### (ii) The Rankings for the TTD and Arran Wind Projects Were Appropriate

436. The ranking of FIT applicants was intended to fulfill the Government of Ontario's objective to procure the most shovel-ready projects.[866] Applications submitted during the initial 60-day launch period benefited from a special ranking regime based on the applicants' evidence of their projects' shovel-readiness.[867] As described above, an applicant could bid for up to four criteria in order to obtain an "earlier time stamp" and increase its ranking.[868] The Claimant bid for three of those criteria: Major Equipment Control, Prior Experience, and Financial Capacity.[869] It did not receive a single point for any of those criteria for a simple reason: in each instance, the Claimant failed to submit sufficient information as required under the FIT Rules.[870]

437. In certain instances, the applications for the TTD and Arran wind projects failed because of basic mistakes on part of the Claimant.[871] For example, instead of audited financial statements for the most recent year as clearly required in the FIT Rules,[872] the TTD and Arran FIT applications contained unaudited financial statements from the wrong fiscal year.[873] Similarly, the Claimant failed to provide the basic elements required to demonstrate prior experience.[874]

438. In other instances, the information submitted was simply inadequate as a matter of proof. In particular, in order to prove that the major equipment it controlled could meet the Ontario FIT Program's domestic content requirements, as required under the FIT

[866] RWS-Duffy, ¶ 9; *Supra*, ¶¶ 69-70; RWS-Lo, ¶¶ 54, 57.

[867] **R-003**, FIT Program Rules, v. 1.2, s. 13.

[868] *Supra*, ¶¶ 72-76 dealing with COD; RWS-Duffy, ¶¶ 10-11.

[869] RWS-Duffy, ¶ 40.

[870] RWS-Duffy, ¶¶ 40, 49; *Supra*, ¶ 155.

[871] RWS-Duffy, ¶¶ 49-50.

[872] RWS-Duffy, ¶ 49; *Supra*, ¶ 160.

[873] *Supra*, ¶ 160; RWS-Duffy, ¶ 49; **R-079**, OPA, Evaluation Criteria Checklist, "Criteria #4" Tab, criteria 2.1(d).

[874] *Supra*, ¶ 159; RWS-Duffy, ¶¶ 46-48.

Rules, the Claimant merely submitted a letter from GE.[875] However, that letter stated only that the turbines the Claimant had already purchased [redacted][876] The letter does not attach the contract to evidence its terms, does not mention the FIT Program or its domestic content requirements, and indeed does not even mention Ontario at all. There was no way that such a letter could be accepted as sufficient, especially in light of the fact that GE had submitted much more specific letters in support of other projects that expressly confirmed their ability to meet the FIT Program's requirement.[877]

439. As Richard Duffy explains, many of the failures of Mesa's projects were due to carelessness, and while it is "possible that Mesa's projects were better than they proved with the applications submitted, the OPA could only assess the applications received".[878]

### (b) The OPA's Implementation of the Bruce to Milton Allocations Process Did Not Violate Article 1105

440. The Claimant alleges that the OPA's management of the connection point change window during the Bruce to Milton allocation process unfairly benefited NextEra to the detriment of Mesa.[879] Ultimately the only allegations of the Claimant with respect to the OPA's involvement in this process are that OPA staff met with NextEra in advance of the issuance of the June 3, 2011 Direction, and that they continued to meet with the OPA after the direction had been issued.[880]

[875] *Supra*, ¶¶ 156-158; RWS-Duffy, ¶¶ 41-45.

[876] *Supra*, ¶¶ 156-157; RWS-Duffy, ¶¶ 42-43. See also, Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009) contained in **C-0364**, Twenty-Two Degrees Wind Project, FIT Application (Nov. 25. 2009), p. 103; Letter from GE Energy to Mesa Power Group, LLC, (Nov. 24, 2009) contained in **C-0365**, Arran Wind Project, FIT Application (Nov. 25, 2009), p. 104.

[877] **R-071**, Letter from Roslyn McMann, General Electric to Pim de Ridder, Premier Renewable Energy Ltd. (Skyway); RWS-Duffy, ¶ 44.

[878] RWS-Duffy, ¶ 50.

[879] See, for example, Claimant's Memorial, ¶¶ 696, 703, 732-733, 748, 776.

[880] Claimant's Memorial, ¶¶ 908-915.

441. The customary international law minimum standard of treatment does not prohibit the staff of a state enterprise from meeting with proponents. The Claimant has no evidence that NextEra was provided any non-public information by the OPA, and for the reasons described above with respect to the Ministry of Energy, there is no reason for the Tribunal to infer that they did.[881] Moreover, the OPA employees involved in these meetings have all confirmed that they did not provide any non-public information to NextEra during these meetings.[882]

442. For example, Bob Chow has explained:

> I am aware that I and others are alleged to have had some sort of "special relationship" with NextEra simply because we met with them on numerous occasions. This is false. I do not have a special relationship with NextEra or any other FIT applicants or proponents. […] The OPA never provided preferential treatment or inside information to any individual FIT proponent.[883]

443. Jim MacDougall has similarly explained:

> I am aware that the Claimant alleges otherwise, and in particular, it seems to be alleging that I gave confidential non-public information to Nextera Energy LLC ("NextEra") that benefited them by giving them advance notice of upcoming changes. This is absolutely false. I never provided any company non-public information regarding the FIT Program or any other procurement program of the OPA.[884]

444. The Claimant's attempts to take statements out of context and to misrepresent the very purpose of certain communications should be rejected by the Tribunal. The facts simply do not provide any basis to conclude that NextEra had any special treatment nor that it enjoyed any sort of special relationship with the OPA.

[881] *Supra*, ¶¶ 420-421.

[882] RWS-Chow, ¶¶ 49-59; RWS-MacDougall, ¶¶ 30-49.

[883] RWS-Chow, ¶ 59. See also ¶¶ 49-58.

[884] RWS-MacDougall, ¶ 36. See also, ¶¶ 37-49.

### (c) The OPA's Decision Not to Explain the Rankings of the TTD and Arran Wind Projects to the Claimant Did Not Violate Article 1105

445. The Claimant submits that the OPA's refusal to disclose the scores for its TTD and Arran wind projects, as well as the reasons for such scores, amounts to "arbitrary abuse of authority, and a violation of Mesa's right to a fair, good faith and transparent process as protected by Article 1105".[885] The Claimant further alleges that the Ministry of Energy and OPA's failure to meet with the Claimant in order to explain its ranking also violates Article 1105.[886] These claims have no merit.

446. Indeed, the OPA has good reason to refuse to disclose the results of a procurement evaluation process, and often refuses to do so.[887] Providing results and feedback to one applicant but not others would not provide equal treatment to all applicants.[888] Thus, if the OPA is going to give feedback to any applicant, it has a policy of doing so for all applicants.[889] However, it is highly burdensome and time consuming for the OPA to provide individual feedback. For a program like the FIT Program, which received close to 500 applications, it was practically impossible to conduct such a process.[890]

447. It was for this reason that when, on June 17, 2011, Mr. Cronkwright replied to the Claimant's letter of May 20, 2011 he explained that "once the evaluation process has

[885] Claimant's Memorial, ¶¶ 772-782.

[886] Claimant's Memorial, ¶¶ 783-792.

[887] RWS-Cronkwright, ¶ 26. In a limited number of programs, the OPA has offered individual debriefs to participants. This was done when the number of applicants was sufficiently low so that it could be managed.

[888] RWS-Cronkwright, ¶ 26.

[889] RWS-Cronkwright, ¶ 26.

[890] RWS-Cronkwright, ¶¶ 26-27.

been completed, the results are kept strictly confidential".[891] Mr. Cronkwright again refused to meet with the Claimant on June 22, 2011 for this very same reason.[892]

448. While the Claimant may have been disappointed that the OPA would not meet with it so that it could lobby for a better result than it deserved, the OPA's refusal to do so is not a violation of the customary international law minimum standard of treatment. Indeed, the policy adopted by the OPA in this regard, which applied equally to all applicants, was the only way to ensure that all applicants were treated fairly and equally.

### F. Conclusion

449. The Claimant's allegations that the measures of Ontario and the OPA in the design and implementation of the FIT Program and the GEIA violate the customary international law minimum standard of treatment are baseless. Far from being manifestly arbitrary, unjust or otherwise egregious, the decisions made and approaches taken by both were reasonable and appropriate responses to the situations that presented themselves. Article 1105 does not prevent a government from adapting regulatory programs as required, nor does it provide an investor with an insurance policy when it fails to obtain the results it desires due largely to its own errors.

## THE CLAIMANT IS NOT ENTITLTED TO THE DAMAGES THAT IT SEEKS FOR THE ALLEGED VIOLATIONS OF NAFTA

### I. Summary of Canada's Position

450. When the Claimant was formed in 2008,[893] one of its first moves was to make a USD $2 billion bet. It signed an agreement to purchase 667 wind turbines from GE[894] for

[891] **C-0195**, Letter from Shawn Cronkwright, Ontario Power Authority to Mark Ward, Mesa, Charles Edey, Leader Resources, and Michael Bernstein, Capstone Infrastructure, (Jun. 17, 2011).

[892] CWS-Robertson, ¶ 48; RWS-Cronkwright, ¶ 29; **R-120**, Email from Shawn Cronkwright, Ontario Power Authority to Chris Benedetti, Sussex Strategy (Jun. 22, 2011).

[893] Mesa Renewables LLC amended its name to Mesa Power Group LLC on July 11, 2008, **C-0117**, Certificate of Amendment of Mesa Renewables LLC (July 11, 2008). Mesa Renewables LLC was formed on May 20, 2008; **C-0039**, Limited Liability Company Agreement of Mesa Renewables LLC (May 20, 2008).

its Texas-based Pampa wind project. It gambled that it could make that project into the largest wind farm in the world despite having no regulatory approvals, no contracts for sale, and no experience at all as a wind producer. Before the FIT Program was even launched, that gamble had failed to pay off, and the Claimant was left with what amounted to a warehouse full of turbines and a huge bill.

451. In an apparent effort to partially mitigate the consequences of its failure, the Claimant shifted its focus to Ontario and the opportunities under the FIT Program.[895] Contrary to what the Claimant now seems to allege, the FIT Program did not guarantee that each and every applicant would be awarded a FIT Contract for whatever capacity it desired. Indeed, the FIT Program was not a blank cheque written to assist investors in recovering their losses for previous business failures. Neither is NAFTA.

452. And yet, that is how the Claimant is seeking to use it. The Claimant is asking this Tribunal to have the Government of Canada insure its losses of allegedly $653.002 million. As is shown below, even if the Tribunal finds that any of the measures in question here breached Canada's obligations under NAFTA, the Claimant is not entitled to recover the damages that it seeks. First, the Claimant has failed to establish that certain of the damages that it seeks were caused by any of the measures that it alleges breach Canada's obligations under NAFTA.[896] Second, the Claimant has failed to show, as required under Article 1116, that it suffered all of the damages that it seeks. Third, in seeking compensation for its alleged future losses, the Claimant is asking this Tribunal to engage in multiple layers of speculation in order to conclude that its unapproved, undeveloped and non-operating ventures would have come into successful operation. If

[894] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted]

[895] **C-0360**, North Bruce Wind Energy I, FIT Application (May 29, 2010); **C-0361**, North Bruce Wind Energy II, FIT Application (May 29, 2010); **C-0362**, Summerhill Wind Energy I, FIT Application (May 29, 2010); **C-0363**, Summerhill Wind Energy II, FIT Application (May 29, 2010); **C-0364**, Twenty-Two Degrees Wind Project, FIT Application (Nov. 25. 2009), p. 103 (bates 108000); **C-0365**, Arran Wind Project, FIT Application (Nov. 25, 2009), p. 104 (bates 109680).

[896] BRG Report, ¶¶ 178-191.

the Claimant is entitled to any damages, those damages should be equal to no more than its proportionate share of the sunk costs related to the TTD and Arran wind projects.[897]

## II. The Alleged Breaches of NAFTA Did Not Cause Certain of the Damages Claimed by the Claimant

### A. The Claimant Bears the Burden of Showing that the Alleged Breaches of NAFTA Caused it Harm

453. Article 1116(1) requires that the Claimant demonstrate that it "has incurred loss or damage, by reason of, or arising out of" a breach of NAFTA.[898] As explained by several NAFTA tribunals, this language requires a "sufficient causal link"[899] or an "adequate[] connect[ion]"[900] between the alleged breach of NAFTA and the loss sustained by the investor.

454. The Tribunal in *Biwater Gauff v. Tanzania* explained that causation in international investment law "comprises a number of different elements, including (inter alia) (a) a sufficient link between the wrongful act and the damage in question, and (b) a threshold beyond which damage, albeit linked to the wrongful act, is considered too indirect or remote".[901] The Commentary to Article 31 of the ILC's Articles describes the requirement of causation as follows:

> [R]eference may be made to losses 'attributable [to the wrongful act] as a proximate cause', or to damage which is 'too indirect, remote, and

[897] BRG Report, ¶ 235.

[898] NAFTA, Article 1116.

[899] **RL-069**, *S.D. Myers Inc. v. Canada* (UNCITRAL) Second Partial Award, 21 October 2002 ("*S.D. Myers - Second Partial Award*"), ¶ 140; *See also* **CL-092**, *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, (ICSID Case No. ARB/05/22) Award, 24 July 2008 ("*Biwater - Award*"), ¶ 779: ("Compensation for any violation of the BIT, whether in the context of unlawful expropriation or the breach of any other treaty standard, will only be due if there is a sufficient causal link between the actual breach of the BIT and the loss sustained by [the Enterprise].").

[900] **CL-040**, *Marvin Feldman v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Final Award, 16 December 2002, ¶ 194.

[901] **CL-092**, *Biwater - Award*, ¶ 785; **RL-048**, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008, ¶ 468 ("*Duke Energy – Award*").

> uncertain to be appraised', or to 'any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of' the wrongful act. Thus causality in fact is a necessary but not a sufficient condition of reparation. […] The notion of a sufficient causal link which is not too remote is embodied in the general requirement in Article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.[902]

455. As such, in order for the Claimant to be entitled to damages, it must prove specifically how each of its alleged losses was caused by one or more of the alleged breaches of NAFTA. The Claimant has not met this burden. The Claimant has alleged that it suffered $653.002 million as a result of Canada's breaches of Articles 1102, 1103, 1105, and 1106.[903] However, the Claimant fails to link any of its alleged harm to any specific alleged breach of the NAFTA.[904] In particular, by assessing damages attributed to breaches of Articles 1102, 1103 and 1105 together,[905] the Claimant has entirely failed to make a *prima facie* case of causation.

456. In its Memorial, the Claimant states that "damages for [breaches of Article 1102, 1103 or 1105] includes damages [for breach of Article1106]". It goes on to add that these two categories "are not additive, and that damages [for breach of Article 1106] would only be applicable if the Tribunal did not find a breach of Articles 1102, 1103 or 1105". However, Deloitte calculates the losses arising out of the alleged breach of Article 1106 solely based on the effects that it assumes having to meet the domestic content requirements would have had on the future revenue and expenses of the Claimant's wind projects. In short, despite the Claimant's claim in its Memorial, its own experts recognize that any losses arising out of the alleged violation of Article 1106 arise only if the Tribunal determines that the Claimant should have been awarded a FIT

[902] **CL-006**, *ILC Articles*, Article 31, Commentary(10), pp. 204–205 (citations omitted).

[903] Deloitte Report, ¶ 1.29.

[904] BRG Report, ¶¶ 102-130.

[905] Deloitte Report, ¶ 4.1, Schedule A. Canada notes that while damages alleged as a result of breaches of Article 1106 are separately assessed, they are claimed contingently on the alleged breach of Article 1102, 1103 or 1105.

Contract. Thus, as calculated by the Claimant's own expert, a finding of damages for Article 1106 is only possible if the Tribunal first finds a breach of Article 1102, 1103 or 1105. If the Tribunal finds that none of the challenged conduct violates those Articles, then Deloitte's own analysis appears to admit that the Claimant has not suffered damages for a beach of Article 1106.

457. It is not enough for the Claimant to simply identify alleged breaches, and then to identify alleged losses. NAFTA, and international law, requires more than this.

### B. The Claimant has Failed to Prove that the Alleged Breaches Caused Any Damages with respect to its North Bruce and Summerhill Wind Projects

458. In its damages claim, the Claimant has included a request for $257.427 million in respect of the alleged sunk costs and future losses of the Summerhill and North Bruce wind projects.[906] However, as is shown below, when the proper approach to the consideration of damages is applied, it is clear that the Claimant has not proven that the losses it claims with respect to the North Bruce and Summerhill wind projects were caused by any of the alleged breaches. As BRG concludes, "[u]nder no scenario for individual or combined violations of NAFTA would there have been <u>any impact or harm</u> caused to Mesa Power's Summerhill and North Bruce Projects [because] without the alleged violations [they] would not have received FIT Contracts."[907]

#### 1. The Claimant Has Not Proven that the 500 MW Set Aside for the Korean Consortium and the Decision to Allow Proponents to Change their Connection Points Caused Harm to the North Bruce and Summerhill Wind Projects

459. Because of the Claimant's failure to even attempt to link any of its alleged losses to any particular breach of the NAFTA, it is difficult to understand which of the alleged breaches allegedly led to harm to the North Bruce and Summerhill wind projects.[908] At least implicitly, the Claimant seems to admit that these alleged losses were not caused by

[906] BRG Report, Figure 2.

[907] BRG Report, ¶ 127.

[908] BRG Report, ¶ 109a.

the 500 MW set aside for the Korean Consortium, nor by the connection change window in the Bruce to Milton allocation process that allowed projects in the West of London region to change their connection points to the Bruce region. It could not reasonably have argued otherwise.

460. Summerhill consisted of two FIT applications for projects of 70 MW and 30 MW[909] and North Bruce consisted of two FIT applications for projects of 100 MW each.[910] The projects were provincially ranked – based solely on the time that the applications were received by the OPA – between 318 and 321.[911] In effect, these projects were ranked so low that even if there was an additional 500 MW of capacity made available only to FIT applicants who originally located their connection points in the Bruce region, they would not have received a contract.[912] Indeed, even in such a situation, for the Claimant's North Bruce and Summerhill wind projects to have received FIT Contracts, the Bruce to Milton Line would have had to have made available approximately 2,000 MW of capacity to renewable energy projects in the Bruce region alone – 750 MW more than it technically could.[913] This extra capacity simply did not exist. Hence, neither the set-aside for the Korean Consortium nor the Bruce to Milton allocation process caused any harm to the Claimant's North Bruce and Summerhill wind projects.[914]

### 2. The Claimant May Not Prove Causation by Relying on a Hypothetical World Which Could Not Exist in Reality

461. In an apparent recognition of the futility of the above arguments, the Claimant resorts to alleging that it should be able to recover losses for its Summerhill and North

[909] **C-0362**, Summerhill Wind Energy I, FIT Application (May 29, 2010), p. 2; **C-0363**, Summerhill Wind Energy II, FIT Application (May 29, 2010), p. 2.

[910] **C-0360**, North Bruce Wind Energy I, FIT Application (May 29, 2010), p. 2; **C-0361**, North Bruce Wind Energy II, FIT Application (May 29, 2010), p.2.

[911] **C-0233**, FIT CAR Priority Ranking, p. 1.

[912] BRG Report, Attachment IV, ¶ 39a.

[913] BRG Report, ¶¶ 38-39.

[914] BRG Report, ¶ 109a.

Bruce wind projects because, but for the alleged violations of NAFTA, it should have received the benefits granted to the Korean Consortium under the GEIA.[915] Therefore, it seems to be asserting that it should have been granted priority access to the Ontario transmission grid in the same way that the projects of the Korean Consortium were granted access to the grid pursuant to the GEIA.

462. In making this argument, the Claimant ignores the fact that the GEIA was an investment agreement entered into by the Korean Consortium and the Government of Ontario.[916] Under its terms, the Korean Consortium committed to establish and operate manufacturing facilities in Ontario for the manufacture of wind and solar generation equipment, employing thousands of people and supplying significant quantities of wind and solar electricity.[917] The investments that it had originally committed to making were valued at $7 billion.[918] In return, it was provided with amongst other things, priority access to 2,500 MW of Ontario's transmission grid.[919]

463. By seeking to recover damages related to the North Bruce and Summerhill wind projects, the Claimant is asking the Tribunal to find that the appropriate remedy for an alleged violation of Article 1103 is that the Claimant should be permitted to have access to the benefits of the GEIA without being saddled with any of the investment and manufacturing commitments in that agreement.[920] In particular, whereas the Korean Consortium had to earn its transmission priority for each phase of the GEIA,[921] the

[915] Deloitte Report, ¶ 4.18a. The Deloitte experts use as their first "key assumption" the following "The Projects obtained a FIT Contract as we have assumed Mesa Power would have been provided with the same treatment as the Korean Consortium" ( BRG Report, ¶¶ 234, 236(e)).

[916] **C-0322**, GEIA; **R-076**, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[917] RWS-Lo, ¶¶ 24, 28; **C-0322**, GEIA, Art. 3.

[918] **R-076**, Ministry of Energy Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment" (Jan. 21, 2010).

[919] RWS-Lo, ¶ 25.

[920] BRG Report, ¶¶ 33 and 183.

[921] RWS-Lo, ¶¶ 24-25; **C-0322**, GEIA, ss. 8.1, 8.3.

Claimant suggests that it should have been entitled to the same transmission priority without having to earn it.

464. If the Claimant is correct, then it is suggesting that the remedy for the alleged violation of Article 1103 requires that it be offered more favourable treatment than any other FIT applicants and even more favourable than the Korean Consortium, itself.[922] That is not what international law requires. For instance, as explained by the Tribunal in *Duke Energy*, which followed the seminal *Factory at Chorzów* case,[923] "any award should as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".[924]

465. If the GEIA is in breach of Article 1103, and it is not, then the remedy for that breach would not be to give the benefits of that agreement without the corresponding obligations to only the Claimant. Indeed, extending to the Claimant the allegedly wrongful treatment is not an appropriate approach to a damages analysis. Rather, the remedy would be to consider the situation which would "in all probability [would] have existed"[925] if the GEIA had not existed – one in which no enterprise had priority access to Ontario's transmission grid (i.e. an analysis that corrects the alleged harm).

466. The only consequence of such a hypothetical as it relates to projects in the Bruce region is that the Korean Consortium would not have been entitled to a 500 MW set-aside of transmission capacity. As explained above, even if the Korean Consortium had not been granted a 500 MW set-aside in the Bruce region, the Summerhill and North Bruce wind projects still would not have received contracts.[926]

[922] BRG Report, ¶¶ 33 and 183.

[923] **CL-169**, Case *Concerning the Factory at Chorzòw* (*Germany* v. *Polish republic*) P.C.I.J., 13 September 1928, (Ser.A) No. 17, p. 47.

[924] **RL-048**, *Duke Energy - Award*, ¶ 468 (emphasis added).

[925] *Ibid*.

[926] See BRG Report, Attachment IV.

467. In sum, the Claimant should not be permitted to trump up its claim for damages by resorting to a hypothetical "but for" world that is improbable, self-serving and would result in it being offered more favourable treatment than any of its competitors.[927] The Claimant has not proven that any wrong-doing by Canada is the proximate cause of any loss to the Summerhill and North Bruce wind projects and thus, its claim of $257.427 million in alleged past and future losses related to these projects must be rejected.

### C. The Claimant Has Not Proven that the Failure to Run an ECT Caused it Harm

468. The Claimant also alleges that the failure to run an ECT caused it harm. However, again, the Claimant's failure to demonstrate a link between the alleged harm suffered with any alleged breach makes it difficult to understand the source of its claim.[928] In its arguments on Article 1105, the Claimant alleged that:

> [I]f Mesa's projects had participated in an ECT, it would have had the opportunity to receive a contract on completion of the test. By delaying the ECT, the OPA thereby denied contracts to projects that would have been successful in the ECT.[929]

469. To the extent that the Claimant is suggesting that the failure to run the ECT was the "but for" cause of the Claimant's projects not receiving a contract, it has entirely failed to meet its burden. To suggest that its projects would have received a FIT Contract had the ECT been run is complete and utter speculation. Indeed, contrary to the Claimant's assertion, running an ECT would not have guaranteed that any particular project would receive a contract. As Bob Chow has explained:

> The running of an ECT would not guarantee a FIT contract to an applicant. In the course of the ECT, the OPA would examine what could be done in a transmission region to make a connection economical. Only once an economic expansion of the transmission system had been identified, received the required regulatory approvals, and advanced

[927] BRG Report, ¶¶ 33 and 183.

[928] BRG Report, ¶¶ 102-104.

[929] Claimant's Memorial, ¶ 758.

> sufficiently such that the OPA was reasonably certain that the upgrades will be completed by a project's milestone date for commercial operation, would an applicant be awarded a contract pursuant to an ECT and placed in the FIT Production Line. Otherwise, the application would be placed in the FIT Reserve Line and await the next ECT process.[930]

470. The Claimant has failed to establish that any additional transmission capacity in the Bruce region would have been economical to develop, particularly in light of the circumstances that led to the cancellation of the ECT – i.e. sufficient supply, decreasing demand, and existing ratepayer burden.[931] Furthermore, there is no guarantee that a transmission expansion would have received the required regulatory approvals, or that any expansion project would have been completed in time for the milestone commercial operation date of either the North Bruce and Summerhill wind projects.[932]

471. In short, the Claimant has offered no evidence that the ECT would actually have resulted in any of its projects receiving a contract, and hence it has failed to prove that the decision not to run the ECT at all was a "but for" cause of any of its alleged damages.

### D. The Claimant Has Failed to Show that Any Losses Associated with the Cancellation of the Turbine Contract with GE Were Caused by the Alleged Breaches

472. The Claimant alleges that it should be awarded the $156.833 million in damages as compensation for the deposit that it forfeited under its MTSA with GE.[933] The Claimant argues that such compensation is appropriate because it had to forfeit its deposit in this contract as a result of wrongfully not being awarded FIT Contracts.[934] This is false. As is shown below, the Claimant entered into this contract long before the FIT Program even existed in Ontario, and it terminated it long after its FIT Applications were

[930] RWS-Chow, ¶ 36.

[931] RWS-Chow, ¶ 37; RWS-Lo, ¶ 40.

[932] BRG Report, ¶¶ 81, 149-151 and Attachment XI.

[933] BRG Report, ¶ 189; Deloitte Report, Sch. IA, fn. 6.

[934] Deloitte Report, ¶¶ 1.6, 4.1(a)(iv).

unsuccessful and it filed this claim. In short, none of the alleged breaches of NAFTA caused the Claimant to forfeit its deposit on this contract.

473. The Claimant entered into the MTSA with GE in [redacted] in order to obtain turbines for its Pampa wind project in Texas.[935] At the time the Claimant entered into the MTSA, the FIT Program had not even been announced in Ontario. Pursuant to the MTSA, the Claimant had to take delivery of the purchased turbines by a certain date,[936] and in order to guarantee its order the Claimant paid a non-refundable deposit to GE of USD $153,592,670.[937]

474. By the summer of 2009, before the FIT Program was even launched, the Pampa wind project had failed.[938] At that moment, the Claimant was at risk of forfeiting its entire deposit. Indeed, if the FIT Program had not come into existence, the Claimant would have been in the same position as it was when it was not awarded FIT Contracts in July 2011. In sum, the fact that this deposit was at risk had nothing to do with the FIT Program, which did not even require applicants to already own major equipment. To the contrary, the "but for" cause of the deposit being at risk was the Claimant's decision to gamble that it would be able to develop the Pampa wind project – that was a gamble that did not pay off.

475. Not only was the payment of the deposit, and its becoming at risk unrelated to the FIT Program, the proximate cause of the forfeiture of the deposit was also unrelated to Ontario's measures. In [redacted] the Claimant sought to repurpose its GE

[935] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted] BRG Report, 38 and 85a.

[936] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted] Article b. Scope of Supply; Projects; Purchase Orders, (b) Projects.

[937] **R-042,** Master Turbine Sale Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power LP [redacted] Attachment 3 Price, Payment and Termination Charges.

[938] **R-099,** Project No Project, "Pampa, Texas Wind Farm, T. Boone Pickens, Mesa Power, LP" Available at: http://www.projectnoproject.com/2010/12/pampa-texas-wind-farm-t-boone-pickens-mesa-power-lp-2/.

turbines for use at wind projects in Ontario and Minnesota.[939] When it did not obtain a FIT Contract on July 4, 2011,[940] it very quickly tried to repurpose these turbines again. After terminating the agreement for [redacted] of these 1.6xle turbines on [redacted] the Claimant entered into a second amended and restated version of the MTSA on [redacted][941] The Claimant was now seeking to use the turbines that it had committed to in [redacted] for another smaller project in Texas, as well as the project in Minnesota.[942] The deposit paid in [redacted] was retained by GE for this new version of the contract.[943]

476. Like all of the Claimant's projects, these new projects also never went into development.[944] And it was only at that point, in [redacted] that the Claimant fully terminated the MTSA.[945]

[939] **R-086**, WindPower Monthly, "T. Boone Pickens new Minnesota wind project hits resistance" (Apr. 16, 2010). Available at: http://www.windpowermonthly.com/article/997272/t-boone-pickens-new-minnesota-wind-project-hits-resistance.

[940] **C-0292**, Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process" (Jul. 4, 2011).

[941] **R-126**, Second Amended and Restated Master Turbine Sales Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power Pampa LLC [redacted] **R-141**, Business Week, Bloomberg News, "Pickens Reviving Plans for Texas Wind Power at Smaller Scale" (Apr. 4, 2012). Available at: http://www.businessweek.com/news/2012-04-04/pickens-reviving-plans-for-texas-wind-projects-at-smaller-scale; **R-085**, "Billionaire T. Boone Pickens is building a 377-megawatt wind farm in Texas" (Apr. 12, 2010); **R-125**, PR Newswire, "Mesa Power Group to Partner with Wind Tex Energy on Stephens Bor-Lynn Wind Project South of Lubbock" (Apr. 4, 2012).

[942] **R-141**, Business Week, Bloomberg News, "Pickens Reviving Plans for Texas Wind Power at Smaller Scale" (Apr. 4, 2012); **R-085**, "Billionaire T. Boone Pickens is building a 377-megawatt wind farm in Texas" (Apr. 12, 2010); **R-125**, PR Newswire, "Mesa Power Group to Partner with Wind Tex Energy on Stephens Bor-Lynn Wind Project South of Lubbock" (Apr. 4, 2012); **R-063**, Amarillo Globe News "Pampa wind farm delayed, not canceled, Pickens says" (Jul. 15, 2009). Available at: http://amarillo.com/stories/071509/new_news5.shtml. This article refers to a conversation held by Mr. Pickens with a Bloomberg Financial Reporter, whereby he confirmed that the 667 turbines bought from GE for the Pampa projects would be used for smaller projects or he would just "put them in the garage".

[943] **R-126**, Second Amended and Restated Master Turbine Sales Agreement for the Sale of Power Generation Equipment and Related Services, between General Electric Company and Mesa Power Pampa LLC [redacted] Attachment 3 Price, Payment and Termination Charges, Section 3B, Payments, Payment Schedule; **R-129**, Master Turbine Sale Agreement External Change Order (ECO) Proposal No.4 (Letter from Gary Elieff, GE to Mark Ward, Mesa [redacted]

[944] BRG Report, ¶ 85b, and Attachment VI.

477. In sum, the MTSA was entered into for the purpose of supplying a U.S. project, and it was terminated and the deposit forfeited after the failure to develop other U.S. projects.[946] Ontario was not the primary or proximate cause of any of these events. Of course, the Claimant cannot bring a NAFTA claim against the U.S. Government and hence it has brought this claim against Canada, hoping that the Tribunal will insure its risky business decisions. Canada should not have to pay $156.833 million for the Claimant's failed projects in the U.S. The loss of the GE deposit was not caused by any alleged breach of NAFTA by Canada, and therefore the Claimant cannot recover damages for its alleged loss related to this agreement.[947]

## III. If the Claimant Is Entitled to Damages, Those Damages Must Be Reduced on Account of Its Partial Ownership of the Projects

478. Further, if the Claimant is entitled to damages at all, its recovery must be reduced to reflect its partial ownership of the enterprises at the relevant time. The Claimant has brought this arbitration pursuant to Article 1116. Under that Article, a Claimant may only bring a claim for loss or damage that it as "the investor has incurred".[948] As such, in a claim under Article 1116, such as this one, the Claimant may not bring a claim for all of the damages suffered by an enterprise unless it can prove that all of the damages suffered by that enterprise were suffered directly by it as the investor. This is consistent with the general principle of international law that a tribunal's jurisdiction is limited to

[945] **C-0382**, Letter from Cole Robertson, Mesa to Stephen Swift, GE [redacted] Deloitte Report, ¶ 2.23.

[946] **R-056**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 1 (Letter from Carson H. Granger, GE to Mark Ward, Mesa [redacted] **R-061**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 2 (Letter from GE to Mesa) ([redacted] **C-0380**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 3 (Letter from Carson Harkrader, GE to Mark Ward) [redacted] **R-129**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 4 (Letter from Gary Elieff, GE to Mark Ward, Mesa) [redacted] **R-130**, Master Turbine Sale Agreement - External Change Order (ECO) Proposal No. 5 (Letter from Gary Elieff, GE to Mark Ward, Mesa) [redacted]

[947] BRG Report, ¶¶ 128-130 and 189-190.

[948] NAFTA, Article 1116.

considering a claim for damages in proportion to the claimant's ownership interest in the investment.[949]

479. The Claimant here has failed to prove that at the time of the alleged breaches it wholly owned any of the wind projects for which it seeks damages. The Claimant alleges that the TTD, Arran, North Bruce and Summerhill wind projects "are ultimately wholly-owned by an American enterprise, Mesa Power Group, LLC".[950] According to the Claimant's Memorial, this ownership is through AWA.[951] The relationship between AWA and Mesa is further discussed in the witness statement of Mr. Robertson, where he testifies that AWA was "originally a joint venture between Mesa and GE Development and Strategic Initiative".[952]

480. As to the extent of GE's share of the joint venture, and when, if ever, it relinquished that share, the Claimant has failed to provide much evidence. The FIT applications for both the TTD and Arran wind pojects, submitted on November 25, 2009, indicate that GE maintained a [redacted][953] Further, both applications indicate that "American Wind Alliance, a joint venture of Mesa Power Group LLC and GE Energy, is the equity provider" for the wind project.[954]

481. GE's partial ownership of these projects was further confirmed in a March 2010 draft project report submitted to Ontario's Ministry of Energy[955] and a draft presentation

[949] **CL-081**, *Saluka - Partial Award*, ¶ 244.

[950] Claimant's Memorial, ¶ 37.

[951] Claimant's Memorial, ¶ 35.

[952] CWS-Robertson, ¶ 5.

[953] **C-0364**, TTD FIT Application, p. 31 (bates 107928); **C-0365** Arran FIT Application, p. 31 (bates 109607).

[954] **C-0364**, TTD FIT Application, p. 30 (bates 107927); **C-0365**, Arran FIT Application, p. 30 (bates 109606).

[955] **R-080**, Golder Associates Report, p. 2: ("American Wind Alliance (AWA) a joint venture of Mesa Power Group LLC and General Electric (GE) Energy is the financier of TTD").

prepared by GE dated [redacted] In [redacted] GE attempted to arrange project financing for the TTD wind project with the U.S. Ex-Im Bank[957] and in July 2010, Mark Ward of AWA wrote to the OPA [redacted][958] Finally, as indicated above, based on an email from Mr. Ward to Mr. Robertson, this relationship ended no later than June 8, 2011.[959]

482. As a result, in order to comply with the terms of Article 1116, and to avoid unjustly enriching the Claimant by awarding it GE's "share" of any recovery, any damages awarded to the Claimant in this case must be reduced by 50 percent.

## IV. If the Claimant Is Entitled to Damages, They Should Be Limited to Its Share of the Sunk Costs for the TTD and Arran Wind Projects

483. If the Tribunal finds that Canada has breached NAFTA, then the appropriate award of compensation in these circumstances is the Claimant's proportionate share of the sunk costs related to the TTD and Arran wind projects.

484. Where an investment is still in the pre-operational stage or has no history of profits, awarding any amount for future losses would require an impermissible degree of speculation on the part of an investment arbitration tribunal. In such situations, tribunals have looked to more certain methods of valuing losses such as book-value, or an assessment of the sunk costs.[960]

485. For instance in *Metalclad v. Mexico* despite the fact that the investor had purchased, permitted, financed and constructed a waste disposal facility in Mexico whose

[956] **R-088**, GE Draft Presentation, "Twenty-two degrees wind project – U.S. Exlm Briefing" [redacted] slides 2, 5, and 6.

[957] *Ibid*.

[958] **R-094**, Letter from Mark Ward, American Wind Alliance to Ontario Power Authority (Jul. 22, 2010).

[959] **R-119**, Email from Mark Ward, AWA to Cole Robertson, Mesa (Jun. 8, 2011) (emphasis added).

[960] *See* for example: **CL-098**, *Metalclad - Award*, ¶ 122; **CL-144**, *Siemens A.G. v. Argentine Republic* (ICSID No. ARB/02/8) Award, 6 February 2007, ¶¶ 355, 368-370; **CL-136**, *Wena Hotels Limited v. The Arab Republic of Egypt* (ICSID Case No. ARB/98/4) Award on Merits, 8 December 2000, ¶¶ 123-125.

operation was thwarted by a local governor's Ecological Decree, the Tribunal ruled that since the landfill was never operational, the "fair market value is best arrived at […] by reference to Metalclad's actual investment in the project".[961] This finding led the *Metalclad* Tribunal to dismiss a discounted cash flow ("DCF") methodology applied to a claim for speculative lost profits in favour of ascertainable and unspeculative investment value to arrive at fair market value.[962]

486. The *Metalclad* Tribunal's ruling is consistent with the decision of nearly every other international investment tribunal that has considered the question of the fair market value of a non-operating company or one without a proven track record. In *Wena Hotels v. Egypt*, the company at issue had operated one of its hotels for less than 18 months and had not completed the construction of the other.[963] The Tribunal awarded the investment costs of the enterprise.[964] In *Vivendi v. Argentina*,[965] the enterprise was not a going concern, and had never been financially viable or ever turned a profit.[966] The Tribunal in that case awarded investment value as the "closest proxy" for fair market value.[967] Similarly, in *Siemens v. Argentina*, the business was not a going concern, and the Tribunal awarded only the investor's sunk costs.[968] In *PSEG v. Turkey*, the Tribunal recognized that the parties had never finalized the terms of the contract at issue. It further noted lost profits were normally reserved for compensation of investments that are

[961] **CL-098**, *Metalclad – Award*, ¶¶ 121-122 (citing *Phelps Dodge Corp. v. Iran* (10 Iran-U.S. CTR 121) (1986) and *Biloune, et al. v. Ghana Investment Centre, et al.* 95 I.L.R. 183, 207-210, 228-229 (1993)).

[962] *Ibid*, ¶ 121.

[963] **CL-136**, *Wena – Award*, ¶ 124.

[964] *Ibid*, ¶ 123.

[965] **RL-077**, *Compagna de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina* (ICSID Case ARB/97/3) Award, 20 August 2007.

[966] *Ibid*, ¶ 8.3.5.

[967] *Ibid*, ¶ 8.3.13.

[968] **CL-144**, *Siemens – Award*, ¶¶ 362-389.

substantially made and have a record of profits and that tribunals are "reluctant to award lost profits for a beginning industry and unperformed work".[969]

487. There is no reason why the Tribunal should vary from this well-established approach to damages in the circumstances of this case. Even if this Tribunal finds that "but for" the wrongful behaviour of Ontario or the OPA, the Claimant's projects would have received FIT Contracts, the fact is that a FIT Contract was no guarantee that a FIT project would actually come into commercial operation and begin making money.

488. As made clear in the BRG Report, the completion risks associated with these projects was significant.[970] These risks included construction, development, regulatory and financing risks.[971] As BRG notes, the real world evidence shows that these risks have manifested and many projects that were actually awarded FIT Contracts have not come into commercial operation. BRG's analysis of the data shows over 43 percent of all wind projects that were awarded FIT Contracts have suffered significant delays or been terminated entirely.[972] Out of the 70 wind projects that received contracts, nine (approximately 13 percent) have been terminated entirely.[973]

489. The Claimant asks the Tribunal to ignore these risks and assume instead that everything would have simply worked out for their projects.[974] There is no reason for the Tribunal to do so. Indeed, there are plenty of reasons to believe these projects would not work out, especially given the Claimant's track record of failures in other wind projects around North America.

[969] **CL-102**, *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 310-319.

[970] BRG Report, ¶¶ 75-81.

[971] BRG Report, ¶¶ 75-81 and Attachments X and XI .

[972] BRG Report, Attachment XI, ¶ 137.

[973] BRG Report, Attachment XI, ¶ 137.

[974] Claimant's Memorial, ¶¶ 950, 957, and 962.

490. Accordingly, should the Tribunal decide that the Claimant is entitled to some damages, it should be able to collect no more than its proportionate share of the sunk costs of the TTD and Arran wind projects. The Claimant's expert Deloitte estimates that these costs are $6.42 million. However, as noted by BRG, they have provided insufficient substantiation to prove that the expenditures that make up this amount are legitimate sunk costs related to the TTD and Arran wind projects. As such, the Claimant has not yet met its burden of proving that it suffered any damages as a result of any of the alleged breaches of NAFTA Chapter 11.

## V. Even if the Tribunal Believes that the Claimant Should Be Entitled to Some Future Losses, the Valuation Offered by the Claimant Is Unreliable

491. Even if this Tribunal were to consider the speculative future losses of the TTD and Arran wind projects in awarding compensation (which it should not), the Claimant's future loss analysis is full of flawed assumptions and biased calculation errors.[975] These have been systematically identified and corrected by BRG.[976] In what follows, Canada highlights only a few of the more significant ones in order to evidence the general flawed approach taken by the Claimant and its expert, Deloitte. Once these errors and flawed assumptions have been corrected, then as BRG concludes, assuming a violation of NAFTA and assuming that the Tribunal finds that it should engage in speculation as to the future losses of these projects, the value of the future losses of the TTD and Arran wind projects are no more than $6.909 million.[977] The Claimant's proportionate share of those losses would be $3.4545 million.

### A. The Claimant Is Not Entitled to the GEIA Economic Development Adder or Capacity Expansion

492. In its analysis of the alleged future losses of the TTD and Arran wind projects, the Claimant includes the 0.27 cents per kWh "Economic Development Adder" and the 10 percent capacity expansion that were available to the Korean Consortium under the

[975] BRG Report, ¶¶ 156-158.

[976] BRG Report, ¶¶ 171-233.

[977] BRG Report, Figure 7.

GEIA.[978] This results in an additional claim of alleged damages of between $10.2 and $11.3 million. This is a meritless claim, and it should be rejected by the Tribunal.

493. As explained above, the Claimant is once again trying to obtain the benefits of the GEIA, while avoiding all of the significant obligations thereunder. It should not be permitted to do so. An appropriate damages analysis should consider the situation which would in all probability have existed but for the allegedly wrongful conduct. The Tribunal should reject the Claimant's illogical attempts to benefit from GEIA terms.[979]

494. Under the GEIA, in recognition of the significant economic development activities the Korean Consortium was undertaking,[980] Ontario offered it an Economic Development Adder to the rate of wind generated electricity of 0.27 cents per kWh.[981] The purpose of the adder was to acknowledge that the Korean Consortium was actually doing much more under the GEIA than a wind developer under a FIT Contract. It would be entirely unreasonable to provide proponents who have not taken on obligations to increase economic development, through for instance opening four clean technology manufacturing facilities and employing thousands of people, with an Economic Development Adder.

495. Under the GEIA, the Korean Consortium was limited to a total of 2,500 MW of transmission capacity.[982] This capacity was to be allocated to it over the course of five phases of 500 MW each. However, the Korean Consortium was able to elect to adjust its

[978] Deloitte Report, ¶ 4.1.

[979] *Supra*, ¶¶ 461-467.

[980] As noted above, the Korean Consortium was obligated to open four manufacturing facilities in Ontario employing 1,440 people and develop 2,500 MW of wind and solar electricity generation capacity.

[981] The base rate was set by the terms of PPA's negotiated with the OPA. These PPA's were on similar terms and the same rates (13.5¢ / kWh) for wind generation as FIT Contracts. Section 15 of the GEIA Amending Agreement amended the Economic Development Adder from 0.5 cents per KXh for wind and 2.6 cents per kWh for solar to 0.27 cents per kWh for wind generation and 1.43 cents per kWh for solar. **C-0322**, GEIA, s. 9.1, 9.3; **C-0282**, Amended Green Energy Investment Agreement, s. 5.

[982] **C-0322**, GEIA, Art. 3.

targeted generation capacity of 500 MW for a particular phase by ten percent.[983] This meant that, for instance, the Korean Consortium could increase Phase 1 capacity by 50 MW to 550 MW, but only if it reduced all other phases collectively by 50 MW to maintain the 2,500 MW total. As such, the total production capacity would not change.[984]

496. In its analysis, Deloitte completely misunderstands these GEIA terms. Deloitte misconstrues these terms to mean that the Korean Consortium was able to elect to increase its overall generation by ten percent.[985] As a result, Deloitte assumes for its future loss calculations that all the Claimant's projects could also produce ten percent more electricity and that the Claimant is, therefore, entitled to the net present value of that additional production. This serves to wrongfully inflate the Claimant's alleged damages.

### B. The Claimant Makes Speculative Assumptions About the Availability of Its Preferred Wind Turbines

497. If the Tribunal does find a breach of Article 1102, 1103 or 1105, and holds that but for that breach the Claimant's projects would have been awarded a FIT Contract, then Deloitte asserts that the domestic content requirements in the FIT Program would have allegedly caused $106.3 million in damages with respect to the TTD and Arran wind projects.[986]

498. It comes to this conclusion because it assumes that "but for" the FIT Program's domestic content requirements, the Claimant would have used different wind turbines in its projects.[987] In particular, the Claimant contends that instead of using the GE 1.6xle

[983] **C-0322**, GEIA, s. 3.4.

[984] **C-0322**, GEIA, s. 3.4.

[985] Deloitte Report, ¶ 4.14.

[986] Deloitte Report, ¶ 4.3(i).

[987] *Ibid*, ¶ 4.1(b)(i), 4.15.

wind turbines, it could have used the larger and more efficient GE 2.5XL turbines.[988] Deloitte estimates that these turbines were cheaper and would have generated more electricity over the course of a 20-year FIT Contract.[989]

499. However, the Claimant has not provided any evidence that the GE 2.5XL turbines were available for use on its projects or, if they were, at what price GE would have been willing to supply them, and how much they would have cost to maintain.[990]

500. Using information on a contemporaneous wind farm known to use the GE 2.5XL turbines and two estimates of its installed costs, BRG was able to determine that there was small margin for error in terms of the cost versus economic benefit of using the larger turbines.[991] BRG found that if Deloitte's cost estimates were off by only 5-6 percent, then there would be no positive value or damages impact in using the GE 2.5XL turbines. Given the highly speculative nature of Deloitte's assumptions on the availability and cost of the GE 2.5XL turbines, the Tribunal should not accept this $106.3 million of alleged damages as part of its consideration of the alleged future losses of the TTD and Arran wind projects.[992]

### C. Deloitte Makes Numerous Inappropriate Assumptions, Calculation Errors and Omissions Inflating the Claimant's Claim

501. The Claimant's experts have also made a number of errors and omissions in their report which should seriously call into question whether a *prima facie* case of any loss has been demonstrated.[993] In fact, BRG even found spreadsheet errors and calculation errors related to failures to capitalize interest during construction of the projects that were

[988] Ibid.

[989] *Ibid*, ¶ 4.15(a).

[990] BRG Report, ¶¶ 87-91, BRG Attachment VII.

[991] BRG Report, ¶¶ 88c and d, BRG Attachment VII, ¶¶ 72-73.

[992] BRG Report, ¶¶ 87-91 and 184-188, BRG Attachment VII.

[993] BRG Report, Figure 7.

to the Claimant's benefit.[994] Together, BRG estimates that the flaws in Deloitte's analysis account for $153.618 million in wrongly claimed future losses in relation to the TTD and Arran wind projects.[995] Canada highlights a couple of these errors below.

502. First, with respect to financing by the U.S. Ex-Im Bank, Deloitte inappropriately speculates that all of the projects would have received such financing.[996] As BRG notes, this assumption is unsound for a number of reasons.[997] The only evidence relied on by Deloitte is a letter of intent from the U.S. Ex-Im Bank to Mesa.[998] However, the letter of intent is just that and admits that it does not "constitute a commitment."[999] Moreover, it also only relates to the TTD wind project and makes absolutely no mention of any of the Claimant's other projects.[1000]

503. The letter of intent also appears to be based on a total projected cost for the TTD wind project that is significantly more expensive (by [redacted][1001] than what Deloitte itself assumed for its DCF analysis.[1002] Interestingly, the U.S. Ex-Im Bank letter of intent is also based on a U.S. domestic content level of [redacted] of the total project cost.[1003]

[994] BRG found that Deloitte had underestimated alleged damages to Arran and TTD by over $2.3 million by failing to depreciate capitalized interest costs for tax purposes and by making certain spreadsheet errors. BRG Report, ¶¶ 228-230.

[995] BRG Report, Figure 7.

[996] Deloitte Report, ¶ 4.41(b); BRG Report, ¶¶ 212-214; **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010).

[997] BRG Report, ¶¶ 212-214, BRG Attachment IX.

[998] **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010).

[999] *Ibid*.

[1000] *Ibid*.

[1001] *Ibid.* At a cost of [redacted] with total U.S. content estimated at [redacted]

[1002] Deloitte Report, ¶¶ 4.41-4.42.

[1003] **C-0377**, Letter from Barbara A. O'Boyle, Export-Import Bank of the United States to Steven W. Howlett, GE Capital Markets Corporate (Sep. 23, 2010). In response to the submission of GE, the U.S. Exim Bank replied: ("Exim Bank is very interested in participating in the financing for this transaction. We understand that you propose to engineer and build a project named TTD Wind Project ULC in Canada. [redacted]

How the Claimant would have complied with the FIT Program's 50 percent Ontario content level and the U.S. Ex-Im Bank's 85 percent U.S. content requirement is left completely unaddressed by both the Claimant and Deloitte.[1004]

504. Accordingly, the Tribunal should not accept Deloitte's assumption that Claimant would have been able to obtain funding at the low rate of [redacted] offered by the U.S. Ex-Im Bank.[1005] Instead, the Tribunal should assume, as BRG notes, that financing would have been obtained at market rates, which both BRG and Deloitte calculate to be about seven percent.[1006] Correcting this assumption has a $28 million impact on the damages claim with respect to the TTD and Arran wind projects.[1007]

505. Second, in coming to its conclusions, it appears that Deloitte mistakenly eliminated capital expenditures of Arran and TTD of $10.8 and $13.8 million, respectively, with respect to post valuation date development costs.[1008] As BRG explains, this resulted in a significant overstatement of alleged damages of $23.517 million. These damages should be rejected by the Tribunal.[1009]

506. Finally, Deloitte made significant errors related to cost of capital calculations.[1010] For example, Deloitte applied an inappropriate 1.85 percent size premium for low-cap stocks to the projects.[1011] According to the Ibbotson SBBI 2010 Valuation Yearbook ("Ibbotson") relied on by Deloitte, a 1.85 percent size premium accords to low-cap stocks with market capitalizations of between $432,175,000 and $1,600,169,000.[1012] However as BRG points out, according to its FIT application for both TTD and Arran Mesa Power

[1004] Deloitte Report, ¶ 4.41(b).

[1005] Deloitte Report, ¶ 4.41(b).

[1006] BRG Report, ¶ 213.

[1007] BRG Report, ¶ 214.

[1008] BRG Report, ¶¶ 218-221.

[1009] BRG Report, ¶ 221.

[1010] BRG Report, ¶¶ 198-211.

[1011] Deloitte Report, ¶ 4.5.4(iv).

[1012] BRG Report, ¶ 199.

only lists [redacted] of capital.[1013] According to Ibbotson, such capital would warrant a much higher 12.06 percent size premium.[1014] This error by Deloitte represents a $50.556 million overstatement of alleged damages related to the Arran and TTD wind projects.[1015]

507. Deloitte also speculates that the Claimant's projects should have a company-specific risk adjustment of -3.00 percent based on the presumption that the Claimant should have been entitled to the benefits of the GEIA (without the obligations), including the Government of Ontario's facilitation of the regulatory approvals and permits.[1016] As explained by BRG, there is no factual or theoretical basis to suggest that this adjustment is appropriate and Deloitte provided no justification for it.[1017] In particular, it is unreasonable for the purposes of assessing company-specific risk to focus only on government backed obligations under the GEIA or FIT Contract and ignore the fact that the Claimant had, at the time, only ever attempted one other sizable wind project. It had failed miserably in that effort. This unreasonable company-specific risk adjustment results in an overstatement of alleged damages related to the Arran and TTD wind projects of $50.502 million.

## VI. Conclusion

508. The Claimant asks that this Tribunal award it the huge sum of $653.683 million. However, it has failed to prove that a significant portion of these damages is at all causally related to the measures that it alleges breach Canada's obligations under NAFTA. In particular, nearly half of this claim relates to hypothetical future losses of its North Bruce and Summerhill wind projects, even though there is no "but for" world in which those projects would have received FIT Contracts. Moreover, with respect to its remaining claims, they are largely speculative, based on improbable and biased

[1013] BRG Report, ¶ 200b.

[1014] BRG Report, ¶ 200b.

[1015] BRG Report, ¶ 201.

[1016] Deloitte Report, Sch. 6A.

[1017] BRG Report, ¶¶ 202-203.

assumptions and riddled with computational errors. If anything, the Claimant should be entitled to recover no more than its proportionate share of the sunk costs for the TTD and Arran wind projects. In determining these costs, the Tribunal should reject any attempt by the Claimant to recoup the losses the Claimant suffered as a result of its risky purchase of wind turbines for a previously failed venture. Further, with respect to these sunk costs, the Claimant has as yet failed to meet its burden of introducing evidence that would support the damages that it seeks.

## COSTS

509. Pursuant to Article 1135 of NAFTA, and Articles 38 to 40 of the 1976 UNCITRAL Arbitration Rules, Canada requests that the Tribunal award it costs related to this arbitration and its legal representation.

510. Articles 38 to 40 codify the principle that the costs of UNCITRAL arbitration are to be borne by the unsuccessful party. This is a rule that has been followed by a number of recent NAFTA tribunals. For example, after ruling that Canada had prevailed in the recent *Chemtura* arbitration, the Tribunal held that it "finds it fair that the Claimant bear the entire costs of the arbitration," a total sum of USD $688,219.[1018] The Tribunal further found it "appropriate and just that the Claimant bear one half of the fees and costs expended by the Respondent in connection with this arbitration", which are a total amount of $2,889,233.80.[1019]

511. Canada requests that the Tribunal order the Claimant to pay the entire cost of the arbitration and to indemnify Canada for its legal fees and costs, including all of the costs associated with the extensive and overbroad document requests, as well as the costs associated with the numerous and repetitive motions that had to be filed in this matter related to the Claimants failure to abide by the clear terms of the Tribunal's Procedural and Confidentiality Orders filed by the Claimant in this matter. Should the Tribunal

[1018] **CL-090**, *Chemtura – Award*, ¶ 272.

[1019] *Ibid*, ¶ 273.

decide that costs are appropriate, Canada respectfully requests the opportunity to submit a more detailed submission on costs to more fully address all relevant considerations.

## CONCLUSION AND PRAYER FOR RELIEF

512. For the foregoing reasons, Canada respectfully requests that the Tribunal dismiss the Claimant's claims in their entirety and with prejudice, order that the Claimant bear the costs of this arbitration, including Canada's costs for legal representation and assistance, and grant any further relief it deems just and proper.

February 28, 2014

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