

PCA Case No. 2021-26

**IN THE MATTER OF AN ARBITRATION UNDER  
ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT  
("CUSMA"), CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE  
AGREEMENT ("NAFTA"),  
AND THE 2013 UNCITRAL ARBITRATION RULES**

- between -

**WINDSTREAM ENERGY LLC**

**(the "Claimant")**

- and -

**THE GOVERNMENT OF CANADA**

**(the "Respondent", and together with the Claimant, the "disputing parties")**

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**PROCEDURAL ORDER NO. 2**

**Decision on Bifurcation**

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**The Arbitral Tribunal**

*Ms Wendy Miles KC (Presiding Arbitrator)*

*Prof. John Gotanda*

*Rt. Hon. Beverly McLachlin*

**Administering Authority**

*Permanent Court of Arbitration*

**Tribunal Secretary**

*Mr José Luis Aragón Cardiel*

**13 September 2022**

## I. PROCEDURAL HISTORY

1. By a Notice of Arbitration dated 22 December 2020, the Claimant commenced arbitration proceedings against the Respondent on its own behalf and on behalf of its enterprise Windstream Wolfe Island Shoals Inc. (“**WWIS**”) pursuant to Article 3 of the 2013 UNCITRAL Arbitration Rules (the “**UNCITRAL Rules**”) and Articles 1116, 1117 and 1120 of the North American Free Trade Agreement (the “**NAFTA**”). The Claimant also invoked Annex 14-C of the United States-Mexico-Canada Agreement (“**CUSMA**”).
2. On 21 December 2021, the Tribunal issued Procedural Order No. 1 establishing, among other things, the Procedural Calendar of the arbitration. As set out in the Procedural Calendar, the Initial Phase of the proceedings shall culminate in a Decision on Bifurcation, following which one of two alternative scenarios shall apply depending on the outcome of such Decision.
3. On 18 February 2022, the Claimant submitted its Memorial (the “**Memorial**”).
4. On 12 May 2022, the Respondent submitted its Request for Bifurcation and Memorial Objecting to Jurisdiction and Admissibility (the “**Request for Bifurcation and Memorial on Jurisdiction**”).
5. On 16 June 2022, the Claimant submitted its Response to Canada’s Request for Bifurcation (the “**Response**”).
6. On 27 June 2022, the Tribunal confirmed the disputing parties’ agreement, as set out in their joint communication of 24 June 2022, that the Tribunal should proceed to decide the Respondent’s Request for Bifurcation on the basis of the written submissions already filed with no oral hearing.
7. In this Procedural Order, the Tribunal decides the Respondent’s Request for Bifurcation.

## II. BACKGROUND TO THE CLAIMANT’S CLAIMS

8. According to the Memorial, the grounds for the Claimant’s claim date back to a feed-in-tariff contract entered into between the Claimant and the Ontario Power Authority in March 2010 (the “**FIT Contract**”).<sup>1</sup> Under the FIT Contract, the Claimant was required to “*develop and bring into commercial operation a 300 [MW] offshore wind energy facility in Lake Ontario*” (the “**Project**”) in exchange for which the Contract “*guaranteed that all the electricity the facility produced would be purchased, at a fixed, indexed price, for a twenty-year period.*”<sup>2</sup>
9. According to the Claimant, the Ontario Government implemented a moratorium on the Project, during which it “*explicitly promised to Windstream that the FIT Contract would be ‘frozen’*”.<sup>3</sup> However, “*Ontario did not keep its promise, and the moratorium made it impossible to build the Project within the timelines set out in the FIT Contract.*”<sup>4</sup>
10. A NAFTA arbitration then proceeded between the same disputing parties, PCA Case No. 2013-22 (“**Windstream I**”), which culminated in an Award dated 27 September 2016 (the “**Windstream I Award**”).<sup>5</sup> In this Award, the *Windstream I* tribunal granted, *inter alia*, the “*Claimant’s claim that the Respondent [had] failed to accord the Claimant’s investments fair and equitable treatment in accordance with international law, contrary to Article 1105 of NAFTA*” and awarded compensation to the Claimant “*for the Respondent’s breach of its obligations under Article 1105(1) of NAFTA in the amount of CAD 25,182,900*”.<sup>6</sup> The *Windstream I* tribunal further dismissed the Claimant’s claims concerning the alleged breach of NAFTA Article 1110 (Expropriation) and of the most-favoured nation (“**MFN**”) and national treatment standards.<sup>7</sup>

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<sup>1</sup> Memorial, para. 2

<sup>2</sup> Memorial, para. 2.

<sup>3</sup> Memorial, para. 4.

<sup>4</sup> Memorial, para. 5.

<sup>5</sup> Memorial, paras. 5-7; *Windstream I Award*, 27 September 2016 (C-2040).

<sup>6</sup> *Windstream I Award*, 27 September 2016, para. 515(b), (e) (C-2040).

<sup>7</sup> *Windstream I Award*, 27 September 2016, para. 515(a), (c), (d) (C-2040).

11. According to the Claimant, following the issuance of the *Windstream I* Award,

[e]ncouraged by the tribunal’s decision and Canada’s representations that the Project had a future, Windstream emerged from the NAFTA proceedings with the expectation that the Project would proceed. While courting substantial third-party interest in investing in the Project, Windstream worked to advance the Project and attempted to engage the Government of Ontario and the Independent Electricity System Operator [“**IESO**”] in discussions about the path forward. The Ontario Government ignored those requests – and its promise in 2011 to “freeze” the FIT Contract – and allowed the IESO to terminate the FIT Contract in February 2020.<sup>8</sup>

12. In this proceeding, the Claimant “*seeks the full value of its investment*”, which it alleges “*has now been destroyed – not just damaged – as a result of the Ontario Government’s actions (and inaction) after the Windstream I Award*”,<sup>9</sup> including the Government’s alleged:

- (a) failure to complete in a timely manner the work it considered necessary in order to lift the moratorium, in order to ensure that the moratorium would not further prejudice WWIS by causing further delays to the Project (claiming that the Government has not conducted any of the studies that were the stated pretence of the application of the moratorium, and does not appear to be taking any steps to lift the moratorium);
- (b) decision to continue to apply the moratorium to WWIS, despite knowing that its continued application as against WWIS would create the conditions that would allow the IESO to terminate the FIT Contract (in direct contradiction with its promise to protect the Project from the effects of the moratorium); and
- (c) failure to direct the IESO not to terminate the FIT Contract, or to amend the FIT Contract to ensure that, consistent with its promise, the Project would be “*deferred*”, “*frozen*” and “*on hold*”.<sup>10</sup>

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<sup>8</sup> Memorial, para. 6.

<sup>9</sup> Memorial, para. 7.

<sup>10</sup> Memorial, para. 7.

### III. THE RESPONDENT'S REQUEST FOR BIFURCATION

13. In its Request for Bifurcation and Memorial on Jurisdiction, the Respondent calls on the Tribunal to address three matters in a preliminary bifurcated phase: (i) the Claimant's "*misleading interpretation of the Windstream I Award from which it argues that Ontario had an obligation to reactivate the FIT Contract, and that its investment continued to have value*" (the "**Interpretation Objection**");<sup>11</sup> (ii) its objection to the admissibility of the Claimant's claims "*on the grounds that they are barred by the doctrines of res judicata and collateral estoppel, and since they constitute an abuse of process*" (the "**Preclusion Objection**");<sup>12</sup> and (iii) the Claimant's failure "*to establish that the Tribunal has jurisdiction over the claims because it has not demonstrated ... that it has suffered any prima facie damage related to its claims of breach, as opposed to the loss for which it has already been compensated*" (the "**Damages Objection**") (collectively the "**Objections**").<sup>13</sup> The bases for the Objections are summarized below, followed by the Respondent's and Claimant's respective positions on bifurcation for the hearing and determination of those Objections.

#### 1. The Interpretation Objection

14. The Interpretation Objection concerns the Claimant's alleged misrepresentation of the *Windstream I Award* in its Memorial. According to the Respondent, contrary to the Claimant's arguments, such Award "*creates no expectation of a path forward for the Project ... and in no way suggests that additional damages would be available to the Claimant in the event that the Project would not be able to proceed in the future.*"<sup>14</sup>
15. First, the Respondent rejects the Claimant's inference that the *Windstream I* tribunal "*declined to award Windstream damages for the full value of its investments*" because the FIT Contract was "*still formally in force' and could be 'reactivate[d]'* and

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<sup>11</sup> Request for Bifurcation and Memorial on Jurisdiction, paras 8, 12-46.

<sup>12</sup> Request for Bifurcation and Memorial on Jurisdiction, paras 9, 47-91.

<sup>13</sup> Request for Bifurcation and Memorial on Jurisdiction, paras 10, 92-133.

<sup>14</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 13.

*‘renegotiate[d]’ to adjust its terms to the moratorium.’*<sup>15</sup> In the Respondent’s view, such decision “*had everything to do with the CAN\$6 million security deposit that was still owed to Windstream [under the FIT Contract], and nothing to do with any increase in value that the Project might experience in the future.*”<sup>16</sup> It was for this reason, the Respondent avers, that the *Windstream I* tribunal concluded that the Claimant had not been substantially deprived of the value of its investment and thus that no breach of NAFTA Article 1110 (Expropriation) occurred.<sup>17</sup>

16. In turn, the Respondent considers that the *Windstream I* tribunal’s determinations regarding the breach of NAFTA Article 1105 (Minimum Standard of Treatment) are at odds with the Claimant’s position “*that the findings by the Windstream I Tribunal and Canada’s representations in the proceeding created the expectation that its Project had a future.*”<sup>18</sup> In this respect, the Respondent references the *Windstream I* tribunal’s findings that “*many of the [Ontario Government’s] research plans did not go forward at all, including some for lack of funding*”, that “*at the hearing counsel for the Respondent confirmed that Ontario did not plan to conduct any further studies*”, and that “*the studies that have been conducted [have not] led to any amendments to the regulatory framework.*”<sup>19</sup>

17. In the Respondent’s view, the *Windstream I* tribunal’s determinations on damages are also at odds with the Claimant’s suggestion that there was “*continuing value of the Project*” after the *Windstream I* Award.<sup>20</sup> In the Respondent’s reading of the *Windstream I* Award, the tribunal fixed the full value of the Project at CAD\$ 31,182,900 and later adjusted the valuation to reflect the CAD\$ 6 million letter of credit that remained available to the Claimant, finding that “*no other adjustments were needed to make the*

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<sup>15</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 16.

<sup>16</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 17, 21, 32, 34.

<sup>17</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 21; *Windstream I* Award, 27 September 2016, para. 290 (C-2040).

<sup>18</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 22-26; Memorial, paras. 6, 21, 206.

<sup>19</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 24; *Windstream I* Award, 27 September 2016, paras. 178, 378 (C-2040).

<sup>20</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 27-34; Memorial, para. 468.

*Claimant whole again.*”<sup>21</sup> It also refers to what it describes as the tribunal’s determination that “*the FIT Contract cannot be considered to have any value.*”<sup>22</sup>

18. Lastly, according to the Respondent, the Claimant’s position that it “*emerged from the [Windstream I proceedings] with an expectation that its Project would proceed*” is also contradicted by the Claimant’s own actions following the *Windstream I* Award.<sup>23</sup> As an example, the Respondent cites, *inter alia*, WWIS’s court application for an order restraining IESO from terminating its FIT Contract, its “*extensive lobbying efforts to create a path forward*” or communications from the Ministry of Environment and Climate Change noting that Ontario still had “*not developed an offshore wind policy framework on approval requirements.*”<sup>24</sup>

## **2. The Preclusion Objection**

19. The Respondent submits that the Claimant’s attempts “*to replead claims or relitigate issues that it put before the Windstream I Tribunal*” are precluded by general principles of international law applicable under NAFTA Article 1131, namely, *res judicata*, collateral estoppel and abuse of process.<sup>25</sup> Flowing from these principles, the Respondent asserts that the Claimant’s claims must be dismissed because it has failed to identify any measures following the *Windstream I* Award that can sustain an independent cause of action under NAFTA Chapter 11.<sup>26</sup>
20. According to the Respondent, the six measures identified by the Claimant as breaching NAFTA following the *Windstream I* Award<sup>27</sup> boil down to two complaints of a NAFTA

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<sup>21</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 28-32; *Windstream I* Award, 27 September 2016, paras. 473-485 (C-2040).

<sup>22</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 33, *Windstream I* Award, 27 September 2016, para. 483 (C-2040).

<sup>23</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 35-46.

<sup>24</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 35-46.

<sup>25</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 47-66.

<sup>26</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 47-91.

<sup>27</sup> According to the Respondent, those measures are: (i) Ontario’s failure to complete the work necessary to lift the moratorium; (ii) Ontario’s continued application of the moratorium; (iii) Ontario’s failure to direct IESO not to terminate the FIT Contract; (iv) Ontario’s failure to direct IESO to amend the FIT Contract to defer the project; (v) the decision of IESO to terminate the FIT Contract; and (vi) the failure of IESO to

breach: “(i) the continued application of the moratorium; and (ii) the termination of the FIT Contract, as opposed to its deferral or amendment”.<sup>28</sup> In the Respondent’s view, at their core, these complaints reflect the same claim that was the subject of the *Windstream I* arbitration, by the same investor and for the exact same investment.<sup>29</sup> On this basis, the Respondent submits that the Claimant is barred from: (i) making a claim that the continued imposition of the moratorium following the *Windstream I* Award breaches NAFTA; (ii) claiming that the termination of the FIT Contract breaches NAFTA; (iii) reopening the determination that its CAD\$6 million security deposit constituted a substantial portion of the value of its investment; or (iv) seeking additional damages based on a valuation of its investment contrary to the determination of value in the *Windstream I* Award.<sup>30</sup>

### 3. The Damages Objection

21. The Respondent submits that the Claimant cannot establish, as it is its burden, *prima facie* loss or damage “by reason of, or arising out of” the breach of an obligation under Section A of NAFTA Chapter 11, which is a condition precedent to the Tribunal’s jurisdiction pursuant to NAFTA Articles 1116(1) and 1117(1).<sup>31</sup>
22. First, the Respondent repeats its argument that the Claimant is estopped from asserting that the Project or the FIT Contract have value on the grounds of issue estoppel or *res judicata*, as it made the opposite argument in *Windstream I* and the tribunal decided upon it. In circumstances where the Claimant is unable to show that its investments had any value, the Respondent concludes that the Claimant is unable to present a *prima facie* damage claim.<sup>32</sup>

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amend the FIT Contract to ensure the project would be deferred. *See* Request for Bifurcation and Memorial on Jurisdiction, para. 67.

<sup>28</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 67-68.

<sup>29</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 68-70.

<sup>30</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 71-91.

<sup>31</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 92-133.

<sup>32</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 98-103.

23. Second, the Respondent considers that the Claimant's damages claim requires overturning matters that have been conclusively determined by the *Windstream I* Award.<sup>33</sup> For this reason, it requests the Tribunal to reject the "*Claimant's argument that its project had value that continued after the Windstream I Award, as demonstrated by the alleged interest of other investors*" and the DCF analysis performed by its hired expert.<sup>34</sup>
24. Third, "[s]ince the Claimant has identified no subsequent, separable, self-standing cause of action that has caused any possible loss beyond what it claimed previously," the Respondent concludes that the Claimant has not made out a *prima facie* claim of damage.<sup>35</sup> The Respondent reiterates that the six measures the Claimant identifies as the causes of its loss were fully addressed in the previous claim, and so must be the damage associated with them.<sup>36</sup> It further submits that the Claimant has failed to make a *prima facie* damages case in the *Windstream II* claim, as it simply repeats the same request for damages that was previously determined in *Windstream I*.<sup>37</sup>

#### 4. The Request for Bifurcation

25. On the basis of its three Objections, the Respondent requests that the proceedings be bifurcated pursuant to Article 17(1) of the UNCITRAL Rules.<sup>38</sup> According to the Respondent, bifurcation should be guided by principles of fairness and procedural efficiency, as invoked by the *Accession Mezzanine v. Hungary* tribunal and other tribunals faced with requests for bifurcation.<sup>39</sup> The Respondent further relies on the standard for bifurcation articulated in *Philip Morris v. Australia*, pursuant to which it

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<sup>33</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 104-108.

<sup>34</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 104-108.

<sup>35</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 109-114.

<sup>36</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 115-125. *See* fn 27 *supra*.

<sup>37</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 126-133.

<sup>38</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 134.

<sup>39</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 134-137; *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezele v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, para. 38 (RL-157).

submits that bifurcation is appropriate when: (i) the objection is *prima facie* serious and substantial, (ii) the objection can be examined without prejudging or entering the merits, and (iii) the objection, if successful, could dispose of all or an essential part of the claims raised.<sup>40</sup> In the Respondent’s view, each of its three Objections clearly satisfies this standard.<sup>41</sup>

26. First, the Interpretation Objection, according to the Respondent, is appropriate for bifurcation because with different interpretive starting points on the *Windstream I* Award, “*the arguments of the disputing parties would pass like ships in the night*”, resulting in inefficient briefing and unnecessary costs.<sup>42</sup> The Respondent considers (i) this objection to be serious and substantial, as the Claimant’s claims rely entirely on its “*erroneous and misleading*” interpretation of the *Windstream I* Award; (ii) the objection to revolve exclusively around a proper interpretation of the *Windstream I* Award and, as such, can be examined without entering the merits; and that (iii) rectifying the Claimant’s interpretations would completely dispose of the Claimant’s claims, or at a minimum would significantly limit the scope of this arbitration.<sup>43</sup>
27. The Respondent submits that the Preclusion Objection also warrants bifurcation.<sup>44</sup> As grounds for the proposition that the Preclusion Objection is *prima facie* serious and substantial, the Respondent posits that the application of the principles of *res judicata*, collateral estoppel and abuse of process to the Claimant’s claims is “*required by procedural fairness,*” as the claims put forward by the Claimant have already been conclusively resolved and are not open for relitigation.<sup>45</sup> Further, the Preclusion Objection requires the Tribunal only to “*rely on the interpretation of the Windstream I Award, and the continuity and logical consequences of what was determined in it, and*

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<sup>40</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 137; *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, para. 109 (**RL-141**).

<sup>41</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 138.

<sup>42</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 139.

<sup>43</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 140-142.

<sup>44</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 143-146.

<sup>45</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 144.

*does not require new evidence.*<sup>46</sup> If successful, the Preclusion Objection “*would dispose of all of Windstream’s claims ... In the alternative, it will give the Tribunal an opportunity to clearly define the issues that need to go to the merits.*”<sup>47</sup>

28. Lastly, the Respondent also considers the Damages Objection to be suitable for preliminary consideration. It says this objection is *prima facie* serious and substantial because it is premised on “*a necessary element to ground the Tribunal’s jurisdiction*”, *i.e.*, a showing of *prima facie* damage.<sup>48</sup> Moreover, in the Respondent’s view, addressing the Damages Objection will not require fact and expert witnesses; rather, it requires focusing “*on the legal standard as well as what the parties pleaded and the Tribunal decided in Windstream I to determine from which measure the alleged damage originates.*”<sup>49</sup> It notes that the tribunal in *Westmoreland v. Canada*, faced with a similar situation, reached the decision not to proceed to an evidentiary hearing on quantum of loss.<sup>50</sup> Since a failure to make a *prima facie* damage claim pursuant to NAFTA Articles 1116(1) and 1117(1) would deprive the Tribunal of jurisdiction, the Respondent concludes that the Damages Objection would also dispose of the entirety of the dispute.<sup>51</sup>

#### IV. THE CLAIMANT’S POSITION

29. The Claimant submits that the Respondent’s Objections should not give rise to bifurcation because (i) they necessarily involve the assessment of evidence regarding what happened after *Windstream I*; and (ii) deciding the Objections on a preliminary basis without the benefit of the full factual record raises “*serious concerns about the integrity of the proceedings.*”<sup>52</sup> Further, while the Claimant notes that there is no disagreement between the disputing parties with regard to the applicable law and principles governing

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<sup>46</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 145.

<sup>47</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 146.

<sup>48</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 148.

<sup>49</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 149.

<sup>50</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 150; *Westmoreland Mining Holdings LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022, para. 235 (RL-139).

<sup>51</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 151.

<sup>52</sup> Response, paras. 4-6.

bifurcation, including the criteria of the *Philip Morris* test for bifurcation, it stresses that these are not “*stand alone*” criteria, adding that the integrity of the proceedings and procedural fairness should also be considered.<sup>53</sup> In any event, the Claimant states that the Objections do not fulfil the *Philip Morris* test.<sup>54</sup>

30. First, the Claimant denies that the Objections are serious and substantial, as they are based on the wrong premise that the Claimant’s claims are identical to the issues considered in *Windstream I*.<sup>55</sup>
31. Second, the Claimant submits that the Objections address the merits of the Claimant’s claims and therefore cannot be examined without prejudging the core of the Claimant’s case.<sup>56</sup> For instance, the Claimant recalls that NAFTA tribunals, such as that in *Glamis Gold v. United States*, have recognized that objections regarding whether a claimant has established a *prima facie* loss are inextricably linked to the merits, meaning bifurcation is “*impractical*” and not appropriate.<sup>57</sup> In any event, the Claimant observes that it is not open to the Respondent to reframe the Claimant’s case as one about measures other than those pleaded: as the *Glamis Gold* tribunal also observed, “*in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunal should take the claim as it is alleged by Claimant.*”<sup>58</sup>
32. In the Claimant’s view, such considerations apply in this case.<sup>59</sup> The Claimant recalls that this case is about measures and conduct by the Ontario Government that took place *after* the *Windstream I* Award and should be taken by the Tribunal as such.<sup>60</sup> Further, the Claimant submits that the Respondent’s own framing of the Memorial and its Objections requires the Tribunal to review and interpret post-2016 conduct to determine

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<sup>53</sup> Response, paras. 10-12.

<sup>54</sup> Response, para. 13.

<sup>55</sup> Response, para. 14.

<sup>56</sup> Response, paras. 17-18.

<sup>57</sup> Response, para. 20; *Glamis Gold v. United States of America*, ad-hoc, Procedural Order No. 2, 31 May 2005, paras. 13, 22 (CL-176).

<sup>58</sup> Response, para. 21; *Glamis Gold v. United States of America*, ad-hoc, Procedural Order No. 2, 31 May 2005, para. 12(a) (CL-176).

<sup>59</sup> Response, para. 21.

<sup>60</sup> Response, para. 21 (emphasis in original).

whether those events raise new measures or give rise to any additional damages, “*which is at the heart of Windstream’s claim and the focus of its fact and expert evidence*”.<sup>61</sup> Such evidence includes seven witness statements and nine expert reports.<sup>62</sup> Similarly, the Claimant observes that the Tribunal’s analysis of the *res judicata* argument will require a determination of whether the new measures and alleged treaty breaches involve different facts and issues than those at stake in the earlier arbitration.<sup>63</sup> According to the Claimant, the Respondent acknowledges in its Request for Bifurcation and Memorial on Jurisdiction that the Tribunal will have to engage with this evidence.<sup>64</sup>

33. In view of the alleged overlap between the Objections and the merits issues, the Claimant also reiterates that bifurcation would not be efficient and would raise procedural fairness concerns.<sup>65</sup> The Claimant cautions that, if the case is bifurcated, it intends to rely upon the evidence submitted with its Memorial and to submit further evidence to respond to the specific issues raised in the Request for Bifurcation and Memorial on Jurisdiction, meaning that any efficiencies will be limited, if at all.<sup>66</sup>
34. According to the Claimant, the Respondent’s request that the Tribunal decide the Interpretation Objection by ignoring the evidence “*while at the same time accepting Canada’s characterization of that evidence*” raises similar fairness concerns:<sup>67</sup> the *Windstream I Award* “*cannot be interpreted in a vacuum*”.<sup>68</sup> Similarly, the Claimant fears the prospect of “*duplicat[ive] development and analysis of the factual record*” if such “*core merits issues*” are bifurcated.<sup>69</sup>
35. Third, in determining whether the Respondent’s Objections could render the claims moot, the Claimant accepts that “*a dispositive ruling from the Tribunal on Canada’s Objections*

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<sup>61</sup> Response, paras. 22-25. *See* the Claimant’s descriptions of the measures at issue at para. 12 above.

<sup>62</sup> Response, para. 24.

<sup>63</sup> Response, para. 26.

<sup>64</sup> Response, para. 27; Request for Bifurcation and Memorial on Jurisdiction, paras. 5, 35-46.

<sup>65</sup> Response, para. 28.

<sup>66</sup> Response, para. 29.

<sup>67</sup> Response, paras. 30-32.

<sup>68</sup> Response, para. 31.

<sup>69</sup> Response, para. 32.

*in either party's favour would dispose of a significant portion of the claim.*"<sup>70</sup> However, noting that a tribunal may decide on deferring its determination of the objections to the merits phase, the Claimant explains that such a dispositive ruling is not the only or likely result of a bifurcated phase.<sup>71</sup>

## V. ANALYSIS

36. The Tribunal has carefully considered the disputing parties' respective submissions in full and addresses below: (1) the Tribunal's power to bifurcate and the applicable standard; and (2) the application of the relevant standard to each of the three Objections.

### 1. The Applicable Standard

37. The Respondent seeks to bifurcate the final determination of its three Objections as a preliminary issue based on the UNCITRAL Rules, Article 17(1). Article 17(1) provides as follows:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.

38. The disputing parties agree that the Tribunal has the power to bifurcate the proceedings in order preliminarily to hear and determine the Objections pursuant to the UNCITRAL Rules. However, Article 17(1) does not supply the applicable standard for bifurcation. Instead, the matter is left to the discretion of the Tribunal.

39. As to factors that the Tribunal may take into account in the exercise of its discretion, the disputing parties have both referred to prior investment arbitration decisions by way of

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<sup>70</sup> Response, para. 33.

<sup>71</sup> Response, para. 33.

guidance.<sup>72</sup> Relevant factors identified in prior decisions, including *Accession Mezzanine v. Hungary* and *Philip Morris v. Australia*, include that the preliminary objections jointly or separately are:

- (a) *prima facie* serious and substantial;
  - (b) able to be examined without prejudging or entering the merits; and
  - (c) if upheld, would be dispositive of all or an essential portion of the claimant's claims.
40. The Tribunal considers each of these factors to be relevant to its decision and, in addition, that they all should be considered through the lens of whether or not bifurcation would enhance procedural efficiency and economy and overall fairness of the proceeding.
41. Therefore, the Tribunal will consider each factor in considering whether the Respondent's Request for Bifurcation should be granted, bearing in mind the overriding objective of achieving overall procedural efficiency, economy and fairness.

## **2. Application of the Standard**

42. Preliminarily, this situation is unusual in that the disputing parties have previously arbitrated disputes between them in the *Windstream I* arbitration and an award was rendered in respect of those disputes.
43. In this regard, the UNCITRAL Rules provide no specific guidance save to require that proceedings be conducted so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute. An unnecessarily duplicative arbitration proceeding, which effectively defeats the full and final resolution of the dispute pursuant to an earlier arbitration, would not avoid unnecessary delay and expense. In order to prevent such outcome, as far as feasible, the arbitral tribunal has full discretion to deal with any post-award further arbitration in such manner as it considers appropriate,

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<sup>72</sup> *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezele v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, para. 38 (**RL-157**); *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, para. 109 (**RL-141**).

provided the parties are treated with equality and each is given a reasonable opportunity of presenting its case at an appropriate stage of the proceedings.

44. In the current circumstances, the Respondent requests that the Tribunal conduct a preliminary hearing in order finally to determine its three Objections. Effectively, it asks the Tribunal to determine the scope and effect of the *Windstream I* Award on allegedly new claims, if any, in the *Windstream II* arbitration. If the Respondent were correct and the claims in the *Windstream II* arbitration were indeed a relitigation of issues and damages that were previously argued and determined in *Windstream I*, then a fair and efficient way forward would be to prevent that from occurring at the earliest opportunity.
45. However, the position is not that straightforward. The Claimant maintains the firm position that the *Windstream II* arbitration and claims relate to “*a series of measures which all occurred after the Windstream I award*”.<sup>73</sup> According to the Claimant, new post-award measures constitute new and additional breaches of the NAFTA and have given rise to losses that have not been compensated.
46. In this regard, the Claimant commenced the new *Windstream II* arbitration on the basis that, “[e]ncouraged by” the *Windstream I* Award and “*Canada’s representations that the Project had a future*”, it “*emerged from the NAFTA proceedings with the expectation that the Project would proceed*”. The Claimant asserts that it thereafter “*worked to advance the Project and attempted to engage the Government of Ontario and the [IESO] in discussions about the path forward*”, but that “[t]he Ontario Government ignored those requests – and its promise in 2011 to ‘freeze’ the FIT Contract – and allowed the IESO to terminate the FIT Contract in February 2020.”<sup>74</sup>
47. The extent to which any allegedly new claim arose only after the *Windstream I* Award, and is based on measures that post-date that Award, goes to the heart of the *Windstream II* arbitration. The facts and evidence regarding that post-Award conduct, including the

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<sup>73</sup> Response, para. 2 (emphasis added).

<sup>74</sup> Memorial, para. 6.

manner in which the *Windstream I* Award influenced that conduct, forms the basis of the Claimant's allegedly new claims.

48. Against that background, the Tribunal considers below the Respondent's request for bifurcation in respect of each of the three Objections, pursuant to UNCITRAL Rule 17(1) and based on the agreed factors to be applied through a lens of whether or not bifurcation would enhance procedural efficiency and economy and the overall fairness of the proceeding.

*a. The Interpretation Objection*

49. The Respondent's first Objection is that the Claimant misinterprets the *Windstream I* Award because: (i) the Award itself "*creates no expectation*" that could form the basis for a new NAFTA claim; and (ii) the Award "*in no way suggests that additional damages would be available to the Claimant in the event that the Project would not be able to proceed in the future.*"<sup>75</sup>
50. As the Tribunal understands the claim in the *Windstream II* arbitration, the Claimant alleges that new measures occurred *following* the *Windstream I* Award, including but not limited to the termination of the FIT Contract, giving rise to a new breach of the NAFTA and ensuing additional loss. According to the Claimant, its new claim does not turn on an expectation created by the *Windstream I* Award itself. Rather, it arises out of events subsequent to that Award. As to whether or not the Claimant is able to establish a new claim and any additional loss as a matter of fact or law is a matter for determination in due course. The question for this juncture is whether or not the non-existence of new measures or loss on the face of the *Windstream I* Award can efficiently and effectively be finally determined as a preliminary issue.
51. In order to examine that question in accordance with the applicable standard, the Tribunal first considers whether or not there is a *prima facie* serious and substantial issue based on the Interpretation Objection. Despite the Claimant's protestations that the Respondent's

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<sup>75</sup> Request for Bifurcation and Memorial on Jurisdiction, para. 13.

objections are “*based on a strawman argument that reframes the Claimant’s claims and recharacterizes the Measures*”,<sup>76</sup> the Tribunal is persuaded that there is a serious and substantial issue as to the scope and effect of the *Windstream I* Award, and its impact on any allegedly new claims or loss.

52. However, and turning to the second relevant factor, the Tribunal considers that the scope and effect of the *Windstream I* Award on any new claims and loss goes to the heart of the merits in the *Windstream II* arbitration. The Tribunal reaches this view with some reluctance; it is unusual to have multiple investor-state arbitration proceedings arising out of a single investment. But it is also not unprecedented. Obligations under the NAFTA may be continuing, provided the investment continues post-Award. New measures may, in certain circumstances, give rise to new claims and loss.
53. In the current case, the Respondent could have sought bifurcation to determine subject-matter jurisdiction as a preliminary issue, i.e., on the basis that there is no extant investment following the *Windstream I* Award. But it did not; instead it seeks that the Tribunal interpret the *Windstream I* Award as a preliminary issue.
54. Given that the *Windstream I* and *Windstream II* proceedings are undoubtedly interrelated, the Tribunal accepts the Respondent’s position that it is incumbent on it to establish the correct interpretation of the *Windstream I* Award and its effect on the subsequent arbitration. The question for this decision is when is the most efficient, economic and procedurally fair point in the proceedings to do so.
55. If the Tribunal were to determine a dispute between the disputing parties as to the interpretation of the *Windstream I* Award, and its effect on the subsequent arbitration, in a vacuum and without full context as to the allegedly new claim and loss, it may lead to an unjust result. On the other hand, if the Tribunal were fully to consider all of the facts, evidence and legal arguments pertaining to the allegedly new claim and loss, including the post-Award events asserted and relied upon by the Claimants, it would largely defeat the purpose of bifurcation in terms of efficiency and economy.

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<sup>76</sup> Response, para. 14.

56. Therefore, in the Tribunal's view, the interpretation of the *Windstream I* Award is very much intertwined with the facts and evidence concerning events subsequent to that Award, which the Claimant alleges give rise to the new claim and loss.
57. As to the third factor, the Interpretation Objection may well be determinative, but at this stage it is impossible to make any real assessment in that regard. This reinforces the Tribunal's view as to the intertwined nature of the *Windstream I* Award interpretation and any post-Award events giving rise to allegedly new claims and loss. Whether or not the Tribunal's findings as to the proper interpretation of the *Windstream I* Award would preclude the allegedly new claims would very much depend on the nature of the new claims, and the facts and evidence underlying them, and how they interact with or follow on from that Award. This, again, is intertwined with the merits in the arbitration.
58. As to the consideration of bifurcation through the lens of whether or not it would enhance procedural efficiency and economy and the overall fairness of the proceeding, the Tribunal is influenced by the disputing parties' agreed timetables in the proceedings for both bifurcated and non-bifurcated proceedings, respectively. A non-bifurcated proceeding would bring these proceedings to the end of a full hearing in less than 17 months. A bifurcated proceeding would result in a hearing solely on the Objections in 12 months' time at the earliest depending on document production. Although there is no timetable for the remainder of proceedings if the bifurcated Objections were not determinative, it is likely to add at least another year to the schedule.
59. The fact that a non-bifurcated hearing of the jurisdictional and substantive issues jointly would add only four months to the length of proceedings if jurisdiction were dispositive, and would save at least a year if not, is a major factor in the Tribunal's decision not to bifurcate the Interpretation Objection. That said, the Tribunal is cognisant of the overlap between the claims in the *Windstream I* Award and the *Windstream II* arbitration and expects both disputing parties to take a responsible and reasoned approach to the interpretation of the existing Award. In that regard, the Tribunal would remain open to hearing the disputing parties as to whether it could provide further direction in this regard at the end of the first round of written submissions, or at any other appropriate time in the proceedings.

*b. The Preclusion Objection*

60. The Respondent's second preliminary objection is that the Claimant's claims in the *Windstream II* arbitration are precluded by general principles of international law applicable under NAFTA Article 1131, namely, *res judicata*, collateral estoppel and abuse of process.<sup>77</sup> It argues that the alleged continued application of the moratorium and termination of the FIT Contract constitute the same claim, by the same investor, regarding the same investment, as the *Windstream I* arbitration, which bars the Claimant from reopening prior claims or seeking any further determination as to loss.
61. As to the existence of a *prima facie* serious or substantive issue arising out of the Preclusion Objection, the Tribunal again considers that this cannot be summarily dismissed as suggested by the Claimant. The legal and/or evidential effect of the *Windstream I* Award on the allegedly new claims and/or the underlying facts or evidence upon which those claims are based, is a real and serious issue and requires careful consideration.
62. However, for the reasons set out above in relation to the Interpretation Objection, the Preclusion Objection also raises matters that are very much intertwined with the merits. Preclusion by definition involves a comparative exercise. Here the Tribunal would need to consider the alleged findings of fact and/or law in the *Windstream I* Award against the evidence, facts and legal arguments asserted in the *Windstream II* arbitration. If the Tribunal were to seek to make a final and binding determination on the basis of the former without proper consideration as to the latter in the context of that determination, it would risk error or unfairness and injustice to one or both disputing parties.
63. Moreover, as the Preclusion Objection is largely an evidential issue (i.e., the evidential effect of earlier Award findings of fact or liability or loss), its determination may not be dispositive of the entire claims in the *Windstream II* arbitration. For example, the Tribunal may preliminarily determine the *res judicata* effect of findings in the *Windstream I* Award, but still need to proceed to apply that finding in its consideration

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<sup>77</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 49-66.

of the allegedly new claims in *Windstream II*, against the full facts, evidence and arguments relating to those new claims.

64. Overall, the Tribunal considers the issues as to *res judicata* and/or collateral estoppel effect of the factual and legal findings in the *Windstream I* Award, and any abuse of process arising out of allegedly new claims that may seek to relitigate those, to be critically important. These are central to its consideration and determination of the allegedly new claims. In part because of their central importance, the Tribunal considers that they are best determined in the context of the allegedly new claims as a whole.
65. The Tribunal is again, as with the Interpretation Objection, influenced by the overall marginal additional time and procedural steps involved in not bifurcating and, on balance, considers it unnecessary and inappropriate to do so in respect of the Preclusion Objection.

*c. The Damages Objection*

66. The Respondent's third and final Objection is that the Claimant cannot establish *prima facie* loss or damage "by reason of, or arising out of" the breach of an obligation under Section A of NAFTA Chapter 11, which it alleges is a condition precedent to the Tribunal's jurisdiction pursuant to NAFTA Articles 1116(1) and 1117(1).<sup>78</sup>
67. Based on the manner in which the Respondent has presented its Damages Objection, it appears to be predicated on its earlier Preclusion Objection. In particular, its starting point is to reiterate the Preclusion Objection arguments as to estoppel and *res judicata* in respect of damages. It submits that the Claimant's damages claim requires the Tribunal to overturn the *Windstream I* Award in order to have any basis. As it is precluded from doing so and absent any "subsequent, separable, self-standing cause of action that has caused any possible loss beyond what it claimed previously," the Respondent argues that the Claimant has not made out a *prima facie* claim of damage.<sup>79</sup>

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<sup>78</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 92-133.

<sup>79</sup> Request for Bifurcation and Memorial on Jurisdiction, paras. 109-114.

68. The Damages Objection, articulated on the basis that damages is a missing condition precedent to jurisdiction under Articles 1116(1) and 1117(1), more closely resembles a challenge to subject-matter jurisdiction than the earlier Objections (as discussed at paragraph 53 above). However, it does so on the basis of the preclusionary effect of the *Windstream I* Award, which the Tribunal has determined above is not, on balance, appropriate for bifurcation. Moreover, the Respondent does not appear to argue that there is no extant investment following the *Windstream I* Award. Rather, it argues that such investment would have no additional value beyond what has already been compensated, meaning no damage as required pursuant to Articles 1116(1) and 1117(1) was established.
69. Accordingly, although the Tribunal recognises that the Damages Objection may well give rise to another *prima facie* serious and substantial issue, and that issue may indeed be determinative, given its reliance on the Tribunal's interpretation of the *Windstream I* Award against the substantive merits of the allegedly new claims, the Tribunal considers those merits to be intertwined with this issue.
70. On balance, therefore, the Tribunal also considers for the same reasons of fairness, due process, efficiency and economy, that the Damages Objection also proceed to be determined with the main proceedings.

## VI. DECISION ON BIFURCATION

71. On the basis of the foregoing, the Tribunal makes the following decisions:

- (a) the Respondent's Request for Bifurcation is denied;
- (b) the Tribunal reserves its decision on costs relating to the Request for Bifurcation;
- (c) the arbitration shall proceed on the basis of the procedural timetable in Procedural Order No. 1, Annex A.2, which provides for the time periods that will apply if the Respondent's Request for Bifurcation is denied; and
- (d) the disputing parties are directed to confer with a view to agreeing on a joint proposed timetable by inserting actual dates into Annex A.2 to Procedural Order No. 1, and to submit such a modified annex to the Tribunal, jointly if possible, and separately if not, on or before **Friday, 30 September 2022**.

**Dated: 13 September 2022**

**Place of Arbitration: Toronto**



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Ms Wendy Miles KC  
(Presiding Arbitrator)

On behalf of the Tribunal