PUBLIC

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES

MESA POWER GROUP LLC

Investor

v.

GOVERNMENT OF CANADA

Respondent

INVESTOR'S SECOND RESPONSE TO THE SECOND 1128 SUBMISSIONs OF THE NON-DISPUTING PARTIES

June 26, 2015

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1. The Investor submits this Response to the Second Article 1128 Submissions made by the Government of the United States and by the Government of the United Mexican States on June 12, 2015.[1]

2. The Second Article 1128 Submissions of the United States and of Mexico with respect to the *Bilcon* Award re-opened matters previously canvassed by the non-disputing Parties and otherwise argued by the disputing parties in the *Mesa* arbitration. The Second US Article 1128 Submission re-argues the first US Article 1128 Submission too.

3. We note that neither Mexico, nor the United States, takes issue with the unanimous interpretations provided by the *Bilcon* tribunal on the issues of state responsibility, attribution and on jurisdiction.

4. This Response will address the following points raised in both submissions:

   a) The Proper Approach to the Interpretation of the Treaty;
   b) National Treatment; and
   c) The International Law Standard of Treatment.

I. TREATY INTERPRETATION

5. The Government of the United States makes reference at paragraph 3 of its Second Article 1128 Submission to actions which it contends constitute the subsequent practice of the NAFTA Parties, purportedly resulting in an authentic interpretation of the NAFTA Parties, which would have the *de facto* effect of amending the terms of the NAFTA to the extent that this interpretation is not a permissible one based on the ordinary meaning of the words of the treaty understood in accordance with the canons of interpretation in the Vienna Convention on the Law of *Treaties* and the interpretive principles specific to the NAFTA.[2] The Government of Mexico applies the same interpretative principle with respect to its reference to prior statements at paragraph 9 of its Second Article 1128 Submission.

6. Mexico and the United States each made reference to the issue of subsequent practice in their original Article 1128 Submissions and the Investor responded to these contentions. None of the issues raised by the Investor in the context of its original Response to the Original Article 1128 Submissions has been addressed by Mexico or by the United States in their Second Submissions. Under the circumstances, the Investor has no choice but to return to the issue of subsequent practice that already has been

[1] Appleton & Associates International Lawyers acted as legal counsel for the Investors in the *Bilcon* claim. The comments made in this submission by Appleton & Associates International Lawyers are solely in their capacity as legal counsel for Mesa Power Group. These comments are not to be construed, in any way, as constituting statements attributable to the Investors in the *Bilcon* claim.

[2] US Second Article 1128 Submission at 2 and more fully explained in footnote 5.

pleaded, to respond to the interpretative issues raised in the Second 1128 Submissions of the non-disputing NAFTA Parties.

7. The United States made the argument in *Methanex* that the positions advocated by the NAFTA Parties during contentious NAFTA litigation constituted subsequent practice under Article 31 of the *Vienna Convention*. This position was adopted by Canada and Mexico.[3] The *Methanex* Tribunal did not make any ruling upon this argument.[4]

8. The overwhelming number of NAFTA Tribunals considering Article 1128 Submissions also have exercised judicial restraint in not confirming that the various Article 1128 Submissions, taken together with the positions of the responding Party in same or other dispute, constitute subsequent practice. Patrick Dumberry confirms that the NAFTA Parties have continued to argue in recent cases that their litigation positions set out in Article 1128 submissions are subsequent agreements but that "such a claim has not been endorsed by **any** NAFTA Tribunal so far.[5]"

9. While subsequent practice is one relevant consideration that the Tribunal must consider to establish context for interpretation under Article 31 of the *Vienna Convention*, the position advanced by the non-disputing Parties overstates the normative significance of subsequent practice, taken in isolation from the other sources of treaty interpretation in Article 31 to the case at hand.

10. The NAFTA Parties imposed a limit on treaty interpretators by explicit terms in the Treaty. NAFTA Article 102 sets out mandatory interpretative guidance requirements for all treaty interpretors which require following specific interpretative rules and principles in the NAFTA (such as MFN treatment, national treatment and transparency) which are possibly broader than the those contained in applicable rules of International Law. In addition, another provision in the NAFTA makes clear that there is a special process required by the Treaty to address the amendment or modification the terms of the NAFTA.

11. It is important to note that NAFTA Article 2202 sets out the treaty-defined process to address any modification to the NAFTA. Paragraph 2 of Article 2202 requires that any modification or addition to the NAFTA must be approved in accordance with the "applicable legal procedures of each Party".

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[3] Patrick Dumberry, *The Fair and Equitable Treatment Standard* (Wolters Kluwer, 2013), Chapter II, Part I: "The Meaning of Article 1105", at p.80 ***(Investor's Schedule of Legal Authorities CL-427)***. But then, at the hearing, the United States modified its own litigation position, by stating that the positions in Article 1128 Submissions should be considered as a subsequent agreement.

[4] *Methanex Corporation v United States of America, Final Award of the Tribunal on Jurisdiction and Merits,* NAFTA - 2005 WL 1950817 (August 3, 2005) ("*Methanex,* Award on Jurisdiction"), at Part II, Ch. B, at ¶20 ***(Investor's Schedule of Legal Authorities CL-428)***.

[5] Dumberry (2013), at p. 82-83 ***(Investor's Schedule of Legal Authorities CL-427)*** *[emphasis added]*.

12. The United States makes no mention of this process of modification in either of its Article 1128 Submissions yet adopting many of the interpretations advanced by the United States would have the effect of modifying the terms of the NAFTA

13. The United States is required to act in accordance with applicable legal procedures with respect to any addition or modification to the NAFTA. According to the terms of the United States Constitution and longstanding practice thereunder, the US Executive would be required to proceed through congressional-executive agreement or to obtain a super-majority vote of the US Senate in order to amend the terms of a treaty like the NAFTA.[6] In sum, amendment to the NAFTA could not take place on the basis of executive action alone, such as a statement made by the United States in the course of litigation, that did not also have the authorization arising from the advice and consent of the US Senate. If such a modification were to take place, there would be a fundamental disruption with the process of democracy in the United States and the voice of the US Congress would be unlawfully truncated. For the United States to take lawful actions under its own domestic procedures, subsequent state practice must be limited entirely to interpretative questions rather than to any question of amendment to the NAFTA.

14. In their two volume commentary on the *Vienna Convention*, Professors Corten and Klein examine the meaning of subsequent practice in Article 31 of the *Vienna Convention*. They identify that this procedure cannot be used to envisage an amendment or a termination to a treaty.[7]

15. Professors Corten and Klein also comment on the importance of Article 31(3)(c) of the *Vienna Convention*, which has been relied upon extensively by the European Court of Human Rights and which, in turn, has used general principles of law under Article 38 of the ICJ Statute to interpret article 6(1) of the *European Convention on Human Rights*.[8] A similar approach was followed by the ICJ in the *Oil Platforms* case when they considered the meaning of the use of force under the *United Nations Charter*.[9]

16. Professor Martins Paparinskis considered subsequent state practice to see whether it was available to the NAFTA Parties as a means of modifying the interpretation of the

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[6] Oona Hathaway "Presidential Power over International Law: Restoring the Balance" 119 Yale L.J. 140 (2009), at pp.260-263 ***(Investor's Schedule of Exhibits at C-0431)***.

[7] Oliver Corten and Pierre Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, Volume I (Oxford University Press, 2011) ("Corten and Klein"), at p.828 ***(Investor's Schedule of Legal Authorities CL-280)***; They rely upon the International Court's decision to this effect in *Gabcikovo-Nagymaros (Hungary/Slovakia),* International Court of Justice, I.C.J. Reports 1997 (September 25, 1997) *("Gabcikovo-Nagymaros")*, at ¶¶100, 114 ***(Investor's Schedule of Legal Authorities CL-176).***

[8] Corten and Klein, at p.828-829, at ¶47 ***(Investor's Schedule of Legal Authorities CL-280)***.

[9] *Oil Platforms (Islamic Republic of Iran v United States of America),* Preliminary Objection, Judgment, I.C.J. Reports 1996, at p.182, ¶25 ***(Investor's Schedule of Legal Authorities CL-020)***. Corten and Klein refer to the fact that the WTO Appellate Body has also followed a similar approach when interpreting treaties. Corten and Klein, at pp.828-829 ***(Investor's Schedule of Legal Authorities CL-280)***.

Treaty at this time pursuant to the *Vienna Convention.* Professor Paparinskis identifies a number of serious obstacles to the position advanced by the non-disputing Parties in their Second Article 1128 Submissions. He concludes that written pleadings of states in investor-state disputes do not raise the threshold of constituting subsequent practice. Instead, widespread and consistent practice needs to be demonstrated. Simply aligning various positions of non-disputing NAFTA Governments is not sufficient to establish concordant, common, and consistent subsequent practice supporting a new content of treaty law.[10] The entirety of Professor Paparinskis's observations was set out in full in paragraph 9 of the Investor's Response to the Original 1128 Submissions of the non-disputing Parties.

17. Professor Paparinskis concludes his analysis by stating :

> The procedural and empirical qualifications for identifying the argument with precision, the contradictions within the identifiable practice, and the consistent emphasis by States and Tribunals alike on the application of *Vienna Convention* form the background to this debate. It does not seem possible to maintain that there exists sufficient practice to change either the content of custom or reinterpret the treaty rules of *Vienna Convention on the Law of Treaties*.[11]

18. Thus, subsequent state practice, as that advanced in the US Second Article 1128 Submission with respect to investor state treaty practice, is simply not a reliable or authoritative approach for supplemental interpretation of a treaty like the NAFTA.

19. Professor Gabrielle Kaufmann-Kohler also has expressed a similar caution in relation to the use of state practice in the NAFTA investor-state context, even where such practice is expressed through the explicit interpretative powers of the Free Trade Commission.[12] States may, as the parties to the treaty, assert a concordant interpretation that benefits them as litigants against investments:

> This appears to be contrary to due process, specifically contrary to the principle of independence and impartiality of justice, which includes the principle that no one can be judge of its own cause.[13]

20. Professor Kaufmann-Kohler further observes:

> Chapter 11 of the NAFTA seeks to protect non-State actors by granting them substantive and procedural rights, including the right to access arbitration.[14]

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[10] Martins Paparinskis, The International Minimum Standard of Treatment and Equitable Treatment (Oxford: Oxford University Press, 2013) ("Paparinskis (2013)"), at pp.144-145 ***(Investor's Schedule of Legal Authorities CL-103)***. The entirety of Prof. Paparinskis's observations were set out in full in paragraph 9 of the Investor's Response to the Original 1128 Submissions of the non-disputing Parties.

[11] Paparinskis (2013), at p.146 (footnote omitted) ***(Investor's Schedule of Legal Authorities CL-103)***.

[12] Gabrielle Kaufmann-Kohler, "Interpretive Powers of the Free trade Commission and the Rule of Law" *Fifteen Years of NAFTA Chapter 11 Arbitration.* (2011) JurisNet., 175 ("Kaufmann-Kohler (2011)") ***(Investor's Schedule of Legal Authorities CL-421)***.

[13] Kaufmann-Kohler (2011), at p.192 ***(Investor's Schedule of Legal Authorities CL-421)***.

[14] Kaufmann-Kohler (2011), at pp.193-194 ***(Investor's Schedule of Legal Authorities CL-421)***.

21. This is a crucial observation: when a treaty brings into being rights of non-State actors that may be asserted against states in arbitration, the fundamental principles of independence and impartiality of justice may require attenuating the extent to which states are regarded as *Herren der Verträge* as far as interpretation is concerned. These concerns are of importance even when explicit interpretative powers under the treaty are being exercised, e.g. through an FTC interpretation. They are arguably even more acutely present when the concordant interpretation is asserted simply *ad hoc*, on the basis of general notions of state practice articulated in the *Vienna Convention*, which must be read, in a context where the treaty creates rights of non-state actors particularly, in the light of due process and fundamental rights as essential elements of the international legal system. Professor Kaufmann-Kohler focuses especially on the due process and the rule of law issues that arise where concordant interpretations of states parties are asserted in the course of an on-going litigation.

22. Finally, as shown *infra*, the NAFTA parties hardly have been consistent in their posited interpretation of various provisions of NAFTA, at times taking inconsistent positions in the very same brief – as the U.S. does even in its very brief to which this briefing responds.

II. NATIONAL TREATMENT

23. The United States makes various submissions regarding Article 1102 National Treatment in its Second Article 1128 Submission at paragraphs 3 and 4. Of particular note is the fact that in the Second US Article 1128 Submission the United States freely admits that:

> [T]he requirement to show discrimination on the basis of nationality under Article 1102 **does not require a showing of discriminatory intent**. Rather, a Claimant must establish that a measure either on its face, or as applied, favors nationals over non-nationals.[15]

24. The Second US Article 1128 Submission on this point is not pertinent to understanding the *Bilcon* award. Instead, the US Second Article 1128 Submission simply appears to be a reargument of the points made in the May 2014 US Original Article 1128 Submission to persuade the Tribunal that it must be bound by positions that NAFTA Parties take in arbitration if those positions align at some point in time. Those interpretative arguments already been have addressed by the Investor in its Original Article 1128 Response and now again in its Second Article 1128 Response to the 1128 Submissions of the non disputing NAFTA Parties.

25. The United States is correct when it states that National Treatment applies only to nationality-based discrimination, that there is no requirement to prove an intent to discriminate on the basis of nationality, and that the proper application of the concepts

[15] US Second Article 1128 Submission, at fn.2 *[emphasis added]*.

of "like circumstances" and "treatment no less favorable" is what ensures that findings of violation of National Treatment are limited to nationality-based discrimination. There is nothing in the *Bilcon* Award that says anything to the contrary.

26. The understanding that National Treatment applies only to nationality-based discrimination was common ground between the Investor and Canada in *Bilcon*, and that the *Bilcon* Tribunal properly understood that a finding of a violation of National Treatment requires a sufficient nexus between the discrimination and the nationality of the investor.[16]

27. The *Bilcon* Tribunal clearly expresses its awareness of the importance of the existence of a sufficient link between discrimination and the nationality of the investor. This is confirmed by the *Bilcon* Tribunal at paragraph 720 of the majority award:

> If a prima facie case is made under the three-part UPS test, can a host state still show that there is no breach because the discriminatory treatment identified is somehow justified, or that the discriminatory treatment is not sufficiently linked to nationality, but merely an incidental effect of the reasonable pursuit of domestic policy objectives?

28. In the end, the United States actually does not take issue with the legal tests applied by the *Bilcon* Tribunal, with the exception of the reversal of the burden of proof once a case of less favorable treatment is made by the investor. (This burden of proof issue is addressed in Section C below).

a) With respect to likeness, the United States contends that the *Bilcon* Tribunal did not properly weigh the facts in coming to the conclusion that certain Canadian investors were in like circumstances with the claimant. In particular, the United States asserts that the *Bilcon* Tribunal ignored **relevant** aspects in which the claimant was **un**like the Canadian investors in question. Since the United States submission gives no particulars as to what these aspects are, and why they are "relevant", it is of little assistance. In any event, that the United States disagrees with how the *Bilcon* Tribunal applied the proper test to the facts is of little important as to what test should applied and, on that point, the United States agrees with the test applied by the tribunal.

b) The United States asserts that in order to be considered in like circumstances within the meaning of NAFTA 1102, an investor of the host state must be "like" in all relevant respects (apart obviously from nationality). However, the text of the NAFTA requires only that the Tribunal make a factual determination that the investors being compared be "in like **circumstances**" not that they be "like", let alone "like in all relevant respects".

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[16] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability (March 17, 2015) ("*Bilcon,* Award"), at ¶720 ***(Investor's Schedule of Legal Authorities CL-422)***.

A. Discriminatory Intent

29. Despite the clear admission of the US Government that "Article 1102 does not require a showing of discriminatory intent" in its Second US Article 1128 Submission, that same Submission appears also to set out the contrary position taken by NAFTA Parties within the contexts of different NAFTA cases in footnote 3, including *Mercer v Canada* and *Pope and Talbot v Canada*. In these cases, the NAFTA Parties did appear to take an initial litigation position that proving the existence of discriminatory intent is necessary to establish a violation of the NAFTA.[17] Such a position has no longer been adopted in the *Mesa* arbitration. This demonstrates that there has not been common positions taken by the Parties regarding treaty interpretation.

30. Another example of the lack of commonality in the positions of the NAFTA Parties (even with the apparent lack of clarity in the US position) is highlighted in the U.S. Article 1128 Submission in the *Mercer* v. *Canada* NAFTA arbitration, which was submitted in May 2015. In this Article 1128 Submission, the U.S. clearly states that discriminatory intent is not required to establish a NAFTA violation. According to the submission, "*De facto* discrimination occurs when a facially neutral measure with respect to nationality is applied in a discriminatory fashion based on nationality".[18] The US relied on *Pope & Talbot* to support this point. Canada takes the opposite position in its pleadings in the *Mercer* claim and clearly asserts that such intent is required.[19] There simply is no commonality or consistency that would be able to consider these expressions of litigation position to be anything in the nature of a common, consistent and concordant subsequent practice.

31. The Second US Article 1128 Submission demonstrates the ephemeral qualities of arbitral positions advanced by different NAFTA Parties. It is understandable that advocacy positions in arbitration, even those of states, would have fluidity depending upon, *inter alia*, jurisprudential developments in other cases or related international economic regimes, such as the WTO, as well as the particular facts of the case.

32. To the extent that the US Second Article 1128 Submission is (albeit, inconsistently) advocating for the existence of a requirement to establish discriminatory intent for national treatment, the Investor simply cannot agree with this suggestion. It is clear that the NAFTA does not expressly require that the difference in treatment must be motivated by the nationality of the investor or investment. What is required is that the

[17] US Second Article 1128 Submission, at fn.3.

[18] *Mercer International Inc. v Government of Canada*, ICSID Case No. ARB(AF)/12/3, Submission of the United States of America, pursuant to Article 1128 of the NAFTA (May 8, 2015), at ¶12 ***(Investor's Schedule of Legal Authorities CL-429)***.

[19] *Mercer International Inc. v Government of Canada*, ICSID Case No. ARB(AF)/12/3, Counter-Memorial (August 22, 2014), at ¶360 ***(Investor's Schedule of Legal Authorities CL-430)***.

challenged measure must "treat foreign investors or investments less favourably than domestic investor or investments." It is not necessary to prove that this is done on the express basis of nationality based discrimination. Based on the term "less favorable treatment" – the emphasis is on the manner and method of the government actions, not intent.

33. The Tribunal in *S.D. Myers* also concluded that the word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent."[20] The Tribunal in *Siemens v Argentina* concurred, finding that intent is "not decisive or essential for a finding of discrimination."[21]

34. The *Feldman* Tribunal was quick to point out that NAFTA Article 1102 does not require an Investor to demonstrate explicitly that a distinction is a result of their foreign nationality.[22] In support, the *Feldman* Tribunal recalled the *Pope & Talbot* Tribunal's observation that requiring proof of intent effectively would limit NAFTA Article 1102 to *de jure* violations, thereby severely limiting the effectiveness of the National Treatment concept in protecting foreign investors.[23]

35. The Second US Article 1128 Submission appears to admit that there are no additional steps.

36. Rejecting the notion that NAFTA Article 1102 offers foreign investors protection only from invidious discrimination – that is, discrimination in which an Investor actually could show on the basis of objective evidence to be based on national prejudice – Arbitrator Cass, in his Separate Opinion in *UPS*, held that such an interpretation of NAFTA Article 1102 "would be of little value to investors."[24] Professor Cass then went on to say that the requirements of Article 1102 "plainly extend beyond formal parity" and instead "commands an effective parity of foreign and domestic investors and investments."[25] The Majority Decision in *UPS* said nothing to the contrary.

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[20] *S.D. Myers Inc. v Government of Canada,* Partial Award, November 13, 2000, 40 ILM 1408 (2001) ("*S.D. Myers,* Partial Award"), at ¶254 ***(Investor's Schedule of Legal Authorities CL-033)***.

[21] *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Award, February 6, 2007 ("*Siemens,* Award*")*, at ¶321 ***(Investor's Schedule of Legal Authorities CL-144)***.

[22] *Feldman v United Mexican States*, Award, ICSID Case No. ARB(AF)/99/1, 16, December 16 2002. ("*Feldman*, Award"), at ¶181 ***(Investor's Schedule of Legal Authorities CL-040)***.

[23] *Feldman,* Award, at ¶¶183, 184 ***(Investor's Schedule of Legal Authorities CL-040)***, citing to *Pope & Talbot*, Award on the Merits of Phase 2, April 10, 2001, at ¶¶78-79. According to the *Pope & Talbot* Tribunal, was that showing discrimination based on nationality would "tend to excuse discrimination that is not facially directed at foreign owned investments" ***(Investor's Schedule of Legal Authorities CL-039)***. A similar finding took place in *Thunderbird v Mexico*, where at ¶177 the Tribunal held: "It is not expected from [claimant] that it show separately that the less favorable treatment was motivated because of nationality." ***(Investor's Schedule of Legal Authorities CL-194).***

[24] *UPS v Canada,* Separate Opinion of Dean Ronald A. Cass (May 24, 2007) ("*UPS*, Separate Opinion of Dean Ronald A. Cass"), at ¶58 ***(Investor's Schedule of Legal Authorities CL-148)***.

[25] *UPS*, Separate Opinion of Dean Ronald A. Cass, at ¶59 ***(Investor's Schedule of Legal Authorities CL-148)***.

37. The United States position, as it sometimes appears in its Second Article 1128 Submission, does not fit with the overall architecture of the NAFTA. Specifically, if NAFTA Article 1102 were to be reduced to an obligation not to treat foreign investors less favourably only on the basis of nationality, this provision would become redundant. This is because such an obligation already exists under the customary international law standard of "fair and equitable treatment". It is clear that Article 1102 is not worded so as to be a simple affirmation of customary international law with respect to discrimination towards aliens. That obligation is properly found in NAFTA Article 1105 – not Article 1102.[26] In sum, the correct position concerning the issue of discriminatory intent is the one that is expressed clearly and unambiguously in footnote 2 of the US Second Article 1128 Submission - which clearly admits that discriminatory intent is simply not required for a finding of violation of 1102.

B. Diversity of Nationality is the Test

38. This section of the Investor's Second Article 1128 Response addresses arguments which may be inferred from paragraph 4 in the Second US Article 1128 Submission. Again, the US position remains unclear. The Investor opposes the position which appears to be advanced in Second US Article 1128 Submission in paragraph 4 – that NAFTA Article 1102 requires intentional nationality-based discrimination. This is a requirement to establish intentional discrimination that is not expressly contained in the NAFTA treaty text.[27]

39. The requirement of the NAFTA is to establish a diversity of nationality rather than proof of intentional nationality-based discrimination. A look at the boundaries on the map and a review of the evidence filed in this claim is sufficient to be able to establish that an Investor or the Investment of a NAFTA Investor is capable of meeting the diversity of nationality requirements which are contained in NAFTA Articles 1102, 1103 and 1104.

40. In addition, there are also good policy reasons that Article 1102 ought not to be limited in the way the United States apparently contends. As the Tribunal in *Feldman* noted:

> …requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government. It would be virtually impossible for any claimant to meet the burden of demonstrating that a government's motivation for discrimination is nationality rather than some other reason.[28]

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[26] *Loewen Group, Inc. and Raymond Loewen v United States of America,* ICSID Case No.ARB(AF)/98/3, Award, 2003 WL 24065653 (June 26, 2003) ("*Loewen,* Award*")*, at ¶¶121, 124 ***(Investor's Schedule of Legal Authorities CL-121)***. The Investor has addressed this issue and the findings of the NAFTA Tribunal in Loewen at paragraph 519 of the Reply.

[27] US 1128 Submission, at ¶4.

[28] *Feldman,* Award, at ¶183 ***(Investor's Schedule of Legal Authorities CL-040)***.

41. NAFTA Articles 1102 and 1103 require that there be a demonstration of diversity of nationality between the nationality of the investor and the nationality of the host state. No further diversity of nationality is required.

42. To the extent that MFN and national treatment are anti-discrimination norms, this simply means that there is no discrimination in the treatment between the Investor and the better treated comparator. Discrimination in this case is in the nature of the existence of a difference in treatment between the Claimant and other investors in like circumstances, whether of NAFTA parties or non-NAFTA parties. This is different from discrimination in the sense of national bias or prejudice against an investor of a particular nationality.

43. The NAFTA Chapter Twenty Tribunal in *Cross Border Trucking* made clear that the goal of MFN treatment was to protect equality of competitive opportunities.[29] This same notion has been identified by the WTO as underpinning MFN Treatment and National Treatment. [30] The very notion of equality of competitive opportunities "from all Members" also emphasizes that there is no special diversity of nationality concept that applies here.

1. The Negotiation History of the NAFTA Makes the Meaning Clear

44. A review of the negotiation history of the Article 1102 demonstrates that there is no requirement for nationality-based discrimination in either NAFTA Articles 1102 or 1103.

45. In her treatise on *Investment Disputes under NAFTA*, Meg Kinnear sets out the negotiation history of NAFTA Articles 1102 and 1103. According to Ms. Kinnear, the national treatment and most favoured nation (MFN) treatment obligations in NAFTA Article 1103 originally was one common obligation that covered both concepts. This was proposed by the government of the United States as non-discriminatory treatment.[31] The draft was changed and the wording of the terms "non-discriminatory treatment" were removed from the NAFTA. Instead of one joint obligation, two

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[29] *In the Matter of Cross-Border Trucking Services*, Secretariat File No. USA-MEX-98-2008- 01, Final Report of the Panel (February 6, 2001) ("*Cross-Border Trucking")*, at ¶244 ***(Investor's Schedule of Legal Authorities CL-069)***.

[30] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, (March 12, 2001), at ¶99 ***(Investor's Schedule of Legal Authorities CL-045)***, *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, Complaint by the United States, Report of the Panel, WT/DS174/R (April 20, 2005), at ¶¶7.131-7.134 ***(Investor's Schedule of Legal Authorities CL-363)***.

[31] Meg Kinnear, Andrea Bjorklund, John Hannaford*, Investment Disputes Under NAFTA: An Annotated Guide to NAFTA Chapter 11*, June 2006, "Article 1103 Most-Favored Nation Treatment" (London: Kluwer, 2006), ("Kinnear (2006)"), at 1103-2 ***(Investor's Schedule of Legal Authorities CL-0053)***. This is in reference to the negotiation draft dated December 1991.

separate obligations – one each for MFN Treatment and National Treatment took form.[32]

46. There is absolutely no support within the negotiation history to support a contention that Article 1102 (or Article 1103) requires a finding of intentional discrimination.

2. US Practice confirms that the meaning of Articles 1102 and 1103 are Terms of Art

47. The *Statement of Administrative Action* says that 1102 and 1103 set out the basic non-discrimination rules of national treatment and most favoured nation treatment. The *Statement of Administrative Action*, just like the NAFTA, does not define these rules because both national treatment and MFN treatment are well known terms of art that derive from a long history of Friendship, Commerce and Navigation Treaties and from the more recent context of the GATT/ WTO.

48. Meg Kinnear describes the "MFN concept" as follows:

> Like national treatment, MFN has been a foundational principle in the context of trade in goods. The trade liberalization goals in GATT were effectuated by a ratchet mechanism: if a country gave better treatment to one other GATT-signatory country, it had to give the same treatment to all other GATT countries. The treatment given to all countries would thereby slowly improve as individual concessions were granted. [33]

This is equally applicable to national treatment obligation in NAFTA Article 1102.

49. Article 31(4) of the *Vienna Convention* requires that a term of art be interpreted in a manner consistent with its meaning in that context. That context comes from the GATT context at the time the treaty was negotiated.

50. A review of the GATT case law at the time that the NAFTA was being negotiated in 1992 and 1993 shows that there was no requirement for nationality-based discrimination for MFN Treatment nor for National Treatment.

51. The ILC long recognized that the concept of nationality-based discrimination was different from the concept inherent in MFN treatment.

52. Accordingly, to the extent that the position in Footnote 4 of the Second US Article 1128 Submission requires discriminatory intent, the Government of the United States is not correct that NAFTA Article 1102 is designed to address situations of national bias or prejudice, *i.e.* discriminatory animus based on nationality. The relegation of 1102 and 1103 to situations of national bias or prejudice would make these provisions inutile or entirely redundant, given the well-established coverage of these situations by the

[32] Kinnear (2006), at 1103-2, 1103-6 ***(Investor's Schedule of Legal Authorities CL-0053)***.
[33] Kinnear (2006), at 1103-7 ***(Investor's Schedule of Legal Authorities CL-0053)***.

notion of Fair and Equitable Treatment, as long understood in the customary international law of protection of aliens. [34]

C. The Burden of Proof

53. Having found that the investor had shown the existence of less favorable treatment relative to investors of the host state in like circumstances, the *Bilcon* Tribunal introduced in its interpretation of Article 1102 a kind of "safeguard" against the possibility that a finding of *de facto* discrimination could lead to the impugning of legitimate public policies, in situations in which the link to nationality-based discrimination is tenuous or remote.

54. Responding understandably to many concerns that have been raised about policy space under investment provisions such as those in NAFTA, the *Bilcon* Tribunal noted, as have other tribunals, that there is an absence of a general exception-type provision such as Article XX of the GATT in the NAFTA. Such general exception provisions allow the justification of public policies as legitimate for recognized objectives, and necessary to achieve them, and entail placing the burden of proof on the party seeking to justify its policies. Given this context, and given the approach of tribunals in earlier awards such as *Feldman*, the *Bilcon* Tribunal's approach to burden of proof was appropriate and logical. Only the regulating state normally will be aware of all the public policy considerations that may motivate a given measure, as well as factors that may affect the ability of the regulating state to choose alternative policies. Thus, shifting the burden of proof to the state responds to the practical reality of the needs of the tribunal in efficiently seeking all the relevant evidence to apply the "safeguard" in question.

55. The United States has not addressed the relevant question in paragraph 4 of its Second Article 1128 Submission. NAFTA Article 1102, like each of the other obligations in Section A of NAFTA Chapter Eleven, does not say anything about the burden of proof. For the same reason, Mexico also is incorrect in paragraph 5 of its Second Article 1128 submission with respect to the onus and burden of proof.

56. The United States and Mexico omitted to address the issue of burden shifting which was a central issue considered by the NAFTA Chapter Twenty Interpretative Tribunal in *US - Cross-Border Trucking.* This Tribunal, after hearing from all the NAFTA Parties, determined that the treaty Parties intended that there be a shifting burden of proof with respect to national treatment and most favoured nation treatment in NAFTA Article 1102 and 1103.[35] Indeed, this NAFTA Tribunal identified admissions from the

[34] "Notes of Interpretation of Certain Chapter 11 Provisions" (NAFTA Free Trade Commission, July 31, 2001), in Appleton, B., *NAFTA: Legal Text and Interpretative Materials* (West Publishing, 2007) Vol 3, 1-3 ("Appleton IV (2007)"), at p.2 ***(Investor's Schedule of Legal Authorities CL-189)*** (FTC Note).

[35] *Cross-Border Trucking* ***(Investor's Schedule of Legal Authorities at CL-069)***.

Government of Mexico that this shifting of the burden was always the clear intention of the NAFTA Parties when the NAFTA was negotiated.[36] As a result, the burden is upon the moving party (in this claim the Investor) to establish that *prima facie* likeness or better treatment exists, and then, once that *prima facie* case is established, the burden shifts to the defending Party (the Respondent) to justify why these like circumstances or the better treatment are not applicable. Thus, the shifting of the burden of proof always was intended by the NAFTA Parties. This was a part of the meaning of the term "like circumstances," used in Article 1402 of NAFTA's predecessor, the *Canada-US Free Trade Agreement* ("FTA").[37]

57. The NAFTA's predecessor agreement, the Canada-US FTA, contained a national treatment obligation for investments in Article 1602 which had an express exception for certain public policy objectives that was modeled on the exception to national treatment for trade in goods in GATT Article XX.

58. FTA Article 1602 reads:

> 1. Except as otherwise provided in this Chapter, each Party shall accord to investors of the other Party treatment no less favorable than that accorded in like circumstances to its investors with respect to measures affecting:
>
> a. the establishment of new business enterprises located in its territory;
>
> b. the acquisition of business enterprises located in its territory;
>
> c. the conduct and operation of business enterprises located in its territory; and
>
> d. the sale of business enterprises located in its territory.
>
> ...
>
> 8. Notwithstanding paragraph 1, the treatment a Party accords to investors of the other Party may be different from the treatment a Party accords its investors provided that:
>
> a. the difference in treatment is no greater than necessary for prudential, fiduciary, health and safety, or consumer protection reasons;
>
> b. such different treatment is equivalent in effect to the treatment accorded by the Party to its investors for such reasons; and
>
> c. prior notification of the proposed treatment has been given in accordance with Article 1803.
>
> 9. **The Party proposing or according the different treatment under paragraph 8 shall have the burden of establishing that such treatment is consistent with that paragraph.**[38]

[36] *Cross-Border Trucking at ¶*249-250 ***(Investor's Schedule of Legal Authorities at CL-069)***.
[37] *Cross-Border Trucking at ¶*249-250 ***(Investor's Schedule of Legal Authorities at CL-069)***.
[38] *Canada-United States Free Trade Agreement*, December 22, 1987, Can. T.S. 1989 No. 3, 27 I.L.M. 281 ("*FTA*"), at Chapter 16 (Part A, Schedule to the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c.65; entered into force January 1, 1989) ***(Investor's Schedule of Legal Authorities at CL-432)***. *[emphasis added]*

59. Paragraph 9 of Article 1602 of the Canada-US FTA confirms that there is a shift of the burden from the Claimant to the Respondent who has to establish the consistency of its treatment.[39]

60. Mexico and the U.S. confirmed in the *Cross-Border Trucking* case that a burden shift based on the Canada-US FTA was intended to be included to address Respondent state justification of the provision of less favorable treatment to investors that would otherwise be inconsistent with MFN and National Treatment obligations. In *Cross-Border Trucking*, Mexico expressly acknowledged that the strict approach to justification of less favorable treatment set out in the FTA was continued in NAFTA.[40] In arguing the meaning of "like circumstances" in the *Cross-border Trucking* case, Mexico's admission also was supported by an admission from the US that the "elaborating language in the FTA" should be used to support the meaning of "like circumstances".[41] Based on these submissions, the NAFTA Chapter Twenty Panel concluded that "the phrase 'like circumstances' may properly include differential treatment under the conditions specified in the FTA."[42]

61. The *Cross-Border Trucking* Tribunal, relying on Mexico's admission that FTA Article 1402 was the basis for NAFTA Articles 1102 and 1103, came to the following conclusions:

> The Panel, in interpreting the phrase "in like circumstances" in Articles 1202 and 1203, has sought guidance in other agreements that use similar language. The Parties do not dispute that the use of the phrase "in like circumstances" was intended to have a meaning that was similar to the phrase "like services and service providers," as proposed by Canada and Mexico during NAFTA negotiations. Also, the United States contends, and Mexico does not dispute, that the phrase "in like circumstances" is not substantively different from the phrase "in like situations," as used in bilateral investment treaties. **Most significantly, no Party asserts that the use of the phrase "in like circumstances" in NAFTA Chapter Twelve was intended to have a different meaning than it did in the United States-Canada Free Trade Agreement (FTA).** Mexico notes that the "immediate source" of the "in like circumstances" language in Articles 1202 and 1203 of NAFTA was the FTA. The United States has referred to elaborating language in the FTA on the national treatment obligation to support the interpretation of the phrase used in NAFTA to permit differential treatment where appropriate to meet legitimate regulatory objectives. Again, the Parties do not differ on the general principle that differential treatment may be appropriate and consistent with a Party's national treatment obligations. [43]

62. The positions advanced by Mexico and by the United States before the NAFTA Chapter Twenty Tribunal are completely inconsistent with the views that they now advocate in

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[39] *FTA* Chapter 16
[40] *Cross-Border Trucking*, at ¶122 ***(Investor's Schedule of Legal Authorities at CL-069)***.
[41] *Cross-Border Trucking*, at ¶249 ***(Investor's Schedule of Legal Authorities at CL-069).***
[42] *Cross-Border Trucking*, at ¶¶249, 258 ***(Investor's Schedule of Legal Authorities at CL-069).*** The Parties were referring to FTA Article 1402 which has the same wording as FTA Article 1602, except that it relates to services rather than investment.
[43] *Cross-Border Trucking*, at ¶249 ***(Investor's Schedule of Legal Authorities at CL-069)*** *[emphasis added]*.

their Second Article 1128 Submissions. It is why the *Cross-Border Trucking* Tribunal could conclude, relying on Mexico's admission and the US submission to the *Cross-Border Trucking* Tribunal that FTA Article 1402 was the basis for NAFTA Articles 1102 and 1103, that:

> FTA Article 1402 is thus instructive. It provides a more detailed elaboration of the national treatment requirement for services than is found in NAFTA...
>
> The provision in the FTA also imposed the burden of establishing the consistency of the differential treatment with the above requirements on the party proposing or according different treatment.[44]

63. At the same time, the Chapter Twenty Panel recognized that "a broad interpretation of the "in like circumstances" language could render NAFTA Articles 1202 and 1203 meaningless". It concluded that, when used to justify less favorable treatment, the phrase "in like circumstances" should be interpreted narrowly in the same manner as GATT Article XX.[45]The existence of an exception to national treatment for investments in the FTA modeled on Article XX of the GATT is further evidence that NAFTA's drafters intended to adapt GATT concepts for the new areas of trade in services and investment. NAFTA's drafters chose to eliminate the elaborating language in FTA Articles 1602(8) and (9) as they understood that these exceptions were implicit in the language of "like circumstances". Accordingly, it is clear that the NAFTA always was drafted in a manner, consistent with other international economic law instruments, that the Claimant had the burden of establishing the existence of likeness and of better treatment, but once this *prima facie* case has been established, the onus shifts to the respondent to demonstrate why national treatment or most favoured nation treatment is being provided.

64. This is specifically what the *Bilcon* Tribunal did when it established its national test. Specifically, the *Bilcon* Tribunal stated:

> .... once a *prima facie* case is made out under the three-part *UPS* test, the onus is on the host state to show that a measure is still sustainable within the terms of Article 1102. It is the host state that is in a position to identify and substantiate the case, in terms of its own laws, policies and circumstances, that an apparently discriminatory measure is in fact compliant with the "national treatment" norm set out in Article 1102.
>
> In the present case, the Tribunal is unable to discern any justification for the differential and adverse treatment accorded to Bilcon that would satisfy the *Pope & Talbot* test with respect to the standard of evaluation under the laws of federal Canada. The "community core values" approach adopted by the JRP was not a "rational government policy"; it was at odds with the law and policy of the *CEAA*. The approach of the JRP was not consistent with the investment

[44] *Cross-Border Trucking*, at ¶250 ***(Investor's Schedule of Legal Authorities at CL-069).***
[45] *Cross-Border Trucking*, at ¶¶259-260 ***(Investor's Schedule of Legal Authorities at CL-069).*** Articles 1202 and 1203 of NAFTA are the national treatment and most-favored-nation treatment obligations for trade in services.

liberalizing objectives of NAFTA; indeed the Tribunal has found it to be incompatible with Article 1105.[46]

65. The *Bilcon* Tribunal found that the claimant established on the basis of evidence presented to the Tribunal that Canada provided less favorable treatment to the Investment and the Investor than it provided to other Canadian companies that were operating in like circumstances.[47] In no way did the *Bilcon* Tribunal lessen the burden of proof upon the Claimant. All that the Tribunal noted was that Canada did not present any evidence to rebut the clear and unambiguous evidence that Bilcon received less favorable treatment than other Canadians. Indeed, this finding in *Bilcon* is very similar to the finding of the NAFTA Tribunal in *Feldman*.[48]

66. With respect to the *Mesa* arbitration, the applicability of the *Bilcon* approach is clear. Under NAFTA Article 1104, Mesa was entitled to receive the best treatment provided in Ontario under either Articles 1102 or 1103. This better treatment was provided to others and included the following:

a) Better treatment was provided to non-Canadian investors in like circumstances including Samsung, KEPCO and their joint venture partner, Pattern Energy with respect to transmission access to Ontario's electricity grid and to the awarding of FIT Contracts;[49]

b) Better treatment was provided to Canadian investors in like circumstances such as International Power Canada;[50] and

c) Better treatment was provided to investors in like circumstances such as NextEra and Boulevard Associates.[51]

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[46] *Bilcon,* Award, at ¶723-724 ***(Investor's Schedule of Legal Authorities CL-422)***.

[47] *Bilcon*, Award, at ¶716 ***(Investor's Schedule of Legal Authorities CL-422)*** in refereeing to the three comparator's identified by majority, the majority of the Bilcon Tribunal stated: "The Tribunal has concluded… that the JRP's approach amounted to unequal and unfavorable treatment of Bilcon."

[48] *Feldman*, Award, at ¶178 ***(Investor's Schedule of Legal Authorities CL-040)*** "If the Respondent had had available to it evidence showing that the Poblano Group companies had not been treated in a more favorable fashion than CEMSA with regard to receiving IEPS rebates, it has never been explained why it was not introduced".

[49] Expert Report of Seabron Adamson, at ¶¶90-108; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.55, lns.6-11 and p.47, lns 11-15; Testimony of Seabron Adamson, Hearing Day 4, at pp.135-136, lns.24-7; Declaration of Zohrab Mawani, August 15, 2013, at ¶10 ***(Investor's Schedule of Exhibits C-0406)*** ("Samsung Korea's guaranteed access to transmission capacity under the *GEIA* allowed Samsung Korea to be in a better competitive position than those companies without guaranteed transmission access, like Mesa Power Group.").

[50] Sue Lo testified that the Ministry of Energy protected International Power's "high profile" project from the priority access given to the Korean Consortium. Closing Statements, Hearing Transcript, Day 6, at p.54, lns.19-23 and p.284, lns.11-16.

[51] The FIT Rule change of June 3, 2011 enabled NextEra to change connection points from the West of London to Bruce Region prior to the ECT. This process was not contemplated in the FIT Rules. As a result of this rule change, NextEra's projects were awarded contracts in the Bruce region. Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, §5.5(d), §5.6 (b), §5.3(d), compare §5.2 ***(Investor's Schedule of Exhibits C-0258)***; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.225-226, lns.5-8; [redacted] Email from Jim MacDougall (OPA) to Nicole

67. Canada did not even file any defence of any kind to the assertions that better treatment were provided to Canadian companies competing for FIT Contracts (such as International Power Canada). There can be no question in the circumstances that Mesa discharged its burden of proof to establish the existence of less favorable treatment being extended to its four Ontario wind projects by Ontario.

68. Furthermore, in the *Mesa* arbitration, Canada failed to provide any evidence to justify any justification for Canada's failure to provide this less favorable treatment on the basis of some good faith legitimate public objective.

69. The burden thus is upon the moving party (in this claim, Mesa) to establish that *prima facie* less favorable treatment in like circumstances exists, and then, once that *prima facie* evidence is established, the burden shifts to the defending Party (Canada) to justify why this less favorable treatment in like circumstances should not be applicable. But in fact, in this case, there can be no question that Mesa established convincingly that less favorable treatment was provided to Mesa's investments in Ontario.

70. Further Canada never took the opportunity to attempt to justify its clear NAFTA violation by attepting to establish evidence using the shifting of the burden of proof. This approach to justification was always intended by the NAFTA Parties to be a part of the meaning of national treatment and MFN treatment as including the shifting of burden that had been understood to be a part of the meaning of the term "like circumstances", in Article 1602 of the Canada - US Free Trade Agreement. [52]

71. In conclusion, it is clear that the NAFTA always was designed to require a Respondent state to have to explain why its measures are consistent with NAFTA Articles 1102 and 1103 once a Claimant establishes a *prima facie* case that a violation has occurred. This gives an opportunity for a Respondent to potentially justify its failure to provide treatment to a Claimant that is as favorable as the best treatment provided in the jurisidtion to investments or investors in like ciicumstances. Such an approach has been followed by other Tribunals, and this is the same logical and practical approach that this Tribunal should apply in the present case.

Geneau (NextEra Energy), May 31, 2011 (Section 1782 Evidence) ***(Investor's Schedule of Exhibits C-0068) [CONFIDENTIAL]*** [redacted]); Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 ***(Investor's Schedule of Exhibits C-0090)*** (demonstrating that the Ministry of Energy informed NextEra that the government was internally discussing whether to have a connection point change window, and whether this would be done province-wide or just for the Bruce and West of London regions, facts that were not disclosed to other FIT proponents).

[52] *Cross-Border Trucking*, at ¶249 ***(Investor's Schedule of Legal Authorities CL-069)***.

III. THE INTERNATIONAL LAW STANDARD

72. A breach of the international law standard of treatment does not require anything more than a finding of inconsistency with that standard on the part of a NAFTA Party. In light of the facts in this claim, there are clear violations of the obligations contained in NAFTA Article 1105 even under the narrow NAFTA analysis presented by the governments in their Article 1128 Submissions.

73. There simply cannot be any doubt that it is within a Tribunal's authority to make an enquiry as to whether a government measure is in accordance with its laws or previously announced rules. NAFTA Article 1105 explicitly includes fair and equitable treatment as part of the international law standard of treatment. Fair and equitable treatment must inherently mean that a tribunal can have regard to the fundamental concepts of legality, due process and adherence to the rule of law. A Tribunal determination based on evidence that a previously-announced regulatory or administrative regime was not followed is entirely within the proper exercise of an international tribunal's jurisdiction when considering fair and equitable treatment.

74. The *Oxford English Dictionary* defines the word "fair" as "just, unbiased, equitable, impartial; legitimate, in accordance with the rules or standards".[53]

75. Reasonable expectations of investors must include the fundamental concept that governments will follow the rules. This is a cornerstone of a predictable commercial framework for business planning and investment, which is explicitly protected within NAFTA's Preamble. Of course, a reasonable investor would expect that in extraordinary situations, such as novel threats to health or the environment, economic crises, or national security emergencies, governments might be temporarily required to depart from the normal existing legal framework. Fair and equitable treatment requires that such departures be justified under the rule of law and not result in a disproportionate burden on the investor that is unjustified by the objective situation being responded to. Such circumstances are covered by extensive exceptions and reservations in the NAFTA, and Article 25 of the *ILC Articles of State Responsibility* and are not applicable to the *Mesa* claim--a situation where in the words of the *Cargill* Tribunal, the host state "grossly subverts a domestic law or policy for an ulterior motive".[54]

76. Nevertheless, there are some arguments of the Investors that may be affected by some of the interpretive choices proposed by the US Article 1128 Submission and thus require a careful response thereto.

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[53] *The Oxford English Dictionary*, Second ed., Volume V (New York: Oxford University Press, 1989), "fair" [Excerpt, at p.673] ***(Investor's Schedule of Legal Authorities CL-426)***; Dumberry (2013), at p.57 ***(Investor's Schedule of Legal Authorities CL-427)***. This treatise is relied upon by the United States in its Second Article 1128 Submission.

[54] *Cargill, Incorporated v United Mexican States,* Ad Hoc UNCITRAL (NAFTA) Award, ICSID Case No. ARB(AF)/05/2, September 18, 2009, at ¶296 ***(Respondent's Schedule of Legal Authorities at RL-045)***

77. The Government of the United States makes reference to the Notes of Interpretation issued by the NAFTA Free Trade Commission on July 31, 2001. The US suggests at paragraph 6 of its Second Article 1128 Submission that this Tribunal must give binding interpretative weight to the Notes of Interpretation because of the operation of NAFTA Article 1131.[55]

78. With respect to the interpretation of the NAFTA Treaty, the Investors set out its position in paragraphs 626 to 639 of the Reply Memorial. In summary,

a) *The Vienna Convention on the Law of Treaties (Vienna Convention*) is an expression of customary international law. The NAFTA Parties not only did not contract out of custom but through Article 1131 the NAFTA Parties specifically reaffirmed the applicability of the international law rules of treaty interpretation which are codified in the *Vienna Convention*. Article 1131, the provision on which the Free Trade Commission Notes of Interpretation (Notes of Interpretation) are based, do not demonstrate any intention on the part of the NAFTA Parties to contract out of the customary international law rules of treaty interpretation contained in Articles 31 and 32 of the *Vienna Convention*. Indeed, Article 1131 confirms the applicability of the international law rules set out in Articles 31 and 32. Thus, it is clear that *Vienna Convention* Articles 31 and 32 are the framework in which the Notes of Interpretation are to be applied.

b) The NAFTA contains specific rules addressing modification of the treaty. As a result, the NAFTA provision on which the Notes of Interpretation are based simply do not permit modifications. Thus, the Notes of Interpretation cannot modify obligations under the Treaty unless those modifications contained in the Notes of Interpretation are first compliant with the specified treaty process in Article 2202 required for modifications of the treaty. As a result, the Notes of Interpretation cannot amend the NAFTA but may only govern the interpretation of the treaty in a manner permitted by Articles 31 and 32 of the *Vienna Convention*.

c) Further, the Notes are best understood as constituting evidence regarding a subsequent practice of the state parties. Either way, the interpretive value of the Notes must be subordinate to the ordinary meaning of the treaty words, and cannot lead to a reading of the treaty that contradicts with the treaty's ordinary meaning taking into account all of the considerations mentioned in Article 31 of the *Vienna Convention*. Such subsequent practice of the Parties must be proven

[55] NAFTA Article 1131(1) confirms that NAFTA Tribunals constituted under Section B of Chapter 11 of NAFTA "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." ***(Investor's Schedule of Legal Authorities RL-030).***

by a Party seeking to rely upon it and requires far more evidence than that which has been provided by any NAFTA Party in this arbitration.

d) The Notes of Interpretation require that the Tribunal direct itself in particular to custom in ascertaining the standard of treatment required by the ordinary meaning of "treatment in accordance with international law including Fair and Equitable Treatment and Full Protection and Security". Custom is a minimum standard of treatment that provides a floor for the interpretation of international law and what is fair and equitable.

e) Taking into account the Notes of Interpretation, the Tribunal must articulate a standard of treatment that makes sense on an overall basis, taking together all of the relevant provisions of Article 31, guided above all by the ordinary meaning of the words and the objectives of the treaty which are set out in NAFTA Article 102.

79. The Investor understands that the Notes of Interpretation were the product of governments responding to public apprehension, given the varying approaches of early NAFTA tribunals, where a completely open-ended conception of fair and equitable tribunal could lead to risks that a state could incur liability even for uniform and conscientious enforcement of laws of general application. It is understandable that governments would be concerned about an impression of unfettered arbitrator discretion and to make explicit their understanding that what is fair and equitable is not a subjective matter but is connected to specific international law reference points common beyond the NAFTA itself.

A. The Proper Meaning to Be Given to NAFTA Article 1105

80. Despite the contentions made by the Government of the United States, the breaches in this arbitration all fit within the longstanding content of NAFTA Article 1105. For example, it has been long been established that the Fair and Equitable treatment standard protects against unfair and arbitrary changes of government policies which have the effect of harming the interests of foreign investors.

81. Decisions taken in the 1930s by international tribunals, including under the customary law of the diplomatic protection of aliens, demonstrate that changes to regulations ostensibly taken to achieve legitimate public welfare objectives resulted in international liability where the changes were not taken in a fair or equitable manner, and in particular where elements of arbitrariness, lack of due process and/or discrimination were present.

82. The US-Panama Claims Commission in 1933 had to consider the impact of a sudden change in process for foreign investors in the *de Sabla* case.[56] In this case, as a result of agrarian reforms in Panama, there was a sudden change in the requirements necessary to register real estate. Under the new reforms, the government provided only a two-week window for land owners to register real property holdings, otherwise, others could claim the property. Mrs. de Sabla, a foreigner, was not able to reach the registry office. The Tribunal concluded that Panama's lack of a fair process violated due process and thus the loss of Mrs de Sabla's property was ruled to be an expropriation. [57]

83. A more recent consideration of the same point was undertaken by the US-Iran Claims Tribunal in *International Technical Products Corp v Iran.*[58] In that case, the US Iran Claims Tribunal was prepared to consider the effect of insufficient notification time by the state as a breach of international law but could not due to jurisdictional issues. The lack of due process simply was an arbitrary act that never could be consistent with the "fair and equitable treatment" standard in international law.

84. Similarly, the US – Turkey Claims Commission in the 1936 *Pandaleon* case[59] came to the conclusion that arbitrary acts could result in the requirement of the state to pay damages to the foreign investor. [60]

85. The position of the US Government simply misstates the expression of customary international law set out in international tribunal decisions since the the first decades of the twentieth century. The abuse of discretion necessarily is included within the concept of abuse of rights. Abuse of discretion arises in administrative practice when arbitrary action results in harm. There is no requirement for there to be any intent to harm, only the existence of arbitrary behavior.[61]

1. Reasonable Expectations

86. The United States has taken issue in its Second Article 1128 Submission with the *Bilcon* Tribunal's findings that the reasonable expectations of an investor are protected under customary international law under Fair & Equitable Treatment.[62]

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[56] *Marguerite de Joly de Sabla (United States) v Panama (1934),* 28 AJIL 602; (1933) 6 RIAA 358 ("*de Sabla*") ***(Investor's Schedule of Legal Authorities CL-097*)**.

[57] *de Sabla*, at pp.358-359 ***(Investor's Schedule of Legal Authorities CL-097).***

[58] *International Technical Products Corp v Iran*, 9 Iran-US C.T.R. 207, at ¶¶240-241 ***(Investor's Schedule of Legal Authorities CL-362)***.

[59] *Costa Andra Pandaleon and George Andrew Pandaleon doing business as Pandaleon Brothers v Turkey, Nielson ("Pandaleon "),* at p.333 ***(Investor's Schedule of Legal Authorities CL-369)***.

[60] *Pandaleon,* at pp.333, 336 ***(Investor's Schedule of Legal Authorities CL-369)***.

[61] M. Panizzon, *Good Faith in the Jurisprudence of the WTO: The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement (*Portland: Hart Publishing, 2006) ("Panizzon (2006)"), at p.31 ***(Investor's Schedule of Legal Authorities CL-106)***.

[62] US Second Article 1128 Submission, at ¶¶17-18.

87. It was fully within the *Bilcon* Tribunal's authority to make determinations that Canada's actions constituted egregious and gross unfairness arising from the breach of specific promises made to the Claimant that were not followed. In this regard, the *Bilcon* Tribunal applied customary international law expressly contained in NAFTA Article 1105 and applied it to the facts as they determined it. That was a proper exercise of the authority of a NAFTA Tribunal.

88. In any event, the *Bilcon* Tribunal says that it applied international law in coming to this determination and this is part of the governing law of the Tribunal as set out in NAFTA Article 1131[63]

89. Mesa's expectations were frustrated by exercise of administrative fiat in a manner inconsistent with the established previous practice that failed to provide the minimum protections that an investor would have legitimately expected to receive.

90. International law recognizes that an investor may expect certain "conditions of competition" that ensure fairness and transparency when making an investment.[64] In Mesa's case, it was expected that the conditions of competition in Canada would permit investors to be treated fairly and equally and have their projects assessed impartially within the application administrative and regulatory framework; this did not happen and therefore the conditions of competition in Canada did not correspond to Mesa's legitimate expectations.

91. Prof. Panizzon argues that treaty goals can prove the basis for a "claim of frustration of expectations."[65] Trade between State Parties to the NAFTA would be severely frustrated and hindered if investors could not legitimately expect that their investments would benefit from fair and transparent treatment at the hands of regulators. Any standard but that would lead to unpredictability and risk that would work against securing the NAFTA's stated objectives of increasing trade and economic opportunity.

92. A view of legitimate expectations that encompasses these basic procedural safeguards is also in line with international practice.

93. Domestic legal guarantees of stable and predictable legal order based on the rule of law are relevant consdierations in assessing legitimate expections that an Investor should expect. As Professor Kaufmann-Kohler has observed, "the rule of law essentially requires predictability through rules that are general, prospective, and clear." [66]

[63] *Bilcon,* Award, at ¶¶738-739 ***(Investor's Schedule of Legal Authorities CL-422)***.
[64] Panizzon (2006), at p.134 ***(Investor's Schedule of Legal Authorities CL-106)***.
[65] Panizzon (2006), at p.158 ***(Investor's Schedule of Legal Authorities CL-106)***.
[66] Kaufmann-Kohler (2011), at p.186 ***(Investor's Schedule of Legal Authorities CL-421)***.

94. The *Paushok* Tribunal noted that other tribunals, including that in *Rumeli v Kazakhstan*[67] have found that "respect of the investor's reasonable and legitimate expectations" are part of the definition of the fair and equitable treatment standard.[68] Therefore one cannot disassociate legitimate expectations with the other factors that make up the Fair and Equitable Treatment standard, which include, "transparency, good faith, conduct that cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, lacking in due process or procedural propriety. [69]

2. Fairness

95. The *Bilcon* Tribunal determined that the fair and equitable treatment standard in NAFTA Article 1105 addressed both procedural and substantive fairness. [70] The Tribunal concluded that based on its evaluation of the evidence that "Bilcon was denied a fair opportunity to know the case it had to meet" and that this failure to understand the process to which it was subjected was unfair.[71]

96. The United States challenges whether fairness forms part of fair and equitable treatment. This would appear to be an absurd argument. The US Second Article 1128 Submission itself states that the *Bilcon* Tribunal failed to analyze whether an unfair situation constituted a breach of fair and equitable treatment. On a *prima facie* basis, the answer to such question seems self evident; the fair and equitable treatment obligation includes basic elements of fairness.

97. The *Bilcon* Tribunal made clear that knowing the criteria that one has to meet, or more aptly stated in terms of the *Bilcon* decision, not basing decisions on criteria *not* stated in the law, forms part of the customary international standard of fairness.

98. The United States also is incorrect when it states in its Second Article 1128 Submission that the majority of the *Bilcon* Tribunal did not consider whether "reasonable notice" forms a part of a general fairness standard under international customary law. The *Bilcon* Award clearly addressed this issue at paragraph 444 of its award. Here, in discussing the NAFTA Article 1105 standard, the *Bilcon* Tribunal explicitly states that the Article 1105 standard as stated in customary international law recognizes "injustice in either procedures or outcomes can constitute a breach."[72]

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[67] *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan,* Award, 2008 WL 4819868 (July 29, 2008) ("*Rumeli,* Award") ***(Investor's Schedule of Legal Authorities CL-064)***.

[68] *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia,* UNCITRAL, Award on Jurisdiction and Liability (April 28, 2011) *("Paushok*, Award on Jurisdiction and Liability"), at ¶253 ***(Respondent's Schedule of Legal Authorities RL-065)***.

[69] *Paushok,* Award on Jurisdiction and Liability ***(Respondent's Schedule of Legal Authorities RL-065)***.

[70] *Bilcon,* Award, at ¶590 ***(Investor's Schedule of Legal Authorities CL-422)***.

[71] *Bilcon,* Award, at ¶590 ***(Investor's Schedule of Legal Authorities CL-422)***.

[72] *Bilcon*, Award, at ¶444 ***(Investor's Schedule of Legal Authorities CL-422)***.

99. Indeed, as already discussed above, the 1933 US- Panamanian Mixed Claims Commission decision in *de Sabla* came to the same conclusion as the *Bilcon* Tribunal that lack of reasonable notice was inconsistent with fair and equitable treatment.[73] This is not, as the United States would suggest, a question about dential of justice. It is clearly a question of fairness and protection against arbitrariness. A similar position was taken by the US – Iran claims Tribunal in *International Technical Products*.[74]

100. It is under this element of the NAFTA Article 1105 fair and equitable treatment standard that majority of the Tribunal found that Canada had breached the fair and equitable treatment terms of NAFTA Article 1105. The lack of reasonable notice provided to Bilcon simply was the underlying factual circumstances that led the majority of the Tribunal to conclude that there was a breach of international law.

101. The *Bilcon* Tribunal expressly applied the governing law set of in NAFTA Article 1131 (the treaty and applicable rules of international law) in formulating its award. Accordingly, there can be no support for the Mexico's attack on the legitimacy of the *Bilcon* Tribunal's determination that the international law minimum standard was breached through the patent and manifest unfairness in Canada's failure to follow its own domestic law procedures that the Claimant expected Canada to follow.[75] In making this determination, the NAFTA Tribunal determined facts and applied them to a the NAFTA and to applicable rules of international law. In these circumstances, this is the application of the proper law of the arbitration. Thus, Mexico is entirely mistaken in this criticism of the *Bilcon* Tribunal majority award.

3. Authority to Consider Legality under Municipal Law

102. At paragraphs 20 and 21, the US Second Article 1128 Submission asserts that an international tribunal does not have the authority to consider the legality of a Party's measures under its own law. Obviously, any judgment about legality under municipal law must be related closely to the tribunal's task of applying the applicable law, in this case under NAFTA Article 1105.

103. The United States clearly is correct that not every breach of muncipal law is *per se* an internationally wrongful act under NAFTA. But, it hardly follows from this truism that departures from municipal law could not in particular cases constitute a breach of NAFTA Article 1105 when they are of a fundamental nature, as the *Bilcon* tribunal found was true in that case, and when they entail basic violations of due process and undermine the rule of law itself. Making it impermissible for an international tribunal to make determinations that a State has departed from its own legal standards

[73] *de Sabla*, at pp.363, 366 ***(Investor's Schedule of Legal Authorities CL-097*)**.
[74] *International Technical Products Corp v Iran*, at pp.240-241 ***(Investor's Schedule of Legal Authorities CL-362)***.
[75] Mexico's Second Article 1128 Submission, at ¶11.

significantly would eviscerate the role of international tribunals not only in addressing denial of justice, but as guardians of the values of rule of law and due process.

104. In *Certain German Interests in Polish Upper Silesia,* the Permanent Court of International Justice observed:

> The Court is certainly not called upon to interpret the Polish law as such: but there is nothing to prevent the Court's giving judgment on the question wehthe or not in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention.[76]

105. In the *India-Patents* case, the Appellate Body of the WTO, citing the *Upper Silesa* decision, agreed with the position of the United States in that dispute that it is appropriate for an international tribunal to examine municipal law for purposes of determining consistency with international obligations, and that a tribunal should not engage in "unquestioning acceptance" of a State's own determinations of the meaning and requirements of its municipal law.[77]

106. The principal fashion in which deference has been shown in international law to the self-correcting mechanisms of municipal systems is through a requirement of exhaustion of local remedies or at least that the claimant pursue justice in the domestic legal system for a defined period of time before having recourse to international remedies. The NAFTA Parties decided not to include any such requirement in NAFTA Chapter Eleven. Other treaties that protect the procedural and substantive rights of non-state parties have included such a requirement. However, this was not the choice that the NAFTA Parties agreed upon. There is no requirement to go to a domestic court under the NAFTA.

107. Professor McRae's dissenting opinion in *Bilcon*, in essence. suggests that the proper recourse for Bilcon would have been judicial review within the Canadian legal system, and that the *Bilcon* tribunal overstepped its authority, appropriating an authority belonging to domestic legal institutions. To the contrary, the *Bilcon* tribunal would have overstepped its authority had it followed Professor McRae's position and read into the NAFTA a requirement of prior recourse to domestic remedies that is not part of the text of the agreement and that the NAFTA parties decided they did not want. Canada itself did not attempt to assert in its pleadings in *Bilcon* that the claimant *was required* to have recourse first to domestic remedies under the terms of the NAFTA.

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[76] *Case Concerning Certain German Interests in Upper Silesia*, PCIJ, Series A, No. 7, at p.19 ***(Investor's Schedule of Legal Authorities CL-425)***.

[77] *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, (Appellate Body Report), WT/DS50/AB/R (December 19, 1997) ("*India – Patents"),* at ¶17 ***(Investor's Schedule of Legal Authorities CL-406)***.

4. There is no burden of proof on the law

108. International law is the governing law of this Tribunal under NAFTA Article 1131 and there is no need for any party to prove the governing law of the arbitration. The Tribunal is deemed to know the law. Neither side is required to prove the governing law. As the International Court of Justice held in the *Fisheries Jurisdiction* case:

> [T]he burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.[78]

109. The United States is mistaken when it suggests that there is a burden on a Investor to prove the law.[79]

110. The requirement on the Investor is to prove its claim. There is also a burden on the Respondent to prove its defense (including exceptions to the Treaty).

111. The test for a breach of international law is clearly set out in the ILC Articles. Article 2 states that :

> **Article 2 -- Elements of an internationally wrongful act of a State**
>
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
>
> (a) is attributable to the State under international law; and
>
> (b) Constitutes a breach of an international obligation of the State.

112. Accordingly, the US Government is mistaken when it states that there is a special more-onerous requirement to establish that government action constitutes a breach of NAFTA Article 1105.[80] In the case of NAFTA Chapter Eleven, international responsibility is engaged, and the jurisdiction of the tribunal under the treaty established, with the submission of the claim to arbitration under NAFTA Article 1120. [81]

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[78] *Fisheries Jurisdiction Case (United Kingdom v Iceland)*, Merits, Judgment of July 25, 1974, I.C.J. Reports 1974, at p.9, ¶17 ***(Investor's Schedule or Legal Authorities CL-367)***; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America),* Merits, Judgment. I.C.J. Reports 1986, at pp.24-25, ¶29 ***(Respondent's Schedule of Legal Authorities RL-064)***.

[79] US Second Article 1128 Submission, at ¶8.

[80] US Second Article 1128 Submission, at ¶12. Mexico makes a similar point at ¶10 of its Second Submission.

[81] There may be situations where there is a preliminary burden of proof on a complaint to establish the jurisdiction of the tribunal or to show that international responsibility is engaged. For instance, under the *Statute of the International Court of Justice*, the contentious jurisdiction of the ICJ may only be engaged where there is an international legal dispute. To establish jurisdiction, the claimant state might have to show the existence of an international legal rule is pertinent to the dispute. In a very different context, the *Alien Tort Claims Act* gives jurisdiction to the US federal courts for torts in violation of the law of nations. In such a circumstance, in meeting its preliminary burden to establish the jurisdiction of the federal court, the plaintiff would normally have to point to the existence of a rule of the Law of Nations that the allegedly tortuous conduct violates. In sum there could be situations where the normal burden of proof would entail a Claimant establishing, as a preliminary matter, the existence of a rule of customary international law.

113. The question of customary international law under NAFTA Article 1105 cannot be, as the United States would have it, establishing the *existence* of custom. The issue is not *whether* states are bound by a customary rule of international law such that international responsibility is engaged. Custom is instead relevant to the *interpretation* of the applicable law, which is the NAFTA. The NAFTA Parties are bound by the *treaty* to provide the *existing* international law standard of treatment to investors of other NAFTA Parties. There is no need to establish *opinio juris* for this reason. Customary international law comes in as an interpretive guide to the content the obligation enunciated in NAFTA Article 1105.

114. The FTC Notes acknowledges the existence of a customary international law standard of treatment that constitutes the content of the Fair and Equitable Treatment standard in NAFTA Article 1105. This further illustrates that the issue is not the existence of custom, but its exact parameters, and what forms of conduct fall below what is required by custom.

115. Traditional sources of custom including such material as diplomatic practice, pronouncements of the foreign ministry legal advisor, positions of states in multilateral negotiations may in some circumstances be the most pertinent means of ascertaining exactly what is the content of a rule of customary international law. They may be of considerable importance in determing *whether* states are bound by custom (*opinio juris*). However, in the case of a broad standard, such as the international law standard of treatment, it is almost inevitable that most considerations of the exact parameters of the standard would occur through the practice of arbitral tribunals and judicial instances, where states repeatedly and increasingly have given their *consent* to a tribunal to determine the meaning of the admittedly binding customary standard in particular situations, and have agreed to *adopt the results* of the adjudication, accepting the arbitral award or judicial ruling normally as the *binding settlement of the dispute*.

116. The determination of the international law standard of treatment by international courts and tribunals is an area therefore, perhaps more than some others some others, where decisions of international tribunals, commissions, arbitrators and courts, on which states have conferred jurisdiction, will be of the utmost pertinence. It thus is not surprising that just like the Bilcon tribunal, almost universally, in the context of investor protection and diplomatic protection, adjudicators have turned to this material to ascertain the content and parameters of the customary standard, as well as to the works of publicists that comment and synthesize the individual instances of application of the customary standard. Indeed, the *Neer* decision itself relied on the work of publicists, and an *acquis* of previous arbitrations.

117. It is the long-standing practice of the United States that the content of general or customary international law may be ascertained from decisions of courts and tribunals.

As early as 1820, the United States Supreme Court held, in *United States v Smith*: the law of natons "may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; *or* judicial decisions recognizing or enforcing that law."[82]

118. This practice has been continuous and has been recognized in *the Restatement of Foreign Relations Law of the United States, Third*, 103:

> (2) In determining whether a rule has become international law, substantial weight is accorded to
>
> (a) judgments and opinions of international judicial and arbitral tribunals;
>
> (b) judgements and opinons of national judicial tribunals;[83]

5. The Threshold for the International Standard of Treatment

119. The factual determination of treatment which amounts to a violation of the "fair and equitable treatment" standard necessarily is specific to each case. Admittedly, there is as of yet no general agreement on the precise content and scope of the customary standard of "fair and equitable treatment." This stems from the inherently supple nature of the standard. There simply is no easy formula that can apply to all cases. As the *Waste Management* Tribunal noted, "the standard is to some extent a flexible one which must be adapted to the circumstances of each case."[84] Again, this reinforces why the deicisons of tribunals applying the standard in individual situations are of such considerable importance in determining the contemporary content of the standard.

120. While this may lead to a certain level of uncertainty as to exactly what constitutes a violation of "fair and equitable treatment", there is at least this much that *is* certain: the more grievous and numerous the violations of these various indicia, the more likely there is to be a violation of the duty to provide "fair and equitable treatment". What also is certain is that the trend has for some time now been evolving towards a higher customary law standard of investment protection from Prof. Schreuer terms "state interference".[85] As a result, there is without questions a higher customary law standard of treatment, incorporating modern notions of administrative fairness and due process of law.

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[82] *United States v Smith*, 18 U.S. (5 Wheat.) (1820), at p.6 ***(Investor's Schedule of Legal Authorities CL-423)*** *[emphasis added]*.

[83] *Restatement of Foreign Relations Law of the United States, Third*, at p.103 ***(Investor's Schedule of Legal Authorities CL-424)***.

[84] *Waste Management Inc. v United Mexican States (II),* Award, ICSID 2004 WL 3249803 (April 30, 2004) ("*Waste Management II*, Award"), at ¶99 ***(Investor's Schedule of Legal Authorities CL-091)***.

[85] See, for example, C. Schreuer, "Fair and Equitable Treatment in Arbitral Practice" (June 2005) 6:3 The Journal of World Investment & Trade, 357 ("Schreuer (2005)"), at p.370, where he states that there is an "evolving trend towards a higher standard of protection against State interference." ***(Investor's Schedule of Legal Authorities CL-145)***.

121. Bearing all this in mind, all this Tribunal needs to ask itself is this: in light of all the circumstances of this case, with a view to all the relevant sources of international law, and in the understanding that there has in recent years been a rapid convergence between the autonomous treaty standard of "fair and equitable treatment" and the customary international law standard, has Canada violated its obligation to accord the Investors the type of "fair and equitable treatment" guaranteed by NAFTA Article 1105(1)?

122. As straightforward as this question may seem, at this point in the discussion it still remains somewhat abstract. As the *Mondev* Tribunal pointed out:

> A judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case.[86]

123. And as the Tribunal in *Rumeli* put it:

> The precise scope of the [fair and equitable treatment] standard is…left to the determination of the Tribunal which "will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable."[87]

124. Canada stated in its Rejoinder Memorial that "every challenged measure in this case is the result of reasonable, rational, fair and good faith policy decisions". [88] Thus, Canada must establish that, on the balance of probabilities "every challenged measure in this case *is the result* of reasonable, rational, fair and good faith policy decisions."(emphasis added). This is indeed the issue to which the Tribunal is directed to address itself in applying the standard of treatment under NAFTA Article 1105.

B. Applying the Law to the Facts in the Mesa Arbitration

125. *Waste Management II* also was identified by Martins Paparinskis as articulating the essence of the modern standard for analysis under the international minimum standard.[89] It is important to recall the situation to which Mesa has been subjected to determine if is arbitrary, unfair, and idiosyncratic in addition to lacking in transparency and candor.

126. The specifics of the facts in this case demonstrate the types of breaches of NAFTA Article 1105 taken by Canada have been nothing less than serious, shocking, and reprehensible. In addition to the facts that have been pleaded in the Memorial and Reply Memorial,[90] the Investors make reference to the following evidence in Canada's possession which demonstrates that the inappropriately low standard of treat

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[86] *Mondev International Ltd. v United States,* NAFTA 2002 WL 32841359, Award (October 11, 2002) ("*Mondev, Award*"), at ¶118 ***(Investor's Schedule of Legal Authorities CL-034)***.
[87] *Rumeli,* Award, at ¶610 ***(Investor's Schedule of Legal Authorities CL-064)***.
[88] Canada's Rejoinder Memorial, at ¶8.
[89] Paparinskis (2013), at ch.9, §3(2) ***(Investor's Schedule of Legal Authorities CL-103)***.
[90] Investor's Memorial, at ¶¶685-817; Investor's Reply Memorial, at ¶¶640-799.

advanced by the Government of the United States in its Second Article 1128 Submission was still not met by Canada in its conduct toward Mesa:

a) Evidence demonstrating that Canada did not follow the objectives and obligations of its FIT Program and that decisions were made based on irrelevant, arbitrary, and capricious criteria (including politics) while relevant scientific criteria was ignored; and

b) Evidence demonstrating that misapplication and manipulation of the regulatory framework resulted in the Investors not being treated fairly, equitably and impartially, contrary to the Investors' reasonable expectations.

127. The US admits in its Second Article 1128 Submission that both of these obligations form a part of the international law standard of treatment which is contained in NAFTA Article 1105 and which must be applied by a NAFTA Chapter Eleven Tribunal.[91]

128. The evidence in the record, including testimony of witnesses at the hearing, demonstrates that the actions taken by Ontario meet Canada's own definition of actions which violate NAFTA Article 1105. In its Counter-Memorial, Canada argued NAFTA Article 1105 is breached in the event of a "manifestly arbitrary, unjust or otherwise egregious" act.[92] This standard has been met by the actions of Ontario at issue in this arbitration as well.

1. Conducting the Secret GEIA & FIT in Parallel is an Unjust, Egregious and Abusive Violation of Transparency, Fairness and Investor Expectations

129. First, on its face, the act of having a one-off deal alongside Ontario's renewable energy program is a breach in itself of the fair and equitable treatment standard. Ontario created one renewable energy program and then gave a better, special deal to the Korean Consortium, which received preferential treatment in the form of access to the Ontario electricity grid and preferential regulatory treatment. There was no basis to give the Korean Consortium any preference whatsoever and especially not to continue to do so when the consortrium failed to meet its obligations pursuan to its special deal. Extraordinarily, the Korean Consortium received the preferential treatment through a secret commitment before any binding agreement even was signed.

130. The *GEIA* gave the Korean Consortium superior knowledge and an unfair advantage which the Consortium acquired and used to convert its projects into successful FIT contracts. As testified by Mr. MacDougall, OPA employee and point person in charge of

[91] US Second Article 1128 Submission, at ¶12.
[92] Canada's Counter-Memorial, at ¶¶406, 449.

the FIT program, the *GEIA* and the FIT conflicted by the very existence of the *GEIA* to the detriment of FIT investors.[93]

(a) Secrecy of the Deal with the Korean Consortium

131. Despite knowing that it would launch the FIT program and in line with the Ministry of Energy's expectation that it would seek investments in preparation for the launch of the FIT Program,[94] Ontario signed the secret MOU with the Korean Consortium in December 2008.[95]

132. Ontario went to serious lengths to keep the MOU and *GEIA* negotiations secret. The OPA, the entity charged with implementing all renewable energy projects, was not informed of the MOU or negotiations toward a special deal with the Korean Consortium until the summer of 2009.[96] Unaware of the special deal, the OPA began consulting with potential investors in March 2009 with respect to the FIT Program.[97] These consultations showed that the interest in the FIT program exceeded the available capacity in the transmission system.[98]

133. Any notion that the secrecy was to protect the Korean Consortium is untrue In fact, Samsung wanted to publicize its MOU with the Six Nations it obtained for purposes of the secret deal, but the Ministry of Energy prohibited it because it did not have answers for the media.[99]

134. The Ministry of Energy nonetheless directed the OPA to develop the FIT Program on September 24, 2009.[100] At that time, the public had not been informed of the special deal with the Korean Consortium, and Mesa already had invested in Ontario.

135. On September 26, 2009, *The Toronto Star* broke the story about negotiations between the Ministry of Energy and Samsung for manufacturing and the development of

[93] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.262, lns.17-20

[94] Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.141, lns.7-17 (recognizing that the FIT legislation intended to promote investment in anticipation of the FIT program).

[95] Memorandum of Understanding by and among Her Majesty The Queen In Right Of Ontario, Korea Electric Power Corporation and Samsung C&T Corporation, December 12, 2008 ***(Investor's Schedule of Exhibits C-0536)***.

[96] Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.194, lns.6-10; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.261, lns.6-10.

[97] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.261, lns.6-22.

[98] Email from Rick Jennings (MOE) to Guna Deivendran (MOE), Jason Chee-Aloy (OPA), Jennifer Morris (MOE) et al., dated May 7, 2009 ***(Investor's Schedule of Exhibits C-0673) [CONFIDENTIAL]*** (reporting that according to surveys there was over [redacted] of potential renewable energy projects, and only [redacted] of available capacity).

[99] Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.200, lns.18-24; Email from Jennifer Morris (MOE) to Hagen Lee (Samsung), November 13, 2009 (Section 1782 Evidence) ***(Investor's Schedule of Exhibits C-0683) [CONFIDENTIAL].***

[100] Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, September 24, 2009 ***(Investor's Schedule of Exhibits C-0264)***.

renewable of energy projects.[101] This article and Ontario's response to it were vague and misleading and did not disclose the main contours of the deal, such as priority transmission access or the consortium in fact had no true obligations to create manufacturing jobs.[102]

136. Days later on September 30, a ministerial directive was issued containing further misleading language that implied that a framework agreement already had been signed.[103]

137. By the close of the FIT launch period, the OPA and the Ministry of Energy knew that the FIT program was successful, having received more than 10,000 megawatts in applications in the first two months.[104] Any worries that Ontario now claims it had about the contemporaneous investment climate and Ontario's ability to attract investors for the FIT program are inconsistent with the knowledge that it had at that time.

138. Even then, the government had ample opportunity to correct its course of conduct. It is undisputed that the Ontario government had not entered the *GEIA* by the time the FIT Program launched and thus it could have backed out of the negotiations and refused to execute the final GEIA.[105] Ontario still would have achieved its goals of promoting green energy, job creation, and manufacturing.

139. Yet, Ontario entered into the *GEIA* in January 2010 and permitted the *GEIA* and FIT to "compete" against each other for the limited capacity for renewable energy for the transmission system. Ontario did so, despite knowing as far back as March 2009 that interest in the FIT Program would exceed renewable energy generation capacity through the FIT Program.[106]

140. This "competition" was completely one-sided. The Korean Consortium was guaranteed capacity, did not have to compete with any other investor for capacity, and was allowed to engage, without any government supervision, in predatory tactics, such as its wait-

[101] Toronto Star Article, Tyler Hamilton, "Ontario eyes green job bonanza", September 26, 2009 ***(Respondent's Schedule of Exhibits R-177)***.

[102] Toronto Star Article, Tyler Hamilton, "Ontario eyes green job bonanza", September 26, 2009 ***(Respondent's Schedule of Exhibits R-177)***; Ministry of Energy Archived News Release, "Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation", at p.1 ***(Respondent's Schedule of Exhibits R-068)***.

[103] Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, September 30, 2009 ***(Investor's Schedule of Exhibits C-0105)***.

[104] Testimony of Rick Jennings, Hearing Transcript, Day 2, at p.162, lns.22-25; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.78, lns.7-14 (FIT program was very successful at launch with 10,000 megawatts in applications); FIT/Micro FIT Announcement, dated December 15, 2009, at p.1 ***(Investor's Schedule of Exhibits C-0669)***.

[105] Testimony of Rick Jennings, Hearing Transcript, Day 2, at pp.157-158, lns.17-8; Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.58-59, lns.19-6; Canada's Closing Statement, Hearing Transcript, Day 6, at pp.215-216, lns.21-6.

[106] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.262-264, lns.17-6.

and-see approach to acquire at low prices developed, but low-ranked, FIT projects that were unlikely to get contracts and convert them to *GEIA* projects.[107]

141. The full terms of the *GEIA* were not even publically released until it was produced by a third party in ancillary discovery in support of this arbitration.[108] The terms were kept secret to hide, *inter alia*, the fact that the manufacturing commitments were a sham[109] and that Ontario had agreed that it would not enter a similar deal unless the terms were identical to the *GEIA*, therby insuring that no other competing investor would be able to obain a deal that matched the favorable terms provided the consoritium.[110]

142. This grossly unfair and inequitable treatment continued when Ontario did not terminate the *GEIA* when the Korean Consortium continuously failed to meet its obligations to the detriment of investors such as Mesa. The Korean Consortium did not meet the deadlines set in the *GEIA* in 2010. Ontario could have terminated the *GEIA* for this failure.[111] Yet, Ontario, despite knowing that there was substantially more FIT interest than available capacity, did not want to see the *GEIA* nullified to avoid a political embarassment and thus did not declare the Korean Consortium in breach.[112]

143. Instead of terminating the agreement to allow that capacity to go to the FIT Program and protect the FIT investors, Ontario amended the *GEIA* on two occasions to extend the deadlines for commercial operation and actually to reduce the generation capacity that the Korean Consortium would develop.[113]

144. Specifically, the Korean Consortium did not meet its obligations under s.11.1(e) of the original *GEIA* for the designation of connection points and access rights by July 30, 2010, and December 31, 2010, respectively.[114]

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[107] Transcript of Colin Edwards Deposition, August 3, 2012, at pp.186-187, lns.20-16 ***(Investor's Schedule of Exhibits C-0574)***; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.200-202, lns.19-12; Testimony of Sue Lo, Hearing Transcript, Day 3, at p.87-88, lns.13-3 ("[i]t would make sense that the Korean Consortium was purchasing "low-ranked projects that really had no realistic opportunity to become part of the FIT program in order to satisfy their obligations under the *GEIA*" but she was "not aware or unaware").

[108] Testimony of Sue Lo, Hearing Transcript, Day 3, at p.35, lns.4-21; Sue Lo testified that the Amended *GEIA* was released in 2011, but what was released did not contain all of the *GEIA* terms. It only contained the actual amendments to the *GEIA* without disclosing *GEIA* terms that were not being amended. Hence, the terms of the *GEIA* were not public in 2011, and it was not until it was produced by Pattern after a federal lawsuit was filed in the U.S., when it was disclosed to the public.

[109] *Green Energy Investment Agreement*, January 21, 2010, art. 8.3 ***(Investor's Schedule of Exhibits C-0322).*** Korean Consortium only had to "attract" plants, not build the plants***.***

[110] *Green Energy Investment Agreement*, January 21, 2010, at art. 8.7 ***(Investor's Schedule of Exhibits C-0322).***

[111] Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.99-100, lns.24-9.

[112] Testimony of Sue Lo, Hearing Transcript, Day 3, at p.91, lns.23-25.

[113] *Green Energy Investment Agreement – Amending Agreement*, July 29, 2011 ***(Investor's Schedule of Exhibits C-282)***; Amended and Restated *Green Energy Investment Agreement* ***(Respondent's Schedule of Exhibits R-133).***

[114] Minutes/Agenda, Working Group Meeting, September 9, 2010 ***(Investor's Schedule of Exhibits C-0562)*** Action item, "KC to provide the OPA and ENERGY with possible "bundle" scenarios for connection points for Phases 2 and 3 wind and solar."; Email from Barbara Constantinescu (IESO) to Bob Chow (OPA), John Sabiston (Hydro

145. In sum, Ontario kept the *GEIA* secret, even though the negotiations for the *GEIA* and the preparatory work for the FIT effectively were being undertaken at the same time, because Ontario could not explain its secret actions to the public. As a result of Ontario keeping the *GEIA* negotiations secret, FIT investors invested in Ontario under false pretenses. In 2009, FIT investors did not know that there was a second half of Ontario's renewable program that would constitute 23% of the total megawatts available for all renewable projects in Ontario,[115] and that the Korean Consortium could take projects to any region in the province and receive priority transmission access and thereby knock their investments from the program. As testified by Mr. MacDougall even the OPA was unaware of these negotiations.[116]

146. Sue Lo testified that one of Ontario's goals for the FIT Program was to allow for a fair and open process,[117] one that did not permit any "gaming" of the system by proponents.[118] However, by entering into the *GEIA*, Ontario created a process whereby the Korean Consortium did exactly that. The *GEIA* was brought to Ontario by an unsolicited group of investors, and Ontario gave those investors preferential treatment and exclusive access to nearly a quarter of the renewable energy capacity in the province.

147. As confirmed by Ontario's Auditor General, Ontario did not even look into the merits of the deal, it just signed it.[119] The *GEIA* itself restricted Ontario's ability to enter into any *GEIA*-like deal given the success of the FIT program.[120] Indeed, at the time, Ontario admitted that it was not in the position to enter a "special" deal with any other competitor of the consortium.[121] And key operational terms of the *GEIA* always were kept secret from competitors such as Mesa, which made it impossible for Mesa to

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One), January 11, 2011 ***(Investor's Schedule of Exhibits C-0070) [RESTRICTED ACCESS]***. [redacted]; Ontario Power Authority, News Release, "Power purchase agreements signed with Korean Consortium", August 3, 2011 ***(Investor's Schedule of Exhibits C-0059)*** Wind sites used for Phase 2 by the Korean Consortium in August of 2011 were K2 and Armow.; Ontario Power Authority, "FIT Car Priority Ranking by Region", July 4, 2011 ***(Investor's Schedule of Exhibits C-0293)*** Wind sites used by the Korean Consortium in August 2011 to meet its Phase 2 obligations were in the FIT program in July 2011.

[115] The LTEP capped the total amount of renewable energy at 10, 700MW in November of 2011. As confirmed by Sue Lo, the LTEP target responded to the fact that renewable energy was too costly and as a result Ontario decided to cap the total amount. Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.112-113, lns.20-6.

[116] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.268, lns.8-12.

[117] Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.12-13, lns.21-4, at p.169, lns.5-7.

[118] Email from JoAnne Butler (OPA) to Sue Lo (Ministry of Energy) and Shawn Cronkwright (OPA), May 12, 2011 ***(Investor's Schedule of Exhibits C-0444).***

[119] Annual Report of the Auditor General of Ontario, 2011, at p.108 ***(Investor's Schedule of Exhibits C-0228).***

[120] *Green Energy Investment Agreement*, January 21, 2010, at art. 8.7 ***(Investor's Schedule of Exhibits C-322).***

[121] Letter from Minister Brad Duguid to Anthony Caputo, ATS Automation Systems, Undated ***(Investor's Schedule of Exhibits C-0714).***

comprehend the full meaning of the *GEIA* or to seek similar terms from Ontario, which contractually was prohibited to provide in any event.

148. These actions, and the others that have been briefed in detail, are egregiously unfair, non-transparent and when viewed against the public terms available to other FIT proponents clearly breached the international law standard of treatment.

2. The June 3rd Rule Change Directed by the Minister of Energy Denied Mesa Due Process, was Manifestly Arbitrary, and was both Unfair and Unjust

149. The available transmission capacity in the Bruce region was unfairly allocated as NextEra lobbied for, and obtained, unprecedented rule changes allowing for connection point changes between regions against the normal OPA process with practically no notification and consultation.

150. Furthermore, there was no clear limits to which Ontario would go in bending the regulatory process to accommodate the Korean Consortium, leading to fundamental uncertainty and non-transparency as to the actual rules of the game. Ontario's determination to make the FIT work for its preferred companies at virtually any cost made ordinary regulatory fairness impossible.

151. The combination of arbitrary and prejudicial favorable treatment to NextEra and the Korean Consortium, lack of consultation and adequate notice period prior to the June 3 Direction, and allowing a rule change between regions contrary to investor expectations constitute a second breach of Article 1105.

3. June 3rd Direction: Lack of Consultation and Notice

152. The FIT Rules identified under what circumstances, projects could change connection points.[122] Under these rules, prior to an ECT, a connection point change was contemplated only in relation to projects connecting to the distribution system, not the transmission system.[123] All the other connection point changes contemplated under the FIT rules were permitted only after the running of the first ECT.[124]

[122] Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, at §§5.3, 5.5 & 5.6 ***(Investor's Schedule of Exhibits C-258)***.
[123] Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, at §5.3(d) ***(Investor's Schedule of Exhibits C-258)***.
[124] Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, at §5.5(d), §5.6 (b) ***(Investor's Schedule of Exhibits C-258)***

153. NextEra's projects which were connecting to the transmission system were allowed to change connection points from the West of London to the Bruce region before the running of an ECT, and as a result were awarded contracts.[125]

154. This was effectuated through a June 3, 2011 rule change, which was decided almost a month before, after private meetings with NextEra officials.[126]

155. NextEra's Al Wiley met with high-level officials within the Ontario Government and with Ministry of Energy with respect to the importance of a window to change connection points amongst regions.[127]

156. Shawn Cronkwright confirmed that the decision was made by the Premier and the Ministry of Energy and communicated by the Ministry of Energy to the OPA on May 12, 2011.[128]

157. The amount of notice provided by Ontario for the Rule Change was inadequate and inequitable. For example, NextEra received notice of this rule change before other FIT applicants,[129] while other FIT applicants received notice on Friday, June 3, 2011, that the window would be opening the following Monday, June 6.[130]

158. The OPA's Jim MacDougall admitted that a weekend was not adequate notice.[131]

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[125] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.226, lns.5-12 (NextEra bundled its projects to get contracts in Bruce in July 2011).

[126] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 ***(Investor's Schedule of Exhibits C-0077)***; Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) ***(Investor's Schedule of Exhibits C-0681) [CONFIDENTIAL]***; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 ***(Investor's Schedule of Exhibits C-0090)*** (discussing with the Ministry of Energy's Andrew Mitchell about the importance of the connection point change window for NextEra); Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at pp.55-56, lns.22-2 (May 12, 2011 the decision to change connection points was made); Rejoinder Statement of Shawn Cronkwright, at ¶21; Email from Sue Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011 ***(Investor's Schedule of Exhibits C-0674)***.

[127] Email from Al Wiley (NextEra), dated May 10, 2011 (Section 1782 Evidence) ***(Investor's Schedule of Exhibits C-0681) [CONFIDENTIAL]***; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 ***(Investor's Schedule of Exhibits C-0090)*** (referring to meeting with the Ministry of Energy's Andrew Mitchell about the importance of the connection point change window for NextEra).

[128] Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at pp.55-56, lns.22-2 (admitting that on May 12, 2011 the decision to change connection points was made); Rejoinder Statement of Shawn Cronkwright, at ¶21; Email from Sue Lo (MEI) to JoAnne Butler, May 12, 2011 ***(Investor's Schedule of Exhibits C-0604)***.

[129] Email from Jim MacDougall (OPA) to Nicole Geneau (NextEra Energy), May 31, 2011 (Section 1782 Evidence) ***(Investor's Schedule of Exhibits C-0068) [CONFIDENTIAL]*** [redacted]; Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011 ***(Investor's Schedule of Exhibits C-0090)*** (the Ministry of Energy informed NextEra that the government was internally discussing whether to have a connection point change window, and whether this would be done province-wide or just for the Bruce and West of London regions, facts that were not disclosed to other FIT proponents).

[130] Ontario Power Authority, Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects, June 3, 2011 ***(Investor's Schedule of Exhibits C-0140)***; Ontario Power Authority, FIT Rules Version 1.5, June 3, 2011 ***(Investor's Schedule of Exhibits C-0005)***.

[131] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.219, lns.17-19.

159. There was also no consultation with stakeholders or opportunity to comment on the rule prior to the release of the June 3rd Direction on any of the issues relating to the direction.[132] This was a departure from standard practice in the OPA for other rule changes.[133]

160. In fact for other major rule changes, ones with much less impact than this one, FIT investors were provided the right to comment.[134]

161. Canada's witness, Mr. MacDougall, admitted that the June 3 rule change was a major rule change.[135]

162. The lack of consultation and expedited implementation improperly benefitted one investor – NextEra. Canada's expressed reason for failing to provide the customary comment period provided an even more nefarious motive: Because of the Ontario government's urgency to award contracts before the "writ dropped" for "good news" and to benefit the incumbent government's public image, the process was rushed, and normal stakeholder consultations were dispensed with.[136]

163. It is foreseeable that if there had been a public comment period consistent with due process and transparency for the proposed June 3 rule change, that opposition to the proposed change by investors in the Bruce region could have resulted in the change not taking place. One never will know because the rule was changed to assist one investor and to assist the incumbent government's re-election goals.

4. June 3rd Direction: Rule Change Allowing Change Between Regions

164. FIT Contracts were awarded by region and that is how the FIT proponents competed with each other. [137]

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[132] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.234-235, lns.4-2.

[133] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.234, lns 1-14, at p.271, lns.2-5 (more from an optics perspective, from a perception perspective, we preferred to have a greater notice period, and then a greater opportunity to act… certainly in making decisions around FIT rules or FIT contract language that was not time-sensitive or urgent, we preferred to post a draft and seek comment, and then implement 20 days, 20 days, 20 business days each."); Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at pp.66-67, lns.23-3 ("Generally speaking, our approach would be to have materials out in advance, to have lots of time for people to comment on them, to run a very, you know, long stretched-out process and from the behind the scenes processing perspective, that also helps our team.").

[134] FIT Program Update, Summary of changes to the FIT Rules, contract and standard definitions, dated July 2, 2010 ***(Investor's Schedule of Exhibits C-0685)*** (referencing review of comments providing for wind turbines with gearless pitch and gearless drive systems); FIT Program Update, Summary of changes to the FIT Rules, contract and standard definitions, dated October 29, 2010 ***(Investor's Schedule of Exhibits C-0686)*** (referencing review of comments for hub and hub casing); FIT Program Update, December 8, 2010 ***(Investor's Schedule of Exhibits C-0687)*** (OPA announcement advising it will accept comments to proposed rule that would include connection capacity assessments as part of the application process).

[135] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.233, lns.17-25.

[136] Testimony of Sue Lo, Hearing Transcript, Day 3, at p.179, lns.9-14, at p.180, lns.17-21.

[137] Testimony of Bob Chow, Hearing Transcript, Day 3, at p.329, lns.12-18, at p.304, lns.12-18.

165. Prior to the June 3rd directive, the FIT proponents expected that a province-wide ECT would occur if necessary.[138] This was the process set out in the FIT rules.[139] This did not happen.[140] Instead, a special run was conducted with only two regions, allowing investor NextEra to change its connection point first.

166. The FIT Rules did not contemplate permitting applicants connected to the transmission system to change connection points prior to the first ECT.[141] Further, the FIT Rules are silent on changes between regions.[142]

167. It is clear from FIT- related documents that FIT contracts would be awarded on a regional basis or via an ECT, not a hybrid method in which only two areas would be examined and applicants in those areas could change their connection points.

168. For example, Canada produced an OPA document from the "FIT Team" clarifying that what mattered for a proponent's chances of getting a contract was its regional ranking and not its province-wide ranking.[143] Canada's witness, Mr. Bob Chow, confirmed druing the hearing that the document was accurate.[144]

169. It is also clear that the FIT Rules as designed did not contemplate proponents being able to change connection points to different regions and bump out other projects.

170. Canada in fact produced a Ministry of Energy presentation from August 2010 which discusses how the FIT Rankings should be published.[145] This document shows that in August 2010, around the time the ECT was scheduled to begin originally, the Ministry of Energy contemplated releasing only regional rankings to applicants, and not the provincial ranking.[146] This is important because without knowing everyone's province ranking, it would be risky and potentially useless to change connection points as the proponent would not know its ranking in comparison to other projects in the target region.

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[138] Testimony of Sue Lo, Hearing Transcript, Day 3, at p.130, lns.21-24; Testimony of Cole Robertson, Hearing Transcript, Day 2, at p.45, lns.10-18; Ontario Power Authority, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p.39 ***(Investor's Schedule of Exhibits C-0088)***.

[139] Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, at §§5.3-5.6, compare §5.2 ***(Investor's Schedule of Exhibits C-0258)***.

[140] Testimony of Sue Lo, Hearing Transcript, Day 3, at p.121, lns.1-4, 21-24.

[141] Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, at §5.3(d) ***(Investor's Schedule of Exhibits C-0258)*** .

[142] Ontario Power Authority, Feed-in Tariff Program, FIT Rules Version 1.1, September 30, 2009, at §5.3(d) ***(Investor's Schedule of Exhibits C-0258)***.

[143] FIT, Application Review Test and Standard Responses, May 9, 2011, at p.33 ***(Investor's Schedule of Exhibits C-0617)***.

[144] Testimony of Bob Chow, Hearing Transcript, Day 3, at pp.329-330, lns.19-2.

[145] MOE Presentation, Priority Ranking Release: Issues to be Addressed, August 26, 2010 ***(Investor's Schedule of Exhibits C-0483) [CONFIDENTIAL]***.

[146] MOE Presentation, Priority Ranking Release: Issues to be Addressed, August 26, 2010, at p.13 ***(Investor's Schedule of Exhibits C-0483) [CONFIDENTIAL]***.

171. Accordingly, as of August 2010, and after announcing that there would be a window before the first ECT to do so, the Ministry of Energy and OPA were not contemplating changes between regions.

172. Canada's contention that the rule change best approximated developer expectations is unavailing.

173. To begin with, Ontario never attempted to actually ascertain these expectations.

174. Second, the June 3rd directive limited the regional ECT to the Bruce and West of London regions, coincidentally benefitting NextEra, harming FIT proponents in line for contracts in the Bruce region, and excluding proponents from other regions.[147] If the rule change was not intended to benefit NextEra, then nearby regions should have been permitted to connect to the Bruce transmission area.

175. Third, the position is contradicted by an actual developer, Pattern's Colin Edwards, who testified in a deposition that he was surprised by the news that NextEra was allowed to change connection points to another region.[148]

5. June 3 Direction: Contrary to Developer Expectations, Ontario was Limiting the Capacity it Awarded to Avoid Paying the FIT Prices which Induced Investors to Invest in Ontario

176. It is undisputed that with the June 3rd Direction, Ontario capped the megawatts which could be awarded with FIT contracts.[149] Ms. Lo in fact testified that "there was a desire not to award all of the contracts that could connect, and that's why we capped the number of megawatts in the Minister's direction. I think it was 750 and 300 megawatts, because if more projects could have connected, **we didn't want to pay** for the additional megawatts that would come on stream."[150]

177. This, amongst other portions of the Direction, went against developer expectations. Canada's witnesses admitted that this was why the OPA needed a Direction.[151] After having promised investors that it would award all available capacity through the FIT

[147] Testimony of Sue Lo, Hearing Transcript, Day 3, at p.123, lns.6-12; Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.221, lns.18-23; Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 ***(Investor's Schedule of Exhibits C-0077)***.

[148] Transcript of Colin Edwards Deposition, August 3, 2012, at p.160, lns.5-21 ***(Investor's Schedule of Exhibits C-0574)***.

[149] Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to OPA, June 3, 2011 ***(Investor's Schedule of Exhibits C-0077)***.

[150] Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.180-181, lns.22-4 *[emphasis added]*.

[151] Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.80, lns.19-24.

program to induce them to invest,[152] it was not within the OPA's power to restrict the contract awards without a direction or directive from the government.

178. The aforementioned conduct shows that Canada managed the FIT Program in an arbitrary, grossly unfair, unjust, idiosyncratic, political and discriminatory manner, in addition to depriving FIT applicants like Mesa of its due process rights by making changes to the FIT Program without consultation and by engaging in secret, special deals which have harmed FIT applicants which otherwise would have been entitled to FIT Contracts.

179. In sum, any expectation of due process that Mesa had was shattered when the Minister of Energy arbitrarily intervened in an OPA run process to direct a rule change with effectively no notice period and no consultation, during which the required studies could not be completed, and which was designed to benefit a proponent who already had completed the work required for change. Further, the directed rule change allowing connection point changes was in itself unjust and unfair and was inconsistent with representations made to the public about the FIT Rules.

180. These actions taken collectively result in a gross and egregious violation of the fair and equitable treatment expected by any investor under the NAFTA, and resulted in Mesa not receiving FIT Contracts for its projects.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of June, 2014,

Counsel for the Investors

[152] FIT/Micro FIT Announcement, dated December 15, 2009, at p.3 ***(Investor's Schedule of Exhibits C-0669)*** ("The basis of the FIT program is having the system built to accommodate all generators who wish to connect. If transmission and/or distribution capacity is not available and a project meets certain economic and technical criteria, the system will be expanded to connect the project") *[emphasis added]*; Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, February 25, 2010 ***(Investor's Schedule of Exhibits C-0215) [CONFIDENTIAL]*** [redacted] *[emphasis added]*; Ministry of Energy presentation, "DRAFT ECT Design Considerations", at p.8 ***(Investor's Schedule of Exhibits C-0657) [CONFIDENTIAL]*** [redacted]); Ontario Power Authority Draft Presentation, 'Implications of the Economic Connection Test', March 8, 2011, at p.3 ***(Investor's Schedule of Exhibits C-0702) [CONFIDENTIAL]*** ("OPA has little ability to withhold amounts discovered due to wind diversity … and is obligated to reveal the 150MW of additional capacity in the Bruce when the next steps for ECT are announced").