PUBLIC VERSION

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

-between-

WINDSTREAM ENERGY LLC

(the "Claimant")

-and-

GOVERNMENT OF CANADA

(the "Respondent", and together with the Claimant, the "disputing parties" or "parties")

GOVERNMENT OF CANADA'S REJOINDER MEMORIAL

October 30, 2023

Trade Law Bureau
Government of Canada
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TABLE OF ABBREVIATIONS[1]

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

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

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

I. INTRODUCTION

1. This claim should never have been brought. It is born out of Windstream Energy LLC's ("Windstream" or "the Claimant") dissatisfaction with the compensation it received in the *Windstream I v. Canada* Award ("the Award"), and its refusal to accept that the Award brought finality to the dispute. The Claimant is wrong that the Award did not fully compensate its losses simply because its Feed-in Tariff Contract ("FIT Contract") of May 4, 2010, remained in force in December 2016, when the final Award was made public. The Claimant cannot re-litigate issues finally decided between the parties. The Claimant's attempt to do so must be rejected, and its claim, premised on the baseless claim that Ontario had an obligation under the North American Free Trade Agreement ("NAFTA") to unlock or create value in its FIT Contract, should not be considered.

2. Over 10 years ago, the Claimant submitted a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter Eleven with respect to the Government of Ontario's ("Ontario") imposition of a moratorium on offshore wind development in February 2011. In the arbitration that followed, the Claimant challenged its inability to develop an offshore wind project ("Project"), alleging that the continued failure of Ontario to complete the science necessary to lift the moratorium breached NAFTA Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation), rendering its investment in Canada worthless as of May 4, 2012. That was the date by which the Claimant could no longer obtain financing to develop its Project because it could not meet its Milestone Date of Commercial Operation ("MCOD") prior to the Independent Electricity System Operator ("IESO") being in a position to terminate the FIT Contract pursuant to section 10.1(g) as of May 4, 2017.

3. After four years of litigation, the *Windstream I* tribunal determined that the moratorium on offshore wind development did not breach the NAFTA. Instead, it found that the wrongful act was Ontario's failure to address the legal and contractual limbo in which the Claimant found itself immediately after the imposition of the moratorium in February 2011. More specifically, Ontario's failure to bring clarity to the regulatory uncertainty surrounding the development of the Project within a reasonable period of time after the moratorium was found to be a breach of Article 1105. The Claimant was awarded CAD 25 million based on a fair market value ("FMV") of its investment using a market comparables approach to valuation.

4. Now, over 10 years since the announcement of the moratorium, the Claimant again brings an Article 1105 and 1110 claim. It challenges a collection of Ontario measures that allegedly rendered its already valueless FIT Contract worthless for a second time, on the flawed premise that Ontario had a responsibility to create value in the FIT Contract. In its attempt to relitigate the same facts and issues that were raised before the *Windstream I* tribunal, using the same damages experts and valuation of damages, the Claimant has characterized its claim as "new". It is evidently not. This dispute was conclusively resolved by the *Windstream I* tribunal. The passage of time does not render Ontario's actions wrongful a second time such that the Claimant is entitled to further compensation. This is true even though the IESO made a decision to terminate the FIT Contract, in accordance with its terms, on February 20, 2018. There is nothing new here. The Claimant may be unsatisfied that it was not awarded the damages it claimed in *Windstream I*, but its quest for a consolation prize must be dismissed.

5. There is no dispute that the Claimant's 2010 FIT Contract, which the Claimant confirmed had no value as of May 2012, remained in force on December 6, 2016, when the final Award was made public. The arbitration did not, and indeed could not have changed the status of the FIT Contract under Ontario law. The Claimant is wrong that the Award created an obligation on Ontario to help the Claimant realize, unlock or create value in its FIT Contract. The terms of the FIT Contract, which arose out of a standard offer program, did not contemplate such renegotiation. The *Windstream I* Award did not and could not order it, and Ontario's decision not to direct the IESO otherwise did not breach Articles 1105 or 1110 of NAFTA Chapter Eleven.

6. The IESO (formerly the OPA) was the counterparty to the Claimant's FIT Contract, not Ontario. It acts independently from Ontario in the administration of energy procurement contracts, including FIT contracts. The terms and project risks that the Claimant accepted in the standard form FIT Contract of May 4, 2010, are clear. These included the "time is of the essence" provision in section 2.5 wherein the Claimant agreed to bring its offshore wind project into commercial operation in a timely manner, by the MCOD of May 4, 2015. Its failure to do so could result in the forfeiture of its security deposit. The FIT Contract also included *force majeure* provisions, which relieved a party from performing or complying with its obligations, including reaching MCOD, for the duration of a *force majeure* event beyond its reasonable control. Also, section 10.1(g) allowed either the

Claimant or the IESO to unilaterally terminate the FIT Contract if *force majeure* caused the Project's commercial operation to be delayed by more than 24 months past its MCOD of May 4, 2015.

7. Moreover, the FIT Contract provided no guarantee from the IESO that the Project would receive a notice to proceed; the Claimant was responsible for obtaining all the necessary approvals and permits prior to commencing construction. Nor did it provide for any guarantees with respect to approvals or permits required from third parties, such as Ontario or the federal government. The FIT Contract left the assessment of the Project's feasibility entirely to the Claimant.

8. The *Windstream I* Award addressed Ontario's decision to place a moratorium on offshore wind, but it also considered the fact that the Claimant's FIT Contract had been in *force majeure* status for more than six years due to its failure to obtain Crown land site release for its Project. The Claimant's inability to access the Project site to conduct wind assessments and permitting work, not the moratorium, was the basis on which the Claimant invoked *force majeure*. By the Award's release, the *force majeure* event, which commenced on November 22, 2010, had resulted in the Project having been delayed more than 19 months past its MCOD. The IESO would therefore be in a position to exercise the right to terminate the FIT Contract just five months later, on May 5, 2017.

9. By the Claimant's own admission, any ability to finance the Project ended on May 4, 2012, making the FIT Contract valueless – a point the *Windstream I* tribunal accepted, awarding the Claimant CAD 25 million to make it whole. The tribunal arrived at this amount after assessing the FMV of the Claimant's investment (CAD 31 million) minus the value still available to the Claimant (its CAD 6 million security deposit). Although it recognized that the FIT Contract was still in force, it had no value, so it made no further adjustments.

10. When the Award was released on December 6, 2016, the FIT Contract was in extended *force majeure,* there was no process for the Project to obtain necessary site access, the moratorium had been in place for almost six years, the scientific research needed to lift the moratorium was unfinished, and there was no regulatory framework to approve an offshore wind project. It is in this context that the Claimant now argues that the *Windstream I* Award opened the door to unlocking or realizing additional value of its FIT Contract, and that the failure of Ontario to make this happen allegedly resulted in a breach of Articles 1105 and 1110 of the NAFTA. The *Windstream I* Award

did not impose an obligation on Ontario to direct the IESO to renegotiate and reactivate the FIT Contract or face future damages. A NAFTA Chapter Eleven tribunal has no such power. The *Windstream I* tribunal merely indicated that renegotiation and reactivation was an option, not an obligation. Another option, also identified by the tribunal, was the termination of the FIT Contract by the IESO in accordance with applicable law, i.e. when the right arose in May 2017.

11. Canada's Rejoinder Memorial addresses the Claimant's arguments and allegations as follows. First, the claim is barred by the doctrine of *res judicata* and is therefore inadmissible. The Claimant attempts to artificially separate conduct that continued after the *Windstream I* Award from the same conduct that occurred prior to the Award, which, once analyzed, demonstrates that the Claimant advances the same cause of action as it did in *Windstream I*. It also advances the same relief it sought in *Windstream I,* even using the same method of valuation.

12. Further, the Claimant is barred from relitigating several determinations of the *Windstream I* Award on the ground of collateral estoppel. This includes the tribunal's decision on the imposition and continued application of the moratorium on offshore wind development. It also includes findings with respect to the contractual limbo in the period following the imposition of the moratorium resulting from Ontario's repudiation of the promises it made to the Claimant to keep the Project frozen and not cancelled. Finally, it includes several determinations relating to the valuation of the Claimant's Project at a FMV of CAD 31 million, the security deposit at CAD 6 million (which it held was a substantial amount when compared to the overall investment), and the FIT Contract at zero.

13. Second, the Claimant has still not established that the Tribunal has jurisdiction *ratione temporis* over the alleged breach. The Claimant's effort to repackage pre-Award measures outside the limitation period with the post-Award FIT Contract termination and label them a continuing or composite breach must fail. It does not change the date when the Claimant became aware of the essence of its claim, which was well before the critical date of December 22, 2017.

14. Third, even if the Tribunal finds that the claims are admissible and that it has jurisdiction, the Claimant has failed to prove that the challenged measures breach the NAFTA. In addition to presenting an incorrect test for the application of Article 1105, the Claimant has not pointed to any evidence that could support a finding of violation of the customary international law minimum

standard of treatment. Instead, its claim rests on the unfounded assertion that, after the *Windstream I* Award, Ontario was required to intervene in the contractual relationship between the Claimant's enterprise and the IESO and to instruct the IESO to renegotiate the terms of the FIT Contract. However, the FIT Contract was a standard offer contract with rights and obligations on both the Claimant's enterprise and the IESO, including various termination rights and associated remedies. The fact that Ontario did not intervene in the IESO's decision to exercise its section 10.1(g) termination right, resulting in the termination of the FIT Contract effective February 18, 2020, did not breach the NAFTA. To the contrary, the evidence, including the Witness Statement of Mr. Andrew Teliszewsky, Chief of Staff to the Ontario Minister of Energy from 2013 to 2018, shows that Ontario's actions cannot be considered "arbitrary" or "grossly unfair".

15. The Claimant's Article 1110 claim is equally flawed. Its claim for expropriation is based on the presumption – wholly unsupported by the record – that Ontario had an obligation to intervene and create value in the FIT Contract after the *Windstream I* Award. There is no evidence to support the contention that Ontario was required to intervene to turn the FIT Contract that was at risk of termination into a vested right to build and operate an offshore wind farm – or that its failure to intervene amounted to an expropriation. NAFTA Article 1110 did not require Ontario to create new value in an investment that had been rendered worthless, for which the Claimant was made whole again and has since had its CAD 6 million security deposit returned to it.

16. Lastly, with respect to damages, even if the Tribunal were to find a breach of Canada's NAFTA obligations, the Claimant did not suffer any losses as a result of that breach. The Claimant has failed to show that the termination of its FIT Contract caused it any loss, separate and distinct from that awarded in the *Windstream I* arbitration. The Claimant cannot disagree, as its "but for" scenario relies on the exact same assumptions used in its *Windstream I* damages calculation. Further, there is no evidence that the Claimant's Project increased in value after the *Windstream I* Award. The Claimant's position that its investment increased by nearly 900 percent despite it being in the same state of development as in 2016 defies reason. It has not demonstrated that its investment, which was already valueless as of the Award, could suffer further damages.

17. In addition, even if it could prove causation, the Claimant's reliance on a discounted cash flow ("DCF") analysis must be rejected. No authority exists, in the jurisprudence or in real-world

experience, that supports a DCF valuation of a non-operating offshore wind farm in the early stages of development, let alone one with the level of uncertainty associated with the Project. Further, the Claimant's market comparable analysis places an inappropriate emphasis on the Claimant's contingent revenue stream under the FIT Contract and ignores most of the Project's characteristics which would have impacted its value on the market. As Canada's expert, Dr. Jérôme Guillet, demonstrates, when the correct market comparables approach is applied, the only possible conclusion is that the Claimant is not entitled to any damages.

18. Today, after having been awarded damages that made it whole, the Claimant argues that NAFTA Chapter Eleven still requires Ontario to renegotiate and reactivate the since terminated FIT Contract or pay further damages. The Claimant has now submitted 947 pages of written argument, 3,673 pages of expert testimony, 291 pages of witness testimony and over 2,800 documents as exhibits in this arbitration and in *Windstream I*. The length of the record does not make it more convincing. The Claimant has failed to establish the jurisdiction of the Tribunal, make admissible claims, show that Canada has breached any obligation under NAFTA Chapter Eleven, or justify any entitlement to additional damages.

II. THE CLAIMANT HAS FAILED TO DEMONSTRATE THAT ITS CLAIM IS ADMISSIBLE AND WITHIN THE TRIBUNAL'S JURSIDICTION

19. The Claimant argues that the measures at issue in this arbitration all arose after the *Windstream I* arbitration.[2] It argues that Articles 1105 and 1110 of the NAFTA were breached by the failure of Ontario to lift the moratorium and its continued application to the Project, and the failure of Ontario to direct the IESO to amend the Claimant's FIT Contract. As a result, it argues, its claim is properly before this Tribunal. The Claimant is incorrect. When the facts are properly presented, they demonstrate that the claim is barred by the doctrines of *res judicata* or collateral estoppel and that it falls outside the Tribunal's jurisdiction *ratione temporis*.

20. As Canada demonstrates below, the Claimant is wrong that its claim is not barred by the doctrine of *res judicata*. Its claim involves the same cause of action and the same relief as its prior claim before the *Windstream I* tribunal. The Claimant's attempt to recharacterize the cause of action

[2] *Windstream II – Claimant's Reply Memorial*, ¶ 198.

by artificially separating Ontario's pre- and post-Award conduct must be rejected as inadmissible. Further, the Claimant has not argued that the termination of the FIT Contract itself is a stand-alone cause of action. As such, even if the termination decision is not barred by the doctrine of *res judicata*, the Tribunal remains without jurisdiction to assess the legality of that action alone under the NAFTA.

21. Further, even if the Claimant's entire claim is not inadmissible on the basis of *res judicata*, it is estopped from relitigating the determinations made by the *Windstream I* tribunal. This includes the *Windstream I* tribunal's findings on the continued imposition of the moratorium on offshore wind and its effects on the Claimant's investment. It also includes the findings related to the Project not having been frozen, reactivated or insulated from termination on the basis of Ontario's 2011 promises. Lastly, it includes findings that go to both the valuation methodology that was appropriate for the Project as it existed in 2016, and the quantum of damages owed.

22. Finally, measures taken prior to and continuing after the *Windstream I* Award, even when combined with the termination of the FIT Contract,[3] do not render the Claimant's claim timely. As the evidence demonstrates, except for the FIT Contract termination, every measure going to the breach alleged by the Claimant was known to it prior to the *Windstream I* Award. The fact that the breach found in *Windstream I* has continuing effects past the critical date of December 22, 2017, does not make the Claimant's claim timely in accordance with NAFTA Articles 1116(2) and 1117(2). Further, packaging these measures, which are outside the limitation period, together with the FIT Contract termination and labelling them a continuing or composite breach, does not change the date when the Claimant knew, or should have known, of the alleged breach and loss or damage arising out of that breach. The Claimant was aware of the "essence of its claim"[4] well before the critical date. As such, its claim must be dismissed for want of jurisdiction.

[3] *Windstream Energy, LLC v. Government of Canada (II)* (UNCITRAL) Claimant's Reply Memorial, 14 August 2023 ("*Windstream II – Claimant's Reply Memorial*"), ¶ 294.

[4] **RL-138**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Corrected Interim Award, 30 May 2017 ("*Spence – Corrected Interim Award*"), ¶ 299.

A. The Claimant's Claims Are Barred by *Res Judicata*

1. The Issue of Burden

23. Canada's admissibility challenges are distinct from the Claimant's burden to prove that it has satisfied the conditions precedent to commence arbitration and the Tribunal's jurisdiction.[5] Any objection raised by Canada does not absolve the Claimant from that burden.[6] While the Claimant appears to agree that it is the Claimant's burden to demonstrate that it has met the requirements of Articles 1116(2) and 1117(2) with respect to the limitation period, the Claimant also states that "Canada bears the burden of establishing the requirements of *res judicata*, collateral estoppel and abuse of process are made out."[7] The only jurisprudence the Claimant relies on for this argument is *Chevron I*.[8] However, that case did not discuss the doctrine of *res judicata* and is of no assistance to this Tribunal. In any event, as the *Mobil II* tribunal explained, since what is at issue is a question of law, not evidence, it is not helpful to think in terms of burden of proof.[9] With this in mind, and when the doctrine of *res judicata* is applied correctly, it results in the inadmissibility of the claim.

2. The Legal Standard

24. For both *res judicata* and collateral estoppel, the question for the Tribunal is whether the matter at issue was "definitively settled" by the *Windstream I* tribunal.[10] The disposition is *res judicata,*

[5] *Windstream Energy, LLC v. Government of Canada (II)* (UNCITRAL) Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility, 12 May 2022 ("*Windstream II – Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*"), ¶¶ 92-95.

[6] **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), ¶ 264; **RL-053**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48.

[7] *Windstream II – Claimant's Reply Memorial*, ¶¶ 178 and 182.

[8] *Windstream II – Claimant's Reply Memorial*, ¶ 182.

[9] **RL-110**, *Mobil Investments Canada v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 137.

[10] **RL-201**, *Polish Postal Service in Danzig*, (PCIJ, Ser. B, No. 11) 16 May 1925, pp. 28-30; **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), ¶ 214; *Mobil Investments Canada Inc. v. Canada (II)* (ICSID Case No. ARB/15/6) Award, 4 February 2020, ¶ 197; **RL-202**, *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia),* Preliminary Objections, Judgment, I.C.J. Reports 2016, ¶ 59.

along with the reasoning upon which that determination was made.[11] The disputing parties appear to agree that their previous submissions are relevant to what was finally decided.[12]

25. The parties agree that *res judicata* applies when there is identity of: (i) parties; (ii) cause of action; and (iii) object.[13] Once the test is met, *res judicata* has conclusive and preclusive effects, meaning that previous findings may be invoked in further proceedings, but also that *res judicata* works as a defence to stop relitigation of subject-matter disposed of in a previous decision.[14] While the parties agree that the first prong is met,[15] they dispute whether the remaining aspects of the test have been satisfied. In what follows, Canada demonstrates that the claim is *res judicata*.

3. The Claimant's Alleged Breach Arises out of the Same Cause of Action as in *Windstream I*

26. The parties agree that the Tribunal must assess whether the prior decision concerns the same claims based on the same factual and legal bases. In other words, whether the facts and circumstances arising from a single event give rise to a right to relief.[16] The relevant question is therefore: what is the single event and what are the factual and legal bases arising from it?

27. The Claimant relies on *Caratube* to advance the view that identical underlying facts in two proceedings do not necessarily carry *res judicata* effect. While Canada agrees with this in principle, it has no application here. In *Caratube*, the causes of action for the two cases were based on different legal instruments: the bilateral investment treaty and the parties' contract and Kazakhstan's Foreign Investment Law. The Claimant acknowledges this,[17] yet prefers to disregard that *res judicata* did not

[11] **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 ("ILA Final Report"), ¶ 52.

[12] **RL-005**, *Apotex Inc. v. United States of America* (UNCITRAL) Award, 25 August 2014, ¶ 7.30; *Windstream II – Claimant's Reply Memorial*, ¶¶ 201, 202, and 209. Note that it is a separate matter whether a party should be estopped from asserting something that is contrary to a previous position it had taken.

[13] *Windstream II – Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, ¶ 52; *Windstream II – Claimant's Reply Memorial*, ¶ 188.

[14] **RL-112**, ILA Final Report, ¶ 15.

[15] *Windstream II – Claimant's Reply Memorial*, ¶ 195.

[16] *Windstream II – Claimant's Reply Memorial*, ¶ 197.

[17] *Windstream II – Claimant's Reply Memorial*, ¶¶ 211 and 212. NAFTA Article 1121 requires a claimant to waive its right to initiate or continue a proceeding before a court or administrative tribunal, so as to prevent this type of claim.

apply because the same factual grounds were alleged to have breached different legal obligations. By contrast, both the present arbitration and the *Windstream I* arbitration are based on a breach of the same provisions: NAFTA Articles 1110 and 1105.

28. The Claimant asserts that the cause of action in the present arbitration is "the failure to lift and the continued application of the Moratorium to [Windstream Wolfe Island Shoals ("WWIS") that] created the conditions necessary to allow the IESO to terminate the FIT Contract".[18] The measures in question are the following:

a) Ontario's failure, following the *Windstream I* Award, to complete the work necessary to lift the moratorium;

b) Ontario's continued application of the moratorium, following the *Windstream I* Award;

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

d) Ontario's failure, following the *Windstream I* Award, to direct IESO to amend the FIT Contract to defer the Project;

e) the IESO's termination of the FIT Contract; and

f) the IESO's failure to amend the FIT Contract to defer the Project.[19]

29. The Claimant mischaracterizes its claim when it argues that it relates to "a series of measures which all occurred after the *Windstream I* Award."[20] What it has in fact presented is a series of measures that began in 2011, coupled with the termination of the FIT Contract in 2020. However, the termination, the only event occurring after the *Windstream I* Award, is not something it challenges *per se.* Instead, the Claimant challenges Ontario's failure to direct the IESO to not terminate the FIT Contract or to amend the FIT Contract to implement Ontario's promise that the Project would be

[18] *Windstream II – Claimant's Reply Memorial*, ¶ 208.

[19] *Windstream II – Claimant's Reply Memorial*, ¶ 206.

[20] Procedural Order No. 2, ¶ 45; *Windstream Energy, LLC v. Government of Canada (II)* (UNCITRAL) Claimant's Response to Canada's Request for Bifurcation, 16 June 2022 ("*Windstream II – Claimant's Response to Canada's Request for Bifurcation*"), ¶ 2 (emphasis in original).

"frozen" and insulated from the moratorium.[21] This is precisely the same argument it made in *Windstream I* when the Claimant argued that Ontario "did not ensure that the OPA amended the FIT Contract to insulate Windstream from the effects of the moratorium […] and not subject to termination by the OPA – while the moratorium remains in effect."[22] The promise to keep the FIT Contract "frozen", the non-direction of the IESO and the failure to insulate the Project from the moratorium were put to, and conclusively determined by, the *Windstream I* tribunal,[23] and are not open for reconsideration.

30. While Canada agrees that the actual termination of the FIT Contract was not, and could not have been, put to the *Windstream I* tribunal, this is irrelevant. The termination is not the cause of action that the Claimant challenges or the damages claim that it has presented. As Canada explains further below,[24] the IESO's decision to exercise the section 10.1(g) termination rights arose out of *force majeure* caused by the Claimant's inability to gain access to its Project site since November 22, 2010. The Claimant could have brought a claim and valued its damages on that basis, but since it has not challenged that measure as a stand-alone breach, the Tribunal has no jurisdiction over such a claim.

31. Before turning to that matter, Canada first explains that the Claimant is not permitted, on grounds of *res judicata,* to recharacterize the same claim it brought in *Windstream I* as a new claim even if its FIT Contract was terminated following the Award.

(a) The Claimant Attempts to Artificially Divide the Same Measure into Two Separate Measures

32. The Claimant draws an artificial line between Ontario's pre- and post-Award behaviour in an attempt to create a separate cause of action for this arbitration. Such attempts to fabricate a distinction have previously been rejected by courts and tribunals, including in *Apotex III*, where the tribunal specified that it is "impermissible to parse the two sets of claims in the two arbitrations, so as

[21] *Windstream Energy, LLC v. Government of Canada (II)* (UNCITRAL) Claimant's Memorial, 18 February 2022 ("*Windstream II – Claimant's Memorial*"), ¶ 7; *Windstream II – Claimant's Reply Memorial*, ¶ 37.

[22] *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Reply Memorial of the Claimant, 22 June 2015 ("*Windstream I – Claimant's Reply Memorial*"), ¶ 372.

[23] **RL-109**, *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016 *("Windstream I – Award")*, ¶¶ 379 and 380.

[24] *See* ¶ 41.

artificially to distinguish one case from the other."[25] Courts have used different words to describe the application of this rule, some emphasising "the same gravamen of the wrong" or "the primary right and duty", and others apply a pragmatic test of "how the facts are related in time, space, origin, or motivation".[26] Thus, something more than the passage of time and a new legal theory is required, otherwise "a party could so easily escape" or "thwart" the purpose of *res judicata*.[27] This is the case even where a new fact emerges, such as the termination of the FIT Contract. In the end, as one court

[25] **RL-005**, *Apotex Inc. v. United States of America* (UNCITRAL) Award, 25 August 2014, ¶ 7.58. *See also* **RL-203**, *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan* (1 RIAA 57) Award on Jurisdiction and Admissibility, 4 August 2000, ¶ 54 (where the Tribunal focussed on "the same Parties grappling not with two separate disputes but with what in fact is a single dispute").

[26] Guidance from how Canadian and U.S. courts have applied the general principle of *res judicata* is also instructive. *See for example*, **R-0835***, Carlson v. Clark* (Supreme Court of Vermont 07-313), 13 February 2009 which held at ¶ 17 that the "[t]he point is that there was a full and fair opportunity to litigate the nature of the right-of-way the first time, and additional legal theories are now foreclosed", citing *inter alia Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991) (additional legal theory will not defeat preclusion when acts complained of, material facts alleged, and evidence required to prove allegations, are same as in prior action), *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985) ("New legal theories do not amount to a new cause of action so as to defeat the application of the principle of res judicata."), and **R-0836***, Smith v. Russell Sage College*, 54 N.Y.2d 185 (N.Y. 1981), 19 November 1981, pp. 192-193 (describing how the Court has moved to a more pragmatic test, and holding that "[a] 'cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the action is brought. This holds true even when 'several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts or would call for different measures of liability or different kinds of relief' […] For, what 'factual grouping' constitutes a 'transaction' or 'series of transactions' depends on how 'the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether […] their treatment as a unit conforms to the parties' expectations or business understanding or usage'" (internal citations omitted)); **R-0837***, Citibank, N.A. v. Data Lease Financial Corp.,* 904 F.2d 1498 (11th Cir. 1990), 5 July 1990, p. 1503 ("The principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." I.A. Durbin, 793 F.2d at 1549 (citations and footnote omitted). In other words, a court "must look to the factual issues to be resolved [in the second cause of action], and compare them with the issues explored in" the first cause of action. S.E.L. Maduro v. M/V Antonio De Gastaneta, 833 F.2d 1477, 1482 (11th Cir.1987)); *see also* Ruple v. City of Vermillion, S.D., 714 F.2d 860, 861 (8th Cir.1983), cert. denied, 465 U.S. 1029, 104 S.Ct. 1290, 79 L.Ed.2d 692 (1984): "It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata."); **R-0838***, Cliffs Over Maple Bay* (Re), 2011 BCCA 180 (CanLII), 2011 April 14, p. 28 ("In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy [...]"); **R-0839***, Cahoon v. Franks,* 1967 CanLII 77 (SCC), [1967] SCR 455, 1967 June 26, p. 459 ("I make reference again to the abstracts quoted by Johnson, J.A. from the judgment of Lord Denning in Letang v. Cooper at p. 240, and the judgment of Diplock, L.J. in Fowler v. Lanning [1959] 1 Q.B. 426. 'The factual situation' which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action.")

[27] **RL-005**, *Apotex Inc. v. United States of America* (UNCITRAL) Award, 25 August 2014, ¶ 7.58.

recognized, it does not matter that all of the facts are not exactly the same, but whether the "substance of the actions, not their form" gives rise to the same cause of action.[28]

33. In this dispute, the Claimant admits to challenging "the very conduct that was already found to breach the NAFTA".[29] Therefore, there is not even a question of whether the substance of the actions challenged is the same in both disputes. The Claimant presents this as the continuation of the moratorium, the continued decision not to undertake the scientific work to lift it, and the failure of Ontario, following the Award, not to direct the IESO to amend the FIT Contract or keep it from being terminated. Yet, the Claimant maintains that it is not raising the same cause of action twice, because, in its view, these measures arose after the *Windstream I* Award.[30] It argues that the continuing nature of these measures "created the conditions necessary to allow the IESO to terminate the FIT Contract" so that "these measures, and the resulting termination of the FIT Contract, violate Articles 1110 and 1105 of the NAFTA."[31] However, looking at each of the measures individually shows that the Claimant's case is not based on a new cause of action.

34. In 2011, Ontario adopted a moratorium on offshore wind development. The Claimant strives to distinguish the continuation of the moratorium after the Award on the basis that it led to the termination of its FIT Contract. The effects of the February 2011 decision to implement a moratorium had been continuing for more than five years when it was conclusively ruled by the *Windstream I* tribunal as not amounting to a NAFTA breach.[32] The very same moratorium then continued for another four years before the Claimant filed its Notice of Arbitration ("NOA") and continues until this day. It is not the source of a new cause of action, even if it bolstered the IESO's rationale to terminate the FIT Contract.

35. The *Windstream I* tribunal also specifically considered Ontario's failure to complete the work necessary to lift the moratorium when it decided that Ontario left the Claimant in legal limbo in

[28] **R-0837***, Citibank, N.A. v. Data Lease Financial Corp.,* 904 F.2d 1498 (11th Cir. 1990), 5 July 1990, p. 1503.

[29] *Windstream II – Claimant's Memorial*, ¶ 244.

[30] *Windstream II – Claimant's Reply Memorial*, ¶ 206.

[31] *Windstream II – Claimant's Reply Memorial*, ¶ 208.

[32] *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Memorial of the Claimant, 19 August 2014 (refiled 30 September 2014) ("*Windstream I – Claimant's Memorial*"), ¶ 623; *Windstream I – Claimant's Reply Memorial*, ¶¶ 601-603.

breach of Article 1105.[33] The Claimant acknowledges that this too was specifically determined by the *Windstream I* tribunal.[34] Yet, it continues to argue that Ontario's decision to not undertake the work forms part of its cause of action in this proceeding. Together, the continued effects of the ongoing moratorium and Ontario's decision not to undertake the necessary work to lift it had already prevented the Claimant from acquiring financing to develop its Project, thus rendering it valueless. These measures were specifically considered and decided by the *Windstream I* tribunal,[35] as acknowledged by the Claimant.[36] The mere passage of time and continued effects of these measures do not give rise to a new cause of action. Otherwise, there would be no finality to the dispute.

36. The *Windstream I* tribunal similarly ruled that Ontario did not direct the IESO to amend the FIT Contract and the IESO did not do so (challenged measures (c) through (f) above). It referred specifically to the Claimant's allegations that Ontario failed to fulfill its promises to ensure that the moratorium would not result in the cancellation of the Claimant's Project,[37] or otherwise "ensure that the OPA amended the FIT Contract to insulate the Claimant from the effects of the moratorium".[38] The tribunal agreed with the Claimant, finding that "in the absence of any further amendments to the FIT Contract", as of May 4, 2012 "the Project effectively became non-financeable":[39]

> [t]he Government did little to address the legal and contractual limbo in which Windstream found itself after the moratorium […] The Government let the [IESO] conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the Government and not the [IESO], and without providing any direction to the [IESO] for the negotiations […] As a result, as the negotiations between the [IESO] and Windstream failed to produce results, by May 2012 the Project had reached a point at which it was no longer financeable.[40]

[33] **RL-109**, *Windstream I – Award*, ¶¶ 378 and 379.

[34] *Windstream II – Claimant's Reply Memorial*, ¶ 203.

[35] **RL-109**, *Windstream I – Award*, ¶¶ 374, 376, and 379.

[36] *Windstream II – Claimant's Reply Memorial*, ¶ 203.

[37] **RL-109**, *Windstream I – Award*, ¶ 375.

[38] **RL-109**, *Windstream I – Award*, ¶ 185.

[39] **RL-109**, *Windstream I – Award*, ¶ 374.

[40] **RL-109**, *Windstream I – Award*, ¶ 379.

37. Therefore, the *Windstream I* tribunal definitively decided upon Ontario's failure to intervene in the IESO's contractual relationship with the Claimant. It noted that the Government did not provide any direction to the IESO to "reactivat[e] Windstream's FIT Contract".[41]

38. Finally, the Claimant admits in its Reply Memorial that it is relies on the same promises and representations that formed part of the *Windstream I* proceedings.[42] These promises, made in February 2011, were extensively litigated. They formed part of the cause of action of the *Windstream I* arbitration, and they were finally decided upon by that tribunal, which recognized that they led to discussions between the Claimant and the OPA but not "an agreed outcome" in the form of a contract amendment or project swap.[43] The Claimant admitted to the *Windstream I* tribunal that as of May 4, 2012, "Ontario had definitively refused to fulfill its promise to ensure that the Project was 'frozen' and not 'cancelled'",[44] and the tribunal agreed, finding that "as a matter of fact" the FIT Contract has not been "reactivated or renegotiated at any time during the period from 11 February 2011 until the date of this award", so "the FIT Contract cannot be considered to have any value."[45] Not amending the FIT Contract to prevent its termination was definitively settled in *Windstream I* and it is disingenuous for the Claimant to argue otherwise solely because the FIT Contract remained in force.[46]

(b) There Is No New Post-*Windstream I* Measure Taken by Ontario for the Tribunal to Consider

39. That Ontario adopted no new measure related to the Claimant's investment after the *Windstream I* Award is another indication that the cause of action is the same in both claims. What the Claimant complains about is the continued application of Ontario's acts and omissions, which were all challenged in *Windstream I*. There is no new measure for the Tribunal to contemplate regarding the non-lifting of the moratorium and the non-completion of the scientific work necessary to lift it. Similarly, there is no new measure to consider regarding Ontario's non-direction of the IESO

[41] **RL-109**, *Windstream I – Award*, ¶ 379.

[42] *Windstream II – Claimant's Reply Memorial*, ¶ 243.

[43] **RL-109**, *Windstream I – Award*, ¶ 371.

[44] *Windstream I – Claimant's Memorial*, ¶ 677.

[45] **RL-109**, *Windstream I – Award*, ¶ 483.

[46] *Windstream II – Claimant's Reply Memorial*, ¶ 205.

to amend the FIT Contract or prevent its termination. With respect to Ontario's conduct, the Claimant identifies no measure that constitutes a stand-alone cause of action separate from the claims definitively settled in the *Windstream I* proceedings.

40. The only new measure it lists is the IESO's termination of the FIT Contract, the reasons for which were communicated to the Claimant on February 20, 2018.[47] The IESO's decision to exercise its *force majeure* termination right under the FIT Contract considered a number of factors. These included "the history, status and outlook for the project", including its seven-year delay based on the Claimant's "inability to obtain access to or control of the project site or to commence a significant number of regulatory approval processes"; the current and anticipated demand and supply outlook for Ontario; and Ontario's current and anticipated procurement policies and strategies.[48]

41. The IESO's rationale for exercising its *force majeure* termination right focused on the delay caused by the Claimant's inability to obtain site access to conduct wind studies, permitting work and develop the Project.[49] In contrast, the Claimant's cause of action in this proceeding focuses on how the moratorium and Ontario's lack of direction of the IESO resulted in the termination of the FIT Contract.[50] It is not based on the decision of the IESO to terminate the FIT Contract, its rationale, or whether it was in accordance with the applicable law. In sum, the Claimant does not challenge that decision as a stand-alone act, and certainly not as the source of a new cause of action.

42. However, should the Tribunal nevertheless consider the termination of the FIT Contract by the IESO as the source of a new cause of action in this proceeding, it must still reject the Claimant's impermissible attempt to conflate and bundle it with the cause of action in *Windstream I*. It is not open to the Claimant to repackage its claim and seek re-determination by this Tribunal by attaching a prior cause of action to a new one. Otherwise, the doctrine of *res judicata* would be meaningless. As Professors Dodge, Schreuer and Reinisch have recognized, "[t]he costs and time required for

[47] **R-0665**, Letter from Michael Lyle (IESO) to Nancy Baines (Windstream Wolfe Island Shoals Inc.) (February 20, 2018).

[48] **R-0665**, Letter from Michael Lyle (IESO) to Nancy Baines (Windstream Wolfe Island Shoals Inc.) (February 20, 2018). *See* ¶¶ 115 and 134.

[49] **R-0665**, Letter from Michael Lyle (IESO) to Nancy Baines (Windstream Wolfe Island Shoals Inc.) (February 20, 2018).

[50] *Windstream II – Claimant's Reply Memorial*, ¶ 208.

investor-state arbitrations, already not inconsiderable, would be multiplied several times over if unsuccessful claimants could persuade later tribunals to restrict the effect of earlier awards by simply reformulating their claims and arguments."[51]

43. Ultimately, the Claimant has not advanced its claim[52] on the termination of the FIT Contract as a stand-alone breach. Such a claim has not been presented to the Tribunal to be decided. The Tribunal therefore has no jurisdiction to consider the FIT Contract termination as a new cause of action. As the *Spence* tribunal noted, a tribunal's jurisdiction is "necessarily linked to and constrained by the breach of which it is seized and over which it has jurisdiction."[53] Jurisdiction is confined temporally, as will be argued below,[54] but the claim must also "rest on a breach that gives rise to a self-standing cause of action".[55] Since the Claimant has not plead the termination of the FIT Contract as a stand-alone breach, the Tribunal has no claim of breach with which it may be seized.[56]

4. The Claimant Raises the Same Object as in *Windstream I*

44. The Parties agree that for this prong of the test, the Tribunal must assess whether the relief sought and determined in the first proceeding is identical to what is being sought here.[57] The Claimant admits that its request is the same as in *Windstream I*, since it has once again asked for the full value of its investment valued on a DCF basis using the same "but for" world scenario.[58] The Claimant argues that the *Windstream I* tribunal did not grant the relief it sought, hence it is not precluded from seeking again the same relief,[59] but its argument is illogical. The Claimant has confused damages

[51] **RL-005**, *Apotex Inc. v. United States of America* (UNCITRAL) Award, 25 August 2014, ¶ 7.59.

[52] *Windstream II – Claimant's Reply Memorial*, ¶ 208.

[53] **RL-138**, *Spence – Corrected Interim Award*, ¶ 211. *See also* the Award in *Infinito Gold v. Costa Rica,* in which the tribunal specifically noted that "the loss or damage must flow from the alleged breach". **RL-140**, *Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Award (3 June 2021), ¶ 221.

[54] *See* Section II(A)(3).

[55] **RL-138**, *Spence – Corrected Interim Award*, ¶ 210.

[56] *See Windstream II – Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, ¶ 68.

[57] *Windstream II – Claimant's Reply Memorial*, ¶ 188.

[58] *Windstream II – Claimant's Reply Memorial*, ¶ 216; *see* Section IV(A)(I). Further, the slight difference in the amount of relief requested is due to small changes to the project layout and the Project's projected CAPEX and OPEX.

[59] *Windstream II – Claimant's Reply Memorial*, ¶ 216.

awarded with relief sought. The Claimant cannot avoid the doctrine of *res judicata* simply because it is unhappy with the damages awarded to it in the *Windstream I* arbitration.

45. Further, the Claimant's reliance on *Mobil II* to argue that it is entitled to additional damages is misplaced. In *Mobil I*, the claimant had specifically sought future damages, but the tribunal was of the view that "the claim for such losses is not yet ripe for determination."[60] That tribunal noted that the case was unique, viewing as "a decisive distinguishing factor" the fact that damages "will eventually be 'actual' (thereby removing the necessity to forecast losses which has been present in other cases)".[61] It therefore held that "the Claimants can claim compensation in new NAFTA arbitration proceedings for losses which have accrued but are not actual in the current proceedings."[62] Accordingly, the claimant brought a later claim for compensation of these future losses in *Mobil II* once they were ripe for determination. Since the *Mobil I* decision had not definitively settled the claimant's entitlement to seek such losses, the *Mobil II* tribunal rejected a *res judicata* argument that future damages cannot be awarded.[63]

46. The facts of the present arbitration are fundamentally different. All damages allegedly suffered by the Claimant, and claimed in *Windstream I* arbitration were "ripe for determination" and were decided upon. While the Claimant sought damages between CAD 277.8 million and CAD 369.5 million,[64] the tribunal's decision to award substantially less was not because the Claimant's claim for future lost profits was pre-mature – it simply refused to accept the Claimant's method of valuation based on a DCF model.[65] Instead, the tribunal made the Claimant whole using a market comparables valuation, thereby compensating it for all of its losses, present and future. It made no finding that future damages would accrue upon the termination of the FIT Contract. To the contrary, the

[60] **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 473.

[61] **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 477.

[62] **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 478.

[63] **RL-204**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Procedural Order No. 9 (Decision on Scope of Damages Phase), 11 December 2018, ¶¶ 47 and 48.

[64] **RL-109**, *Windstream I – Award*, ¶ 436 referring to CER-Deloitte (Taylor and Low)-2 (Addendum), p. 2.

[65] **RL-109**, *Windstream I – Award*, ¶ 475.

Windstream I tribunal held that the CAD 6 million security deposit would be returned to the Claimant upon termination of the FIT Contract, and it held that the FIT Contract had no value.[66] Further, while the Claimant contends that Ontario disagreed with this interpretation and held the same view as the Claimant,[67] this is bluntly untrue. The Government of Ontario was of the view that the "Windstream Tribunal determined that the value of the Project amounted to $31,182,900 CAD", as opposed to the value of the "life of the contract […] if the project had generated electricity".[68] In the end, the Claimant cannot be allowed to reargue its damages case simply because it is unhappy with the damages awarded to it in the *Windstream I* Award.

B. The Claimant Is Estopped from Making Certain Claims

47. As Canada explains below, even if the Tribunal disagrees that the entire claim is inadmissible for reasons of *res judicata,* the Claimant is estopped from litigating certain aspects of its claim.

48. The Parties agree that collateral estoppel does not require the triple identity test,[69] and that the test to apply is whether a right, question or fact: (i) was distinctly put in issue in the *Windstream I* arbitration; (ii) that the tribunal decided it; and (iii) that its resolution was necessary to resolving the claims before it.[70] However, the Claimant disagrees that it is estopped from relitigating: (1) the continuation of the moratorium; (2) the promises to keep the FIT Contract frozen and not terminate it; and (3) certain determinations with respect to the valuation of its investments. It is mistaken.

[66] **RL-109**, *Windstream I – Award*, ¶¶ 290 and 483.

[67] *Windstream II – Claimant's Reply Memorial*, ¶¶ 219 and 220.

[68] **C-2652**, Email from Erin Thompson to Jennifer Kacaba re: Wind Contract value (October 26, 2016). Even if certain officials did not point out the error in the Claimant's interpretation of the Award, this is in no way determinative. The only thing that matters is the correct interpretation of the *Windstream I* Award. It is on this basis that this Tribunal will decide whether the *Windstream I* tribunal made a determination on the relief currently being requested by the Claimant in this arbitration.

[69] *Windstream II – Claimant's Response to Canada's Request for Bifurcation*, ¶ 55; *Windstream II – Claimant's Reply Memorial*, ¶¶ 191 and 192.

[70] *Windstream II – Claimant's Response to Canada's Request for Bifurcation*, ¶ 56; *Windstream II – Claimant's Reply Memorial*, ¶ 194.

1. The Claimant Is Estopped from Challenging the Continued Imposition of the Moratorium

49. The Claimant asserts 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*".[71] Regardless of whether the Claimant characterizes the measure as a stand-alone breach, continuing breach, or part of composite breach, it is estopped from relitigating the existence of the moratorium as a breach of the NAFTA.

50. ***Distinctly put at issue*** – As Canada pointed out in its Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility, when the *Windstream I* tribunal issued its Award, the moratorium had been in place for nearly six years.[72] The Claimant put the moratorium's continued imposition and impacts on its investment before the *Windstream I* tribunal when it argued that "the moratorium prevented Windstream from obtaining access to Crown land to develop the Project in accordance with the timelines set out in the FIT Contract"[73] and that as a result, its Project became impossible to finance and develop as of May 4, 2012.[74]

51. ***The tribunal decided it*** – The *Windstream I* tribunal conclusively determined that the imposition of the moratorium was not a wrongful act, but also that the Project could not proceed because, in its words "clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium" had not been addressed by Ontario.[75] It agreed with the Claimant that the Project became unfinanceable as of May 4, 2012.[76]

52. ***Its resolution was necessary*** – The *Windstream I* tribunal noted that, to avoid a NAFTA breach, Ontario's failure to address the legal and contractual limbo needed to occur within "a reasonable time

[71] *Windstream II – Claimant's Reply Memorial*, ¶ 231 (emphasis in original).

[72] *Windstream II – Canada's Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility*, ¶ 72.

[73] *Windstream I – Claimant's Reply Memorial*, ¶ 572; **RL-109**, *Windstream I – Award*, ¶ 288.

[74] **RL-109**, *Windstream I – Award*, ¶ 481.

[75] **RL-109**, *Windstream I – Award*, ¶¶ 377 and 380.

[76] **RL-109**, *Windstream I – Award*, ¶ 380.

after the moratorium" in 2011.[77] That period had long passed by the issuance of the Award in 2016. As a result, the tribunal found a breach of Article 1105 for which the Claimant was compensated.[78]

53. The Claimant is therefore barred from raising the matter again. The mere passage of time, up to the FIT Contract termination in 2020, does not change the fundamental issue: this measure and related facts have not changed since 2011 and were decided in *Windstream I*.[79]

2. The Claimant Is Estopped from Relitigating Ontario's Failure to Fulfill Its Promise that the FIT Contract Would Be Frozen and Not Terminated

54. The Claimant states that the *Windstream I* tribunal did not and could not have made a determination on the termination of the FIT Contract.[80] Canada does not disagree. However, the *Windstream I* tribunal did make a determination with respect to the promises that Ontario made in 2011 that the Claimant's Project be frozen and not cancelled. The Claimant re-invokes those same promises, arguing once again that Ontario promised 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."[81] In its view, the tribunal's determination does not prevent it from raising again the promises again in relation to what it characterizes as a new breach.[82] It is incorrect.

55. ***Distinctly put at issue*** – The Claimant argued in *Windstream I* that "Ontario should have been carrying out its promises to ensure that Windstream's project was 'frozen' and not 'cancelled' following the moratorium", which it could have done by removing contractual deadlines.[83] It also

[77] **RL-109**, *Windstream I – Award*, ¶ 380.

[78] **RL-109**, *Windstream I – Award*, ¶ 380. *See also Windstream II – Canada's Counter Memorial*, ¶ 80.

[79] Nor can the continued imposition of the moratorium be transformed into a new measure by appending it to other measures and calling it a composite breach. Allowing the Claimant to do this would effectively enable it to re-open and re-argue any matter previously determined.

[80] *Windstream II – Claimant's Reply Memorial*, ¶ 236.

[81] *Windstream II – Claimant's Reply Memorial*, ¶ 364.

[82] *Windstream II – Claimant's Reply Memorial*, ¶ 243.

[83] *Windstream I – Claimant's Memorial*, ¶¶ 623 and 629.

argued that as of May 4, 2012, "Ontario had definitively refused to fulfill its promise to ensure that the Project was 'frozen' and not 'cancelled'".[84]

56. ***The tribunal decided it*** – The *Windstream I* tribunal found that "in the absence of any further amendments to the FIT Contract", by May 4, 2012, the Project was no longer financeable.[85] The tribunal agreed with the Claimant that Ontario "failed to take the necessary measures, including when necessary by way of directing the [IESO], within a reasonable period of time after the imposition of the moratorium" to clarify the situation. Although the tribunal did not foreclose the options available to bring clarity, it specifically noted that they included either "reactivating Windstream's FIT Contract" or "terminating Windstream's FIT Contract in accordance with the applicable law".[86]

57. ***Its resolution was necessary*** – The *Windstream I* tribunal's conclusion that "as a matter of fact" the FIT Contract has not been "reactivated or renegotiated at any time during the period from 11 February 2011 until the date of this award" was a necessary premise to its determination that "the FIT Contract cannot be considered to have any value" and that no further adjustments to the amount of damages therefore needed to be made "to reflect that the FIT Contract is still formally in place".[87]

58. Accordingly, the Claimant is estopped from alleging that the termination of the FIT Contract was a repudiation of the promises Ontario made, since the repudiation had already taken place by May 4, 2012, as specifically determined by the *Windstream I* tribunal.

3. The Claimant Is Estopped from Challenging Certain Determinations with Respect to the Value and Valuation

(a) The Use of DCF as a Valuation Methodology

59. The Claimant argues that "the most appropriate method to determine the value Windstream's investment would have had, but for the NAFTA breaches, is the DCF method."[88] Yet, the *Windstream*

[84] *Windstream I – Claimant's Memorial*, ¶ 677.

[85] **RL-109**, *Windstream I – Award*, ¶¶ 374 and 379.

[86] **RL-109**, *Windstream I – Award*, ¶¶ 379 and 380.

[87] **RL-109**, *Windstream I – Award*, ¶ 483.

[88] *Windstream II – Claimant's Reply Memorial*, ¶ 416; CER-Secretariat, ¶¶ 2.22 and 5.25.

I tribunal decided that the Project was at the early stages of development, so a DCF analysis was inappropriate.[89] That finding is not open for redetermination.

60. ***Distinctly put at issue*** – The Claimant argued in *Windstream I* that the DCF method was appropriate for calculating its damages because it allows one "to determine the value the investment would have had 'but for' the illegal act."[90] It emphasized that DCF is an appropriate method for projected cash flows that are capable of determination and not speculative,[91] submitting that the cash flows could "be forecast with a relatively high degree of confidence."[92] Canada disagreed, arguing that the DCF method was not appropriate given the early-stage development of the Project, the inherent risk, and that the Claimant's Project was not a going concern.[93]

61. ***The tribunal decided on it*** – The *Windstream I* tribunal determined that as of 2016 the Project was "an early-stage project."[94] It accepted Canada's argument that a DCF "is not usually used for projects that have not yet reached financial closure, given the many risks and uncertainties surrounding such projects".[95] As such, the Tribunal proceeded with a market comparables analysis based on the expert testimony of Canada's expert, Dr. Jérôme Guillet.[96]

62. ***Its resolution was necessary –*** The *Windstream I* tribunal's determination that DCF was inappropriate to value the Claimant's investment was the foundation of its disposition on damages, which the tribunal was required to undertake having found a breach of Article 1105.

63. The Claimant argues that the *Windstream I* tribunal's "finding that the DCF method of valuation was not appropriate […] flowed from the measures at issue in that case" and that "it is an

[89] **RL-109**, *Windstream I – Award*, ¶ 475.

[90] *Windstream I – Claimant's Memorial*, ¶ 666.

[91] *Windstream I – Claimant's Memorial*, ¶ 669.

[92] *Windstream I – Claimant's Reply Memorial*, ¶ 646.

[93] *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Canada's Rejoinder Memorial, 6 November 2015 ("*Windstream I – Canada's Rejoinder Memorial*"), ¶¶ 290 and 302.

[94] **RL-109**, *Windstream I – Award*, ¶¶ 475 and 481.

[95] **RL-109**, *Windstream I – Award*, ¶¶ 474 and 475.

[96] **RL-109**, *Windstream I – Award*, ¶ 476.

obiter finding on the issue before this Tribunal"[97] that is not barred by the doctrine of collateral estoppel. This is untenable. The *Windstream I* tribunal's finding on the DCF method being inappropriate is clear, considered and deliberate, not *obiter*. Investment tribunals have considered *obiter* as commentary of a tribunal that does not form a basis for any reasoning of the award.[98] This is not the case here. The decision on valuation methodology formed the basis of the tribunal's damages award as well as its decision to award the Claimant only half of its litigation costs, as "the Tribunal did not accept the Claimant's principal method of valuation, to which much of the evidence, in particular expert evidence related, and on which much of the time at the hearing was spent."[99]

(b) Damages Suffered by the Claimant as of 2016 as a Result of the Failure to Insulate Windstream from the Effects of the Ongoing Moratorium

64. Contrary to the Claimant's suggestion, the *Windstream I* tribunal was not merely tasked with determining the value of the Project at a specific point in 2016.[100] Instead, the tribunal assessed the full value of the investment for the purpose of making the Claimant "whole".[101] The valuation by the *Windstream I* tribunal of the Claimant's damages as of 2016, and the factual determinations it made in arriving at that value, cannot be reopened.

65. ***Distinctly put at issue*** – In the *Windstream I* proceeding, the Claimant argued that it was entitled to over CAD 565.5 million in damages.[102] In doing so, the Claimant put forward numerous technical and engineering experts, as well as experts on causation and quantum.[103] In response, Canada argued that the Claimant had not shown that the alleged breaches caused the Claimant any

[97] **RL-109**, *Windstream I – Award*, ¶ 253.

[98] **RL-205**, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Decision on Respondent's Request for A Supplementary Decision, 6 September 2004, ¶ 21; **CL-051**, *Gami Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 130.

[99] **RL-109**, *Windstream I – Award*, ¶ 514.

[100] *Windstream II – Claimant's Reply Memorial*, ¶ 247.

[101] **RL-109**, *Windstream I – Award*, ¶ 473.

[102] *Windstream I – Claimant's Reply Memorial*, ¶ 641.

[103] CER-Powell; CER-Deloitte (Taylor and Low); CER-Deloitte (Bucci); CER-4C Offshore; CER-Power Advisory; CER-SgurrEnergy; CER-Baird; CER-Kerlinger; CER-Reynolds; CER-Brian Howe (HGC); CER-Ortech; CER-Compass; CER-Dolzer; CER-Powell-2; CER-Deloitte (Taylor and Low)-2; CER-Deloitte (Bucci)-2; CER-4C Offshore-2; CER-SgurrEnergy-2; CER-Baird-2; CER-WSP; CER-Aerocoustics; CER-Brian Howe (HGC)-2.

loss, and that even if causation was proven, the Claimant was not entitled to the quantum of damages it sought.[104] Like the Claimant, Canada put forward engineering and technical experts, as well as experts that spoke to quantum.

66. ***The tribunal decided it*** – The *Windstream I* tribunal directly considered and decided on the amount of damages owed to the Claimant as a result of the breach of Article 1105. In doing so, it considered the expert evidence before it, and determined that the Project should be valued at a FMV of CAD 31,182,900, the security deposit at CAD 6 million, and the FIT contract at zero.[105] The tribunal then took into account "the letter of credit that still, as at the date of this award, remains available to the Claimant" and deducted this value from the FMV of the Claimant's investment, arriving at damages in the amount of CAD 25,182,90 based on the failure to insulate the Claimant from the effects of the ongoing moratorium.[106]

67. ***Its resolution was necessary*** – Having found Canada in violation of Article 1105 as a result of the failure to insulate the Claimant from the effects of the ongoing moratorium, it was necessary for the tribunal to determine the Claimant's entitlement to damages.

(c) Value of the FIT Contract as of 2016

68. The Claimant has argued that it has been substantially deprived of the value of its investment that had yet to be realized under the FIT Contract,[107] which the *Windstream I* tribunal did not award because "it 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".[108] In doing so, the tribunal determined the value of the FIT Contract to be zero. The Claimant is now estopped from arguing otherwise.

69. ***Distinctly put at issue*** – The value of the FIT Contract was distinctly put at issue before the *Windstream I* tribunal. The Claimant argued in that proceeding that the FIT Contract was its "most

[104] **RL-109**, *Windstream I – Award*, ¶¶ 445-472.

[105] **RL-109**, *Windstream I – Award*, ¶¶ 482 and 483.

[106] **RL-109**, *Windstream I – Award*, ¶ 485.

[107] *Windstream II – Claimant's Reply Memorial*, ¶¶ 246 and 252.

[108] *Windstream II – Claimant's Reply Memorial*, ¶¶ 91 and 92.

important property right and asset."[109] It would have constituted WWIS's most significant source of revenue had the Project proceeded as planned.[110] It submitted that "the FIT Contract and WWIS, became substantially worthless as of May 22, 2012 [the date of valuation used by its expert] and continue to be substantially worthless."[111]

70. ***The tribunal decided it*** – The *Windstream I* tribunal agreed with the Claimant that absent reactivation or renegotiation, "the Project can no longer be completed by the MCOD", a FIT Contract requirement.[112] In doing so, it held that although the FIT Contract could have been reactivated and renegotiated by the parties at any time, "as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value."[113]

71. ***Its resolution was necessary*** – A determination of the value of the FIT Contract was necessary in order to quantify damages owed to the Claimant as a result of the *Windstream I* tribunal's finding of a breach of Article 1105. In finding that the FIT Contract had no value, unlike the security deposit, the tribunal did not consider it appropriate or necessary to further reduce the amount of damages owing to the Claimant "to reflect that the FIT Contract is still formally in place."[114]

(d) The CAD 6 million Security Deposit

72. The Claimant does not respond to Canada's argument that it is barred from reopening the *Windstream I* tribunal's determination that the CAD 6 million security deposit constituted a substantial portion of the value of the investment, although it recognizes such a finding.[115] It merely argues that the *Windstream I* tribunal's valuation took place in 2016, not 2020.[116]

[109] *Windstream I – Claimant's Memorial*, ¶ 497.

[110] *Windstream I – Claimant's Memorial*, ¶ 497.

[111] *Windstream I – Claimant's Reply Memorial*, ¶ 730; CER-Deloitte (Taylor and Low)-2, ¶¶ 3.11 and 3.12.

[112] **RL-109**, *Windstream I – Award*, ¶ 290.

[113] **RL-109**, *Windstream I – Award*, ¶ 483.

[114] **RL-109**, *Windstream I – Award*, ¶ 483.

[115] *Windstream II – Claimant's Response to Canada's Request for Bifurcation*, ¶¶ 82-85.

[116] *Windstream II – Claimant's Reply Memorial*, ¶ 247.

73. ***Distinctly put at issue*** – Canada argued in *Windstream I* that the Claimant's investment had no value at the time of the alleged breach and therefore could not have been expropriated because there had been no substantial deprivation of its economic value.[117] The Claimant disagreed, arguing that its investment, which in its view was worth CAD 565.5 million, was rendered substantially worthless.[118] Its investment included the FIT Contract, its most important asset, but also the CAD 6 million security deposit.[119]

74. ***The tribunal decided it*** – In arriving at its finding that there was no expropriation, the tribunal noted that "the Claimant's CAD 6 million security deposit is still in place and has not been taken or rendered otherwise worthless as a result of any action taken by the Government of Ontario."[120] The tribunal also held that "the amount of money invested by the Claimant in the Project – its sunk costs – do not substantially exceed, if at all, the value of the security deposit. Consequently, […] the value of the asset that is still available to the Claimant as it has not been taken (i.e., the security deposit) is substantial, in particular when compared to the overall value of the investment."[121]

75. ***Its resolution was necessary*** – The determination that the CAD 6 million security deposit was substantial compared to the overall investment was the reason for the tribunal's conclusion that the Claimant had not been substantially deprived of its investment, and as such, "no expropriation has taken place in this case".[122]

76. Accordingly, the Claimant is estopped from reopening the questions of whether a DCF was appropriate to value the Claimant's early-stage project, the FMV of the Claimant's investment in 2016, whether the Project or the FIT Contract had any value, unlocked or otherwise characterized, as of the date of the Award, as well as the value of the security deposit, considered to be substantial, as compared to the Claimant's overall investment.

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[117] *Windstream Energy, LLC v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial on Jurisdiction, 20 January 2015 ("*Windstream I – Canada's Counter-Memorial*"), ¶ 481.

[118] *Windstream I – Claimant's Reply Memorial*, ¶¶ 473 and 641.

[119] *Windstream I – Claimant's Memorial*, ¶ 493.

[120] **RL-109**, *Windstream I – Award*, ¶ 290.

[121] **RL-109**, *Windstream I – Award*, ¶ 291.

[122] **RL-109**, *Windstream I – Award*, ¶¶ 290 and 291.

C. The Claimant Has Failed to Establish the Tribunal's Jurisdiction *Ratione Temporis*

77. Pursuant to Articles 1116(2) and 1117(2) of the NAFTA, the Claimant must establish that it has submitted its claim to arbitration within three years of when it "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] has incurred loss or damage arising out of that breach."[123] In this regard, the disputing parties agree that 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: (i) what is the critical date for the three-year limitation period?; (ii) did the Claimant first know, or should it have known, about the alleged breach prior to the critical date?; and (iii) did the Claimant first know, or should it have known, that it incurred loss or damage arising out of that alleged breach before the critical date?[124] Both Canada and the Claimant agree that the critical date is December 22, 2017.[125] However, the second and third questions remain in dispute.

78. To answer the second and the third questions the Tribunal must determine: (a) when did the Claimant first know, or when should it have known, of the alleged breach, and (b) when did the Claimant first know, or when should it have first known, that it incurred loss or damage arising out of that alleged breach.

79. The Claimant alleges that the answer to both questions is, at the earliest, February 20, 2018, when the IESO notified the Claimant it made the decision to terminate the FIT Contract.[126] This is untrue. No matter how the claim is considered, whether it is "based on the composite effect of the challenged Measures"[127] or the act of "keeping the Moratorium in place after the *Windstream I* Award and failing to do any of the research required to lift the Moratorium […] *in combination with the other impugned measures* [to] creat[e] the conditions that led to the termination of the FIT

[123] While only Article 1117(2) of the NAFTA applies to knowledge of the alleged breach and associated damage by an enterprise, as applicable in the present arbitration, the legal test for both Articles 1116(2) and 1117(2) of the NAFTA is the same.

[124] *Windstream II – Claimant's Reply Memorial*, ¶ 280.

[125] *Windstream II – Claimant's Reply Memorial*, ¶ 281.

[126] *Windstream II – Claimant's Reply Memorial*, ¶¶ 285, 287, and 288.

[127] *Windstream II – Claimant's Reply Memorial*, ¶ 287.

Contract",[128] the Claimant has still not met the requirements of Articles 1116(2) and 1117(2). As explained in the paragraphs that follow, the Claimant had knowledge of the alleged breaches long before February 20, 2018, and indeed well before the critical date of December 22, 2017. The Claimant has therefore failed to establish the Tribunal's jurisdiction *ratione temporis*.

1. The Claimant Must Prove the Facts on Which It Alleges the Tribunal's Jurisdiction Rests at the Jurisdictional Stage

80. The Claimant has alleged that there is no basis for the Tribunal to accept Canada's "characterization of Windstream's claim."[129] It misunderstands Canada's argument. As the *Chevron I* tribunal noted, while relying on the rule first advanced by Judge Higgins in the *Oil Platforms* case, with respect to an argument to establish jurisdiction, the Tribunal is not limited to the claim as pleaded.[130] This position is supported by the well-established principle in international investment arbitration that "if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[131] In this regard, the *Phoenix Action* tribunal remarked:

> [W]hen a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven.[132]

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[128] *Windstream II – Claimant's Reply Memorial*, ¶ 231 (emphasis in original); *see also* ¶ 285.

[129] *Windstream II – Claimant's Reply Memorial*, ¶¶ 289-301.

[130] The Claimant takes this position. *See Windstream II – Claimant's Reply Memorial*, ¶ 282.

[131] **RL-135**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009 ("*Phoenix Action – Award*"), ¶ 61. *See also* **CL-056**, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶ 143; **RL-170**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on the Respondent's Jurisdictional Objections, 1 June 2012, ¶ 2.8 ("The Tribunal considers that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant's CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that 'prima facie' or other like standard is limited to testing the merits of a claimant's case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal's jurisdiction directly depends […] In the context of factual issues which are common to both jurisdictional issues and the merits, there could be, of course, no difficulty in joining the same factual issues to the merits. That, however, is not the situation here, where a factual issue relevant only to jurisdiction and not to the merits requires more than a decision pro tempore by a tribunal.")

[132] **RL-135**, *Phoenix Action – Award*, ¶ 64. This general approach was confirmed by the tribunal in *Emmis* when deciding the jurisdictional issues presented in that case, noting "[i]ssues that are essential to establish jurisdiction, such as the existence or ownership of a covered investment, must be dealt with decisively in the jurisdictional phase."; **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, ¶ 174. *See also* ¶¶ 172 and 173.

81. The Claimant merely argues that "[t]he Windstream I tribunal accepted jurisdiction over Windstream's claims against Canada under Chapter 11 of the NAFTA. The investor and the investments in this arbitration are the same. There should therefore be no dispute that the Tribunal has jurisdiction over the parties and subject-matter of the dispute."[133] In reality, the fact that jurisdiction was accepted in *Windstream I* has no bearing on whether jurisdiction is established here, particularly given the Claimant's position that the measures it challenges "all arose *after* the *Windstream I* arbitration."[134]

82. Canada's arguments do not re-characterize the Claimant's claim. To the contrary, Canada's submissions demonstrate that the facts relied on by the Claimant to prove this Tribunal's jurisdiction should not be accepted as pled by the Claimant. As the *Chevron* tribunal held, if jurisdiction were to depend on characterizations of the measures made by the Claimant alone, "the inquiry into jurisdiction would be reduced to naught, and tribunals would be bereft of the *compétence de la compétence* enjoyed by them."[135] Accordingly, the *Chevron* tribunal found that it may take into account evidence available, including evidence submitted by the Respondent State, that directly contradicts the Claimant's bald assertion of jurisdiction.[136]

83. This Tribunal must ultimately find its jurisdiction on the facts going to jurisdiction, which requires that it decide whether the Claimant's characterization of the measures is correct. As the *Spence* tribunal held, the role of the tribunal is to identify the "essence" of the claim.[137] In what follows, Canada demonstrates that the Claimant has misconstrued the facts in an attempt to save the jurisdictional defects of its claim. The essence of its current claim was, in fact, formed well before the critical date of December 22, 2017.

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[133] *Windstream II – Claimant's Memorial*, ¶ 402.

[134] *Windstream II – Claimant's Memorial*, ¶ 448 (emphasis in original).

[135] **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), ¶ 109 citing **RL-206**, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic* (ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶ 50.

[136] **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), ¶ 112.

[137] **RL-138**, *Spence – Corrected Interim Award*, ¶¶ 226, 227, and 299.

2. The Claimant Knew About the Alleged NAFTA Breaches and Loss before the Critical Date of December 22, 2017

84. The proper approach to analyze whether a claim is time-barred was adopted by the tribunals in *Bilcon* and *Rusoro*.[138] Those tribunals considered it most appropriate, even in the face of a claimant's characterization of the measures as composite, to break down each claim into a series of individual measures and alleged breach, then apply the time bar to each breach separately. Such an approach makes clear that the Tribunal has no jurisdiction *ratione temporis* over Ontario's conduct.

85. The Claimant challenges Ontario's: (a) failure to complete the work necessary to lift the moratorium; (b) continued application of the moratorium to WWIS; (c) failure to direct the IESO not to terminate the FIT Contract; and (d) failure to direct the IESO to amend the FIT Contract to ensure the Project would be frozen.[139] Canada argued in its Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility that these complaints boil down to two measures: the continued application of the moratorium and the termination of the FIT Contract, as opposed to its deferral or amendment.[140] The Claimant disagrees, stating that its complaint 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 […] these measures and the resulting termination of the FIT Contract violate Articles 1110 and 1105 of the NAFTA."[141]

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[138] In determining whether a claim is within the limitation period, the approach taken by the tribunals in *Rusoro Mining* and *Bilcon* should be followed. As stated by the *Rusoro Mining* tribunal: "The better approach for applying the time bar consists in breaking down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately. This approach is the one adopted by other investment tribunals and respects the wording of Art. XII.3 (d), which defines the starting date for the time bar period as the date when the investor acquired knowledge that a breach had occurred and a loss had been suffered." The *Rusoro Mining* tribunal cited to *Bilcon v. Canada*: "The Tribunal finds it possible and appropriate, as did the tribunals in *Feldman*, *Mondev* and *Grand River*, to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits". Each element of the Claimant's claim is outside the limitation period. *See* **RL-176**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016 ("*Rusoro – Award*"), ¶ 231 and **CL-157**, *Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA Case No. 2009-04), Award on Jurisdiction and Liability (March 17, 2015) ("*Bilcon – Award on Jurisdiction and Liability")*, ¶ 266.

[139] *Windstream II – Claimant's Reply Memorial*, ¶ 206. Canada addresses measures (e) and (f) in ¶¶ 90-96 below. Note that the moratorium was a one-time act with consequences that extend in time, but the Claimant professes to be challenging its continued application after the *Windstream I* Award.

[140] *Windstream II – Claimant's Response to Canada's Request for Bifurcation*, ¶ 68.

[141] *Windstream II – Claimant's Reply Memorial*, ¶ 208.

86. The Claimant had knowledge of the measures (a)–(d) well before the critical date since, in *Windstream I,* it challenged the moratorium, Ontario's failure to lift it, Ontario's failure to direct the IESO not cancel the FIT Contract, and its failure to direct the IESO to freeze the FIT Contract.[142] The continued alleged "failure" by Ontario to cease these acts following the *Windstream I* Award, or the ongoing application of the moratorium, does not re-set the limitations period for those measures. If it did it would "effectively denude the limitation clause of its essential purpose [of] draw[ing] a line under the prosecution of historic claims" and "encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time".[143] Indeed, international tribunals have consistently rejected the notion that a continuing course of conduct resets the limitation period.[144] Moreover, all three NAFTA Parties agree that the three-year limitation period under the NAFTA begins on the date of first acquisition of relevant knowledge – not subsequent, repeated or ultimate acquisition of such knowledge.[145]

[142] *Windstream I – Claimant's Memorial*, ¶ 505.

[143] **RL-138**, *Spence – Corrected Interim Award*, ¶ 208.

[144] For example, in *Bilcon*, the claimants submitted a claim to arbitration on June 17, 2008, challenging several government measures from both before and after the relevant limitation period cut-off date of June 17, 2005. The claimants argued that the measures before that cut-off date were "continuing breaches" that tolled the limitation period under Articles 1116(2) and 1117(2). The tribunal disagreed, noting that the breaches alleged by the claimant that arose prior to the three-year period, but that had continuing effects after that date, fell outside of NAFTA's limitation period. **CL-157**, *Bilcon – Award on Jurisdiction and Liability*, ¶¶ 251-254, and 281. *See also* **RL-166**, *Grand River Enterprises Six Nations and others v. United States of America* (UNCITRAL) Decision on Jurisdiction, 20 July 2006, ¶ 81. Other international investment tribunals have also expressly rejected the *UPS* tribunal's finding that a continuing breach re-set the limitations period. *See for example*, **RL-138**, *Spence – Corrected Interim Award*, ¶ 208. **RL-207**, *Carlos Ríos and Francisco Ríos v. Republic of Chile* (ICSID Case No. ARB/17/16), Award, 11 January 2021 [Spanish, with attached translated excerpts] ("*Carlos Rios – Award*"), ¶ 209, where the tribunal rejected the conclusions reached by the *UPS* tribunal, noting that the *UPS* tribunal reached its conclusion without considering the relevant provisions of the NAFTA with respect to limitation periods.) *See also, Carlos Rios – Award*, ¶¶ 202-203, and 205, where the majority of the tribunal rejected the claimants' argument that the limitation period starts running upon the cessation of the continuous wrongful act and instead, ruled that the FTA's 39-month limitation period runs from the time when the claimant first acquires knowledge of the alleged wrongful act, regardless of its duration, and first acquires knowledge that the alleged wrongful act has caused some damage or loss, whatever that may be.

[145] *See for example*, **RL-173**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 July 2008, ¶¶ 8-10; **RL-208**, *Merrill & Ring Forestry, L.P. v. Government of Canada (UNCITRAL)* Submission of the Government of Mexico, 2 April 2009; **RL-199**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 19 April 2013, ¶ 12; **RL-209**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) United States Article 1128 Submission, 14 February 2014, ¶ 3; **RL-175**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions, 3 March 2014, ¶ 29.

87. Further, even if the Tribunal was to entertain facts that post-date the *Windstream I* Award*,* the Claimant faces equally problematic time-bar hurdles. The Claimant's own documents demonstrate that it had its actual knowledge of an alleged breach arising out of measures (a)–(d) after the *Windstream I* Award, but before the critical date. For example, on October 12, 2016, Ian and Nancy Baines admitted that "no further scientific studies are being planned" to lift the moratorium.[146] On August 25, 2017, months before the critical date, the Ministry of the Environment ("MOE") informed the Claimant by letter that it could not "confirm whether or when Ontario will be revisiting the February 2011 decision [on the moratorium]".[147] And on December 15, 2016, the Claimant wrote to the Minister of Energy stating that it continued to be in contractual limbo and that it was "for the Government of Ontario, including where necessary by way of directing the IESO (which is within your powers as Minister of Energy) to resolve the situation that has prevailed due to the actions of the Government of Ontario such that we may either move forward with the project or negotiate a reasonable resolution."[148] The Claimant, therefore, first became aware of measures (a)–(d) well before the critical date of December 22, 2017 and has failed to establish the Tribunal's jurisdiction *ratione temporis* over these measures.

88. As for loss or damage, the Claimant argues that it first acquired knowledge of damage arising out of the alleged breach on February 20, 2018, upon learning that the IESO had made the decision to exercise its termination right.[149] This is untenable. The Claimant had already admitted that its investment had no value as of May 2012, when its Project became impossible to finance within the timelines of the FIT Contract.[150] The Claimant's position is based on the argument that the

[146] **C-2644**, Email from David Mars (WEI) to Randi Rahamim (NAV) re "FW: Key Points for Navigator" (October 13, 2016) with attached (a) WWIS – Offshore Win Project Key Facts (October 12, 2016); (b) Analysis entitled "Analysis of Benefits to Ontario of Cancelling the Wolfe Island Shoals FIT Power Purchase Agreement" (July 31, 2014).

[147] **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017).

[148] **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).

[149] *Windstream II – Claimant's Reply Memorial*, ¶ 286.

[150] CER-Deloitte (Taylor and Low), ¶ 5.8: ("given that the Project would have no longer been able to obtain financing as of the Date of Breach [of Article 1110 or 1105], the Project has nominal value, if any, since that date and continues to have nominal value, if any. Accordingly, the related FIT Contract and the shares of WWIS likely have nominal, if any, value on the basis that the FIT Contract value is contingent on the successful operation of the Project and that the Project is the only asset of WWIS."); **RL-109***, Windstream I – Award,* ¶ 190.

Windstream I tribunal "did not award damages for the full value of the investment",[151] but that does not change the fact that it already knew prior to the Award that it suffered a loss. Articles 1116(2) and 1117(2) are clear – the limitation period commences on the date when a claimant first acquires knowledge of loss or damage, not when it acquires additional knowledge of loss.

89. Finally, the Claimant's argument is untenable because the only question for the Tribunal is whether the Claimant knew that it incurred some loss or damage, not the full amount of the loss.[152] The Claimant does not deny that the *Windstream I* tribunal awarded it "damages to its investment" in September 2016,[153] so it is groundless to claim now that it only first acquired knowledge of its loss or damage arising out of the alleged breach when its FIT Contract was terminated.

3. Jurisdiction *Ratione Temporis* Cannot Be Founded on Any Act or Omission of the IESO

90. In its submission, the Claimant relies on certain measures of the IESO to argue that its claim was filed within the limitations period – namely the IESO's termination of the FIT Contract and its failure to amend the FIT Contract to "freeze" the Project (measures (e) and (f)).[154] Neither of the measures arising out of the IESO's conduct can save this Tribunal's jurisdiction *ratione temporis.*

91. The alleged breach identified by the Claimant is based solely on Ontario's conduct, not the IESO's. The Claimant treats the IESO's decision to terminate the FIT Contract as a natural consequence thereof and does not challenge the legality of the IESO's decision. As such, the IESO's measures do not constitute a self-standing cause of action which can establish this Tribunal's jurisdiction under Articles 1116(2) and 1117(2).

92. As the *Spence* tribunal held, "a tribunal cannot rest simply on how a claimant has formulated its case."[155] Limitation periods such as the one set out in Article 1116(2) start to run when the claimant first acquired or must be deemed to have first acquired "knowledge of the breaches that form the

[151] *Windstream II – Claimant's Reply Memorial*, ¶¶ 250, 274, 298.

[152] *Windstream Energy, LLC v. Government of Canada (II)* (UNCITRAL) Canada's Counter-Memorial, 12 December 2022 ("*Windstream II – Canada's Counter-Memorial*"), ¶¶ 134 and 135.

[153] *Windstream II – Claimant's Reply Memorial*, ¶ 250.

[154] *Windstream II – Claimant's Reply Memorial*, ¶ 206.

[155] **RL-138**, *Spence – Corrected Interim Award*, ¶¶ 226 and 227.

essence of their claims".[156] Here, the essence of the Claimant's complaint is that Ontario's actions (i.e. the continuation of the moratorium and the failure to direct the IESO to insulate the Claimant's investments from its effects) created the conditions for the IESO to terminate the FIT Contract, depriving the Claimant of the value of its investment.[157] This deprivation of value occurred in May 2012, when the Claimant admits its investments became valueless[158] or at the very latest when the IESO was in a position to terminate the FIT Contract under section 10.1(g) in May 2017.[159] The essence of that complaint is not changed by the fact that the IESO eventually decided to terminate the Claimant's FIT Contract in accordance with the contract provisions – the damage had been done long before then. In this regard, and to quote the *Spence* tribunal, the Claimant was "on notice" of a potential breach well before the critical date.[160]

93. Canada's arguments with respect to the limitation period still stand regardless of the fact that the termination of the FIT Contract occurred after the critical date. The Claimant's arguments are merely an attempt to parse its claim into numerous pieces so that it can evade the strict requirements

[156] **RL-138**, *Spence – Corrected Interim Award*, ¶ 299 ("[…] affording to the Claimants' recently derived knowledge the weight that they propose would again turn the limitation clause on its head. The relevant question is the date on which the Claimants first acquired or are deemed to have first acquired knowledge of the breach and loss that they allege. While the Claimants may have first acquired knowledge of the SETENA suspensions in July 2014, the Tribunal has concluded, and underlines that conclusion, that the Claimants must be deemed to have first acquired knowledge of the breaches that form the essence of their claims a good deal earlier, before both the 10 June 2010 critical date and the 1 January 2009 CAFTA entry into force date. As with the MINAET instructions just addressed, knowledge of the SETENA 2008–2009 suspensions does not generate a new independently actionable breach separable from the conduct that preceded it of which the Claimants were aware.") (emphasis added).

[157] *Windstream II – Claimant's Reply Memorial*, ¶ 208.

[158] **RL-109**, *Windstream I – Award*, ¶ 192.

[159] The Claimant's Domestic Application delayed the IESO's decision on termination to February 20, 2018, and then the actual termination until February 18, 2020. Ultimately, the Claimant withdrew its Domestic Application, meaning that the Court never had the opportunity to rule on the legality of the termination within Canadian law.

[160] **RL-138**, *Spence – Corrected Interim Award*, ¶ 179. The *Spence* tribunal was charged with determining if the claimants had constructive knowledge of facts underlying their claims that their properties had been unlawfully expropriated. The tribunal found that the publication of a government resolution declaring a neighbouring piece of land subject to expropriation was sufficient to put the claimants "on notice" that in the government's view, the claimants' properties were also subject to expropriation ("The Tribunal also draws attention to the 5 November 2003 publication of the 22 July 2003 MINAE Resolution declaring the acquisition of Marion Unglaube's property to be in the public interest, subsequently described as the formal start of the expropriation process of properties within the Park. Notwithstanding any issue surrounding the contested status of this Resolution, the Tribunal considers that the fact of this Resolution, and its publication, must be taken to have put potential, and sitting, property investors on notice that the MINAE considered properties within a 125-metre landward zone to lie within the boundaries of the Park and thus to be subject to a legislative requirement on the State to expropriate in the public interest.")

of that provision. Such an approach was described as unsustainable[161] by the *Ansung* tribunal and was expressly rejected by the *Spence* tribunal:

> On the issue of first knowledge of the breach, if a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period.[162]

94. The *Spence* tribunal also emphasized that if a measure "has deep roots in […] pre-critical limitation date conduct" it is particularly important that it be "*independently* actionable".[163]

95. The acts and omissions of the IESO have not been presented as being independently actionable. The Claimant merely points to the IESO's decision to terminate the FIT Contract on February 20, 2018 and to its effective termination on February 18, 2020, describing the latter as the point at which the breaches of NAFTA Articles 1105 and 1110 "crystallized".[164] It does not challenge the IESO's conduct *per se*, just that the termination was the result of the conditions created by Ontario.[165] In its Article 1110 claim, the Claimant consistently asserts that it is Ontario's conduct that expropriated its investment.[166] It makes no allegation that the IESO's decision to terminate the FIT Contract was wrongful conduct in its Article 1110 claim. Similarly, in its Article 1105 claim, the Claimant challenges Ontario's conduct as denying it fair and equitable treatment, not the IESO's.[167] It does not

[161] **RL-210**, *Asung Housing v. China,* (ICSID Case No. ARB/14/25) Award, 9 March 2017, ¶ 113 ("However, even assuming a continuing omission breach attributable to China, which the Tribunal must assume, and even assuming Ansung might wish to claim damages from a date later than the first knowledge of China's continuing omission – for example, from November 2, 2011, when Ansung tentatively agreed to transfer its shares or even December 17, 2011, when Ansung's commercial patience ran out – that could not change the date on which Ansung first knew it had incurred damage. And it is that first date that starts the three-year limitation period in Article 9(7). To allow Claimant to adjust that date of first knowledge by selecting the date from which it wants to claim damages for continuing breach would be, to borrow from the *Spence* decision, to allow an "endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period.")

[162] **RL-138**, *Spence – Corrected Interim Award*, ¶ 210.

[163] **RL-138**, *Spence – Corrected Interim Award*, ¶ 221.

[164] *Windstream II – Claimant's Reply Memorial*, ¶¶ 286 and 287.

[165] *Windstream II – Claimant's Memorial*, ¶¶ 329-331 and 484-492; *Windstream II – Claimant's Reply Memorial*, ¶¶ 357, 364-368, and 400.

[166] *Windstream II – Claimant's Memorial*, ¶ 458; *Windstream II – Claimant's Reply Memorial*, ¶¶ 285, 303, and 334. Also note the Claimant's position in paragraph 432 of its Memorial that the "*Windstream I* tribunal did not need to decide whether the acts of the IESO's predecessor, the OPA, were attributable to Canada, because it found that the acts of the Ontario Government organs were sufficient to find liability. The same is true here."

[167] *Windstream II – Claimant's Reply Memorial*, ¶¶ 373-383.

challenge the IESO's contractual right to terminate the FIT Contract and it recognizes that the IESO did not have the power to isolate the Claimant from the effects of the moratorium. It needed a direction from Ontario to do so.[168] The alleged NAFTA breaches therefore do not depend on the IESO's conduct.

96. Allowing the Claimant to find the Tribunal's jurisdiction *ratione temporis* based on the IESO's measures would deprive Article 1116(2) and 1117(2) of their *effet utile*. To borrow the conclusion of the tribunal in *Nissan Motor*, the facts relied on by the Claimant in attempt to establish jurisdiction *ratione temporis* are nothing more than additional conduct relating to the same underlying alleged breach, and as such this "dispute cannot be revived".[169]

4. The Tribunal's Jurisdiction *Ratione Temporis* Cannot Be Founded by Characterizing the Breach as a Composite Act

97. In its Reply Memorial, the Claimant clarifies that "[i]t was only once the FIT Contract was terminated that these individual measures, taken together, became internationally wrongful."[170] However, even if the Claimant characterizes the four Ontario measures and the two IESO measures as a single composite act, crystalizing with the FIT Contract's termination, then the Claimant still acquired knowledge of the alleged wrongful conduct well before the critical date.[171]

98. Article 15(2) of the International Law Commission's ("ILC") Articles on State Responsibility "deals with the extension in time of a composite act", providing guidance on how to analyze a composite act that breaches an international legal obligation.[172] The ILC makes clear that, in the case of a composite act, "the breach is dated to the first of acts in the series" insofar as the underlying

[168] *Windstream II – Claimant's Reply Memorial*, ¶¶ 382 and 383.

[169] **RL-172**, *Nissan Motor Co., Ltd. v. Republic of India* (UNCITRAL) Decision on Jurisdiction, 29 April 2019, ¶ 325 (noting that "[o]nce an investor has knowledge that it has been harmed by a particular State act alleged to breach a CEPA obligation, additional conduct relating to the same underlying harm 'cannot without more renew the limitation period' for the filing a claim seeking redress. If the three years have elapsed from first knowledge, then that particular investment dispute cannot be revived.")

[170] *Windstream II – Claimant's Reply Memorial*, ¶ 294.

[171] *Windstream II – Claimant's Reply Memorial*, ¶ 292.

[172] **RL-029**, James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (New York: Cambridge University Press, 2002) ("*ILC Articles - Commentary*"), Commentary 10 to Article 15.

primary obligation was in force.[173] In other words, the Tribunal must determine when the Claimant first knew of the first act in the series of Ontario's measures that allegedly breach NAFTA. A number of investment tribunals have applied this principle, including in the context of time bar.[174]

99. The Tribunal may not assess the breach at the time the last action or omission occurred.[175] To use the words of the *Rusoro Mining* tribunal, "the purpose of Art. 15.1 is to set a criterion to determine the occurrence of a composite act (i.e., when the last action has occurred, which taken with the previous ones is sufficient for the breach to have occurred); while Art. 15.2 determines the relevant date of the breach (i.e., the date of the first of the acts in the series)."[176]

100. The question for the Tribunal then becomes what was the first of the series of acts that allegedly taken together breach Canada's obligations and when did the Claimant first know of it. The first act raised by the Claimant in this dispute that allegedly led to the termination of the Claimant's FIT Contract is the imposition of the moratorium on February 11, 2011.[177] The Claimant was undisputedly aware of the imposition of moratorium and its continued application thereafter.

III. THE CLAIMANT HAS FAILED TO ESTABLISH A VIOLATION OF THE NAFTA

101. As demonstrated above, the Claimant has failed to discharge its burden to establish the admissibility of its claims and the Tribunal's jurisdiction. Even if the Tribunal does consider the merits, the Claimant has failed to establish a violation of NAFTA Article 1105 or Article 1110.

[173] **RL-029**, *ILC Articles - Commentary*, Commentary 10 to Article 15.

[174] **RL-176**, *Rusoro – Award*, ¶¶ 224-230; **RL-211**, *OOO Manolium Processing v. Republic of Belarus*, (PCA Case No. 2018-06) Final Award, 22 June 2021, ¶¶ 278.10 and 279; **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, ¶¶ 12-44; **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), ¶ 301.

[175] **RL-029**, *ILC Articles - Commentary*, Commentary 8 to Article 15.

[176] **RL-176**, *Rusoro – Award*, ¶ 226.

[177] Note that the Claimant had already obtained *force majeure* status as of November 22, 2010, when it was not able to obtain the approval to access the site to establish its project layout, conduct wind studies, or undertake research for permitting.

A. The Claimant Has Failed to Establish a Violation of NAFTA Article 1105

102. In its Reply Memorial, the Claimant states that the "central issue" for the Tribunal is whether Ontario had an obligation to direct the IESO to ensure the Claimant's FIT Contract was not cancelled following the *Windstream I* Award.[178] The Claimant continues to adopt an overly broad approach to the protections afforded by NAFTA Article 1105. The Claimant also fails to demonstrate how any action (or inaction) of Ontario or the IESO after the *Windstream I* Award violated the established customary international law minimum standard of treatment.

1. The Claimant Continues to Adopt an Incorrect Interpretation of the Minimum Standard of Treatment under NAFTA Article 1105

103. The Claimant's interpretation of the minimum standard of treatment under Article 1105 remains incorrect in at least three respects. First, although the Claimant criticizes Canada's statement that the threshold for proving a violation of Article 1105(1) is high,[179] the three NAFTA Parties[180] and numerous tribunals confirm that conclusion.[181] As noted by the tribunal in Westmoreland, "significant weight" should be given to the views of the NAFTA Parties because they "have a unique

[178] *Windstream II – Claimant's Reply Memorial*, ¶ 357.

[179] *Windstream II – Claimant's Reply Memorial*, ¶ 359.

[180] **RL-212**, *Alicia Grace and others v. United Mexican States* (ICSID Case No. UNCT/18/4) 1128 Non-Disputing Party Submission of the Government of Canada, 24 August 2021, ¶ 29; **RL-076**, Second Article 1128 Submission of Mexico, 12 June 2015 ("*Mesa – Second Article 1128 Submission of Mexico*"), ¶ 8; **RL-075**, *Mesa Power Group, LLC v. Canada* (UNCITRAL) Second Article 1128 Submission of the United States, 12 June 2015; **RL-185**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018, ¶ 7.55 ("Both the USA and Mexico submit that the threshold under NAFTA Article 1105(1), as in customary international law, is high.")

[181] *See* **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004 ("*Waste Management II – Award")*, ¶ 98 (requiring "a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process.") (emphasis added); **CL-134**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. The Government of Canada, Permanent Court of Arbitration* (PCA) Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 441 ("there is indeed a high threshold for Article 1105") (emphasis added); **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum, May 22, 2012, ¶¶ 152 and 153 (The minimum standard guaranteed by Article 1105 of NAFTA is "set […] at a level which protects against egregious behavior". The Claimant also incorrectly suggests that the application of a "strict standard" is based "entirely" on the 1926 *Neer* decision.) *Windstream II – Claimant's Reply Memorial*, ¶ 362. In the words of the *Thunderbird* tribunal, "[n]otwithstanding the evolution of customary law since decisions such as *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high". **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States (UNCITRAL)* Arbitral Award, 26 January 2006, ¶ 194 (emphasis added). *See also* **CL-053**, *Mesa Power Group, LLC v. The Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 503: ("[T]he FTC Note is clear that the Tribunal must apply the customary international law standard of the international minimum standard of treatment, and nothing else. There is thus no scope for autonomous standards to impose additional requirements on the NAFTA Parties.")

perspective on how the NAFTA should be interpreted and also in recognition of the systemic interests of States in ensuring consistency of interpretation."[182]

104. Second, the Claimant impermissibly attempts to broaden the scope of Article 1105 to prohibit differential treatment of different types of investors and investments.[183] As a general matter, customary international law does not preclude a State from treating its own investors more favourably than foreign investors.[184] As Canada set out in its Counter-Memorial,[185] only targeted discrimination on manifestly wrongful grounds that expose claimants to sectional prejudice, such as gender, race or religious beliefs, could amount to conduct that would rise to the level of a breach of the minimum standard of treatment.[186] All three NAFTA Parties agree that customary international law as reflected in Article 1105 does not incorporate a general prohibition on discrimination.[187]

105. Indeed, none of the authorities cited by the Claimant in its Reply support the view that discrimination could breach Article 1105 "even in the absence of racial, gender, religious or sectional prejudice".[188] The Claimant refers to *Nelson*, *Quiborax*, *Saluka*, *CMS*, and *Cairn Energy*.[189] However, only *Nelson* concerned Article 1105 of the NAFTA, and it cited with approval the *Waste*

[182] **RL-139**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022, ¶ 214.

[183] *Windstream II – Claimant's Reply Memorial*, ¶¶ 391 and 392.

[184] **CL-054**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 209; **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award on Jurisdiction and Merits, 3 August 2005, Part IV – Chapter C – Page 7, ¶ 14; **RL-185**, *Mercer International Inc. v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Award, 6 March 2018, ¶ 7.58.

[185] *Windstream II – Canada's Counter-Memorial*, ¶¶ 210 and 211.

[186] The Claimant does not rebut Canada's submissions on **CL-091**, *Waste Management II – Award* and **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012. The Claimant cited these two cases with approval in the *Windstream I* proceedings. *See Windstream I – Claimant's Memorial*, fn. 942.

[187] **RL-186**, *Mercer International v. Government of Canada* (ICSID Case No. ARB(AF)/12/3) Submission of the United States, 8 May 2015, ¶ 21: ("State practice confirms that there is no 'categorical rule' under customary international law requiring non-discrimination."); **RL-213**, *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada* (ICSID Case No. 20/52) Submission of the United States of America, 28 October 2022, ¶ 27: ("the customary international law minimum standard of treatment set forth in Article 1105(1) does not incorporate a prohibition on economic discrimination against aliens or a general obligation of non-discrimination."); **RL-214**, *Windstream Energy, LLC v. Government of Canada,* (PCA Case No. 2013-22), Submission of Mexico, 12 January 2016, ¶ 6: "Mexico also agrees with Canada that Article 1105(1) does not provide a blanket prohibition on discrimination against foreign investors or their investments."

[188] *Windstream II – Claimant's Reply Memorial*, ¶ 392.

[189] *Windstream II – Claimant's Reply Memorial*, ¶ 392 and fn. 551.

Management II tribunal's limitation to "sectional or racial prejudice".[190] Cases interpreting bilateral investment treaties that contain an express provision regarding "discriminatory measures"[191] are of no assistance in establishing the content of the customary international law standard under NAFTA Article 1105(1).[192]

106. Third, the Claimant continues to ignore the requirement that an investor's expectations must be objectively reasonable, relying instead on a highly selective reading of the record and its representatives' subjective feelings about the Project.[193] The Claimant now agrees that, to the extent relevant,[194] a failure to comply with an investor's legitimate expectations does not itself give rise to a NAFTA breach.[195] However, as NAFTA tribunals have consistently recognized, expectations must be objectively reasonable.[196] In the words of the *RREEF* tribunal, "[j]ust because an investor may

[190] **RL-183**, *Joshua Dean Nelson and Jorge Blanco v. United Mexican States* (ICSID Case No. UNCT/17/1) Final Award, 5 June 2020, ¶ 351.

[191] **CL-141**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Award, 16 September 2015, ¶ 288: Article III(2) of the Bolivia-Chile BIT ("Each Contracting Party shall protect within its territory the investments made in accordance with its laws and regulations, by the investors of the other Contracting Party and shall not impair the free administration, maintenance, use, enjoyment, extension, transfer, sale and liquidation of those investments through unreasonable or discriminatory measures.") (emphasis added); **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 318 (Article 3(1) of the Netherlands-Czech Republic BIT ("Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures […].") (emphasis added); **CL-140**, *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8) Award, 12 May 2005, ¶ 285: Article II(2)(b) of the Argentina-U.S. BIT ("Neither Party shall in any way impair by arbitrary or discriminatory measures […]") (emphasis added); In *Cairn Energy*, the tribunal cited with approval the *Waste Management II* tribunal's limitation to "sectional or racial prejudice". **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.

[192] *See* **CL-053**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 608; **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 278. In addition, both *Quiborax* and *Saluka* concerned allegations of discrimination on the basis of nationality, which in the NAFTA context must be treated exclusively under Article 1102 or Article 1103. *See also Windstream II – Canada's Counter-Memorial*, ¶ 211; **CL-141**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2) Award, 16 September 2015, ¶¶ 246 and 288; **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 318.

[193] *Windstream II – Claimant's Reply Memorial*, ¶ 399.

[194] *Windstream II – Canada's Counter-Memorial*, ¶ 213; *Windstream II – Claimant's Reply Memorial*, ¶ 395.

[195] *Windstream II – Claimant's Reply Memorial*, ¶ 400. The Claimant "does not allege that this [failure to meet legitimately held expectations] alone gives rise to a breach of the FET standard."

[196] **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 152; **CL-057**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Arbitral Award, 26 January 2006, ¶ 147; **CL-053**, *Glamis Gold,*

have an expectation […] does not necessarily mean that such an expectation is objectively legitimate in any given circumstance."[197] In addition, although the Claimant now agrees that a State's specific commitment must have been made "to the investor to induce the investment",[198] it continues to point to alleged representations that post-dated its investment in Canada.[199] As set out below, the Claimant does not explain how such statements could have induced an investment that had already been made.

2. The Claimant Has Not Established that the Challenged Measures Breach NAFTA Article 1105

107. The Claimant challenges six measures in this arbitration, alleging that together (but not individually) they amount to a violation of NAFTA Article 1105 because they allowed the IESO to exercise its right to terminate the FIT Contract.[200] None of the four arguments raised in the Claimant's Reply Memorial show a violation of Article 1105. As Canada sets out below: (a) the Claimant has failed to identify or prove any arbitrary or grossly unfair conduct in violation of Article 1105; (b) the Claimant's new "continuing" breach theory has no merit; (c) the Claimant has not shown any

Ltd. v. The United States of America (UNCITRAL) Award, 8 June 2009, ¶ 621. *See also* **CL-044**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 340: (The legitimacy or the reasonableness and the justifiability of expectations is assessed objectively taking into account "all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."); **CL-203**, *The PV Investors v. The Kingdom of Spain*, (UNCITRAL, PCA Case No. 2012-14), Final Award (February 28, 2020), ¶¶ 573 and 574; **RL-020**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB05/13) Award, 8 October 2009, ¶ 176.

[197] **RL-215**, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain (*ICSID Case No. ARB/13/30), Decision on Responsibility and on the Principles of Quantum, 30 November 2018, ¶ 262.

[198] *Windstream II – Claimant's Reply Memorial*, ¶ 395. *See also* **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 152: (requiring "clear and explicit representations made by or attributable to the NAFTA host State in order to induce the investment"); **CL-026**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009, ¶¶ 190 and 191.

[199] *Windstream II – Claimant's Reply Memorial*, ¶¶ 397 and 398.

[200] The Claimant points to the "composite effect" of the six challenged measures. *Windstream II – Claimant's Reply Memorial*, ¶ 287. However, the Claimant has not addressed or explained how the aggregate nature, if any, of the alleged measures amounts to an internationally wrongful act. Article 15 of the ILC's Articles on State Responsibility provides guidance. The ILC explains in its Commentaries that composite acts are "limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such." **RL-029**, *ILC Articles - Commentary*, Commentary 2 to Article 15, p. 141. The Claimant's allegations fall far short of a composite act as discussed by Professor James Crawford, namely "a legal entity the whole of which represents more than the sum of its parts." **RL-227**, Crawford, J. (2013), "State Responsibility: The General Part" (Cambridge Studies in International and Comparative Law), Cambridge: Cambridge University Press (excerpt), p. 266 (emphasis added). As in *Infinito*, the Claimant has merely referred to the "composite effect" of several measures, which is insufficient to substantiate the allegation of composite breach. **RL-140**, *Infinito Gold Ltd. v. Republic of Costa Rica,* ICSID Case No. ARB/14/5, Award (3 June 2021), ¶¶ 229 and 230.

discriminatory treatment of its investment; and (d) the Claimant could not have had a legitimate expectation that the FIT Contract would be renegotiated to suit its preferred outcome.

(a) Ontario's Actions Were Neither "Arbitrary" Nor "Grossly Unfair"

108. The Claimant alleges that Ontario's conduct was "arbitrary and grossly unfair"[201] because: (i) Ontario allegedly adopted an "obstructionist attitude" after the *Windstream I* Award;[202] (ii) the IESO lacked a "legitimate rationale" for terminating the FIT Contract;[203] (iii) Ontario did not conduct additional scientific studies relevant to the moratorium;[204] and (iv) Ontario deferred to the IESO with respect to the FIT Contract.[205] Ontario's conduct falls far below the threshold required to show a violation of NAFTA Article 1105.

(i) Ontario's Engagement with Windstream after the Windstream I Award

109. The Claimant asserts that there is no legitimate rationale for Ontario's conduct towards it after the *Windstream I* Award.[206] The Claimant is incorrect. On September 30, 2016, after four years of contentious NAFTA proceedings,[207] Ontario received the *Windstream I* Award. Ontario proceeded to review and consider the Award, which remained confidential until early December. The time to seek set-aside of the Award would expire on or around December 30, 2016.[208]

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[201] *Windstream II – Claimant's Reply Memorial*, ¶ 333.

[202] *Windstream II – Claimant's Reply Memorial*, ¶¶ 375 and 376.

[203] *Windstream II – Claimant's Reply Memorial*, ¶ 377.

[204] *Windstream II – Claimant's Reply Memorial*, ¶ 379.

[205] *Windstream II – Claimant's Reply Memorial*, ¶ 386.

[206] *Windstream II – Claimant's Reply Memorial*, ¶¶ 374-376.

[207] Between March 2017 and February 2020, the Claimant and Canada/Ontario/the IESO continued to face one another in various legal proceedings. As Canada laid out in its Counter-Memorial, after the release of the *Windstream I* Award, the Parties held discussions on its payment until March 14, 2017. In that period, the Claimant filed for an enforcement application which it withdrew on the same date when it received the payment. Less than two weeks thereafter, on March 27, 2017, the Claimant filed its Domestic Application against the IESO, which it maintained until January 15, 2020. *Windstream II – Canada's Counter-Memorial*, ¶¶ 70-72, 80-82, 86, 106-108, and 115. On January 22, 2020, the Claimant delivered a Notice of Intent to commence the present arbitration.

[208] **R-0840**, *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, Schedule, Article 34(3).

110. On October 5, 2016 – less than a week after receiving the Award – the Ministry of Energy Chief of Staff, Mr. Teliszewsky, advised internally that Ontario should not engage directly with Windstream.[209] This was a reasonable posture to adopt at the time, since as Mr. Teliszewsky explains, "interaction directly with a proponent (or their emissary) recently engaged in a legal dispute without the benefit of legal counsel (from both sides) in attendance would not have been a wise course of action".[210] Having been contacted by a Windstream representative, Mr. Teliszewsky advised him that Windstream's legal counsel should "outreach via appropriate channels to IESO Legal".[211]

111. Moreover, far from "refus[ing] to do *anything*",[212] Ontario and the IESO responded to the issues the Claimant raised in various letters and met with representatives of the Claimant in 2016-2017:

- *Correspondence with the Ministry of the Environment.* On November 23, 2016, Windstream wrote to the Environment Minister requesting "an update on the anticipated timing of the release of the finalized research as well as the updated policy framework" for offshore wind.[213] On December 23, 2016, the Director of Standards wrote to Windstream regarding the release of two desktop studies on offshore wind, "one of the many steps necessary to allow for all of the proper research to take place first".[214] On February 21, 2017, WWIS submitted an updated Project Description to MOE, calling it an "updated REA" and attaching materials from the *Windstream I* arbitration.[215] In its response, MOE noted that the studies in the submission were not, in fact, the reports required for an REA

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

[210] RWS-Teliszewsky, ¶ 23.

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

[212] *Windstream II – Claimant's Reply Memorial*, ¶ 374 (emphasis in original).

[213] **R-0784**, Letter from David Mars (WEI) to Glen. R. Murray (MOE) re Finalization of Offshore Wind Research (November 23, 2016).

[214] **R-0785**, Email from Sarah Paul (MOE) to David Mars (WEI) (December 23, 2016).

[215] **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).

application. The Ministry also stated that it could not confirm when or even "whether" Ontario would lift the moratorium.[216]

- *Correspondence with the Ministry of Energy.* In a November 28, 2016 letter to the Minister of Energy, the Claimant identified two issues it wished to discuss: "an update on the anticipated timing of the release of the finalized research as well as the updated policy framework" dependent on the completion of research and "the FIT Contract's terms", regarding which it looked forward to working with the IESO.[217] In its December 6, 2016 reply to the Claimant, the Minister of Energy stated that the Ministry does not discuss matters related to individual FIT Contracts, referred the Claimant to the IESO as the FIT Contract counterparty, and noted that Ontario was still reviewing the *Windstream I* Award.[218] The Claimant wrote again on December 15, 2016, highlighting the "ongoing moratorium", to which the Minister responded on February 21, 2017, repeating the consistent message that this was a contractual matter for the IESO.[219]

- *Meetings with the Minister of Energy's Chief of Staff.*[220] Mr. Teliszewsky met with Mr. Benedetti, an energy sector lobbyist, several times in the fall of 2016.[221] Mr. Teliszewsky recalls that Mr. Benedetti raised the issue of Windstream during one of those meetings.[222] Mr. Teliszewsky was "wary of discussing Windstream at the time" given the recently concluded NAFTA dispute.[223] Mr. Teliszewsky says that he "would have been quite blunt"

[216] **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017).

[217] **C-2049**, Email from David Mars (WEI) to Glenn Thibeault (MEI) re Next Steps for Windstream Wolfe Island Shoals Project attaching letter from David Mars (WEI) to Glenn Thibeault (MEI) (November 28, 2016).

[218] **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016).

[219] **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); **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).

[220] *See Windstream II – Claimant's Memorial*, ¶ 236: ("On October 6, 2016, Mr. Benedetti spoke with MEI's Chief of Staff, Andrew Teliszewsky […]. On October 13, 2016, Mr. Benedetti met with the Minister of Energy […]. On October 16, 2016, Mr. Benedetti spoke again with Mr. Teliszewsky […]. On November 9, 2016, Mr. Benedetti met with Mr. Teliszewsky […].")

[221] RWS-Teliszewsky, ¶ 25.

[222] RWS-Teliszewsky, ¶ 26.

[223] RWS-Teliszewsky, ¶ 27.

with Mr. Benedetti that "any concerns with respect to Windstream's FIT Contract should have been discussed with the IESO as contractual counterparty" and that legal counsel should be present.[224]

- *Meeting with the IESO*. The Claimant also met directly with WWIS's contractual counterparty, the IESO, on January 12, 2017. The IESO stated that it would not waive its section 10.1(g) termination right or extend the MCOD.[225] By letter dated February 9, 2017, the IESO confirmed that it would not waive its termination right or grant an extension.[226] The IESO also stated that it had not yet made a decision with respect to its section 10.1(g) right to terminate the FIT Contract, which would arise on May 5, 2017.

- *Correspondence with Ontario after the Claimant launched the Domestic Application*. Ontario's interactions with the Claimant continued in the period between March 2017, when the Claimant brought the Domestic Application against the IESO, and December 2020, when the Claimant brought this NAFTA claim against Canada.[227]

[224] RWS-Teliszewsky, ¶ 27. *See also* **R-0841**, E-mail to David Mars (WEI) from Chris Benedetti (Sussex Strategy Group) Re: Ontario GR (14 October 2016).

[225] **C-2067**, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017).

[226] **R-0789**, Letter from Donna Glassman (MOE) to David Mars (WEI) Re: Response to Letters of October 13, October 20, and November 14 (November 29, 2022).

[227] For example, on October 12, 2018, Mr. Mars met with Mitchell Davidson and Patrick Sackville of Ontario Premier's Office. They exchanged emails in the following weeks (**R-0813**, E-mail exchange between David Mars (White Owl Capital) and Patrick Sackville (Ontario Premier's Office) (October 2018)). On December 10, 2019, Mr. Rickford, the Minister of Energy responded to Mr. Mars' letter and conveyed that Ontario has decided not to intervene regarding the FIT Contract, which is subject to ongoing litigation between Windstream and the IESO, thus referring Windstream to the IESO (**C-2253**, Letter from Greg Rickford (MEI) to David Mars (WEI) in response to Windstream's letter dated November 26, 2019 (December 10, 2019)). After the Claimant filed its NOA on November 2, 2020, the Claimant continued to contact Ontario directly even though it has been repeatedly advised to direct its communications to Canada as the named party in the present arbitration. *See* Minister Smith's letter of August 6, 2021 in which he acknowledges the July 7, 2021 letter from the Claimant, notes that the matter is in arbitration, "respectfully declines [the] meeting invitation", specifies that "[g]oing forward, any discussion related to this matter should occur through our respective counsel", and states that he "would be happy to meet with [Windstream] once this matter is settled" (**R-0842**, Letter from Todd Smith (Minister of Energy) to David Mars (White Owl Cap) (6 August 2021)). On September 13, 2021, Ms. Glassman, MEI's Legal Director, responded to Mr. Mars' letter stating that "[a]s noted in the Minister of Energy's letter of August 6, 2021, Canada is the named party in this dispute, they are the appropriate party with whom to discuss settlement. Again, please direct any future correspondence to Canada as counsel for record." (**R-0843**, Letter from Ms. Glassman (Ministry of the Attorney General, Ontario) to David Mars (White Owl Cap) (13 September 2021)). On November 29, 2022, Ms. Glassman responded again to Windstream's letters dated on October 13, 2022 and November 14, 2022, noting that Ontario was not in a position to comment on the matter relating to the present ongoing NAFTA dispute, declining the meeting invitation and asking that future correspondence occur through Canada as counsel of record

112. Far from "obstructionism", Ontario engaged with the Claimant as appropriate given the circumstances: having arbitrated the Claimant's complaints with respect to the moratorium on offshore wind, Ontario viewed the matter as concluded.[228] As far as Ontario was concerned, any remaining issues regarding the FIT Contract were for the contracting parties to resolve, in line with the terms agreed to in the contract.

(ii) IESO's Decision to Terminate the FIT Contract in Accordance with its Section 10.1(g)

113. The FIT Contract granted the IESO extensive termination rights, including in situations of delay caused by government inaction.[229] The IESO's decision to terminate the FIT Contract was a fair and reasonable exercise of a right provided under the FIT Contract itself, and does not rise to the level of a breach of Article 1105.

114. As explained by Mr. Lyle, "[redacted]" and "[redacted]"[230] [redacted][231] [redacted]

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

[228] In contrast, the Claimant put in motion a plan to garner significant media attention to the NAFTA Award and "utilize the pronounced media coverage to exert further pressure on the Ontario government regarding a settlement." **R-0845**, Navigator Strategic Communication and Media Relations Proposal (Confidential Unapproved Draft) (7 October 2016), p. 2. According to the Claimant's lobbyist, the media pressure caused the Ministry of Energy to take a "crisis management" rather than a "remedial" approach, which was "prepping now for what they believe will be a focused attack from the Opposition in the Legislature next week". **R-0841**, E-mail to David Mars (WEI) from Chris Benedetti (Sussex Strategy Group) Re: Ontario GR (14 October 2016).

[229] **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, sections 2.5(b), 9.1(b), and 9.1(j). *See also* **R-0833**, *Grasshopper Solar Corporation v. Independent Electricity System Operator* (2019 Ontario Superior Court of Justice 6297), 15 November 2019.

[230] **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits, ¶ 15; RWS-Lyle, fn. 1.

[231] **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits, ¶ 16; **C-2125**, Letter from Michael Killeavy (IESO) to Nancy Baines (WWIS) re Feed-in Tariff Contract #F-000681-WIN-130-602 (the "FIT Contract") between the Independent Electricity System Operator (the "IESO") and Windstream Wolfe Island Shoals Inc. (the "Supplier") dated May 4, 2010 (November 10, 2017).

[redacted][232] [redacted]

[redacted][233]

115. [redacted]

[redacted][234] [redacted]

- [redacted]
- [redacted]
- [redacted]

[…]

- [redacted]

[…]

[232] **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits, ¶ 18(d). [redacted]; **C-2477**, Affidavit of Perry Cecchini sworn June 5, 2017 with exhibits, ¶ 70.

[233] **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits, ¶¶ 20-25.

[234] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018), p. 1.

- [redacted][235]

116. [redacted][236]

117. Faced with unequivocal contract terms and the cogent contemporaneous analysis by the IESO, the Claimant nevertheless challenges the IESO's decision to exercise its termination right as "arbitrary" – alleging that it was "based solely on the circumstances created by the Moratorium" and it relied on a "flawed" forecast of Ontario's energy costs and needs.[237] [redacted][238][239][240]

(iii) Ontario's Decision Not to Prioritize Scientific Studies Related to Offshore Wind Power

118. In its Reply Memorial, the Claimant argues that Ontario allegedly had no legitimate rationale for not conducting any studies to lift the moratorium.[241] It does so even though it acknowledges that

[235] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018), pp. 14-15 and 17.

[236] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018), p. 18.

[237] *Windstream II – Claimant's Reply Memorial*, ¶¶ 377 and 378. *See also* ¶¶ 151 and 152.

[238] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

[239] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018), pp. 28-53.

[240] Mr. Killeavy's later disavowal of his recommendation to terminate must be viewed in light of his departure from the IESO in February 2018 and his employment by Power Advisory LLC (an expert retained by the Claimant in this arbitration) from May 2018 onwards. **C-2475**, Affidavit of Michael Killeavy sworn October 18, 2018 with exhibit, ¶ 8; **R-0846**, LinkedIn information for Michael Killeavy (accessed on 24 October 2023).

[241] *Windstream II – Claimant's Reply Memorial*, ¶ 380.

it "has not alleged that the failure to do the work necessary to lift the Moratorium is itself a breach of the NAFTA."[242]

119. Ontario's decisions with respect to studies related to offshore wind must be viewed in the context of energy and electricity considerations in the period following the *Windstream I* Award. Ontario had a legitimate rationale for not prioritizing allocating resources to studies specific to offshore wind: at the time, it did not forecast needing any additional capacity from offshore wind.[243]

120. On September 1, 2016, the IESO had provided the Minister of Energy with the "Ontario Planning Outlook".[244] The Ontario Planning Outlook indicated that "Ontario will benefit from a robust supply of energy over the coming decade to meet projected demand".[245] As Mr. Teliszwesky recalls, the Minister of Energy "did not see a pressing need to move forward with additional generating resources at the time because, as I mentioned, the IESO had advised that Ontario was in a strong energy position and the LRP renewables procurement was being curtailed."[246]

121. Ontario publicly confirmed this approach on numerous occasions. For example, on October 15, 2016, media reported on the Minister of Energy's "many concerns" with respect to offshore wind power.[247] On February 13, 2017, the Ministry of the Environment indicated that Ontario would

[242] *Windstream II – Claimant's Reply Memorial*, ¶ 292 (emphasis added). The Claimant acknowledges that the imposition of the moratorium and the process that led to it were not wrongful. *See Windstream II – Claimant's Reply Memorial*, ¶ 234; **RL-109**, *Windstream I – Award*, ¶ 376.

[243] The FIT Contract's terms recognized that Ontario's energy needs could change over time and that the IESO had an unfettered right to terminate if a project did not achieve commercial operation within the prescribed time. RWS-Cecchini, ¶ 43: ("The OPA/IESO has a legitimate and reasonable interest in requiring its FIT Contract counterparties to achieve commercial operation within a specified time. FIT Contracts were offered by the OPA on the basis of projected grid capabilities. Given that demand, supply and price are susceptible to change in Ontario's electricity sector, if the milestones under a FIT Contract are not progressing as planned and the project does not achieve commercial operation at the intended time, the OPA/IESO needs to be able to re-evaluate its current electricity needs and retain the right to terminate the FIT Contract.")

[244] **C-2035**, IESO Ontario Planning Outlook – A technical report on the electricity system (September 1, 2016).

[245] **R-0770**, Directive from the Minister regarding LRP II RFQ Process and EFWSOP Cancellation (September 27, 2016) (web version, accessed on December 7, 2022).

[246] RWS-Teliszewsky, ¶ 21. In addition, in 2017 Ontario announced that it would move away from long-term electricity contracts and towards a "market-based approach", as set out in the 2017 Long-Term Energy Plan. **C-2061**, Ontario's Long-Term Energy Plan (2017), p. 35.

[247] Toronto Star, "Province waits on offshore wind power; More research is needed, Ontario energy minister says" (October 15, 2016), which appeared in a daily media scan prepared for the Claimant. *See* **R-0847***,* Navigator Daily Media Brief – Windstream Energy LLC (17 October 2016), p. 3.

"continue to follow the impact of North America's first offshore wind pilot project in Lake Erie" in order to "have a better grasp of any potential environmental and health challenges posed by freshwater offshore wind developments."[248] The Ministry stated that: "[t]he moratorium will not be lifted until research findings are understood and concerns surrounding offshore wind projects are addressed."[249] Another media article noted an official's statement that the government "still believes the decision to put a moratorium on offshore wind was correct" and it was continuing to take a "cautious approach to offshore wind".[250]

122. Far from being arbitrary or grossly unfair, Ontario's decision not to prioritize scientific research on offshore wind was reasonable in the circumstances. The Claimant should be held to its concession that "the failure to do the work necessary to lift the Moratorium" does not breach the NAFTA.[251]

(iv) Ontario's Deference to the IESO Regarding the FIT Contract

123. Finally, the Claimant argues that there was "no legitimate rationale for Ontario's decision not to intervene" with the IESO's administration of the FIT contract.[252] The Claimant makes two equally unpersuasive points in support of this argument.

124. First, the Claimant notes that Ontario, rather than the IESO, was responsible for the moratorium. This is true but of no consequence. The *Windstream I* Award did not mandate the removal of the moratorium (which, in any event, it was not found to constitute a breach), nor could it. The Claimant's argument is based on the assumption that Ontario was required to intervene to create value in the FIT Contract following the *Windstream I* Award. There is no support for this assumption in the *Windstream I* Award itself or in the evidence before this Tribunal.

[248] **R-0794**, The Globe and Mail, Article, "Ontario signals moratorium on offshore wind projects will continue for years" (February 13, 2017), p. 2.

[249] **R-0794**, The Globe and Mail, Article, "Ontario signals moratorium on offshore wind projects will continue for years" (February 13, 2017), p. 2 *See also* **C-2072**, "Ontario signals offshore wind moratorium will continue for years" – Chat News Today (February 13, 2017).

[250] **R-0848**, Navigator Daily Media Brief – Windstream Energy LLC (20 October 2016), p. 3.

[251] *Windstream II – Claimant's Reply Memorial*, ¶ 292.

[252] *Windstream II – Claimant's Reply Memorial*, ¶ 381.

125. Second, the Claimant examines at length whether Ontario had the power to direct the IESO through formal directive and informal control.[253] This misses the point. While Ontario did have the power to direct the IESO, it did not have an obligation to do so with respect to the Claimant's FIT Contract, or for any other reasons.[254]

126. Ontario's practice was to defer to the IESO with respect to individual FIT Contracts.[255] As noted by Mr. Teliszewsky, the Minister of Energy's practice was to provide policy direction to the overall FIT program and decisions of systemic importance.[256] As he says:

> While it is true that the Ministry has legislative powers to issue directives to the IESO in relation to certain issues and that the IESO must comply with these directives, in my time at the Ministry this was typically used for relatively high-level policymaking as opposed to specific contractual issues regarding individual FIT Contracts. This was done to ensure suppliers were aware that their FIT Contract was with the IESO, not the Ministry, and that as the FIT Contract counterparty, the IESO was the decision-making authority with respect to the management of individual FIT Program contracts.[257]

127. As with the other allegedly "arbitrary" elements of Ontario's conduct following the *Windstream I* Award, Ontario's deferral to the IESO to decide whether to terminate and/or amend the FIT Contract was reasonable and based on legitimate policy choices. It was certainly not "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety"[258] as is required to find a breach of Article 1105.

(b) The Claimant's "Continuing Breach" Theory Has No Merit

128. In its Reply Memorial, the Claimant advances the theory that Ontario's failure to intervene with the IESO with respect to the FIT Contract was a continuation of the Article 1105 breach found by the

[253] *Windstream II – Claimant's Reply Memorial*, ¶¶ 384 and 385.

[254] The Claimant's expert, Ms. Powell, comments extensively on the "formal and informal tools available to" Ontario to direct the IESO but does not identify any legal instrument that compels Ontario to exercise of such power. CER-Powell-3, ¶¶ 45 and 65. The Claimant's witness, Mr. Smitherman, likewise does not identify any legal obligation to direct the IESO. *See* CWS-Smitherman-2.

[255] RWS-Teliszewsky, ¶ 23.

[256] RWS-Teliszewsky, ¶¶ 11 and 12.

[257] RWS-Teliszewsky, ¶ 11.

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

Windstream I tribunal.[259] The Claimant does not address how this theory of continuing breach is related (if at all) to the six allegedly new measures it challenges in this arbitration. Nor does it explain how this allegation can be reconciled with its statement – in the same submission – that the "impugned measures and legal grounds" in the first Windstream arbitration and this arbitration "are distinct".[260]

129. In any event, the Claimant's "continuing breach" theory has no merit. In September 2016, after extensive written and oral submissions, the *Windstream I* tribunal decided that "the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the [IESO], 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" was an internationally wrongful act.[261] The breach for which Canada was held liable in *Windstream I* occurred at a specific time – "within a reasonable period of time after the imposition of the moratorium"[262] – and did not have a continuing character.[263] In addition, and conclusively, the breach was fully remedied with the payment of the *Windstream I* Award on March 14, 2017.

[259] *Windstream II – Claimant's Reply Memorial*, ¶¶ 18, 387, and 388.

[260] *Windstream II – Claimant's Reply Memorial*, ¶ 198.

[261] **RL-109**, *Windstream I – Award*, ¶ 380. The *Windstream I* tribunal also found that the imposition of the moratorium was not internationally wrongful. **RL-109**, *Windstream I – Award*, ¶ 376: ("The Tribunal is unable to find that the Government of Ontario's decision to impose a moratorium on offshore wind development, or the process that led to it, were in themselves wrongful.")

[262] **RL-109**, *Windstream I – Award*, ¶ 380.

[263] As the ILC notes, "[a]n act does not have a continuing character merely because its effects or consequences extend in time". **RL-029**, *ILC Articles - Commentary*, Commentary 6 to Article 14, p. 136. The authorities to which the Claimant cites are inapposite. In *Mobil II*, the tribunal considered the question of when the limitation period in NAFTA Articles 1116(2) and 1117(2) began, and in so doing made clear that it "is not endorsing Mobil's 'continuing breach' argument." **RL-110**, *Mobil Investments Canada v. Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 170. In *LG&E*, the tribunal was concerned with the assessment of damages. **RL-070**, *LG&E Energy Corp. et al v. Argentine Republic* (ICSID Case No. ARB/02/1) Award, 25 July 2007, ¶¶ 85-87. The paragraph in the ICJ's *Nicaragua* case to which the Claimant points is a conclusion that the United States is under a duty to cease an internationally wrongful act. **CL-181**, *Case Concerning Military and Paramilitary Activity in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment (June 27, 1986), ¶ 292(12), p. 149. In *United States of America v. Iran*, the ICJ held that the Iranian authorities' decision to allow the ongoing occupation of the United States Embassy by militants, as well as the continued detention of Embassy staff as hostages, "clearly gave rise to repeated and multiple breaches of the applicable provisions of the Vienna Conventions." **CL-182**, *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment (May 24, 1980), ¶ 76.

(c) Ontario's Treatment of the Claimant Was Not Discriminatory

130. Next, the Claimant asserts that Ontario's treatment of Windstream was "inconsistent with its treatment of others".[264] In the two paragraphs discussing discrimination, the Claimant does not point to any facts that could amount to discrimination of any sort.[265] As set out above, the Claimant raises no manifestly wrongful grounds that could, in theory, found a claim for breach of Article 1105. Regardless, the Claimant has failed to meet even its own (faulty) test for discrimination.[266]

131. In other parts of its Reply Memorial, the Claimant alleges that its investment received less favourable treatment than the White Pines project.[267] However, there is nothing comparable between the White Pines project and that of the Claimant. First, as found by the *Windstream I* tribunal, only other prospective developers of offshore wind projects could be in similar circumstances to the Claimant.[268] The White Pines project was an onshore wind energy project. Second, the White Pines project is fundamentally dissimilar to the Claimant's Project because the former had almost reached commercial operation at the time at its termination.[269] Even the Claimant recognizes that the White Pines project was "partially built".[270] This stands in stark contrast with the Claimant's project, which, as the *Windstream I* tribunal found, was "an early-stage project" without the required permits and approvals, much less any completed construction.[271] Third, the White Pines proponents had not brought their grievance to, and received compensation from, a NAFTA arbitration process. With the payment of the *Windstream I* Award and the return of its CAD 6 million security deposit following

[264] *Windstream II – Claimant's Reply Memorial*, ¶ 391.

[265] *Windstream II – Claimant's Reply Memorial*, ¶¶ 391 and 392.

[266] In its Reply, the Claimant proposes a three-prong test to determine whether a State conduct is discriminatory: ("If (i) similar cases are (ii) treated differently (iii) and without reasonable justification.") *Windstream II – Claimant's Reply Memorial*, ¶ 392. *See also* **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 313.

[267] *Windstream II – Claimant's Reply Memorial*, ¶¶ 5, 172-174, and 344.

[268] **RL-098**, *Windstream I – Award*, ¶ 414. While the "like circumstances" analysis is not part of the legal test under Article 1105 of the NAFTA but of Articles 1102 and 1103, determination by the *Windstream I* tribunal on this point is factually relevant for the analysis under Article 1105 in this case.

[269] *Windstream II – Claimant's Reply Memorial*, ¶ 172.

[270] *Windstream II – Claimant's Reply Memorial*, ¶ 174.

[271] **RL-098**, *Windstream I – Award*, ¶ 475.

the termination of the FIT Contract, the Claimant was "made whole" with respect to its investment, much as the White Pines proponent was.

(d) The Claimant Could Not Have Had any Legitimate Expectation that the FIT Contract Would Be Renegotiated or Not Terminated

132. As set out above, should legitimate expectations be examined as a factor in the Tribunal's Article 1105 analysis, only objectively legitimate expectations arising from specific representations to the investor to induce the investment, assessed at the time of making the investment, are relevant.[272] The Claimant has not identified any representations falling into this category.

133. First, the Claimant has neither identified nor valued any investment it has made in Canada following the *Windstream I* Award. There is no post-*Windstream I* Award investment that could have been induced. Indeed, in May 2018 the Claimant's representative wrote that it had not yet "defined exactly what [the Project] would look like nor what it would cost",[273] and that the Project "was no closer to being built" than in 2016.[274]

[272] *See* ¶ 106.

[273] **R-0849**, 2018 Engineering Plan (2 May 2018), p. 1. This document, an engineering plan provided by Mr. Baines to Mr. Mars, has been heavily redacted for litigation privilege, like many of the documents it has provided. Canada has written to the Claimant on five occasions to ask for it to review its solicitor-client, litigation, and settlement privilege designations. *See* **R-0851**, Correspondence between Counsel for Canada and Counsel for the Claimant, (27 June 2023 to 27 September 2023) and **R-0852**, Email exchange with Torys LLP Re: Production and Privilege Issues, (17 October 2023 to 18 October 2023). In response to Canada's repeated requests, the Claimant has lifted certain redactions on information that it should never have withheld for privilege. For example, the Claimant removed the redaction over "He provided the juiciest emails". *Compare* **R-0853** *with* **R-0854**, E-mail to David Mars (White Owl Cap) and Nancy Baines, Re: Case (Unredacted) (15 October 2016). In other instances, the Claimant has maintained privilege assertions that Canada has specifically asked it to reconsider, including the phrase "We are at Torys" in a document the Claimant exhibited unredacted. *Compare* **R-0855** *with* **C-2046**, Email from [redacted] to Ian Baines (WEI) re Congratulations! (November 24, 2016). It has also maintained litigation privilege over much of an email sent by [redacted], an entity unrelated to Windstream. *See* **R-0936**, E-mail to Daniel Brown (KeyBanc) from Ian Baines (Control Tech) Re: Wolfe Island Shoals – Follow up on our July 27th call (21 August 2018). Canada therefore questions the accuracy of the Claimant's privilege assertions, including the more than 2,000 documents that the Claimant has withheld in their entirety on the grounds of privilege. *See* **R-0850**, Windstream Privilege Log (27 September 2023).

[274] **R-0856**, E-mail to Chris Spencer (Queens University) from Ian Baines (Control Tech) Re: Wolfe Island Shoals Wind Project (21 December 2022).

134. Second, even if the Tribunal were to consider pre-*Windstream I* Award investments, it must examine what a reasonable investor would expect in the period following the *Windstream I* Award.[275] Those expectations would be informed by:

- *The Windstream I Award's findings and award of damages*. As a result of the Award, the Claimant received compensation in the amount of the full value of its investment (CAD 31,182,900), less its CAD 6 million security deposit.[276]

- *The terms of the FIT Contract*. At the time of the *Windstream I* Award, the FIT Contract had been in *force majeure* for six years. In addition to the termination right under section 10.1(g), the FIT Contract accorded the IESO other termination rights. For example, section 9.2(a) allowed the IESO to terminate the FIT Contract for certain supplier events of default, including: a failure to perform any material covenant or obligation such as the failure to achieve the MCOD (section 9.1(b)); and a failure to reach commercial operation on or before the date that is 18 months after the MCOD (section 9.1(j)).[277]

- *The IESO's communications regarding termination.* On January 12, 2017, the IESO informed the Claimant that it would not waive its FIT Contract termination rights.[278]

- *Ontario's updated energy forecast and procurement policies.* In 2016-2017, Ontario was forecasting adequate electricity supply and moving away from long-term, fixed-payment, large scale standard offer procurement contracts.[279]

135. Third, the Claimant argues that it was entitled to rely on representations Ontario made after the *Windstream I* Award that the scientific research needed to lift the moratorium was being "finalized"

[275] *See* ¶ 106.

[276] **RL-098**, *Windstream I – Award*, ¶ 485.

[277] **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3; **R-0833**, *Grasshopper Solar Corporation Solar Corporation et al. v. Independent Electricity System Operator* (2019 Ontario Superior Court of Justice 6297), 15 November 2019.

[278] **C-2067**, Meeting Minutes (WWIS) Windstream/IESO Meeting (January 12, 2017); **R-0662**, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream) (February 9, 2017).

[279] *See* ¶¶ 119 and 120. *See also* RWS-Teliszewsky, ¶ 21. In addition, in 2017 Ontario announced that it would move away from long-term electricity contracts and towards a "market-based approach", as set out in the 2017 Long-Term Energy Plan. **C-2061**, Ontario's Long-Term Energy Plan (2017), p. 35.

and "the Project could still be built".[280] When viewed in context, it is not possible to conclude that these statements could create a legitimate expectation that the Project would proceed:

a) The Claimant refers to an answer from the Minister of Energy to a parliamentary committee on October 26, 2016. The Minister emphasized that Ontario "still believe[s] that [its] decision to put the moratorium on offshore wind is a correct one".[281] He made clear that Ontario intended to maintain the moratorium until the necessary scientific research is completed. He reminded parliamentarians once again of Ontario's "cautious approach to offshore wind".[282] His comments highlighted the uncertainty in offshore wind development and may not be reasonably interpreted as an inducement for investment.

b) The Claimant also points to a news article from a media scrum on December 6, 2016 quoted the Minister of Energy affirming that Ontario was carefully considering all its options.[283] The context for this article – omitted by the Claimant – was the very recent public release of the *Windstream I* Award. The Minister stated, in vague terms, that allowing the Project to proceed was amongst the options that Ontario was studying. He also made clear that Ontario was continuing to adopt a cautious approach to offshore wind. These statements made in the context of the release of the *Windstream I* Award are in no way "clear and explicit representations" made to induce investment.

[280] *Windstream II – Claimant's Reply Memorial*, ¶¶ 75, 244, and 397-399.

[281] **C-2045**, Official Report of Debates (Hansard) Transcript - English, Legislative Assembly of Ontario, Standing Committee on Estimates (October 26, 2016), p. E-159.

[282] **C-2045**, Official Report of Debates (Hansard) Transcript - English, Legislative Assembly of Ontario, Standing Committee on Estimates (October 26, 2016), p. E-159.

[283] **R-0788**, Article, "Energy minister says all options still being considered in offshore wind power case" (December 6, 2016): "'We're still considering all of our options,' the minister told reporters Tuesday at Queen's Park. 'I think the important thing for us to do is do our due diligence and get this right. And that's what the lawyers are doing.'"; "'Ontario is carefully reviewing all legal options following the Tribunal's decision in the NAFTA Chapter 11 dispute between US-based Windstream Energy LLC and Canada'"; "'The Ontario continues to take a cautious approach to offshore wind, which includes finalizing research to make sure that we are protective of both human health and the environment,' added his spokesperson in a statement. 'Without thorough studies, there is relatively little data or comparative examples for the use of offshore wind on inland, fresh water bodies.'"

c) In a February 13, 2017 news article, Ontario publicly signaled that the moratorium "will likely continue for several more years" due to "many unknowns about offshore wind in freshwater environments" as revealed by studies.[284] The Claimant was aware of this position.[285]

d) The same message was repeated directly to the Claimant on August 25, 2017, when MOE informed it by letter that it could not "confirm whether or when Ontario will be revisiting the February 2011 decision".[286]

136. In these circumstances, a reasonable investor would have concluded that the Project remained unfinanceable due to the section 10.1(g) right to terminate the FIT Contract as of May 5, 2017, and that the most likely outcome was for the IESO to ultimately exercise that right. In fact, the Claimant's own documents show that it did not expect that the Project had a clear path forward after the *Windstream I* Award.[287] The Claimant even hired a communications and lobbying firm to help "exert further pressure on the Ontario government regarding a settlement."[288] In line with those expectations, in March 2017, the Claimant launched the Domestic Application in an attempt to

[284] **C-2072**, "Ontario signals offshore wind moratorium will continue for years" – Chat News Today (February 13, 2017).

[285] *Windstream II – Claimant's Memorial*, ¶ 297; **R-0857**, E-mail to David Mars (White Owl Cap) from Daniel Brown (Key Banc) Re: Windstream in the news (13 February 2017).

[286] **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017).

[287] As Mr. Baines wrote at the time, "It is hard to know what is next for our project." **R-0858**, E-mail to Ian Baines (Control Tech) from Lorry Wagner (Leed Co) Re: Windstream (17 October 2023), p. 2. This stands in contrast to Ms. Baines' statement in this arbitration that Windstream "felt optimistic about the future of the Project." CWS-N. Baines, ¶ 17. In October 2016, Mr. Baines wrote to Ortech, WWIS' project manager, to construct a grid of prior correspondence and "add anything you think is missing if we are to move this project forward". Mr. Baines added that the "intent is to send out a barrage of letters" and that Ortech should "[i]gnore the set back as it doesn't exist" and "[a]ssume that all regulations are in place". **R-0859**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel Re: Next Steps (25 October 2016), p. 3.

[288] **R-0845**, Navigator Strategic Communication and Media Relations Proposal (Confidential Unapproved Draft) (7 October 2016), p. 2; **R-0860**, E-mail to David Mars (White Owl Cap) from Randi Rahamim (NAV) Re: Media Interviews (19 October 2016); **R-0861**, Navigator Brief, "Key Messages and Q&A", prepared for David Mars by Navigator (20 October 2016); **R-0862**, E-mail to David Mars (White Owl Cap) from Ian Baines (Control Tech) Re: Nice work with Richard Blackwell (20 October 2016) (acknowledging that "Ontario is talking of a moratorium"); **R-0863**, E-mail to Steven Webster (Avista Cap) from William Ziegler Re: Additional Windstream NAFTA Press Coverage (21 October 2016). Any enquiries from third parties about the Project in Fall 2016 arose as a result of the Claimant's press release (**R-0781**, PRNewswire, Press Release, "Windstream Energy awarded $28 million in damages and costs for inequitable treatment by Ontario; largest NAFTA award against Canada" (October 13, 2016)) and related press coverage, rather than the Award itself, which was not publicly released until December 6, 2016.

prevent the IESO from exercising its termination right, which would result in the termination of the FIT Contract and the return of the Claimant's security deposit.[289]

137. Finally, for completeness, Canada addresses the Claimant's meritless arguments that the Tribunal should consider its expectations arising from statements made by Ontario in 2011 and from Canada's arguments in the *Windstream I* proceedings.[290]

138. The Claimant states that it could continue to rely on "promises made in 2011" that "did not evaporate by virtue of the *Windstream I* Award."[291] These 2011 statements were extensively litigated in the *Windstream I* proceedings, in which the Claimant contended that Ontario failed to "insulate the Claimant from the effects of the moratorium".[292] The *Windstream I* tribunal did not reference these statements in its findings on Article 1105, and the Claimant has not pointed to anything new that warrants revisiting them.[293] There was no breach of Article 1105 based on these statements then, nor is there one now.

139. The Claimant also asserts that it was entitled to rely on Canada's arguments in the *Windstream I* proceedings that the Project was "frozen" and could proceed once the moratorium lifted.[294] The Claimant omits to refer to Canada's other statements – also in those proceedings – confirming that "Ontario did not plan to conduct any further studies".[295] The Claimant cannot pick certain statements by Canada (but not others) and assert reasonable reliance, particularly given Mr. and Mrs. Baines' contemporaneous understanding that "Government documents show that the anticipated studies could take 3-5 years maximum – however, no new studies are being planned."[296] And regardless,

[289] *Windstream II – Canada's Counter-Memorial*, ¶ 81.

[290] *Windstream II – Claimant's Reply Memorial*, ¶¶ 244 and 397-399.

[291] *Windstream II – Claimant's Reply Memorial*, ¶ 397.

[292] **RL-109**, *Windstream I – Award*, ¶¶ 185 and 306.

[293] **RL-109**, *Windstream I – Award*, ¶¶ 376-380.

[294] *Windstream II – Claimant's Reply Memorial*, ¶ 244.

[295] **RL-109**, *Windstream I – Award*, ¶ 378.

[296] **C-2644**, Email from David Mars (WEI) to Randi Rahamim (NAV) re "FW: Key Points for Navigator" (October 13, 2016) with attached (a) WWIS – Offshore Wind Project Key Facts (October 12, 2016); (b) Analysis entitled "Analysis of Benefits to Ontario of Cancelling the Wolfe Island Shoals FIT Power Purchase Agreement" (July 31, 2014).

Canada's arguments in the *Windstream I* proceeding cannot be characterized as "clear and explicit representations […] in order to induce"[297] the very investment at issue in that proceeding.

B. The Claimant Has Failed to Establish a Violation of NAFTA Article 1110

140. The Claimant bases its Article 1110 claim on an erroneous reading of the *Windstream I* Award. Its case rests on the premise that the *Windstream I* tribunal found that the value of the Claimant's investment both *was* and *was not* CAD 31,182,900 – that despite its award of damages, the tribunal also found there was some ethereal value that it excluded from its valuation of the investment. In essence, the Claimant's case is that Ontario was required to create value for the Claimant's investment. This is simply wrong.

141. The tribunal in *Windstream I* found there was no violation of Article 1110 because the security deposit of CAD 6 million was substantial when compared to the overall value of the Claimant's investment (found to be CAD 31,182,900), and the security deposit had not been taken.[298] Since the Claimant still held the CAD 6 million security deposit, the Claimant had not been substantially deprived of the value of its investment, a required element in the test for expropriation.[299]

142. In light of this, the tribunal found that the Claimant was to be compensated for the damage to the investment, rather than its full fair market value.[300] The tribunal then quantified damages by subtracting the CAD 6 million security deposit that the Claimant still held from the full fair market value of the investment.[301] No further deduction was made for the FIT Contract, which was still in force. The tribunal was clear that "as at the date of this award, the FIT Contract cannot be considered to have any value."[302] The CAD 6 million security deposit having been returned upon the termination

[297] **CL-064**, *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID Case No. ARB(AF)/07/4) Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 152.

[298] **RL-109**, *Windstream I – Award*, ¶ 291: ("In reaching the conclusion that, on the facts, the Claimant has not been substantially deprived of its investment, the Tribunal has taken into account its determination of the overall value of the Claimants' investment, as set out in Section B below.") (emphasis added).

[299] **RL-109**, *Windstream I – Award*, ¶ 291.

[300] **RL-109**, *Windstream I – Award*, ¶ 473.

[301] **RL-109**, *Windstream I – Award*, ¶ 485.

[302] **RL-109**, *Windstream I – Award*, ¶ 483.

of the FIT Contract,[303] the Claimant has been fully compensated for the fair market value of its investment. This finding is a complete answer to the Claimant's claim for expropriation.

143. If the Tribunal does reach the merits of the Claimant's expropriation claim, its task is to apply the test for expropriation in light of the evidence in these proceedings, the compensation awarded by the tribunal in *Windstream I*, and the factual matrix that existed when the FIT Contract was terminated. In considering whether Canada's actions or inactions have had any adverse economic effect on the Claimant's investment, the Tribunal must take into consideration the Claimant's evidence that its Project, FIT Contract and enterprise combined had only nominal value, if any, as of May 2012.[304] It must also take into consideration the CAD 25 million in damages that the Claimant has been awarded, and the return of the CAD 6 million security deposit following the termination of the FIT Contract.

144. In the sections that follow, Canada first explains the correct approach to determining whether an expropriation has taken place, and then shows that the record does not support a finding of expropriation. The Claimant has failed to meet any of the elements required to establish that Ontario's measures following the *Windstream I* Award constituted a breach of Article 1110.

1. The Claimant Continues to Apply an Incomplete Test for Expropriation

145. As the *Windstream I* Award recognized, NAFTA Article 1110 "sets out the criteria for legality of expropriation and defines the modalities of compensation, but does not provide any criteria for determining whether or when an expropriation has taken place."[305] In its Counter-Memorial, Canada explained that tribunals interpreting the meaning and scope of "expropriation" have done so in

[303] **R-0659**, Letter from Darryl Yahoda (IESO) to Bank of Montreal (February 20, 2020). The CAD 6 million security deposit was returned to the Claimant upon the termination of the FIT Contract.

[304] *Windstream I – Claimant's Memorial*, ¶ 558; *Windstream II – Claimant's Reply Memorial*, ¶¶ 6 and 407; **C-2470**, Day 10 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 26, 2016) (Confidential), p. 22:25; CER-Deloite-1, ¶ 5.8.

[305] **RL-109**, *Windstream I – Award*, ¶ 283 (emphasis added).

accordance with customary international law,[306] an approach that all three NAFTA Parties support.[307] The Claimant fails to meaningfully engage on this point, ignoring the *Windstream I* tribunal's caution that Article 1110 itself does not provide the criteria required to establish an expropriation.

146. As Canada explained in its Counter-Memorial, in CUSMA Annex 14-B, the NAFTA Parties explicitly addressed the correct approach at customary international law to determining if an indirect expropriation has taken place. Once a claimant has established that it had a property right capable of being expropriated, the approach calls for a case-by-case, fact-specific inquiry into various factors, including whether the claimant was substantially deprived of the value of its investment and the context of the impugned measure.[308] If an expropriation has occurred, a tribunal may then turn to the requirements applicable to the legality of the expropriation.

[306] *Windstream II – Canada's Counter-Memorial,* ¶ 151 and fn. 290.

[307] For statements that NAFTA Article 1110 incorporates customary international law and the fact-based inquiry it requires, *see:* **RL-216**, *Alicia Grace and Others v. United Mexican States,* (ICSID Case No. UNCT/18/4) Article 1128 Submission of the United States of America, 24 August 2021, ¶ 59; **RL-218**, *Espiritu Santo Holdings, LP and L1bre Holding, LLC v. United Mexican States*, (ICSID Case No. ARB/20/13), Submission of the United States of America, 21 March 2023, ¶ 31; **RL-219**, *Espiritu Santo Holdings, LP and Libre Holdings LLC v. United Mexican States*, (ICSID Case No. ARB/20/13) Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 21 March 2023, ¶ 19 ("Canada notes that the NAFTA Parties have recently reconfirmed their shared understanding of the state of international law as it relates to expropriations" in CUSMA Annex 14-B); **RL-220**, *Odyssey Marine Exploration, Inc., v. United Mexican States*, (ICSID Case No. UNCT/20/1) Submission of the United States of America, 2 November 2021, ¶ 27; **RL-213**, *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada* (ICSID Case No. 20/52) Submission of the United States of America, 28 October 2022, ¶ 31; **RL-221**, *Lone Pine Resources Inc., v. Canada* (ICSID Case No. UNCT/15/2) Submission of Mexico Pursuant to NAFTA Article 1128, 16 August 2017, ¶¶ 7 and 8; **RL-222**, *Pope and Talbot, Inc., v. Government of Canada*, (UNCITRAL) Submission of the United Mexican States, 3 April 2000, ¶¶ 36 and 38; **RL-180**, *Lone Pine Resources Inc., v. Canada* (ICSID Case No. UNCT/15/2) Non-Disputing Party Submission of the United States of America Pursuant to NAFTA Article 1128, 16 August 2017, ¶ 12; **RL-179**, *Odyssey Marine Exploration, Inc. v. United Mexican States* (ICSID Case No. UNCT/20/1) Non-Disputing Party Submission of the Government of Canada Pursuant to NAFTA Article 1128, 2 November 2021, ¶ 28; **RL-223**, *Marvin Roy Feldman Karpa v. United Mexican States,* 1128 Second Submission of Canada, 28 June 2001, ¶ 12; **RL-212**, *Alicia Grace and others v. United Mexican States* (ICSID Case No. UNCT/18/4) 1128 Non-Disputing Party Submission of the Government of Canada, 24 August 2021, ¶ 40; **RL-079**, *Methanex Corporation v. The United States of America*, (UNCITRAL) Canada's Fourth Submission Pursuant to Article 1128, 30 January 2004, ¶¶ 14 and 15. As the *Westmoreland Mining Holdings LLC* tribunal found, "significant weight should be placed upon" non-disputing party submissions. **RL-139**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022, ¶¶ 213 and 214.

[308] In CUSMA Annex 14-B, the NAFTA Parties confirmed their shared understanding that, as a threshold matter, "[a]n action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment." CUSMA, Annex 14-B, ¶ 1 (internal footnote: "For greater certainty, the existence of a property right is determined with reference to a Party's law."). The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires "a case-by-case, fact-based inquiry that considers, among other factors": (i) the economic impact of the government action; (ii) the extent

147. In its Reply Memorial, the Claimant criticizes Canada for referring to the factors set out in the CUSMA Annex, stating that Canada "is seeking to import into Article 1110 language that is not there."[309] The Claimant misses the point. Canada's position is not that the CUSMA Annex forms part of NAFTA Chapter Eleven. The Annex, and those like it in other agreements,[310] "do not change the nature of the substantive obligations that existed under […] prior agreements; instead, they merely elucidate, for the benefit of tribunals charged with interpreting the treaty, the Parties' intent in agreeing to those obligations."[311]

148. Here, in order to evaluate whether the Claimant has established an expropriation, the Tribunal should apply the approach endorsed by the treaty Parties:

a) Does the termination of the FIT Contract and other impugned measures interfere with a tangible or intangible property right or property interest in an investment?

b) Do the facts, in this specific case, establish an indirect expropriation, having regard to (at least) the following factors?

    1. What was the economic impact of the government action?

to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) character of the government action, including its object, context, and intent. The Parties further specified that "[n]on-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances."

[309] **RL-098**, *Windstream II – Claimant's Reply Memorial*, ¶ 311.

[310] **RL-098**, Text of the Trans-Pacific Partnership, Investment Chapter, 26 January 2016, Annex 9-B: Expropriation (both Canada and Mexico are parties to the CPTPP); **RL-054**, *Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment*, 19 February 2008 (entered into force 1 January 2012), Annex B: Expropriation; **RL-224**, *United States – Panama Trade Promotion Agreement*, (2007), in force 31 October 2012, Chapter Ten, Annex 10-B: Expropriation; **RL-225**, *United States – Colombia Trade Promotion Agreement*, (2006), in force 15 May 2012, Chapter Ten, Annex 10-B: Expropriation. *See also* **RL-054**, *Treaty Agreement Between the Government of the United States of America and the Government of Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment*, 19 February 2008 (entered into force 1 January 2012), Annex B: Expropriation; **RL-226**, *Canada's 2021 Foreign Investment Promotion and Protection Agreement* (FIPA) Model (2021), Art. 9(2), (3) and (4).

[311] **RL-035**, Andrea J. Menaker, "Benefiting From Experience: Developments in the United States' Most Recent Investment Agreements" (2006), 12:1 U.C. Davis J. Int'l L. Pol'y, p. 122; **RL-061**, Andrew Newcombe, "Canada's New Model Foreign Investment Protection Agreement" (August 2004), pp. 5 and 6.

2. Does the government action interfere with the Claimant's distinct, reasonable investment-backed expectations?

3. Was the character of the government action, including its object, context, and intent, expropriatory?

4. If an expropriation has occurred, is it in breach of NAFTA Article 1110?

149. The Claimant agrees with prong (a) of the test, acknowledging that as a threshold matter it must "have rights capable of being expropriated"[312] and that "the property right or asset in question must have vested."[313] As for prong (b), the disputing parties also agree that a consideration of the economic impact is necessary, or more specifically that a claimant must be "substantially deprived" of the value of its investment.[314] However, the Claimant would elevate this factor to serve as the entirety of the test.[315] The disputing parties disagree on the relevance of factor (b)(3),[316] but agree that an expropriation will only be lawful if it satisfies Article 1110(a)-(d). As set out below, the Claimant has failed to establish that Ontario's measures following the *Windstream I* Award amounted to an expropriation in contravention of Article 1110.[317]

[312] *Windstream II – Claimant's Reply Memorial*, ¶ 309.

[313] *Windstream II – Claimant's Reply Memorial*, ¶ 326.

[314] *Windstream II – Claimant's Memorial*, ¶ 451. *See also Windstream II – Claimant's Reply Memorial*, ¶¶ 306 and 336. The *Windstream I* tribunal's analysis of the claim of indirect expropriation began with this question. Finding that there could be no substantial deprivation, the tribunal did not consider other relevant factors. However, the tribunal did recognize the importance of the other factors in an analysis of indirect expropriation, including whether there is a property with value, the severity of economic impact, and whether there are any considerations that would justify the government action. *See* **RL-109**, *Windstream I – Award*, ¶¶ 284 and 285.

[315] *Windstream II – Claimant's Reply Memorial*, ¶ 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.")

[316] *Windstream II – Claimant's Reply Memorial*, ¶ 347.

[317] *Windstream II – Claimant's Reply Memorial*, ¶ 348.

2. The Claimant Has Failed to Meet Each Element of the Test for Indirect Expropriation

150. The Claimant alleges that it has three investments in Canada: WWIS, the Project, and the FIT Contract.[318] The Claimant's expropriation claim focuses on the FIT Contract[319] and what it calls a "right to build and operate an offshore wind farm."[320]

(a) The Claimant Has Not Established the Existence of a Vested Property Right Capable of Expropriation

151. As set out in Canada's Counter-Memorial, the Tribunal must determine whether the Claimant held rights capable of expropriation at the time of the alleged breach.[321] The Claimant agrees in its Reply Memorial that the property right or asset in question must have vested for the Claimant to seek redress,[322] but it has failed to establish a vested property right here.

152. The Claimant attempts to overcome this issue by arguing that the tribunal in *Windstream I* found that the FIT Contract was an asset capable of expropriation.[323] The tribunal did not make such a finding, nor did it determine which rights had vested under the FIT Contract.[324] The tribunal in *Windstream I* limited its analysis on expropriation to whether the Claimant was substantially deprived of the value of its investment, and concluded its analysis on that basis.[325] Finding that the Claimant

[318] *Windstream II – Claimant's Memorial*, ¶ 414. According to the Claimant, the Project includes: the FIT Contract; the CAD 6 million letter of credit; WWIS' work product in connection with the development of the Project; data collected or acquired by WWIS in connection with the Project; the meteorological tower; WWIS's turbine supply agreement with Siemens; and land leases concluded in connection with the Project. *Windstream II – Claimant's Memorial*, ¶ 417.

[319] *Windstream II – Claimant's Reply Memorial*, p. 80 ("The FIT Contract is an Investment Capable of Being Expropriated".)

[320] *Windstream II – Claimant's Reply Memorial*, ¶ 318. The Claimant has not quantified the value of the Project apart from the revenue it alleges it would have obtained under the FIT Contract, nor does it quantify the value of WWIS. *See* Part IV.

[321] *Windstream II – Canada's Counter-Memorial*, ¶¶ 155-168.

[322] *Windstream II – Claimant's Reply Memorial*, ¶ 326.

[323] *Windstream II – Claimant's Reply Memorial*, ¶ 314.

[324] The Claimant points to no section in the *Windstream I* Award where the tribunal made a determination on this issue preventing Canada from raising it. In support of this assertion, at paragraph 314 of its Reply Memorial, the Claimant references paragraphs 251 and 252 of its Reply Memorial where it purportedly recounts the tribunal's findings – but those paragraphs provide no citation for any such finding either. It is thus incorrect to assert that this point is *res judicata* or that Canada has "cherry-picked" aspects of the *Windstream I* Award. *Windstream II – Claimant's Reply Memorial*, ¶ 314.

[325] **RL-109**, *Windstream I – Award*, ¶ 290.

was not substantially deprived of the value of its investment, the tribunal had no need to consider the question of whether the FIT Contract conferred a vested right capable of expropriation.[326]

153. As in the *Windstream I* arbitration, the Claimant argues that Canada is unduly focusing on the revenue stream aspect of the FIT Contract.[327] This is despite arguing in its Reply Memorial that the "FIT Contract is WWIS's most important property right and asset" and that "it would have constituted WWIS's most significant source of revenue."[328] The Claimant does not address Canada's argument that although the FIT Contract may have conferred certain vested rights, the right to generate revenue was not one of them. For example, the FIT Contract conferred *force majeure* rights,[329] and the specific right of the Claimant to have its "performance security […] returned at the time of the termination" of the FIT Contract by either party.[330] At the same time, the FIT Contract did not grant the Claimant the right to attain commercial operation.[331]

154. The Claimant also attempts to bring the notion of substantial deprivation into the test of whether there is an investment capable of being expropriated.[332] However, the question at this juncture of the expropriation analysis is not whether there has been substantial deprivation of the investment as a whole (including WWIS and the Project), but whether the particular asset alleged to have been expropriated (the FIT Contract's revenue stream) constitutes a property right that is capable of being taken. If an aspect of the Claimant's investment does not amount to a vested right, it is not an asset

[326] **RL-109**, *Windstream I – Award*, ¶¶ 289-291.

[327] *Windstream II – Claimant's Reply Memorial*, ¶ 332.

[328] *Windstream II – Claimant's Reply Memorial*, ¶ 320; CER-Powell, ¶ 111.

[329] **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, section 10.

[330] **RL-109**, *Windstream I – Award*, ¶ 290.

[331] These points are respected in *Windstream I* Award. First, the *Windstream I* tribunal assessed damages on a comparable transaction basis rather than assessing the value of a revenue-generating Project, which was too speculative given its "early development stage and related risks and uncertainties". **RL-109**, *Windstream I – Award*, ¶ 475. Second, it subtracted the value of the security deposit – CAD 6 million dollars – from the damage to the full value of the investment, since it would have been returned to the Claimant if the FIT Contract was terminated. **RL-109**, *Windstream I – Award*, ¶ 483.

[332] *Windstream II – Claimant's Reply Memorial*, ¶ 316.

capable of being taken. Again, the *Windstream I* tribunal did not make a finding on this question, the answer to which is disconnected from the status of WWIS or the Project.[333]

155. In this regard, the Claimant's reliance on *Electrabel v. Hungary* is misplaced. The *Electrabel* tribunal considered the whole of the claimant's investment in determining that the termination of the claimant's power purchase agreement could not be considered a substantial deprivation of the claimant's investment, since other parts of its investment remained available to it. The tribunal was not considering the issue of whether a particular right was capable of expropriation. In addition, in *Electrabel*, the claimant was already entitled to revenue under that agreement at the time of the alleged breach.[334] That is not the case here. At best, the Claimant had a potential revenue stream, if all of the FIT Contract conditions were met[335] and if the FIT Contract was not otherwise terminated in accordance with its standard provisions.[336]

[333] *Windstream II – Claimant's Reply Memorial*, ¶ 315 citing *Windstream II – Canada's Counter-Memorial*, ¶ 169.

[334] **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, ¶¶ 6.63 and 6.64.

[335] At the time of the alleged expropriation, the Claimant had no permits or approvals, no site access to undertake the work, no financing, and it was far from obtaining the required NTP from IESO to begin construction. *See Windstream II – Canada's Counter-Memorial*, ¶¶ 167 and 168.

[336] The FIT Contract contained numerous termination rights. Under section 10.1(g), either party could terminate the FIT Contract without costs in the event that the Commercial Operation Date (the "COD") was delayed by a *force majeure* event for an aggregate of more than 24-months after the original Milestone Commercial Operation Date ("MCOD"). All Completion and Performance Security which, in the ordinary course, would need to be maintained by the supplier until the project reaches commercial operation, would be returned or refunded to the supplier in the event that either party were to exercise this termination right. Under section 10.1(h), either party could terminate the contract if the supplier was unable to comply with its contractual obligations, by reason of a *force majeure* event, for more than 36 months in any 60-month period during the term. This termination right was also without costs of any kind to either party, except for any amounts due or payable by a party up to date of termination, and all security to be returned/refunded. Under section 9.1(b), the IESO was entitled to terminate without costs if the supplier failed to achieve commercial operation by the MCOD, which is a fundamental obligation under the FIT contracts (*see* **R-0833**, *Grasshopper Solar Corporation Solar Corporation et al. v. Independent Electricity System Operator* (2019 Ontario Superior Court of Justice 6297), 15 November 2019)). Under section 9.1(j), the IESO was entitled to terminate the contract and retain the amount of security as liquidated damages in the absence of a *force majeure* event, if a supplier failed to achieve COD within 18 months following the MCOD (known as the "long-stop date").

156. Moreover, in relation to the FIT Contract itself, Ms. Powell's conclusion that the Claimant had a property right in the FIT Contract is based on the presumption that the right to sell power exists.[337] Here, the Claimant had no vested right to sell power at the time of the impugned measures.[338]

157. Finally, the Claimant's criticism that only one of the authorities cited by Canada involves a contract[339] misses the point. The authorities cited by Canada uniformly emphasize that rights subject to expropriation must accord an investor actual and demonstrable entitlement to a benefit. In the same way that the Claimant's FIT Contract did not entitle it to the permits and other requirements necessary to reach commercial operation, the *Emmis* tribunal concluded that a broadcasting agreement did not confer any rights constituting assets of value capable of expropriation.[340] In its view, "the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed." The termination of the FIT Contract, and the consequential return of the security deposit, did not deprive the Claimant of any value in vested property.

158. The FIT Contract did not contain a vested property right in the form of a "right to build and operate an offshore wind farm".[341] The Claimant has not provided sufficient reliable evidence to establish that any other right under the FIT Contract constitutes property capable of expropriation. In addition, it has not alleged that it suffered any independent loss with respect to the Project or WWIS. As a result, the Claimant's expropriation case fails and the Tribunal need not proceed further.

(b) The Claimant Has Failed to Establish Any of the Factors Indicating an Indirect Expropriation

159. The Claimant summarizes the measures that allegedly "caused the expropriation of Windstream's investments" as: Ontario's failure to complete the studies required to lift the

[337] CER-Powell, ¶ 130.

[338] *Windstream II – Canada's Counter-Memorial*, ¶ 165. Ms. Powell herself opines that "it would be extremely unlikely that any project lender would be willing to provide financing for a renewable energy project if such *force majeure* termination right is exercisable prior to the project's expected commercial operation date." CER-Powell, ¶ 115.

[339] *Windstream II – Claimant's Reply Memorial*, ¶ 332.

[340] **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, ¶¶ 192 and 221.

[341] *Windstream II – Claimant's Reply Memorial*, ¶ 218.

moratorium; Ontario's continued application of the moratorium to WWIS; and Ontario's deferral to the IESO with respect to the decision to terminate the FIT Contract.[342] However, even if the Claimant had investments capable of expropriation, the record shows that these measures do not satisfy any of the indicia of an indirect expropriation.

(i) Ontario's Actions Post-*Windstream I* Award Had No Economic Impact on the Claimant's Investments

160. The Claimant has not shown that it was substantially deprived of the value of its investments. In 2016, the *Windstream I* tribunal ascribed a fair market value of CAD 31,192,000 to the Claimant's investment. Since the Claimant could still recover its CAD 6 million security deposit,[343] the tribunal awarded damages of CAD 25,192,000.[344] In February 2020, the IESO returned the Claimant's CAD 6 million security deposit.[345] In other words, the Claimant has recouped the entire value of its investment, leaving nothing of which it could be deprived. Ontario's actions (or inactions) between September 27, 2016 (*Windstream I* Award) and February 18, 2020 (the alleged Valuation Date) did not have any economic impact on the Claimant's investment.

161. Despite this, the Claimant argues that the Project had potential or unlocked value that was allegedly not realized as a result of Ontario's actions. The Claimant's argument assumes that Ontario was required to create value after the *Windstream I* Award. It alleges that it has been wrongfully deprived of the "additional value" that could have been created "if the FIT Contract were renegotiated."[346] Canada has explained why the Claimant's position is wrong.[347] The Claimant states that Canada cannot rely on the "fact that value was never created" because the failure to renegotiate the contract is part of the alleged breach.[348] Since there was no obligation on Ontario to renegotiate or otherwise create value in the FIT Contact, the Claimant's attempt to show value fails. The only

[342] *Windstream II – Claimant's Memorial*, ¶ 458(a)-(c).

[343] **RL-109**, *Windstream I – Award*, ¶ 483.

[344] **RL-109**, *Windstream I – Award*, ¶¶ 291 and 484.

[345] **R-0659**, Letter from Darryl Yahoda (IESO) to Bank of Montreal (February 20, 2020).

[346] *Windstream II – Claimant's Reply Memorial*, ¶ 341.

[347] *See* ¶¶ 108-139.

[348] *Windstream II – Claimant's Reply Memorial*, ¶ 342.

case the Claimant cites in support, *Gemplus*, concerns damages, not expropriation.[349] In *Gemplus*, the tribunal found that when computing damages, tribunals should be mindful if the breach creates uncertainty in the amount of compensation due, such that the amount awarded should not be reduced as a result of the uncertainty created by the breach itself. Its analysis has no application to whether an element of the legal test on expropriation has been satisfied.

162. The Claimant's argument that third party interest in the Project showed the Project had value after the *Windstream I* Award is equally baseless. As explained in paragraphs 199 to 205, the evidence before this Tribunal fails to support the Claimant's position.[350] As Mr. Baines stated on December 21, 2022: "Our current endeavour is suing under NAFTA to recover lost profits. We won a similar case in 2016, but unfortunately the project is no closer to being built."[351]

163. Further, the Claimant's reliance on e-mails from the Ministry of Energy regarding the potential value of the FIT Contract is misplaced.[352] The email exchange referred to by the Claimant was not intended to calculate the value of the investment under NAFTA Chapter Eleven. Rather, it was generated in the context of Ontario's receipt of the *Windstream I* Award in September 2016. Notably, the communication was with respect to the maximum potential revenue that could have accrued under the FIT Contract, had all of the requirements of the contract been met and had there been no disruption in generation of electricity throughout the life of the Project. The discussion on valuation assumed that the Project would achieve commercial operation in 2016 and operate for 20 years.[353]

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[349] *Windstream II – Claimant's Reply Memorial*, ¶ 342 citing **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 2010, ¶¶ 13-92.

[350] *See* Section IV.

[351] **R-0856**, E-mail to Chris Spencer (Queens University) from Ian Baines (Control Tech) Re: Wolfe Island Shoals Wind Project (21 December 2022). This conclusion is consistent with the *Windstream I* tribunal's conclusion that as of May 4, 2012, "the Project effectively became non-financeable." **RL-109**, *Windstream I – Award*, ¶ 374. Ms. Powell also notes that "it would be extremely unlikely that any project lender would be willing to provide financing for a renewable energy project if such *force majeure* termination right is exercisable prior to the project's expected commercial operation date". CER-Powell, ¶ 115. The FIT Contract granted that termination right. *See* **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, section 10.1(g). *See also* **RL-109**, *Windstream I – Award*, ¶ 374, fn. 770.

[352] *Windstream II – Claimant's Reply Memorial*, ¶ 343.

[353] **C-2638**, Email from Emma Ferner to Sam Colalillo re Windstream Contract Value Estimate (September 30, 2016). The Claimant itself notes that its own valuation of damages would have been much higher had they used the same scenario (which was not realistic). *See Windstream II – Claimant's Reply Memorial*, ¶ 323.

164. The Claimant also argues that a settlement agreement between the Government of Ontario and a third party, White Pines, indicates that its investment had value.[354] As noted above[355], the White Pines project is in no way comparable to the Claimant's project. Most notably, the Claimant's inability to proceed with development of its early-stage Project was resolved through a CAD 25 million NAFTA award. In contrast, White Pines' development proceeded until legislation was passed to cancel the project's FIT contract and regulatory approvals, to require it to decommission the project, and to compensate it for eligible costs. In addition, the White Pines project was for onshore wind and had received its permits and financing to proceed. It was also partially built at the time of the settlement agreement.[356] As set out in Canada's Counter-Memorial,[357] at the time of the alleged expropriation, the Claimant had no permits or approvals, no site access and no financing.

165. Finally, the Claimant adds that this Tribunal should find substantial deprivation on the basis that it was allegedly the only FIT contract holder that was not paid upon the termination of its FIT Contract.[358] In fact, the Claimant was paid in full as a result of the *Windstream I* arbitration. It was awarded damages based on the fair market value of its investment as determined by an impartial tribunal presented with expert evidence, less the CAD 6 million security deposit that was ultimately returned to it upon termination.[359] All of the evidence on the record indicates that the FIT Contract and the Project had no remaining value after the payment of the *Windstream I* Award and the return of the Claimant's security deposit. Indeed, the *Windstream I* tribunal contemplated the exact scenario that took place after the Award: the IESO terminated the FIT Contract under section 10.1(g) and, in keeping with that provision, returned the security deposit.[360]

[354] *Windstream II – Claimant's Reply Memorial*, ¶¶ 172-174.

[355] *See* ¶¶ 130 and 131 above.

[356] *Windstream II – Claimant's Reply Memorial*, ¶¶ 172 and 173.

[357] *Windstream II – Canada's Counter-Memorial*, ¶ 166.

[358] *Windstream II – Claimant's Reply Memorial*, ¶ 345.

[359] **RL-109**, *Windstream I – Award*, ¶ 485. *See also* **R-0659**, Letter from Darryl Yahoda (IESO) to Bank of Montreal (February 20, 2020).

[360] **RL-109**, *Windstream I – Award*, ¶ 290. Referring to section 10.1(g) of the FIT Contract, the tribunal noted that "[…] the Respondent cannot terminate, and indeed confirmed at the hearing that it would not be able to terminate, the FIT Contract pursuant to Article 10.1(g) without returning the security. It therefore cannot be said that the Claimant has been substantially deprived of its investment."

(ii) Ontario's Actions Did Not Interfere with any Reasonable, Investment-Backed Expectations Post-*Windstream I* Award

166. The Claimant blurs the lines between this proceeding and *Windstream I* by arguing that this Tribunal should consider its expectations from before the *Windstream I* Award.[361] However, the question before this Tribunal is whether the Claimant held any reasonable, investment-backed expectations after the *Windstream I* Award and leading up to the alleged expropriatory measures.

167. The Claimant has failed to allege any inducement of investment by Ontario following the *Windstream I* Award. There is no evidence of any new investment following the *Windstream I* Award and no evidence that Ontario made specific representations or commitments to the Claimant that would give rise to any investment-backed expectations.[362]

168. In any event, the Claimant cannot establish that it had a reasonable expectation that the FIT Contract would not be terminated. Indeed, any expectation that Ontario should have interfered to prevent the IESO from exercising its termination right is unreasonable in the circumstances.

169. Following the *Windstream I* Award, the Claimant was concerned that its reading of the Award was not shared by Ontario.[363] It had good reason to be concerned. As set out in detail below, the Claimant had just been awarded compensation for damages to its investment (based on the fair market value less the security deposit); the large FIT Program had been cancelled and Ontario had sufficient energy supply for forecasted demand; the Ministry of Energy consistently referred it to counsel and the IESO; and the IESO confirmed that it would not waive its section 10.1(g) termination right that could be exercised as of May 5, 2017.

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[361] *Windstream II – Claimant's Reply Memorial*, ¶ 354.

[362] **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ¶ 7: ("[…] as a matter of general international law, a non-discriminatory regulation for a public purposes, which is enacted in accordance with due process, and which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.")

[363] **R-0864**, E-mail to David Mars (White Owl Cap) and Nancy Baines (Ortech) from Ian Baines (Control Tech) Re: Premier Letter – October 26 Draft 1 (26 October 2016) and **R-0865**, Letter to Premier Wynne Re: Windstream Wolfe Island Shoals Project – FIT Contract and NAFTA Ruling (undated, unsigned): "Does the Government of Ontario share the interpretation that the completion of the NAFTA ruling sets the stage for moving the project forward?"

170. First, the Claimant had brought its complaint regarding the moratorium to an international tribunal and had received compensation in the fair market value of its investment, less its security deposit. The Award recognized that contracting parties "could" create subsequent value, if they so chose;[364] nothing required them to do so. The Award also contemplated another outcome, the one that actually occurred: termination of the FIT Contract in accordance with the applicable law.[365]

171. Second, Ontario's energy outlook had changed. In September 2016, the IESO had provided the "Ontario Planning Outlook", which indicated that Ontario had sufficient energy to meet projected demand. In that context, on September 22, 2026, Minister Thibeault cancelled a major planned renewables procurement process (LRP II). Mr. Teliszewsky also recalls that the Ministry of Energy had launched "Conservation First" a multi-pillared strategy to drive load curtailment from consumers through efficiency measures, and that cost containment for electricity prices was front of mind.[366] Far from any movement on the moratorium, Mr. Teliszewsky says that: "the Ministry did not see a pressing need to move forward with additional generating resources at the time because, as I mentioned, the IESO had advised that Ontario was in a strong energy position and the LRP renewables procurement was being curtailed."[367]

172. Third, Ontario was clear that it viewed this as a contractual matter between the IESO and the Claimant, and repeatedly communicated this message to the Claimant.[368] In light of these communications, the Claimant could not have had any *bona fide* expectation that the Government of Ontario would interfere to prevent the IESO from exercising its contractual right to terminate:

[364] **RL-109**, *Windstream I – Award*, ¶ 483.

[365] **RL-109**, *Windstream I – Award*, ¶ 290 and 379: ("Consequently, the Respondent cannot terminate, and indeed confirmed at the hearing that it would not be able to terminate, the FIT Contract pursuant to Article 10.1(g) without returning the security.")

[366] RWS-Teliszewsky, ¶¶ 18 and 19.

[367] RWS-Teliszewsky, ¶ 21.

[368] **R-0841**, E-mail to David Mars (WEI) from Chris Benedetti (Sussex Strategy Group) Re: Ontario GR (14 October 2016); CWS-Benedetti-3, ¶ 5(d): Mr. Teliszewsky "informed me that MEI had been advised by their counsel not to engage with Windstream."

- On December 6, 2016, the Ministry of Energy told Mr. Mars that "we do not think it would be appropriate to meet with you at this time";[369]

- [redacted];[370] and

- On February 21, 2017, in response to the Claimant's letter of December 15, 2016 requesting a meeting to discuss its FIT Contract, Minister Thibeault reiterated to the Claimant that the Ministry was not in a position to discuss matters related to individual FIT contracts.[371]

173. Fourth, the Claimant was aware that the FIT Contract granted the IESO extensive termination rights.[372] Among other termination rights, the FIT Contract gave either party the right to terminate the agreement for a *force majeure* event that delayed the COD by more than 24 months after the MCOD – including delays caused by the inability to obtain permits or approvals from government authorities.[373] In the face of the explicit terms in the FIT Contract that allowed for the termination of the agreement where there is a delay as a result of government action, it is unreasonable to hold

[369] **R-0787**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (December 6, 2016). The Claimant understood this message. *See for example,* **R-0866***,* E-mail to Ciara DeJong (Ortech) and Nancy Baines (Ortech) from Ian Baines (Control Tech) Re: Initial Draft of the Draft Project Description (20 December 2016).

[370] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018). *See also* **C-2477**, Affidavit of Michael Lyle sworn June 1, 2018 with exhibits, ¶¶ 36 and 39.

[371] **C-2076**, Letter from Glenn Thibeault (MEI) to David Mars (WEI) (February 21, 2017).

[372] **C-2471**, WWIS Application Record and Affidavit of David Mars sworn June 2, 2017 with exhibits, ¶¶ 27-30; **R-0662**, Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream) (February 9, 2017); **R-0789**, Letter from Donna Glassman (MOE) to David Mars (WEI) Re: Response to Letters of October 13, October 20, and November 14 (November 29, 2022).

[373] *See* **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, section 10.3(i). *See also* termination rights discussed by **R-0833**, *Grasshopper Solar Corporation Solar Corporation et al. v. Independent Electricity System Operator* (2019 Ontario Superior Court of Justice 6297), 15 November 2019 (section 9.2(a) (termination right upon event of default)). The court found that that the obligation to achieve commercial operation by MCOD is a "material covenant or obligation" in the FIT Contract because section 2.5(a) is a "time is of the essence" clause. Thus, pursuant to section 9.1(b), the failure to achieve MCOD is an event of default (¶ 34), which gives rise to IESO's termination rights under section 9.2(a). *See also* discussion on the event of default set out in section 9.1(j) that again gives rise to IESO's termination rights under section 9.2(a) if the Commercial Operation Date has not occurred on or before the date that is 18 months after the MCOD (the "long-stop termination right") if it elects to waive its termination right under section 9.2(a) at MCOD (¶ 50).

expectations that termination may not occur in those circumstances.[374] Indeed, on February 9, 2017, the IESO directly advised WWIS that it was not prepared to amend the FIT Contract to provide an extension to the MCOD or the date that would be an event of default under section 9.1(j), or to waive any of its rights under the FIT Contract, including its termination right under section 10.1(g).[375]

(iii) The Character of Ontario's Actions Post-*Windstream I* Award Was Not Expropriatory

174. The Claimant's case is that Ontario, after paying more than CAD 25 million in damages to the Claimant, was required to interfere in a contractual arrangement between the IESO and WWIS in order to create value in the FIT Contract and the Project after the *Windstream I* Award, and that the failure to do so constituted an expropriation. As explained in Canada's Counter-Memorial, Ontario's actions lacked the character of an expropriation.[376] The Claimant's Reply Memorial does nothing to disturb that conclusion.

175. By 2016, the outlook for renewable energy had changed in Ontario. In September 2016, Ontario had a strong energy position. As noted by the Minister of Energy at the time, the Ontario Planning Outlook indicated that "Ontario will benefit from a robust supply of energy over the coming decade to meet projected demand".[377] That same month, the Minister cancelled the planned second round of renewable energy procurements (LRP II).[378]

176. Ontario also viewed the *Windstream I* Award as having resolved Windstream's dispute. In contrast to other issues that required legislative or other changes, as noted by Mr. Teliszwesky (Chief

[374] The Claimant at times also expressed doubts about the future of the Project. For example, in response to an e-mail from [redacted], Mr. Baines replied on October 25, 2016 (less than a month after the Tribunal's decision) that the Claimant "would like to obtain clarification regarding the moratorium" before entering into discussions with a third party and "recent public statements by government require some discussion". **R-0867**, E-mail to [redacted] from Ian Baines (Control Tech) Re: [redacted] Introduction – WindStream Energy – Offshore Wind (25 October 2016).

[375] **R-0662,** Letter from Michael Killeavy (IESO) to Nancy Baines (Windstream) (February 9, 2017).

[376] *Windstream II – Canada's Counter-Memorial*, ¶¶ 188-191.

[377] **R-0770**, Directive from the Minister regarding LRP II RFQ Process and EFWSOP Cancellation, 27 September 2016 (web version, accessed on December 7, 2022).

[378] **R-0770**, Directive from the Minister regarding LRP II RFQ Process and EFWSOP Cancellation, 27 September 2016 (web version, accessed on December 7, 2022); **R-0772**, Letter from Glenn Thibeault (MEI) to Bruce Campbell (IESO) Re: Directive from Minister, 27 September 2016. *See also* RWS-Teliszewsky, ¶¶ 18 and 19.

of Staff to the Minister of Energy): "when the *Windstream I* Award was issued there was nothing further required of the Ministry of Energy."[379]

177. Nor is there any support for the proposition that the IESO's decision to terminate was, in itself, expropriatory. The IESO followed an established process that included the assessment of a number of factors to inform its termination decision, and concluded that it should exercise its contractual right to terminate.[380] [redacted],[381] [redacted]

- [redacted],[382] [redacted]
- [redacted]
- [redacted]
- [redacted]

[379] RWS-Teliszewsky, ¶ 24.

[380] The Claimant did not challenge the IESO's right to terminate under the contractual dispute resolution mechanism available to it. *See* **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, section 15.2 (Arbitration).

[381] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018). Mr. Killeavy's later disavowal of his analysis should be given little weight. His change of heart coincided with his hiring by Power Advisory LLC, a firm retained by the Claimant in this arbitration.

[382] [redacted] *See Windstream II – Canada's Counter-Memorial*, ¶ 60. *See also* **C-2041**, Official Report of Debates (Hansard) Transcript – English, legislative Assembly of Ontario, (October 17, 2016), p. 720.

[redacted][383]

178. Finally, the Claimant attacks Canada for overbreadth in its application of the police powers doctrine.[384] As Canada explained in its Counter-Memorial, States have a legitimate right to regulate in the interests of public welfare and this exercise of police power should not be confused with expropriatory measures.[385] The context within which an impugned measure is adopted and applied is critical to the determination of its validity, as is the reasonableness of the measure.[386]

179. Here, Ontario's deferral to the IESO with respect to the Claimant's FIT Contract falls within its legitimate regulatory power. In light of the circumstances – including that Ontario did not need the energy from the Project, that Ontario had already litigated the dispute with Windstream and paid

[383] **R-0808**, Section 10.1(g) Analysis Memorandum (February 16, 2018).

[384] *Windstream II – Claimant's Reply Memorial*, ¶¶ 350 and 351.

[385] *Windstream II – Canada's Counter-Memorial*, ¶¶ 188-191. *See also* **RL-050**, *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/17) Decision on Liability, 30 July 2010, ¶ 128. The cases cited by the Claimant do not support its view that the factors underlying the police powers doctrine should be minimized or disregarded. For example, the tribunal in *Saluka* concluded that exceptions to the police powers doctrine serve to remind the adjudicator that it "is not absolute" but also that the exceptions do not "weaken the principle that certain takings or deprivations are non-compensable." (**CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 258). In *Chemtura*, the tribunal cited *Saluka* with approval, noting that the impugned measures were within the mandate of the relevant agency, taken in a non-discriminatory manner, and motivated by public health concerns. The tribunal did not endorse a narrow view of the police powers doctrine, stating that "[a] measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation." (**CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 2 August 2010, ¶ 266). In *Pope & Talbot*, the tribunal rejected the argument that the NAFTA adopted broader requirements that "include under the purview of Article 1110 measures of general application which have the effect of substantially interfering with the investments of investors of NAFTA Parties." (**CL-074**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Interim Award, 26 June 2000, ¶ 103 (internal citations omitted)). In *Quiborax*, the tribunal adopted a test for expropriation that expressly included whether there was "justification under the police powers doctrine" and applied that test to the revocation of a concession. The tribunal concluded that "[i]f a State cancels a license or a concession because the investor has not fulfilled the necessary legal requirements to maintain that license or concession, or has breached the relevant laws and regulations that are sanctioned by the loss of those rights, such cancellation cannot be considered to be a taking by the State." (**CL-164**, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, Award (September 16, 2015), ¶ 206). In *Burlington*, the tribunal began its expropriation analysis with the question of whether the State's action (preventing the suspension of oil production) was justified under the police powers doctrine (**CL-029**, *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5) Decision on Liability, 14 December 2012, ¶ 506).

[386] **CL-080**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶¶ 263-264 and 272. The Tribunal considered the reasonableness of the Czech State's decision in imposing the forced administration of IPB, a bank in which the claimant had shares.

compensation to it, and that the Project was at an early stage of development and had yet to receive even preliminary permits – Ontario's decision to not intervene and to defer to the IESO's administration of the FIT Contract lacked the character of an expropriation.[387]

IV. THE CLAIMANT HAS NOT PROVEN IT IS ENTITLED TO THE QUANTUM OF DAMAGES IT SEEKS

180. The Claimant's damages analysis is fundamentally flawed. It is asking the Tribunal to believe that its Project, which is no closer to being developed than it was at the time of the *Windstream I* Award, has increased in value by nearly 900 percent. It claims that its Project, which had a fair market value of CAD 31 million in 2016, is now worth over CAD 300 million, despite not having received a single required permit. This defies reality. This damages claim must be rejected.

181. As Canada demonstrated in its Counter-Memorial, the Claimant can only recover damages if it can prove that an alleged breach caused the losses it seeks to recover.[388] Like the Claimant's Memorial, its Reply Memorial fails to prove causation. It does not demonstrate that the termination of its FIT Contract caused it any loss, separate and distinct from that which it was awarded in the *Windstream I* arbitration. The Claimant cannot disagree, as its "but for" scenario relies on the exact same assumptions used in its *Windstream I* damages calculation. It is a mere repetition of an argument the Claimant already lost. Further, there is no evidence that the Claimant's Project increased in value after the *Windstream I* Award such that any additional losses could accrue.

182. Even if it could prove causation, the Claimant's reliance on a DCF analysis must be rejected, for the same reasons that it was rejected in *Windstream I*. The Project has never been anything more than a speculative and unrealistic venture. The Claimant applied for and entered into a FIT Contract

[387] Because Canada has not expropriated the Claimant's investments, there is no need for the Tribunal to consider paragraphs (a) through (d) of NAFTA Article 1110(1). However, in the alternative, even if the Tribunal finds that the Claimant's investments have been expropriated, there has been no breach of NAFTA Article 1110 because Ontario's measures were adopted for a public purpose, on a non-discriminatory basis, in accordance with due process of law and NAFTA Article 1105(1), and upon payment of compensation in the amount of the fair market value of the investments. The elements of public purpose, non-discrimination, and due process of law are addressed in Canada's submissions on Article 1105. The Claimant has also received payment of compensation in the amount of the fair market value of the investments, assessed, as of September 2016, at CAD 31 million, of which CAD 25 million was paid as satisfaction of the *Windstream I* Award in March 2017. As of the date of the alleged expropriation (the termination of the FIT Contract in February 2020), the investment's remaining value in the form of the CAD 6 million letter of credit was returned to the Claimant, meaning it has now been fully compensated.

[388] *Windstream II – Claimant's Reply Memorial*, ¶¶ 219-288.

pursuant to which it committed to develop a 300-megawatt ("MW"), 130-turbine offshore wind project within five years, despite the fact that it had not conducted a single feasibility study, lacked access to its proposed Project site, and lacked every single permit required to proceed with the Project. No authority exists, either in in jurisprudence or in real-world experience, that supports the valuation of a non-operating (non-existent) offshore wind farm in the very early stages of development through the use of a DCF, let alone one with the level of uncertainty associated with the Project. The Claimant has also advanced a market comparables approach, but its approach places an inappropriate emphasis on the Claimant's contingent revenue stream under the FIT Contract and ignores most of the Project's characteristics that would impact its value on the market. When the correct market comparables approach is applied, the only possible conclusion is that the Claimant is not entitled to any damages.

A. The Claimant Has Failed to Prove that any of the Challenged Measures Caused It Actual Loss, Let Alone the Specific Losses It Seeks

183. Canada's Counter-Memorial demonstrated why the Claimant has failed to show a causal link between its alleged breaches of Articles 1105 and 1110 and any loss it allegedly suffered.[389] The Claimant's failure to meet the burden of proof required to establish causation continues in its Reply Memorial. In response, the Claimant asserts that (i) the cause of Windstream's losses was the termination of the FIT Contract,[390] and (ii) it has not been compensated for those losses.[391]

184. The Claimant has not responded to Canada's argument that any losses suffered by the Claimant were caused by measures that occurred prior to the *Windstream I* Award, for which compensation was already received.[392] Notably, in the event that termination of the FIT Contract results in a breach of Article 1105 or 1110,[393] the Tribunal has not been provided with a means to calculate damages. A correct "but for" scenario for the alleged breach is a world in which the IESO did not terminate the FIT Contract but the unchallenged measures, including the Claimant's *force majeure* event and the

[389] *Windstream II – Canada's Counter-Memorial*, ¶¶ 233-255.

[390] *Windstream II – Claimant's Reply Memorial*, ¶¶ 409 and 410.

[391] *Windstream II – Claimant's Reply Memorial*, ¶¶ 411-414.

[392] *Windstream II – Canada's Counter-Memorial*, ¶¶ 239-246.

[393] *Windstream II – Claimant's Reply Memorial*, ¶¶ 286 (with respect to Article 1110 the Claimant argues that "[t]he alleged breach and losses only crystallized when the termination took effect on February 18, 2020.") and 287 (with respect to Article 1105 the Claimant argues that "[l]ike 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.")

moratorium, continue to apply. It is wrong for the Claimant to assume that the moratorium would be lifted, an approval process for Crown land access would be established, and a framework for approving an offshore wind project would be in place. Its damages analysis, which relies on the same "but for" scenario it presented in the *Windstream I* arbitration, is nothing more than a second attempt to seek the same damages that it was denied in the *Windstream I* Award.

185. The Claimant has also failed to demonstrate how an investment that had no value as of the date of the *Windstream I* Award could suffer any further compensable damages.[394] The Claimant's arguments that its DCF analysis or discussions with alleged interested parties somehow demonstrate that the Project had value are illogical. Its DCF analysis, based on an incorrect "but for" in a counterfactual scenario, fails to demonstrate that its investment had value in the real world prior to the FIT Contract termination. The Claimant has not pointed to any real-world evidence that its investment increased in value following the *Windstream I* Award. In this regard, the Claimant's discussions with alleged interested investors demonstrate that the Project had no value when the proper "but for" world is applied.

186. Similarly, the Claimant's position that Canada's damages arguments are "simply a repackaging of its *res judicata* and liability arguments"[395] must also fail. Canada's causation arguments stand on their own, and indeed, assume Canada has lost on jurisdiction, admissibility and liability. The Claimant seems to have confused the principle of *res judicata* with that of double recovery, the latter of which is Canada's concern with respect to the claim for damages.[396]

[394] *Windstream II – Canada's Counter-Memorial*, ¶¶ 247-255.

[395] *Windstream II – Claimant's Reply Memorial*, ¶ 411.

[396] The Claimant also argues that Canada has not put forward any evidence which disputes the technical feasibility of the Project. This is both irrelevant and incorrect. First, Canada's causation arguments do not depend on the technical feasibility of the Project. The Claimant has failed to prove causation based on a) its failure to put forward a proper "but for" scenario that isolates the effect of the termination of its FIT Contract, and b) its failure to demonstrate that its investment, which had zero value at the time of the *Windstream I* Award, suffered further loss as a result of the FIT Contract's termination. Second, as Canada explains further in Section IV.B.1(b)(iii), there remains considerable uncertainty with respect to the feasibility of the Project, which has remained largely unchanged since the *Windstream I* proceeding. Canada extensively dealt with the feasibility of the Project in that proceeding in its written submissions, cross-examination, and closing arguments (*see Windstream I – Canada's Counter-Memorial,* ¶¶ 527-556; RER-URS-1; *Windstream I – Canada's Rejoinder Memorial*, ¶¶ 275-289; RER-URS-2; and **C-2470**, Day 10 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 26, 2016) (Confidential), pp. 212:24-238:7).

1. The Claimant's Incorrect "But For" Scenario Confirms the Cause of Any Loss Suffered by the Claimant Were the Measures that Took Place Prior to the *Windstream I* Award

187. In its Counter-Memorial, Canada explained that the cause of any loss suffered by the Claimant were the measures that took place prior to the *Windstream I* Award. As Canada has demonstrated, the measures alleged to breach the NAFTA in this arbitration cannot be a new source of damages upon which the Claimant can argue causation.[397] The Claimant's Reply Memorial does nothing to dispel this argument. The Claimant continues to argue that its damages arise solely out of conduct which occurred after the *Windstream I* Award.[398] It argues that certain "measures and facts" in question arose after the *Windstream I* Award so the *Windstream I* tribunal could not have determined the quantum of those damages.[399] More specifically, it argues that the cause of its losses, which is allegedly separate and distinct from those at issue in *Windstream I*, was "the termination of the FIT Contract".[400] For example, the Claimant states that:

> 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.[401]

188. Moreover, even if certain "measures and facts" arose after the *Windstream I* Award, that does not prove causation. The Claimant must still demonstrate that the termination of the FIT Contract

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[397] *Windstream II – Canada's Counter-Memorial*, ¶¶ 239-246.

[398] *See for example*, *Windstream II – Claimant's Reply Memorial*, ¶¶ 15(a): ("This case is not about Ontario's 2011-2012 conduct that was at issue in *Windstream I*") and 198: ("All of the measures at issue arose after the *Windstream I* arbitration.")

[399] *Windstream II – Claimant's Reply Memorial*, ¶ 410.

[400] *Windstream II – Claimant's Reply Memorial*, ¶¶ 409 and 410. *See also* ¶¶ 15(a): ("This case isn't 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"), 15(c): ("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"), and 92: ("As a result, once the FIT Contract was terminated, the full value of the FIT Contract was lost.")

[401] *Windstream II – Claimant's Reply Memorial*, ¶ 181.

itself caused it to suffer actual loss, for which it has not already been compensated. Yet the Claimant's "but for" scenario does not permit a quantification of losses based on that specific measure alone.

189. On September 30, 2016, the release date of the *Windstream I* Award to the disputing parties, the 2011 moratorium had continued for over five years, and its impact on the Project, coupled with the failure of Ontario to "address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium"[402] rendered the Project valueless. This resulted in a finding of a breach of Article 1105[403] and an award of damages. This is not disputed between the parties. Indeed, the Claimant maintains that these were the two causes of action in the *Windstream I* proceeding, not this one.[404]

190. Despite this, the Claimant's damages claim is identical to the "but for" scenario put forward in the *Windstream I* arbitration, which, according to the Claimant at the time, had "the effect of erasing the effects of the indefinite-term moratorium on Windstream's investments and of keeping Windstream whole."[405] This makes the Claimant's damages claim illogical. A "but for" scenario which was suitable for the *Windstream I* arbitration cannot be a suitable "but for" scenario in the present arbitration which relies on new "measures and facts" as the Claimant alleges.[406]

191. The identical nature of the assumptions underlying the "but for" scenarios in both arbitrations is clear:[407]

Windstream I **"But For" Scenario**	***Windstream II*** **"But For" Scenario**
In constructing a "but for" scenario, Windstream has assumed that the Ontario Government did not adopt an indefinite-term moratorium on offshore wind development on February 11, 2011. Instead, Windstream has	The "but for" or counterfactual case (i.e. the case that would have prevailed absent the Alleged Breaches) that we have been instructed to assume is that the IESO would not have terminated the FIT contract on February 18,

[402] *Windstream I – Award,* ¶ 379.

[403] *Windstream I – Award,* ¶ 379.

[404] *Windstream II – Claimant's Reply Memorial*, ¶¶ 198 and 199.

[405] *Windstream I – Claimant's Reply Memorial*, ¶ 669.

[406] *Windstream II – Claimant's Reply Memorial*, ¶ 409.

[407] While the *Windstream II* "but for" scenario refers to the termination of the FIT Contract as the alleged breach, and it makes minor changes to update the names of the Ministries, the assumptions it lays out in the counter-factual world are exactly the same as in *Windstream I*.

assumed that the following would have occurred by February 11, 2011:	2020, the Moratorium which had prevented Windstream from proceeding through its approvals process for the Project would have been lifted, and that the following would have occurred by February 18, 2020:
(a) MOE would have confirmed its proposed regulatory amendment to include a five-kilometre setback, or confirmed that it would not proceed with any regulatory amendment (such that setbacks for offshore wind projects would continue to be assessed on a site-specific basis);	(a) the MECP would have confirmed its proposed regulatory amendment to include a five-kilometre setback or confirmed that it would not proceed with any regulatory amendment (such that setbacks for offshore wind projects would continue to be assessed on a site-specific basis);
(b) MNR would have fulfilled its commitment to discuss the reconfiguration of Windstream's applications for Crown land for the Project (if a five-kilometre setback was confirmed) and would have thereafter fulfilled its commitment to "move as quickly as possible through the remainder of the application review process so that [WWIS] may obtain Applicant of Record status in a timely manner."	(b) the MNR would have fulfilled its commitment to discuss the reconfiguration of Windstream's applications for Crown land for the Project (if a five-kilometre setback was confirmed) and would have thereafter fulfilled its commitment to "move as quickly as possible through the remainder of the application review process so that the Project may obtain Applicant of Record status in a timely manner."
(c) MOE and MNR would have fulfilled their commitment to process WWIS' application for a REA within the six-month service guarantee;	(c) MECP and MNR would have fulfilled their commitment to process the Project's application for a REA within the six-month service guarantee;
(d) MNR would have permitted Windstream to proceed through MNR's Crown land application process and granted Windstream site release; and,	(d) MNR would have permitted Windstream to proceed through MNR's Crown land application process and granted Windstream site release; and,
(e) the Ontario Government would have dealt with Windstream in good faith and not have subjected the Project to unreasonable regulatory delays.[408]	(e) the Ontario Government would have dealt with Windstream in good faith and not have subjected the Project to unreasonable regulatory delays.[409]

[408] *Windstream I – Claimant's Reply Memorial*, ¶ 667.

[409] CER-Secretariat, ¶ 2.18.

192. The Claimant argues that "Windstream is not challenging […] any of the measures that were determined by the *Windstream I* tribunal"[410] or that "[c]ontrary 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".[411] However, the lifting of the moratorium, approved site access to its Project, and the establishment of a framework for approving an offshore wind project, are precisely what it quantifies in its damages analysis.[412] If the "but for" scenario in this case and in *Windstream I* are the same, then the only logical conclusion is that the Claimant is quantifying its damages for the alleged breaches in *Windstream I*. Its attempt at double recovery must be dismissed.

193. For the Claimant to prove causation and that it is indeed arguing only that it suffered additional loss when its FIT Contract was terminated, as it states,[413] then it has failed to put forward a valuation that specifically identifies harm arising out of the termination of the FIT Contract. Its damages claim fails on that ground alone.

2. The Alleged Breach Could Not Have Caused the Claimant Further Damage as the Investment Was Already Valueless at the Relevant Time

194. The Claimant has not directly responded to Canada's causation arguments that the alleged breach could not have caused the Claimant further damage as the investment was already valueless at the relevant time.[414] The Claimant fails to deal with the fact that, during the *Windstream I*

[410] *Windstream II – Claimant's Reply Memorial*, ¶ 198.

[411] *Windstream II – Claimant's Reply Memorial*, ¶ 83.

[412] Further, the Claimant cannot argue that the difference in its DCF quantification between *Windstream I* and the current arbitration proves that the termination of the FIT Contract caused additional damage. The results differ only due to the alleged lower costs of building and operating the Project as a result of advancements in technology since the *Windstream I* Award. In *Windstream I*, the Claimant "quantifie[d] the value of its investment using the DCF method as between CAD 277.8 million and CAD 369.5 million based on a valuation date of 22 May 2012". **RL-109**, *Windstream I – Award*, ¶ 436 referring to CER-Deloitte (Taylor and Low)-2 (Addendum), p. 2. In *Windstream II*, the Claimant has quantified the value of its investment using the DCF method as between CAD 291.4 million and CAD 333 million as of the date of the cancellation of the FIT Contract, February 18, 2020. *Windstream II – Claimant's Reply Memorial*, ¶¶ 410 and 412 referring to CER-Secretariat-2, ¶¶ 2.7 and 4.44. Further, these lower projected costs have not been proven with any kind of certainty. As demonstrated below in ¶¶ 234 and 235, for example, it is not even clear which turbines the Claimant would use in the development of the Project.

[413] *Windstream II – Claimant's Reply Memorial*, ¶ 232. *See also* ¶ 292: ("[…] Ontario created the circumstances that allowed the IESO to terminate the FIT Contract and that is what is alleged to be a beach of the NAFTA." (emphasis in original).)

[414] *Windstream II – Canada's Counter-Memorial*, ¶¶ 233-255.

arbitration, it repeatedly acknowledged that its investment was valueless as of May 2012.[415] Instead, the Claimant attempts to backtrack on these statements. First, it argues that its quantum analysis "reflects the value of Windstream's investment as at the date of the breach, when Windstream's FIT Contract was terminated (February 18, 2020)",[416] and that it must have increased in value since the *Windstream I* Award. Second, it submits that "a number of credible investors expressed serious interest in the Project, if it were permitted to proceed following the *Windstream I* Award."[417] Neither submission directly responds to Canada's arguments nor demonstrates that the Claimant's investment had positive value as of February 18, 2020.

195. First, not only has the Claimant failed to point to any real-world evidence that the Project had value as of the Valuation Date and that such value was taken away by the alleged breach, it is also attempting to prove causation through quantum, which is impermissible.[418] Its failure is compounded given its additional failures with respect to its quantum analysis, discussed below.[419]

196. Second, the Claimant argues that despite Mr. Mars explaining at the *Windstream I* hearing that the Project was effectively worthless as of May 2012, 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.'"[420] Mr. Mars' explanation is factually incorrect. The tribunal did not agree with the Claimant that the FIT Contract itself had value in 2016. The tribunal held that it was not:

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[415] *Windstream I – Claimant's Memorial*, ¶¶ 2, 14, 34, 299, 316, 317-318, 320-321, 555, 608, 661, 666, and 677; *Windstream I – Claimant's Reply Memorial*, ¶¶ 24, 34, 400, 407-408, 472-478, and 729; **C-2461**, Day 1 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 15, 2016) (Confidential), pp. 89:6, 90:23-24, and 98:9-20; CER-Deloitte (Taylor and Low), section 5; **RL-109**, *Windstream I – Award*, ¶¶ 192 and 235. *See also Windstream II – Canada's Counter-Memorial*, ¶¶ 247-255.

[416] *Windstream II – Claimant's Reply Memorial*, ¶ 412.

[417] *Windstream II – Claimant's Reply Memorial*, ¶ 412.

[418] The requirement to prove causation is separate and distinct from a requirement to prove a specific quantum of loss. As the tribunal in *Biwater Gauff* held, the inquiry into question of quantum only arises if there is a sufficient causal link between the actual breach of the international obligation and the loss sustained by the investor. Causation must then be proven separate from quantum. **RL-010**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008, ¶¶ 776-780. *See also Windstream I – Canada's Counter-Memorial*, ¶¶ 517-520 and authorities relied on therein.

[419] *See* Section IV.B.1(b)(iii). *See also Windstream II – Canada's Counter-Memorial*, ¶¶ 266-274.

[420] *Windstream II – Claimant's Reply Memorial*, ¶ 88.

> […] appropriate or necessary to make any further adjustments to reflect the fact that the FIT Contract is still formally in place; although the FIT Contract could have been reactivated and renegotiated by the Parties at any time during the period from 11 February 2011 until the date of this award, as a matter of fact this has not happened and consequently, as at the date of this award, the FIT Contract cannot be considered to have any value.[421]

197. The tribunal adjusted the damages amount to reflect any value left in the Claimant's investment:

> While the Tribunal considers that this is the proper valuation of the Project, it should be kept in mind that, as determined above, the Claimant is not entitled to compensation for the full value of its investment: the Claimant has not lost the letter of credit, which is still in place, and the FIT Contract is still in force and could, in theory, be still revived and renegotiated if the Parties so agreed. Consequently, in order to quantify the damage caused by the Respondent's breach to the value of the Claimant's investment, a further adjustment must be made to reflect the value of the letter of credit (CAD 6 million).[422]

198. Thus, the only part of its investment which retained any value as of the *Windstream I* Award was the CAD 6 million security deposit, which has been returned to the Claimant.[423]

199. Third, the Claimant's position that "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" is meritless. Canada has already refuted this point extensively,[424] and the Claimant's new arguments fail to rehabilitate its position. The Claimant is factually wrong that the alleged interest of potential investors demonstrated any value in the Project. Further, even if these conversations somehow support the Claimant's notion that value could be "unlocked", in a properly applied "but for" world with the moratorium still in place, such value would not have been created.

200. The Claimant would have the Tribunal believe that the *Windstream I* Award caused numerous investors to approach the Claimant with "serious interest in the Project"[425] and that it was "only after

[421] **RL-109**, *Windstream I – Award*, ¶ 483 (emphasis added).

[422] **RL-109**, *Windstream I – Award*, ¶ 483.

[423] **C-2291**, Letter from Daryl Yahoda (IESO) to Bank of Montreal Global Trade Operations re Irrevocable Standby letter of Credit No. BMT0494154OS (February 20, 2020); **C-2082**, Windstream Payouts (April 21, 2017-December 31, 2020); *Windstream II – Canadas's Counter-Memorial*, ¶ 117.

[424] *Windstream II – Canadas's Counter-Memorial*, ¶¶ 253 and 254.

[425] *Windstream II – Claimant's Reply Memorial*, ¶ 413.

these unsolicited expressions of interest" that the Claimant engaged KeyBanc to "evaluate potential partners for the Project".[426] This is misleading. The Award was not released to the public until December 6, 2016. Therefore, the "numerous inquiries from parties inside and outside Canada concerning their interest in partnering"[427] prior to this point would have been made without knowledge of the *Windstream I* tribunal's factual findings, reasoning or basis for its conclusions.[428] The Claimant's arguments that "[potential partners] reached out to Windstream following the public release of the *Windstream I* Award to express their genuine interest in the Project"[429] is simply untrue. In addition, the Claimant's documents reveal that it was the Claimant that approached potential partners following the *Windstream I* Award.[430] Of the alleged unsolicited outreaches, the majority were congratulatory remarks from the Claimant's own experts who were hired for the purposes of the *Windstream I* arbitration, and not for the actual development of the Project.[431] Following the *Windstream I* Award, they wrote expressing congratulations on the Claimant's win and offered their

[426] *Windstream II – Claimant's Reply Memorial*, ¶ 414.

[427] *See* **R-0863**, E-mail to Steven Webster (Avista Cap) from William Ziegler Re: Additional Windstream NAFTA Press Coverage (21 October 2016).

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

[429] *Windstream II – Claimant's Reply Memorial*, ¶ 95; CWS-Mars-4, ¶ 11.

[430] *See* **R-0868**, E-mail to Ian Irvine and Bill Follett (Sgurr Energy) from Ian Baines (Windstream Energy) Re: Request for Input (21 November 2016); **R-0869**, E-mail to David Mars (White Owl Cap) from Tyler Nielsen (KeyBanc) Re: Windstream Outreach (9 June 2017); **R-0870**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: (Reuters) Statoil eyes Japan, U.S. for floating wind expansion (15 June 2017); **R-0871**, E-mail to [redacted] from David Mars (White Owl Cap) Re: Call with [redacted] (22 June 2017); **R-0872**, E-mail to David Mars (White Owl Cap) from [redacted] Re: Call with [redacted] (22 June 2017); **C-2093**, Email from Daniel Brown (KeyBanc) to David Mars (WEI) re AWEA Update (May 19, 2017); **C-2100**, Email from Tyler Nielsen (KeyBanc) to David Mars (WEI) re Windstream Outreach (June 9, 2017); **C-2101**, Email from Tyler Nielsen (KeyBanc) to David Mars (WEI) re Call Tuesday (June 26, 2017); **C-2103**, Email from Daniel Brown (KeyBanc) to David Mars (WEI) re [redacted] (June 29, 2017); **C-2654**, Email from Ian Baines (WEI) to Ian Irvine and Bill Follett (SgurrEnergy) re A request for input (November 21, 2016).

[431] *See for example*, **C-2466**, Day 6 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 21, 2016) (Confidential), 22:9-22, 104:19, 105:3, 164:21, and 165:4; **C-2078**, Email exchanges between Brent Cooper (COWI), David Mars (WEI), Ian Baines (WWIS), Jan Ronberg (COWI) and John Chapman (COWI) re COWI checking in (March 7 to May 8, 2017); **C-2086**, Email from Bill Follett (Sgurr Energy) to Mars, David (WEI) re New York Offshore Conference (May 2, 2017); **C-2087**, Email from David Mars (WEI) to Bill Follett (Sgurr Energy) re New York Offshore Conference (May 2, 2017).

services going forward, to the extent the Project did in fact move forward in the real world.[432] Indeed, some of this turned into work used as expert opinions in the current arbitration.[433]

201. Therefore, even if the KeyBanc process had been driven by genuine developer interest,[434] and the Claimant had genuinely engaged KeyBanc to pursue "a possible transaction involving the Project",[435] none of the documents the Claimant relies on demonstrate any actual valuation of the Project, or establish that, as of the Valuation Date, the Project had increased in value. In fact, some do not relate to the Project at all.[436]

202. Fourth, the limited outreach by those not hired as experts merely contains: (1) updates from KeyBanc on who they contacted and information provided;[437] (2) information the Claimant placed in the data room for viewing (principally the expert reports filed in *Windstream I)*;[438] (3) [redacted]

[432] **R-0873**, E-mail to David Mars (White Owl Cap) from Brent Cooper (COWI) Re: Lunch/Dinner Invitation (11 August 2017); **R-0874**, E-mail to Hank Van Bakel (Ortech) and Ian Baines (Control Tech) from Brent Cooper (COWI) Re: Windstream - COWI Advanced Concept Proposal (23 August 2017); **R-0875**, E-mail to Brent Cooper (COWI) and Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: Windstream - COWI Advanced Concept Proposal (23 August 2017); **C-2703**, Email from David Mars (WEI) to Bill Follett (SgurrEnergy) re New York Offshore Conference (May 2, 2017).

[433] **R-0876**, Memo to Ian Baines (Control Tech) and Hank Van Bakel (Ortech) from COWI North America Inc. Re: Windstream Wolfe Island Shoals (8 August 2017).

[434] CWS-Mars-4, ¶¶ 10-14.

[435] CWS-Mars-4, ¶¶ 15-19.

[436] **C-2029**, Email from Bill Follett (SgurrEnergy) to David Mars (WEI) re Offshore Wind meeting (May 9, 2016).

[437] **R-0877**, E-mail to David Mars (White Owl Cap) and Tyler Nielsen (KeyBanc) from Arindam Basu Re: Windstream Outreach (19 June 2017); **R-0878**, E-mail to Daniel Brown (KeyBanc) and David Mars (White Owl Cap) from Tyler Nielsen (KeyBanc) Re: Call Tuesday (26 June 2017); **R-0879**, E-mail to David Mars (White Owl Cap) from Arindam Basu (Key Banc) Re: EL (26 June 2017); **R-0880**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: Call Tuesday (27 June 2017); **R-0881**, E-mail to [redacted] and Tyler Nielsen (KeyBanc) from Daniel Brown (KeyBanc) Re: [redacted] (29 June 2017); **R-0882**, E-mail to [redacted] from Daniel Brown (KeyBanc) Re: [redacted] (29 June 2017); **R-0883**, E-mail to David Mars (White Owl Cap) from Tyler Nielsen (KeyBanc) Re: Windstream Buyers (29 June 2017); **R-0884**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: [redacted] (29 June 2017); **R-0885**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: Meeting in New York (6 October 2017); **R-0886**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: Windstream (12 December 2016); **R-0887**, Windstream Energy Corporate and Investment Banking Report (KeyBanc) (Source – Bloomberg, Press Releases) (January 2017); **R-0888**, Windstream Wolfe Island Shoals Report "A 300 MW Offshore Wind Development Project" (KeyBanc); **R-0889**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: AWEA Update (17 May 2017); **R-0890**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: Next Steps (31 May 2017).

[438] **R-0891**, E-mail to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: 2017 WIS Data Room (9 February 2017); **C-2071**, Email from David Mars (WEI) to Daniel Brown (WEI) re 2017 WIS Data Room (February 7, 2017) (Confidential).

[redacted];[439] and (4) questions or communications by the alleged interested parties with respect to the uncertainty of the Project's ability to move forward or become financeable.[440] None of this demonstrates real-world value. In fact, the Claimant's own data room documents did not provide alleged interested parties with an accurate valuation of the Project. Windstream courted prospective partners using the analysis by Deloitte that it relied on in *Windstream I* to advance its damages claim,[441] an analysis that the *Windstream I* tribunal deemed to be far too speculative to be reliable.[442]

203. Fifth, as noted above, the Claimant's arguments appear to ignore the fact that the moratorium was still in place (and indeed would still be in place in the correct "but for" world). Many of the alleged potential partners indicated that their interest was conditional upon the moratorium lifting, thus indicating they saw no value until this was the case.[443] The Claimant agrees on this point, noting that "[t]he potential partners did indicate that they required clarity regarding the Moratorium before

[439] **R-0892**, E-mail to David Mars (White Owl Cap) from Arindam Basu (KeyBanc) Re: WWIS[redacted] (20 June 2017); **R-0894**, E-mail to Arindam Basu (KeyBanc) from David Mars (White Owl Cap) Re: WWIS/[redacted] (22 June 2017); **R-0896**, E-mail to David Mars (White Owl Cap) from Arindam Basu (KeyBanc) Re: WWIS/[redacted] (21 June 2017); **R-0897**, E-mail to David Mars (White Owl Cap) from Tyler Nielsen Re: [redacted] (21 June 2017); **R-0898**, E-mail to Tyler Nielsen (KeyBanc) from David Mars (White Owl Cap) Re: [redacted] (22 June 2017); **R-0899**, Email to David Mars (White Owl Cap) from Tyler Nielsen (KeyBanc) Re: Canadian Offshore Wind Opportunity (23 June 2017); **R-0901**, Email to David Mars (White Owl Cap from Arindam Basu (KeyBanc) Re: Windstream – Wolfe Island Shoals (28 June 2017).

[440] **R-0903**, E-mail to David Mars (White Owl Cap) to Arindam Basu (KeyBanc) Re: Lake Ontario Offshore Wind Project (6 July 2017); **R-0904**, E-mail to Daniel Brown (Key Banc) and Arindam Basu (KeyBanc) from David Mars (White Owl Cap) Re: Lake Ontario Offshore Wind Project (24 July 2017); **R-0905**, E-mail to David Mars (White Owl Cap) and Ian Baines (Control Tech) from Tyler Nielsen (Key Banc) Re: Lake Ontario Offshore Wind Project (26 July 2017); **R-0906**, E-mail to David Mars (White Owl Cap) and Tyler Nielsen (KeyBanc) from Arindam Basu Re: Windstream Outreach (19 June 2017). *See also* **R-0907**, Email to David Mars (White Owl Cap) from Daniel Brown (KeyBanc) Re: Canadian Project Question (6 October 2017); **C-2097**, Email from [redacted] to David Mars (WEI) re Lake Ontario Offshore Wind Project (June 2, 2017); **C-2123**, Email from [redacted] to Daniel Brown (WEI) re Follow up questions/comments (October 9, 2017) with attached Management Discussion Analysis (MDA) 2016-2017 (Redacted).

[441] **R-0908**, Email to Hank Van Bakel (Ortech) from Ian Baines (Control Tech) Re: Windstream Documents – Draft Project Description, Summary of Studies, Cover letter for MOECC (30 January 2017).

[442] **RL-109**, *Windstream I – Award*, ¶ 475.

[443] **C-2042**, Email from [redacted] to Ian Baines (WWIS) re [redacted]Introduction – Windstream Energy – Offshore Wind (October 17, 2016).

they would substantially invest in the Project"[444] and that they were "interested in partnering with Windstream to develop the Project after the moratorium was lifted."[445]

204. The Claimant continues to confuse a company's interest in learning more about the Project, or its potential desire to position itself as a future partner should the moratorium be lifted, with evidence of value. For example, Mr. Mars states:

> I strongly disagree with Canada's assertion that these potential partners did not believe there was value in the Project at the time. To the contrary, they expressed significant interest in the project, underscoring its value."[446]

205. Interest does not equate to value. Indeed, Windstream, along with KeyBanc, had prepared a document to allow for interested parties to bid on an "acquisition of up to 100% of [Windstream Energy LLCs] equity interest in Windstream Wolfe Island Shoals Inc. (the "Project")".[447] No such bids were ever received.

B. The Claimant Has Failed to Prove It Is Entitled to the Quantum of Damages It Seeks

206. Even if the Claimant was able to prove the alleged breach caused it loss or damage, the Claimant is not entitled to the quantum of damages it seeks. The Claimant's main damages valuation uses a DCF methodology which is entirely inappropriate for a speculative, early-stage project like the Claimant's. Despite losing on this point in *Windstream I*, the Claimant puts forward the same argument to support it here. As Canada demonstrates below, the Claimant's arguments must fail.

207. First, the authorities put forward by the Claimant do not support the use of a DCF methodology for the Claimant's Project. In fact, they expressly disagree with such an approach. Second, the Claimant's Project was highly speculative. The Claimant admits that its project schedule was

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[444] *Windstream II – Claimant's Reply Memorial*, ¶ 100. *See also* **C-2044**, Email from Ian Baines (WEI) to [redacted] re [redacted] Introduction – Windstream Energy – Offshore Wind (October 25, 2016); **C-2647**, Email from [redacted]) to Ian Baines (WEI) re [redacted] Introduction - WindStream Energy - Offshore Wind (October 17, 2016).

[445] *Windstream II – Claimant's Reply Memorial*, ¶ 414; CWS-Mars-4, ¶ 11.

[446] CWS-Mars-4, ¶ 21.

[447] **R-0909**, Letter from Daniel Brown (KeyBanc) and Arindam Basu (KeyBanc) Re: Proposal Instructions (30 May 2023).

unrealistic and highly optimistic, and that it was highly unlikely the Project could have been built within the strict timelines of the FIT Contract. The Claimant's ability to meet its MCOD was further compounded by all the risks faced by the Project – which have remained unchanged since Canada relied on them in the *Windstream I* proceeding to successfully argue that the DCF valuation methodology was inappropriate. Third, the evidence reveals that offshore wind farms in the early stage of development are not valued using a DCF model in the real world. As noted below, the single example otherwise relied on by the Claimant does nothing to dispel this reality.

208. Further, the Claimant's alternative market comparables analysis must be rejected. It places inappropriate weight on the Claimant's FIT Contract without attributing any weight to the fact that the Project did not have access to its Project site, had not obtained a single permit, and did not have grid access. When all Project-specific factors are considered, and a correct market comparables analysis is used, such as that conducted by Canada's expert, Dr. Guillet, it reveals that "but for" the alleged breaches, the Claimant's investment would have the same value on the Valuation Date it had at the time of the *Windstream I* Award. Once the appropriate deduction for the *Windstream I* Award is made to this valuation,[448] the result is that the Claimant is not entitled to any damages.

1. A DCF Valuation Is Not Appropriate for a Speculative, Early-Stage Project

209. Even if the Tribunal finds that the Claimant is not barred from reopening the *Windstream I* Award's holding on DCF, it remains inappropriate for this Tribunal to adopt a DCF methodology to value the Claimant's investment, despite the Claimant's arguments to the contrary.[449] The Claimant argued this point in *Windstream I*, and lost.[450] Yet, it resubmitted the same authorities in this arbitration, to which Canada responded again in its Counter-Memorial.[451] It now puts forward additional authorities in a futile, final attempt to persuade the Tribunal. These attempts must fail. A DCF methodology is not appropriate for projects in the early stage of development that are not a going concern and have no record of profits, such as the Claimant's. These types of projects are

[448] The disputing parties agree that this deduction should be made. *See Windstream II – Claimant's Reply Memorial*, ¶ 412.

[449] *Windstream II – Claimant's Reply Memorial*, ¶¶ 431 and 432.

[450] **RL-109**, *Windstream I – Award*, ¶ 475.

[451] *Windstream II – Canada's Counter-Memorial*, ¶¶ 261-263.

highly uncertain in nature, thus requiring too much room for speculation and error in a DCF analysis. Canada's position is supported by evidence of how offshore wind projects in the early stage of development are valued in the real world. The Claimant's arguments to the contrary fail to appreciate the specific characteristics of the Project, namely that it lacked site control, grid access and had none of its over 40 required permits, and must be rejected.

(a) The Claimant's Authorities Fail to Support the Use of a DCF Methodology to Value Its Investment

210. Instead of responding directly to the authorities raised by Canada with respect to the appropriateness of the DCF valuation for the Project,[452] the Claimant argues that other tribunals have accepted the DCF methodology in cases where projects or companies faced future risk. It also argues that a DCF methodology was applied in a number of recent awards involving renewable energy facilities against Spain.[453] The Claimant then argues that the risk associated with a project can simply be accounted for in the appropriate discount rate.[454] However, the Claimant greatly over-simplifies the authorities it points to, and fails to acknowledge the reason why a DCF methodology was used in those specific instances.[455] For example, in *Gold Reserve v. Venezuela*[456] and *Lemire v. Ukraine,*[457] whether or not DCF was the appropriate valuation methodology was not discussed by the tribunal – in those cases, both the claimants' and respondents' experts agreed that the DCF methodology was to be used. That is not the case here. Moreover, the *Gold Reserve* tribunal expressed its reservation on using such a methodology for one of the projects at issue, since it was "never a functioning mine and therefore did not have a history of cash flow which would lend itself to a DCF."[458]

[452] *See Windstream II – Canada's Counter-Memorial*, ¶¶ 259-263.

[453] *Windstream II – Claimant's Reply Memorial*, ¶ 431.

[454] *Windstream II – Claimant's Reply Memorial*, ¶ 432.

[455] The Claimant relied on the very same authorities in *Windstream I* with no success. *Windstream II – Claimant's Reply Memorial*, ¶¶ 647-651; *Windstream I – Canada's Rejoinder Memorial*, ¶¶ 291-300.

[456] **CL-121**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID) Case No. ARB (AF) 09/1, Award, 22 September 2014, ¶ 690.

[457] **CL-123**, *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award, 28 March 2011, ¶ 254.

[458] **CL-121**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID) Case No. ARB (AF) 09/1, Award, 22 September 2014, ¶ 830.

211. Similarly, in *CMS Gas v. Argentina*, *El Paso v. Argentina*, and *Cargill v. Mexico*, the investment in question was a going concern, unlike the Claimant's Project.[459] The Claimant was not successful in relying on these authorities in *Windstream I*, and nor should they carry any weight here.[460] Additionally, the Spanish renewable energy cases relied on by the Claimant all involved going concern businesses.[461] That is simply not the case here. In fact, those decisions support Canada's position. For example, as the *AES Solar* tribunal noted: "[…] the use of the DCF may not be suited to all cases, especially those where the business to be valued is not a 'going concern' and 'lacks a clear record of profitability'."[462]

212. Further, the Claimant's reliance on *Karaha Bodas v. PLN* does not support its position. While the contract in that case allocated commercial risks of market availability, price fluctuations and inflation like the FIT Contract,[463] this is not analogous to removing risks associated with the development and construction of a project like the Claimant's. The FIT Contract itself did not provide a guarantee that the Project would be permitted, developed or reach commercial operation.[464] The Claimant had no automatic or guaranteed right to any of the necessary permits and approvals, and the failure to obtain a single one could have resulted in substantial costs or the failure of the Project

[459] **CL-040**, *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8) Award, 12 May 2005, ¶ 48; **CL-047**, *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15) Award, 31 October 2011, ¶ 78; **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 186.

[460] *See* Canada's response to the Claimant relying on these cases in *Windstream I* in *Windstream I – Canada's Counter-Memorial*, ¶¶ 297 and 298. Further, Canada does not bring forward this point in its damages argument with the goal of arguing that such a finding is *res judicata.* For Canada's arguments in that regard, please see Section II.A. Instead, Canada simply notes the *Windstream I* tribunal's finding for its value before this court, to the extent decisions of other tribunals may be considered persuasive.

[461] **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), ¶ 121; **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), ¶ 70; **CL-201**, *InfraRed Environmental Infrastructure GP Limited and Others v. Kingdom of Spain*, (ICSID case No. ARB/14/12), Award (August 2, 2019), ¶¶ 523 and 524; **CL-202**, *Renergy S.A R.L. v. Kingdom of Spain*, (ICSID Case No. ARB/14/18), Award (May 6, 2022), ¶ 785; **CL-203**, *The PV Investors v. The Kingdom of Spain,* (UNCITRAL, PCA Case No. 2012-14), Final Award (February 28, 2020), ¶ 691.

[462] **CL-203**, *The PV Investors v. The Kingdom of Spain*, (UNCITRAL, PCA Case No. 2012-14), Final Award (February 28, 2020), ¶ 691.

[463] **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, ¶¶ 125 and 126.

[464] RWS-Cecchini, ¶ 6; RER-BRG-1, ¶ 77; RER-BRG-2, ¶¶ 27-28, 93, and 119-123.

altogether.[465] Indeed, the Claimant's understanding of the FIT Contract fails to take into account any of the contractual pre-requisites. The Claimant seems to entirely ignore, for example, the fact that the IESO will not issue a NTP until a supplier has obtained the required permitting and financing.[466] The Claimant had neither the necessary permits nor financing, and as a result, it is wrong to assume away the risk that the Project would not only fail to reach NTP, but also fail to meet commercial operation by the MCOD. As Canada previously demonstrated, the reality is that for many FIT Contract holders, these risks can, and do, materialize.[467]

(b) The Claimant's Project Remains Highly Speculative in Nature

213. As it did in the *Windstream I* arbitration, the Claimant has once again spent countless dollars hiring technical experts to argue that the Project could have been built within the timelines of the FIT Contract. However, its development plans have barely changed since *Windstream I*. While the Claimant did complete some desktop wind studies and preliminary bathymetric work following the *Windstream I* Award, the Project remains in the early stages of development and is a highly speculative endeavour. Indeed, as demonstrated below, the Claimant's own documents reveal that it has created a project schedule that suits its legal needs, rather than reflecting real-world conditions.

(i) The Claimant Admits that Its Project Timelines in *Windstream I*, Which It Uses Again in this Arbitration, Are Extremely Optimistic and Unrealistic

214. The Claimant has presented a detailed project schedule in this arbitration which "outlines the key activities required for the Project to be successfully implemented" within the five years required by the FIT Contract.[468] That project schedule is "based on the original version prepared by SgurrEnergy (now Wood) for NAFTA 1 […] dated 11 June 2015" with updates for "current Project design and offshore wind market conditions".[469] However, the Claimant's own documents reveal that

[465] RWS- Teliszewsky, ¶ 10.

[466] **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, section 2.4(a).

[467] RER-BRG-2, ¶ 245.

[468] CER-Wood, ¶ 53.

[469] CER-Wood, ¶ 53: ("The NAFTA1 schedule had a total duration of 63 months with a start date of 11 February 2011 and an end date of 23 May 2016. The updated schedule prepared in support of NAFTA2 has a total duration of 58 months with a start date of 18 February 2020, and an end date of 20 December 2024. The improvement in the duration of the

the project schedule as designed for the *Windstream I* arbitration was entirely unrealistic and that it could not meet the FIT Contract's five-year MCOD. The fact that the Claimant's current schedule relies on that schedule makes the Claimant's current claim that the Project could be operational in 58 months all the more absurd.

215. The need for more than five years to develop the Project was noted by the Claimant numerous times following the *Windstream I* Award. For example, in November 2016, Mr. Baines wrote to Ian Irvine, the Claimant's expert in the *Windstream I* arbitration (the same individual who developed the Project schedule in that arbitration and this one), noting that more than five years would be needed to develop the project realistically.[470] Further, the Claimant admitted that the schedule was created to fit a "but for" world, and not market realities. For example, in assembling its *Windstream I* materials to submit as part of an alleged REA application, Mr. Baines noted that:

> We are moving away from the "but-for" world of NAFTA where prices and timing had to match the original 2015 completion date. We are now assuming that the project can proceed on a schedule that makes sense, with appropriate timelines negotiated or re-set as needed."[471]

216. In response, Ortech provided two options for the Claimant – a realistic description for the Project, or one that more closely resembles the one which was designed for the purposes of the NAFTA hearing:

> This initial draft has kept most of the project details quite open and flexible so that the Project can better respond to public/agency/aboriginal consultation, however, we can make this draft report more specific to the project as it was determined through the NAFTA hearing preparation. I am partial to the more flexible range of options version of the report.[472]

schedule is due to the reduced number of WTGs. The schedule also considers the approach taken by current and recent offshore wind projects in Europe; accordingly, any updates in the market, since 2015, have also been taken into account.")

[470] **C-2654**, Email from Ian Baines (WEI) to Ian Irvine and Bill Follett (SgurrEnergy) re A request for input (November 21, 2016).

[471] **R-0910**, E-mail to Uwe Roeper (Ortech) from Ian Baines (Control Tech) Re: REA (29 November 2016). *See also* **R-0911**, E-mail to Ciara Dejong (Ortech) and Nancy Baines (Ortech) from Ian Baines (Control Tech) Re: Initial Draft of the Draft Project Description (20 December 2016) where the Mr. Baines notes: "The timelines used in our NAFTA case are no longer relevant. We are not in the but-for world of the legal argument."

[472] **R-0912**, E-mail to Ian Baines and Nancy Baines (Ortech) from Ciara Dejong (Ortech) Re: Initial Draft of the Draft Project Description (16 December 2016).

217. In July 2017, Mr. Baines also provided a project engineering update to Mr. Mars where he noted:

> Generally, I am telling the contractors that we are thinking in terms of tens of thousands of dollars, three to four months of work, and focus on what is the best way forward without the NAFTA imposed constraints. Each will have to provide a detailed report of their findings which I will collate into a go-forward plan. We are moving beyond the constraints of the but-for world of 2012 and looking at how we would design the project in 2017, building on what we have learned to date.[473]

218. The Claimant failed to prove that its Project schedule and expert reports support the use of a DCF analysis in the *Windstream I* arbitration. Yet it continues to rely on the same unrealistic assumptions, which were created to aid its damages claim in the *Windstream I* arbitration, to argue for the use of a DCF methodology again. This should not be permitted. There is no reason for this Tribunal to reach a different conclusion than the *Windstream I* tribunal with respect to the inappropriateness of a DCF methodology to value the Claimant's Project.

(ii) The Claimant's Project Would Not Reach Commercial Operation Prior to the MCOD Using the Claimant's Own Schedule

219. The Claimant's use of a DCF is all the more inappropriate because based on the Claimant's own project schedule, the IESO would have been entitled to terminate the FIT Contract without compensation for failure to meet the (revised) MCOD.

220. The Claimant attempts to downplay the effect that the MCOD would have on its ability to realize the full value of the FIT Contract.[474] The Two Dogs Project report argues that the FIT Contract provides numerous buffers that would have guaranteed the Claimant more time to reach commercial operation.[475] However, none of these clauses are of any help to the Claimant.

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[473] **R-0913**, E-mail to David Mars (White Owl Cap) and Nancy Baines from Ian Baines (Ortech) Re: Project engineering update (26 July 2017). *See also* **R-0914**, E-mail to Ian Baines (Control Tech) and Ciara Dejong (Ortech) from Hank Van Bakel (Ortech) Re: REA submission (19 December 2016), p. 4 noting: "In our NAFTA case we worked within a 'but for' would where the project was assumed to have commenced in sufficient time to meet a COD of May 2015. That world is long past and any schedule that we work towards in future will be at our discretion and subject to our contract, not the agencies."

[474] *See for example*, CER-Two Dogs-2 ¶¶ 3.3, 3.4, and 6.4; CER-Secretariat-2, ¶ 5.103; and *Windstream II – Claimant's Reply Memorial*, ¶ 424(b).

[475] CER-Two Dogs-2 ¶¶ 3.3, 3.4, and 6.4.

221. First, the Claimant does not have the luxury of a guaranteed additional 18 months past MCOD, despite its allegations to the contrary. The IESO may terminate the FIT Contract if a supplier misses the MCOD by 18 months[476] or for failure to achieve commercial operation by the MCOD.[477] As the *Ontario Superior Court of Justice* has held:

> In light of these sections of the FIT Contract I have concluded that the Contracting Parties' obligation to achieve commercial operation by the MCOD is a "material covenant or obligation" in the contract. As a result, s.9.1(b) applies to the Contracting Parties' failure to achieve commercial operation by the MCOD.
>
> […]
>
> Achieving commercial operation by the MCOD is a fundamental obligation under the FIT Contracts. A breach of this obligation is included in s.9.1(b) because it constitutes a failure to perform a material obligation […] It is a different breach than the event of default set out in s.9.1(j) which is only applicable if commercial operation has not been achieved 18 months after the MCOD.

222. The Claimant had 60 months from its Contract Date of May 4, 2010 to reach MCOD.[478] As noted above, as of November 22, 2010, the Claimant had already used up 6 months of the 60 months available to it, leaving only 54 months of development and construction time to reach MCOD once it emerged from *force majeure* status before the IESO would be in a position to terminate under section 9.1(b) of the FIT Contract.[479] Yet the Claimant has indicated it needs 58 months after

[476] An event of default described in section 9.1(j) of the FIT Contract.

[477] Considered to be an event of default under section 9.1(b) of the FIT Contract.

[478] The Claimant's FIT Contract was signed August 20, 2010, with an effective date of May 4, 2010. Based on the FIT Contract terms, the Claimant had five years (1827 days) from May 4, 2010 to bring its Project into commercial operation, making the MCOD May 4, 2015. From November 22, 2010, onwards, the Claimant's FIT Contract was in *force majeure* status. As of this point, just over six months had passed between the contract date and the commencement of the *force majeure* event, or 202 days specifically, during which the Claimant could have been advancing its Project. In a "but for" world, where the Claimant's FIT Contract is not terminated on the Valuation Date (February 18, 2020) and it is permitted to move ahead with the Project (on the assumption it is no longer in *force majeure* status and its MCOD is accordingly revised, and the moratorium has been lifted), there are 1625 days left before MCOD (1827 days – 202 days). This means the new MCOD for the Project would be July 31, 2024. *See Windstream II – Canada's Counter-Memorial*, ¶ 256.

[479] The fact that the Claimant would have been granted the 54 months to complete development and construction in the time remaining after emerging from *force majeure* is not in itself a certainty. Section 10.1(f) of the FIT Contract provides that, for suppliers that do not achieve Commercial Operation by the MCOD, the MCOD "shall be extended for such reasonable period of delay directly resulting from such Force Majeure event".

emerging from *force majeure* to reach commercial operation.[480] Thus the Claimant would certainly miss the revised MCOD, with a risk that its FIT Contract would be terminated. Indeed, the Claimant admits this, when it notes that under this scenario the Project would reach commercial operation "143 days after the revised MCOD."[481] Therefore, even on the Claimant's own schedule, the Claimant would not be able to meet the revised MCOD before the IESO would be in a position to terminate the FIT Contract pursuant to section 9.1(b) as a result of the Claimant's failure to comply with a material covenant or obligation of the FIT Contract.

223. Second, it is incorrect for the Claimant to assume, as it does, that it has more than five years of development and construction time to reach the MCOD. The Claimant arrives at a January 31, 2025 MCOD by adjusting the MCOD for two events of *force majeure* – one for the period from November 22, 2010 to February 18, 2020, and a second 185 days for the REA appeal to the Environmental Review Tribunal (REA appeal process) starting on August 19, 2022.[482] The Claimant's argument has serious flaws. First, the Claimant has not demonstrated that it would have been entitled to further *force majeure* relief beyond what its project schedule assumes has already been granted.[483] Second, even if the additional *force majeure* relief was granted, the Claimant's project schedule continues to use this time to complete project activities in order to meet the 58-month time frame it has set for itself.[484] This defies the notion that the FIT Contract would validly be in *force majeure* without the

[480] *Windstream II – Claimant's Reply Memorial*, ¶ 136; CER-Wood, ¶ 10.2. The Claimant's Project schedule has the first activity commencing on February 18, 2020, and the final event (commercial operation) on December 20, 2024, for a total of 58 months.

[481] CER- Secretariat-2, ¶ 6.8 ("In this scenario, the Revised MCOD would be July 30, 2024 (i.e., 3,375 days from May 4, 2015). Accordingly, the COD of December 20, 2024 based on the Project Schedule set out in the Wood Report would be 143 days after the Revised MCOD.")

[482] CER-Secretariat-2, Figure 6-1 and ¶¶ 6.4 and 6.8.

[483] If the Commercial Operation Date is delayed by reason of one or more events of *force majeure*, section 10.1(g) of the FIT Contract effectively allows a supplier to remain in *force majeure* status for an aggregate of 24 months after the original MCOD, before the FIT Contract may be terminated by either party. As of February 18, 2020, the Claimant would have already been in *force majeure* status for almost 5 years after its original MCOD, with the termination right in section 10.1(g) still triggered. Without IESO's waiver of the termination right under section 10.1(g) of the FIT Contract, which waiver the Claimant has not proven would have been obtained, the Claimant cannot demonstrate that it would be entitled to further *force majeure* relief. **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, section 10.1(g).

[484] *See for example*, CER-Wood, Appendix B: "Project Schedule", line 280 (Wind Data Collection (Charity Shoals)), line 302 (construction of the gravity-based foundation fabrication facility), line 322 (Pre-Fab GBF), and line 364 (onshore substation – Secondary Equipment Procurement). The REA appeal process is scheduled to occur from August 19, 2022 to February 20, 2023 (*see* CER-Wood, Appendix B: "Project Schedule", line 69).

ability of the Claimant to move forward during this time.[485] The Claimant cannot take an extra six months of *force majeure* to further extend its MCOD to January 2025 while at the same time continue to develop its project during these six months. Correcting for this error, and delaying development activities for the Project during this second *force majeure* period, would delay commercial operation by six months from December 20, 2024 to June 20, 2025, well after the Claimant's further revised MCOD of January 31, 2025, thus again putting the IESO in a position where it could terminate the FIT Contract pursuant to section 9.1(b).

224. Third, section 8.1(d) of the FIT Contract does not extend the MCOD – it is an option to extend the Term of operation of the project, as defined in the FIT Contract should commercial operation be delayed past the MCOD. This provision does not waive or remove the IESO's discretion to terminate the FIT Contract for an event of default under section 9.1(b) should it so choose. Indeed, as the Ontario Superior Court has confirmed, "if the IESO terminates the contract under s.9.1(b) for failure to achieve commercial operation by MCOD, s.8.1 will not come into play."[486]

225. As Canada's expert Dr. Guillet notes, these types of issues with the Project's schedule would have made financing of the Project practically impossible.[487] Such fundamental flaws cannot be corrected by Secretariat's "sensitivity analysis",[488] these errors alone should be reason enough for the Tribunal to dismiss the use of a DCF for the Claimant's project.

[485] The very point of *force majeure* status is that an unforeseen and uncontrollable event is preventing development and/or construction from moving forward, and therefore a suspension of the timelines for achieving MCOD under the FIT Contract are justified for the duration of the *force majeure* event.

[486] **R-0833**, *Grasshopper Solar Corporation Solar Corporation et al. v. Independent Electricity System Operator* (2019 Ontario Superior Court of Justice 6297), 15 November 2019, ¶ 43; **R-0915**, *Grasshopper Solar Corporation v. Independent Electricity System Operator* (2020 ONCA 499), 7 August 2020.

[487] RER- Jérôme Guillet-2, ¶¶ 70, 183, 204-210.

[488] CER-Secretariat-2, ¶ 6.8. The Claimant has included two sensitivity analyses with regards to its DCF model. The first assumes a one-year delay in COD (*see Windstream II – Claimant's Reply Memorial*, ¶ 425(a)) and the second assumes no period of *force majeure* is granted for the REA appeal (*see Windstream II – Claimant's Reply Memorial*, ¶ 425(a) and CER-Secretariat-2, ¶ 6.8). In both scenarios, the COD would occur after the MCOD, leaving the IESO in a position to terminate the FIT Contract as of the MCOD pursuant to section 9.1(b) – before a single turbine becomes operational.

(iii) The Claimant's Project, and Associated Risk, Remain Unchanged Since the *Windstream I* Arbitration

226. The Claimant's Project is no more suited to a DCF valuation at this time than it was in 2016. An analysis of the specifics of the Project shows its speculative nature, and the inconclusive and "heroic"[489] assumptions of the Claimant's expert reports (which feed into its Project schedule). On the Claimant's Valuation Date of February 18, 2020, the Project was an undeveloped project without a single permit. It remained a highly speculative and entirely conceptual endeavour, that was in *force majeure* status, not due to the moratorium, but due to its pre-existing inability to access the site upon which it wanted to build the Project. Its development status was unchanged from the time of the *Windstream I* Award. As made clear in Canada's submissions in that arbitration,[490] and again here, the Claimant's arguments with respect to the likelihood of reaching commercial operation are entirely speculative and fails to support the use of a DCF methodology in this case.

227. The Claimant argues in its Reply Memorial that it has made efforts to move its Project forward, by "filing an updated REA submission" and "under[taking] additional engineering work".[491] The evidence does not support the Claimant's argument,[492] but even if it did, the Project remained in early stages of development and was no closer to being built as of the Valuation Day than it was at the time of the *Windstream I* Award.[493] The Claimant's own expert agrees with this characterization,[494] as does the Claimant:

[489] RER- Jérôme Guillet-1, ¶ 34.

[490] *See for example*, *Windstream II – Canada's Rejoinder Memorial*, ¶¶ 293-302. *See also Windstream II – Canada's Counter-Memorial*, ¶¶ 261-274.

[491] *Windstream II – Claimant's Reply Memorial*, ¶ 71.

[492] The documents that the Claimant submitted as part of its REA application were a repackaging of the export reports it had filed in the *Windstream I* arbitration, and MOE informed it that the "documents that you describe as studies […] are not the reports required to be prepared under O.Reg. 359/09 as part of an application for an REA." **R-0795**, Letter from Dolly Goyette (MOE) to Ian Baines (WWIS) (August 25, 2017).

[493] *See also* **R-0916**, Letter from Andre Bernier (Natural Resources Canada) to Ian Baines Re: ERPP-OW 16 Windstream Wolfe Island Shoals Offshore Wind Farm (13 July 2018) where NRCan also views the Project as being in the early stages.

[494] CER-Wood, p. 54 referring to the early stage of development of the Project.

> Our current endeavour is suing under NAFTA to recover lost profits. We won a similar case in 2016, but unfortunately the project is no closer to being built.[495]

228. The only difference between the Project design and plan as it existed in *Windstream I* and its current plan is a change of turbines and, as a result, a change in the project layout.[496] Other than minimal updates to the bathymetric work and additional wind studies that were not conducted on the proposed Project site,[497] all other steps to advance the Project were completed prior to the moratorium in February 2011 or as part of expert reports in the context of the *Windstream I* arbitration.[498]

229. The record shows overwhelming evidence that a DCF valuation is inappropriate. In particular, Canada highlights that: (i) there were numerous outstanding studies to be completed, (ii) the Project timeline was unrealistic, (iii) the turbine to be used remained undetermined, (iv) uncertainties around grid access and the offshore substation were outstanding, (v) concerns regarding the gravity based foundation fabrication facility and the availability of installation vessels had not been addressed, (vi) the Claimant has completely ignored geopolitical issues and their impact on costs and supply chains, and (vii) the Project's ability to obtain financing was far from certain. There are many more issues which could be addressed,[499] but in the interest of efficiency, other aspects of riskiness related to the Project can be found in the arguments Canada made in the *Windstream I* arbitration.[500]

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[495] **R-0856**, E-mail to Chris Spencer (Queens University) from Ian Baines (Control Tech) Re: Wolfe Island Shoals Wind Project (21 December 2022).

[496] CER-Wood, ¶ 53.

[497] *Windstream II – Claimant's Reply Memorial*, ¶ 82(b)(viii-ix); **C-2143**, CSR 2017 Geological Assessment Report Project Number 1714 (February 27, 2018); **C-2713**, Email from Hank Van Bakel to Tyler G. Nielsen, David Mars et al. re Windstream Contract and WRA (June 30, 2017).

[498] *Windstream II – Claimant's Reply Memorial*, ¶ 82.

[499] It is not even clear that the Claimant was set on developing the Project at all. For example, the Claimant proposed to replace the Project with a "ground-mount solar photovoltaic project" in order to preserve its rights under the FIT Contract. It similarly proposed building a "combined cycle gas plant" and offered to revise the existing FIT Contract to "reduce the contract price in exchange for other considerations". Thus, even from the Claimant's perspective, the development of the Project was anything but certain. *See* **R-0917**, E-mail to David Mars (White Owl Cap) from Randi Rahamim (Navigator) RE: Media Request Re release of Windstream Decision (6 December 2016); **RL-109**, *Windstream I – Award*, ¶ 152; and **R-0918**, Windstream Energy Power Point Presentation (18 July 2018) (redacted in part), pp. 2 and 3.

[500] *Windstream I – Canada's Counter-Memorial*, ¶¶ 527-559; *Windstream I – Canada's Rejoinder Memorial*, ¶¶ 271-327; **RL-109**, *Windstream I – Award*, ¶¶ 474-476; RER-URS-1; RER-URS-2; RER-Green Giraffe.

230. ***Outstanding Studies to be Completed:*** As of the Valuation Date, the Project was "conceptual",[501] according to the Claimant's own experts, contingent on a myriad of tasks yet to be completed prior to finalizing the layout of what would be built, and under what parameters or restrictions.[502] For example, the Claimant had Ortech draw up a list of outstanding studies necessary for an "engineering reboot" of the Project following the *Windstream I* Award.[503] None of this was completed by the time the IESO advised of its decision to terminate the FIT Contract in February 2018.

231. The Claimant's own documents confirm the early-stage nature of the Project, and that the outcome of all of these outstanding tasks could have changed the Project as currently designed, with subsequent impact on timing, or even project completion at all.[504] For example, following submission of the so-called REA application (which was a simple repurposing of the Claimant's *Windstream I* expert reports[505]), the Claimant was required to: "us[e] feedback from the Province [to] finalize the Project Description", "meet with First Nations [and] affected Municipalities", and provide public notice and an opportunity to comment.[506]

[501] **R-0919**, E-mail to Glen Gilbert (CSR Marine) and Patrick Campbell (CSR Marine) from Hank Van Bakel (Ortech) Re: WIS Turbine Locations (28 July 2017).

[502] CER-Wood, ¶ 52.

[503] This included studies related to grid connection, geotechnical information, wind resource assessments, coastal processes, shipping and navigation, feasibility of the gravity based foundations and associated construction facilities and installation, substations, turbine supply agreements, financial modelling, logistical and port supply, as well as further work on project management, and other areas of uncompleted work, including environmental studies and issues surrounding site access and land tenure. *See* **R-920**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) re: WIS Engineering reboot (19 June 2017). *See also* **R-0921**, Letter from Ian Baines (Control Tech) to David Mars (White Owl Cap) Re: next steps in engineering the WIS project Draft (15 June 2017).

[504] The outcome of the REA process for the Claimant was far from certain, as the Claimant admits. *See* **R-0921**, Letter from Ian Baines (Control Tech) to David Mars (White Owl Cap) Re: next steps in engineering the WIS project Draft (15 June 2017). *See also* **R-0922**, Letter from Ian Baines (Ortech) to David Mars (White Owl Cap) Re: Engineering Status Update (26 May 2021) demonstrating that the Claimant also had first-hand experience with "unanticipated changes" that could occur with direct impacts on the Project, and its design, and timelines.

[505] *See* **R-0923**, Letter from Ian Baines (Control Tech) to Ciara Dejong (Ortech) and Nancy Baines Re: REA Submission, (15 December 2016) noting "[r]emember, throw the works at them as we paid for all this stuff and should use it".

[506] **R-0924**, E-mail to Ian Baines (Ortech) from Uwe Roeper (Ortech) Re: REA start activities (28 November 2016). *See also* **R-0925**, E-mail to David Mars (White Owl Cap) from Ian Baines (Control Tech) Re: FN Partnership (12 December 2016) in which the Claimant expresses concerns about the "endless consultation" with Indigenous Groups and the impact it could have on the Project.

232. ***Project Timeline:*** A closer look at the project schedule shows additional unrealistic assumptions relied on by the Claimant to achieve MCOD on time. For example, according to its schedule, the Claimant reaches financial close on February 20, 2023. Yet, as of that date it would not yet have completed its connection studies and agreements required to obtain grid connection (due to be completed on February 28, 2023). Its schedule also fails to allow several necessary permits to be obtained.[507]

233. In order to justify the reasonableness of its Project schedule, the Claimant relies on the report of Mr. Irvine, where he identifies two projects, Nysted and Rodand II, which were completed on "similar schedules" to the Project.[508] The Claimant then argues that projects put forward by Dr. Guillet which demonstrate the substantial risk associated with the project were not relevant due to their size and distance from the shore.[509] However, as Dr. Guillet notes, the Claimant's comparison only refers to part of the Project timeline and ignores risk associated with others.[510] Further, both projects were developed under a defined regulatory regime with experience in offshore wind, not as a first of its kind in a new jurisdiction such as the Claimant's.

234. ***Undetermined Turbine Selection:*** The Claimant's Project was not far enough along in development to know what turbines it would be using. Up until the Valuation Date, the Claimant was still debating the issue.[511] The Project Description submitted to the Ministry of Environment in

[507] *See for example*, CER-Wood, Appendix B: "Project Schedule", line 137 (Building permit occurring on April 4, 2023) and line 141 (Environmental Compliance Approval occurring on August 7, 2023).

[508] *Windstream II – Claimant's Reply Memorial*, ¶ 424(b).

[509] *Windstream II – Claimant's Reply Memorial*, ¶ 424(b).

[510] RER-Jérôme Guillet-2, ¶ 205.

[511] **R-0926**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: ORTECH Questions for Siemens (6 February 2017); **R-0927**, E-mail to Ian Baines (Control Tech) and Nancy Baines from Hank Van Bakel (Ortech) Re: ORTECH Question for Sgurr (7 February 2017); **R-0928**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: turbine model and Hub height (13 February 2017); **R-0929**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: turbine model and Hub height (13 February 2017); **R-0930**, E-mail to Hank Van Bakel (Ortech) from William Youmans (Siemens) re: ORTECH Questions for Siemens (16 February 2017); **R-0931**, E-mail to David Mars (White Owl Cap) and Nancy Baines from Ian Baines (Control Tech) Re: preliminary WIS wind analysis results (17 February 2017); **R-0932**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: Budget for additional wind resource analysis (21 February 2017); **R-0933**, E-mail to Hank Van Bakel (Ortech) from Ian Baines (Control Tech) Re: Budget for additional wind resource analysis (2 March 2017); **R-0934**, E-mail to David Mars (White Owl Cap) from Ian Baines (Control Tech) Re: Budget for additional wind resource analysis (2 March 2017); **R-0935**, E-mail to Ian Baines (Control Tech) and Nancy Baines from David Mars (White Owl Cap) Re: Vestas Introduces 4.2 MW Wind

February 2017 used "Siemens 2.3 MW direct drive WTG",[512] and its updated wind resource assessment in June 2017 is based on 3.6 MW turbines,[513] which as the Claimant notes "increase[d] the uncertainty" of the assessment.[514] Further, as Siemens noted, the 3.6 MW turbine is a "vintage machine"[515] that have not even been proven to meet the specific requirements of the FIT Contract,[516] nor would they be available to the Claimant.[517] Indeed, the Claimant recognized this as a potential issue in emails with Siemens about the Project.[518] Further, as described in the Claimant's expert reports filed in the arbitration, the Project uses a 4.5 MW turbine.[519]

235. This calls into question not only the Claimant's ability to use the selected turbines, but also the wind resource assessment upon which it bases its DCF analysis (which is unclear), as well as the

Platform in Three Variants (30 June 2017); **R-0936**, E-mail to Daniel Brown (KeyBanc) from Ian Baines (Control Tech) Re: Wolfe Island Shoals – Follow up on our July 27th call (21 August 2017).

[512] **C-2074**, ORTECH Report: Project Description - Wolfe Island Shoals Offshore Wind Farm (February 15, 2017) (February 15, 2017), p. 15. Further, the study used an uncertain Project layout which was "outside of the general outer boundary" of the crown land the on which Claimant wished to build its Project. *See* **C-2099**, ORTECH 2017 Report: WRA for Wolfe Island Shoals Offshore Wind Project – Report #70802 (June 5, 2017), p. 3. **R-0937**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re; Budget for additional wind resource analysis (7 March 2017) which notes that the wind modelling is not based on the project layout as there are turbines located outside the project layout as designed. As the document notes "we are not engineering the project at this time."

[513] C-**2099**. ORTECH 2017 Report: WRA for Wolfe Island Shoals Offshore Wind Project – Report #70802 (June 5, 2017), p. 3.

[514] **R-0938**, E-mail to Ian Baines (Control Tech) and Nancy Baines from Hank Van Bakel (Ortech) Re: ORTECH Question for Sgurr (7 February 2017), p. 1.

[515] **R-0939**, E-mail to Nancy Baines from William Youmans (Siemens) Re: NDA between Siemens and Windstream Energy (15 February 2017), p. 2.

[516] **R-0940**, E-mail to William Youmans (Siemens) from Hank Van Bakel (Ortech) Re: ORTECH Question for Siemens (3 February 2017).

[517] **R-0926**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: ORTECH Questions for Siemens (6 February 2017).

[518] *See* **R-0939**, E-mail to Nancy Baines from William Youmans (Siemens) Re: NDA between Siemens and Windstream Energy (15 February 2017), p. 2.

[519] CER-Wood, p. 41. The Claimant has not provided any evidence that they could secure these turbines or that they would meet the requirements of the FIT Contract. Further, at one point the Claimant expressly rejected the use of a 4 MW turbine, almost the same size put forward by the Claimant for the Project in this arbitration. *See* **R-0941**, E-mail to Hank Van Bakel (Ortech) from Ian Baines (Control Tech) Re: ORTECH Question for Siemens (6 February 2017) ("We do not want a 4 MW machine, we would have the same swept area, but would lose 10% of turbines. Siemens are not developers, so they seem not to understand this.")

Claimant's estimated capital expenditures, the Project's overall capacity factor, and the Project's overall Internal Rate of Return ("IRR"), as the Claimant itself admitted in 2017.[520]

236. ***Grid Access and Offshore Substation:*** The Claimant also had not completed the studies needed to obtain a Notice to Proceed under its FIT Contract as it related to grid access,[521] nor has it secured a location for the offshore substation.[522] The Claimant's expert reports merely assume that Pigeon Island would be used,[523] an assumption that was far from certain.[524] Further, if the Claimant is wrong on this assumption, it would require a new Project schedule and design changes.[525] The Claimant has not put forward any testimony that addresses these points raised by Canada.

237. ***Gravity Based Foundation Fabrication Facility and Jack Up Vessels:*** Although the Claimant's expert, Wood, states that the Claimant "had identified numerous potential fabrication sites on Lake Ontario", one had yet to be chosen,[526] and then assumes, as it did in *Windstream I*, that the structures would be fabricated at St. Mary's Cement's facilities in Bowmanville, Ontario.[527] The Claimant has not put forward a single contract, expression of interest, or even email correspondence with St. Mary's indicating that this was feasible. Canada also refuted the Claimant's alleged plan to

[520] **R-0942**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: ORTECH Question for Sgurr (3 February 2017).

[521] **R-0821**, Memo to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: Interconnection Process Summary for Wolfe Island Shoals (2 March 2017); **R-0822**, E-mail to Ian Baines (Control Tech) from Hank Van Bakel (Ortech) Re: Summary of WIS Interconnection (15 March 2017), p. 2.

[522] **R-0943**, E-mail to David Mars (White Cap Owl) from Ian Baines (Control Tech) Re: Interim Report (28 July 2017).

[523] CER-Wood, p. 106; CER-SgurrEnergy, ¶ 3.3(b)(iv). Further, the Claimant assumes that such a location would be accessible year-round, and the importance of this being the case, without providing any evidence that it would be. *See* CER-Wood, p. 57.

[524] **C-2470**, Day 10 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 26, 2016) (Confidential), p. 234:1-4; **C-2466**, Day 6 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 21, 2016) (Confidential), p. 210:18-22. *See also* **R-0944**, Wolfe Island Status of Agency Correspondence and Next Steps – Draft Excel Spreadsheet; **R-0138,** Report to the Board of Directors, Windstream Energy LLC (Aug. 30, 2010), "Pigeon Island", noting that the Claimant's request to put a temporary met mast on Pigeon Island was refused by the Canadian Coast guard, making its use as an offshore substation uncertain.

[525] **C-2466**, Day 6 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 21, 2016) (Confidential), pp. 212 and 213.

[526] CER-Wood, p. 79.

[527] CER-Wood, p. 79.

use the RJR MacDonald jack up vessel[528] in *Windstream I,*[529] but the Claimant maintains the assumption that the vessel would be available without any concrete evidence.

238. ***Site Control:*** The Claimant argues that its lack of site control "does not render the Project in too early a stage to employ a DCF approach"[530] and that "risks around site control [are] immaterial". This conclusion cannot stand. Windstream did not have "an exclusive and priority position secured on the site that the Project could be built on" despite Secretariat's assertion to the contrary.[531] The land with respect to which the Claimant had applied for AOR status is not the land upon which its project layout is even situated. Therefore, even if the Claimant had received AOR status, it did not have any exclusive or priority position over the land it actually required.[532] As Dr. Guillet explains, "it is unreasonable to say that it is immaterial" as certain obstacles remain and "it is also definitely reasonable to consider that the risk is serious."[533]

239. ***Geopolitical Impacts:*** Real-world evidence demonstrates many uncertainties arise in the offshore wind industry, and that relying on a DCF methodology for a project at the beginning of a long permitting and construction schedule is inappropriate.[534] The Claimant's schedule, which begins

[528] CER-Wood, p. 99.

[529] *Windstream I – Canada's Counter-Memorial*, ¶ 539. *See* also CER-URS-1, pp. 186-198; **C-2466**, Day 6 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 21, 2016) (Confidential), p. 61:17-24.

[530] *Windstream II – Claimant's Reply Memorial*, ¶ 420.

[531] *Windstream II – Claimant's Reply Memorial*, ¶ 420; CER-Secretariat-2, ¶ 5.8(ii).

[532] *See Windstream I – Canada's Counter-Memorial*, ¶ 152 and 417; *Windstream I – Canada's Rejoinder Memorial*, ¶ 303. Further, in order to obtain access to Crown land to build its Project, the Claimant originally required Applicant of Record ("AOR") status. It had applied under the existing process at the time, but had not yet received such status, and when it approached MOE in 2017, it was informed that Ontario no longer even had "a process for obtaining Crown land site access under the Public Lands Act". Its lack of AOR status was the very reason it was granted force majeure status in 2010, as it could not obtain access to the site to undertake any work. *See Windstream I – Canada's Counter-Memorial*, ¶¶ 174 and 224-233; **C-2474**, Letter from Goyette, Dolly (MOE) to Baines, Ian (WWIS) (August 25, 2017), p. 1.

[533] RER-Jérôme Guillet-2, ¶ 85.

[534] **R-0945***,* Financial Times, "Renewable Energy – Soaring Costs Threaten Offshore Wind Farm Projects", 8 August 2023; **R-0946***,* Fortune, "As renewable-energy demand soars amid extreme heat, rising costs are making offshore wind projects so expensive that 'it doesn't make sense to continue'", 22 July 2023; **R-0947**, New York Times, "No Bidders in British Offshore Wind Auction", 8 September 2023; **R-0948**, The New York Times, "Wind Energy Giant Orsted Says Delays in U.S. May Cost $2 Billion", 30 August 2023; **R-0893**, Offshore Engineer, "Offshore Wind Supply Chain Struggles Threaten Global Targets", 17 August 2023; **R-0895**, Offshore Engineer, "Why the Offshore Wind Power Industry has hit Turbulence", 11 September 2023; **R-0900***,* Reuters, "Cost Crunch Prompts mass rethink of US offshore wind contracts", 13 September 2023; **R-0902***,* Wind Europe, "Offshore wind investments recovering but still way to go – including on supply chain" 16 August 2023.

in February 2020, fails to take into account any of the real-world events that transpired in the past three-and-a-half years, which would have had measurable impacts on the supply chains needed to build the Project, the willingness of lenders to finance it, and even its costs.[535] This evidence, which the Claimant would have been aware of at the time it developed its Project schedule and most certainly by the time it filed its Reply Memorial, cannot be ignored in a "but for" world.

240. ***Financeability:*** Finally, the Claimant has not provided any guidance to the Tribunal on the financeability of its Project. It has not responded to Dr. Guillet's comment in this regard, which he further emphasizes in his second report.[536] The type of project schedule put forward by the Claimant examines its technical feasibility, not whether it could obtain financing, something Mr. Irvine, the Claimant's expert, confirmed at the *Windstream I* hearing.[537] Dr. Guillet points out the problem with this approach as it relates to Project valuation:

> Wood was not mandated to act as lenders' advisor, with a duty of care towards them, as their mandate would then not be to say what it possible, but to identify worst case scenarios and indicate whether those would be compatible with the buffer available before the termination risk applies. With such a mission, their conclusions would certainly be quite different, because the question is different (and it is logical that the same competent advisor would give a different answer in respect of the same project).
>
> […]
>
> while it is correct that (some) investors would be willing to invest on the basis of the "what's possible" scenarios prepared by the Project's engineers, the lenders would only care about the worst case scenarios, and mixing up the two is inappropriate.[538]

[535] The Claimant's Project schedule notes that equipment procurement of turbines would have started in February 2023, and that the foundation and turbine installation would have commenced in December 2022. This is precisely when increased costs and supply chain delays occurred all over the world. CER-Wood, Appendix B: "Project Schedule", lines 401 and 406. *See also* RER-Jérôme Guillet-2, ¶¶ 56, 64, and 66.

[536] RER-Jérôme Guillet-2, ¶ 70. *See also* ¶¶ 204-210.

[537] **C-2466**, Day 6 - Confidential Condensed Transcript of the Arbitration Hearing of Windstream Energy LLC v. Government of Canada (PCA Case No. 2013-22) (February 21, 2016) (Confidential), pp. 190 and 191 ("That's correct. We were looking at the technical feasibility as to whether a hypothetical project could be constructed. We were not looking at the feasibility with regards to whether it could be financed"). *See also* pp. 191 and192 where Mr. Irvin confirms that "arranging for financing is not part of the technical process."

[538] RER-Jérôme Guillet-2, ¶¶ 208 and 210.

(c) A DCF Methodology Is Not Industry Standard for Projects at the Stage of Development of the Claimant's

241. In its Counter-Memorial, Canada demonstrated again[539] that a DCF methodology is not the industry standard practice for valuing offshore wind projects at the early stage of development given the highly speculative nature of such projects, and the difficulties in estimating DCF inputs, such as CAPEX and OPEX.[540] In response, the Claimant argues that it is "inaccurate for projects with revenue certainty, such as the Project" to be valued in any way other than using a DCF methodology.[541] To support his argument, the Claimant's expert points to (i) a single project where he alleges a DCF methodology was used,[542] (ii) the alleged importance of Windstream's Power Purchase Agreement ("PPA") which gave it a "guaranteed revenue stream"[543], and (iii) one paragraph from a KPMG quarterly brief.[544] However, as Canada's expert, Dr. Guillet, explains, the Claimant's arguments do not justify using a DCF methodology for the Project.

242. First, despite the Claimant's reliance on it, the Ørsted Project provides a clear example of why a DCF methodology is inappropriate for a project at the early stage of development. As Dr. Guillet notes, recent events demonstrate the inaccuracy of the original valuation of the Ørsted project using a DCF.[545] Second, as Dr. Guillet notes, Secretariat overstates the importance of a guaranteed revenue regime for an early-stage development project, like the Claimant's:

> The logic of valuing a project on the basis of its revenues when the revenue regime comes last (as Secretariat acknowledges is the usual development situation) cannot apply when the revenue regime comes first.[546]

[539] Canada does not bring forward this point in its damages argument with the goal of arguing collateral estoppel. For Canada's arguments in that regard, please see Section II.B. Instead, Canada simply notes the *Windstream I* tribunal's finding for its value before this tribunal, to the extent decisions of other tribunals may be considered persuasive.

[540] *Windstream II – Canada's Counter-Memorial*, ¶¶ 275-280.

[541] *Windstream II – Claimant's Reply Memorial*, ¶ 433.

[542] *Windstream II – Claimant's Reply Memorial*, ¶ 433(a).

[543] *Windstream II – Claimant's Reply Memorial*, ¶ 433(b).

[544] *Windstream II – Claimant's Reply Memorial*, ¶ 433; CER-Secretariat-2, ¶¶ 6.43-6.49.

[545] RER-Jérôme Guillet-1, ¶¶ 56 and 64.

[546] RER-Jérôme Guillet-2, ¶ 94.

243. Dr. Guillet further notes that:

> the importance of the revenue regime and level will come to the fore only when there is reasonable visibility on reaching FC/FID and that usually only comes when projects are 'fully permitted' or close to it.[547]

244. As noted above in paragraphs 114 and 115, the Project was far from being permitted. Third, the KPMG Report relied on by the Claimant is selectively cited in an attempt to help the Claimant's position. However, the report refers to valuation of renewable energy assets without noting specifically their stage of development and does not refer specifically offshore wind.[548] The general nature of the report means it provides no guidance to the specific situation the Tribunal must decide on here.[549] Further, the document itself notes that the market approach can be used.[550]

245. The Project, which did not have a single permit, site control, or grid access (with a FIT Contract contingent on obtaining all three), "was not at a stage where the determination of its construction and operating costs could be made with any level of precision."[551] As Dr. Guillet states:

> The Secretariat report continually tries to present the Project as a fully developed project ready to be built, which it was emphatically not. It is an early development project, where the only valuation mode used by the industry is comparables and not DCF.[552]

246. The inherent problems in using a DCF methodology to value a project in the early stage of development, such as the Claimant's, are discussed by Dr. Guillet in his second report:

> We have seen substantial movements over the past year in the cost of building projects, with a downward movement of 40% or so in the years 2015 2020 and an inverse upward movement of +40% in the past 2 3 years (see in paragraphs 178

[547] RER-Jérôme Guillet-2, ¶ 76.

[548] **C-2786**, KPMG quarterly brief, 17th edition, Q1 2022 entitled "Renewable energy valuation in the global energy transition" (January 2022), p. 8 ("Valuation of renewable energy assets are required at different points in time throughout the investment lifecycle.")

[549] The same comment applies to the Claimant's reliance on general public disclosures made by Boralex, Brookfield Renewable Corporation, TransAlta, Northland Power, and Enbridge. *See Windstream II – Claimant's Reply Memorial*, fn. 628.

[550] **C-2786**, KPMG quarterly brief, 17th edition, Q1 2022 entitled "Renewable energy valuation in the global energy transition" (January 2022), p. 8.

[551] RER-Jérôme Guillet-2, ¶ 66.

[552] RER-Jérôme Guillet-2, ¶ 66.

> 180). This makes it very difficult to predict with any accuracy the cost, and thus the value of a project many years into the future. Any calculation made on the basis of today's assumptions should come with the warning that an unknown but potentially quite large margin of error (in both directions) should be taken into account – a margin of error compounded by the fact that the calendar for construction is itself uncertain, adding another layer of uncertainty as to the cost (and the value) of the project, as seen from the date of early development and expressed in today's money. Thus, the information provided by such a calculation for such an early stage project as the Project is limited – at best it will provide an indication on the likelihood of whether a project has a chance of being profitable or not under *current* market conditions, but not much else.[553]

247. The Claimant's CAPEX assumptions used in its DCF were informed by numerous inputs, such as the gravity-based foundations and turbines.[554] As noted above, many issues remained outstanding with the Project, including site location and turbine selection, which could impact development and building costs, even without taking into account the large fluctuation in market trends Dr. Guillet notes in his report,[555] and as Canada has noted above.[556]

2. Canada Has Provided the Only Accurate Market Comparables Analysis

248. Canada has provided an extensive response with respect to the Claimant's market comparables approach in Dr. Guillet's first and second reports, which build on the Green Giraffe Report relied on by the *Windstream I* tribunal to value the Claimant's investment.[557] Unlike a DCF valuation, a market comparables analysis does not require the Tribunal to engage in the lengthy, speculative issues described above, making it the more appropriate valuation methodology to be applied.

249. The Claimant argues that Secretariat's market comparables approach should be preferred to that of Canada's expert, Dr. Guillet, asserting that the latter presents 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".[558] The Claimant also argues that its market comparables

[553] RER-Jérôme Guillet-2, ¶ 56.

[554] *Windstream II – Claimant's Reply Memorial*, ¶ 429.

[555] RER-Jérôme Guillet-2, ¶ 56.

[556] *See* ¶ 239.

[557] **RL-109**, *Windstream I – Award*, ¶ 477.

[558] *Windstream II – Claimant's Reply Memorial*, ¶ 439.

valuation confirms its DCF valuation.[559] However, as Dr. Guillet notes, this is due to the Claimant's selective approach with respect to market comparables, with an inappropriate weight given to the fact that the Project had a FIT Contract, and does not lend any validity to the Claimant's DCF valuation:

> [Secretariat] claims that the only criterion to find a comparable project to the Project is whether it had a PPA, and then that PPA's price level. That approach goes against the demonstrated behaviour of investors in the industry, which follows the steps I described in the original Green Giraffe Report almost ten years ago, and reiterated in the First Guillet Report last year: they conduct an assessment of the development of the project across the multiple items that must be met, including site control, grid access, permits and revenue regime. The revenue regime is only one item, and in terms of valuation, it comes last, timing-wise, as it is quite difficult to predict in advance the timing, and accordingly the cost, of actually building a project, before there is visibility on the other three items. Absent the visibility on these other items, the revenue regime, even if it is settled early, has limited relevance to the valuation of a project.[560]

250. Dr. Guillet confirms that his original opinion remains unchanged, and Canada's arguments in its Counter-Memorial remain valid:

> I confirm that I continue to consider that a fully permitted project has a value of approximately 0.2 MEUR/MW or a little bit more, and this value has remained stable over the years, as is shown by the history of transactions in the sector, for which I have extensive data, both old and more recent, further presented herein. The summary of that data – taking into account a handful of errors flagged by the Secretariat report […], which do not change the overall conclusions, […] shows strong consistency in valuations across the years.[561]
>
> […]
>
> My position today is that the valuation of the Project as of the Valuation Date would not be different than the value articulated in the Green Giraffe Report then: close to zero and in any case below 0.1 MEUR/MW (i.e. below EUR 30 M).[562]

251. The Claimant's arguments in response to Dr. Guillet's report[563] are flawed in numerous respects. The Claimant makes an overarching argument that Dr. Guillet's analysis "relies extensively

[559] *Windstream II – Claimant's Reply Memorial*, ¶¶ 405 and 435.

[560] RER-Jérôme Guillet-2, ¶ 53.

[561] RER-Jérôme Guillet-2, ¶ 22.

[562] RER-Jérôme Guillet-2, ¶ 24.

[563] *Windstream II – Claimant's Reply Memorial*, ¶ 438.

on non-public, inaccessible data that cannot be tested"[564] and as such, the evidence should be excluded. The Claimant's arguments are misplaced. First, the Claimant has misunderstood Dr. Guillet's point about his use of confidential information.[565] Second, Dr. Guillet confirms that "all of the transactions are themselves public" as is the fact that he participated in the transactions.[566] The information Dr. Guillet presents on these projects should not be doubted. Third, in an effort to repeat almost every argument it raised in the *Windstream I* arbitration, Canada notes that the Claimant made the same complaint with respect to Dr. Guillet's use of confidential information in that arbitration.[567] The *Windstream I* tribunal did not see fit to exclude such evidence,[568] and instead relied on Dr. Guillet in its Award.[569] Indeed, the same arguments the Claimant makes here can be made with respect to the Claimant's own expert as the Secretariat Report relies on Mr. Tetard's "personal experience working directly on the Formosa 1 transaction".[570]

252. The Claimant also criticizes Dr. Guillet's failure to provide an alternative valuation of the Project to confirm the reasonableness of its market comparables approach.[571] As the tribunal in *Windstream I* noted, an appropriate comparator would be the sunk investment costs of the Claimant.[572] The Claimant has not provided evidence of any post-*Windstream I* sunk costs, but given its plan to spend "tens of thousands of dollars" for contractors to undertake three to four months of

[564] *Windstream II – Claimant's Reply Memorial*, ¶ 438(e).

[565] *See* RER-Jérôme Guillet-2, ¶¶ 145-148.

[566] RER-Jérôme Guillet-2, ¶ 148.

[567] *See* **R-0949**, Letter from Tory's to Members of the *Windstream I* tribunal, 2 February 2016 and **R-0950**, Letter from Trade Law Bureau to Members of the *Windstream I* tribunal, 5 February 2016.

[568] **R-0951**, Letter from Permanent Court of Arbitration to Torys and Trade Law Bureau, Re: Claimant's Request for Further Production of Documents, 8 February 2016.

[569] **RL-109**, *Windstream I – Award*, ¶ 475 noting "[…] based on the evidence of Dr. Guillet, which the tribunal accepts […]".

[570] CER-Secretariat-2, fn. 67. Also, the Claimant's other expert reports make similar points. The Claimant has retained Wood and Two Dogs to provide its expert opinion on a multitude of topics including, scheduling, project risks, financing, and decommissioning. Wood and Two Dogs disclose in their expert reports that they have experience in a number of offshore wind projects with respect to these topics, and it is clear that the opinions expressed in those reports are based on their experience. Yet, the Claimant has not had Wood or Two Dogs produce any of the schedules, emails, advice, or other information which they prepare, on a confidential basis, for clients with respect to these projects. The same could be said about the other Claimant's experts.

[571] *Windstream II – Claimant's Reply Memorial*, ¶¶ 23 and 405.

[572] *See* **RL-109**, *Windstream I – Award*, ¶ 481 referring to RER-Green Giraffe, ¶¶ 21-26, 72, and 94-100.

work,[573] the only evidence suggests Claimant's sunk costs following the *Windstream I* award were minimal. In any event, Dr. Guillet confirms that using a DCF methodology to confirm a market comparables approach is of no use for an early-stage project like the Claimant's.[574]

253. Dr. Guillet has addressed each of the Claimant's remaining arguments in his second report. Rather than repeat them here, Canada has directed the Tribunal to the appropriate sections of Dr. Guillet's report in the following table, which provides a brief overview.

Windstream Critique	**Dr. Guillet's Response**
Dr. Guillet includes several projects that "significantly pre-date the valuation date"[575]	Dr. Guillet notes that advancements in the offshore wind industry have not changed the valuation of early-stage development wind projects such as the Claimant's: > the Second Secretariat Report is repeatedly using arguments about projects post FC/FID (which have indeed seen an improvement in their risk perception and accordingly have attracted cheaper capital) to argue that I have said things about valuation of development projects that supposedly contradict my position that the valuation of these projects has not moved significantly.[576] > […] > Even if late development projects have seen a small increase in valuations in the late 2010s, the valuation levels remain consistent with the ranges I have provided for the valuation of projects under development and I do not see the need to change these. Additionally, the trend is not visible for early development projects, which is the category where the Project belongs.[577]

[573] **R-0913**, E-mail to David Mars (White Owl Cap) and Nancy Baines from Ian Baines (Ortech) Re: Project engineering update (26 July 2017).

[574] RER-Jérôme Guillet-2, ¶¶ 56 and 64.

[575] *Windstream II – Claimant's Reply Memorial*, ¶ 438(a).

[576] RER-Jérôme Guillet-2, ¶ 46.

[577] RER-Jérôme Guillet-2, ¶ 47.

Dr. Guillet's inclusion of floating wind farms which "are not comparable to the Project"[578]	Dr. Guillet confirms his expert opinion that floating wind farms are appropriately included in his market comparables analysis. He indicates: > While I acknowledge that the perceived risk of *building* floating wind projects is higher, due to a current lack of track record for the sector (only a handful of relatively small projects have been built to date), that does not necessarily mean that projects under development are valued differently.[579]
Dr. Guillet's inclusion of certain "windfall" projects with price certainty[580]	Dr. Guillet confirms his expert opinion that certain "windfall projects" be excluded from the market comparables analysis. He indicates: > The windfall projects are excluded for reasons that I discuss again in the next paragraph – their values were based upon very different calculations, taking into account external factors that are not present in other projects. Floating wind projects are not subject to such external factor considerations and are assessed in the same way as fixed bottom projects.[581]
Dr. Guillet's alleged failure to account for transactions that had price certainty[582]	Dr. Guillet's expert opinion confirms that the fact that the Project had a FIT Contract and its impact on overall Project valuation is being overstated by the Claimant: > An early development offshore wind farm does not have, and will not have revenues for several years, and may need to spend tens of millions of dollars before it gets to the stage where it knows whether it will be able to operate or not. In that period, what matters is reducing the risk that these development funds are not spent in vain, and making the project a reality.[583] > […]

[578] *Windstream II – Claimant's Reply Memorial*, ¶ 438(b).

[579] RER-Jérôme Guillet-2, ¶ 59.

[580] *Windstream II – Claimant's Reply Memorial*, ¶ 438(c).

[581] RER-Jérôme Guillet-2, ¶ 124. *See also* ¶¶ 125-133.

[582] *Windstream II – Claimant's Reply Memorial*, ¶ 438(d).

[583] RER-Jérôme Guillet-2, ¶ 136.

	To say that the revenue regime is the sole relevant factor is to be too narrowly focused and incorrect. In some jurisdictions it will be an important element, and in others, it will not, with other items in the development list taking precedence. It thus makes sense to compare the overall development status of a project, taking into account all dimensions and not just one, and comparing the Project to other early development projects from multiple different jurisdictions (and periods, as the rules change over time) makes sense to have a more complete picture.[584]
Dr. Guillet's early stage and late stage analysis which the Claimant finds "overly simplistic"[585]	Dr. Guillet's opinion confirms that the Claimant's unexplained emphasis on the fact that the Claimant had a FIT Contract does not render irrelevant his expert opinion on whether some projects are early stage or late stage. As he notes: 93. Saying that a project that has done 95% of the permitting work is worth the same as a project that has done 10% of the permitting work because neither has actually reached the "permitted" milestone is not a serious argument against my general point that valuations should be seen as belonging on a continuum, with a premium (which can be small or large depending on the specific requirement of the regulatory framework) for formally reaching the specific milestone, and value accrued with progress in the development work towards the relevant milestones […][586] 94. Altogether, I note that Secretariat agrees with my typology of milestones to be reached under a development process. Secretariat emphasises revenue certainty as the core driver of a project's valuation during development but does not justify such preference nor do they acknowledge that such methodology breaks down for projects where the revenue certainty (whether in the form of PPA or guaranteed FIT or otherwise) comes before permits and other development milestones – like with the Project. The logic of valuing a project on the basis of

[584] RER-Jérôme Guillet-2, ¶ 144. *See also* ¶¶ 135-143 and 145.

[585] *Windstream II – Claimant's Reply Memorial*, ¶ 438(f).

[586] RER-Jérôme Guillet-2, ¶ 93.

	its revenues when the revenue regime comes last (as Secretariat acknowledges is the usual development situation) cannot apply when the revenue regime comes first.[587]
Dr. Guillet's exclusion of contingent payments[588]	Dr. Guillet confirms that excluding contingent payments in his valuation allows the valuator to make less assumptions about the development of a project, and therefore provides a more accurate analysis: 117. As a matter of consistency and certainty, it is simpler and fairer to use the upfront payments, and well identified quasi certain payments that are within the control of the seller (for instance a payment linked to submitting an application), as any other methodology will require to make numerous other assumptions about the development of the project and both the competence and the preferences of the parties involved.[589]

254. Real-world valuations demonstrate that absent access to the proposed project site and given the Claimant's lack of progress towards obtaining environmental permits, the Project had no material value on the market, and indeed, the same (non-material) value it had as of the *Windstream I* Award.[590] As Dr. Guillet notes, the value ascribed to an offshore wind project is highly dependent on its stage of development and on whether the project has reached certain milestones, such as site control, permits, a revenue regime, and grid access.[591] A project with all of these items has more value than a project that has only some, or none of these.[592]

255. The Claimant's market comparables analysis places inappropriate weight on the fact that the Claimant had a FIT Contract – a contract that required it to, among other things, obtain site control and numerous permits before it could begin construction.[593] The FIT Contract is a single milestone

[587] RER-Jérôme Guillet-2, ¶ 94.

[588] *Windstream II – Claimant's Reply Memorial*, ¶ 438(g).

[589] RER-Jérôme Guillet-2, ¶ 117. *See also* ¶¶ 114-116 and 118.

[590] RER-Jérôme Guillet-2, ¶ 69.

[591] *See for example*, RER-Jérôme Guillet-2, ¶¶ 25 and 53.

[592] RER-Jérôme Guillet-2, ¶¶ 22 and 23.

[593] **R-0092**, Ontario Power Authority, Feed-in Tariff Contract, v. 1.3, section 2.6.

on a path toward value for the Project. By comparing itself to late-stage projects much further along in their road to commercial operation, or those projects' highly unique circumstances, the Claimant has presented a highly skewed valuation.

256. When a correct market comparables analysis is utilized, it reveals that "but for" the alleged breaches, the Claimant's investment would have the same value on the Valuation Date it had at the time of the *Windstream I* Award. Canada's expert, Dr. Guillet, the author of the Green Giraffe valuation report from the *Windstream I* arbitration, confirms that valuation continues to apply in this arbitration, despite the passage of time.[594] The Claimant was awarded over CAD 25 million in damages by the *Windstream I* Award, and the IESO has returned the CAD 6 million security deposit required under the terms of the FIT Contract. The Claimant has thus already been compensated the full fair market value of its investment and it is not entitled to any further compensation. When a correct valuation of the Claimant's investment is used, and the appropriate deduction for the *Windstream I* Award is made,[595] the result is that the Claimant is not entitled to any damages.

V. THE CLAIMANT HAS NOT PROVEN IT IS ENTITLED TO PRE- AND POST-JUDGEMENT INTEREST

257. Canada explained in its Counter-Memorial that the Claimant has not demonstrated that it is entitled to pre-judgement interest.[596] In its Reply Memorial, the Claimant argues that an award of interest is needed to "ensure that the claimant receives the full present value its compensation for the breach […]."[597] However, despite stating this general principle, the Claimant offers no evidence as to why, in this specific case, it should be entitled to any pre-judgement interest. There is no evidence of Canada being "unjustly enriched by virtue of [a] delay in compensation",[598] as the Claimant argues could be the case. As it is neither Canada nor the Tribunal's responsibility to make the Claimant's

[594] RER-Jérôme Guillet-2, ¶ 24.

[595] The disputing parties agree that this deduction should be made. *See Windstream II – Claimant's Reply Memorial*, ¶ 412.

[596] *Windstream II – Canada's Counter-Memorial*, ¶¶ 289-292.

[597] *Windstream II – Claimant's Reply Memorial*, ¶ 441.

[598] *Windstream II – Claimant's Reply Memorial*, ¶ 441.

case for it, should the Tribunal find a breach of NAFTA and determine that damages are appropriate, Canada asks the Tribunal to deny the Claimant's request for pre- and post-award interest.

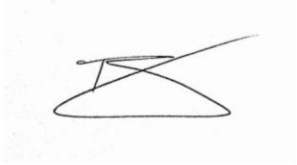
258. Further, in the event the Tribunal finds that interest is appropriate in the current case, Canada reiterates that it should be based on the rate that was agreed to by Canada and the Claimant following the *Windstream I* arbitration.[599]

VI. CONCLUSION

259. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

October 30, 2023

Respectfully submitted on behalf of Canada,



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[599] *Windstream II – Canada's Counter-Memorial*, ¶¶ 291 and 292; **R-0779,** Letter from Rodney Neufeld (Global Affairs Canada) to Myriam Seers (Torys) Re: Agreeing to Post-Award Interest (October 27, 2016) (setting an interest rate of 2.7 percent, compounded annually).