PUBLIC VERSION

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 ANSWER ON CANADA'S PRELIMINARY OBJECTIONS ON JURISDICTION

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Investor's Submissions on Jurisdiction

A. The Factual Context

1. Article 1120 of the NAFTA sets out the process for the submission of a claim to arbitration:

> ARTICLE 1120: SUBMISSION OF A CLAIM TO ARBITRATION
>
> 1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration: …[1]

The only preliminary factual question, therefore, is whether "*the events giving rise to a claim*" in this arbitration arose at least "*six months"* prior to the filing of the Notice of Arbitration.

2. In this arbitration, the Notice of Arbitration was filed on October 4, 2011. The events giving rise to a claim by the Investor began on November 17, 2009, when the Investor incorporated its first two wind projects, and thereby became subject to the domestic content requirements of the FIT Program.[2]

3. Unlike some investment treaties, like the US-Ecuador BIT for example, the requirement to provide "notice of a dispute" under the NAFTA is expressly contained in NAFTA Article 1119. The notice requirement of Article 1119 is an entirely separate provision from the requirement to provide a Notice of Arbitration under NAFTA Article 1120. Similarly, the requirement to attempt resolution of a dispute through negotiation or consultation is also expressly contained in a separate provision in NAFTA Article 1118.

4. In the actual circumstances of this arbitration, there can be no doubt that the Investor has completely satisfied each of the prerequisites of NAFTA Articles 1118, 1119 and 1120:

   a) NAFTA Article 1118 states:

> ARTICLE 1118: SETTLEMENT OF A CLAIM THROUGH CONSULTATION AND NEGOTIATION
>
> The disputing parties should first attempt to settle a claim through consultation or negotiation.

In respect of NAFTA Article 1118 consultations, the Investor requested consultations with Canada in a letter to the Deputy Attorney General of Canada, on July 6, 2011.[3]

   b) NAFTA Article 1119 states:

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[1] Annex 1120.1 only applies to claims against Mexico and this is not applicable in this arbitration.
[2] Certificate of Incorporation for Arran Wind Project ULC (**C-01**); Certificate of Incorporation for TTD Wind Project ULC (**C-02**). The remaining two wind farms were incorporated on April 6, 2010. Certificate of Incorporation for Summerhill Project, ULC **(C-03)**; Certificate of Incorporation for North Bruce Project, ULC **(C-04)**.
[3] Letter from Barry Appleton (Counsel for the Investor) to Myles J. Kirvan (Deputy Minister of Justice), dated July 6, 2011**(C-05)**.

> ARTICLE 1119: NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION
>
> 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…

In respect of NAFTA Article 1119, the Investor issued its Notice of Intent on July 6, 2011, 90 days before the Notice of Arbitration was filed on October 4, 2011.

c) And, in respect of NAFTA Article 1120, which states:

> ARTICLE 1120: SUBMISSION OF A CLAIM TO ARBITRATION
>
> Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:…

The events giving rise to a claim first arose on November 17, 2009, almost 2 years before the Notice of Arbitration was filed on October 4, 2011.

5. Each of the specific events giving rise to the Investor's claims in this arbitration are presented in Annex A. The events giving rise to the Investor's claims in this arbitration also includes composite breaches of the NAFTA.

6. The International Law Commission's *Articles on State Responsibility*, consider the date which gives rise to a composite breach as being the earliest date of the series of events. In this arbitration, the date upon which the composite breach commences, January 17, 2011, is also clearly more than six months before the filing of the Notice of Arbitration.[4]

7. Canada has identified two dates upon which Canada has engaged in measures which are inconsistent with the obligations in Section A of NAFTA Chapter Eleven which occurred within six months of the filing of the Notice of Arbitration. However, each of these two acts is the natural part of a composite act which commenced long before. These two actions – namely the last minute modification of the FIT Program Rules providing a five day window for filing application changes in June 2011 and the improper award of contracts on July 4, 2011 – were the results of a larger systemic NAFTA measure which commenced in both cases more than six months before the filing of the Notice of Arbitration. Based on the applicable international law rules codified in the ILC *Articles on State Responsibility*, the acts giving rise to the claim with respect to both of these particular events started on dates which commenced more than six months before the submission of the Notice of Arbitration.

[4] Article 15(2) of the *ILC Articles on Responsibility of States* provides that the events giving rise to a claim over a composite breach begin at the first act in the series **(CL-1)**.

8. So in essence, Canada's entire objection is to have this Tribunal ignore the longstanding international law rules that the timing of composite acts begin at the start of the series of actions, and on this basis to conclude that a part of the composite act at issue in the arbitration be severed from the rest of the arbitration because these actions arose within six months of the filing of the arbitration.

9. The determination of when a composite act arises is well settled. Professor Crawford, Special Rapporteur on State Responsibility to the International Law Commissions, 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.[5] (emphasis added)

10. Canada contends that the six month period in Article 1120 runs from the last event of the composite act.[6] Canada has submitted no authority for such a proposition.

11. The Commentary to the ILC *Articles of State Responsibility* address the nature of composite breaches. Paragraph 2 of the Commentary on Article 15 confirms that "systemic acts of discrimination prohibited by a trade agreement" constitute a composite breach. Within the claim before this tribunal, the following systemic breaches form part of a composite breach:

    a) The systemic requirement for local content in the FIT program;

    b) The systemic failure to follow the FIT program rules with respect to the ranking and evaluation of applications;

    c) The special privileges and inducements provided to the Korean Consortium with respect to Power Purchase Agreements and priority access to power transmission;

    d) Systemic discrimination applied to applicants owned by Mesa Power as opposed to the better treatment provided to applicants from others, such as Boulevard Associates which was owned by NextEra.

    Each of these breaches at issue in this arbitration are part of composite breaches.

12. Article 1120 requires that the events giving rise to the arbitration claim arise more than six months before the filing of the Notice of Arbitration. Two events took place within

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[5] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge, UK: Cambridge University Press, 2002), at 143 (**CL-19**).
[6] Government of Canada Objections to Jurisdiction, 3 December 2012, paras. 15, 38.

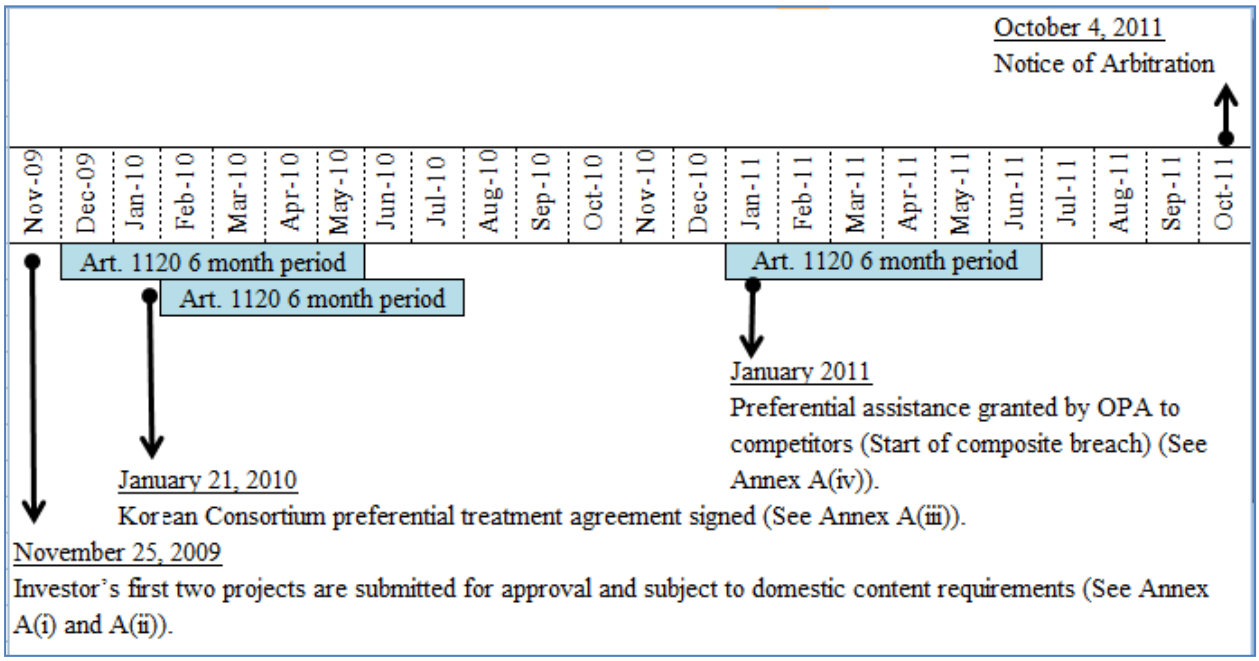
this six month period of time – namely the amendment of the designation of the interconnection point on June 3, 2011 and the improper awarding of FIT Contracts on July 4, 2011.

13. Both of these actions were part of composite measures arising more than six months before the submission of the claim to arbitration.

    a) The interconnection point amendment was merely the culmination of discriminatory and unfair preferences given to other competitors who had private and secret meetings with the governmental authority in January 2011.
    b) The improper awarding of contracts was the culmination of unfair and discriminatory preferences given to other competitors who had private and secret meetings with the governmental authority in January 2011 as well as a result from the discriminatory administration and operation of the local content rules in the Fit Program which date back to the fall of 2009.

14. International law recognizes that the events giving rise to the arbitration started at the beginning of the series of events. Thus, the fact that these two events manifested less than six months before the filing of the Notice of Arbitration is not inconsistent with the requirement of NAFTA Article 1120 as they were part of a composite breach.

15. By any measure, more than six months elapsed from each of the distinct events giving rise to the Investor's claim.



B. The Legal Context

i. The Interpretation Mandate

NAFTA Article 102(2) requires that the NAFTA be interpreted in light of its objectives, which are set out in NAFTA Article 102(1), and include, in particular:

> e. Create effective procedures … for the resolution of disputes

Article 31 of the *Vienna Convention of the Law of Treaties* compels the same interpretive mandate.

16. In this regard, the *Ethyl* Tribunal said:

> 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."[7]

17. Similarly, in *Pope & Talbot*, where Canada objected to the Investor's inclusion of a claim relating to a new stumpage fee that had not been specifically listed in the Statement of Claim,[8] the Tribunal determined that the Investor was challenging the statutory regime as a whole, and that the challenge of the new fee was not a "'new' claim, but relate[d] instead to a new element that ha[d] been recently grafted onto the overall Regime."[9] The Tribunal said:

> Lading [the NAFTA dispute resolution] process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat [the] objective, [of "provid[ing] a mechanism for the settlement of investment disputes that assures 'due process' before an impartial tribunal"], particularly if employed with draconian zeal.[10]
>
> It must be remembered in considering the positions taken by the State Parties, that if their arguments prevailed, it would still be open to the Investor to instate a new claim to be handled by a new tribunal. It is difficult to see how the aims of Article 1115 would be furthered by resort to this duplication of effort.[11]

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[7] *Ethyl Corporation v. the Government of Canada*, Award on Jurisdiction, 24 June 1998, para. 83 ["*Ethyl*"] (**CL-2**).
[8] *Pope & Talbot,* Award Concerning the Motion by Government of Canada Respecting the Claim based upon imposition of the "Super Fee", 7 August 2000, para. 6 ["Super Fee Award"] **(CL-3)**.
[9] *Pope & Talbot,* Super Fee Award, para. 25 **(CL-3)**.
[10] *Pope & Talbot,* Super Fee Award, para. 26 **(CL-3)**.
[11] *Pope & Talbot,* Super Fee Award, para. 26, footnote 4 **(CL-3)**.

18. In Canada's attempt to dismiss the Investor's arbitration, Canada relies on two events which were mentioned in the Notice of Arbitration but which were not in the Notice of Intent because they occurred after the filing of the Notice of Intent.[12] The two actions are:

    a) that Ontario withdrew its ability to terminate FIT contracts for cause; [13]
    b) that Ontario extended the term of the special preferences given to the Korean Consortium by a year.[14]

    Neither of these two events constituted a specific new breach of the NAFTA, but each fact was relevant to the evaluation of the breaches by the Tribunal.

19. There is no prohibition in the NAFTA against the mention of relevant facts which have arisen out of the operation of the regulatory scheme in dispute in this arbitration. The mention of these facts does not affect the jurisdiction of this Tribunal in any way. Neither of these actions constitutes a new breach of the NAFTA but both are facts that are relevant to the quantification of damages in this arbitration. But even if these events did constitute new breaches of the NAFTA, this Tribunal would clearly still have jurisdiction over such breaches because they arise from the same statutory and regulatory regime from the rest of the claim.[15]

20. In this arbitration, Canada is asking this Tribunal to interpret Article 1120 as requiring the Investor to wait six months after ***all*** of its possible claims have materialized[16], rather than six months after "***a*** claim" has arisen, as Article 1120 plainly states is sufficient.

21. Canada's purported interpretation is not only contrary to the interpretive mandate of NAFTA Article 102 and Article 31 of the *Vienna Convention of the Law of Treaties,* it is spurious.

22. It would be absurd to require an Investor to wait six months from every subsequent breach of the NAFTA before it could bring a claim in respect of a prior breach. The result would be that continuous and ongoing breaches would in effect bar a tribunal from ever deciding a claim. As long as a NAFTA Party kept committing wrongful acts against an Investor, the Investor could never launch a claim. The NAFTA party could simply avoid accountability for past wrongs by continuing to commit new wrongs.

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[12] Government of Canada Objections to Jurisdiction, 3 December 2012, para. 15.
[13] Investor's Notice of Arbitration, 4 October 2011, para. 36.
[14] Investor's Notice of Arbitration, 4 October 2011, para. 37.
[15] *Pope & Talbot,* Super Fee Award, para. 25 **(CL-3)**.
[16] Government of Canada Objections to Jurisdiction, 3 December 2012, para. 22.

23. Christoph Schreuer eloquently expresses the point in *The Oxford Handbook of International Investment Law:*

> It would seem that the question of whether a mandatory waiting period is jurisdictional or procedural is of secondary importance. What matters is whether or not there was a promising opportunity for a settlement. There would be little point in declining jurisdiction and sending the parties back to the negotiating table if these negotiations are obviously futile. Negotiations remain possible while the arbitration proceedings are pending. Even if the institution of arbitration was premature, compelling the claimant to start the proceedings anew would be a highly uneconomical solution. A better way to deal with non-compliance with a waiting period may be a suspension of proceedings to allow additional time for negotiations if these appear promising.[17]

ii. The Legal Regime of Articles 1120, 1119 and 1118

24. Canada contends that the express provisions of Articles 1118 and 1119 are also duplicative by implication into Article 1120. Not only does that serve no practical, logical or conceptual purpose, the proposition is directly contrary to the plain text of the NAFTA, and the deliberate choice of the NAFTA Parties to draft Articles 1118 through 1120 as distinct requirements each providing separately for consultation (in Article 1118), notice of dispute (in Article 1119) and a cooling-off period (in Article 1120).

Article 1119 notice requirement

25. Notice to the respondent state is a pre-requisite to initiating of a NAFTA claim. The Investor satisfied this requirement, and Canada does not suggest otherwise. As required by Article 1119, the Notice of Intent was issued on July 6, 2011.

26. The United States *Statement of Administrative Action*, which was made in connection with the implementation of the NAFTA, and which sets out the U.S. understanding of the NAFTA at the time of implementation, confirms Article 1119 to be the notice provision:

> Article 1118 encourages the settlement of claims through consultation or negotiation. Articles 1119 and 1120 set forth the process leading up to the submission of a dispute to an arbitral panel.
>
> Article 1119 provides that an investor must provide notice of its intention to submit a claim to arbitration at least 90 days before doing so, and specifies the Content of such notice. Article 1120 provides that once 180 days have elapsed from the events giving rise to a claim, the investor may submit the claim for arbitration… [18]

[17] Christoph Schreuer, "Consent to Arbitration" in P. Muchlinski, F. Ortino, C. Schreuer, eds., *The Oxford Handbook of International Investment Law* (New York: Oxford University Press, 2008), Ch. 21, at 846 **(CL-4)**.
[18] *United States Statement of Administrative Action*, November 1993, p. 146 **(CL-5)**.

27. In purporting to have not received requisite notice, Canada mistakenly conflates the Article 1119 notice requirement with the cooling-off period requirement of Article 1120. The same conflation was resoundingly rejected by the *Ethyl* Tribunal.[19]

28. NAFTA Article 1120 does not impose an additional notice requirement. It is only Article 1119 that requires "written notice of [an Investor's] intention to submit a claim to arbitration".

29. In Article 1119, the NAFTA Parties agreed to a 90 day notice period under Article 1119, nothing more. The Investor's Notice of Arbitration was filed on October 4, 2011, 90 days after it issued its Notice of Intent on July 6, 2011.

Article 1118 Consultation

30. Immediately following the Notice of Intent, the Investor invited Canada to engage in consultations on July 6th, 2011.[20]

31. Although NAFTA Article 1118 does not specify a time frame for consultation, Canada acknowledges that consultation generally occurs following notice[21].

32. The logical practicality is affirmed by the NAFTA Free Trade Commission which stated:

> Efforts to settle NAFTA investment claims through consultation or negotiation have generally taken place only after the delivery of the notice of intent. The notice of intent naturally serves as the basis for consultation or negotiations between the disputing investor and the competent authorities of a Party.[22]

33. The Investor first sought consultations from Canada under NAFTA Article 1118 on July 6, 2011. This was the first initiation of an offer for consultations within this controversy. While Canada has provided a listing of its correspondence with respect to consultations in paragraphs 16 and 37 of its Submission, it has failed to disclose that the Investor initiated these privileged discussions. Canada also did not provide a listing of the responding letters from the Investor to Canada's letters. Instead, Canada mischaracterizes the matter. The Investor and Canada had a series of privileged exchanges of correspondence under the terms of NAFTA Article 1118 but no consultations arose over a disagreement between the Investor and Canada over the lack of confirmation that Canada's delegation would include those persons responsible for the measures in dispute from the Government of Ontario to ensure that consultations between the parties were

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[19] *Ethyl*, paras. 83-85 (**CL-2**).
[20] Letter from Barry Appleton to Myles J. Kirvan (Deputy Minister of Justice), dated July 6, 2011**(C-05).**
[21] It is possible, of course, for consultation and negotiations to happen before a NOI as part of an effort by the Investor to resolve the issues underlying the claim.
[22] *Re Notices of Intent to Submit a Claim to Arbitration* (2003) (FTC) **(CL-6)**.

meaningful. It is unfair to simply ignore the correspondence and then declare that the Investor did not avail itself of consultations under NAFTA Article 1118.

Article 1120 waiting period

34. NAFTA Article 1120 imposes no additional notice or consultation requirement. It requires the Investor to wait six months after the events which gave rise to a claim before filing a Notice of Arbitration. As affirmed by the *Feldman* Tribunal, it is simply a "cooling off" period:

> Article 1120 (1) provides for a cooling-off period of six months between the events giving rise to a claim and the submission of the claim to arbitration.[23]

35. In its request for bifurcation in the *Grand River* case, the United States confirmed that it considered Article 1120 to be a "cooling-off" period, that is distinct from the notice period:

> Article 1119 provides that a claimant must deliver a notice of intent identifying the challenged measures at least 90 days prior to submitting its claims to arbitration… Claimants also failed to observe the "cooling-off" period prescribed by Article 1120. Article 1120 requires that six months must elapse after the events giving rise to a claim before the claim may be submitted to arbitration. …
>
> The Tribunal should apply the notice and six-month waiting period requirements in accordance with their plain meaning. [24]

36. In the *Ethyl* case, the Tribunal held that events giving rise to a claim could also include the knowledge of future events, such as pending legislation, which would give rise to a claim.[25] In this case, the Investor had concerns that the improper application of the ranking criteria to its project would lead to a loss that had yet to occur. Similarly, the Investor had substantial concerns that the special treatment granted to the Korean Consortium were measures that would result in better treatment to the Korean Consortium and its partners competing with the Investor for power purchase agreements as well as in unfair treatment.

iii. US-Ecuador BIT notice provision is not comparable to Article 1120

37. Canada's proposition relies entirely on two cases under the US-Ecuador BIT, where tribunals declined jurisdiction over aspects of a claim that had taken place within six

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[23] *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1), Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, para. 46 **(CL-7)**.
[24] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Request for Bifurcation of Respondent, 29 August 2005, p. 7-8 **(CL-8)**.
[25] *Ethyl,* paras 87-88 **(CL-2)**.

months of the submission of the claim to arbitration: *Burlington* and *Murphy*. Those decisions, however, have no application to this arbitration, as the notice provisions of the US-Ecuador BIT and the NAFTA are completely different.

38. Professor Kenneth Vandevelde, in his treatise "*U.S. International Investment Agreements*", explains that the US-Ecuador BIT adopted the 1992 version of the standard US Model BIT as the basis for the US-Ecuador BIT.[26] Unlike the NAFTA, the only notice provision in the US-Ecuador BIT is contained in Article VI(3)(a), which states:

> 3. (a) Provided that...six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration [to the ICSID]."

39. The *Burlington* Tribunal explained that this provision serves both a notice and a consultation purpose:

> 315…by imposing upon investors an obligation to voice their disagreement at least six months prior to the submission of an investment dispute to arbitration, […] effectively accords host States the right to be informed about the dispute at least six months before it is submitted to arbitration. The purpose of this right is to grant the host State an opportunity to redress the problem before the investor submits the dispute to arbitration. In this case, Claimant has deprived the host State of that opportunity. That suffices to defeat jurisdiction.[27]

40. The *Burlington* Tribunal reasoned that a "dispute aris[e]s" only when the host state is informed of the existence of the dispute and that notice periods are "designed precisely to provide the State with an opportunity to redress the dispute before the investor decides to submit the dispute to arbitration."[28] Similarly, the *Murphy* Tribunal focused on the importance of consultation and negotiations that could only occur after notice has been given.[29]

41. As Professor Vandevelde notes, the provision in the NAFTA Investment Chapter is completely different from the Model US BIT. The NAFTA "included an investment chapter that resembled, but in many respects differed from, the BITs".[30] Instead of one

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[26] Kenneth Vandevelde, *U.S. International Investment Agreements* (New York, Oxford University Press, 2009), at 302 **(CL-9)**. [Professor Vandevelde notes that there are some minor modifications in this Treaty from the 1992 model treaty was that exceptions to MFN and national treatment were in a protocol. Otherwise, this BIT followed the 1992 model BIT].

[27] *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 315 ["*Burlington*"] **(CL-10)**. (Emphasis added).

[28] *Burlington*, paras. 316, and 312 **(CL-10)**.

[29] *Murphy Exploration and Production Company International v. Republic of Ecuador*, Award on Jurisdiction, December 15, 2010, e.g. paras. 149, 154, 155 (**CL-11**).

[30] Kenneth Vandevelde, *U.S. International Investment Agreements*, at 95 **(CL-12)**.

notice provision, into which time for consulation needed to be implied, the NAFTA provides for three separate and distinct requirements in Articles 1118, 1119 and 1120.

42. The essential purpose of Article VI (3)(a) in the US-Ecuador BIT is contained in Article 1119 of the NAFTA, which provides for the state to be informed of a dispute, so it can then collect information and engage in consultations as provided for in Article 1118.

iv. The NAFTA Parties rejected the approach of the US-Ecuador BIT

43. Unlike the US-Ecuador BIT, the NAFTA was carefully designed to have separate provisions regarding consultation, notice periods and waiting periods. The Tribunal needs to give effect to the express choice made by the NAFTA Parties explicitly in the treaty text.

44. The earliest drafts of the NAFTA contained a dispute settlement provision that was based on the 1992 US model BIT (like that in Article VI(3)(a) of the US-Ecuador BIT).[31] For example, the September 4, 1992 negotiation text of the NAFTA shows:

> DRAFT ARTICLE 1120: ARBITRATION FORA
>
> 1. Provided that six months have elapsed since the date on which the investment dispute arose, the investor may submit the dispute to arbitration under… [32]

45. The early NAFTA draft is virtually identical to Article VI (3)(a) of the US-Ecuador BIT:

> **US-Ecuador BIT** : Provided that...six months have elapsed from the date on which the dispute arose,[33]
>
> **1992 US Model BIT** : Provided that...six months have elapsed from the date on which the dispute arose,[34]
>
> **Early NAFTA Draft**: Provided that six months have elapsed since the date on which the investment dispute arose,[35]

46. The final wording of NAFTA Article 1120, however, is very different. The NAFTA Parties expressly rejected the single provision approach in favor of the three separate

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[31] NAFTA, Draft Text of May 22, 1992, in Barry Appleton, ed., *NAFTA: Legal Text and Interpretative Materials, Vol.3* (West Legal Publishing, 2007), at Sec. 20:10 at 261["NAFTA, Draft Text"] **(CL-13)**.
[32] NAFTA, Draft Text of September 4, 1992, 1:30pm, at Sec. 20:26 at 666 **(CL-14)**. (Emphasis added).
[33] *The Treaty Between the United States of America and the Republic of Ecuador Concerning The Encouragement and Reciprocal Protection of Investment, With Protocol and a Related Exchange of Letters, Signed at Washington on August 27, 1993*, Article VI, para. 3 **(CL-20)**.
[34] Kenneth Vandevelde, *U.S. International Investment Agreements*, at 95 **(CL-12)**.
[35] NAFTA, Draft Text of September 4, 1992, 1:30pm, at Sec. 20:26 at 666 **(CL-14).**

provisions contained in Articles 1118, 1119 and 1120.[36] They chose instead to replace the term "since the date when the dispute arose" with the term "since the events giving rise to a claim", and to address the specific notice requirement in Article 1119, and the consultation requirement in Article 1118.

47. The negotiation history of the NAFTA is also completely consistent with the plain meaning of the text of Article 1120. Put simply, NAFTA Article 1120 cannot be interpreted in a way that would ignore its plain words terms and replace them with a meaning that the NAFTA Parties explicitly rejected.

48. There is simply no question of Article 1120 restricting Canada's consent to arbitration in the present case. Interpretation of other treaties' notice provisions do not have the effect of changing the plain meaning of Article 1120 from being a cooling-off period and turning it into a notice and consultation period.

v. The timing requirements of Articles 1119 and 1120

49. NAFTA Articles 1119 and 1120 are related to, but independent of each other. For example, the six month cooling-off period under Article 1120 can run prior to or concurrently with the 90 day notice period under Article 1119.

50. Yet, Canada unabashedly asks this Tribunal to rewrite NAFTA in order to "send the message" that an Investor cannot submit a Notice of Arbitration and Notice of Intent at the same time.[37] But there is no message to send. The NAFTA already does this. Article 1119 requires an Investor to wait 90 days between the Notice of Intent and the Notice of Arbitration. It is not possible under the NAFTA for a State to have less than 90 days to inform itself of the dispute and to attempt negotiation and consultation. The NAFTA Article 1119 and 1120 requirements are clear; and the only "message" the Tribunal should send is a message to Canada, directing it to stop its systemic practice of attempting to delay access to justice through spurious jurisdictional delays.[38]

C. Conclusion

51. The first of the events that gave rise to the Investor's claim arose well over six months prior to the submission of the Notice of Arbitration.

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[36] NAFTA, Draft Text of September 4, 1992, 6:00pm, at Sec. 20:27 at 687 **(CL-15)**.
[37] Government of Canada Objections to Jurisdiction, 3 December 2012, para. 38**.**
[38] The recent bifurcation decision of the NAFTA Tribunal in *Apotex Holdings Inc. and Apotex Inc. v. United States of America,* 25 January 2013 rejected a request to bifurcate jurisdictional arguments where, as in the present hearing, that bifurcation would still require a hearing on the merits of some of the Investor's claims **(CL-16)**.

52. There can be no factual doubt that the Investor has met the timing requirements and satisfied the purpose of each of Articles 1118, 1119, and 1120.

53. There can therefore be no legal doubt that this Tribunal has plenary jurisdiction under the NAFTA to determine the Investor's claims in this arbitration. No purpose is served by further inquiry into these issues at this stage of the proceeding.

54. Accordingly, the Investor respectfully requests that the Tribunal summarily dismiss Canada's objections, without further submissions or hearing, and re-join any residual or related issues to be determined after a full-hearing on the merits of the Investor's claim.

All of which is respectfully submitted this 19th day of February, 2013.

Barry Appleton
for Appleton & Associates International Lawyers
Counsel for the Investor

Annex A:

Factual events giving rise to the Investor's claims

55. A number of measures attributed to Canada constitute specific breaches of the NAFTA. These measures are:

MEASURE	FIT Program applicable to Investment	Granting of Privileges to Korean Consortium	Private Meeting with Competitors to Facilitate Connection Point Changes
DATE	November 25, 2009	January 21, 2010	January 2011
DAYS PRIOR TO NOA	686	621	259

56. The measures taken by Canada are highly interrelated. The result of the measures was the denial of Power Purchase Agreements that the Investor would otherwise have been entitled to receive on July 4, 2011.

57. In December 2010, the Ontario Power Authority ["OPA"] announced that 1200 MW of transmission capacity would be available to projects in the Bruce region.[39] If the rankings had been conducted correctly in 2010, if competitors had not been provided advance information about FIT Program changes starting in January 2011, and if transmission capacity had not been reserved for the Korean Consortium pursuant to the Green Energy Investment Agreement, Mesa would have received FIT contracts on July 4, 2011.

i. Domestic Content Requirements of the FIT Program

58. On September 24, 2009, Ontario announced the FIT program.[40] Canada explained the purpose of this program in their submissions to the WTO on challenges from Japan and the EU:

> Like FIT programs in other parts of the world, the Ontario FIT Program was created to induce new renewable generation. As recognized by Japan, the Ontario 'FIT Program … became necessary to encourage the entry into the market of renewable energy generators, most of which would not have entered the market in the absence of the FIT Program.[41]

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[39] FIT Priority Ranking List of December 21, 2010 **(C-6)**.
[40] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), dated September 24, 2009 **(C-7)**.
[41] World Trade Organization Panel Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector* (Complaint by Japan), and *Canada – Measures Relating to the Feed-in Tariff Program* (Complaint by the European Union), 19 December 2012, WT/DS412/R & WT/DS426/R, at para 9.18 ["WTO Panel Report"]; citing

59. Whether a well-sited investment would be fruitful was entirely dependent on choosing a connection point where a project had a high probability of being granted a Power Purchase Agreement (PPA). Once a PPA was granted the Investor would benefit from a guaranteed rate of return from the purchase of all the electricity they could generate under the PPA.

60. A WTO Panel Report consolidating Ontario's FIT Program explains this system of guaranteed payments:

> As we have explained elsewhere in these Reports, the FIT Programme guarantees a fixed price for every kWh of electricity delivered into the Ontario electricity system over a period of 20 years by qualifying generators of electricity using solar PV and windpower technology. The prices paid under the FIT Programme were established by the OPA with a view to ensuring that participants are able to cover "typical" development costs and obtain a reasonable rate of return. Thus, generators participating in the FIT Programme will be remunerated for each kWh of electricity delivered into Ontario's electricity system at a price calculated to ensure economically viable operations for "typical" facilities for a 20-year period.[42]

61. The WTO Panel determined that "at least some Ontario-sourced (and therefore Canadian-Sourced) goods *must* be used to satisfy" the "Minimum Required Domestic Content Level" requirement to obtain a PPA.[43]

62. There are limited numbers of Ontario manufacturers of components required to meet these domestic content requirements.[44] Prudent investors are *de facto* required to purchase option contracts with these domestic producers to guarantee that when offered a PPA they can meet its terms.[45] [redacted] Canada's wrongful actions [redacted]

63. The FIT Program and the obtaining of PPAs with Ontario must be operated in accordance with the NAFTA, particularly Articles 1102 through 1106.

64. The Investor is entitled to present a case on whether the domestic content requirements which are a "necessary condition and prerequisite for the electricity generators to participate in the FIT Programme"[47] are in violation of the prohibition of domestic content

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Canada's first written submission (DS412), para. 39 **(CL-17)**.

[42] WTO Panel Report, para. 7.165**(CL-17)**.

[43] WTO Panel Report, para. 7.163 **(CL-17)**. (Emphasis added).

[44] Indeed, this is one of the reasons Ontario signed the Korean Consortium agreement, to boost local manufacturing in the renewable energy sector.

[45] An option contract gives priority manufacturing capacity to a purchaser over other customers. Project rankings were partially based on whether an applicant had an option contract that would satisfy local content requirements. [redacted]

[47] WTO Panel Report, para. 7.165 **(CL-17)**.

requirements under Article 1106(1)(b) of the NAFTA. The events surrounding this domestic content requirement are:

a) The creation of the requirement (September 24, 2009);

b) The incorporation of the Investor's initial projects (November 17, 2009);

c) The [redacted] and

d) The Investor being required [redacted]

65. The Investor was subjected to this domestic content purchasing requirement 686 days prior to the Notice of Arbitration.

66. 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.[49]

ii. Ontario's Mismanagement of FIT Program Rankings

67. The FIT Program was to grant investors preferential treatment based upon their rank in accordance with a point system. [redacted] When they received their ranking, they were ranked far below their calculated position. On May 20, 2011, the Investor wrote to the OPA to verify that the OPA had correctly calculated their priority rank.[51] The OPA replied that they had verified the ranking and that the Investor was accurately ranked, but the OPA did not provide supporting calculations, as requested by the Investor, claiming they were confidential.[52]

68. Under the Investor's calculations, it had amongst the highest number of points in the province of project proponents. Despite this, it was ranked 8th and 9th in the Bruce Region, below projects the Investor calculated had lower rankings:

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[48] This recent date demonstrates the fallacy of Canada's argument that the Investor must wait 180 days from every claim. Events may arise during the arbitration which involve the matters in dispute and are part of existing claims.
[49] *Mobil Investments Inc. v. Government of Canada* (ICSID Case No ARB(AF)/07/4) (**CL-18**).
[50] Letter from Mark Ward (Mesa Group), Charles Edey (Leader Resources Services Corp.) and Michael Bernstein (Capstone Infrastructure Corp.) to Shawn Cronkwright (OPA), dated May 20, 2011(**C-10**).
[51] Letter from Mark Ward (Mesa Group), Charles Edey (Leader Resources Services Corp.) and Michael Bernstein (Capstone Infrastructure Corp.) to Shawn Cronkwright (OPA), dated May 20, 2011(**C-10**).
[52] Letter from Shawn Cronkwright (OPA) to Mark Ward (Mesa Group), Charles Edey (Leader Resources Services Corp.) and Michael Bernstein (Capstone Infrastructure Corp.), dated June 17, 2011 (**C-11**).

Bruce Region Priority Ranking - December 21, 2010

Rank	Applicant Name	Capacity (MW)
1	Boulevard Associates Canada, Inc.	102
2	Boulevard Associates Canada, Inc.	23
3	Grand Bend Wind, L.P.	100
4	Grand Valley Wind Farms Inc.	40
5	St. Columban Energy L.P.	15
6	Skyway 127 Wind Energy Inc.	100
7	St. Columban Energy L.P.	18
8	**TTD Wind Project ULC**	**150**
9	**Arran Wind Project ULC**	**115**
	Total	663

69. The ranking of the Investor's program according to alternative criteria on December 21, 2010, deprived it of a PPA. This occurred 287 days prior to the Notice of Arbitration.

iii. The Korean Consortium

70. The Korean Consortium, comprised of Samsung C & T Corporation and Korea Electric Power Corporation were granted preferential access to generating contracts in exchange for establishing green energy manufacturing facilities in Ontario.

71. In addition to the opaqueness of the OPA ranking system, the Investor has learned that it could be bypassed by members of the Korean Consortium and their partners. The Consortium was granted preferential access to connection points with guaranteed access to transmission capacity. This preferential treatment permitted the Consortium members to identify lower ranked applicants for PPAs, purchase those projects and secure a PPA for those projects by integrating their operation into the Consortium. This scheme granted other investors and their Canadian subsidiaries preferential treatment to the Investor.

72. The events giving rise to this scheme were ongoing:

    a. Ontario started negotiations with the Korean Consortium in the fall of 2008.[53]

    b. The Agreement granting special privileges was signed on January 21, 2010.[54]

[53] Legislative Assembly of Ontario, Official Report of Debates (Hansard), dated May 3 2012, p. 2052 (**C-12)**.
[54] Green Energy Investment Agreement among Her Majesty the Queen in Right of Ontario, as represented by the Minister of Energy and Korea Electric Power Corporation and Samsung C&T Corporation, dated January 21, 2010.

c. Projects owned by Pattern Inc, a competitor of the Investor and a partner of Samsung, were transferred from the FIT program to obtain the better terms available through the Korean Consortium's agreement.[55]

d. Projects owned by other investors were transferred from lower-ranked positions through the Consortium Agreement to privileged status such that they received PPAs.[56]

73. The events giving rise to this claim[57] occurred 621 days prior to the Notice of Arbitration.

iv. Meeting with competitors and advanced notice of Connection Point Window changes

74. In mid-January 2011, shortly after the OPA announced that 1200MW of contracts would be offered in the Bruce region, a lobby organization, the Canadian District Energy Association, contacted the OPA to set up a meeting on behalf of a competitor, NextEra Energy Resources, to discuss the migration of their projects in the "West of London" region to the "Bruce" region.[58] The OPA, met with NextEra and this meeting precipitated the announcement of the rule change some six months later on June 3, 2011.

> We have limitations on the extent we can discuss information that is relevant and material to the upcoming ECT process. We will try to be helpful, but as I said to all who wish to discuss this kind of matter with us, we can't recommend, suggest or consult on your specific needs. We can clarify rules and provide better understanding as they related to disclosed information.[59]

75. The OPA met with this lobby organization and NextEra representatives to discuss "data confirmation as to what [NextEra] modeled in [their] load flows."[60] Following this meeting an internal OPA communication recommends that "going forward, [the OPA] should reflect this potential connection point in [their] studies."[61] In effect, despite stated reservations that the OPA could not "consult" on "specific needs", the OPA met with a competitor and, following which, adopted changes to the FIT Program that were directly beneficial to them.

(**C-13**).

[55] E-mail from Frank Davis (Pattern) to Susan Kennedy (OPA), dated August 2, 2011 (**C-14**).

[56] See, for example, FIT Priority Ranking List of December 21, 2010 (**C-7)**. Armow Wind Project was ranked 24th in Bruce area and 180th provincially. It then received a PPA through the Green Energy Investment Agreement. OPA Article headed "Power purchase agreements signed with Korean Consortium" **(C-15)**.

[57] Canada's jurisdiction submission inexplicably state that the better treatment afforded the Korean Consortium is relevant to the merits of the Investor's case but did not give rise to a claim (para. 3 n.3). To the contrary, better treatment afforded to nationals of another party gives rise to a claim for breach of Article 1103 of the NAFTA.

[58] E-mail from Mary Ellen Richardson (Canadian District Energy Association) to Bob Chow (OPA), dated January 14, 2011 **(C-16).**

[59] E-mail from Bob Chow (OPA) to Bobby Adjemian (NextEra Energy), dated January 18, 2011 **(C-17)**.

[60] E-mail from Bobby Adjemian (NextEra Energy) to Bob Chow (OPA), dated January 18, 2011 **(C-17)**.

[61] E-mail from Tracy Garner (OPA) to Irwin Ng, January 25, 2011 **(C-18)**

76. In February 2011, Ontario continued to grant NextEra extraordinary assistance not available to other investors. Representatives of NextEra met with the Ministry of Energy on February 25, 2011 to obtain further information about how to change their projects connection point, including specific timing of a window to conduct those changes.[62]

77. In early April 2011, the IESO scheduled a meeting with NextEra and its representatives regarding possibilities for connecting to 500kv transmission lines, the lines to which NextEra changed during the connection point amendment window process.

78. Following these interactions with multiple government actors in the Ontario energy regulation sector, NextEra prepared the necessary documents to be ready for a connection point window change opportunity. Such an opportunity was announced on June 3, 2011. A window of a mere 5 days, from June 6 to 10, was granted to investors to reformulate their strategy.

79. Canada has submitted that 37 projects also changed connection points during this window.[63] However, this count blurs issues by ignoring the magnitude of NextEra's change. While other projects, including one owned by the Investor, made minor changes, NextEra's proposal included a construction of a transmission line of hundreds of kilometers. The due diligence and expense required for such a substantial change demonstrates that NextEra was granted advanced knowledge and had a reasonable belief that their change would be approved.

80. Following this connection point change, PPAs were offered to proponents on July 4, 2011, including new entrants, in the Bruce region. Had these new entrants not been admitted, the Investor's projects in that region would have been granted a PPA:

Bruce Region Contract Offers – July 4, 2011

Rank	Applicant Name	Capacity (MW)
1	*New NextEra Project: Boulevard Associates Canada, Inc.*	60
2	*New NextEra Project: Boulevard Associates Canada, Inc.*	150
3	*New NextEra Project: Bornish Wind, L.P.*	73.5
4	Boulevard Associates Canada, Inc.	102
5	*New Project: Suncor Energy Products Inc.*	100
6	*New NextEra Project: Summerhaven Wind, L.P.*	60
7	Boulevard Associates Canada, Inc.	23
8	Grand Bend Wind, L.P.	100
9	Grand Valley Wind Farms Inc.	40

[62] E-mail from Bob Lopinski (Counsel Public Affairs) to Pearl Ing (MEI), dated February 25, 2011**(C-19)**.
[63] Canada's Outline of Potential Issues, 31 July 2012, para. 11.

10	St. Columban Energy L.P.	15
		Total 723.5

Bruce Region Priority Ranking as of July 4, 2011

Rank	Applicant Name	Capacity (MW)
1	Suncor Energy Products Inc.	50
2	Skyway 127 Wind Energy inc.	100
3	**TTD Wind Project ULC**	**150**
4	**Arran Wind Project ULC**	**115**

81. The manner with which the OPA conducted the connection point window change was such as to be unreasonable, unforeseeable and unfair such that it constituted a breach of Article 1105.

82. Furthermore, the decision to grant a competitor, NextEra Energy, preferential access to the Bruce region by allowing construction of a massive transmission line also constitutes unfair and unreasonable treatment that deprived the Investor of a PPA they would have otherwise been granted.

83. The events giving rise to this claim occurred 259 days prior to the Notice of Arbitration and these events from January through July 2011 constitute a composite breach of the NAFTA.

84. The unfair and arbitrary 2010 project rankings made under the FIT Program resulted in Mesa not receiving a PPA offer on July 4, 2011. The later act was inextricably linked to the earlier 2010 breach arising from the arbitrary and unfair project rankings. Mesa was concerned that the ranking process in Section 13 of the FIT Rules had not been followed and sought information about the apparent impropriety within the FIT ranking process in a May 20, 2011 letter.[64] Based on the rules, Mesa should have received a higher ranking that other projects in the queue.

85. The changes to the FIT rules on June 3, 2011, of which competitors like NextEra had advance notice, contributed to the fact that Mesa did not get a contract on July 4, 2011. Before other competitors were allowed to change from the West of London region, where only 350 MW of transmission was available, to the Bruce region where at least 750 MW of transmission capacity was available, Mesa would have received contracts for TTD and Arran because those projects were within the top 750 MW of transmission capacity in that region. NextEra was able to submit an application to change its connection point because it

[64] Letter from Mark Ward (Mesa Group), Charles Edey (Leader Resources Services Corp.) and Michael Bernstein (Capstone Infrastructure Corp.) to Shawn Cronkwright (OPA), dated May 20, 2011 (**C-10**).

had advance notice of the rule change. The change in connection point that NextEra was permitted to complete would not have been possible without advance notice to prepare the applications.

86. The signing of the Green Energy Investment Agreement in January 2010 resulted in Mesa not obtaining a contract on July 4, 2011. This later action inextricably resulted from Canada's earlier NAFTA breach in granting special privileges in the GEIA. If GEIA parties had not been granted priority access to transmission capacity in the Bruce region, a greater amount of transmission capacity would have been available for FIT applicants. In December 2010, the OPA indicated that 1200 MW of transmission capacity would become available in the Bruce Transmission region. However, the actual transmission capacity that was made available to FIT applicants was 750 MW because the Korean Consortium was guaranteed access to 450 MW in the Bruce region and was able to select their desired connection points. Despite the problems with the rankings and the connection point amendment window, Mesa was within the top 1200 MW of transmission capacity and thus would have received a contract had it not been for the special and guaranteed access to transmission that the GEIA parties received.