

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT AND THE  
2010 UNCITRAL ARBITRATION RULES**

**- between -**

**WINDSTREAM ENERGY LLC**

**(the “Claimant”)**

**- and -**

**GOVERNMENT OF CANADA**

**(the “Respondent”)**

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**AWARD**

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**ARBITRAL TRIBUNAL:  
Dr Veijo Heiskanen (President)  
Mr R. Doak Bishop  
Dr Bernardo Cremades**

**REGISTRY:  
Permanent Court of Arbitration**

**27 September 2016**

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## LIST OF DEFINED TERMS

Advisory	Power Advisory LLC
Aercoustics	Aercoustics Engineering Ltd.
Aird & Berlis	Aird & Berlis LLP
AOR	Applicant of Record
APRD	Approval and Permitting Requirements Document for Renewable Energy Projects issued 24 September 2009
Baird	W.F. Baird & Associates Coastal Engineers
BLG	Borden Ladner Gervais LLP
BRG	Berkeley Research Group
CAD	Canadian Dollar
CER	Claimant's Expert Report
CIA	Customer Impact Assessment
Claimant (or Windstream)	Windstream Energy LLC
CWS	Claimant's Witness Statement
DCF	Discounted Cash Flow
Deloitte	Deloitte LLP
Deloitte reports	Expert reports of Messrs Richard Taylor and Robert Low of Deloitte
Discussion Paper	Discussion Paper on Offshore Wind Facilities Renewable Energy Approval Requirements posted for comment in June 2010 by the Government
EBR	Environmental Bill of Rights
FIT	Feed-in-Tariff
FIT Contract	Feed-in-Tariff Contract
FIT Program	Feed-in-Tariff Program in Ontario launched by the OPA on 1 October 2009
FTC	Free Trade Commission of the North American Free Trade Agreement
GEGEA	Green Energy and Green Economy Act 2009
Government (or Ontario)	Government of Ontario
HGC	HGC Engineering
Helimax	Helimax Inc.
Hydro One	The Ontario Government entity responsible for managing Ontario's transmission system
ICSID	International Centre for Settlement of Investment Disputes
IESO	Independent Electricity System Operator
ILC Articles	International Law Commission's Articles on State Responsibility
MCOD	Milestone Date for Commercial Operation under the standard FIT Contract
MEI	Ministry of Energy and Infrastructure
MOE	Ministry of the Environment
MNR	Ministry of Natural Resources
MW	Megawatt
NAFTA	North American Free Trade Agreement
NTP	Notice to Proceed
Offshore Wind Policy Proposal Notice	MOE's proposal notice dated 25 June 2010
Ontario (or Government)	Government of Ontario
OPA	Ontario Power Authority
OPP	Ontario Provincial Police
Ortech	ORTECH Consulting Inc.

<b>PCA</b>	<b>Permanent Court of Arbitration</b>
<b>Policy (or Wind Policy 4.10.04)</b>	<b>Policy Number 4.10.04, Wind Power Development on Crown Land, issued by the MNR in March 2004</b>
<b>Project (or WWIS Project)</b>	<b>Offshore wind electricity generation project in the Wolfe Island Shoals area in Ontario, Canada</b>
<b>REA</b>	<b>Renewable Energy Approval</b>
<b>REA Regulation</b>	<b>Renewable Energy Approval Regulation: Environmental Protection Act, R.S.O. 1990, c. E.19, O. Reg. 359/09 (in force since 24 September 2009)</b>
<b>RER</b>	<b>Respondent's Expert Report</b>
<b>Respondent</b>	<b>Government of Canada</b>
<b>RFP</b>	<b>Request for proposals</b>
<b>RWS</b>	<b>Respondent's Witness Statement</b>
<b>Setback</b>	<b>Five-kilometer shoreline exclusion zone for offshore wind projects</b>
<b>SIA</b>	<b>IESO System Impact Assessment</b>
<b>Supplementary Request</b>	<b>Supplementary Request to Produce</b>
<b>Supplier</b>	<b>FIT Contract holder</b>
<b>Sussex Strategy</b>	<b>Sussex Strategy Group</b>
<b>TSA</b>	<b>Turbine Sales Agreement</b>
<b>UNCITRAL Rules</b>	<b>Arbitration Rules of the United Nations Commission on International Trade Law of 2010</b>
<b>Vienna Convention</b>	<b>Vienna Convention on the Law of Treaties of 23 May 1969, 115 U.N.T.S. 331</b>
<b>WEI</b>	<b>Windstream Energy Inc.</b>
<b>White Owl</b>	<b>White Owl Capital Partners LLC</b>
<b>Wind Policy 4.10.04 (or Policy)</b>	<b>Policy Number 4.10.04, Wind Power Development on Crown Land, issued by the MNR in March 2004</b>
<b>Windstream (or the Claimant)</b>	<b>Windstream Energy LLC</b>
<b>WWIS</b>	<b>Windstream Wolfe Island Shoals Inc.</b>
<b>WWIS Project (or Project)</b>	<b>Offshore wind electricity generation project in the Wolfe Island Shoals area in Ontario, Canada</b>

## DRAMATIS PERSONAE

<b>Ian Baines</b>	<b>President of WEI and a director of WWIS</b>
<b>Chris Benedetti</b>	<b>Principal at Sussex Strategy Group, a consultancy used by Windstream for the Project</b>
<b>Remo Bucci</b>	<b>Licensed Professional Engineer, Windstream’s expert on infrastructure projects related to power and utilities</b>
<b>Donna Cansfield</b>	<b>Minister of Natural Resources</b>
<b>Perry Cecchini</b>	<b>Former Manager RESOP/FIT in the Electricity Resources Contract Management group at the OPA</b>
<b>Rudolph Dolzer</b>	<b>Professor of Law, Windstream’s expert on interpreting the scope of the fair and equitable treatment provision under Article 1105 of NAFTA</b>
<b>Brad Duguid</b>	<b>Minister of Energy and Infrastructure</b>
<b>Doris Dumais</b>	<b>Director of Environmental Approvals Access and Service Integration Branch at the MOE</b>
<b>Christopher Goncalves</b>	<b>Managing Director of BRG, Canada’s expert on assessing damages</b>
<b>Jérôme Guillet</b>	<b>Managing Director of Green Giraffe B.V., Canada’s expert on assessing damages</b>
<b>Brian Howe</b>	<b>President of HGC, Windstream’s expert on evaluating the acoustic impact of the Project</b>
<b>Ian Irvine</b>	<b>Director and founder of SgurrEnergy, Windstream’s expert on the technical feasibility of the Project</b>
<b>Paul Kerlinger</b>	<b>Windstream’s expert on bird behavior, ecology and research design</b>
<b>Rosalyn Lawrence</b>	<b>Assistant Deputy Minister of the Policy Division at the MNR</b>
<b>Richard Linley</b>	<b>Special Assistant Policy at the MNR</b>
<b>David Livingston</b>	<b>Chief of Staff to Ontario Premier Dalton McGuinty</b>
<b>Susan Lo</b>	<b>Assistant Deputy Minister of the Renewables and Energy Efficiency Division at the MEI</b>
<b>Brenda Lucas</b>	<b>Senior Policy Advisor at the MOE</b>
<b>David Mars</b>	<b>Co-founder and Director of Windstream and its subsidiaries and principal at White Owl</b>
<b>Jim MacDougall</b>	<b>Principal of Compass Renewable Energy Consulting Inc., Windstream’s expert on offshore wind FIT contract pricing; and former manager of the OPA</b>
<b>Craig MacLennan</b>	<b>Chief of Staff to the Minister of Energy and Infrastructure</b>
<b>Dalton McGuinty</b>	<b>Ontario Premier</b>
<b>Andrew Mitchell</b>	<b>Senior Policy Advisor (Renewables) at the MEI</b>
<b>Sean Mullin</b>	<b>Deputy Director of Policy to Ontario Premier Dalton McGuinty</b>
<b>Sarah Powell</b>	<b>Partner with the law firm Davies Ward Phillips &amp; Vineberg LLP, Windstream’s expert on environmental and energy law</b>
<b>Scott Reynolds</b>	<b>Windstream’s expert on Physiological Ecology</b>
<b>Uwe Roeper</b>	<b>President of Ortech, which acted as Windstream’s project manager for the Project</b>
<b>George Smitherman</b>	<b>Deputy Premier and Minister of Energy and Infrastructure for the Province of Ontario</b>
<b>Richard Taylor and Robert Low</b>	<b>Certified Public Accountants, Chartered Accountants and Certified Business Valuators with Deloitte, Windstream’s experts on quantum</b>
<b>Paul Ungerman</b>	<b>Director of Policy at the MEI</b>
<b>Marcia Wallace</b>	<b>Manager in MOE’s Environmental Programs Division</b>
<b>Steven Webster</b>	<b>Principal investor in Windstream</b>
<b>John Wilkinson</b>	<b>Minister of the Environment from 18 August 2010 to 20 October 2011</b>



<b>William Ziegler</b>	<b>Co-founder of and majority investor in Windstream and principal at White Owl</b>
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## **I. INTRODUCTION**

### **A. THE PARTIES**

1. The present arbitration has been brought by Windstream Energy LLC (“Windstream” or the “Claimant”), a company incorporated in Delaware, the United States.
2. The Claimant is the parent company of Windstream Wolfe Island Shoals Inc. (“WWIS”), a special purpose vehicle incorporated in Ontario, as well as Windstream Energy Inc. (“WEI”), which provides various services to WWIS under a Management Services Agreement. The Claimant in turn is managed by its managing director White Owl Capital Partners LLC (“White Owl”), a private equity firm based in New York City and founded in 2007 by Messrs David Mars and William Ziegler.
3. The Claimant is represented in these proceedings by:

Mr John A. Terry  
Ms Myriam M. Seers  
Mr Nick E. Kennedy  
Ms Emily S. Sherkey  
Mr James Gotowiec  
Ms Stéphanie A. Lafrance  
Torys LLP  
Suite 3000  
79 Wellington St. West  
Box 270, TD Centre  
Toronto, Ontario, M5K 1N2  
Canada

4. The Respondent is the Government of Canada (“Canada” or the “Respondent”). The Respondent is represented in these proceedings by:

Ms Sylvie Tabet, General Counsel and Director  
Mr Shane Spelliscy, Counsel  
Mr Rodney Neufeld, Counsel  
Mr Raahool Watchmaker, Counsel  
Ms Heather Squires, Counsel  
Ms Susanna Kam, Counsel  
Ms Jenna Wates, Counsel  
Trade Law Bureau  
Department of Foreign Affairs, Trade and Development, Canada  
125 Sussex Drive  
Ottawa, Ontario, K1A 0G2  
Canada

**B. THE DISPUTE**

5. The dispute between the Parties arises out of an offshore wind electricity generation project in the Wolfe Island Shoals area in Ontario, Canada (the “Project” or the “WWIS Project”). The Project was undertaken following Ontario’s enactment of the Green Energy and Green Economy Act of 2009 (“GEGEA”) and the subsequent promulgation of additional rules and regulations, creating a Feed-in-Tariff (“FIT”) program (the “FIT Program”) for the development of renewable energy projects, including onshore and offshore wind. According to the Claimant, following the award of a Feed-in-Tariff Contract (the “FIT Contract”) to the Claimant, the Government of Ontario (also referred to as the “Government” or “Ontario”) delayed the approval of the required permits and authorizations, including those allowing access to Crown land, and eventually, on 11 February 2011, imposed a moratorium on the development of offshore wind that frustrated the Claimant’s attempts to develop the Project.
6. The Claimant argues that the conduct of the Government, including the Ontario Power Authority (the “OPA”), is attributable to the Respondent and contends that the measures taken by Ontario authorities are inconsistent with the Respondent’s obligations under Chapter 11 of the North American Free Trade Agreement (“NAFTA”), specifically Articles 1110 (Expropriation and Compensation), 1105 (Minimum Standard of Treatment), 1102 (National Treatment), 1103 (Most-Favored-Nation Treatment) and, to the extent that the OPA is a state enterprise as defined in NAFTA Article 1505, Article 1503(2) (State Enterprises).
7. The Respondent disputes that it is in breach of any of its obligations under NAFTA. According to the Respondent, the Claimant was always aware of the regulatory risks related to the development of the regulatory processes and the significant scientific uncertainty regarding the effects of offshore wind projects on human health, safety and the environment. The Respondent contends that Ontario’s decision to defer the development of offshore wind was taken to allow the necessary scientific research to be completed and applied to all such projects and thus was not discriminatory, and fell within the legitimate policy-making power of the Government of Ontario to regulate in the public interest.

**C. THE PARTIES’ REQUESTS FOR RELIEF**

8. The Claimant requests the following relief:

“a) a declaration that Canada has unlawfully expropriated Windstream’s investments in WWIS, the Project and the FIT Contract, contrary to Article 1110 of NAFTA;

b) a declaration that Canada has failed to accord Windstream’s investments fair and equitable treatment in accordance with international law, contrary to Article 1105 of NAFTA;

- c) a declaration that Canada has failed to accord Windstream's investments treatment no less favorable than that accorded, in like circumstances, to its own investors contrary to Article 1102 of NAFTA;
- d) a declaration that Canada has failed to accord Windstream's investments treatment no less favorable than that accorded, in like circumstances, to investors of any Party or non-Party, contrary to Article 1103 of NAFTA;
- e) alternatively, a declaration that Canada has breached Article 1503 of NAFTA;
- f) alternatively, a declaration that Canada has failed to ensure through regulatory control, administrative supervision or the application of other measures, that its state enterprise, the OPA, acts in a manner consistent with Canada's obligations under Chapter 11 of NAFTA;
- g) damages in the range of between CAD 357.5 and CAD 486.6 million, to be updated as at the time of the hearing, or alternatively between CAD 427.9 and CAD 568.5, to be updated as at the time of the hearing;
- h) pre-and post-award interest at a rate to be fixed by the Tribunal;
- i) all legal fees and costs associated with this arbitration; and
- j) such other relief as the Tribunal considers appropriate."<sup>1</sup>

9. The Respondent 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."<sup>2</sup>

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<sup>1</sup> Memorial, para. 691; Reply, para. 746.

<sup>2</sup> Counter-Memorial, para. 580; Rejoinder, para. 337.

## **II. PROCEDURAL HISTORY**

### **A. COMMENCEMENT OF THE PROCEEDINGS AND CONSTITUTION OF THE TRIBUNAL**

10. On 17 October 2012, the Claimant served upon the Respondent a Notice of Intent to Submit a Claim to Arbitration pursuant to Articles 1118 and 1119 of NAFTA. The Notice was served on the Claimant's own behalf and on behalf of its subsidiary WWIS.
11. On 28 January 2013, the Claimant filed a Notice of Arbitration pursuant to Articles 1116, 1117 and 1120 of NAFTA and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law of 2010 ("UNCITRAL Rules"). In the Notice of Arbitration, the Claimant appointed Mr R. Doak Bishop as arbitrator.<sup>3</sup>
12. On 26 April 2013, the Respondent filed a Response to the Notice of Arbitration. On the same date, the Respondent appointed Dr Bernardo Cremades as arbitrator.
13. On 18 July 2013, the Parties agreed to appoint Dr Veijo Heiskanen as the Presiding Arbitrator.
14. On 5 September 2013, the Tribunal held a first procedural meeting in Toronto and appointed the Permanent Court of Arbitration (the "PCA") as the administering institution. The PCA designated Mr Hanno Wehland, PCA Legal Counsel, to act as the Secretary of the Tribunal.<sup>4</sup>
15. On 10 September 2013, the Parties informed the Tribunal that they had reached "an agreement on all of the remaining issues in Procedural Order No. 1" and submitted to the Tribunal a final agreed draft of Procedural Order No. 1 as well as a final agreed draft of a Confidentiality Order.
16. On 16 September 2013, the Tribunal issued Procedural Order No. 1 which, *inter alia*, confirmed the proper constitution of the Tribunal and set the time frame for further proceedings. On the same day, the Tribunal also issued a Confidentiality Order.
17. On 6 November 2013, with the Respondent's agreement, the Claimant filed an Amended Notice of Arbitration pursuant to Article 22 of the UNCITRAL Rules. On 5 December 2013, with the Claimant's agreement, the Respondent filed an Amended Response to the Notice of Arbitration.

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<sup>3</sup> Notice of Arbitration, para. 50.

<sup>4</sup> On 1 January 2016, following the resignation of Mr Wehland, Ms Jennifer Nettleton and Ms Claire de Tassigny Schuetze replaced Mr Wehland as the Secretary of the Tribunal.

**B. WRITTEN PROCEEDINGS**

18. In accordance with the procedural timetable, between 16 October 2013 and 2 December 2013, the Parties exchanged document production requests in the form of Redfern Schedules.
19. On 20 December 2013, the Claimant submitted its completed Redfern Schedule, setting out three document production requests to which the Respondent had objected and requesting a ruling from the Tribunal regarding the disputed requests. On the same day, the Respondent confirmed that there were no disputes relating to its document production requests left to be resolved by the Tribunal.
20. On 12 January 2014, the Tribunal issued Procedural Order No. 2, approving one request made by the Claimant and denying the other two requests.
21. On 14 April 2014, the Parties exchanged documents.
22. On 25 April 2014, the Parties informed the Tribunal that they had agreed to amend the existing schedule of the proceedings. The Tribunal acknowledged and approved the Parties' agreement the following day.
23. On 19 August 2014, the Claimant submitted its Memorial with accompanying evidence.
24. On 30 September 2014, the Claimant submitted a corrected version of its Memorial fixing various typographical errors in the original version. The Claimant also submitted a revised Procedural Order No. 1 and a revised Confidentiality Order. On 1 October 2014, the Respondent confirmed its agreement with the proposed changes to Procedural Order No. 1 and the Confidentiality Order. On 2 October 2014, the Tribunal issued the revised Procedural Order No. 1 and the revised Confidentiality Order incorporating the amendments agreed by the Parties.
25. On 7 November 2014, the Claimant requested the Tribunal's "assistance in connection with certain issues that have arisen among the parties during the document production process." According to the Claimant, the issues related to (a) a lack of documents produced by the Respondent from the Premier's Office of the Government of Ontario, and (b) discrepancies between the amount of documents produced by the Respondent from the Government of Ontario's Ministry of Natural Resources ("MNR"), Ministry of the Environment ("MOE") and Ministry of Energy and Infrastructure ("MEI"),<sup>5</sup> when compared to the volume of documents obtained by the

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<sup>5</sup> As the Claimant notes, "[b]etween 2007 and 2010, the Ministry was known as the Ministry of Energy and Infrastructure. It is now known as the Ministry of Energy." **Memorial**, para. 67 (n. 67).

Claimant from these Ministries through access to information requests. The Claimant requested the Tribunal to issue various procedural orders to address these issues.

26. Regarding the first issue, the Claimant requested that, “in lieu of documentary discovery, the Premier’s Office staff member who was the most closely involved with the decision to implement the moratorium be compelled to attend an examination for discovery in Toronto to answer questions about that decision, and the decision to apply the moratorium to Windstream.” In this respect, the Claimant requested the Tribunal to order as follows:

“1) Canada shall disclose the identity of the individual from the Premier’s Office who was most directly involved with the decision to implement the moratorium on offshore wind development (whether it is Mr Mullin, Mr Steeve, Mr Morley or another individual);”

2) “The individual identified by Canada shall appear before a certified court reporter in Toronto, Ontario to be examined for discovery by counsel for Windstream to answer questions relating to the decision to implement the moratorium on offshore wind development;” and

3) “If that individual will not appear voluntarily to be examined for discovery, the Tribunal grants Windstream its approval to seek an order from the Ontario Superior Court of Justice for assistance in compelling the attendance of the individual.”

4) Alternatively to the above requests, the Claimant requested the Tribunal to order that “the Premier’s Office [shall] restore the available back-up tapes and search the resulting restored documents for documents responsive to Claimant’s document request #25.”<sup>6</sup>

27. Regarding the second issue, the Claimant contended that the fact that it had received through two requests made under Ontario’s Freedom of Information and Protection of Privacy Act a number of documents from the MNR that “(1) [were] responsive to Windstream’s document requests, and (2) were not included in Canada’s productions ... calls into question the comprehensiveness of Canada’s searches for documents.” In this respect, the Claimant requested the Tribunal to order the Respondent to:

“1) Disclose to Windstream and to the Tribunal the search processes it used to identify documents responsive to document requests #22, 27, 28, 29 and 56;”

2) “Identify, and disclose to Windstream and to the Tribunal, the lacunae in its search processes that led to the above documents not being produced in response to document requests #22, 27, 28, 29 and 56;” and

3) “Conduct any further and better searches for documents responsive to requests #22, 27, 28, 29 and 56 as may be agreed with Windstream, or ordered by the Tribunal failing such agreement.”<sup>7</sup>

28. On 18 November 2014, the Respondent provided comments on the Claimant’s requests.

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<sup>6</sup> Procedural Order No. 3, dated 21 January 2015, para. 2.11.

<sup>7</sup> Procedural Order No. 3, dated 21 January 2015, para. 2.12.

29. On 24 November 2014, the Claimant submitted a reply to the Respondent's comments.
30. On 28 November 2014, the Respondent submitted a rejoinder to the Claimant's reply.
31. On 15 December 2014, the Tribunal requested the Respondent to clarify whether it was in a position to identify the individual in the former Premier's Office who was most directly involved in the decision on the moratorium on offshore wind development.
32. On 18 December 2014, the Respondent informed the Tribunal that at this time it was not in a position to do so and that it would update the Tribunal on its progress in this regard by 7 January 2015.
33. On 22 December 2014, the Claimant informed the Tribunal that "new information" relevant to its requests had been disclosed as a result of a legal proceeding in Ontario, requesting an opportunity to submit it to the Tribunal. On 23 December 2014, the Tribunal invited the Respondent to provide its comments on the Claimant's communication of 22 December 2014 by 30 December 2014. At the Respondent's request, the Tribunal extended this deadline until 7 January 2015.
34. On 7 January 2015, the Respondent informed the Tribunal that it was "not able to identify an individual in the former [Premier's Office] who was directly involved in making the deferral/moratorium decision." In the same communication to the Tribunal, the Respondent objected to the Claimant's request to submit the "new information."
35. On 8 January 2015, the Tribunal decided to allow the Claimant to submit the "new information" referred to in the Claimant's communication of 22 December 2014 and to give an opportunity to the Respondent to respond to the Claimant's submission.
36. On 9 January 2015, the Claimant submitted a search warrant issued by an Ontario judicial officer authorizing the search of the premises of the Ontario Provincial Government Cyber Security Branch, including the email accounts of, among others, Mr David Livingston, the former Chief of Staff to Ontario Premier Dalton McGuinty as the "new information" previously referred to. The Claimant also requested that, should the Tribunal decide to make the order requested by the Claimant in its letter of 7 November 2014, such order should name Mr Sean Mullin – who acted as Deputy Director of Policy responsible for the energy portfolio at the former Premier's Office – as the appropriate witness to appear for discovery voluntarily or, if necessary, by being compelled to do so.
37. On 14 January 2015, the Respondent submitted further observations on the Claimant's requests and requested the Tribunal to dismiss the Claimant's motion in its entirety.



38. On 20 January 2015, the Respondent submitted its Counter-Memorial with accompanying evidence.
39. On the same day, the Respondent requested that, given the pending dispute between the Parties as to what is confidential in the Claimant's submissions, the timelines in paragraph 2 of the Confidentiality Order be suspended and that the Tribunal order the Respondent to designate confidential information in its written submissions within ten days from the date on which the disagreements between the Parties regarding the confidentiality designations in the Claimant's submissions had been resolved.
40. The Respondent also asserted parliamentary privilege with respect to certain information relied on by the Claimant in its written submissions and informed the Tribunal that it would be bringing a motion for an order to strike this material from the record.
41. On 21 January 2015, the Tribunal invited the Claimant to provide its comments regarding the Respondent's request relating to the suspension of timelines in paragraph 2 of the Revised Confidentiality Order and the designation of confidential information by 26 January 2015.
42. On the same day, the Tribunal issued Procedural Order No. 3, deciding the Claimant's requests of 7 November 2014. On the basis of the Parties' submissions, the Tribunal decided as follows:
  - a) The Claimant's request that the Respondent be ordered to disclose the identity of the individual from the Premier's Office who was most directly involved with the decision to implement the moratorium on offshore wind development is dismissed as moot.
  - b) The Claimant's request that the individual identified by the Claimant shall appear before a certified court reporter in Toronto, Ontario, to be examined for discovery by counsel for the Claimant to answer questions relating to the decision to implement the moratorium on offshore wind development is dismissed for lack of jurisdiction.
  - c) The Claimant's request that if the individual identified by the Claimant will not appear voluntarily to be examined for discovery, the Tribunal grants the Claimant its approval to seek an order from the Ontario Superior Court of Justice for assistance in compelling the attendance of the individual, is granted.
  - d) The Claimant's alternative request that the Tribunal order the Respondent to restore the available back-up tapes and search the restored documents for documents responsive to the Claimant's document request #25 is denied...
  - e) The Claimant's request that the Tribunal order the Respondent to disclose to the Claimant and to the Tribunal the search processes it used to identify the documents responsive to documents requests #22, 27, 28, 29, and 56 is denied.
  - f) The Claimant's request that the Respondent identify and disclose to the Claimant and to the Tribunal the lacunae in its search processes that led to the documents not being produced in response to document requests #22, 27, 28, 29, and 56 is denied; and
  - g) The Claimant's request that the Respondent conduct further and better searches for documents responsive to requests #22, 27, 28, 29, and 56, as may be agreed with the Claimant, or ordered by the Tribunal failing such agreement, is denied."

43. On 26 January 2015, the Claimant indicated that it had no objection to the Respondent's requests regarding the suspension of timelines in paragraph 2 of the Revised Confidentiality Order and the designation of confidential information.
44. On 27 January 2015, the Tribunal suspended the timelines in paragraph 2 of the Confidentiality Order for the filing of the Respondent's confidentiality designations, and ordered that the Respondent designate confidential information in its written submissions within ten days from the date upon which the disagreements over designations in the Claimant's submissions have been resolved.
45. On 6 February 2015, the Respondent submitted a motion to the Tribunal, requesting that certain information and exhibits listed in an annex attached to the motion be disregarded and excluded from the record. On 9 February 2015, the Tribunal invited the Claimant to provide its comments on the Respondent's motion by 13 February 2015. On 13 February 2015, the Claimant submitted a response to the Respondent's motion, requesting that it be dismissed.
46. On 12 February 2015, the Parties agreed on certain modifications regarding the time frame for the further proceedings. The Tribunal subsequently confirmed the revised procedural calendar.
47. On 23 February 2015, the Tribunal issued Procedural Order No. 4, denying the Respondent's request of 6 February 2015 that certain information and exhibits be disregarded and excluded from the evidence on the grounds of parliamentary privilege or political sensitivity.
48. On 5 March 2015, the Claimant submitted a redacted version of its Memorial.
49. On 30 March 2015, the Claimant wrote to Mr Bishop to request some clarification concerning a disclosure made by the Respondent's expert, Mr Christopher Goncalves, in his report regarding his engagement in other matters in which Mr Bishop has acted as counsel or arbitrator. On 23 April 2015, Mr Bishop confirmed that Mr Goncalves was acting as an expert for a party represented by Mr Bishop.
50. On 28 April 2015, the Claimant submitted a Supplementary Request to Produce (the "Supplementary Request"), requesting the Tribunal to "order the Respondent to produce the documents set out in the [Supplementary Request] ... as soon as possible and in any event no later than within 30 days of the Tribunal's decision on any disputed document request." On 29 April 2015, the Respondent informed the Tribunal that it would respond to the Supplementary Request within five business days pursuant to Section 12.1 of Procedural Order No. 1.
51. On 5 May 2015, the Respondent submitted a response to the Supplementary Request.

52. On 6 May 2015, the Claimant wrote to the Tribunal requesting a conference call “to address some of the issues raised in Canada’s letter and other issues related to document productions by Canada and Ontario.” The Respondent objected to the Claimant’s request by email of the same date.
53. On 8 May 2015, the Respondent produced certain additional documents to the Claimant.<sup>8</sup>
54. On 13 May 2015, the Respondent submitted a redacted version of its Counter-Memorial.
55. On 14 May 2015, the Parties jointly requested that certain amendments be made to the procedural calendar. On 15 May 2015, the Tribunal noted and confirmed the amendments to the procedural calendar requested by the Parties.
56. On 15 May 2015, the Tribunal issued Procedural Order No. 5, denying the Supplementary Request and noting that its decision was “without prejudice to [the Tribunal’s] authority to order further production of documents on its own motion if so required, in accordance with Section 7.6 of Procedural Order No. 1.” On 25 May 2015, following a request by the Claimant and in the absence of any objections from the Respondent, the Tribunal issued a revised version of Procedural Order No. 5.
57. On 22 June 2015, the Claimant submitted its Reply Memorial with accompanying evidence. On 8 July 2015, the Claimant submitted an Addendum to the second expert report of Messrs Richard Taylor and Robert Low of Deloitte LLP (“Deloitte”) (submitted with its Reply Memorial) to correct “three errors in the Economic Losses model.”<sup>9</sup>
58. On 30 September 2015, the Claimant submitted a redacted version of its Reply Memorial.
59. On 6 November 2015, the Respondent submitted its Rejoinder Memorial with accompanying evidence.
60. On 17 December 2015, Mr Bishop notified the Parties that he had appeared as counsel in cases in which he or his firm had used the same experts as the Parties. He noted that he did not believe this to fall within any of the grounds for disclosure in the 2014 International Bar Association *Guidelines on Conflicts of Interest in International Arbitration* and indicated that he was only raising it “as a matter of caution.” He further noted that this would not affect his impartiality or independence.
61. On 13 January 2016, the United States and Mexico, in their capacities as State parties to NAFTA, each filed a submission pursuant to Article 1128 of NAFTA. According to Article 1128, “[o]n

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<sup>8</sup> Reply, para. 48.

<sup>9</sup> CER-Taylor/Low-2 (Addendum), p. 1.

written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.”

62. On 18 January 2016, the Respondent submitted a redacted version of its Rejoinder Memorial.
63. On 28 January 2016, the Claimant wrote to the Tribunal requesting an opportunity to make submissions as to whether the Respondent should be required to disclose documents and information relied on by its experts (Green Giraffe and Berkeley Research Group (“BRG”)) that were not submitted as exhibits with its Rejoinder. On 29 January 2016, the Tribunal confirmed that the Claimant could make the requested submissions by 2 February 2016, and set 5 February 2016 as the deadline for any reply by the Respondent.
64. On 29 January 2016, the Claimant and the Respondent each submitted a Reply to the Article 1128 Submissions of the United States and Mexico.
65. On 2 February 2016, the Claimant filed its submissions, requesting that the Tribunal order the Respondent to produce, subject to the Confidentiality Order, the documents and information relied on by its experts, Green Giraffe and BRG, to support certain statements that they made in their respective expert reports. The Claimant also requested that, if the Respondent did not produce the requested documents and information, the Tribunal exclude the relevant portions of the expert reports from the record or alternatively afford them no weight. On 5 February 2016, the Respondent submitted its response to the Claimant’s submissions.
66. On 8 February 2016, the Tribunal declined to grant the Claimant’s request that the Respondent be ordered to produce the documents and information relied on by Green Giraffe and BRG. The Tribunal noted that it would “take into account, when assessing the weight to be given to the expert evidence in question in accordance with Article 27(4) of the UNCITRAL Rules, the fact that some of the underlying evidence and information has not been made available.”
67. On 14 February 2016, the Claimant and the Respondent submitted the Parties’ Joint Chronology.
68. On 11 April 2016, the Claimant and the Respondent each submitted their respective Costs Submissions.
69. On 26 April 2016, the Claimant and the Respondent each submitted their respective Reply Costs Submissions.
70. On 18 May 2016, the Claimant wrote to the Tribunal stating that the Parties had agreed to certain corrections to the Claimant’s Reply Memorial and requesting that the Tribunal grant it permission to produce a letter from Mr Ian Irvine of SgurrEnergy correcting a typographical error in the

Second Expert Report submitted by SgurrEnergy. The Claimant indicated that the Respondent had not consented to the request.

71. On 20 May 2016, the Respondent submitted its comments on the Claimant's request.
72. On 23 May 2016, the Tribunal informed the Parties that it had decided to allow the Claimant to produce the letter from Mr Irvine, and invited the Respondent to comment on the letter within five business days of its production. The Tribunal indicated that its decision was without prejudice to its determination as to whether the correction related to a typographical error, and whether any further procedural steps might be required.
73. On the same day, the Claimant produced the letter from Mr Irvine.
74. On 27 May 2016, the Respondent submitted its comments on Mr Irvine's letter.
75. On 28 May 2016, the Claimant requested an opportunity to file a brief response to the Respondent's letter. Upon the Tribunal's approval, the Claimant filed its response on 31 May 2016.
76. On 2 June 2016, the Respondent commented on the Claimant's letter of 31 May 2016.
77. On 3 June 2016, the Tribunal decided to admit Mr Irvine's letter into evidence, without prejudice to its ultimate determination as to the evidentiary value of the letter. The Tribunal indicated that it did not consider it necessary to re-open the hearings at this stage.
78. On 15 June 2016, the Claimant wrote to the Tribunal requesting directions with respect to an oral request it had received from the Ontario Provincial Police ("OPP") for documents produced, or produced and filed as exhibits, in this arbitration. The Claimant stated that it had been unable to resolve the issue with the Respondent.
79. On 21 June 2016, the Respondent commented on the Claimant's request, stating that the request was premature because the OPP had not yet put its oral request in writing and also unnecessary because the Claimant had not requested the Respondent's consent to disclose any information.
80. On 3 July 2016, the Tribunal noted that there had been no formal, written request from the OPP, and that accordingly it was unclear whether the OPP's request covered information that could be considered confidential under the Tribunal's Confidentiality Order. Noting the Respondent's offer to cooperate with the Claimant in an effort to resolve any issues that might arise, the Tribunal considered that it was neither necessary nor appropriate for it to issue any directions as there was, as yet, no concrete issue to be resolved by the Tribunal.

**C. ORAL PROCEEDINGS**

81. On 22 January 2016, the Tribunal held a pre-hearing teleconference with the Parties. Prior to the teleconference, the Parties had notified the Tribunal of certain procedural and organizational issues on which they had reached agreement and provided a list of issues on which they were unable to agree. The two outstanding issues related to the introduction of new documents during the examination or cross-examination of witnesses at the hearing, and the use of PowerPoint presentations by experts at the hearing. On 25 January 2016, the Tribunal issued its decision on the two outstanding issues and provided a schedule for the hearing.
82. An oral hearing was held on 15-19 and 21-26 February 2016 in Toronto, Ontario, Canada. In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following individuals participated at the hearing:

For the Claimant:

Mr John A. Terry	Torys LLP
Ms Myriam M. Seers	Torys LLP
Mr Nick E. Kennedy	Torys LLP
Ms Emily S. Sherkey	Torys LLP
Mr David Mars	Windstream

For the Respondent:

Ms Sylvie Tabet	General Counsel and Director, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Mr Shane Spelliscy	Counsel, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Mr Rodney Neufeld	Counsel, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Mr Raahool Watchmaker	Counsel, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Ms Heather Squires	Counsel, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada

Ms Susanna Kam	Counsel, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Ms Jenna Wates	Counsel, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Ms Valentina Amalraj	Counsel, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Ms Melissa Perrault	Paralegal, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada
Ms Darian Parsons	Paralegal, Trade Law Bureau (JLT), Foreign Affairs, Trade and Development Canada

83. The following individuals were examined:

On behalf of the Claimant:

Witnesses of fact:

Mr David Mars  
Mr William Ziegler  
Mr Chris Benedetti  
Mr Ian Baines  
Mr George Smitherman  
Mr Uwe Roeper

Expert witnesses:

Ms Sarah Powell, Davies Ward Phillips & Vineberg LLP  
Mr Andrew Roberts, WSP  
Mr Mark Kolberg, Baird  
Mr Brent Cooper, COWI  
Mr Richard Palmer, Weeks Marine  
Mr Ian Irvine, SgurrEnergy  
Mr Remo Bucci, Deloitte  
Mr Richard Aukland, 4C Offshore  
Mr Robert Low, Deloitte

**On behalf of the Respondent:**

**Witnesses of fact:**

**Mr Perry Cecchini**

**Ms Rosalyn Lawrence**

**Mr John Wilkinson**

**Ms Marcia Wallace**

**Ms Doris Dumais**

**Expert witnesses:**

**Dr Jérôme Guillet, Green Giraffe**

**Mr Marc Rose, URS**

**Mr Gareth Clarke, URS**

**Mr Franz Barillaro, URS**

**Mr Christopher Goncalves, BRG**

84. The hearing was streamed by live video feed to a separate room in Arbitration Place, the venue of the hearing, which was open to the public. The availability of the live video feed was notified to the public in a PCA press release on 1 February 2016.
85. Prior to the hearing, on 11 January 2016, and in response to the Parties' joint request, the Tribunal sent the Parties a list of questions to be addressed by them during their oral arguments. During the hearing the Tribunal sent further questions to the Parties.



### III. FACTUAL BACKGROUND

#### A. THE REGULATORY FRAMEWORK GOVERNING RENEWABLE ENERGY IN ONTARIO

86. In 2003, the Government of Ontario determined that without increasing electricity supply in the Province of Ontario, it would run a risk of electricity shortages.<sup>10</sup> At the same time, the Government felt that the Province's dependence on coal-fired power plants as an energy source gave rise to health and environmental concerns.<sup>11</sup> Consequently, Ontario started exploring the use of alternative and renewable sources of electricity generation<sup>12</sup> and adopting policies to promote renewable energy development.<sup>13</sup> In the same year, Ontario's Premier announced a plan to close Ontario's coal-fired power plants.<sup>14</sup>
87. In 2004, Ontario enacted the Electricity Restructuring Act that amended the Electricity Act of 1998, establishing *inter alia* the OPA as "an independent non-share capital corporation responsible for medium and long-term system planning, conservation, demand management and procurement of new generation through long-term power purchase agreements (PPAs)."<sup>15</sup> The OPA had separate legal personality and could enter into electricity procurement contracts.<sup>16</sup> The Minister of Energy could direct the OPA to undertake specific actions regarding its electricity procurement programs, but the Electricity Act specified that the OPA was "not an agent of the Crown."<sup>17</sup>
88. Between 2003 and 2008, Ontario and the OPA ran a number of procurement programs to encourage the desired use of alternative and renewable energy sources. However, all these initiatives failed to produce the required level of new investment.<sup>18</sup> On 1 January 2015, the OPA was merged with the Independent Electricity System Operator ("IESO") and the new entity kept working under the IESO name.<sup>19</sup>
89. In Ontario, all lakebeds (with one exception that is not relevant) are Crown land.<sup>20</sup> The MNR, among other things, exercises regulatory authority on behalf of Ontario for granting access to Crown land for offshore wind development.<sup>21</sup> In March 2003, the MNR released for public

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<sup>10</sup> Amended Response to the Notice of Arbitration, para. 10; Reply, para. 64.

<sup>11</sup> Counter-Memorial, para. 36.

<sup>12</sup> Amended Response to the Notice of Arbitration, para. 12.

<sup>13</sup> Memorial, para. 80.

<sup>14</sup> Parties' Joint Chronology, p. 1 (citing Article, Spears, John (Toronto Star), Ontario Coal-Burning Power Plants to Close This Year of 10 January 2003 (C-1090)).

<sup>15</sup> Counter-Memorial, para. 39; Amended Response to the Notice of Arbitration, para. 12.

<sup>16</sup> Counter-Memorial, para. 40.

<sup>17</sup> Counter-Memorial, paras. 39, 41 (referring to the *Electricity Act, 1998* (C-3), Part II.1, s. 25.3).

<sup>18</sup> Amended Response to the Notice of Arbitration, paras. 13-14.

<sup>19</sup> Counter-Memorial, para. 34.

<sup>20</sup> Memorial, para. 132.

<sup>21</sup> Amended Notice of Arbitration, para. 16; Memorial, para. 74.

comment a draft policy on the disposition of Crown land (including the beds of the Great Lakes) for wind energy development.<sup>22</sup> In March 2004, the draft policy was finalized, and the MNR subsequently issued it as Policy Number 4.10.04, Wind Power Development on Crown Land (“Wind Policy 4.10.04”).<sup>23</sup> Wind Policy 4.10.04 established for the first time a set of standardized rules for wind developers to apply for the use of Crown land.<sup>24</sup> Between 2004 and 2006, the MNR engaged in research regarding the potential environmental effects of offshore wind energy projects.<sup>25</sup>

90. In November 2006, the MNR decided to defer its consideration of applications for access to Crown land to develop offshore wind power.<sup>26</sup> In light of the “relatively little experience with understanding the positive and negative social and economic effects associated” with wind power, this deferral was meant to allow the further study of the effects of offshore wind as a source of energy generation.<sup>27</sup>
91. In January 2008, following “considerable activity on the policy and resource analysis front,” the MNR determined that the existing policy and Environmental Assessment processes “[were] sufficient to address site-specific issues and concerns related to offshore wind.”<sup>28</sup> On 16 January 2008, the Premier of Ontario, Mr Dalton McGuinty, informed the local media that “offshore wind could play an important role in the development of renewable energy resources in Ontario.”<sup>29</sup> He also stated that offshore wind power could be harnessed “in a way that does not compromise ecosystems.”<sup>30</sup> On 17 January 2008, the MNR announced the lifting of the deferral decision of November 2006.<sup>31</sup>
92. The lifting of the deferral meant that new applications for access to offshore Crown land would be reviewed by the MNR.<sup>32</sup> On 28 January 2008, Wind Policy 4.10.04 was updated and reissued

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<sup>22</sup> **Memorial**, para. 80.

<sup>23</sup> **Memorial**, para. 81.

<sup>24</sup> **Memorial**, para. 133.

<sup>25</sup> **Memorial**, para. 81 (referring to **CER-Powell**, para. 63).

<sup>26</sup> **Memorial**, para. 86.

<sup>27</sup> **Memorial**, para. 86 (referring to Issues Management Plan (MNR), Offshore Wind Power – Temporary Deferral of 17 January 2011 (C-460)); **Parties’ Joint Chronology**, p. 1 (citing Letter from Boysen, Eric (MNR) to Proponent Address of 21 November 2006 (C-13)).

<sup>28</sup> **Memorial**, para. 90 (citing House Note (MNR), Issue: Lifting of the Off-Shore Wind Power Deferral of 3 January 2008 (C-52)).

<sup>29</sup> **Memorial**, para. 88 (referring to Article, Hamilton, Tyler (Toronto Star), Premier Reveals Support for Offshore Energy Plan of 16 January 2008 (C-56)); **Parties’ Joint Chronology**, p. 1 (also citing (C-56)).

<sup>30</sup> **Reply**, para. 193 (citing Article, Hamilton, Tyler (Toronto Star), Premier Reveals Support for Offshore Energy Plan of 16 January 2008 (C-56), p. 1). *See also Reply*, paras. 194-195.

<sup>31</sup> **Memorial**, para. 87; Press Release (MNR), Ontario Lays Foundation for Offshore Wind Power of 17 January 2008 (C-58); **Reply**, paras. 59, 191; **Parties’ Joint Chronology**, p. 1 (also citing (C-58)).

<sup>32</sup> **Amended Response to the Notice of Arbitration**, para. 23; **Memorial**, para. 87; **Reply**, para. 59; **Parties’ Joint Chronology**, p. 1.

to include offshore wind, and guidelines were published regarding the application of the Policy.<sup>33</sup> On 23 April 2008, Ms Donna Cansfield, the Minister of Natural Resources, stated at an energy conference:

“For the past two years we’ve been assessing potential benefits and impacts of this technology. Our research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place. As a result, we were able to lift the deferral last January and began accepting applications for exploration proposals.”<sup>34</sup>

93. On 30 June 2008, Minister Cansfield was quoted in the Toronto Star newspaper to the effect “that Ontario was ‘open for business’ when it comes to offshore wind.”<sup>35</sup> On 29 October 2008, at the annual Ontario Waterpower Conference, Minister Cansfield gave a speech in which she confirmed that “timely approval of applications to use Crown land for offshore wind energy development could be expected by those submitting applications.”<sup>36</sup>
94. On 20 February 2009, the Ontario Government announced a proposal to enact the GEGEA.<sup>37</sup> The Government described the proposal as “sweeping new legislation to attract new investment, create new green economy jobs and better protect the climate.”<sup>38</sup> On the same date, the Deputy Premier, Minister George Smitherman, explained before the Toronto Board of Trade that the GEGEA meant that Ontario would “offer an attractive price for renewable power, including wind – onshore and offshore ... and we’ll guarantee the price for decades.”<sup>39</sup>
95. On 21 February 2009, the Toronto Star newspaper published an interview with Minister Smitherman in which he stated that there were “wonderful opportunities for offshore wind” and the Government had been “making sure we’ll move those proposals along.”<sup>40</sup> On 23 February 2009, Minister Smitherman gave a speech at the Legislative Assembly of Ontario in which he stated that the GEGEA “would make Ontario the ‘destination of choice’ for green power developers, would ‘incent proponents large and small to develop projects by offering an attractive

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<sup>33</sup> **Memorial**, para. 87; **Parties’ Joint Chronology**, p. 1 (citing Policy No. PL 4.10.04 (MNR) of 28 January 2008 (C-60); Policy No. PL 4.10.04 (MNR), Wind Power Site Release and Development Review – Crown Land of 28 January 2008 (C-59)).

<sup>34</sup> **Reply**, para. 192 (citing Remarks by Natural Resources Minister Cansfield, Donna to the Energy 2100 of 23 April 2008 (C-761), pp. 16-17).

<sup>35</sup> **Memorial**, para. 91 (citing Email from Cooper, John (MNR) to Morencie, Mike (MNR) et al. attaching Toronto Star Article of 30 June 2008 (C-81)).

<sup>36</sup> **Memorial**, para. 98 (referring to CWS-Baines, para. 96).

<sup>37</sup> **Memorial**, para. 100; **Reply**, para. 71; **Parties’ Joint Chronology**, p. 2 (citing News Release, Smitherman, George (MEI), The Green Economy of 20 February 2009 (C-110)).

<sup>38</sup> **Memorial**, para. 100 (citing News Release (Ministry of Energy), Ontario’s Bold New Plan for a Green Economy of 23 February 2009 (C-115)).

<sup>39</sup> **Memorial**, para. 103 (citing News Release, Smitherman, George (MEI), The Green Economy of 20 February 2009 (C-110)); **Reply**, para. 71.

<sup>40</sup> **Reply**, para. 71 (citing Article, Hamilton, Tyler (Toronto Star), Province to Fast-Track Wind Turbine Projects of 21 February 2009 (C-111), p. 2).

- price renewable energy’ and would provide ‘the certainty that creates an attractive investment climate.’<sup>41</sup> He also stated that the GEGEA “would coordinate approvals from the Ministries of the Environment and Natural Resources into a streamlined process with a service guarantee,”<sup>42</sup> adding that “so long as all necessary documentation is successfully completed, permits would be issued within a six-month service window.”<sup>43</sup>
96. On 14 May 2009, the GEGEA was approved.<sup>44</sup> The GEGEA introduced the FIT Program and consolidated many of the provincial environmental approvals for renewable energy projects into a streamlined approval process, the Renewable Energy Approval (“REA”) process, making the MOE the primary regulator in the renewable energy sector.<sup>45</sup>
97. The GEGEA authorized the MEI to direct the OPA to develop the FIT Program. On 24 September 2009, the MEI exercised its authority and the OPA began taking applications for the FIT Program on 1 October 2009.<sup>46</sup> The launch of the FIT Program and the GEGEA was accompanied by a press release, published on 24 September 2009, which stated that “Ontario’s new regulations provide a stable investment environment where companies know what the rules are – giving them confidence to invest in Ontario, hire workers, and produce and sell renewable energy.”<sup>47</sup> On the same date, the OPA issued a press release announcing the adoption of the Renewable Energy Approval Regulation (“REA Regulation”) and stating that the REA “[i]s coordinated with other provincial approvals to ensure a streamlined approach, providing a six-month service guarantee per project.”<sup>48</sup>
98. The OPA developed the FIT Rules, Standard Definitions and a standard FIT Contract, together setting out the terms and conditions for participating in the FIT Program.<sup>49</sup>

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<sup>41</sup> **Memorial**, para. 161 (citing Legislative Assembly of Ontario (Hansard Transcript), Smitherman, George Statement of 23 February 2009 (C-116)); **Reply**, paras. 70, 79.

<sup>42</sup> **Memorial**, para. 100 (citing News Release, Smitherman, George (MEI), The Green Economy of 20 February 2009 (C-110)); **Reply**, para. 70.

<sup>43</sup> **Reply**, para. 84 (citing Legislative Assembly of Ontario (Hansard Transcript), Smitherman, George, Statement of 23 February 2009 (C-116), p. 2).

<sup>44</sup> **Memorial**, para. 105 (referring to *An Act to enact the Green Energy Act of 2009 and to build a green economy, to repeal the Energy Conservation Leadership Act of 2006 and the Energy Efficiency Act and to amend other statutes* (C-123)); **Parties’ Joint Chronology**, p. 2 (also citing (C-123)).

<sup>45</sup> **Memorial**, para. 102; **Counter-Memorial**, para. 7.

<sup>46</sup> **Amended Response to the Notice of Arbitration**, paras. 14-15; **Parties’ Joint Chronology**, p. 2 (citing Letter from Smitherman, George (MEI) to Andersen, Colin (OPA) of 24 September 2009 (C-141)).

<sup>47</sup> **Reply**, para. 77 (citing Article, Green Energy Rules Make Ontario a North American Leader of 24 September 2009 (C-143), p. 1); **Parties’ Joint Chronology**, p. 2 (citing Article, Green Energy Rules Make Ontario a North American Leader of 24 September 2009 (C-143)).

<sup>48</sup> **Reply**, para. 84 (citing Article (Ministry of Energy), Ontario Makes it Easier, Faster to Grow Green Energy of 24 September 2009 (C-137), p. 4); **Parties’ Joint Chronology**, p. 3 (citing *Environmental Protection Act*, Ontario Regulation 359/09 (C-103)).

<sup>49</sup> **Amended Response to the Notice of Arbitration**, para. 16.

99. The FIT Contract was a standard long-term fixed-price contract that provided standard terms and conditions applicable to all FIT projects, as well as terms and conditions specific to different types of renewable energy fuels under the FIT Program.<sup>50</sup> The FIT Program established a 20-year fixed premium price to be paid by the OPA for energy from renewable sources, including onshore and offshore wind, hydroelectric, solar, biogas, biomass and landfill gas.<sup>51</sup> The goal of the FIT Program was to ensure that project “proponents could use their FIT contracts to secure long term limited recourse debt financing to fund the planning and construction of their projects.”<sup>52</sup>
100. FIT Contract holders (known as “Suppliers”) were required to bring their project into commercial operation by what the standard FIT Contract referred to as the “Milestone Date for Commercial Operation” (“MCOD”).<sup>53</sup> The standard FIT Contract for offshore wind facilities provided for a MCOB four years after the contract date, and subjected a project to termination if commercial operation did not occur within eighteen months of the MCOB.<sup>54</sup> At the moment of signing a FIT Contract, a Supplier would have to provide security, which would in principle be forfeited if the Supplier could not bring its project into commercial operation within the time frames specified in its FIT Contract.<sup>55</sup>
101. Commercial operation under the standard FIT Contract was defined to be occurring when the following principal conditions were met:
- “a) the Contract Facility has been completed in all material respects;
  - b) the Connection Point of the Contract Facility is that set out in the FIT Contract Cover page ...; and
  - c) the Contract Facility has been constructed, connected, commissioned and synchronized to the IESO-Controlled Grid such that 90% of the contract capacity is available to deliver electricity to the grid.”<sup>56</sup>
102. The standard FIT Contract allowed Suppliers who were encountering difficulties in meeting their obligations under the Contract, including achieving its MCOB, due to factors outside their control, to invoke force majeure.<sup>57</sup> In the event of force majeure, a Supplier would be excused and relieved from its obligation to achieve commercial operation by the MCOB for the duration of the force majeure status.<sup>58</sup> Pursuant to Section 10.1 of the Contract, if one or more events of

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<sup>50</sup> Counter-Memorial, para. 53.

<sup>51</sup> Amended Notice of Arbitration, para. 12. It is noted that waterpower projects have a 40-year term.

<sup>52</sup> Memorial, para. 131.

<sup>53</sup> Counter-Memorial, para. 55; Hearing Transcript (15 February 2016), 320:10-20.

<sup>54</sup> Counter-Memorial, para. 12.

<sup>55</sup> Reply, para. 99; OPA FIT Contract, Schedule 1, General Terms and Conditions of 4 May 2010 (C-245), s. 9.2 (d)(i).

<sup>56</sup> Memorial, para. 180.

<sup>57</sup> Counter-Memorial, para. 57.

<sup>58</sup> Counter-Memorial, paras. 57-58.

force majeure delayed commercial operation for an aggregate of more than 24 months after the original MCOD, both the OPA and the Supplier would be entitled to unilaterally terminate a FIT Contract.<sup>59</sup> Similarly, both parties could unilaterally terminate a FIT Contract if one or more events of force majeure prevented the Supplier from complying with its obligations for more than an aggregate of 36 months in any 60-month period during the term of the FIT Contract.<sup>60</sup> In both situations, when either party exercised its force majeure termination rights, the Supplier was entitled to the return of the security deposited at the moment of signing the FIT Contract.<sup>61</sup>

103. Two key regulatory documents related to the FIT Program were the REA Regulation<sup>62</sup> and the Approval and Permitting Requirements Document for Renewable Energy Projects (“APRD”).<sup>63</sup> The REA Regulation established the environmental approval requirements for wind, solar, thermal and anaerobic digestion energy facilities, setting out specific requirements for all types of wind facilities, including offshore wind projects, which it defined as “Class 5” wind facilities.<sup>64</sup> The REA Regulation specified that proponents of offshore wind projects would be required to submit an Offshore Wind Facility Report, identifying potential negative environmental impacts which would result from proposed projects and mitigation measures.<sup>65</sup> Between June 2009 and June 2010, the MOE posted four Environmental Bill of Rights (“EBR”) notices regarding the REA Regulation and the regulatory framework that was to be developed for offshore wind.<sup>66</sup>
104. The APRD described the requirements and approval process for matters falling under the responsibility of the MNR, specifying the requirements for completing the Offshore Wind Facility Report needed under the REA Regulation.<sup>67</sup> The APRD requirements related primarily to the natural heritage component of the REA Regulation.<sup>68</sup>

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<sup>59</sup> Counter-Memorial, para. 61; Memorial, para. 246; FIT Contract, v. 1.3 (R-92), s. 10.1(g).

<sup>60</sup> Counter-Memorial, para. 61; FIT Contract, v. 1.3 (R-92), s. 10.1(h).

<sup>61</sup> Counter-Memorial, para. 62.

<sup>62</sup> *Environmental Protection Act*, Ontario Regulation 359/09 (C-103).

<sup>63</sup> Report (MNR), APRD (C-136); Parties’ Joint Chronology, p. 3.

<sup>64</sup> Memorial, para. 118.

<sup>65</sup> Reply, paras. 12, 201.

<sup>66</sup> Counter-Memorial, para. 117; Memorial, para. 197; RWS-Wallace, paras. 19-24; Parties’ Joint Chronology, pp. 2, 3, 4, 6 (citing Report (MOE), Proposed Content for the Renewable Energy Approval Regulation under the Environmental Protection Act of 9 June 2009 (C-126); MOE, “Regulation Decision Notice: Proposed Ministry of the Environment Regulations to Implement the Economy Act, 2009” (EBR Registry No. 010-6516) of 24 September 2009 (R-72); Policy Proposal Notice (MOE), Renewable Energy Approval Technical Guidance Bulletins (EBR Registry Number: 010-9235) of 1 March 2010 (C-188); Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines of 1 March 2010 (C-194); MOE, Policy Proposal Notice: Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry No. 011-0089) of 25 June 2010 (R-118); Discussion Paper (R-119); Discussion Paper (C-298)).

<sup>67</sup> Memorial, para. 121; Reply, para. 204.

<sup>68</sup> Counter-Memorial, para. 116.

105. The FIT application process was identical for onshore and offshore wind projects.<sup>69</sup> The initial FIT application period was opened by the OPA from 1 October 2009 to 30 November 2009.<sup>70</sup> It generated significant interest from renewable energy investors around the world, receiving 454 applications in total.<sup>71</sup> Offshore wind projects accounted for only a few applications: in addition to the Claimant’s application, only one other proponent filed a complete and eligible FIT application for an offshore wind project.<sup>72</sup> In response to this first round of applications, the OPA offered 186 FIT Contracts.<sup>73</sup>
106. According to the GEGEA, an offshore wind project proponent had to meet four requirements: (i) obtain a FIT Contract; (ii) obtain access to Crown land; (iii) obtain an REA; and (iv) obtain a grid-connection approval from the IESO (an entity that monitors the operation of Ontario’s power system and ensures its reliability).<sup>74</sup>
107. In particular, project proponents building on Crown land had to apply for the “release” of the applicable sections of Crown land for wind testing and project construction and operation.<sup>75</sup> The process of applying for permission to test or build on Crown land was called the Site Release process, and a project proponent obtaining Site Release was referred to as an Applicant of Record (“AOR”).<sup>76</sup> When the FIT Program was launched, the MNR had a three-stage process for establishing a wind project on Crown land under Wind Policy 4.10.04: (i) wind power testing application and review; (ii) wind power development review; and (iii) issuing permits and tenure for development of a wind farm on Crown land.<sup>77</sup> The first two stages represented the Site Release process, through which the applicants for Crown land sought to obtain an AOR status in respect of specific “grid cells” or groupings of grid cells of Crown land. Obtaining an AOR status allowed an applicant to proceed to the third stage, at which it could request the permits and approvals necessary for the development of the wind project.<sup>78</sup> AOR status gave sole right to apply for permits and approvals with respect to particular grid cells of Crown land,<sup>79</sup> but was “not a disposition” and still required completion of “all [e]nvironmental [a]ssessment requirements for the proposal prior to any authorizations or approvals being issued.”<sup>80</sup>

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<sup>69</sup> Memorial, para. 131.

<sup>70</sup> Memorial, para. 131; Parties’ Joint Chronology, p. 3 (citing Report (OPA), FIT Program – Backgrounder of April 2010 (C-208)).

<sup>71</sup> Amended Response to the Notice of Arbitration, para. 17.

<sup>72</sup> Counter-Memorial, para. 173.

<sup>73</sup> Amended Response to the Notice of Arbitration, para. 17.

<sup>74</sup> Memorial, para. 130.

<sup>75</sup> Memorial, para. 132.

<sup>76</sup> Memorial, para. 132.

<sup>77</sup> Counter-Memorial, para. 151.

<sup>78</sup> Counter-Memorial, para. 151.

<sup>79</sup> Counter-Memorial, para. 152.

<sup>80</sup> Counter-Memorial, para. 153 (citing Policy No. PL 4.10.04 (MNR) of 28 January 2008 (C-60)).

108. On 21 October 2009, Minister Cansfield gave a speech at a conference on Offshore Wind Energy in Coastal North America and the Great Lakes, stating:

“In 2006, my ministry placed a deferral on proposals for Great Lakes offshore development. We needed to get a better understanding of how offshore wind turbines might affect the surrounding environment. We also needed to assess the potential benefits and impacts of this technology. Our research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place. As a result, the deferral was lifted in January [2008] and the province began accepting applications for project proposals.”<sup>81</sup>

...

[W]e know that when it comes to new investment, one of the most important factors for investors is certainty. When companies know exactly what the rules are it instills greater confidence to invest in Ontario, hire workers and produce self-renewable energy.”<sup>82</sup>

...

Offshore windpower is included in the Feed-in-Tariff program at 19 cents per kilowatt hour. Ontario is the first jurisdiction in North America to set a price for offshore windpower, reflecting our strong support for exploring offshore potential.”<sup>83</sup>

109. In a letter addressed to the Canadian Wind Energy Association dated 24 November 2009, the Assistant Deputy Minister from the MNR, Ms Rosalyn Lawrence, stated:

“Existing Crown land applicants who apply to FIT during the launch period, and who are awarded contracts by the OPA, will be given the highest priority to the Crown land sites applied for. This means that these applications will take precedence over all others for this site, and will receive priority attention from MNR.”<sup>84</sup>

110. The letter also specified that “an application for Crown land does not create a legal entitlement or confer rights” and that “the Minister of Natural Resources has the sole authority to approve or deny any application for the use of Crown land to support wind power testing or development.”<sup>85</sup>

111. The approvals process under the REA Regulation consists of several steps. First a project proponent had to conduct certain “pre-submission activities,” including submitting to the MOE a draft project description report,<sup>86</sup> conducting consultations with stakeholders and preparing a

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<sup>81</sup> **Memorial**, para. 127 (citing Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference of 21 October 2009 (C-147)).

<sup>82</sup> **Reply**, para. 105 (citing Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference of 21 October 2009 (C-147)).

<sup>83</sup> **Reply**, para. 105 (citing Event Note (MNR), Offshore Wind Energy In Coastal North America and the Great Lakes Conference of 21 October 2009 (C-147)); **Parties’ Joint Chronology**, p. 3 (also citing (C-147)).

<sup>84</sup> **Memorial**, para. 163 (citing Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) of 24 November 2009 (C-158)); **Parties’ Joint Chronology**, p. 3 (also citing (C-158)).

<sup>85</sup> **Counter-Memorial**, para. 163 (citing Letter from Lawrence, Rosalyn (MNR) to Hornung, Robert (Canadian Wind Energy Association) of 24 November 2009 (C-158)).

<sup>86</sup> **Counter-Memorial**, paras. 82-83.



consultation report,<sup>87</sup> and conducting a natural heritage assessment<sup>88</sup> as well as a water assessment.<sup>89</sup> The proponent then had to submit its application with the necessary accompanying materials to the MOE.<sup>90</sup> If the application was found to be complete, it was reviewed by a team of inter-ministerial experts led by the MOE's Environmental Approvals Branch to determine if the application met the regulatory requirements and "whether or not there [was] adequate information to allow the [MOE] Director to make a decision in the public interest to issue or not issue a REA."<sup>91</sup> Once the technical review had been completed, the Director of the MOE was to make "an independent and discretionary determination of whether or not it [was] in the public interest to issue a REA."<sup>92</sup> Subsequently, the applicant and any resident of Ontario might appeal that decision to the Environmental Review Tribunal.<sup>93</sup>

112. Renewable energy proponents of projects larger than ten megawatts ("MW") were also required to obtain a connection assessment, which included an IESO System Impact Assessment ("SIA") and a Customer Impact Assessment ("CIA") from the relevant transmitter.<sup>94</sup> The purpose of the SIA was to assess the impact of a project on Ontario's integrated power system,<sup>95</sup> while the purpose of the CIA was to assess the impact of the connection of a new project to the power grid on existing customers.<sup>96</sup>
113. A project could only start after issuance of a Notice to Proceed ("NTP") by the OPA pursuant to Section 2.4 of the standard FIT Contract once the following requirements had been met: (i) receipt of the REA; (ii) submission of a financing plan including signed commitment letters from sources of financing representing at least 50% of the expected development costs; and (iii) submission of a domestic content plan explaining that the Project would meet a 50% Ontario content requirement.<sup>97</sup>
114. On 1 March 2010, the MOE posted one of the aforementioned EBR notices entitled "Renewable Energy Approval Technical Guidance Bulletins" with six attached technical bulletins including "Technical Bulletin Six: Required Setbacks for Wind Turbines."<sup>98</sup>

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<sup>87</sup> Counter-Memorial, para. 94.

<sup>88</sup> Counter-Memorial, para. 96.

<sup>89</sup> Counter-Memorial, para. 103.

<sup>90</sup> Counter-Memorial, para. 104.

<sup>91</sup> Counter-Memorial, para. 105.

<sup>92</sup> Counter-Memorial, para. 106.

<sup>93</sup> Counter-Memorial, para. 109.

<sup>94</sup> Memorial, para. 141.

<sup>95</sup> Memorial, para. 142.

<sup>96</sup> Memorial, para. 143.

<sup>97</sup> Memorial, para. 181.

<sup>98</sup> Reply, para. 207 (referring to Report (MOE), Renewal Energy Approvals, Technical Bulletin One, Guidance for Preparing the Project Description Report of 1 March 2010 (C-189); Report (MOE), Renewal Energy Approvals, Technical Bulletin Two, Guidance for Preparing the Design and Operations Report of 1 March 2010

115. During the spring and summer of 2010, the MOE held technical workshops on topics concerning offshore wind such as noise, water quality and sediment management, and technical and safety standards.<sup>99</sup> In particular, on 29 April 2010 and 23 August 2010, the MOE held workshops on the propagation of noise for offshore wind projects in Ontario.<sup>100</sup> The workshops were not able to recommend an appropriate noise propagation model, instead recommending that research be conducted and empirical data be collected through measurements.<sup>101</sup>
116. Similarly, on 16 July 2010 the MOE held a water quality and sediment management workshop, which indicated that several communities were potentially affected by offshore wind development in Ontario and might claim aboriginal title over the lakebed.<sup>102</sup> The workshop concluded that “no development should be allowed within one kilometer of an intake protection zone 1 ... and ... water quality modelling would need to be conducted within intake protection zones 2 and 3,”<sup>103</sup> and also that “it was necessary to conduct research to obtain baseline data for modelling.”<sup>104</sup> On 13 September 2010, the MOE held a workshop on technical specifications and safety issues which indicated that modifications of international design standards for offshore wind turbines “were necessary for the Great Lake context,” and that “standards specific to all other offshore wind facility components ... would require further study.”<sup>105</sup>

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(C-190); Report (MOE), Renewal Energy Approvals, Technical Bulletin Three, Guidance for Preparing the Construction Plan Report of 1 March 2010 (C-191); Report (MOE), Renewal Energy Approvals, Technical Bulletin Four, Guidance for Preparing the Decommissioning Plan Report of 1 March 2010 (C-192); Report (MOE), Renewal Energy Approvals, Technical Bulletin Five, Guidance for Preparing the Consultation Report of 1 March 2010 (C-193); Report (MOE), Renewable Energy Approvals, Technical Bulletin Six, Required Setbacks for Wind Turbines of 1 March 2010 (C-194); **Parties’ Joint Chronology**, p. 4 (citing Policy Proposal Notice (MOE), Renewable Energy Approval Technical Guidance Bulletins (EBR Registry Number: 010-9235) of 1 March 2010 (C-188); and also citing (C-194)).

<sup>99</sup> **Counter-Memorial**, para. 134.

<sup>100</sup> **Counter-Memorial**, paras. 135-137; **Parties’ Joint Chronology**, pp. 4, 8 (citing MOE, Technical Session, Off-Shore Wind Facilities – Noise Agenda (R-103); MOE, Agenda for Second Technical Stakeholder Session, Off-Shore Wind Farms – Noise Issues of 23 August 2010 (R-133); Off-Shore Wind Noise Workshop Meeting Notes of Postacioglu, Dilek (MOE) of 23 August 2010 (R-134)).

<sup>101</sup> **Counter-Memorial**, para. 138 (citing Off-Shore Wind Noise Workshop Meeting Notes of Postacioglu, MOE of 23 August 2010 (R-134)).

<sup>102</sup> **Counter-Memorial**, paras. 140-141; **Parties’ Joint Chronology**, p. 7 (citing MOE, Off-Shore Wind Facilities – Water Quality and Sediment Management Workshop Agenda of 16 July 2010 (R-125); MOE, Off-Shore Wind Facilities: Water Quality and Sediment Management Workshop Recap, undated (R-436)).

<sup>103</sup> **Counter-Memorial**, para. 141.

<sup>104</sup> **Counter-Memorial**, para. 142.

<sup>105</sup> **Counter-Memorial**, para. 146; **Parties’ Joint Chronology**, p. 9 (citing MOE, Off-Shore Wind Development in Ontario, Technical Specifications, Spectrum Interference and Safety Issues Technical Workshop Agenda of 13 September 2010 (R-141); Meeting Notes of Chan, Jim, Canadian Environmental Assessment Agency, Off-Shore Wind Meeting: Summary Action Items and Notes of the Meeting of 4 August 2010 (R-130)).

## **B. THE WOLFE ISLAND SHOALS PROJECT**

117. Starting in 2008, Windstream began to invest in resource evaluation, engineering and technical reviews relating to the WWIS Project.<sup>106</sup>
118. On 8 February 2008, Windstream submitted to the MNR Crown land applications to develop an offshore wind facility.<sup>107</sup> Windstream proposed to construct approximately 100 wind turbines, capable of generating 300 MW of electricity, in Lake Ontario near Wolfe Island, south of the City of Kingston.<sup>108</sup> Windstream applied for AOR status and submitted SIA applications to the IESO, together with other preparatory work regarding the Project.<sup>109</sup>
119. In April 2008, the OPA received a document addressing the future of offshore wind in Ontario from wind energy consultant Helimax Inc. (“Helimax”).<sup>110</sup> Helimax had identified 64 offshore sites that were considered to have potential for wind project development in the Ontario Great Lakes region and had performed a technical assessment and ranking of these sites.<sup>111</sup> The site of the Project was “[o]ne of the nine locations identified [by Helimax] as being most favourable for offshore wind development.”<sup>112</sup>
120. According to the Claimant, in October 2008, Mr Ian Baines, the President of WEI,<sup>113</sup> met with the Assistant Deputy Ministers for Energy, Finance and Natural Resources. During that meeting the Assistant Deputy Ministers “indicated that they were determined to direct the OPA to take steps to facilitate renewable energy development in the Province.”<sup>114</sup>
121. On 24 September 2009, the MNR wrote to Windstream, acknowledging its Crown land applications.<sup>115</sup> On the same day, Minister Cansfield informed Windstream that “in order to maintain priority position within MNR’s site release process, [Windstream] must submit an application to the FIT Program within the FIT launch application process.”<sup>116</sup>

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<sup>106</sup> Amended Notice of Arbitration, para. 17.

<sup>107</sup> Amended Notice of Arbitration, para. 17; Memorial, para. 156.

<sup>108</sup> Amended Response to the Notice of Arbitration, para. 30.

<sup>109</sup> Memorial, paras. 157-158.

<sup>110</sup> Memorial, para. 92; Parties’ Joint Chronology, p. 2 (citing Report (Helimax), Analysis of Future Offshore Wind Farm Development of 30 April 2008 (C-72)).

<sup>111</sup> Memorial, para. 94.

<sup>112</sup> Memorial, para. 94; Report (Helimax), Analysis of Future Offshore Wind Farm Development of 30 April 2008 (C-72), pp. 29-30.

<sup>113</sup> CWS-Baines, para. 1.

<sup>114</sup> Memorial, para. 98; CWS-Baines, para. 40; Email from Baines, Ian (WEI) to Mars, David (White Owl Capital) of 30 October 2008 (C-93).

<sup>115</sup> Memorial, para. 159.

<sup>116</sup> Memorial, paras. 159, 163 (referring to Letter from Cansfield, Donna (MNR) to Baines, Ian (OCP) of 24 September 2009 (C-144); CWS-Baines, para. 56; CWS-Mars, para. 57); Reply, para. 175.

122. The initial FIT application period was open from 1 October 2009 to 30 November 2009.<sup>117</sup> According to the Claimant, by the end of October 2009, Windstream had met with a number of investors to attract potential partners in the Project and managed to secure additional investment from two investors, Mr Steven Webster and Lucky Star Shipping S.A.<sup>118</sup> Windstream also retained ORTECH Consulting Inc. (“Ortech”), an environmental engineering firm specialized in renewable energy projects, to act as project manager and conduct the relevant development work.<sup>119</sup>
123. On 27 November 2009, Windstream, through WWIS and other subsidiaries, applied to the OPA for eleven FIT Contracts: ten for onshore wind facilities and one for the Project.<sup>120</sup> The Project was based on a subset of the grid cells for which Windstream had requested AOR status.<sup>121</sup> Windstream posted with WWIS’s application a CAD 3 million letter of credit, as required by the FIT Program rules.<sup>122</sup>
124. According to the Claimant, from 2009 until spring 2012, Windstream performed work to advance the Project, including wind resource/energy yield testing, the preparation of designs relating to the Project’s electrical system, a lake bottom investigation, financial assessments and the organization of specialized consultants.<sup>123</sup>
125. On 8 April 2010, the OPA advised WWIS that it had approved WWIS’ FIT application.<sup>124</sup> On 19 April 2010, Windstream representatives met with representatives of the MNR, the MEI, the MOE and the Ministry of Culture to discuss the Project and determine what information Ontario would need from Windstream to further advance the Project.<sup>125</sup>
126. On 4 May 2010, the OPA offered WWIS a FIT Contract.<sup>126</sup> In accepting the Contract, WWIS had to provide a CAD 6 million letter of credit to replace the CAD 3 million letter of credit paid to secure WWIS’s application.<sup>127</sup> Pursuant to the FIT Rules, the offer to WWIS was open for a

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<sup>117</sup> **Memorial**, para. 131.

<sup>118</sup> **Memorial**, paras. 167-168. *See also Reply*, para. 401; **CWS-Mars**, paras. 58-59.

<sup>119</sup> **Memorial**, para. 171; **Reply**, para. 209.

<sup>120</sup> **Memorial**, para. 165. *See also Counter-Memorial*, para. 172; **Amended Response to the Notice of Arbitration**, para. 32; **Reply**, para. 99; **Parties’ Joint Chronology**, p. 3 (citing FIT Program Application Form, FIT-FALCB9K – Wolfe Island Shoals Wind Farm of 29 November 2009 (**R-84**)).

<sup>121</sup> **Counter-Memorial**, para. 179.

<sup>122</sup> **Memorial**, para. 166; **Reply**, para. 96; Standby Letter of Credit (RBS) of 27 November 2009 (**C-162**).

<sup>123</sup> **Memorial**, paras. 302-315.

<sup>124</sup> **Memorial**, para. 173; **Parties’ Joint Chronology**, p. 4 (citing Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) of 8 April 2010 (**C-207**)).

<sup>125</sup> **Memorial**, para. 194; **Reply**, para. 147; **Parties’ Joint Chronology**, p. 4 (citing Email from Baines, Ian (WEI) to Roeper, Uwe (Ortech) of 14 April 2010 (**C-214**); Email from Boysen, Eric (MNR) to Dumais, Doris (MOE) and Ing, Pearl (MEI) of 13 April 2010 (**R-97**)).

<sup>126</sup> **Counter-Memorial**, para. 192; **Parties’ Joint Chronology**, p. 4 (citing Letter from Butler, Joanne (OPA) to Baines, Nancy (WWIS) of 4 May 2010 (**C-246**)).

<sup>127</sup> **Reply**, para. 99; Standby Letter of Credit (RBS) of 14 April 2014 (**C-692**).

period of ten business days, i.e. until 18 May 2010.<sup>128</sup> WWIS did not sign the contract by this deadline. According to the Respondent, the delay in signing was “due to the regulatory risk it [the Claimant] perceived and sought to resolve.”<sup>129</sup>

127. The OPA granted several extensions of the deadline to sign the contract, with the last one expiring on 12 August 2010.<sup>130</sup>
128. On 21 May 2010, a representative of the MEI informed Mr Chris Benedetti, the principal of Sussex Strategy Group, a consultancy that had been engaged by Windstream,<sup>131</sup> that the MEI and the MOE were working to finalize offshore REA guidelines and that “the guidelines would be available soon.”<sup>132</sup>
129. On 15 June 2010, Windstream representatives met with staff from the MEI, the MNR, the MOE and the Renewable Energy Facilitation Office.<sup>133</sup> In the context of this meeting, Windstream put forward a proposal of “‘swapping’ the land that Windstream had applied for with other land further offshore in order to comply with a five-kilometer setback from shore, which at the time was rumored to be under consideration by the MOE.”<sup>134</sup> MNR staff promised to consider Windstream’s proposal for a possible “land swap” and to inquire about the status of Windstream’s AOR application, while also offering to provide input on the field studies required for the Project.<sup>135</sup> MOE staff indicated that guidelines for setbacks were being developed.<sup>136</sup> In addition, MEI staff indicated that they would speak to the OPA about FIT Contract provisions dealing with Ontario content requirements and the need for flexibility on this issue for offshore projects.<sup>137</sup>
130. On 23 June 2010, Windstream’s counsel spoke with the Director of the MNR’s Renewable Energy Program regarding the WWIS Project.<sup>138</sup> According to the Claimant, the Director indicated to

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<sup>128</sup> Counter-Memorial, para. 193.

<sup>129</sup> Counter-Memorial, para. 193.

<sup>130</sup> Counter-Memorial, paras. 217-218; Reply, para. 133; Parties’ Joint Chronology, pp. 5-8.

<sup>131</sup> See CWS-Benedetti, para. 1.

<sup>132</sup> Memorial, para. 197 (referring to Email from Roeper, Uwe (Ortech) to Ing, Pearl (MEI) of 25 May 2010 (C-270)); Parties’ Joint Chronology, p. 5 (also citing (C-270)).

<sup>133</sup> Reply, para. 150; CWS-Baines, para. 79; Parties’ Joint Chronology, p. 6 (citing Email from Duffey, Barry (ENE) to Ing, Pearl (MEI) et al. of 15 June 2010 (C-281); Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010 (C-285)).

<sup>134</sup> Memorial, para. 198; Reply, para. 136.

<sup>135</sup> Memorial, para. 198 (referring to Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010 (C-285)).

<sup>136</sup> Memorial, para. 198 (referring to Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010 (C-285)).

<sup>137</sup> Memorial, para. 198 (referring to Memorandum from Chamberlain, Adam (BLG) to WEI of 17 June 2010 (C-285)).

<sup>138</sup> Parties’ Joint Chronology, p. 6 (citing Email from Baines, Nancy (WEI) to Benedetti, Chris (Sussex Strategy) of 23 June 2010 (C-291)).

Windstream “that the Project was ‘special,’ and that he was ‘advancing’ Windstream’s proposal to swap grid cells selected for the Project.”<sup>139</sup>

131. On 25 June 2010, the MOE posted for public comment a further EBR notice, this time a policy proposal entitled “Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach,” which outlined its approach for developing the regulatory requirements and guidance in respect of offshore wind facilities (“Offshore Wind Policy Proposal Notice”).<sup>140</sup> Among other things, the draft policy proposed a five-kilometer shoreline exclusion zone for offshore wind projects (“setback”). The MOE proposed the five-kilometer exclusion zone “in light of its commitment to protect water bodies, including the Great Lakes, and to ensure that Ontarians enjoy safe drinking water, beaches, food and fish, and natural and cultural heritage.”<sup>141</sup>
132. The Offshore Wind Policy Proposal Notice further explained that “[partner] ministries [were] working together to provide greater certainty and clarity on off-shore wind requirements” and that the “Ontario Government [was] proposing an approach and [was] seeking input from interested members of the public, early in the process, to inform the work that will be completed to finalize the approach and the off-shore wind specific requirements under the REA regulation.”<sup>142</sup> The Notice indicated that “[the proposed] approach [would] also be supplemented by the outcome of research underway by the Ministry of the Environment, Ministry of Natural Resources (MNR), and Ministry of Tourism and Culture and will be the subject of subsequent Environmental Registry postings that [would] outline requirements for off-shore wind development.”<sup>143</sup>
133. Still in June 2010, Windstream informed the MEI and the MNR that it “believe[d] that [it] could work within the proposed 5 km set-back guidelines”<sup>144</sup> and sent a proposal to the Government, suggesting that it “release its application for parts of the lakebed ... that were within five kilometers of Wolfe Island in exchange for other lakebed lands further offshore.”<sup>145</sup>
134. On 5 July 2010, Windstream attended a meeting with senior staff from the MNR and the MEI, in the context of which it asked for clarifications with respect to the timing of receiving AOR status

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<sup>139</sup> **Memorial**, para. 199 (referring to Email from Baines, Nancy (WEL) to Benedetti, Chris (Sussex Strategy) of 23 June 2010 (C-291); CWS-Roeper, para. 30).

<sup>140</sup> **Counter-Memorial**, paras. 121, 429; Discussion Paper (C-298); **Parties’ Joint Chronology**, p. 6 (citing MOE, Policy Proposal Notice: Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry No. 011-0089) of 25 June 2010 (R-118); Discussion Paper (R-119); Discussion Paper (C-298)).

<sup>141</sup> **Counter-Memorial**, para. 121; Discussion Paper (C-298).

<sup>142</sup> Policy Decision Notice (MOE) of 25 June 2010 (C-296).

<sup>143</sup> Presentation, Wolfe Island Shoals Off-Shore Wind Project of 25 June 2010 (C-297).

<sup>144</sup> Email from Baines, Ian (WEL) to Cain, Ken (MNR) of 26 June 2010 (C-302).

<sup>145</sup> **Memorial**, paras. 201, 204.

and requested an extension from four to five years of the MCOD specified in the FIT Contract.<sup>146</sup> Mr Paul Ungerman, the MEI's representative, committed to following up on the issues Windstream had identified regarding the Project.<sup>147</sup> A further meeting was held with Mr Ungerman on 7 July 2010, to discuss the Project and the extension of the deadline for the Project to reach its MCOD.<sup>148</sup> According to the Claimant, Windstream was told that "MEI representatives [would] speak to OPA representatives about extending the commercial operation date under the FIT Contract, and ... [would] support Windstream in its discussions with the MNR on the process and methodology for the 'land swap.'"<sup>149</sup>

135. On 5 August 2010, WWIS sent a proposed layout and description of the grid cells required for the Project to be built outside the five-kilometer exclusion zone to the MNR.<sup>150</sup> On 9 August 2010, with the approval of the MEI and the Premier's Office, the MNR sent Windstream a letter confirming its willingness to discuss a reconfiguration of the Project site after the conclusion of the five-kilometer setback policy proposal and promising to move "as quickly as possible through the remainder of the application review process in order that [WWIS] may obtain Applicant of Record status in a timely manner."<sup>151</sup>
136. On the same day, Windstream requested that the MCOD in the draft FIT Contract be amended.<sup>152</sup> On 12 August 2010, the OPA confirmed to Windstream that it would issue a revised FIT Contract with a special term that extended the MCOD by a year from the standard offer, i.e. from four to five years from the contract date.<sup>153</sup> On 18 August 2010, the OPA provided WWIS with a revised contract<sup>154</sup> and granted it three additional business days to sign the contract.<sup>155</sup>
137. On 20 August 2010, WWIS executed its FIT Contract<sup>156</sup> and substituted the CAD 3 million letter of credit deposited when it applied for the FIT Contract with a letter of credit in the amount of

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<sup>146</sup> **Memorial**, para. 202; **Parties' Joint Chronology**, p. 6 (citing Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) et al. of 5 July 2010 (C-1904); Memorandum from Ortech to WEI of 6 July 2010 (C-308)).

<sup>147</sup> **Memorial**, para. 202; **CWS-Baines**, para. 86.

<sup>148</sup> **Parties' Joint Chronology**, p. 6.

<sup>149</sup> **Memorial**, para. 205; **Reply**, para. 152; **CWS-Baines**, para. 87.

<sup>150</sup> **Memorial**, para. 208; **CWS-Roeper**, para. 36.

<sup>151</sup> **Memorial**, para. 208 (citing Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) of 9 August 2010 (C-334); **Reply**, paras. 137, 139; **Parties' Joint Chronology**, p. 7 (also citing (C-334)).

<sup>152</sup> **Counter-Memorial**, para. 219; **Parties' Joint Chronology**, p. 8 (citing Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) of 10 August 2010 (C-340)).

<sup>153</sup> **Counter-Memorial**, para. 220; **Parties' Joint Chronology**, p. 8 (citing Email from Cecchini, Perry (OPA) to Chamberlain, Adam (BLG) et al. of 12 August 2010 (C-343)).

<sup>154</sup> **Memorial**, para. 210 (referring to Letter from Butler, JoAnne (OPA) to Baines, Nancy (WWIS) of 18 August 2010 (C-349); OPA FIT Contract, Schedule 2, Special Terms and Conditions Wind (Off-Shore) Facilities of 4 May 2010 (C-243)); **Parties' Joint Chronology**, p. 7 (also citing (C-349)).

<sup>155</sup> **Counter-Memorial**, para. 221.

<sup>156</sup> **Counter-Memorial**, para. 222; **Parties' Joint Chronology**, p. 8 (citing FIT Contract (C-251); OPA FIT Contract, Schedule 1, General Terms and Conditions, v.1.3 (C-199); OPA FIT Contract, Schedule 2, Special Terms and Conditions Wind (Off-Shore) Facilities of 4 May 2010 (C-243); Appendix 1 – Standard Definitions of 9 March 2010 (C-195)).

CAD 6 million.<sup>157</sup> Regardless of the extensions of the deadline to sign the Contract, its date remained the date of the original offer, i.e. 4 May 2010.<sup>158</sup> Accordingly, the FIT Contract required WWIS to bring the Project into commercial operation by its MCOB, specified as 4 May 2015.<sup>159</sup> The FIT Contract required the OPA to purchase all electricity generated by the Project at a rate of CAD 190 per MW hour, with full escalation for inflation until the Project's commercial operation date, and escalation for inflation up to a maximum of 20% in total for the 20 years starting from the date of the Project's commercial operation.<sup>160</sup>

138. The public consultation period relating to the Offshore Wind Policy Proposal Notice was originally open for 60 days until 23 August 2010, but according to the Respondent, due to significant public interest, the MOE extended the consultation period by an extra fourteen days until 7 September 2010.<sup>161</sup> The Respondent states that during the consultation period the MOE received 1,403 comments.<sup>162</sup> Over 65% of respondents opposed offshore wind development, and a majority of respondents expressed concern either that the proposed five-kilometer exclusion zone might not be far enough from the shoreline, or that there were significant areas of scientific uncertainty requiring further study.<sup>163</sup>
139. On 9 September 2010, Mr Uwe Roeper, the President of Ortech, and other representatives of Ortech met with MNR officials on behalf of Windstream "to discuss the technical studies that Ortech needed to carry out while MNR and MOE were considering the issues raised in ... [the Offshore Wind Policy Proposal Notice]."<sup>164</sup> At this meeting, Ortech was informed that setting up an offshore wind measurement mast required a temporary land use permit, "which could not be granted until WWIS was given Applicant of Record status under the site release process."<sup>165</sup> On 30 September 2010, Mr Baines wrote to the MNR and requested that WWIS "be allowed to erect a temporary wind monitoring mast to carry out wind speed testing."<sup>166</sup> On 7 October 2010,

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<sup>157</sup> **Memorial**, para. 223; **Amended Notice of Arbitration**, para. 20; **CWS-Baines**, para. 92; **Parties' Joint Chronology**, p. 8.

<sup>158</sup> **Counter-Memorial**, para. 223.

<sup>159</sup> **Memorial**, para. 179; OPA FIT Contract, Schedule 1, General Terms and Conditions of 4 May 2010 (C-245), s. 2.5.

<sup>160</sup> **Memorial**, para. 178.

<sup>161</sup> **Counter-Memorial**, para. 123.

<sup>162</sup> **Counter-Memorial**, para. 123.

<sup>163</sup> **Counter-Memorial**, para. 124.

<sup>164</sup> **Memorial**, para. 233 (referring to Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting of 9 September 2010 (C-357)); **Parties' Joint Chronology**, p. 9 (also citing (C-357)).

<sup>165</sup> **Memorial**, para. 234 (referring to Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting of 9 September 2010 (C-357)).

<sup>166</sup> **Memorial**, para. 236 (referring to Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) of 30 September 2010 (C-366)); **Parties' Joint Chronology**, p. 9 (also citing (C-366)).



Windstream formally applied to the MNR for the “swap” of Crown land grid cells, also reiterating its request to obtain AOR status.<sup>167</sup>

140. On 8 November 2010, WWIS received a Notification of Conditional Approval for Connection from the IESO, allowing it to connect to the grid at the Lennox connection point.<sup>168</sup> On the same day, Hydro One, the owner of the relevant power lines, issued a CIA for WWIS, which provided that WWIS was not expected to adversely impact transmission customers in the area of Lennox County.<sup>169</sup>
141. On 22 November 2010, the MNR informed WWIS that the Government’s offshore wind power policy review was “still outstanding” and that it was “not yet able to consider advancing the Wolfe Island Shoals project through the Application of Record process, nor implement the potential exchange of grid cells.”<sup>170</sup> The MNR also informed WWIS that “no decision on ... permission to conduct testing should be expected while the government’s offshore wind power policy review is still outstanding.”<sup>171</sup>
142. On 10 December 2010, WWIS claimed a force majeure event under its FIT Contract “on account of the lack of regulatory assistance from MNR and MOE.”<sup>172</sup> In its force majeure notice, WWIS indicated that “it was unable to advance further towards the milestone dates in the FIT Contract without being able to carry out wind testing, further defining of the project area, and related studies, all of which required that AOR status be granted.”<sup>173</sup> The force majeure event meant that the MCOD would be extended for its duration, but either Party could still unilaterally terminate the FIT Contract if the Project did not reach commercial operation within two years of the original MCOD, i.e. by 4 May 2017.<sup>174</sup> Windstream had to maintain the CAD 6 million security deposit posted at the signature of the FIT Contract during the force majeure period.<sup>175</sup>

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<sup>167</sup> **Memorial**, para. 238; **Parties’ Joint Chronology**, p. 9 (citing Letter from Baines, Ian (WEI) to Boysen, Eric (MNR) of 7 October 2010 (C-371)).

<sup>168</sup> **Memorial**, para. 231; **Parties’ Joint Chronology**, p. 10 (citing System Impact Assessment Report, Wolfe Island Shoals Wind Generation Station, Connection Assessment & Approval Process (Final Report) of 8 November 2010 (C-381)).

<sup>169</sup> **Memorial**, para. 231; **Parties’ Joint Chronology**, p. 10 (citing Report (Hydro One), CIA, Wolfe Island Shoals GS 300 MW Wind Turbine Generator Generation Connection of 8 November 2010 (C-383)).

<sup>170</sup> **Memorial**, para. 240; **Parties’ Joint Chronology**, p. 10 (citing Email from Cain, Ken (MNR) to Roeper, Uwe (Ortech) of 22 November 2010 (C-388)).

<sup>171</sup> **Counter-Memorial**, para. 231.

<sup>172</sup> **Counter-Memorial**, para. 232; **Reply**, para. 402; **Parties’ Joint Chronology**, p. 10 (citing Windstream’s Notice of Force Majeure of 10 December 2010 (C-408); Exhibit A to Windstream’s Notice of Force Majeure (C-406)).

<sup>173</sup> **Memorial**, para. 244.

<sup>174</sup> **Memorial**, para. 246; **Counter-Memorial**, para. 61.

<sup>175</sup> **Memorial**, para. 280.

143. WWIS subsequently proposed to MOE officials that the Project proceed as a “pilot project,” generating scientific data to assist Ontario in determining how to proceed with future offshore wind projects.<sup>176</sup> According to the Claimant, on 15 December 2010, Mr Baines discussed the pilot project proposal with a policy advisor from the MEI.<sup>177</sup> The Claimant also states that on 21 December 2010, Mr Benedetti spoke with a policy advisor from the MEI “who told him the Ministry was receptive to the pilot project proposal, but it was unclear what the government’s timelines would be for moving the project forward.”<sup>178</sup>
144. The Claimant states that on 19 January 2011, Mr Baines met with MEI representatives who “confirmed that the pilot project concept was being favorably received” and told him to “leave it with [them]” and to “have faith.”<sup>179</sup> According to the Respondent, at the same time, the MNR and the MOE internally expressed [REDACTED]  
[REDACTED]<sup>180</sup>
145. According to the Respondent, on 9 February 2011, the OPA announced that it would offer to amend the contracts of all FIT Contract holders who had not yet reached commercial operation so that they could extend their MCOB by up to one year. In the course of February and March 2011, the OPA contacted each FIT Supplier, including the Claimant, with an offer to execute an amending agreement that would extend the MCOB by up to one year in exchange for trade-offs by the Supplier on certain force majeure rights.<sup>181</sup> WWIS did not accept this offer.<sup>182</sup>
146. On 11 February 2011, officials from the MEI, the MOE, the MNR and the OPA held a conference call with the Claimant to inform the latter of a forthcoming announcement regarding a deferral on offshore wind projects and how it would affect Windstream.<sup>183</sup> During the call, officials explained that the Government of Ontario had decided that it “will not be moving forward with offshore wind until further science regulatory work and co-ordination with our U.S. partners is complete.”<sup>184</sup> The impact of the deferral was described by the Government officials in the following terms:

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<sup>176</sup> **Memorial**, para. 253.

<sup>177</sup> **Memorial**, para. 254 (referring to **CWS-Baines**, para. 109; Email from Baines, Ian (WEI) to Benedetti, Chris (Sussex Strategy) et al. of 15 December 2010 (C-414)).

<sup>178</sup> **Memorial**, para. 254 (referring to **CWS-Baines**, para. 109; **CWS-Benedetti**, para. 51).

<sup>179</sup> **Memorial**, para. 255 (referring to **CWS-Baines**, para. 110).

<sup>180</sup> **Counter-Memorial**, paras. 248, 250 (referring to **RWS-Lawrence**, paras. 46-48; **RWS-Wallace**, para. 61; Email from Wallace, Marcia (MOE) to Dumais, Doris (MOE) of 13 January 2011 (R-208)).

<sup>181</sup> **Counter-Memorial**, para. 234 (referring to FAQs on FIT COD Extension of 9 February 2011 (C-475)).

<sup>182</sup> **Counter-Memorial**, para. 234 (referring to FAQs on FIT COD Extension of 9 February 2011 (C-475); FIT Amending Agreement Re: Extension of MCOB for Non-CAE Projects (R-449)).

<sup>183</sup> **Memorial**, para. 258; **Counter-Memorial**, para. 263; **Reply**, para. 258; **Parties’ Joint Chronology**, p. 13 (citing Audio Recording of Call of 11 February 2011 (C-483); Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484)).

<sup>184</sup> Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484), p. 2.

“[Andrew Mitchell of MEI:] We set this call up today just to give you some notice about a decision of the Government of Ontario is going to be announcing this afternoon. And that decision is that we will not be moving forward with offshore wind until further science regulatory work and co-ordination with our U.S. partners is complete. Our feeling is that offshore wind in freshwater lakes is in its early developments and to date there are gaps that exist in the science that don’t support siting wind projects in freshwater at this time. ... We acknowledge that your project is unique in that it has a FIT Contract and so that end Perry [of the OPA] is here but we’ve asked that the OPA sit down with you to negotiate a number of pieces including the force majeure provisions, the two-year force majeure termination clause associated with those provisions and the security deposits ... .<sup>185</sup>

...

[Brenda Lucas of MOE:] We came out at the end of the summer as you know and we’ve proposed five fifty and did the EBR consultation and we had over 1400 people write in and we have a lot more questions than we have answers so the concern from the Environment Ministry’s perspective is a lot of questions, not enough information, not enough science to build an offshore specific REA regulation and similarly questions about how we would evaluate the reports and studies that any individual project brought in to us in terms of how they would be able to mitigate any of those concerns from you know fish and fish habitat to ice, freeze and thaw issues to noise issues over water, there’s just like I said, too much uncertainty for us to go forward on that now, so our part of the news today essentially is that we’re not ready with the REA regulation. We are going to take the time and do more science work.<sup>186</sup>

...

[Richard Linley of MNR]: [O]ur piece of the announcement is that MNR will be cancelling all existing Crown Land Applications for access to lake beds for offshore wind development but that does not mean those with the initial Feed in Tariff contracts which is yourselves, but this will include those without that kind of record status and we will not be accepting any new Crown Land Applications and to Brenda’s point, when there is greater scientific certainty, consideration of offshore wind development will resume.”<sup>187</sup>

147. Later on the same day, the Government of Ontario publicly announced that it would not be “proceeding with any development of offshore wind projects until the necessary scientific research is completed and an adequately informed policy framework can be developed.”<sup>188</sup> It stated that:

“Ontario is not proceeding with proposed offshore wind projects while further scientific research is conducted. No Renewable Energy Approvals for offshore have been issued and no offshore projects will proceed at this time. Applications for offshore wind projects in the Feed-in-Tariff program will no longer be accepted and current applications will be suspended.”<sup>189</sup>

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<sup>185</sup> Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484), p. 2.

<sup>186</sup> Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484), p. 3.

<sup>187</sup> Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484), p. 3.

<sup>188</sup> Counter-Memorial, para. 252.

<sup>189</sup> Amended Response to the Notice of Arbitration, para. 40 (citing News Release (MOE), Ontario Rules Out Offshore Wind Projects of 11 February 2011 (C-485)).

148. On the same day, the MOE and the MNR also published policy decisions, stating that:

“[d]uring ... [the moratorium], applications for offshore wind projects in the Feed-in-Tariff program will no longer be accepted and the current applications will be cancelled; the MNR will be cancelling all existing Crown land applications for offshore wind development that do not have a Feed-in-Tariff contract, including those with Applicant of Record status. MNR will not be accepting any new Crown land applications for offshore wind development. When there is greater scientific certainty, consideration of offshore wind development will continue.”<sup>190</sup>

149. After the announcement of the moratorium, the Claimant engaged in without-prejudice settlement negotiations with the OPA over its FIT Contract terms,<sup>191</sup> which still provided that WWIS had to bring the Project into commercial operation by 4 May 2017 and maintain the CAD 6 million security deposit.<sup>192</sup>

150. On 23 February 2011, Windstream made a proposal to the OPA, suggesting that “the force majeure situation persist until such date as Windstream elects to resume the Project, and that the OPA waive its force majeure termination rights under Sections 10.1(g) and (h) of the FIT Contract.”<sup>193</sup> Windstream also requested that “it be permitted to elect when to resume the Project”<sup>194</sup> given the regulatory uncertainty,<sup>195</sup> and that the security deposit be returned for the duration of the event of force majeure.<sup>196</sup>

151. In its response dated 18 March 2011, the OPA rejected Windstream’s requests.<sup>197</sup> The OPA offered “to extend the MCOD for the Project to the earlier of (a) the date on which the Government of Ontario makes a definitive decision to either allow development of the Project or (b) the fifth year anniversary of the original MCOD for the Project (so, May 4, 2020)”<sup>198</sup> and “to waive its force majeure termination rights under Sections 10.1(g) and (h) of the FIT Contract until the

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<sup>190</sup> **Memorial**, para. 269 (citing Policy Decision Notice (MOE), Renewable Energy Approval Requirements of 11 February 2011 (C-494)); **Parties’ Joint Chronology**, p. 13 (citing Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry Number: 011-0089) of 2 February 2011 (C-725); Decision on Policy (MNR), Offshore Wind Power: Consideration of Additional Areas to be Removed from Future Development of 11 February 2011 (C-482)).

<sup>191</sup> **Memorial**, para. 282; **Counter-Memorial**, paras. 270-274.

<sup>192</sup> **Memorial**, para. 280.

<sup>193</sup> **Reply**, para. 376.

<sup>194</sup> **Reply**, para. 376.

<sup>195</sup> **Reply**, para. 376; **Parties’ Joint Chronology**, p. 13 (citing Letter from Chamberlain, Adam (BLG) to Cecchini, Perry and Killeavy, Michael (OPA) of 23 February 2011 (R-223)).

<sup>196</sup> **Reply**, para. 377.

<sup>197</sup> **Reply**, para. 380 (referring to Letter from Killeavy, Michael (OPA) to Chamberlain, Adam (BLG) of 18 March 2011 (R-226)); **Parties’ Joint Chronology**, p. 13 (also citing (R-226)).

<sup>198</sup> **Reply**, para. 382.

earlier of the dates in (a) or (b).”<sup>199</sup> The OPA further offered to reduce WWIS’s security deposit to CAD 3 million.<sup>200</sup>

152. Windstream subsequently approached the OPA with a proposal to replace the Project with a ground-mount solar photovoltaic project that would allow WWIS to preserve its rights under the FIT Contract.<sup>201</sup> On 14 April 2011, Windstream gave a presentation to the OPA about its proposed solar project.<sup>202</sup> However, the proposal was not received favorably, and the Claimant states that during a meeting on 30 May 2011, the OPA made it “clear” to Windstream that the proposed project would “not be considered.”<sup>203</sup>
153. Following the OPA’s rejection, by letter dated 7 June 2011, Windstream requested that the OPA remove its termination right prior to the NTP under Section 2.4 of the FIT Contract and “waive all reporting requirements on Windstream for the duration of the force majeure delay.”<sup>204</sup> In a further letter dated 13 June 2011, Windstream submitted a revised proposal regarding a ground-mount solar project “as an immediate alternative to the 300 MW offshore wind project.”<sup>205</sup> On 24 June 2011, in response to the two letters from Windstream, the OPA repeated its earlier position.<sup>206</sup>
154. On 5 July 2011, Windstream informed the OPA that it was “prepared to accept the five-year extension provided that the force majeure could be further extended if the force majeure conditions were not resolved on time for the Project to achieve commercial operation before it risked triggering the termination provisions.”<sup>207</sup> Windstream also repeated its request that the security deposit be returned.<sup>208</sup>

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<sup>199</sup> Reply, para. 382.

<sup>200</sup> Reply, para. 383.

<sup>201</sup> Memorial, para. 284; Counter-Memorial, para. 276.

<sup>202</sup> Memorial, para. 287; Parties’ Joint Chronology, p. 13 (citing Presentation, Discussion with OPA, Windstream Energy of 14 April 2011 (C-526)).

<sup>203</sup> Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 7 June 2011 (R-247).

<sup>204</sup> Parties’ Joint Chronology, p. 14 (citing Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 7 June 2011 (R-247)).

<sup>205</sup> Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 13 June 2011 (R-248).

<sup>206</sup> Reply, para. 384 (referring to Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 7 June 2011 (R-247); Letter from Baines, Ian (WEI) to Zindovic, Bojana (OPA) of 13 June 2011 (R-248); Letter from Cecchini, Perry (OPA) to Baines, Ian (WEI) of 24 June 2011 (R-250)); Parties’ Joint Chronology, p. 14 (also citing (R-250)).

<sup>207</sup> Reply, para. 386 (referring to CWS-Mars, paras. 56-58; Letter from Chamberlain, Adam (BLG) to Clark, Ron (Aird & Berlis) of 5 July 2011 (R-254), pp. 2-4); Parties’ Joint Chronology, p. 14 (also citing (R-254)).

<sup>208</sup> Reply, para. 387.

155. On 12 October 2011, the OPA responded stating that it had reviewed the content of the 5 July letter and has instructed that “the views of the OPA as set out in its letter of March 18 and June 24 remain unchanged.”<sup>209</sup>
156. After the deferral decision, the MOE developed a research plan to address the issues related to offshore wind development that had been identified as requiring further study, including noise propagation, water quality requirements, technical design requirements and safety issues.<sup>210</sup> According to the Respondent, while a number of studies have in the meantime been completed, several others are still ongoing and are not expected to be completed before the end of 2016.<sup>211</sup>
157. On 9 September 2011, the OPA advised Windstream of its recognition that the delays faced by the Project constituted a valid force majeure event from 22 November 2010.<sup>212</sup> In the same correspondence, the OPA indicated that it would “determine the appropriate relief following the notice of termination of the force majeure event.”<sup>213</sup>
158. The Claimant notes that in October 2011, following the provincial election, Windstream renewed its efforts to have the WWIS Project proceed as a pilot project.<sup>214</sup> Windstream also renewed its requests for a reconfiguration of its Crown land application and for approval to proceed with testing activities on the Project site.<sup>215</sup> These efforts did not produce any results.<sup>216</sup>
159. On 4 May 2012, Windstream sent a “final letter” to the Premier’s Office, asking “why after two years it was still unable to determine when and if the Project would ever be allowed to proceed.”<sup>217</sup> The Claimant states that it did not receive a response to this letter and there was no further correspondence with the Premier’s Office.<sup>218</sup>

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<sup>209</sup> Reply, para. 391 (referring to Email from Lalla, Geetu (Aird & Berlis) to Chamberlain, Adam (BLG) of 12 October 2011 (R-264), attaching Letter from Clark, Ron (Aird & Berlis) to Chamberlain, Adam (BLG) of 12 October 2011); Parties’ Joint Chronology, p. 14 (also citing (R-264)).

<sup>210</sup> Counter-Memorial, para. 277; Parties’ Joint Chronology, p. 13.

<sup>211</sup> Counter-Memorial, paras. 294-299.

<sup>212</sup> Memorial, para. 245; Parties’ Joint Chronology, p. 14 (citing OPA’s Acceptance of Force Majeure Status of 9 September 2011 (C-550)).

<sup>213</sup> Counter-Memorial, para. 233.

<sup>214</sup> Memorial, para. 291.

<sup>215</sup> Memorial, para. 296.

<sup>216</sup> See Memorial, paras. 295-296.

<sup>217</sup> Memorial, para. 299; Parties’ Joint Chronology, p. 15 (citing Email from Baines, Ian (WEI) to Brodhead, John (PO) of 4 May 2012 (C-613)).

<sup>218</sup> Memorial, para. 300.

160. On 10 January 2014, the OPA refused to return WWIS’s letter of credit and waive its right to unilaterally terminate WWIS’s FIT Contract if the Project has not achieved commercial operation by 4 May 2017.<sup>219</sup>

**C. THE PARTIES’ POSITIONS ON THE DISPUTED FACTUAL ISSUES**

**1. The Claimant’s Position**

**(a) The level of uncertainty regarding the regulatory framework**

161. The Claimant contends that there was sufficient regulatory certainty at the time it decided to invest in Ontario.<sup>220</sup> On 24 September 2009, when the FIT Program was launched, the MNR sent a letter to the Claimant acknowledging its Crown land applications and stating that WWIS was required to submit a FIT application within the initial FIT application period in order to maintain the priority position of its AOR application.<sup>221</sup> The press release announcing the launch of the FIT Program and the GEGEA also indicated that Ontario provided “a stable investment environment where companies know what the rules are – giving them confidence to invest in Ontario.”<sup>222</sup> It was generally understood among developers that the MNR would align “its Site Release process and timelines with the OPA’s renewable energy procurement process.”<sup>223</sup>
162. The Claimant submits that the overall REA framework fully applies to offshore wind, including classified facilities and offshore wind facilities.<sup>224</sup> According to the Claimant, the MOE document released on 20 September 2009, which explained to offshore proponents how to meet MOE’s requirements for offshore wind projects under the REA Regulation, made it clear that REA applications for offshore wind projects would be assessed based on site-specific considerations.<sup>225</sup> Accordingly, the REA Regulation provided the Claimant with reasonable certainty regarding the required regulatory assessment process for the Project.<sup>226</sup>

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<sup>219</sup> **Memorial**, paras. 317, 322; **Parties’ Joint Chronology**, p. 16 (citing Letter from OPA to Chamberlain, Adam (BLG) of 10 January 2014 (C-680)).

<sup>220</sup> **Memorial**, para. 428.

<sup>221</sup> **Memorial**, para. 163.

<sup>222</sup> **Reply**, para. 77 (citing Article, Green Energy Rules Make Ontario a North American Leader of 24 September 2009 (C-143), p. 1).

<sup>223</sup> **Memorial**, para. 428 (citing **CER-Powell**, paras. 106-107).

<sup>224</sup> Hearing Transcript (17 February 2016), 14:3-6.

<sup>225</sup> **Reply**, para. 203.

<sup>226</sup> **Reply**, para. 198 (citing **CER-Powell**, paras. 95-102).

163. The Claimant submits that in deciding to apply for a FIT Contract it relied on the MNR's letter of 24 September 2009, along with another letter from Minister Cansfield and Minister Smitherman's February 2009 speech.<sup>227</sup>
164. In the Claimant's view, when it received the FIT Contract, the relevant authorities "all had extensive regulatory and scientific expertise with respect to in-lake developments."<sup>228</sup> The Respondent had committed itself to developing setbacks and noise requirements for offshore wind energy projects which would have led a reasonable developer to expect that the applicable setbacks would be determined based on a project-specific assessment as part of the Offshore Wind Facility Report that project proponents were required to prepare.<sup>229</sup> The REA Regulation and the APRD provided the provincial requirements for offshore wind energy projects, thereby providing the Claimant with reasonable regulatory certainty regarding the assessment process for offshore wind energy.<sup>230</sup> The Claimant also alleges that large-scale offshore developments in the Great Lakes are common and regulators in Ontario have decades of experience in regulating water development as well as extensive knowledge of the Great Lakes ecosystem.<sup>231</sup>
165. According to the Claimant, MOE officials repeatedly noted that the REA Regulation provided a rigorous approval process for offshore wind development.<sup>232</sup> This ensured that there were protections in place to address any potential concerns.<sup>233</sup> The MOE gave no indication that existing regulatory mechanisms were insufficient.<sup>234</sup>
166. The Claimant further considers that the Respondent's approach to the approval process was another tool for creating investor certainty. When the FIT Program was adopted, there was broad coordination across the Ontario Government to "streamline" approvals and to ensure that project proponents received the necessary approvals as expeditiously as possible.<sup>235</sup>

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<sup>227</sup> **Memorial**, para. 161.

<sup>228</sup> **Memorial**, para. 435.

<sup>229</sup> **Memorial**, para. 428 (citing **CER-Powell**, para. 100). *See also* Hearing Transcript (17 February 2016), 19:9 to 20:19.

<sup>230</sup> **Memorial**, para. 428 (citing **CER-Powell**, para. 95).

<sup>231</sup> **Memorial**, para. 428 (citing **CER-Powell**, para. 95).

<sup>232</sup> **Reply**, para. 268 (citing Information Note: *Green Energy Act* and Renewable Energy Approvals of 3 February 2010 (C-797), p. 6; Email from Wallace, Marcia (ENE) to Dumais, Doris (ENE) of 9 February 2010 (C-184); Information Note: *Green Energy Act* and Renewable Energy Approvals for Offshore Wind Facilities of 6 April 2010 (C-806); Email from Wallace, Marcia (ENE) to Postacioglu, Dilek (ENE) et al. of 12 April 2010 (C-807); Presentation (MOE), Offshore Wind, Modernization of Approvals Project, Environmental Programs Division of 23 August 2010 (C-845), slide 5; Renewable Energy Messaging – Master Sheet of 29 November 2010 (C-878), pp. 13-16).

<sup>233</sup> **Reply**, para. 268 (citing Email from Mahmood, Mansoor (ENE) to Dumais, Dora (ENE) of 27 October 2010 (C-860); Key Points for Minister re Wolfe Island of 27 October 2010 (C-861)).

<sup>234</sup> **Reply**, para. 268.

<sup>235</sup> **Reply**, para. 80.



167. While the Claimant concedes that the Respondent provided no “guarantee” that the project would be built, it submits that “the Government committed to doing its part” to ensure that developers would meet the timelines under their respective FIT Contracts.<sup>236</sup> Such commitment was in line with the main purpose of the FIT Program and the GEGEA, namely to get energy projects permitted and built as efficiently and expeditiously as possible.<sup>237</sup> The Claimant points out that, as part of this commitment, the Government implemented a “six-month service guarantee for the issuance of the Renewable Energy Approvals.”<sup>238</sup>
168. The Claimant further relies on MNR emails, which indicate that as early as 2008 MNR officials were confident that existing regulatory mechanisms were sufficient to deal with site-specific concerns for offshore wind projects.<sup>239</sup> Furthermore, during the Claimant’s discussions and interactions with representatives of all the involved Ministries, Government officials repeatedly stated that the Project had the full support of the Ontario Government, that they understood the need for certainty, and that the Government would work with the Claimant to resolve any permitting issues.<sup>240</sup>
169. In the Claimant’s view, it was commercially reasonable to execute the FIT Contract despite the fact that certain regulations for offshore wind energy were not yet in place.<sup>241</sup> The Claimant also rejects the Respondent’s claim that the Project would have been “first of a kind,” maintaining that the “components proposed for this project have been used in many other applications.”<sup>242</sup>
170. The Claimant submits that the FIT Contract was generally viewed by members of the industry as the key requirement in the project development process that would have to be met before any other material milestone would be pursued.<sup>243</sup> In addition, members of the industry understood that the MNR “would support Ontario’s commitment to renewable energy by aligning the Crown land access process with the OPA’s renewable energy procurement process” and that it “would have been commercially reasonable for a contractor who had been awarded a FIT Contract to assume it would receive Crown land tenure in a timely manner.”<sup>244</sup> The Claimant’s expert witness Ms Sarah Powell testified that the regulated community had understood that once one had a FIT

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<sup>236</sup> Reply, para. 79.

<sup>237</sup> Reply, para. 79.

<sup>238</sup> Memorial, para. 117 (citing Article (Ministry of Energy), Ontario Makes it Easier, Faster to Grow Green Energy of 24 September 2009 (C-137)); Reply, para. 82; CER-Powell-2, para. 39.

<sup>239</sup> Memorial, para. 435 (referring to House Note (MNR), Issue: Lifting of the Off-Shore Wind Power Deferral of 17 January 2008 (C-57); Key Messages (MNR) of 15 January 2008 (C-54)).

<sup>240</sup> Memorial, para. 192.

<sup>241</sup> Memorial, para. 227.

<sup>242</sup> Hearing Transcript (21 February 2016), 156:2-6.

<sup>243</sup> Memorial, para. 227 (citing CER-Powell, para. 3); Hearing Transcript (15 February 2016), 25:3-9 and 27:15 to 28:22.

<sup>244</sup> Memorial, para. 227 (citing CER-Powell, para. 3).

Contract, the Ministries would assist the developer with moving through the development process.<sup>245</sup> Ms Powell added that the OPA generally took a pragmatic and commercial approach to contracting and worked cooperatively with FIT Contract holders, which suggested that if a delay had happened, the OPA would likely have considered some form of extension.<sup>246</sup> Similarly, it would have been “commercially reasonable for a developer to assume that permitting of an offshore wind project could have been completed in approximately three years.”<sup>247</sup> A developer could not have reasonably anticipated that Ontario would later reverse its support for offshore wind projects.<sup>248</sup>

171. The Claimant asserts that, by letter dated 9 August 2010, the MNR “provided explicit comfort to Windstream that MNR would not cause regulatory delays to Windstream’s site approval.”<sup>249</sup> According to the Claimant, the letter gave Windstream “comfort that MNR was planning to accommodate the proposed reconfiguration of WWIS’ Crown land applications within the evolving policy direction, and that it would grant Windstream AOR status in a timely manner once the policy review was complete.”<sup>250</sup>

**(b) The reasons for the moratorium**

172. The Claimant argues that, contrary to the Respondent’s official position,<sup>251</sup> the need for further scientific research was not the motivation for imposing the moratorium.<sup>252</sup> According to the Claimant, the Respondent’s suggestion cannot be reconciled with the fact that in 2008 Ontario had already lifted a previous moratorium on offshore wind development imposed in 2006, after confirming that such development was environmentally sound.<sup>253</sup> The Claimant also notes that Minister Cansfield announced at the time that the MNR had taken steps to address environmental concerns regarding the impact of wind power projects.<sup>254</sup>
173. In the Claimant’s view, the moratorium was motivated by the rising costs of renewable energy electricity as well as by considerations of political expediency of the governing Liberal Party in the light of the 2011 elections.<sup>255</sup> The assertion that further scientific research was required was

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<sup>245</sup> Hearing Transcript (18 February 2016), 14:15-20.

<sup>246</sup> Hearing Transcript (18 February 2016), 15:5 to 17:3.

<sup>247</sup> Memorial, para. 227 (citing CER-Powell, para. 3).

<sup>248</sup> Memorial, para. 227 (citing CER-Powell, para. 3); Hearing Transcript (15 February 2016), 55:18-21.

<sup>249</sup> Reply, para. 179 (referring to Letter from Boysen, Eric (MNR) to Baines, Ian (WWIS) of 9 August 2010 (C-334)).

<sup>250</sup> Reply, para. 182 (citing CWS-Roeper-2, para. 29).

<sup>251</sup> Counter-Memorial, para. 297.

<sup>252</sup> Memorial, para. 326.

<sup>253</sup> Memorial, para. 326; Hearing Transcript (15 February 2016), 13:2 to 15:13.

<sup>254</sup> Hearing Transcript (15 February 2016), 13:20 to 14:10.

<sup>255</sup> Memorial, paras. 335-338; Hearing Transcript (15 February 2016), 73:18-21.

only developed as a rationale of expediency after other potential rationales for regulating offshore wind had been abandoned as untenable.<sup>256</sup> The process was driven not by the Ministries' technical and policy experts but by the Premier's Office, the ministers and their political staff.<sup>257</sup> The Claimant notes that there were documents in the Premier's Office that were deleted, some of which may have been relevant to these proceedings. The Claimant requests that an adverse inference be drawn that the deleted documents would have further established that the Premier's Office directed the adoption of the moratorium, and that it was motivated by concerns over costs and public opposition.<sup>258</sup>

174. The Claimant takes issue with the reliability of Mr John Wilkinson's testimony that the moratorium was decided by him, as the then Minister of Environment, and not the Premier's Office.<sup>259</sup> The Claimant notes that the main individual working on renewable energy policy within the MOE, Ms Marcia Wallace, testified that she had not been aware of the decision to defer offshore wind at the time that Mr Wilkinson alleges to have made the decision.<sup>260</sup>
175. As to costs, the Claimant explains that the price for offshore wind power, including for the WWIS project, was CAD 190 per MW hour, and therefore significantly higher than the price of CAD 135 per MW hour to be paid for onshore wind power.<sup>261</sup>
176. In addition, the Claimant contends that in 2010 and 2011 groups opposing wind energy were becoming increasingly active in Ontario.<sup>262</sup> The Premier was frequently greeted by anti-wind protestors while on the campaign trail, and anti-wind groups had organized mail-in campaigns to facilitate complaints to elected officials about wind power and had begun to target the electoral ridings of various liberal members of the Provincial Parliament.<sup>263</sup> When anti-wind opponents had mounted especially strong campaigns against offshore projects, the governing Liberal Party became sensitive to the offshore wind power issue and its perceived impact on the upcoming election.<sup>264</sup>

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<sup>256</sup> **Memorial**, para. 327.

<sup>257</sup> **Memorial**, para. 327; Hearing Transcript (15 February 2016), 62:11-17 and 66:21 to 73:21; Hearing Transcript (26 February 2016), 31:3-6 (referring to Email from Morley, Chris (OPO) to Johnston, Alicia (MEI) et al. of 11 January 2011 (C-911)).

<sup>258</sup> Hearing Transcript (15 February 2016), 73:13-21; Hearing Transcript (26 February 2016), 29:6 to 31:11.

<sup>259</sup> Hearing Transcript (26 February 2016), 35:15 to 36:4.

<sup>260</sup> Hearing Transcript (26 February 2016), 34:3 to 35:23.

<sup>261</sup> **Memorial**, para. 330.

<sup>262</sup> **Memorial**, para. 335.

<sup>263</sup> **Memorial**, para. 335 (citing Article, Talaga, Tanya (Toronto Star), Ontario Scraps Offshore Wind Power Plans of 12 February 2011 (C-498); CWS-Baines, para. 107; Article, McGuinty Vulnerable on Wind Power: Opponent of 12 June 2011 (C-539)).

<sup>264</sup> **Memorial**, para. 336 (citing CWS-Benedetti, para. 39).

177. The Claimant argues that political concerns were particularly influential during two parts of the offshore wind policy-making processes: the period from April to July 2010 when the five-kilometer setback proposal was being discussed and proposed to the MOE, and the period from November 2010 to February 2011, which led to the moratorium being imposed.<sup>265</sup>
178. During the period from April to July 2010, before the proposed five-kilometer setback was posted for public comments, the proposal was being discussed in inter-Ministerial correspondence, which according to the Claimant underlines the absence of a scientific rationale supporting the proposal.<sup>266</sup> According to the Claimant, “MOE employees were careful not to ‘rationalize’ the proposed setback on the basis of scientific reasons or to suggest that it was ‘a science-based number,’”<sup>267</sup> and they were “looking for ecological reasons from MNR to rationalize the number.”<sup>268</sup> The Claimant concludes from the minutes of MOE meetings discussing the setback issue that “the concerns were focused on issues of ‘viewscape,’ as opposed to noise or scientific rationales.”<sup>269</sup> According to the Claimant, the setback of five kilometers was a number “pulled out of the air”<sup>270</sup> in support of a political decision for an “aesthetic setback.”<sup>271</sup>
179. Specifically, the Claimant refers to internal MNR correspondence considering the setback discussion to be “driven politically”<sup>272</sup> and the apparent concern of MNR officials that the five-kilometer setback would prevent all offshore wind projects from being developed.<sup>273</sup> In addition, the Claimant relies on intergovernmental communication (including handwritten notes,<sup>274</sup> emails,<sup>275</sup> and draft communications<sup>276</sup>) to show that the Respondent was concerned about public opposition to offshore wind power.<sup>277</sup>
180. As for the period between November 2010 and February 2011, the Claimant asserts that the Respondent was “looking for ways to move away from offshore development without sending a

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<sup>265</sup> **Memorial**, para. 337.

<sup>266</sup> **Memorial**, para. 340; Presentation (MNR), Offshore Wind Power Development of 19 April 2010 (C-219), p. 5; Handwritten Notes of Cain, Ken (MNR) of 6 May 2010 (C-253), p. 2.

<sup>267</sup> **Memorial**, para. 340; Handwritten Notes of Cain, Ken (MNR) of 2010 (C-172), p. 1; Email from Hamilton, Rachel (ENE) to Duffey, Barry (ENE) of 11 May 2010 (C-256); Email from Leus, Adam (ENE) to Duffey, Barry (ENE) et al. of 26 May 2010 (C-271); Email from Postacioglu, Dilek (ENE) to Leus, Adam (ENE) of 20 April 2010 (C-222).

<sup>268</sup> **Memorial**, para. 340; Email from Cain, Ken (MNR) to Hayward, Neil (MNR) of 23 April 2010 (C-234).

<sup>269</sup> **Memorial**, para. 340; Handwritten Notes of Postacioglu, Dilek (ENE) of 21 April 2010 (C-227), p. 1.

<sup>270</sup> **Memorial**, para. 341; Email from Boysen, Eric (MNR) to Ing, Pearl (MEI) of 21 April 2010 (C-228); Email from Boysen, Eric (MNR) to Lawrence, Rosalyn (MNR) of 22 April 2010 (C-231); Email from Boysen, Eric (MNR) to Cain, Ken (MNR) of 22 April 2010 (C-232).

<sup>271</sup> **Memorial**, para. 343; Email from Lo, Sue (MEI) to Mitchell, Andrew (MEI) of 22 November 2010 (C-386).

<sup>272</sup> **Memorial**, para. 346; Email from Harvey, Deborah (MNR) to Boysen, Eric (MNR) of 26 May 2010 (C-273).

<sup>273</sup> **Memorial**, para. 344; Email from Cain, Ken (MNR) to Harvey, Deborah (MNR) of 18 May 2010 (C-266); Email from Boysen, Eric (MNR) to Duffey, Barry (ENE) et al. of 28 June 2010 (C-304).

<sup>274</sup> **Memorial**, para. 347; Handwritten Notes of Heneberry, Jennifer (MEI) of 10 January 2011 (C-442), p. 1.

<sup>275</sup> **Memorial**, para. 347; Email from Zaveri, Mirrun (MEI) to Powers, Kevin (MEI) of 6 January 2011 (C-433).

<sup>276</sup> **Memorial**, para. 348; Communications Strategy Summary: Offshore Wind of 10 January 2011 (C-446).

<sup>277</sup> **Memorial**, para. 347.

chill through the energy development and manufacturing markets.”<sup>278</sup> In doing so, officials initially considered a rationale of restricting offshore wind development on the basis of constraints in Ontario’s electricity transmission system.<sup>279</sup> [REDACTED]

[REDACTED],<sup>280</sup> the Respondent settled on scientific uncertainty as the basis for imposing the moratorium.<sup>281</sup> The Claimant points out that this rationale was adopted despite MNR staff’s repeated assertions that there were sufficient mechanisms to deal with the development of offshore wind projects.<sup>282</sup>

181. The Claimant further submits that the Respondent’s significant experience with construction projects in fresh water lakes and rivers throughout the province also demonstrates that there was not, in fact, any significant scientific or regulatory uncertainty concerning permitting or environmental effects of offshore wind.<sup>283</sup>
182. According to the Claimant, when it was awarded the FIT Contract, the Respondent had awarded 45 FIT Contracts for waterpower projects with considerable similarities with offshore wind projects.<sup>284</sup> These projects were to be constructed in fresh water and involved similar construction techniques as well as nearly identical approval processes.<sup>285</sup> Moreover, the Claimant contends that the Respondent is routinely requested to issue permits for complex construction projects in fresh water and has conducted extensive studies for these types of projects.<sup>286</sup>
183. The Claimant further suggests that the MOE issued requests for further study proposals in 2013 merely “to give the impression that it is proceeding with the scientific research” and [REDACTED]  
[REDACTED]<sup>287</sup> In making this assertion the Claimant relies on an internal email exchange between MEI and MNR, which provides in relevant part:

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<sup>278</sup> **Memorial**, para. 350; Email from Zaveri, Mirrun (MEI) to Slawner, Karen (MEI) et al. of 8 December 2010 (C-403).

<sup>279</sup> **Memorial**, para. 352.

<sup>280</sup> **Memorial**, para. 356; Report (MEI), *Can Transmission Capability Limits Aid in Buffering Offshore Applications?* of 4 January 2011 (C-421); Email from Norman, Jonathan (MEI) to Lo, Sue (MEI) of 5 January 2011 (C-425); Email from Zaveri, Mirrun (MEI) to Powers, Kevin (MEI) of 6 January 2011 (C-433); Email from Bishop, Cieran (MEI) to Viswanathan, Samira (MEI) of 7 January 2011 (C-437); Email from Heneberry, Jennifer (MEI) to Viswanathan, Samira (MEI) et al. of 10 January 2011 (C-444); Handwritten Notes of Heneberry, Jennifer (MEI) of 10 January 2011 (C-441), paras. 1, 5.

<sup>281</sup> **Memorial**, para. 360; Presentation (MEI), *Offshore Wind: Options for Moving Forward* of 21 January 2011 (C-464).

<sup>282</sup> **Memorial**, para. 361.

<sup>283</sup> **Memorial**, para. 362.

<sup>284</sup> **Memorial**, para. 363.

<sup>285</sup> **Memorial**, para. 363.

<sup>286</sup> **Memorial**, para. 364.

<sup>287</sup> **Reply**, para. 413.

“Also, our ADM [possibly Susan Lo] is suggesting, and I would agree, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>288</sup>

184. The Claimant also contends that the Respondent failed to complete the research that it planned to conduct<sup>289</sup> and that even the completed research studies are unrelated to the Respondent’s stated scientific rationale for imposing the moratorium.<sup>290</sup> The Claimant states that, to its knowledge, there are two studies that have been done (related to noise propagation and decommissioning), while there are six other studies which the MOE had in its research plan which have not been carried out—including the study on water and sediment quality, notwithstanding Mr Wilkinson’s statements as to his concerns about drinking water safety when allegedly making the decision to impose the moratorium.<sup>291</sup> Additionally, the Respondent [REDACTED]

<sup>292</sup>

**(c) The Respondent’s conduct after the imposition of the moratorium**

185. The Claimant submits that the Respondent should have taken steps to ensure that it was not penalized as a result of the moratorium.<sup>293</sup> Even if the Respondent’s intent was to halt the development of all offshore wind projects, the Respondent could have ensured that the Project would be “frozen” rather than “cancelled,” by removing the contractual deadlines under the FIT Contract.<sup>294</sup> According to the Claimant, by failing to ensure that the OPA amended the FIT Contract to insulate the Claimant from the effects of the moratorium, the Respondent failed to keep a number of promises it had previously made to the Claimant, in particular:

- a. that the Project would be frozen rather than cancelled;
- b. that the Claimant would be kept whole through the province negotiating an acceptable solution to ensure that the Claimant was “happy” with the process;
- c. that the government would allow the Project to continue; and

<sup>288</sup> Email from Block, Jennifer (ENERGY) to Cain, Ken (MNR) of 6 March 2013 (C-1094).

<sup>289</sup> Reply, paras. 416-426.

<sup>290</sup> Reply, paras. 427-441.

<sup>291</sup> Hearing Transcript (15 February 2016), 86:7-25.

<sup>292</sup> Reply, paras. 442-446.

<sup>293</sup> Memorial, para. 623.

<sup>294</sup> Memorial, para. 623.

- d. that the OPA would enter into discussions with the Claimant that would include, among other things, constraining the OPA's right to terminate the FIT Contract if the Project was delayed by more than two years.<sup>295</sup>
186. According to the Claimant, the last issue was of particular importance because the FIT Contract terms allowed the OPA to terminate the Contract if the Project was delayed for more than two years from its MCOB.<sup>296</sup> However, despite these commitments, the OPA rejected the Claimant's proposals to amend the FIT Contract to ensure that it would not be subject to termination while the moratorium remained in effect.<sup>297</sup>
187. In particular, the Claimant points out that in its first proposal it requested that it be permitted to elect when to resume the Project "given that it remains unclear at this stage when a commercially reasonable environmental approvals and Crown land site release process for fresh water off-shore wind will be completed, or what those processes will entail."<sup>298</sup> It also requested the return of its completion and performance security for the duration of the event of force majeure.<sup>299</sup> In its second proposal, the Claimant stated that it was prepared to accept the five-year extension proposed by the Respondent, "provided that the force majeure could be further extended if the force majeure conditions were not resolved on time for the Project to achieve commercial operation before it risked triggering the termination provisions."<sup>300</sup>
188. The Claimant further contends that it was not in a position to accept what it considers an "unreasonable" offer from the OPA.<sup>301</sup> Under the OPA's offer, the Commercial Operation Date for the Claimant's FIT Contract would have been extended by a maximum of five years while the Project remained under force majeure, but the Contract could still have been terminated if the Project did not achieve commercial operation by 4 May 2020.<sup>302</sup> The Claimant explains that it properly decided not to accept this offer, because Ontario refused to specify the length of the moratorium.<sup>303</sup> The Claimant notes that, in hindsight, the moratorium "did last longer than five years."<sup>304</sup>

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<sup>295</sup> Memorial, para. 12.

<sup>296</sup> Memorial, para. 13.

<sup>297</sup> Reply, para. 372.

<sup>298</sup> Reply, para. 376; Letter from Chamberlain, Adam (BLG) to Cecchini, Perry and Killeavy, Michael (OPA) of 23 February 2011 (R-223), p. 3.

<sup>299</sup> Reply, para. 377; Letter from Chamberlain, Adam (BLG) to Cecchini, Perry and Killeavy, Michael (OPA) of 23 February 2011 (R-223), p. 3.

<sup>300</sup> Reply, para. 386; CWS-Mars-2, paras. 56-58; Letter from Chamberlain, Adam (BLG) to Clark, Ron (Aird & Berlis) of 5 July 2011 (R-254), pp. 2-4.

<sup>301</sup> Reply, para. 357.

<sup>302</sup> Reply, para. 356; Hearing Transcript (15 February 2016), 81:9-12.

<sup>303</sup> Reply, para. 357.

<sup>304</sup> Hearing Transcript (15 February 2016), 82:12-13.

**(d) The current status of the Project**

189. The Claimant contends that, contrary to the Respondent's assertions,<sup>305</sup> the Project has effectively been "cancelled." This is because, even if the Respondent were to lift the moratorium, the Project could no longer be built before the OPA's right to terminate the FIT Contract would be triggered.<sup>306</sup> According to the Claimant, this right will inevitably arise when the Project fails to achieve commercial operation two years after the Project's MCOD, i.e. by 4 May 2017.<sup>307</sup>
190. In addition, the Claimant points out that the development and construction of the Project can no longer be financed, since the FIT Contract is subject to unilateral termination by the OPA.<sup>308</sup> The Claimant highlights that the OPA has exercised the power to terminate projects that are delayed by more than 24 months in meeting their MCOD in the past.<sup>309</sup> According to the Claimant, the fact that the OPA would be permitted to terminate the FIT Contract even if the Claimant built the Project and brought it into operation on a date after May 2017 has rendered the Project impossible to finance.<sup>310</sup>
191. In addition, the Claimant argues that, even if the OPA were to waive its ability to terminate, the "uncertainty around offshore wind and mistrust in the investor community" would persist, so that "none of the strategic partners, banks, pension funds, and utilities that Windstream was negotiating with would entertain an investment in the Project."<sup>311</sup> In particular, the Claimant points out that there was now a "[c]ontract [t]ermination [r]isk," "a massive amount of mistrust in the investor community," "a high level of counter party risk to the contract," "[p]olicy [u]ncertainty," "[s]upply [c]hain [d]estruction," and a general "[n]egative [p]ublic [p]erception" of the Project.<sup>312</sup>
192. The Claimant further contends that, as a result of the moratorium and the Government's refusal to insulate the Claimant against its consequences, the Project has become substantially worthless and not financeable.<sup>313</sup> According to the Claimant, while "nominal value may be attributed to past costs incurred related to certain assets of the Project, including the meteorological tower and the studies performed," given that "a potential purchaser ... would not be able to earn future

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<sup>305</sup> Counter-Memorial, paras. 24, 260, 265, 266, 268, 269.

<sup>306</sup> Reply, para. 399; CER-Bucci, p. 9; CER-Bucci-2, pp. 3, 4, 16.

<sup>307</sup> Reply, para. 405.

<sup>308</sup> Memorial, paras. 317, 319; OPA FIT Contract, Schedule 1, General Terms and Conditions of 4 May 2010 (C-245), s. 10.1 (g).

<sup>309</sup> Memorial, paras. 247-249, 317; Reply, para. 405; Article (tbnewswatch.com), Contract Scrapped of 25 July 2014 (C-706).

<sup>310</sup> Memorial, para. 320.

<sup>311</sup> Memorial, paras. 323, 325.

<sup>312</sup> Memorial, para. 324; CWS-Ziegler, para. 18.

<sup>313</sup> Memorial, paras. 14, 608; Reply, para. 407; Hearing Transcript (15 February 2016), 89:6 and 90:23-24.



profits from those assets” under the current circumstances, he “would not likely ascribe any value to these assets.”<sup>314</sup>

## **2. The Respondent’s Position**

### **(a) The level of uncertainty regarding the regulatory framework**

193. The Respondent contends that the Claimant was aware of the lack of necessary regulatory details at the time it made the decision to invest. The Government of Ontario had yet to finalize the guidance material for offshore wind and had no significant experience in regulating large-scale offshore wind projects.<sup>315</sup> The Respondent maintains that the Project would have been “first of a kind” as no offshore wind project in Ontario had ever gone through an REA process or federal environmental assessment.<sup>316</sup> In addition, not only would the Claimant’s Project have been the first offshore wind project in North America, it would have been only the second freshwater offshore wind project anywhere in the world.<sup>317</sup> As to the Claimant’s assertion that the Project is not “first of a kind” because it comprises pre-existing components, the Respondent’s expert testified that these components have never before been merged together in an approvals process for offshore wind.<sup>318</sup>
194. When the FIT Program was launched, “only two of the sixteen proponents that applied to MNR for Crown land to develop offshore wind projects by December 2008 applied for a FIT Contract, despite the fact that seven of them had already obtained AOR status and were therefore eligible to proceed to the permitting stage.” With no experience having been developed in the Province (or anywhere else in North America), neither the industry nor the Government of Ontario was ready for the Project.<sup>319</sup>
195. According to the Respondent’s account, the 19 April 2010 meeting was designed to discuss Ontario’s policy on offshore wind in general, as opposed to discussing the Claimant’s specific projects.<sup>320</sup> The intention, according to the Respondent, was to provide the vision, while identifying the challenges faced by the Respondent.<sup>321</sup>

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<sup>314</sup> **Memorial**, para. 321; **CER-Taylor/Low**, s. 5.

<sup>315</sup> **Counter-Memorial**, para. 111; **Hearing Transcript (19 February 2016)**, 234:1-3.

<sup>316</sup> **Hearing Transcript (19 February 2016)**, 233:15-24.

<sup>317</sup> **Counter-Memorial**, para. 184.

<sup>318</sup> **Hearing Transcript (19 February 2016)**, 325:9-16.

<sup>319</sup> **Counter-Memorial**, para. 8.

<sup>320</sup> **Counter-Memorial**, para. 84 (citing **RWS-Dumais**, paras. 8, 17-31, 52-53).

<sup>321</sup> **Counter-Memorial**, para. 194 (citing Email from Baines, Ian (WEI) to Roeper, Uwe (Ortech) of 14 April 2010 (C-214)).

196. In addition, the Respondent contends that the Claimant was aware of the lack of necessary details in the REA Regulation.<sup>322</sup> The Claimant itself expressed concerns with regard to the absence of “established guidelines for access and control of off-shore property rights available for renewable energy projects, adding to the uncertainty of the REA process.”<sup>323</sup> According to the Respondent, the Claimant’s knowledge of the underdeveloped state of offshore REA requirements is likely the reason why the Claimant never formally initiated the process for applying for an REA – because it had difficulty discerning what information it would have to submit.<sup>324</sup>
197. The Respondent refers to several documents to support its claim that the Claimant knew of the regulatory uncertainty prior to entering into the Contract.<sup>325</sup> These documents include Ortech’s presentation prepared for the Claimant suggesting “concerns ... over staff constraints at MOE to process REA applications”<sup>326</sup> and Ortech’s letter dated 10 May 2011 indicating that the relevant agencies “do not have well established guidelines for off-shore project adding to the uncertainty of the REA process.”<sup>327</sup> The Respondent also refers to another letter from Ortech to the Claimant describing the timeline proposed by the MNR to review its policy on Crown land access as “too long”<sup>328</sup> and a document prepared by the Claimant mentioning concerns about “A High Degree of Regulatory Uncertainty.”<sup>329</sup>
198. Indeed, the lack of regulatory certainty was the reason cited by the Claimant in its requests for FIT Contract signing extensions, including its requests after the MOE’s 25 June 2010 EBR posting.<sup>330</sup> Under the circumstances, the Claimant could have no legitimate expectations that the introduction of the GEGEA and the mere existence of the REA Regulation meant that its project would be able to proceed quickly through the REA process.<sup>331</sup>
199. The Respondent further contends that the Claimant had reason to be concerned about the development and construction risks of its Project.<sup>332</sup> Such risks included seasonal construction

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<sup>322</sup> Counter-Memorial, para. 427.

<sup>323</sup> Counter-Memorial, para. 428 (citing Windstream, Report to the Board of Directors, Windstream Energy LLC Wolfe Island Shoals Wind Project, Eight Month Work Schedule and Budget of 30 August 2010 (R-138), p. 13).

<sup>324</sup> Counter-Memorial, paras. 84-85, 430.

<sup>325</sup> Rejoinder, para. 129.

<sup>326</sup> Rejoinder, para. 129; Ortech, Presentation, “FIT Program, What Has Changed? Everything!” of August 2009 (C-130), p. 5.

<sup>327</sup> Rejoinder, para. 131; Ortech, Project Management Plan for the Wolfe Island Shoals Wind Farm of 10 May 2010 (R-105), pp. 11-12.

<sup>328</sup> Rejoinder, para. 134; Email from Roeper, Uwe (Ortech) to Baines, Ian (Windstream) of 7 June 2010 (R-528), p. 5.

<sup>329</sup> Rejoinder, para. 135; WWIS, Current Project Status and Regulatory Issues of 8 June 2010 (R-529).

<sup>330</sup> Counter-Memorial, para. 430 (citing Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) of 10 August 2010 (C-340); Email from Chamberlain, Adam (BLG) to Cecchini, Perry (OPA) of 29 June 2010 (R-121)).

<sup>331</sup> Counter-Memorial, para. 430.

<sup>332</sup> Counter-Memorial, para. 13.

restrictions and weather disruptions, the lack of available specialized vessels, and the time required for manufacturing the foundations for the wind turbines.<sup>333</sup> Moreover, the Claimant had even more reason to be concerned when on 25 June and 18 August 2010, the MOE and the MNR, respectively, posted for public comment on the Environmental Registry policy proposal notices regarding offshore wind and access to Crown land for offshore wind projects.<sup>334</sup> The Respondent highlights that the proposal notices explained that work on the regulatory framework for offshore wind development was ongoing, and that the requirements for offshore wind projects under the REA Regulation remained incomplete.<sup>335</sup>

200. In light of this regulatory uncertainty, the Respondent submits that the Claimant made three requests to the Respondent, which the Respondent however was unable to accommodate.<sup>336</sup> First, the Claimant requested to change its Crown land application to a different area. Second, it asked the MEI to instruct the OPA to provide the Claimant with additional time to complete the Project. Finally, the Claimant asked the MOE to confirm that the five-kilometer setback would not apply to the areas relevant to the Project.<sup>337</sup> The Respondent further refers to an exchange that took place on 10 August 2010 between the Claimant and the OPA, in which the Claimant reiterated its concern with respect to the unresolved regulatory uncertainty.<sup>338</sup>
201. The Respondent contends that the Government did not provide any assurances to the Claimant in the months preceding the execution of the Contract.<sup>339</sup> In particular, contrary to the contention of one of the Claimant's witnesses,<sup>340</sup> MNR officials made no commitment with respect to facilitating access to Crown land.<sup>341</sup> Indeed, according to the Respondent, the relevant MNR officials "rebuffed the Claimant's attempts to extract assurances in relation to its applications for access to Crown land for the Project."<sup>342</sup>
202. In the Respondent's view, the Claimant assumed significant risks when it signed the FIT Contract on 20 August 2010 while the MOE was still receiving feedback from the public and conducting its own research.<sup>343</sup> More specifically, the Respondent contends that, by signing the Contract, the

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<sup>333</sup> Counter-Memorial, para. 13.

<sup>334</sup> Counter-Memorial, para. 14.

<sup>335</sup> Counter-Memorial, para. 119.

<sup>336</sup> Rejoinder, para. 144.

<sup>337</sup> Rejoinder, para. 143; WEI Briefing Document of 24 June 2010 (C-294), p. 2.

<sup>338</sup> Rejoinder, para. 148; Email from Ungerman, Paul (MEI) to Benedetti, Chris (Sussex Strategy) of 10 August 2010 (C-340), p. 1.

<sup>339</sup> Rejoinder, paras. 170-174.

<sup>340</sup> CWS-Baines, para. 16.

<sup>341</sup> Rejoinder, para. 173 (citing RWS-Dumais-1, para. 21; RWS-Lawrence-1, paras. 29-32; RWS-Lawrence-2, para. 4).

<sup>342</sup> Rejoinder, para. 174; CWS-Baines-2, para. 33.

<sup>343</sup> Counter-Memorial, para. 16.

Claimant accepted all the rights and obligations stipulated in the FIT Contract.<sup>344</sup> Shortly after signing the FIT Contract, MNR officials reminded the Claimant that “there was no policy or procedure in place for offshore development.”<sup>345</sup> The Respondent refutes the suggestion by the Claimant that offshore wind projects are no different than onshore wind projects, referring to the evidence and testimony of its experts that described the differences in costs and construction.<sup>346</sup>

203. The MNR also informed the Claimant that it was free to apply for permits to commence field studies, such as surveying or sampling, while the public consultations on offshore wind continued and the site release process was on hold. However, the Respondent insists that officials made it clear that the Claimant would proceed with any such studies at its own risk, given that the policy consultations were ongoing.<sup>347</sup>
204. The Respondent further points out that the Claimant gambled that the MOE would adopt only a five-kilometer setback as a means of addressing all of the concerns raised by the public and the research.<sup>348</sup> Given that 85% of the Crown land that the Claimant had applied for was located within the proposed five-kilometer setback, the Claimant also gambled that it would be allowed to swap its existing Crown land applications for Crown land located outside the proposed five-kilometer setback.<sup>349</sup> Finally, in signing its FIT Contract, the Claimant accepted the OPA’s termination rights and gambled that it would be able to bring its project into commercial operation within five years, despite being well aware that the regulatory process for its permits and approvals was still under development.<sup>350</sup>
205. In addition, the Respondent contends that the Claimant’s reliance on “general statements by ministers” was unreasonable.<sup>351</sup> Specifically, the Respondent submits that Minister Cansfield’s statement referred to by the Claimant, according to which Ontario “was open for business” was made in 2008, prior to the development of the FIT Program.<sup>352</sup> Similarly, the Respondent points out that Minister Smitherman’s representation that the GEGEA “provided certainty”<sup>353</sup> was made prior to the GEGEA coming into force.<sup>354</sup> According to the Respondent, this statement “could not accurately reflect Ontario’s efforts to operationalize the streamlined approvals process for

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<sup>344</sup> Counter-Memorial, para. 222.

<sup>345</sup> Counter-Memorial, para. 226; Meeting Minutes (MNR), Wolfe Island Shoals MNR Kick Off Meeting of 9 September 2010 (C-357), p. 2; RWS-Lawrence, paras. 41-42.

<sup>346</sup> Hearing Transcript (26 February 2016), 149:4 to 151:13.

<sup>347</sup> Counter-Memorial, para. 226.

<sup>348</sup> Counter-Memorial, para. 17.

<sup>349</sup> Counter-Memorial, para. 17.

<sup>350</sup> Counter-Memorial, para. 17.

<sup>351</sup> Rejoinder, para. 152.

<sup>352</sup> Rejoinder, para. 153.

<sup>353</sup> Reply, para. 524.

<sup>354</sup> Rejoinder, paras. 154-155.

renewable energy projects” and “could not have created a reasonable or objective expectation that the regulatory framework was or would be fully developed for offshore wind projects” at the time of the execution of the FIT Contract.<sup>355</sup>

**(b) The reasons for the moratorium**

206. The Respondent contends that the Claimant’s assertions regarding the motivation underlying the deferral are not supported by the evidence.<sup>356</sup> In particular, the Respondent submits that there is no evidence in the record to support the Claimant’s allegation that the decision to defer offshore wind development was made because of electoral politics.<sup>357</sup> The Respondent points out that Mr Wilkinson, the Minister of the Environment at the time, has confirmed that his decision had nothing to do with politics.<sup>358</sup> The Respondent denies the Claimant’s inference that the Premier’s Office directed the deferral decision because of political motivations, noting that “the MOE had been concerned for at least six months prior [to the decision] about the lack of standards and the lack of science to justify the new standards.”<sup>359</sup> According to the Respondent, “the decision to defer offshore development was taken by the Minister of the Environment upon being informed that the regulatory framework to approve projects was unfinished,”<sup>360</sup> as confirmed by the testimony of Mr Wilkinson.<sup>361</sup> The Respondent emphasizes that the MOE based the deferral decision on public consultation spanning various considerations such as “the protection of human health and the environment,” “ecological considerations,” “cultural resources,” “shipwrecks,” “shipping lanes,” “recreational use,” “drinking water” and “beach erosion.”<sup>362</sup>
207. As such, the Respondent argues, the decision to defer offshore wind projects was grounded in the precautionary principle, which suggests waiting until sufficient research had been conducted, so that an adequately informed policy framework could be developed.<sup>363</sup> While the Respondent concedes that data existed for onshore wind facilities, it submits that the MOE lacked the information required to understand the impact that the construction and operation of an offshore wind facility would have on the environment.<sup>364</sup> Research was required to address numerous

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<sup>355</sup> Rejoinder, para. 155.

<sup>356</sup> Counter-Memorial, paras. 390-391.

<sup>357</sup> Counter-Memorial, para. 391.

<sup>358</sup> Counter-Memorial, para. 391 (citing RWS-Wilkinson, paras. 21-22).

<sup>359</sup> Hearing Transcript (15 February 2016), 185:24 to 186:7.

<sup>360</sup> Hearing Transcript (26 February 2016), 158:3-12.

<sup>361</sup> Hearing Transcript (26 February 2016), 162:16 to 163:1.

<sup>362</sup> Hearing Transcript (26 February 2016), 160:17 to 162:15.

<sup>363</sup> Counter-Memorial, para. 397; Hearing Transcript (15 February 2016), 179:7-10.

<sup>364</sup> Counter-Memorial, para. 397 (citing RWS-Wilkinson, paras. 9-16).

concerns, including noise emissions, water quality, disturbance on benthic life forms, and the potential of structural failure.<sup>365</sup>

208. The Respondent submits that Ontario was in collaboration with [REDACTED]<sup>366</sup>

[REDACTED]  
[REDACTED]  
[REDACTED]<sup>367</sup> The Respondent acknowledges that [REDACTED]  
[REDACTED] did not go as planned, but argues that this cannot be said to “indicate that Ontario never intended to undertake the science necessary to lift the deferral.”<sup>368</sup>

209. Specifically, in the Respondent’s view, the decision not to proceed with offshore wind was necessary to allow the regulator sufficient time to determine the rules, requirements and standards that the proponent of an offshore wind facility would have to satisfy prior to the issuance of an REA.<sup>369</sup> Since the regulatory requirements could be the subject of “intense” scrutiny by stakeholders and potential litigation, the Respondent submits that it needed to ensure that the approval process was based on solid policy and scientific grounds.<sup>370</sup>

210. The Respondent further points out that it is continuing to pursue the necessary research for the development of the regulatory framework for offshore wind facilities.<sup>371</sup> In particular, the Respondent claims that it is currently conducting noise and decommissioning studies which will assist with policy development.<sup>372</sup> As to Mr Wilkinson’s concerns about drinking water, the Respondent submits that these were “partially addressed” in an internal study on water quality impact within Lake Ontario (which provided a preliminary conclusion that the impact of an offshore wind turbine would likely be quite small).<sup>373</sup>

211. At the hearing, the Respondent confirmed that Ontario is “not planning to commence further scientific studies in the near term.”<sup>374</sup> However, the Respondent argues that it “should not be faulted for not prioritizing this work.”<sup>375</sup> This is because, the Respondent argues, “[g]iven the Claimant’s decision not to freeze its FIT contract, no project will be proceeding in the near future.”<sup>376</sup> That is, given the Claimant’s “admission” that it could not proceed with developing

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<sup>365</sup> **Counter-Memorial**, para. 397.

<sup>366</sup> Hearing Transcript (15 February 2016), 181:2 to 182:4 and 206:25 to 207:19; Hearing Transcript (26 February 2016), 146:4-8.

<sup>367</sup> Hearing Transcript (15 February 2016), 207:20-22.

<sup>368</sup> Hearing Transcript (26 February 2016), 146:23 to 147:1.

<sup>369</sup> **Counter-Memorial**, para. 403.

<sup>370</sup> **Rejoinder**, para. 182; Hearing Transcript (25 February 2016), 145:23 to 146:8.

<sup>371</sup> **Counter-Memorial**, para. 403.

<sup>372</sup> **Rejoinder**, para. 114.

<sup>373</sup> Hearing Transcript (15 February 2016), 210:16-23.

<sup>374</sup> Hearing Transcript (15 February 2016), 210:24 to 211:2.

<sup>375</sup> Hearing Transcript (15 February 2016), 211:2-3; **Rejoinder**, para. 105 (referring to **Reply**, para. 511).

<sup>376</sup> Hearing Transcript (15 February 2016), 211:3-6.

its project after May 2012, the Respondent submits that “any science that Ontario plans to undertake after May 2012 is irrelevant for the purposes of addressing Windstream’s claim.”<sup>377</sup> The Respondent notes, however, that once the noise and decommissioning studies are completed, Ontario will analyze the findings to determine whether any further study is required.<sup>378</sup>

212. The Respondent also takes issue with the Claimant’s suggestion that the MOE issued requests for further study proposals “to give the impression that it is proceeding with the scientific research”<sup>379</sup> [REDACTED].<sup>380</sup> The Respondent explains that the internal MEI and MNR email relied upon by the Claimant should be construed as offering “a relevant consideration by MEI” rather than “MOE’s and MNR’s justification for undertaking the studies.”<sup>381</sup>

**(c) The Respondent’s conduct after the imposition of the moratorium**

213. The Respondent argues that, while the OPA put forward a number of reasonable solutions to accommodate the Claimant in the context of the deferral, the Claimant chose to reject those offers and make unreasonable and unrealistic demands instead.<sup>382</sup> In particular, the Respondent points out that the Claimant not only sought an extension of its MCOD until such date as the Claimant elected to resume the project as well as the return of the full amount of the security deposit, a removal of the time limitations on force majeure, and removal of the OPA’s termination right; it also made requests unrelated to mitigating the impact of the deferral, such as the removal of its domestic content requirement.<sup>383</sup>
214. The Respondent states that OPA was willing to allow flexibility regarding the security provided, the specific force majeure status, and the termination rights of both Parties, and that the Claimant was offered a five-year extension of the MCOD.<sup>384</sup> However, the Claimant failed to accept the OPA’s offer and made demands that could not have been entertained by OPA.<sup>385</sup> In this regard, Mr Perry Cecchini testified that the Claimant’s demand was equivalent to asking for perpetual force majeure, which would have been “irresponsible” for the OPA to allow when there needed to be an end date.<sup>386</sup> The Respondent also alleges that none of the Claimant’s proposed alternative projects were acceptable since they were inconsistent with the FIT Rules and would result in

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<sup>377</sup> Hearing Transcript (26 February 2016), 147:19-24.

<sup>378</sup> Hearing Transcript (15 February 2016), 211:11-15.

<sup>379</sup> Reply, para. 413.

<sup>380</sup> Rejoinder, para. 113.

<sup>381</sup> Rejoinder, para. 113.

<sup>382</sup> Counter-Memorial, para. 455.

<sup>383</sup> Counter-Memorial, para. 448; RWS-Cecchini, para. 21.

<sup>384</sup> Counter-Memorial, para. 488.

<sup>385</sup> Counter-Memorial, para. 489; RWS-Cecchini, para. 22.

<sup>386</sup> Hearing Transcript (17 February 2016), 239:12 to 240:9.

major implications to ratepayers and other renewable energy projects already under development.<sup>387</sup>

215. The Respondent states that the negotiations show that the Claimant wanted to dump the existing deal under the FIT Contract and execute a new, better deal on its own terms and timeline.<sup>388</sup> The Respondent therefore concludes that “the fact that the Claimant’s project will not be able to proceed to permitting is because the Claimant declined the opportunity to have its contract frozen.”<sup>389</sup>

**(d) The current status of the Project**

216. The Respondent states that the current legal status of the contract is that it is in force majeure.<sup>390</sup>
217. The Respondent points out that when it decided to defer all offshore wind projects, it canceled all Crown land applications for offshore wind sites, with the exception of the Claimant’s. Given the Claimant’s unique position as the only FIT Contract holder for offshore wind, its Contract was frozen until the regulatory framework could be finalized.<sup>391</sup> The Respondent attributes this arrangement to the fact that the “OPA was willing to preserve [the Claimant’s] opportunity to pursue a contract” and “didn’t want the Claimant’s [P]roject to fail because ... of government’s lack of readiness to approve it.”<sup>392</sup> According to the Respondent, the deferral is intended to last only as long as necessary to conduct scientific research and develop and implement an adequately informed framework for offshore wind projects in Ontario.<sup>393</sup> When the decision to implement the deferral was made, this task was expected to take approximately 3-5 years.<sup>394</sup>
218. The Respondent further contends that the Claimant has been repeatedly informed that its Project is only put on hold until the regulatory rules and requirements for offshore wind projects are developed.<sup>395</sup> According to the Respondent, the Project is therefore merely “frozen” and still “kept alive.”<sup>396</sup> That is, it has not been terminated by the OPA.<sup>397</sup> In addition, the Respondent points out that “the legal status of other assets of the project ... remain unaffected.”<sup>398</sup>

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<sup>387</sup> Counter-Memorial, para. 451.

<sup>388</sup> Hearing Transcript (15 February 2016), 205:11-13.

<sup>389</sup> Hearing Transcript (15 February 2016), 212:10-13.

<sup>390</sup> Hearing Transcript (15 February 2016), 203:19-21.

<sup>391</sup> Counter-Memorial, paras. 21, 260 (referring to RWS-Lo, para. 37).

<sup>392</sup> Hearing Transcript (15 February 2016), 202:8-24.

<sup>393</sup> Counter-Memorial, para. 483.

<sup>394</sup> Counter-Memorial, para. 483.

<sup>395</sup> Counter-Memorial, paras. 260, 263-276, 353, 487.

<sup>396</sup> Counter-Memorial, para. 487; Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484); Hearing Transcript (15 February 2016), 252:21-23.

<sup>397</sup> Hearing Transcript (15 February 2016), 252:22-23.

<sup>398</sup> Hearing Transcript (15 February 2016), 203:22-25.



#### IV. THE JURISDICTION OF THE TRIBUNAL

219. There is no dispute between the Parties as to the Tribunal's jurisdiction to hear a claim on whether the acts of an organ of the Government of Ontario such as the MNR, the MOE, the MEI and the Premier's Office are in breach of Chapter 11 of NAFTA.<sup>399</sup> However, there is disagreement as to whether the Tribunal has jurisdiction to hear claims based on the attribution of conduct of the OPA to the Respondent.<sup>400</sup> The Parties also disagree on whether this question is relevant at all.
220. The Respondent submits that the measures challenged by the Claimant are attributable to the Government of Ontario, not the OPA.<sup>401</sup> According to the Respondent, the Claimant's challenges are directed to the Government of Ontario, and the MEI in particular, for allegedly failing to cause the OPA to take certain measures.<sup>402</sup> Therefore, the question whether acts of the OPA can be attributed to the Respondent for the purpose of Chapter 11 should be irrelevant.<sup>403</sup> However, if the Claimant were challenging measures of the OPA, the Respondent contends that the Claimant has failed to establish that the Tribunal has jurisdiction to consider whether such measures breached the Respondent's obligation under the NAFTA.<sup>404</sup>
221. The Claimant states that its primary case is indeed that the MEI's failure to act should be attributed to the Respondent.<sup>405</sup> Given that the MEI exercised both *de jure* and *de facto* control over the OPA,<sup>406</sup> the Respondent could have caused the OPA to comply with its commitment to "freeze" the Claimant's FIT Contract.<sup>407</sup> However, if the Tribunal were to find that this omission is not attributable to the MEI, the Claimant suggests that the omission would necessarily have to be attributable to the OPA.<sup>408</sup> In that case, the question of whether measures of the OPA can in turn be attributed to the Respondent would not be "wholly irrelevant in this arbitration."<sup>409</sup>

##### A. THE RESPONDENT'S POSITION

222. According to the Respondent, to the extent that the Claimant is challenging measures adopted or maintained by the OPA, it has the burden of establishing the jurisdiction of this Tribunal to

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<sup>399</sup> Counter-Memorial, para. 306; Memorial, paras. 509-511.

<sup>400</sup> Counter-Memorial, para. 300; Reply, para. 626. The Parties agree that the OPA is a State enterprise and that, pursuant to Article 1503 of NAFTA, the acts of a State enterprise are attributable to the State if they were performed in the exercise of delegated public authority: Counter-Memorial, paras. 310-316; Reply, para. 633; Rejoinder, para. 35.

<sup>401</sup> Counter-Memorial, para. 300.

<sup>402</sup> Counter-Memorial, para. 303.

<sup>403</sup> Counter-Memorial, para. 300.

<sup>404</sup> Rejoinder, para. 41.

<sup>405</sup> Reply, para. 626.

<sup>406</sup> Memorial, paras. 512-513.

<sup>407</sup> Reply, para. 626.

<sup>408</sup> Reply, para. 632.

<sup>409</sup> Counter-Memorial, para. 303; Reply, para. 632.

consider the measures.<sup>410</sup> The Respondent relies on *Apotex v. United States*, in which the tribunal held that “Apotex (as claimant) bears the burden of proof with respect to the factual elements necessary to establish the Tribunal’s jurisdiction.”<sup>411</sup>

223. The Respondent submits that the OPA does not qualify either as a *de jure* or a *de facto* State organ under international law.<sup>412</sup> In order to qualify as a *de jure* State organ, the OPA would need to have the status of a State organ under domestic law, as required by Article 4 of the International Law Commission’s Articles on State Responsibility (the “ILC Articles”).<sup>413</sup> However, in the Respondent’s view, the OPA acts independently and is not an agent of the Crown, even if it was created by a statute.<sup>414</sup> Moreover, in order to be considered a *de facto* State organ, the OPA would have to act “in ‘complete dependence’ on the State, of which [it is] ultimately merely the instrument.”<sup>415</sup> However, the OPA does not act in such a manner, nor does the Respondent exercise complete control over it.<sup>416</sup>

224. According to the Respondent, under Article 1503(2) of NAFTA, the Tribunal has jurisdiction to consider measures of a State enterprise only insofar as those “measures were adopted or maintained in the exercise of delegated governmental authority.”<sup>417</sup> The Respondent alleges that the Claimant has failed to point to an act or omission of the OPA that was carried out in the exercise of delegated governmental authority.<sup>418</sup> In particular, the Respondent points out that the fact that the OPA was established by statute does not automatically render all of its acts “an exercise of delegated governmental authority.”<sup>419</sup> Rather, according to the Respondent’s interpretation of Article 1503(2), “only a limited set of acts of State enterprises are subject to Chapter 11.”<sup>420</sup>

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<sup>410</sup> Counter-Memorial, para. 304.

<sup>411</sup> Counter-Memorial, para. 304 (referring to *Apotex Inc. v. The Government of the United States of America* (UNCITRAL), Award on Jurisdiction and Admissibility of 14 June 2013 (RL-6), para. 150 (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Award of 15 April 2009, paras. 58-64)).

<sup>412</sup> Counter-Memorial, para. 307.

<sup>413</sup> Counter-Memorial, para. 308; Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) (RL-29), Article 4; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (I.C.J. Reports 2007), Judgment of 26 February 2007 (RL-27), para. 386.

<sup>414</sup> Counter-Memorial, para. 308.

<sup>415</sup> Counter-Memorial, para. 309; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, (I.C.J. Reports 2007), Judgment of 26 February 2007 (RL-27), paras. 392-393.

<sup>416</sup> Counter-Memorial, para. 309.

<sup>417</sup> Counter-Memorial, para. 301.

<sup>418</sup> Counter-Memorial, para. 301.

<sup>419</sup> Rejoinder, para. 36.

<sup>420</sup> Rejoinder, para. 36.

225. The Respondent takes the view that the OPA was not exercising any delegated governmental authority in its negotiations with the Claimant.<sup>421</sup> First, while the OPA designed the FIT Program pursuant to the Minister of Energy’s letter dated 24 September 2009, it was not delegated any governmental authority to make decisions on regulatory instruments;<sup>422</sup> the governmental authority was exercised by the relevant Ministries.<sup>423</sup> Second, in the Respondent’s view, commercial negotiations and contracts entered into in that context do not qualify as “an exercise of governmental authority” even if they were made in furtherance of a public policy objective.<sup>424</sup>
226. The Respondent also notes that the Claimant has not introduced any evidence that the Minister of Energy delegated to the OPA the implementation of the alleged commitment to the Claimant that it would not be negatively affected by the deferral.<sup>425</sup> Moreover, even if there had been evidence, such a delegation by the MEI would not amount to an exercise of governmental authority, as there would be “nothing inherently governmental about the conduct of negotiations to settle a dispute pertaining to a contract between a state enterprise and an investor.”<sup>426</sup>
227. In the same fashion, the Respondent maintains that the Claimant has failed to prove that the decision to award Samsung – rather than the Claimant – the solar project, constituted an exercise of governmental authority.<sup>427</sup> According to the Respondent, “the consideration of how to resolve a contractual dispute within [the FIT Program] is not an issue of exercising ‘governmental authority.’”<sup>428</sup>

## **B. THE CLAIMANT’S POSITION**

228. While the Claimant agrees that the OPA qualifies as a State enterprise for the purpose of NAFTA,<sup>429</sup> it takes issue with the Respondent’s assertion that the OPA is an “independent”<sup>430</sup> entity.<sup>431</sup> According to the Claimant, the Respondent has failed to counter the Claimant’s evidence which demonstrates that the MEI had both formal and informal control of the OPA.<sup>432</sup>

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<sup>421</sup> **Rejoinder**, para. 37.

<sup>422</sup> **Rejoinder**, para. 38.

<sup>423</sup> **Rejoinder**, para. 38.

<sup>424</sup> **Rejoinder**, para. 39.

<sup>425</sup> **Counter-Memorial**, para. 315.

<sup>426</sup> **Counter-Memorial**, para. 315.

<sup>427</sup> **Counter-Memorial**, para. 316.

<sup>428</sup> **Counter-Memorial**, para. 316.

<sup>429</sup> **Memorial**, paras. 505, 512, 514, 536-541.

<sup>430</sup> **Counter-Memorial**, paras. 34, 39, 41, 308, 309.

<sup>431</sup> **Reply**, para. 627.

<sup>432</sup> **Memorial**, paras. 515-535; **Reply**, para. 627.

More specifically, the Respondent has not replied to Mr Smitherman's explanation that he exercised a high degree of control over the OPA during his tenure.<sup>433</sup>

229. In addition, according to the Claimant, the MEI "was heavily engaged with the OPA with respect to post-moratorium negotiations with [the Claimant]."<sup>434</sup> The Claimant relies in particular on the fact that the OPA's first proposal to the Claimant was made at the direction of the MEI,<sup>435</sup> while its second proposal was included in the MEI agenda for its weekly meetings.<sup>436</sup> The MEI had also discussed with the OPA the possibility of allowing the Contract to "lapse" prior to the imposition of the moratorium.<sup>437</sup> Moreover, according to the Claimant, "the OPA had earlier felt compelled to fulfil the promise of the Premier's Office and MEI to TransCanada to keep TransCanada 'whole.'"<sup>438</sup> The MEI had also intervened with the OPA to obtain a one-year extension for the FIT Contract, over the OPA's protests, and with the support of the [REDACTED]
230. The Claimant disagrees for two reasons with the Respondent's position that the OPA was not exercising delegated authority "in failing to implement MEI's commitment to 'freeze' the FIT Contract or its decision to keep [the Claimant] 'whole.'"<sup>440</sup> First, according to the Claimant, the Chief of Staff of the MEI advised the Claimant that the OPA would ensure that the commitment would be met.<sup>441</sup> Second, in assessing whether a State enterprise is operating in the exercise of governmental authority, one needs to consider the purposes for which the relevant powers are to be exercised and the extent to which the State enterprise is accountable to the Government.<sup>442</sup> Accordingly, if the Tribunal were to find that the MEI did not retain for itself the responsibility of keeping the FIT Contract "frozen," then that responsibility would be "squarely directed to the fulfillment of a governmental objective delegated to the OPA."<sup>443</sup>

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<sup>433</sup> Reply, para. 627; CWS-Smitherman, paras. 69-72.

<sup>434</sup> Reply, para. 628.

<sup>435</sup> Reply, para. 628; Chart (MOE), OPA Proposed Response to Windstream of 18 March 2011 (C-1004).

<sup>436</sup> Reply, para. 628; Email from Zaveri, Mirrun (MEI) to Viswanathan, Samira (MEI) and Heneberry, Jennifer (MEI) of 6 July 2011 (C-1026).

<sup>437</sup> Reply, para. 628; Handwritten Notes of Heneberry, Jennifer (MEI) of 25 January 2011 (C-945); Email from Ing, Pearl (MEI) to Viswanathan, Samira (MEI) et al. of 3 February 2011 (C-964); Email from Viswanathan, Samira (MEI) to Heneberry, Jennifer (MEI) of 26 January 2011 (C-950); Handwritten Notes of Heneberry, Jennifer (MEI) of 13 January 2011 (C-920), p. 4; Email from Lo, Sue (MEI) to Ing, Pearl (MEI) et al. of 7 December 2010 (C-879).

<sup>438</sup> Memorial, paras. 525-533; Reply, para. 630.

<sup>439</sup> Memorial, para. 535; Reply, paras. 130, 631.

<sup>440</sup> Reply, para. 633 (referring to Counter-Memorial, paras. 310-316).

<sup>441</sup> Reply, para. 634.

<sup>442</sup> Reply, para. 635; Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) (RL-29), Article 5, p. 101.

<sup>443</sup> Reply, para. 636.

231. Finally, the Claimant argues that the OPA's administration of the FIT Program constitutes "sovereign acts to carry out [the Respondent's] objective of increasing procurement of electricity from renewable energy sources,"<sup>444</sup> and that the FIT Contract which "[the Respondent] tasked the OPA with administering, was the key component of [the Respondent's] signature policy objective of procuring more electricity from renewable energy sources."<sup>445</sup> According to the Claimant, the Respondent's argument "ignores the public purpose behind the OPA's involvement in the FIT Program, which simply cannot be characterized as merely commercial in nature."<sup>446</sup>

### C. THE TRIBUNAL'S ANALYSIS

232. The disagreement between the Parties concerns the interpretation and application of Article 1503(2) of NAFTA ("State Enterprises"), which provides:

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

233. Article 1503(2) of NAFTA makes it clear that the State parties to NAFTA are responsible for the conduct of State enterprises, but only to the extent that such enterprises are empowered to exercise governmental authority. This is consistent with Article 5 of the ILC Articles, which further specifies that "[t]he conduct of a person or entity which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance." In other words, the conduct of persons or entities such as State enterprises which are not formal organs of the State can only be attributable to the State if the person or entity in question is exercising governmental authority in the particular instance.

234. The Tribunal notes that under the Electricity Act of 1998, while the OPA was "not an agent of the Crown," the Government of Ontario (the MEI) had the authority to issue directions to OPA.<sup>447</sup> Consequently, to the extent that OPA acted on the basis of such directions, its conduct could be considered attributable to Canada, depending on whether the direction in question involved a delegation of exercise of governmental authority to the OPA. Thus, the determination of whether

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<sup>444</sup> Reply, para. 638.

<sup>445</sup> Reply, para. 639.

<sup>446</sup> Reply, para. 639.

<sup>447</sup> See Section 25.32 of the *Electricity Act, 1998 (C-3)* ("[t]he Minister may direct the OPA to undertake any request for proposal, any other form of procurement solicitation or any other initiative or activity that relates to ... the procurement of electricity supply or capacity derived from renewable energy sources ...").

any of the specific acts or omissions of the OPA at issue in this case are indeed attributable to Canada requires an assessment of the relevant directions and therefore cannot be made *in abstracto*, but only *in concreto*, in the context of an assessment of the relevant direction. Any such determination is necessarily closely intertwined with the merits and therefore cannot be decided independently of the merits. Consequently, the Tribunal considers it appropriate to defer the consideration of this issue to the merits.

## V. THE MERITS OF THE CLAIMANT'S CLAIMS

### A. NAFTA ARTICLE 1110 – EXPROPRIATION

#### 1. The Claimant's Position

##### (a) The Respondent has indirectly expropriated the Claimant's investment

235. The Claimant submits that WWIS, the Project and the FIT Contract are each investments in Canada<sup>448</sup> and that the Respondent has indirectly expropriated these investments through the imposition of the moratorium and its “failure to fulfill its promise [made during the conference call of 11 February 2011] to take positive steps to ensure that Windstream was not penalized as a result of [the moratorium].”<sup>449</sup> The Claimant contends that these two measures “have rendered WWIS, the Project and the FIT Contract substantially worthless.”<sup>450</sup> In particular, the Claimant characterizes the FIT Contract as “a valuable asset” and “personal property under Ontario Law”<sup>451</sup> and asserts that the FIT Contract meets the *ratione materiae* requirement under expropriation provisions.<sup>452</sup>
236. The Claimant notes that Article 1110 of NAFTA prohibits NAFTA parties from expropriating investments without compensation,<sup>453</sup> whether directly or indirectly.<sup>454</sup> An indirect expropriation under Article 1110 of NAFTA occurs when the investor is substantially deprived of the value of its investment by measures attributable to the relevant NAFTA Party.<sup>455</sup> In the Claimant's view, the test that has been most widely applied by arbitral tribunals to determine whether measures amount to an indirect expropriation is the “sole effects” test.<sup>456</sup> According to the Claimant, “the test ... is to look solely at the effects of the deprivation, not at the purpose.”<sup>457</sup> The Claimant explains that “[u]nder that test, expropriation occurs where the investor has been substantially deprived of the value or economic viability of its investment.”<sup>458</sup>

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<sup>448</sup> Memorial, paras. 488-501; Reply, paras. 454-471; Hearing Transcript (26 February 2016), 10:16-21.

<sup>449</sup> Memorial, para. 555; Reply, para. 38; Hearing Transcript (15 February 2016), 95:11-16.

<sup>450</sup> Memorial, para. 555; Reply, paras. 34, 407-408, 472-478; Hearing Transcript (15 February 2016), 98:9-20.

<sup>451</sup> Hearing Transcript (26 February 2016), 12:15-17.

<sup>452</sup> Hearing Transcript (26 February 2016), 13:18-20 and 15:3-4.

<sup>453</sup> Memorial, para. 543; Reply, para. 447.

<sup>454</sup> Memorial, para. 544; Reply, para. 447.

<sup>455</sup> Memorial, para. 545; Reply, para. 481.

<sup>456</sup> Memorial, para. 546.

<sup>457</sup> Hearing Transcript (26 February 2016), 15:18-21.

<sup>458</sup> Memorial, para. 546; Reply, para. 481.

237. Citing *Burlington Resources Inc. v. Ecuador*,<sup>459</sup> *Metalclad v. Mexico*,<sup>460</sup> *Vivendi II*<sup>461</sup> and *Tecmed v. Mexico*,<sup>462</sup> the Claimant submits that a substantial deprivation of the value of an investment amounting to an expropriation occurs when:

- a) the investment is no longer capable of generating a commercial return;
  - b) the investor has lost, in whole or in significant part, the use or reasonably-to-be expected economic benefit of the investment;
  - c) the most economically optimal use of the investment has been rendered useless;
- or
- d) the investment's economic value has been neutralized or destroyed, as if the rights related thereto had ceased to exist."<sup>463</sup>

238. The Claimant explains that WWIS has the obligation to bring the Project into commercial operation by 4 May 2015 pursuant to the FIT Contract. This deadline can only be extended by up to two years (i.e., to 4 May 2017) by reason of force majeure. Thereafter, either party will be entitled to terminate the FIT Contract.<sup>464</sup> While the Claimant's Project currently has force majeure status, the Claimant argues that there is no longer any realistic prospect that the Project will reach commercial operation by 4 May 2017. The Claimant notes that this was admitted by Mr Cecchini of the OPA during his testimony.<sup>465</sup> According to the Claimant, the deadline became unachievable as of 4 May 2012,<sup>466</sup> "[i]n light of the period that would be required to re-start the Project, confirm regulatory requirements, obtain the required approvals, complete development work and build the Project."<sup>467</sup> The Claimant argues that, consequently, the Project is no longer "financeable."<sup>468</sup> The Claimant adds that, even if the OPA were to waive its right to terminate the FIT Contract, the Government's actions have created such a level of uncertainty around the offshore wind industry that none of the potential partners with whom Windstream was negotiating would now invest in the Project.<sup>469</sup>

239. The Claimant contends that, as a direct consequence of the moratorium and the Respondent's failure to effectively "freeze" the Project as promised,<sup>470</sup> its investments in the Project and the

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<sup>459</sup> *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability of 14 December 2012 (CL-29).

<sup>460</sup> *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2001 (CL-62).

<sup>461</sup> *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of 20 August 2007 (CL-41).

<sup>462</sup> *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003 (CL-84).

<sup>463</sup> Memorial, para. 550.

<sup>464</sup> Memorial, para. 556.

<sup>465</sup> Hearing Transcript (26 February 2016), 23:4-24.

<sup>466</sup> Memorial, para. 557; Reply, para. 408; Hearing Transcript (26 February 2016), 22:20-25.

<sup>467</sup> Memorial, para. 318.

<sup>468</sup> Memorial, para. 558; Reply, paras. 6, 407; Hearing Transcript (26 February 2016), 22:25.

<sup>469</sup> Memorial, para. 561.

<sup>470</sup> Memorial, para. 563; Reply, paras. 367-371.



FIT Contract are now substantially worthless,<sup>471</sup> and this amounts to an indirect expropriation.<sup>472</sup> The Claimant disagrees with the Respondent's assertion that "the fact that Windstream's investments are now worthless is somehow Windstream's fault."<sup>473</sup> The OPA rejected Windstream's request that the FIT Contract remain under force majeure for the duration of the moratorium and instead proposed to limit any extension to five years, while retaining the security, regardless of the fact that the Ontario Government had not specified the duration of the moratorium.<sup>474</sup> The Claimant did not accept the OPA's offer because it was "unreasonable."<sup>475</sup>

240. The Claimant submits that the situation in the present arbitration is "analogous" to that underlying the *Khan Resources v. Mongolia* decision.<sup>476</sup> The Claimant points out that the tribunal in that case found that the invalidation and failure to re-register a mining license made the execution of contractual obligations impossible and thus "deprived the claimant of the benefits of the relevant agreements, even though the agreements had never been formally terminated."<sup>477</sup>
241. The Claimant further contends that "[i]t is the nature of the deprivation that is relevant, not the duration of the measure," arguing that, as a consequence, the Respondent's argument about "the alleged temporariness of the moratorium is misplaced."<sup>478</sup> The Claimant refers to the decision in *Belokon v. The Kyrgyz Republic*, in which the tribunal concluded that a "temporary" measure suspending the powers of the board and managing bodies of five Kyrgyz banks was expropriatory<sup>479</sup> and emphasizes that the decision in *Tecmed*, on which the Respondent relies, "confirms that a temporary measure may lead to a permanent deprivation."<sup>480</sup> The Claimant points out that "[t]here is no indication on the record that the Ontario Government truly intends to lift the moratorium in the near future, or at all."<sup>481</sup>

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<sup>471</sup> Memorial, para. 560; Reply, paras. 407-408, 532.

<sup>472</sup> Memorial, para. 565; Reply, paras. 532-533.

<sup>473</sup> Reply, para. 478 (referring to Counter-Memorial, para. 489).

<sup>474</sup> Reply, para. 479.

<sup>475</sup> Reply, para. 479.

<sup>476</sup> Reply, para. 474.

<sup>477</sup> Reply, para. 474 (referring to *Khan Resources Inc. v. Mongolia* (UNCITRAL, PCA), Award on the Merits of 2 March 2015 (CL-125), paras. 309-312).

<sup>478</sup> Reply, para. 481 (referring to Counter-Memorial, paras. 482-483); Hearing Transcript (26 February 2016), 24:5-9.

<sup>479</sup> Reply, para. 482 (referring to *Valeri Belokon v. The Kyrgyz Republic* (UNCITRAL), Award of 24 October 2014 (CL-131), paras. 4, 206-210, 215).

<sup>480</sup> Reply, para. 482 (referring to Counter-Memorial, para. 482 (citing *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003 (CL-84), paras. 116-117)).

<sup>481</sup> Reply, para. 485.

**(b) The expropriation of the Claimant's investment was unlawful**

242. The Claimant further submits that the Respondent's alleged expropriation of its investment was unlawful.<sup>482</sup> According to the Claimant, an expropriation is an unlawful breach of Article 1110 of NAFTA unless it meets the following criteria: (i) it is made for a public purpose; (ii) it is conducted on a non-discriminatory basis; (iii) it is conducted in accordance with due process of law and Article 1105(1); and (iv) compensation is paid in accordance with Article 1110(2)-(6).<sup>483</sup>

243. The Claimant alleges that the expropriation of its investment was not done for a public purpose and that, in particular, the moratorium was not adopted for a legitimate public purpose.<sup>484</sup> As a consequence, according to the Claimant, it falls below the standard set by the International Law Commission, according to which:

“[t]he power to expropriate should be exercised only when expropriation is necessary and is justified by a genuinely public purpose or reason. If this *raison d'être* is plainly absent, the measure of expropriation is 'arbitrary' and therefore involves the international responsibility of the state.”<sup>485</sup>

244. The Claimant further contends that “Ontario has realized an economic benefit of between [CAD] 1.3 billion to [CAD] 2.5 billion by imposing the moratorium and indirectly cancelling the Project.”<sup>486</sup> According to the Claimant, Ontario wanted to prevent the Project from proceeding “so that the OPA would not be required to procure power from WWIS at the higher offshore energy prices.”<sup>487</sup> The Claimant refers to a statement by the Minister of Energy and Infrastructure, Mr Brad Duguid, made shortly after the imposition of the moratorium, asking “[i]f we're reaching our clean energy objectives with onshore projects in solar, wind, bioenergy, why would we then want to expand into offshore which is going to be more costly?”<sup>488</sup>

245. According to the Claimant, the expropriation was also discriminatory. The moratorium discriminated against Windstream, as a FIT Contract holder, by preventing it from proceeding through the REA process in order to bring its Project into operation by the deadline in its FIT Contract. According to the Claimant, such a constraint was not imposed on other FIT Contract holders.<sup>489</sup>

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<sup>482</sup> Memorial, paras. 566-576.

<sup>483</sup> Memorial, para. 566.

<sup>484</sup> Memorial, para. 568; Reply, paras. 489-505.

<sup>485</sup> Memorial, para. 567.

<sup>486</sup> Memorial, para. 569 (referring to CER-Advisory); Reply, para. 303.

<sup>487</sup> Memorial, para. 334; Reply, paras. 302-303.

<sup>488</sup> Memorial, paras. 10, 331 (referring to Article, Spears, John, Ontario Denies Losing Its Taste for Renewable Energy of 17 February 2011 (C-504)).

<sup>489</sup> Memorial, para. 570.

246. The Claimant further contends that the expropriation was not carried out in accordance with due process requirements. In the Claimant’s view, the imposition of the moratorium “overrides the provisions of the REA Regulation and of Wind Policy 4.10.04” that have been adopted “to encourage Windstream and other developers to invest in renewable energy projects in Ontario.”<sup>490</sup> The Claimant contends that “[t]his regulatory framework applies equally to offshore wind projects as it does to onshore ones, yet has been eviscerated with respect to offshore wind projects.”<sup>491</sup>
247. Finally, the Claimant claims that the Respondent failed to pay any compensation for its expropriatory measures, which also renders it unlawful.<sup>492</sup>

**(c) The rationale for the moratorium is not relevant for the expropriation analysis**

248. The Claimant submits that the rationale for the moratorium is not relevant for the expropriation analysis.
249. The Claimant refers to the Amended Response to the Notice of Arbitration, in which the Respondent argues that the moratorium cannot have the effect of substantially depriving Windstream of the value of its investment because “it was a *bona fide*, non-discriminatory governmental decision implemented in the public interest” and that “Article 1110 does not prohibit such legitimate governmental decision making.”<sup>493</sup> The Claimant submits that this argument should be rejected for several reasons.<sup>494</sup>
250. First, the Claimant argues that there is no public policy exception to expropriation and that the Respondent’s argument that regulatory measures having a legitimate public purpose cannot be expropriatory should be rejected.<sup>495</sup> The Claimant avers that “recognition of a broad ‘public purpose’ exception to expropriation would be inconsistent with the plain wording of Article 1110,” as “Article 1110(1)(a) provides that a public purpose is a prerequisite to a finding of expropriation, including indirect expropriation.”<sup>496</sup>
251. The Claimant also argues that the Respondent’s position is based on an incorrect interpretation of the *Methanex* decision, pointing out that, while the *Methanex* tribunal broadened the scope of the “police powers” doctrine, thus making certain types of general regulatory measures non-compensable, the tribunal in that case found that the challenged measures did not

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<sup>490</sup> Memorial, para. 574.

<sup>491</sup> Memorial, para. 574.

<sup>492</sup> Memorial, para. 575.

<sup>493</sup> Amended Response to the Notice of Arbitration, para. 60 (referred to in Memorial, para. 577).

<sup>494</sup> Memorial, para. 577.

<sup>495</sup> Memorial, para. 578; Reply, paras. 501-503.

<sup>496</sup> Reply, para. 489 (emphasis in original).

substantially deprive the investor of the value of its investment.<sup>497</sup> The Claimant further asserts that many tribunals have rejected the application of a broad “public purpose” exception, including the NAFTA tribunals in *Pope & Talbot*, *Metalclad* and *Feldman*,<sup>498</sup> as well as the tribunals in *Santa Elena v. Costa Rica*,<sup>499</sup> *Azurix*<sup>500</sup> and *Vivendi II*.<sup>501</sup> In particular, the Claimant states that the tribunal in *Vivendi II* observed that “the application of a public policy exception to expropriation is inconsistent with the plain language of Article 1110 (and many expropriation provisions in BITs)” and held that “Article 1110 provides that a failure to compensate an investor for the expropriation of its investment is a breach, even if the expropriation is for a public purpose.”<sup>502</sup>

252. The Claimant further points out that the decisions in *Chemtura*, *Suez*, *Sahuka* and *Methanex*, on which the Respondent relies, involve the application of the police powers doctrine, rather than a broad public purpose exception to expropriation.<sup>503</sup> According to the Claimant, the police powers doctrine is not applicable in the present arbitration because it has to be construed narrowly and cannot apply when the measure complained of was not adopted in good faith or for a legitimate public purpose; when its effects are disproportionate to its stated public policy rationale; or when the measure is contrary to specific commitments made to the investor and to the investor’s legitimate expectations.<sup>504</sup> In this context, the Claimant asserts that, in this case, “the moratorium and the failure to freeze ... are not proportionate or necessary for legitimate public purpose.”<sup>505</sup>
253. Second, the Claimant alleges that the moratorium was not adopted in good faith or for a legitimate public purpose.<sup>506</sup> In particular, in the Claimant’s view, the moratorium was politically motivated and was not based on a rationale that would justify the application of the police powers doctrine. The Claimant alleges that the moratorium was motivated by concerns about the cost of offshore

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<sup>497</sup> **Memorial**, para. 579 (referring to *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005 (CL-63)).

<sup>498</sup> **Reply**, para. 496 (referring to *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Interim Award of 26 June 2000 (CL-74); *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2001 (CL-62); *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002 (RL-24)).

<sup>499</sup> **Memorial**, para. 580 (referring to *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica* (ICSID Case No. ARB/96/1), Final Award of 17 February 2000 (CL-42), paras. 71-72).

<sup>500</sup> **Reply**, para. 491 (referring to *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006 (CL-25), paras. 309-311).

<sup>501</sup> **Memorial**, para. 581 (referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of 20 August 2007 (CL-41), paras. 7.5.17, 7.5.20).

<sup>502</sup> **Memorial**, para. 582 (referring to *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of 20 August 2007 (CL-41), para. 7.5.21).

<sup>503</sup> **Reply**, paras. 501-503.

<sup>504</sup> **Reply**, para. 506; Hearing Transcript (26 February 2016), 25:15 to 26:10 (referring to *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003 (CL-84), para. 122; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (ICSID Case No. ARB(AF)/04/05), Award of 21 November 2007 (CL-23)).

<sup>505</sup> Hearing Transcript (26 February 2016), 27:5-11.

<sup>506</sup> **Memorial**, para. 583; **Reply**, paras. 507-512.

power and public opposition to wind turbine projects, particularly in certain key electoral ridings for the governing Liberal Party, rather than “scientific uncertainty” concerning offshore wind development.<sup>507</sup>

254. The Claimant submits that the “scientific uncertainty” rationale put forward by the Respondent is undermined by many elements, including that: (i) it was a rationale arrived at by politicians (rather than scientific personnel) only after a number of other rationales for constraining offshore wind were considered and rejected; (ii) several key government officials expressed skepticism about the legitimacy of scientific uncertainty as a rationale for imposing a moratorium on offshore wind; (iii) it was inconsistent with Minister Cansfield’s statement of 21 October 2009 that the government’s “research made it clear that developing offshore wind potential would be practical and environmentally sound once the appropriate infrastructure is in place;” and (iv) Ontario has made no serious efforts to advance scientific research following the moratorium.<sup>508</sup> The Claimant emphasizes that the Respondent “has not provided any credible evidence of harm to the environment.”<sup>509</sup> As to the alleged concern about drinking water, the Claimant asserts that it has been accepted that there is no problem with drinking water, not to mention there is no credible evidence of a significant threat to drinking water.<sup>510</sup>

255. Third, the Claimant contends that the effects of the Respondent’s measures have been disproportionate to their stated public policy rationale.<sup>511</sup> According to the Claimant, the Respondent could have resorted to less intrusive measures to achieve its stated public policy objective.<sup>512</sup>

256. Fourth, the Claimant submits that the Respondent’s measures were contrary to Ontario’s specific commitments and Windstream’s legitimate expectations, noting that “tribunals that accept a public policy exception to expropriation do not apply it where the measure is contrary to the state’s specific commitments to the investor or to the investor’s legitimate expectations.”<sup>513</sup> According to the Claimant, the moratorium was a reversal of Ontario’s self-promotion as “open for business” for offshore wind and its repeated assurances that it supported the Project.<sup>514</sup>

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<sup>507</sup> **Memorial**, para. 583.

<sup>508</sup> **Memorial**, para. 583; **Reply**, para. 511.

<sup>509</sup> Hearing Transcript (26 February 2016), 38:20-21.

<sup>510</sup> Hearing Transcript (26 February 2016), 39:10 to 40:15.

<sup>511</sup> **Memorial**, para. 585; **Reply**, paras. 513-521; Hearing Transcript (26 February 2016), 38:15-19.

<sup>512</sup> **Memorial**, para. 585; **Reply**, para. 521.

<sup>513</sup> **Memorial**, para. 587 (referring to *National Grid plc v. The Argentine Republic* (UNCITRAL), Award of 3 November 2008 (CL-68)); **Reply**, paras. 522-530.

<sup>514</sup> **Memorial**, para. 587; **Reply**, para. 530.

## 2. The Respondent's Position

### (a) The FIT Contract is not an interest capable of being expropriated

257. The Respondent submits that there is no expropriation in this case. According to the Respondent, the Claimant's argument that the FIT Contract has been rendered "substantially worthless" must fail as the FIT Contract does not create an investment capable of being expropriated.<sup>515</sup> Since NAFTA contains a closed definition of investment, the Claimant must demonstrate that the FIT Contract is among the exhaustive list of investments found in Article 1139.<sup>516</sup>
258. Moreover, relying on *Emmis v. Hungary*, the Respondent contends that the existence of a valid FIT Contract does not excuse the Claimant from proving that "specific rights ... under the Contract have vested such that they are capable of being expropriated, and that there was an expropriation."<sup>517</sup> While the Respondent does not dispute the fact that the FIT Contract "imposes some vested rights and obligations,"<sup>518</sup> it contends that the Claimant has failed to show that such rights have been expropriated.<sup>519</sup>
259. According to the Respondent, the right that the Claimant alleges has been expropriated is the supposed right to a revenue stream under the FIT Contract.<sup>520</sup> In the Respondent's words, what the Claimant had was nothing more than "an opportunity."<sup>521</sup> This, however, was not a "vested right" since "the FIT Contract provided only a potential, speculative interest in a future revenue stream, contingent upon, among other things, obtaining the required permits and reaching Commercial Operation by the deadlines required."<sup>522</sup> As such, the alleged right was not "certain and demonstrable" and not capable of being expropriated.<sup>523</sup> The Respondent notes that "only once the project enters into commercial operation is a supplier entitled to the revenue stream under the FIT contract." The Respondent stresses that in this case the Claimant had not even begun the process of obtaining the relevant permits such as a NTP which are preconditions for the project to enter into commercial operation.<sup>524</sup> From the perspective of the Respondent therefore, unless the Claimant met the preconditions required by its FIT Contract, "the fact that the FIT contract

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<sup>515</sup> Counter-Memorial, para. 460.

<sup>516</sup> Counter-Memorial, para. 466.

<sup>517</sup> Rejoinder, para. 79 (referring to *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 of 16 April 2014 (RL-22)).

<sup>518</sup> Rejoinder, para. 81.

<sup>519</sup> Rejoinder, para. 82.

<sup>520</sup> Rejoinder, para. 82; Hearing Transcript (26 February 2016), 185:1-2.

<sup>521</sup> Hearing Transcript (15 February 2016), 196:2-3.

<sup>522</sup> Counter-Memorial, paras. 45-70; Rejoinder, para. 86; Hearing Transcript (15 February 2016), 196:15 to 201:16; Hearing Transcript (26 February 2016), 185:6-10.

<sup>523</sup> Rejoinder, para. 86.

<sup>524</sup> Hearing Transcript (26 February 2016), 185:15 to 186:9.

offered a fixed price is completely irrelevant as to whether the right to claim payment has vested under the FIT contract.”<sup>525</sup>

**(b) The economic impact of the moratorium does not amount to an expropriation**

260. The Respondent submits that an expropriation requires a “taking” of fundamental ownership rights that causes a substantial deprivation of the economic value of an investment.<sup>526</sup> In this case, the Respondent argues, the moratorium could not have constituted an expropriation because (i) the Project had no value at the time of the measures the Claimant complains of; and (ii) the deferral resulting from the moratorium is temporary in nature.<sup>527</sup>

261. The Respondent argues that when Ontario decided to defer offshore wind development the Project had not reached a stage at which it could realistically be completed within the deadlines imposed by the FIT Contract and, as a consequence, the Project had no value.<sup>528</sup> In the words of the Respondent:

“[g]iven where the Claimant was in the development process when it signed its FIT Contract, and given the first-of-a-kind nature of its proposal, the Windstream Wolfe Island Shoals offshore wind facility was doomed to fail from the moment that the Claimant signed on the dotted line.”<sup>529</sup>

262. In addition, the Respondent submits that the current case law of NAFTA tribunals requires showing that the expropriation is “permanent, and not ephemeral or temporary.”<sup>530</sup> The Respondent points out that since the moratorium it has conducted several studies relating to offshore wind and continues to complete the work required to develop regulatory rules and requirements for offshore wind facilities, thus demonstrating that the deferral is only a temporary measure.<sup>531</sup>

263. The Respondent argues that the temporary nature of the measure is reflected in the fact that the Claimant’s assets remain intact,<sup>532</sup> the FIT Contract is still in place and under force majeure.<sup>533</sup>

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<sup>525</sup> Hearing Transcript (26 February 2016), 188:22 to 189:5.

<sup>526</sup> Counter-Memorial, para. 477.

<sup>527</sup> Counter-Memorial, para. 478.

<sup>528</sup> Counter-Memorial, para. 481.

<sup>529</sup> Counter-Memorial, para. 25.

<sup>530</sup> Counter-Memorial, para. 482 (citing *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award of 17 July 2006 (RL-25), para. 17(d); *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53), para. 360; *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award of 18 September 2009 (CL-31), para. 248).

<sup>531</sup> Counter-Memorial, para. 485; Hearing Transcript (26 February 2016), 192:2 to 194:19.

<sup>532</sup> Hearing Transcript (26 February 2016), 194:20-23.

<sup>533</sup> Hearing Transcript (26 February 2016), 194:24 to 195:3.

Accordingly, the Respondent takes the position that “the Claimant could obtain its security deposit sooner if it entered into a mutual termination agreement with the OPA.”<sup>534</sup>

**(c) The moratorium has not interfered with the Claimant’s reasonable expectations**

264. The Respondent further claims that the moratorium has not interfered with the Claimant’s reasonable expectations. The Respondent observes that “it is not the function of Article 1110 to eliminate the normal commercial risks of a foreign investor” or to compensate investors for their imprudent business decisions.<sup>535</sup> The Respondent contends that the Claimant knew that its Project “required regulatory change to proceed” and “accepted these risks when it invested in Ontario.”<sup>536</sup> The Respondent further notes that “by the time the first FIT contracts were offered, the regulatory framework for offshore wind projects had not been any further developed.”<sup>537</sup>

265. According to the Respondent, this uncertainty was “clearly communicated to the public in the MOE’s policy proposal notice of June 25<sup>th</sup>, 2010.”<sup>538</sup> Moreover, in accordance with the FIT Contract that the Claimant signed, “the Claimant assumed the obligation of bringing the project into commercial operation, including obtaining all the necessary permits and approvals such as the REA, access to Crown land, and completing applicable federal permits.”<sup>539</sup> The Respondent, therefore, takes the position that “the Claimant was solely responsible for ensuring the technical, regulatory and financial viability of its project.”<sup>540</sup>

**(d) The measure was not of an expropriatory character**

266. The Respondent states that many types of government regulation can have significant effects on investments, yet this does not mean that all such measures would constitute indirect expropriations. Referring to the decision in *Feldman v. Mexico*, the Respondent points out that:

“a non-discriminatory measure, designed to protect legitimate public welfare objectives such as health, safety and the environment, is not an indirect expropriation except in the

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<sup>534</sup> Hearing Transcript (26 February 2016), 195:8-11.

<sup>535</sup> Counter-Memorial, para. 491 (referring to *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004 (CL-91), paras. 160, 177; *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award of 17 July 2006 (RL-25), paras. 184, 218; *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award of 1 November 1999 (RL-7), para. 83).

<sup>536</sup> Counter-Memorial, para. 492.

<sup>537</sup> Hearing Transcript (26 February 2016), 198:1-3.

<sup>538</sup> Hearing Transcript (26 February 2016), 198:4-8.

<sup>539</sup> Hearing Transcript (26 February 2016), 205:8-14.

<sup>540</sup> Hearing Transcript (26 February 2016), 205:20-24.



rare circumstance where its impacts are so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith.”<sup>541</sup>

267. According to the Respondent, the Claimant has failed to meet the following criteria established by NAFTA tribunals for the indirect expropriation of an enterprise:

“(i) whether the investor remained in control of its investment, (ii) whether it directed its day-to-day operations, (iii) whether its officers and employees were detained by the State, (iv) whether the State supervised the work of the investor’s officers and employees or not, (v) whether the State had taken the proceeds of sales other than through taxation, (vi) whether the State interfered with management or shareholders’ activities, (vii) whether the State prevented the distribution of dividends to shareholders, (viii) whether the State interfered with the appointment of directors or management, and (ix) whether the State had taken any other actions ousting the investor from full ownership and control of the investment.”<sup>542</sup>

268. The Respondent points out that the “Claimant has not even attempted to argue that any of these criteria are met in this case.”<sup>543</sup> The Respondent distinguishes the decisions in *Santa Elena v. Costa Rica* and *Vivendi II* quoted by the Claimant on the basis that “they involved measures targeted at a particular investment as opposed to regulatory measures of general application.”<sup>544</sup>

269. The Respondent further refers to the precautionary principle, noting that “there were legitimate concerns that the science was not sufficient to support the development of a regulatory framework that would be capable of assessing the effects of the first large scale freshwater offshore wind farm in the world.”<sup>545</sup> The Respondent also refers to the public consultation process on offshore projects, where it received an unprecedented number of responses from the public and points out that, because of this, it “anticipated that REAs for offshore wind projects would be appealed to administrative tribunals and the courts.”<sup>546</sup>

270. The Respondent further submits that the moratorium was of general application and non-discriminatory.<sup>547</sup> Finally, according to the Respondent, “impacts of the deferral on the Claimant are not so severe in the light of its purpose that the deferral cannot be reasonably viewed as having been adopted and applied in good faith.”<sup>548</sup>

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<sup>541</sup> Counter-Memorial, para. 495 (citing *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002 (RL-24), para. 103).

<sup>542</sup> Rejoinder, para. 75; *Chemtura Corporation v. Government of Canada* (UNCITRAL, PCA), Award of 2 August 2010 (CL-37), para. 245 (citing *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Interim Award of 26 June 2000 (CL-74), para. 100).

<sup>543</sup> Rejoinder, para. 76.

<sup>544</sup> Counter-Memorial, para. 499.

<sup>545</sup> Counter-Memorial, para. 501.

<sup>546</sup> Counter-Memorial, para. 502.

<sup>547</sup> Counter-Memorial, para. 503.

<sup>548</sup> Counter-Memorial, para. 504.

### 3. Submissions pursuant to Article 1128 of NAFTA

#### (a) Submission of the United States

271. According to the United States, determining indirect expropriation is a “fact based inquiry”<sup>549</sup> which, once the scope of the property interest has been established,<sup>550</sup> considers several factors including: “(i) the economic impact of the government action; (ii) the extent to which that action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.”<sup>551</sup>
272. As to the first factor, the United States submits that a claimant must show that “the government measure at issue destroyed all, or virtually all, of the economic value of its investment, or interfered with it to such a similar extent and so restrictively as ‘to support a conclusion that the property has been ‘taken’ from the owner.’”<sup>552</sup>
273. According to the United States, the second factor requires “an objective inquiry of the reasonableness of the claimant’s expectations, which ‘depend in part on the nature and extent of governmental regulation in the relevant sector.’”<sup>553</sup>
274. As to the third factor, the United States explains that it requires a determination of the nature and character of the government action; in particular, whether “such action involves physical invasion by the government or whether it is more regulatory in nature.”<sup>554</sup>

#### (b) Submission of Mexico

275. Mexico takes the position that a breach of Article 1110 based on indirect expropriation requires at a minimum a “finding that a measure or series of measures attributable to the host State resulted in the effectively permanent, substantially complete deprivation of the economic benefit of an

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<sup>549</sup> United States’ Article 1128 Submission, para. 3.

<sup>550</sup> United States’ Article 1128 Submission, para. 3 (referring to *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Rejoinder of Respondent United States of America of 15 March 2007, para. 11).

<sup>551</sup> United States’ Article 1128 Submission, para. 3 (referring to 2012 U.S. Model Bilateral Investment Treaty, ann. B, 4(a); 2004 U.S. Model Bilateral Investment Treaty, ann. B, 4(a)).

<sup>552</sup> United States’ Article 1128 Submission, para. 4 (referring to *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Interim Award of 26 June 2000 (CL-74), para. 102; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53), para. 357; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA, UNCITRAL), Award of 12 January 2011, paras. 149-150 (citing (CL-53)); *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award of 18 September 2009 (CL-31), para. 360).

<sup>553</sup> United States’ Article 1128 Submission, para. 5 (referring to *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005 (CL-63); *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA, UNCITRAL), Award of 12 January 2011, paras. 144-145; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Rejoinder of Respondent United States of America of 15 March 2007, para. 91).

<sup>554</sup> United States’ Article 1128 Submission, para. 6.

‘investment,’ as defined in Article 1139, that is (or was) owned or controlled by an investor of another party.”<sup>555</sup> Mexico further states that an “investment” cannot exist in the absence of vested (and not contingent) legal rights comprising an asset described in Article 1139.<sup>556</sup>

276. Mexico submits that “the existence (or non-existence) of investor’s ‘distinct, reasonable, investment-backed expectations’ is at most a factor to consider in determining whether a measure or series of measures have risen to the level of an indirect expropriation.”<sup>557</sup> According to Mexico, “a host state’s failure to satisfy such expectations does not amount to an indirect expropriation.”<sup>558</sup> Mexico adds that a bona fide regulatory action taken in the public interest that adversely affects the value or viability of an investment will not ordinarily amount to an indirect expropriation.<sup>559</sup>

**(c) The Claimant’s reply to the submissions of the United States and Mexico**

277. Contrary to the positions of the United States and Mexico,<sup>560</sup> the Claimant submits that “there is no broad public purpose or public interest exception to expropriation under Article 1110.”<sup>561</sup> According to the Claimant, even tribunals that have found an exception under the police powers doctrine have recognized that the doctrine has traditionally been narrowly construed.<sup>562</sup>

278. The Claimant relies on the *Methanex* and *Chemtura* decisions, asserting that “proven harm” (and not public interest) is necessary to justify an otherwise expropriatory measure.<sup>563</sup> Even in cases in which harm is proven, the Claimant contends that the measure will not “fall within the narrow

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<sup>555</sup> Mexico’s Article 1128 Submission, para. 9.

<sup>556</sup> Mexico’s Article 1128 Submission, para. 11.

<sup>557</sup> Mexico’s Article 1128 Submission, para. 12.

<sup>558</sup> Mexico’s Article 1128 Submission, para. 12.

<sup>559</sup> Mexico’s Article 1128 Submission, para. 13.

<sup>560</sup> United States’ Article 1128 Submission, para. 7; Mexico’s Article 1128 Submission, paras. 12-13.

<sup>561</sup> Claimant’s Article 1128 Submission, para. 2. See also Memorial, paras. 577-582; Reply Memorial, paras. 487-505.

<sup>562</sup> Claimant’s Article 1128 Submission, para. 2 (referring to *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplun v. Plurinational State of Bolivia* (ICSID Case No. ARB/06/2), Award of 16 September 2015 (CL-141), paras. 200, 238; *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability of 14 December 2012 (CL-29), para. 506; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003 (CL-84), para. 119; *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006 (CL-80), paras. 258, 263).

<sup>563</sup> Claimant’s Article 1128 Submission, para. 4 (referring to *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005 (CL-63), para. 7; *Chemtura Corporation v. Government of Canada* (UNCITRAL, PCA), Award of 2 August 2010 (CL-37), para. 266).

boundaries of the police powers doctrine if it is not truly necessary and proportionate to the measure's stated rationale, or if it is contrary to the investor's legitimate expectations."<sup>564</sup>

**(d) The Respondent's reply to the submissions of the United States and Mexico**

279. The Respondent submits that, pursuant to Article 31(3) of the 1969 Vienna Convention on the Law of Treaties (the "Vienna Convention"),<sup>565</sup> "the clear and long-standing agreement of the NAFTA Parties regarding the interpretation" should be taken into account in interpreting Article 1110 of NAFTA.<sup>566</sup>

280. According to the Respondent, "[w]ithout substantial deprivation of a property right there can be no expropriation."<sup>567</sup> The Respondent agrees with Mexico's statement that expropriation requires vested legal rights to exist and not contingent contractual rights,<sup>568</sup> and reiterates its position that "the Claimant's contractual rights were contingent on obtaining regulatory approvals and permits and therefore did not constitute vested rights that can be expropriated."<sup>569</sup>

281. The Respondent emphasizes that "the character of a measure is relevant to the indirect expropriation analysis and that bona fide regulatory action taken in the public interest is not ordinarily expropriatory or compensable."<sup>570</sup> The Respondent notes that all three NAFTA parties share this view.<sup>571</sup>

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<sup>564</sup> **Claimant's Article 1128 Submission**, para. 4 (referring to *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003 (CL-84), para. 122; *Burlington Resources Inc. v. Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability of 14 December 2012 (CL-29), paras. 519, 528-529; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award of 31 October 2012 (CL-43), para. 522; *Azurix Corp. v. The Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006 (CL-25), paras. 309-311; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1) Decision on Liability of 3 October 2006 (CL-59), paras. 189, 195; *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005 (CL-63), Part IV, Ch. D, para. 7; **United States' Article 1128 Submission**, para. 11; **Mexico's Article 1128 Submission**, para. 6).

<sup>565</sup> Vienna Convention.

<sup>566</sup> **Respondent's Article 1128 Submission**, para. 5 (referring to *Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL), Award on Jurisdiction of 28 January 2008 (RL-87), paras. 186, 188-189; The views of non-disputing parties in *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award of 19 June 2007 (RL-9), paras. 100, 106-107; *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Award of 14 March 2011 (RL-88), paras. 81-82; Roberts, Anthea, "Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States," *The American Journal of International Law*, p. 104 (2010) (RL-90), p. 179).

<sup>567</sup> **Respondent's Article 1128 Submission**, para. 39.

<sup>568</sup> **Mexico's Article 1128 Submission**, para. 11.

<sup>569</sup> **Respondent's Article 1128 Submission**, para. 39.

<sup>570</sup> **Respondent's Article 1128 Submission**, para. 42.

<sup>571</sup> **Respondent's Article 1128 Submission**, para. 42.

282. The Respondent argues that “interference with an investor’s expectation is only one factor in an indirect expropriation analysis, and is not conclusive on its own,” and notes that all three NAFTA Parties also agree with the position.<sup>572</sup>

#### 4. The Tribunal’s Analysis

283. The Parties disagree not only on whether an expropriation has taken place, but also on the criteria for such determination. The relevant provision of 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. However, the provision does distinguish between direct and indirect expropriation, and as summarized above, it is the Claimant’s case that the Respondent has indirectly expropriated its investment.

284. NAFTA tribunals have generally taken the view that under Article 1110 of NAFTA the determination of whether an indirect expropriation has taken place is in the first place a matter of evidence, that is, a factual determination of whether an effective or *de facto* taking of property that is attributable to the State has taken place, even if there has been no formal transfer of title, and even if the host State has not obtained any economic benefit. If it is determined that such a *de facto* taking has indeed taken place, the issue arises as to whether the taking is lawful, and what the appropriate form and level of relief should be. In certain circumstances, the question may also arise as to whether the alleged taking is excused by a justification provided under international law, such as the police powers doctrine.

285. The Tribunal agrees that the first step in the process of determining whether an effective taking has taken place is to determine whether the investor has been substantially deprived of the value of its investment.<sup>573</sup> This is a test that has been applied by numerous investment treaty tribunals, including NAFTA tribunals. Thus, in *ADM v Mexico*, the tribunal held:

“The test on which other Tribunals and doctrine have agreed – and on which the Claimants’ [sic] rely – is the ‘effects test.’ Judicial practice indicates that the severity of the economic impact is the decisive criterion in deciding whether an indirect expropriation or a measure tantamount to expropriation has taken place. An expropriation occurs if the interference is substantial and deprives the investor of all or most of the benefits of the investment. There is a broad consensus in academic writings that the intensity and duration of the economic

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<sup>572</sup> Respondent’s Article 1128 Submission, para. 48.

<sup>573</sup> In making its determination on this and other issues, the Tribunal has reviewed and considered the submissions of the United States and Mexico pursuant to Article 1128 of NAFTA.

deprivation is the crucial factor in identifying an indirect expropriation or equivalent measure.”<sup>574</sup>

286. The *Cargill v Mexico* tribunal similarly stressed that a finding of expropriation requires “radical deprivation of the Claimant’s economic use and enjoyment of its investment:”

“It is widely accepted that a finding of expropriation of property under customary international law requires a radical deprivation of a claimant’s economic use and enjoyment of its investment. This is the consistent view of previous NAFTA tribunals. ‘[T]he affected property must be impaired to such an extent that it must be seen as ‘taken.’ ‘The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).’ It is a view also stated in numerous BIT arbitrations. Therefore, putting to the side the question of sufficiency of the duration of the interference, the Tribunal must find a radical deprivation of the Claimant’s economic use and enjoyment of its investment for the period of the interference.”<sup>575</sup>

287. In *Metalclad v Mexico* the tribunal analyzed the distinction made in Article 1110 of NAFTA between direct and indirect expropriation, noting that both require “the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property:”

“Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.”<sup>576</sup>

288. The Claimant claims that such a *de facto* taking of its investment has occurred in the present case. According to the Claimant, under the FIT Contract, WWIS had the obligation to bring the Project into commercial operation by 4 May 2015. This deadline could be extended, but only up to two years, i.e., until 4 May 2017, for reason of force majeure, whereafter either party will be entitled to terminate the Contract. The Claimant contends that, while the Project is currently under force majeure, there is no longer any realistic prospect that the Project can reach commercial operation by 4 May 2017. Consequently, the Project is no longer financeable and has effectively lost all of its value. This is the case even if the OPA were to waive its right to terminate the FIT Contract as the conduct of the Ontario Government has created such uncertainty around the offshore wind industry in Ontario that no potential investor would be prepared to invest in the Project.

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<sup>574</sup> *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico* (ICSID Case No. ARB(AF)/04/05), Award of 21 November 2007 (CL-23), para. 240.

<sup>575</sup> *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award of 18 September 2009 (CL-31), para. 360 (footnotes omitted).

<sup>576</sup> *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2001 (CL-62), para. 103.

289. As summarized above, the Respondent argues that, on the facts, there has been no expropriation in this case because the Project had no value at the time of its alleged taking. At most, the Claimant was deprived of an “opportunity” to develop the Project. Moreover, the moratorium is only a temporary measure and therefore could not have resulted in a permanent deprivation of the Claimant’s investment. The Claimant’s assets, including the security deposit, remain intact and could be returned if the Claimant entered into a mutual termination agreement with the OPA.
290. The Tribunal has carefully reviewed the relevant evidence and finds that, on the facts, no expropriation has taken place in this case. First, the Claimant’s FIT Contract is still formally in force and has not been unilaterally terminated by the Government of Ontario; consequently, while the Tribunal agrees with the Claimant that the Project can no longer be completed by the MCOD, 4 May 2017, it continues to remain open for the Parties to re-activate and, as appropriate, renegotiate the FIT Contract to adjust its terms to the moratorium. Second, and more importantly in the context of the Claimant’s expropriation claim, 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. Under Article 10.1(g) of the FIT Contract, if by reason of force majeure the MCOD is delayed for an aggregate of more than 24 months (which is the case here), completion and performance security will be returned at the time of the termination of the agreement by either party. 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. It therefore cannot be said that the Claimant has been substantially deprived of its investment.
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. As determined in Section B, 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, although the Tribunal accepts (as determined in Section B below) that the Claimant’s investment consists not only of the sunk investment costs and the security deposit, but also of the value created by the Claimant in developing the Project, 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. In the circumstances, the Tribunal is unable to conclude that the Claimant has been substantially deprived of the value of its investment.

## **B. NAFTA ARTICLE 1105 – FAIR AND EQUITABLE TREATMENT**

### **1. The Claimant’s Position**

292. The Claimant contends that the Respondent has failed to grant Windstream’s investments fair and equitable treatment in breach of its obligations under Article 1105(1) of NAFTA. According to the Claimant, fair and equitable treatment is one of the elements included in the umbrella concept of minimum standard of treatment.<sup>577</sup> The Claimant submits that the minimum standard of treatment is a rule of customary international law and as such constitutes the “floor” of treatment protected under Article 1105.<sup>578</sup>
293. Citing various arbitral awards, the Claimant explains that examples of treatment that have been deemed to fall below the fair and equitable treatment standard include the breach of commitments or of the investor’s legitimate expectations;<sup>579</sup> failure to observe the required regulatory fairness and predictability;<sup>580</sup> arbitrariness;<sup>581</sup> and discrimination.<sup>582</sup> The Claimant notes that, while bad faith is a persuasive indicator of unfair treatment, it is not a necessary element for finding a breach of Article 1105(1).<sup>583</sup>
294. The Claimant accepts that it has the burden of proving that the legal standard has been breached.<sup>584</sup> However, as to proving what the relevant legal standard is, the Claimant submits that there is an equal burden on either side to provide evidence of customary law, i.e., state practice and *opinio juris*.<sup>585</sup> The Claimant emphasizes that its main position is not that “there is a customary international law principle under [the fair and equitable treatment standard] of legitimate expectations that is ... independent and standalone.”<sup>586</sup> According to the Claimant, legitimate expectations is one of the elements or factors examined by tribunals when determining whether a breach of the fair and equitable treatment standard has occurred.<sup>587</sup>

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<sup>577</sup> Hearing Transcript (15 February 2016), 103:18-19; Hearing Transcript (26 February 2016), 45:1-6 (referring to Dumberry, Patrick, *The Fair And Equitable Treatment Standard: A Guide To NAFTA Case Law On Article 1105* (2013) (CL-148), p. 45).

<sup>578</sup> Hearing Transcript (26 February 2016), 44:8-14 (referring to Dumberry, Patrick, *The Fair And Equitable Treatment Standard: A Guide To NAFTA Case Law On Article 1105* (2013) (CL-148)).

<sup>579</sup> Memorial, para. 597; Reply, paras. 537, 540, 545.

<sup>580</sup> Memorial, para. 600; Reply, paras. 537, 540.

<sup>581</sup> Memorial, para. 601; Reply, paras. 537, 540.

<sup>582</sup> Memorial, para. 602; Reply, para. 540.

<sup>583</sup> Memorial, para. 603.

<sup>584</sup> Hearing Transcript (26 February 2016), 46:6-9.

<sup>585</sup> Hearing Transcript (26 February 2016), 46:9-16.

<sup>586</sup> Hearing Transcript (26 February 2016), 51:7-10.

<sup>587</sup> Hearing Transcript (26 February 2016), 51:1-3, 51:11-19, 56:3-10.



295. The Claimant submits that the Respondent’s position that the threshold for proving a breach of Article 1105(1) is “extremely high” is incorrect.<sup>588</sup> In *Bilcon v. Canada*, the tribunal rejected Canada’s arguments that the challenged conduct needs to rise to the level of shocking or outrageous behavior.<sup>589</sup> The Claimant also cites the tribunal in *Mondev v. United States*, which confirmed that “[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious.”<sup>590</sup>
296. The Claimant submits that the only NAFTA tribunal to have accepted the “egregious conduct” standard – based on the 1926 *Neer* decision – is the one in *Glamis Gold*, but that its reasoning “has consistently been rejected by NAFTA tribunals, other tribunals applying the minimum standard of treatment and commentators.”<sup>591</sup> What is more, according to the Claimant, the Respondent “has failed to show any evidence of state practice and *opinio juris* that [the fair and equitable treatment standard, under minimum standard of treatment,] requires conduct that is outrageous or egregious.”<sup>592</sup> In any event, in the Claimant’s view, there is no substantial difference between the Claimant’s and the Respondent’s standard; the same factors are relevant.<sup>593</sup>
297. According to the Claimant, there is a consistent practice of arbitral tribunals when applying the standard under Article 1105(1) to consider “whether a state has breached an investor’s legitimate expectations arising from specific commitments made to the investor to induce the investment.”<sup>594</sup>
- (a) The moratorium was arbitrary, grossly unfair and contrary to the Respondent’s commitments and representations and the Claimant’s legitimate expectations**
298. Applying the standard under Article 1105(1) to the facts, the Claimant submits that the moratorium breached commitments and representations made by the Respondent to encourage

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<sup>588</sup> Reply, para. 541.

<sup>589</sup> Reply, para. 542 (referring to *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA), Award on Jurisdiction and Liability of 17 March 2015 (CL-134), para. 444).

<sup>590</sup> Reply, para. 542 (referring to *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002 (CL-66), para. 116).

<sup>591</sup> Reply, para. 543; Hearing Transcript (26 February 2016), 49:11-14 (referring to *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53), paras. 612-616).

<sup>592</sup> Hearing Transcript (26 February 2016), 48:5-7.

<sup>593</sup> Hearing Transcript (26 February 2016), 52:3-22.

<sup>594</sup> Reply, para. 545; Reply, paras. 546-551 (referring to *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award of 29 July 2008 (CL-129); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA), Award on Jurisdiction and Liability of 17 March 2015 (CL-134); *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL), Award of 26 January 2006 (CL-57); *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53); *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case), Award of 31 March 2010 (CL-61); *CER-Dolzer*; Hearing Transcript (26 February 2016), 55:12-20).

the Claimant to enter into the FIT Contract and breached the Claimant's resulting legitimate expectations.<sup>595</sup> The Claimant contends that the moratorium has prevented Windstream from obtaining access to Crown land to develop the Project in accordance with the timelines set out in the FIT Contract.<sup>596</sup>

299. The Respondent's commitments, representations and assurances included that: (i) Ontario was "open for business" for offshore wind; (ii) timely approval of applications to use Crown land for offshore wind energy development could be expected by those submitting applications; (iii) the streamlined regulatory approvals process created by the GEGEA applied equally to all renewable energy projects, including offshore wind projects; (iv) the GEGEA, and the FIT Program and REA process it created, would make Ontario the "destination of choice for green power developers ... including wind, both onshore and offshore" by providing "certainty that government would issue permits in a timely way" and a fair price guaranteed "for decades," and that the Act would "coordinate approvals from the [MOE and MNR] into a streamlined process with a service guarantee;" (v) Ontario was satisfied that its research "made clear" that developing offshore wind was environmentally sound, and as a result lifted the earlier deferral on accepting applications for offshore wind project development; (vi) the Project had the "highest priority" for receiving AOR status and would receive "priority attention from MNR;" (vii) the Ontario Government, including the Premier's Office, supported the Project; (viii) the Government was working "feverishly" to develop offshore REA guidelines and that, as of May 2010, the guidelines would be available "very soon;" (ix) the MNR "appreciate[d] Windstream's need for certainty" before it signed a FIT Contract, and would "move as quickly as possible through the remainder of the application review process in order that [WWIS] may obtain Applicant of Record status in a timely manner;" (x) the approval process for the Project would be expedited; and (xi) the Project could proceed as an offshore wind pilot project.<sup>597</sup> The Claimant emphasizes that "[w]ithout this repeated and continuous confirmation of the government's support for the Project, Windstream would not have invested time and capital in the Project."<sup>598</sup>

300. The Claimant points out that Minister Smitherman stated in his witness statement that remarks he had made on the occasion of the introduction of the GEGEA "were designed to attract investors to Ontario."<sup>599</sup> Windstream relied on these commitments when it decided to invest in WWIS and the Project.<sup>600</sup> In the view of the Claimant, "[t]hese representations are akin to the representations

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<sup>595</sup> Memorial, para. 605; Reply, para. 571.

<sup>596</sup> Reply, para. 572.

<sup>597</sup> Memorial, para. 606. See also Reply, paras. 557-559.

<sup>598</sup> Memorial, para. 607. See also Reply, para. 561.

<sup>599</sup> Reply, para. 559 (citing CWS-Smitherman, para. 21 (emphasis removed)).

<sup>600</sup> Reply, para. 561 (referring to CWS-Mars-2, paras. 11-22; CWS-Baines-2, para. 29; CWS-Ziegler-2, paras. 7-8).

given to the claimant in *Bilcon*, on which the tribunal in that case relied in finding that Canada had breached Article 1105(1).”<sup>601</sup>

301. The Claimant disagrees with the Respondent’s assertion that in light of the allegedly underdeveloped regulatory framework for offshore wind, Windstream’s reliance on these representations was not reasonable.<sup>602</sup> According to the Claimant, Windstream’s reliance on the Ontario Government’s commitment to issue regulatory approvals for offshore wind projects in a timely way “would only be unreasonable if the Government had made public statements reneging those commitments;”<sup>603</sup> the 2008 decision of Minister Cansfield to lift the deferral was based on research that “made clear” that the environmental approvals process in place was sufficient to ensure compliance of offshore wind projects with environmental standards;<sup>604</sup> and Ontario never publicly communicated that it was “not ready” to receive investment in offshore wind projects.<sup>605</sup>
302. In the Claimant’s view, in terms of the REA Regulations, all the main rules were in place for the project to move forward.<sup>606</sup> The Claimant maintains that the REA Regulations specifically applied to offshore wind including classified facilities and offshore wind facilities.<sup>607</sup> Furthermore, there existed a regulatory framework that included not only the REA Regulations, but also the FIT Contract, renewable energy procurement initiatives from the Ministry of Energy, the Environmental Protection Act, and the site release process.<sup>608</sup> The Claimant further notes that the Offshore Wind Facility Report served as a “specific piece of guidance documentation” published in relation to REA Regulation 359, and included environmental assessment components.<sup>609</sup> In addition, as to the setback issue, the Claimant disagrees with the Respondent that there was regulatory uncertainty, arguing that each setback would be determined on a specific basis based upon each individual project.<sup>610</sup> The Claimant’s witness, Mr Uwe Roeper, explains that there have been many projects in which there have been no specific setback guidelines and, in those instances, the standard approach is followed that uses science and the specific requirements.<sup>611</sup> In sum, the Claimant maintains that “there were sufficient rules in place ... for

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<sup>601</sup> Reply, para. 562.

<sup>602</sup> Reply, para. 563 (referring to Counter-Memorial, paras. 426-430).

<sup>603</sup> Reply, para. 564.

<sup>604</sup> Reply, para. 568.

<sup>605</sup> Reply, para. 569.

<sup>606</sup> Hearing Transcript (26 February 2016), 63:2 to 65:5.

<sup>607</sup> Hearing Transcript (17 February 2016), 14:3-6.

<sup>608</sup> Hearing Transcript (17 February 2016), 11:21-25, 13:9-13.

<sup>609</sup> Hearing Transcript (18 February 2016), 20:16-22; Hearing Transcript (17 February 2016), 13:20-22.

<sup>610</sup> Hearing Transcript (26 February 2016), 71:6 to 73:10.

<sup>611</sup> Hearing Transcript (17 February 2016), 28:16-21.

the project to have proceeded through the REA application and through the application provisions in the MNR.”<sup>612</sup>

303. According to the Claimant, the “moratorium was an abrupt withdrawal of Ontario’s support for the Project,” with “devastating consequences” that rendered the Project “substantially worthless.”<sup>613</sup> In particular, the Claimant sees the moratorium as contrary to ministerial commitments that the GEGEA would provide offshore wind developers with “certainty,” that the MNR and the MOE “would issue permits in a timely way,”<sup>614</sup> and to the MNR’s commitment to “move as quickly as possible” with respect to Windstream’s application for the AOR status.<sup>615</sup>
304. Further, the Claimant contends that, “[r]ather than amending the regulatory framework in place for offshore wind projects at the time Windstream invested in the Project, in adopting the moratorium Ontario decided to override that framework by fiat, with complete disregard for the regulatory process.”<sup>616</sup> The Claimant points out that the moratorium lacked formal legal authority because it was based on “nothing more than policies announced via [online] postings ... and via press releases.”<sup>617</sup> This notwithstanding, the practical effect of the moratorium was to “override” the REA Regulation, which promised to proponents of offshore wind projects that they “could apply for, and obtain, a Renewable Energy Approval.”<sup>618</sup> The Claimant characterizes the moratorium as a “shocking and unexpected repudiation of a policy’s very purpose and goals” and a “willful disregard of the law,” which the Claimant says has consistently been found by arbitral tribunals “to be arbitrary and grossly unfair.”<sup>619</sup>
305. The Claimant also alleges that the moratorium was “politically motivated” by the “desire to indefinitely stall offshore wind development” out of considerations including “cost savings” and “countering public opposition to offshore wind development,” rather than any “scientific uncertainty.”<sup>620</sup>
306. Finally, the Claimant submits that the Respondent failed to fulfill its promises to ensure that the moratorium would not penalize Windstream.<sup>621</sup> The Claimant contends that the Respondent

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<sup>612</sup> Hearing Transcript (26 February 2016), 91:20-24.

<sup>613</sup> Memorial, para. 608; Reply, para. 34.

<sup>614</sup> Memorial, para. 609; Reply, para. 558.

<sup>615</sup> Memorial, para. 610; Reply, para. 138.

<sup>616</sup> Memorial, para. 612.

<sup>617</sup> Memorial, para. 613.

<sup>618</sup> Memorial, para. 613.

<sup>619</sup> Memorial, para. 615; Reply, para. 538.

<sup>620</sup> Memorial, para. 616; Reply, paras. 596, 599.

<sup>621</sup> Memorial, para. 623; Reply, para. 601.

could have treated Windstream “fairly” by ensuring the Project was “frozen” and not “cancelled” or by giving it an alternative project, like it did for TransCanada.<sup>622</sup>

**(b) The Respondent discriminated against the Claimant**

307. The Claimant submits that the Respondent also breached Article 1105(1) of NAFTA by treating other investors more favorably.<sup>623</sup> The Claimant points out that several NAFTA awards have found that discriminatory treatment can amount to a breach of Article 1105.<sup>624</sup> In addition, the Claimant submits that discriminatory intent is not necessary to qualify a given measure as discriminatory under international law; what counts is the discriminatory effect.<sup>625</sup>

308. According to the Claimant, the Respondent discriminated against it when compared to the treatment of TransCanada, Samsung, other applicants for Crown land and the other developers of large-scale projects who were awarded FIT Contracts at the same time as Windstream.<sup>626</sup> In particular, the Claimant submits that the Respondent kept TransCanada “whole” after cancelling its project, but refused to do the same for Windstream.<sup>627</sup> The Claimant also complains that the Respondent gave a solar project that the Claimant had proposed as an alternative to the Project to Samsung, thus “prevent[ing] Windstream from salvaging the value of its FIT Contract and Project, and instead favour[ing] the interests of Samsung.”<sup>628</sup>

309. The Claimant further submits that within the period of over six years since Windstream applied for AOR status to develop the Project, the Respondent granted that status to “at least 19 other wind energy developers,” but not to Windstream, despite the “MNR’s commitment to Windstream ... that [it] would receive Applicant of Record status in a ‘timely manner.’”<sup>629</sup> According to the Claimant, “Ontario has allowed every other developer of a large wind project ... to receive the benefits of its FIT contract,” while “Windstream has been singled out and prevented from receiving the benefit of its FIT Contract.”<sup>630</sup>

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<sup>622</sup> Memorial, para. 623. See also Reply, paras. 602-603.

<sup>623</sup> Reply, para. 602.

<sup>624</sup> Reply, para. 602 (referring to *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003 (CL-60), para. 123; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004 (CL-91), para. 98; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53), paras. 22, 829).

<sup>625</sup> Reply, para. 602 (referring to *Marion Unglaube v. Republic of Costa Rica* (ICSID Case No. ARB/08/1), Award of 16 May 2012 (CL-127), paras. 262-263).

<sup>626</sup> Memorial, para. 624; Reply, para. 603.

<sup>627</sup> Memorial, paras. 625-630.

<sup>628</sup> Memorial, para. 631.

<sup>629</sup> Memorial, para. 632.

<sup>630</sup> Memorial, para. 633.

## 2. The Respondent's Position

310. The Respondent submits that the Claimant's allegations "that Ontario's adoption and implementation of the deferral violated Canada's obligation to provide the Claimant with the customary international law minimum standard of treatment because it (1) was arbitrary and grossly unfair; (2) constituted a repudiation of the regulatory framework; (3) violated the commitments and representations made by Ontario contrary to the Claimant's legitimate expectations; and (4) was discriminatory" are without any merit.<sup>631</sup> The Respondent argues that Article 1105(1) of NAFTA only requires Canada to accord the customary international minimum standard of treatment of aliens, referring to NAFTA's Free Trade Commission's ("FTC") Notes of Interpretation of 31 July 2001.<sup>632</sup>
311. According to the Respondent, the Tribunal must "consider the applicable customary rules, which requires proof of extensive uniform, consistent, and general practice by States, together with the States' belief that such practice is required by law."<sup>633</sup> The Respondent notes that "the practice of states does not support the proposition that standalone FET clauses have become part of the customary international law minimum standard of treatment" and "there is no uniform consistent practice."<sup>634</sup> According to the Respondent, "to prove a breach of Article 1105 requires proving a breach of a customary international law standard, such as denial of justice or a breach of an investor's full protection and security."<sup>635</sup> The Respondent submits that "the Claimant has not met its burden in identifying a standard of customary international law and has not alleged a denial of justice or a breach of full protection and security."<sup>636</sup>
312. According to the Respondent, the threshold to establish a breach of Article 1105(1) of NAFTA is very high.<sup>637</sup> In particular, following the FTC Note of Interpretation, NAFTA tribunals "have consistently affirmed that a violation of the minimum standard of treatment under customary international law will not be found unless there is evidence of egregious conduct, such as serious malfeasance, manifestly arbitrary behaviour or denial of justice."<sup>638</sup>
313. The Respondent argues that the tribunal in *S.D. Myers v. Canada* held that, to establish a breach of Article 1105 of NAFTA, it must be "shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international

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<sup>631</sup> Counter-Memorial, para. 361.

<sup>632</sup> Counter-Memorial, paras. 366, 369.

<sup>633</sup> Hearing Transcript (26 February 2016), 156:21-25.

<sup>634</sup> Hearing Transcript (26 February 2016), 155:7-11, 16-17.

<sup>635</sup> Hearing Transcript (26 February 2016), 157:6-10.

<sup>636</sup> Hearing Transcript (26 February 2016), 157:13-21.

<sup>637</sup> Counter-Memorial, para. 382.

<sup>638</sup> Counter-Memorial, para. 382.

perspective.”<sup>639</sup> The *S.D. Myers* tribunal elaborated that “determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.”<sup>640</sup> The Respondent further refers to summaries of the minimum standard of treatment under customary international law provided by the tribunals in *Thunderbird*, *Waste Management*, *Glamis*, *Cargill* and *Mobil*.<sup>641</sup>

314. The Respondent concludes that “it is clear from the consistent post-FTC Note of Interpretation NAFTA jurisprudence ... that the measure in question must hit a high level of severity and gravity in order to breach the exacting threshold set by Article 1105.”<sup>642</sup>

**(a) The moratorium was neither manifestly arbitrary nor grossly unfair**

315. The Respondent disputes the Claimant’s allegation that Ontario’s decision to defer the development of offshore wind was made because of “economic benefit, along with electoral politics,” stating that such an allegation is “unsubstantiated by the evidentiary record” of this arbitration.<sup>643</sup> The Claimant’s allegation that the decision to defer offshore wind development was made “because of electoral politics” is not supported by the evidence.<sup>644</sup> According to the Respondent, the record is “replete with evidence concerning the reason for the deferral,”<sup>645</sup> i.e. the need to ground the offshore wind policy framework on solid scientific foundation.

316. While the Respondent does not deny that it was aware of public opposition to offshore wind, it argues that such opposition required that the regulatory framework be backed by scientific research.<sup>646</sup> The Respondent considers it “absurd for the Claimant to suggest that the consideration of public concerns by elected officials is somehow a breach of Article 1105.”<sup>647</sup> Similarly, while conceding that the impact on ratepayers was a consideration in deciding to impose the deferral, the Respondent argues that “Article 1105 does not prevent elected officials charged with managing public finances from considering the full context of their decisions when making policy choices.”<sup>648</sup>

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<sup>639</sup> Counter-Memorial, para. 383 (citing *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, PCA), Partial Award of 13 November 2000 (CL-81), para. 263).

<sup>640</sup> Counter-Memorial, para. 383 (citing *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, PCA), Partial Award of 13 November 2000 (CL-81), para. 263).

<sup>641</sup> Counter-Memorial, paras. 384-388.

<sup>642</sup> Counter-Memorial, para. 389.

<sup>643</sup> Counter-Memorial, para. 390.

<sup>644</sup> Counter-Memorial, para. 391.

<sup>645</sup> Counter-Memorial, para. 392.

<sup>646</sup> Rejoinder, para. 241; RWS-Wilkinson, para. 9.

<sup>647</sup> Rejoinder, para. 241.

<sup>648</sup> Rejoinder, para. 242.

317. The Respondent explains that because the REA process was intended to be standardized and prescriptive in nature to ensure that the development of renewable energy projects does not adversely affect human health and the environment, the determination of requirements for project proponents “was a necessary prerequisite for the issuance of REAs for offshore wind projects.”<sup>649</sup> As the REA Process also provides third-parties with a right of appeal,<sup>650</sup> the Respondent had to adopt a “cautious approach, especially in light of the public opposition to offshore wind.”<sup>651</sup> Accordingly, Ontario’s decision to institute a temporary deferral on offshore wind development “was neither manifestly arbitrary nor grossly unfair.”<sup>652</sup>

**(b) The moratorium did not amount to a repudiation of the regulatory framework for offshore wind**

318. The Respondent disagrees with the Claimant’s characterization of the REA Regulation.<sup>653</sup> Contrary to the Claimant’s assertion that the deferral amounts to a repudiation of the existing regulatory framework for offshore wind, the Respondent contends that the moratorium is “fully in support of the development of offshore wind policies in the REA Regulation.”<sup>654</sup> Indeed, the moratorium was necessary to allow the regulator sufficient time to determine appropriate rules, requirements and standards.<sup>655</sup> According to the Respondent, it could not repudiate a regulatory framework “that did not yet exist.”<sup>656</sup>

319. The Respondent acknowledges that “the REA Regulation applies equally to offshore wind projects as it does to onshore wind and other renewable energy projects,”<sup>657</sup> but contends that the Claimant ignores the technology-specific requirements in the REA Regulation which are reflected in different classifications of renewable energy generation facilities.<sup>658</sup> The decision to defer offshore wind development was necessary “to allow the regulator sufficient time to determine the rules, requirements and standards that the proponent of an offshore wind facility would have to satisfy prior to the issuance of a REA.”<sup>659</sup> According to the Respondent, the Claimant’s contention that the deferral was “unnecessary to achieve its stated environmental objective” is

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<sup>649</sup> Counter-Memorial, para. 393.

<sup>650</sup> Counter-Memorial, para. 394.

<sup>651</sup> Counter-Memorial, para. 394.

<sup>652</sup> Counter-Memorial, para. 399.

<sup>653</sup> Counter-Memorial, para. 401.

<sup>654</sup> Counter-Memorial, para. 401.

<sup>655</sup> Counter-Memorial, para. 403.

<sup>656</sup> Counter-Memorial, para. 403.

<sup>657</sup> Memorial, para. 614.

<sup>658</sup> Counter-Memorial, para. 402.

<sup>659</sup> Counter-Memorial, para. 403.



therefore unfounded.<sup>660</sup> Without “scientifically sound rules” the MOE could not be in a position to assess a project and issue a REA accordingly.<sup>661</sup>

**(c) Neither the moratorium nor Ontario’s subsequent conduct vis-à-vis the Claimant breached any specific commitments to the Claimant**

320. The Respondent argues that, even assuming a mere breach of a commitment or representation was sufficient to demonstrate a breach of Article 1105 of NAFTA, the Claimant has not provided any evidence “that Ontario made any specific assurances, which could reasonably have been relied upon by the Claimant to induce it to invest in Ontario.”<sup>662</sup> In particular, the customary international law minimum standard of treatment does not require a State to respect an investor’s legitimate expectations, as explained by the arbitral tribunals in *Waste Management II*, *Glamis* and *Mobil*.<sup>663</sup> According to the Respondent, the mere failure to meet a commitment does not fall below the customary international law standard of treatment required by Article 1105 of NAFTA.<sup>664</sup>
321. The Respondent disagrees with the Claimant’s argument that a breach of legitimate expectations in and of itself could amount to a breach of Article 1105.<sup>665</sup> Specifically, the NAFTA decisions that the Claimant relies on provide no assistance because the tribunals in those cases failed to apply the customary international law standard.<sup>666</sup> The Respondent suggests that, at most, the standard can be used as a “relevant factor” in assessing the egregious behavior under customary international law, referring to the decisions in *Thunderbird*, *Glamis Gold* and *Mobil*.<sup>667</sup>
322. The Respondent also argues that the only relevant expectations for the Article 1105 NAFTA analysis are those that are objective and reasonable, based on specific assurances made to induce the investment, and existing at the time of the investment.<sup>668</sup> However, the Claimant has failed

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<sup>660</sup> **Rejoinder**, para. 238; **Reply**, paras. 584-589.

<sup>661</sup> **Rejoinder**, para. 238.

<sup>662</sup> **Counter-Memorial**, para. 404.

<sup>663</sup> **Counter-Memorial**, paras. 405-409.

<sup>664</sup> **Counter-Memorial**, para. 405.

<sup>665</sup> **Rejoinder**, para. 209.

<sup>666</sup> **Rejoinder**, paras. 204-206 (referring to the decisions in **Reply**, paras. 545-551, citing *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 of 22 May 2012 (CL-64); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA), Award on Jurisdiction and Liability of 17 March 2015 (CL-134); *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case), Award of 31 March 2010 (CL-61)).

<sup>667</sup> **Rejoinder**, para. 209 (referring to *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL), Award of 26 January 2006 (CL-57); *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award of 29 July 2008 (CL-129)).

<sup>668</sup> **Counter-Memorial**, paras. 410-412 (referring to *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award of 18 August 2008 (CL-44); *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction of

to prove that it had any expectations that would be relevant to an Article 1105 analysis.<sup>669</sup> In particular, the Claimant had no objective and legitimate expectation that (i) its application for Crown land would be approved;<sup>670</sup> (ii) it would be permitted to proceed through the REA process before the establishment of the requirements for offshore winds facilities;<sup>671</sup> (iii) its Project would be permitted to proceed merely because the OPA (an independent State enterprise) offered it a FIT Contract;<sup>672</sup> and (iv) its Project would be permitted to proceed as a pilot project proposal.<sup>673</sup>

323. Finally, the Respondent's expert, Mr Gareth Clarke, notes that the Project had a "significant risk profile"<sup>674</sup> as it would have been "the first offshore wind project permitted in North America and particularly under the REA process" and subject to more scrutiny from the various agencies involved,<sup>675</sup> and because it was in an early stage of development as there were still a number of technical, and environmental studies and other work to do to develop the project.<sup>676</sup>

**(d) The moratorium and Ontario's subsequent conduct did not discriminate against the Claimant**

324. The Respondent submits that the Claimant has failed to make any distinction between its Article 1105 NAFTA claims with respect to TransCanada and Samsung and its Articles 1102 and 1103 NAFTA claims, whereas the FTC Note of Interpretation clearly states that "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."<sup>677</sup> According to the Respondent, the Claimant therefore inappropriately relies on its allegations of discriminatory treatment under NAFTA Articles 1102 and 1103 to establish a breach of Article 1105.<sup>678</sup>

325. The Respondent submits that the Claimant has also failed to prove, on the facts, that it was subject to any discriminatory treatment. According to the Respondent, the Claimant was treated in its

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14 November 2005 (RL-8); *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL), Partial Award of 17 March 2006 (CL-80); *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009 (RL-20); *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53); *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004 (CL-91)).

<sup>669</sup> Counter-Memorial, para. 413.

<sup>670</sup> Counter-Memorial, paras. 414-421.

<sup>671</sup> Counter-Memorial, paras. 422-430.

<sup>672</sup> Counter-Memorial, paras. 431-439 (referring also to Counter-Memorial, paras. 46-48).

<sup>673</sup> Counter-Memorial, paras. 440-441.

<sup>674</sup> Hearing Transcript (21 February 2016), 236:22-25, 237:1-7.

<sup>675</sup> Hearing Transcript (21 February 2016), 238:6-14.

<sup>676</sup> Hearing Transcript (21 February 2016), 237:11-13.

<sup>677</sup> Counter-Memorial, para. 442 (referring also to Counter-Memorial, paras. 338-360).

<sup>678</sup> Counter-Memorial, para. 442.

capacity as a FIT project proponent, whereas neither TransCanada nor Samsung participated in the FIT Program.<sup>679</sup>

326. The Respondent notes that none of the comparators that the Claimant has identified are offshore wind developers.<sup>680</sup> The Respondent points out that “there are currently no offshore wind proponents in Ontario with AOR status” and that “no other offshore wind projects have been developed or proceeded through the REA process in Ontario.”<sup>681</sup> According to the Respondent, the Claimant actually received more favorable treatment because its Project was “merely frozen,” whereas all other offshore wind applications were cancelled.<sup>682</sup>

**(e) Ontario took reasonable efforts to ensure that the Claimant was not adversely affected by the moratorium**

327. The Respondent submits that it “took all reasonable measures to accommodate the Claimant.”<sup>683</sup> In particular, during the telephone conference on 11 February 2011 the Government of Ontario (through officials from the MEI, MOE, MNR and the OPA) explained to the Claimant the effects of the decision on its Project and presented various options as to how to move forward.<sup>684</sup> In other words, “Ontario confirmed that whereas all other offshore FIT and Crown land applications were cancelled, the Claimant’s Project and its Crown land applications were not terminated.”<sup>685</sup> The Claimant “was invited to engage the OPA in ‘without prejudice’ negotiations specifically in respect of the Force Majeure, two-year Force Majeure termination clause and security deposit provisions in the FIT Contract.”<sup>686</sup>

328. The Respondent submits that the Claimant “did not pursue the available options ... and instead chose to make unreasonable and unrealistic demands of Ontario and the OPA,” seeking “an extension of its MCOB until such date as the Claimant elected to resume the project.”<sup>687</sup> The Claimant also requested “the return of the full amount of the security deposit, a removal of the time limitations on Force Majeure, and removal of the OPA’s termination right,” as well as making “requests unrelated to mitigating the impact of the deferral, such as the removal of its domestic content requirement.”<sup>688</sup> According to the Respondent, “[i]f the Claimant had accepted the OPA’s proposal, then the harm that it claims occurred on May 4, 2012, when its financing

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<sup>679</sup> Counter-Memorial, para. 443.

<sup>680</sup> Counter-Memorial, para. 444.

<sup>681</sup> Counter-Memorial, para. 444.

<sup>682</sup> Counter-Memorial, para. 445.

<sup>683</sup> Counter-Memorial, para. 446.

<sup>684</sup> Counter-Memorial, para. 447.

<sup>685</sup> Counter-Memorial, para. 447.

<sup>686</sup> Counter-Memorial, para. 447.

<sup>687</sup> Counter-Memorial, para. 448.

<sup>688</sup> Counter-Memorial, para. 448.

backed out because of the OPA's termination rights, never would have happened."<sup>689</sup> The Respondent also contends that the Claimant's "alternative proposals" were "unreasonable," as they were "inconsistent with the FIT Rules and would result in major implications to ratepayers and other renewable energy projects that were already under development."<sup>690</sup>

### 3. Submissions pursuant to Article 1128 of NAFTA

#### (a) Submission of the United States

329. The United States submits that the FTC's interpretation of Article 1105 is binding on all NAFTA tribunals constituted under Chapter 11.<sup>691</sup> As confirmed by the FTC, the term fair and equitable treatment does "not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."<sup>692</sup>

330. According to the United States, customary international law has two components, State practice and *opinio juris*.<sup>693</sup> Both requirements "must...be identified to support a finding that a relevant rule of customary international law has emerged."<sup>694</sup> The United States points out that "legitimate expectations" is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation,<sup>695</sup> and an investor's expectation with respect to "a particular legal regime do[es] not preclude a State from taking future regulatory action."<sup>696</sup> Consequently, "something more" than mere interference with the investor's expectations is required under the minimum standard of treatment.<sup>697</sup>

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<sup>689</sup> Counter-Memorial, para. 450.

<sup>690</sup> Counter-Memorial, para. 451.

<sup>691</sup> United States' Article 1128 Submission, para. 9 (referring to NAFTA, Article 1131(2)).

<sup>692</sup> United States' Article 1128 Submission, para. 9 (referring to NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2011, para. B.2).

<sup>693</sup> United States' Article 1128 Submission, para. 13 (referring to Wood, Michael (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission of 22 May 2014, para. 21, and Annex, Proposed Draft Conclusion 3; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, (I.C.J. Reports 2012), Judgment of 3 February 2012, p. 122; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, (I.C.J. Reports 1985), Judgment of 3 June 1985, pp. 29-30; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, (I.C.J. Reports 1986), Judgment of 27 June 1986, p. 97).

<sup>694</sup> United States' Article 1128 Submission, para. 14 (referring to Wood, Michael (Special Rapporteur), *Second Report on Identification of Customary International Law*, A/CN.4/672, International Law Commission of 22 May 2014, paras. 22-23).

<sup>695</sup> United States' Article 1128 Submission, para. 16 (referring to Dumberry, Patrick, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (2013), pp. 158-159).

<sup>696</sup> United States' Article 1128 Submission, para. 17.

<sup>697</sup> United States' Article 1128 Submission, para. 16 (referring to *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA, UNCITRAL), Counter-Memorial of Respondent United States of America of 22 December 2008, paras. 96-97; *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award of 1 November 1999, para. 87).

331. According to the United States, States may extend protections by treaty beyond what is required under customary international law through “autonomous” standards.<sup>698</sup> However, such protections are not relevant for the purpose of interpreting “fair and equitable treatment” and “full protection and security” under Article 1105.<sup>699</sup>
332. As to the burden of proof, the United States asserts that the claimant needs to establish “the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.”<sup>700</sup> Once such a burden is discharged, the claimant must show that the State breached the customary international law rule and the minimum standard of treatment.<sup>701</sup> Such a determination “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.”<sup>702</sup> Furthermore, as confirmed by the FTC, “establishing that Article 1102 or 1103 has been breached does not establish a breach of Article 1105(1).”<sup>703</sup>

**(b) Submission of Mexico**

333. Mexico reiterates the position on Article 1105(1) of NAFTA which it presented in *Mercer International Inc. v. Government of Canada*: “(i) the threshold for a violation of the minimum standard of treatment is high; (ii) the burden is on the claimant to establish the existence of an obligation under customary international law that meets the requirements of State practice and *opinio juris*; and (iii) decisions of international courts and arbitral tribunals interpreting ‘fair and equitable treatment’ as a concept of customary international law are not themselves instances of

<sup>698</sup> United States’ Article 1128 Submission, para. 18.

<sup>699</sup> United States’ Article 1128 Submission, para. 18 (referring to NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2011, para. B.1; *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (NAFTA, UNCITRAL), Award of 12 January 2011, para. 176).

<sup>700</sup> United States’ Article 1128 Submission, para. 20 (referring to *Asylum Case (Colombia v. Peru)*, (I.C.J. Reports 1950), Judgment of 20 November 1950, paras. 266-276; *North Sea Continental Shelf (Germany v. Denmark/Netherlands)*, (I.C.J. Reports 1969), Judgment of 20 February 1969, p. 43; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53), paras. 601-602; *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, (I.C.J. Reports 1952), Judgment of 27 August 1952, paras. 176, 200; *The Case of the S.S. “Lotus” (France v. Turkey)*, (P.C.I.J., ser. A, no. 10), Judgment of 27 September 1927, paras. 25-26; *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award of 18 September 2009 (CL-31), para. 273; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003 (CL-22), para. 185; *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits of 3 August 2005 (CL-63), para. 26 (citing *Asylum Case (Colombia v. Peru)*, (I.C.J. Reports 1950), Judgment of 20 November 1950).

<sup>701</sup> United States’ Article 1128 Submission, para. 21 (referring to *Marvin Roy Feldman Karpa v. United Mexican States* (NAFTA, ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002, para. 177).

<sup>702</sup> United States’ Article 1128 Submission, para. 21 (citing *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL, PCA), Partial Award of 13 November 2000 (CL-81), para. 263; *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL), Award of 26 January 2006 (CL-57), para. 127).

<sup>703</sup> United States’ Article 1128 Submission, para. 22 (referring to NAFTA FTC, Notes of Interpretation of Certain Chapter 11 Provisions of 31 July 2011, para. B.3).

‘State practice’ for purposes of proving customary international law, although such decisions can be relevant for determining State practice when they include an examination of such practice.”<sup>704</sup>

334. Mexico also reiterates its position that “Article 1105(1) does not provide a blanket prohibition on discrimination against foreign investors or their investments,” stressing that “[n]ationality-based discrimination falls under the purview of NAFTA Articles 1102 and 1103, and not Article 1105.”<sup>705</sup>
335. Mexico also refers to the United States’ submission in the *Mesa* case, in which the United States argued as follows:

“Article 1105 thus reflects a standard that develops from State practice and *opinio juris*, rather than an autonomous, treaty-based standard. ... Arbitral decisions interpreting ‘autonomous’ fair and equitable treatment and full protection and security provisions in other treaties ... do not constitute evidence of the content of the customary international law standard required by Article 1105. ...

States may modify or amend their regulation to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor’s ‘expectations’ about the state of regulation in a particular sector. ...

The burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*. ‘The party which relies on a custom,’ therefore, ‘must prove that this custom is established in such a manner that it has become binding on the other Party.’ Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violates that rule. Determining a breach of the minimum standard of treatment ‘must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.’”<sup>706</sup>

336. Mexico endorses the following positions adopted by the Respondent in its Rejoinder: (i) “[o]nly States can engage in relevant actions which, if followed out of *opinio juris* and in concert with enough other States, coalesce into binding custom;” (ii) “none of the awards cited by the Claimant, NAFTA or otherwise, undertakes the requisite examination of State practice and *opinio juris* necessary to prove that the customary international law minimum standard of treatment of aliens has the same substantive content as the autonomous fair and equitable treatment standard;” (iii) “the threshold for establishing a breach of the customary international law minimum standard of treatment under Article 1105(1) is high, requiring evidence of egregious conduct”; and

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<sup>704</sup> Mexico’s Article 1128 Submission, para. 6.

<sup>705</sup> Mexico’s Article 1128 Submission, para. 6.

<sup>706</sup> Mexico’s Article 1128 Submission, para. 6.

(iv) “NAFTA tribunals have accorded a high level of deference to domestic authorities” in determining breaches of Article 1105(1).<sup>707</sup>

**(c) The Claimant’s reply to the submissions of the United States and Mexico**

337. The Claimant submits that the United States’ and Mexico’s proposed interpretation of Article 1105(1) should be rejected.<sup>708</sup> The Claimant relies on the FTC’s Notes of Interpretation,<sup>709</sup> the decisions in *Pope & Talbot*<sup>710</sup> and *Bilcon*,<sup>711</sup> the United States’ submission<sup>712</sup> and Professor Dolzer’s opinion,<sup>713</sup> arguing that the Tribunal should be guided by “the interpretation of Article 1105(1) set out in the decisions of NAFTA tribunals” and also by “the interpretation of the fair and equitable treatment standard in other arbitral decisions.”<sup>714</sup> According to these decisions, in determining whether the minimum standard has been breached, “the tribunal should consider whether the state has breached specific commitments made to induce the investment that were reasonably relied upon by the investor.”<sup>715</sup>

338. The Claimant rejects the position of Mexico and the United States that State practice and *opinio juris* must be proven independently in every case.<sup>716</sup> The Claimant also submits that Mexico and the United States do not provide any assistance to the Tribunal as to how “state practice and *opinio juris* concerning the precise scope of the requirement to grant fair and equitable treatment under Article 1105 would ever be established.”<sup>717</sup> The Claimant argues that the Tribunal should be guided by the decisions of other NAFTA tribunals which “have consistently referred to the formulations of the content of Article 1105(1) adopted by other NAFTA tribunals, and other arbitral tribunals interpreting the fair and equitable treatment component of the minimum standard of treatment.”<sup>718</sup> According to these decisions, conclusive proof with respect to State practice or

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<sup>707</sup> Mexico’s Article 1128 Submission, para. 7.

<sup>708</sup> Claimant’s Article 1128 Submission, paras. 6-7.

<sup>709</sup> Claimant’s Article 1128 Submission, paras. 9-10, 12.

<sup>710</sup> Claimant’s Article 1128 Submission, para. 10 (referring to *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Award in Respect of Damages of 31 May 2002 (CL-140), paras. 53-54).

<sup>711</sup> Claimant’s Article 1128 Submission, para. 11 (referring to *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA), Award on Jurisdiction and Liability of 17 March 2015 (CL-134), para. 441).

<sup>712</sup> Claimant’s Article 1128 Submission, para. 11 (referring to United States’ Article 1128 Submission, para. 11).

<sup>713</sup> Claimant’s Article 1128 Submission, paras. 8, 11-12 (referring to CER-Dolzer, paras. 12-13).

<sup>714</sup> Claimant’s Article 1128 Submission, para. 7.

<sup>715</sup> Claimant’s Article 1128 Submission, para. 7.

<sup>716</sup> Claimant’s Article 1128 Submission, para. 14.

<sup>717</sup> Claimant’s Article 1128 Submission, para. 14.

<sup>718</sup> Claimant’s Article 1128 Submission, para. 13 (referring to *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA), Award on Jurisdiction and Liability of 17 March 2015 (CL-134), paras. 435-443; *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 of 22 May 2012 (CL-64), paras. 138-153; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award of 30 April 2004 (CL-91), para. 98; *Mondev International Ltd. v. United States*

*opinio juris* is not required for the purpose of establishing the conduct that would amount to a breach of the minimum standard of treatment.<sup>719</sup> The Claimant argues that the Tribunal may also be “guided by the decisions of arbitral tribunals interpreting the ‘autonomous’ fair and equitable treatment standard established under bilateral and multilateral investment treaties...”<sup>720</sup>

339. The Claimant notes that “even the *Glamis Gold* tribunal, on which the United States relies, found that a breach of an investor’s legitimate expectations could constitute a breach of Article 1105(1) ‘where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct...’”<sup>721</sup> In the Claimant’s view, there is no general rule of customary international law that requires the application of the “shocking or outrageous” standard established in *Neer* in the circumstances of the present proceedings.<sup>722</sup>
340. The Claimant submits that, as explained by Professor Dolzer, both State practice and *opinio juris* provide for the provision of fair and equitable treatment as part of the minimum standard of treatment under customary international law.<sup>723</sup> Indeed, fair and equitable treatment provisions have become “pervasive” in bilateral and multilateral investment treaties, representing efforts to standardize foreign investment protection.<sup>724</sup> As to *opinio juris*, the Claimant relies on Professor Dolzer’s opinion that “the fact that states have overwhelmingly included fair and equitable treatment provisions in investment protection treaties ‘constitutes the best evidence of what states consider themselves obliged to do under customary international law.’”<sup>725</sup> The Claimant notes that Professor Dolzer’s opinion has not been challenged in these proceedings.<sup>726</sup>

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of America (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002 (CL-66), paras. 119, 126-127; *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award of 18 September 2009 (CL-31), paras. 277-278; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003 (CL-22), para. 184; *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL), Award of 26 January 2006 (CL-57), para. 194; *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), Award of 19 December 2013 (CL-85), paras. 454-456; *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23), Award of 29 June 2012 (RL-43), paras. 217, 219).

<sup>719</sup> Claimant’s Article 1128 Submission, para. 13.

<sup>720</sup> Claimant’s Article 1128 Submission, para. 24 (referring to *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005 (CL-40), para. 284).

<sup>721</sup> Claimant’s Article 1128 Submission, para. 20 (referring to *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53), para. 621).

<sup>722</sup> Claimant’s Article 1128 Submission, para. 21; *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case), Award of 31 March 2010 (CL-61), para. 204.

<sup>723</sup> Claimant’s Article 1128 Submission, paras. 8, 12.

<sup>724</sup> Claimant’s Article 1128 Submission, paras. 26, 28-29 (referring to CER-Dolzer, paras. 20-28; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002 (CL-66), para. 125; *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case), Award of 31 March 2010 (CL-61), paras. 210-211).

<sup>725</sup> Claimant’s Article 1128 Submission, para. 27 (referring to CER-Dolzer, para. 58).

<sup>726</sup> Claimant’s Article 1128 Submission, paras. 8, 25.



341. The Claimant submits that the Tribunal should reject the submission of the United States and Mexico that entering into treaties containing fair and equitable treatment provisions constitutes a policy decision by a State and not an action taken out of legal obligation. According to the Claimant, this submission “ignores that the sheer number and pervasiveness of bilateral investment treaties evidences that states, when entering into bilateral investment treaties, consider themselves bound by the obligation to provide fair and equitable treatment to foreign investors.”<sup>727</sup>

**(d) The Respondent’s reply to the submissions of the United States and Mexico**

342. The Respondent agrees with the other NAFTA parties that “the Claimant must prove that the specific rules of customary international law regarding the treatment of the investment that it alleges have crystallized into widespread and consistent State practice flowing from a sense of legal obligation.”<sup>728</sup> According to the Respondent, the Claimant has failed to meet its burden of proof as “neither the Claimant’s Memorial nor the Claimant’s Reply Memorial contain any discussion of State practice and *opinio juris* necessary to prove a rule of customary international law.”<sup>729</sup>

343. The Respondent also agrees with the United States and Mexico that “decisions of international courts and arbitral tribunals interpreting ‘fair and equitable treatment’ as a concept of customary international law are not themselves instances of ‘state practice’ for the purpose of evidencing customary international law.”<sup>730</sup> Moreover, in the Respondent’s view, “none of the decisions on which the Claimant relies as evidence of the customary international law minimum standard of treatment contain any analysis of State Practice and *opinio juris*.”<sup>731</sup> Canada also disagrees with the Claimant’s argument that the autonomous fair and equitable treatment standard and the minimum standard of treatment under customary international law “are similar standards, and that the autonomous standard has relevance to the customary international law standard,” referring again to the other NAFTA parties’ submissions.<sup>732</sup>

344. According to the Respondent, the Tribunal is not entitled to “second-guess domestic policy and decision-making and to question the domestic regulatory process.”<sup>733</sup> Supporting the common

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<sup>727</sup> Claimant’s Article 1128 Submission, para. 31 (referring to CER-Dolzer, para. 58).

<sup>728</sup> Respondent’s Article 1128 Submission, para. 6.

<sup>729</sup> Respondent’s Article 1128 Submission, paras. 7, 12.

<sup>730</sup> Respondent’s Article 1128 Submission, para. 15 (referring to United States’ Article 1128 Submission, para. 18; Mexico’s Article 1128 Submission, para. 6).

<sup>731</sup> Respondent’s Article 1128 Submission, para. 16.

<sup>732</sup> Respondent’s Article 1128 Submission, paras. 17-21 (referring to United States’ Article 1128 Submission, para. 18; Mexico’s Article 1128 Submission, para. 6).

<sup>733</sup> Respondent’s Article 1128 Submission, para. 24 (referring to Reply Memorial, para. 600).

position of the United States and Mexico, the Respondent submits that “a determination of breach of the customary international law minimum standard of treatment ‘must be made in the light of the high measures of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders.’”<sup>734</sup>

345. The Respondent further argues that “no established rule of customary international law has emerged that generally prohibits any nationality-based discrimination against foreign investors,”<sup>735</sup> rejecting the Claimant’s allegation that Canada breached its Article 1105 obligation “[by] providing more favourable treatment to Samsung and TransCanada.”<sup>736</sup>

346. The Respondent disagrees with the Claimant’s assertion that “there is a breach of Article 1105 when a state ‘breaches the investor’s legitimate expectations arising from state representations and assurances’ or ‘fails to maintain regulatory fairness and predictability.’”<sup>737</sup> The Respondent alleges that “the Claimant failed to establish that such protections are part of the minimum standard of treatment at customary international law.”<sup>738</sup> The Respondent relies on the submission of the United States, to the effect that “the concept of ‘legitimate expectations’ is not a component element of ‘fair and equitable treatment’ under customary international law that gives rise to an independent host State obligation.”<sup>739</sup> The Respondent also concurs with Mexico’s position that “States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor’s ‘expectations’ about the state of regulation in a particular sector.”<sup>740</sup>

#### **4. The Tribunal’s Analysis**

##### **(a) The interpretation and content of Article 1105(1) of NAFTA**

347. As summarized above, the Claimant alleges that the Respondent has breached Article 1105(1) (“Minimum Standard of Treatment”) of NAFTA. Article 1105(1) provides:

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<sup>734</sup> Respondent’s Article 1128 Submission, para. 25 (referring to United States’ Article 1128 Submission, para. 21; Mexico’s Article 1128 Submission, para. 6).

<sup>735</sup> Respondent’s Article 1128 Submission, para. 27 (referring to United States’ Article 1128 Submission, para. 22; Mexico’s Article 1128 Submission, para. 6).

<sup>736</sup> Respondent’s Article 1128 Submission, para. 30.

<sup>737</sup> Respondent’s Article 1128 Submission, para. 31 (referring to Reply Memorial, para. 537).

<sup>738</sup> Respondent’s Article 1128 Submission, para. 32.

<sup>739</sup> Respondent’s Article 1128 Submission, para. 33.

<sup>740</sup> Respondent’s Article 1128 Submission, paras. 33, 35 (referring to United States’ Article 1128 Submission, para. 16; Mexico’s Article 1128 Submission, para. 6).

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

348. While the Parties disagree on the content of the minimum standard of treatment set out in Article 1105(1), as well as on how the content of the standard should be established, they agree that the interpretation of this provision by the FTC in its Notes of Interpretation of 31 July 2001 is binding on all NAFTA tribunals under Article 1131(2) (“Governing Law”) of NAFTA.<sup>741</sup> The FTC’s Notes of Interpretation state:

- “1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).”

349. The Claimant submits that both Parties bear the burden of proving the content of the standard. According to the Claimant, rather than requiring the Parties to prove the existence of custom on the basis of state practice and *opinio juris*, NAFTA tribunals have relied primarily on arbitral jurisprudence in determining the level of conduct that amounts to a breach of the requirement of fair and equitable treatment. The Respondent submits, in response, that it is the Claimant that bears the burden of proving the content of the standard because it is the party alleging that the standard has been breached. In support of its position, the Respondent refers *inter alia* to *Cargill v Mexico*, in which the tribunal held that “it is for the party asserting the custom to establish the content of that custom.”

350. The Tribunal agrees that it is in the first place for the party asserting that a particular rule of customary international law exists to prove the existence of the rule. However, in the present case the issue is not whether the relevant rule of customary international law exists; the minimum standard of treatment contained in Article 1105(1) of NAFTA is indeed a rule of customary international law, as interpreted by the FTC in its Notes of Interpretation. The issue therefore is not whether the rule exists, but rather how the content of a rule that does exist – the minimum standard of treatment in Article 1105(1) of NAFTA – should be established. The Tribunal is therefore unable to accept the Respondent’s argument that the burden of proving the content of

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<sup>741</sup> Article 1131(2) of NAFTA provides that “[a]n interpretation by the Commission of a provision of this agreement shall be binding on a Tribunal established under this Section.”

the rule falls exclusively on the Claimant. In the Tribunal's view, it is for each Party to support its position as to the content of the rule with appropriate legal authorities and evidence. On this issue, the Respondent argues, and the Claimant appears to agree, that the Tribunal is not strictly bound by the Parties' positions although it may be said to be bound by the record before it in the sense that, if the Tribunal considers that there are issues or questions that neither Party has fully or properly addressed, or if it wishes to refer to legal authorities other than those cited by the Parties, it should draw the Parties' attention to those issues, questions and authorities and solicit the Parties' views thereon. This is indeed what the Tribunal has sought to do in the course of the present proceedings, having put forward a series of questions both before and during the February 2016 hearing, including regarding the content of the minimum standard of treatment.

351. The Tribunal further agrees with the Respondent that in principle the content of a rule of customary international law such as the minimum standard of treatment can best be determined on the basis of evidence of actual State practice establishing custom that also shows that the States have accepted such practice as law (*opinio juris*). However, the Tribunal notes that neither Party has produced such evidence in this arbitration. In the circumstances, the Tribunal must rely on other, indirect evidence in order to ascertain the content of the customary international law minimum standard of treatment; the Tribunal cannot simply declare *non liquet*. Such indirect evidence includes, in the Tribunal's view, decisions taken by other NAFTA tribunals that specifically address the issue of interpretation and application of Article 1105(1) of NAFTA, as well as relevant legal scholarship.<sup>742</sup>
352. The Tribunal notes that other NAFTA tribunals have adopted a similar approach when seeking to determine the contents of the minimum standard of treatment in Article 1105(1) of NAFTA. Both Parties have also extensively cited to NAFTA awards and legal scholarship. Furthermore, while decisions of earlier international tribunals such as the *Neer* tribunal are often referred to as reflective of the content of the customary international law minimum standard of treatment, including by the Respondent in the present proceedings, the Tribunal notes that *Neer* is also an award (or more accurately, a decision of an international claims commission), not direct evidence of State practice, and that the *Neer* tribunal itself did not have any direct evidence relating to State practice before it.<sup>743</sup> The Tribunal is therefore unable to determine the content of the customary international law minimum standard of treatment by revisiting the evidence before the *Neer*

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<sup>742</sup> This approach is consistent with the approach that the International Court of Justice is required to adopt under Article 38 of its Statute, which provides that the Court may refer to "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as *subsidiary means* for the determination of rules of law" (emphasis added).

<sup>743</sup> See *L. F. H. Neer and Pauline Neer (United States) v. United Mexican States* (Mexico-United States Claims Commission), Decision of 15 October 1926, para. 4 (citing Basset Moore, John, *American Journal of International Law* (1910), p. 787).

tribunal. Nor did the *Neer* decision deal with the treatment of foreign investors, and consequently the factual circumstances of the case are in any event not directly relevant here.

353. The Parties also disagree on the content of the minimum standard of treatment. According to the Claimant, the minimum standard of treatment is an “umbrella concept” which incorporates different elements, the fair and equitable treatment standard being one of these elements. Citing *Pope & Talbot*, the Claimant contends that the FTC Notes do not require that the reference to the fair and equitable treatment standard in Article 1105(1) should be ignored; any other reading would require “including” to be read as “excluding.” Moreover, according to the Claimant, the content of the minimum standard of treatment is not static, but evolves over time with the development of customary international law, as explained by Professor Dolzer in his expert opinion.
354. The Respondent argues, in turn, that a breach of the minimum standard of treatment requires “egregious” conduct, and while bad faith is not required to commit a breach, it will in practice often be present. According to the Respondent, treaties containing “autonomous” fair and equitable treatment standards are not evidence of State practice or *opinio juris*, and the expert opinion of Professor Dolzer must therefore be rejected. Moreover, mere inconsistency with domestic law or breach of contract is not sufficient to breach customary international law, nor are NAFTA tribunals courts of appeal from decisions of domestic courts.
355. The Tribunal has carefully analyzed the Parties’ positions and considers that, when determining the content of the standard of treatment contained in Article 1105(1) of NAFTA, it cannot disregard the language of the provision. While the FTC in its Notes of Interpretation established that the rule contained in Article 1105(1) of NAFTA, bearing the heading “Minimum Standard of Treatment,” is the customary international law minimum standard of treatment, it does not follow that the terms used in this provision have thereby become irrelevant; there is nothing in the FTC’s Notes which would suggest that NAFTA tribunals should entirely disregard the relevant rules of treaty interpretation. Indeed, there can be no “plain reading” of a treaty provision that would involve no interpretation at all; “plain meaning” is in itself a result of interpretation. Consequently, when determining the content of the standard of treatment contained in Article 1105(1), the Tribunal must take into account both FTC’s Notes of Interpretation, which establish that the standard contained in Article 1105(1) is indeed the customary international law minimum standard of treatment, and the general rule of treaty interpretation, as reflected in Article 31 of the Vienna Convention, which establishes that a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

356. As to the terms used, Article 1105(1) provides that each State party shall accord to investments of investors of another party “treatment in accordance with international law, including fair and equitable treatment and full protection and security.” Consequently, while keeping in mind that the standard set out in the provision is the customary international law minimum standard of treatment, the Tribunal must also take into account the express language of the provision, which refers to “fair and equitable treatment” and “full protection and security.” The Tribunal therefore considers that the treatment required under Article 1105(1) is fair and equitable treatment and full protection and security consistent with the minimum standard of treatment under customary international law. In other words, as stated by the FTC, the treatment required is not “in addition to or beyond” that which is required by the customary international law standard, but one that is in accordance, or consistent, with the standard, while remaining “fair and equitable” and providing “full protection and security.”
357. In the present case, the Claimant argues that the Respondent is in breach of the “fair and equitable” treatment component of the minimum standard of treatment, but does not allege that the Respondent has failed to provide “full protection and security.” The Tribunal does not consider it helpful, for purposes of determining the content of the “fair and equitable” treatment component of the standard, to look for dictionary definitions of the terms used in Article 1105(1) – “fair” and “equitable.” This is not only unhelpful as it would effectively result in replacing these terms with other words which would then also have to be interpreted; but also because it would create the risk that if the alleged breach were to be assessed in light of such other terms rather than the terms actually used in Article 1105(1), the standard to be applied would not be the standard set out in Article 1105(1), but another standard that might not be in accordance with the customary international law minimum standard of treatment. The State parties to NAFTA must have considered, when using the terms “fair and equitable treatment” and “full protection and security,” that it is these terms, and not any others, that best reflect the content of the minimum standard of treatment set out in the provision. Nor can the FTC’s Notes of Interpretation be taken to mean that a NAFTA tribunal must entirely disregard the terms “fair and equitable” and “full protection and security” in Article 1105(1) when considering whether the customary international law standard of treatment set out in the provision has been met.
358. Given that the Claimant invokes the “fair and equitable” treatment element, but not the “full protection and security” element of Article 1105(1) of NAFTA, in support of its Article 1105 claim, the Tribunal must determine whether the Respondent’s conduct that the Claimant alleges as a breach of Article 1105(1) of NAFTA may be considered “unfair” or “inequitable” in accordance with the customary international law minimum standard of treatment. This determination is best done, not in the abstract, but in the context of the facts of this particular case,

taking into account the indirect evidence of the content of the customary international law minimum standard of treatment as evidenced in the decisions of other NAFTA tribunals.

359. As noted above, this is also how other NAFTA tribunals have approached the issue. The Tribunal agrees in particular with the *Pope & Talbot* tribunal, which stated:

“The [FTC] Interpretation concluded that Article 1105 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of other Parties. The Interpretation does not require that the concepts of ‘fair and equitable treatment’ and ‘full protection and security’ be ignored, but rather that they be considered as part of the minimum standard of treatment that it prescribes. Parenthetically, any other construction of the Interpretation where by the fairness elements were treated as having no effect, would be to suggest that the Commission required the word ‘including’ in Article 1105(1) to be read as ‘excluding.’ Such an approach has only to be stated to be rejected. Therefore, the Interpretation requires each Party to accord to investments of investors of the other Parties the fairness elements as subsumed in, rather than additive to, customary international law.”<sup>744</sup>

360. Similarly, the *Mondev* tribunal observed:

“When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.

...

[T]he FTC interpretation makes it clear that that in Article 1105(1) the terms ‘fair and equitable treatment’ and ‘full protection and security’ are, in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard. The word ‘including’ paragraph (1) supports that conclusion. To say that these elements are included in the standard of treatment under international law suggests that Article 1105 does not intend to supplement or add to that standard. But it does not follow that the phrase ‘including fair and equitable treatment and full protection and security’ adds nothing to the meaning of Article 1105(1), nor did the FTC seek to read those words out of the article, a process which *would* have involved amendment rather than interpretation.”<sup>745</sup>

361. The Tribunal underwrites all of these observations, including in particular the *Mondev* tribunal’s observation that “[a] judgment of what is fair and equitable cannot be reached in the abstract; it

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<sup>744</sup> *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Interim Award of 26 June 2000 (CL-74), p. 26.

<sup>745</sup> *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002 (CL-66), paras. 118, 122 (emphasis in original).

must depend on the facts of the particular case.”<sup>746</sup> The Mondev tribunal rightly stressed that “[i]t is part of the essential business of courts and tribunals to make judgments such as these;” and that “[i]n doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.”<sup>747</sup>

362. In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts.

**(b) The determination of whether the Respondent is in breach of Article 1105(1) of NAFTA**

363. As summarized above, the Claimant contends that the Respondent breached Article 1105(1) of NAFTA by imposing a moratorium on the development of offshore wind, which was contrary to the representations and commitments made by the Respondent when encouraging the Claimant to invest in the development of offshore wind in Ontario, and by failing to respect its promise to ensure that the moratorium would not penalize the Claimant. The Claimant also contends that the Respondent breached Article 1105(1) by treating other investors, specifically TransCanada and Samsung, more favorably by offering them alternative projects.

364. The Respondent denies all of these allegations, contending that the development of offshore wind was deferred in order to ensure that the regulatory framework would be backed by solid scientific research. The Respondent acknowledges that the cost of offshore wind, and its impact on ratepayers, was also a consideration when the decision to defer the development of offshore wind was taken, but this was an entirely legitimate concern. The Respondent contends that, following the moratorium, it took reasonable measures to accommodate the Claimant, but the Claimant failed to pursue the available options and instead made unreasonable and unrealistic demands. The Respondent also denies that there was any discrimination.

365. The Tribunal has carefully considered the evidence produced by the Parties surrounding the moratorium and the subsequent conduct of the Parties, in order to determine whether Article 1105(1) of NAFTA might have been breached.

366. The Tribunal notes that following the signing of the FIT Contract on 20 August 2010, the position of the Government of Ontario grew gradually more ambiguous towards the development of offshore wind. Thus, while the Government appears to have envisaged still in August 2010 that

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<sup>746</sup> *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002 (CL-66), para. 118.

<sup>747</sup> *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002 (CL-66), para. 118.



the relevant regulatory framework, including the setback requirements, would be in place possibly [REDACTED],<sup>748</sup> its position started changing in the fall of 2010. This change appears to have coincided with the receipt and analysis of the information generated through the EBR posting of 25 June 2010, which indicated an increasing resistance to the development of offshore wind.<sup>749</sup> Thus, while the MOE in a workshop held on 31 August 2010 [REDACTED]

[REDACTED], on 16 September 2010 MOE staff in a presentation to the Deputy Minister of the Environment [REDACTED]

[REDACTED]<sup>750</sup> The briefing note specifically reported on the EBR comments, noting that two thirds of the comments opposed offshore wind development. In November 2010, MOE forwarded to MNR and MEI officials an outline for a strategy for the development of offshore wind, which stressed the need for further technical and environmental research, [REDACTED] but envisaged that “[t]he required research will not delay the implementation of any off-shore wind projects.”<sup>751</sup> On 7 December 2010, the officials of the MEI, MOE and MNR met to discuss “ways to move away from the off-shore development,” while possibly going ahead with the Windstream project as a pilot. It was noted that the OPA was considering its options, including legal and financial risks “associated with not pursuing off-shore.”<sup>752</sup>

367. It does not appear from the evidence that the various options that were being considered and the related concerns were communicated to Windstream, either at the meetings between the government officials and Windstream representatives or otherwise. On 10 December 2010, Windstream delivered a force majeure notice to the OPA, effective from 22 November 2010, stating that MNR’s failure to proceed with the permitting process, in particular the site release process, and MOE’s failure to take steps to implement its policy proposal to create an exclusion

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<sup>748</sup> MOE, Presentation, “Off-Shore Wind Noise Requirements: Technical Workshop Findings: Path Forward – Options” (R-140).

<sup>749</sup> MOE, Preliminary Summary of EBR Comments (EBR Registry # 011-0089, undated (R-421). The Discussion Paper was posted on the Environmental Registry on 25 June 2010 for a period of 60 days until 23 August 2010, but was subsequently extended until 7 September 2010.

<sup>750</sup> MOE, Presentation, “Off-Shore Wind Noise Requirements: Deputy Minister’s Briefing” (“Noise Requirements DM Briefing #3) of 29 September 2010 (R-152). See also MOE, Presentation, “Off-Shore Wind Noise Requirements: Technical Workshop Findings: Path Forward – Options” (R-140).

<sup>751</sup> Government of Ontario, Presentation, “Offshore Wind Development: Strategies for a Path Forward” of 16 November 2010 (R-178), p. 10.

<sup>752</sup> Email from Zaveri, Mirrun (MEI) to Slawner, Karen (MEI) et al. of 8 December 2010 (C-403).

zone, had prevented Windstream from progressing the Project in accordance with the FIT Contract.<sup>753</sup>

368. On 6 January 2011, the representatives of MNR, MEI, MOE and the Premier's Office held an energy issues meeting. At the meeting, MEI made a presentation stating that, while there was "significant potential for offshore wind development in the Great Lakes," extensive offshore wind development could have a "substantial impact" on electricity costs for Ontario consumers given the prices paid for output, and that the EBR process had indicated that there were significant concerns relating to the development of offshore wind power.<sup>754</sup> [REDACTED] options were outlined for the development of offshore wind: [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

369. On the following day, 7 January 2011, Minister of Environment Mr Wilkinson received a briefing memorandum from his senior policy adviser Ms Brenda Lucas which updated the Minister on the energy issues meeting that had taken place earlier during the day.<sup>756</sup> The memorandum noted that the "[d]irection from the meeting was to proceed with [REDACTED]

[REDACTED] At the hearing, Mr Wilkinson testified that he was concerned by Ms Lucas's memorandum and called for a follow-up meeting with the Deputy Minister of the Environment which took place either on 7 or 8 January 2011. At the meeting, Mr Wilkinson put questions to the Deputy Minister on a number of issues, including the impact of the Project on drinking water, which the Deputy was not able to answer. Mr Wilkinson testified that he then decided, on the spot, that he could not accept the development of offshore wind development in the circumstances.

370. However, the evidence before the Tribunal suggests that Mr Wilkinson's decision was not a definitive one, or at least not effectively communicated within the Government of Ontario, or even within MOE, as Ms Wallace testified at the hearing that she was not aware that any such decision had been taken.<sup>757</sup> Subsequent communications between Ontario Government officials

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<sup>753</sup> Windstream's Notice of Force Majeure of 10 December 2010 (C-408); Exhibit A to Windstream's Notice of Force Majeure (C-406).

<sup>754</sup> Presentation (MEI), Offshore Wind: Options for Moving Forward of 6 January 2011 (C-430).

<sup>755</sup> Presentation (MEI), Offshore Wind: Options for Moving Forward of 6 January 2011 (C-430).

<sup>756</sup> Memorandum (Confidential Advice to the Minister) from Lucas, Brenda (ENE) to Minister Wilkinson (ENE) of 6 January 2011 (C-900).

<sup>757</sup> Hearing Transcript (18 February 2016), 357:17 to 361:8.

also suggest that the [REDACTED] options were still on the table as late as 24 January 2011. On that date, an inter-ministerial meeting attended by the Ministers of Energy and Infrastructure, the Environment and the Natural Resources took place where the [REDACTED] [REDACTED] [REDACTED] although it is not entirely clear from the evidence whether this decision also applied to the Windstream project, or whether it would be allowed to proceed as a pilot project. After the meeting, Mr Andrew Mitchell of MEI wrote to his colleagues at MNR and MOE stating that his Minister's direction was that the FIT Contract with Windstream would be respected and the Project would be allowed to proceed.<sup>759</sup> Mr Sean Mullin of the Premier's Office indicated that he agreed, and that "there is a desire to get this out publicly before Friday," while Ms Lucas of MOE indicated that "Minister Wilkinson still has reservations."<sup>760</sup> However, in a separate email of the same date, Mr Craig MacLennan of MEI wrote to Mr Mullin of the Premier's Office that "[REDACTED] [REDACTED] [REDACTED]"<sup>761</sup> Subsequent correspondence suggests that a consensus emerged in the following two weeks that [REDACTED] [REDACTED].<sup>762</sup>

371. The decision on the moratorium was eventually communicated to Windstream during a conference call on 11 February 2011.<sup>763</sup> The transcript and the audio recording of the call show that the decision came as a surprise to Windstream, whose representatives indicated that they had been expecting an announcement on the setbacks.<sup>764</sup> During the call, the Government officials confirmed that the Project was not terminated, and that it would go forward once the science studies had been completed:

"[Andrew Mitchell of MEI:] Our feeling is that offshore wind in freshwater lakes is in its early developments and to date there are gaps that exist in the science that don't support siting wind projects in freshwater at this time. ... We acknowledge that your project is unique in that it has a FIT Contract and so that end Perry [of the OPA] is here but we've asked that the OPA sit down with you to negotiate a number of pieces including the force

<sup>758</sup> Email from MacLennan, Craig (MEI) to Morley, Chris (OPO) of 24 January 2011 (C-943).

<sup>759</sup> Email from Lucas, Brenda (ENE) to Mullin, Sean (OPO) et al. of 24 January 2011 (C-942). It is noted in this email: "[r]espect the OPA FIT contract and allow the project to proceed;" and "[a]dvice Windstream that we will proceed with their project."

<sup>760</sup> Email from Lucas, Brenda (ENE) to Mullin, Sean (OPO) et al. of 24 January 2011 (C-942).

<sup>761</sup> Email from MacLennan, Craig (MEI) to Morley, Chris (OPO) of 24 January 2011 (C-943).

<sup>762</sup> Email from Mitchell, Andrew (MEI) to MacLennan, Craig (MEI) and Mullin, Sean (OPO) of 28 January 2011 (C-959).

<sup>763</sup> Audio Recording of Call of 11 February 2011 (C-483); Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484).

<sup>764</sup> Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484), pp. 5-6 (Mr Baines stating that "[t]his comes as I'll be honest as a terrible shock to us and to our investor, I invited David Mars from New York to be on the line because we had every reason to believe that we would be hearing that the set-back announcement would be resolved and we could move forward and what I'm hearing is the exact opposite so it is quite a shock ...").

majeure provisions, the two-year force majeure termination clause associated with those provisions and the security deposits ...<sup>765</sup>

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[Ian Baines of WWIS:] Now I understand you said that there is an announcement at 2 o'clock and the announcement will be that there will no offshore wind, so those two statements are kind of at odds with each other. If the public is being told there is no offshore wind, they're going to assume there is no Wolf Island Shoals project and I am not sure how a meeting is going to resolve that. We certainly can meet with you for clarification, but what I am hearing very clearly is the project has been terminated by the government.

[Perry Cecchini of the OPA:] No you are not hearing that."<sup>766</sup>

372. On the same day, the Ontario government issued a press release, announcing that it would not be proceeding with offshore wind development,<sup>767</sup> and the MOE and MNR posted decision notices to the same effect on Ontario's Environmental Registry.<sup>768</sup> There were no changes made to the regulatory framework, including the REA Regulation and Wind Policy 4.10.04, which continued to envisage the development of offshore wind.<sup>769</sup>
373. Starting in the spring of 2011 and continuing until 2012, several communications, meetings and discussions took place between WWIS and the OPA, in an attempt to agree on the required changes to the FIT Contract to reflect the moratorium. While the parties were able to agree on waiving the OPA's pre-NTP termination rights under Section 2.4(a) of the FIT Contract, and although the OPA accepted WWIS's force majeure claim retroactively from 22 November 2010, the discussions did not produce an agreed outcome, nor did the OPA accept WWIS's proposal to convert the offshore wind project into a solar project. The Government also did not accept WWIS proposal of 2 March 2012 to the Premier's Office to designate the Project as an "active research project" which would have left the moratorium in place, but would have addressed the science questions raised in connection with the moratorium.
374. By 4 May 2012, the ongoing force majeure had delayed commercial operation for more than 24 months after the original MCOD, which in turn triggered the right of the OPA to unilaterally terminate the FIT Contract. Consequently, in the absence of any further amendments to the FIT

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<sup>765</sup> Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484), p. 2.

<sup>766</sup> Transcription of Audio Recording of Telephone Conference Call of 11 February 2011 (C-484), p. 6.

<sup>767</sup> News Release (MOE), Ontario Rules Out Offshore Wind Projects of 11 February 2011 (C-485).

<sup>768</sup> Policy Decision Notice (MOE), Renewable Energy Approval Requirements for Off-Shore Wind Facilities – An Overview of the Proposed Approach (EBR Registry Number: 011-0089) of 2 February 2011 (C-725); Decision on Policy (MNR), Offshore Wind Power: Consideration of Additional Areas to be Removed from Future Development of 11 February 2011 (C-482).

<sup>769</sup> Policy No. PL 4.10.04 (MNR), Wind Power Site Release and Development Review – Crown Land of 28 January 2008 (C-59); *Environmental Protection Act*, Ontario Regulation 359/09 (C-103).

Contract to address the suspension, as of this date the Project effectively became non-financeable.<sup>770</sup>

375. On 17 October 2012, Windstream filed a Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11.
376. The Tribunal has carefully considered the evidence before it, in order to determine whether the Government of Ontario's conduct during the relevant period could be characterized as unfair and inequitable and thus in breach of the customary international law minimum standard of treatment. The Tribunal is unable to find that the Government of Ontario's decision to impose a moratorium on offshore wind development, or the process that led to it, were in themselves wrongful. The Tribunal notes that, while the conduct of the Ontario Government during the period leading up to the moratorium could have been more transparent, and although Windstream was kept in the dark as to the evolving policy position of the Government while Windstream continued to invest in the Project, the Government's evolving position was at least in part driven by a genuine policy concern that there was not sufficient scientific support for establishing an appropriate setback, or exclusion zone, for offshore wind projects.
377. At the same time, however, the evidence before the Tribunal suggests that the decision to impose the moratorium was not only driven by the lack of science. The impact of offshore wind on electricity costs in Ontario, as well as the upcoming provincial elections in November 2011, also appear to have influenced the decision, and the latter in particular in light of the public opposition to offshore wind that had emerged during the relevant period in many parts of rural Ontario (although not in Kingston, where the Project was located). Again, however, the Tribunal is unable to find, on the basis of the evidence before it, that these concerns were the predominant reason for the moratorium, or that the decision to impose the moratorium amounted to a breach of Article 1105(1) of NAFTA just because the Government failed to communicate these other concerns when imposing the moratorium.
378. As to the period following the moratorium, the Tribunal notes that, while the MOE developed research plans relating to offshore wind,<sup>771</sup> and while it appears that the Government did conduct

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<sup>770</sup> See para. 100 above. See also Article 10.1(g) of the FIT Contract: "If, by reason of one or more events of Force Majeure, the Commercial Operation Date is delayed by such event(s) of Force Majeure for an aggregate of more than 24 months after the original Milestone Date for Commercial Operation (prior to any extension pursuant to Section 10.1(f), then notwithstanding anything in this Agreement to the contrary, either Party may terminate this Agreement upon notice to the other Party and without any costs or payments of any kind to either Party, and all Completion and Performance Security shall be returned or refunded (as applicable) to the Supplier forthwith."

<sup>771</sup> MOE, Offshore Wind Development Research Plan, Vol. 3 of 5 April 2011 (R-232); Presentation (MOE), Offshore Wind Power Development – Proposed Research Plan, MO Briefing of 17 February 2012 (C-598); Presentation (MOE), Offshore Wind Power Development – Proposed Research Plan (Confidential) of May 2012 (C-611); MOE, "Offshore Wind Power – Ministry of the Environment Research Plan" of 22 March 2013 (R-334).

some studies,<sup>772</sup> the Government on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium. Indeed, many of the research plans did not go forward at all, including some for lack of funding, and at the hearing counsel for the Respondent confirmed that Ontario did not plan to conduct any further studies. Nor have the studies that have been conducted led to any amendments to the regulatory framework.

379. Most importantly, the Government did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium. While the regulatory framework continued to envisage the development of offshore wind, additional and more detailed regulations governing offshore wind specifically were never developed. The Government let the OPA conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the Government and not by the OPA, and without providing any direction to the OPA for the negotiations although it had the authority to do so under the GEGEA (a power it had exercised when introducing the FIT program). As a result, as the negotiations between the OPA and Windstream failed to produce results, by May 2012 the Project had reached a point at which it was no longer financeable. Nonetheless, the Government failed to clarify the situation, either by way of promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT Contract, or by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy and terminating Windstream's FIT Contract in accordance with the applicable law. For these reasons, the Tribunal finds that the Government's conduct vis-à-vis Windstream during the period following the imposition of the moratorium was unfair and inequitable within the meaning of Article 1105(1) of NAFTA.

380. The Tribunal concludes that the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA. It was indeed the Government of Ontario that imposed the moratorium, not the OPA, so it cannot be said that the resulting regulatory and contractual

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<sup>772</sup> See, e.g., Report (MNR), Nienhuis, Sarah and Dunlop, Erin S., "The Potential Effects of Offshore Wind Power Projects on Fish and Fish Habitat in the Great Lakes," Aquatic Research Series 2011-01 of 6 July 2011 (C-543); Reid, Scott, Murrant, Meghan and Dunlop, Erin, MNR Aquatic Research and Development Section Report, "Impacts of Electromagnetic Fields from the Wolfe Island Wind Power Project Submarine Cable on Fish Biodiversity and Distribution: 2011-12 Project Report on Nearshore Fish Community Sampling" (R-194); Report (MOE), Application of the MIKE3 model to examine water quality impacts within Lake Ontario nearshore in 2008 of 28 December 2012 (C-637). These studies were released after Windstream had served its Notice of Intent to Submit a Claim to Arbitration under NAFTA Chapter 11.

limbo was a result of the Claimant's own failure to negotiate a reasonable settlement with the OPA. The regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium was a result of acts and omissions of the Government of Ontario, and as such is attributable to the Respondent. The Tribunal therefore need not consider whether the conduct of the OPA during the relevant period must also be considered attributable to the Respondent.<sup>773</sup>

381. [REDACTED]  
[REDACTED].<sup>774</sup> Indeed, the evidence before the Tribunal suggests that the Government expected that Windstream would bring legal action to settle the consequences of the moratorium, which the Government was unable to address within a reasonable period of time either by way of appropriate regulatory action or by way of an appropriate direction to the OPA.

382. In light of the above, the Tribunal concludes that the Respondent is in breach of Article 1105(1) of NAFTA.

### C. NAFTA ARTICLES 1102 AND 1103 – LESS FAVORABLE TREATMENT

#### 1. The Claimant's Position

##### (a) Test for less favorable treatment

383. The Claimant argues that three elements must be established for a *prima facie* violation of NAFTA Articles 1102 or 1103: "treatment," "like circumstances" and "treatment less favorable."<sup>775</sup> The Claimant submits that once it has established that it was afforded treatment less favorable than that accorded to national investors in like circumstances, the burden shifts to the NAFTA Party to establish that the discriminatory treatment has a "reasonable nexus to rational government policies that (1) do not distinguish, on their face or de facto, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA."<sup>776</sup>

384. The Claimant disagrees with the Respondent's contention that the procurement exception contained in NAFTA Article 1108(7)(a) forecloses Windstream's claims based on Articles 1102

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<sup>773</sup> In view of its findings, the Tribunal also need not consider whether an adverse inference should be drawn, as requested by the Claimant, in light of the evidence that some of the emails relating to the Project may have been intentionally deleted by officials of the Premier's Office. See para. 173 above.

<sup>774</sup> Presentation (MEI), Offshore Wind: Options for Moving Forward (Draft 3) of 13 January 2011 (C-921).

<sup>775</sup> Memorial, para. 636 (referring to *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL), Award on the Merits of 24 May 2007 (CL-88)).

<sup>776</sup> Memorial, para. 641.

and 1103 because the FIT Program involved procurement by a State enterprise.<sup>777</sup> According to the Claimant, it “never claimed that it was subject to less favourable treatment by the OPA in connection with ‘the FIT Program,’” but its case is rather based on the less favorable treatment it received “in connection with the means by which the Ontario Government implemented a termination of “the various relevant projects.”<sup>778</sup> Accordingly, “the relevant measure for the purpose of the analysis under Article 1102 is the failure to keep Windstream ‘whole’ after the moratorium was made,” which cannot be qualified as procurement.<sup>779</sup> The Claimant points out that “the procurement exception must be construed narrowly” as applying only to “the act of ‘procuring’” and that the Respondent provides no authority for a broader interpretation.<sup>780</sup>

385. In addition, the Claimant contends that “‘procurement’ does not extend to procurement of electricity by the OPA for the purpose of reselling it to customers,” but only to “the obtaining of title to or possession of a good or a service.”<sup>781</sup> The Claimant points out that the *UPS v. Canada* case relied on by the Respondent “did not involve procurement by a government for the purpose of resale” and, therefore, “does not assist Canada’s argument.”<sup>782</sup>

**(b) The Respondent has accorded to the Claimant treatment that is less favorable than that accorded to other entities in like circumstances**

386. In the Claimant’s view, the Respondent’s treatment of Windstream was less favorable than its treatment of TransCanada, a Canadian company, in like circumstances.<sup>783</sup>

387. The Claimant submits that TransCanada and Windstream were in like circumstances, as they were both parties to power purchase agreements with the OPA that guaranteed them fixed prices for electricity,<sup>784</sup> and since both contracts were under force majeure.<sup>785</sup> The Claimant contends that both contracts had similar force majeure provisions<sup>786</sup> and were terminated by Ontario “for political reasons.”<sup>787</sup>

388. The Claimant alleges that Ontario, having terminated TransCanada’s contract, kept it “whole” “by awarding it a new project and compensating it for its costs associated with the

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<sup>777</sup> Reply, para. 608 (referring to Counter-Memorial, paras. 326-332).

<sup>778</sup> Reply, paras. 608-609.

<sup>779</sup> Reply, para. 609.

<sup>780</sup> Reply, paras. 609-610.

<sup>781</sup> Reply, para. 612.

<sup>782</sup> Reply, para. 613.

<sup>783</sup> Memorial, para. 634.

<sup>784</sup> Memorial, para. 642; Reply, para. 615.

<sup>785</sup> Memorial, para. 643; Reply, para. 616.

<sup>786</sup> Memorial, para. 643; Reply, para. 616.

<sup>787</sup> Memorial, para. 643; Reply, para. 618.



cancellation.”<sup>788</sup> By contrast, Ontario failed to do the same thing with regard to Windstream following the moratorium.<sup>789</sup> According to the Claimant, “there can be no rational policy to justify such discriminatory treatment of Windstream vis-à-vis TransCanada.”<sup>790</sup>

389. The Claimant also submits that the Respondent’s treatment of Windstream was less favorable than its treatment of Samsung, a South Korean company, in like circumstances.<sup>791</sup> Referring to the solar project that Windstream proposed to the OPA,<sup>792</sup> the Claimant alleges that Windstream and Samsung were in like circumstances “as two possible recipients of contracts to develop the solar project.”<sup>793</sup> While Ontario offered Samsung a FIT Contract “for the very solar project that Windstream proposed following the moratorium,” no such contract was offered to the Claimant.<sup>794</sup> Consequently, the Claimant alleges, an investor of a third party<sup>795</sup> received better treatment than Windstream.<sup>796</sup>

390. Moreover, according to the Claimant, the Respondent has allowed every other developer of a large wind project that was awarded a FIT Contract at the same time as the Claimant to develop its project and receive the benefits of its FIT Contract, unimpeded by the Government or by any moratorium. As the only developer of an offshore wind project that was awarded a FIT Contract, the Claimant argues that it was singled out and prevented from receiving the benefit of its FIT Contract when all other developers of large-scale wind projects who were awarded a FIT Contract have been allowed to proceed through the regulatory process.<sup>797</sup>

## **2. The Respondent’s Position**

### **(a) Articles 1102 and 1103 of NAFTA do not apply because the challenged measures involve procurement**

391. The Respondent submits that the Tribunal should dismiss the Claimant’s arguments because they are precluded by Article 1108(7)(a) of NAFTA, which expressly preserves the NAFTA parties’ right to pursue policy objectives in carrying out procurement programs, even when doing so amounts to discriminatory treatment.<sup>798</sup> The Respondent argues that the FIT Program and the

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<sup>788</sup> **Memorial**, para. 634; **Reply**, paras. 619-624; Hearing Transcript (15 February 2016), 111:24 to 112:2.

<sup>789</sup> **Memorial**, para. 644; Hearing Transcript (15 February 2016), 112:2-3.

<sup>790</sup> **Memorial**, para. 644.

<sup>791</sup> **Memorial**, para. 634.

<sup>792</sup> *See above*, para. 152.

<sup>793</sup> **Memorial**, para. 645.

<sup>794</sup> **Memorial**, para. 645.

<sup>795</sup> **Memorial**, para. 634.

<sup>796</sup> **Memorial**, para. 645.

<sup>797</sup> **Memorial**, para. 633.

<sup>798</sup> **Counter-Memorial**, para. 319; Hearing Transcript (26 February 2016), 154:1-4.

measures taken by Ontario involve procurement,<sup>799</sup> and that the procurement at issue in this arbitration is “by a Party or state enterprise.”<sup>800</sup>

392. The Respondent further argues that the Claimant’s suggested narrow interpretation of the procurement exception in Article 1108 should be rejected.<sup>801</sup> The Respondent considers that the term “procurement” must be interpreted in accordance with its ordinary meaning and in light of its object and purpose; accordingly, Article 1108 applies whenever the impugned measures “involve the acquisition of products or services by a [State] Party or State enterprise.”<sup>802</sup>
393. The Respondent disagrees with the Claimant’s proposition that the procurement exception does not apply to the subsequent treatment applied to an investor under the procurement contract and that, as a result, Article 1108 does not apply to the Respondent’s failure to keep the Claimant “whole” and the “cancelation” of the Claimant’s Contract.<sup>803</sup> The Respondent contends that “procurement” under Article 1108 includes “all aspects of a procurement process, including any stoppage of it or other decisions related to it.”<sup>804</sup>
394. Finally, the Respondent rejects the Claimant’s argument that “procurement” does not cover the “procurement of electricity by the OPA with the purpose of reselling it to the customers.”<sup>805</sup> According to the Respondent, there is nothing in the language of Article 1108 that excludes procurement for the resale to the public.<sup>806</sup> The Respondent relies on the *ADF* and *UPS* decisions, considering that neither tribunal required that the government (as opposed to the public) be the owner or possessor of the procured goods or service.<sup>807</sup>

**(b) The Claimant bears the burden of establishing the essential elements of Articles 1102 and 1103**

395. The Respondent notes that the Claimant bears the burden to show that: (i) the government accorded both the Claimant and the comparators “treatment with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition” of their respective investment; (ii) the government accorded the alleged treatment “in like circumstances;” and (iii) the treatment accorded to the Claimant or its investments was “less favourable” than the

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<sup>799</sup> **Counter-Memorial**, paras. 323-332; Hearing Transcript (26 February 2016), 154:1-4.

<sup>800</sup> **Counter-Memorial**, paras. 333-336.

<sup>801</sup> **Reply**, para. 610; **Rejoinder**, para. 45.

<sup>802</sup> **Rejoinder**, para. 47.

<sup>803</sup> **Reply**, para. 609; **Rejoinder**, para. 48.

<sup>804</sup> **Rejoinder**, para. 49.

<sup>805</sup> **Reply**, para. 612; **Rejoinder**, para. 51.

<sup>806</sup> **Rejoinder**, para. 52.

<sup>807</sup> **Rejoinder**, para. 52 (referring to *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003 (CL-22); *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL), Award on the Merits of 24 May 2007 (CL-88)).

- treatment accorded to the comparator investors or investments.<sup>808</sup> More specifically, the Respondent submits that the Claimant must show that “there was any nationality-based discrimination.”<sup>809</sup> According to the Respondent, the Claimant failed to identify “how the treatment it received was as a result of nationality-based discrimination.”<sup>810</sup>
396. The Respondent submits that even if the Tribunal does not agree that the Claimant’s Article 1102 and Article 1103 claims are barred by the procurement exemption in Article 1108(7)(a), they should still be dismissed because the Claimant has failed to identify treatment accorded in like circumstances.<sup>811</sup>
- (c) The Claimant has failed to identify comparators that are accorded treatment “in like circumstances”**
397. The Respondent submits that the Claimant’s investment was accorded treatment in its capacity as a participant in the FIT Program, a standardized renewable energy procurement program specifically designed to achieve certain public policy objectives.<sup>812</sup> According to the Respondent, “the standardized features of the FIT Program and the underlying policy objective are wholly different from the RFP [request for proposals] for a gas-fired plant, which resulted in TransCanada’s contract, and the GEIA [Green Energy Investment Agreement], the investment agreement pursuant to which Samsung is accorded treatment.”<sup>813</sup> The Respondent points out that neither TransCanada nor Samsung participated in the FIT Program, and that neither of them applied for Crown land to develop an offshore wind facility.<sup>814</sup>
398. In sum, the Respondent argues that none of the comparators identified by the Claimant was an offshore wind proponent and that neither TransCanada nor Samsung were “in like circumstances” to the Claimant.<sup>815</sup> According to the Respondent, the Claimant conflates “treatment and the circumstances in which it was accorded,” thus “effectively strik[ing] the like circumstances requirement from Articles 1102 and 1103.”<sup>816</sup>

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<sup>808</sup> Counter-Memorial, para. 344.

<sup>809</sup> Hearing Transcript (15 February 2016), 219:4-5.

<sup>810</sup> Hearing Transcript (26 February 2016), 153:11-13.

<sup>811</sup> Counter-Memorial, para. 338.

<sup>812</sup> Counter-Memorial, para. 348.

<sup>813</sup> Counter-Memorial, para. 348; Hearing Transcript (15 February 2016), 218:15-23.

<sup>814</sup> Counter-Memorial, para. 348.

<sup>815</sup> Counter-Memorial, paras. 349-357.

<sup>816</sup> Rejoinder, para. 60.

**(d) The Claimant was accorded more favorable treatment than investors that were in more like circumstances**

399. The Respondent notes that the Claimant seeks to distinguish itself from other offshore wind proponents on the basis that it was the only offshore wind proponent that was offered a FIT Contract.<sup>817</sup> However, in the Respondent's view, this "does not justify its attempt to ignore an entire class of comparators who are in more like circumstances in favour of remote comparators."<sup>818</sup>

400. Given that the Claimant was the only offshore wind proponent to receive a FIT Contract, the Respondent submits that the better class of comparators is other offshore wind proponents who were affected by the moratorium.<sup>819</sup> Furthermore, the Respondent asserts that the treatment accorded to the Claimant is not so much less favorable as different compared with that accorded to TransCanada.<sup>820</sup>

401. The Respondent argues that, when compared to other offshore wind proponents, the Claimant received more favorable treatment than investors "in like circumstances."<sup>821</sup> While all other Crown land applications for offshore wind development were cancelled, the Claimant's Crown land application was only "frozen," thus keeping the Claimant's Project alive.<sup>822</sup>

**3. Submissions pursuant to Article 1128 of NAFTA**

**(a) Submission of the United States**

402. The United States submits that neither Article 1102 nor Article 1103 is intended to "prohibit all differential treatment among investors or investments."<sup>823</sup> In the United States' view, they are rather "designed to ensure that nationality is not the basis for differential treatment."<sup>824</sup>

403. According to the United States, the NAFTA parties agree that a claimant has the burden of proving the breach under 1102 and 1103.<sup>825</sup> Articles 1102 and 1103 do not require that investors or

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<sup>817</sup> Counter-Memorial, paras. 358-359.

<sup>818</sup> Counter-Memorial, para. 359 (referring to *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003 (CL-22)).

<sup>819</sup> Counter-Memorial, para. 360.

<sup>820</sup> Hearing Transcript (15 February 2016), 219:6-8.

<sup>821</sup> Counter-Memorial, paras. 358-360.

<sup>822</sup> Counter-Memorial, paras. 340, 360.

<sup>823</sup> United States' Article 1128 Submission, para. 27 (referring to *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003 (CL-60), para. 139).

<sup>824</sup> United States' Article 1128 Submission, para. 27 (referring to *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003 (CL-60), para. 139).

<sup>825</sup> United States' Article 1128 Submission, para. 29 (referring to *Mesa Power LLC v. Government of Canada* (NAFTA, PCA), Counter-Memorial and Reply on Jurisdiction of Canada of 28 February 2014, para. 353; *Mercer International Inc. v. Government of Canada* (NAFTA, ICSID), Counter-Memorial of Canada of 22 August 2014,

investments of investors of a NAFTA party “be accorded the best or most favorable treatment given to any national or third State investor or investment.”<sup>826</sup> The appropriate comparison should be “between the treatment accorded to the NAFTA Party’s investment or investor and a national or third State investment or investor in like circumstances.”<sup>827</sup>

404. According to the United States, “circumstances” mean the “conditions or facts that *accompany* treatment as opposed to the treatment itself.”<sup>828</sup> Consequently, Articles 1102 and 1103 require, among other characteristics, consideration of the regulatory framework and policy objectives as well as the business sector.<sup>829</sup> In comparing the claimant with investors or investments in like circumstances, the national or third State investor or investment must be the same “in all relevant respects but for nationality of ownership.”<sup>830</sup>
405. The United States also submits that the Claimant’s Article 1102 and 1103 claims are barred by the procurement exception in Article 1108(7) of NAFTA. When interpreted in accordance with its ordinary meaning, as required by the Vienna Convention,<sup>831</sup> the exception in Article 1108(7) “applies to treatment accorded at all stages of the procurement process.”<sup>832</sup>

**(b) The Claimant’s reply to the submission of the United States**

406. The Claimant notes, in response to the United States’ contention that “Article 1102 and 1103 ‘prohibit only nationality-based discrimination,’”<sup>833</sup> that “NAFTA tribunals have consistently and repeatedly held that the claimant is not required to demonstrate discriminatory intent in order to establish a violation of Article 1102 or 1103.”<sup>834</sup> Consequently, in order to establish a breach of Article 1102, “Windstream need only show that it received treatment less favourable than

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para. 357; *Mercer International Inc. v. Government of Canada* (NAFTA, ICSID), Submission of the United States of America of 8 May 2015, para. 13; *Mercer International Inc. v. Government of Canada* (NAFTA, ICSID), Submission of Mexico pursuant to Article 1128 of NAFTA of 8 May 2015, para. 11).

<sup>826</sup> United States’ Article 1128 Submission, para. 30.

<sup>827</sup> United States’ Article 1128 Submission, para. 30 (emphasis omitted).

<sup>828</sup> United States’ Article 1128 Submission, para. 31.

<sup>829</sup> United States’ Article 1128 Submission, para. 31.

<sup>830</sup> United States’ Article 1128 Submission, para. 31.

<sup>831</sup> United States’ Article 1128 Submission, para. 25.

<sup>832</sup> United States’ Article 1128 Submission, para. 25.

<sup>833</sup> United States’ Article 1128 Submission, para. 28.

<sup>834</sup> Claimant’s Article 1128 Submission, para. 34 (referring to *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002 (RL-24), paras. 181-182; *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Award on the Merits of Phase 2 of 10 April 2001 (CL-75), para. 79; *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL), Award of 26 January 2006 (CL-57), para. 177; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL, PCA), Award on Jurisdiction and Liability of 17 March 2015 (CL-134), para. 179).

TransCanada in like circumstances.” Specifically, Windstream need not establish that it was treated less favorably because of its status as a foreign investor.<sup>835</sup>

407. The Claimant did not submit any reply on the United States’ submissions on Article 1108(7).

**(c) The Respondent’s reply to the submission of the United States**

408. According to Canada, all NAFTA parties agree that “NAFTA Articles 1102 and 1103 prohibit nationality-based discrimination.”<sup>836</sup> Canada adds that “simply establishing that there are distinctions made between investors or that such distinctions result in less favourable treatment of a foreign investor is not sufficient to establishing a breach of the NAFTA’s non-discriminatory provisions.”<sup>837</sup> According to Canada, “[t]he onus is on the Claimant to establish all of the elements required to establish a breach of the nondiscriminatory provisions.”<sup>838</sup>

409. The Respondent did not submit any reply on the United States’ submissions on Article 1108(7).

**4. The Tribunal’s Analysis**

410. The relevant provisions of NAFTA, Articles 1102 and 1103, deal with national treatment and most-favored-nation treatment, respectively. These provisions apply to both investors and investments “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments,”<sup>839</sup> insofar as the relevant investors and investments are “in like circumstances.”

411. The Parties disagree on a number of issues, including whether the Claimant can be considered to have been in “like circumstances” to TransCanada and Samsung, as well as whether the Claimant’s claims are excluded by virtue of the procurement exception in Article 1108(7)(a) of NAFTA, which provides that “Articles 1102, 1103 and 1107 do not apply to ... procurement by a Party or a State enterprise.”

412. The Claimant argues that the Respondent’s treatment of Windstream was less favorable than that of TransCanada, a Canadian company, and that the two companies were “in like circumstances.” Similarly, the Claimant argues that the Respondent’s treatment of Windstream was less favorable than that of Samsung, a South Korean company, which also was allegedly “in like circumstances.”

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<sup>835</sup> Claimant’s Article 1128 Submission, para. 37.

<sup>836</sup> Respondent’s Article 1128 Submission, para. 53.

<sup>837</sup> Respondent’s Article 1128 Submission, para. 53.

<sup>838</sup> Respondent’s Article 1128 Submission, para. 53 (referring to United States’ Article 1128 Submission, para. 29).

<sup>839</sup> See NAFTA Article 1102(1) *in fine*, Article 1102(2) *in fine*, Article 1103(1) *in fine*, and Article 1103(2) *in fine*.

The Claimant further contends that every other developer of large-scale wind projects that had been awarded a FIT Contract at the same time as the Claimant was allowed to develop its projects.

413. The Respondent, in turn, contends that the Claimant's investment was accorded treatment in its capacity as a participant in the FIT Program, a renewable energy procurement program with standardized rules, prices and contracts. However, TransCanada and Samsung were not "in like circumstances" as they had made their investment in an entirely different legal context and neither had applied for Crown land to develop an offshore wind facility. TransCanada's contract was issued pursuant to a request for proposals ("RFP") for a gas-fired plant, and thus did not involve renewable energy, whereas Samsung had entered into an investment agreement, the Green Energy Investment Agreement, with the Ontario Government for the construction of 2,500 MW renewable energy generation project consisting of both wind and solar power.
414. Having considered the Parties' positions and the supporting evidence, the Tribunal is satisfied that the treatment accorded to the Claimant cannot be considered to have been in "like circumstances." Unlike TransCanada and Samsung, the Claimant had a FIT Contract for offshore wind development, and indeed it was the only holder of such a contract. Accordingly, the moratorium and the related measures did not apply to TransCanada and Samsung in the first place, which therefore were not affected by them. The Tribunal further notes that the moratorium only applied to offshore wind and that it was not applied in a non-discriminatory manner in that it resulted in the cancellation of all offshore wind projects, with the exception of that of the Claimant, which was the only holder of a FIT Contract. The Tribunal is therefore unable to agree that the Claimant was treated less favorably than other prospective developers of offshore wind projects, which were the only proponents that could be said to have been in "like circumstances."
415. In the circumstances, the Tribunal need not consider whether the procurement exception in Article 1108(7)(a) of NAFTA applies to the procurement of electricity by the OPA for purposes of resale in the Ontario electricity market.
416. The Claimant's claims for breach of Articles 1102 and 1103 of NAFTA therefore stand to be dismissed.

## VI. THE DAMAGE SUSTAINED BY THE CLAIMANT

### A. THE CLAIMANT'S POSITION

#### 1. The Applicable Legal Standards

417. The Claimant contends that it is entitled to damages in an amount sufficient to wipe out all the economic losses suffered by it as a result of Canada's NAFTA breaches, as calculated in the expert reports of Messrs Richard Taylor and Robert Low of Deloitte (the "Deloitte reports").<sup>840</sup> In the Claimant's view, the Respondent's imposition of the moratorium together with its failure to meet its promise in keeping the Claimant whole rendered the Claimant's investment effectively worthless.<sup>841</sup>
418. The Claimant argues that, because NAFTA does not describe a method for determining reparation for illegal acts, customary international law applies. The proper authority on this issue is the *Chorzów Factory* decision of the Permanent Court of International Justice,<sup>842</sup> which established that a State responsible for an illegal act "must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if the act had not been committed."<sup>843</sup>
419. As to the date for calculating damages, the Claimant takes the view that in cases of unlawful expropriations an investor can choose between the date of the expropriation and the date on which a tribunal renders its award.<sup>844</sup> Contrary to the Respondent's submission,<sup>845</sup> the Claimant contends that it is not relevant whether NAFTA tribunals have adopted this approach.<sup>846</sup> The Claimant explains that NAFTA tribunals have "considerable discretion in fashioning what they believe to be reasonable approaches to damages."<sup>847</sup> Accordingly, the Tribunal has discretion in following the decisions of other tribunals establishing that the Claimant may choose either the date of breach or the date of the award as a valuation date.<sup>848</sup> According to the Claimant, the right to choose between calculating damages based on the date of the breach and calculating damages based on the date of the award "applies equally to damages arising from Canada's breaches of

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<sup>840</sup> Memorial, para. 647.

<sup>841</sup> Memorial, para. 661.

<sup>842</sup> Memorial, para. 649; Hearing Transcript (26 February 2016), 99:17-20.

<sup>843</sup> Memorial, para. 649; *Case Concerning the Factory at Chorzów (Germany v. Poland)* (P.C.I.J., ser. A, no. 17), Judgment of 13 September 1928 (CL-34), para. 125.

<sup>844</sup> Memorial, para. 659; Reply, para. 738.

<sup>845</sup> Counter-Memorial, para. 515.

<sup>846</sup> Reply, para. 739.

<sup>847</sup> Reply, para. 739; *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002 (RL-24), para. 197.

<sup>848</sup> Reply, para. 739; Hearing Transcript (26 February 2016), 102:12-13, 103:22-24.



Articles 1105(1), 1102 and 1103.”<sup>849</sup> In this context, the Claimant takes the position that the appropriate valuation date is the date of the award.<sup>850</sup> At the same time, the Claimant also advances its alternative position that the appropriate valuation date is 22 May 2012, which is the date of the breach.<sup>851</sup>

420. As to a breach of Article 1105(1), the Claimant submits that it is entitled to be put in the position in which it would have been had the moratorium not been imposed or had the Respondent kept it whole for the imposition of the moratorium.<sup>852</sup> According to the Claimant, “the result is the same” and it is “entitled to be put in the position it would have been in had the moratorium not been imposed, whichever is higher.”<sup>853</sup>

421. As to the alleged breach of Article 1102, the Claimant submits that it is “entitled to be put in the same position it would have been in had Ontario treated Windstream the same a[s] it treated TransCanada,” namely by keeping it whole following the moratorium. According to the Claimant, the “damages resulting from Canada’s breach of Article 1102 are the same as its damages resulting from Canada’s breach of Article 1105(1).”<sup>854</sup>

422. Finally, as to the alleged breach of Article 1103, the Claimant contends that it is entitled to be put in the position in which it would have been had the Respondent awarded the solar project to the Claimant instead of Samsung.<sup>855</sup> The Claimant submits that calculating the damages arising from a breach of Article 1103 “would involve an alternate DCF [Discounted Cash Flow] analysis,” which it has not performed, but proposes to prepare it if “the Tribunal were to dismiss Windstream’s claims for breaches of Articles 1110, 1105(1) and 1102 but allow Windstream’s claim for breach of Article 1103.”<sup>856</sup>

## **2. The Discounted Cash Flow Method is Appropriate**

423. The Claimant submits that the appropriate method for calculating damages in this case, in which the “investment has been rendered substantially worthless,” is the Discounted Cash Flow (“DCF”) method that allows one “to determine the value the investment would have had ‘but for’ the illegal act.”<sup>857</sup> The Claimant explains that this method measures the “present value of the future cash

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<sup>849</sup> **Memorial**, para. 660.

<sup>850</sup> Hearing Transcript (26 February 2016), 102:12-13.

<sup>851</sup> Hearing Transcript (26 February 2016), 103:22-24; Hearing Transcript (23 February 2016), 13:22-23.

<sup>852</sup> **Memorial**, para. 663.

<sup>853</sup> **Memorial**, para. 663.

<sup>854</sup> **Memorial**, para. 664.

<sup>855</sup> **Memorial**, para. 665.

<sup>856</sup> **Memorial**, para. 665.

<sup>857</sup> **Memorial**, para. 666.

flows available to equity”<sup>858</sup> “in a hypothetical world but for the breach”<sup>859</sup> and that it is deemed appropriate when the projected cash flows are capable of determination and are not speculative.<sup>860</sup>

424. Contrary to the Respondent’s contention,<sup>861</sup> the Claimant asserts that its hypothetical cash flows from the Project can be determined with a reasonable degree of certainty.<sup>862</sup> The Claimant submits that the Project would more likely than not have achieved commercial operation and even generated revenues, but for the moratorium.<sup>863</sup> According to the Claimant, the Project did not face significant regulatory risks<sup>864</sup> and would have received the required approvals.<sup>865</sup> The Claimant also argues that it would also have received tenure to the Crown land necessary to develop the Project,<sup>866</sup> which was technically feasible<sup>867</sup> and financeable.<sup>868</sup>
425. The Claimant further points out that the cash flows from the Project “can be forecast with a relatively high degree of confidence,” because “(i) the price per kilowatt for electricity sold by the Project is established by contract, (ii) the Project’s projected electricity output can be reasonably estimated on the basis of numerous high-quality and independently prepared wind resource assessments, (iii) the majority of the Project’s capital costs and operating costs would have been contractual and therefore can be determined using benchmark data, and (iv) engineering for the Project would not have involved the use of any novel technology.”<sup>869</sup> In any event, the DCF methodology accounts for future uncertainties and risks through the application of an appropriate discount rate.<sup>870</sup> The Claimant emphasizes that, as a consequence, tribunals have accepted the DCF methodology in a number of cases involving projects or companies that faced future risks.<sup>871</sup>

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<sup>858</sup> Memorial, para. 667.

<sup>859</sup> Memorial, para. 668.

<sup>860</sup> Memorial, para. 669.

<sup>861</sup> Counter-Memorial, paras. 563-565.

<sup>862</sup> Memorial, para. 673.

<sup>863</sup> Memorial, para. 672.

<sup>864</sup> Memorial, para. 672; CER-Powell, paras. 106-110.

<sup>865</sup> Memorial, para. 672; CER-Baird, p. 99; CER-Kerlinger, para. 3; CER-Reynolds, p. 20; CER-Oretch, p. 10.

<sup>866</sup> Memorial, para. 672; CER-Powell, para. 107.

<sup>867</sup> Memorial, para. 672; CER-SgurrEnergy, p. 5.

<sup>868</sup> Memorial, para. 672; CER-Baird, p. 99; CER-Kerlinger, para. 3; CER-Reynolds, p. 20; CER-Oretch, p. 10.

<sup>869</sup> Reply, para. 646; CER-Taylor/Low-2, para. 2.5; Hearing Transcript (26 February 2016), 125:4-14.

<sup>870</sup> Reply, para. 652; Hearing Transcript (15 February 2016), 113:10 to 114:4-8.

<sup>871</sup> Reply, para. 655; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)09/1), Award of 22 September 2014 (CL-121); *Joseph Charles Lemire v. Ukraine* (ICSID Case No. ARB/06/18), Award of 28 March 2011 (CL-123); *Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara and PT. PLN (Persero)* (UNCITRAL), Final Award of 18 December 2000 (CL-124); *CMS Gas Transmission Company v. The Republic of Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005 (CL-40); *El Paso Energy International Company v. The Argentine Republic* (ICSID Case No. ARB/03/15), Award of 31 October 2011 (CL-47); *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)05/2), Award of 18 September 2009 (CL-31).

426. Specifically, tribunals have considered the DCF methodology as appropriate even in the absence of a proven record of profitability when a long-term contract or concession guaranteed a certain level of profits, which is the case here.<sup>872</sup> By contrast, the Claimant asserts that the cases relied on by the Respondent to show that the DCF methodology is not appropriate are not relevant to the present situation, because none of them involved an investment with a contract providing for a fixed revenue stream.<sup>873</sup>
427. Furthermore, the Claimant submits that the OPA and the Respondent themselves have used the DCF methodology to determine the respective net present values of TransCanada's cancelled gas-fired power plant project and of the replacement project that it was awarded,<sup>874</sup> even though at the time these projects were valued they had not yet received all the required approvals.<sup>875</sup>

### **3. The Comparable Transaction Methodology as an Alternative Approach**

428. In the event that the Tribunal rejects the DCF method, the Claimant suggests that the comparable transaction approach, which "determines project value on the basis of transactions involving projects at a similar stage of development" would be "the second most-appropriate methodology."<sup>876</sup> According to the Claimant, this approach is "appropriate to determine the value of Windstream's investments because precedent transaction multiples would reflect value attributed to the FIT Contract and turbine contracts and other characteristics of the Project, such as wind data and resource assessments, seismic, engineering and electrical interconnection work."<sup>877</sup>
429. By contrast, the Claimant contends that the Investment Value approach proposed by the Respondent<sup>878</sup> severely undervalues the Claimant's investment.<sup>879</sup> Referring to Deloitte's expert report, the Claimant argues that the Investment Value approach is inappropriate because it ascribes no value to the FIT Contract, which according to the Claimant is its most valuable asset.<sup>880</sup> Specifically, the Claimant points to market research conducted by Deloitte to establish that FIT Contracts have significant value beyond the investment costs associated with project

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<sup>872</sup> Reply, para. 650; *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award of 11 December 2013 (CL-65), para. 1010.

<sup>873</sup> Reply, paras. 656-658.

<sup>874</sup> Reply, para. 660; Special Report, Office of the Auditor General, Oakville Power Plant Cancellation Costs of October 2013 (C-671); OPA, Analysis of TCE Cost of Capital of 24 November 2011 (C-1905).

<sup>875</sup> Reply, para. 660; Meeting Note, TransCanada Energy of 5 October 2010 (C-855), p. 2; Notes to File (MEI), Meeting with Barrack, Michael and Finnegan, John of 2 June 2011 (C-1024), p. 1.

<sup>876</sup> Reply, para. 662.

<sup>877</sup> Reply, para. 662; CER-Taylor/Low-2, para. 2.3.

<sup>878</sup> Counter-Memorial, paras. 560-565.

<sup>879</sup> Reply, para. 664.

<sup>880</sup> Reply, para. 664; CER-Taylor/Low-2, para. 2.3.

development.<sup>881</sup> The Claimant also contends that the experts from both sides agree that the FIT Contract is a valuable asset.<sup>882</sup>

#### 4. Quantification of the Claimant's Losses

430. The Claimant has quantified its losses under two scenarios, namely (a) “in the event that the Tribunal finds the moratorium to be a breach of Articles 1101, 1105 or 1102 of NAFTA” and (b) “in the event that the Tribunal finds the moratorium did not breach Articles 1110, 1105 or 1102 of NAFTA, but the failure to keep Windstream whole following the imposition of the moratorium constituted a breach of these articles.”<sup>883</sup>

431. For each of these scenarios, the Claimant has quantified its losses using the DCF method based on a valuation date of (a) 22 May 2012 and (b) 19 June 2015 (the latter being the date of Deloitte's second report).<sup>884</sup> The Claimant considers the former date to be “the date of breach.”<sup>885</sup> The Claimant explains that “the Project became substantially worthless on the date on which it was no longer possible for the Project to reach commercial operation before triggering the OPA's termination rights under Section 10.1(g) of the FIT Contract,”<sup>886</sup> adding that “this occurred as of May 22, 2012.”<sup>887</sup> The Claimant therefore contends that it is entitled to damages calculated on the basis of 22 May 2012 or on the basis of the date of the award, whichever amount is higher.<sup>888</sup>

##### (a) Valuation “but for” the moratorium

432. According to the Claimant, its calculations in the scenario “but for” the moratorium are based on “reasonable assumptions about the Project's development, construction and operation” if no moratorium had been imposed, the Project had been “permitted to proceed through the regulatory approvals process unimpeded by regulatory delays,” “the Ontario Government [had] fulfilled its

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<sup>881</sup> Reply, para. 664; CER-Taylor/Low-2, para. 2.3.

<sup>882</sup> Hearing Transcript (26 February 2016), 12:18 to 14:24; Hearing Transcript (18 February 2016), 9:20 to 10:5; Hearing Transcript (18 February 2016), 195:5-11, 196:6-10; Hearing Transcript (23 February 2016), 166:5-8; Hearing Transcript (22 February 2016), 99:17-20, 100:3-7; Hearing Transcript (17 February 2016), 252:19 to 253:4.

<sup>883</sup> Reply, para. 642.

<sup>884</sup> Reply, para. 641.

<sup>885</sup> Reply, para. 641.

<sup>886</sup> Reply, para. 729.

<sup>887</sup> Reply, para. 729. In its Memorial, the Claimant had suggested that 4 May 2012 should be regarded as the relevant date, arguing that “as of May 4, 2012 it was no longer feasible to expect that the Project could achieve that commercial operation date, even if the moratorium were lifted and the Project were allowed to proceed”; Memorial, paras. 317-318. The Claimant had added that “as of that date, Ontario had definitively refused to fulfill its promise” to ensure that the Project would only be frozen, by not responding to Windstream's “final letter”; Memorial, paras. 299, 316, 677.

<sup>888</sup> Reply, paras. 730, 738.

commitments made to Windstream” and had not engaged “in any further wrongful conduct in connection with Windstream’s investments.”<sup>889</sup> In particular, the Claimant has assumed that:

- (a) “MOE would have confirmed its proposed regulatory amendment to include a five-kilometer 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-kilometer 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.’
- (c) MOE and MNR would have fulfilled their commitment to process WWIS’ 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
- (e) the Ontario Government would have dealt with Windstream in good faith and not have subjected the Project to unreasonable regulatory delays.”<sup>890</sup>

433. As for the counter-factual scenario proposed by the Respondent,<sup>891</sup> the Claimant contends that it is not appropriate for a number of reasons, in particular as it “fails to eliminate the consequences of the moratorium” and “improperly relies on further anticipated NAFTA breaches” by the Respondent.<sup>892</sup> Based on a Project Schedule prepared in August 2014 by SgurrEnergy, a renewable energy consultancy commissioned by the Claimant,<sup>893</sup> in consultation with several others,<sup>894</sup> the Claimant contends that “all the steps necessary to bring the Project to commercial operation would more likely than not have been completed by May 2016,” and therefore “well within the contractual parameters of the FIT Contract.”<sup>895</sup> According to the Claimant, the Project would then “have generated a predictable guaranteed revenue stream over a 20-year term.”<sup>896</sup>

434. The Claimant rejects the Respondent’s allegation that the Project would “not have achieved commercial operation until July 9, 2020”<sup>897</sup> as unfounded.<sup>898</sup> According to the Claimant, the

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<sup>889</sup> Reply, para. 666.

<sup>890</sup> Reply, para. 668.

<sup>891</sup> RER-BRG, paras. 45-46, 170.

<sup>892</sup> Reply, paras. 671, 674.

<sup>893</sup> CER-SgurrEnergy-2, Appendix 4. See also Reply, para. 55(e).

<sup>894</sup> The Project Schedule is supported by the Expert Reports of COWI, a designer for offshore wind turbine foundations; Weeks Marine and its Canadian subsidiary McNally, with experience in the fields of marine construction, dredging and vessel construction; WSP, with experience in the development, permitting, design and construction of wind energy projects; and Baird, with experience with coastal processes on the Great Lakes; see Reply, para. 677 (referring to CER-SgurrEnergy-2; CER-COWI; CER-Weeks Marine; CER-WSP; CER-Baird-2).

<sup>895</sup> Reply, para. 677. See also Reply, para. 684 (referring to CER-WSP, p. 46; CER-Aercoustics, pp. 16-17; CER-HGC-2; CER-Baird-2, pp. 2-11; CER-Bucci-2, p. 3; CER-SgurrEnergy-2, pp. 9-10, 26, 32, 41); Hearing Transcript (22 February 2016), 98:10 to 99:14.

<sup>896</sup> Reply, para. 678; CER-Taylor/Low-2, para. 2.5.

<sup>897</sup> Counter-Memorial, para. 544; RER-URS, p. 1, para. 4(a).

<sup>898</sup> Reply, para. 685; Counter-Memorial, para. 544; RER-URS, p. 1, para. 4(a).

analysis of the Respondent's expert URS, on which the Respondent relies,<sup>899</sup> is flawed in that it "incorrectly assumes that the Project was 'first of a kind' and therefore faced considerable uncertainty," failing to appreciate that the Project utilizes pre-existing, proven technology borrowed from other industries that are neither novel nor present any technical challenges. URS also "incorrectly presents generic development risks ... as extraordinary risks for the Project," overestimates the length of time it takes to complete field studies, "incorrectly concludes that numerous Project activities would occur in sequence, when in fact they would occur in parallel," "incorrectly assumes that only a single construction vessel spread would have been used in support of foundation installation," fails to appreciate the advantage this Project had over others in being able to use readily-available vessels that currently exist on the market to construct the foundations, and "incorrectly concludes that Windstream's project team lacked sufficient experience to bring the Project into commercial operation," among other things.<sup>900</sup>

435. The Claimant also contends that the Respondent's expert report overstates the construction, design and permitting risks of the Project,<sup>901</sup> pointing out that all of these are risks that "more likely than not, would have been managed by the experienced development team created by Windstream."<sup>902</sup> The Claimant notes that its schedule had a 10% contingency for mechanical failure built into it which is both a standard and conservative estimate as well as contingency for weather.<sup>903</sup> In any event, the Claimant points out that the possibility that the Project may not achieve the relevant milestones has been "expressly accounted for in the discount rate applied to determine the net present value of the Project."<sup>904</sup> The Claimant concludes that "the project was buildable; the timelines were achievable; and that the project, more likely than not, would have succeeded had the moratorium not been imposed upon it."<sup>905</sup>
436. Assuming a five-kilometer setback was implemented, the Claimant quantifies the value of its investment using the DCF method as between CAD 277.8 million and 369.5 million based on a valuation date of 22 May 2012; and between CAD 459.5 million and 565.5 million based on a valuation date of 19 June 2015.<sup>906</sup>
437. In the alternative, the Claimant also quantifies the value of its investment based on the original layout (without the requirement of a five-kilometer setback) as between CAD 347.4 million and

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<sup>899</sup> Counter-Memorial, para. 542; RER-URS, paras. 3, 6.

<sup>900</sup> Reply, para. 685(e); Hearing Transcript (19 February 2016), 27:17-19 (21 February 2016), 101:2-9, 29: 20-25, 30: 1-3.

<sup>901</sup> Reply, paras. 690-707.

<sup>902</sup> Reply, para. 708; CER-SgurrEnergy-2, pp. 10, 38, 41, 194; Hearing Transcript (26 February 2016), 112:1 to 120:21.

<sup>903</sup> Hearing Transcript (21 February 2016), 132:20-25; 97:3-7.

<sup>904</sup> Reply, paras. 709, 716; CER-Taylor/Low-2, para. 3.4; Hearing Transcript (23 February 2016), 23:21 to 24:2.

<sup>905</sup> Hearing Transcript (26 February 2016), 111:13-16; Hearing Transcript (26 February 2016), 120:17 to 121:9.

<sup>906</sup> CER-Taylor/Low-2 (Addendum), p. 2.

CAD 444.8 million based on a valuation date of 22 May 2012; and between CAD 552.5 million and CAD 663.3 million based on a valuation date of 19 June 2015.<sup>907</sup> According to the Claimant, these figures are also supported by Deloitte’s application of the market comparables approach.<sup>908</sup>

**(b) Valuation “but for” the Respondent’s failure to insulate the Claimant from the effects of the moratorium**

438. In the event that the Tribunal does not find the Respondent in breach for imposing the moratorium, the Claimant claims compensation for the Respondent’s breach in failing to insulate the Claimant from the effects of the moratorium.<sup>909</sup> The alternative “but-for” scenario assumed by the Claimant to calculate the damages arising from this failure is one in which:

- (a) “the FIT Contract remained under *force majeure* for the duration of the moratorium without triggering any termination right by the OPA;
- (b) the Ontario Government completed the research it deemed necessary in good faith and in a timely manner;
- (c) the Government lifted the moratorium within a reasonable period of time – Windstream has assumed a three-year moratorium imposed between February 11, 2011 and February 11, 2014;
- (d) the Project would be permitted to resume development in February 2014;
- (e) by that time, 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;’
- (f) MOE and MNR would have fulfilled their commitment to process WWIS’ application for a REA within the six-month service guarantee; and
- (g) the Ontario Government would have dealt with Windstream in good faith and not have subjected the Project to unreasonable regulatory delays.”<sup>910</sup>

439. According to the Claimant, under this scenario “the Project, more likely than not, would have been developed, permitted and constructed” so as to reach “Commercial Operation by May 2019.”<sup>911</sup> The Claimant points out that this would have been “well before the Supplier Default Date,” which on the basis of its assumptions would have been 20 July 2021.<sup>912</sup>

440. According to the Claimant, referring to Deloitte’s second report, its damages in this second scenario, assuming a five-kilometer setback would have been confirmed, amount to between

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<sup>907</sup> CER-Taylor/Low-2 (Addendum), p. 3.

<sup>908</sup> Reply, para. 711; CER-Taylor/Low-2, para. 5.19.

<sup>909</sup> Reply, para. 731.

<sup>910</sup> Reply, para. 732.

<sup>911</sup> Reply, para. 733.

<sup>912</sup> Reply, para. 735.

CAD 271.5 million and 361.7 million based on a valuation date of 22 May 2012; and between CAD 371.7 million and 478.1 million based on a valuation date of 19 June 2015.<sup>913</sup>

441. The Claimant has also quantified its damages based on the alternative assumption that no setback would have been required and the original layout would have been kept.<sup>914</sup> In this scenario, the Claimant calculates its damages as ranging between CAD 328.1 million and CAD 424.7 million based on a valuation date of 22 May 2012; and between CAD 444.3 and CAD 556.8 million based on a valuation date of 19 June 2015.<sup>915</sup>

## 5. Pre- and Post-Award Interest

442. The Claimant further claims that it is entitled to interest.<sup>916</sup> It points out that the purpose of an award of interest is “to compensate the damage resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum he was supposed to receive.”<sup>917</sup> In relying on the *Chorzów Factory* principle, the Claimant proposes the use of compound interest, as opposed to simple interest.<sup>918</sup> In the Claimant’s view, the awarding of compound interest reflects the actual damages suffered, thereby guaranteeing full reparation.<sup>919</sup> By contrast, the Claimant points out that the Respondent’s view that the Claimant has the burden to prove that the present circumstances justify the awarding of interest<sup>920</sup> is unsupported by any authority.<sup>921</sup>
443. The Claimant contends that interest should accrue from the date when the State’s international responsibility became engaged<sup>922</sup> and should be annually compounded “until the date of full payment of the award.”<sup>923</sup> In the event that the Tribunal establishes the date of the breach as the

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<sup>913</sup> CER-Taylor/Low-2 (Addendum), p. 2.

<sup>914</sup> Reply, paras. 736, 737 (citing CER-Taylor/Low-2, para. 3.38).

<sup>915</sup> CER-Taylor/Low-2 (Addendum), p. 3.

<sup>916</sup> Memorial, para. 684.

<sup>917</sup> Memorial, para. 685; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of 20 August 2007 (CL-41), para. 9.2.3; *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries* of 2001 (CL-9), Article 38(1) (“Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result”).

<sup>918</sup> Memorial, para. 688; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Award of 20 August 2007 (CL-41), paras. 8.3.20, 9.2.4, 9.2.6, 9.2.8.

<sup>919</sup> Memorial, para. 688.

<sup>920</sup> Counter-Memorial, para. 568.

<sup>921</sup> Reply, para. 743.

<sup>922</sup> Reply, para. 743; *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2001 (CL-62), para. 128; *Middle East Cement Shipping and Handling Co. S.A. v. Egypt* (ICSID Case No. ARB/99/6), Award of 12 April 2002 (CL-128), para. 174; *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award of 29 May 2003 (CL-84), para. 196.

<sup>923</sup> Memorial, para. 689; *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (UNCITRAL, PCA), Final Award of 18 July 2014 (CL-93), para. 1672.



valuation date, the Claimant specifies that it is entitled to pre- and post-award interest.<sup>924</sup> The Claimant's experts have added interest at a rate of 3%, compounded annually, from the valuation date up to February 2016.<sup>925</sup>

444. The Claimant quantifies the total compensation in the various scenarios considered, including interest through February 2016, as follows:

(1) Compensation resulting from the moratorium:<sup>926</sup>

(a) on the basis of a 5km setback: between CAD 310.2 and 412.6 million based on a valuation date of 22 May 2012; and between CAD 468.6 and 576.7 million based on a valuation date of 19 June 2015; and

(b) on the basis of the original layout: between CAD 387.9 and 496.8 million based on a valuation date of 22 May 2012; and between CAD 563.3 and 676.4 million based on a valuation date of 19 June 2015.

(2) Compensation resulting from the failure to insulate the Claimant from the effects of the moratorium:<sup>927</sup>

(a) on the basis of a 5km setback: between CAD 303.3 and 403.9 million based on a valuation date of 22 May 2012; and between CAD 379.0 and 487.5 million based on a valuation date of 19 June 2015; and

(b) on the basis of the original layout: between CAD 366.4 and 474.3 million based on a valuation date of 22 May 2012; and between CAD 453.0 and 567.8 million based on a valuation date of 19 June 2015.

## **B. THE RESPONDENT'S POSITION**

### **1. The Claimant Bears the Burden of Proof**

445. The Respondent points out that, for the Claimant to be able to claim damages, it needs to prove that the alleged NAFTA breaches caused it actual and specific loss.<sup>928</sup> According to the Respondent, the Claimant fails to meet this burden of proof, since "[t]he Project has never been anything more than a speculative and unrealistic venture" with "no material value in the market

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<sup>924</sup> Reply, para. 744.

<sup>925</sup> CER-Taylor/Low-2, para. 3.42.

<sup>926</sup> CER-Taylor/Low-2 (Addendum), pp. 2-3.

<sup>927</sup> CER-Taylor/Low-2 (Addendum), pp. 2-3.

<sup>928</sup> Counter-Memorial, para. 517.

place,” and “what Windstream considered its most valuable asset, the FIT Contract, turned out to be an insurmountable hurdle.”<sup>929</sup> As a consequence, the Respondent takes the view that “not only should the Claimant be unable to recover any damages for its alleged future lost profits, it would also be inappropriate for the Tribunal to award the Claimant any of its investment costs.”<sup>930</sup> The Respondent submits that a claim for lost profits must be grounded upon appropriate data which can be known with a sufficient degree of certainty.<sup>931</sup>

446. The Respondent points out that the Claimant “significantly [altered] its programme and schedule” in its Reply submission, thus demonstrating that the Claimant’s original planning suffered from deficiencies, a “lack of preparatory work,” and an “underestimation ... of the complexities associated with a project of this magnitude.”<sup>932</sup> The Respondent claims that “[t]hrough the 2015 redesign of its Project, the Claimant has tacitly admitted that its initial plans would have resulted in Project failure.”<sup>933</sup> According to the Respondent, the “Claimant should not get the benefit of information and analysis only available in 2015 to prove in hindsight that its Project had value” and the Project’s feasibility should rather “be assessed as it was planned by Windstream in 2010/2011.”<sup>934</sup> In any event, the Respondent suggests that “[e]ven under the new 2015 programme, the Claimant would not have been able to develop its Project in the timelines required by its FIT Contract.”<sup>935</sup>
447. The Respondent also criticizes the Claimant’s calculation of damages for a breach of Article 1102 of NAFTA, arguing that “the Claimant has made no effort to explain how there is a causal link between the treatment accorded to TransCanada and the fact that the Claimant could not bring its Project into commercial operation.”<sup>936</sup> As to the alleged breach of Article 1103 of NAFTA, the Respondent points out that “the Claimant did not even attempt to quantify the losses it allegedly suffered.”<sup>937</sup>

## 2. Valuation Date

448. The Respondent also rejects the Claimant’s assertion that it is entitled to choose between a valuation as of the alleged expropriation date and a valuation as of the date of the award.<sup>938</sup> The

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<sup>929</sup> Rejoinder, paras. 255-257.

<sup>930</sup> Rejoinder, para. 257; Hearing Transcript (15 February 2016), 222:11 to 223:9.

<sup>931</sup> Hearing Transcript (15 February 2016), 223:23-25.

<sup>932</sup> Rejoinder, para. 267; RER-URS-2, paras. 4, 181.

<sup>933</sup> Rejoinder, para. 267.

<sup>934</sup> Rejoinder, para. 268.

<sup>935</sup> Rejoinder, para. 269.

<sup>936</sup> Rejoinder, para. 270.

<sup>937</sup> Rejoinder, para. 270.

<sup>938</sup> Counter-Memorial, para. 515; Memorial, paras. 658-660; Hearing Transcript (26 February 2016), 219:8-13.

Respondent takes the position that “the only relevant date is the date of the breach.”<sup>939</sup> The Respondent’s expert used 22 May 2012 as the valuation date for most of its analysis, except for one of the alleged breaches of Article 1105 of NAFTA, where 11 February 2011 was used.<sup>940</sup> In doing so, the Respondent contends that the Claimant fails to rely on any NAFTA award or justification to support its approach.<sup>941</sup> According to the Respondent, the Claimant’s reliance on *Feldman* and *S.D. Myers* is inappropriate because neither of these decisions involves damages claims based on expropriation.<sup>942</sup> The Respondent also stresses that “it should not be for the Claimant to, on one hand reap the benefits of an increase, while on the other hand, if the value of the investment has decreased ... ask for the higher valuation on the date of expropriation.”<sup>943</sup>

449. According to the Respondent, “[i]n the end, the Tribunal need not even engage in such an analysis,” since the “Claimant cannot point to any factual events that demonstrate a change in value of the Project” and the difference in the Claimant’s calculations based on the two dates “relates only to the different time value of money, not any other factor.”<sup>944</sup>

### 3. No Evidence of Damage as a Result of the Deferral

450. The Respondent submits that the Claimant fails to distinguish the damages arising out of the mere imposition of the deferral itself from those derived from the failure to lift the deferral.<sup>945</sup> According to the Respondent, this means that the Claimant has not provided a but-for scenario for the Tribunal.<sup>946</sup>

451. As to the Claimant’s calculations of damages for an alleged breach of Article 1105 of NAFTA based on the decision to defer offshore wind projects, the Respondent claims that “the Claimant’s use of May 22, 2012 for the valuation date ... is entirely misguided” and that the appropriate date would have been the “project restart date” of 11 February 2011.<sup>947</sup> The Respondent also argues that “[b]y the Claimant’s own logic ... a deferral that was lifted any time before May 22, 2012 would not have caused the Claimant to lose the full value of its Project,” yet “the Claimant offers

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<sup>939</sup> Hearing Transcript (26 February 2016), 219:14-15.

<sup>940</sup> Hearing Transcript (24 February 2016), 170:5-17.

<sup>941</sup> **Counter-Memorial**, para. 515; Hearing Transcript (26 February 2016), 220:14-20.

<sup>942</sup> **Rejoinder**, para. 319 (referring to *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Award and Dissenting Opinion of 16 December 2002 (**RL-24**); *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Second Partial Award of 21 October 2002 (**RL-47**)).

<sup>943</sup> **Rejoinder**, para. 321.

<sup>944</sup> **Rejoinder**, para. 322 (referring to **CER-Taylor/Low-2**, paras. 1.10-1.11).

<sup>945</sup> Hearing Transcript (26 February 2016), 227:1-13.

<sup>946</sup> Hearing Transcript (26 February 2016), 227:2-4 and 11-13.

<sup>947</sup> **Rejoinder**, para. 272.

no valuation ... that demonstrates what loss the Claimant would have incurred if the deferral had been of a shorter duration.”<sup>948</sup>

452. The Respondent submits that, by the time the decision to defer offshore wind projects was made, the Claimant’s Project already had no market value since the Project would not have been able to reach Commercial Operation within the time frames outlined in the FIT Contract.<sup>949</sup> According to the Respondent, a project that could not be built prior to the OPA having an unfettered right to terminate the FIT Contract has no value.<sup>950</sup>
453. The Respondent highlights “considerable problems” regarding the Claimant’s project schedule, claiming in particular that it appeared to “underestimate the risks of certain activities in development and their influence on ability to secure financing to enable the Project to progress to its next stage,”<sup>951</sup> and that it did “not provide for any contingency to take into account any delays in the Project,” nor “take into account adequate time to construct and establish the foundation manufacturing facility.”<sup>952</sup> Furthermore, the Respondent asserts that the Claimant did not provide adequate timing for the initial field studies and “additional fieldwork following confirmation of the final layout.”<sup>953</sup> These scheduling problems, not the deferral decision, resulted in the Claimant’s deprivation of the Project’s investment value.
454. The Respondent further argues that the Claimant’s revised programme still “remains unreasonably optimistic and fails to adequately account for possible risks that could result in Project delays,” and that the Claimant’s attempt “to remedy the mistakes in the Claimant’s original programme ... has resulted in new errors and incorrect assumptions.”<sup>954</sup> The Respondent’s expert Green Giraffe indicates that the combination of assumptions that the Claimant makes is absolutely unrealistic.<sup>955</sup> In particular, the Respondent suggests that “the new programme ... does not follow the proper sequencing of events based on the FIT Contract itself, Ontario law, or that of the Claimant’s own experts,” and that it clearly “has been created solely for the purpose of this arbitration ..., not for the purpose of realistically determining how long it would have taken to actually develop and construct the Claimant’s Project.”<sup>956</sup>
455. According to the Respondent, even under the revised programme, the Claimant would still have failed to develop the Project within the required timelines due to the considerable risks faced by

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<sup>948</sup> Rejoinder, para. 274.

<sup>949</sup> Counter-Memorial, para. 529.

<sup>950</sup> Counter-Memorial, para. 528.

<sup>951</sup> Counter-Memorial, para. 531; Hearing Transcript (26 February 2016), 237:25 to 238:3.

<sup>952</sup> Counter-Memorial, para. 531.

<sup>953</sup> Hearing Transcript (19 February 2016), 236:20-22 and 238:6-8.

<sup>954</sup> Rejoinder, para. 277.

<sup>955</sup> Hearing Transcript (18 February 2016), 166:8-12.

<sup>956</sup> Rejoinder, para. 278.

the Project,<sup>957</sup> including risks associated with lack of offshore experience,<sup>958</sup> inappropriate programme,<sup>959</sup> pre-financial close funding risks,<sup>960</sup> the “first of a kind” nature of the project,<sup>961</sup> as well as other various project risks.<sup>962</sup> The Respondent also refers to development risks,<sup>963</sup> risks relating to Crown land access,<sup>964</sup> permitting and design,<sup>965</sup> project viability risks<sup>966</sup> as well as construction risks involving manufacturing facilities, procurement, and vessel availability.<sup>967</sup>

456. The Respondent relies on URS’s proposed adjusted programme schedule to show that the Claimant could not have brought the Project into Commercial Operation “more than two and a half years following the MCOD required by the Claimant’s FIT Contract, and over a year following the Supplier Default Date.”<sup>968</sup> The Respondent explains that:

“when the relevant adjustments are made to the Claimant’s proposed schedule to take in into account the advice of its own experts,<sup>969</sup> the binding procurement lead times under the [Turbine Sales Agreement],<sup>970</sup> an appropriate time for mobilization following the lifting of the deferral,<sup>971</sup> the appropriate time to complete the permitting process,<sup>972</sup> and the lead time for financial closure,<sup>973</sup> the relevant time to construct the onshore manufacturing facilities,<sup>974</sup> foundation manufacture,<sup>975</sup> and installation,<sup>976</sup> the construction of offshore electrical substation,<sup>977</sup> turbine erection<sup>978</sup> and commissioning,<sup>979</sup> the result is that the Claimant’s Project would not have reached Commercial Operation until August 2018<sup>980</sup> at the earliest.”

457. The Respondent further submits that, in light of the speculative nature of the Project as well as the associated risks, “as a matter of law” the application of the DCF method is not an appropriate way to value the Claimant’s investment.<sup>981</sup> In the event that the Tribunal finds that the harm

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<sup>957</sup> Rejoinder, para. 269.

<sup>958</sup> Rejoinder, para. 286; RER-URS-2, paras. 165-195.

<sup>959</sup> Rejoinder, para. 286; RER-URS-2, paras. 197-200.

<sup>960</sup> Rejoinder, para. 286; RER-URS-2, paras. 226-240; Hearing Transcript (24 February 2016), 16:2-19.

<sup>961</sup> Rejoinder, para. 286; RER-URS-2, paras. 270-273, 301-302, 358-360, 361-363.

<sup>962</sup> Rejoinder, para. 286; RER-URS-2, paras. 201-225.

<sup>963</sup> Rejoinder, para. 286; RER-URS-2, paras. 241-249.

<sup>964</sup> Rejoinder, para. 286; RER-URS-2, paras. 250-252.

<sup>965</sup> Rejoinder, para. 286; RER-URS-2, paras. 263-347.

<sup>966</sup> Rejoinder, para. 286; RER-URS-2, paras. 348-360; RER-Green, paras. 132-135.

<sup>967</sup> Rejoinder, para. 286; RER-URS-2, paras. 361-418.

<sup>968</sup> Rejoinder, paras. 279, 283; RER-URS-2, paras. 70, 424, 473.

<sup>969</sup> Rejoinder, para. 282; RER-URS-2, paras. 119(a), 121, 223, 428(a).

<sup>970</sup> Rejoinder, para. 282; RER-URS-2, para. 468.

<sup>971</sup> Rejoinder, para. 282; RER-URS-2, paras. 432-433.

<sup>972</sup> Rejoinder, para. 282; RER-URS-2, paras. 436-453.

<sup>973</sup> Rejoinder, para. 282; RER-URS-2, paras. 449-453.

<sup>974</sup> Rejoinder, para. 282; RER-URS-2, paras. 454-456.

<sup>975</sup> Rejoinder, para. 282; RER-URS-2, paras. 457-458.

<sup>976</sup> Rejoinder, para. 282; RER-URS-2, paras. 459-463.

<sup>977</sup> Rejoinder, para. 282; RER-URS-2, paras. 464-466.

<sup>978</sup> Rejoinder, para. 282; RER-URS-2, paras. 467-470.

<sup>979</sup> Rejoinder, para. 282; RER-URS-2, para. 471.

<sup>980</sup> Rejoinder, para. 282; RER-URS-2, paras. 472-473.

<sup>981</sup> Rejoinder, paras. 290, 302.

suffered by the Claimant was the result of the alleged breach, the Claimant should only be entitled to receive the value of its investment cost.<sup>982</sup> Tribunals have consistently confirmed that “where an investment is still in the preoperational stage or has no history of profits, awarding any amount for future profits would require an impermissible degree of speculation.”<sup>983</sup>

458. According to the Respondent, the existence of a FIT Contract does not provide a guarantee that the Claimant’s Project would reach Commercial Operation and generate revenue.<sup>984</sup> Taking into account “the speculative nature of the project, its undeveloped status, the lack of permitting, the known development and construction risks, questions around whether it could attract necessary investors and financing, and the speculative cost profile, there is no reason why the Tribunal should vary from a well-established approach to damages in the circumstances of this particular case.”<sup>985</sup> The Respondent further rejects the Claimant’s characterization of Canada’s position on the basis that BRG itself used the DCF methodology, pointing out that BRG only uses this methodology to show that even if it is used the Project had no value.<sup>986</sup> The Respondent’s expert considers the DCF methodology involves too many subjective adjustments for the purpose of assessing damages<sup>987</sup> and it does not capture risk properly in an early-stage development project.<sup>988</sup>
459. In addition, the Respondent takes the view that the Claimant’s assertion that it accounted for the Project risks in its DCF analysis is not supported.<sup>989</sup> Thus the Respondent highlights that “Deloitte’s lack of appropriate risk quantification leads to the absurd conclusion that Windstream is entitled to a 1,300% return on the money it alleges to have invested to date.”<sup>990</sup>
460. The Respondent further disputes the relevance of the authorities relied on by the Claimant in this context. The Respondent points out that the tribunal in *Anatolie Stati v. Kazakhstan* held that a claim for lost profits needs to meet a “high standard of proof”<sup>991</sup> and that a claim for lost opportunity requires that a “sufficient probability”<sup>992</sup> of the opportunity be established.

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<sup>982</sup> Counter-Memorial, para. 560.

<sup>983</sup> Counter-Memorial, para. 561; *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award of 30 August 2001 (CL-62), para. 122; *Siemens A.G. v. Argentine Republic* (ICSID Case No. ARB/02/8), Award of 6 February 2007 (CL-82), paras. 355, 368-370; *Wena Hotels Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Award on Merits of 8 December 2000 (CL-92), paras. 123-125.

<sup>984</sup> Counter-Memorial, para. 565.

<sup>985</sup> Counter-Memorial, para. 565.

<sup>986</sup> Rejoinder, para. 296; Hearing Transcript (24 February 2016), 178:9-19.

<sup>987</sup> Hearing Transcript (24 February 2016), 170:21 to 171:10.

<sup>988</sup> Hearing Transcript (24 February 2016), 177:5-7.

<sup>989</sup> Rejoinder, para. 295; Reply, paras. 716-717.

<sup>990</sup> Rejoinder, para. 295.

<sup>991</sup> Rejoinder, para. 297 (referring to *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd. v. Kazakhstan* (SCC), Award of 19 December 2013 (CL-118)).

<sup>992</sup> Rejoinder, para. 297 (referring to *Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Trading Ltd. v. Kazakhstan* (SCC), Award of 19 December 2013 (CL-118)).

According to the Respondent, the Claimant has failed to meet the burden to show that, despite the construction and development risks associated with the Project, profits would have been realized.<sup>993</sup> The Respondent further asserts that the commercial risks involved in *Karaha Bodas v. PLN* are distinguishable from the project risks in the present case.<sup>994</sup> Similarly, the Claimant's FIT Contract is distinguishable from the contract in *Ioan Micula v. Romania* because the Claimant does not have a "guaranteed revenue stream or level of profit."<sup>995</sup> Moreover, none of the present circumstances are analogous to the circumstances in *Khan Resources v. Mongolia* that supported an award in favor of the claimant.<sup>996</sup>

461. As to the Claimant's argument that the OPA relied on the DCF methodology in the context of the TransCanada project, the Respondent points out that "TransCanada's project ... was proceeding through a well-established regulatory process for a well-known technology" and that, consequently, "the speculation that makes the DCF methodology inappropriate for the Claimant's Project did not apply to the valuation of a gas-fired plant."<sup>997</sup>
462. The Respondent further notes that, at the time of the execution of the FIT Contract, the Claimant had no permitting or Crown land access.<sup>998</sup> The Claimant had also failed to conduct any necessary environmental studies.<sup>999</sup> The Claimant had only applied for an AOR status, an application that provided no guarantee that the Project would be developed.<sup>1000</sup> In these circumstances the Project would not have any material value.<sup>1001</sup> The Respondent further disputes the Claimant's assertion that a comparable transactions approach would confirm its valuation using the DCF method, arguing that "real world experience" indicates the opposite.<sup>1002</sup>
463. According to the Respondent, even if the Tribunal accepts the DCF as the appropriate methodology, "Deloitte's failure to account for development and construction risks, as well as various errors and incorrect assumptions in its analysis, cause Deloitte to drastically overvalue the Project," leading it to a value that "is not in line with the real world."<sup>1003</sup> Once the necessary corrections are made for these errors and assumptions, a DCF valuation reveals that in February 2011 the Project was already worthless.<sup>1004</sup>

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<sup>993</sup> Rejoinder, para. 297.

<sup>994</sup> Rejoinder, para. 298.

<sup>995</sup> Rejoinder, para. 299.

<sup>996</sup> Rejoinder, para. 300.

<sup>997</sup> Rejoinder, para. 301.

<sup>998</sup> Rejoinder, para. 303.

<sup>999</sup> Rejoinder, para. 303.

<sup>1000</sup> Rejoinder, para. 303.

<sup>1001</sup> Rejoinder, para. 303; RER-Green Giraffe, paras. 23, 94.

<sup>1002</sup> Rejoinder, para. 304.

<sup>1003</sup> Rejoinder, paras. 306, 308.

<sup>1004</sup> Rejoinder, para. 306.

464. The Respondent highlights the following assumptions as sources of errors in Deloitte's calculations:

- a. Deloitte's "minimal adjustment" for risk, which is "not adequate to reflect the real risk faced by the Project."<sup>1005</sup>
- b. Deloitte's inappropriate choice of a valuation date.<sup>1006</sup>
- c. Deloitte's misplaced assumption that a Turbine Sales Agreement ("TSA")<sup>1007</sup> concluded between the Claimant and Siemens in November 2011 providing for the supply of 130 turbines for the Project at a price "slightly higher"<sup>1008</sup> than CAD 700 million would have been renegotiated<sup>1009</sup> to a lower price.<sup>1010</sup> The Respondent points out that the Claimant has failed to provide any evidence to that effect.<sup>1011</sup> Additionally, according to the Respondent, Deloitte erred in relying on European (instead of North American) market costs for assessing costs associated with the turbines.<sup>1012</sup>
- d. Deloitte's numerous other errors and omissions, "including with respect to the base land rent and decommissioning costs."<sup>1013</sup>

465. According to the Respondent, once all these errors and unreasonable assumptions are corrected, the result is a "net negative value for the Project on the valuation date."<sup>1014</sup>

#### 4. No Evidence of Damage as a Result of the Failure to Lift the Deferral or Insulate the Claimant from the Effects of the Deferral

466. The Respondent argues that it was impossible for the Respondent to cause any damage to the Claimant because the Claimant's Project already had no market value on the purported valuation date, 22 May 2012. By this date, it was "a foregone conclusion" that the Project would fail to meet the time frames specified in the FIT Contract, and "because of its riskiness and its high costs."<sup>1015</sup>

467. According to the Respondent, the Claimant's assumption in this scenario "that the FIT Contract is frozen for three years" is "of no use to this Tribunal," as the Claimant "puts forward no evidence to show why imposing an arbitrary three year deferral would put it in the position it would have

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<sup>1005</sup> Rejoinder, para. 308; RER-BRG-2, para. 103.

<sup>1006</sup> Rejoinder, para. 309; RER-BRG-2, para. 330.

<sup>1007</sup> Memorial, para. 314; Resolution to enter into TSA of 22 November 2011 (C-562); Siemens Wolfe Island Shoals Turbine Supply Agreement Contract Schedules of 28 November 2011 (C-566); Siemens Turbine Supply Agreement of 19 December 2011 (C-576).

<sup>1008</sup> Memorial, para. 314. See also CWS-Baines, para. 134.

<sup>1009</sup> A higher price of the TSA would increase the Project capital and decrease the value of the Project as a result.

<sup>1010</sup> Rejoinder, para. 310; CER-Taylor/Low-2, paras. 6.1-6.3.

<sup>1011</sup> Rejoinder, para. 311.

<sup>1012</sup> Rejoinder, para. 310; RER-Green Giraffe, para. 116; Hearing Transcript (18 February 2016), 171:6-13.

<sup>1013</sup> Rejoinder, para. 312; RER-BRG-2, paras. 186-202, Figure 1.

<sup>1014</sup> Rejoinder, para. 313; RER-BRG-2, para. 37, Figure 1; Hearing Transcript (24 February 2016), 169:21-24.

<sup>1015</sup> Rejoinder, para. 315.



been in had Ontario kept the Claimant's FIT Contract 'frozen' during the deferral."<sup>1016</sup> The Respondent claims that "the correct 'but for' scenario is the same as that used if the failure to lift the deferral by May 22, 2012 is seen as the breach."<sup>1017</sup>

468. Accordingly, the Respondent submits that the same development and construction risks that apply for the 11 February 2011 scenario also apply to this scenario.<sup>1018</sup> In both scenarios, the Claimant would have failed to bring the Project into Commercial Operation by the time frames required by the FIT Contract.<sup>1019</sup> According to the Respondent, the delay in the Project restart date from 11 February 2011 to 22 May 2012 means that the Project would not have reached Commercial Operation until 28 October 2019 – a full year after the Supplier's Default Date.<sup>1020</sup>

##### **5. In the Alternative, the Claimant Failed to Prove its Investment Costs**

469. Finally, the Respondent contends that the Project is unlikely to have been sold for "even the value of its sunk costs at the date of the breach."<sup>1021</sup> As such, the Claimant should not be entitled to any investment costs.<sup>1022</sup> In the event that the Tribunal finds that the Claimant could have brought its Project into Commercial Operation within the time frames of the Contract and that the Project had a positive value, the Claimant should only be entitled to investment costs.<sup>1023</sup> Even then, the Claimant has failed to discharge its burden in proving the quantum of such costs.<sup>1024</sup>

470. The Respondent lists four reasons that would preclude the Tribunal from awarding any compensation for the Claimant's investment costs. First, the Claimant's reliance on *Vivendi II* is misplaced because the tribunal did not hold that approximations were allowed in the context of investment costs.<sup>1025</sup> Second, the Claimant has included in its calculations numerous expenditures that were made after the date of the alleged breaches.<sup>1026</sup> Third, the Claimant should not be entitled to certain sunk costs that were incurred prior to the breach or costs that it was unreasonable to incur.<sup>1027</sup> Finally, the evidence submitted by the Claimant does not support the quantum of the losses it claims.<sup>1028</sup>

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<sup>1016</sup> Rejoinder, para. 318.

<sup>1017</sup> Rejoinder, para. 318.

<sup>1018</sup> Rejoinder, para. 323.

<sup>1019</sup> Rejoinder, paras. 323-327.

<sup>1020</sup> Rejoinder, para. 325; RER-URS-2, paras. 70, 483.

<sup>1021</sup> Rejoinder, para. 328.

<sup>1022</sup> Rejoinder, para. 328.

<sup>1023</sup> Counter-Memorial, paras. 560-565; Rejoinder, para. 328.

<sup>1024</sup> Rejoinder, para. 329.

<sup>1025</sup> Rejoinder, para. 330.

<sup>1026</sup> Rejoinder, para. 331; RER-BRG-2, Attachment 3, paras. 40-41, 44-47; CER-Taylor/Low-2, Schedule 3b.

<sup>1027</sup> Rejoinder, para. 332.

<sup>1028</sup> Rejoinder, para. 333.

471. The Respondent concludes that if the Tribunal were to decide that the Claimant is entitled to investment costs, the Claimant should be awarded only “a fraction” of its alleged expenditures of CAD 17 million.<sup>1029</sup> In particular, the Respondent claims that an audit of the evidence provided by the Claimant shows that as of 25 June 2010 (the date on which the Claimant knew that the Project might not proceed) the Claimant’s investment amounted to only CAD 0.208 million.<sup>1030</sup> By 22 November 2010 (the date the Project entered into force majeure status) the Claimant had invested CAD 0.528 million.<sup>1031</sup> By 11 February 2011 (the date of the deferral) the Claimant had invested CAD 0.921 million.<sup>1032</sup> Finally, by 22 May 2012 (the Claimant’s own valuation date) it had spent only CAD 1.746 million.<sup>1033</sup>

## **6. The Claimant has not Proven it is Entitled to Pre-Judgment Interest**

472. The Respondent agrees that if interest is to be awarded, a 3% interest rate annually compounded should be used.<sup>1034</sup> The Respondent asserts that, while the Tribunal has discretion in awarding interest, “the Claimant bears the burden of proving that the circumstances of this case justify an award of interest to ensure full reparation.”<sup>1035</sup> In this case, the Respondent contends that the Claimant fails to establish why full reparations can only be met with an award of interest.<sup>1036</sup>

## **C. THE TRIBUNAL’S ANALYSIS**

473. Having found that the Respondent is in breach of its obligations under Article 1105(1) of NAFTA, the Tribunal must determine the relief that the Claimant is entitled to as a result of the breach. The Tribunal recalls that the purpose of the compensation to be awarded is to make the Claimant “whole,” keeping in mind the Tribunal’s determination that the Claimant has not lost the entire value of its investment as the FIT Contract is still formally in force (albeit under an extended force majeure) and, accordingly, as the CAD 6 million letter of credit is still available to the Claimant and has not been lost or taken by the Government. The compensation to be awarded to the Claimant must therefore reflect the Claimant’s loss (damage to the investment) rather than the full value of the investment. This latter would be relevant only if the Claimant has lost the entirety of its investment as a result of an expropriation, which is not the case here.

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<sup>1029</sup> Rejoinder, para. 334. The Respondent contends that only about CAD 1.8 million had been invested in the development of the company; Hearing Transcript (26 February 2016), 251:5-10.

<sup>1030</sup> Rejoinder, para. 334; RER-BRG-2, Attachment 3, para. 36.

<sup>1031</sup> Rejoinder, para. 334; RER-BRG-2, Attachment 3, para. 37.

<sup>1032</sup> Rejoinder, para. 334; RER-BRG-2, Attachment 3, para. 38.

<sup>1033</sup> Rejoinder, para. 334; RER-BRG-2, Attachment 3, para. 39.

<sup>1034</sup> Rejoinder, para. 335.

<sup>1035</sup> Counter-Memorial, para. 568.

<sup>1036</sup> Counter-Memorial, para. 568; Hearing Transcript (26 February 2016), 224:1-4.

474. As a first step, the Tribunal must determine the appropriate method of valuation, taking into account the development stage of the Project. The evidence before the Tribunal indicates that there are three critical value milestones for offshore wind projects: (a) permitting (early stage); (b) contracting, financing and construction (late stage); and (c) operations.<sup>1037</sup> The early development stage ends when the developer has site control, grid access and the revenue regime (e.g., FIT Contract) in place and when the project is fully permitted, whereas the late development stage ends when the project becomes operational. The value of the project increases as it moves along in this continuum of project development. According to Dr Jérôme Guillet of Green Giraffe, while the DCF method is used in the industry to value offshore wind projects, it is not usually used for projects that have not yet reached financial closure, given the many risks and uncertainties surrounding such projects.<sup>1038</sup>
475. The Tribunal notes that, while the Claimant did have a FIT Contract and a grid connection, it did not yet have site control and the permitting process had not yet been completed. The relatively early development stage of the Project is also reflected in the investment cost, which the Claimant alleges amounts to some CAD 17.4 million (including the security deposit of CAD 6 million),<sup>1039</sup> whereas the development cost of a fully-permitted project of a similar capacity (i.e., 300 MW) would typically be in the range of EUR 20-40 million (CAD 29-58 million at today's exchange rate).<sup>1040</sup> The Project must therefore be considered an early-stage project. Accordingly, based on the evidence of Dr Guillet, which the Tribunal accepts, the DCF method is not an appropriate method of valuation for the Project, given its early development stage and the related risks and uncertainties.
476. The Tribunal considers that, in the circumstances, the Project can be best valued, and the damage to it quantified, on the basis of the comparable transactions methodology. While the Tribunal agrees, as noted by Deloitte, that there are limitations in directly applying transaction references in the context of the Project due to the different geographic areas served, terms of power pricing agreements, wind levels and project size, the evidence relating to comparable transactions is the best evidence before it, and the Tribunal finds it reasonable to rely on this evidence, subject to any adjustments that may be necessary to reflect the fact that the Claimant's investment has not been expropriated.

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<sup>1037</sup> See **RER-Green Giraffe**, pp. 18-25. The Deloitte reports similarly distinguish between early-stage, late-stage, under construction and installed projects; see **CER-Taylor/Low**, para. 4.68.

<sup>1038</sup> **RER-Green Giraffe**, paras. 22, 94.

<sup>1039</sup> As discussed in para. 481 below, the Tribunal does not accept that all of the CAD 17.4 million can be considered investment costs.

<sup>1040</sup> **RER-Green Giraffe**, para. 72.

477. The most comprehensive evidence relating to the comparable transactions methodology was provided by Dr Guillet of Green Giraffe, and the Tribunal therefore takes his evidence as the starting point of analysis; the evidence of other experts, including that offered by Messrs Taylor and Low of Deloitte and Mr Goncalves of BRG, is referred to as appropriate.<sup>1041</sup>
478. Dr Guillet testified that offshore wind projects have relatively consistent values in Europe. Depending on the development stage, the project value may range from below EUR 0.1 million/MW for projects that are not fully permitted (i.e., that do not have one of site control, permits, a revenue regime and grid access) to EUR 0.2 million/MW for fully permitted early-stage projects,<sup>1042</sup> to approximately EUR 4 million/MW for projects that have reached financial closure, and up to EUR 4.5 million/MW for projects that have reached commercial operation.<sup>1043</sup> As to the early-stage projects specifically, Dr Guillet's evidence on actual transactions before the Tribunal shows that the overall valuations of such projects range from EUR 0.01 million/MW to approximately EUR 0.1 million/MW, depending on the development stage, whereas late development stage projects have been sold for prices ranging from EUR 0.1 million/MW to EUR 0.5 million/MW. The evidence of Messrs Taylor and Low on late stage (fully permitted) projects indicated valuations from CAD 0.2 million/MW to CAD 0.7 million/MW, with a median of CAD 0.35 million/MW (approximately EUR 0.24 million in September 2016).<sup>1044</sup> Their evidence is thus consistent with that of Dr Guillet for late-stage projects.
479. Dr Guillet's evidence on early-stage projects covered six different transactions, whereas Mr Goncalves' evidence covered three of the transactions considered by Dr Guillet, as well as one additional transaction on an early-stage project (Luchterduinen) which was not included in Dr Guillet's evidence.<sup>1045</sup> The multiples of these seven transactions range from EUR 0.01 million/MW to approximately EUR 0.1 million/MW, with a median of approximately EUR 0.08 million/MW and an average of approximately EUR 0.06 million/MW.<sup>1046</sup> As noted above, Messrs Taylor and Low did not consider early stage projects.

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<sup>1041</sup> See **CER-Taylor/Low**, pp. 10, and **RER-BRG**, pp. 87-88. In relying on Dr Guillet's evidence, the Tribunal keeps in mind that some of the third-party confidential evidence underlying the Green Giraffe Report was not made available to the Claimant; *see above* paras. 63-66.

<sup>1042</sup> **RER-Green Giraffe**, paras. 23, 94 and hearing slides, p. 10.

<sup>1043</sup> **RER-Green Giraffe**, paras. 26, 94 and hearing slides, p. 10.

<sup>1044</sup> **CER-Taylor/Low**, para. 4.69 (as corrected during the hearing).

<sup>1045</sup> See **RER-BRG**, Figure 20 (at p. 87), which analyzes a number of pre-construction projects at various stages of development (late and early). The table was presented by the Respondent in a corrected form (including a correction to the Luchterduinen project) in its Closing Statement, at p. 258, distinguishing between early and late stage developments.

<sup>1046</sup> "Approximately" 0.1 because Dr Guillet provides only an estimate for three transactions as "< 0.1." The Tribunal has no basis to adjust these estimates.

480. Depending on whether one relies on the median or the average multiple, and subject to any further adjustments that may be required as noted above, the evidence on comparable transactions thus suggests that the value of the Project would fall between EUR 18 million (based on the average multiple of EUR 0.06 million/MW) and EUR 24 million (based on the median multiple of EUR 0.08 million/MW).
481. The Claimant's sunk investment costs may be used as a "reality check" to test whether the above valuation is appropriate.<sup>1047</sup> According to the Claimant, its sunk costs amount to approximately CAD 17 million (CAD 17,428,000). The Tribunal has taken note of the Respondent's criticism of the Claimant's calculation of its sunk costs, and although the Tribunal agrees with much of the criticism, including that the CAD 6 million security cannot be considered a "sunk" cost, it does not agree that no costs incurred by Windstream after May 2012 can be accepted because the Claimant argues that as of that date the Project was no longer financeable; as noted above, the FIT Contract is still in force and the Parties could have at any time revived the Project, had the Respondent promptly completed the scientific studies. Consequently, costs incurred by the Claimant after May 2012 may be taken into account, insofar as they are not to be accounted for as arbitration costs. Conversely, as the Tribunal has determined that the Project has not been lost in its entirety, but has only been damaged, not all of the costs incurred by the Claimant after May 2012 can be considered arbitration costs. Based on this yardstick, the Claimant's sunk costs would amount to some CAD 8-10 million, i.e., approximately EUR 5.5-7 million, at today's exchange rate.
482. The Tribunal notes that, while the Claimant's sunk costs are substantially lower than the provisional valuation of EUR 18 to 24 million based on the comparable transactions method, this is not inconsistent with the evidence before the Tribunal, which suggests that a developer typically earns a "premium" on a project when sold, which reflects the value added to the project by the developer.<sup>1048</sup> In the circumstances, the Tribunal does not consider that any further adjustments are necessary and concludes that EUR 0.07 million/MW (i.e., EUR 21 million), which represents the mid-point of the range of valuation reached above (EUR 18 to 24 million), is an appropriate valuation of the Project.
483. 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

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<sup>1047</sup> The expert evidence before the Tribunal suggests that there is a relationship between the developer's investment costs and the valuation of the project, depending on the development stage; *see RER-Green Giraffe*, paras. 21-26, 72, 94-100.

<sup>1048</sup> *See supra* note 1047.

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

484. Finally, the Tribunal must decide the date at which the damage to the Claimant's investment is to be quantified, as this will determine the EUR/CAD exchange rate to be applied to the EUR 0.07 million/MW valuation of the Project; it is to this CAD amount that the CAD 6 million adjustment must be applied. The Tribunal considers that, since (as determined above) the Claimant has not lost the full value of its investment, the proper date of quantification of the damage to the investment, and accordingly of the Claimant's loss, is the date of this award. It is on this date that the damage to the Claimant's investment crystallized.<sup>1049</sup>
485. Based on the exchange rate of the date of the award, the value of the Project as determined above (EUR 21 million) amounts to CAD 31,182,900. Consequently, taking into account the letter of credit that still, as at the date of this award, remains available to the Claimant, the damage to the Claimant's investment, and therefore the amount of compensation that the Claimant is entitled to, amounts to CAD 25,182,900. The Tribunal determines that this amount is payable within 30 days of the notification of this award.
486. In view of the date of quantification of the Claimant's loss, the Tribunal need not take a decision on interest. Moreover, the Tribunal cannot contemplate that the Respondent will not comply with the award and therefore does not fix an interest for late payment.

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<sup>1049</sup> The Tribunal notes, in this connection, that the comparable transactions on the basis of which the value of the Project is determined took place over a period of years between 2009 and 2013 and accordingly they benchmark the market value of the Project, based on its development stage (which did not substantially change since 11 February 2011), over the entirety of this period and not on any particular date.

## VII. COSTS

### A. THE CLAIMANT'S POSITION

487. If it is successful in this arbitration, the Claimant requests that the Tribunal order the Respondent to bear the costs of arbitration that have been incurred by the Claimant as defined in Article 40 of the UNCITRAL Rules, in the total amount of CAD 6,474,864.84, including the following costs:

- a. legal fees of CAD 3,323,115.01;
- b. costs of expert witnesses, third-party service providers and witness travel costs of CAD 2,268,712.27;
- c. disbursements of CAD 233,037.56; and
- d. Tribunal and PCA costs advanced by the Claimant of CAD 650,000.00.<sup>1050</sup>

488. The Claimant submits that the legal costs are reasonable having regard to the volume of evidence and written submissions, and argues that the costs are “well within the range of legal costs incurred by claimants in investment treaty arbitrations.”<sup>1051</sup>

489. The Claimant also submits that the witness fees and third-party costs incurred by the Claimant are reasonable. Referring to summaries of its expert evidence,<sup>1052</sup> the Claimant argues that the evidence was necessary to respond to the Respondent's arguments and to satisfy the Claimant's burden of proof (especially, to establish the reasonableness of the Claimant's decision to invest in the Project, the technical feasibility of the Project and the quantum of the Claimant's damages).<sup>1053</sup> The Claimant notes that its costs claim does not include the costs of expert evidence already counted in its sunk cost calculation.<sup>1054</sup>

490. The Claimant further submits that “a number of the steps taken” by the Respondent caused the Claimant to incur costs that would otherwise have been avoided. According to the Claimant, these steps included (i) the Respondent's production of documents 30 days before the Claimant's original deadline to file its Reply Memorial; (ii) the Respondent's request to strike portions of the Claimant's Memorial and evidence from the record on the ground of parliamentary privilege (which, the Claimant notes, was rejected by the Tribunal); and (iii) the inclusion of what the

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<sup>1050</sup> **Claimant's Costs Submissions**, paras. 1-2.

<sup>1051</sup> **Claimant's Costs Submissions**, para. 4 (referring to a number of authorities).

<sup>1052</sup> The Claimant refers to the expert evidence of: Ms Sarah Powell, Messrs Richard Taylor and Robert Low of Deloitte, Mr Remo Bucci of Deloitte, Mr Richard Aukland of 4C Offshore, SgurrEnergy, COWI, Weeks Marine, W.F. Baird & Associates Coastal Engineers, Beacon Environmental, Dr Michael Risk, Scarlett Janusas Archeology, WSP, Ortech, Dr Paul Kerlinger, Dr Scott Reynolds, Mr Brian Howe of HGC, Aercoustics, Mr Jim MacDougall of Compass Renewable Energy Consulting, Advisory, and Professor Rudolph Dolzer.

<sup>1053</sup> **Claimant's Costs Submissions**, paras. 10-27.

<sup>1054</sup> **Claimant's Costs Submissions**, para. 8.

Claimant terms “incorrect and unsubstantiated assertions” in the Respondent’s rejoinder expert evidence.<sup>1055</sup> The Claimant also argues that the non-production of documents and information relied upon by the Respondent’s experts, BRG and Green Giraffe, had necessitated the Claimant bringing a motion to the Tribunal to take the non-production into account when assessing the weight to be given to the expert evidence.<sup>1056</sup> The Claimant also argues that the production of certain documents by the Respondent during the hearing caused wasted costs through Mr Cecchini needing to be recalled to testify a second time.<sup>1057</sup>

491. In the Claimant’s view, if it is wholly successful, the Tribunal should order the Respondent to pay the Claimant’s costs of arbitration in full, in accordance with the principle that costs follow the event.<sup>1058</sup> The Claimant notes that Article 42 of the UNCITRAL Rules specifies that a tribunal should award the successful party its legal costs and the costs of arbitration. The Claimant considers this provision to create a rebuttable presumption that the unsuccessful party will bear these costs. The Claimant submits that this presumption is consistent with the “increasingly common practice in investment arbitration endorsed by Canada – that costs should ‘follow the event’.”<sup>1059</sup>

492. The Claimant further submits that in cases where the claimant was not wholly successful, tribunals have awarded legal and arbitration costs because the respondent forced the claimant to initiate the arbitration. Thus, the Claimant argues that if it is partially successful, the Tribunal should order the Respondent to pay an appropriate portion of the Claimant’s costs.<sup>1060</sup>

493. However, if the Claimant is not successful, the Claimant requests that the Tribunal “bear in mind the several decisions in which NAFTA tribunals have declined to order an unsuccessful claimant

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<sup>1055</sup> Claimant’s Costs Submissions, paras. 28–40.

<sup>1056</sup> Claimant’s Costs Submissions, paras. 41, 43.

<sup>1057</sup> Claimant’s Costs Submissions, paras. 42–43.

<sup>1058</sup> Claimant’s Costs Submissions, paras. 44–51.

<sup>1059</sup> Claimant’s Costs Submissions, paras. 45–50 (referring to *Chemtura Corporation v. Government of Canada* (UNCITRAL, PCA), Government of Canada Submission on Costs of 25 February 2010 (CL-149), paras. 9, 13; *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia* (ICSID Case No. ARB/05/24), Award of 17 December 2015 (CL-150), para. 599; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Final Award on Costs of 30 December 2002 (CL-151), paras. 15, 49; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006 (CL-21), para. 533; *Waguib Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award of 1 June 2009 (CL-132), para. 621; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award on the Merits of 20 May 1992 (CL-83), para. 207; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)09/1), Award of 22 September 2014 (CL-121), para. 860; *Robert Azinian, Kenneth Davitian & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB(AF)97/2), Award of 1 November 1999 (RL-7), para. 125).

<sup>1060</sup> Claimant’s Costs Submissions, paras. 51–52 (referring to *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007 (CL-76), para. 353).



to pay the respondent's costs, particularly where, as here, the claimant brought this arbitration in good faith and had no other meaningful way of obtaining compensation."<sup>1061</sup>

494. The Claimant opposes the Respondent's contention that, if the Claimant is only partially successful, the Tribunal should order the Claimant to pay for the portion of claims that did not succeed. The Claimant considers this position to be without merit and lacking in arbitral precedent.<sup>1062</sup> The Claimant denies that the decision in *European American Investment Bank v. The Slovak Republic* supports the Respondent's position. The Claimant refers instead to the cost awards in *Pope & Talbot, Rumeli, Cargill* and *PSEG*, which take an "overall view of the case" and award the claimant part of its legal costs when the claimant succeeds in part.<sup>1063</sup> The Claimant also objects to the Respondent's assertion that it advanced "untenable or frivolous claims" that contributed to the costs of the arbitration. The Claimant maintains that its claims regarding the OPA and breaches of Articles 1102 and 1103 of NAFTA are appropriate. In addition, the Claimant submits that its damages claim is appropriate.<sup>1064</sup>

495. The Claimant disputes the Respondent's argument that certain of the Claimant's expert reports and document requests increased the Respondent's costs. The content of the Respondent's pleadings, the Claimant observes, does not evidence that the Respondent incurred any costs in responding to those expert reports. With respect to document production, the Claimant explains that it only pursued further document production requests because of the Respondent's "repeated failure to comply with its documentary production obligations."<sup>1065</sup>

496. The Claimant contends that the costs claimed by the Respondent are "disproportionate and unreasonable." The Claimant notes that the Respondent used a larger legal team than the

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<sup>1061</sup> **Claimant's Costs Submissions**, para. 53 (referring to *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002 (CL-66), para. 159; *Glamis Gold, Ltd. v. United States of America* (UNCITRAL), Award of 8 June 2009 (CL-53), para. 833; *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1), Award of 9 January 2003 (CL-22), para. 200; *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3), Award of 26 June 2003 (CL-60), para. 240; *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL), Award on the Merits of 24 May 2007 (CL-88), para. 188; *Merrill & Ring Forestry L.P. v. The Government of Canada* (UNCITRAL, ICSID Administered Case), Award of 31 March 2010 (CL-61), para. 270-271; *Fireman's Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1), Award of 17 July 2006 (RL-25), para. 221; *Gami Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL), Final Award of 15 November 2004 (CL-51), para. 135; *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/98/2), Arbitral Award of 2 June 2000 (CL-89), p. 239).

<sup>1062</sup> **Claimant's Reply Costs Submissions**, para. 2.

<sup>1063</sup> **Claimant's Reply Costs Submissions**, paras. 7-8 (referring to *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Award on Costs of 26 November 2002 (CL-152), para. 8; *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award of 29 July 2008 (CL-129), para. 819; *Cargill Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2), Award of 18 September 2009 (CL-31), para. 561; *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5), Award of 19 January 2007 (CL-76), para. 352).

<sup>1064</sup> **Claimant's Reply Costs Submissions**, paras. 9-18.

<sup>1065</sup> **Claimant's Reply Costs Submissions**, paras. 24-26.

Claimant, and its counsel spent more than twice as many hours on the matter than the Claimant's counsel.<sup>1066</sup>

**B. THE RESPONDENT'S POSITION**

497. The Respondent submits that pursuant to Article 1135 of NAFTA and Article 42 of the UNCITRAL Rules, the Tribunal should direct that the costs of the arbitration be borne by the unsuccessful party, except if it determines that the circumstances require apportionment between the parties.

498. The Respondent argues that all costs should be borne by the Claimant on the basis that the claims are "without merit." According to the Respondent, these costs include the Respondent's share of the Tribunal's fees and expenses and the Respondent's legal and other costs. The Respondent claims a total amount of CAD 8,261,052.35, which consists of the following:

- a. arbitration costs of CAD 650,000;
- b. lawyer fees of CAD 4,215,554.93;
- c. expert and consultant costs of CAD 3,225,912.58; and
- d. additional disbursements of CAD 169,584.84.<sup>1067</sup>

499. The Respondent submits that its costs are reasonable, stating that "[s]ignificant resources were necessary to defend this case, owing to the Claimant's numerous allegations of NAFTA breaches, involving three provincial government ministries, the OPA, and former political staff, as well as to the Claimant's inappropriate claim for lost profits, which unnecessarily added significant complexity to the case."<sup>1068</sup>

500. The Respondent submits that the general presumption that costs follow the event has been supported by investment treaty tribunals, including numerous NAFTA tribunals, which have held that the prevailing party in an arbitration should be awarded its arbitration costs in whole or in part.<sup>1069</sup> In addition to arguing that the Claimant knew or ought to have known its claims are

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<sup>1066</sup> Claimant's Reply Costs Submissions, paras. 27-28.

<sup>1067</sup> Respondent's Costs Submissions, paras. 2, 5, Annex I, Annex II.

<sup>1068</sup> Respondent's Costs Submissions, paras. 33-38.

<sup>1069</sup> Respondent's Costs Submissions, para. 8 (referring to *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009 (RL-20), paras. 321-329; *Iberdrola Energia S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5), Award of 17 August 2012 (RL-103), paras. 509-518; *Achmea B.V. v. Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)* (UNCITRAL), Final Award of 7 December 2012 (RL-99), paras. 347-351; *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9), Award of 16 September 2003 (RL-57), paras. 24.1-24.8; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary* (ICSID Case No. ARB/03/16), Award of 2 October 2006 (CL-21), para. 533; *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL), Award on Costs of 26 November 2002 (RL-105), para. 18; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Final Award on Costs of 30 December 2002 (RL-106), paras. 29, 49; *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the

without merit, the Respondent also claims that the Claimant: (i) filed “irrelevant” expert reports, (ii) made “unnecessary and improper” procedural motions and (iii) presented an “incoherent” damages case based on an “inappropriate valuation methodology” and an “insufficient” evidentiary record to meet its burden of proof.<sup>1070</sup>

501. The Respondent disputes the Claimant’s argument that the Tribunal should require the Respondent to bear its own costs even if the Claimant is wholly unsuccessful in its claims. According to the Respondent, the Claimant fails to offer a compelling reason or supportive arbitral decisions to justify such a departure from the general principle of costs following the event.<sup>1071</sup>
502. The Respondent further submits that even if the Claimant is partially successful, it should be required to bear the Respondent’s costs for its unsuccessful claims. Referring to academic commentary and the decision in *European American Investment Bank* in support of its position, the Respondent states that the principle that costs follow the event must be “based on an assessment of relative success rather than simply on which party won the case.”<sup>1072</sup> In this regard the Respondent argues that the Claimant inappropriately advanced and maintained (i) jurisdictional arguments relating to the OPA,<sup>1073</sup> (ii) claims regarding alleged breaches of Article 1102 and 1103<sup>1074</sup> and (iii) a damages claim that was “incoherent and based on an inappropriate valuation methodology and insufficie