

PUBLIC VERSION

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

**TENNANT ENERGY, LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)**

FINAL AWARD

The Arbitral Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. Doak Bishop

Sir Daniel Bethlehem KC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Mr. José Luis Aragón Cardiel

25 October 2022

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TABLE OF ABBREVIATIONS

Canada	Government of Canada
Claimant or Tennant Energy	Tennant Energy, LLC
Claimant's Costs Submission	Claimant's Statement of Costs, dated 15 July 2022
Claimant's PHB	Claimant's Post-Hearing Brief, dated 17 December 2021
Claimant's Second Article 1128 Submission	Claimant's Second Response to the Submissions of the United States and Mexico pursuant to Article 1128 of the NAFTA, dated 26 July 2021
Claimant's Westmoreland Submission	Claimant's submission on the award in <i>Westmoreland Mining Holdings LLC v. Government of Canada</i> (ICSID Case No. UNCT/20/3), dated 4 May 2022
Confidentiality Order	Confidentiality Order, executed by the Tribunal and the Parties on 24 June 2019
Counter-Memorial	Respondent's Memorial on Jurisdiction, dated 21 September 2020
Critical Date	The agreed critical date for the purposes of determining Claimant's compliance with Article 1116(2), namely 1 June 2014
Decision in <i>Dirk Herzig</i>	Decision on the respondent's Request for Security for Costs and the claimant's Request for Security for Claim in <i>Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan</i> (ICSID Case No. ARB/18/35), dated 27 January 2020
Deloitte Report	Expert valuation report of Deloitte LLP (CER-1)
First Objection	Respondent's contention that the Claimant was not a protected "investor of a Party" when the alleged breach occurred, and therefore the Claimant has not met the requirements of Article 1116(1) of the NAFTA
First Procedural Meeting	First Procedural Meeting held on 17 June 2019 at the World Bank Main Complex Building in Washington D.C.
FIT Contract	Contract under the FIT Program
FIT Program	Ontario Feed-in Tariff Program to procure energy from renewable energy sources in the province, launched on 1 October 2009
FIT Rules	Rules governing the FIT Program, originally issued by the OPA on 30 September 2009

GE Energy	GE Energy, LLC
GEIA	Green Energy Investment Agreement
Grignon Report	Expert legal opinion of Hon. Margaret Grignon (CER-2)
Hearing on Bifurcation and Preliminary Motions	Hearing on Bifurcation and Preliminary Motions, held from 14 to 15 January 2020
Hearing on Jurisdiction	Hearing on Jurisdiction, held from 15 to 19 November 2021
ICSID	International Centre for Settlement of Investment Disputes
ILC Articles	International Law Commission's 2001 Articles on the Responsibility of States for Internationally Wrongful Acts
IPC	International Power Canada
Korean Consortium	Samsung C&T and Korea Electric Power Corporation
Launch Period	First 60 days of the FIT Program (<i>i.e.</i> , from 1 October 2009 to 30 November 2009)
Lodise Report	Expert legal opinion of Margaret G. Lodise (RER-1)
MAKAE Award	Award in <i>MAKAE Europe SARL v. Kingdom of Saudi Arabia</i> (ICSID Case No. ARB/17/42) dated 30 August 2021
McCall Statement	Witness statement of Lucas McCall, filed by the Respondent on 21 September 2020, together with the Renewed Request for Bifurcation (RWS-1)
Memorial	Claimant's Memorial on Jurisdiction, Merits and Quantum, dated 7 August 2020
Mesa Power	<i>Mesa Power Group LLC v. Government of Canada</i> (PCA Case No. 2012-17)
Mexico	United Mexican States
Mexico's Second Submission	Second Submission of Mexico pursuant to Article 1128 of the NAFTA, dated 25 June 2021
Minister of Energy	Ontario Minister of Energy and Infrastructure
Motion for Security for Costs	Respondent's Motion for Security for Costs and Disclosure of Third-Party Funding, dated 16 August 2019
Motion for Targeted Document Production	Respondent's Motion for Targeted Document Production, dated 3 April 2020
MW	Megawatt

NAFTA or the Treaty	North American Free Trade Agreement
OPA	Ontario Power Authority
PCA	Permanent Court of Arbitration
Pennie Statement	Witness statement of John C. Pennie (CWS-1)
Preliminary Objections	First Objection and Second Objection
Premier Renewable	Premier Renewable Energy, Ltd.
Rejoinder	Respondent's Rejoinder Memorial on Jurisdiction, dated 26 May 2021
Renewed Request for Bifurcation	Respondent's Renewed Request for Bifurcation, dated 21 September 2020
Reply	Claimant's Counter-Memorial on Jurisdiction, dated 1 March 2021
Request for Bifurcation	Respondent's Request for Bifurcation, dated 23 September 2019
Request for Interim Measures	Claimant's Request for Interim Measures, dated 16 August 2019
Respondent	Government of Canada
Respondent's Costs Submission	Respondent's Submission on Costs, dated 15 July 2022
Respondent's PHB	Respondent's Post-Hearing Submission, dated 17 December 2021
Respondent's Second Article 1128 Submission	Respondent's Second Response to the Submissions of the United States and Mexico pursuant to Article 1128 of the NAFTA, dated 26 July 2021
Respondent's <i>Westmoreland</i> Submission	Respondent's submission on the award in <i>Westmoreland Mining Holdings LLC v. Government of Canada</i> (ICSID Case No. UNCT/20/3), dated 4 May 2022
Response to the Request for Interim Measures	Response to the Claimant's Request for Interim Measures, dated 23 September 2019
Response to the Respondent's PHB	Claimant's Response to Canada's Post Hearing Brief on Transfers
Second Objection	Respondent's contention that the claim was not filed prior to the expiry of the 3-year limitation period articulated in Article 1116(2) of the NAFTA
Skyway 127	Skyway 127 Wind Energy Inc.

Statement of Defence	Respondent's Statement of Defence, dated 2 July 2019
UNCITRAL Rules	United Nations Commission on International Trade Law Rules of Arbitration, as adopted in 1976
United States	United States of America
United States' Second Submission	Second Submission of the United States of America pursuant to Article 1128 of the NAFTA, dated 25 June 2021
VCLT	Vienna Convention on the Law of Treaties, 1969
<i>Westmoreland Award</i>	Final Award in <i>Westmoreland Mining Holdings LLC v. Government of Canada</i> (ICSID Case No. UNCT/20/3), dated 31 January 2022
<i>Westmoreland Decision</i>	Procedural Order No. 3, Decision on Bifurcation in <i>Westmoreland Mining Holdings LLC v. Government of Canada</i> (ICSID Case No. UNCT/20/3), dated 20 October 2020
<i>Windstream Energy</i>	<i>Windstream Energy, LLC v. Government of Canada</i> (PCA Case No. 2013-22)

I. INTRODUCTION

A. THE PARTIES AND THE TRIBUNAL

1. The Claimant in this arbitration is Tennant Energy, LLC (the “**Claimant**” or “**Tennant Energy**”), a Limited Liability Corporation incorporated in California, United States of America (“**United States**”), with its address at 27 Edgefield Ct., Napa, California 94558.¹ As of 15 January 2015, the Claimant acquired 45.2% of the shares of Skyway 127 Wind Energy Inc. (“**Skyway 127**”), an enterprise incorporated in Ontario, Canada on 18 October 2007, with its address at 3042 Concession 3, Adjala, Ontario, RRI, Hockley Valley, Palgrave, Ontario, L0N 1P0.²

2. The Claimant is represented in these proceedings by:

Mr. Barry Appleton
Appleton & Associates International Lawyers LP
121 Richmond St
Suite 602
Toronto, ON M5H 2K1
Canada

Mr. Edward Mullins
Reed Smith LLP
200 South Biscayne Boulevard
Suite 2600
Miami, Florida 33131
United States

3. The Respondent in this arbitration is the Government of Canada, a sovereign State (“**Canada**” or the “**Respondent**”).

4. The Respondent is represented in these proceedings by:

Ms. Heather Squires, Lead Counsel
Ms. Alexandra Dosman, Counsel³
Ms. Susanna Kam, Counsel
Mr. Mark Klaver, Counsel

¹ The Claimant was originally incorporated with the name “Tennant Consulting, LLC” in California, United States on 10 September 2001 (Articles of Organization, 10 September 2001 (**C-111**)). On 27 November 2002 the Claimant amended its certificate of incorporation in order to change its name to “Tennant Travel Services, LLC” (Tennant Travel Services, LLC, Limited Liability Company Restated Articles of Organization, 27 November 2002 (**R-10**)). On 20 April 2015, the Claimant was renamed “Tennant Energy, LLC” (Tennant Energy LLC, Amendment to Articles of Organization of a Limited Liability Company, 20 April 2015 (**R-11**)). Throughout this document, regardless of the time, the Claimant is referred to as the Claimant or Tennant Energy.

² Skyway 127 - Certificate of Incorporation, 18 October 2007 (**C-113**).

³ Since 4 February 2020.

Ms. Maria Cristina Harris, Counsel
Mr. Stefan Kuuskne, Counsel
Mr. Benjamin Tait, Paralegal
Ms. Krystal Girvan, Paralegal⁴
Trade Law Bureau (JLT)⁵
Global Affairs Canada
125 Sussex Drive
Ottawa, ON, K1A 0G2
Canada

5. The Tribunal is composed of Mr. Doak Bishop, appointed by the Claimant, Sir Daniel Bethlehem KC, appointed by the Respondent, and Mr. Cavinder Bull SC, appointed as presiding arbitrator by the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) acting as appointing authority.

B. THE DISPUTE

6. This arbitration concerns the Claimant’s allegation that the Respondent violated its obligations under Chapter Eleven of the North American Free Trade Agreement (the “NAFTA” or the “Treaty”) through certain measures related to the 2011 Feed-in Tariff Program (see below) in respect of the Claimant’s alleged investment in Skyway 127 in Canada.
7. In particular, the Claimant submits that the Respondent violated Article 1105 of the NAFTA by reference to the following five alleged wrongful actions or omissions:⁶
- “(a) Special business opportunities provided to a politically connected local favourite, IPC.
 - (b) The “Breakfast Club” cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.
 - (c) Ontario’s decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127.
 - (d) The delay of the award of contracts because of Korean Consortium’s failure to comply with its contractual obligations.
 - (e) The conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.”
8. In its **Statement of Defence**, dated 2 July 2019, the Respondent advanced four objections to the jurisdiction of the Tribunal over the Claimant’s claims. By its Procedural Orders Nos. 8 and 9, dated 12 November 2020 and 10 March 2021, respectively, the Tribunal ordered the bifurcation of the proceedings, such that two of those objections would be decided as preliminary questions,

⁴ Since 6 October 2020.

⁵ Since the outset of the proceedings until 4 February 2020, Ms. Lori Di Pierdomenico formed part of the team of the Trade Law Bureau as Lead Counsel. Ms. Annie Ouellet and Ms. Darian Bakelaar also represented the Respondent as Counsel and Paralegal, respectively.

⁶ Memorial, ¶ 13.

namely, that (a) the Claimant was not a protected “investor of a Party” when the alleged breach occurred, and therefore the Claimant has not met the requirements of Article 1116(1) of the NAFTA (the “**First Objection**”); and (b) the claim was not filed prior to the expiry of the 3-year limitation period articulated in Article 1116(2) of the NAFTA (the “**Second Objection**”, and together with the First Objection, the “**Preliminary Objections**”). In this Final Award, the Tribunal decides the Respondent’s Preliminary Objections.

II. RELEVANT PROCEDURAL HISTORY

A. COMMENCEMENT OF THE ARBITRATION AND CONSTITUTION OF THE TRIBUNAL

9. On 2 March 2017, the Claimant served upon the Respondent a “Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter Eleven of the North American Free Trade Agreement” pursuant to Articles 1119 and 1116 of the NAFTA.
10. On 1 June 2017, the Claimant commenced these arbitration proceedings by serving upon the Respondent its Notice of Arbitration pursuant to Articles 1116 and 1120 of the NAFTA and Article 3 of the United Nations Commission on International Trade Law Rules of Arbitration, as adopted in 1976 (the “**UNCITRAL Rules**”).
11. On 6 April 2018, the Claimant appointed Mr. R. Doak Bishop, a United States national, as the first arbitrator.
12. On 20 April 2018, the Respondent appointed Sir Daniel Bethlehem KC, a United Kingdom national, as the second arbitrator.
13. The Parties being unable to agree on a presiding arbitrator, the Claimant, by a letter dated 5 October 2018, requested the Secretary-General of ICSID to appoint the presiding arbitrator pursuant to Article 1124(1) of the NAFTA.
14. On 12 November 2018, the Secretary-General of ICSID, acting as appointing authority, appointed Mr. Cavinder Bull SC, a Singapore national, as Presiding Arbitrator.

B. FIRST PROCEDURAL STEPS

15. On 20 November 2018, the Claimant confirmed that its Notice of Arbitration of 1 June 2017 should also serve as its Statement of Claim.

16. On 21 November 2018, the Respondent informed the Tribunal that the Parties had jointly agreed that the Permanent Court of Arbitration (the “PCA”) would act as registry in these proceedings.
17. On 10 January 2019, the Tribunal circulated the final version of the Terms of Appointment for the Parties’ signature, and on 29 January 2019, the PCA circulated the signed copy of the document, as executed by the Parties and the Tribunal.
18. On 17 June 2019, the first procedural meeting was held at the World Bank Main Complex Building in Washington D.C. (the “**First Procedural Meeting**”), and attended by the following participants:

Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)
Mr. R. Doak Bishop (*via videoconference*)
Sir Daniel Bethlehem KC (*via videoconference*)

Claimant

Claimant’s Representative, Tennant Energy LLC
Mr. John Pennie

*Counsel, Appleton and Associates International
Lawyers LP*
Mr. Barry Appleton
Ms. Lillian De Pena
(*via telephone*)

Counsel, Reed Smith LLP
Mr. Edward Mullins
Mr. Ben Love

Respondent

*Respondent’s Representatives, Ministry of Energy,
Northern Development and Mines, Government of
Ontario*

Ms. Jennifer Kacaba, Senior Counsel
Ms. Harkamal Multani, Counsel
(*via videoconference*)
Ms. Karen Slawner, Senior Advisor
(*via videoconference*)

Mr. William Coutts, Senior Project Advisor
(*via videoconference*)

*Respondent’s Representatives, Ministry of the Attorney
General, Government of Ontario*

Ms. Saroja Kuruganty, Counsel
Ms. Aida Setrakian, Counsel
(*via videoconference*)
Mr. Andrew Christie, Counsel
(*via videoconference*)

*Respondent’s Representatives, Economic Development,
Job Creation and Trade, Government of Ontario*

Mr. Miran Ternamian, Senior Policy Advisor
(*via videoconference*)
Ms. Jenarra DeSouza, Manager
(*via videoconference*)

*Respondent’s Representatives, Independent Electricity
System Operator, Legal Services*

Ms. Reena Goyal, Senior Counsel
(*via videoconference*)

*Respondent's Representatives, Investment Trade
Policy, Government of Canada*

Ms. Julie Boisvert, Deputy Director
(via videoconference)

Ms. Renaude Bender, Senior Trade Policy Officer
(via videoconference)

Ms. Jessica Choe, Trade Policy Officer
(via videoconference)

Counsel

Ms. Lori Di Pierdomenico, Senior Counsel

Ms. Annie Ouellet, Senior Counsel
(via videoconference)

Ms. Susanna Kam, Counsel

Ms. Maria Cristina Harris, Counsel

Ms. Johannie Dallaire, Counsel
(via videoconference)

Ms. Darian Bakelaar, Senior Paralegal

Mr. Benjamin Tait, Paralegal

Ms. Paula Cabrera Jimenez, Student
(via videoconference)

Court Reporter

Ms. Felicia Newland

Permanent Court of Arbitration

Ms. Christel Y. Tham

19. On 24 June 2019, the Tribunal issued **Procedural Order No. 1** which, *inter alia*, provided that these proceedings shall be governed by the UNCITRAL Rules (except as modified by the provisions of Section B of the NAFTA) and fixed Washington, D.C. as the place of arbitration. Annex 1 of Procedural Order No. 1 also established the procedural calendar for an initial phase leading to a **Hearing on Bifurcation and Preliminary Motions** and the Tribunal's decision on bifurcation and preliminary motions, as well as two alternative timetables for a subsequent phase applicable (a) should the proceedings not be bifurcated; and (b) should the proceedings be bifurcated.
20. On the same date, the Parties and the Tribunal executed a **Confidentiality Order** which, *inter alia*, set forth a regime governing the handling of confidential and restricted access information in the proceedings.
21. On 2 July 2019, the Respondent submitted its Statement of Defence.

C. REQUEST FOR BIFURCATION AND PRELIMINARY MOTIONS

22. On 16 August 2019, the Respondent submitted its Motion for Security for Costs and Disclosure of Third-Party Funding (the "**Motion for Security for Costs**").

23. On the same date, the Claimant submitted its **Request for Interim Measures**.
24. On 23 September 2019, the Claimant submitted its Response to Canada's Motion for Security for Costs and Disclosure of Funding.
25. On the same date, the Respondent submitted its **Request for Bifurcation** and, in a separate filing, its Response to the Claimant's Request for Interim Measures (the "**Response to the Request for Interim Measures**").
26. On 23 October 2019, the Claimant submitted its Response to the Request for Bifurcation.
27. On 1 November 2019, the United States, through its Department of State, submitted a letter to the Tribunal informing *inter alia* that it did not intend to make any submissions in connection with the Request for Bifurcation but that it may wish to do so in connection with the Parties' 16 August 2019 preliminary motions. The United States proposed to inform the Tribunal and the Parties whether it would make such submissions by 27 November 2019, and file any such submissions by 6 December 2019. The United States also reserved its right to make oral submissions during the Hearing on Bifurcation and Preliminary Motions, pursuant to Article 1128 of the NAFTA.
28. On 2 November 2019, the Claimant wrote to the Tribunal (a) objecting to the United States' proposed procedural schedule and maintaining that any non-disputing Party submissions should be provided no later than 6 November 2019; and (b) objecting to the United States' participation at the Hearing on Bifurcation and Preliminary Motions.
29. On 4 November 2019, the Government of the United Mexican States ("**Mexico**") submitted a letter to the Tribunal (a) informing that it did not intend to make a submission on bifurcation; (b) communicating its intention to attend the Hearing on Bifurcation and Preliminary Motions; and reserving its right to make any oral submissions at that point; and (c) joining the United States in its proposal to inform the Tribunal and the Parties whether it would make submissions on the Parties' preliminary motions by 27 November 2019 and file any such submissions by 6 December 2019.
30. On the same day, the Respondent wrote to the Tribunal arguing *inter alia* that (a) under the NAFTA, the non-disputing Parties have a right to make submissions on questions of interpretation of the NAFTA and that their proposed timetable was reasonable; and (b) the non-disputing Parties have a right under the NAFTA to attend hearings and make oral submissions.
31. On 5 November 2019, in reaction to the 4 November 2019 letter from Mexico, the Claimant wrote to the Tribunal requesting that it (a) set a new date, no later than 8 November 2019, for the filing

of all remaining non-disputing Party submissions; and (b) reaffirm its prior decision, as reflected in Procedural Order No. 1, that the non-disputing Parties should not be allowed to attend the Hearing on Bifurcation and Preliminary Motions.

32. On 11 November 2019, the Tribunal wrote to the Parties and the non-disputing Parties directing *inter alia* that (a) the non-disputing Parties inform the Tribunal by 13 November 2019 whether they would be making any submissions on the Parties' preliminary motions and file any such submissions by 27 November 2019; (b) the Parties file their responses, if any, to any non-disputing Party submissions, by 27 December 2019; and (c) the non-disputing Parties would be allowed to attend the Hearing on Bifurcation and Preliminary Motions and make any oral submissions to the extent that they had given timely notice to the Parties in writing.
33. On 13 November 2019, both Mexico and the United States informed the Tribunal that they expected to make submissions on questions of interpretation of the NAFTA in connection with the Parties' preliminary motions.
34. On 18 November 2019, the Respondent submitted a revised version of legal authority RLA-6,⁷ containing a translation from Spanish into English of the paragraphs of this document cited by the Claimant in its Response to the Request for Interim Measures.
35. On 27 November 2019, Mexico and the United States submitted their respective submissions on questions of interpretation of the NAFTA, pursuant to Article 1128 of the Treaty.
36. On 27 December 2019, the Parties submitted their respective responses to the non-disputing Parties' submissions of 27 November 2019.
37. On 7 January 2020, the United States informed the Tribunal and the Parties that it intended to make oral submissions at the Hearing on Bifurcation and Preliminary Motions. On the same date, Mexico informed the Tribunal and the Parties that it did not intend to make oral submissions at the Hearing on Bifurcation and Preliminary Motions.
38. The Hearing on Bifurcation and Preliminary Motions was held from 14 to 15 January 2020 at the World Bank main complex building in Washington, D.C. The following persons attended the Hearing on Bifurcation and Preliminary Motions:

⁷ *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Procedural Order No. 9, Decision on Provisional Measures, 20 June 2018 [Spanish, with attached translated excerpts in English] (**RLA-6**).

Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. R. Doak Bishop

Sir Daniel Bethlehem KC

Claimant

Claimant's Representative, Tennant Energy LLC
Mr. John Pennie

*Counsel, Appleton and Associates International
Lawyers LP*
Mr. Barry Appleton
Ms. Lillian De Pena
(via telephone)

Counsel, Reed Smith LLP
Mr. Edward Mullins

Respondent

*Respondent's Counsel, Trade Law Bureau,
Government of Canada*

Ms. Lori Di Pierdomenico, Senior Counsel

Ms. Susanna Kam, Counsel

Mr. Mark Klaver, Counsel

Ms. Johannie Dallaire, Counsel

Ms. Maria Cristina Harris, Counsel

Ms. Darian Bakelaar, Senior Paralegal

Mr. Scott Little, Deputy Director and Senior Counsel
(via videoconference)

Ms. Annie Ouellet, Deputy Director
(via videoconference)

Mr. Benjamin Tait, Paralegal
(via videoconference)

*Respondent's Representatives, Ministry of Energy,
Northern Development and Mines, Government of Ontario*

Ms. Jennifer Kacaba, Senior Counsel

Ms. Harkamal Multani, Counsel
(via videoconference)

Ms. Haramrit Kaur, Article Student
(via videoconference)

Ms. Karen Slawner, Senior Advisor
(via videoconference)

Mr. William Coutts, Senior Project Advisor
(via videoconference)

*Respondent's Representatives, Investment Trade Policy,
Government of Canada*

Ms. Renaude Bender, Senior Trade Policy Officer

Ms. Julie Boisvert, Deputy Director
(via videoconference)

Ms. Jessica Choe, Trade Policy Officer
(via videoconference)

*Respondent's Representatives, Ministry of Economic
Development, Job Creation and Trade,
Government of Ontario*

Ms. Saroja Kuruganty, Counsel

Ms. Aida Setrakian, Counsel
(via videoconference)

Mr. Miran Ternamian, Senior Policy Advisor
(via videoconference)

Mr. Sean Andrade, Policy and Trade Strategy Advisor
(via videoconference)

*Respondent's Representatives, Independent Electricity
System Operator, Legal Services*

Ms. Sejal Shah, Senior Counsel
(via videoconference)

Representatives of the Non-Disputing Parties

Mexico

Mr. Aristeo López Sánchez, Ministry of Economy
Mr. Orlando Perez, General Counsel for International Trade

United States of America

Ms. Nicole Thornton, U.S. Department of State
Mr. Nathaniel Jedrey, U.S. Department of State
Ms. Margaret Sedgewick, U.S. Department of State
Ms. Amanda Blunt, Office of the U.S. Trade Representative
Ms. Catherine Gibson, Office of the U.S. Trade Representative

Permanent Court of Arbitration

Ms. Christel Y. Tham

Court Reporter

Ms. Dawn Larson

39. During the Hearing on Bifurcation and Preliminary Motions, the Tribunal heard oral submissions by counsel and put questions to the Parties regarding the Request for Interim Measures, the Request for Bifurcation and the Request for Security for Costs. The Tribunal further heard oral submissions by the United States on questions of interpretation of the NAFTA regarding the Motion for Security for Costs, pursuant to Article 1128 of the Treaty.
40. On 4 February 2020, the Respondent requested leave to introduce into the record the Decision on the respondent's Request for Security for Costs and the claimant's Request for Security for Claim in *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35), dated 27 January 2020 (the "**Decision in Dirk Herzig**"), as a new legal authority, and to allow the Parties to make written submissions on the relevance of this decision vis-à-vis the Motion for Security for Costs. The Claimant objected to this request on the same date.
41. On 10 February 2020, the Tribunal granted the Respondent leave to file the Decision in *Dirk Herzig* and invited the Parties to provide their comments thereon.
42. On 17 February 2020, the Respondent submitted the Decision in *Dirk Herzig* into the record as exhibit RLA-112 and its comments thereon. On 24 February 2020, the Claimant provided its response to the Claimant's submission on the Decision in *Dirk Herzig*.

43. On 27 February 2020, the Tribunal issued **Procedural Order No. 4**, by which the Tribunal (a) dismissed the Request for Interim Measures;⁸ (b) dismissed the Request for Bifurcation on the ground that it was premature;⁹ (c) ordered the Claimant to make certain disclosures to the Tribunal and the Respondent regarding the identity of any third-party funder as well as the terms of any third-party funding agreement;¹⁰ and (d) dismissed the Request for Security for Costs.¹¹ The Tribunal determined that the proceedings would continue in accordance with the procedural timetable set out in Procedural Order No. 1 for the non-bifurcated scenario, with certain modifications adopted in order to allow the Respondent to pursue the bifurcation of the proceedings after having had sight of the Claimant's Memorial. The Tribunal further directed that the Memorial should set out in full detail the Claimant's pleading on issues of jurisdiction, including the issue of the time-bar. In the event that the Respondent decided to renew its request for bifurcation, the Tribunal held that it would decide that request on the papers without a hearing and issue relevant procedural directions thereafter.¹²
44. On 2 March 2020, the Parties respectively requested, *inter alia*, that the Tribunal rule on the Respondent's confidentiality designations as set out in their Disputed Designations Schedule pursuant to the Confidentiality Order.
45. On 3 March 2020, the Claimant provided its response to the Respondent's e-mail of 2 March 2020.
46. On 4 March 2020, the Tribunal indicated that it considered the confidentiality designations to be ripe for decision and stated that it would render a decision in this respect in due course.
47. On 27 March 2020, the Tribunal issued Procedural Order No. 5, setting out its decision on the Respondent's confidentiality designations in the Disputed Designations Schedule submitted on 2 March 2020.
48. On 3 April 2020, the Respondent filed a Motion for Targeted Document Production, requesting that the Claimant be ordered to produce certain categories of documents relating to the Claimant's ability to comply with an adverse costs award (the "**Motion for Targeted Document Production**"). Together with its Motion, the Respondent filed a Redfern Schedule specifying the documents for which it requested production.

⁸ Procedural Order No. 4, ¶¶ 69, 183(a).

⁹ Procedural Order No. 4, ¶¶ 88, 183(b).

¹⁰ Procedural Order No. 4, ¶¶ 106-108, 183(c).

¹¹ Procedural Order No. 4, ¶¶ 181, 183(d).

¹² Procedural Order No. 4, ¶¶ 92-93, 183(b).

49. On 20 April 2020, the Claimant filed a Response to the Respondent's Motion for Targeted Document Production, requesting that such motion be denied.
50. On 6 May 2020, the Tribunal issued Procedural Order No. 6, dismissing the Motion for Targeted Document Production.

D. FURTHER WRITTEN PLEADINGS AND THE RENEWED BIFURCATION REQUEST

51. On 2 May 2020, the Claimant informed that it had encountered "severe difficulties" caused by the COVID-19 pandemic and requested that the deadline for the filing of the Memorial be postponed by six weeks, and that the two subsequent deadlines in the procedural calendar be correspondingly modified. On 8 May 2020, the Respondent consented to the Claimant's request. On 10 May 2020, the Tribunal confirmed the Parties' agreed amendments to the procedural schedule.
52. On 27 June 2020, the Claimant explained that it continued to experience difficulties caused by the worsening pandemic and requested a further one-month extension of the deadline for the filing of the Memorial, along with corresponding modifications to the two immediately following deadlines. On 3 July 2020, the Respondent agreed to the Claimant's proposed modifications and, the next day, the Tribunal approved the modifications to the procedural calendar, as agreed by the Parties.
53. On 7 August 2020, the Claimant filed its Memorial on Jurisdiction, Merits and Quantum (the "**Memorial**"), accompanied by the witness statement of John C. Pennie (CWS-1) ("**Pennie Statement**"), and the expert valuation report of Deloitte LLP (CER-1) ("**Deloitte Report**").
54. On 10 August 2020, the Respondent asserted that the Claimant had in its Memorial inappropriately used information contained in unredacted videos of the hearing in the *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17) arbitration ("**Mesa Power**") that had been designated as confidential, and requested the Tribunal to order appropriate remedies.
55. On 18 August 2020, the Claimant submitted its "Response to Canada's Motion to Suppress Evidence from the Public and the Tribunal", accompanied by the witness statement of Ms. Parthenya Taiyanides (CWS-2). In its response, the Claimant requested the Tribunal reject the Respondent's 10 August 2020 request.
56. On 26 August 2020, the Respondent submitted its reply to the Claimant's submission of 18 August 2020.

57. On 2 September 2020, the Claimant submitted its rejoinder to the Respondent's reply of 26 August 2020, accompanied by the witness statement of Mr. Justin Giovannetti (CWS-3).
58. On 21 September 2020, the Respondent submitted its Memorial on Jurisdiction (the "**Counter-Memorial**") and, in a separate filing, its renewed request for bifurcation (the "**Renewed Request for Bifurcation**"), which was accompanied by the witness statement of Mr. Lucas McCall (RWS-1) ("**McCall Statement**"). In its Renewed Request for Bifurcation, the Respondent asked the Tribunal to bifurcate the proceedings and consider the Preliminary Objections as preliminary questions.¹³
59. On the same date, the Tribunal issued **Procedural Order No. 7**, by which the Tribunal dismissed the Respondent's request of 10 August 2020.
60. On 13 October 2020, the Claimant filed its response to the Respondent's Renewed Request for Bifurcation.
61. On 28 October 2020, the Respondent sought leave (a) to submit into the record as a new legal authority the *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Procedural Order No. 3 (Decision on Bifurcation), dated 20 October 2020 (the "**Westmoreland Decision**"); and (b) for both disputing Parties to file submissions on the relevance of the *Westmoreland* Decision to the Renewed Request for Bifurcation.
62. On 30 October 2020, at the Tribunal's invitation, the Claimant provided its response to the Respondent's 28 October 2020 request, stating that it "oppose[d] [it] based on practicality, delay, and cost." Further, in the event that the Tribunal decided to admit the *Westmoreland* Decision into the record, the Claimant argued that a specific procedure should then follow, according to which both the disputing and non-disputing Parties would be given the opportunity to file submissions and the Parties would then be given the opportunity to respond to the non-disputing Parties' submissions.
63. On 10 November 2020, the Tribunal informed the Parties that, prior to receipt of the Respondent's request concerning the *Westmoreland* Decision, it had already decided on the course to be followed in connection with the Respondent's Renewed Request for Bifurcation. As such, it saw no need to depart from that decision for purposes of receiving further submissions from the Parties on the *Westmoreland* Decision. Taking account of the fact that the *Westmoreland* Decision was

¹³ Renewed Request for Bifurcation, ¶ 2, 21-22.

already in the public domain, the Tribunal nevertheless granted the Respondent permission to submit it into the record, without comment from the Parties.

64. On 12 November 2020, the Tribunal issued **Procedural Order No. 8**, by which the Tribunal granted the Respondent's Renewed Request for Bifurcation, with the scope of the bifurcated jurisdictional hearing to be determined after the Claimant's filing of its ensuing submission on jurisdiction.¹⁴ In particular, the Tribunal determined that, while at least the First Objection warranted the bifurcation of the proceedings, it would decide whether the preliminary review of the Second Objection was appropriate after it had sight of the Claimant's Counter-Memorial on jurisdiction.¹⁵

E. BIFURCATED JURISDICTIONAL PHASE

65. On 30 November 2020, the Claimant submitted *inter alia* that "fairness and due process require" that there be document production in the preliminary phase of the proceedings. The Claimant further submitted that it should file its Reply on Jurisdiction only after the Respondent had filed its Counter-Memorial on merits and damages, and the proposed document production phase had occurred.
66. On 15 December 2020, the Respondent objected to the Claimant's 30 November 2020 submissions.
67. On 23 December 2020, the Tribunal, having considered the Parties' views, rejected the Claimant's proposal for document production in the preliminary phase of proceedings, and "confirm[ed] that, in accordance with PO1 and PO8, the Claimant's Reply on Jurisdiction shall be due on 11 January 2021. Thereafter, after determining whether the Second Objection will be addressed in the preliminary phase of the proceedings, the Tribunal shall fix the deadlines for the remaining procedural steps in accordance with the procedural calendar set out in Annex 1 of PO1."
68. On the same date, the Claimant (a) requested an extension from 11 January to 1 March 2021 for the filing of its next submission on jurisdiction; and (b) proposed a revised procedural calendar, which reflected corresponding adjustments to what it considered to be the remaining procedural events for this phase, namely the Reply and Rejoinder Memorials on Jurisdiction, the non-disputing Party submissions, and the disputing Parties' responses to those submissions.

¹⁴ Procedural Order No. 8, ¶¶ 39, 46.

¹⁵ Procedural Order No. 8, ¶ 44.

69. On 29 December 2020, the Respondent agreed to the Claimant's request to extend the deadline for the filing of its Reply on Jurisdiction. However, the Respondent objected to the Claimant's proposed procedural calendar, submitting its own proposal for a revised procedural calendar. The Respondent contended, in particular, that (a) reply and rejoinder memorials on jurisdiction were not necessary since both Parties would have each already completed two rounds of submissions on jurisdiction; and (b) the Claimant's proposed calendar did not account for the Tribunal's decision on the scope of the preliminary phase following the Claimant's Counter-Memorial on jurisdiction.
70. On 10 January 2021, the Tribunal (a) confirmed the Parties' agreement regarding the extension of the deadline for the filing of the Claimant's Reply on Jurisdiction; and (b) adopted the procedural calendar proposed by the Respondent.
71. On 1 March 2021, the Claimant filed its Counter-Memorial on Jurisdiction (the "**Reply**"), accompanied by the witness statements of Mr. John H. Tennant (CWS-2) and Mr. Derek Tennant (CWS-3), as well as the expert legal opinion of Hon. Margaret Grignon (CER-2) (the "**Grignon Report**").
72. On 10 March 2021, the Tribunal issued **Procedural Order No. 9**, *inter alia*, deciding on the scope of the bifurcated jurisdictional hearing and granting the Respondent's Renewed Request for Bifurcation in respect of both Preliminary Objections.
73. On the same day, the Claimant wrote to the Tribunal (a) contending that Procedural Order No. 9 erroneously "omits Tennant Energy's opportunity to respond by filing a Rejoinder Memorial on Jurisdiction", and proposing a modified procedural schedule for the remainder of the bifurcated jurisdiction phase correcting this alleged error; (b) requesting an extension from 15 to 30 days of the time period for the Parties to respond to the non-disputing Parties' submissions; and (c) requesting guidance on the length and dates for the bifurcated jurisdictional hearing.
74. On 12 March 2021, at the Tribunal's invitation, the Respondent responded, *inter alia*, (a) rejecting the Claimant's proposed schedule; and (b) raising no objections to the Claimant's extension request.
75. By letter dated 23 March 2021, the Tribunal (a) rejected the Claimant's proposed schedule and corresponding request to file an additional submission on jurisdiction after the Respondent's second submission on jurisdiction, on the basis that it had already decided this issue in its 10 January 2021 letter and saw no reason to depart from the said decision; (b) in the absence of any objections from the Respondent to the Claimant's request, the Tribunal confirmed that the time

period for the Parties to respond to the non-disputing Parties' submissions would be extended from 15 to 30 days; and (c) decided that the bifurcated jurisdictional hearing would take place over a maximum of four days, in the period from 15 to 19 November 2021, the final hearing schedule to be determined in the light of the Parties' agreement, if any, or submissions, in advance of the pre-hearing conference.

76. On 26 March 2021, the Respondent, *inter alia*, requested that the Tribunal make a final determination with respect to disputed confidentiality designations to exhibit C-108 and the videos of the hearing in *Mesa Power*.
77. On 5 April 2021, the Claimant submitted its response to the Respondent's request of 26 March 2021.
78. On 13 April 2021, the Respondent submitted its reply to the Claimant's response of 5 April 2021.
79. On 15 April 2021, the Tribunal issued Procedural Order No. 10 which set out in its Annex I the revised procedural calendar for the bifurcated jurisdictional phase.
80. On 20 April 2021, the Claimant submitted its rejoinder comments to the Respondent's reply of 13 April 2021.
81. On 1 May 2021, the Tribunal issued Procedural Order No. 11, adopting an amended procedural calendar for the Bifurcated Jurisdictional phase agreed upon by the Parties.
82. On 5 May 2021, the Tribunal issued **Procedural Order No. 12**, by which the Tribunal rejected the Respondent's request of 26 March 2021.
83. On 26 May 2021, the Respondent filed its Rejoinder Memorial on Jurisdiction ("**Rejoinder**"), accompanied by the expert legal opinion of Margaret G. Lodise (RER-1) (the "**Lodise Report**").
84. On 11 June 2021, the United States notified the Tribunal of its intention to make a written submission on matters of interpretation of the NAFTA in the bifurcated jurisdictional phase of the proceedings.
85. On 25 June 2021, Mexico and the United States filed their respective submissions regarding the Preliminary Objections pursuant to NAFTA Article 1128 ("**Mexico's Second Submission**" and the "**United States' Second Submission**", respectively)
86. On 26 July 2021, the Parties filed their respective Responses to the non-disputing Parties' submissions regarding the Preliminary Objections pursuant to NAFTA Article 1128 (the

“**Claimant’s Second Article 1128 Submission**” and the “**Respondent’s Second Article 1128 Submission**”).

F. HEARING ON JURISDICTION

87. On 27 August 2021, the Respondent proposed that the bifurcated jurisdictional hearing (the “**Hearing on Jurisdiction**”) take place in person in Toronto, Canada. In support thereof, the Respondent relied on paragraph 3.2 of Procedural Order No. 1, which provided that hearings may take place at locations other than Washington D.C., if so decided by the Tribunal after consultation with the Parties.
88. On 3 September 2021, the Claimant advised the Tribunal that it did not share the Respondent’s view about holding the Hearing on Jurisdiction in-person due to the on-going COVID-19-related health concerns and travel restrictions.
89. On 8 September 2021, the Tribunal decided that the Hearing on Jurisdiction would proceed by way of a videoconference, noting that virtual hearings had been conducted in numerous cases with good efficiency. The Tribunal further informed the Parties that, in accordance with paragraphs 13.1 and 13.2 of PO1, it would propose a draft virtual hearing protocol for the Parties to consider.
90. On 16 September 2021, the Respondent requested a ruling from a Tribunal for permission to submit into the record the Award in *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42) dated 30 August 2021 (the “**MAKAE Award**”).
91. On 16 September 2021, the Tribunal circulated a draft of Procedural Order No. 14 (a virtual hearing protocol for the Hearing on Jurisdiction) and invited the Parties’ comments thereon.
92. On 25 September 2021, at the Tribunal’s invitation, the Claimant noted that, to its knowledge, the *MAKAE Award* had not been released to the public and sought “clarification of the [*MAKAE Award*]’s status before being able to address whether this decision should be admitted into the record.”
93. On 8 October 2021, the Respondent explained that it had obtained a copy of the *MAKAE Award* through Investment Arbitration Reporter, an online subscription-based source.
94. On 14 October 2021, the Parties submitted their agreed proposed amendments to the draft Procedural Order No. 14. By separate correspondence of the same date, the Parties provided comments on outstanding points of disagreements on the draft Order.

95. On 16 October 2021, the Tribunal provided certain guidance to the Parties and directed them to confer with a view to reducing the number of outstanding issues relating to draft Procedural Order No. 14 in advance of the pre-hearing conference scheduled for 19 October 2021.
96. On 18 October 2021, the Parties submitted an updated version of the draft Procedural Order No. 14, noting that the issue of the hearing schedule remained outstanding.
97. Also on 18 October 2021, the Respondent recalled its 16 September 2021 request to have the *MAKAE* Award added to the record and inquired whether the Tribunal required anything further to assist in its decision on the matter.
98. On 19 October 2021, a pre-hearing conference was held by video-conference, in which counsel and representatives for both Parties, all members of the Tribunal, and the PCA participated, to discuss the organization of the Hearing on Jurisdiction, as well as the Respondent's request to add the *MAKAE* Award into the record.
99. On 25 October 2021, at the Tribunal's direction, the PCA wrote to ICSID seeking clarification in respect of the authenticity of the version of the *MAKAE* Award published in Investment Arbitration Reporter. On the same date, ICSID noted that the parties in the *MAKAE* case "have not consented to the publication of the Award to date", meaning that ICSID was "unable to address the authenticity or completeness of the version presented to the tribunal".
100. On 26 October 2021, following the Tribunal's direction, the Parties jointly proposed an indicative schedule for the Hearing on Jurisdiction for the Tribunal's consideration.
101. On 27 October 2021, the Tribunal requested that the Parties provide indicative timings for each step in their proposed draft hearing schedule. Following an inquiry from the Claimant of the same date, the Tribunal reiterated this direction to the Parties on 28 October 2021.
102. On 31 October 2021, the Parties submitted an agreed indicative schedule for the Hearing on Jurisdiction.
103. On 2 November 2021, the Tribunal issued **Procedural Order No. 14**, whereby the Tribunal made directions for the procedure of the Hearing on Jurisdiction and set forth a hearing schedule. As noted in Section 5.4 of Procedural Order No. 14, the non-disputing Parties notified the Tribunal that they did not expect to make oral submissions during the Hearing on Jurisdiction.
104. On 5 November 2021, the Respondent reiterated its request to add to the record the *MAKAE* Award.

105. On 8 November 2021, the Claimant provided its response to the Respondent's 5 November 2021 submission concerning the *MAKAE* Award.
106. On 9 November 2021, the Tribunal granted the Respondent's application to admit the *MAKAE* Award into the record. The Respondent filed the *MAKAE* Award on the same date.
107. The Hearing on Jurisdiction was held from 15 to 19 November 2021 by video-conference. The following persons attended the Hearing on Jurisdiction:

Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)
Mr. R. Doak Bishop
Sir Daniel Bethlehem KC

Claimant

Claimant's Representative, Tennant Energy LLC
Mr. John Pennie

Counsel, Reed Smith LLP
Mr. Edward Mullins
Ms. Sujey Herrera
Ms. Cristina Cardenas
Ms. Annabel Blanco
Mr. Kevin Hernandez
Mr. Jarol Guterrez

*Counsel, Appleton and Associates International
Lawyers LP*
Mr. Barry Appleton
Mr. Gabriel Marshall

Respondent

*Respondent's Counsel, Trade Law Bureau,
Government of Canada*
Ms. Heather Squires, Deputy Director and Senior
Counsel

Mr. Mark Klaver, Counsel
Ms. Alexandra Dosman, Counsel
Mr. Stefan Kuuskne, Counsel
Mr. Benjamin Tait, Paralegal
Ms. Krystal Girvan, Paralegal
Ms. Jessica Scifo, Articling Student
Mr. Scott Little, Deputy Director and Senior Counsel
Mr. Mark Luz, General Counsel
Mr. Jean-Francois Hebert, Senior Counsel

*Respondent's Representatives, Ministry of Energy,
Northern Development and Mines,
Government of Ontario*
Mr. Erik Guloien, Counsel
Ms. Karen Slawner, Senior Advisor
Mr. William Coutts, Senior Policy Advisor

*Respondent's Representatives, Investment Trade
Policy, Government of Canada*
Mr. Matthew Tone, Senior Trade Policy Analyst
Ms. Callie Stewart, Executive Director

*Respondent's Representatives, Ministry of Economic
Development, Job Creation and Trade,
Government of Ontario*
Ms. Saroja Kuruganty, Counsel
Ms. Margaret Kim, Counsel
Ms. Adrianna Militano, Senior Policy and Trade
Advisor

*Respondent's Representative, Independent Electricity
System Operator, Legal Services*
Ms. Eva Markowski, Counsel

*Respondent's Representative, Core Legal,
Trial Graphics
Ms. Gen Barlow*

Permanent Court of Arbitration

Mr. José Luis Aragón Cardiel, Legal Counsel
Ms. Clara Ruiz Garrido, Assistant Legal Counsel
Ms. Diana Pyrikova, Case Manager

Court Reporter

Mr. David Kasdan

Technical Support

Mr. Faraz Kahn, Law in Order

Observers

Mr. Romane S. Duncan
Ms. María Gómez

108. At the Hearing on Jurisdiction, the following fact and expert witnesses for the Claimant were cross-examined by the Respondent's counsel: Mr. Lucas McCall, Mr. John C. Pennie, Mr. John Tennant, Mr. Derek Tennant, and Justice Margaret Grignon.
109. At the Hearing, the following expert witness for the Respondent was cross-examined by the Claimant's counsel: Ms. Margaret G. Lodise.
110. Following discussions with the Parties at the close of the Hearing, the Tribunal issued questions to the Parties to be addressed in the Parties' respective post-hearing briefs, directing the Parties to make simultaneous submissions by 17 December 2021 and the Claimant to file a further submission, limited only to responding to the Respondent's submissions during the hearing on the matter of successor in interest, by 22 December 2021.

G. POST-HEARING PROCEEDINGS

111. On 17 December 2021, the Parties respectively submitted their post-hearing briefs (the Claimant's post-hearing brief (the "**Claimant's PHB**") and the Respondent's post-hearing brief (the "**Respondent's PHB**").
112. On 22 December 2021, the Claimant filed its Response to Canada's Post Hearing Brief on Transfers (the "**Response to the Respondent's PHB**").
113. On 16 February 2022, the Respondent filed a dual application (a) to submit into the record the Final Award in *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3), dated 31 January 2022 (the "**Westmoreland Award**"); and (b) for security for costs.

114. On 24 February 2022, at the Tribunal's invitation, the Claimant submitted its response to the Respondent's application of 16 February 2022.
115. On 20 April 2022, the Tribunal granted the Respondent's application to submit into the record the *Westmoreland* Award and invited the Parties to address the Award by 4 May 2022. As for the Respondent's renewed application for security for costs, the Tribunal indicated that it would address the issue in this Final Award.
116. On 4 May 2022, the Respondent filed its submission on the *Westmoreland* Award (the "**Respondent's Westmoreland Submission**"). Noting that its textual interpretation of NAFTA Article 1116(1) aligned with that advanced by the *Westmoreland* tribunal, with which all NAFTA Parties agreed, the Respondent maintained that the NAFTA offered no mechanism to assign investment claims to separate investors who did not hold the investment at the time of the alleged breach. According to the Respondent, the Claimant failed to satisfy the jurisdictional pre-requisites articulated in the *Westmoreland* Award because the Claimant's acquisition of the investment, after the alleged breach occurred for the purpose of bringing the NAFTA claims, did not constitute a *bona fide* transaction. Furthermore, the Respondent, *inter alia*, clarified that (a) NAFTA Article 1109 was a substantive obligation and thus was not relevant to the Tribunal's determination of its jurisdiction; (b) domestic law was not dispositive to the question of whether the right to bring a NAFTA claim may be assigned; and (c) a separate entity, like Tennant Energy that merely acquired the investment years after the alleged breach, could not be a "legal successor" who could continue a NAFTA claim.
117. On the same date, the Claimant filed its submission on the *Westmoreland* Award (the "**Claimant's Westmoreland Submission**"). According to the Claimant, the *Westmoreland* Award was inapposite because (a) the Claimant already owned and controlled the investment (*i.e.*, the Skyway 127 shares) at the time it had actual knowledge of the Respondent's breach of its NAFTA obligations; and (b) unlike the situation in *Westmoreland* where only specific claims were assigned to the claimant through bankruptcy, Tennant Energy was the "successor in interest" in relation to all rights and liabilities attached to the Skyway 127 shares, including any treaty claims, that Mr. John Tennant previously held. In any event, the Claimant considered that the *Westmoreland* tribunal erred by failing to take into account NAFTA Article 1109, which, according to the Claimant, permitted the transfer of a claim between foreign nationals insofar as there is no change in the underlying nationality. Consequently, the Claimant submitted that the Tribunal should not rely upon the *Westmoreland* Award, which was "contradictory to general principle of international law and by the *jurisprudence constante*".

118. On 26 May 2022, the Respondent requested that the Tribunal give advance notice regarding the issuance of its Award on Jurisdiction. The Claimant submitted its comments on such request the same day.
119. On 24 June 2022, the Tribunal invited the Parties to file submissions on costs. The Parties filed their respective Submissions on Costs on 15 July 2022 (the “**Claimant’s Costs Submission**” and the “**Respondent’s Costs Submission**”).

III. THE PARTIES’ REQUEST FOR RELIEF

A. THE RESPONDENT’S REQUEST FOR RELIEF

120. The Respondent requests that the Tribunal:¹⁶
- “(a) Dismiss the Claimant’s claim in its entirety and with prejudice on the grounds of lack of jurisdiction under NAFTA Articles 1116(1) and 1116(2);
 - (b) Order the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
 - (c) Grant any further relief it deems just and appropriate under the circumstances.”

B. THE CLAIMANT’S REQUEST FOR RELIEF

121. The Claimant requests that the Tribunal:¹⁷
- “a. Declare that Tennant Energy is an Investor as defined by NAFTA Article 1139 as of April 26, 2011 over Tennant Energy’s investment in Skyway 127 Wind Energy;
 - b. Declare that this Tribunal has jurisdiction over Tennant Energy’s NAFTA Chapter Eleven claim;
 - c. Dismiss Canada’s jurisdictional application in its entirety and order that this arbitration proceeds to the merits.
 - d. Award the costs, disbursements, and fees of the defense of this application on a full indemnity basis to the Investor, Tennant Energy.”

IV. FACTUAL BACKGROUND

122. The following sections will briefly summarize the facts giving rise to this dispute to the extent necessary to place the Parties’ arguments on the Preliminary Objections in context. This summary is not intended to set out all of the facts as alleged by the Parties or all of the Parties’ submissions.

¹⁶ Rejoinder, ¶ 109; Counter-Memorial, ¶ 159; Respondent’s PHB, ¶ 82.

¹⁷ Reply, ¶ 447. *See also* Claimant’s PHB, ¶ 154; Response to the Respondent’s PHB, ¶ 90.

A. THE CLAIMANT’S ALLEGED INVESTMENT

123. The Claimant’s primary position is that it “directly owns and controls Skyway 127, a wind project located in the province of Ontario, Canada”,¹⁸ and that it had “standing” as an investor under the NAFTA when its claim first arose on 15 August 2015 because, at the time, it “was effectively controlling Skyway 127, and it effectively owned 45.2% of the shares of Skyway 127.”¹⁹
124. To the extent that the Tribunal finds that the claim arose prior to 15 January 2015, when the Claimant allegedly acquired its 45.2% stake in Skyway 127, the Claimant maintains that it still “has standing to bring a claim.”²⁰ In particular, the Claimant avers that it “has standing to bring a claim regarding the period from April 26, 2011 to January 15, 2015” as it owned and controlled “a property right through its beneficial ownership of shares in Skyway 127 Wind Energy Inc.” that qualifies as a protected investment under the NAFTA.²¹

1. The Alleged Beneficial Ownership in the Shares of Skyway 127

125. As mentioned above, Skyway 127 was incorporated in Ontario, Canada on 18 October 2007.²² At the time of its constitution, Skyway 127 was 50% owned by I.Q. Properties Inc., a company with its address at 51 St. Lawrence St., ON L9Y 4Y3, Collingwood, Canada; 25 % owned by Mr. John C. Pennie; and 25% owned by Ms. Marilyn Field, both with their address at 3030 Concession Road 3 Adjala, ON L0N 1P0, Palgrave, Canada.²³
126. According to Messrs. John Pennie, John Tennant and Derek Tennant’s witness testimony, on 19 April 2011, Mr. John Tennant “agreed to allow the [437,500] Skyway 127 shares [that I.Q. Properties Inc. held at the time] to satisfy the debt” of CAD 200,000 on which Mr. Derek Tennant had defaulted.²⁴ Thereafter, on 26 April 2011, Mr. John Tennant “confirmed with Derek that I would nominate Tennant Travel Services, LLC to hold the Skyway 127 shares”,²⁵ and notified

¹⁸ Memorial, ¶¶ 112.

¹⁹ Memorial, ¶ 117.

²⁰ Reply, ¶ 7(a).

²¹ Reply, ¶¶ 2(a), 7(a). *See also* Reply, ¶¶ 115-119.

²² Skyway 127 - Certificate of Incorporation, 18 October 2007 (C-113).

²³ Shareholders and Transfers Register, Skyway 127, 18 October 2007 (C-140).

²⁴ Witness Statement of John Tennant, ¶ 18 (CWS-2). *See also* Pennie Statement, ¶ 47 (CWS-1); Witness Statement of Derek Tennant, ¶ 16 (CWS-3).

²⁵ Witness Statement of John Tennant, ¶ 19 (CWS-2). *See also* Witness Statement of Derek Tennant, ¶ 21 (CWS-3).

Mr. John C. Pennie, who was the corporate secretary of Skyway 127 at the time, that the shares should be transferred to Tennant Travel Services, LLC.²⁶

127. According to Skyway 127's shareholders and transfers register, on 20 June 2011, Tennant Travel Services, LLC did not hold any of its shares. Instead, Mr. John Tennant, with his address at 250 Greenfield Avenue, San Mateo, California, United States, held an 11.3% equity interest in Skyway 127.²⁷ The remaining portion of Skyway 127's shares at that time was held by:

- (a) GE Energy, LLC ("**GE Energy**"), a company with its address at 1 River Road, Schenectady, New York 12345, United States (total of 50% of the shares);
- (b) Premier Renewable Energy, Ltd. ("**Premier Renewable**"), a company with its address at Fransestraat 2, 6524 JA Nijmegen, the Netherlands (total of 25% of the shares);
- (c) Ms. Marilyn Field (total of 5.6% of the shares);
- (d) Mr. J. C. Pennie (total of 5.6% of the shares);
- (e) Mr. Earl Hughson, with his address at 17 Silver Spring Crescent, Uxbridge, Canada (total of 0.5% of the shares);
- (f) Mr. Al Lopez, with his address at 37 Fenwick Ave., Toronto, Canada (total of 0.3% of the shares);
- (g) Mr. Anthony Oram, with his address at 4168 Susan Court, Burlington, Canada (total of 0.3% of the shares);
- (h) Mr. Brad White, with his address at 3 May Street, Toronto, Canada (total of 0.3% of the shares);
- (i) Mr. Mohammad Al Zaibak, with his address at 112 Forest Hill Road, Toronto, Canada (total of 0.3% of the shares);
- (j) Cross Over Solutions Inc., a company with its address at 45A West Wilmot Street, Richmond Hill, Canada (total of 0.2% of the shares);
- (k) Mr. Fred Kahn, with his address at 1908 - 65 Harbour Square, Toronto, Canada (total of 0.2% of the shares);
- (l) Mr. Michael Harrison, with his address at 349 Sunnyside Avenue, Toronto, Ontario (total of 0.2% of the shares); and

²⁶ Witness Statement of John Tennant, ¶ 20 (CWS-2); Pennie Statement, ¶ 48 (CWS-1); Witness Statement of Derek Tennant, ¶¶ 22-24 (CWS-3).

²⁷ Shareholder's Ledger Skyway 127, 9 June 2011 (C-117).

- (m) Mr. Wayne Noble, with his address at 112 Forest Hill Road, Toronto, Canada (total of 0.2% of the shares).
128. As a result of the cancellation of Premier Renewable's shares, on 31 December 2011, Mr. John Tennant's shareholding increased from 11.3% to 22.6%.²⁸
129. As will be discussed in detail below, the Parties disagree on the date on which Mr. John Tennant first acquired shares in Skyway 127 and the capacity in which he held his shares.²⁹ According to the Claimant, although Mr. John Tennant's first acquisition of shares in Skyway 127 was officially recorded on 20 June 2011, it was in fact completed on 19 April 2011.³⁰ According to Mr. John C. Pennie, however, this was only because Skyway 127 was very busy at the time with managing its wind energy project.³¹ The Claimant further maintains that Mr. John Tennant acquired his shares in Skyway 127 to be held in trust, and designated Tennant Energy as the beneficiary owner of its shares on 26 April 2011 and 31 December 2011, respectively.³²
130. The Respondent, by contrast, contends that Mr. John Tennant acquired an 11.3% equity interest in Skyway 127 on the date recorded in the shareholders' ledger (*i.e.*, on 20 June 2011).³³ Moreover, the Respondent maintains that the Claimant has failed to provide sufficient evidence to prove its beneficial ownership of up to 22.6% of the shares in Skyway 127.³⁴
131. On 15 January 2015, the Claimant acquired 45.2% of the shares in Skyway 127 from Mr. John Tennant, Ms. Marilyn Field and Mr. John Pennie.³⁵

2. Skyway 127 Application to the FIT Program

132. On 27 November 2009, Skyway 127 submitted an application to the Ontario FIT Program (as defined below) for a 100 megawatts ("MW") on-shore wind project near the town of Port Elgin, with a connection point in the Bruce region.³⁶

²⁸ Shareholder's Ledger Skyway 127, 30 December 2011(C-114).

²⁹ Section VI.A.1. below.

³⁰ Reply, ¶¶ 69-70.

³¹ Pennie Statement, ¶ 47 (CWS-1).

³² Reply, ¶¶ 84, 154.

³³ Counter-Memorial, ¶ 32.

³⁴ Counter-Memorial, ¶ 88.

³⁵ Shareholder's Ledger Skyway 127, 15 January 2015 (C-115).

³⁶ Skyway 127 FIT Application, 27 November 2009, p. 26 (R-25).

B. THE FIT PROGRAM

133. On 24 September 2009, the Ontario Minister of Energy and Infrastructure (the “**Minister of Energy**”) directed the Ontario Power Authority (the “**OPA**”) to develop a Feed-in Tariff Program to procure energy from renewable energy sources in the province (the “**FIT Program**”).³⁷ Under the FIT Program, the OPA would negotiate long-term contracts with developers to design, build and operate renewable generating facilities in exchange of guaranteed, long-term pricing for their output.³⁸
134. On 30 September 2009, the OPA issued rules setting out the eligibility criteria for the program as well as the processes and criteria to evaluate applications (the “**FIT Rules**”);³⁹ and a model FIT contract (“**FIT Contract**”).⁴⁰ The FIT Program was formally launched by the OPA on 1 October 2009.
135. Applications for the FIT Program were regulated by two different procedures: (a) a special procedure for applications received during the first 60 days of the FIT Program (*i.e.*, from 1 October 2009 to 30 November 2009) (the “**Launch Period**”); and (b) a standard procedure for all subsequently-received applications.⁴¹ As mentioned above, Skyway 127 submitted its application to the FIT Program on 27 November 2009, which falls within the Launch Period.⁴² Under the Launch Period procedure, projects that had reached certain development milestones were granted priority access to available connection capacity.⁴³
136. During the Launch Period of the FIT Program, the OPA received about 930 FIT applications.⁴⁴ On 8 April 2010, the OPA announced that it had offered 184 FIT Contracts to applications submitted during the Launch Period for large projects (*i.e.*, projects exceeding a generation capacity of 500 kilowatts).⁴⁵ The Launch Period applicants that did not receive a FIT Contract

³⁷ Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, 24 September 2009 (**C-174**).

³⁸ Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, 24 September 2009, p. 2 (**C-174**).

³⁹ OPA, FIT Rules Version 1.1, 30 September 2009 (**C-162**).

⁴⁰ OPA, FIT Program Contract, v. 1.1, 30 September 2009 (**R-36**).

⁴¹ OPA, FIT Rules Version 1.1, 30 September 2009, Sections 13.2(a), 13.5 (**C-162**).

⁴² Skyway 127 FIT Application, 27 November 2009, p. 26 (**R-25**).

⁴³ OPA, FIT Rules Version 1.1, 30 September 2009, Section 13.5 (**C-162**); OPA, Feed-in Tariff Program, Program Overview, v. 1.1, 30 September 2009, p. 10 (**R-35**).

⁴⁴ OPA, Backgrounder, 8 April 2010, p. 2 (**R-34**).

⁴⁵ OPA, Backgrounder, 8 April 2010, p. 2 (**R-34**).

remained in “reserve” pending their re-assessments under certain conditions.⁴⁶ On 21 December 2010, the OPA published a priority ranking in respect of such projects.⁴⁷

137. On 17 February 2011, the Minister of Energy directed the OPA prepare a plan to meet the Ontario Government’s goal, in its 2010 Long-Term Energy Plan, to generate 10,700 MW of electricity from renewable energy sources other than hydroelectric by 2018.⁴⁸
138. Further to its direction of 17 February 2011, on 3 June 2011, the Minister of Energy directed the OPA to offer FIT Contracts for up to 750 MW in the Bruce region and up to 300 MW in the West of London transmission area.⁴⁹ Under this direction, the OPA was instructed to allow a five-day change window during which any FIT applicant in the Bruce and West of London regions could change its connection point.⁵⁰
139. As a result of this 3 June 2011 direction, the Claimant alleges that Skyway 127’s domestic competitor, Boulevard Associates Canada, Inc., “was able to move four of its unsuccessful West of London projects over to the Bruce Region”, which allowed it “to jump to the front of the priority line for the Bruce Transmission Region and bump ahead some of the projects, including Skyway 127, that had been in the top six in that area since the launch of the FIT Program.”⁵¹ Likewise, the Claimant contends that two other companies, International Power Canada (the “**IPC**”) and NextEra, were also able to change their connection points from the West of London to Bruce regions and obtain FIT Contracts to Skyway 127’s detriment.⁵² The Claimant further claims that the changes to the FIT Program under 3 June 2011 direction were a result lobbied for by NextEra.⁵³

⁴⁶ OPA, Feed-in Tariff Program, Program Overview, v. 1.1, 30 September 2009, p. 10, 25-26 (**R-35**).

⁴⁷ Feed in Tariff Program, Program Update, Priority ranking for First Round FIT Contracts, 21 December 2010 (**C-128**).

⁴⁸ Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 17 February 2011, p. 3 (**C-222**).

⁴⁹ Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 3 June 2011 (**C-176**).

⁵⁰ Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 3 June 2011, p. 2 (**C-176**).

⁵¹ Memorial, ¶ 248; OPA, FIT CAR Priority Ranking by Region, 3 June 2011 (**C-148**).

⁵² Memorial, ¶¶ 78-87, 251, 258-259.

⁵³ Memorial, ¶¶ 254-256; *Mesa Power Group, LLC v. Government of Canada* (PCA Case No, 2012-17), Hearing Transcript, Day 3 (Public Version), 28 October 2014, Testimony of Jim MacDougall, 225:5-9 (**C-121**); *Mesa Power Group, LLC v. Government of Canada*, (PCA Case 2012-17), Hearing Video, Day 3, Part 2 (Public Version), 28 October 2014, E-mail from Al Wiley (NextEra), 10 May 2011 [CONFIDENTIAL], 1:25:35 (**C-204**).

140. On 4 July 2011, the OPA awarded FIT Contracts for the available capacity on the Bruce to Milton Line.⁵⁴ While Skyway 127 was not offered a FIT Contract, it was informed by the OPA that “[a]t this time, your project will remain in the Priority Ranking and proceed to the Economic Connection Test.”⁵⁵
141. In the fall of 2011, the Office of the Auditor General of Ontario submitted its 2011 Annual Report to the Legislative Assembly of Ontario.⁵⁶ Among other matters, the report set out the observations and recommendations relating to the implementation of the Government’s renewable energy policy by the OPA and the Ministry of Energy, including the FIT Program and the Green Energy Investment Agreement (“**GEIA**”).⁵⁷ With respect to the FIT Program, the Auditor indicated *inter alia* that “[a] higher-than-anticipated number of renewable energy projects under the FIT program [were] awaiting connection to the distribution grid,” however, Ontario’s power grid could not accommodate all of the over 3000 pending FIT applications.⁵⁸ As to the GEIA (which is further described below), the Auditor pointed out, in July 2011, that this was amended to grant the Korean Consortium (described further below) a date extension for phases one and two of its projects and consequentially reduced the original price contract.⁵⁹
142. Following a two-year review of the FIT Program, on 12 June 2013, the Minister of Energy directed the OPA no longer to procure any additional MW under the FIT Program for large FIT projects.⁶⁰ The OPA was further directed to discontinue large FIT project applications submitted prior to the date of this direction and in relation to which a contract offer had not been made.⁶¹ Thus, pursuant to the 12 June 2013 Direction, Skyway 127’s application was discontinued.⁶²

C. THE GEIA

143. In December 2008, the Minister of Energy, on the one hand, and Samsung C&T and Korea Electric Power Corporation, on the other hand (together the “**Korean Consortium**”), signed a

⁵⁴ Bruce-Milton Contract List, 4 July 2011 (C-25).

⁵⁵ Notice of Arbitration, ¶ 73, *quoting* Letter from JoAnne Butler (OPA) to John Pennie (Skyway 127), 4 July 2011 (C-149). *See also* Memorial, ¶ 249; Reply, ¶ 266.

⁵⁶ Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt] (R-2).

⁵⁷ Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], p. 92-120 (R-2).

⁵⁸ Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], p. 91 (R-2).

⁵⁹ Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], p. 108 (R-2).

⁶⁰ Direction from Minister of Energy, Bob Chiarelli to Colin Anderson, OPA, 12 June 2013, p. 3 (C-152).

⁶¹ Direction from Bob Chiarelli, Minister of Energy to Colin Andersen, OPA, 12 June 2013, p. 3 (C-152).

⁶² *See* Direction from Bob Chiarelli, Minister of Energy to Colin Andersen, OPA, 12 June 2013, p. 3 (C-152).

memorandum of understanding regarding a proposal from the latter for an investment project in Ontario's renewable energy sector.⁶³

144. On 29 September 2009, the ongoing negotiations with the Korean Consortium were publicly announced.⁶⁴
145. By a direction dated 30 September 2009, the Minister of Energy advised the OPA that the "Government [was] exploring opportunities to further enable new green industries through new investment and job creation and provide incentives for investment in renewable energy technologies."⁶⁵ Against this backdrop, the Minister of Energy directed the OPA, "in carrying out the Transmission Availability Test under the FIT Program Rules", to "hold in reserve 240 MW of transmission capacity in Haldimand County and a total of 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities whose proponents have signed a province-wide framework agreement with the Province."⁶⁶
146. On 21 January 2010, the Minister of Energy and the Korean Consortium signed the GEIA.⁶⁷ Under this CAD 7-billion agreement, the Korean Consortium committed to build 2,000 MW of wind projects and 500 MW of solar projects in Ontario in five phases from 2012 to 2016.⁶⁸ On the same date, the Ontario Government announced the GEIA at the Toronto Stock Exchange and through a press release.⁶⁹
147. On 1 April 2010, referring to phase 1 of the GEIA, the Minister of Energy directed the OPA "to negotiate one or more power purchase agreements as appropriate with respect to each Phase [of the GEIA] with the Korean Consortium or appropriate Project companies."⁷⁰ The 1 April 2010

⁶³ Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], p. 108 (**R-2**).

⁶⁴ Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], p. 108 (**R-2**).

⁶⁵ Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, 30 September 2009 (**C-186**).

⁶⁶ Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, 30 September 2009 (**C-186**).

⁶⁷ Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment", 21 January 2010 (**R-41**); Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], p. 108 (**R-2**).

⁶⁸ Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment", 21 January 2010 (**R-41**); Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], p. 108 (**R-2**).

⁶⁹ The Canadian Press, "Korean Deal Approved: Wind, Solar Farms Coming to Ontario", 21 January 2010 (**R-42**); Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment", 21 January 2010 (**R-41**).

⁷⁰ Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010, p. 2 (**C-139**).

direction specified that, in accordance with section 5.2 of the FIT Rules, the OPA was to “give priority to projects within the scope of this direction when assessing transmission availability with respect to the FIT Program.”⁷¹ The Minister further clarified that the transmission capacity held in reserve pursuant to its direction of 30 September 2009 was for the Korean Consortium or its project companies.⁷²

148. According to the Claimant, however, the Korean Consortium failed to meet its obligations under Article 11.1(e) of the GEIA to notify its connection points and, as a result, “Ontario was not required to hold any transmission capacity back in the Bruce Transmission region for the Korean Consortium after July 30, 2010”⁷³ and was further entitled to terminate the GEIA.⁷⁴ Yet, the Claimant alleges, Ontario did not do so “for political reasons” and instead extended the deadlines under the GEIA, which resulted in the displacement of projects like Skyway 127.⁷⁵
149. On 3 August 2011, the Ontario Ministry of Energy announced changes to the GEIA, which included a one-year extension of the commercial operation date.⁷⁶
150. On 17 September 2010, the Minister of Energy further directed the OPA “in carrying out Transmission Availability Tests and Economic Connection Tests under the FIT Program Rules, to hold in reserve 500 MW of transmission capacity to be made available in the Bruce area in anticipation of the completion of the Bruce-Milton Transmission Reinforcement, for Phase 2 projects of the Korean Consortium or its Project Companies.”⁷⁷
151. The Claimant further alleges that from early 2010 to 13 September 2011, the Korean Consortium and its joint venture partner Pattern Energy “used the delay [in notifying connection points], to pick ‘low-hanging fruit’ – projects ranked too low to obtain a FIT contract – in the FIT process to then convert into GEIA projects.”⁷⁸

⁷¹ Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010, p. 2 (C-139).

⁷² Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010, p. 3 (C-139).

⁷³ Memorial, ¶ 214.

⁷⁴ Memorial, ¶ 215; Green Energy Investment Agreement, 21 January 2010, Art. 14.2(d) (C-210).

⁷⁵ Memorial, ¶ 76, 216.

⁷⁶ Ministry of Energy, Statement from Minister of Energy, the Honourable Brad Duguid, 3 August 2011 (C-147).

⁷⁷ Direction from Minister of Energy to OPA, 17 September 2010 (R-43).

⁷⁸ Memorial, ¶ 222-223; *Mesa Power Group, LLC v. Government of Canada* (PCA Case No, 2012-17), Hearing Transcript, Day 3 (Public Version), 28 October 2014, Testimony of Jim MacDougall, 200:19-201:19 (C-121).

152. The 2011 Auditor General's Report, which was made public on 5 December 2011, also addressed the GEIA and its relationship to the FIT Program.⁷⁹

D. ONTARIO'S HANDLING OF GOVERNMENT RECORDS

153. Among the alleged breaches of the NAFTA at issue in this arbitration, the Claimant argues that "[s]enior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness."⁸⁰ In support of this contention, the Claimant refers to two proceedings which, in its view, confirm the Government of Ontario's unlawful records management practices.⁸¹

1. Management of Documents Concerning Gas Plants Cancellation

154. Between 2012 and 2013, Ontario's Legislative Assembly conducted investigations in connection with the cancellation in 2010 and 2011 of two gas plants in Oakville and Mississauga, Canada.⁸² Within the framework of these investigations, the office of Minister of Energy and Premier of Ontario failed to submit documents it was directed to provide concerning the cancellation of the gas plants.⁸³ On 9 April 2013, Mr. Craig MacLennan, the Chief of Staff to the former Minister from January 2010 to August 2012, appeared before the Legislative Assembly and testified that the reason why he could not provide any responsive documents was because he had a practice of deleting all of his e-mails.⁸⁴
155. On 5 June 2013, the Information and Privacy Commissioner of Ontario issued a special investigation report addressing a complaint pertaining to the statement made by Mr. MacLennan.⁸⁵ The Commissioner concluded that the practice of indiscriminate deletion of all e-mails sent and received by the former Chief of Staff was in violation of the applicable recordkeeping rules and policies.⁸⁶ In addition, the Commissioner stated that, as part of her

⁷⁹ Office of the Auditor General of Ontario, 2011 Annual Report, 2011 [Excerpt], pp. 107-108 (**R-2**).

⁸⁰ Notice of Arbitration, ¶ 91.

⁸¹ Memorial, ¶¶ 262-268.

⁸² Information and Privacy Commissioner of Ontario, Deleting Accountability: Records Management Practices of Political Staff, 5 June 2013, pp. 4-6 (**R-3**).

⁸³ Information and Privacy Commissioner of Ontario, Deleting Accountability: Records Management Practices of Political Staff, 5 June 2013, p. 5 (**R-3**).

⁸⁴ Information and Privacy Commissioner of Ontario, Deleting Accountability: Records Management Practices of Political Staff, 5 June 2013, p. 5 (**R-3**).

⁸⁵ Information and Privacy Commissioner of Ontario, Deleting Accountability: Records Management Practices of Political Staff, 5 June 2013, p. 1 (**R-3**).

⁸⁶ Information and Privacy Commissioner of Ontario, Deleting Accountability: Records Management Practices of Political Staff, 5 June 2013, pp. 1-2 (**R-3**).

investigation, she verified that Mr. David Livingston, the Chief of Staff that preceded Mr. MacLennan, also had the practice of deleting all his e-mails.⁸⁷

156. On 7 June 2013, the Ontario Provincial Police launched a criminal investigation into the destruction of e-mails relating to the relocation and cancellation of the gas plants.⁸⁸

2. Claim for Spoliation of Documents in *Trillium Power v. Ontario*

157. In or around June 2015, Trillium Wind Power Corporation, a company that also applied to the FIT Program, amended its statement of claim in a lawsuit against the Government of Ontario to include claims for “the Willful Destruction or Suppression of Evidence relevant to a legal proceeding.”⁸⁹ The litigation initiated by Trillium concerned the cancellation in February 2011 of Trillium’s proposed off-shore wind power projects.⁹⁰

E. OTHER RELEVANT NAFTA PROCEEDINGS

158. In their submissions, the Parties refer to two previous investment treaty arbitrations conducted under the NAFTA that dealt with claims regarding the FIT Program.⁹¹ A brief description of those cases is provided below.

1. *Mesa Power Group, LLC v. Canada*

159. On 4 October 2011, Mesa Power Group, LLC, an American developer of renewable energy projects, commenced an arbitration against Canada pursuant to Article 1120(1)(c) of the NAFTA.⁹² The former claimed that Canada had breached a number of its obligations under

⁸⁷ Information and Privacy Commissioner of Ontario, *Deleting Accountability: Records Management Practices of Political Staff*, 5 June 2013, pp. 3-4 (**R-3**).

⁸⁸ Information and Privacy Commissioner of Ontario, *Addendum to Deleting Accountability: Records Management Practices of Political Staff*, 20 August 2013, p. 3 (**R-4**).

⁸⁹ *Destruction of Evidence Motion against Government of Ontario Granted by Court*, Trillium Power Wind Corporation media release, 22 June 2015 (**C-153**).

⁹⁰ *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, 12 November 2013, ¶¶ 1-2 (**CLA-99**).

⁹¹ See e.g. Memorial, ¶¶ 14-30, 729, 754-755; Counter-Memorial, ¶¶ 45-52.

⁹² *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011 (**R-5**).

Section A of the NAFTA by undertaking certain measures in respect of the application of the FIT Program.⁹³ In particular, the claimant alleged that Canada had breached:⁹⁴

“[I]ts obligation to provide National Treatment by providing more favorable transmission treatment to a Canadian company in like circumstances, Boulevard Associates Canada, Inc., and to local subsidiaries of members of the [Korean] Consortium, which was also in like circumstances.⁹⁵

[...]

[I]ts Most Favored Nation Treatment obligation (NAFTA Article 1103), when it provided more favorable transmission treatment to the local subsidiary of a company owned by a non-NAFTA party which was in like circumstances, namely the members of the [Korean] Consortium, than that provided to the Investor and its Investments.⁹⁶

[...]

[I]ts Article 1105 obligation through the Government of Ontario’s unfair, arbitrary and discriminatory actions. These measures include, but are not necessarily limited to, the following:

- a. Unannounced last-minute arbitrary changes, failing to fulfill the reasonable and legitimate expectations of the Investment;
- b. Failure to provide reasons for the ranking methodology applied by the Ontario Power Authority;
- c. Undue political interference and discriminatory treatment to the Investment and blatant favoritism to other investments;
- d. Failure to provide transparent administration of the FIT Program;
- e. Imposition of irrelevant political considerations when assessing the Investment; and
- f. Failure to apply relevant considerations such as the technical merits of the Investors wind farm.⁹⁷

[And]

[Article 1106 of the NAFTA by] impos[ing] prohibited local content requirements on the Investor and its Investments, as a precondition to obtain approval of contracts under the FIT Program.”

160. The tribunal in *Mesa Power* issued its final award on 24 March 2016, in which it dismissed in full the claimant’s claims.⁹⁸

2. *Windstream Energy, LLC v. Canada*

161. On 28 January 2013, Windstream Energy, LLC, a company incorporated in the United States, commenced an arbitration against Canada pursuant to Articles 1116, 1117 and 1120 of the

⁹³ *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶¶ 6, 70 (R-5).

⁹⁴ *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶ 68 (R-5).

⁹⁵ *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶ 58 (R-5).

⁹⁶ *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶ 60 (R-5).

⁹⁷ *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶ 62 (R-5).

⁹⁸ *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 706 (RLA-1).

NAFTA.⁹⁹ The dispute pertained to the administration of the FIT Program in respect of an offshore wind electricity generation project in Ontario.¹⁰⁰ Windstream Energy, LLC claimed that Canada violated a number of its obligations under Section A of Chapter Eleven the NAFTA by *inter alia* imposing a moratorium on the development of offshore wind that frustrated the claimant's attempts to develop a project under the FIT Program.¹⁰¹

162. On 27 September 2016, the tribunal in *Windstream Energy, LLC v. Canada* (“**Windstream Energy**”) issued its award, in which it held that the respondent breached Article 1105 of the NAFTA and dismissed the remaining claims submitted by the claimant.¹⁰²

V. THE CLAIMANT'S CASE ON MERITS AND QUANTUM

163. The Claimant claims that the Respondent breached Article 1105 of the NAFTA by failing to accord to Skyway 127 treatment in accordance with international law, including fair and equitable treatment and full protection and security.
164. The Claimant asserts that the Respondent's conduct in implementing and administering the FIT Program was wrongful. According to the Claimant:¹⁰³

“13. The Tennant NAFTA Claim is about:

- (a) Special business opportunities provided to a politically connected local favourite, IPC.
- (b) The “Breakfast Club” cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.
- (c) Ontario's decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127.
- (d) The delay of the award of contracts because of Korean Consortium's failure to comply with its contractual obligations.
- (e) The conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.”

⁹⁹ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 11 (**RLA-88**). See also *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Amended Notice of Arbitration, 28 January 2013 (**R-54**).

¹⁰⁰ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶¶ 5-7 (**RLA-88**).

¹⁰¹ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 5 (**RLA-88**).

¹⁰² *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 515 (**RLA-88**).

¹⁰³ Memorial, ¶ 13. See also Memorial, ¶¶ 89, 310, 717.

165. The Claimant claims damages as a result of the Respondent's alleged wrongful actions. The Deloitte Report assessed the midpoint value of damages to be not less than CAD 219,012,000, comprised of economic losses of CAD 184,012,000 (midpoint value) and the Claimant's claim for moral damages of CAD 35,000.¹⁰⁴ The alleged economic losses were calculated to include: (a) the alleged lost profits that Tennant Energy would have earned from its project, had a FIT Contract been obtained; and (b) the alleged costs already incurred by Tennant Energy in relation to preparing the project for commercial operation.¹⁰⁵ As regards moral damages, the Claimant avers that it is entitled to damages for the "reputational, psychological, and emotional harm" suffered by the corporate officials of Tennant Energy.¹⁰⁶ In addition, the Claimant seeks arbitration and legal costs.¹⁰⁷

VI. THE PARTIES' ARGUMENTS ON JURISDICTION

166. In the following Section, the Tribunal summarizes the Parties' arguments with respect to (A) two preliminary considerations, namely whether Articles 1116(1) and 1116(2) of the NAFTA constitute jurisdictional or admissibility requirements, and which Party bears the burden of proof; (B) the Respondent's First Objection, namely, that the Tribunal has no jurisdiction *ratione temporis* under Article 1116(1) because the Claimant was not an "investor of a Party" when the alleged breach occurred; and (C) the Respondent's Second Objection, namely that the Tribunal has no jurisdiction *ratione temporis* because the Claimant failed to submit its claim within the three-year limitation period established by Article 1116(2) of the NAFTA.

167. Both the United States and Mexico made submissions on the interpretation of Article 1116 of the NAFTA, and in particular on the question whether the fulfilment of the requirements of Article 1116 is a matter of jurisdiction or admissibility. As such, sub-sections summarizing each of the non-disputing Parties' arguments in this respect, and the disputing Parties' responses thereto, follow the summaries of the Parties' arguments.

¹⁰⁴ Memorial, ¶¶ 31(d), 889.

¹⁰⁵ Deloitte Report (CER-1), ¶ 4.2.4.

¹⁰⁶ Memorial, ¶¶ 894-899.

¹⁰⁷ Memorial, ¶¶ 900-903.

A. PRELIMINARY CONSIDERATIONS**1. The Respondent's Position**

168. The Respondent submits that compliance with Articles 1116(1) and 1116(2) of the NAFTA constitute jurisdictional requirements in respect of which the Claimant bears the burden of proof, as agreed by the non-disputing Parties.¹⁰⁸
169. The Respondent avers that, pursuant to Article 1122(1) of the NAFTA, its consent to arbitration is conditioned upon the fulfilment of the requirements imposed by the NAFTA, including those set forth in Articles 1116(1) and 1116(2).¹⁰⁹ It follows, the Respondent asserts, that the assessment of its objections under Articles 1116(1) and 1116(2) are questions of jurisdiction.¹¹⁰ According to the Respondent, the former has been consistently recognized by NAFTA tribunals.¹¹¹
170. The Respondent contends that the awards in *Pope & Talbot v. Canada* and *Feldman v. Mexico*, on which the Claimant relies, are not relevant to the question of whether Article 1116(2) raises admissibility or jurisdictional questions because neither of the tribunals ruled on that question.¹¹² Moreover, the Respondent observes that, although the *TECMED v. Mexico* tribunal concluded that compliance with a time limitation to bring a claim was not a jurisdictional matter under the applicable treaty, such position is inconsistent with the one adopted by numerous subsequent NAFTA tribunals and the NAFTA Parties.¹¹³ In any event, the Respondent notes that, as the *Mobil v. Canada* tribunal held, regardless of whether an objection under Article 1116(2) is characterized as an issue of jurisdiction or admissibility, that “the practical consequences are the same: if a

¹⁰⁸ Counter-Memorial, ¶¶ 55-61; Rejoinder, ¶ 12; Respondent's PHB, ¶ 5.

¹⁰⁹ Counter-Memorial, ¶ 55.

¹¹⁰ Counter-Memorial, ¶ 55.

¹¹¹ Counter-Memorial, ¶¶ 56-57; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶¶ 325-327 (**RLA-1**); *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 83 (**RLA-79**); *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 318, 335 (**RLA-80**); *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 145 (**RLA-121**); *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶¶ 324-326 (**RLA-4**). See also Hearing on Jurisdiction Transcript, Day 1, 22:23-23:7, referring to *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002 (**RLA-2**).

¹¹² Rejoinder, ¶¶ 13-14; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim of the Record (“The Harmac Motion”), 24 February 2000, ¶ 11 (**RLA-36**); *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 46-47 (**RLA-81**).

¹¹³ Rejoinder, ¶ 15; *Técnicas Medioambientales, TECMED, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 73 (**CLA-113**).

claimant has failed to comply with the limitation period set out in Article 1116(2), then the case cannot proceed.”¹¹⁴

171. As to burden of proof, the Respondent maintains that NAFTA tribunals have consistently held that it is for the claimant to establish that its claims fall within the scope of the NAFTA and within the tribunal’s jurisdiction, including that it qualified as an “investor of a Party” when the alleged breach occurred under Article 1116(1) and that its claim was timely under Article 1116(2).¹¹⁵ Concerning the Claimant’s assertion that the Respondent bears the burden of proof because the objections before the Tribunal at this stage are “affirmative defences”, the Respondent maintains that this is incorrect and lacks any basis.¹¹⁶ The Respondent asserts that Article 24(1) of the UNCITRAL Rules, referred to by the Claimant, “does not override the Claimant’s legal burden of establishing the Tribunal’s jurisdiction.”¹¹⁷ Further, the Respondent argues that the tribunal’s dictum in *Pope & Talbot v. Canada*, that an objection under Article 1116(2) constitutes an “affirmative defence”, should be disregarded as it has been discounted by numerous more recent decisions.¹¹⁸
172. In order to discharge its burden of proof, the Respondent further posits that a claimant must prove all the facts on which the jurisdiction of the tribunal rests.¹¹⁹ In support of this claim, the Respondent quotes the *Phoenix Action v. Czech Republic* tribunal, which held that for the establishment of its jurisdiction it must “ascertain that the prerequisites for its jurisdiction are

¹¹⁴ Counter-Memorial, ¶ 57; *Mobil Investments Canada Inc. v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 136 (**RLA-131**).

¹¹⁵ Counter-Memorial, ¶ 58; Rejoinder, ¶ 16; *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 150 (**RLA-80**); *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, 19 June 2007, ¶¶ 63, 122 (**RLA-65**); *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill, and Arthur Montour v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶ 122 (**RLA-132**), *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 328 (**RLA-4**). See also Respondent’s PHB, ¶ 54.

¹¹⁶ Rejoinder, ¶¶ 16-21.

¹¹⁷ Rejoinder, ¶ 19, David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Second Edition, 2012) [Updated Excerpt], p. 558 (**RLA-74**); *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 84 (**RLA-79**).

¹¹⁸ Rejoinder, ¶ 20; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 236 (**RLA-1**); *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 150 (**RLA-80**); *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 58-64 (**RLA-5**); *Bayview Irrigation District et al. v. United States of America*, UNCITRAL, Award, 12 January 2011, ¶ 122 (**RLA-132**), *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 328 (**RLA-4**).

¹¹⁹ Rejoinder, ¶ 16.

fulfilled, and that the facts on which its jurisdiction can be based are proven”.¹²⁰ For this reason, in the Respondent’s view, the Claimant’s position that, absent evidence of bad faith, the Tribunal should defer to the Claimant’s judgment about when its claim arose when assessing whether it complied with a jurisdictional requirement, is “unsupported and incorrect”.¹²¹

2. The Claimant’s Position

173. While the Claimant similarly agrees that this distinction is ultimately not material as a practical matter, it maintains, contrary to the Respondent’s position, that compliance with Articles 1116(1) and 1116(2) of the NAFTA constitute an admissibility requirement. In addition, specifically in relation to the Respondent’s time bar objection, the Claimant considers that the Respondent bears the burden of proving it because it is an affirmative defence.
174. The Claimant first submits that “the questions raised by Canada are fundamentally ones of admissibility rather than questions of jurisdiction”.¹²² With respect to the time limitation requirement in Article 1116(2) of the NAFTA, in particular, the Claimant observes that the tribunals in *Pope & Talbot v. Canada*, *Feldman v. Mexico* and *TECMED v. Mexico* adopted the same view.¹²³ Nevertheless, the Claimant contends that as a practical matter, the “Tribunal need not be overly concerned with this distinction as it might in other cases due to the sufficiency of evidence produced by Tennant Energy with respect to standing, and due to the absence of responsive evidence adduced by Canada on the issue of its affirmative defence on timing.”¹²⁴
175. In addition, the Claimant submits that the Respondent’s time bar objection under Article 1116(2) constitutes an affirmative defence, and, thus, that the Respondent bears the burden of proving sufficient facts to justify that particular objection.¹²⁵ In this regard, the Claimant contends that the Respondent “conflates the burden and standard of proof for admissibility with that for jurisdiction. Canada incorrectly suggests that they are the same.”¹²⁶ In fact, the Claimant asserts, not only has

¹²⁰ Rejoinder, ¶ 23; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 64 (**RLA-5**). See also Hearing on Jurisdiction Transcript, Day 1, 23:16-24:20.

¹²¹ Rejoinder, ¶ 23.

¹²² Reply, ¶ 183.

¹²³ Reply, ¶ 214, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim of the Record (“The Harmac Motion”), 24 February 2000, ¶ 11 (**RLA-36**); *Técnicas Medioambientales, TECMED, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 73 (**CLA-113**). See also *Marvin Roy Feldman Karpas v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002 (**RLA-81**).

¹²⁴ Reply, ¶ 183.

¹²⁵ Reply, ¶¶ 23, 191.

¹²⁶ Reply, ¶ 263.

the Respondent admitted that it bears the burden of proving its time bar objection,¹²⁷ but this position is also consistent with Article 24(2) of the UNCITRAL Rules, which provides that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”¹²⁸ The Claimant further relies on the *Pope & Talbot v. Canada* tribunal’s holding that it is for “Respondent States to bear ‘the burden of proof of showing [a] factual predicate’ to ‘an affirmative defense’.”¹²⁹

3. The Non-Disputing Parties’ Submissions

(a) Submissions of the United States and Mexico

176. The non-disputing Parties agree with the Respondent’s submission that the requirements set forth in Article 1116 are matters of jurisdiction.¹³⁰
177. With respect to consent to arbitration, Mexico, relying on *Methanex v. United States*, “concurs with Canada that fulfillment of Article 1116’s requirements is one of the conditions that must be met to establish a NAFTA Party’s consent” contained in Article 1122(1).¹³¹ Thus, Mexico affirms that “[f]ailure to comply with Article 1122(1) results in the absence of a NAFTA Party’s consent and thus, in the tribunal’s lack of jurisdiction.”¹³²
178. Likewise, the United States submits that “a tribunal must find that a claim satisfied the requirements of, *inter alia*, Article 1116 in order to establish a Party’s consent to (and therefore the tribunal’s jurisdiction over) an arbitration claim.”¹³³
179. As to the burden of proof, the non-disputing Parties agree that a claimant bears the burden of proving the factual elements necessary to establish the tribunal’s jurisdiction and the fulfilment of the specific legal requirements, including that each of its claims falls within the three-year

¹²⁷ Reply, ¶ 259; Respondent’s Response to Claimant’s Request for Interim Measures, 23 September 2019, ¶ 6.

¹²⁸ Reply, ¶¶ 23, 191.

¹²⁹ Reply, ¶ 192, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim of the Record (“The Harmac Motion”), 24 February 2000 (RLA-36).

¹³⁰ United States’ Second Submission, ¶ 3; Mexico’s Second Submission, ¶ 2.

¹³¹ Mexico’s Second Submission, ¶¶ 3-4, *referring to Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120 (RLA-2).

¹³² Mexico’s Second Submission, ¶ 2.

¹³³ United States’ Second Submission, ¶ 3.

limitations period provided in Article 1116(2).¹³⁴ This view, according to Mexico, is shared by all three NAFTA Parties and has been confirmed by NAFTA tribunals.¹³⁵

(b) The Respondent's Reply to the Submissions of the Non-Disputing Parties

180. As a threshold matter, the Respondent submits that concordant views expressed by the NAFTA Parties in their non-disputing Party submissions regarding the interpretation of their obligations constitute subsequent agreement and practice within the meaning of Article 31(3) of the 1969 Vienna Convention on the Law of Treaties (the “VCLT”).¹³⁶ Accordingly, the Respondent contends that, in line with other NAFTA tribunals, the Tribunal should give considerable weight to the “longstanding interpretation of Article 1116 that has been consistently maintained by all three NAFTA Parties”.¹³⁷
181. The Respondent emphasizes that the NAFTA Parties – as demonstrated in the Mexican and United States’ submissions – have consistently advanced the same position with respect to the burden of proof under Article 1116, namely that a claimant bears the burden of proving the factual elements necessary to establish jurisdiction.¹³⁸ This position, the Respondent continues, has been recognized and accepted by numerous NAFTA tribunals.¹³⁹
182. In a similar vein, the Respondent highlights that both Mexico and the United States agree with the Respondent that the fulfilment of the requirements of Article 1116 is one of the conditions that must be met to establish a NAFTA Party’s consent to arbitration and, in turn, to establish a tribunal’s jurisdiction.¹⁴⁰

(c) The Claimant's Reply to the Submissions of the Non-Disputing Parties

183. Disagreeing with the non-disputing Parties’ submissions, the Claimant reiterates that “the issue of time is best considered as an admissibility issue rather than as a jurisdictional one.”¹⁴¹ Accordingly, the Claimant takes the view that the burden of proof rests on the party advancing the admissibility the argument – the Respondent.¹⁴² The Claimant further contests the

¹³⁴ United States’ Second Submission, ¶ 3; Mexico’s Second Submission, ¶¶ 5, 13.

¹³⁵ Mexico’s Second Submission, ¶ 13, *referring to Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 85 (RLA-79).

¹³⁶ Respondent’s Second Article 1128 Submission, ¶¶ 5-6.

¹³⁷ Respondent’s Second Article 1128 Submission, ¶¶ 7-8, 11.

¹³⁸ Respondent’s Second Article 1128 Submission, ¶ 10.

¹³⁹ Respondent’s Second Article 1128 Submission, ¶10.

¹⁴⁰ Respondent’s Second Article 1128 Submission, ¶ 11.

¹⁴¹ Claimant’s Second Article 1128 Submission, ¶ 9.

¹⁴² Claimant’s Second Article 1128 Submission, ¶ 9.

Respondent's and the non-disputing Parties' assertions that the interpretations by the NAFTA Parties in the form of written pleadings are sufficient to constitute subsequent practice under VCLT.¹⁴³

184. The Claimant further objects to the non-disputing Parties' position that "the matter at hand is not properly one of consent".¹⁴⁴ Instead, the Claimant argues that the Respondent has given its consent to this arbitration in Article 1122(1) and that, contrary to Mexico's contention, such admission of consent meets any burden of proof.¹⁴⁵

B. THE FIRST OBJECTION

185. The Respondent submits that the Tribunal has no jurisdiction *ratione temporis* under Article 1116(1) because the Claimant was not an "investor of a Party" when the alleged breach occurred. Article 1116(1) provides:

"1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

- (a) Section A or Article 1503(2) (State Enterprises), or
- (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach."

186. The Claimant, on the other hand, contends that it has standing to submit the claims at issue in this arbitration pursuant to Article 1116(1) of the NAFTA as it was an "investor of a Party" when the alleged breaches occurred. On this basis, the Claimant requests that the Tribunal dismiss the First Objection.

1. The Respondent's Position

(a) Interpretation of Article 1116(1) of the NAFTA

187. The Respondent advances two interpretative considerations for the assessment of the First Objection.¹⁴⁶ First, the Respondent submits that claims submitted by a claimant on its own behalf

¹⁴³ Claimant's PHB, ¶¶ 151-153. See Claimant's First Article 1128 Submission, ¶¶ 42-44, referring to Martins Paparinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (Oxford University Press, First Edition, 2013), pp. 144-146 (CLA-97).

¹⁴⁴ Claimant's Second Article 1128 Submission, ¶ 10.

¹⁴⁵ Claimant's Second Article 1128 Submission, ¶ 10.

¹⁴⁶ Counter-Memorial, ¶¶ 62-79.

under Article 1116(1), such as those that have been brought by the Claimant, may only be brought by an “investor of a Party” that qualified as such at the time the alleged breach occurred.¹⁴⁷

188. According to the Respondent, the term “investor of a Party” in Article 1116(1) should be read together with Articles 1101(1) and 1139 of the NAFTA.¹⁴⁸ Article 1101(1) establishes that Chapter Eleven of the NAFTA applies to measures of a Contracting Party relating to, *inter alia*, (a) investors of another Party; or (b) investments of investors of another Party in the territory of the Party.¹⁴⁹ Article 1139 of the NAFTA, in turn, defines “investor of a Party” as “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;” and “investment of an investor of a Party” as “an investment owned or controlled directly or indirectly by an investor of such Party”.¹⁵⁰ Having regard to these provisions, the Respondent concludes that “[t]he proper interpretation of the term ‘investor of a Party’, as it operates within Article 1116(1), is that a tribunal’s jurisdiction *ratione temporis* is limited to claims submitted by a claimant who qualified as an ‘investor of a Party’ when the alleged breach occurred”.¹⁵¹
189. Additionally, the Respondent maintains that scholars and investment treaty tribunals, including tribunals established under the NAFTA, agree that, for a tribunal to have temporal jurisdiction, a claimant must be a protected investor under the treaty when the alleged breach occurred.¹⁵² The Respondent notes that in reaching that conclusion some tribunals have referred to the principle of

¹⁴⁷ Counter-Memorial, ¶ 67.

¹⁴⁸ Counter-Memorial, ¶¶ 65-67; Rejoinder, ¶ 28.

¹⁴⁹ Counter-Memorial, ¶ 65.

¹⁵⁰ Counter-Memorial, ¶ 66.

¹⁵¹ Counter-Memorial, ¶ 67.

¹⁵² Counter-Memorial, ¶¶ 68-74; Rejoinder, ¶ 28; *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶ 68 (**RLA-5**); *Cementownia “Nowa Huta” S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009, ¶ 112 (**RLA-139**); *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶¶ 146-147 (**RLA-140**); *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶¶ 325-329 (**RLA-1**); *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 529 (**RLA-141**); *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia*, PCA Case No. 2015-40, Award, 29 March 2019, ¶ 107 (**RLA-142**); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, ¶¶ 121-128 (**RLA-143**); *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S.A. v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 106-107 (**RLA-144**); *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, ¶ 300 (**RLA-145**); Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, First Edition, 2009) [Excerpt], ¶¶ 303, 631, and Rule 32 (**RLA-117**); Hanno Wehland, “The Transfer of Investments and Rights of Investors under International Investment Agreements — Some Unresolved Issues” (2014) 3(30) *Arbitration International*, p. 568 (**RLA-137**); Nelson Goh, “The Assignment of Investment Treaty Claims: Mapping the Principles” (2019) 1(10) *Journal of International Dispute Settlement*, p. 35 (**RLA-138**). See also Hearing on Jurisdiction Transcript, Day 1, 30:12-31:5.

non-retroactivity of international treaties, pursuant to which “State conduct cannot be governed by rules that are not applicable when the conduct occurs”.¹⁵³ According to the Respondent, NAFTA tribunals similarly have considered provisions such as Article 1116(1) and Article 1101(1) to be consistent with the principle of non-retroactivity.¹⁵⁴ For instance, the *Mesa Power* tribunal held that it lacked jurisdiction *ratione temporis* over certain measures that occurred before the claimant’s enterprises were incorporated in Canada, and thus, before it became a protected investor with respect to those investments.¹⁵⁵ In this respect, the Respondent underlines that the *Mesa Power* tribunal, referring to Article 1101(1), found that there is no jurisdiction if disputed measures are not “relating to investors” or to “investments of an investor.”¹⁵⁶

190. While the Claimant does not appear to challenge this legal principle, the Respondent notes, it erroneously contends that the date of the alleged breach is when “Tennant Energy became aware or could have become aware of the internationally wrongful act.”¹⁵⁷ In the Respondent’s view, however, for purposes of determining the Tribunal’s jurisdiction under Article 1116(1), the date of the alleged breach “is an objective event” which is not linked to a claimant’s subjective knowledge.¹⁵⁸ The former is consistent, the Respondent asserts, with paragraph 42 of Procedural Order No. 8, in which the Tribunal held that the First Objection is “separate from the question of whether the Claimant knew or should have known about the alleged breach”.¹⁵⁹
191. Second, the Respondent argues that the applicable standard of proof for establishing ownership of an investment requires the Claimant to provide cogent, reliable, contemporaneous documentary evidence.¹⁶⁰ The Respondent asserts that investment treaty tribunals have confirmed that an

¹⁵³ Counter-Memorial, ¶¶ 71-72, quoting *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 325 (**RLA-1**).

¹⁵⁴ Counter-Memorial, ¶ 72; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 325 (**RLA-1**); International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, Article 13 (**CLA-185**); Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 23 May 1969, Article 28 (**RLA-31**).

¹⁵⁵ Counter-Memorial, ¶ 70, referring to *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶¶ 325-327 (**RLA-1**).

¹⁵⁶ Counter-Memorial, ¶ 71, referring to *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 325 (**RLA-1**).

¹⁵⁷ Rejoinder, ¶ 29, referring to Reply, ¶ 171.

¹⁵⁸ Rejoinder, ¶ 30.

¹⁵⁹ Rejoinder, ¶ 30, quoting Procedural Order No. 8, ¶ 42.

¹⁶⁰ Counter-Memorial, ¶¶ 75-79; Rejoinder, ¶¶ 34-38; *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶¶ 325-326 (**RLA-4**); *Ampal-American Israel Corporation, EGI-FUND (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, ¶¶ 223-226 (**RLA-175**); *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 607 (**RLA-1**).

alleged investor cannot rely exclusively on (a) materials drafted in contemplation of arbitration; or (b) witness statements with a personal interest in the arbitration without any reliable corroborating evidence.¹⁶¹ Citing *Gallo v. Canada*, a case brought under the NAFTA, the Respondent points out that the tribunal declined jurisdiction as it deemed “unconceivable that the [c]laimant, after extensive discovery, ha[d] not been able to produce one single shred of documentary evidence, confirming the date when Mr. Gallo acquired ownership”.¹⁶² The Respondent emphasizes that, in that case, Mr. Gallo only relied on the testimony of a witness to prove his ownership and control over the investment at issue.¹⁶³

192. The Respondent also relies on *Ampal v. Egypt*, in which the tribunal determined that the claimants failed to prove that they beneficially owned the alleged investment as the evidence produced in this respect was limited to a witness statement and documents executed five years after the relevant transaction.¹⁶⁴ The Respondent underscores that the claimant in *Ampal v. Egypt* did not produce a trust deed evidencing the double blind trust had been submitted to that tribunal.¹⁶⁵
193. Third, the Respondent argues that nothing in the language of the Treaty, nor the jurisprudence thereof, offers a mechanism that allows an investor to “assign or sell” a potential NAFTA claim to another investor.¹⁶⁶ The Respondent, in this regard, emphasizes that a NAFTA Party’s consent to arbitration is specific to the disputing investor who brings a claim relating to the alleged breaches of specific obligations “owed to that investor”, which is filed “on its own behalf”.¹⁶⁷ Otherwise, the Respondent takes the view that the NAFTA Parties would have expressly established a mechanism authorising the assignment of claims, such as in the case of subrogation.¹⁶⁸

¹⁶¹ Counter-Memorial, ¶¶ 75-79; Rejoinder, ¶¶ 36, 38; *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 284 (RLA-4); *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award, 3 July 2008, ¶ 158 (RLA-150); *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶¶ 224-232 (RLA-151).

¹⁶² Counter-Memorial, ¶ 76, quoting *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 289 (RLA-4).

¹⁶³ Counter-Memorial, ¶ 76; *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶ 289 (RLA-4).

¹⁶⁴ Rejoinder, ¶ 36; *Ampal-American Israel Corporation, EGI-FUND (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, ¶¶ 223-226 (RLA-175).

¹⁶⁵ Rejoinder, ¶ 36, referring to *Ampal-American Israel Corporation, EGI-FUND (08-10) Investors LLC, EGI-Series Investments LLC,) BSS-EMG Investors LLC, and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, ¶ 223 (RLA-175).

¹⁶⁶ Respondent’s PHB, ¶¶ 17-18; Hearing on Jurisdiction Transcript, Day 5, 716:24-717:5, 718:15-21.

¹⁶⁷ Respondent’s PHB, ¶ 19; Hearing on Jurisdiction Transcript, Day 5, 717:5-7

¹⁶⁸ According to the Respondent, subrogation is an exception to the general rule that a claim cannot be assigned. It is a special case of assignment that arises where the investor has received an indemnity under

194. For the Respondent, permitting an investment claim under NAFTA to be assigned from one investor to another poses several risks: (a) NAFTA Parties may face duplicative domestic and international proceedings over the same alleged breach from the assignor and assignee, rendering the waiver provision in Article 1121(1)(b) meaningless; (b) it would incentivize claim shopping; (c) it would create significant uncertainty to NAFTA Parties with no predictability as to the scope of potential claimants; and (d) it would create leeway for investors to avoid personal liability for adverse costs orders.¹⁶⁹
195. The Respondent considers the cases cited by the Claimant inapposite because none of the tribunals found that a different investor or a “successor in interest” can initiate a claim about events that predated its acquisition of the investment, or that a claimant bringing a NAFTA claim need not be a protected investor when the alleged breach occurred.¹⁷⁰ The Respondent adds that inter-State cases are also irrelevant since the right of the States to bring claims under international law procedures of diplomatic protection are distinct from those of an investor to bring a claim under the NAFTA.¹⁷¹
196. In response to the Claimant’s argument that the Respondent’s interpretation may impede access to justice, the Respondent clarifies that its position is not applicable to situations where there is a continuation of “the same legal personality after a death, or corporate reorganization, under the applicable domestic law.”¹⁷²

(b) Whether the Claimant Complied with the Requirements of Article 1116(1)

197. In the present case, the Respondent argues, the Claimant has failed to establish that it was a protected “investor of a Party” when the alleged breaches occurred, and therefore, “the Tribunal has no jurisdiction *ratione temporis* [...] under Article 1116(1).”¹⁷³ In support of this position, the Respondent contends that (a) all of the challenged measures, and therefore the alleged breach,

an insurance claim. Respondent’s PHB, ¶ 21 and fn. 45; United States–Mexico–Canada Agreement (USMCA), 1 July 2020, Chapter 14-Investment, Art. 14.15 (CLA-294).

¹⁶⁹ Respondent’s PHB, ¶ 22.

¹⁷⁰ Respondent’s PHB, ¶ 24; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶¶ 40-44, 144 (CLA-309); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 237 (CLA-138); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction (Ancillary Claim), 14 January 2004, ¶ 52 (CLA-333).

¹⁷¹ Respondent’s PHB, ¶ 25.

¹⁷² Respondent’s PHB, ¶ 26.

¹⁷³ Counter-Memorial, ¶¶ 80-96.

occurred between 2008 and 2013;¹⁷⁴ and (b) during that period the Claimant did not own or control its alleged investment in Skyway 127.¹⁷⁵

i. The Alleged Breach Occurred between 2008 and 2013

198. As explained above, the Respondent contends that the date of the alleged breach for purposes of determining a tribunal's jurisdiction under Article 1116(1) is an objective event that is not linked to a claimant's subjective knowledge.¹⁷⁶ On this proposition, the Respondent submits that the alleged breach occurred between 2008 and 2013, which the Parties agree is the period during which all the challenged measures in this dispute were implemented.¹⁷⁷
199. According to the Respondent, the government measures and actions which the Claimant avers resulted in violations of the NAFTA may be categorized into three groups.¹⁷⁸ The first group of measures, according to the Respondent, concerns the Korean Consortium and occurred from December 2008 to 13 September 2011.¹⁷⁹ The actions impugned by the Claimant in this respect, the Respondent states, comprise: the negotiation and signature of the GEIA from December 2008 to 21 January 2010,¹⁸⁰ the Ministerial Directions from 30 September 2009 to 17 September 2010,¹⁸¹ the extension granted to the Korean Consortium by the Ontario Government on 3 August 2011¹⁸² and the Korean Consortium's purchase of lower-ranked FIT projects from early 2010 to 13 September 2011.¹⁸³
200. The Respondent asserts that the second group of impugned measures relate to the administration of the FIT Program and were implemented from 27 November 2009 to 12 June 2013.¹⁸⁴ The Respondent avers that these include: Skyway 127's application to the FIT Program on

¹⁷⁴ Counter-Memorial, ¶¶ 81-85.

¹⁷⁵ Counter-Memorial, ¶¶ 86-96.

¹⁷⁶ See above ¶ 190.

¹⁷⁷ Rejoinder, ¶ 31; Counter-Memorial, ¶¶ 81-85; Reply, ¶¶ 42.

¹⁷⁸ Counter-Memorial, ¶¶ 82-85.

¹⁷⁹ Counter-Memorial, ¶ 82.

¹⁸⁰ Counter-Memorial, ¶ 82; Office of the Auditor General of Ontario, *2011 Annual Report*, p. 108 (R-2); Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment", 21 January 2010 (R-41); Samsung C&T Press Release, "Samsung C&T, Korea Electric Power Company to Build World's Largest Wind, Solar Panel Cluster in Ontario", 21 January 2010 (C-132).

¹⁸¹ Counter-Memorial, ¶ 82; Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010 (C-139); Direction from Brad Duguid, Minister of Energy, to Colin Andersen, Ontario Power Authority, 17 September 2010 (R-43).

¹⁸² Counter-Memorial, ¶ 82; Office of the Auditor General of Ontario, *2011 Annual Report*, p. 108 (R-2).

¹⁸³ Counter-Memorial, ¶ 82; Renewables Now, "Pattern Energy, Samsung Renewable buy 180-MW Canadian wind project", 13 September 2011 (R-79).

¹⁸⁴ Counter-Memorial, ¶ 83.

27 November 2009, the Minister's Direction to the OPA of 3 June 2011 on allocating capacity from the Bruce to Milton Line,¹⁸⁵ the treatment afforded to NextEra and IPC in 2011, the FIT Contracts awarded on 4 July 2011,¹⁸⁶ and the Minister's Direction to the OPA on 12 June 2013 no longer to procure any additional MW under the FIT Program for large FIT projects.¹⁸⁷

201. The third group of challenged measures, the Respondent states, pertains to the handling of documents by Ontario and took place from August 2011 to February 2013.¹⁸⁸ These include the alleged destruction of documents by staff of the former Minister of Energy and Premier of Ontario.¹⁸⁹
202. As to the Claimant's argument that the Respondent's response to allegations made in the *Mesa Power* pleadings, and its application of confidential designations in the *Mesa Power* proceedings delayed and denied the Claimant's access to justice, the Respondent asserts that such alleged conduct does not constitute measures under the NAFTA and, therefore, are not a cause of action in their own right.¹⁹⁰
203. In light of the foregoing, the Respondent rejects the Claimant's argument that the date on which it purportedly acquired knowledge of the alleged breach is 15 August 2015.¹⁹¹

ii. The Claimant Was Not an "investor of a Party" When the Alleged Breach Occurred

204. In connection with the date on which the Claimant qualified as an "investor of a Party", the Respondent submits that the Claimant has failed to discharge its burden of establishing that it owned or controlled its purported investment when the alleged breaches occurred.¹⁹² In this respect, the Respondent rejects the Claimant's assertions that (a) it was the "successor[]" in interest" to the shares held by Mr. John Tennant either as the designated beneficiary of an oral

¹⁸⁵ Counter-Memorial, ¶ 83; Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 3 June 2011 (C-176); OPA, *FIT Rules Version 1.5*, 3 June 2011 (C-129).

¹⁸⁶ Counter-Memorial, ¶ 83; Bruce-Milton Contract List, 4 July 2011 (C-25).

¹⁸⁷ Counter-Memorial, ¶ 83; Direction from Minister of Energy, Bob Chiarelli to Colin Anderson, OPA, 12 June 2013, p. 3 (C-152).

¹⁸⁸ Counter-Memorial, ¶ 84.

¹⁸⁹ Counter-Memorial, ¶ 84; Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-10, 9 April 2013, p. 22 (R-50); Information and Privacy Commissioner of Ontario, *Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, 5 June 2013, pp. 4, 13, 23, and 25 (R-3).

¹⁹⁰ Hearing on Jurisdiction Transcript, Day 5, 740:13-741:16.

¹⁹¹ Hearing on Jurisdiction Transcript, Day 1, 25:15-22, 26:24-27:12.

¹⁹² Counter-Memorial, ¶¶ 86-96.

trust in April 2011 or by way of an assignment of NAFTA claims; and (b) it controlled its investment accordance with NAFTA case law.¹⁹³ Instead, the Respondent maintains that the Claimant became an “investor of a Party” at the earliest on 15 January 2015, when the Claimant acquired 45.2% equity interest in Skyway 127,¹⁹⁴ as supported by Skyway 127’s shareholder’s ledger.¹⁹⁵

(1) The Claimant failed to establish that it owned its investment when the alleged breach occurred

205. According to the Respondent, the Claimant’s “alternative theories” that it owned intangible property rights in the form of beneficial rights in up to 22.6% of the Skyway 127 shares by way of an oral trust and/or by way of a transfer of NAFTA claims are “incorrect, unsupported, and do not establish the Tribunal’s jurisdiction”.¹⁹⁶
206. With respect to the Claimant’s theory of an oral trust, the Respondent argues that the available evidence does not meet the “clear and convincing evidence” standard – a high evidentiary threshold – to prove its existence under California law and that the Claimant, as a result, failed to prove that it was a protected investor under NAFTA before the alleged breach occurred on 4 July 2011.¹⁹⁷ Specifically, given the absence of any contemporaneous documentary evidence to prove that Mr. John Tennant created the alleged trust, put the Skyway 127 shares in it, or designated Tennant Travel as the beneficiary, the Respondent contends that “[t]he available evidence is not strong enough to conclude that every reasonable person would agree that the alleged oral trust existed, as California law requires”, as concluded by Ms. Lodise.¹⁹⁸
207. First, the Respondent contends that the documents that the Claimant has submitted in support of its alleged beneficial ownership of Skyway 127 do not constitute reliable, contemporaneous documentary evidence necessary to prove that it acquired the investment through an oral trust.¹⁹⁹ These documents, in particular, comprise: the respective witness statements of Messrs. John

¹⁹³ Respondent’s PHB, ¶¶ 6-7.

¹⁹⁴ Counter-Memorial, ¶ 90; Respondent’s PHB, ¶ 42. *See also* Counter-Memorial, ¶ 87; Shareholder’s Ledger Skyway 127, 15 January 2015 (C-115).

¹⁹⁵ Counter-Memorial, ¶ 90; Shareholder’s Ledger Skyway 127, 15 January 2015 (C-115).

¹⁹⁶ Respondent’s PHB, ¶ 8.

¹⁹⁷ Counter-Memorial, ¶ 88; Respondent’s PHB, ¶¶ 30-31, 43; California Probate Code, Division 9 – Trust Law [15000-19530], Enacted by Stats. 1990, Ch. 79 [Excerpt], § 15207 (R-90); Hearing on Jurisdiction Transcript, Day 5, 729:1-19.

¹⁹⁸ Rejoinder, ¶ 56; Lodise Report ¶ 50 (RER-1). *See also* Rejoinder, ¶¶ 42-43; Lodise Report ¶¶ 32, 36-37 (RER-1).

¹⁹⁹ Rejoinder, ¶¶ 39-41; Respondent’s PHB, ¶ 31.

Tennant, Derek Tennant and John Pennie and a memorandum from Mr. John Tennant to the Claimant's management board dated 8 February 2016.²⁰⁰

208. Addressing the witness statements, the Respondent argues that they should be given “no weight”.²⁰¹ This is because, the Respondent explains, Messrs. John Tennant and Derek Tennant, as members of the Claimant's management board, and Mr. Pennie, as a senior executive for the Claimant, all have a personal interest in this arbitration.²⁰² The Respondent asserts that this is further reinforced by the fact that Mr. Derek Tennant is also the President of Skyway 127.²⁰³ In addition, the Respondent argues that Mr. Derek Tennant's and Mr. Pennie's statements on what Mr. John Tennant told them are merely “hearsay”.²⁰⁴ Thus, the Respondent contends that absent any reliable, contemporaneous documentary evidence to verify independently these witnesses' assertions, their witness statements are insufficient to prove the Claimant's alleged ownership rights, as observed by the tribunal in *MAKAE Europe v. Saudi Arabia*.²⁰⁵
209. Further, the Respondent argues that both written and oral witness testimonies consist of inconsistencies, revised statements, and variable recollections and therefore do not offer a reliable basis to establish the Claimant's acquisition of the investment before the alleged breach occurred.²⁰⁶ In particular, the Respondent notes that, without documentary evidence, the Tribunal has no way of resolving the inconsistencies in the testimonies on whether Tennant Travel was in fact a designated beneficiary of the trust on 26 April 2011,²⁰⁷ and on the four different purposes of the alleged trust, which arose during the Hearing on Jurisdiction.²⁰⁸

²⁰⁰ Rejoinder, ¶ 39; Memorandum from John Tennant to Tennant Energy regarding Trust transfer and successor in interest, 8 February 2016 (C-268).

²⁰¹ Counter-Memorial, ¶ 89; Rejoinder, ¶ 40.

²⁰² Rejoinder, ¶ 40; Counter-Memorial, ¶ 89; Respondent's PHB, ¶ 34; Witness Statement of John Tennant, ¶ 3 (CWS-2); Witness Statement of Derek Tennant, ¶ 2 (CWS-3); Pennie Statement, ¶ 68 (CWS-1).

²⁰³ Rejoinder, ¶ 40; Witness Statement of Derek Tennant, ¶ 2 (CWS-3).

²⁰⁴ Counter-Memorial, ¶ 89; Rejoinder, ¶ 40; Respondent's PHB, ¶ 34.

²⁰⁵ Counter-Memorial, ¶ 89; Rejoinder, ¶ 40; Hearing on Jurisdiction Transcript, Day 1, 33:21-35:1; *MAKAE Europe SARL v. Kingdom of Saudi Arabia*, ICSID Case No. ARB/17/42, Award, 30 August 2021 (RLA-205). See also Hearing on Jurisdiction Transcript, Day 1, 36:9-38:2.

²⁰⁶ Respondent's PHB, ¶ 38.

²⁰⁷ Respondent's PHB, ¶¶ 35-36; Hearing on Jurisdiction Transcript, Day 2, 254:18-21; Hearing on Jurisdiction Transcript, Day 3, 382:18-25-383:1-18, 407:20-23, 409:2-12, 454:11-15; Hearing on Jurisdiction Transcript, Day 4, 617:17-618:5; Pennie Statement, ¶ 48 (CWS-1).

²⁰⁸ Respondent's PHB, ¶ 37. According to the Respondent, the witnesses testified that the trust was created for four different purposes: (a) to avoid a community property dispute; (b) to prevent the dilution of voting control; (c) to avoid taxes; and (d) to maintain continuity of control over the shares. See Hearing on Jurisdiction Transcript, Day 2, 249:21-25; Hearing on Jurisdiction Transcript, Day 3, 382:18-25-383:1-18, 384:3-6, 469:2-5.

210. In this respect, the Respondent asserts that Mr. John Tennant's narrative regarding the creation of the alleged trust is unconvincing and unreliable.²⁰⁹ Drawing the Tribunal's attention to the following issues relating to Mr. John Tennant's witness testimony, the Respondent notes that:

- (a) Mr. Tennant first acquired shares in Skyway 127 because such shares served as a collateral for a loan to Mr. Derek Tennant for \$200,000.²¹⁰ Given the value of the loan, it is incongruous that Mr. John Tennant documented all matters concerning the loan and yet did nothing to document the alleged transfer of the shares into the alleged trust.²¹¹
- (b) Mr. Tennant's allegation that the Claimant served as a holding company for his shares in Skyway 127 is at odds with the lack of any documentary evidence on the record showing his ownership over the Claimant when the alleged breach occurred.²¹² In any event, the Respondent points out that Mr. Tennant could not explain the reason for creating a trust when he had already told Mr. John Pennie to transfer ownership of shares to the holding company that he would designate in the future.²¹³
- (c) Mr. John Tennant's assertion that he never owned shares in Skyway 127 for his personal benefit is not supported by any explanation as to why he allegedly relinquished his beneficial ownership in these shares.²¹⁴ The Respondent avers that this assertion "means, in effect, that he received nothing in return for his \$200,000 loan to Derek Tennant".²¹⁵
- (d) Mr. John Tennant's allegation that, at Mr. Derek Tennant's request, he intended to hold the Skyway 127 shares in a holding company so they could avoid any community property dispute is implausible.²¹⁶ Relying on the Lodise Report, the Respondent contends that if the trust was created to prevent Mr. John Tennant's spouse to access such shares, preserve continuity of legal ownership over shares and prevent dilution of voting control, the trust would be invalid under California law for violating public policy.²¹⁷ In any event, the

²⁰⁹ Rejoinder, ¶¶ 48-53.

²¹⁰ Rejoinder, ¶ 48.

²¹¹ Rejoinder, ¶¶ 48-49; Respondent's PHB, ¶ 33; John Tennant Bank Statements with copies of cashed checks to Derek Tennant, September 2007 (C-264); Promissory Note between I.Q. Properties and John Tennant, 19 October 2007 (C-265); Acknowledgement of Promissory Note between I.Q. Properties and John Tennant, 20 October 2007 (C-266); Demand Notice to I.Q. Properties from John Tennant on Promissory Note, 19 October 2011 (C-267).

²¹² Rejoinder, ¶ 50; Respondent's PHB, ¶ 41; Witness Statement of John Tennant, ¶ 18 (CWS-2). *See also* Hearing on Jurisdiction Transcript, Day 3, 362.

²¹³ Respondent's PHB, ¶ 41; Hearing on Jurisdiction Transcript, Day 3, 378:22-379:3.

²¹⁴ Rejoinder, ¶ 51; Witness Statement of John Tennant, ¶ 35 (CWS-2).

²¹⁵ Rejoinder, ¶ 51.

²¹⁶ Rejoinder, ¶¶ 52-53.

²¹⁷ Rejoinder, ¶ 52; Respondent's PHB, ¶¶ 37; Lodise Report, ¶ 40 (RER-1).

Respondent contends that the use of the alleged trust as an “asset protection device” without ensuring documentation certifying the trust is untenable.²¹⁸

211. The Respondent highlights that Messrs. John Tennant and Derek Tennant admitted during the Hearing on Jurisdiction that they had no contemporaneous documentation on certain key events to corroborate the existence or terms of the alleged oral trust.²¹⁹ Considering that all of the events from April 2011 – the point in time which the Claimant asserts it became a protected investor – are based merely on oral assertions, the absence of any contemporaneous documentation on the alleged trust, for the Respondent, strongly indicates that Mr. John Tennant never created the trust and that the Claimant never acquired the Skyway 127 shares at that time.²²⁰
212. In the Respondent’s view, Mr. John Tennant’s 8 February 2016 memorandum – the sole exhibit the Claimant filed in attempt to prove the existence of the trust – likewise does not constitute reliable evidence because it was created over a year after the trust was purportedly terminated, after the alleged breach occurred, and around the same time the Claimant’s counsel was “taking steps” to prepare the claims in this arbitration (*i.e.*, on 16 March 2015).²²¹ According to the Respondent, this document “is exactly the type of non-contemporaneous material prepared in contemplation of arbitration that tribunals have found unreliable.”²²²
213. Second, the Respondent submits that the evidence submitted by the Claimant in support of its alleged beneficial ownership of Skyway 127 fails to meet the applicable standard of proof under California law.²²³ Quoting the Lodise Report, the Respondent maintains that pursuant to Section 15207 of the California Probate Code “[t]he oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property”.²²⁴ Thus, the Respondent argues

²¹⁸ Rejoinder, ¶ 53; Lodise Report, ¶ 40-42 (**RER-1**).

²¹⁹ Respondent’s PHB, ¶ 32; Hearing on Jurisdiction Transcript, Day 3, 365:2-366:10, 372:7-19, 377:4-24, 378:22-379:7, 379:8-15, 414:17-415:10, 441:3-7, 446:3-22.

²²⁰ Respondent’s PHB, ¶¶ 32-33.

²²¹ Rejoinder, ¶ 41; Respondent’s PHB, ¶ 40; Memorandum from John Tennant to Tennant Energy regarding Trust transfer and successor in interest, 8 February 2016 (**C-268**).

²²² Rejoinder, ¶ 41; Respondent’s PHB, ¶ 40; *Vito G. Gallo v. Government of Canada*, PCA Case No. 2008-03, Award, 15 September 2011, ¶¶ 174, 216-219, 286-290 (**RLA-4**); *Ampal-American Israel Corporation, EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC, and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction, 1 February 2016, ¶¶ 223-226 (**RLA-175**).

²²³ Rejoinder, ¶¶ 42-45.

²²⁴ Rejoinder, ¶ 42; California Probate Code, Division 9 – Trust Law [15000-19530], Enacted by Stats. 1990, Ch. 79 [Excerpt], § 15207 (**R-90**).

that the alleged declarations of Mr. John Tennant, on their own, “cannot prove the existence of the alleged trust under California law.”²²⁵

214. The Respondent further argues that Justice Grignon’s opinion does not assist the Claimant’s position regarding the validity of the trust under California law.²²⁶ This is because, the Respondent contends, Justice Grignon’s view is based on the untenable and disputed assumption that the statements made by Messrs. John Tennant, Derek Tennant and John Pennie are true.²²⁷
215. Third, the Respondent contends that documentary evidence on the record discredits the Claimant’s asserted beneficial ownership of Mr. John Tennant’s shares in Skyway 127.²²⁸ In particular, the Respondent avers that Skyway 127’s shareholder’s ledgers of 9 June 2011, 20 June 2011 and 30 December 2011 contain no reference to the Claimant.²²⁹ The Respondent also notes that there was no written consent or direction to transfer the shares to the Claimant on 26 April 2011.²³⁰ In fact, the Respondent points out that Mr. John Tennant could not have transferred beneficial ownership of shares to Tennant Travel on 26 April 2011, given that he did not acquire the Skyway 127 shares until 20 June 2011.²³¹ Leaving aside the lack of any explanation as to why this may be the case, the Respondent argues that it is in any event unconvincing that any information on the trust allegedly created by Mr. John Tennant was not recorded in Skyway 127’s shareholder ledgers at the time Mr. John Tennant created the trust or thereafter.²³²
216. With respect to the Claimant’s second theory on assignment, the Respondent submits that the Tribunal has jurisdiction only if it finds that “Canada consent[ed] to arbitrate with Tennant Energy, not with [Mr.] John Tennant”.²³³ Therefore, the Tribunal’s jurisdiction, the Respondent argues, cannot be established simply because Mr. John Tennant owned the Skyway 127 shares when the alleged breach occurred and transferred them to the Claimant.²³⁴

²²⁵ Rejoinder, ¶ 43.

²²⁶ Rejoinder, ¶¶ 54-56; Respondent’s PHB, ¶ 39.

²²⁷ Rejoinder, ¶¶ 54-56; Grignon Report, ¶ 12 (CER-2). *See also* Hearing on Jurisdiction Transcript, Day 4, 525:23-527:25.

²²⁸ Rejoinder, ¶¶ 46-53.

²²⁹ Counter-Memorial, ¶ 90; Rejoinder, ¶ 46; Shareholder’s Ledger Skyway 127, 9 June 2011 (C-116); Shareholder’s Ledger Skyway 127, 20 June 2011 (C-117); Shareholder’s Ledger Skyway 127, 30 December 2011 (C-114).

²³⁰ Respondent’s PHB, ¶ 42. *See also* Hearing on Jurisdiction Transcript, Day 3, p. 439:3-19.

²³¹ Respondent’s PHB, ¶ 42; Shareholder’s Ledger Skyway 127, 20 June 2011 (C-117). *See* Hearing on Jurisdiction Transcript, Day 2, 243:9-11, 246:7-18.

²³² Rejoinder, ¶ 47.

²³³ Respondent’s PHB, ¶ 20; Hearing on Jurisdiction Transcript, Day 5, 716:2-5.

²³⁴ Respondent’s PHB, ¶ 20.

217. According to the Respondent, given that Mr. John Tennant and Tennant Energy have distinct legal personalities, this is also not a case where claims are transferred due to a continuation of the same legal personality.²³⁵ In this respect, the Respondent disagrees with Justice Grignon that the applicable law to determine whether NAFTA claims may be assigned by Mr. John Tennant is California law, not international law.²³⁶

218. In any event, the Respondent argues that the Claimant has failed to substantiate what specifically was being assigned by Mr. John Tennant: Mr. John Tennant confirmed that he could not assign the Skyway 127 shares with the February 2016 memorandum because he no longer held those shares as of January 2015.²³⁷

(2) *The Claimant failed to establish that it controlled its investment when the alleged breach occurred*

219. The Respondent further argues that the Claimant failed to discharge its burden of proving that it controlled the alleged investment at the time the alleged breach took place.²³⁸

220. As a preliminary matter, the Respondent contends that the Claimant has put forward arguments regarding its control over Skyway 127, when in fact its alleged investment is not this company but rather “intangible property rights in the form of beneficial rights” of up to 22.6% of Skyway 127 shares.²³⁹ It follows, the Respondent asserts, that the Claimant “has not articulated how it controlled this investment, beyond its unsubstantiated claim that it beneficially owned the shares” through an “unproven” trust.²⁴⁰

221. In any event, the Respondent submits that the Claimant did not control Skyway 127 when the alleged breach occurred as it “did not hold the majority of votes needed to elect a majority of the Skyway 127 board”.²⁴¹ Therefore, the Respondent contends, the Claimant did not comply with the requirements to hold control over Skyway 127 under Ontario law.²⁴²

²³⁵ Respondent’s PHB, ¶ 26.

²³⁶ Respondent’s PHB, ¶ 27; Hearing on Jurisdiction Transcript, Day 4, 505:17-25, 523:24-524:3, 553:18-22.

²³⁷ Hearing on Jurisdiction Transcript, Day 5, 716:10-17.

²³⁸ Rejoinder, ¶¶ 58-62.

²³⁹ Rejoinder, ¶ 58.

²⁴⁰ Rejoinder, ¶ 58; Respondent’s PHB, ¶ 44.

²⁴¹ Rejoinder, ¶ 59. *See also* Counter-Memorial, ¶¶ 93-94.

²⁴² Rejoinder, ¶ 59; Respondent’s PHB, ¶ 48; Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, § 1(5) (R-97). *See also* Hearing on Jurisdiction Transcript, Day 5, 720:7-16.

222. As to the Claimant's attempt to attribute to itself control over Skyway 127 when the alleged breach occurred through an alleged "voting bloc" comprising Mr. John Tennant, Mr. John Pennie, and Ms. Marilyn Field, the Respondent contends that it should be rejected.²⁴³ According to the Respondent, the votes of the alleged members of this "voting bloc", being votes of entities with a legal personality separate to the Claimant, are not attributable to the Claimant.²⁴⁴ In this respect, the Respondent refers to the testimonies of Messrs. John Tennant and Derek Tennant that Tennant Travel did not otherwise hold the rights to direct the actions of Skyway 127.²⁴⁵ Moreover, the Respondent notes that the alleged "voting bloc" only held 45.2% of the shares of Skyway 127, and therefore could not confer control of Skyway 127 under Ontario law.²⁴⁶ In any event, the Respondent argues that the Claimant fails to submit any evidence (a) of this "voting bloc", (b) that this change in the control over the company was notified to the OPA, as required under the FIT Rules, (c) that GE Energy, which held 50% of the Skyway 127 shares at the time of the alleged breach, did not exercise its voting rights, or (d) of the United States nationality of the three "active shareholders", which would be required to establish foreign control by the alleged "voting bloc".²⁴⁷
223. As to Mr. Pennie's assertion that Mr. John Tennant controlled the day-to-day decisions of Skyway 127, the Respondent maintains that it does not assist the Claimant's case.²⁴⁸ In its view, it is impossible to reconcile this assertion with the fact that Mr. John Tennant never held a position on Skyway 127's board of directors and management, and, in any event, it does not establish the Claimant's control over Skyway 127 at the relevant time.²⁴⁹ This is because, according to the Respondent, the Claimant retains separate legal personality from its owners and it is therefore impermissible to conflate the two for purposes of establishing control.²⁵⁰
224. Addressing the Claimant's argument that the Tribunal could still find jurisdiction because Mr. John Tennant owned both the Skyway 127 shares and 90% of the Claimant when the alleged breach occurred, the Respondent argues that the decision in *S.D. Myers v. Canada* is not helpful

²⁴³ Rejoinder, ¶ 60.

²⁴⁴ Rejoinder, ¶ 60.

²⁴⁵ Respondent's PHB, ¶ 49; Hearing on Jurisdiction Transcript, Day 3, 465:13-466:1.

²⁴⁶ Rejoinder, ¶ 61; Ontario Business Corporations Act, R.S.O. 1990, c. B.16 [Excerpt], s. 1(5) (**R-97**).

²⁴⁷ Rejoinder, ¶ 61; Respondent's PHB, ¶ 49.

²⁴⁸ Counter-Memorial, ¶ 95. In any event, the Respondent asserts that day-to-day operational management of an enterprise does not, on its own, establish control of the enterprise. See Respondent's PHB, ¶ 47; *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 497 (**RLA-141**).

²⁴⁹ Counter-Memorial, ¶ 95.

²⁵⁰ Counter-Memorial, ¶ 95.

in this regard.²⁵¹ This is because, according to the Respondent, the *S.D. Myers* tribunal offered no reasoning or interpretative guidance under NAFTA Article 1116(1) or international law as to how a claimant's corporate veil can be pierced to find jurisdiction based on whether its owners were protected investors at the time of the alleged breach.²⁵²

225. The Respondent emphasizes that nothing in the terms of the Treaty reflects the NAFTA Parties' intention to authorize tribunals to "suspend separate personality [of corporations] to find jurisdiction".²⁵³ According to the Respondent, the term "indirectly", in referring to ownership or control in the definition of "investment of an investor of a Party", only allows a tribunal to look down the corporate chain to determine if the claimant owned or controlled the investment via intermediaries it owned or controlled.²⁵⁴ For the Respondent, this does not mean that a claimant's veil can be pierced by looking up the corporate chain to determine if the claimant's owners owned or controlled the investment at the requisite times.²⁵⁵ Consequently, the Respondent takes the view that the Federal Court, in finding that the claimant qualified as an investor, also "improperly pierced the veil of the claimant".²⁵⁶
226. In fact, the Respondent contends that the Claimant has submitted "none of the evidence considered relevant by the tribunal or reviewing Federal Court in *S.D. Myers v. Canada* to show[] a claimant's control over an investment enterprise."²⁵⁷ This includes evidence that Tennant Travel advanced the money necessary for the operation of Skyway 127, or provided Skyway 127 with loans, technical assistance, personnel, or other forms of support, when the alleged breach occurred.²⁵⁸ The Respondent further highlights that no reliable evidence has been filed to support

²⁵¹ Respondent's PHB, ¶ 10; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 229 (**CLA-111**).

²⁵² Respondent's PHB, ¶¶ 12-13.

²⁵³ Respondent's PHB, ¶ 13.

²⁵⁴ Respondent's PHB, ¶ 14.

²⁵⁵ Respondent's PHB, ¶ 14. *See also* Hearing on Jurisdiction Transcript, Day 5, 713:2-13, 713:20-25, 714:8-715:6.

²⁵⁶ Respondent's PHB, ¶ 15; *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, ¶¶ 64, 67 (**R-80**).

²⁵⁷ Counter-Memorial, ¶ 96; *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, ¶ 64 (**R-80**); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 226 (**CLA-111**). *See also* Rejoinder, fn. 133; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶¶ 106-107 (**CLA-136**); *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶ 526 (**RLA-182**); *Aguas del Tunari, S.A., v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 264 (**RLA-183**); *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 220 (**RLA-121**); *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, ¶ 369 (**RLA-184**); *Vacuum Salt Products Limited v. Republic of Ghana*, ICSID Case No. ARB/92/1, Award, 16 February 1994, ¶ 53 (**RLA-185**).

²⁵⁸ Counter-Memorial, ¶ 96.

Mr. John Tennant's 90% ownership of the Claimant from 2011 to 2015 or the majority ownership of Skyway 127 by the Tennant family when the alleged breach occurred.²⁵⁹

227. In any event, the Respondent disagrees with the *S.D. Myers* tribunal's reasoning that a jurisdictional impediment should not prevent a tribunal from hearing an otherwise meritorious claim because, in the Respondent's view, the "potential strength of a claim on its merits cannot establish a NAFTA Party's consent to arbitration".²⁶⁰

2. The Claimant's Position

(a) Interpretation of Article 1116(1) of the NAFTA

228. In interpreting Article 1116(1) of the NAFTA, the Claimant agrees with the Respondent that reference must first be made to Article 1139, which defines "investor of a Party".²⁶¹ Noting that this definition is "broad",²⁶² the Claimant asserts that it encompasses "an enterprise of [a] Party, that seeks to make, is making or has made an investment."²⁶³ Article 1139, in turn, and by reference to Article 201 of the NAFTA, defines an "enterprise of a Party" as "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there",²⁶⁴ and an "enterprise" as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association".²⁶⁵
229. Further to the above, the Claimant advances two interpretative considerations with respect to Article 1116(1) of the NAFTA, only the second of which the Respondent appears to contest. First, the Claimant submits that beneficial interests in a company constitute intangible property rights protected as "investments" under Article 1139(g) of the NAFTA²⁶⁶ and that accordingly, a trust created in accordance with the laws of one of the NAFTA Parties qualifies as an "Enterprise of a Party" under Article 1139 of the NAFTA.²⁶⁷

²⁵⁹ Respondent's PHB, ¶ 16.

²⁶⁰ Respondent's PHB, ¶ 11.

²⁶¹ Reply, ¶ 91.

²⁶² Reply, ¶ 118.

²⁶³ Reply, ¶ 91.

²⁶⁴ Reply, ¶ 92.

²⁶⁵ Reply, ¶¶ 89-90.

²⁶⁶ Reply, ¶ 117.

²⁶⁷ Reply, ¶ 93.

230. In support of this position, the Claimant states that the definition of “investment” in Article 1139 covers in its paragraph (g) “property, tangible or intangible acquired in the expectation or used for the purpose of economic benefit”.²⁶⁸ “[I]ntangible property”, in the Claimant’s view, is a “very broad term”, which includes beneficial rights held by a trust as well as intangible property interests acquired in the expectation of economic benefit.²⁶⁹
231. The Claimant further submits that general international law recognizes the right of a beneficial owner to submit claims to international arbitration, in some instances even to the exclusion of the holders of a legal title.²⁷⁰ The Claimant maintains that this proposition has been acknowledged by the tribunals in *Mason Capital v. Korea* and *Blue Bank v. Venezuela* as well as in the *ad hoc* annulment committee in *Occidental v. Ecuador*.²⁷¹
232. Contrary to the Respondent’s contention, the Claimant argues that the assignment of rights to a claim is a form of investment that is transferrable under Article 1109 of the Treaty.²⁷² This is because intangible property that is protected under Article 1139 encompasses the assignment of rights.²⁷³ The Claimant adds that the NAFTA’s objective to “provide adequate and effective protection and enforcement of intellectual property” as set out in Article 102(d) is also relevant, given that the transfer rights (within the intangible property rights) are “in the same genus” as intellectual property rights.²⁷⁴ Conversely, the Claimant posits that there is nothing in the text of the Treaty that prohibits and restricts transfers of claims.²⁷⁵ In this respect, the Claimant clarifies that, unlike the United States-Mexico-Canada Agreement, which expressly prohibits subsequent claims arising from a subrogation, the NAFTA takes no steps to limit subrogation rights.²⁷⁶

²⁶⁸ Reply, ¶ 116.

²⁶⁹ Reply, ¶ 116-117.

²⁷⁰ Reply, ¶¶ 97-103.

²⁷¹ Reply, ¶¶ 98-102; *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent’s Preliminary Objections, 22 December 2019, ¶¶ 168-169 (CLA-311); *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, ¶172 (CLA-308); *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, ¶¶ 259, 262-264 (CLA-312).

²⁷² Claimant’s PHB, ¶ 88; Response to the Respondent’s PHB, ¶¶ 9-10.

²⁷³ Claimant’s PHB, ¶ 89; Response to the Respondent’s PHB, ¶ 11.

²⁷⁴ Response to the Respondent’s PHB, ¶¶ 25-27.

²⁷⁵ Response to the Respondent’s PHB, ¶¶ 21-23, 42.

²⁷⁶ Response to the Respondent’s PHB, ¶¶ 36-41, 43; United States-Mexico-Canada Agreement, Chapter 14 – Investment, Art. 14.15 (CLA-294). According to the Claimant, the Respondent also misconstrues subrogation by asserting that it is an exception to the general rule that a claim cannot be assigned. See Response to Respondent’s PHB, ¶¶ 46-49.

233. In response to the Respondent's argument that allowing the transfer of a claim would render the waiver provision in Article 1121 of the Treaty meaningless, the Claimant contends that the remedy to address the issue is "simple", namely, a NAFTA tribunal could order the filing of a waiver by any additional claimant before it, or the respondent State could ask the local court to stay the proceedings under the relevant local arbitration laws.²⁷⁷
234. The Claimant submits that "[n]o NAFTA case ever has denied jurisdiction regarding a transfer".²⁷⁸ Specifically, the Claimant relies on *Loewen Group v. United States* in which the tribunal, according to the Claimant, expressly confirmed the legitimacy of transfer of NAFTA claims under Article 1109 as long as there is no change in the claimant's nationality.²⁷⁹ Other international tribunals and authorities, the Claimant asserts, have recognized and accepted the transfer of claims and the successors in interest pursuing those claims.²⁸⁰
235. Second, contrary to the Respondent's contention, the Claimant argues that the legally relevant time for assessing whether the Claimant qualified as an "investor of a Party" is when it "became aware or could have been aware of the internationally wrongful act".²⁸¹ This is because, according to the Claimant, "[a] breach under the NAFTA does not occur until there is breach and knowledge of that breach".²⁸²

(b) Whether the Claimant Complied with the Requirements of Article 1116(1)

236. At the outset, the Claimant notes that the Respondent does not object to the Claimant's standing with respect to claims arising as of 15 January 2015, the date on which the Claimant obtained

²⁷⁷ Response to the Respondent's PHB, ¶¶ 66-69.

²⁷⁸ Response to the Respondent's PHB, ¶ 51.

²⁷⁹ Reply, ¶ 104; Claimant's PHB, ¶¶ 93-94; Response to the Respondent's PHB, ¶¶ 14-20; *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing on Respondent's Objection to Competence and Jurisdiction, 5 January 2001, ¶ 23 (CLA-285).

²⁸⁰ Claimant's PHB, ¶¶ 90-91, 95; Response to the Respondent's PHB, ¶¶ 52-55; *Daimler Financial Services Ag v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (CLA-309); *Gustave Caire (France) v. United Mexican States*, 13 June 1929 (CLA-322); *B. E. Chattin (U.S.A.) v. United Mexican States*, US-Mexico Claims Commission, 23 July 1927 (CLA-323); *Harry Roberts (U.S.A.) v. United Mexican States*, US-Mexico Claims Commission, 2 November 1926 (CLA-324); *Marguerite de Joly de Sabla (United States) v. Panama*, 29 June 1933 (CLA-325); Hanno Wehland, "The Transfer of Investments and Rights of Investors under International Investment Agreements – Some Unresolved Issues" (2014) 30(3) *Arbitration International* 565 (RLA-137); Nelson Goh, "The Assignment of Investment Treaty Claims: Mapping the Principles" (2019) 10(1) *Journal of International Dispute Settlement* 23 (RLA-138).

²⁸¹ Reply, ¶ 171.

²⁸² Reply, ¶ 271. *See also ibid*, ¶ 177.

legal ownership of 45.2% of the shares of Skyway 127.²⁸³ Therefore, the Claimant submits that “the Tribunal has unchallenged jurisdictional capacity with respect to those claims.”²⁸⁴

237. The Claimant maintains that it has standing to submit claims regarding the period from 26 April 2011 to 15 January 2015 pursuant to Article 1116(1) of the NAFTA as it beneficially owned the Skyway 127 shares under an oral trust validly created under California law.²⁸⁵ Even if there was no oral trust created, the Claimant argues that it is still a protected investor because Mr. John Tennant’s transfer of Skyway 127 shares to Tennant Energy encompassed a transfer of both tangible and intangible rights, including the right to bring claims under the NAFTA.²⁸⁶

i. The Claimant Became an “investor of a Party” on 26 April 2011

238. The Claimant submits that it qualifies as an “investor of a Party” under Article 1116(1) of the NAFTA given that it is (a) “an enterprise of [a] Party”; that (b) “made an investment” on 26 April 2011 in Canada.
239. Addressing the first element, the Claimant submits that it is a limited liability company constituted under California law, and consequently, a United States national as defined by the NAFTA.²⁸⁷ Likewise, the trust created by Mr. John Tennant through which the Claimant received beneficiary ownership of shares in Skyway 127 was, according to the Claimant, also constituted under the laws of the United States.²⁸⁸ Thus, the Claimant alleges that both itself and the trust created by Mr. John Tennant qualify as “enterprises of a Party” under Article 1139 of the NAFTA.²⁸⁹
240. Addressing the second element, the Claimant maintains that it made, and has had, an investment in Canada since 26 April 2011, when it was designated as the beneficial owner of Mr. John Tennant’s 11.3% interest in Skyway 127 shares through an oral trust.²⁹⁰ This investment, Claimant explains, increased on 31 December 2011 when Mr. John Tennant’s shareholding in Skyway 127 increased from 11.3% to 22.6%.²⁹¹ At that time, the Claimant asserts, Mr. John Tennant informed Mr. John Pennie, a member of the Claimant’s management, and Mr. Derek Tennant, President of Skyway 127, “that these new shares should be held the same way as the old

²⁸³ Reply, ¶ 138.

²⁸⁴ Reply, ¶ 431.

²⁸⁵ Reply, ¶ 2; Claimant’s PHB, ¶ 51.

²⁸⁶ Claimant’s PHB, ¶ 53.

²⁸⁷ Reply, ¶ 108.

²⁸⁸ Reply, ¶ 109.

²⁸⁹ Reply, ¶ 109.

²⁹⁰ Reply, ¶¶ 84, 88; Grignon Report, ¶ 33 (CER-2).

²⁹¹ Reply, ¶ 153; Shareholder’s Ledger Skyway 127, 30 December 2011 (C-114).

shares”.²⁹² The Claimant alleges that on 15 January 2015, “the Trust shares were formally moved to Tennant Travel” and that, on the same date, the Claimant “received additional Skyway 127 shares bringing Tennant Travel’s legal ownership stake to 45.2%.”²⁹³

241. The Claimant submits that it has filed sufficient evidence to demonstrate its rights as the beneficial owner of the Skyway 127 shares held by Mr. John Tennant from 26 April 2011 to 15 January 2015.²⁹⁴ In particular, the Claimant contends that its rights are evidenced by (a) the witness testimonies of Messrs. John Pennie, Derek Tennant and John Tennant; (b) a memorandum sent by Mr. John Tennant to the Claimant’s management dated 8 February 2016; and (b) the Grignon Report.²⁹⁵
242. The Claimant first points to the testimony of Mr. Pennie who “can offer the best evidence about the treatment of the [Skyway 127] shares by [the Claimant]” because he is a member of the Claimant’s board of directors and its corporate representative.²⁹⁶ In his witness statement, the Claimant notes, Mr. Pennie “confirmed that” Tennant Energy received the shares in trust from Mr. John Tennant, who held the shares as a bare trustee.²⁹⁷ Likewise, Mr. Derek Tennant, the President of Skyway 127, asserted in his witness statement that he was aware that the shares obtained by Mr. John Tennant on 19 April 2011 were held for a company incorporated in the United States to be designated in future in trust.²⁹⁸ As for the testimony of Mr. John Tennant, the Claimant submits that he corroborated that on 26 April 2011 he informed Messrs. Derek Tennant and John Pennie that the Skyway 127 shares he acquired on 19 April 2011 in trust should be for the benefit of the Claimant.²⁹⁹ He further testifies, the Claimant notes, that on 8 February 2016 he sent a memorandum to the Claimant in which he made specific reference to the Skyway 127 shares as being held in trust in favour of Tennant Energy.³⁰⁰
243. The Claimant contends that the above-mentioned witness statements are material and should be admitted in accordance with Article 4(2) of the 2010 International Bar Association Rules on the Taking of Evidence in International Arbitration, which are applicable to the present proceedings

²⁹² Reply, ¶ 154; Witness Statement of John Tennant, ¶ 26 (CWS-2).

²⁹³ Reply, ¶ 157; Skyway 127 Energy Inc Shareholder’s Ledger, 15 January 2015 (C-115).

²⁹⁴ Reply, ¶ 127.

²⁹⁵ Reply, ¶¶ 128-135.

²⁹⁶ Reply, ¶ 127.

²⁹⁷ Reply, ¶ 128; Pennie Statement, ¶¶ 48, 66 (CWS-1).

²⁹⁸ Reply, ¶ 131; Witness Statement of Derek Tennant, ¶¶ 24-26 (CWS-3).

²⁹⁹ Reply, ¶¶ 84; Grignon Report, ¶ 33 (CER-2); Claimant’s PHB, ¶ 74. See Hearing on Jurisdiction Transcript, Day 3, 377:6-13, 412:12-17.

³⁰⁰ Reply, ¶ 133; Memorandum from Mr. John Tennant to Tennant Energy, 8 February 2016 (C-268).

pursuant to paragraph 8 of Procedural Order No. 1 and Article 25(6) of the UNCITRAL Rules.³⁰¹

This provision makes clear, in the Claimant's view, that "there is no prohibition on the Tribunal receiving evidence from persons who are corporate officers."³⁰²

244. Further, and contrary to the Respondent's contention, the Claimant maintains that this witness testimony is not "hearsay" because it was given by individuals directly involved in the relevant transaction.³⁰³ In any event, regardless of whether this evidence is hearsay, the Claimant argues that under Article 25(6) of the UNCITRAL Rules, this evidence "must be admitted and given serious weight given its materiality and relevance."³⁰⁴
245. Turning to the opinion of Justice Grignon, the Claimant relies thereon to assert that, as a matter of Californian law, the witness statements and supporting documents on the record demonstrate that "John [Tennant] created an oral trust on April 19, 2011, and as of April 26, 2011, he held the Skyway 127 shares as trustee in trust for Tennant Travel, subsequently renamed Tennant Energy".³⁰⁵
246. As explained by Justice Grignon, the Claimant submits that an oral trust was created under California law when (a) the trustee Mr. John Tennant resided in the State of California between 2007 and 2015; (b) Mr. John Tennant declared on 19 April 2011 that he would be holding the Skyway 127 shares in a trust for a holding company; (c) he identified the holding company and the beneficiary of the trust as Tennant Travel on 26 April 2011; and (d) the purpose of the trust was to hold shares for the benefit of a company to prevent dilution of voting control.³⁰⁶ According to the Claimant, it is not necessary under California law to name a specific beneficiary as long as there is an identifiable class of beneficiaries – in this case, a holding company that Mr. John Tennant would designate in the future.³⁰⁷ In addition, the Claimant considers irrelevant the fact that the shares themselves were not shown as transferred on the corporate records until later because it is not disputed that either the company shares or simply the right to those shares can constitute trust property under California law.³⁰⁸

³⁰¹ Reply, ¶¶ 73, 75; International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 29 May 2010, Article 4(2) (**RLA-87**).

³⁰² Reply, ¶ 73; International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 29 May 2010, Article 4(2) (**RLA-87**).

³⁰³ Reply, ¶ 74.

³⁰⁴ Reply, ¶ 75.

³⁰⁵ Reply, ¶ 83; Grignon Report, ¶ 28 (**CER-2**).

³⁰⁶ Reply, ¶ 82-85; Grignon Report, ¶¶ 21-22, 28 (**CER-2**); Claimant's PHB, ¶¶ 58-60, 63-64. *See also* Hearing on Jurisdiction Transcript, Day 5, 802:19-24.

³⁰⁷ Claimant's PHB, ¶ 62; Hearing on Jurisdiction Transcript, Day 5, 803:2-23.

³⁰⁸ Claimant's PHB, ¶ 61; Hearing on Jurisdiction Transcript, Day 4, 644:12-20.

247. The Claimant likewise contends that Mr. John Tennant's 8 February 2016 memorandum to the Tennant Energy Management Board confirms the creation of the trust, consistent with his witness testimony.³⁰⁹ In response to the Respondent's criticism of the veracity of the memorandum, the Claimant points out that the memorandum in fact is consistent with the Skyway 127's share registry, which shows the transfer of shares to Mr. John Tennant's name in 2011, and then to Tennant Travel in January 2015.³¹⁰
248. In light of the foregoing, the Claimant submits that it has proved that Mr. John Tennant held Skyway 127 shares for the benefit of Tennant Travel from 19 April 2011 under the clear and convincing standard as required by California law.³¹¹ Contrary to the Respondent's contention, the Claimant asserts that the clear and convincing standard requires only high probability; completely consistent evidence is not required.³¹² As to the Respondent's argument on the lack of contemporaneous documents, the Claimant argues that, as opined by Ms. Lodise, "there does not have to be contemporaneous writing to proven an oral trust" under California law.³¹³
249. According to the Claimant, the witness testimony at the Hearing on Jurisdiction was consistent with the testimony in the witness statements. There is also no conflicting testimony that actually denies the declaration of the trust by Mr. John Tennant.³¹⁴ Indeed, the Claimant highlights Ms. Lodise's concession that the testimony of Messrs. Derek Tennant and John Pennie could be considered corroboration of the existence of the trust under California law.³¹⁵ As such, the Claimant takes the view that there is sufficient evidence from witness testimony and surrounding evidence to satisfy the clear and convincing standard as applied in California.³¹⁶ It therefore argues that Tennant Travel, as the holding company, held an intangible property interest in the Skyway 127 shares as an equitable interest as of 26 April 2011.³¹⁷
250. Alternatively, even assuming *arguendo* that no oral trust was created, the Claimant submits that it is the successor in interest to the Skyway 127 shares held by Mr. Tennant, including all rights

³⁰⁹ Claimant's PHB, ¶ 67; Memorandum from John Tennant to Tennant Energy regarding Trust transfer and successor in interest, 8 February 2016 (C-268).

³¹⁰ Claimant's PHB, ¶ 67; Shareholder's Ledger Skyway 127, 20 June 2011 (C-117); Shareholder's Ledger Skyway 127, 15 January 2015 (C-115).

³¹¹ Claimant's PHB, ¶ 71.

³¹² Claimant's PHB, ¶¶ 72-73; *Butte Fire Cases*, 24 Cal. App. 5th 1150 (2018) (CLA-335); *Fahrney v. Wilson*, 180 Cal. App. 2d 694, 695 (1960) (CLA-301).

³¹³ Claimant's PHB, ¶ 57.

³¹⁴ Claimant's PHB, ¶ 65.

³¹⁵ Claimant's PHB, ¶ 65; Hearing on Jurisdiction Transcript, Day 4, 657:13-18.

³¹⁶ Claimant's PHB, ¶ 75.

³¹⁷ Reply, ¶ 85; Claimant's PHB, ¶¶ 69-70; Grignon Report, ¶ 35 (CER-2); Hearing on Jurisdiction Transcript, Day 4, 535:19-25, 626:9-24. *See also* Hearing on Jurisdiction Transcript, Day 4, 626:13-15, 626:22-24.

affixed to the shares, by obtaining legal title to the shares through a transfer that occurred in 15 January 2015.³¹⁸ This transfer of shares, the Claimant continues, “automatically became the assignment and legally transferred the intangible rights” originally held by Mr. John Tennant, including any chose of action that he would have as a shareholder.³¹⁹ Moreover, the Claimant notes that the transfer occurred more than two years before 1 June 2017 (*i.e.*, the date of the making of its claim) and earlier than the date of the discovery by Mr. John Pennie in August 2015 with respect to the Respondent’s breaches of its NAFTA obligations.³²⁰

251. Additionally, as opined by Justice Grignon, the Claimant maintains that it was not necessary to assign separately any “choses in action”, including the rights under the NAFTA that Mr. John Tennant had at the time of the assignment, along with the shares, because “whatever rights he had as a shareholder, whether it’s as trustee or as a shareholder” were “automatically” conveyed with the shares as a matter of California law.³²¹ The Claimant stresses that the Respondent has filed no contrasting expert testimony in this regard.³²²
252. Having put forward its arguments regarding the existence and validity of the shares it beneficially owned through Mr. John Tennant, the Claimant submits that such rights constitute intangible property acquired in the expectation of economic benefit under Article 1139(g) of the NAFTA.³²³ Thus, the Claimant maintains that the rights it held in respect of Skyway 127 from 26 April 2011 to 15 January 2015 fall within the sphere of protected investments under the NAFTA.³²⁴
253. Although, in its view, the determination of its ownership over Skyway 127 is sufficient to conclude that it has standing under Article 1116, the Claimant avers that it also exercised control over its investment.³²⁵ The Claimant asserts that Mr. John Tennant, following his decision to hold his shares in trust in favour of the Claimant, “reached an agreement with other shareholders that he would get the last word in the voting bloc.”³²⁶
254. The Claimant specifies that it had effective voting control of Skyway 127 as of 31 December 2011, when Mr. John Tennant increased his shareholding in the company from 11.3% to 22.6%

³¹⁸ Claimant’s PHB, ¶¶ 76-78, 96-97; Response to the Respondent’s PHB, ¶¶ 77-80, 83.

³¹⁹ Hearing on Jurisdiction Transcript, Day 5, 819:5-7, 839:12-17.

³²⁰ Response to the Respondent’s PHB, ¶ 80.

³²¹ Claimant’s PHB, ¶ 53, 83; Hearing on Jurisdiction Transcript, Day 5, 816:17-20. *See also* Response to the Respondent’s PHB, ¶¶ 72.

³²² Claimant’s PHB, ¶ 78. *See also* Hearing on Jurisdiction Transcript, Day 4, 611:22-25.

³²³ Reply, ¶¶ 116-117.

³²⁴ Reply, ¶¶ 116-117.

³²⁵ Reply, ¶¶ 141-169.

³²⁶ Reply, ¶ 149; Witness Statement of John Tennant, ¶ 25 (CWS-2).

and informed Messrs. John Pennie and Derek Tennant that “the trust would continue to vote the shares with Derek and John Pennie to control the company”.³²⁷ According to the Claimant, although GE Energy held 50% of the shares of Skyway 127, it never exercised its voting rights.³²⁸ It follows, the Claimant asserts, that “the control went to those who wished to vote, and to those who showed up to vote”.³²⁹ In support of this position, the Claimant further relies on Mr. Pennie’s witness testimony, who states that Mr. “John Tennant as Trustee controlled Skyway 127”.³³⁰

255. The Claimant considers the definition of “control” under Ontario law irrelevant for the purposes of interpreting the NAFTA because, in its view, the terms of the Treaty should be interpreted in accordance with applicable rules of international law, as required by Article 1131(1) of the Treaty, in particular, when the text of the Treaty does not impose any local law requirements in defining the terms.³³¹ The Claimant notes that the Federal Court of Canada in the *S.D. Myers* case reached the same conclusion.³³² Therefore, it is the Claimant’s view that the ordinary term “control” requires “the ability to get one’s own way” under the circumstances, but does not depend upon 50.1% shareholding.³³³
256. With respect to the issue of “piercing the corporate veil”, the Claimant asserts that the *S.D. Myers* case is highly relevant in understanding an investor’s “control” of an investment made by a family corporation.³³⁴ Specifically, the Claimant highlights that the *S.D. Myers* tribunal took broad steps to preserve an otherwise meritorious claim affected by a problematic corporate structure, after considering the objectives of the Treaty to protect all forms of economic activity that resulted in the holding of investments and the sufficiency of circumstances regarding the investment.³³⁵ The correctness of these jurisdictional findings by the *S.D. Myers* tribunal, the Claimant continues, was confirmed by the Federal Court in its judicial review.³³⁶

³²⁷ Reply, ¶ 154.

³²⁸ Reply, ¶ 166.

³²⁹ Reply, ¶ 166.

³³⁰ Reply, ¶ 145; Pennie Statement, ¶ 48 (CWS-1).

³³¹ Claimant’s PHB, ¶¶ 127-134; Response to the Respondent’s PHB, ¶ 65.

³³² Claimant’s PHB, ¶¶ 135-136; *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, ¶¶ 68-69 (R-80).

³³³ Claimant’s PHB, ¶¶ 115-116.

³³⁴ Claimant’s PHB, ¶¶ 99, 122.

³³⁵ Claimant’s PHB, ¶¶ 102-111; *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, ¶ 229 (CLA-111); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶¶ 119-121 (CLA-193); *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz, 12 November 2000, ¶¶ 38-39 (CLA-336).

³³⁶ Claimant’s PHB, ¶¶ 123, 125; *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, ¶ 68 (R-80).

257. Accordingly, rejecting the Respondent's contention that the facts in this case are dissimilar to those in the *S.D. Myers* case, the Claimant posits that the "broad and purposive approach" taken by the *S.D. Myers* tribunal should be applied in this arbitration for the following reasons:³³⁷

- (a) The Claimant's claims deal with entities owned and controlled by members of the Tennant family.³³⁸
- (b) While Mr. John Tennant did not own the majority of shares, he had the "last word over decisions".³³⁹
- (c) Members of the Tennant family worked in concert regarding the Skyway 127 Project.³⁴⁰
- (d) The purpose of the "family business" was similar to that of the Myers family, namely to benefit the local investment for the family. In this respect, the basic *raison d'être* of Skyway 127, the Claimant notes, was to promote and serve the interests of Tennant Energy.³⁴¹
- (e) Tennant Energy and Skyway 127 were affiliated companies with common control, just as *S.D. Myers Inc.* was affiliated with *Myers Canada*.³⁴²

ii. The Alleged Breaches Occurred in August 2015

258. As explained above,³⁴³ the Claimant's position is that the alleged breaches at stake in this arbitration took place in August 2015, when it first became aware or could have been aware of the Respondent's internationally wrongful acts.³⁴⁴ The Claimant further asserts that because its claims challenge composite acts that involve the concealment of wrongful acts, the alleged breach should be deemed to have occurred "when the victim discovered the wrong".³⁴⁵

259. As will be detailed below (*see* section VI.C.2(b) below), the Claimant contends that it was only after August 2015, when the post-hearing written submissions and other materials related to the hearing in *Mesa Power* were made available to the public, that it became possible to acquire

³³⁷ Claimant's PHB, ¶¶ 112, 122.

³³⁸ Claimant's PHB, ¶ 114.

³³⁹ Claimant's PHB, ¶¶ 115-117.

³⁴⁰ Claimant's PHB, ¶ 118.

³⁴¹ Claimant's PHB, ¶¶ 119, 121.

³⁴² Claimant's PHB, ¶ 120.

³⁴³ *See* ¶ 235 above.

³⁴⁴ Reply, ¶ 171.

³⁴⁵ Reply, ¶ 271.

knowledge of the core facts underlying its claims.³⁴⁶ In support of its claim that it did not know of the alleged breaches before August 2015, the Claimant cites to the witness statement of Mr. John Pennie.³⁴⁷

260. Notwithstanding this, the Claimant submits that even if the Tribunal concluded that the breaches occurred when the Claimant was placed on a FIT priority waiting list (*i.e.*, on 4 July 2011) or when the FIT Program was terminated (*i.e.*, on 12 June 2013) the Tribunal would still have jurisdiction because these events occurred after the Claimant became an “investor of a Party” on 26 April 2011.³⁴⁸

261. The Claimant therefore concludes that it owned and controlled its investment in Skyway 127 regardless of when the Tribunal determines the alleged breaches to have taken place, and, as a result, it has standing to bring the claims at issue in this arbitration under Article 1116(1) of the NAFTA.³⁴⁹

3. The Non-Disputing Parties’ Submissions

(a) Submissions of Mexico and the United States

262. The non-disputing Parties agree that a claimant must prove that it was an “investor of a Party” when the alleged breach occurred to establish jurisdiction under Article 1116(1).³⁵⁰

263. According to Mexico, no obligation is owed to a claimant in the absence of a threshold connection between a claimant bringing the claim and the challenged measure under Section A of Chapter Eleven.³⁵¹ As such, Mexico agrees with the Respondent that Articles 1101(1) and 1116(1) set a temporal limitation on a NAFTA tribunal’s jurisdiction, requiring the existence of an investor of a Party at the time of the alleged breach.³⁵²

264. Similarly, the United States points out that the terms “the investor” and “that breach”, in Article 1116(1) require that the investor bringing the claim be the same investor who suffered loss or damage as a result of the alleged breach.³⁵³ To the contrary, nothing in Chapter Eleven,

³⁴⁶ Reply, ¶¶ 173-175.

³⁴⁷ Reply, ¶ 172; Pennie Statement, ¶ 50 (CWS-1).

³⁴⁸ Reply, ¶ 137.

³⁴⁹ Reply, ¶¶ 134, 176.

³⁵⁰ United States’ Second Submission, ¶ 11; Mexico’s Second Submission, ¶ 6.

³⁵¹ Mexico’s Second Submission, ¶ 7.

³⁵² Mexico’s Second Submission, ¶ 6.

³⁵³ United States’ Second Submission, ¶ 10.

the United States asserts, authorizes an investor to bring a claim for an alleged breach relating to a different investor.³⁵⁴

265. According to the United States, the waiver provision in Article 1121(1)(b) offers context for interpreting Article 1116(1).³⁵⁵ The waiver provision, the United States explains, ensures that a NAFTA respondent need not litigate concurrent and overlapping proceedings in multiple forums relating to the same alleged breach.³⁵⁶ The United States warns that if Article 1116(a) was interpreted as to allow an investor, who is different from the investor who had made the investment at the time of the alleged breach, to bring a claim, respondents might be subject to domestic and international proceedings with respect to the same alleged breach, rendering the waiver provision meaningless.³⁵⁷

(b) The Respondent's Reply to the Submissions of the Non-Disputing Parties

266. According to the Respondent, Mexico “correctly notes that the requisite connection between a claimant and a challenged measure under Section A cannot be met until the claimant became a protected investor”.³⁵⁸ Therefore, the Respondent reiterates that an investor can establish jurisdiction for a claim under Article 1116(1) only if it was an investor of a Party who suffered the loss or damage as a result of the alleged breach.³⁵⁹ As observed by the United States, the Respondent asserts that a different interpretation of Article 1116(1) would render the waiver provision in Article 1121(1)(b) meaningless and “incentivize claim shopping”.³⁶⁰
267. In addition to the NAFTA Parties’ agreement on the interpretation of Article 1116(1), to which, according to the Respondent, the Tribunal should give considerable weight, the Respondent highlights that NAFTA tribunals have consistently required a claimant to prove that it was a protected investor with a protected investment when the alleged breach occurred to establish a tribunal’s jurisdiction.³⁶¹ According to the Respondent, the Claimant “appears to accept this rule,

³⁵⁴ United States’ Second Submission, ¶ 11.

³⁵⁵ United States’ Second Submission, ¶ 12.

³⁵⁶ United States’ Second Submission, ¶¶ 13-14.

³⁵⁷ United States’ Second Submission, ¶ 15.

³⁵⁸ Respondent’s Second Article 1128 Submission, ¶ 13.

³⁵⁹ Respondent’s Second Article 1128 Submission, ¶¶ 13-14.

³⁶⁰ Respondent’s Second Article 1128 Submission, ¶ 15. The Respondent notes that Mexico has advanced the same position in other NAFTA proceedings. See Respondent’s Second Article 1128 Submission, ¶ 15, fn. 29.

³⁶¹ Respondent’s Second Article 1128 Submission, ¶ 16.

as it has not challenged Canada's interpretation of Article 1116(1) concerning jurisdiction *ratione temporis* in its Counter-Memorial on Jurisdiction or Reply on Jurisdiction".³⁶²

(c) The Claimant's Reply to the Submissions of the Non-Disputing Parties

268. The Claimant disagrees with the non-disputing Parties that an investor bringing a claim must be the same party as the party who suffered the alleged breach.³⁶³ According to the Claimant, this "highly restrictive approach" advanced by the non-disputing Parties would leave "meritorious successors in interest to victims without access to impartial and fair dispute settlement".³⁶⁴ In this respect, the Claimant notes that the concept of the successor in interest pursuing treaty claims is well established under international law.³⁶⁵
269. For the Claimant, the United States' observations on the application of the context to Article 1116 are overly narrow.³⁶⁶ Instead, the Claimant argues that the context for the "broad" definitions of an "enterprise" in Article 201 and "investment" in Article 1139 must be read in light of the full NAFTA Treaty and not just the specific chapters contained therein.³⁶⁷ Therefore, the Claimant submits that this "broad context is relevant when considering the associated requirements for an investor and an investment, such as the element of control" and that past NAFTA cases are helpful in understanding the term "owns or controls" in Article 1139.³⁶⁸
270. According to the Claimant, "[t]he date of the NAFTA breach was not earlier than August 15, 2015" and the Respondent does not dispute that by 15 August 2015, Tennant Energy owned shares in Skyway 127.³⁶⁹ As such, in the Claimant's view, there could be no possible issue raised concerning its investment.³⁷⁰

³⁶² Respondent's Second Article 1128 Submission, ¶ 16.

³⁶³ Claimant's Second Article 1128 Submission, ¶ 16.

³⁶⁴ Claimant's Second Article 1128 Submission, ¶ 16.

³⁶⁵ Claimant's Second Article 1128 Submission, ¶ 17; *Isaiah v. Bank Mellat*, 2 IRAN-U.S. C.T.R., 30 March 1983, pp. 232, 249-252 (CLA-321); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Hearing on Respondent's Objection to Competence and Jurisdiction, 5 January 2001 (CLA-285); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004 (CLA-333).

³⁶⁶ Claimant's Second Article 1128 Submission, fn. 6.

³⁶⁷ Claimant's Second Article 1128 Submission, ¶¶ 18-19.

³⁶⁸ Claimant's Second Article 1128 Submission, ¶ 19.

³⁶⁹ Claimant's Second Article 1128 Submission, ¶ 20.

³⁷⁰ Claimant's Second Article 1128 Submission, ¶ 20.

C. THE SECOND OBJECTION

271. Even if the Tribunal finds that the Claimant qualifies as an “investor of a Party”, the Respondent maintains that the Tribunal has no jurisdiction *ratione temporis* because the Claimant failed to submit its claim within the three-year limitation period established by Article 1116(2) of the NAFTA. Article 1116(2) provides:

“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”

272. It is undisputed that the present dispute was submitted to arbitration on 1 June 2017, making 1 June 2014 the critical date for purposes of determining the Claimant’s compliance with Article 1116(2) (the “**Critical Date**”).

273. The Respondent submits that the Claimant knew, or should have known, about the alleged breaches and that it had incurred loss or damage prior to the Critical Date of 1 June 2014 because “ample information regarding the alleged breach was publicly available prior to the [Critical Date]” and “[a]ny reasonably prudent investor in the Ontario renewable energy market – as the Claimant holds itself out to be” would or should have been aware of that information.³⁷¹ As a result, the Respondent argues, the Tribunal has no *ratione temporis* jurisdiction because Claimant’s claims are time-barred.

274. By contrast, the Claimant submits that it did not and could not have known either of the alleged breaches or of the derived loss or damage before 15 August 2015, the date on which the *Mesa Power* post-hearing submissions became publicly available. Therefore, the Claimant submits that its claims were submitted to this Tribunal in a timely manner.

1. The Respondent’s Position**(a) Interpretation of Article 1116(2) of the NAFTA**

275. The Respondent advances four interpretative considerations in respect of Article 1116(2) of the NAFTA, which it claims are “well-settled”.³⁷²

276. First, the Respondent maintains that the three-year period in Article 1116(2) is a strict limitation period that forms one of the fundamental bases of its consent to arbitration, and therefore must be

³⁷¹ Rejoinder, ¶¶ 6-7.

³⁷² Counter-Memorial, ¶¶ 98-114; Respondent’s PHB, ¶ 57.

complied with in order to establish this Tribunal's jurisdiction.³⁷³ According to the Respondent, it has been recognized that provisions setting time limits for commencing disputes, such as Article 1116(2), have the purpose of providing legal predictability and certainty, and preventing States from being forced to present a defence against claims "for which evidence may no longer be readily available or which require witnesses to recollect events long past".³⁷⁴ As such, the Respondent points out, failure to comply with the three-year limitation period has resulted in the dismissal of several claims submitted under the NAFTA, Chapter Eleven³⁷⁵ as well as claims brought on the basis of treaties that contain equivalent provisions.³⁷⁶

277. Second, the Respondent submits that the limitation period in Article 1116(2) begins running from the date on which the claimant "*first* acquired, or should have *first* acquired, knowledge of the alleged breach and knowledge that [it] has incurred loss or damage."³⁷⁷ The Respondent contends that, consistent with its ordinary meaning, the term "first" means "earliest in occurrence, existence."³⁷⁸ Thus, the Respondent asserts, the inclusion of the term "first" to modify the phrase "acquired knowledge" was "a deliberate drafting choice" intended to mark the beginning of the relevant time frame "and not the middle or end of a continuous event or period".³⁷⁹ This

³⁷³ Counter-Memorial, ¶¶ 98-101.

³⁷⁴ Counter-Memorial, ¶ 99; *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 208 (**RLA-136**).

³⁷⁵ Counter-Memorial, ¶¶ 100-101; *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶¶ 103-104 (**RLA-70**); *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 314-335 (**RLA-80**); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (**RLA-3**).

³⁷⁶ Counter-Memorial, ¶¶ 100-101; *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 192, 199 (**RLA-82**); *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶¶ 297-298 (**RLA-136**).

³⁷⁷ Counter-Memorial, ¶ 102 (emphasis in original).

³⁷⁸ Counter-Memorial, ¶ 103 *quoting* Shorter Oxford English Dictionary, 5th ed., (New York: Oxford University Press, 2002), p. 965 (**RLA-154**).

³⁷⁹ Counter-Memorial, ¶ 104.

interpretation, the Respondent states, has been consistently upheld by NAFTA tribunals,³⁸⁰ each of the Contracting Parties to the NAFTA³⁸¹ and tribunals interpreting the similar provisions.³⁸²

278. In this respect, and contrary to what the Claimant argues, the Respondent maintains that there is no basis to reset, suspend or prolong the time-limit imposed by Article 1116(2) in the face of claims alleging continuous acts or alleging continuous breaches.³⁸³ Therefore, the Claimant's subsequent learning of certain new facts relating to the same claims, in the Respondents view, does not affect the Tribunal's jurisdiction unless they form the basis of a new cause of action.³⁸⁴ According to the Respondent, investment treaty tribunals³⁸⁵ and the NAFTA Parties³⁸⁶ support the position that "[o]nce a claimant has acquired actual or constructive knowledge of the alleged breach, subsequent disclosure of related factual details does not change the date when the claimant

³⁸⁰ Counter-Memorial, ¶ 105; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 281 (**RLA-3**); *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 315 (**RLA-80**); *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 53 (**RLA-70**).

³⁸¹ Counter-Memorial, ¶ 105; *Merrill & Ring Forestry, L.P. v. Government of Canada*, UNCITRAL, Submission of the United States of America, 14 July 2008, ¶ 5 (**RLA-156**); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014, ¶ 22 (**RLA-157**); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, 3 March 2014, ¶ 33 (**RLA-158**).

³⁸² Counter-Memorial, ¶ 105; *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 208 (**RLA-136**); *Corona Materials, LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the CAFTA-DR, 31 May 2016, ¶ 200 (**RLA-82**).

³⁸³ Counter-Memorial, ¶ 107; Rejoinder, ¶¶ 79, 81.

³⁸⁴ Hearing on Jurisdiction Transcript, Day 1, 59:15-18.

³⁸⁵ Rejoinder, ¶ 81; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 251-254 (**RLA-3**); *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81 (**RLA-70**); *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 208 (**RLA-136**); *Carlos Rios and Francisco Javier Rios v. Republic of Chile*, ICSID Case No. ARB/17/16, Award, 11 January 2021, ¶ 209 (**RLA-173**).

³⁸⁶ Rejoinder, ¶ 81; *Merrill & Ring Forestry, L.P. v. Government of Canada*, UNCITRAL, Submission of the United States of America, 14 July 2008, ¶¶ 8-10 (**RLA-156**); *Merrill & Ring Forestry, L.P. v. Government of Canada*, UNCITRAL, Submission of the Government of Mexico, 2 April 2009 (**RLA-189**); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Submission of the United States of America, 19 April 2013, ¶ 12 (**RLA-190**); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Submission of the United States of America, 14 February 2014, ¶ 3 (**RLA-191**); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, 3 March 2014, ¶ 29 (**RLA-158**).

first acquired or should have *first* acquired such knowledge”.³⁸⁷ Any interpretation to the contrary, the Respondent contends, would “render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.”³⁸⁸

279. Third, the Respondent asserts that either actual or constructive knowledge of the alleged breach and loss or damage is sufficient to start the limitation period in Article 1116(2).³⁸⁹ According to the Respondent, the “notion of actual knowledge accounts for what an investor subjectively knew”, while that “of constructive knowledge accounts for what an investor objectively ought to have known.”³⁹⁰ Relying on the Decision on Jurisdiction in *Grand River v. United States*, the Respondent further submits that the notion of constructive knowledge requires investors to exercise a measure of “reasonable care” and “diligence” under the standard of “a reasonably prudent investor”.³⁹¹ The Respondent also refers to the *Spence International v. Costa Rica* Interim Award, in which the tribunal determined that the “should have first acquired knowledge test” is an “objective standard” that requires a tribunal to assess “what a prudent claimant should have known or must reasonably be deemed to have known.”³⁹² Accordingly, the Respondent submits, the limitation period “cannot be extended, for example, through willful blindness on the part of an investor, a failure on the part of the investor to acknowledge that a measure is causing it loss or damage, or a lack of carefulness on the part of the investor to discover any loss or damage that it may have incurred.”³⁹³
280. In this respect, the Respondent contends that constructive knowledge of an alleged breach and loss from publicly available information starts the limitation period which, in the Respondent’s view, existed in this case as further explained below in Section VI.C.1(b).³⁹⁴

³⁸⁷ Rejoinder, ¶ 79.

³⁸⁸ Rejoinder, ¶ 80, quoting *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81 (RLA-70).

³⁸⁹ Counter-Memorial, ¶¶ 108-111; Respondent’s PHB, ¶ 58.

³⁹⁰ Counter-Memorial, ¶ 109.

³⁹¹ Counter-Memorial, ¶¶ 110-111; Rejoinder, ¶ 74; *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 59 (RLA-70).

³⁹² Counter-Memorial, ¶ 109; Rejoinder, ¶ 74 quoting *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, ¶ 209 (RLA-136).

³⁹³ Counter-Memorial, ¶ 111; Respondent’s PHB, ¶ 59.

³⁹⁴ Respondent’s PHB, ¶ 61.

281. Fourth, the Respondent alleges that simple knowledge that loss or damage has been caused, even if its extent or quantification is still unclear, is sufficient to trigger the limitation period in Article 1116(2).³⁹⁵ This assertion is supported by each of the NAFTA Parties,³⁹⁶ tribunals constituted under the NAFTA³⁹⁷ and other arbitral tribunals.³⁹⁸

(b) Whether the Claimant's Claims Comply with the Time Limit under Article 1116(2) of the NAFTA

282. The Respondent submits that the Claimant first acquired or should have first acquired knowledge of the alleged breaches and loss or damage prior to the Critical Date of 1 June 2014, *i.e.*, three years before the Claimant filed its Notice of Arbitration.³⁹⁹

283. As a preliminary matter, the Respondent contends that the claims at issue in this arbitration do not involve a continuing breach, and thus the Claimant's arguments in this respect are irrelevant for assessing the Second Objection.⁴⁰⁰ Instead, the alleged breach, according to the Respondent, is "a single one-time act that had continuing events for the Claimant".⁴⁰¹ The Respondent also asserts that the Claimant has not explained how the challenged measures form a composite breach.⁴⁰² Rather, the Respondent contends that this case concerns a "single alleged breach leading to a single source of alleged losses that were incurred on one date – July 4, 2011 – the date the Claimant did not receive a FIT Contract".⁴⁰³

284. As its primary position, the Respondent submits that, prior to the Critical Date, there was ample publicly available information regarding this alleged breach, and the three groups of impugned

³⁹⁵ Counter-Memorial, ¶ 112; Rejoinder, ¶ 105.

³⁹⁶ Counter-Memorial, ¶ 113; *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Submission of Mexico Pursuant NAFTA Article 1128, 14 June 2017, ¶ 6 (**RLA-160**); *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Objection to Jurisdiction of Respondent United States of America, 5 December 2005, p. 36 (**RLA-126**).

³⁹⁷ Counter-Memorial, ¶ 113; *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour, Jr. v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006 (**RLA-70**); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 275 (**RLA-3**).

³⁹⁸ Counter-Memorial, ¶ 114; Rejoinder, ¶ 105; *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 217 (**RLA-159**); *Nissan Motor Co., Ltd. (Japan) v. Republic of India*, PCA Case No. 2017-37, Decision on Jurisdiction, 29 April 2019, ¶ 325 (**RLA-155**).

³⁹⁹ Counter-Memorial, ¶¶ 117-155; Rejoinder, ¶ 64.

⁴⁰⁰ Rejoinder, ¶ 81.

⁴⁰¹ Hearing on Jurisdiction Transcript, Day 5, 750:19-20.

⁴⁰² Hearing on Jurisdiction Transcript, Day 1, 58:4-11.

⁴⁰³ Rejoinder, ¶ 81. *See also* Hearing on Jurisdiction, Day 1, 24:21-25:13.

measures that the Claimant alleges led to this breach, namely, measures concerning the GEIA, the administration of the FIT Program, and the handling of documents by Ontario officials from 2011 to 2013.⁴⁰⁴ This is true, according to the Respondent, even without taking into account the evidence arising out of the public pleadings in the *Mesa Power* arbitration.⁴⁰⁵ Thus, notwithstanding its wilful blindness to this information, the Claimant, as the reasonably prudent investor in the Ontario renewable energy market that it holds itself out to be, nevertheless knew or should have known about it, thereby triggering the limitation period.⁴⁰⁶

285. In particular, the Respondent argues that the relevant documents in respect of each group of challenged measures were accessible before 1 June 2014, and that this demonstrates that “all the alleged ‘new information’ relied upon by the Claimant to argue it submitted its claim to arbitration within the limitation period was either already public prior to the [Critical Date] or fails to toll the limitation period, such that the entirety of the claim falls outside the Tribunal’s jurisdiction.”⁴⁰⁷ The Respondent elaborates on each group of challenged measures as follows.

i. Measures Concerning the GEIA

286. According to the Respondent, all the relevant aspects of the GEIA for the purposes of the Claimant’s claim were publicly known, and available in the documents filed in the *Mesa Power* arbitration, press reports and government publications, prior to the Critical Date.⁴⁰⁸

287. First, the Respondent posits that the negotiation and signature of the GEIA were “widely reported in the press in 2009 and 2010”.⁴⁰⁹ Such reports, the Respondent asserts, demonstrate that “[f]rom the outset, industry observers were concerned about the impact of the GEIA on the renewables sector in Ontario.”⁴¹⁰

288. Second, the Respondent refers to a number of publicly available documents issued by public bodies that provided information on the GEIA, as well as its terms and/or effects on the FIT

⁴⁰⁴ Counter-Memorial, ¶ 123; Rejoinder, ¶ 68.

⁴⁰⁵ Respondent’s PHB, ¶ 62.

⁴⁰⁶ Rejoinder, ¶¶ 6-7; Respondent’s PHB, ¶ 62.

⁴⁰⁷ Counter-Memorial, ¶ 124.

⁴⁰⁸ Counter-Memorial, ¶¶ 126-135.

⁴⁰⁹ Counter-Memorial, ¶¶ 126-127; The Star, “Ontario eyes green job bonanza”, 26 September 2009 (C-171); The Globe and Mail, “Samsung looking to build Lake Erie wind farm”, 27 September 2009 (R-84); Renewable Energy World, “Samsung Invests \$7B in Ontario Wind & Solar”, 22 January 2010 (R-85); The Globe and Mail, “‘Unfair’ advantage cited in Samsung deal”, 25 January 2010 (R-86).

⁴¹⁰ Counter-Memorial, ¶¶ 126-127; The Globe and Mail, “‘Unfair’ advantage cited in Samsung deal”, 25 January 2010, pp. 2-3 (R-86).

Program.⁴¹¹ The Respondent underscores that “[i]t was public knowledge that the Korean Consortium’s projects faced ‘challenges’ and that the FIT Program was delayed because of the Korean Consortium’s need to finalize connection points.”⁴¹² The Respondent specifically refers to the:

- (a) Direction from the Ontario Minister of Energy to the OPA of 1 April 2010, which described the GEIA and instructed the OPA to negotiate power purchase agreements with the Korean Consortium in accordance with the terms of the GEIA.⁴¹³
- (b) 2011 Annual Report of the Office of the Auditor General of Ontario, published on 5 December 2011, which discussed *inter alia* details of the renegotiation of the GEIA in 2011 that arose in view of the Korean Consortium’s request for an extension to finalize the first phases of its project. This report further noted the delays by the Korean Consortium also impacted the schedule of the FIT Program.⁴¹⁴
- (c) Discussions in the Legislative Assembly of Ontario in 2012.⁴¹⁵
- (d) Ontario’s updated Long-Term Energy Plan, made public in November 2013.⁴¹⁶

289. The Respondent underscores that the *Mesa Power* tribunal acknowledged that, since 2009, it was public knowledge that the GEIA “would give [the Korean Consortium] priority access to Ontario[’s] grid space”.⁴¹⁷

290. Third, the Respondent submits that the *Mesa Power* pleadings that were publicly available on the Global Affairs Canada website prior to the Critical Date further support the conclusion that the Claimant should have first acquired knowledge of the alleged breach prior to the Critical Date, because Mesa Power made the same allegations as the Claimant with respect to the GEIA.⁴¹⁸

⁴¹¹ Counter-Memorial, ¶¶ 128-130.

⁴¹² Rejoinder, ¶ 95; Office of the Auditor General of Ontario, *2011 Annual Report* [Excerpt], 5 December 2011, p. 108 (**R-2**).

⁴¹³ Counter-Memorial, ¶ 129; Directive from Minister of Energy, the Honourable Brad Duguid, to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010 (**C-139**).

⁴¹⁴ Counter-Memorial, ¶¶ 128, 130, fn. 318; Rejoinder, ¶ 95; Office of the Auditor General of Ontario, *2011 Annual Report* [Excerpt], 5 December 2011, p. 108 (**R-2**).

⁴¹⁵ Counter-Memorial, ¶ 128; Ontario, Official Report of Debates (Hansard), 40th Parl., 1st Sess., No. 47, 3 May 2012, p. 2052 (**R-87**).

⁴¹⁶ Counter-Memorial, ¶ 128; Government of Ontario, “Achieving Balance: Ontario’s Long Term Energy Plan”, December 2013, p. 15 (**R-88**).

⁴¹⁷ Counter-Memorial, ¶ 130; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 607 (**RLA-1**).

⁴¹⁸ Counter-Memorial, ¶¶ 118-120; McCall Statement, ¶¶ 3, 5 (**RWS-1**); Global Affairs Canada, *Mesa Group LLC v. Government of Canada*, Webpage Screenshot, as of 8 May 2013 and 11 September 2013, pp. 1-2 (**R-30**). See also Rejoinder, ¶ 96.

These pleadings include, for example, Mesa Power’s Notice of Intent and Notice of Arbitration, which were available as of 8 May 2013;⁴¹⁹ and Mesa Power’s Answer on Canada’s Preliminary Objections to Jurisdiction, which was available as of 11 September 2013.⁴²⁰ Moreover, the Respondent notes that the *Mesa Power* arbitration “was discussed in both general interest and industry media” prior to the Critical Date and, as such, there “is no basis on which the Claimant can reasonably maintain that it could not have known about the [relevant aspects of the GEIA] until the [...] Post-Hearing Submission in *Mesa* was made public.”⁴²¹

291. While the Claimant attempts to differentiate its claim from the ones brought by Mesa Power in 2011,⁴²² the Respondent maintains that a simple side-by-side comparison of the early written submissions in *Mesa Power* and the Claimant’s submissions confirms the overlap between both claims.⁴²³ Specifically, the Respondent asserts that, like Mesa Power did prior to 1 June 2014, the Claimant alleges in respect of the GEIA that:

- (a) Although the “[t]he existence of the [GEIA] was public, [...] its terms and conditions were kept secret,” including the fact that the Korean Consortium was granted “significantly better access to renewable energy transmission and generation than to other energy providers” in Ontario;⁴²⁴
- (b) Pursuant to Direction of the Ministry of Energy to the OPA of 30 September 2009, “the Korean Consortium received a guaranteed right of first refusal on transmission access” in three transmission zones in Ontario;⁴²⁵

⁴¹⁹ Counter-Memorial, ¶ 118; McCall Statement, ¶ 3 (**RWS-1**); Global Affairs Canada, *Mesa Group LLC v. Government of Canada*, Webpage Screenshot, as of 8 May 2013 and 11 September 2013, p. 1 (**R-30**).

⁴²⁰ Counter-Memorial, ¶ 119; McCall Statement, ¶ 5 (**RWS-1**); Global Affairs Canada, *Mesa Group LLC v. Government of Canada*, Webpage Screenshot, as of 8 May 2013 and 11 September 2013, p. 2 (**R-30**).

⁴²¹ Counter-Memorial, ¶ 135; The Globe and Mail, “Oil tycoon takes on Ontario Green Energy Act over wind farm”, 14 July 2011 (**R-59**); Appleton & Associates website excerpt, “Mesa Power Group Files Legal Action Against Government for NAFTA Infractions”, 14 July 2011 (**R-60**); Recharge News, “Pickens issues NAFTA challenge to Canada over wind rules”, 18 July 2011 (**R-61**); Columbia Law School, Climate Law Blog, “Texas Renewable Energy Developer Initiates NAFTA Claim Against Canada”, 22 July 2011 (**R-62**); The Star, “Texas firm to challenge to Ontario’s wind power regulations”, 14 July 2011 (**R-63**); PR Wire, “Mesa Power Group Files Legal Action Against Canadian Government for NAFTA Infractions”, 14 July 2011 (**R-64**); Reuters, “Boone Pickens challenges Canada on green power law”, 14 July 2011 (**R-65**); IISD, Investment Treaty News, “Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy”, 19 July 2012 (**R-66**); Ontario Wind Resistance, “McGuinty Liberals charged with abuse of power, undue ‘political interference’ in awarding wind contracts”, 17 July 2011 (**R-67**). See also Rejoinder, ¶ 96.

⁴²² Rejoinder, ¶ 67.

⁴²³ Counter-Memorial, ¶ 133.

⁴²⁴ Counter-Memorial, ¶ 133, quoting *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011 (**R-5**); Memorial, ¶ 202.

⁴²⁵ Counter-Memorial, ¶ 133, quoting *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011 (**R-5**); Memorial, ¶ 211.

- (c) But for the transmission capacity that the OPA reserved to the Korean Consortium, it was highly likely that it would have been awarded a FIT contract;⁴²⁶
- (d) On 3 August 2011, the Ontario Minister of energy “gave a one-year extension to the Consortium”;⁴²⁷
- (e) It was not offered a FIT contract “because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects”;⁴²⁸ and
- (f) The preferential treatment granted through the GEIA and OPA’s public release of the December 2010 rankings allowed the Korean Consortium to identify low-ranking projects and to engage in “predatory” behaviour by purchasing and advancing those projects.⁴²⁹

292. The Respondent argues that in view of the overlap in the claims brought by the Claimant and Mesa’s claims, “[i]t is simply not credible for the Claimant to argue that its claim differs from the one brought almost ten years ago by Mesa.”⁴³⁰ Therefore, the Respondent contends that “[i]f there was enough public information about the alleged breach in 2011 for Mesa to file its claim, then there was certainly enough for the Claimant to do the same.”⁴³¹

293. Finally, the Respondent submits that the Claimant’s allegation that the Korean Consortium and Pattern Energy were engaged in a “predatory scheme” is based on facts that the Claimant concedes it knew before December 2010.⁴³² The Respondent avers that in its Memorial, the Claimant acknowledges that on 10 December 2010, Pattern Renewable entered into an agreement to acquire the Skyway 127\ project.⁴³³ The Respondent adds that Mr. Pennie’s Statement confirms that “individuals involved in the Skyway 127 Project were well aware of the GEIA and actions of the Korean Consortium prior to the [Critical Date]”.⁴³⁴

⁴²⁶ Counter-Memorial, ¶ 133, *referring to Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Investor’s Answer on Canada’s Preliminary Objections on Jurisdiction, 19 February 2013, ¶ 86 (R-13); Memorial, ¶ 227.

⁴²⁷ Counter-Memorial, ¶ 133, *quoting Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011 (R-5); Memorial, ¶ 246.

⁴²⁸ Counter-Memorial, ¶ 133, *quoting Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011 (R-5); Notice of Arbitration, ¶ 60.

⁴²⁹ Counter-Memorial, ¶ 133, *referring to Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Investor’s Answer on Canada’s Preliminary Objections on Jurisdiction, 19 February 2013, ¶ 71, 72(c)-(d) (R-13); Memorial, ¶ 221.

⁴³⁰ Counter-Memorial, ¶ 134.

⁴³¹ Counter-Memorial, ¶ 134.

⁴³² Counter-Memorial, ¶ 131; Rejoinder, ¶ 96.

⁴³³ Counter-Memorial, ¶ 131, *referring to* Memorial, ¶ 130.

⁴³⁴ Counter-Memorial, ¶ 132; Pennie Statement, ¶ 19 (CWS-1).

ii. Measures Concerning the Administration of the FIT Program

294. The Respondent submits that the Claimant should have first acquired knowledge of the measures it complains of in respect of the administration on the FIT Program, namely that “Ontario unfairly manipulated the award of access to the electricity grid”, prior to the Critical Date.⁴³⁵
295. First, the Respondent points out that “[a]ll of the changes mandated by the June 3, 2011 Direction were public.”⁴³⁶ Thus, the Claimant cannot now complain of these changes, including the ability to change connection points between regions within the five-day window, the consideration of projects that required paid upgrades to connection points, the award of FIT contracts in the Bruce transmission area for up to only 750 MW, and the West of London transmission area for up to only 300 MW, and the method of determining priority for those FIT contract awards.⁴³⁷
296. Second, as to “allegations of unfairness and improper political considerations in the administration of the FIT Program from 2011 to 2013”, the Respondent similarly maintains that the Claimant should have known about these measures prior to the Critical Date because Mesa Power made the same allegations in its Notice of Arbitration filed in 2011.⁴³⁸ Comparing the *Mesa Power* pleadings and the Claimant’s submissions, the Respondent contends that the overlap of the allegations “is incontestable”:⁴³⁹
- (a) On 3 June 2011, the OPA issued “without any prior notice” “a new set of rules for awarding FIT Program contracts” based on the 3 June 2011 Direction. As a result of such new rules, several wind projects in the FIT Program lost available transmission capacity in their designated locations. The June 2011 rules also allowed projects in the West of London region which “had a higher provincial-wide priority ranking” to “build long transmission lines to interconnect in the Bruce Region and thereby jump ahead in the priority ranking”.⁴⁴⁰

⁴³⁵ Counter-Memorial, ¶¶ 137-140.

⁴³⁶ Counter-Memorial, ¶ 138.

⁴³⁷ Counter-Memorial, ¶ 138, *referring to* Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 3 June 2011 (C-176); IESO Public News Release, “Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects,” 3 June 2011 (C-143).

⁴³⁸ Counter-Memorial, ¶ 139.

⁴³⁹ Counter-Memorial, ¶ 142.

⁴⁴⁰ Counter-Memorial, ¶ 141, *referring to* Mesa Power Group, LLC v. Government of Canada, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶¶ 28-29, 30-32, 34 (R-5); Notice of Arbitration, ¶ 59, 61, 238-239, 508; Memorial, ¶ 238.

- (b) It was “not offered a FIT Program Contract, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity”.⁴⁴¹
- (c) The Respondent used its authority to implement arbitrary and non-transparent regulatory changes that “resulted in a direct and immediate benefit to the better-treated companies, and were taken in the context of an Ontario provincial general election”.⁴⁴²
- (d) The Respondent gave NextEra preferential access to meetings with high-level government officials and advance access to information concerning regulatory changes.⁴⁴³

297. Not only were Mesa Power’s pleadings with these same allegations publicly available on the GAC website prior to the Critical Date, but the Respondent also notes that the allegations were covered by the media, and the Claimant in fact agrees that it was aware of the arbitration when it was filed.⁴⁴⁴ Considering that the Claimant also had a “sense of unfairness”, such notice, in the Respondent’s view, should have triggered the Claimant to investigate further.⁴⁴⁵ However, the Respondent observes that “the Claimant has not offered any valid reason as to why it waited until 2017 to challenge the same measures that Mesa was able to challenge in 2011, using the same documents and evidence that Mesa used to argue its claim almost a decade ago.”⁴⁴⁶

298. Third, the Respondent argues that the three-year limitation period cannot be extended on the basis of any of the five “additional facts” that Messrs. John and Derek Tennant allege they learned of only after the *Mesa Power* hearing.⁴⁴⁷ With respect to the last three additional facts, namely (a) special meetings between senior Ontario government officials and senior wind power corporate officials; (b) the Ontario Ministry of Energy’s decisions not to follow the FIT Program’s terms; and (c) to not allocate all the available power transmission to successful FIT Program applications, the Respondent maintains that these were all publicly known prior to the Critical Date, through media reports, government publications, and the submissions in the *Mesa Power* and *Windstream Energy* arbitrations.⁴⁴⁸

⁴⁴¹ Counter-Memorial, ¶ 141, quoting *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶ 33 (R-5); Memorial, ¶ 235.

⁴⁴² Counter-Memorial, ¶ 141, quoting *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011, ¶ 50 (R-5); Notice of Arbitration, ¶ 62.

⁴⁴³ Counter-Memorial, ¶ 141, referring to *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Investor’s Answer on Canada’s Preliminary Objections on Jurisdiction, 19 February 2013, ¶¶ 85, 143(b) (R-13); Memorial, ¶¶ 746, 748; Rejoinder, ¶ 97.

⁴⁴⁴ Counter-Memorial, ¶ 140. See also Hearing on Jurisdiction Transcript, Day 1, 21:10-15.

⁴⁴⁵ Hearing on Jurisdiction Transcript, Day 5, 768:5-770:23.

⁴⁴⁶ Counter-Memorial, ¶ 142.

⁴⁴⁷ Rejoinder, ¶¶ 83-84.

⁴⁴⁸ Rejoinder, ¶ 91.

299. With respect to the first two facts, namely the so-called “Breakfast Club” conspiracy of government officials and the alleged preferential treatment that IPC received under the FIT Program, the Respondent maintains that even if they only became known to the Claimant after the Critical Date, the Claimant’s claims are still time-barred under Article 1116(2).⁴⁴⁹ This is because, the Respondent contends, the “essence of the Claimant’s complaint is that Ontario favoured certain FIT Program applicants over others for improper political reasons”.⁴⁵⁰ Thus, the Respondent argues that identifying further alleged “political favourites” and other “secret meetings” simply provides additional information relating to the same underlying breach, and is insufficient to constitute an entirely new self-standing cause of action that would restart the limitation period under Article 1116(2).⁴⁵¹
300. This position, the Respondent contends, is proven by the fact that although Mesa Power did not have these additional facts when it filed its claim in 2011, it relied heavily on them in its post-hearing submissions, after they were revealed through witness cross-examination and document production, to buttress its Article 1105 claim – the same claim on which the Claimant alleges these facts are based.⁴⁵² In this respect, the Respondent argues that the Claimant cannot use “unfounded allegations by Mesa Power” dismissed by the *Mesa Power* tribunal as matters of objective fact to form the basis to start the limitation period afresh.⁴⁵³
301. Further, the Respondent points out that the Claimant has failed to articulate “anything distinct about its allegations with respect to [IPC] that distinguish them from its allegations with respect to NextEra” despite its argument that the situation with respect to IPC was “different” and “significantly worse” from the events relating to NextEra.⁴⁵⁴ In the Respondent’s view, the Claimant’s argument with respect to IPC is the “exact same claim” on which the Claimant’s alleged breach of Article 1105 rests, the “exact claim” that the Claimant’s damages experts quantify, and the “exact one” Mesa Power filed in 2011.⁴⁵⁵ As such, the Respondent underlines that the Claimant could have filed the same claim in 2011 that it filed in 2017 regarding the alleged undue political interference that prevented the Claimant from receiving a FIT program on 4 July 2011.⁴⁵⁶

⁴⁴⁹ Rejoinder, ¶ 85.

⁴⁵⁰ Counter-Memorial, ¶ 145.

⁴⁵¹ Rejoinder, ¶ 98; Hearing on Jurisdiction Transcript, Day 1, 86:3-89:20, 90:11-14.

⁴⁵² Rejoinder, ¶ 90.

⁴⁵³ Respondent’s PHB, ¶¶ 69-71.

⁴⁵⁴ Respondent’s PHB, ¶¶ 65-66, *quoting* Hearing on Jurisdiction Transcript, Day 5, 891:16-19.

⁴⁵⁵ Respondent’s PHB, ¶¶ 67-68.

⁴⁵⁶ Respondent’s PHB, ¶ 67. *See also* Hearing on Jurisdiction Transcript, Day 5, 746:10-14.

302. In any event, the Respondent reiterates that the information with respect to alleged favouritism was publicly available prior to the Critical Date in the context of the *Mesa Power* written submissions.⁴⁵⁷ Thus, the time in which further alleged “political favourites” or details regarding specific meetings became known is irrelevant for triggering the time-limit established in Article 1116(2).⁴⁵⁸

iii. Measures Concerning the Handling of Documents

303. As an initial matter, the Respondent observes that the Claimant has not alleged in its submissions any new information that supposedly became public after 1 June 2014 in respect of its claim that the Respondent improperly destroyed or suppressed necessary and material evidence of their internationally unlawful actions, such that it would make its claim timely.⁴⁵⁹

304. Notwithstanding this, the Respondent submits that ample information concerning the handling of documents by the Ontario officials was made public before the Critical Date.⁴⁶⁰

305. First, according to the Respondent, information regarding the alleged spoliation of documents that was publicly available before the Critical Date included (a) the Official Report of the Debates in the Estimates Committee and the Justice Policy Committee of the Legislative Assembly in 2012 and 2013, when they conducted their work concerning the cancellation of the two gas plants;⁴⁶¹ (b) the report of the Information and Privacy Commissioner of Ontario dated 5 June 2013 on its investigation into the destruction of e-mails relating to the relocation and cancellation of the gas

⁴⁵⁷ Counter-Memorial, ¶ 144; Respondent’s PHB, ¶ 64; Meet Mike, mikecrawley.ca, 2012, (C-166); Bruce Transmission Project Rankings, 21 December 2010 (C-104); Letter from George Smitherman (Minister of Energy) to Colin Anderson (OPA), Direction to OPA, 30 September 2009 (C-186); Directive from Minister of Energy, the Honourable Brad Duguid to Colin Anderson, CEO, Ontario Power Authority, 3 June 2011 (C-176); Bruce-Milton Contract List, 4 July 2011 (C-25). *See also* Hearing on Jurisdiction Transcript, Day 2, 278:7-280:1; Skyway 127 Project History – Attachments Only, 1 September 2011 (C-27).

⁴⁵⁸ Counter-Memorial, ¶ 144; Rejoinder, ¶ 98.

⁴⁵⁹ Counter-Memorial, ¶ 122; Respondent’s PHB, ¶ 72.

⁴⁶⁰ Counter-Memorial, ¶ 148; Rejoinder, ¶¶ 100, 102.

⁴⁶¹ Counter-Memorial, ¶ 148; Information and Privacy Commissioner of Ontario, *Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, 5 June 2013, cover page (R-3); Information & Privacy Commissioner of Ontario, *ADDENDUM to Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, 20 August 2013, p. 3 (R-4).

plants, and its addendum dated 20 August 2013;⁴⁶² and (c) relevant news articles that were published in June and September 2013.⁴⁶³

306. Second, the Respondent contends that the fact that the claimants in the *Mesa Power* and *Windstream Energy* arbitrations submitted their respective claims before the Critical Date proves “that a reasonably prudent investor would have had knowledge of the alleged breach before June 1, 2014”.⁴⁶⁴ In *Mesa Power*, the Respondent notes, the claimant filed the news articles concerning the spoliation issue with its memorial of 20 November 2013.⁴⁶⁵ The Respondent also stresses that over 8,000 documents were produced by the Respondent upon which the witnesses were cross-examined at the *Mesa Power* hearing with respect to IPC and the “Breakfast Club”.⁴⁶⁶ In *Windstream Energy*, the claimant similarly relied upon the Official Report of Debates that took place in the two committees, the IPC Report, and the press articles, all of which were publicly available prior to the Critical Date and filed with the claimant’s memorial of 19 August 2014.⁴⁶⁷
307. Third, the Respondent argues that the Claimant has failed to demonstrate that the information that became available after the *Mesa Power* hearing constitutes a self-standing cause of action separate from its allegations regarding the spoliation of documents.⁴⁶⁸ Even if the documents publicly available prior to the Critical Date did not contain specific details discussed by the Claimant, the Respondent alleges that “there was still enough publicly available information for the Claimant to file its claim years before it finally did.”⁴⁶⁹
308. According to the Respondent, statements made by two witnesses in the *Mesa Power* arbitration following certain inquiries of the Claimant also cannot constitute evidence of suppression because “[t]he fact that those witnesses indicated there was no issue with how the FIT Program was being

⁴⁶² Counter-Memorial, ¶ 148; Information and Privacy Commissioner of Ontario, *Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, 5 June 2013, cover page (R-3); Information & Privacy Commissioner of Ontario, *ADDENDUM to Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report*, 20 August 2013, p. 3 (R-4).

⁴⁶³ Counter-Memorial, ¶ 150; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Memorial of the Investor, 20 November 2013 [Excerpt], ¶ 11 and fns. 11-12 (R-6).

⁴⁶⁴ Counter-Memorial, ¶¶ 150-152; Rejoinder, ¶ 99; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Notice of Arbitration, 4 October 2011 (R-5); *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Amended Notice of Arbitration, 5 November 2013, originally filed on 28 January 2013 (R-54).

⁴⁶⁵ Counter-Memorial, ¶ 150; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Memorial of the Investor, 20 November 2013 [Excerpt], ¶ 11 and fns. 11-12 (R-6).

⁴⁶⁶ Respondent’s PHB, ¶ 74.

⁴⁶⁷ Counter-Memorial, ¶ 44; *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Memorial of the Claimant, 19 August 2014, ¶¶ 366-381 (R-55).

⁴⁶⁸ Rejoinder, ¶ 101.

⁴⁶⁹ Rejoinder, ¶ 102.

run was a true statement [...] in line with their written testimony in that arbitration and the eventual decision of the *Mesa Power* tribunal”.⁴⁷⁰

309. Fourth, the Respondent asserts that the only documents from the Premier’s Office that purportedly show Ontario’s practice of destroying or hiding documents pertained to an unrelated investigation concerning gas plants.⁴⁷¹ Therefore, to the extent that the Claimant relies on the “code names” to allege the Respondent’s improper conduct, the Respondent considers them irrelevant to the FIT Program, onshore wind, or Skyway 127’s Project.⁴⁷²
310. Finally, with respect to the Claimant’s allegations concerning the lack of transparency of the terms of the GEIA, the Respondent reiterates that the *Mesa Power* tribunal found that there was sufficient information pertaining to the GEIA in the public domain in November 2009.⁴⁷³ Notwithstanding this, the Respondent argues that the Claimant has failed to submit any evidence of spoliation with respect to the GEIA.⁴⁷⁴
311. The Respondent concludes that, considering the vast public record regarding the three groups of challenged measures, and the fact that the Claimant “presents its executives as experienced investors and developers in the renewable energy sector in Ontario”, the Claimant was far from a “passive observer” of the market and could not reasonably or credibly have been unaware of the alleged improprieties regarding these measures.⁴⁷⁵ Indeed, the Respondent points out that the Claimant’s fact witnesses all knew of the existence of the *Mesa Power* and *Windstream Energy* proceedings, and yet implausibly assumed that they were irrelevant despite the numerous similarities the Claimant shared with Mesa Power and Windstream Energy.⁴⁷⁶ Notwithstanding this, the Respondent maintains that “the Claimant could not evade the limitation period by being wilfully blind and not obtaining the knowledge any reasonably prudent investor would have acquired”,⁴⁷⁷ and that, at the very least, a reasonably prudent investor should have conducted some inquiries into the allegations at the time.⁴⁷⁸

⁴⁷⁰ Respondent’s PHB, ¶ 75; Hearing on Jurisdiction Transcript, Day 2, 282:2-284:7, 309:14-16.

⁴⁷¹ Respondent’s PHB, ¶ 73.

⁴⁷² Respondent’s PHB, ¶ 73.

⁴⁷³ Counter-Memorial, ¶ 153; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶ 595 (RLA-1).

⁴⁷⁴ Counter-Memorial, ¶ 153.

⁴⁷⁵ Rejoinder, ¶ 75.

⁴⁷⁶ Rejoinder, ¶ 76.

⁴⁷⁷ Counter-Memorial, ¶ 135; Rejoinder, ¶ 75.

⁴⁷⁸ Counter-Memorial, ¶ 135.

312. Even if suppression of information could be proven, the Respondent argues that the Claimant has failed to demonstrate that the specific information that was suppressed gives rise to a self-standing caution of action such that the Claimant's claim is timely under Article 1116(2).⁴⁷⁹ In this respect, the Respondent maintains that the alleged preferential treatment to IPC or the existence of the "Breakfast Club" are not separate and distinct from the allegations that the Claimant could have made with respect to NextEra prior to the Critical Date.⁴⁸⁰
313. In addition to its arguments regarding the date on which the Claimant acquired or should have acquired knowledge of the alleged breaches, the Respondent submits that the Claimant also knew, or should have known, of alleged loss or damage arising out of such breaches prior to the Critical Date.⁴⁸¹ In particular, the Respondent notes the Claimant's acknowledgement that it knew, or should have known, of the alleged loss or damage when it failed to receive a FIT Contract on 4 July 2011 and certainly no later than 12 June 2013, when the OPA stopped procuring renewable energy from large-scale FIT projects.⁴⁸²

2. The Claimant's Position

(a) Interpretation of Article 1116(2) of the NAFTA

314. The Claimant submits that the three-year period established in Article 1116(2) of the NAFTA is initiated when there is actual or constructive knowledge of both (a) a breach; and (b) of loss or damage that has been incurred as a result.⁴⁸³ The Claimant underscores that these are cumulative conditions.⁴⁸⁴
315. With respect of the first condition, the Claimant asserts that "[a] breach under the NAFTA does not occur until there is breach and knowledge of that breach".⁴⁸⁵ The Claimant alleges that the determination of the date on which a claimant acquired knowledge of a breach needs to consider the operation of continuing acts.⁴⁸⁶ According to the Claimant, a breach by a continuing action entails that the host State "commits a separate breach of international law every day" of which

⁴⁷⁹ Respondent's PHB, ¶ 76.

⁴⁸⁰ Respondent's PHB, ¶¶ 77-78.

⁴⁸¹ Counter-Memorial, ¶¶ 155-158.

⁴⁸² Counter-Memorial, ¶¶ 155-158; Rejoinder, ¶ 106; Respondent's PHB, ¶ 79; Hearing on Jurisdiction Transcript, Day 1, 182:2-4.

⁴⁸³ Memorial, ¶ 683; Reply, ¶¶ 34-35, 194.

⁴⁸⁴ Memorial, ¶ 683; Reply, ¶¶ 34-35, 194.

⁴⁸⁵ Reply, ¶ 271.

⁴⁸⁶ Reply, ¶ 217.

the investor becomes aware every day.⁴⁸⁷ Therefore, the Claimant argues that this type of breaches “cannot be time-barred while the state continues to breach its obligation.”⁴⁸⁸ This approach, in the Claimant’s view, is consistent with the fact that “within the NAFTA context, and outside it, international tribunals broadly have approached time limits in a manner to ensure the effectiveness of international tribunals to address internationally wrongful behavior.”⁴⁸⁹

316. The Claimant refers to the *Feldman v. Mexico* and *UPS v. Canada* arbitrations as instances in which NAFTA tribunals have “refused to apply Article 1116(2) to bar claims challenging acts that were continuing.”⁴⁹⁰ In this regard, the Claimant recalls the *UPS v. Canada* tribunal’s determination that “continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.”⁴⁹¹ The Claimant also relies on scholarly writing, commentaries prepared by the International Law Commission, and decisions of the European Court of Human Rights recognising that continuous acts could constitute a breach of international obligations.⁴⁹²
317. Regarding the second condition, the Claimant maintains that a reasonable belief that damages are probable would be insufficient to trigger the commencement of the three-year period in Article 1116(2) because the damages would not yet have been “incurred” or suffered.⁴⁹³ In this respect, the Claimant cites the *Pope & Talbot v. Canada* tribunal which held that “[t]he critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur”.⁴⁹⁴
318. Lastly, the Claimant reiterates that the Tribunal must assess the Second Objection on the basis of the Claimant’s good faith understanding of its own claim and the law and facts as pleaded in its

⁴⁸⁷ Reply, ¶ 218.

⁴⁸⁸ Reply, ¶ 218.

⁴⁸⁹ Reply, ¶ 237.

⁴⁹⁰ Reply, ¶¶ 218-222; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 203 (**RLA-81**); *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, 24 May 2007, ¶ 28 (**CLA-282**).

⁴⁹¹ Reply, ¶ 220; *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, 24 May 2007, ¶ 28 (**CLA-282**).

⁴⁹² Claimant’s PHB, ¶¶ 38-40, 43-44; James Crawford, *The International Law Commission’s Articles on State Responsibility* (Cambridge University Press, 2002), p. 60(5) (**CLA-199**); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, pp. 250-261 (**CLA-185**).

⁴⁹³ Reply, ¶ 195.

⁴⁹⁴ Reply, ¶ 196; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record, 24 February 2000, ¶ 12 (**RLA-36**).

Notice of Arbitration.⁴⁹⁵ Accordingly, absent evidence of bad faith, the Claimant maintains that the Tribunal should defer to the Claimant's judgment about when its claim arose.⁴⁹⁶

(b) Whether the Claimant's Claims Comply with the Time Limit under Article 1116(2) of the NAFTA

319. The Claimant submits that the Respondent has failed to carry its burden of proof in establishing its affirmative defence that the Claimant's claims are time-barred under Article 1116(2) because it knew or should have known of the alleged breaches before the Critical Date. To the contrary, based on the evidence the Claimant has proffered, it knew and could only have known of facts that give rise to each of its four claims as identified in paragraph 13 of its Memorial after 15 August 2015,⁴⁹⁷ when the *Mesa Power* post-hearing written submissions and the videos of the hearing in that arbitration became available to the public.⁴⁹⁸ Accordingly, for the Claimant, the only relevant date for the purpose of the limitation period under Article 1116(2) is the date when it gained actual knowledge of the breach.⁴⁹⁹
320. In support of its position, the Claimant first makes several overarching arguments. First, the Claimant submits that the date of the alleged breach for purposes of Article 1116(2) is either 30 April 2015 or 15 August 2015.⁵⁰⁰ This is because the date of breach "must consider when an investor actually knew, or reasonably ought to have known, of the specific breach at issue", and it was on these two dates that key documents from the *Mesa Power* arbitration were made available to the public.⁵⁰¹ For the same reasons, the Claimant rejects the Respondent's position that the date of the alleged breach for purposes of Article 1116(2) is either 4 July 2011, when Skyway 127 was not awarded a FIT Contract and instead placed on a FIT priority waiting list, or 12 June 2013, when the FIT Program was terminated.⁵⁰² According to the Claimant, neither date is relevant because even after 4 July 2011, Skyway 127 remained in the running for a contract, and 12 June 2013 "occurs well before the time when [the Claimant] had actual or constructive knowledge of the internationally wrongful actions taken by Ontario."⁵⁰³ In the Claimant's view, the Respondent's "temporal allegations completely ignore the August 15, 2015 date [the

⁴⁹⁵ Reply, ¶ 53.

⁴⁹⁶ Reply, ¶ 55.

⁴⁹⁷ Reply, ¶¶ 339, 348-410.

⁴⁹⁸ Reply, ¶¶ 288-293; Claimant's PHB, ¶ 15.

⁴⁹⁹ Claimant's PHB, ¶¶ 16-17.

⁵⁰⁰ Reply, ¶¶ 268, 276.

⁵⁰¹ Reply, ¶ 44; Claimant's PHB, ¶ 18.

⁵⁰² Reply, ¶¶ 266-267.

⁵⁰³ Reply, ¶ 267.

Claimant] pled and the facts upon which [the Claimant] relies”, and has instead “artificially substitute[d] a series of earlier dates in place” thereof.⁵⁰⁴

321. The Claimant submits that, absent evidence of bad faith or unreasonableness, the Tribunal “should defer to the [Claimant’s] judgment about when its claim arose when assessing whether it complied with” Article 1116(2).⁵⁰⁵ Citing the award in *Glamis Gold v. United States*, the Claimant asserts that since “the basis of the claim is to be determined with reference to the submissions of [the] [c]laimant”,⁵⁰⁶ it “is entitled to argue its claim based on those measures that it finds material and relevant”.⁵⁰⁷ In the present case, the Claimant submits that it has in good faith “articulated specific claims that largely rest on information arising from the public revelation of the October 2014 *Mesa Power* NAFTA Hearing”,⁵⁰⁸ and “has been reasonable in arriving at the conclusion that it filed its claim within three years of learning of the facts and acts of Canada’s wrongful conduct before bringing its Notice of Arbitration.”⁵⁰⁹ Conversely, the Claimant argues that the Respondent has improperly recast the Claimant’s claim as one that mirrors that brought by the claimant in the *Mesa Power* arbitration, and in doing so, completely ignored the facts and the claim as pleaded by the Claimant.⁵¹⁰
322. Furthermore, the Claimant asserts that the facts that form the basis of its claims could not have been known prior to date in which the materials relating to the *Mesa Power* hearing became public as these were kept secret and suppressed by the Respondent.⁵¹¹ On the basis of its assertion that under international law that no one can benefit from their own wrongdoing,⁵¹² the Claimant submits that the Respondent cannot benefit from the measures it took to disguise and hide its wrongfulness from the public.⁵¹³
323. Based on the above premises, the Claimant submits that the information that was publicly available prior to 1 June 2014, including the numerous public documents used in the *Mesa Power*

⁵⁰⁴ Reply, ¶ 286.

⁵⁰⁵ Reply, ¶ 55.

⁵⁰⁶ Reply, ¶ 315; *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, 8 June 2009, ¶ 349 (CLA-315).

⁵⁰⁷ Reply, ¶ 31.

⁵⁰⁸ Reply, ¶¶ 31, 53. See also Memorial, ¶¶ 711-713.

⁵⁰⁹ Reply, ¶ 56.

⁵¹⁰ Reply, ¶¶ 19, 30, 309. See also Memorial, ¶¶ 711-713.

⁵¹¹ Reply, ¶ 337.

⁵¹² Reply, ¶¶ 241-243; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge University Press, 1953), p. 149 (CLA-108); *Case Concerning the Factory at Chorzów (Germany v. Poland)*, PCIJ Series A, No. 9, 1927, p. 31 (CLA-318); *Frances Irene Roberts case*, Reports of International Awards, Vol. IX, 1903-1904, p. 207 (CLA-319).

⁵¹³ Reply, ¶¶ 240-244.

arbitration, did not disclose the information that could allow any of the claims to arise.⁵¹⁴ Contrary to the claims in *Mesa Power*, which were grounded on a “generalized suspicion” of political favouritism, the Claimant asserts that the claims at stake in the instant case are based upon the admission of a government official of the existence of a “specific conspiracy of the most senior officials”.⁵¹⁵ Accordingly, its claims arise out of information that was only made public after the Critical Date, and in particular, the out of the following four “new” facts.

324. First, the Claimant submits that the post-hearing submissions in the *Mesa Power* arbitration, which were published on 15 August 2015, “made it public knowledge for the first time that ‘Ontario granted special transmission privileges to the members of the Korean Consortium despite the fact that the Korean Consortium was non-compliant with the binding terms of the GEIA [...]’”.⁵¹⁶ The Claimant posits that the mentioned written submissions disclosed, *inter alia*, that a government official admitted that the Korean Consortium was having trouble meeting the deadlines provided for in the GEIA for the first phases of its project.⁵¹⁷
325. The Claimant asserts that the formerly described facts serve as the sole basis for its claim in connection with the Korean Consortium,⁵¹⁸ and that therefore, contrary to the Respondent’s suggestion, the existence and terms of the GEIA are not the matter at issue in this arbitration.⁵¹⁹ Moreover, the Claimant contends that the Respondent has failed to produce any evidence to support the proposition that the facts that give rise to its claim were in the public domain prior to the Critical Date.⁵²⁰ In this respect, the Claimant also disputes the Respondent’s assertion that the 2011 Ontario’s Auditor General Report contained information regarding the extension granted to the Korean Consortium for the completion of the first phases of its project.⁵²¹ To the contrary, the Claimant asserts that the report makes no reference to the extension of the referred deadline.⁵²²
326. Second, the Claimant maintains that it could only have acquired knowledge of the special protection provided by the Respondent to IPC when the *Mesa Power* post-hearing written

⁵¹⁴ Reply, ¶¶ 293-294, 326-329. *See also* Hearing on Jurisdiction Transcript, Day 1, 117:17-118:22.

⁵¹⁵ Reply, ¶ 342.

⁵¹⁶ Memorial, ¶ 744; Notice of Arbitration, ¶¶ 99-101. *See also* Reply, ¶ 349; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Hearing Transcript Day 3, 28 October 2014, 39:22-40:23 (C-121).

⁵¹⁷ Reply, ¶ 354; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Hearing Transcript Day 3, 28 October 2014, 97:19-98:2 (C-121).

⁵¹⁸ Reply, ¶ 350.

⁵¹⁹ Reply, ¶ 350.

⁵²⁰ Reply, ¶ 351.

⁵²¹ Reply, ¶ 354; Counter-Memorial, ¶ 130.

⁵²² Reply, ¶ 354; Office of the Auditor General of Ontario, 2011 Annual Report, pp. 108, 116 (R-2).

submissions were published.⁵²³ In particular, the Claimant submits, the Mesa Power’s submissions recorded admissions made by representatives of Ontario during the *Mesa Power* hearing that (a) a “Breakfast Club” of senior government officials held secret meetings to, *inter alia*, take steps to protect the business prospects of applicants to the FIT program which had connections with the Ontario government;⁵²⁴ (b) that the “Breakfast Club” gave preferential treatment to IPC to ensure that they were protected from the Korean Consortium set aside and allowed for connection changes so that IPC would still receive FIT Contracts;⁵²⁵ and (c) that IPC was “[a] key political supporter of the Ontario governing Liberal Party” and the President of IPC was the past president of the governing Ontario Liberal Party.⁵²⁶

327. While the Claimant admits that Mr. Pennie was aware of the allegations made by Mesa Power through press reports around 14 July 2011,⁵²⁷ the Claimant stresses that even a professional investigative journalist, who reviewed all the available public information regarding “the politics of Ontario’s energy policy in relation to renewable and clean energy”, could not locate any evidence on the existence of the “Breakfast Club” conspiracy before the submissions were published.⁵²⁸ Therefore, contrary to the Respondent’s assertions, the Claimant maintains that none of the documents that the Respondent has enumerated as being available prior to the Critical Date reveals the above facts.⁵²⁹
328. Further, the Claimant notes that when Mr. John Pennie made repeated contacts to obtain information from the OPA officials after the *Mesa Power* allegations became public, the officials confirmed only “untrue” statements that the FIT Program rules were fairly and consistently followed and denied their wrongful conduct continuously.⁵³⁰
329. Third, the Claimant submits that the *Mesa Power* hearing videos, which were published on 15 August 2015, made public for the first time an Ontario government official’s admission that the Respondent granted the Vice President of NextEra access to a meeting with the [REDACTED]

⁵²³ Memorial, ¶¶ 742-743; Reply, ¶¶ 60, 358; Claimant’s PHB, ¶ 27; *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Claimant’s PHB, ¶ 16 (C-17). See also Memorial, ¶¶ 750-753.

⁵²⁴ Reply, ¶ 359(a); Hearing on Jurisdiction Transcript, Day 1, 121:3-14.

⁵²⁵ Reply, ¶ 361; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Investor’s Post-Hearing Brief, 18 December 2014, ¶ 158 (C-17).

⁵²⁶ Reply, ¶¶ 361-362; Notice of Arbitration, ¶ 81; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Hearing Transcript Day 6, 31 October 2014, 54:19-23, 284:11-16 (C-125).

⁵²⁷ Claimant’s PHB, ¶ 19.

⁵²⁸ Claimant’s PHB, ¶ 28; Witness Statement of Peter Wolchak, filed in *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, 28 April 2014, ¶ 3 (C-203).

⁵²⁹ Reply, ¶ 359.

⁵³⁰ Claimant’s PHB, ¶ 21. See also Hearing on Jurisdiction Transcript, Day 5, 864:18-865:21.

██████████⁵³¹ According to the Claimant, this meeting “lead to NextEra’s six projects receiving FIT Contracts”.⁵³²

330. The Claimant asserts that none of the public sources referred to by the Respondent mention the meeting of the ██████████ with the Vice President of NextEra, which is the basis of its claim related to the treatment afforded to NextEra.⁵³³ While the Claimant acknowledges that the *Mesa Power* written submissions publicly available prior to the Critical Date discussed the close relationship between NextEra and mid and low-level government officials, these did not refer to the high-level interactions between NextEra and the Ontario Government.⁵³⁴ In this regard, the Claimant underlines that the meetings held between the NextEra and government officials between January and April 2011 referred to in the sources identified by the Respondent were “not [] secret meeting[s] with a high-level official” and did not “suggest to a FIT Proponent that nefarious or improper conduct was underway”.⁵³⁵
331. Fourth, the Claimant alleges that it only acquired knowledge of how the spoliation of documents by Ontario officials affected its interest when the *Mesa Power* hearing videos were introduced into the public domain.⁵³⁶ The Claimant contends that its claim concerning the spoliation of documents is based on the fact that this conduct took place at a time when senior government officials were affording preferential treatment to certain FIT applicants.⁵³⁷
332. In particular, the Claimant alleges that, as disclosed in the *Trillium Wind* case, “code names” were used by Ontario officials to delay or block production of documents relating to the energy policy decisions in Ontario.⁵³⁸ The Claimant admits that it “do[es] not know the code name for onshore projects under the FIT Program”, but takes the view, based on the fact that the person criminally convicted for the destruction of documents was a member of the “Breakfast Club”, that there was

⁵³¹ Reply, ¶¶ 367-368, 371; *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17, Day 3, Part 2 Hearing Video, 28 October 2014, 1:25:35, 1:27:21 (C-204). See also Memorial, ¶¶ 748-749.

⁵³² Reply, ¶ 367.

⁵³³ Reply, ¶¶ 378-384; Claimant’s PHB, ¶¶ 22, 30.

⁵³⁴ Reply, ¶ 367.

⁵³⁵ Reply, ¶¶ 390-397.

⁵³⁶ Memorial, ¶¶ 754-755; Reply, ¶¶ 401-403.

⁵³⁷ Reply, ¶ 406.

⁵³⁸ Claimant’s PHB, ¶¶ 137-141, referring to *Trillium Power Wind Corporation v. Her Majesty the Queen, in right of the Province of Ontario, as represented by the Ministry of Natural Resources, the Ministry of the Environment, and the Ministry of Energy*, CV-11-436012, Superior Court of Justice Order and Plaintiff Amended Statement of Claim, 18 June 2015 (CLA-278).

a “direct link” between the “Breakfast Club” and the “systematic and endemic efforts secretly taken by the Ontario government” to avoid the disclosure of information.⁵³⁹

333. The Claimant rejects the Respondent’s argument that the confidentiality designations of the *Mesa Power* hearing videos did not amount a measure under the Treaty because, in the Claimant’s view, the designations, notwithstanding the notice from Mesa Power that they were not confidential and the fact that the videos were made available for years to the public, were part of the Respondent’s “practice” of actively suppressing information.⁵⁴⁰
334. Further to the above, the Claimant submits that, based on the witness statement of Messrs. John Tennant, Derek Tennant and John Pennie, the Claimant did not have actual knowledge of the alleged breaches prior to August 2015, *i.e.*, until after the release of information arising from the *Mesa Power* hearing, resulting to a tolling of the limitation period.⁵⁴¹
335. In light of the foregoing, the Claimant argues that its claims are not time-barred because the evidence demonstrates that the Respondent’s continuous act of “delaying, denying and distracting” occurred in a three-year zone.⁵⁴² Such non-instantaneous systematic acts of concealing information and abuse of process, according to the Claimant, constitute continuous and composite breaches of the Respondent’s international obligations.⁵⁴³ Consequently, the Claimant contends that a self-standing cause of action crystallized when it first acquired knowledge of the Respondent’s unfair conduct in 2015.⁵⁴⁴

3. The Non-Disputing Parties’ Submissions

(a) Submissions of the United States and Mexico

336. The non-disputing Parties agree that Article 1116(2) imposes a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of a dispute.⁵⁴⁵ The non-disputing Parties further highlight that NAFTA tribunals have recognized the three-year limitation period

⁵³⁹ Claimant’s PHB, ¶ 141; Hearing on Jurisdiction Transcript, Day 1, 128:17-129:19.

⁵⁴⁰ Hearing on Jurisdiction Transcript, Day 5, 865:2-866:13.

⁵⁴¹ Reply, ¶¶ 412-420; ; Claimant’s PHB, ¶¶ 35, 48-49; Witness Statement of John Tennant, ¶¶ 37-40 (CWS-2); Witness Statement of Derek Tennant, ¶¶ 47-51 (CWS-3); Pennie Statement, ¶¶ 70, 94, 96-97, 99-101 (CWS-1).

⁵⁴² Hearing on Jurisdiction Transcript, Day 5, 879:5-7.

⁵⁴³ Hearing on Jurisdiction Transcript, Day 1, 146:25-147:2, 148:10-20.

⁵⁴⁴ Hearing on Jurisdiction Transcript, Day 1, 180:7-13; Hearing on Jurisdiction Transcript, Day 5, 880:6-8, 883:16-18.

⁵⁴⁵ United States’ Second Submission, ¶ 3; Mexico’s Second Submission, ¶ 8.

to be a “clear and rigid” requirement that is not subject to any “suspension, prolongation or other qualification”.⁵⁴⁶

337. The non-disputing Parties agree that the limitation period under Article 1116(2) begins to run on the particular “date” when an investor “*first* acquires knowledge of an alleged breach and loss”.⁵⁴⁷ Such knowledge, the United States notes, “cannot *first* be acquired at multiple points in time or on a recurring basis”.⁵⁴⁸ As such, once the investor knows or should have known, of the alleged breach and loss or damage, subsequent transgressions by a Party arising from a continuing course of conduct do not renew the limitation period, as consistently confirmed by NAFTA tribunals.⁵⁴⁹ The United States adds that allowing an investor to “evade” the limitation period by basing its claim on the ground of continued violation would render the limitation period ineffective and undermine a NAFTA Party’s consent to arbitration.⁵⁵⁰
338. The non-disputing Parties agree that the knowledge requirement under Article 1116(2) may be satisfied either by actual knowledge (“first acquired”) or constructive knowledge (“should have first acquired”).⁵⁵¹ In this respect, the non-disputing Parties endorse the finding of the *Grand River* tribunal that “[c]onstructive knowledge’ of a fact is imputed to person if by exercise of reasonable care of diligence, the person would have known of that fact”.⁵⁵² Accordingly, the United States notes that the test for constructive knowledge is an objective standard, that of a “reasonably prudent investor”.⁵⁵³

⁵⁴⁶ Mexico’s Second Submission, ¶ 9; *Grand River Enterprise Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 29 (**RLA-70**); *Marvin Roy Feldman Karpas v. United States of Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63 (**RLA-200**); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB/15/16, 13 July 2018, ¶ 146 (**RLA-131**); United States’ Second Submission, ¶ 4, referring to *Apotex Inc. v. United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, 14 June 2013, ¶ 327 (**RLA-80**).

⁵⁴⁷ United States’ Second Submission, ¶ 4 (emphasis in original); Mexico’s Second Submission, ¶ 8.

⁵⁴⁸ United States’ Second Submission, ¶ 4 (emphasis in original).

⁵⁴⁹ United States’ Second Submission, ¶ 4; Mexico’s Second Submission, ¶ 10; *Grand River Enterprise Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 81 (**RLA-70**); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada*, ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, ¶ 146 (**RLA-131**).

⁵⁵⁰ United States’ Second Submission, ¶ 5.

⁵⁵¹ United States’ Second Submission, ¶ 7; Mexico’s Second Submission, ¶ 11.

⁵⁵² United States’ Second Submission, ¶ 7; Mexico’s Second Submission, ¶ 11; *Grand River Enterprise Six Nations Ltd. v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 59 (**RLA-70**).

⁵⁵³ United States’ Second Submission, ¶ 7; *Grand River Enterprise Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 66 (**RLA-70**); *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence*

339. With respect to the knowledge of “incurred loss or damage”, the non-disputing Parties agree that an investor need not have full knowledge of the loss or damage incurred in order to start the limitation period under Article 1116(2).⁵⁵⁴ The United States further explains that the investor may “incur” loss or damage even if the financial impact of that loss or damage is not immediate.⁵⁵⁵

(b) The Respondent’s Reply to the Submissions of the Non-Disputing Parties

340. According to the Respondent, the NAFTA Parties’ agreement on the interpretation of Article 1116(2) is “both consistent and longstanding”.⁵⁵⁶

341. First, the NAFTA Parties agree that Article 1116(2) imposes a “clear and rigid” limitation period that is not subject to any suspension, prolongation, or other qualification.⁵⁵⁷ Noting that past NAFTA tribunals have followed this strict interpretation of the limitation period in Article 1116(2), the Respondent submits that there is no reason for the Tribunal to depart from this well-established rule.⁵⁵⁸

342. Second, the NAFTA Parties agree that the limitation period in Article 1116(2) begins to run on the date when an investor first acquires knowledge of the alleged breach and the alleged loss.⁵⁵⁹ In addition, the “longstanding view of the NAFTA Parties” is that the first acquisition of knowledge can occur only once and that subsequent State conduct relating to the same alleged breach does not renew or reset the limitation period.⁵⁶⁰ Echoing the submissions of both Mexico and the United States, the Respondent posits that allowing a claimant to circumvent the three-year statute of limitations on the grounds of continued breach would run contrary to a NAFTA Party’s consent to arbitration.⁵⁶¹

International Investments and others) v. Republic of Costa Rica, ICSID Case No. UNCT13/2, Interim Award (Corrected), 30 May 2017, ¶ 209 (RLA-136).

⁵⁵⁴ United States’ Second Submission, ¶ 6; Mexico’s Second Submission, ¶ 12.

⁵⁵⁵ United States’ Second Submission, ¶ 6.

⁵⁵⁶ Respondent’s Second Article 1128 Submission, ¶ 17.

⁵⁵⁷ Respondent’s Second Article 1128 Submission, ¶ 18.

⁵⁵⁸ Respondent’s Second Article 1128 Submission, ¶ 18.

⁵⁵⁹ Respondent’s Second Article 1128 Submission, ¶ 19.

⁵⁶⁰ Respondent’s Second Article 1128 Submission, ¶ 19.

⁵⁶¹ Respondent’s Second Article 1128 Submission, ¶ 19.

343. Third, the NAFTA Parties agree that the test for constructive knowledge (“should have acquired”) is an objective one, assessed against the standard of what a reasonably prudent investor should have known, as formulated in *Grand River v. United States*.⁵⁶²
344. Finally, the NAFTA Parties agree with the finding in *Mondev v. United States* that a claimant need not have full knowledge of the allegedly “incurred loss or damage” in order to start the limitation period under Article 1116(2).⁵⁶³

(c) The Claimant’s Reply to the Submissions of the Non-Disputing Parties

345. For the Claimant, the test for constructive knowledge formulated in *Grand River v. United States* is too narrow and is not consistent with the objectives and context of the NAFTA.⁵⁶⁴ Noting that its claims first arose in 2015 with the release of information from the *Mesa Power* hearing in October 2014, the Claimant considers that “it would be inequitable to allow Canada to wrongful[ly] hide the knowledge of its wrongfulness and at the same time suggest that the time clock was running”.⁵⁶⁵
346. Relying on *Resolute Forest Products v. Canada*, the Claimant submits that Tennant Energy could not have known of the wrongful actions of the Respondent due to the Respondent’s “subterfuge in hiding this information from the public” and that the Respondent’s practices to ensure that no information was available to the public could not allow the time clock to run.⁵⁶⁶ Given that the Respondent has not challenged the jurisdiction for actions that arose after Tennant Energy had its shares formally registered in 2015, the Claimant argues that the Tribunal has jurisdiction to hear to its claims.⁵⁶⁷

VII. THE TRIBUNAL’S ANALYSIS

347. As set out above, the Respondent’s two Preliminary Objections are:

⁵⁶² Respondent’s Second Article 1128 Submission, ¶ 20, referring to *Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill and Arthur Montour v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction, 20 July 2006, ¶ 59 (RLA-70).

⁵⁶³ Respondent’s Second Article 1128 Submission, ¶ 21, referring to *Mondev International Ltd. v. United States America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, ¶ 87 (RLA-83).

⁵⁶⁴ Claimant’s Second Article 1128 Submission, fn. 1.

⁵⁶⁵ Claimant’s Second Article 1128 Submission, ¶¶ 7, 13. See also Counter-Memorial, ¶¶ 180-181.

⁵⁶⁶ Claimant’s Second Article 1128 Submission, ¶¶ 14-15, 21, referring to *Resolute Forest Products v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 154 (RLA-79).

⁵⁶⁷ Claimant’s Second Article 1128 Submission, ¶¶ 21-22.

- (a) **First Objection:** the Tribunal has no jurisdiction *ratione temporis* under Article 1116(1) because the Claimant was not an “investor of a Party” when the alleged breach occurred.
- (b) **Second Objection:** the Tribunal has no jurisdiction *ratione temporis* because the Claimant failed to submit its claim within the three-year limitation period established by Article 1116(2) of the NAFTA.

348. The Tribunal turns first, below, to the objection that the Claimant was not an “investor of a Party” when the breach occurred. In setting out its analysis on both objections, the Tribunal has considered all relevant factual and legal arguments presented in the disputing Parties’ written submissions and oral presentations. The fact that any argument, allegation or any specific evidence is not mentioned does not mean that the Tribunal has not considered it.

A. THE FIRST OBJECTION

1. Preliminary Considerations

349. The Tribunal agrees with the Respondent, and with the United States and Mexico in their Article 1128 submissions, that compliance with Article 1116(1) of the NAFTA constitutes a jurisdictional requirement in respect of which the Claimant bears the burden of proof.
350. Article 1122(1) of the NAFTA states that “[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement”. Unless a claim is submitted in accordance with the procedures under NAFTA, there is no consent. The Tribunal agrees with the Respondent that consent is a question of jurisdiction.⁵⁶⁸
351. Article 1116(1) states that an investor of a Party “may submit to arbitration” a claim that another Party has breached an obligation under Section A, Chapter Eleven of the NAFTA and that the investor has incurred loss or damage by reason of, or arising out of, that breach. In the Tribunal’s view, the clear inference of Article 1122(1) read with Article 1116(1) is that NAFTA Parties do not consent to arbitrate a claim which does not satisfy the conditions under Article 1116(1).
352. The Tribunal notes that NAFTA tribunals have consistently held that compliance with Article 1116(1) is required to establish a NAFTA Party’s consent to arbitration and in turn a tribunal’s

⁵⁶⁸ Counter-Memorial, ¶ 55; *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 229 (RLA-3); *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120 (RLA-2).

jurisdiction, and that it is for the claimant to establish that it satisfies the requirements under Article 1116(1).⁵⁶⁹ The Tribunal sees no good reason to depart from such jurisprudence. The cases cited by the Claimant, including *Pope & Talbot v. Canada*, do not state that an objection under Article 1116(1) constitutes an “affirmative defence”, nor that the respondent bears the burden of proving that the claim does *not* satisfy the conditions under Article 1116(1).

353. The Claimant relies on Article 24(1) of the UNCITRAL Rules, which states that “[e]ach party shall have the burden of proving the facts relied on to support his claim or defence”. In the Tribunal’s view, this is simply a restatement of the general principle that a party who relies on a fact to support his claim bears the *evidentiary* burden of proving it. The Tribunal agrees with the Respondent that this principle does not override the Claimant’s *legal* burden of establishing the Tribunal’s jurisdiction.⁵⁷⁰ In *Resolute Forest Products v. Canada*, the tribunal found that Article 24(1) of the UNCITRAL Rules imposes on the claimant the burden of proving the facts necessary to establish that a claim has been brought in accordance with Section B of the NAFTA Chapter Eleven.⁵⁷¹ The Tribunal agrees.

354. Having found that it is the Claimant’s legal burden to establish that it satisfies the requirements under Article 1116(1), the Tribunal considers it necessary to clarify the standard of proof that the Claimant must satisfy at the jurisdictional phase. In the Tribunal’s view, the standard of proof is twofold: (a) where an alleged fact is relevant to the merits, the Claimant needs only to establish that fact on a *prima facie* basis; and (b) where an alleged fact is necessary to establish the Tribunal’s jurisdiction, the Claimant must prove it. This distinction was explained by the tribunal in *Phoenix Action, Ltd v. Czech Republic*:⁵⁷²

“60. In the Tribunal’s view, it cannot take all the facts as alleged by the Claimant as granted facts, as it should do according to the Claimant, but must look into the role these facts play either at the jurisdictional level or at the merits level, as asserted by the Respondent.

61. If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until

⁵⁶⁹ Counter-Memorial, ¶ 56; Rejoinder, ¶ 18; *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120 (RLA-2); *Vito G. Gallo v. Government of Canada*, PCA Case No. 55798, Award, 15 September 2011, ¶¶ 277, 325-326 (RLA-4); *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶¶ 82-83 (RLA-79); *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 145 (RLA-121).

⁵⁷⁰ Rejoinder, ¶ 19.

⁵⁷¹ *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 84 (RLA-79).

⁵⁷² *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, ¶¶ 60-63 (RLA-5).

their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage. For example, in the present case, all findings of the Tribunal to the effect that there exists a protected investment must be proven, unless the question could not be ascertained at that stage, in which case it should be joined to the merits.

62. This double approach is routinely followed by arbitral tribunals. The alleged facts complained of have to be accepted *pro tem* at the jurisdictional phase. Recently, the tribunal in *Saipem v. Bangladesh*:

“The Tribunal’s task is to determine the meaning and scope of the provisions upon which [the claimant] relies to assert jurisdiction and to assess whether the facts alleged by [the claimant] fall within those provisions or would be capable, if proven, of constituting breaches of the treaty obligations involved. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the relevant BIT provisions and to the assessment whether the facts alleged may constitute breaches of these provisions. In doing so, the Tribunal will assess whether [the claimant’s] case is reasonably arguable on its face. If the result is affirmative, jurisdiction will be established but the existence of breaches will remain to be litigated on the merits.”

It is quite clear that the tribunal refers here to facts capable of being analyzed as a breach of the BIT, and not to facts whose existence is necessary to support jurisdiction.

63. If, on the contrary, the alleged facts are facts on which the jurisdiction of the tribunal rests, it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant. The tribunal must take into account the facts and their interpretation as alleged by the claimant, as well as the facts and their interpretation as alleged by the respondent, and take a decision on their existence and proper interpretation. To take a simple example, if under a BIT entered into by Italy, a tribunal only has jurisdiction if the claimant is an Italian investor and if, at the jurisdictional level, a claimant asserts that he is Italian, and the respondent alleges that he is not, the tribunal cannot simply accept the facts as asserted by the claimant and confirm its jurisdiction, but it has to make a decision in order to verify whether or not it has jurisdiction *ratione personae* over the investor, based on his Italian nationality.”
355. The Tribunal agrees with this analysis. For the purposes of the First Objection, the Tribunal must therefore be satisfied that the Claimant has established, on a *prima facie* basis, that its claim on the merits falls within the scope of Article 1116(1) of the NAFTA. In addition, where the Claimant asserts facts which are necessary to establish the Tribunal’s jurisdiction, including that there exists a protected investment and that the Claimant is a protected investor, the Tribunal must make a finding on whether these facts have been proven by the Claimant.

2. The Pre-conditions for Jurisdiction under Article 1116(1)

356. The corollary of the Tribunal's finding that Article 1116(1) constitutes a jurisdictional requirement is that, unless all conditions under Article 1116(1) are satisfied to the requisite standard of proof, the Tribunal has no jurisdiction to hear the present claim. Article 1116(1) of the NAFTA states:

“Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.”

357. On a plain reading of Article 1116(1) of the NAFTA, the following requirements must be satisfied to the requisite standard of proof for the Tribunal to have jurisdiction:

- (a) First, the claimant must be “[a]n investor of a Party”. For the reasons explained above, the facts which establish the Claimant's status as an “investor of a Party” within the meaning of the NAFTA must be proven by the Claimant.
- (b) Second, the claimant must allege a breach of a NAFTA obligation. Where the claimant alleges a breach of an obligation under Section A, Chapter Eleven of the NAFTA, Article 1101 (“Scope and Coverage”) must be satisfied. Article 1101(1) establishes both the scope and coverage of the substantive protections accorded to investors and investments as well as the scope of the rights to submit disputes to arbitration. Pursuant to Article 1101, the claim must target measures adopted or maintained by a Party “relating to” investors of another Party and investments of investors of another Party in the territory of the Party. In this regard, the Tribunal's role is to assess whether the claim, as stated by the Claimant in its Notice of Arbitration and Memorial, *prima facie* satisfies the requirements of Article 1101 and therefore falls within the scope and coverage of the NAFTA. The Tribunal must not attempt at this stage to determine the merits of the claim.⁵⁷³

⁵⁷³ *Amco Asia Corporation and Others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, ¶ 38 (CLA-283).

- (c) Third, the claimant must have incurred loss or damage by reason of, or arising out of, the alleged breach. Since Article 1116(1) of the NAFTA refers to “the” investor having incurred loss or damage, the same “investor of a Party” who brings the claim must itself have suffered loss or damage arising from the breach.⁵⁷⁴ The Claimant must establish, on a *prima facie* basis, that it had itself suffered loss or damage by reason of, or arising out of, the alleged breach. The Claimant need not prove the extent of such loss or damage suffered, given that these facts necessarily relate to the Claimant’s case on the merits.⁵⁷⁵
- (d) Fourth, the claimant must be bringing the claim on its own behalf, and not on behalf of another party. Article 1116 of the NAFTA is entitled “Claim by an Investor of a Party on Its Own Behalf”, which is contrasted with Article 1117, entitled “Claim by an Investor of a Party on Behalf of an Enterprise”.

358. The Tribunal notes that Article 1116 of the NAFTA does not expressly state that the claimant-investor must be the same investor who owned or controlled the investment at the time of the alleged breach, or that the allegedly wrongful measures must have directly affected the claimant-investor.

3. Whether the Claimant is an “investor of a Party”

359. Article 1139 of the NAFTA defines an “investor of a Party” as follows:

“**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;”

360. Article 1139 further defines an “investment of an investor of a Party” as follows:

“**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;”

361. “Investment” is defined broadly under Article 1139 to include many different types of investments, including an enterprise and shares in an enterprise.

⁵⁷⁴ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 200 (**RLA-207**).

⁵⁷⁵ *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on Preliminary Motion to Dismiss the Claim Because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven, 26 January 2000, ¶ 25 (**CLA-284**): “In its Statement of Claim the Investor claims that the breaches described above relate to the Investor or the Investment, and that in each case it or the Investment has sustained loss or damage by reason of those breaches. For the purposes of the present Motion, the Tribunal must take those assertions of fact as true.”

362. Tennant Energy is a United States' corporation. Presently, Tennant Energy owns shares in Skyway 127,⁵⁷⁶ an Ontario corporation. This makes Tennant Energy an investor as defined by paragraph (b) of the definition of "investment" under Article 1139 of the NAFTA.
363. The Respondent does not challenge the Claimant's current status as an investor. Instead, the Respondent objects to jurisdiction on the basis that the Claimant was not an investor *when the alleged NAFTA breach occurred*. The Respondent submits that all of the measures alleged by the Claimant to breach Article 1105 occurred *before* the Claimant became an "investor of a Party" on 15 January 2015.⁵⁷⁷ This objection requires an analysis of when the Claimant first became an "investor of a Party" and when the alleged breaches occurred, which the Tribunal considers in turn below.

4. When the Claimant Became an "investor of a Party"

364. It is evident from the definition of "investment of an investor of a Party" under Article 1139 that the Claimant does not need to both own *and* control an investment in order to qualify as an "investor of a Party". The Claimant needs only to show that it either owned *or* controlled the investment.
365. There is no dispute that the Claimant obtained legal ownership of 45.2% of the shares of Skyway 127 on 15 January 2015. The Claimant alleges that it was an investor of a Party even prior to 15 January 2015 because:
- (a) the Claimant owned Skyway 127 shares beneficially under an oral trust created in April 2011;⁵⁷⁸ and/or
 - (b) the Claimant controlled Skyway 127 since 31 December 2011.⁵⁷⁹
366. The Tribunal considers each allegation below.

⁵⁷⁶ Memorial, ¶ 773(d); Pennie Statement, ¶ 66(d) (CWS-1).

⁵⁷⁷ Counter-Memorial, ¶¶ 62-63.

⁵⁷⁸ Reply, ¶¶ 2(a)-(b), 119.

⁵⁷⁹ Reply, ¶ 154.

5. Ownership

(a) The Alleged Existence of an Oral Trust

367. As mentioned above, the Claimant asserts that Mr. John Tennant acquired 11.3% of Skyway 127 shares on 19 April 2011 to be held in trust, and designated Tennant Travel as the beneficiary owner of the shares on 26 April 2011.⁵⁸⁰ On 31 December 2011, Mr. John Tennant acquired a further 11.3% of Skyway 127 shares (bringing his total shareholding to 22.6%), which he likewise designated Tennant Travel as the beneficial owner of.⁵⁸¹ Accordingly, the Claimant submits that it was an American investor with an investment in Skyway 127 from 26 April 2011.⁵⁸²
368. There is no dispute that Californian law is the applicable law for determining the existence of an alleged trust created by Mr. John Tennant over the Skyway 127 shares in favour of the Claimant. The Parties also do not dispute that a trust can be created orally, and that the legal requirements for creating a trust are the existence of trust property, a purpose that is not illegal or against public policy, a beneficiary that is ascertainable with reasonable certainty or that is sufficiently described, and an intention to create a trust.⁵⁸³ The Respondent's main contention with the Claimant's case on oral trust is the lack of evidence.⁵⁸⁴
369. The standard for determining whether or not an oral trust exists under California law is clear and convincing evidence.⁵⁸⁵ The Parties' respective experts agree that this standard requires a high probability on the evidence, and that it lies between the standard of a preponderance of evidence and the standard of beyond all reasonable doubt.⁵⁸⁶ In addition, the Tribunal considers that the cases of *Butte Fire Cases*, *Higgins v Higgins*, and *Nevarrez v. San Marino Skilled Nursing & Wellness Ctr., LLC* interpret the same standard of a high probability on the evidence, notwithstanding that they describe the standard in different terms. The Tribunal's view is fortified by the fact that the Judicial Council of California's Civil Jury Instructions, which cites *Butte Fire Cases* as authority, states that the requirement of clear and convincing evidence "means the party must persuade you that it is highly probable that the fact is true".⁵⁸⁷

⁵⁸⁰ Reply, ¶¶ 69, 84.

⁵⁸¹ Reply, ¶¶ 153-154.

⁵⁸² Reply, ¶ 88.

⁵⁸³ Respondent's PHB, ¶ 30.

⁵⁸⁴ See ¶ 205 above; Lodise Report, ¶ 46 (**RER-1**).

⁵⁸⁵ California Probate Code, § 15207(a) (**R-90**); Hearing on Jurisdiction Transcript, Day 4, 645:22-646:23, 659:10-116.

⁵⁸⁶ Hearing on Jurisdiction Transcript, Day 4, 658:16-2, 660:11-14; Hearing on Jurisdiction Transcript, Day 4, 669:20-670:24.

⁵⁸⁷ Judicial Council of California, Civil Jury Instructions, Series 100-2500 (**C-270**).

370. Having reviewed the evidence and considered the submissions made by the disputing Parties, the Tribunal is not persuaded that Mr. John Tennant created an oral trust and held the Skyway 127 shares in trust for Tennant Travel.
371. First, the Tribunal considers it significant that there is no contemporaneous documentary evidence to corroborate the existence or terms of the alleged oral trust. The Tribunal notes that the 437,500 Skyway 127 shares (*i.e.*, the alleged trust property) were pledged as security for a loan by Mr. John Tennant of \$200,000 to his brother's company. According to Mr. Tennant, this was a fairly significant personal loan.⁵⁸⁸ The loan was documented by: (a) a written promissory note between Mr. John Tennant as lender, IQ Properties as borrower and Mr. Derek Tennant guarantor;⁵⁸⁹ and (b) Skyway 127's written acknowledgment of the promissory note issued to Mr. John Tennant and IQ Properties, and signed by Mr. John Pennie.⁵⁹⁰ When IQ Properties defaulted on the loan, Mr. John Tennant issued a written notice to demand that the Skyway 127 shares be transferred to him in the event of a failure to pay by 19 April 2011.⁵⁹¹ As at 19 April 2011, when IQ Properties still did not pay, the total debt owed to Mr. John Tennant including interest would have been around \$270,000.⁵⁹² Therefore, the 437,500 Skyway 127 shares represented the value of approximately \$270,000.
372. In the Tribunal's view, given Messrs. John Tennant, Derek Tennant and John Pennie's careful documentation of the loan and its default, it is incongruous that the same individuals would not take any steps to document the alleged trust, or register Tennant Travel's alleged beneficial ownership of the shares in Skyway 127's records. The first time that Skyway 127's ledger makes reference to Tennant Travel's interest in the shares is on 15 January 2015⁵⁹³ (*i.e.*, nearly four years after the trust was allegedly created). The Tribunal considers that Messrs. John Tennant, Derek Tennant, and John Pennie are reasonably sophisticated businessmen who would have appreciated that it would be prudent to record the alleged trust in writing if they had intended to create such a trust. The Tribunal is not persuaded that Mr. John Tennant would have simply *assumed* that the

⁵⁸⁸ Hearing on Jurisdiction Transcript, Day 3, 347:4-6.

⁵⁸⁹ Promissory Note to Mr. John H. Tennant, 19 October 2007 (C-265).

⁵⁹⁰ Letter of Acknowledgement between Mr. John H. Tennant and I Q Properties Inc., 20 October 2007 (C-266).

⁵⁹¹ Demand Notice to T Q Properties Inc. & Skyway 127 Wind Energy Inc., 19 October 2010 (C-267).

⁵⁹² Hearing on Jurisdiction Transcript, Day 3, 351:14-18.

⁵⁹³ Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 15 January 2015 (C-115).

Skyway 127 ledgers reflected Tennant Travel's beneficial ownership,⁵⁹⁴ without taking steps to verify the same with Mr. Pennie.⁵⁹⁵

373. The Tribunal is additionally troubled by the fact that, despite the alleged creation of the trust on 19 April 2011, the Shareholders & Transfers Register for Skyway 127 on 9 June 2011, 20 June 2011 and 30 December 2011 make no reference to Tennant Travel's beneficial ownership in Skyway 127's shares.⁵⁹⁶ When the Register was updated on 20 June 2011 and 30 December 2011, it was updated to reflect *Mr. John Tennant's* 11.3% and 22.6% shareholding respectively, but made no mention of a trust.
374. If, as the Claimant asserts, the purpose of the alleged trust was to prevent the dilution of voting control in Skyway 127,⁵⁹⁷ it is reasonable to expect that steps would be taken to ensure that the trust was reflected in Skyway 127's records. No documentation of the trust exists, and the Claimant has not been able to provide any satisfactory explanation for the absence of documentation.
375. The Tribunal notes that a contemporaneous writing is not necessary to prove an oral trust under California law.⁵⁹⁸ However, in the Tribunal's view, the absence of *any* contemporaneous writing by reasonably sophisticated businessmen, who have on other occasions documented their dealings in writing, weighs considerably in favour of a finding that no oral trust in fact existed.
376. Second, the Tribunal finds that Mr. John Tennant's memorandum of 18 February 2016 to Tennant Energy, which is the only documentary evidence adduced by the Claimant in support of the alleged trust, does not constitute contemporaneous or reliable evidence of the alleged trust.⁵⁹⁹ Mr. Tennant issued this memorandum nearly 5 years after the alleged trust was created, and after he had discussed the Respondent's alleged breach of NAFTA with the Claimant's counsel in mid-June 2015.⁶⁰⁰ Whilst Mr. Tennant had stated in the memorandum that he at all times held the Skyway 127 shares as "bare trustee", Mr. Tennant testified during the Hearing on Jurisdiction that the term "bare trustee" was "someone else's term", and that he did not know what it meant.⁶⁰¹

⁵⁹⁴ Witness Statement of John Tennant, ¶ 28 (CWS-2); Hearing on Jurisdiction Transcript, Day 3, 358:21-24.

⁵⁹⁵ Hearing on Jurisdiction Transcript, Day 3, 359:1-4.

⁵⁹⁶ Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 9 June 2011 (C-116); Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 20 June 2011 (C-117); Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 30 December 2011 (C-114).

⁵⁹⁷ Hearing on Jurisdiction Transcript, Day 5, 795:3-22, 796:6-24, 797:12-23.

⁵⁹⁸ Hearing on Jurisdiction Transcript, Day 4, 641:1-21.

⁵⁹⁹ Memorandum to the Management Board, Tennant Energy, LLC, 8 February 2016 (C-268).

⁶⁰⁰ Hearing on Jurisdiction Transcript, Day 3, 386:18-24.

⁶⁰¹ Hearing on Jurisdiction Transcript, Day 3, 408:2-13.

377. Third, the Tribunal also finds that the evidence of Mr. John Tennant, Mr. Derek Tennant, and Mr. Pennie does not constitute clear, convincing, or reliable evidence of the alleged oral trust.
378. The Tribunal notes that there are critical inconsistencies in the witness testimonies as to when Tennant Travel was designated as the alleged beneficiary of the Skyway 127 shares. Mr. John Tennant's evidence that he had designated Tennant Travel as beneficiary on 26 April 2011⁶⁰² contradicts Mr. John Pennie and Mr. Derek Tennant's testimony at the Hearing that Mr. Tennant still had not designated a company to hold his Skyway 127 shares by 30 December 2011.⁶⁰³ Mr. Derek Tennant's testimony at the Hearing on Jurisdiction also contradicted his statement that Mr. John Tennant informed him by telephone on 26 April 2011 that he was holding the shares in trust for Tennant Travel.⁶⁰⁴
379. More fundamentally, the Tribunal is not persuaded that Mr. John Tennant had an intention to create a trust at the material time. In the Tribunal's view, at its best, the evidence shows that Mr. John Tennant intended for his Skyway 127 shares to be ultimately transferred to a holding company.⁶⁰⁵ It is not clear to the Tribunal that until legal title to the shares were transferred, Mr. Tennant also intended to hold the shares as trustee for the holding company. The purpose of creating this alleged trust was not clearly and consistently articulated by the witnesses. As the Respondent pointed out,⁶⁰⁶ four different potential purposes were advanced by the Claimant during the Hearing: (a) avoiding a community property dispute;⁶⁰⁷ (b) preventing the dilution of voting control;⁶⁰⁸ (c) avoiding taxes;⁶⁰⁹ and (d) continuity of control over shares.⁶¹⁰ Additionally, the Tribunal finds it difficult to see how Mr. Tennant's purported creation of a trust over his Skyway 127 shares in favour of a holding company which he allegedly owned 90% of the shares in⁶¹¹ serves the alleged purpose of preventing the dilution of voting control.

⁶⁰² Witness Statement of John Tennant, ¶ 19 (CWS-2); Hearing on Jurisdiction Transcript, Day 3, 372:12-15, 373:17-25.

⁶⁰³ Hearing on Jurisdiction Transcript, Day 2, 247:16-24; Pennie Statement, ¶ 48 (CWS-1); Hearing on Jurisdiction Transcript, Day 3, 454:11-15.

⁶⁰⁴ Witness Statement of Derek Tennant, ¶ 24 (CWS-3).

⁶⁰⁵ Witness Statement of John Tennant, ¶ 20 (CWS-2); Hearing on Jurisdiction Transcript, Day 3, 380:4-5, 406:3-7.

⁶⁰⁶ Respondent's PHB, ¶ 37.

⁶⁰⁷ Hearing on Jurisdiction Transcript, Day 3, 382:18-383:18.

⁶⁰⁸ Hearing on Jurisdiction Transcript, Day 3, 384:3-6.

⁶⁰⁹ Hearing on Jurisdiction Transcript, Day 2, 249:21-250:6.

⁶¹⁰ Hearing on Jurisdiction Transcript, Day 3, 468:25-469:5.

⁶¹¹ Hearing on Jurisdiction Transcript, Day 3, 365:5-10.

380. For the foregoing reasons, the Tribunal is not persuaded that Mr. John Tennant held his shares in Skyway 127 in trust for Tennant Travel prior to 15 January 2015. Accordingly, the Tribunal finds that the Claimant did not own any part of the investment prior to 15 January 2015.

(b) Control

381. The issue of ownership aside, the Claimant argues that it in any event qualifies as an investor because it also exercised control over its investment.⁶¹²

382. The Claimant argues that it had effective voting control of Skyway 127 since 31 December 2011⁶¹³ because: (a) Mr. John Tennant held his 22.6% shareholding in Skyway 127 in trust for Tennant Travel; (b) Mr. John Tennant, Mr. John Pennie, and Ms. Marilyn Field agreed to follow Mr. Tennant in voting; and (c) GE Energy, which at the time held 50% of the shares in Skyway 127, was a silent investor.⁶¹⁴ According to the Claimant, this allowed Mr. John Tennant to make decisions for Skyway 127 on behalf of Tennant Travel.⁶¹⁵

383. The Tribunal is not satisfied that the Claimant controlled the investment within the meaning of NAFTA Article 1139 from 31 December 2011.

384. Crucially, in the Tribunal's view, the Claimant's case of control is inseparable from and contingent on its case of an oral trust. Mr. John Tennant would not have been able to make decisions for Skyway 127 "on behalf of Tennant Travel" if his Skyway 127 shares were not held in trust for Tennant Travel. Mr. John Tennant would have been making those decisions on his own behalf. Given the Tribunal's finding that Mr. John Tennant did not hold his shares in trust for Tennant Travel, it follows that Tennant Travel could not have had control over Skyway 127 prior to owning shares on 15 January 2015. This alone is sufficient to dispose of the Claimant's argument on control.

385. In any case, the Tribunal is not persuaded that Mr. John Tennant exercised control over Skyway 127, whether on his own behalf or on behalf of Tennant Travel.

⁶¹² Reply, ¶ 143.

⁶¹³ Reply, ¶¶ 152-154, 167.

⁶¹⁴ Reply, ¶¶ 152-154, 167.

⁶¹⁵ Reply, ¶¶ 154, 167-168.

386. The Tribunal accepts that “control” under NAFTA can mean either legal control or *de facto* control.⁶¹⁶ Legal control may exist by reason of the percentage of shares held, voting rights, or other legal rights conveyed in instruments such as the company’s articles or shareholders’ agreements.⁶¹⁷ Legal control may also exist by reason of multiple shareholders’ collective shareholding and voting rights.⁶¹⁸ The Tribunal is not persuaded that Mr. John Tennant had the legal capacity to control Skyway 127, whether independently or collectively with Mr. John Pennie and Ms. Marilyn Field.
387. On 30 December 2011, Mr. John Tennant owned 22.6% of Skyway 127’s shares. The alleged voting bloc between Mr. Tennant, Mr. Pennie and Ms. Field comprised 45.2% of Skyway 127’s shares at December 2011, which is a minority interest. In the first place, the Tribunal notes that there is no documentary evidence of the alleged agreement between Mr. Tennant, Mr. Pennie and Ms. Field to vote their shares together, nor any documentary evidence of the three individuals actually voting in common.⁶¹⁹ There is also no documentary evidence to show that GE Energy, a separate entity holding 50% of Skyway 127’s shares in December 2011, was a passive investor that did not vote its shares.⁶²⁰
388. The evidence on record does not present a clear picture of how shareholder decisions were made in Skyway 127, given the absence of any meeting minutes, shareholder vote records, or other legal instruments which may govern shareholders’ voting rights. For example, in *B-Mex v. Mexico*, legal control was assessed by reference to the companies’ bylaws.⁶²¹ In *Aguas del Tunari v. Bolivia*, the tribunal considered the entities’ constitution and articles of association to determine legal control.⁶²² No similar points of reference can be found in the present case.

⁶¹⁶ *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 210, 220 (**RLA-121**); *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶¶ 106, 108 (**CLA-136**).

⁶¹⁷ *Aguas del Tunari, S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 264 (**RLA-183**); *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 223 (**RLA-121**).

⁶¹⁸ *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 223-225 (**RLA-121**).

⁶¹⁹ Hearing on Jurisdiction Transcript, Day 2, 273:22-274:4; Hearing on Jurisdiction Transcript, Day 3, 399:9-13, 466:21-467:5.

⁶²⁰ Hearing on Jurisdiction Transcript, Day 2, 236:11-21, 274:5-11; Hearing on Jurisdiction Transcript, Day 3, 400:3-6; Hearing on Jurisdiction Transcript, Day 3, 467:6-11.

⁶²¹ *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶¶ 228-230 (**RLA-121**).

⁶²² *Aguas del Tunari, S.A. v Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶¶ 317-323 (**RLA-183**).

389. In addition, the Tribunal considers it relevant that under the Ontario Business Corporations Act, a corporation shall be deemed to be controlled only if one holds more than 50% of the votes that may be cast to elect directors of the corporation, and the votes are sufficient, if exercised, to elect a majority of the directors of the corporation.⁶²³ The Tribunal does not accept the Claimant's submission that the Tribunal should have no regard to Ontario corporate law in determining whether control was in fact exercised over Skyway 127.⁶²⁴ In *Perenco v. Ecuador*, the tribunal had regard to Bahamian law in determining whether control was exercised over the claimant, a Bahamian entity. The tribunal's observations in *Perenco* are instructive:⁶²⁵

“518. It can be fairly asked why an international tribunal which derives its jurisdiction from an international treaty specifically concerned with the reciprocal promotion and protection of investment ought not to be concerned with the formalities of the law of the particular State pursuant to which a company has been incorporated when considering the ownership and governance of that company. [...]

519. Thus, since the Claimant is a creature of Bahamian law, the Tribunal must look to the operation of that law. [...]

520. Both general international law and the applicable bilateral Treaty lack the specificity and particularity of municipal law (e.g. French law, Ecuadorian law, or Bahamian law) in terms of the ordering of corporate relations and neither purports to regulate such spheres of corporate activity in detail.”

390. To be clear, the Tribunal is not purporting to be constrained by the definition of control under Ontario law in determining the meaning of “control” under NAFTA Article 1139, which as the Tribunal highlights above, is wider than the concept of “legal control”. Nevertheless, as far as “legal control” is concerned, the fact that the alleged 45.2% voting bloc, even if proved, does not amount to control of an Ontario corporation under Ontario law is a relevant consideration and leads the Tribunal to the conclusion that Mr. John Tennant did not in fact have legal control over Skyway 127.

391. Additionally, the Tribunal is troubled by the fact that two of the three members in the voting bloc, Mr. Pennie and Ms. Field, are Canadian citizens. Of the 45.2% alleged voting bloc, 22.6% would comprise Canadian ownership. Therefore, even if 45.2% was sufficient to confer legal control

⁶²³ Ontario Business Corporations Act, R.S.O. 1990, c. B. 16, s. 1(5) (**R-97**).

⁶²⁴ Claimant's PHB, ¶¶ 126-130.

⁶²⁵ *Perenco Ecuador Limited and Empresa Estatal Petróleos del Ecuador (Petroecuador) v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, ¶¶ 518-520 (**RLA-182**).

over Skyway 127, such legal control would not be held by a U.S. investor and would not, as a consequence, satisfy the nationality requirement under NAFTA Chapter Eleven.

392. The Tribunal is similarly not convinced that Mr. John Tennant had *de facto* control of Skyway 127. The Tribunal accepts that *de facto* control will, in the words of the *B-Mex* tribunal, “typically, and logically, present a greater evidentiary challenge.”⁶²⁶ The Tribunal is unable to conclude that the Claimant has met the evidentiary challenge when the Claimant has adduced *no* documents to show any indicia of *de facto* control – for example, that Mr. John Tennant exercised significant influence over Skyway 127, had the power to effectively decide and implement key decisions of Skyway 127, or had any power to direct the actions of Skyway 127.
393. In any case, the Tribunal emphasises that the critical point remains that any control exercised by Mr. Tennant, even if found, cannot be attributed to the Claimant without a finding of an oral trust. Mr. John Tennant and Mr. Derek Tennant confirmed at the Hearing on Jurisdiction that there are no documents to show that Tennant Travel otherwise held any rights to direct the actions of Skyway 127.⁶²⁷
394. Insofar as the Claimant seeks to attribute any control exercised by Mr. John Tennant to Tennant Travel through the concept of “indirect control”, as found in the *S.D. Myers* case, the Tribunal is of the view that the *S.D. Myers* case does not assist the Claimant in establishing control.
395. In *S.D. Myers*,⁶²⁸ the tribunal found that the claimant (SDMI) indirectly controlled the investment (Myers Canada) notwithstanding that it did not own shares in the investment at the time of the alleged breach. Instead, the shares of Myers Canada were owned equally by four members of the Myers family, who also owned shares in different proportions in SDMI.⁶²⁹ The tribunal found that Mr. Dana Myers, a member of the Myers family, was the authoritative voice of both SDMI and Myers Canada,⁶³⁰ and that there was “uncontradicted evidence” that he was the controlling person in respect of the entirety of the Myers family’s business interests, including SDMI and

⁶²⁶ *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, ¶ 220 (**RLA-121**).

⁶²⁷ Hearing on Jurisdiction Transcript, Day 3, 400:10-21; Hearing on Jurisdiction Transcript, Day 3, 465:13-466:1.

⁶²⁸ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 12 November 2000 (**CLA-111**).

⁶²⁹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 12 November 2000, ¶¶ 226-227 (**CLA-111**).

⁶³⁰ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 12 November 2000, ¶ 227 (**CLA-111**).

Myers Canada.⁶³¹ Mr. Dana Myers was also the chief executive officer of SDMI, and held 51% of the shares in SDMI.⁶³² The tribunal's analysis on indirect control is set out below:

"229. Taking into account the objectives of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organise the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above."

396. In the Tribunal's view, the *S.D. Myers* case is factually distinguishable. It appears that the tribunal in *S.D. Myers* placed significant weight on the fact that the claimant and the investment shared the same controlling mind at the relevant time, Mr. Dana Myers. Here, the Tribunal has found that Mr. John Tennant did not exercise legal or *de facto* control over Skyway 127. For the same reasons, Mr. Tennant cannot be said to be the "authoritative voice" or "controlling person" of Skyway 127. Further, the Tribunal notes the lack of any documentation to support Mr. John Tennant's claim that Mr. Derek Tennant "let [him] have" 90% of the shares in Tennant Travel.⁶³³ Mr. John Tennant was also unable to state with precision when such share transfer allegedly took place,⁶³⁴ thus leaving the Tribunal with no clear reference point in time by which to assess whether Mr. John Tennant was in fact the controlling person of both Tennant Travel and Skyway 127 at the same time. Unlike *S.D. Myers*, in which the investment was wholly owned by the Myers family, the Tennant family did not wholly or majority-own Skyway 127 in December 2011.
397. The relationship between SDMI and Myers Canada was also unique. The tribunal found that Myers Canada was "established to be the Canadian face of SDMI", was "provided with capital, know-how and managerial directions by SDMI", and "carried on business as if it were a branch of SDMI".⁶³⁵ In essence, there was evidence that SDMI and Myers Canada acted in concert. There is no evidence of any such relationship between the Claimant and Skyway 127 prior to the Claimant owning shares in Skyway 127 in January 2015.
398. In addition, the Tribunal accepts the Respondent's submission that the NAFTA does not disclose any basis to pierce the Claimant's corporate veil and to find jurisdiction solely based on the fact

⁶³¹ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 12 November 2000, ¶ 230 (CLA-111).

⁶³² *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 12 November 2000, ¶¶ 89, 227 (CLA-111).

⁶³³ Witness Statement of John Tennant, ¶ 18 (CWS-2).

⁶³⁴ Hearing on Jurisdiction Transcript, Day 3, 365:2-366:10.

⁶³⁵ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 109 (CLA-193).

that the Claimant and Skyway 127 shared the same minority shareholder (Mr. John Tennant).⁶³⁶ By virtue of the definition of “investment of an investor of a Party” under NAFTA Article 1139, it is the *claimant* that must directly or indirectly control the investment in order to found jurisdiction. The language of the Treaty does not permit the *claimant’s owners* to be the one directly or indirectly controlling the investment. In the Tribunal’s view, if the NAFTA Parties had intended to disregard the international and domestic law principle of a corporation’s separate legal personality, clear words would have been used to do so. The Tribunal is not aware of any other decision in which a claimant’s separate legal personality was disregarded to establish jurisdiction, save for *S.D. Myers*.

399. For the foregoing reasons, the Tribunal finds that the Claimant did not directly or indirectly control Skyway 127 within the meaning of NAFTA Article 1139 until 30 June 2016, the point at which it acquired GE Energy’s 50% shareholding in Skyway 127, taking its ownership above the 50% mark.

(c) Conclusions on When the Claimant Became an “investor of a Party”

400. As noted above, the burden is on the Claimant, Tennant Energy, to establish that it owned or controlled, directly or indirectly, Skyway 127, the investment of the investor of a Party, and the point in time at which such ownership or control crystallized. The scope and coverage of NAFTA Chapter Eleven, addressed in Article 1101(1), imposes this requirement, as do (in the circumstances of this case) the terms of Article 1105, on which the Claimant relies.
401. Having rejected the Claimant’s case on oral trust and on ownership and control of Skyway 127, it necessarily follows from the Tribunal’s decision that the Claimant only became an “investor of a Party” on 15 January 2015, when it obtained legal ownership of 45.2% of the shares of Skyway 127, or on 30 June 2016, at which point it acquired GE Energy’s 50% shareholding in Skyway 127, taking its shareholding above the 50% mark.
402. Prior to 15 January 2015, therefore, on any analysis, the Claimant did not hold an “investment” in Skyway 127 that was capable of constituting an “investment of an investor of a Party”.

6. When the Alleged Breaches Occurred

403. Based on the manner in which the Claimant has pleaded its case, it is not clear to the Tribunal when the Respondent’s alleged wrongful measures are said to have taken place. In particular, the

⁶³⁶ Respondent’s PHB, ¶ 13.

Claimant does not clearly and fully set out the specific government measures and actions that allegedly breached Article 1105 of the NAFTA, or the dates on which they occurred. Instead, the Claimant's submissions on Article 1116(1) of the NAFTA focused on two main arguments: (a) it qualified as an "investor of a Party" on 26 April 2011 when it acquired beneficial ownership of Skyway 127 shares under an oral trust, which is before the Claimant was placed on a FIT priority waiting list on 4 July 2011 and before the FIT Program was terminated on 12 June 2013; and (b) in any event, the alleged breaches did not occur until August 2015, when the Claimant first became aware or could have been aware of the Respondent's internationally wrongful acts.⁶³⁷

404. As set out above, the Tribunal has dismissed the Claimant's argument of an oral trust.
405. The Tribunal likewise finds no merit in the Claimant's argument that "[a] breach under the NAFTA does not occur until there is breach and knowledge of that breach."⁶³⁸ As the Tribunal had stated in its Procedural Order No. 8, the question of *when the alleged breach occurred* is separate from the question of *when the Claimant knew or should have known of the alleged breach*.⁶³⁹ The Tribunal's conclusion is fortified by the language of Article 1116(1) and Article 1116(2), which draws a clear distinction between *a breach* and *knowledge of a breach*. Specifically, Article 1116(1) provides that an investor of a Party may submit to arbitration a claim "*that another Party has breached an obligation [...] and that the investor has incurred loss or damage by reason of, or arising out of, that breach*" (emphasis added). Article 1116(2) in turn provides that "[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, *knowledge of the alleged breach and knowledge that the investor has incurred loss or damage*" (emphasis added). In other words, a breach does not necessarily occur at the time when an investor first acquired knowledge of the wrongful measure. A breach occurs at the time the wrongful measure took place. The limitation period however starts running only after *knowledge of the alleged breach and loss* is first acquired. To this end, the Tribunal agrees with the Respondent's submission that the date of the alleged breach is an objective event, and cannot be changed by the subjective knowledge of a claimant.⁶⁴⁰ In the Tribunal's view, the Claimant's submission confuses the requirements under Article 1116(1) with the temporal restrictions for bringing a claim under Article 1116(2).
406. To ascertain when the alleged breaches occurred, the Tribunal considers it helpful to reproduce below the table set out at page 37 of the Respondent's Counter-Memorial, which purports to

⁶³⁷ See ¶¶ 236-261 above.

⁶³⁸ Reply, ¶ 271.

⁶³⁹ Procedural Order No. 8, ¶ 42.

⁶⁴⁰ Rejoinder, ¶ 30.

summarize the measures alleged by the Claimant to be wrongful, and the dates on which they occurred.

Challenged Measures Alleged by the Claimant	Date(s)
Challenged Measures Related to the GEIA	
Ontario negotiated the GEIA in “secret”.	December 12, 2008 to January 21, 2010
Ontario did not make the terms of the GEIA public upon conclusion.	January 21, 2010
Ontario reserved transmission capacity for the Korean Consortium, and provided its projects priority access to transmission capacity.	September 30, 2009 to April 1, 2010
Ontario reserved 500 MW of transmission capacity in the Bruce region for the Korean Consortium.	September 17, 2010
Ontario granted the Korean Consortium an extension to select connection points in the Bruce region, instead of cancelling the GEIA.	August 3, 2011
Ontario allowed the Korean Consortium and its partner Pattern Energy to acquire lower-ranked FIT application projects.	2010 to September 13, 2011
Challenged Measures Related to the FIT Program	
Ontario revised the rules of the FIT Program (including the allocation of transmission capacity in the Bruce and West of London regions, and the Connection Point Amendment Window).	June 3, 2011
Ontario provided NextEra preferential access to government officials and advanced information on FIT Rule changes.	2011
Ontario favoured NextEra and IPC in awarding FIT Contracts.	July 4, 2011
The Minister issued a Direction to the OPA to no longer procure any additional MW under the FIT Program for large FIT projects.	June 12, 2013
Challenged Measure Related to the Management of Information	
Staff of the former Minister of Energy and Premier of Ontario allegedly destroyed documents relating to the two cancelled gas plants and to Ontario’s deferral on the development of off-shore wind projects.	August 2011 to February 2013

407. As set out in the table, the challenged measures occurred between 2008 and 2013. The Tribunal notes that this has not been disputed by the Claimant. In fact, the Claimant states expressly that

“[t]here is no dispute that [Ontario’s wrongful measures] took place before June 1, 2014.”⁶⁴¹ Given that the Tribunal has held above that the Claimant became an “investor of a Party” only on 15 January 2015 at the earliest, then at the time the allegedly wrongful measures took place between 2008 and 2013 (or 2014), the Tribunal finds that the Claimant was not an investor of a Party within the meaning of Article 1116(1).

408. For completeness, the Tribunal does not accept the Claimant’s submission that the Respondent’s allegedly wrongful acts were continuous, composite, and/or complex acts.⁶⁴² The characterization of a wrongful act as continuing or composite affects the date on which a breach of an international obligation occurs and how long the breach extends. As set out in the International Law Commission’s 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”):

- (a) The breach of an international obligation by an act of a State not having a continuing character (an “instantaneous act”) occurs at the moment when the act is performed.⁶⁴³
- (b) The breach of an international obligation by an act of a State having a continuing character (a “continuing act”) extends over the entire period during which the act continues and remains not in conformity with the international obligation.⁶⁴⁴
- (c) Where an international obligation is breached through a series of actions or omissions defined in aggregate as wrongful (a “composite act”), the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.⁶⁴⁵

409. Put simply, continuing and composite wrongful acts give rise to continuing breaches. The ILC Articles do not address “complex acts”, and the Claimant does not explain what is meant by a “complex act”, or whether it is an accepted classification under international law.⁶⁴⁶ In fact, the characterization of the Respondent’s conduct as “complex” appears to have arisen for the first time in the Claimant’s closing submissions at the Hearing on Jurisdiction.

410. The Tribunal finds that the Claimant’s case on the nature of the Respondent’s allegedly wrongful acts is wholly unclear. Whilst the Claimant asserts that the Respondent’s conduct is

⁶⁴¹ Reply, ¶ 42.

⁶⁴² Claimant’s PHB, ¶ 41.

⁶⁴³ ILC Articles, Article 14(1) (**CLA-185**).

⁶⁴⁴ ILC Articles, Article 14(2) (**CLA-185**).

⁶⁴⁵ ILC Articles, Article 15 (**CLA-185**).

⁶⁴⁶ Hearing on Jurisdiction Transcript, Day 5, 873:19-876:8.

simultaneously continuous, composite and complex, the Claimant fails to particularize which of the challenged measures constitutes a continuing wrongful act, and which of the challenged measures taken together are cumulatively wrongful.

411. Instead, the Claimant places significant emphasis on the Respondent's alleged acts of deception to conceal its internationally wrongful acts. According to the Claimant, "the concealment by the government forms an essential part of the composite breach."⁶⁴⁷ However, as highlighted at paragraphs 406 and 407, even the alleged destruction of documents took place before 1 June 2014.
412. Indeed, the Claimant's case on the date of breach hinges entirely on the date of the Claimant's claimed *discovery* of the breach.⁶⁴⁸ This is evident from the Claimant's submission that "[t]he August 15, 2015 date of a breach under NAFTA Article 1116 ***remains the same whether the breach was to be considered as a single act, a continuous act or as part of a composite act*** involving systemic state practice ***as the disclosure of the systemic practice also first occurred on August 15, 20[15]***" (emphasis added).⁶⁴⁹
413. The Tribunal is unable to accept this submission. A later discovery of an earlier wrongful act does not make that wrongful act "continuing" or "composite". As the Tribunal has explained at paragraph 405 above, the conflation of the date of an alleged breach (an objective event) and the date of disclosure and therefore knowledge of the alleged breach (a subjective event) is misguided.
414. The conclusion of the Tribunal's analysis is that the Claimant was not an "investor of a Party" within the meaning of Article 1116(1) at the time the alleged breaches took place. The Claimant only became an investor of a Party on 15 January 2015 at the earliest, after all of the Respondent's alleged breaches had taken place.

7. The Claimant as a "Successor in Interest"

415. The Tribunal turns to consider the Claimant's further argument that, even if it did not own Skyway 127 shares or control Skyway 127 prior to 15 January 2015, it would still be a protected investor because it is a "successor in interest" to any claims that Mr. John Tennant may have had under the NAFTA prior to 15 January 2015. It is not disputed that Mr. John Tennant, being a U.S. citizen, was an "investor of a Party" when he owned Skyway 127 shares between 20 June 2011

⁶⁴⁷ Reply, ¶ 271.

⁶⁴⁸ See Claimant's PHB, ¶ 40, where the Claimant alleges that "the time of the breach occurs upon discovery of the truth".

⁶⁴⁹ Memorial, ¶ 716.

and 15 January 2015. According to the Claimant, when Mr. John Tennant transferred his Skyway 127 shares to Tennant Travel on 15 January 2015, all his rights to a claim under NAFTA were also transferred to Tennant Travel. Pursuant to the Claimant's expert testimony, choses in action such as NAFTA rights are automatically conveyed with the shares under California law.⁶⁵⁰

416. The Respondent avers that the applicable law to determine whether NAFTA claims may be assigned is NAFTA and international law, not California law. According to the Respondent, and the Article 1128 submissions from the United States and Mexico, NAFTA offers no mechanism to assign investment claims because Article 1116(1) requires a claimant to be an "investor of a Party" when the alleged breach occurred.⁶⁵¹ The Respondent thus submits that "NAFTA claims, and potential causes of action under NAFTA, cannot be assigned to other investors freely on the open market".⁶⁵²
417. The Respondent also relies upon the Final Award in *Westmoreland* for the propositions that a claimant must be a protected investor at the time of the alleged breach, and the challenged measures must have a "direct and immediate effect on the claimant". The Respondent argues that this is "impossible where a claimant did not own or control its investment when the challenged measures were adopted or maintained".⁶⁵³ In turn, the Claimant submits that the *Westmoreland* Award is "not a complete and reliable treatment of this issue" as the tribunal failed to consider Article 1109 of the NAFTA which expressly permits transfers of investments, which was noted by the *Loewen* NAFTA tribunal.⁶⁵⁴
418. The Tribunal makes the following observations.
419. The Tribunal notes that the Claimant has not cited any cases in which a tribunal found that it had jurisdiction to hear a claim brought by the claimant as an assignee of a NAFTA claim who did not own or control the investment at the time of the alleged breach. The cases of *Daimler v. Argentina*, *Loewen v. United States*, and *Enron v. Argentina* cited by the Claimant do not concern a similar factual matrix and do not, in the Tribunal's view, stand for the proposition that an assignee or subsequent owner of an investment can bring a NAFTA claim in respect of breaches that occurred prior to the assignment or ownership. *Daimler* was considered by the *Westmoreland* tribunal, and was distinguished on the basis that the claimant had owned or controlled the

⁶⁵⁰ Claimant's PHB, ¶¶ 76-85.

⁶⁵¹ Counter-Memorial, ¶¶ 64-74; Respondent's PHB, ¶¶ 17-27.

⁶⁵² Respondent's PHB, ¶¶ 19.

⁶⁵³ Respondent's *Westmoreland* Submission, ¶ 11.

⁶⁵⁴ Claimant's *Westmoreland* Submission, ¶¶ 94-103.

investment at the time of the alleged treaty breach, but no longer owned or controlled the investment at the time the arbitration was commenced.⁶⁵⁵ *Enron* did not involve the issue of an assigned claim, but whether a shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain.⁶⁵⁶ The tribunal in *Enron* concluded that a “cut-off point” had to be established, and the answer lay in establishing whether the host State’s consent to arbitration had been extended to the investor in question.⁶⁵⁷ *Daimler* and *Enron* were also not NAFTA cases.

420. In *Loewen*, the Loewen Group, Inc (“TLGI”, a Canadian corporation) had assigned all of its rights in, title to and interest in a NAFTA claim to a newly created corporation (Nafcanco) after TLGI was forced by bankruptcy proceedings to undergo a corporate reorganization which changed its nationality from Canadian to U.S.⁶⁵⁸ The *Loewen* tribunal declined jurisdiction on the basis that the requirement of continuous nationality was not satisfied. The tribunal made no ruling on whether, had Nafcanco qualified as a continuing national, the tribunal would have jurisdiction to hear the claim.
421. The Tribunal does not agree with the Claimant’s submission that the *Loewen* tribunal “noted that NAFTA Article 1109 permissively recognized transfers of property which would include the NAFTA [c]laim.”⁶⁵⁹ The assignment from TLGI to Nafcanco was not challenged in *Loewen*.⁶⁶⁰ More importantly, the Tribunal struggles to see the relevance of Article 1109 to the issue of whether a claimant qualifies as a protected investor under the NAFTA. Article 1109(1) states that each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Article 1109(1) does not state that the *transferee* becomes a protected investor under the NAFTA by virtue of the permitted transfer. Nor does Article 1109(1) state that NAFTA Parties consent to arbitrate claims brought by such transferee.

⁶⁵⁵ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 210 (RLA-207).

⁶⁵⁶ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 50 (CLA-333).

⁶⁵⁷ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶ 52 (CLA-333).

⁶⁵⁸ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 220 (CLA-138).

⁶⁵⁹ Claimant’s PHB, ¶ 94; Claimant’s *Westmoreland* Submission, ¶ 99.

⁶⁶⁰ *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003, ¶ 237 (CLA-138).

422. On the contrary, the Respondent cites the recent decision of *Westmoreland*, which effectively found that a NAFTA claim cannot be assigned to a separate legal entity.
423. In *Westmoreland*, the tribunal considered the question of whether “a NAFTA claim can be transferred together with the underlying investment when the investment is transferred or whether it remains with the party which owned or controlled it at the time of the alleged treaty breach.”⁶⁶¹ The *Westmoreland* tribunal answered in the negative. The tribunal found that only the party which owned the investment at the time of the alleged treaty breach has jurisdiction *ratione temporis* to bring a claim.⁶⁶² The tribunal based its finding on its construction of Articles 1101(1), 1116(1) and 1117(1) of the NAFTA, as follows:
- (a) Pursuant to Article 1101(1), the alleged wrongful measures must relate to investors of another Party and investments of investors of another Party in the territory of the Party. Article 1101(1)(a) and Article 1101(1)(b) must refer to the same “investor[s] of another Party”. According to the tribunal, this means that the claimant (*i.e.*, *Westmoreland*) must show that the challenged measures related to the claimant itself as well as to its investment.⁶⁶³
 - (b) Pursuant to the text of Articles 1116(1) and 1117(1), the investor/claimant must be claiming on its own behalf “such that it held the investment at the time of the alleged breach” and must itself have suffered loss or damage arising out of that breach.⁶⁶⁴
 - (c) The tribunal’s construction of Article 1101(1), 1116(1) and 1117(1) comports with the object and purpose of the NAFTA to increase substantially investment opportunities in the territories of the Parties. According to the tribunal, in order to encourage and support this investment, “an investor must have taken a risk by making an investment in order to be assured of treaty protection”. A purchaser or assignee of an investment subsequent to any treaty breach does not take a risk that there may be a subsequent treaty breach.⁶⁶⁵

⁶⁶¹ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 209 (**RLA-207**).

⁶⁶² *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 209 (**RLA-207**).

⁶⁶³ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 199 (**RLA-207**).

⁶⁶⁴ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 200 (**RLA-207**) (emphasis added).

⁶⁶⁵ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 201 (**RLA-207**) (emphasis added).

424. The *Westmoreland* tribunal concluded that “the correct construction of Articles 1101(1), 1116(1) and 1117(1) is that the challenged measures alleged to be in breach of a Section A obligation must relate to the investor of the party that is filing the claim under Section B”. Further, the tribunal found that “relate to” means that the challenged measure must “directly address, target, implicate, or affect the claimant” or have a “direct and immediate effect on the claimant”.⁶⁶⁶ Accordingly, the tribunal ruled that in order for *Westmoreland* to be able to bring its claim it must show firstly that the challenged measures applied to it and secondly that it itself suffered loss as a result of those challenged measures.⁶⁶⁷
425. In order to determine if the principles stated by the *Westmoreland* tribunal that connect the NAFTA texts are correct, the Tribunal has considered the following.
426. First, as the Tribunal had alluded to at paragraph 358 above, neither Articles 1101, 1116, nor 1117 expressly states that the claimant must have held the investment at the time of the alleged breach. Nor do they state that the wrongful measures must have directly affected the claimant. The text of the NAFTA does not make these connections of temporality and directness on its face, although it could have been drafted to do so clearly. The Tribunal is being asked to add to the text of the Treaty in making such a finding.
427. The Claimant cites *Loewen* as embodying the proper rule that only a continuity of nationality is required for jurisdiction over a transferred claim.⁶⁶⁸ In other words, an investor can transfer its interest to another party who brings the claim as long as they are both of the same nationality. However, the problem with this simple rule is that it does not by itself encompass all of the jurisdictional elements of Article 1116, and they were not all placed in issue in the *Loewen* case.
428. Article 1116(1) is clear that the claimant-investor must be claiming on its behalf and must itself have suffered loss or damage arising out of the alleged breach. What is less clear is whether the “investor of a Party” under Article 1116(1), who brings the claim and who itself suffers loss or damage arising out of the breach, must be the same “investor[s] of another Party” under Article 1101(1)(a) who the wrongful measures related to. It is true that because the claim must be submitted by an investor, and the investor who submits the claim must have suffered a loss or damage by reason of a NAFTA breach, in most cases the claimant *will be* the investor who held the investment at the time of the breach. The question is whether there are any other circumstances

⁶⁶⁶ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 212 (**RLA-207**) (emphasis added).

⁶⁶⁷ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 215 (**RLA-207**).

⁶⁶⁸ Claimant’s PHB, ¶¶ 93, 94, 96; Claimant’s *Westmoreland* Submission, ¶¶ 98, 99, 101.

in which a claimant who files a NAFTA claim could also be an investor who suffered loss or damage as a result of the alleged breach without having held the investment at the time of the alleged breach.

429. In this regard, the Tribunal cannot exclude the possibility of an investor, whilst not an investor at the time of the breach, assuming an indirect loss or damage by reason of or arising from the breach *after* the breach has occurred. This might take place *ex hypothesi*, for instance, in a situation where the investor undertakes significant liabilities caused by the alleged breach to another investor, and thus itself suffers loss or damage. There may be other unusual situations in which the same appreciation may also arise but the Tribunal need not decide them as they are not before us.
430. Second, an investor who suffers a loss from an alleged breach might sell the investment after the alleged breach (either before or after filing a claim) while expressly seeking to retain the NAFTA claim and still qualify for jurisdiction under Article 1116. This would seem to be the situation in the cases of *Daimler* and *EnCana Corp. v. Ecuador*,⁶⁶⁹ which the *Westmoreland* tribunal distinguished.⁶⁷⁰ In both cases, the claimants' respective sale of the investment after the breach occurred was not by itself a bar to the tribunals' jurisdiction over the investors' BIT claims.
431. Third, *Westmoreland* also noted that corporate restructuring or internal reorganization is not necessarily fatal to jurisdiction.⁶⁷¹ For example, according to *Westmoreland*, a legal successor involving a continuity of interest with an investor who owned or controlled the investment at the time of the breach could still qualify for NAFTA jurisdiction.
432. In this case, the Tribunal does not need to decide whether the principles stated in *Westmoreland* would properly apply in all situations. Without prejudice to the reach of the *Westmoreland* principle, and its application in any other circumstances, the Tribunal considers that it provides a sound basis for assessment in the particular circumstances of this case, namely, where the Claimant acquired a minority interest in Skyway 127 on 15 January 2015, and a majority interest only thereafter – dates which, in the Tribunal's assessment, on any reading, postdate 12 June 2013, when the FIT Program was terminated and it was clear that Skyway 127 would not receive a FIT Contract. In other words, the Claimant would have acquired those shares in Skyway 127 with knowledge that Skyway 127 had failed to receive a FIT Contract. In the circumstances of

⁶⁶⁹ *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012 (**CLA-309**); *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, LCIA Case No. UN3481, Award, 3 February 2006.

⁶⁷⁰ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 210 (**RLA-207**).

⁶⁷¹ *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, ¶ 230 (**RLA-207**).

this case, the Tribunal considers that the principle that, to be a qualifying investor under the NAFTA, a putative investor must hold a qualifying interest at the time of breach, applies reasonably and properly. The Claimant cannot now sue for losses arising from Skyway 127's failure to obtain a FIT Contract when it knew that there would be no FIT Contract at the time it became an investor. Consequently, the Tribunal finds that it has no jurisdiction *ratione temporis* to hear any NAFTA claim which Mr. John Tennant purportedly assigned to the Claimant as a "successor in interest".

8. Whether the Claimant Suffered Loss or Damage by Reason of, or Arising out of, the Alleged Breaches

433. In any event, even if it were *not* necessary for the purposes of Article 1116(1) for the Claimant to hold a qualifying interest at the time of the breach, the Claimant has not proved, on a *prima facie* basis, that it had itself incurred any incidence of loss or damage by reason of or arising from the Respondent's alleged breach, which occurred prior to the Claimant becoming an investor and acquiring an investment. This means that a condition under Article 1116(1) of the NAFTA is not satisfied, and consequently, that the Tribunal lacks jurisdiction to hear the claim.
434. The Claimant does not dispute that it must *itself* have incurred loss or damage arising out of the Respondent's alleged breaches in order to satisfy the requirements of Article 1116(1) of the NAFTA.⁶⁷² The Claimant submits that it suffered loss or damage to its investment in Skyway 127 as a result of the Respondent's alleged breach.⁶⁷³ The loss and damage claimed by the Claimant comprise:
- (a) Economic losses calculated on the basis of the differential between the "but for" cash flows and "actual cash flows" on the assumption that Tennant Energy obtained a FIT Contract for the project. "But for" cash flows are determined as the difference between cash flows that Tennant Energy would have expected to receive, net of any cash outflows that Tennant would have to incur to earn such incoming cash flows.⁶⁷⁴
 - (b) Moral damages for the "reputational, psychological, and emotional harm" suffered by Tennant Energy and the corporate officials of Tennant Energy.⁶⁷⁵
435. The Tribunal is not persuaded that the abovementioned categories of loss and damage were, or could have been, suffered by the Claimant, Tennant Energy.

⁶⁷² Reply, ¶ 195; Claimant's *Westmoreland* Submission, ¶ 22.

⁶⁷³ Claimant's *Westmoreland* Submission, ¶ 25.

⁶⁷⁴ Deloitte Report, ¶¶ 7.2.1-7.2.3 (CER-1).

⁶⁷⁵ Memorial, ¶¶ 892-899.

436. Importantly, the Claimant's claim for economic losses and moral damages is wholly premised on Skyway 127's failure to obtain a FIT Contract. The Deloitte Report calculated the economic losses suffered by the Claimant on the basis of the net present value of the incremental cash flow the Claimant would have received over the period of a 20-year FIT Contract, assuming that a FIT Contract had been obtained.⁶⁷⁶ Mr. John Tennant,⁶⁷⁷ Mr. Derek Tennant⁶⁷⁸ and Mr. John Pennie⁶⁷⁹ made claims that Skyway 127 suffered loss of the FIT Contract, and that they each suffered anxiety and/or stress from discovering that Skyway 127 was not awarded a FIT Contract as a result of the Respondent's alleged internationally wrongful measures. The Claimant further asserts that Tennant Energy is entitled to moral damages for the reputational, psychological, and emotional harm suffered by Tennant Energy "due to the internationally wrongful measures taken by Canada".⁶⁸⁰
437. The Tribunal considers it critical that the Respondent's alleged wrongful measures occurred between 2008 to 2013 (or 2014), and any loss arising from Skyway 127's failure to obtain a FIT Contract crystallized at the latest by 12 June 2013, when the FIT Program was terminated and it was clear that Skyway 127 would not receive a FIT Contract.⁶⁸¹ This is well before the Claimant owned shares in Skyway 127 on 15 January 2015. To be clear, the date on which the loss occurred is relevant, in the Tribunal's view, for determining whether the *Claimant* as the party bringing the NAFTA claim incurred any loss or damage within the meaning of Article 1116(1) of the NAFTA. However, that is not to be conflated with the date on which the Claimant first acquired knowledge of the loss, which is relevant for determining when the 3-year limitation period starts to run under Article 1116(2).
438. As mentioned above, the Tribunal does not foreclose the possibility of an investor who acquires an investment *after* an alleged treaty breach to have assumed the loss caused to the investment by the breach. However, the Tribunal is unable to find that such a case is made out on the present facts.
439. First, on 15 January 2015, the Claimant acquired 45.2% of Skyway 127 shares, of which 22.6% were acquired from Mr. John Tennant, a U.S. citizen, and the remaining 22.6% were acquired from Mr. John Pennie and Ms. Marilyn Field.⁶⁸²

⁶⁷⁶ Deloitte Report, ¶¶ 2.1.5, 7.2.1 (CER-1).

⁶⁷⁷ Witness Statement of John Tennant, ¶¶ 43-45 (CWS-2).

⁶⁷⁸ Witness Statement of Derek Tennant, ¶¶ 54-56 (CWS-3).

⁶⁷⁹ Pennie Statement, ¶¶ 114-118 (CWS-1).

⁶⁸⁰ Memorial, ¶ 894.

⁶⁸¹ Memorial, ¶¶ 235, 258.

⁶⁸² Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 15 January 2015 (C-115).

440. Given that Mr. John Pennie and Ms. Marilyn Field are Canadian citizens, the Claimant cannot be said to have assumed any loss caused to an investment of an investor of a Party within the meaning of Article 1139 of the NAFTA by acquiring their shares.
441. As regards the 22.6% shares owned by Mr. John Tennant as a U.S. citizen, there is no evidence, nor does the Claimant allege, that it paid any consideration when it acquired these shares from Mr. John Tennant on 15 January 2015, or that it in any other way assumed whatever loss may have occurred because of any Treaty breaches. The Claimant's witness statements and pleadings are silent on this point. Mr. John Tennant simply states that "the Skyway 127 shares in the trust were formally transferred over to Tennant Travel Services and registered in January 2015."⁶⁸³ In fact, given the Claimant's case that Mr. John Tennant always held the Skyway 127 shares for the benefit of Tennant Travel under an oral trust, it would seem incongruous for the Claimant to have paid consideration for Mr. John Tennant's shares on, or at any time prior to, 15 January 2015. Whilst Mr. John Tennant had acquired his 11.3% shares from I.Q. Properties on 20 June 2011 in exchange for \$200,000 (being the sum of his loan to Mr. Derek Tennant), this would amount to consideration from Mr. John Tennant, and not from the Claimant. Similarly, even if Mr. John Tennant had paid consideration for his acquisition of a further 11.3% shares from Premier Renewable Energy Ltd on 30 December 2011 (of which there is no evidence),⁶⁸⁴ this would not constitute consideration from the Claimant.
442. Second, there is insufficient evidence for the Tribunal to conclude that the Claimant paid any consideration for its subsequent acquisition of Skyway 127 shares *after* 15 January 2015. The Tribunal notes that the changes in the Claimant's shareholding in Skyway 127 are unclear after January 2015:
- (a) From 15 January 2015 to 30 June 2016, the Claimant held 45.2% of Skyway 127 shares.
 - (b) On 30 June 2016, GE Energy allegedly transferred its shares in Skyway 127 to the Claimant "in exchange for consideration, including the irrevocable right to sell wind turbines to it if Skyway 127 is awarded a renewable energy contract by Ontario" (the "**GE Energy Shares**").⁶⁸⁵ The Claimant does not specify the number of shares transferred by GE Energy to the Claimant, nor the amount of consideration paid by the Claimant for GE Energy's shares. The Claimant has also not adduced any documentary evidence to show that it indeed acquired GE Energy's shares, much less for any consideration.

⁶⁸³ Witness Statement of John Tennant, ¶ 28 (CWS-2).

⁶⁸⁴ Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 30 December 2011 (C-114); Memorial ¶ 128.

⁶⁸⁵ Pennie Statement, ¶ 67 (CWS-1); Memorial ¶ 133 (emphasis added).

- (c) More importantly, it is not clear to the Tribunal that there was a continuity of U.S. nationality in respect of the GE Energy Shares between the time of the alleged breaches (*i.e.*, 2008 to 2014) and the Claimant's later acquisition of those shares on 30 June 2016. Based on the documentary evidence before the Tribunal, GE Energy had disposed *all* of its Skyway 127 shares between 30 December 2011 and 15 January 2015.⁶⁸⁶ It is not evident who GE Energy transferred its Skyway 127 shares to during this period. In any case, it is clear that those shares were not transferred to the Claimant since the Claimant first acquired its Skyway 127 shares only on 15 January 2015 from Mr. John Tennant, Mr. John Pennie, and Ms. Marilyn Field.⁶⁸⁷ Subsequently, GE Energy reacquired shares in Skyway 127 on an unknown date, and then purportedly transferred the GE Energy Shares to the Claimant on 30 June 2016.
- (d) After 30 June 2016, it is alleged that Tennant "owned almost all of the shares in Skyway 127".⁶⁸⁸ There is again no evidence of payment from the Claimant for these shares.

443. Even if consideration had been paid by the Claimant for its acquisition of Skyway 127 shares *on* or *after* 15 January 2015, the Claimant would have acquired those shares with the knowledge that Skyway 127 failed to receive a FIT contract on 12 June 2013. This necessarily leads the Tribunal to the conclusion that any consideration paid would have taken into account Skyway 127's failure to receive a FIT contract. This is not the case where, for instance, the Claimant acquired Skyway 127 shares at a premium because there was an expectation that Skyway 127 may in the future receive a FIT contract. At the time it acquired Skyway 127 shares, the Claimant was well aware that Skyway 127 had failed to obtain a FIT contract. The Claimant also has not asserted that it suffered any loss in an indirect way, whether by assuming any liabilities suffered by Mr. John Tennant because of the alleged breaches or otherwise. Consequently, it is difficult to see what loss or damage the Claimant could have itself suffered by reason of, or arising out of, the alleged breaches which led to Skyway 127's failure to obtain a FIT contract.

444. For the foregoing reasons, the Tribunal finds that the Claimant has not proved, on a *prima facie* basis, that it incurred any loss or damage by reason of or arising from the Respondent's alleged breach, which occurred prior to the Claimant becoming an investor and acquiring an investment. The Tribunal's decision means that a condition under Article 1116(1) of the NAFTA is not satisfied, and consequently, that the Tribunal lacks jurisdiction to hear the claim.

⁶⁸⁶ Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 30 December 2011 (C-114); Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 15 January 2015 (C-115).

⁶⁸⁷ Shareholders & Transfers Register: Skyway 127 Wind Energy Inc., 15 January 2015 (C-115).

⁶⁸⁸ Pennie Statement, ¶ 68 (CWS-1).

9. Conclusions on the First Objection

445. For the foregoing reasons, the Tribunal finds in favour of the Respondent on the First Objection.

B. THE SECOND OBJECTION

446. The Tribunal having found in the Respondent's favour on the First Objection, and thus disposing of the case in its entirety for the Respondent, considers that it need not address the Second Objection.

VIII. THE RESPONDENT'S RE-APPLICATION FOR SECURITY FOR COSTS

447. In the Respondent's re-application for security for costs dated 16 February 2022, the Respondent relied on Mr. John Tennant's testimony at the Hearing on Jurisdiction that Tennant Energy is a holding company with no financial resources in a bank account, no assets besides the Skyway 127 shares, and no business operations selling goods or services to consumers.⁶⁸⁹ According to the Respondent, this is new evidence which provides a reasonable basis to find that the Claimant is impecunious. The Respondent thus requested that the Tribunal order Tennant Energy to issue:

- (a) security for costs within 90 days of the order, either by depositing the security into an escrow account arranged by the PCA or by submitting a bank guarantee, in the amount of **CAD 1,477,098.91** for the procedural and jurisdictional phase of the proceeding; and
- (b) security for costs in the amount of **CAD 5,456,903.04** for the remaining phases of the arbitration at a later date that the Tribunal deems appropriate, should the arbitration proceed to the merits and damages phases.

448. If Tribunal issues an order for security for costs, and if the Claimant subsequently indicates that it has been unable to obtain the funds or a bank guarantee to satisfy the order, the Respondent requested that the Tribunal: (a) order Tennant Energy to credibly demonstrate that it has taken best efforts to satisfy the order for security for costs; (b) sign an undertaking to confirm that the Claimant will pay any adverse costs orders; and (c) take into account Tennant Energy's non-compliance in the Tribunal's final decision on the allocation of costs.

449. In response, the Claimant argued that the Respondent does not demonstrate any "exceptional circumstances" or urgency which would justify an interim order for security for costs. According

⁶⁸⁹ Hearing on Jurisdiction Transcript, Day 3, 395:10-24.

to the Claimant, Mr. Tennant's testimony at the Hearing is not new and does not amount to an admission of impecuniosity.

450. The Tribunal hereby dismisses the Respondent's renewed application for security for costs. The Respondent's application is unavoidably contingent on the Tribunal's decision on jurisdiction. In the light of the Tribunal's decision that it lacks jurisdiction to hear the Claimant's claim, the issue of security for costs is moot. The Tribunal will decide on the issue of costs below.

IX. COSTS

A. THE PARTIES' ARGUMENTS ON COSTS

451. Were it to have been successful in its claim, the Claimant requested that the Tribunal order the Respondent to bear the costs of the arbitration that have been incurred by the Claimant as defined in Article 40 of the UNCITRAL Rules, in the total amount of USD 5,430,768.03,⁶⁹⁰ including the following costs:
- (a) attorney fees and disbursements at USD 5,097,825.64;
 - (b) costs of expert witnesses at USD 150,848.46;
 - (c) other disbursements at USD 31,245.47; and
 - (d) fees paid for Tribunal and Institutions at USD 335,000.
452. According to the Claimant,⁶⁹¹ Article 40 of the UNCITRAL Rules sets out two separate tests for awarding costs. Paragraph 1 of Article 40 creates a rebuttable presumption that arbitration costs (which the Claimant defines to mean costs of the arbitration or institutional fees paid to the Tribunal, the secretariat, and the appointing authority) will be paid by the unsuccessful party. Paragraph 2 of Article 40 further provides that representation costs (which the Claimant defines to mean legal costs and associated expert fees, and management costs) are mainly left to the Tribunal's discretion based on the circumstances of the case.
453. In this regard, the Claimant asserted that the Respondent should bear the arbitration costs of this arbitration, as well as the Claimant's representation costs in full, if the Claimant is successful in any of its claim. In particular, the Claimant relies on *inter alia*: (a) the complexity and novelty of

⁶⁹⁰ Claimant's Costs Submission, ¶ 40.

⁶⁹¹ Claimant's Costs Submission, ¶¶ 13-40.

the claim,⁶⁹² (b) that the Claimant's claim was made in good faith, and was reasonable in light of the circumstances of the Respondent's unfair and non-transparent conduct,⁶⁹³ and (c) the amount of the Claimant's costs are proportional to the amounts in dispute.⁶⁹⁴

454. The Claimant further asserted that were it not to be successful in any of its arbitration claims, it should: (a) still be awarded certain specific and identifiable costs incurred due to the Respondent's vexatious arguments, repetitive and convoluted pleadings, and conduct throughout these proceedings under Article 40(2) of the UNCITRAL Rules,⁶⁹⁵ and (b) not bear the Respondent's arbitration or representation costs.
455. In respect of (a) above, the Claimant requested an award of 50% of the costs (USD 2,781,000) based on the Respondent's alleged vexatious argumentation and egregious conduct, which caused the Claimant specific, identifiable and unnecessary costs.
456. In respect of (b) above, the Claimant submitted, amongst others, that several aspects of the claim were novel and of the first instance,⁶⁹⁶ there was no unreasonable or wasteful conduct on the Claimant's behalf,⁶⁹⁷ and that material misrepresentations were allegedly made by the Respondent denying any maladministration in the FIT Program when the record demonstrates that the Respondent knew at the time that these public statements were false and intended to mislead.⁶⁹⁸
457. On the contrary, the Respondent argued that the Claimant should never have brought this claim because the Respondent had not consented to arbitrate it under NAFTA Chapter Eleven. Thus, if the Tribunal determines that it has no jurisdiction over this claim by finding for the Respondent on one or both of its jurisdictional objections, the Respondent requested that the Tribunal order the Claimant to bear all of the costs of this arbitration and the Respondent's legal costs pursuant to NAFTA Article 1135(1) and Article 40 of the UNCITRAL Rules.⁶⁹⁹ The Respondent submitted that it should be entitled to CAD 3,526,411.02, which comprises of:⁷⁰⁰
- (a) arbitration costs at CAD 932,262.88; and

⁶⁹² Claimant's Costs Submission, ¶ 25.

⁶⁹³ Claimant's Costs Submission, ¶ 27.

⁶⁹⁴ Claimant's Costs Submission, ¶ 33.

⁶⁹⁵ Claimant's Costs Submission, ¶¶ 34-39.

⁶⁹⁶ Claimant's Costs Submission, ¶¶ 43, 50-55.

⁶⁹⁷ Claimant's Costs Submission, ¶¶ 44, 57.

⁶⁹⁸ Claimant's Costs Submissions, ¶¶ 45-46, 56.

⁶⁹⁹ Respondent's Costs Submission, ¶¶ 1-2.

⁷⁰⁰ Respondent's Costs Submission, ¶¶ 4, 21.

- (b) legal representation and assistance at CAD 2,594,148.14.
458. Were payment not to be received by the Respondent within 30 days of the issuance of the Award, the Respondent further requested that the Tribunal order the Claimant to pay post-award compound interest.⁷⁰¹
459. According to the Respondent, Article 40(1) of the UNCITRAL Rules provides that in principle, the unsuccessful party shall bear the arbitration costs, and that Article 40(2) provides that the Tribunal has discretion to apportion the disputing parties' legal representation and assistance costs as it considers reasonable. In apportioning costs under Article 40, the Respondent argued that the Tribunal should have regard both to the outcome of the proceedings and to the relevant factors in order to serve the dual function of reparation and dissuasion.
460. Consequently, the Respondent claimed that it should be awarded all its arbitration costs and costs of legal representation and assistance because (a) the Claimant's legal arguments were convoluted, incurred and unsupported by jurisprudence,⁷⁰² (b) the Claimant's factual assertions continuously shifted and lacked evidentiary support,⁷⁰³ (c) the Claimant created procedural difficulties throughout the arbitration by *inter alia* re-litigating decisions already made by the Tribunal and attempted to gain for itself a third round of jurisdictional submissions,⁷⁰⁴ (d) the Claimant filed needless procedural motions in the arbitration and otherwise failed to follow the procedures set by the Tribunal,⁷⁰⁵ (e) the Claimant persistently objected to reasonable requests from the Respondent,⁷⁰⁶ and (f) the Claimant's conduct has undermined the integrity of the arbitration proceedings in general.⁷⁰⁷
461. If, however, the Tribunal finds that it has jurisdiction over the Claimant's claim, the Respondent asserted that the Tribunal should refrain from allocating costs for the jurisdictional phase of the proceedings and instead apportion costs with its final award on merits and damages, as only at that time will the Tribunal have a full appreciation of the relevant cost considerations arising over the course of the entire proceeding.⁷⁰⁸

⁷⁰¹ Respondent's Costs Submission, ¶ 21.

⁷⁰² Respondent's Costs Submission, ¶ 8.

⁷⁰³ Respondent's Costs Submission, ¶ 8.

⁷⁰⁴ Respondent's Costs Submission, ¶¶ 9-11.

⁷⁰⁵ Respondent's Costs Submission, ¶ 12.

⁷⁰⁶ Respondent's Costs Submission, ¶¶ 13-14.

⁷⁰⁷ Respondent's Costs Submission, ¶ 15.

⁷⁰⁸ Respondent's Costs Submission, ¶¶ 3, 17-18.

B. THE TRIBUNAL'S ANALYSIS

462. Article 1135(1) of NAFTA provides that a “tribunal may also award costs in accordance with the applicable arbitration rules.”

463. In the present case, the relevant provisions are Articles 38 and 40 of the UNCITRAL Rules. Article 38 of the UNCITRAL Rules provides:

- “1. The arbitral tribunal shall fix the costs of arbitration in its award. The term “costs” includes only:
 - (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
 - (b) The travel and other expenses incurred by the arbitrators;
 - (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
 - (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
 - (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
 - (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.”

464. Article 40 of the UNCITRAL Rules further provides:

- “1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.”

465. Article 40(1) of the UNCITRAL Rules provides that the unsuccessful party shall “in principle” bear all the costs of the arbitration, save for costs of legal representation and assistance referred to in Article 38, paragraph (e). The Tribunal has decided that it has no jurisdiction over the Claimant’s claim. Consequently, the Respondent has prevailed in the present proceedings and the Tribunal sees no reason to depart from the general rule set out in Article 40(1) of the UNCITRAL Rules. Accordingly, the Tribunal finds it appropriate that the Claimant bear the entire costs of the arbitration, as defined in Article 40(1) of the UNCITRAL Rules.

466. The Claimant has made advances towards costs in the amount of USD 425,000 and the Respondent also in the amount of USD 425,000, which gives a total advance of USD 850,000. The PCA will provide the Parties with a statement of account after the issuance of this Final

Award and will return the unused balance (USD 81,774.88) to the Parties in equal share (*i.e.*, USD 40,887.44 each side).

467. The fees and expenses incurred by the members of the Tribunal, as well as those incurred by the PCA in its capacity as Registry in these proceedings, are as follows:

	Fees	Expenses
Mr. Cavinder Bull, SC	USD 260,535.39	USD 21,788.48
Mr. R. Doak Bishop	USD 110,300.00	USD 3,217.24
Sir Daniel Bethlehem KC	USD 138,794.02	USD 15,599.89
Permanent Court of Arbitration	USD 127,407.25	USD 12,038.60

468. Other administrative costs, including the costs of organization of the First Procedural Meeting, the Hearing on Bifurcation and Preliminary Motions, and the Hearing on Jurisdiction amount to USD 78,544.25. Thus, the amounts paid from the deposit established with the PCA total USD 768,225.12.
469. Accordingly, the total costs of the arbitration under Article 40(1) of the UNCITRAL Rules amount to USD 950,319.05⁷⁰⁹ and CAD 359,710.09.⁷¹⁰ This includes the fees and expenses of the Tribunal, the costs of expert advice, the travel and other expenses of witnesses, and fees and expenses of the PCA (*i.e.*, the items enumerated at Article 38(a), (b), (c), (d) and (f) of the UNCITRAL Rules).
470. The Tribunal thus fixes the costs of arbitration at USD 950,319.05 and CAD 359,710.09, and orders the Claimant to pay to the Respondent USD 384,112.56 (*i.e.*, the share of the amounts paid from the advances on costs borne by the Respondent) plus CAD 359,710.09 (*i.e.*, the Respondent's total disbursements towards the costs of arbitration other than Tribunal Advancements).

⁷⁰⁹ This figure represents the amounts paid from the deposit established with the PCA (USD 768,225.12) plus all other disbursements in USD corresponding to the items enumerated at Article 38(a), (b), (c), (d) and (f) of the UNCITRAL Rules – *i.e.*, the Claimant's costs of expert witnesses (USD 150,848.46) and other disbursements (USD 31,245.47).

⁷¹⁰ This figure represents the Respondent's total disbursements towards the costs of arbitration other than Tribunal Advancements. See Respondent's Costs Submission, Annex II.

471. Turning to the costs of legal representation and assistance, the UNCITRAL Rules do not contain a presumption for awarding such costs to the successful party. Instead, Article 40(2) provides that in apportioning these costs, the arbitral tribunal should take into account “the circumstances of the case”. In doing so, and as submitted by the Parties, NAFTA tribunals have generally taken several factors into account, including the novelty of the case and the parties’ conduct in the arbitration proceedings.
472. Here, both Parties have complained that the other Party’s conduct led to an unnecessary increase in costs.
473. The Tribunal recalls that both Parties brought a large number of procedural requests in the course of this arbitration. Whilst neither Party should be faulted for doing so, many of these requests unnecessarily burdened and prolonged the arbitral process. In particular, the Tribunal notes that some of these procedural requests were initiated by and decided against the Respondent, the successful party in this arbitration. This includes the Respondent’s Motion for Security for Costs, the Respondent’s Motion for Targeted Document Production, as well as the Respondent’s applications to impose confidentiality designations.⁷¹¹
474. Additionally, the Tribunal agrees with the Claimant that some of the issues raised were novel. For instance, whether a NAFTA claim can be assigned to another investor who did *not* hold the investment at the time of the breach is a novel issue which was decided only recently, and for the first time, in *Westmoreland*. In fact, the *Westmoreland* Award was issued several months *after* the Hearing on Jurisdiction had concluded. Furthermore, the principles set out in *Westmoreland* are not without controversy and the Tribunal did not reach a conclusion that these principles should apply in *all* situations.
475. Taking all the above into account, the Tribunal is of the view that the Claimant should bear all of its own costs, and 80% of the Respondent’s legal representation and assistance costs in the amount of CAD 2,075,318.51.

X. THE TRIBUNAL’S DECISION

476. For the reasons set forth above, the Tribunal decides as follows:

- (a) The Tribunal does not have jurisdiction to hear this claim on the grounds that the requirements under Article 1116(1) of the NAFTA are not satisfied;

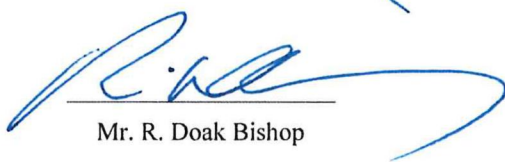
⁷¹¹ See, for example, Procedural Order No. 7 and Procedural Order No. 12.

- (b) The Claimant's claim is accordingly dismissed in its entirety;
- (c) The Respondent's re-application for security for costs dated 16 February 2022 is dismissed;
- (d) The costs of the arbitration are fixed at USD 950,319.05 and CAD 359,710.09;
- (e) The Claimant shall bear 100% of the arbitration costs fixed in the preceding paragraph and the Tribunal thus orders that the Claimant pay the Respondent USD 384,112.56 and CAD 359,710.09 within 30 days of notification of this Final Award; and
- (f) The Claimant shall bear 80% of the Respondent's legal representation and assistance costs and the Tribunal thus orders that the Claimant pay the Respondent CAD 2,075,318.51 within 30 days of notification of this Final Award.

Seat of the arbitration: Washington, D.C.

Date: 25 October 2022

The Arbitral Tribunal



Mr. R. Doak Bishop

Sir Daniel Bethlehem KC

Mr. Cavinder Bull SC
(Presiding Arbitrator)

Seat of the arbitration: Washington, D.C.

Date: 25 October 2022

The Arbitral Tribunal

Mr. R. Doak Bishop



Sir Daniel Bethlehem KC

Mr. Cavinder Bull SC
(Presiding Arbitrator)

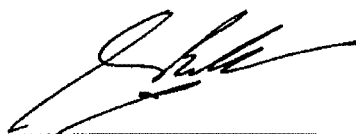
Seat of the arbitration: Washington, D.C.

Date: 25 October 2022

The Arbitral Tribunal

Mr. R. Doak Bishop

Sir Daniel Bethlehem KC

A handwritten signature in black ink, appearing to be 'C. Bull', written over a horizontal line.

Mr. Cavinder Bull SC
(Presiding Arbitrator)