WINDSTREAM ENERGY: NAFTA ARBITRATORS ORDER CANADA TO PAY $ 25 MILLION

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An earlier issue of this Journal[1] reported on a claim brought by *Trillium Wind*[2] in the Ontario Courts relating to decision by an Ontario Power Authority to cancel a wind energy contract. That matter is still before the courts. In recent months there have been two decisions by arbitration panels under the *North American Free Trade Agreement* (NAFTA) relating to similar the claims.

The first case, *Mesa Power*[3], was a claim relating to onshore wind contracts. The second case, *Windstream Energy* [4] involved offshore wind contracts.

Mesa, a claim for $775 million, resulted in an arbitration panel decision on March 24 2016 denying the claim in its entirety. *Windstream,* a claim for $ 568 million, resulted in a decision on September 27, 2016 granting the Complainant $26 million plus costs, the largest NAFTA judgment in Canadian history.

In both cases the canceled contracts were contracts the Ontario government issued under the *Green Energy Act* known as feed in tariffs or FIT contracts. The Order in *Windstream* was against the Government of Canada rather than Ontario because under the NAFTA treaty Ottawa is responsible for the actions of the provinces

Background

Disputes involving renewable energy are not new. Over the last 10 years a number of countries have developed incentive programs to attract investment in renewable energy. These programs are usually driven by a policy commitment to reduce the dependence on fossil fuel electricity generation.

In most jurisdictions a common problem has developed. Governments for different reasons change the incentive programs either by reducing the incentives or eliminating them entirely. There may be good reasons for this but investors are not amused. When that happens, investors often seek damages through arbitration under investment treaties.

There are two reasons why investors often choose arbitration. First as the Court found in *Trillium Wind* there is often no remedy under domestic law. There, the plaintiff sought $ 2 billion in damages against the Ontario government based on claims of breach of contract, unjust enrichment, negligent misrepresentation, misfeasance in public office and intentional infliction of economic harm. The motion judge threw out the case, entirely on the basis that the government's decision to stop financing windfarms was a policy decision and therefore immune from suit. The Court of

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1 Gordon Kaiser, "Trillium Wind: Can Developers Sue When Government Wind Projects are Cancelled?" (2014) 2 Winter 2014, Energy Regulation Quarterly 75.

2 *Trillium Power Wind Corp v Ontario,* 2013 ONCA 683.

3 *Mesa Power Group LLC v Government of Canada*, PCA Case No 2012-17, 24 March 2016.

4 *Windstream Energy LLC v Government of Canada*, PCA Case No 2013-22, 27 September 2016.

Appeal reversed to a degree finding that there was one claim that could proceed, namely the claim for misfeasance in public office – not the easiest claim to prove.

The remedies available in arbitration, whether under NAFTA or the *Energy Charter Treaty* (*ECT*)[5] under which many of the European cases are brought, include direct and indirect expropriation of the investment, discrimination against a specific investor, denial of fair and equal treatment and denial of legitimate expectations

The second reason investors prefer arbitration is that many of the investors are foreigners and they prefer an arbitration panel to the domestic courts particularly where the claim is against the government of that country. To date 27 arbitration claims involving renewable energy have been filed against Spain, 7 against the Czech Republic, and 5 against Italy.

The only decision to date in the European cases is the decision in *Charanne*[6] where the majority dismissed entirely the claims of a Dutch company and a Luxembourg company that had jointly invested in solar generation based on an incentive program established by the Spanish government. As in Ontario the Spanish program consisted of feed-in tariffs for 25 year period. Aside from the attractive rate for the power the program allowed the claimants to distribute all of the energy produced to the grid. Subsequently the Spanish government amended the program to limit the amount of electricity that could be supplied and added a new charge for grid access.

The Claimants argued that the amendments reduced their return on investment and expropriated part of the value of their investment in breach of Article 13 of the *ECT*. They also argued that the amendments violated the standard of fair and equitable treatment and denied their legitimate expectations as investors contrary to *ECT* Article 10 (1) and 10 (12).

A majority of the arbitration panel dismissed all of the claims. The claim for indirect expropriation was dismissed on the ground that the claimants had to show that the investor had been deprived of all or part of its investment. This claim failed because the program remained in place as did the contracts although the rate of return was reduced.

The majority also held that the government actions did not breach the investor's legitimate expectations because the claimants had not received any specific promises or commitments from Spain. The program did not create commitments to *specific* individuals and investors. The Tribunal found that a commitment to a *group* of investors did not amount to a commitment to an individual investor, noting that to find otherwise would amount to an excessive limitation on the power of the state to regulate the economy in accordance with the public interest. This of course is the fine line that arbitration panels in these cases often face.

In support of this conclusion the Tribunal also noted that the materials provided to the investors in 2007 did not say that the feed-in tariff would stay in place for the regulatory lives of the solar plants. To decide otherwise, the Tribunal stated, would mean that any modification of the tariff would be a violation of international law, a principle the Tribunal was not prepared to accept.

There is another rationale to the decision which might find its way into Canadian decisions at some point. The majority concluded that in order to exercise the right of legitimate expectations the Claimants must show that they had first made a diligent analysis of the legal framework for the investment. The Tribunal found that if the Claimant had done that, they would have discovered that amendments to the feed in tariff program were permitted under established Spanish domestic law.

But is domestic law the right test? The dissenting arbitrator disagreed with the majority concluding that legitimate expectations can arise where states grant incentives to a specific category of persons in exchange for their investment. The dissenting arbitrator found that regardless of the state's regulatory power under domestic law, a breach of an investors legitimate expectations should result in compensation. To some this dissent may bear a striking resemblance to the dissent of Judge Bower in *Mesa Power.*

5 *The International Energy Charter Consolidated Energy Charter Treaty,* 17 December 2014.
6 *Charanne v Kingdom of Spain,* Case No 062/2012, ECT, 21 January 2016.

The Ontario FIT Program

On September 24, 2009 the Ontario Minister of Energy directed the Ontario Power Authority to create the FIT program including the fit rules which established the eligibility criteria as well as a criteria for evaluating applications, the deadlines for commercial operation and the domestic content requirements. Those were originally set at 25% but increase later to 50%. The domestic content requirements were subsequently challenged under another regulatory regime.[7]

The FIT program offered 20 or 40 year power purchase agreements with the Ontario Power Authority. Under those contracts the generator was a guaranteed a fixed price per kilowatt hour for electricity delivered to the Ontario grid. Contracts were available for projects located in Ontario that generated electricity exclusively from renewable energy. Applicants also had to establish that the project could be connected to the electricity grid through a distribution system or transmission system. That proved to be a particular problem for Mesa Power.

Windstream Energy

In October 2012 Windstream filed a claim against the government of Canada in the amount of $ 475 million. Following a 10 day hearing in February 2016 a panel of three arbitrators issued an award of $ 26 million resulting from Ontario's decision in February 2011 to suspend all offshore wind development. The panel accepted Windstream's argument that the government's decision frustrated Windstream's ability to obtain the benefits of the 2010 contract Windstream had signed with the Ontario Power Authority.

In November 2009 Windstream had submitted 11 FIT applications for wind power projects including an application for a 300 MW 130 turbine offshore wind project near Wolfe Island in Lake Ontario a short distance from Kingston. The Ontario Power Authority offered Windstream a FIT contract in May 2010 which Windstream signed in August of that year. Under the contract the OPA would pay Windstream a fixed price for power for 20 years. In total the contract was worth $ 5.2 billion.

During this period the Ontario Government was conducting a policy review to develop the regulatory framework for offshore wind projects including the proposed 5 km shoreline exclusion zone. The policy review ceased on February 11, 2011 when the Government of Ontario decided to suspend all offshore wind development until further research was completed

The main ground for the Windstream claim was that the Ontario decision was arbitrary and was based on political concerns that wind contracts would increase electricity rates. Windstream argued that the government really had no intention of pursuing scientific research.

Canada in response said that Ontario was entitled to proceed with caution on offshore wind development and that NAFTA does not prohibit reasonable regulatory delays.

The Claims

Windstream made a number of claims under the NAFTA The Most important (and the only one that succeeded) was a breach of Article 1105 (1), the Minimum Standard of Treatment provision, which reads:

> "Each Party shall accord to investments of nother Party treatment. In accordance with international law, including fair and equitable treatment and full protection and security"

The Tribunal noted that any judgement as to what is fair and equitable will turn on the facts of each case, stating at para 360 to 362:

> "360. Similarly, the Mondev tribunal observed:
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> "When a tribunal is faced with the claim by a foreign investor that the investment has been unfairly or inequitably treated or not accorded full protection and security, it is bound to pass upon that claim on the facts and by application of any governing treaty provisions. A judgment of what is fair and equitable cannot

7 That requirement was successfully challenged by Japan and Europe in WTO cases reporting amendments to the programme. WTO, Canada – Measures relating to the Feed-In Tariff Program (WT/DS 426/AB/R).

be reached in the abstract; it must depend on the facts of the particular case. It is part of the essential business of courts and tribunals to make judgments such as these. In doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts.

[T]he FTC interpretation makes it clear that that in Article 1105(1) the terms 'fair and equitable treatment' and 'full protection and security' are, in the view of the NAFTA Parties, references to *existing* elements of the customary international law standard and are not intended to add novel elements to that standard. The word 'including' paragraph (1) supports that conclusion. To say that these elements are included in the standard of treatment under international law suggests that Article 1105 does not intend to supplement or add to that standard. But it does not follow that the phrase 'including fair and equitable treatment and full protection and security' adds nothing to the meaning of Article 1105(1), nor did the FTC seek to read those words out of the article, a process which *would* have involved amendment rather than interpretation."

361. The Tribunal underwrites all of these observations, including in particular the *Mondev* tribunal's observation that "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[8] The Mondev tribunal rightly stressed that "[i]t is part of the essential business of courts and tribunals to make judgments such as these;" and that "[i]n doing so, the general principles referred to in Article 1105(1) and similar provisions must inevitably be interpreted and applied to the particular facts."[9]

362. In other words, just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, but in its application on the facts."

In finding that there was a breach the Tribunal questioned whether the real rationale for the moratorium was the need for more scientific research Just as important was the tribunal finding that Ontario made little if any efforts to accommodate Windstream and seemed to deliberately keep Windstream in the dark This is best set out in the decision at para 366 and 367:

"366. The Tribunal notes that following the signing of the FIT Contract on 20 August 2010, the position of the Government of Ontario grew gradually more ambiguous towards the development of offshore wind. Thus, while the Government appears to have envisaged still in August 2010 that

The relevant regulatory framework, including the setback requirements, would be in place possibly its position started changing in the fall of 2010. This change appears to have coincided with the receipt and analysis of the information generated through the EBR posting of 25 June 2010, which indicated an increasing resistance to the development of offshore wind.

367. It does not appear from the evidence that the various options that were being considered and the related concerns were

8 *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002 (CL-66), para 118.
9 *Ibid* at para 11.

> communicated to Windstream, either at the meetings between the government officials and Windstream representatives or otherwise. On 10 December 2010, Windstream delivered a force majeure notice to the OPA, effective from 22 November 2010, stating that MNR's failure to proceed with the permitting process, in particular the site release process, and MOE's failure to take steps to implement its policy proposal to create an exclusion zone, had prevented Windstream from progressing the Project in accordance with the FIT Contract.

The Tribunal concluded at para 377, 378 and 380:

> "377. At the same time, however, the evidence before the Tribunal suggests that the decision to impose the moratorium was not only driven by the lack of science. The impact of offshore wind on electricity costs in Ontario, as well as the upcoming provincial elections in November 2011, also appear to have influenced the decision, and the latter in particular in light of the public opposition to offshore wind that had emerged during the relevant period in many parts of rural Ontario (although not in Kingston, where the Project was located). Again, however, the Tribunal is unable to find, on the basis of the evidence before it, that these concerns were the predominant reason for the moratorium, or that the decision to impose the moratorium amounted to a breach of Article 1105(1) of NAFTA just because the Government failed to communicate these other concerns when imposing the moratorium.
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> 378. As to the period following the moratorium, the Tribunal notes that, while the MOE developed research plans relating to offshore wind, and while it appears that the Government did conduct some studies, the Government on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it had relied upon as the main publicly cited reason for the moratorium. Indeed, many of the research plans did not go forward at all, including some for lack of funding, and at the hearing counsel for the Respondent confirmed that Ontario did not plan to conduct any further studies. Nor have the studies that have been conducted led to any amendments to the regulatory framework.
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> 380. The Tribunal concludes that the failure of the Government of Ontario to take the necessary measures, including when necessary by way of directing the OPA, within a reasonable period of time after the imposition of the moratorium to bring clarity to the regulatory uncertainty surrounding the status and the development of the Project created by the moratorium, constitutes a breach of Article 1105(1) of NAFTA. It was indeed the Government of Ontario that imposed the moratorium, not the OPA, so it cannot be said that the resulting regulatory and contractual limbo was a result of the Claimant's own failure to negotiate a reasonable settlement with the OPA. The regulatory and contractual limbo in which the Claimant found itself in the years following the imposition of the moratorium was a result of acts and omissions of the Government of Ontario, and as such is attributable to the Respondent. The Tribunal therefore need not consider whether the conduct of the OPA during the relevant period must also be considered attributable to the Respondent."

There was a further claim by Windstream that Ontario had violated Article 1102 of NAFTA by granting Windstream less favorable treatment than was accorded to other entities in similar circumstances. It was argued that the treatment of Windstream was less favorable than the treatment Ontario granted to TransCanada. Both companies were parties to power purchase agreements with the OPA that guaranteed a fixed price for electricity. Both contracts had force majeure provisions. Both contracts were terminated. However, when Ontario terminated the TransCanada contract, Ontario awarded TransCanada a new project and compensated TransCanada for the costs of the cancellation. In contrast Ontario failed to do the same thing for Windstream following the moratorium.

The Tribunal rejected Windstream's argument noting that Article 1102 deals with national treatment and most favored nation treatment. However, the Tribunal concluded that TransCanada was not in like circumstances. Unlike TransCanada, Windstream had a FIT contract for offshore wind. TransCanada did not.

There is no question that the TransCanada project was different from the Windstream project. TransCanada had a contract with the OPA to build a gas generation plant in

Mississauga near Toronto. The local residents were not too happy and the Liberal government canceled the project in the heat of the provincial election. To keep TransCanada happy the OPA negotiated an agreement that reimbursed them for their costs and gave them a new contract in another area. The circumstances were different as was the government's response. In TransCanada there was extensive negotiation. In Windstream there was none. The Tribunal concluded that the two projects were totally different and therefore did not result in like circumstances. TransCanada was not even renewable energy which is the basis of all FIT contracts

Accordingly, the Tribunal ruled that the moratorium and related measures did not apply to TransCanada in the first place. TransCanada was not affected by the moratorium on offshore wind. Moreover the moratorium was not applied in a non-discriminatory manner because it resulted in the cancellation of all offshore wind projects. The problem was that Windstream had the only contract for offshore wind. The tribunal therefore concluded that it could not agree that Windstream had been treated less favorably than other developers of offshore wind.

Mesa Power

The decision of the NAFTA panel in *Mesa Power* is much different than *Windstream Energy.* Both involved claims under Article 1105 of the NAFTA. Both were heard in Toronto in 2016.

In 2011 Mesa Power Group, a US corporation owned by Texas oil tycoon T. Boone Pickens, filed a $700 million claim against Canada relating to the Province of Ontario's policy of awarding power purchase agreements under the Ontario feed in tariff program for the supply renewable energy.

Mesa claimed that Canada adopted discriminatory measures, imposed minimum domestic content requirements and failed to provide Mesa with the minimum standard treatment in violation of NAFTA's investment provisions. In the end the Tribunal dismissed all the Mesa's claims and ordered Mesa to bear the cost of the arbitration as well as a portion of Canada's legal costs of nearly $3 million.

Mesa argued that the reason it did not receive any FIT contracts was that the program was mismanaged and Mesa was discriminated against when Ontario granted unwarranted preferences to two other applicants. *Windstream* really turned on the legitimacy of the moratorium issued by Ontario to defer all offshore wind generation and the conduct of the Ontario government following the announcement of that moratorium.

The OPA launched the FIT program in October 2009. During the first round of contacts the OPA reviewed 337 applications and granted 184 contracts for a total of 2500 MW of capacity. The second round of contracts took place in February 2011. Fourty FIT contracts for a total of 872 MW were issued. The third round of contracting took place in July 2011 resulting in 14 contracts totaling 749 MW.

Mesa Power filed six applications under the FIT program but was unsuccessful in all three rounds of contracting. The problem was that all the MESA projects were located in Bruce County. In order to obtain a contract

all applicants had to demonstrate that they had the right to connect to the transmission system. Mesa was unable to obtain transmission connection due to the transmission constraints in Bruce County.

Mesa argued that the failure to acquire transmission access was to due flaws in the contracting process and preferences granted to two other parties, namely Next ERA Energy (an affiliate of Florida Light and Power) and the Korean Consortium led by Samsung.

Fair and Equitable Treatment

Mesa argued that this conduct amounted to a breach of Article 1105(1) of the NAFTA which reads:

> "Each Party shall accord to investments of investors of another Party treatment in accordance with International law, including fair and equitable treatment and full protection and security"

Before the Tribunal could determine if Canada had failed to grant Mesa Power fair and equitable treatment, the Tribunal had to define that term. The panel`s definition is set out in paragraphs 501, 502, 504, and 505 of the decision:

> "501. Having considered the Parties' positions and the authorities cited by them, the Tribunal is of the opinion that the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 110 This decision was cited with approval in the Claimant's submissions.[10] It was also quoted in the recent *Bilcon* decision,[11] with which the Claimant agrees,[12] in the following terms:
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> "The formulation of the 'general standard for Article 1105' by the *Waste Management* Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard based on its reading of NAFTA authorities:
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> [T]he 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.
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> Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case.'
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> While no single arbitral formulation can definitively and exhaustively capture the meaning of Article 1105, the Tribunal finds this quote from *Waste Management* to be a particularly apt one. Acts or omissions constituting a breach must be of a serious nature. The *Waste Management* formulation

10 *Mesa, supra* note 3 referring to the Memorial of the Investor (20 November 2013) at §361.
11 *Mesa, supra* note 3 at n 228: "The decision was also quoted in the cases relied on by the Respondent. See *Mobil Investments Inc & Murphy Oil Corporation v Government of Canada* (ICSID Case No ARB(AF)/07/4), Decision on Liability and on Principles of Quantum, 22 May 2012 ("Mobil"), §141; *Cargill Incorporated v United Mexican States* (ICSID Case No ARB(AF)/05/2), Award, 18 September 2009 ("Cargill"), §283."
12 *Mesa, supra* note 3 at n 229: "See Claimant's Submissions on *Bilcon v Canada* §§46-50 (setting out the Bilcon tribunal's decision on Article 1105 and stating that "[i]n this arbitration, the Investor made similar submissions […] advocating for the standard ultimately adopted in Bilcon.")".

applies intensifying adjectives to certain items—but by no means have all of them— in its list of categories of potentially nonconforming conducted. The formulation includes 'grossly' unfair, 'manifest' failure of natural justice and 'complete' lack of transparency.

The list conveys that there is a high threshold for the conduct of a host state to rise to the level of a NAFTA Article 1105 breach, but that there is no requirement in all cases that the challenged conduct reaches the level of shocking or outrageous behaviour. The formulation also recognises the requirement for tribunals to be sensitive to the facts of each case, the potential relevance of reasonably relied-on representations by a host state, and a recognition that injustice in either procedures or outcomes can constitute a breach."

502. On this basis, the Tribunal considers that the following components can be said to form part of Article 1105: arbitrariness; "gross" unfairness; discrimination; "complete" lack of transparency and candor in an administrative process; lack of due process "leading to an outcome which offends judicial propriety"; and "manifest failure" of natural justice in judicial proceedings.[13] Further, the Tribunal shares the view held by a majority of NAFTA tribunals[14] that the failure to respect an investor's legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached.

504. The threshold for a breach of Article 1105 is also relevant to the Tribunal's analysis. The Claimant does not appear to dispute – and rightly so – that the threshold for Article 1105 is high. Indeed, the three NAFTA Parties concur on this issue[15] and other Chapter 11 tribunals have come to the same conclusion.[16]

505. Finally, when defining the content of Article 1105 one should further take into consideration that international law requires tribunals to give a good level of deference to the manner in which a state regulates its internal affairs. Or, in the words of the *Bilcon* tribunal:

"Even when state officials are acting in good faith there will sometimes be not only controversial judgments, but clear-cut mistakes in following procedures, gathering and stating facts and identifying the applicable substantive rules. State authorities are faced with competing demands on their administrative resources and there can be delays or limited

13 *Mesa, supra* note 3 at n 231: "In a recent case, while interpreting Article 10.5 of the U.S.-Oman Treaty, which is similar to Article 1105 of the NAFTA, the tribunal described the scope and content of the customary international law standard of treatment as "a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law. Such a standard requires more than that the Claimant point to some inconsistency or inadequacy in Oman's regulation of its internal affairs: a breach of the minimum standard requires a failure, wilful or otherwise egregious, to protect a foreign investor's basic rights and expectations. It will certainly not be the case that every minor misapplication of a State's laws or regulations will meet that high standard." See *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No ARB/11/33), Award, 3 November 2015, §390".

14 *Mesa, supra* note 3 at n 232. See for instance *Waste Management, Inc v United Mexican States* (ICSID No ARB(AF)00/3), Award, 30 April 2004 at §96; *Cargill, supra* note 11 at §296.

15 *Mesa, supra* note 3 at n 234: "US Second Article 1128 Submission §20 ("Accordingly, there is a high threshold for Article 1105 to apply"); Mexico's Second Article 1128 Submission §8 ("[T]he threshold for establishing a breach of the minimum standard of treatment at customary international law is high."); Canada's Observations on the Bilcon §15; C-Mem. §394-402; Rej. §146."

16 *Mesa, supra* note 3 at n 235: "Bilcon §441; Exh. CL-194, International Thunderbird Gaming Corporation v. United Mexican States (UNCITRAL), Arbitral Award, 26 January 2006 ("International Thunderbird"), §§194, 197."

> time, attention and expertise brought to bear in dealing with issues. The imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard."

The Tribunal rejected all three claims that Mesa made that Canada that had breached the fair and equitable treatment provisions of Article 1105 of NAFTA.

The Tribunal rejected the allegation that the OPA had mismanaged the program and did not treat all applicants fairly noting that the OPA had retained an independent monitor to administer the FIT program.

The Tribunal also discounted the charge that NextEra had met with government officials noting that this was common practice in the industry and there was no evidence of any preference. NextEra was given access to transmission facilities in Bruce County at one point but apparently Mesa was also offered the opportunity.

The most contentious part of the Mesa allegations related to the Korean Consortium agreement. Mesa had argued that the agreement between Ontario and the Korean Consortium unfairly diminished the prospects for other investors including Mesa that were already participating in the renewable energy program by setting aside transmission capacity for the Korean Consortium that was intended for FIT applicants.

Mesa also argued that Ontario was less than transparent in negotiating the Agreement and issued inaccurate and incomplete information. Canada responded that there was nothing manifestly arbitrary or unfair when a government enters into an investment agreement which grants advantages to a investor in exchange for investment commitments.

Deference to Government Regulators

Deference is an important concept. In Canada and the United States courts routinely grant deference to both arbitrators[17] and regulators[18]. In investor state arbitrations arbitrators grant deference to governments particularly where those governments are carrying out a regulatory function where the public interest is the dominant test.

The Mesa Tribunal pointed to the deference which NAFTA Chapter 11 Tribunals usually grant to governments when it comes to assessing how governments regulate and manage their affairs. The Tribunal stated at para 553 of the decision:

> "553. In reviewing this alleged breach, the Tribunal must bear in mind the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs. This deference notably applies to the decision to enter into investment agreements.[19] As noted by the *S.D. Myers* tribunal, "[w]hen interpreting and applying the 'minimum standard', a Chapter Eleven tribunal does not have an open- ended mandate to second-guess government decision-making."[20] The tribunal in *Bilcon*, a case which the Claimant has cited with approval, also held that "[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach of the international minimum standard." [21]

Jurisdictions and Exceptions

A number of preliminary matters arose in *Mesa* regarding questions of jurisdiction and the

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17 *Moses H Cane Memorial Hospital v Mercury Construction,*460 US 1 (1983) at 24; *Dell Computer Corp v Union des consommateurs,* 2007 SCC 34,[2007]2 SCR 801; *Ontario Hydro v Dominion Mines Ltd,* (192 OJ 2848).

18 *McLean v British Columbia Securities Commission*, 2013 SCC 67, [2013] 3 SCR 895; *Chevron v Natural Resource Def Council,* 467 US 837; *Walton v Alberta Securities Commission,* 2014 ABCA 273 at para 17.

19 *Mesa, supra* note 3 at n 296: "The Claimant agrees with this position. See C-PHB §201 ("a tribunal's role is not to weigh the wisdom of the decision to enter an agreement, but to determine whether a government provided preferential treatment when it did so.")".

20 *Mesa, supra* note 3 at n 297: "SD Myers, §261".

21 *Mesa, supra* note 3 at n 298: "Bilcon §§437, 440. See also SD Myers §263; International Thunderbird §127 (a State "has a wide discretion with respect to how it carries out such policies by regulation and administrative conduct."

procurement exception under NAFTA.

The Mesa Tribunal agreed with Canada's claim that an investor cannot challenge pre-existing measures. Mesa had relied upon the domestic content requirements under the program as part of its claim. The tribunal found that these requirements were part of the fit program before the Mesa projects were initiated. As result the arbitrators did not have jurisdiction over that claim.

Another issue related to the status of the Ontario Power Authority. Canada agreed that the acts of the government of Ontario were attributable to Canada but did not agree that the OPA was a state agency. Accordingly Canada argued that the OPA was not subject to the Tribunal's jurisdiction. However the Tribunal ultimately found that the OPA was state enterprise and its acts were attributable to Canada.

The procurement exception NAFTA raised another issue. NAFTA provides that if the conduct at issue constitutes procurement by a state enterprise a number of the NAFTA obligations do not apply. Those include national treatment and most favored nation treatment. The exception was designed to ensure that NAFTA signatories retained the ability to include nationality-based preferences in their procurement programs. Despite Mesa's objection the majority of the tribunal ruled that the fit program was in fact procurement implemented by the OPA, a state enterprise. Accordingly the OPA's actions could not be challenged under the non-discrimination provisions of NAFTA.

In the end the Mesa case turned on the existence of fair and equitable treatment. The majority was not convinced that Next Era Energy had received the special deal that Mesa argued was the case. There was no question that Next Era received a number of FIT contracts totaling $3.8 billion in value. But the majority refused to agree that this resulted from collusion and discounted the contribution of $18,600 that Next Era made to the Liberal Party of Ontario.

The more contentious issue related to the Green Energy Investment Agreement or GEIA which Ontario and the Korea Electric Power Consortium entered in January 2010. There was no question that that agreement gave priority access to 2500 MW of generation capacity in Ontario and that the OPA was directed in September 2010 to reserve 500 MW of transmission capacity in Bruce region for the consortium.

Mesa saw preference as a red flag given that its lack of access to transmission capacity in Bruce County was the source of its problems. However the Tribunal refused to find that this amounted to discrimination. Arguably, this was a finer distinction but the majority ruled that the GEIA was not part of the FIT program. It was a totally separate deal - a one off agreement where the Korean Consortium received transmission capacity in exchange for an agreement to make a substantial investment in Ontario manufacturing.

Going Forward

It turns out that neither *Windstream* nor *Mesa* is over. There is no appeal under NAFTA but Mesa Power has filed an application for the vacatur before the District Court for the District of Columbia. Mesa claimed that the award constitutes a manifest disregard of the law. The argument seems to be that the majority relied too much on the deference that should be granted to the Government of Ontario instead of carefully examining the government's conduct, as the dissenting arbitrator did in finding that the Ontario's conduct violated NAFTA.

More recently Windstream filed a motion before the Ontario Supreme Court seeking to enforce the award against Canada. Canada responded that it intended to meet its obligations under NAFTA but Canada and Ontario had not been able to agree who should pay and when.

The arbitrations in the renewable energy cases around the world may raise serious questions as to whether arbitration is the best mechanism to resolve these disputes. The renewable energy cases present a unique opportunity for this type of analysis.

There are currently over 40 cases in five countries with essentially the same facts. A government has created incentives to attract investment in renewable energy. Investors have responded to those incentives. Governments then decided to eliminate the incentives either whole or in part because an oversupply of renewable energy resulted or voters and rate payers objected to the high cost of that energy.

These are difficult cases because arbitrators have considerable latitude in determining what conduct meets the standard of fair and equitable treatment and the legitimate expectations of the investors The real issue is whether the standard in international law is different than the powers a government can lawfully exercise under domestic law. Generally domestic law allows government's greater latitude.

The long established principle in NAFTA cases that Tribunals must grant government's wide discretion when they are exercising lawful regulatory jurisdiction adds to the difficulty. There is no longer a clear line between what is allowable under domestic law and what is allowable under international law and investor state treaties. The *Charanne, Windstream* and *Mesa* Tribunals all struggled with this distinction. ■