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

BETWEEN:

MESA POWER GROUP LLC

Investor

AND

GOVERNMENT OF CANADA

Party

INVESTOR'S RESPONSE ON BIFURCATION

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Introduction

1. In Paragraph 1 of its Submission, Canada proclaims boldly that its request for bifurcation is premised entirely on the basis that "*Canada has not consented to the arbitration of this claim*". However, that is the question. Canada's consent is granted in NAFTA Article 1122, and is not a prerequisite to the Tribunals's jurisdiction to determine the Investor's claim. The question of bifurcation is a practical one, to be determined in respect of principles of arbitral efficiency and economy. Framing the question in the context of NAFTA Article 1120 is an illusion, and Canada's request for bifurcation is nothing short of a request that the Investor prove its claim on the merits prior to a hearing.

2. If Article 1120 raises any question of law at all, it is certainly not one that can be determined in the abstract. Article 1120 states:

> ARTICLE 1120: SUBMISSION OF A CLAIM TO ARBITRATION
>
> … provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration

3. Its words are plain, and its meaning is clear. Canada, however, contends that the Tribunal should re-interpret Article 1120 to mean either:

   a. " six months have elapsed since the ["**last**"][1] event[**s**] giving rise to a claim"; or

   b. "six months have elapsed since [**"each and every event"**[2][**s**]]" giving rise to [**all**] claim[**s**]".

   In either event, a full examination of the entire factual matrix in which the claim actually arises is required.

4. For example, the events giving rise to this claim commenced with the creation of the Ontario Feed in Tariff ("FIT") Program on September 24, 2009 (24 months prior to the Notice of Arbitration) and the granting of special privileges and treatment to the Korean Consortium[3] on January 21, 2010 (22 months prior to the Notice of Arbitration.)

5. The more recent impugned measures, being the changes to the FIT interconnection rules in June 2011 and the FIT Power Purchase Agreements ("PPAs") announced on July 4, 2011.

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[1] Canada's Submissions on Jurisdiction, 3 December 2012, paras. 15, 38.
[2] Canada's Submissions on Jurisdiction, 3 December 2012, para. 22.
[3] Samsung, Pattern, KEPCO are a group of competitors to Mesa that received special treatment not available to the Investor.

6. The June and July events are composite acts that are directly linked to the operation of the Ontario FIT Program and prior events including the ranking methodology that was employed, failure to follow the process set out in the FIT rules, and efforts to facilitate connection point changes as early as January 2011.

7. It would defeat the purposes of investment treaties, if the host state could "reset the clock" by continuing to commit wrongs. The NAFTA does not require an Investor to launch separate claims for each new breach that arose after the first.

8. In this case, there is no doubt that a series of impugned measures in the Investors claim predate the Notice of Arbitration by at least 6 months, and cannot be assessed and determined without a full hearing[4]:

Creation of FIT Program	Granting of Privileges to Korean Consortium	Privately Meeting with Competitors to Facilitate Connection Point Changes
•September 24, 2009 •24 months prior to Notice of Arbitration	•January 21, 2010 •22 months prior to Notice of Arbitration	•January 2011 •10 months prior to Notice of Arbitration

9. The local content requirements of the FIT Program and special treatment privileges granted to the Korean Consortium are also NAFTA breaches that arose at least six months prior to the Notice of Arbitration.

10. Canada acknowledges that these events, as well as proof of nationality, share ownership and attribution of OPA's specific acts, require a hearing.[5]

11. It is therefore obvious that bifurcation in this context would not promote or provide significant costs savings. It would be the exact opposite.

12. The principles of arbitral efficiency and economy strongly favor an interpretation and application of the NAFTA that avoids related other claims being the subject of separate NAFTA hearings. The Tribunal in *Enron* addressed this specific issue in considering whether later claims could be joined to the earlier claims where notice was deficient:

> 85. Even more so than the situation discussed in the *Metalclad*, *Pope & Talbot Inc* and *Ethyl* cases, the filing of multiple, subsequent and related actions in this case would lead

[4] Investor's Statement of Particulars of the Statement of Claim, 12 October 2012 (**Annex A**); Investor's Timeline of Key Events, 12 October 2012 (**Annex B**).
[5] Canada's Submissions on Jurisdiction, 3 December 2012, paras. 17, 2 ["In the alternative, the Tribunal should dismiss all of the claims arising from events that took place within the six month waiting period."] (emphasis added).

> to a superlative degree of inefficiency and inequity. This would be particularly unjustified in view of the many efforts by ICSID to avoid the multiplicity of proceedings concerning the Argentine Republic.
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> 86. In this context, the question that this Tribunal must answer is not even whether the claims in respect of La Pampa and Chubut can be considered as ancillary or additional claims. It is the much simpler question whether the action of other Provinces further extending the same dispute already registered requires a separate registration and procedure. It certainly does not.
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> 87. The issue concerning the observance of the six-month consultation period becomes therefore moot. (emphasis added).[6]

13. *Metalclad*, *Pope & Talbot* and *Ethyl* are all cases involving breaches of the NAFTA. They all confirm that, it is not necessary for an Investor to wait six months from subsequent breaches or to launch separate claims for each breach.

14. On the merits here, at least 6 months passed between the filing of the claim concerning the Power Purchase Agreements and the events giving rise to those claims.

15. On July 4th 2011, Ontario announced new PPAs for the Bruce Region. The Investor was not granted a PPA, and suffered significant damage as a result.

16. The failure to receive a PPA is directly related to the June 3, 2011 changes to the FIT interconnection rules. These changes allowed new entrants to the Bruce Region and changed the ranking of companies awaiting PPAs.

17. The events of June 3rd and July 4th 2011 are directly connected to earlier events granting special and more favorable treatment to the Investor's competitors – notably meeting with competitors to facilitate connection point changes as early as January 2011, 10 months prior to the Notice of Arbitration. These earlier events arose in January 2012, 10 months prior to the submission of the Notice of Arbitration.

18. This series of events began in January of 2011, and by July 4th, the damage was fully materialized. The breach extends over the entire period starting with the first of the impugned actions and lasting for as long as governmental actions were not in conformity.[7]

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[6] *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic* (ICSID Case No. Arb/01/03) Decision on Jurisdiction 14 January 4 2004, paras. 85-87 (**RL-005**) ("*Enron*").

[7] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 15(2) (**CL-1**).

19. The determination of how the events of January through July 2011 constitute a breach of the NAFTA requires a full consideration of all the evidence, including witnesses and experts. The proof of the events which constitute the composite breach is primordial to the Investor's case. Persuasive documents obtained by the Section 1782 procedures relate to the events around January 2011 and the advance notice improperly provided by Canada to Mesa's competitors. Expert testimony is required to assess all of the implications of this advance notice, as well as the disclosure of all the related documents. The evidence adduced in the deposition of Pattern Energy also needs to be considered.

20. In essence, bifurcation would require the Investor to prove its case twice.

The NAFTA requires that six months have elapsed since the events giving rise to a claim, not all claims

21. Canada's contention is that an Investor cannot submit a Notice of Arbitration for prior breaches,[8] has also been long rejected. The Ethyl Tribunal wrote:

> Initially, there is an issue as to whether the phrase "events giving rise to a claim" is intended to include all events (or elements) required to constitute a claim, or instead some, at least, of the events leading to crystallization of a claim. The argument is made that the object and purpose of NAFTA, set forth in its Article 102(1)(c) and (e), to "increase substantially investment opportunities" and at the same time to "create effective procedures … for the resolution of disputes" would not be best served by a rule absolutely mandating a six-month respite following the final effectiveness of a measure until the investor may proceed to arbitration. Had the NAFTA parties desired such rigidity, it is contended, they explicitly could have required passage of six months "since the adoption or maintenance of a measure giving rise to a claim." [9]

22. In both principle and practice, ongoing and later wrongs do not remove existing jurisdiction. Canada's contention simply results in continuous and ongoing breaches being a bar to a tribunal having NAFTA jurisdiction.

23. Canada makes reference to the French and Spanish text of the NAFTA.[10] The French text "*donné lieu*" is even stronger than "giving rise", with a meaning of "starting place". Similarly, the use of the singular "la plainte" as opposed to the plural "les plaintes" also indicates that there is no requirement to wait six months from the latest event in situations where multiple events are giving rise to claims.

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[8] Canada's Submissions on Jurisdiction, 3 December 2012, para. 22. ("Further, the ordinary meaning of 'events giving rise to a claim' is each and every event which led to the claim being filed.")
[9] *Ethyl Corporation v. the Government of Canada*, Preliminary Tribunal Award on Jurisdiction, 24 June 1998, para. 83 (**CL-2**).
[10] Canada's Submissions on Jurisdiction, 3 December 2012, para. 23 n. 40.

Article 1120 is consistent with the International Law Commissions Articles on State Responsibility

24. The Investor has claimed breaches consisting of composite acts. The determination of when a composite act arises is well settled. Prof. Crawford writes:

> Paragraph 2 of article 15 deals with the extension in time of a composite act. Once a sufficient number of actions or omissions have occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series.[11] (emphasis added)

25. Despite this, Canada contends that the six month period in Article 1120 runs from the last event of the composite act.[12] There is no authority for such a proposition, and it makes no sense.

26. Article 1120 provides Investors protection from breaches that constitute composite acts by requiring that 6 months pass from the events *giving rise* –the first or initial actions of the state which become part of a wrongful composite act and are therefore consistent with ILC Article 15.2. The plain wording of Article 1120 is consistent with the types of wrongs committed by states under the International Law Commissions' *Articles on State Responsibility*.

27. The recent award in *Mobil Oil v Canada* similarly demonstrates that a continuous act, in that case Federal guidelines inconsistent with the NAFTA which were still in effect at the time of the hearing, were not a jurisdictional bar to the determination of the dispute.[13]

The NAFTA notice requirement is Article 1119

28. Canada refers to two awards on notice periods under the ICSID and the US-Ecuador BIT which are easily distinguishable.[14]

29. The text of the US-Ecuador BIT requires a waiting period from the date the Investor *notified* the respondent of the dispute. This is not applicable to Article 1120. The US-Ecuador BIT use of the word "dispute" rather than the NAFTA "events" imposes a notice requirement that is completely different from Article1120. The corresponding requirement is in Article 1119:

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[11] James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, (Cambridge University Press, 2002) 143 (**CL-3**).
[12] Canada's Submissions on Jurisdiction, 3 December 2012, paras. 15, 38.
[13] *Mobil Investments Inc. v. Government of Canada*, (ICSID Case No ARB(AF)/07/4) (**CL-4**).
[14] Canada's submissions on Bifurcation, para. 5 n7. (**RL-011** and **RL-002**). (The Investor notes that Canada has also cited *Enron*, para. 88 (**RL-005**), however that authority as demonstrated *supra* para. 12 actually supports the Investor's positions and requires no further consideration.)

> The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted

30. The "notice" provision in *Murphy*[15] and *Burlington*[16] is akin to Article 1119, which gives the Respondent the right to be advised and informed of the dispute.[17]

Article 1120 is Solely a Procedural Requirement, Not Jurisdiction Issue

31. The Investor's claim is not dependent on Canada's consent. Canada's universal and comprehensive consent to arbitration is contained in Article 1122:

> ARTICLE 1122: CONSENT TO ARBITRATION
>
> 1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

32. The weight of arbitral practice has been to consider "waiting period" provisions like Article 1120 to be purely procedural and not a matter of jurisdiction.[18] Commenting on the case history, Lucy Reed, Jan Paulsson & Nigel Blackaby have succinctly stated:

> ICSID Tribunals have generally considered such consultation period clauses to be procedural rather than jurisdictional in nature.[19]

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[15] In determining this requirement, the Murphy Tribunal (**CL-5**) relied upon the decision in *Lauder*:
> However, the waiting period does not run from the date [on] which the alleged breach occurred, but from the date [on] which the State is advised that said breach occurred. This results from the purpose of the waiting period, which is to allow the parties to enter into good-faith negotiations before initiating the arbitration. (emphasis added) *Ronald S. Lauder v The Czech Republic* (UNCITRAL Case), Award of September 3, 2011 para. 185 (**CL-6**).

[16] … by imposing upon the investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, the Treaty effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. (emphasis added) *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5), Decision on Jurisdiction of 2 June 200, para. 315 (**RL-002**).

[17] *Murphy*, paras. 107-108, (**CL-5**).

[18] See, e.g., *Abaclat and others v. Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011, para. 564 (**CL-7**); *Biwater Gauff (Tanzania) Ltd. v. Tanzania* (ICSID Case No. ARB/05/22), Award, 24 July 2008, para. 343 (**CL-8**); *Bayindir Insaat Turizm Ticaret ve Sanayi A.S v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Decision on Jurisdiction, 14 November 2005, para. 100 (**CL-9**); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 184 (**CL-10**); *Ronald S. Lauder v. the Czech Republic* (UNCITRAL), Final Award, 3 September 2001, paras. 187 and 190–91 (**CL-6**); *Link-Trading Joint Stock Company v. Department for Customs Control of Republic of Moldova*, Award on Jurisdiction, 16 February 2001, p. 5–6 (**CL-11**); *Wena Hotels Limited Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Summary Minutes of the Session of the Tribunal, 25 May 1999, p. 891 (**CL-12**); *Franz J. Sedelmayer v. the Russian Federation*, Award, 7 July 1998, p. 82 (**CL-13**); *Ethyl Corporation v. Government of Canada*, Award on Jurisdiction, 24 June 1998, 38 I.L.M. 708, paras. 84–85 (**CL-2**).

[19] Reed, Paulsson & Blackaby, *Guide to ICSID Arbitration*, Kluwer Law International, 2006) 57 (**CL-14**).

33. Similarly, Christoph Schreuer notes:

> *It follows that waiting periods may be seen as a bar to the tribunal's competence only in extreme circumstances. These would normally involve procedural bad faith such as starting arbitration prematurely in order to put pressure on the opposing party in negotiations. In other cases, the appropriate response appears to be that of the Ethyl Tribunal when it awarded costs against the claimant in respect of the premature proceedings.*[20]

34. In this context, August Reinisch explains the extraordinary circumstances of *Burlington* and *Murphy:*

> *In fact, it was apparently important in both cases that respondents had no real opportunity to redress the disputes in the pre-arbitration phases because they were informed about the claims either never or only three days before the filing of the arbitration request.*[21]

35. In *SGS v Pakistan*, the Tribunal summarized the general jurisprudence:

> *Tribunals have generally tended to treat consultation periods as directory and procedural rather than as mandatory and jurisdictional in nature. Compliance with such a requirement is, accordingly, not seen as amounting to a condition precedent for the vesting of jurisdiction.*[22]

<u>One hearing is required</u>

36. In the result, this Tribunal is respectfully urged to follow the normal arbitral practice and to hold a single hearing on the questions at issue, in keeping with the principles of arbitral efficiency and economy.

    a. Canada accepts that a hearing will be required on the NAFTA breaches occurring nearly two years prior to the Notice of Arbitration.

    b. The latest events in the series, occurring on June and July 2011, are part of a composite act that first arose around January 2011, 10 months prior to the Notice of Arbitration, all of which will require a full hearing of all the evidence, including witnesses and experts.

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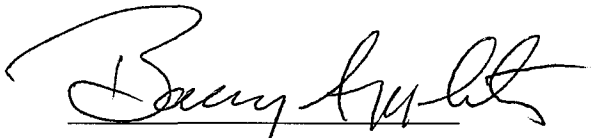
[20] Christoph Schreuer, "Travelling the BIT Route, Of Waiting Periods, Umbrella Clauses and Forks in the Road" *The Journal of World Investment & Trade*, April 2004 Geneva vol 5 No 2, 239 (**CL-15**).
[21] August Reinish, *"From Rediscovered Waiting Periods to Ever More Activist Annulment Committees – ICSID in* 2010, (online: http://europainstitut.de/fileadmin/bibliothek/ICSID_Cases_in_2010_Reinisch.pdf), 9 (**CL-16**).
[22] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13), Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 184 (**CL-10**).

c. Article 1120 does not "reset the clock" each time a new breach has occurred.

d. Article 1120 is a matter of procedure and not jurisdiction.

e. And the simple fact is that there are multiple events, each of which has to be assessed and adjudicated. There is not one legal question or point of law that can be determined of in the abstract.

All of which is respectfully submitted this 24th day of December, 2012.



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