

In the matter of an arbitration under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules between

Mesa Power Group, LLC

Claimant

and

Government of Canada

Respondent

CONCURRING AND DISSENTING OPINION OF JUDGE CHARLES N. BROWER

I. INTRODUCTION

1. I concur with the Award in all respects other than its conclusions regarding Articles 1105 and 1108(7)(a) and (8)(b) of NAFTA.

II. ARTICLE 1105

2. I begin with the Tribunal's treatment of Claimant's claim pursuant to Article 1105, which forms the principal basis of the Award on the merits.

3. I agree with the Award's formulation of the applicable standard under NAFTA Article 1105. That formulation was set out by the tribunal in *Waste Management II* and has been adopted by a number of other tribunals, including most recently the *Bilcon* tribunal.¹ It provides that:

the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.²

¹ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 588.

² *Waste Management Inc. v. Mexico*, ICSID Case No. ARB(AF)00/3, Award, 30 April 2004, ¶¶ 98-99 (emphasis added), quoted in *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada*, ICSID Case No. ARB(AF)07/04, Decision on Liability and on Principles of Quantum, 22 May 2012, ¶ 141; *Cargill Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)05/2, Award, 18 September 2009, ¶ 283; and

4. The nub of what I see as Ontario's, hence Canada's, violation of Article 1105 is that it torpedoed the Feed-In Tariff ("FIT") program as offered at large, including in relation to Claimant's Arran and TTD projects, to the extent of the 500 megawatts ("MW") committed to the Korean Consortium on 17 September 2010 in implementation of the Green Energy Investment Agreement ("GEIA") made on 21 January 2010 with the Korean Consortium. Up until then Claimant's projects, as well as all other FIT applicants, had been competing for capacity that had been 500 MW or greater. Moreover, – and this can only be characterized as grotesque – as it actually happened, the Korean Consortium was thereby enabled to acquire low-ranked FIT applicants in order to fill its allotted 500 MW, thereby jumping clear losers in the FIT Program over higher-ranked, but ultimately unsuccessful FIT applicants, due to the reduced available megawattage. This effectively stood the FIT Program on its head, turned it upside down. Thus the Government of Ontario acted arbitrarily, grossly unfairly, unjustly, idiosyncratically, discriminated against the FIT applicants and in favor of the Korean Consortium, and acted with a complete lack of transparency and candor.

5. Just how the GEIA made a mockery of the FIT Program, and consciously was designed to do so, is clear from the history that follows.

6. The terms of the GEIA are compelling as to Respondent's intent. As set out under Recital (A), Respondent was "committed to developing, enhancing and diversifying the Province of Ontario's renewable energy power generation capacity, and [wished] to supplement the Province of Ontario's significant and growing commitment to renewable energy power generation with the development of manufacturing capability. . . ."³ Under Recital (B), the GEIA's objective was to give the Korean Consortium sole direct access to 2,500 MW "to develop, construct and operate wind and solar generation projects in Ontario . . . and, with its Manufacturing Partners, to establish and operate facilities in Ontario for the manufacture of wind and solar generation equipment and components (the "Project"). . . ."⁴

7. Under Article 7.3(b), Respondent furthered the above objectives by contractually pledging to "[g]uarantee priority access to, the Bulk Transmission System capacity allocated under the FIT Program, and availability of connection access [thereto]"⁵ to the extent of 500 MW. This was despite the existence of the FIT Program, of which both the Korean

Bilcon of Delaware Inc. et al v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, ¶ 442.

³ Ex. C-0322, *Green Energy Investment Agreement* dated 21 January 2010.

⁴ *Id.*

⁵ *Id.*

Consortium and Respondent were fully cognizant and whose awareness thereof was expressly reflected, repeatedly, in the GEIA.⁶

8. The Korean Consortium was permitted to undertake any phase of the Project through one or more entities – known as a “Project Company”. Article 1.1 of the GEIA states that “‘Project Company’” has the meaning set out in Article 4.1,” which in turn “provide[s] that [the Korean Consortium] shall retain Control [defined in Article 1.1 as having “the meaning ascribed thereto in the FIT Rules”] of each Project Company until such Project Company enters into a PPA [power purchase agreement] with the OPA [Ontario Power Agency] and thereafter the provisions in the FIT Contract related to Control and assignment shall apply to the Project Company.”⁷ Once such a Project Company submitted the necessary details to the OPA, Respondent was obligated to “cause OPA to be directed to negotiate and enter into a PPA with the Project Company...”⁸ In other words, while FIT participants were vying for PPAs under the FIT Program, Respondent could hand them to the Korean Consortium on a silver platter. For this purpose, the same Article 4.1 also envisioned the Korean Consortium

⁶ *Id.* The GEIA is replete with references to the FIT Program and the FIT Rules: Article 1.1 defines “‘FIT’” as “‘Feed-In Tariff’”, “‘FIT Contract’” as “the meaning ascribed thereto in the FIT Rules”, “‘FIT Program’” as “the Feed-In Tariff program as it exists from time to time arising from a direction or directions issued by the Minister pursuant to s. 25.35 of the *Electricity Act, 1998*”, “‘FIT Rules’” as “the rules set out in the Feed-in Tariff Program as same may be amended in accordance with its terms from time to time”, “‘Aboriginal Price Adder’” has the same meaning as “ascribed ... in the FIT Rules”, “‘Access Rights’” has the same meaning as “ascribed . . . in the FIT Rules”, “‘Commercial Operation Date’ means, in respect of a Generation Facility, the day on which the facility achieves Commercial Operation, as defined in the FIT Contract”, “‘Community Price Adder’” has the same meaning as “ascribed in the FIT Rules”, “‘Control’” has the same meaning as ascribed “in the FIT Rules”, and “‘Domestic Content’ means the target under the FIT Rules for domestic and provincial manufacturing”. The following articles in the GEIA also refer to the FIT, FIT Rules, FIT Contract and/or FIT Program: Articles 4.1, 6.2, 7.3(b) & (c), 8.7, 8.8, 9.1, 9.2 & 10.3.

⁷ *Id.*

⁸ *Id.* Article 9.1 in full reads: “The Parties agree that the payment for Hourly Delivered Electricity generated by each Phase of the Project shall be effected through one or more PPAs between Project Companies and the OPA. If a Project Company submits to the OPA connection details and evidence of necessary Access Rights as specified in Section 3.1(d) and (e) of the FIT Rules for a Phase (or part thereof) and it so advises the Government of Ontario and the OPA, the Government of Ontario shall cause OPA to be directed to negotiate and enter into a PPA with the Project Company for the procurement of the Electricity supply and capacity contemplated by such Phase (or part thereof). Such PPA shall be substantially in the form of the FIT Contract in use by the OPA at the time such PPA is being entered into as amended to give effect to the terms and conditions of this Agreement and with such other amendments thereto as the Parties may agree. Each such PPA will provide that the price payable by the OPA for the Electricity supply and capacity subject to such agreement will be the aggregate of,

- (a) for wind, the price as specified in the then current Price Schedule, and
- (b) for solar, in Phase 1 and Phase 2, 44.3 cents per kWh and in Phase 3, Phase 4 and Phase 5, the price as specified in the then current Price Schedule,

(the “**base prices**”) plus, the Economic Development Adder, as applicable, and any other adder to which the Project Company would be entitled had it made application for a FIT Contract pursuant to the FIT Rules. Each such PPA will constitute a ‘Procurement Contract’ for the purposes of the *Electricity Act, 1998*. Upon execution of a PPA, the rights and obligations of the Parties with respect to the Phase (or part thereof where the Phase has been subdivided) shall be governed exclusively by that PPA.”

contracting with “strategic partners,” and in fact the Korean Consortium chose as its “strategic partner” the Claimant’s major competitor, Pattern Energy Group LP (“Pattern”) of San Francisco.⁹

9. To ensure that the Project would run smoothly, Article 5.2 of the GEIA established a “Working Group” comprised of “eight (8) members, with equal membership from the Korean Consortium and the Government of Ontario, which [met] regularly throughout the term of [the] Agreement. . . .”¹⁰ The Korean Consortium thus had a direct channel of communication to Respondent that no FIT participant had.¹¹

10. Already while the GEIA negotiations were ongoing, in August 2009, Pattern entered into negotiations with the Korean Consortium.¹² Pattern, in parallel with its discussions with the Korean Consortium, also submitted ten applications to the FIT Program in November 2009. One application was awarded a FIT Contract in February 2010 – the Merlin project with a mere 10 MW capacity.¹³ By late July 2010, Pattern and, on behalf of the Korean Consortium, Samsung entered into a joint venture agreement whereby Pattern was to collaborate exclusively with the Korean Consortium to develop the first 1,000 MW under the GEIA.¹⁴ Following Respondent’s 500 MW allocation to the Korean Consortium in September 2010, Pattern in October 2010 terminated the 10 MW Merlin project awarded under the FIT Program and, instead, caused it to be absorbed under GEIA.¹⁵

11. Thus Pattern, rather than taking its chances in competition with other FIT applicants, could, as the Korean Consortium’s “strategic partner” under the GEIA, acquire PPAs without any competition whatsoever, given the GEIA’s exclusive access to megawattage reserved to it. It even attended some of the “Working Group” meetings of Respondent and the Korean Consortium, despite not being a member of it.¹⁶ When Pattern’s involvement in the Working

⁹ **Ex. C-0537**, *Transcript of Mr. Colin Edwards’ Deposition, 3 August 2012*, at p. 65, lns. 2-14.

¹⁰ *See supra* n. 3.

¹¹ Testimony of Bob Chow, Tr. Day 3, p. 301, ln. 25, p. 302, lns. 1-5:

[Q:] Korean Consortium got the benefit of the working group and not members of the FIT program; right?

A. Under that agreement, yes, we have been helpful on that.

¹² *See supra* n. 9 at p. 27, lns. 7-23.

¹³ *Id.* at p. 48, lns. 4-19; Rejoinder Witness Statement of Shawn Cronkwright dated 2 July 2014 at ¶ 12.

¹⁴ *See supra* n. 9 at p. 61, lns. 18-22.

¹⁵ *Id.* at p. 51, lns. 22-25, p. 52, lns. 1-12; **Ex. C-0153**, Email from Colin Edwards (Pattern Energy) to Travis Lusney (OPA), 11 October 2010 (Section 1782 Evidence); *See also* **Ex. C-0280**, Email from Frank Davis (Pattern Energy) to Susan Kennedy (OPA), 2 August 2011 (Section 1782 Evidence).

¹⁶ **Ex. C-0275**, Email from Pearl Ing (Ministry of Energy and Infrastructure) to Colin Edwards (Pattern Energy), 16 June 2011 (Section 1782 Evidence); **Ex. C-0153**, Email from Colin Edwards (Pattern Energy) to Travis

Group meetings was resisted, Pattern argued that its role was “*beyond merely co-sponsoring PPAs . . . [and that] Samsung [had] expressed a preference to [Pattern that they] be included in future discussions with you [i.e. Ontario] around the GEIA . . .*”¹⁷

12. Colin Edwards of Pattern testified quite candidly that the GEIA presented a very attractive alternative to the FIT Program:

[MR. MULLINS, COUNSEL FOR CLAIMANT] -- was there any discussions of whether or not the FIT program would be an alternative to your ability – Pattern’s ability to invest for purchase agreement? Or I’m just trying to see if there's any relationship at all, if there was any discussions about that.

MR. AMDURSKY [MR. EDWARDS’ ATTORNEY]: Between Samsung and Pattern?

MR. MULLINS: Yes.

[MR. EDWARDS, WITNESS]: Pattern submitted a number of projects into the FIT program --

BY MR. MULLINS:¹⁸

Q Okay.

A -- which was -- which occurred in November of 2009. **At the same time, we were in negotiations with Samsung of partnering together, and that partnership would be an alternative to remaining in the FIT program...**

...

Q You just testified that it was an alternative. Let me rephrase the question. That’s fair.

Did you talk to -- with Samsung about -- about the GEIA -- what we call the GEIA program, just for simplicity -- did you talk with anyone at Samsung about the GEIA program being an alternative to the FIT program?

A Yes.

Q Who did you speak to? Same gentleman?

A Yes.

Q And how many conversations did you have?

A Numerous conversations over the period August 2009 up until the GEIA got executed.

...

Q Did you have any such discussions -- And I appreciate the help. Did you have any such discussions with anyone in Ontario?

Lusney (OPA), 11 October 2010 (Section 1782 Evidence); **Ex. C-0277**, Email from Shawn Cronkwright (OPA) to Woong Han (Samsung), 25 July 2011 (Section 1782 Evidence).

¹⁷ **Ex. C-0276**, E-mail from Frank Davis (Pattern Energy) to Susan Kennedy (OPA), 26 July 2011 (Section 1782 Evidence).

¹⁸ See *supra* n. 9 at p. 35, lns. 15-25.

A No.

MR. AMDURSKY: Sorry.

BY MR. MULLINS:

Q Well, we were talking about where the -- the -- the GEIA program would be an alternative to the FIT program.

A We did not.

Q You did not?

A No.

Q Do you know if anyone at Pattern had any such discussions?

A No.

Q Okay. Do you know if anyone at Samsung had such discussions?

A With Ontario?

Q Yes.

A About the GEIA?

Q About the -- the -- as you put it, the GEIA program being an alternative for the Power Purchase Agreement to the FIT program.

A The very nature of the GEIA would suggest they were having conversations.

Q And you weren't present at any such conversations, personally?

A No.

Q What do you mean by the very nature of it?

A It is an agreement that was included as part of the Green Energy Act, and it's an agreement between Samsung and Ontario; so they must have been having discussions to reach agreement

Q No. Right. I guess I was simply asking, though, this notion that it would be an alternative to having to go through the FIT program --

A I don't know.¹⁹

...

Q Did you ever talk with them about how the GEIA ended up being a much better deal for Pattern than it would have been had Pattern simply gone through a power -- a FIT contract?

A Are you asking if Pattern had discussions with Ontario that this was a more advantageous opportunity for Pattern?

Q Yes.

A I don't recall.

Q Did you have such discussions with Samsung?

¹⁹ See *supra* n. 9 at p. 36, lns. 1-6, 14-25; p. 37, lns. 1-2, 18-25; p. 38, lns. 1-25; p. 39 lns. 1-5.

MR. AMDURSKY: I'm going to object again that it goes beyond the scope of today's deposition.

THE WITNESS [MR. EDWARDS]: **The fact that we signed a joint venture agreement and elected to participate with Samsung is evidence that we thought this was a better opportunity.**²⁰ (Emphasis added).

13. Upon the release of the revised FIT rankings on 4 July 2011²¹, the Korean Consortium and Pattern began eyeing FIT projects for the GEIA Project. The revised July 2011 rankings identified TTD and Arran at the top – at 3rd and 4th respectively. Despite these high rankings, neither of Claimant's projects secured a FIT Contract. On 6 July 2011, Mr. George Hardie of Pattern wrote to Mr. Cole Robertson and Mr. Mark Ward of Mesa expressing sympathy, but also acknowledging the obviously negative impact on Claimant's applications of the 500 MW that had been removed from the FIT Program by the GEIA. Entirely predictably, Pattern sought to acquire Claimant's Arran and TTD [also known as "22 Degrees"] projects:

Cole and Mark,

I am writing to let you know that we were surprised to see that your Arran and 22 Degree sites did not secure FIT contracts – as we were pretty sure you'd get contracts for at least one and probably both of the sites. And, on a personal level, I'm genuinely disappointed for you guys. I can say, however, with 100% certainty that our current POI's did not have any impact on the FIT award outcome – **although the Samsung 500 MW transmission allocation obviously didn't help matters.**

In any event, and now that the dust has settled so to speak, we may still be interested in acquiring one or more of your sites. If there is interest on your part in transacting please let me know ASAP as time is truly of the essence. Specifically, our intention would be to enter into a binding term sheet immediately with closing conditional only upon our being awarded a GEIA FIT contract in the next 6-8 weeks (read before the election). . . .²² (Emphasis added).

14. Thus, while Claimant's two projects, ranked 3rd and 4th, bore no fruit—thanks to GEIA's removal of 500 MW that otherwise would have been available to Claimant and other FIT applicants—and Claimant declined to sell its projects to Pattern, Pattern predictably picked the "low-hanging fruit" of lesser-ranked FIT applicants.²³ As Pattern's Colin Edwards candidly recounted:

²⁰ *Id.* at p. 193, lns. 13-25; p. 194, lns. 1-3.

²¹ **Ex. C-0293**, Ontario Power Authority, "FIT Car Priority Ranking by Region", 4 July 2011.

²² **Ex. C-0038**, Email from George Hardie (Pattern Energy) to Cole Robertson (Mesa), 11 July 2011.

²³ **Ex. C-0408**, *Transcript of Mr. Colin Edwards' Deposition, 3 August 2012*, at p. 187, lns. 9-10.

Q Did you look at the public information of where your competitors wanted to do interconnection points when selecting your own interconnection points for the GEIA project?

A We had an awareness of where different parties ranked on the publicly available list when we made our interconnection point selections.

Q And how would that affect your decision, the ranking?

A We would -- parties who were ranked higher on the list would be more likely to stay in the queue in hopes of keeping their project and receiving a FIT contract, knowing that there was transmission capacity coming to this area.

Q And the lower ones would be **low-hanging fruit**, right?

A The lower ranked parties would have a lesser chance to get a FIT contract.

Q And it would be more easily able to buy their assets in order to fulfill your obligations under the GEIA as a joint venture, correct?

A Perhaps.²⁴ (Emphasis added).

15. While that last word of Mr. Edwards' may appear to have been non-committal, Pattern actually did acquire hopelessly-low-ranked projects in furtherance of the GEIA. By August 2011, the Korean Consortium had acquired two low-ranked projects in the Bruce region that never stood a chance of obtaining a FIT Contract, but were nevertheless granted PPAs under GEIA. First, the Korean Consortium acquired the Armow project from Acciona,²⁵ which was ranked 21st in the Bruce region.²⁶ Second, the Korean Consortium acquired the K2 wind project from Capital Power,²⁷ which was ranked 24th in the Bruce region.²⁸ Thus, these projects were well behind TTD and Arran, which had been ranked 3rd and 4th respectively.²⁹

16. It does not justify the conduct of Ontario, for which Canada is responsible, that the Korean Consortium offered and contracted via GEIA to bring renewable energy equipment manufacturers to the Province of Ontario. Ontario was perfectly justified in wanting to

²⁴ *Id.* at p. 186, lns. 20-25; p. 187, lns. 1-16.

²⁵ **Ex. C-0540**, News Article, Bloomberg, "Pattern Energy, Samsung Acquire Acciona Wind Farm in Ontario," 16 September 2011; **Ex. C-0286**, Armow Wind Project Power Purchase Agreement between Ontario Power Authority and SP Ontario Wind Development LP, 2 August 2011 (Section 1782 Evidence).

²⁶ *See supra* n. 21.

²⁷ **Ex. C-0663**, Samsung Renewable Energy Inc., "Samsung Signs Power Purchase Agreement Bringing Jobs, Investment & Clean Energy to Ontario," dated 3 August 2011; **Ex. C-0574**, *Transcript of Mr. Colin Edwards' Deposition*, 3 August 2012, at p. 146, lns. 22-23; **Ex. C-0287**, K2 Wind Project Power Purchase Agreement between Ontario Power Authority and K2 Wind Ontario Limited Partnership, August 3, 2011 (Section 1782 Evidence).

²⁸ *See supra* n. 21.

²⁹ *Id.*

attract such investment for the benefit of the Province, its inhabitants and its industrial base. That is not the point. The point is that by tying a business attraction arrangement to a sweetheart deal guaranteeing, and then actually granting to the Korean Consortium, 500 MW of FIT access for which other companies had been competing on prescribed terms, the Government of Ontario pulled the rug out from under the general FIT Program to the extent of those 500 MW. The sin was in combining the two to the detriment of FIT applicants who were not part of the Korean Consortium and otherwise would have won contracts.

17. This misconduct cannot be excused, as the Award does, by noting that a sovereign is to be given a certain degree of deference and, in particular, that “Article 1105 does not provide a guarantee against regulatory change.”³⁰ Of course “[a] State may amend its laws and regulations as it deems appropriate in light of changing circumstances . . . [and] the FIT Program had undergone several amendments.”³¹ Of course “the FIT Rules expressly stipulate that they may be reviewed and amended.”³² There is an acceptable range of potential change that the Province could lawfully effect, particularly to the extent that that right was expressly reserved within the confines of the FIT Program. That is far different, however, from contracting outside the FIT Program with a third party, in this case the Korean Consortium, to withdraw 500 MW from the MW target at which the other FIT applicants were aiming. It is not permissible under Article 1105 that the FIT Rules be “reviewed and amended” to accommodate what essentially was a Province-authorized intruder into the FIT Program. A jockey must ride one horse at a time.

18. The very conduct of Ontario in respect of the GEIA betrays a sense of its knowing at the time that its actions were questionable at best. The first news of Ontario’s negotiations with the Korean Consortium, which one subsequently learned had been going on since the summer of 2008,³³ was a Toronto Star article entitled “Ontario Eyes Green Job Bonanza” published on 26 September 2009. Its text, set forth in large part in the Award,³⁴ mostly was about “manufacturing wind turbines and other green-energy gear – including solar panels,” but did report Energy Minister Smitherman as noting that the Korean Consortium would be “taking part in the [FIT] program.”³⁵ Clearly Minister Smitherman and the Korean

³⁰ Award at ¶ 619.

³¹ *Id.*

³² *Id.* at ¶ 620.

³³ Samsung initially approached the Government of Ontario in the summer of 2008. **Ex. C-0228**, Annual Report of the Auditor General of Ontario, 2011, p. 108; Rejoinder Statement of Rick Jennings dated 2 July 2014, at ¶ 4.

³⁴ Award at ¶ 596.

³⁵ *Id.*

Consortium deeply regretted this disclosure of their year-long negotiations, as they on the same day issued a joint press statement that “information concerning [their] negotiations has prematurely entered the public domain . . . [which] [b]oth parties regret . . . even while serious negotiations are ongoing.”³⁶ It mentioned, however, only that “Samsung . . . proposes to establish a new renewable energy business in Ontario where the Feed in Tariff was recently launched”³⁷ It made no mention whatsoever of Samsung submitting applications itself under the FIT Program.

19. Recall in this regard that the Green Energy and Green Economy Act (“GEGEA”), which specifically authorized the Minister of Energy to direct the OPA to develop the FIT Program, was introduced into the Provincial Parliament in February of 2009 and took effect in May of that year³⁸, yet at no time during the parliamentary debates or the public consultations regarding the FIT Program did the Ministry of Energy ever disclose that it had been negotiating for the GEIA since the summer of 2008.³⁹ In fact, the GEIA also was not even submitted to the Ontario Cabinet for approval⁴⁰, and no one at OPA received any information (other than press reports) regarding what later became GEIA until the summer of 2009.⁴¹

20. It must be recalled that although the negotiations of the Ministry of Energy with the Korean Consortium had taken place from the summer of 2008 until the actual signing of GEIA on 21 January 2010, Ontario was not legally bound vis-à-vis the Korean Consortium at any time prior to that signing. There had been a non-binding Memorandum of Understanding, and although the 26 September 2009 news release of the Ministry of Energy

³⁶ *Id.* at ¶ 597.

³⁷ *Id.*

³⁸ **Ex. R-057**, Green Energy and Green Economy Act, 2009, S.O. 2009, c.12, Schedule B, s. 7, amending Electricity Act, 1998 by introducing s. 25.35.

³⁹ **Ex. C-0228**, Annual Report of the Auditor General of Ontario, 2011, p. 108.

⁴⁰ Respondent’s witnesses gave contradictory testimony as to whether this approval was required. *Compare* Testimony of Rick Jennings, Tr. Day 2, p. 152, ln. 25, p. 153, lns. 1-6, p. 168, ln. 25, p. 169, lns.1-5, p. 188, lns. 16-25 and p. 189, lns. 1-5 (suggesting that the reason for keeping the GEIA negotiations secret was that the Ministry believed it needed to obtain the Cabinet’s approval before the GEIA became final, and that the Ministry could not announce the deal before it became final) *with* Testimony of Sue Lo, Tr. Day 3, p. 18, lns. 10-13, p. 21, lns. 10-12 (stating that Cabinet approval was neither necessary nor in fact sought) and *Id.* (“Although the Cabinet was briefed about the agreement, the Ministry indicated that there had been no formal Cabinet approval because it was not required.”).

⁴¹ *See supra* n. 39 (“Neither the OEB [i.e. Ontario Energy Board] nor the OPA was consulted about the agreement. The OPA was not involved until summer 2009, when the Ministry inquired about available transmission capacity to accommodate consortium projects.”). Testimony of Rick Jennings, Tr. Day 2, p. 194, lns. 6-10; Testimony of Sue Lo, Tr. Day 3, p. 16, lns. 15-17.

and the Korean Consortium referred to a forthcoming “historic framework agreement,”⁴² there in fact never was a framework agreement, but only a draft of GEIA.⁴³ The press reports mentioned earlier, and subsequent ones, may have served to discourage some potential FIT applicants, but that does nothing to change the fact that it was only as of 21 January 2010 that Ontario became legally obligated to grant the Korean Consortium unchallengeable access to the 500 MW here in issue. Until then the public applicants were competing on an equal basis in a fair game. By that date, as the Award confirms,⁴⁴ it was well established that “there were thousands and thousands of megawatts of interest of project development in Ontario So I knew that there would be more demand for FIT contracts than there would be supply of contract capacity.”⁴⁵ In other words, when Ontario committed itself to award the Korean Consortium 500 MW pursuant to the GEIA it knew for sure that it was interfering with the ongoing FIT Program, depriving the publicly competing applicants of that amount of megawattage and, as noted above, enabling otherwise losing FIT applicants to recoup at least some of their doomed investments by selling out to the Korean Consortium, which then could fill its 500 MW allotment with them and thereby deprive higher-ranked FIT applicants of their just rewards (due to the reduced available megawattage).

21. It is relevant, too, that the Auditor General of Ontario rendered this disturbing report:

. . . The Ministry negotiated a contract with a consortium of Korean companies to build renewable energy projects. The consortium will receive two additional incentives over the life of the contract if it meets its job-creation targets: a payment of \$437 million (reduced to \$110 million, as announced by the Ministry in July 2011 after the completion of our audit fieldwork) in addition to the already attractive FIT prices; and priority access to Ontario’s electricity transmission system, whose capacity to connect renewable energy projects is already limited. However, no economic analysis or business case was done to determine whether the agreement with the consortium was economically prudent and cost-effective, and neither the OEB nor the OPA was consulted about the agreement. . . .⁴⁶

[The GEIA was a] privately negotiated contract between the Ministry and the Korean consortium.⁴⁷

⁴² Award at ¶ 596.

⁴³ *Id.* at ¶ 612.

⁴⁴ *Id.* at ¶ 575.

⁴⁵ Testimony of Jim MacDougall, Tr. Day 3, p. 263, Ins. 9-15; **Ex. C-0669**, FIT/Micro FIT Announcement, December 15, 2009 (“We’re seeing a tremendous response to the FIT and microFIT programs . . .”); Testimony of Rick Jennings, Tr. Day 2, at pp. 167-8; Testimony of Sue Lo, Tr. Day 3 at p.78, Ins. 3-14 (FIT Program was very successful with applications for 10,000 MW).

⁴⁶ *See supra* n. 39 at pp. 90-91.

⁴⁷ *Id.* at p. 98, Figure 6.

Agreement with the Korean Consortium

While the FIT program was intended to provide a channel for renewable energy investments by homeowners, farmers, small businesses, and community groups, the Ministry was also negotiating with a consortium of Korean companies under separate terms to build more renewable energy projects. The consortium, led by two large Korean companies, approached the Ministry in June 2008 and proposed to make a major investment in Ontario's renewable energy sector. This led to ongoing talks between the Ministry and the consortium and the signing of a memorandum of understanding in December 2008. In June 2009, the Minister travelled to Korea for more discussions; six months later, the Minister, on behalf of the government, signed the \$7-billion Green Energy Investment Agreement (GEIA) with the consortium. The consortium committed to build 2,000 MW of wind projects and 500 MW of solar projects in Ontario in five phases by 2016, with the equipment to be manufactured in this province. Neither the OEB nor the OPA was consulted about the agreement. The OPA was not involved until summer 2009, when the Ministry inquired about available transmission capacity to accommodate consortium projects. . . . [W]e noted that the normal due diligence process for an expenditure of this magnitude had not been followed. For large projects such as the consortium agreement, we expected but did not find that a comprehensive and detailed economic analysis or business case had been prepared. . . .⁴⁸

Allocation of Capacity to Korean Consortium

. . . In April 2010, the Minister directed the OPA to give priority to connecting the consortium projects to the grid when assessing the availability of already-limited transmission capacity. This commitment to the consortium affected the FIT contract allocation process and the timely connection of renewable energy from other generators. . . ."⁴⁹

22. It is noteworthy that those who were called upon to implement both the FIT Program and the FIT aspects of the GEIA reacted to the clash of the two with concern. For example, OPA Manager Jim MacDougall testified at the hearing that he was not "terribly pleased by the competing development opportunities that were running in parallel,"⁵⁰ as "the existence of the Korean Consortium commitment . . . created greater pressure on the FIT program and less capacity availability through the FIT program to offer contracts."⁵¹ Indeed, even the Award concedes that it "might have seemed to make sense [to 'have chosen not to sign the formal agreement in January 2010'] considering that it was known in 2009 that the GEIA would impact the limited available transmission capacity"⁵²; that "the actual need for an 'anchor tenant' could be questioned" as "[b]y the time the GEIA was signed in January 2010

⁴⁸ *Id.* at pp. 107-108.

⁴⁹ *Id.* p. 116.

⁵⁰ Testimony of Jim MacDougall, Tr. Day 3, p. 262, lns. 24-25.

⁵¹ *Id.* p. 264, lns. 2-6.

⁵² Award at ¶ 577.

(as opposed to its precursor MOU signed in December 2008), it was known that the applications under the FIT Program far exceeded the available capacity”⁵³; and that “[the Korean Consortium] arguably had no experience with developing wind or solar power.”⁵⁴ Surprisingly, the Award nonetheless concludes: “Be that as it may, these are all policy considerations and questions that were for the government of Ontario alone. It is not the Tribunal’s role to act as an appellate body in this regard, or second guess or weigh the wisdom of Ontario’s decision to enter into the GEIA at the time – even if sufficient renewable energy would possibly have been available through the FIT Program,”⁵⁵ citing *Paushok v. Mongolia*’s conclusion that “Claimants have not succeeded in demonstrating that this was an abusive or irrational decision.”⁵⁶ I beg to differ: Signing GEIA when the FIT Program already had proven more than sufficient to supply the desired megawattage was abusive in that it was, in the words of *Waste Management II*, arbitrary, grossly unjust, unfair and idiosyncratic, discriminated against the otherwise successful FIT applicants in favor of the Korean Consortium, and was done with a complete lack of transparency and candor. Once more, its perhaps most egregious feature was that it enabled the Korean Consortium to fill its secure 500 MW by scavenging among the lowest-ranked FIT applicants, enabling them to sell to it and thus realize on their otherwise doomed investments, causing higher-ranked FIT applicants who otherwise would have been awarded contracts to be denied them solely due to the disappearance of 500 MW from the targeted availability.

23. It is ironic that the Award, in the end states that, “While reaching [its] conclusion, the Tribunal nevertheless notes that at least some criticism may be levelled at Ontario’s decision to run two renewable energy programs in parallel without clearly articulating the relationship of the two and without spelling out their interaction in the event of shifts in demand and supply and other changes in the energy market. In the event, this choice and the manner in which it was implemented created certain problems, and might well have been handled differently. But judged in all the circumstances, this is not criticism that reaches the threshold of a violation of Canada’s international obligations.”⁵⁷ I say it did breach Article 1105.

24. The record in this case leaves no doubt that without GEIA, hence without its diminution by 500 MW of capacity in the Bruce Region, Claimant’s FIT applications for

⁵³ *Id.* at ¶ 578.

⁵⁴ *Id.*

⁵⁵ *Id.* at ¶ 579.

⁵⁶ *Id.* at n. 328.

⁵⁷ *Id.* at ¶ 682.

Arran and TTD would have succeeded. Canada's own expert on the subject, Mr. Christopher Goncalves, Co-Chair and Director of BRG Energy and Natural Resources (Berkeley Research Group), testified at the hearing on 30 October 2014, using 20 slides collectively labeled "Summary Of BRG Analysis" in the course of his initial presentation. Slide No. 12 was labeled "GEIA Violation Only" and subtitled "Bruce Region Results – GEIA Counterfactual." The legend below that and preceding a chart read, in pertinent part, "If only the GEIA is found in breach, Arran and TTD would have been awarded contracts" Mr. Goncalves was questioned by the Tribunal:

MR. BROWER: Right, okay. Now, let's take your initial presentation that was on the screen and turn to slide 12. Are you there? It is slide 12.

THE WITNESS: I am.

MR. BROWER: I understood your testimony to be, but please confirm or disaffirm it, that if the GEIA was found to be a breach of NAFTA, then you conclude that Arran and TTD would have won their contracts?

THE WITNESS: Correct.

MR. BROWER: Okay.

THE WITNESS: That's right.

. . .

THE CHAIR: Do you here discuss the reservation of capacity for the Korean Consortium?

THE WITNESS: Yes, yes.

THE CHAIR: That is the only issue that is dealt with here on this slide.

THE WITNESS: Correct. That's the only thing I think would have impacted Mesa --

THE CHAIR: Absolutely, yes.

THE WITNESS: -- is the lack of access to transmission capacity, and I hope that it is clear -- I know I was moving fast when I introduced this -- that the difference between the prior slide, 11, the actual scenario where you have 750 megawatts of available transmission and this one on slide 12 is the additional 500 megawatts of capacity.

So you lift the available capacity back to the total by removing the Korean Consortium's 500 megawatts, and when you make -- when you lift that available capacity, TTD and Arran would have gotten FIT contracts.

MR. BROWER: Okay. So as --

THE WITNESS: Is that clear?

MR. BROWER: Your testimony basically is, as an expert appearing on behalf of Canada in this case, you have no doubt but that if GEIA were found to be a breach, we may proceed on the basis that Arran and TTD were home free; they got their contracts?

THE WITNESS: Or in other words that they were harmed, yes.⁵⁸

III. ARTICLES 1108(7)(A) AND (8)(B) (“PROCUREMENT BY A PARTY OR A STATE ENTERPRISE”)

25. I turn now to the Award’s finding that the FIT Program constituted “procurement” within the meaning of that term in NAFTA’s Articles 1108(7)(a) and (8)(b).

26. I do agree that Article 1103, the most-favored-nation clause, does not give Claimant access to more favorable treaties to which Canada is a Party as regards this issue.

27. Articles 1108(7)(a) and (8)(b) together immunize “procurement by a Party or a state enterprise” – not just “procurement” alone – from the application of other Articles invoked by Claimant, namely “National Treatment” (Article 1102), “Most-Favored-Nation Treatment” (Article 1103), certain “Performance Requirements” (Article 1106(1)(b), (c), (f) and (g) and (3)(a) and (b)), and “Senior Management and Boards of Directors” (Article 1107). I emphasize that the term to be interpreted is “procurement by a Party or a state enterprise,” not just “procurement.” I disagree with the Award’s view that “it makes no difference . . . whether one focuses upon the single word ‘*procurement*’ or the phrase ‘*procurement by a Party or a state enterprise.*’”⁵⁹

28. While Canada’s General Notes to Appendix I of the Government Procurement Agreement (“GPA”) do not fall within any of the interpretive items listed in Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”), I do think that the following statement in that context is relevant to determination of the “ordinary meaning” of “procurement by a Party or a state enterprise:”

Procurement in terms of Canadian coverage is defined as contractual transactions to acquire property or services for the direct benefit or use of the government . . . It does not include . . . government provision of goods and services, given to individuals, firms, private institutions, and sub-central governments. It does not include procurements made with a view to commercial resale or made by one entity or enterprise or made by one entity or enterprise of Canada.

This accords with what I regard as a broad understanding in the field of “government procurement” as to what the “ordinary meaning” of that two-word term is, which I cannot distinguish from “procurement by a Party or a state enterprise.” Accordingly, I do not accept that Webster’s online dictionary, Webster’s New Twentieth Century Dictionary of the

⁵⁸ Testimony of Mr. Christopher Goncalves, Tr. Day 5, p. 209, lns. 10-22, p. 211, lns. 3-25 and p. 212, lns. 1-9.

⁵⁹ Award at ¶ 421. See also Award at ¶¶ 437-438.

English Language, or any other English lexicon's definition of the single word "procurement" standing alone, on which the Award relies for "ordinary meaning,"⁶⁰ is at all relevant. Similarly, the fact that "procurement," standing alone, is "achats" (English: purchases) in NAFTA's French text and "compras" (English: purchases) in its Spanish text lacks relevance.

29. While the Tribunal relies particularly on the earlier NAFTA Chapter 11 awards in both *ADF* and *UPS* as supporting its interpretation of "procurement" – as *ADF*, in my view mistakenly, addressed the word "procurement" alone and not as part of the term "procurement by a Party or a state enterprise" when it expressly relied on the "ordinary or dictionary connotation" of "procurement"⁶¹ – the fact remains that both *ADF* and *UPS* dealt with government procurement in what I regard as the ordinary meaning of that phrase: *ADF* involved the construction by the Commonwealth of Virginia in the United States, at least in part with Federal funds, of a public highway interchange on public property, and in *UPS* the Canadian Customs Service contracted with a private entity to collect as its agent customs duties and excise taxes from the addressees of packages subject to such levies.

30. I also do not agree that any interpretation of Chapter 8 of NAFTA, including the Article 1108 paragraphs and subparagraphs invoked in the Award, should be materially influenced by, as the Award says, the Tribunal's perception that "[a]ll three NAFTA Parties appear to support the broad notion of procurement [not, I note again, "procurement by a Party or state enterprise"] as advanced by the tribunals in *ADF* and *UPS*"⁶² (which cases I have just dealt with in paragraph 29. above). I have never experienced a case in which the other Party or Parties to a treaty subject to interpretation, appearing in a non-disputing capacity, have ever differed from the interpretation being advanced by the respondent State. Inevitably, they club together. Moreover, the interpretation given by a State Party in actual litigation cannot be regarded as an authentic interpretation. In the end (Article 2001(2)(c)), only three Ministers of the States Party to NAFTA, convened as the Free Trade Commission, can "resolve disputes that may arise regarding [NAFTA's] interpretation or application." That does not mean that the Tribunal is in any way barred from interpreting NAFTA. To the contrary. It does suggest at least, however, that caution should be exercised, if not skepticism, when confronted by that with which the Tribunal is dealing in the Award's paragraph 410.

⁶⁰ *Id.* at n. 151.

⁶¹ *ADF v. United States*, ICSID Case No. ARB (AF)/00/1 (2003), ¶ 161 and n. 158, cited in the Award's n. 151.

⁶² Award at ¶ 410.

31. As I have noted in paragraph 28. above, neither GATT nor anything occurring within its realm falls within the list of interpretive sources in Article 31, or, for that matter, Article 32, of the VCLT. In any event, even the Award draws little comfort from that source, for as it points out, the Appellate Body in the case cited stated that “[i]n a more technical sense, procurement usually refers to *formal procedures used by governments to acquire goods or services.*”⁶³ Thereby the Appellate Body tends to confirm my conclusion as to the ordinary meaning of “procurement by a Party or a state enterprise.” (Emphasis in original.)

32. I further differ with the Tribunal’s conclusion that “[Articles 1001(1) and (5), 1201(2) and 1502(4)] provide little guidance on the interpretation of the term ‘procurement’ [‘by a Party or a state enterprise’] in Article 1108(7)(a).” First, NAFTA has a Preamble, which normally would be consulted. Second, “[t]he objectives of [NAFTA]” are set forth in Article 102(1) and only there. Third, Article 102(2) provides that⁶⁴

The Parties shall interpret and apply provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law [which of course include the VCLT].

Of course it is true that the various Chapters of NAFTA are somewhat like separate treaties on discrete subjects. Nevertheless, the Parties have placed them in a single treaty with a comprehensive title, and one cannot correctly “focus on” one Article of one Chapter alone. In that respect I recall that the “context” of a treaty as defined in Article 31 of the VCLT includes “the text,” meaning the entire text of the treaty, “including its preamble and annexes.” Given that wider approach dictated by the VCLT, it is indeed relevant that other Articles of NAFTA define “procurement by a Party or a state enterprise” (or equivalent phrases) compatibly with what I have indicated is the “ordinary meaning” of the phrase. Thus, Article 1001 “Scope and Coverage” of “Chapter Ten: Government Procurement” provides in its paragraph 1. that “[t]his Chapter applies to measures adopted or maintained by a party relating to procurement . . . (a) by a federal government entity . . . , a government enterprise . . . , or a state or provincial government entity (b) of goods . . . , services . . . or construction services. . . .” In addition, its paragraph 5. stipulates that “. . . [p]rocurement does not include . . . (a) any form of government assistance, including cooperative agreements . . . and government provision of goods and services to persons or state, provincial and regional governments” Similarly, Article 1502(4) of “Chapter Fifteen: Competition Policy, Monopolies and State Enterprises” excludes from certain anti-monopoly

⁶³ *Id.* at ¶ 413.

⁶⁴ *Id.* at ¶ 417.

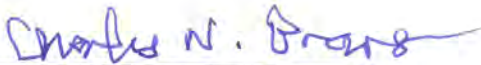
provisions “procurement by governmental agencies of goods or services for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the provision of services for commercial sale.” Surely these other provisions of NAFTA are not to be disregarded in arriving at the proper interpretation of “procurement by a Party or a state enterprise.”

33. Furthermore, for interpretive purposes I do not accept that the description of a provision as either a “carve-in” or a “carve-out” has any role to play.⁶⁵ Articles 31 and 32 of the VCLT regularly are described by international courts and tribunals as permitting neither a liberal nor a restrictive interpretation. VCLT Article 31 prohibits any weighting of terms other than as required by its proper application.

34. In conclusion on this issue, I disagree with the Tribunal’s approach and result as regards its interpretation of “procurement by a Party or a state enterprise.”

⁶⁵ *Id.* at ¶¶ 426-427.

Dated: 25 March 2016


The Hon. Charles N. Brower