of the moratorium,"[476] that the outcome of *Windstream I* did not change the status of the FIT Contract, which was still in force,[477] and that the expected value of the FIT Contract was at least $2.76 billion over its 20 year term.[478]

344. When Ontario cancelled other FIT contracts in 2018, it paid hundreds of millions of dollars to compensate those project holders. In particular, it reportedly paid more than $100 million to WPD for the cancelled White Pines project, an 18 MW project (compared to WWIS' 300 MW project) that was also a FIT 1 contract holder (like Windstream) where the IESO had waived its pre-NTP termination right (again, like Windstream).[479]

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[474] CER-Secretariat, ¶ 2.40; CER-Secretariat-2, ¶ 2.7, 4.44.
[475] See **CL-052**, *Gemplus*, ¶ 13-92.
[476] **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016), Attachments: RE: Wind Contract value.
[477] **C-2643**, Independent Electricity System Operator Issues Note: Windstream NAFTA Claim (October 6, 2016) and **C-2667**, Email from Adam Hendy to Dan Moulton re: Media Call Summary: January 13, 2017 (January 13, 2017). See also **C-2641**, MNRF House Note Issue: Windstream Energy Offshore Wind Power NAFTA Claim (September 30, 2016), **C-2649**, Email from Katrina Xavier to Richard Blackwell re: Globe&Mail query (October 20, 2016).
[478] **C-2638**, Email from Emma Ferner to Sam Colalillo re Windstream Contract Value Estimate (September 30, 2016) Attachments: Windstream Contract Value Estimate.xlsx; **C-2639**, Email from Sam Colalillo to Daniel Cayley re "FW: Windstream Contract Value Estimate" (September 30, 2016); **C-2650**, Email from Mirrun Zaveri to Erin Thompson re: Wind Contract Value (October 21, 2016), Attachments: Windstream Contract Value Estimatev06.xlsx; **C-2620**, Windstream Contract Value Estimatev06.xlsx.
[479] See ¶¶ 166 to 174 above.

345. Windstream was the only FIT contract holder that was not paid upon the termination of its FIT Contract. As a result, Windstream has lost the full value of its investment in WWIS, the Project and the FIT Contract. There is no longer any possibility for the Project to move forward.

2. The Expropriation was Unlawful as it Did Not Meet the Criteria Set out in Article 1110 and the Police Powers Doctrine Does Not Apply

346. If there has been a *de facto* taking, the next question is whether that taking is unlawful based on the four factors laid out in Article 1110.[480] Each of those four requirements must be met for an expropriation to be lawful. In its Memorial on the Merits, Windstream set out why each of those four factors has not been met, including that no compensation was paid.[481]

347. Canada does not attempt to address these four factors. Instead, it argues there is no expropriation because there was no interference with Windstream's reasonable, investment-backed expectations and because of the character of the measures.[482] In other words, it seeks a broad public-policy exemption from expropriation if those factors are present. There is no support for such an interpretation of the expropriation protection. There are four reasons Canada's argument must be rejected.

348. First, this interpretation ignores the plain wording of Article 1110. The language of Article 1110 provides that an expropriation will only be lawful when the four preconditions are met, including that it has a public purpose. Therefore, it is already a prerequisite to a lawful expropriation that the measures have a public purpose. Canada attempts to turn this one factor from a prerequisite into a *complete defence*, regardless of whether the other preconditions have been met. This undermines the language of Article 1110 of the NAFTA.

349. As held by the NAFTA tribunal in *Metalclad*, the tribunal does not need to consider the motivation or intent of an ecological regulatory measure to determine that the measure was expropriatory.[483] In *Feldman*, a decision on which Canada relies, the tribunal found that "[i]f there

[480] **C-2040**, *Windstream I* Award, ¶¶ 284-285.
[481] Memorial on the Merits, ¶¶ 463-475.
[482] Canada's Counter-Memorial on the Merits, ¶¶ 181-191.
[483] **CL-062**, *Metalclad*, ¶ 111.

is a finding of expropriation, compensation is required, *even if*, the taking is for a public purpose, non-discriminatory and in accordance with due process of law."[484]

350. Second, the jurisprudence recognizes a *narrow* exemption to expropriation if a measure falls within the police powers doctrine. Numerous tribunals have rejected arguments from respondent states seeking to broaden that doctrine.[485] Rather, the police powers doctrine has only been applied in exceptional circumstances where the respondent state has provided clear evidence that there was imminent or serious risk to human health or financial stability.[486] Tribunals have also held that the doctrine will only apply in the following circumstances: when the measure is truly necessary and proportionate to its stated rationale,[487] is not contrary to the investor's legitimate expectations,[488] does not otherwise breach international obligations,[489] and is not contrary to domestic law.[490] In other words, a violation of an investor's legitimate expectations is a reason the police powers doctrine *cannot* apply to exempt the government conduct from liability, but it does not make an investor's legitimate expectations a requirement to establish an expropriation. There is simply no basis in the text of Article 1110 or the jurisprudence for that requirement.

351. Canada has not cited any cases to support its argument that the expropriation test is as broad as it suggests. Rather, the cases it relies upon illustrate the narrow reach of the police powers doctrine. These cases involved measures that required intervention to protect human health or to ensure financial stability. For example, in *Saluka*, in the course of privatizing its banking industry,

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[484] **RL-024**, *Marvin Roy Feldman Karpa*, ¶ 98.
[485] **CL-074**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Interim Award, 26 June 2000, ¶ 99; **CL-041,** *Vivendi II*, ¶ 7.5.21; **CL-164**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Award (September 16, 2015), ¶ 200 ("*Quiborax*"); **CL-029**, *Burlington*, ¶ 506; **CL-084**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003, ¶ 119 ("*Tecmed*"); **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶¶ 258, 263 ("*Saluka*").
[486] **CL-191**, *Philip Morris Brands Sàrl, Philip Morris Products S.A. And Abal Hermanos S.A. v. Oriental Republic of Uruguay*, (ICSID Case No. ARB/10/7), Award (July 8, 2016), ¶¶ 284-286; **CL-080**, *Saluka*, ¶¶ 262-265, 270-275, **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 266.
[487] **CL-084**, *Tecmed*, ¶ 122; **CL-029**, *Burlington*, ¶¶ 528-529; **CL-043**, *Deutsche Bank*, ¶ 522; **CL-025**, *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006, ¶ 311; **CL-059**, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability, 3 October 2006, ¶¶ 189, 195.
[488] **CL-043**, *Deutsche Bank*, ¶ 523.
[489] **CL-043**, *Deutsche Bank*, ¶ 523.
[490] **CL-029**, *Burlington*, ¶ 529; **CL-164**, *Quiborax*, ¶¶ 214, 221, 227.

the Czech Republic engaged in the forced administration of a bank in which the claimant held shares when it appeared the bank was in crisis and its circumstances endangered the stability of the Czech banking system.[491] In *Chemtura*, the tribunal found that a ban on lindane-based pesticide was a valid exercise of the police powers doctrine since the evidence clearly demonstrated the dangers posed by lindane to human health and the environment.[492]

352. Third, Canada is re-litigating the same arguments raised before the *Windstream I* tribunal. Canada made the same argument in *Windstream I* that the expropriation test contained a broad public purpose exemption that required the investor to establish breach of reasonable, investor-backed expectations and an assessment of the character of the measures.[493] Indeed, its Counter-Memorial repeats this assertion almost verbatim. It is surprising that Canada has attempted to make this argument again, since it was not accepted by the *Windstream I* tribunal in setting out the two-step test for expropriation.

353. Fourth, the police powers doctrine has no application in this case. There is no evidence of some exceptional circumstance like risk to human health, nor has Canada attempted to argue the narrow doctrine has been met. This is a complete answer. To the contrary, this is a 300MW renewable power project. In light of climate change and the urgent need for energy supply in Ontario, the idea that cancelling a project of this kind falls within the limited scope of the police powers doctrine is simply not credible.

354. In any event, Canada is wrong that the measures did not interfere with Windstream's expectations or were non-expropriatory in their character, even if those factors were relevant:

a) With respect to Windstream's expectations, Canada re-argues the same position it raised before the *Windstream I* tribunal that there was regulatory uncertainty regarding offshore wind and Windstream is asking the tribunal to hold Canada liable for its own speculations.[494] As set out at paragraphs 30 to 32 above, the *Windstream I* tribunal did not accept *any* of the arguments Canada raised about the

[491] **CL-080**, *Saluka*, ¶¶ 262-265, 270-275.
[492] **CL-037**, *Chemtura*, ¶ 266.
[493] *Windstream I* Counter-Memorial, ¶¶ 490-504.
[494] Canada's Counter-Memorial on the Merits, ¶¶ 181-182.

regulatory uncertainty around offshore wind. Rather, Ontario promoted Ontario as "open for business" when it came to offshore wind and created the specific regulatory requirements for such projects. The tribunal found that Ontario's position only "grew gradually more ambiguous towards the development of offshore wind" after the FIT Contract was signed.[495] That finding of fact is *res judicata*, as is the tribunal's finding that the legal and contractual limbo that Ontario created after the imposition of the Moratorium violated the NAFTA.[496]

b) The continuation of that legal and contractual limbo after *Windstream I* is equally the responsibility of the Ontario Government. The *Windstream I* tribunal held that Ontario was liable for putting Windstream in that situation, and the Ontario Government is equally liable for the failure to end that limbo following the award, which caused Windstream further damages. Windstream should certainly not be found to have expected Ontario to continue the conduct that was already found to be internationally wrongful. Windstream's expectations following the *Windstream I* Award are set out in more detail below in addressing the violation of the FET standard in Article 1105. That is the proper place for such analysis.

II. CANADA HAS FAILED TO ACCORD WINDSTREAM'S INVESTMENTS FAIR AND EQUITABLE TREATMENT (VIOLATING ARTICLE 1105)

355. Article 1105(1) of the NAFTA guarantees foreign investors fair and equitable treatment of their investments in accordance with the minimum standard of treatment under customary international law. As set out in Windstream's Memorial, Canada breached this obligation.

356. Canada asks the Tribunal to dismiss Windstream's claim on the basis that: (a) the legal standard under Article 1105 is extremely high; (b) the treatment of Windstream's investments was neither manifestly arbitrary nor grossly unfair; (c) the treatment of Windstream's investments was not discriminatory because it was not based on specific types of prejudice, like racial or religious prejudice; and (d) the treatment of Windstream's investments was not in breach of any legitimate expectations. Canada argues for a narrow interpretation of the NAFTA's FET protections, which

[495] **C-2040**, *Windstream I* Award, ¶ 366.
[496] **C-2040**, *Windstream I* Award, ¶¶ 378-379.

is not in keeping with the standard that has been well-established by international tribunals. All NAFTA tribunals to which Canada has proposed this interpretation have rejected it.

357. The central issue between the parties is whether Ontario had an obligation to intervene and direct the IESO to ensure that WWIS' rights under the FIT Contract were not terminated in violation of the promise to keep the FIT Contract "frozen." Canada asserts Ontario had no duty to act and therefore there was no breach. Windstream maintains that Article 1105(1) was violated by Ontario continuing the very course of conduct that was already found to be unfair and inequitable, *i.e.*, the failure to act and rectify the "legal and contractual" limbo Ontario created. Its failure to do so created the conditions that led to the wrongful termination of the FIT Contract. This was contrary to the promises made to Windstream and the representations made to the *Windstream I* tribunal: that the Project was only on hold and could proceed once the temporary Moratorium was lifted. This conduct was also arbitrary and capricious – there was no valid reason for Ontario's failure to intervene or for the IESO to terminate the FIT Contract, particularly in light of Ontario's current energy needs. It is also inconsistent with the way other FIT contract holders have been treated. Ontario's deliberate decision not to act in these circumstances violated Article 1105(1).

A. Canada Mistates the Applicable Legal Standard Under Article 1105(1)

358. Article 1105(1) of the NAFTA requires Canada to grant Windstream's investments "treatment in accordance with international law, including fair and equitable treatment…" The well-established standard was articulated by the tribunal in *Waste Management II*, which provides that states must not act in a manner that is "arbitrary, grossly unfair, unjust or idiosyncratic, [or] is discriminatory…," among other things.[497] In applying that standard, it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the claimant.[498]

359. Repeating its argument from *Windstream I* and many other NAFTA cases (which have consistently rejected this argument), Canada argues, incorrectly, that the threshold for proving a violation of Article 1105(1) is "extremely high" such that "the impugned conduct must have been

[497] See Memorial on the Merits, ¶¶ 478-483; **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 ("*Waste Management II*"), ¶ 98.
[498] **CL-091**, *Waste Management II*, ¶ 98.

"egregious or shocking…such as serious malfeasance, manifestly arbitrary behaviour, or denial of justice by the respondent NAFTA party" and that the standard is "exacting." It relies solely on the *Glamis Gold* decision to support that narrow standard, which it claims is a standard that has been "upheld by various tribunals."[499]

360. Canada has attempted on numerous occasions to ratchet up the standard under Article 1105(1). Its attempts to do so have not been accepted by other NAFTA tribunals – including the *Windstream I* tribunal. The *Glamis Gold* standard is not the accepted standard. Several tribunals have previously rejected Canada's argument:

a) In *Bilcon v. Canada*, the tribunal found the formulation of the general standard for Article 1105 by the *Waste Management II* tribunal to be particularly influential. The tribunal rejected Canada's argument that the standard requires conduct that "reaches the level of shocking or outrageous behaviour."[500]

b) In *Mesa Power v. Canada*, Canada similarly argued that the standard must be "egregious and shocking." This was not accepted by the tribunal, which instead found that the *Waste Management II* standard correctly identified the content of Article 1105.[501]

c) In *Resolute Forest Products v. Canada*, Canada made the same argument, relying on *Glamis Gold*. The tribunal did not accept that standard and instead quoted other NAFTA tribunals affirmatively, including *Waste Management II*.[502]

d) In *Windstream I*, Canada made the same argument, again relying on *Glamis Gold*. The tribunal rejected this standard and found it inconsistent with the plain meaning of Article 1105, which require "fair and equitable" treatment. The question is what is "unfair or inequitable." To make that determination, one cannot determine it in

[499] Canada's Counter-Memorial on the Merits, ¶¶ 202-203.
[500] **CL-157**, *Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability (March 17, 2015), ¶¶ 442-444 ("*Bilcon*").
[501] **CL-163**, *Mesa Power Group, LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award (March 24, 2016), ¶¶ 488, 496, 500, 501.
[502] **CL-194**, *Resolute Forest Products Inc. v. Government of Canada*, (PCA Case No. 2016-13), Final Award (July 25, 2022), ¶¶ 669, 738-742.

the abstract: "just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts."[503]

361. This is consistent with the findings of other NAFTA tribunals. As put by the tribunal in *Mondev v. United States of America*, "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious."[504] Rather, the minimum standard should not be rigidly interpreted and should reflect evolving customary international law.[505]

362. Canada cites the decision in *Glamis Gold* in support of its extremely high "egregious or shocking" conduct standard. That tribunal's reasoning in that case rested entirely on its finding that it was bound to apply the standard from the 1926 *Neer* decision absent evidence that the minimum standard of treatment under customary international law had evolved since *Neer*.[506] That reasoning has consistently been rejected by NAFTA tribunals,[507] other tribunals applying the minimum standard of treatment,[508] and commentators such as Judge Stephen Schwebel.[509] As explained by the tribunal in *Bilcon v. Canada*, "NAFTA tribunals have, however, tended to move away from the position more recently expressed in *Glamis* and rather move towards the view that the international minimum standard has evolved over the years towards greater protection for investors."[510]

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[503] **C-2040**, *Windstream I* Award, ¶¶ 354-362. Canada also unsuccessful made this argument in **CL-061**, *Merrill & Ring*, ¶¶ 209, 213.
[504] **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 116 [emphasis added].
[505] **CL-057**, *International Thunderbird*, ¶ 194. See also **CL-022**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 ("*ADF Group*"), ¶¶ 179-186.
[506] **CL-053,** *Glamis Gold, Ltd. v. The United States of America*, (UNCITRAL), Award, 8 June 2009 ("*Glamis Gold*"), ¶¶ 612-616.
[507] **CL-037**, *Chemtura*, ¶ 121; **CL-140**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award in Respect of Damages, 31 May 2002, ¶ 65; **CL-091**, *Waste Management II*, ¶ 93; **CL-061**, *Merrill & Ring*, ¶ 204; **CL-022**, *ADF Group*, ¶ 179; **CL-157**, *Bilcon*, ¶¶ 433-441; **CL-066**, *Mondev*, ¶¶ 115-125.
[508] **CL-085**, *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23) Award, 19 December 2013, ¶¶ 449-55; **CL-043**, *Deutsche Bank*, ¶¶ 419-20.
[509] **CL-205**, Schwebel, S.M., *Is Neer Far From Fair and Equitable* (Int'l Arb. Club, London, 5 May 2011) at 557-558.
[510] **CL-157**, *Bilcon*, ¶ 435.

B. Canada has Denied Windstream's Investments Fair and Equitable Treatment

363. The question of whether the FET standard was breached is a fact-specific inquiry. As set out in Windstream's Memorial, Ontario's treatment of Windstream after the issuance of the *Windstream I* Award was arbitrary, grossly unfair, unjust, lacked transparency, was discriminatory and violated Windstream's legitimate expectations.

364. Ontario promised Windstream that the FIT Contract would be "frozen" or insulated from the effects of the Moratorium, and that the Moratorium would not mean the termination of the Project.[511] These representations were repeated by Canada during the *Windstream I* arbitration; Canada repeatedly stated that the Project was only "on hold" and "frozen" and could resume once scientific studies had been conducted and the temporary Moratorium (or, as Canada called it, the "deferral") was lifted.[512] Despite its promise, Ontario did nothing to clarify Windstream's contractual position or direct the OPA in its negotiations with WWIS. As a result, Canada was found liable for a breach of Article 1105. The tribunal did, however, agree with Canada that the Project (and the FIT Contract) had not been terminated, and could be renegotiated in a manner that would implement the promises made by Ontario and the representations made by Canada.[513]

365. In light of the tribunal's findings, the representations made by Canada in *Windstream I*, and the representations Ontario made after the Award (that the research needed to lift the Moratorium was being "finalized" and the Project could proceed), Windstream expected that there was a future for the Project.[514] It expected that, at a minimum, Ontario would agree to meet with it to discuss a path forward. As explained by Ms. Baines:

> More specifically, we expected that the Ontario government would speak to us, in good faith, about the FIT Contract to fulfil their promise to freeze the Project from the effects of the moratorium. We did not expect the government to maintain the conduct that was already found to be a breach of its international obligations.[515]

[511] Memorial on the Merits, ¶ 485; **C-0484**, Transcription of Audio Recording Telephone Conference Call (February 11, 2011); **C-0483**, Audio Recording of Telephone Conference Call (February 11, 2011).
[512] See ¶ 61 above for a summary of Canada's representations.
[513] **C-2040**, *Windstream I* Award, ¶ 290.
[514] See ¶¶ 58 to 63 above.
[515] CWS-N. Baines, ¶ 4(c).

366. However, Ontario did nothing to prevent the termination of the FIT Contract or require the IESO to renegotiate in the FIT Contract in a manner consistent with Ontario's promises. Instead, Ontario made a deliberate policy decision "not to intervene" in the matter.[516] MEI refused to meet with Windstream, refused to direct the IESO to renegotiate the FIT Contract and allowed the IESO to exercise its termination right. The Government also failed to conduct the scientific research that was the premise for the Moratorium, which remains in force to this day.

367. In making the deliberate decision not to act, Ontario created the conditions that led to the termination of the FIT Contract. The IESO in turn relied upon the lack of direction from the Ontario Government in making the Termination Decision, as set out at paragraphs 329 to 331 of Windstream's Memorial.

368. This conduct is a clear breach of the FET standard. None of Canada's defensive responses have merit.

1. The Treatment of Windstream's Investments was Arbitrary and Grossly Unfair

369. Canada claims that Ontario's non-intervention in the IESO's termination of the FIT Contract was neither manifestly arbitrary nor grossly unfair as it was not a wilful disregard of due process or one that amounts to an act that shocks or surprises a sense of judicial propriety. Canada argues that Ontario "respected every legal rule" and Ontario was not obliged to ensure that Windstream was insulated from the post-Award continuation of the Moratorium.[517] This misstates the FET standard and ignores Canada's obligations under international law.

370. ***FET Prohibits Arbitrary and Grossly Unfair Conduct***. The FET standard prohibits conduct that is arbitrary and grossly unfair.[518] That standard is not limited to conduct that violates due process or does not respect legal rules, as Canada argues.

371. In its plain meaning, arbitrariness and gross unfairness is not equated to only a violation of due process. Indeed, violation of due process is expressly identified as a separate type of conduct

[516] CWS-N. Baines, ¶ 68; **C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019).
[517] Canada's Counter-Memorial on the Merits, ¶¶ 205-206.
[518] See Memorial on the Merits, ¶ 262.

that may breach the FET standard. Conduct that violates due process may be arbitrary, but that is not the only way conduct may be arbitrary. Interpreting the "arbitrary and grossly unfair" standard narrowly would effectively interpret it out of the FET standard entirely.

372. Arbitrariness has been described by numerous tribunals as encompassing violations of due process or conduct that surprises a sense of judicial propriety. It also includes conduct that is "founded on prejudice or preference rather than reason or fact," "manifestly violate[s] the requirements of consistency, transparency, even-handedness and non-discrimination," inflicts damages on the investor without serving any apparent legitimate purpose or is a measure taken for reasons that are different from those put forward by the decision maker.[519]

373. ***Ontario's Conduct was Arbitrary and Grossly Unfair***. Ontario's conduct was arbitrary as it lacked transparency and even-handedness, served no legitimate purpose, and was carried out for reasons that are different from those put forward by the decision maker.

374. The Ontario Government had the power to direct the IESO to amend the FIT Contract and/or not to terminate the FIT Contract based on delays caused by the Moratorium. This was recognized by the *Windstream I* tribunal[520] and is not disputed by Canada in its Counter-Memorial. Despite its ability to do so, Ontario refused to do *anything* – it even refused to meet with Windstream. It refused to do so even though its own internal documents recognized that the *Windstream I* tribunal found that Windstream *"ha[d]n't lost the entire value of its investments (i.e., its project) as there was no expropriation: the contract [was] still in force*"[521] and that the value of the contract over its life was worth at least $2.76 billion dollars over its 20-year term.[522]

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[519] **CL-188**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Decision on Jurisdiction and Liability (January 14, 2010), ¶ 262; **CL-159**, *Crystallex*, ¶ 578; **CL-058**, *Ronald S. Lauder v. Czech Republic* (UNCITRAL) Final Award, 3 September 2001, ¶ 221; **CL-080**, *Saluka*, ¶ 307; **RL-020**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, ¶ 303; **CL-187**, *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v. The Republic of Peru* (UNCITRAL), Final Award (December 6, 2022), ¶ 830; **CL-186**, *Eco Oro Minerals Corp. v. The Republic of Columbia* (ICSID Case No. ARB/16/41), Decision on Jurisdiction, Liability and Directions on Quantum (September 9, 2021), ¶ 760.

[520] **C-2040**, *Windstream I* Award, ¶ 380.

[521] **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016), Attachments: RE: Wind Contract value.

[522] **C-2638**, Email from Emma Ferner to Sam Colalillo re Windstream Contract Value Estimate (September 30, 2016); **C-2639**, Email from Sam Colalillo to Daniel Cayley re "FW: Windstream Contract Value Estimate" (September 30,

375. Canada has provided no legitimate rationale for Ontario's refusal to do anything to make good on its promises and representations. There is not a single production from Canada that indicates Ontario had any meaningful internal discussions prior to making the deliberate decision not to intervene.

376. To the contrary, the Ontario Government appeared to adopt an obstructionist attitude as a matter of reflex. Within a mere handful of days following the release of the *Windstream I* Award, MEI's Chief of Staff sent an email "strongly suggest[ing] that no political government representative engage in dialogue with Windstream."[523] Ontario made the decision right away to not engage further with Windstream and to deliberately stay away from its negotiations with the IESO. The reason provided by MEI's Chief of Staff was because the *Windstream I* proceeding involved allegations of political intervention impacting the contractual relationship.[524] In other words, through Ontario's conduct, Canada was found liable for the political conduct that created the legal and contractual limbo in which Windstream found itself. Because its political conduct essentially got Ontario into that mess, Ontario inexplicably decided that it would do nothing further to fix the situation it created. The legal and contractual limbo therefore continued.

377. There was similarly no legitimate rationale for the IESO's decision to terminate the FIT Contract. As set out at paragraphs 137 to 141 above, the IESO terminated the FIT Contract based solely on circumstances created by the Moratorium and the Ontario Government. The IESO relied upon the indefinite nature of the Moratorium and the *lack of direction from Ontario* in its negotiations with Windstream.[525] The IESO also relied upon an analysis about the total cost of electricity service and capacity needs that was severely flawed. As Michael Killeavy – the IESO official that wrote the recommendation to terminate the FIT Contract – testified in the Ontario Application, if he had been aware of the flaws in the analysis at the time, he would not have made the termination recommendation.[526] That evidence fatally undermines the argument that there was

2016); **C-2650**, Email from Mirrun Zaveri to Erin Thompson re: Wind Contract Value (October 21, 2016); **C-2620**, Windstream Contract Value Estimate.

[523] **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada* (October 5, 2016).

[524] **C-2642**, Email from Andrew Teliszewsky to Andrew Bevan re Decision: *Windstream Energy LLC v. Government of Canada* (October 5, 2016).

[525] Memorial on the Merits, ¶ 329.

[526] Memorial on the Merits, ¶ 324; **C-2475**, Affidavit of Michael Killeavy sworn October 18, 2018.

a legitimate rationale for terminating the FIT Contract by the person who made that recommendation.

378. The lack of a legitimate rationale for the IESO's termination decision is made even clearer given Ontario's current energy needs. The Project is needed now more than ever. Windstream has put forward expert evidence from Power Advisory that identifies that Ontario is anticipating a severe electricity supply shortfall and has reverted back to using long-term contracts to address that forecasted supply shortfall.[527] Windstream has attempted on numerous occasions to try to present its Project to Ontario and Canada as a solution to Ontario's forecasted energy crisis (most recently, in July 2023, after the Minister of Energy made public statements reinforcing Ontario's desire to fill its growing electricity needs with renewable sources, including wind energy).[528] Consistent with their reflexive reaction to the *Windstream I* Award, Ontario and Canada have maintained their refusal to meet or even discuss a possible solution.[529]

379. On top of this, Ontario has failed to conduct any of the studies required to lift the Moratorium. Canada represented in *Windstream I* that "[t]he Claimant's Project <u>was merely frozen and could continue after the necessary science is conducted and an adequate policy framework can be developed</u>"[530] and that the Moratorium (or "deferral") was "intended to last <u>only as long as necessary to conduct the scientific research</u> and develop and implement an adequately informed framework for offshore wind projects in Ontario…<u>Ontario has been working to conduct the required scientific studies</u>…<u>demonstrating that the deferral is a temporary measure</u>."[531] It has not followed through on those representations. Clearly, whatever rationale once existed to adopt the Moratorium has been replaced by other reasons. The research into offshore wind was not pursued during the Ford administration, which was elected on a platform opposing renewable energy projects, in particular wind projects.[532] As expressed in an internal MNR email dated May 16,

[527] See ¶¶ 148 to 150 above; CER-Power Advisory-2, pp. 2, 12.
[528] **C-2828**, Letter from John Terry (Torys LLP) to Rodney Neufeld (GAC) (July 31, 2023).
[529] See ¶¶ 157 to 162 above.
[530] *Windstream I* Counter-Memorial Canada, ¶ 455. See also ¶ 457. [<u>emphasis</u> added].
[531] *Windstream I* Counter-Memorial Canada, ¶¶ 483-485 [<u>emphasis</u> added].
[532] Memorial on the Merits, ¶ 255.

2019, "[g]iven the new govt messages on wind power I don't think it's about doing studies anymore."[533]

380. There can be no credible basis for refusing to advance the research that was the pretense for the Moratorium more than a decade ago and was a key pillar of Canada's position before the *Windstream I* tribunal. The lack of rationale contributes to the arbitrariness of the conduct and the circumstances that led to the termination of the FIT Contract.

381. The only purported rationale provided by Canada for Ontario's deliberate decision not to intervene is that Ontario decided not to interfere with WWIS' contractual relationship with the IESO.[534] There are two flaws with this argument.

382. First, the IESO was the contractual counterparty but not the entity that put the Moratorium in place or the one that promised Windstream that the FIT Contract would be insulated from the impacts of the Moratorium. Indeed, as Windstream explained in its December 15, 2016 letter to MEI asking for a meeting, "[the] ongoing moratorium is not within the sphere of the IESO's responsibility or power to resolve" and as such a meeting alone with the IESO would not be productive in achieving a resolution, "which is why we wrote to your office…"[535] Windstream never got a substantive response beyond a cursory refusal to meet.

383. The *Windstream I* tribunal already found that Ontario's failure to direct the IESO in the negotiations with Windstream was conduct contributing to a breach of Article 1105. It did not accept that there was no obligation for Ontario not to act because it was not the contractual counterparty.[536] That remains true today.

384. Second, in any event, this argument does not genuinely reflect the reality of Ontario's relationship with the IESO. Ontario *does* regularly intervene in contractual matters involving the IESO. Windstream was treated differently from others, highlighting the arbitrary nature of its

[533] **C-2219**, Email to Pauline Desroches from Kevin Edwards – "Re: For Approval Revised: Proposed Project List & Information Requirements and Time Management Regulations under the Impact Assessment Act" (May 16, 2019).
[534] Canada's Counter-Memorial on the Merits, ¶ 207.
[535] **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).
[536] **C-2040**, *Windstream I* Award, ¶ 379.

conduct. There are numerous examples where the Ontario Government inserted itself into a contractual relationship and directed the IESO what to do:

a) As Mr. Killeavy explains in his witness statement, and as set out in the Memorial, the Minister of Energy has previously issued directives to the IESO in respect of its contractual relationships on a number of occasions. The Memorial sets out over ten such examples. The Minister has issued formal directives to extend timelines for projects under certain contracts, to negotiate and enter into contracts with specific parties with respect to specific projects, and to terminate contracts for the procurement of electricity.[537]

b) In addition to the Minister of Energy's formal directive power, the Minister also exercises significant control over the IESO through his or her informal control powers.[538] As Mr. Killeavy explains, the Minister has instructed the IESO to undertake certain actions as it relates to a contractual counterparty without issuing a formal directive, such as informal directives to terminate and/or renegotiate the terms of a power purchase agreement.[539] This is consistent with the evidence of Mr. Smitherman, a former Minister of Energy.[540] In each of their respective witness statements, Messrs. Killeavy and Smitherman provide examples where the Minister of Energy used informal control powers to direct the IESO to make changes to power purchase agreements, including TransCanada, Greenfield South, Bruce Power, among others.[541]

c) In her expert report, Ms. Powell confirms this factual evidence and concludes that "Ontario has previously inserted itself in the IESO's contractual relationships and has both acted unilaterally and directed the IESO to amend, cancel and even move

[537] Memorial on the Merits, ¶ 342; CWS-Killeavy.
[538] CWS-Killeavy, ¶ 11(b).
[539] CWS-Killeavy, ¶ 20. As an example involving Windstream, prior to signing the FIT Contract, the OPA rejected Windstream's request to extend the COD in its FIT Contract from four years to five years. The Minister of Energy's Chief of Staff requested that the OPA make that amendment and then the OPA did so.
[540] CWS-Smitherman, ¶ 13.
[541] Memorial on the Merits, ¶ 353.

> energy projects. Ms. Powell notes that "directing the IESO to amend the FIT Contract, whether formally or informally, would not have been exceptional."[542]

385. Canada has not responded to this factual and expert evidence. It has put forward no fact witness statements from the Ontario Government. Its one fact witness, Mr. Lyle, is with the IESO and yet he does address this in his witness statement. Despite such evidence, Canada purports to claim in its Counter-Memorial that MEI's refusal to meet with Windstream was because it did not want to interfere with the IESO's contractual relationships.[543] Without a witness statement, it has no evidence to support this position, nor can it address this bald argument's inconsistencies with the evidence from Michael Killeavy, George Smitherman and Sarah Powell. In the absence of any such evidence, Canada's argument should be rejected.

386. There is no legitimate rationale for Ontario's decision not to intervene and to create circumstances leading to the termination of the FIT Contract. The conduct is arbitrary and grossly unfair, particularly given the Project's value to Ontario as a green energy project that should contribute to the economy, the workforce and, of course, Ontario's energy supply deficit.

387. ***Ontario's Obligation to Cease Internationally Wrongful Conduct***. In its Counter-Memorial, Canada argues that there was nothing "untoward" about its refusal to deal with Windstream and to implement a policy of refusing to intervene in Windstream's negotiations with the IESO. It claims it had no obligation to act to "insulate" Windstream from the Moratorium.[544]

388. Windstream disagrees that Canada had no obligation to act. Canada claims that even though its conduct was already found to violate Article 1105, it essentially did not have to do anything to change its conduct going forward, arguing that the *Windstream I* tribunal had no power to obligate Ontario to act.[545] This ignores the widely accepted rule of customary international law that a State is required to cease an ongoing breach of its international law obligations. Article 30

[542] CER-Powell-3, ¶¶ 65-66. [emphasis added].
[543] Canada's Counter-Memorial on the Merits, ¶ 207.
[544] Canada's Counter-Memorial on the Merits, ¶¶ 206-207.
[545] Canada's Counter-Memorial on the Merits, ¶ 206.

of the UN Articles on the Responsibility Articles states "[t]he State responsible for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing."[546]

389. The obligation to cease a continuing breach has been recognized by multiple tribunals, including in *Mobil II*,[547] where Canada advanced a similar argument to the one advanced here: that it was not required to remove a measure which had been found to violate NAFTA Chapter 11. The tribunal rejected this argument, finding that, while the NAFTA "confers no power on a Chapter Eleven tribunal to order that an offending measure be repealed or that it cease to be enforced,"[548] states are still under a continuing obligation not to maintain measures that offend the NAFTA:

> The Tribunal considers that, as a matter of general international law the position is quite straightforward. NAFTA Article 1106(1) prohibits Canada from imposing or enforcing measures which are contrary to its terms. That obligation is a continuing one and, like any treaty obligation, must be performed in good faith. Once a Chapter Eleven tribunal found that the imposition and enforcement of the 2004 Guidelines was contrary to Article 1106, it is difficult to see how Canada could discharge its duty to perform its obligations under Article 1106 in good faith while still enforcing the Guidelines. That conclusion is reinforced by the ILC Articles on State Responsibility, Article 30 of which provides that a State which is responsible for an internationally wrongful act is under an obligation to cease that act if it is a continuing one.[549]

390. In this case, by continuing the course of conduct that gave rise to a finding of liability under Article 1105 in *Windstream I,* Ontario has continued to breach its obligations to treat Windstream fairly and equitably. The fact that the tribunal in *Windstream I* has already issued an Award which found such a breach does not, as Canada appears to suggest, provide a licence to Ontario to continue the course of conduct that led to that breach. To the contrary, the fact that Ontario repeated the conduct that the tribunal in *Windstream I* found gave rise to a breach of the NAFTA only underscores the arbitrary and unfair character of Ontario's conduct.

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[546] **CL-206**, U.N. Articles on the Responsibility of States for Internationally Wrongful Acts, Dec 12, 2001, Article 30.
[547] **RL-110**, *Mobil II*, ¶ 165. See also **RL-070**, *LG&E Energy Corp. et al v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007, ¶ 85 (emphasis added); **CL-181**, *Case Concerning Military and Paramilitary Activity in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment (June 27, 1986), p. 149 (¶ 292(12)); **CL-182**, C*ase Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment (May 24, 1980), ¶¶ 77-78 and 95(1).
[548] **RL-110**, *Mobil II*, ¶ 164.
[549] **RL-110**, *Mobil II*, ¶ 165. [emphasis added].

391. ***Ontario's Treatment of Windstream was Inconsistent with its Treatment of Others***. The arbitrariness and gross unfairness of Ontario's conduct is further underscored by the differential way it treated Windstream compared to other FIT Contract and energy sector proponents. As set out above, Ontario regularly interjects itself into other contractual relationships and directs the IESO accordingly. Canada argues that Article 1105 does not apply to discrimination claims outside of conduct involving sectional, racial, gender or religious prejudice.[550] This limitation on the type of discrimination that can found an FET claim is inconsistent with the case law.

392. It is well-recognized that discrimination violates the FET standard, even in the absence of racial, gender, religious or sectional prejudice.[551] In *Joshua Dean Nelson v. Mexico*, the NAFTA tribunal found that under the FET standard, discrimination exists if the State willfully targets the investor. To determine whether targeting has occurred, tribunals look at whether there is a legitimate justification for the targeting.[552] As explained by the tribunal in *Saluka v. Czech Republic*, "State conduct is discriminatory if (i) similar cases are (ii) treated differently (iii) and without reasonable justification."[553]

393. ***Windstream is Not Responsible for the Conditions Created by Ontario***. In its Counter-Memorial, Canada purports to hold Windstream responsible for the continuation of the "legal and contractual limbo" following the *Windstream I* Award. It claims that but for the Ontario Application commenced on March 27, 2017, the IESO would have terminated the FIT Contract sooner and so it is not responsible for any "contractual limbo" after that date.[554]

394. This is a puzzling submission. WWIS commenced the Ontario Application because of Ontario's inaction and refusal to intervene. In light of the termination right that became effective on May 4, 2017, WWIS sought to protect its rights. The IESO agreed not to exercise its termination right pending the Ontario Application. Then, in the fall of 2017, the IESO agreed to the

[550] Canada's Counter-Memorial on the Merits, ¶ 210.
[551] See **CL-164**, *Quiborax*, ¶ 292; **CL-080**, *Saluka*, ¶ 313; **CL-040**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) ("*CMS v. Argentina*"), Award, 12 May 2005, ¶ 290; **CL-180**, *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India*, (UNCITRAL, PCA Case No. 2016-7), Award (December 21, 2020), ¶1725.
[552] **RL-183**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States* (ICSID Case No. UNCT/17/1) Final Award, 5 June 2020, ¶¶ 351-352
[553] **CL-080**, *Saluka*, ¶ 313
[554] Canada's Counter-Memorial on the Merits, ¶ 208.

Adjournment Agreement whereby it made the Termination Decision on February 20, 2018 but also agreed that the Termination Decision did not take effect while the application was pending. Canada's mischaracterizations about the timing and steps in the Ontario Application are already addressed at paragraphs 123 to 131 above. WWIS did nothing inappropriate or improper in seeking to protect its rights and the IESO entered into those agreements about the timing of its Termination Decision freely and having received legal advice.

2. Ontario Breached Windstream's Legitimate Expectations

395. In determining whether there was a breach of the FET standard, it is relevant to consider whether a state has breached an investor's legitimate expectations arising from specific commitments made to the investor to induce the investment. On this, Canada and Windstream seem to agree.[555]

396. Canada argues that Windstream improperly relies on "old promises" that were litigated in the *Windstream I* proceeding and on representations Canada made during the proceeding, rather than on representations made after the *Windstream I* Award. Canada claims that nothing changed after the Award to give rise to a reasonable belief that the Project would proceed.[556] Canada's attempt to dismiss Windstream's expectations and the representations made by counsel for Canada itself during the *Windstream I* Award should be dismissed.

397. First, as set out at paragraphs 242 to 245 above, Canada provides no basis for its assertion that Windstream cannot rely on the promises made in 2011. They are part of the factual background, although the impugned measures relate to conduct that arose after the *Windstream I* Award. Windstream submits that those promises did not evaporate by virtue of the *Windstream I* Award. The question is how these background facts contribute to the allegations that the new measures, which post-date the Windstream I Award, breach the NAFTA.

398. Second, these earlier promises were entirely consistent with the representations that were made during the *Windstream I* arbitration. Canada succeeded in part in *Windstream I* on the basis

[555] Canada's Counter-Memorial on the Merits, ¶ 213. See **CL-064**, *Mobil Investments Canada and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4, Decision on Liability and Principles of Quantum, 22 May 2012, ¶¶ 152-171; **CL-134**, *Bilcon*, ¶¶ 446-454; **CL-091**, *Waste Management II*, ¶ 98.
[556] Canada's Counter-Memorial on the Merits, ¶¶ 216, 218.

of its arguments that the Moratorium was temporary and the Project had a future. It was on that basis that an expropriation was not found and damages for the loss of the full investment were not awarded. Canada cannot now claim that these representations cannot be relied upon.

399. Following the *Windstream I* Award, Windstream felt optimistic about the Project. As set out at paragraph 58 above, this optimism was not just based on these earlier promises and representations, but also public statements by the Ontario Government following the Award that offshore wind research would soon be "finalized" and the Project could still be built. In addition, the IESO did not return the $6 million security credit provided. In light of all of this, Windstream expected that the Project could proceed. This expectation is supported by Windstream's contemporaneous documents.[557]

400. Ontario's refusal to even meet with Windstream to discuss the FIT Contract is inconsistent with these legitimately held expectations. Windstream does not allege that this alone gives rise to a breach of the FET standard. It is, however, part of the context of understanding why Ontario's conduct was arbitrary, grossly unfair, and nontransparent.

PART FIVE – DAMAGES AND INTEREST

401. Windstream is entitled to damages to compensate it for the loss it sustained because of Ontario's breaches of the NAFTA. The Secretariat Report calculates the economic losses suffered by Windstream, as of the date of the breach, plus pre- and post-award interest.[558] The Secretariat Report quantifies the damage caused by the NAFTA breaches to be between CAD $291.4 million and $333 million as of February 18, 2020 (the date of the cancellation of the FIT Contract), plus applicable interest, costs and taxes.[559] This calculation is net of the CAD $25,182,900 Windstream received pursuant to the *Windstream I* Award as compensation for Canada's prior failure to afford fair and equitable treatment to Windstream.[560]

[557] See ¶ 60 above.
[558] CER-Secretariat, ¶¶ 9.1-9.6, 10.1. Windstream is entitled to the FMV of its investment as of the date of the breach or as of the date of the award, whichever is highest. Secretariat can update its report at a later date to reflect this alternative valuation date.
[559] CER-Secretariat, ¶¶ 10.1-10.3.
[560] CER-Secretariat, ¶¶ 4.26, 5.4(ii).

402. Canada raises two related threshold arguments on the issue of causation. First, it suggests that any loss suffered by Windstream was caused by events that pre-date the *Windstream I* Award. Second, it suggests that Windstream was already fully compensated for its losses by virtue of the Award in *Windstream I*. Both arguments repeat Canada's inaccurate jurisdiction and liability arguments and overlook the conclusions of the *Windstream I* tribunal and the events that have taken place since the Award. Both should be dismissed, for the reasons set out above.

403. On the issue of quantifying Windstream's damages, none of the criticisms put forward by Canada's expert, Dr. Guillet, undermine Secretariat's conclusions about the value of the Project. Although Dr. Guillet attempts to undermine Secretariat's DCF analysis, most of his criticisms are general in nature (suggesting that assumptions are "optimistic", "aggressive", or "low", without providing a credible explanation for that opinion) and unsupported by any evidence.

404. Instead of providing his own DCF analysis, Dr. Guillet provides a standalone, cherry-picked comparables analysis which ignores the specific features of the Project and instead lumps projects into two categories: "early stage" and "late stage." None of the projects that he relies on as "comparable" to the Project had the revenue certainty that the Project did, despite the fact that Dr. Guillet agrees that this is the "single most important" factor in financing renewable projects.[561] Dr. Guillet also relies on projects that significantly pre-date the Project's valuation date, including projects relied upon for his opinion in the *Windstream I* proceedings, despite the fact that he has acknowledged previously that the offshore wind industry has advanced significantly since that time, and offshore wind valuations have increased.[562] For example, in one presentation, Dr. Guillet noted that, as of April 2019:

a) there was "decent, if regularly shrinking, premium for construction risk and early development (permitting) risk";

b) the perception of offshore wind risk was "improving as experience and track record builds up";

[561] **C-2464**, Day 4- Confidential Condensed Transcript of the Arbitration Hearing of *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (February 18, 2016) (Confidential).
[562] CER-Secretariat-2, ¶¶ 4.5-4.11.

c) "the debt market has shown it was ready to take construction risk [for offshore wind projects] on attractive terms (leverage, pricing, covenants)";

d) the overall size of greenfield debt transactions in the offshore wind industry had increased substantially since 2011/2012;

e) offshore wind debt financing "ha[d] now become mainstream"; and

f) there was a "record number of projects funded [in the previous] year", which included "several large greenfield projects."[563]

405. Further, Dr. Guillet has rested his entire opinion on this flawed comparables analysis – he has not conducted any other analysis to confirm his opinion, despite acknowledging that it is typical for market participants to conduct "secondary" confirmatory analyses.[564] By contrast, Secretariat and Mr. Tetard have prepared three separate principal analyses (two DCF approaches and one comparables approach) which confirm the value that the Project would have had but for Canada's breach of the NAFTA, which are themselves supported by several other analyses confirming the reasonableness of Secretariat's analysis. Their approach should be preferred over Canada's standalone comparables analysis.

I. THE STANDARD OF COMPENSATION UNDER NAFTA CHAPTER 11

406. Canada and Windstream agree that the purpose of compensation is to put the Claimant in the position that it would have been absent the breach, and, as set out in *Chorzów Factory*, "as far as possible, wipe out all of the consequences of the illegal act and re-establish a situation which would, in all probability, have existed if that act had not been committed."[565]

407. Canada claims that the appropriate valuation date should be the date of the alleged breach.[566] While, as set out in Windstream's Memorial, it is well-established that the investor is entitled to choose as a valuation date either the date of the breach or the date of the award in cases

[563] CER-Secretariat-2, ¶ 4.7.
[564] RER-Guillet-1, ¶¶ 181-183.
[565] **CL-034**, *Chorzow Factory*, p. 47; Canada Counter-Memorial on the Merits, ¶ 226.
[566] Canada Counter-Memorial, ¶¶ 231-232.

of unlawful expropriation,[567] that principal need not be tested in the abstract, as the parties have agreed that the applicable valuation date is the date of the breach, which is the date on which Secretariat has based its analyses (February 18, 2020).

II. CANADA'S NAFTA BREACHES CAUSED WINDSTREAM'S LOSS

408. Canada makes two related threshold arguments about whether Ontario's conduct caused any loss to Windstream. First, it suggests that the cause of any loss suffered by Windstream related to events that pre-date the *Windstream I* Award. Second, it suggests that Windstream was already fully compensated for its losses by virtue of the Award in *Windstream I*.[568] Both these threshold arguments repeat Canada's erroneous jurisdiction and liability arguments, which is set out in detail above ignore key components of the *Windstream I* Award and the events that have transpired since the Award. These arguments should be dismissed for the same reasons.

A. The Cause of Windstream's Loss was the Termination of the FIT Contract, Which Occurred Because of Conduct that Post-dates the *Windstream I* Award

409. Canada argues that Windstream has not demonstrated how any specific measures it alleges caused the specific harm claimed. It claims there is no new damage to the investment beyond what was previously awarded.[569] Canada's argument is meritless. As set out in the Liability Section above, Windstream's evidence amply demonstrates that Ontario's post-Award conduct gave rise to the termination of the FIT Contract and the loss of the entirety of Windstream's investment. The *Windstream I* tribunal could not have determined the quantum of those damages, since these measures and facts arose after the *Windstream I* Award.

410. Canada has provided no other basis to challenge the causality between the impugned conduct and the resulting losses. Canada has not seriously contested the evidence from Windstream's technical experts that the Project was "technically feasible and could be developed

[567] Windstream's Memorial, ¶¶ 658-660; **CL-093**, *Yukos Universal Limited (Isle of Man) v. the Russian Federation* (PCA Case No. AA 227) Final Award, 18 July 2014, ¶ 1763; **CL-021**, A*DC 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, ¶¶ 496-497; **CL-082**, *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8) Award, 6 February, 2007, ¶ 353; **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, ¶ 514.
[568] Canada's Counter-Memorial on the Merits, ¶¶ 5, 16, 190, 220.
[569] Canada Counter-Memorial on the Merits, ¶ 233.

and constructed within the timelines specified in the FIT Contract" but for Ontario's wrongful conduct. It has put forward no engineering evidence to refute those conclusions. In the opinion of Secretariat, Windstream's quantum experts, Windstream's losses arising from Canada's NAFTA breaches are between $291.4 million and $333 million as of the date of the termination of the FIT Contract.[570]

B. Windstream Has Not Been Compensated for its Losses

411. Canada also argues that Windstream is not entitled to damages because it has already been compensated by virtue of the *Windstream I* Award.[571] This is simply a repackaging of its *res judicata* and liability arguments. It fails for the same reasons that those arguments fail. As set out at paragraphs 216 to 223 above, the *Windstream I* tribunal recognized that if the FIT Contract were renegotiated, there was value in the FIT Contract that could be created and was not available to Windstream at the time of the *Windstream I* Award. It therefore did not award Windstream damages for the full value of its investment.

412. In its Counter-Memorial, Canada suggests that Ontario was free to continue the conduct that already gave rise to the breach of Article 1105(1) because it did not cause any further loss to Windstream.[572] This is incorrect. Windstream's expert evidence from Secretariat quantifies the loss that Windstream suffered by virtue of Ontario's wrongful conduct as between $291.4 and $333 million.[573] Secretariat's quantification is not duplicative of the amount awarded to Windstream by the *Windstream I* tribunal. It reflects the value of Windstream's investment as at the date of the breach, when Windstream's FIT Contract was terminated (February 18, 2020). Indeed, as Canada acknowledges, the amount of damages of CAD $25,182,900 awarded to Windstream in the *Windstream I* Award have been deducted from Secretariat's calculation.[574]

413. The facts on the ground further support the reality that there was value in the Project beyond what was awarded by the *Windstream I* tribunal. As Mr. Mars explains, a number of credible investors expressed serious interest in the Project, if it were permitted to proceed following the

[570] CER-Secretariat, ¶ 2.40; CER-Secretariat-2, ¶¶ 2.7, 4.44.
[571] Canada Counter-Memorial, ¶¶ 245, 247, 255.
[572] Canada's Counter-Memorial on the Merits, ¶ 245.
[573] CER-Secretariat, ¶ 2.40; CER-Secretariat-2, ¶¶ 2.7, 4.44.
[574] Canada's Counter-Memorial on the Merits, ¶ 287.

Windstream I Award.[575] While Canada is dismissive of this evidence as "limited outreach," it reflects real-world interest in the Project, even in the face of the continued application of the Moratorium to the Project (and not the but-for scenario in which the parties agree this Tribunal must value Windstream's loss).[576]

414. As Mr. Mars sets out in his Fourth Witness Statement, after the tribunal in *Windstream I* released its Award, he was approached by several major renewable companies who were "interested in partnering with the Windstream to develop the Project after the moratorium was lifted."[577] It was only after these unsolicited expressions of interest that Mr. Mars began the process of engaging Key Banc to facilitate a process by which Windstream could evaluate potential partners for the Project. Canada agrees that, in order to fully compensate Windstream, the Tribunal must assess the fair market value of the entire investment: had Windstream been fully compensated for its investment by the Award in *Windstream I* and the FIT Contract been entirely devoid of any value as Canada suggests, it is hard to imagine that there would have been any such interest in the market.[578] Given this, Canada's dismissal of this real-world evidence is not credible.

III. THE CLAIMANT'S APPROACH TO DAMAGES REFLECTS THE PROPER VALUATION OF THE PROJECT AS AT FEBRUARY 18, 2020

415. As set out above, Canada and Windstream agree that damages for the substantial deprivation of the entire investment (an expropriation) are based on the fair market value of the entire investment. Similarly, Canada and Windstream agree that fair market value may also be appropriate in the case of a breach of Article 1105 where the breach caused the total loss of the investment.[579] That fair market approach to value is appropriate here, since there can be no dispute that, after the termination of Windstream's FIT Contract, its investment now has no value.

[575] CWS-Mars-3; CWS-Mars-4.
[576] Canada's Counter-Memorial on the Merits, ¶ 180.
[577] CWS-Mars-4, ¶ 11.
[578] Canada's Counter-Memorial on the Merits, ¶ 228.
[579] Canada's Counter-Memorial on the Merits, ¶ 228.

A. Secretariat's DCF Analyses Most Accurately Reflect the Quantum of Windstream's Losses

416. As Secretariat explains, the most appropriate method to determine the value Windstream's investment would have had, but for the NAFTA breaches, is the DCF method.[580] Secretariat explains in its first report that there are several advantages of employing a DCF method. In particular, they note:

a) Unlike a comparables analysis, which determines value by identifying investments with characteristics similar (but not identical) to the investment being valued, a DCF approach is the only approach that can capture the specificities of a project.[581] By contrast, as Dr. Guillet acknowledges, "it is fair to say that comparables provide only an approximation" of the value of the project being considered.[582]

b) A DCF analysis best reflects the price that would be negotiated by prudent arms' length notional buyers and sellers because it is the approach that market participants use when valuing a Project. In other words, a DCF approach best approximates the real-world fair market value of an investment.[583] This is important because, as set out above, the appropriate approach to valuing the Claimant's damages where the value of the entire investment has been destroyed by the state's conduct is to assess the investment's fair market value.

417. Canada argues that a DCF approach is inappropriate because it is an "early stage" project, as classified by Dr. Guillet, and there are therefore too many uncertainties to value the project using a DCF model. Dr. Guillet's approach to categorizing projects into "early stage" or "late stage" is overly simplistic, and ignores the critical question, which is whether the project in question possesses characteristics that render a DCF analysis a reliable indicator of its fair market value. As Secretariat explains, different phases of a project are often completed in different orders

[580] CER-Secretariat, ¶¶ 2.22, 5.25.
[581] CER-Secretariat, ¶ 6.48.
[582] RER-Guillet-1, ¶ 176.
[583] CER-Secretariat, ¶ 2.22.

in different jurisdictions, meaning that it is misleading to lump projects into "early stage" or "late stage" buckets:

> [D]epending on the country, and the regulatory framework within each country, the above noted elements that compose a 'shovel-ready' project are gathered in different orders. In some markets, site control comes first, in other markets, grid access comes first, and in other markets, the PPA comes first. It is also important to note that a project that has secured a PPA (and which is sufficiently attractive economically) typically completes the development phase.[584]

418. That the distinction between "early stage" and "late stage" projects is overly simplistic is underscored by the fact that Dr. Guillet, himself, appears to have miscategorized projects based on his own criteria. For example, several of the projects referenced in his summary of "late stage" projects did not have permits or grid access at the respective transaction dates, despite Dr. Guillet's suggestion that a project must have obtained both in order to be considered a "late stage" project.[585]

419. Instead, in determining whether a DCF approach will provide a reliable valuation, it is more useful to look at a project's specific characteristics. In determining that the Project met this threshold, Secretariat noted that the Project possessed what Dr. Guillet agreed was the "single most important factor" in financing renewable projects: price certainty.[586] As Secretariat notes:

> It is a widely held view within the offshore wind industry that the most important consideration (out of the four milestones noted above) is a project's revenue regime, i.e., a confirmation of the guaranteed price that it would receive for the sale of its power. An offshore wind project without revenue certainty is simply not comparable to a project that has already obtained revenue certainty, such as the FIT Contract obtained by Windstream. This is because it is only once a project has obtained revenue certainty, that it can be valued with a reasonable degree of certainty.[587]

420. Contrary to Dr. Guillet's assertion, the absence of complete site control does not render the Project in too early a stage to employ a DCF approach. In Mr. Tetard's experience, potential buyers would instead consider the project-specific path to obtaining site control, and whether there is any

[584] CER-Secretariat, ¶ A2.12.
[585] CER-Secretariat-2, ¶¶ 5.13-5.14.
[586] **C-2464**, Day 4 - Confidential Condensed Transcript of the Arbitration Hearing of *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (February 18, 2016) (Confidential), page 194; Secretariat-2, ¶ 5.8(i).
[587] CER-Secretariat-2, ¶ 5.8(i).

competition for the site. In this case, as Secretariat notes, "the Project had priority over all other applications to lease the crown lands that the Project would require. Therefore, Windstream had an exclusive and priority position secured on the site that the Project would be built on." As a result, Secretariat considers risks around site control to be immaterial, in the absence of Ontario's wrongful conduct.[588]

421. Ultimately, although Secretariat disagrees that the Project should be labelled "early stage" (as that term is used by Dr. Guillet),[589] the key question for this Tribunal in determining whether a DCF approach is appropriate is whether the Project has characteristics that make DCF a reliable indicator of the fair market value of Windstream's investment. In Windstream's submission, that threshold is amply met in this case, particularly in light of the price certainty established by the FIT Contract.

B. The Fact that the Project Faced Risks Does Not Make a DCF Methodology Inappropriate

422. In conducting its DCF analysis, Secretariat specifically accounted for future risks. Secretariat's evidence relies on the conclusion set out in the Wood Report that, as at the Valuation Date, the Project was "technically feasible and could be developed and constructed within the timelines specified in the FIT contract … but for the imposition of the moratorium and cancellation of the FIT contract."[590] However, Secretariat also considers future risks by identifying an appropriate risk discount rate.

423. ***Windstream's Technical Experts Have Accounted for Schedule Risks.*** Canada suggests, in error, that the Project is not analogous to cases where the DCF methodology was used. In particular, it cites the example of the *Oil Company Sapphire* Award and suggests that Windstream "cannot prove that 'its project would have been more likely than not to become operational absent [Ontario's] conduct.'"[591] This ignores the extensive technical evidence submitted by Windstream – to which Canada has not responded through evidence of its own – which concluded that the

[588] CER-Secretariat-2, ¶ 5.8(ii).
[589] CER-Secretariat-2, ¶ 5.12.
[590] CER-Wood, pp. 2-3.
[591] Canada's Counter-Memorial at ¶ 263, citing **CL-072**, *Oil Company Sapphire International Petroleum, Ltd. v. National Iranian Oil Company* (35 ILR (1967) 136) Award, 15 March 1963.

Project was technically feasible and would have been built in accordance with the timelines specified by the FIT Contract but for Ontario's breaches.[592] Having decided not to put forward *any* evidence addressing this issue, Canada cannot contest the conclusions of Windstream's technical experts.

424. Despite having put in no evidence challenging the conclusions of Windstream's technical experts, Canada calls into question certain of those conclusions. For example, Canada calls the Wood Group's detailed 58-month schedule "entirely unreasonable", relying on two paragraphs from Dr. Guillet's report where he questions, but does not address in detail, the schedule set out in the Wood Report.[593] As both Secretariat and Windstream's technical expert, Mr. Irvine, explain, this argument stems from a fundamental misapprehension of the Wood Report:

a) Dr. Guillet's criticisms of the schedule ignore the fact that "float" (i.e., time buffer) is built into each task in the Schedule. Dr. Guillet's criticisms of the Schedule reveal that he does not appear to have read the Schedule in any detail (if at all), and instead has relied exclusively on the summaries of the Wood Report set out in the Secretariat Report.

   For example, Dr. Guillet criticizes the schedule set out in the Wood Report for "putting together 'Design, Procurement and Construction' as a single task", when in fact the Wood Schedule breaks this category down into 94 separate, successive tasks. It appears that Dr. Guillet obtained his misapprehension that Design, Procurement and Construction were one task from reviewing only the summary table set out in the Secretariat report.[594]

   Similarly, Dr. Guillet criticizes the timetable as internally inconsistent because "it has installation lasting until March 2025 and COD taking place in December 2024, whereas it seems impossible to have COD before the end of installation."[595] As Secretariat notes, Appendix B of the Wood Report provides that "installation" is

[592] CER-Wood, pp. 2-3.
[593] Canada's Counter-Memorial, ¶ 266, citing RER-Jerome Guillet, ¶¶ 34, 123.
[594] CER-Secretariat-2, ¶ 4.30(i).
[595] RER-Guillet-1, ¶ 128.

completed by November 2024, before COD. The "end date" for installation noted in Figure 2-2 of Secretariat was simply the end date of the winter season during which installation would be carried out. Appendix B of the Wood Report (and not simply the tables in the Secretariat Report) makes clear that there is no internal inconsistency in Wood's schedule.[596]

b) Dr. Guillet argues that future risks are enhanced by what he calls the "cliff-edge" timelines set out in the FIT Contract. He suggests that in the absence of significant time buffers, an investor would not be willing to accept these "cliffs." This argument dismisses, without any credible evidence, the evidence of Windstream's technical experts that the Project was technically feasible and could be built in accordance with the deadlines set out in the FIT Contract, but for Canada's NAFTA breaches. Indeed, in his reply report, Mr. Irvine identifies two projects, Nysted and Rødsand II, which were installed in the Baltic Sea in similar metocean conditions using gravity-based foundations and were completed on similar schedules (19 months for both projects). In Mr. Irvine's opinion, there is no reason why lenders would seek an additional time buffer.[597]

By contrast, the anecdotal comparables utilized by Dr. Guillet to make his point about risks to the Schedule are not, in fact, comparable to the Project: these projects "are 1.5 to 24 times larger than WIS, are located largely in the North Sea in significantly deeper water than WIS…and are up to 130km from shore."[598] In any event, this argument ignores both the float built into the Wood Schedule and the 18-month extension period that can be purchased under the FIT Contract, resulting in a 19-month time buffer between the date when Windstream's experts assessed the Project would reach COD and the date that would be considered a supplier event of default under the FIT Contract.[599]

[596] CER-Secretariat-2, ¶ 4.30(ii).
[597] CER-Two Dogs-2, s. 3.4, 3.7.
[598] CER-Two Dogs-2, s. 4.8.
[599] CER-Secretariat-2, ¶ 5.103; CER-Two Dogs-2, ss. 3.3, 3.4, 6.4.

c) Canada also suggests that Windstream had "no experience" developing offshore wind projects, which they suggest further increases the risk to the Project. This ignores (1) the extensive experience within Windstream in the renewables sector, including the fact that Mr. Baines was responsible for developing a 200MW onshore wind facility only 5km northeast of the Project site, which became operational in 2009;[600] (2) the extensive capital support from Windstream's investors;[601] and (3) the involvement of technical experts like Wood Group (previously SgurrEnergy), who Dr. Guillet testified before the *Windstream I* tribunal are one of the "top technical experts in the field" of offshore wind, "highly credible", and "one of the two [engineering firms] that have been accepted by lenders to do the role of lender's technical advisor". Indeed, Dr. Guillet noted that SgurrEnergy was involved in approximately half of the projects worked on by Green Giraffe.[602]

425. Windstream's experts do not agree that any adjustments to the schedule are necessary, or that any adjustments to its valuations are warranted. In the alternative, Secretariat has included two alternative sensitivity analyses to address Dr. Guillet's concerns:

a) Scenario One assumes a one-year delay to COD, which addresses Dr. Guillet's assertion that the schedule is "aggressive." All else being equal, this would result in a $31.2 million to $44.9 million reduction to the value of the Project.[603]

b) Scenario Two responds to Dr. Guillet's argument that the initial six-month period between the effective date of the FIT Contract (May 4, 2010), and the commencement of the force majeure on the Project (November 22, 2010), should be taken off from the five-year period used to determine the Revised MCOD. This argument does not have merit. The January 2025 Revised MCOD date already incorporated an initial six-month period between May 4, 2010 and November 22,

[600] CER-Secretariat-2, ¶ 6.112; CWS-Baines; CWS-Mars, pp. 42 to 55, and CWS-Mars 2 ¶ 77.
[601] CWS-Mars, pp. 42 to 55, and CWS-Mars 2 ¶ 77; CWS-Ziegler.
[602] **C-2464**, Day 4- Confidential Condensed Transcript of the Arbitration Hearing of *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (February 18, 2016) (Confidential), page 186-187.
[603] CER-Secretariat-2, ¶ 4.45.

> 2010 when the project was not under force majeure. Consistent with the evidence in the *Windstream I* proceedings, the calculation of the Revised MCOD included 185 days of additional *force majeure* that would result from the Project's REA being appealed to the Environmental Review Tribunal.[604] The Schedule set out in the Wood Report reflected a six-month period between when the REA appeal would commence (August 19, 2022), and the conclusion of the REA appeal and environmental review process (February 20, 2023).[605] Therefore, no adjustments are required to the MCOD. In any event, Scenario Two reflects the impact to Secretariat's damages conclusions if the adjustment to the Revised MCOD on account of the REA appeal was not incorporated. All else being equal, removing the adjustment to the Revised MCOD on account of the REA appeal would result in a $2.2. million to $3 million reduction to the value of the Project.[606]

426. ***Risks are Factored into the DCF Analysis.*** In any event, part of the strength of a DCF approach is that it expressly considers the fact that the Project faced future risks through a discount rate. Secretariat's reply report explains that the discount rate is integral to a DCF approach:

> …contrary to Dr. Guillet's comment that "…the discount rate is an outcome of other value assessments, and not a driver of valuation", the discount rate is the driver of a valuation exercise, and is dictated by the market. It is one of the key inputs in a valuation exercise, not an outcome of the exercise. Under the DCF method, the basic valuation formula calculates the present value of the project's expected cash flows as "the value, as of a specified date, of future economic benefits and/or proceeds from sale, calculated **using an appropriate discount rate**" [emphasis in Secretariat-2]. In other words, without the discount rate, there is no valuation calculation under the DCF methodology.[607]

427. Dr. Guillet wrongly suggests that Secretariat assumed that there would be no regulatory risk to the Project. This is false. As explained by Secretariat:

a) First, and fundamentally, Secretariat's approach does not assume that the Project would be free from risk: the regulatory risks that Dr. Guillet references are already

[604] *Windstream I* Reply Memorial ¶ 679.
[605] CER-Wood, Appendix B, p. 2.
[606] CER-Secretariat-2, ¶ 4.45.
[607] CER-Secretariat-2, ¶ 6.24.

accounted for in Secretariat's valuation. Secretariat addresses these risks in multiple ways: through the discount rate, the higher expected Internal Rate of Return (IRR) applied in Secretariat's transaction structuring approach, and the risk adjustment factor applied in the project stage risk adjustment approach, which reduces the net present value of the Project by 55% to 60% to reflect the Project's development stage risk.[608]

b) Its DCF approach relies on evidence from technical experts who concluded that the Project was technically feasible, including the Wood Report, which developed a Schedule for the Project that includes over three years to obtain all permits, and float for all aspects of the schedule.[609]

c) The "but-for" scenario in which Windstream's losses are assessed includes the assumption that Ontario would have dealt with Windstream in good faith and would not have subjected the Project to unreasonable regulatory delays. Assuming otherwise would allow Ontario to benefit from its own wrongdoing.[610]

428. ***Dr. Guillet's criticisms of Secretariat's Assumptions are Unfounded.*** In addition to raising a number of unfounded criticisms about the Wood Group's 58-month schedule, Dr. Guillet criticizes a number of the inputs to Secretariat's model. He does not, however, put forward his own DCF approach – as set out in more detail below, Dr. Guillet relies exclusively on a single comparables analysis. In each case, Dr. Guillet describes Secretariat's assumptions as "optimistic", "arbitrary", and "aggressive", but provides no alternative DCF model which would allow the Tribunal to test his criticisms.[611]

429. In any event, as Secretariat and Mr. Irvine note, the criticisms are without merit. For example, Dr. Guillet asserts that the CAPEX and OPEX assumptions adopted in Secretariat's DCF model are "too aggressive", relying on the Vineyard Wind project as his sole counter-example (which Mr. Irvine notes has several important distinguishing features from the perspective of

[608] CER-Secretariat-2, ¶ 6.41.
[609] CER- Secretariat-2, ¶ 6.39; CER-Two Dogs-2, s. 6.4.
[610] CER-Secretariat-2, ¶ 6.40.
[611] RER-Guillet-1, ¶¶ 34, 40, 44, 140, 141, 210, 228.

capital costs, including the metocean conditions, water depths, and proposed hub heights[612]), in addition to unspecified non-public information available only to Dr. Guillet.[613] Though Dr. Guillet relies extensively on such information, it is not evidence, offends the adversarial principle, and should be given no weight.[614] In contrast, Mr. Irvine's CAPEX assumptions were informed by: (1) data collected by 4C Offshore, which maintains a large database of information about offshore wind projects; (2) information provided by Wood Group, including information specific to the Project; and (3) a detailed cost build-up of the gravity based foundations proposed for WIS by COWI, based on over a decade of first-hand experience of designing this type of foundation for offshore wind facilities.[615] Similarly, Dr. Guillet makes the bald statement that Mr. Irvine's OPEX assumptions "optimistic" without citing any support for this view. By contrast, Mr. Irvine's OPEX assumptions were developed using inputs from the Wood Report, which relies on an assessment of site-specific characteristics, including the location of the Project in relation to other wind energy projects.[616] There is no evidence before the Tribunal that undermines the reasonableness of those assumptions.

430. Dr. Guillet's criticism of Secretariat's insurance cost assumptions are similarly unsupported: while Dr. Guillet advocates for an unsubstantiated personal "rule-of-thumb" to assess the appropriate insurance costs for the Project, the insurance costs estimated by Secretariat were based on actual price quotes from insurance brokers and considered the specific characteristics of the Project.[617] While Canada raises these criticisms in order to raise the spectre of uncertainty, these criticisms only serve to underline the fact that Dr. Guillet has not proposed an alternative valuation method that more accurately reflects Windstream's losses, nor (as set out below) has he appropriately considered and reflected the specific features of the Project in his comparables analysis.

431. ***The DCF Approach has Been Used in Cases Where Projects Involve Future Risk.*** Lastly, contrary to Canada's suggestion, there is ample precedent for the use of a DCF approach where

[612] CER-Two Dogs-2, s. 9.2.
[613] RER-Guillet-1, footnote 129.
[614] **CL-204**, *IBA Rules on the Taking of Evidence in International Arbitration* (December 17, 2020), Article 5(2)(e).
[615] CER-Two Dogs-2, s. 9.1.
[616] CER-Two Dogs-2, s. 10.1; CER-Secretariat-2, ¶ 6.68.
[617] CER-Secretariat-2, ¶ 6.72(i).

future risks exist. Indeed, tribunals have accepted the DCF methodology in a number of cases involving projects or companies that faced future risks, including *Gold Reserve v. Venezuela*,[618] *Lemire v. Ukraine*,[619] *Karaha Bodas Company v. PLN*,[620] *CMS Gas v. Argentina*,[621] *El Paso v. Argentina*,[622] and *Cargill v. Mexico*.[623] The DCF method has also been accepted in a number of recent awards against the Kingdom of Spain involving renewable energy facilities.[624]

432. In these cases, the fact that a project faced future risks did not render the DCF methodology inappropriate – instead, it factored into the discount rate. This makes sense, because it is how participants assess the fair market value of renewable projects in the real world. If there were no future risks, then the Project would be worth 100% of the present value of its future cash flows under the FIT contract, *i.e.*, several billion dollars. Secretariat's valuation of $291.4-333 million

[618] The tribunal applied the DCF methodology to determine the fair market value of the Project, even though it had yet to be constructed, did not have all required approvals and was subject to a change in project design: **CL-121**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID) Case No. ARB (AF) 09/1, Award, 22 September 2014, ¶¶ 762, 772, 780, 782.

[619] The tribunal applied the DCF methodology where the claimant had been unfairly denied broadcasting licenses. The tribunal recognized that this was a heavily regulated business and factored regulatory uncertainties into the discount rate: **CL-123**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, ¶¶ 244, 254, 280, 286, 296, 303, 305.

[620] The tribunal noted risks that might arise when developing the Project, such as "[p]ossible delays in the plant's construction and operation, actual availability of reserves in the quantities estimated by the Claimant, availability of the financing necessary for the project implementation at an acceptable cost." These risks were factored into the discount rate: **CL-124**, *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT.* PLN (Persero), ad hoc arbitration under UNCITRAL rules, Final award of 18 December 2000, ¶¶ 127, 134, 136.

[621] The tribunal recognized that it had to look 27 years into the future as part of its damages determination. But, it held that it was possible to arrive at rationally justified figures that would not be "arbitrary or analogous to a shot in the dark." The uncertainty of Argentina's future economic health was factored into the discount rate: **CL-040**, *CMS Gas*, ¶¶ 443-446.

[622] The tribunal applied the DCF methodology, but adjusted the discount rate to account for the additional risk stemming from the Argentine financial crisis: **CL-047**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, ¶¶ 718, 721.

[623] The tribunal discounted damages because there were difficulties in projecting the overall market for high fructose corn syrup, the claimant's market share, and the appropriate price of and demand for the syrup in light of the claimant's four-year absence from a competitive market: **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶¶ 444-445, 448.

[624] **CL-200**, *Eiser Infrastructure Limited and Energia Solar Luxembourg S.À R.I. v. Kingdom of Spain*, (ICSID Case No. ARB/13/36), Award (May 4, 2017), ¶ 465; **CL-199**, *Antin Infrastructure Services Luxembourg S.À.R.L. and Antin Energia Termosolar B.V. v. The Kingdom of Spain*, (ICSID Case No. ARB/13/31), Award (June 15, 2018), ¶¶ 579-580; **CL-201**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, (ICSID Case No. ARB/14/12), Award (August 2, 2019), ¶¶ 532-535; **CL-202**, *Renergy S.A R.L. v. Kingdom of Spain*, (ICSID Case No. ARB/14/18), Award (May 6, 2022), ¶¶ 782-788; **CL-203**, *AES Solar and others (PV Investors) v. Kingdom of Spain* (UNCITRAL, PCA Case No. 2012-14), Award, (February 28, 2020, ¶ 691.

appropriately accounts for the future risks, hence the substantially lower number than the value of future cash flows.

C. The DCF Approach is Industry Standard

433. Canada argues that the Tribunal should not adopt the DCF approach because that is not how market participants assess the fair value of an investment such as the Project. As Secretariat explains, this is inaccurate for projects with revenue certainty such as the Project. For example:

a) Mr. Tetard's experience as an equity investor in the offshore wind industry as at the Valuation Date demonstrates that, once a project has obtained revenue certainty, industry participants would value the Project using a DCF methodology. Mr. Tetard points to the acquisition of Deepwater Wind by Ørsted in 2018 in which he was involved and notes that, in that case, Ørsted used a DCF model to value all projects with a Power Purchase Agreement. By contrast, Mr. Tetard notes that projects within the Deepwater Wind portfolio that had no Power Purchase Agreement were valued using a market multiple.[625]

b) Dr. Guillet provides no support for his assertion that certain European offshore projects were valued using multiples. In any event, he fails to note the distinction between a settled revenue regime (which many of the European projects cited by Mr. Guillet had) and price certainty through a Power Purchase Agreement (which many of the European projects cited by Dr. Guillet did not have). In other words, operating within an established revenue regime does not provide investors with the same level of certainty as having the guaranteed revenue stream of a Power Purchase Agreement.[626]

c) In its Q-1 2022 Quarterly Brief, the public accounting firm KPMG notes that DCF is the "most often used method to estimate the value of a renewable energy project." The report notes that DCF captures "complexities such as reflecting Power Purchase Agreements ("**PPA**"), Feed-in-Tariffs ("**FiT**") and merchant price

[625] CER-Secretariat-2, ¶ 6.43.
[626] CER-Secretariat-2, ¶ 6.45.

exposure…in detail throughout the life of the project."[627] This is consistent with the approach adopted by significant investors in the renewable energy space: the public disclosures of Boralex, Brookfield Renewable Corporation, TransAlta, Northland Power and Enbridge indicate that they use a DCF model to value renewable energy investments.[628]

434. Ultimately, Dr. Guillet acknowledges that, even in cases where the project being valued does not have a firm revenue regime, a DCF approach is still used "as a secondary" or "ancillary valuation tool."[629] Despite this, Dr. Guillet has not prepared a DCF analysis to confirm his comparables analysis.

435. Unlike Dr. Guillet, who has exclusively relied on so-called comparables from several years before the Valuation Date, Secretariat has not simply relied upon a DCF calculation. It has also conducted a rigorous comparables analysis (and several other approaches which confirm the reasonableness of both its DCF and comparables analyses), which confirms the reasonableness of Secretariat's DCF approach. As Secretariat opines, the use of a comparables approach as a check on a DCF approach "more precisely capture[s]" project-specific characteristics than the use of a comparables approach alone.[630]

D. The Claimant's Comparables Approach Should be Preferred to Canada's Cherry-Picked Comparables

436. ***Secretariat's Analysis Confirms the Reasonableness of its DCF Valuation Through Multiple Avenues, Including a Comparable Projects Approach.*** Although, in Secretariat's view, the DCF methodology results in the most accurate estimate of the value of the Project, Secretariat has also undertaken additional market-based valuation methodologies to confirm the

[627] **C-2786**, KPMG quarterly brief, 17th edition, Q1 2022 entitled "Renewable energy valuation in the global energy transition" (January 2022), p. 8; cited in CER-Secretariat-2, ¶ 6.49.
[628] **C-2815**, Boralex Inc. 2022 Annual Report as of December 31, 2022 (February 24, 2023), p. 85, 91, 107, 118; **C-2808**, Brookfield Renewable Corporation 2022 Annual Consolidated Financial Statements and Notes (as at December 31, 2022 and 2021, and for the Years ended December 31, 2022, 2021 and 2020), pp. 5, 16 & 27; **C-2790**, TransAlta Renewables 2021 Annual Report entitled "Delivering Green Demand" (February 24, 2022), pp. 41 & 103; **C-2530**, Northland Power Report entitled "2022 Annual Report" (Undated), pp. 78 & 105; **C-2789,** Enbridge Report entitled "Bridge to a cleaner energy future – 2021 Annual Report" (February 11, 2022), pp. 37, 92 & 133.
[629] RER-Guillet-1, ¶¶ 181-183.
[630] CER-Secretariat-2, ¶ 6.55.

reasonableness of the DCF calculation contained in the Secretariat Report. These approaches, summarized at paragraphs 548 to 555 of Windstream's Memorial, include:

a) Comparable Projects Approach. Secretariat completed a market-based alternative valuation which determined value by identifying transactions proximate to the Valuation Date for suitably comparable projects.[631] Using project data from 4C Offshore, Secretariat identified ten appropriately comparable transactions involving offshore wind energy projects, having regard to (1) the date of the transaction; (2) the development stage of the project; (3) revenue clarity; and (4) the availability of reliable information on the project.[632] By contrast, Dr. Guillet simplistically shoe-horned projects into broad "early stage" or "late stage" categories, without regard to whether those early stage projects shared characteristics with the Project (such as revenue clarity through a PPA) that would tend to enhance its value.[633]

b) Once it identified appropriately comparable transactions, Secretariat calculated the price paid per megawatt acquired for each comparable project to obtain a benchmark range of price per megawatt value for the Project as at the Valuation Date. It then multiplied the Project's 297 MW capacity by the range of transaction multiples derived from the comparable transactions.[634] This approach resulted in a Project valuation of $284.7 million to $299.1 million (broadly consistent with the fair market value determined through Secretariat's two DCF approaches, $291.4 million - $333 million).

c) Offshore Lease Wind Transactions. Secretariat explains that the Project would have commanded a significantly higher sale price than that achieved in the lease transactions identified because it was significantly more advanced than these transactions and the Project already had a FIT Contract. However, lease transactions are still relevant in that they provide a floor to the value of the Project

[631] CER-Secretariat, ¶ 7.5.
[632] CER-Secretariat, ¶¶ 7.5-7.6.
[633] CER-Secretariat-2, ¶¶ 5.7-5.10.
[634] CER-Secretariat, ¶¶ 7.6, 7.14.

at the Valuation Date. This is because Windstream could have at least leased the Project area for rates similar to transactions based on the lease value of the Project.[635] This approach results in a Project value of $68 million (this is more than $42 million than what Windstream was awarded in the *Windstream I* proceedings).

d) Transactions in Onshore Wind Projects in Ontario. While there are differences between onshore and offshore project (including different technologies, lower wind speeds in the onshore environment, and lower power purchase agreement prices for onshore projects compared to Windstream's FIT Contract), Secretariat reviewed onshore wind transactions in Ontario to assess "the order of magnitude for the value" ascribed by market participants to the wind energy projects in Ontario in the three-year period prior to the Valuation Date.[636] Secretariat's review of these transactions demonstrates that their fair market value conclusions under the DCF approach and the comparable transactions approach are lower than the implied value of the Project based on more advanced onshore windfarms in Ontario.[637]

e) Public Company Trading Multiples Methodology.[638] Using the S&P Capital IQ database to identify public companies which met shared certain criteria, Secretariat identified seven companies that hold assets similar to the Project and calculated the average Enterprise Value per MW of the comparable companies, plus a 30% acquisition premium paid to reflect the additional consideration that an investor would pay to own a controlling interest in the company.[639] While Secretariat does not believe that this approach on its own reflects the value of the Project, it confirms the reasonableness of the DCF and comparable transactions approaches: the Enterprise Value per MW to the Project's 297 MW capacity results in a value

[635] CER-Secretariat, ¶ 7.19.
[636] CER-Secretariat, ¶ 7.25.
[637] CER-Secretariat, ¶¶ 7.25-7.31.
[638] CER-Secretariat, ¶ 7.32.
[639] CER-Secretariat, ¶¶ 7.33-7.44.

between $438.5 million and $545.9 million for the Project as at the Valuation Date.[640]

437. Each of these approaches confirm the reasonableness of Secretariat's DCF analysis. By contrast, as set out in more detail below, Dr. Guillet has no alternative valuation methodologies to support the conclusions of his comparables analysis. Further, as Secretariat notes, even taken on its face, Dr. Guillet's analysis fails to identify adequate comparators to the Project.

438. ***Secretariat's Comparables Approach Should be Preferred to Dr. Guillet's.*** In addition to failing to perform any additional analyses that would confirm his conclusions, Secretariat identifies a number of issues with the set of comparable transactions identified by Dr. Guillet. In addition to the basic mathematical errors that Dr. Guillet has made in his analysis (including assuming the wrong megawatt capacity for multiple comparable transactions),[641] these include the following substantive issues:

a) Dr. Guillet's analysis includes several projects that significantly pre-date the valuation date. As part of his comparables analysis, Dr. Guillet has included several projects that significantly pre-date the February 18, 2020 valuation date, including the same six early-stage transactions identified in the Green Giraffe Report delivered in *Windstream I*, which were carried out from 2009-2013, i.e., seven to eleven years before the Valuation Date. Dr. Guillet has also included two additional transactions carried out in Q4 2011 and Q4 2012, which were, inexplicably, not included in the Green Giraffe Report.[642] These comparables are inappropriate, since, as the experts agree, the offshore wind industry has significantly advanced between the relevant period for the *Windstream I* proceeding (in and around February 2011) and the appropriate valuation date for this proceeding (February 2020), resulting in decreased costs and improved valuations.[643]

[640] CER-Secretariat, ¶ 7.45.
[641] CER-Secretariat-2, ¶¶ 7.2-7.3.
[642] CER-Secretariat-2, ¶ 5.4.
[643] CER-Secretariat-2, ¶¶ 4.5-4.11.

b) Dr. Guillet's analysis includes floating wind farm transactions, which are not comparable to the Project. Dr. Guillet's comparables analysis includes six floating wind farm transactions, despite the fact that (as Dr. Guillet acknowledges) floating wind farms are riskier than traditional fixed-bottom offshore wind farms such as the Project, resulting in higher costs of capital and lower project value.[644]

c) Dr. Guillet's analysis excludes so-called "windfall" projects with price certainty. Dr. Guillet's analysis excludes transactions involving what Dr. Guillet calls "windfall projects" on the basis that these projects were transacted at substantially higher "windfall prices." Dr. Guillet describes these projects as "US projects with a long term PPA in place (at an attractive price) in addition to site control, and a handful of European projects that have benefited from a unique, and temporary set of circumstances, being the combination of having an old (i.e. high) tariff and having been delayed due to permitting reasons." Dr. Guillet excluded these projects despite the fact that the Project shares characteristics with the so-called "windfall projects."[645]

d) None of Dr. Guillet's comparable transactions had price certainty. Dr. Guillet's comparables approach does not include any transactions involving wind facilities that had price certainty in place as at the transaction date, such as the Project. This is significant, since Dr. Guillet testified before the *Windstream I* tribunal that price certainty is the "single most important factor" in financing renewable projects.[646]

e) Dr. Guillet's analysis relies extensively on non-public, inaccessible data that cannot be tested. Dr. Guillet's analysis includes thirteen transactions where the amount paid by the buyer was not publicly disclosed, and where the supporting information was not provided in Dr. Guillet's report. Dr. Guillet simply states that this information is "available to Green Giraffe but subject to confidentiality

[644] RER-Guillet-1, ¶ 66 ; CER-Secretariat-2, ¶ 4.34.
[645] RER-Guillet-1, ¶¶ 74-76.
[646] **C-2464**, Day 4- Confidential Condensed Transcript of the Arbitration Hearing of *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (February 18, 2016) (Confidential), page 194.

undertakings." This information was not provided to the Claimant or the Tribunal, cannot be tested, and should be disregarded.[647]

f) Dr. Guillet's early stage and late stage analysis is overly simplistic. As set out in more detail at paragraphs 417 to 421 above, Dr. Guillet's analysis lumps together multi-project transactions with projects at different stages of development in "early stage" and "late stage" projects. He does so even though different projects may have different characteristics relevant to value (e.g., price certainty). In addition, Dr. Guillet arbitrarily allocates the total value between the "early" and "late stage" assets included in the analysis (i.e., 50% for the early-stage assets and 50% for the late-stage assets), which further skews the analysis.[648]

g) Dr. Guillet's analysis excludes contingent payments. Dr. Guillet's analysis only includes transaction payments that were "due with certainty and not conditioned by factors outside the project's control."[649] In other words, Dr. Guillet's analysis only reflects amounts that were paid upfront and excludes all contingent payments from the total purchase price and implied transaction multiples.[650] This is improper because as Secretariat explains, all other things being equal, a project with additional contingent payments is more valuable than a project with no such payments.[651]

439. Dr. Guillet's comparables analysis results in a highly skewed analysis that ignores the significant advancements in offshore wind since 2011 and the specific characteristics of the Project that enhanced its value. Canada rests its entire damages assessment on that one unchecked analysis, which (as set out above) is itself propped up by Dr. Guillet's own unsupported generalizations. By contrast, Secretariat and Mr. Tetard have prepared three separate principal analyses (two using DCF approaches and one using a comparables approach) which establish the value that the Project

[647] RER-Guillet-1, Table 4, and footnote 43; **CL-204**, *IBA Rules on the Taking of Evidence in International Arbitration* (December 17, 2020), Article 5(2)(e).
[648] RER-Guillet-1, ¶¶ 56-57.
[649] RER-Guillet-1, ¶ 245, and Figure 1 (¶ 66).
[650] CER-Secretariat-2, ¶ 3.4.
[651] CER-Secretariat-2, ¶ 4.34.

would have had but for Canada's breaches of the NAFTA. These analyses are in turn supported by several other analyses, which confirm the reasonableness of Secretariat's analysis. That rigorous approach should be preferred.

IV. WINDSTREAM IS ENTITLED TO PRE- AND POST-AWARD INTEREST

440. Windstream is entitled to an award of interest in order to fully compensate it for Canada's breaches. This is consistent with the vast majority of international investment tribunal awards awarding damages, which have included pre- and post-award interest as a separate damages heading.[652]

441. Canada suggests that the burden is on the Claimant to establish entitlement to an award of interest. This argument misses the point. Windstream does not dispute that the burden is on the claimant to establish its damages. However, once that burden is met, interest is well-recognized to be an integral part of compensation and accrues from the date when the State's international responsibility became engaged.[653] The purpose of an award of interest is self-evident: to ensure that the claimant receives the full present value of its compensation for the breach and to prevent the state from being unjustly enriched by virtue of that delay in compensation.[654]

442. For those reasons, as the appropriate valuation date is the date of the breach, Windstream is entitled to pre-Award interest from the date of the breach onwards. Windstream is also entitled to post-Award interest to ensure Canada is not unjustly enriched by any delays in paying any compensation ordered. Secretariat has proposed an interest rate at the Canada Three Month Interbank Rate plus 2% compounded annually. Although Canada disputes this rate because Dr. Guillet takes issue with Secretariat's proposed debt funding plan, Dr. Guillet does not propose an alternative interest rate.

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[652] See **CL-041**, *Vivendi II*, ¶ 11.1; **RL-049**, *Sempra Energy*, ¶ 486; **CL-092**, *Wena Hotels*, ¶ 129; **RL-023**, *Enron*, ¶ 452; **CL-082**, *Siemens*, ¶ 399; **CL-021**, *ADC*, ¶ 522; **RL-047**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Second Partial Award, 21 October 2002, ¶ 307.

[653] See footnote above.

[654] **CL-042**, *Compañiá del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1) Final Award, 17 February 2000, ¶¶ 101, 104.

PART SIX – RELIEF REQUESTED

443. For the foregoing reasons and those set out in its Memorial, Windstream respectfully requests that the Tribunal grant the relief requested in paragraph 563 of its Memorial.

DATED: August 14, 2023

Respectfully submitted on behalf of Windstream Energy LLC,

Torys LLP
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