

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES, 1976**

between

MESA POWER GROUP, LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 6

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

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I. PROCEDURAL BACKGROUND

1. In their communications over the past two and a half months, the Parties have made several applications to the Tribunal. On 30 December 2013, recognising the urgency of the applications, the Tribunal conveyed its decisions on the then pending requests, advising the Parties that the reasons for its decisions would follow. This Order provides the reasons for the Tribunal's decisions of 30 December 2013. It also contains the Tribunal's decisions on the several requests made by the Parties since then.

II. THE REQUESTS

A. STRIKING PORTIONS OF THE CLAIMANT'S MEMORIAL AND THE ACCOMPANYING EXHIBITS REFERRING TO WITNESS TESTIMONY

1. The Respondent's position

2. In a communication of 9 December 2013, the Respondent requested the Tribunal to "strike the portions of the Claimant's Memorial and the accompanying exhibits that refer to witness testimony obtained and submitted by the Claimant contrary to the established procedures in this arbitration and to Canada's due process rights."
3. The Respondent submitted that in several instances, the Claimant had relied on witness testimony which it had obtained through its *ex parte* 1782 applications as the sole evidence of certain facts. In particular, it pointed out that the Claimant had relied on the testimony of Messrs Mawani and Edwards without submitting witness statements from these individuals. The Respondent (and subsequently the Tribunal) would therefore be unable to examine these individuals and assess their credibility, which would affect the Respondent's right to procedural fairness. According to the Respondent, admitting the evidence into the record would be contrary to the IBA Rules on the Taking of Evidence in International Arbitration (2010) ("the IBA Rules"), the Tribunal's earlier procedural orders, as well as the 1976 UNCITRAL Arbitration Rules ("the UNCITRAL Rules"). Finally, the Respondent stressed that it had consistently objected to the admissibility of witness testimony obtained through the 1782 process.

2. The Claimant's position

4. In its response of 16 December 2013, the Claimant replied that the Respondent had yet to file its defense and that document production vis-à-vis the Ontario Power

Authority and Hydro One was yet to be completed. Thus, it would be premature for the Tribunal to rule on the admissibility of the evidence in question at this stage. For the event that the Tribunal were nevertheless to make a decision, the Claimant pointed out that there were “a number of procedural safeguards available to [the Respondent] to ensure due process.” For instance, the Respondent could have participated in the 1782 proceedings and tested the credibility of the evidence. For the Claimant, there was no reason why it should be required to present the persons from whom the evidence originated as witnesses simply because it had produced documents containing information obtained from them.

5. In any event, according to the Claimant, the evidence at issue was not a “witness statement” as described in Section 13 of Procedural Order No. 1 (“PO 1”), but rather a “document” as described in Section 11 of PO 1. The Respondent had not presented any reason why this evidence would be inadmissible. It had challenged the evidence as whole, without objecting to its specific content. The Claimant further argued that the evidence in question was “clearly and directly” relevant to the dispute and necessary for it to make its case. It added that it was common practice for international tribunals to accept evidence of this nature.

3. Analysis

6. The Tribunal notes the Claimant’s submission that the evidence at issue is not intended to be used as testimony but rather as documentary evidence. Messrs Mawani and Edwards are thus not meant to be witnesses in this arbitration. Their evidence is to be treated like any other documentary evidence submitted by the Claimant in support of its submissions. For the Tribunal, no applicable rule excludes such evidence, and none appears to have been pointed out by the Respondent.
7. It follows from the above that there is no prohibition on either Party submitting witness evidence from another proceeding as an ordinary documentary exhibit in the present proceedings. It goes without saying that the Tribunal will assess the weight of that evidence taking into account other elements in the record as well as the fact that the persons making the statements have not appeared as witnesses and thus have neither been cross-examined nor questioned by the Tribunal. In addition, the Tribunal could always request that these persons be produced as witnesses, if it desires to do so. Finally, the Respondent could also challenge the evidence on any of the grounds mentioned in the IBA Rules (lack of relevance or materiality, etc.).

8. For all these reasons, the Tribunal denies the Respondent's request.

B. STRIKING PORTIONS OF THE CLAIMANT'S MEMORIAL AND THE ACCOMPANYING EXHIBITS REPRESENTING NEW ARGUMENTS RELATING TO THE RESPONDENT'S JURISDICTIONAL OBJECTIONS

1. The Respondent's position

9. In its communication of 9 December 2013, the Respondent objected to the inclusion of arguments relating to the Respondent's jurisdictional objections in the Claimant's Memorial. It submitted that "[by] introducing entirely new arguments on jurisdiction, the Claimant has failed to respect the procedural calendar, and has tried to circumvent the procedural rules set in place by the Tribunal." It contended that the Claimant had no right to supplement or modify its arguments on jurisdiction, and that the Respondent should not be required to answer to the Claimant's unauthorized submissions. Accordingly, the Respondent requested the Tribunal to strike the portions of the Memorial which dealt with the jurisdictional objections.

2. The Claimant's position

10. In its reply of 16 December 2013, the Claimant responded that the jurisdictional objections had been joined to the merits and that it was thus entitled to address jurisdiction in its Memorial. There was no provision prohibiting it from responding to the arguments which were added to the merits through Procedural Order No. 3 ("PO 3"). The Claimant added that the Respondent could not be prejudiced by learning of the Claimant's arguments on jurisdiction even before the Respondent had fully articulated its objections.

3. Analysis

11. Pursuant to the procedural calendar, the Claimant must submit its Memorial on Merits, which must be followed by the Respondent's Counter-Memorial on Merits and Reply on Jurisdiction ("the Counter-Memorial") and then by the Claimant's Reply on Merits and Rejoinder on Jurisdiction ("the Reply"). Thus, it appears that by including submissions on jurisdiction in its Memorial, the Claimant has acted out of turn; these submissions should have been made in the Reply (i.e. after the Counter-Memorial).
12. While this may be true, it is also true that in PO 3, the Tribunal held that the jurisdictional objections would be heard with the merits. No specific limitation was

imposed on the content of the Parties' pleadings, because the arguments raised by one Party could be rebutted by the other in its reply submission. The same applies here. The Respondent will not be prejudiced by having notice of the Claimant's submissions. It can fully address the Claimant's arguments in its Counter-Memorial to which the Claimant may then reply and the Respondent rejoin. This process will ensure that all the jurisdictional objections are adequately addressed and will facilitate the Tribunal's decision-making.

13. Therefore, the Tribunal denies the Respondent's request to strike the portions of the Claimant's Memorial that deal with the jurisdiction of the Tribunal.

C. ORDERING THE PRODUCTION OF DOCUMENTS RESPONSIVE TO THE RESPONDENT'S DOCUMENT REQUESTS NOS. 1, 2, 3, 4, 6 AND 10 AS THEY MAY RELATE TO THE AMERICAN WIND ALLIANCE

1. The Respondent's position

14. In its communication of 9 December 2013, the Respondent submitted that it had learned from the Memorial and accompanying documents that at the relevant time the Claimant did not fully own the entities in respect of which it claims damages. As a result, it submitted that the Claimant should be ordered to produce documents related to the American Wind Alliance ("AWA"), such documents being "relevant and material to assessing whether the Claimant wholly owned the four wind projects in Southern Ontario at the time of the alleged breaches of the NAFTA." The Respondent also submitted that "[the]documents [would be] relevant and material to whether the Claimant is entitled to seek [] damages allegedly incurred with respect to those projects."

2. The Claimant's position

15. In its submission of 16 December 2013, the Claimant responded that the existence of the AWA "[was] fully disclosed by [the Claimant] in its energy regulatory filings, as early as its Feed-In-Tariff application was available with Canada since 2009." The request was, therefore, untimely; it should have been made with the Respondent's earlier document production requests. Further, the Claimant noted that it bore the burden of proving its own damages and that "any failure to produce necessary documents would be material to [the Claimant], but not to Canada." Finally, it submitted that the request had not been made in accordance with the procedural directions (in the form of a Redfern Schedule) and that it did not meet the requirements of the IBA Rules (the

request was overbroad, production would be unduly burdensome for the Claimant, and the Respondent had not established that the documents are not within its possession, custody or control).

3. Analysis

16. The Tribunal notes that the Respondent knew or should have known of the existence of the AWA since 2009 at least. The Respondent should therefore have requested documents concerning the AWA in its initial document production request of 17 April 2013. It has not given a legitimate reason why it did not do so at the time. Further and in any event, the Tribunal recalls that in Procedural Order No. 4, it denied some of the Respondent's document requests on the basis that it was the Claimant who bore the burden of proving its own damages. Similarly here, the burden of producing evidence to establish ownership lies on the Claimant. It is for the Claimant to establish that it owned the investments in question and that it is entitled to claim damages in respect of those investments, which the Claimant has itself accepted. Accordingly, since no compelling reason has been advanced for not requesting responsive documents at the appropriate time and the burden lies on the Claimant to establish its damages, the Tribunal denies the Respondent's request for production.

D. ORDERING THE PRODUCTION OF ALL DOCUMENTS RESPONSIVE TO THE RESPONDENT'S DOCUMENT REQUESTS RELATED TO THE CLAIMANT'S CONTRACTS WITH GENERAL ELECTRIC

1. The Respondent's position

17. In its communication of 9 December 2013, the Respondent requested the Tribunal to direct the Claimant to produce all documents responsive to the Respondent's original document requests in connection with the Claimant's contracts with General Electric ("GE"). In particular, it requested (i) documents relating to negotiations with GE to secure domestic content manufacturing capacity (Request No. 40); (ii) the Option Contract with GE Energy LLC and all documents related to it, including Operations and Maintenance (O&M) agreements and precursor term sheets (Request No. 41); and (iii) documents relating to the cancellation of the Option Contract with GE Energy LLC (Request No. 42). It submitted that it was re-activating its earlier document requests (which had been partially granted by the Tribunal) because the Claimant's production was incomplete. Moreover, in its Memorial and accompanying expert report, the Claimant had made submissions which demonstrated that the original document requests were relevant and material.

2. The Claimant's position

18. In its response of 16 December 2013, the Claimant objected to the request for many of the reasons referred to above in connection with the previous requests (non-compliance with the procedural orders and the IBA Rules, etc.). In addition, the Claimant submitted that the request was untimely as the role of GE as a turbine supplier was known to the Respondent since the Notice of Arbitration. The Respondent itself had not disputed that it was aware of GE's role. Further, the Respondent had not made out a change in circumstances that would require a change in the procedural calendar established in PO 4.

3. Analysis

19. While it may be correct that the request was not made in accordance with the applicable procedural rules, the Tribunal believes that what really matters is whether the request has been made in a timely fashion and whether sufficient reasons exist to order production (relevance and materiality to the dispute etc.). The Tribunal now proceeds to examine each request on this basis.

(i) Documents relating to negotiations with GE to secure domestic content manufacturing capacity (Request No. 40)

20. The Respondent submits that the Claimant appears to have relied on a 2008 Master Turbine Sale Agreement as part of its claim for damages. It also submits that the Claimant has referred to a 2012 Master Turbine Sale Agreement in its claim. Neither of these agreements nor the change orders have been produced to the Respondent. Accordingly, the Respondent requests the Tribunal to order the Claimant to produce "all versions of the MTSA [and] all Change Orders". The Claimant replies that the 2009 MTSA (which has already been supplied to the Respondent) is the only relevant MTSA. The other documents do not relate to domestic content manufacturing capacity.
21. On the question of timeliness of the Respondent's requests, the Tribunal notes that until receipt of the Claimant's submissions, the Respondent was unaware of the existence of the 2008 and 2012 MTSA's. The Claimant has not alleged otherwise. Therefore, the request is timely.

22. On the question of relevance and materiality, the Tribunal recalls that in PO 4 the Tribunal accepted the Claimant's offer to produce the final agreement between Mesa and GE regarding domestic content manufacturing. It denied the remainder of the request as its relevance and materiality to the dispute had not been sufficiently demonstrated. Further, it observed that the Claimant's objections had not been convincingly rebutted, particularly the objections that only the final version of the agreement was relevant to the calculation of damages and that, in any event, it was for the Claimant to prove its damages. As a result, the Claimant produced the 2009 MTSA.
23. It now appears that the Claimant has relied on the 2008 MTSA as part of its claim for damages. Similarly, the 2012 MTSA has been "referenced" in the Claimant's damage presentation, which it has not denied.¹ As the 2008 and 2012 MTSAs have both been referred to in the claim for damages, which was the basis on which the Tribunal ordered production of the 2009 MTSA, the Tribunal grants the Respondent's request. The Claimant is to produce the 2008 and 2012 MTSAs and all related change orders (to the extent not already produced).

(ii) The Option Contract with GE Energy LLC and all documents related to it, including Operations and Maintenance (O&M) agreements and precursor term sheets (Request No. 41)

(iii) Documents relating to the cancellation of the Option Contract with GE Energy LLC (Request No. 42)

24. For both requests, the Tribunal remains unconvinced that it should order production as originally sought by the Respondent. First, the requests do not appear to be made in a timely fashion. Indeed, the examples on which the Respondent relies to explain why each request is timely concern the MTSA and not the option contract "and all documents related to it". To the Tribunal, unlike for the 2008 and 2012 MTSAs, the Respondent has not established any new circumstances that should cause the Tribunal to reconsider its decision on the Respondent's original document production request in respect of the option contract and its cancellation. Second, as observed in PO 4 and reiterated above, it is in any event for the Claimant to prove its alleged damages. Therefore, the Tribunal rejects these requests.

¹ See Claimant's communication of 16 December 2013 ("the independent valutors reviewed the 2012 document in the course of their valuation process").

E. ORDERING PRODUCTION OF THE EXCEL MODEL USED BY THE CLAIMANT'S EXPERTS

1. The Respondent's position

25. In its communication of 9 December 2013, the Respondent requested the Tribunal to direct the Claimant to provide the Respondent with the Excel model used by the Claimant's experts. It submitted that, while the experts had used such model in drawing up their conclusions, they had not disclosed the details of the formula which they had applied, nor had they explained how they performed certain calculations. The Respondent further submitted that the information used in the model was not privileged and that it would involve considerable expense for the Respondent to recreate the model.

2. The Claimant's position

26. In its response of 16 December 2013, the Claimant submitted that it was unaware of any proceedings in which this type of information was produced. In fact, the Respondent itself had refused to provide similar information in another case. According to the Claimant, the request was "both unnecessary and burdensome". It also pointed out that the Respondent's rights were not affected, as it could cross-examine the Claimant's experts at the hearing. In any event, the burden of proving its damages was on the Claimant.

3. Analysis

27. The Tribunal notes that the Claimant has not denied the existence of the model.² Neither has it denied its relevance and/or materiality or stated that it contains privileged information. To the Tribunal, it appears that the Claimant has not adequately met the main premise of the Respondent's request (that it requires the model to ascertain the formulae and calculations used by the Claimant's experts). Further, the Claimant has not contested that manipulation and verification of raw data is possible in the model itself. Unless it receives the model from the Claimant, the Respondent may have to recreate the model and may incur considerable expenses. No compelling reason has been advanced why the model prepared by the Claimant's experts should be duplicated by the Respondent (if at all possible), especially when there is no allegation

² In its letter of 3 December 2013 (Tab 4 to the Respondent's letter of 9 December 2013), the Claimant submitted that "[w]e did not receive schedules from the experts in excel format [] We do not have this information and we are not in a position to provide you with something new that we do not have ourselves." However, in its letter of 16 December 2013, the Claimant has not indicated that the excel model requested by the Respondent is not in its possession.

of privilege or challenge of relevance and materiality. For all the reasons, the Tribunal grants the Respondent's request.

F. THE CLAIMANT'S 1782 REQUESTS

28. On 28 August 2013, the Claimant sought leave of the Tribunal to proceed with its 1782 applications before the U.S. District Court for the Southern District of Florida (the "NextEra Application") and before the U.S. District Court for the District of New Jersey (the "Samsung Application", collectively the "Applications"). Thereafter, the Parties completed two rounds of submissions on the Applications. On 28 October 2013, the Tribunal directed the Claimant to file the actual applications which it intended to make in the US courts. These applications were eventually submitted on 11 December 2013, to which the Respondent commented on 20 December 2013. As mentioned above, on 30 December 2013 the Tribunal rejected the Claimant's request, specifying that it could be revived at a later stage.

1. The Claimant's position

29. For the NextEra Application, the Claimant sought leave of the Tribunal to seek an order from the U.S. District Court for the Southern District of Florida "to depose a corporate representative of NextEra in relation to documents produced by NextEra pertaining to meetings between NextEra and the Government of Ontario."³ It contended that many of the documents produced by NextEra as a result of the Section 1782 order issued by the U.S. District Court for the Southern District of Florida were technical in nature. A deposition was therefore needed to explain those documents. Evidence obtained from the deposition would also provide the Tribunal with a more complete picture of NextEra's relationship with the OPA. It insisted that the deposition sought was initially requested from the Court in December 2011. No new matter was thus being raised. The Magistrate Judge of the U.S. District Court for the Southern District of Florida had denied the Claimant's recent application for a deposition on the basis that it required prior authorization from the Tribunal, which was now being sought.

30. With respect to the Samsung Application, the Claimant observed that it had obtained evidence that Samsung had not complied with the terms of the Section 1782 order of the U.S. District Court for the District of New Jersey. The Claimant therefore sought

³ The Tribunal notes that in its communication of 28 August 2013, the Claimant had also sought leave of the Tribunal to request documents from NextEra. In its later communications, however, the Claimant limited its request to seeking leave to obtain a deposition of a NextEra representative.

leave of the Tribunal to “return to the local court so the local court can properly consider the matter of [Samsung’s] compliance with the local court order.” It emphasised that no new action was taken in the Court, nor was any additional documentary request made.

31. In respect of both Applications, the Claimant submitted that “[the 1782 process] is a separate process independent of the NAFTA arbitration. [It] supplements and supports the NAFTA arbitration. The evidence sought is in the possession of third parties that were directly involved with the matters in dispute, most of which cannot be obtained from Canada within the NAFTA process.” The Claimant submitted that, if granted, the Applications would obviate the Respondent’s difficulty in producing documents involving proprietary information from third parties.
32. Finally, the Claimant denied all of the Respondent’s objections reproduced below. It insisted that the information sought was relevant and material, that permitting US courts to assist in the evidence-gathering process was consistent with established arbitration practice, and finally that the Respondent would not suffer any prejudice if the information was produced.

2. The Respondent’s position

33. The Respondent objected to the request on several grounds. It submitted that the Applications were not specific as the Claimant had only provided the legal arguments it intended to make in the US courts without identifying the evidence sought. For instance, in the NextEra Application the Claimant had not mentioned the questions which it would pose to the representative of NextEra. Similarly, for the Samsung Application, it had not identified the documents requested from Samsung. Further, the Respondent pointed out that the subject matters of the evidence identified in the Applications resembled those of document requests for which the Tribunal had already denied *prima facie* relevance.
34. The Respondent further argued that the Applications were unnecessary. Neither the Respondent nor the OPA had yet had an opportunity to produce documents responsive to the Claimant’s requests. Until they did so, there was no reason to burden third parties with requests for documents. The Applications were also inappropriate as the Claimant had not indicated how the documents to be obtained through the Applications would be relevant and material to the present dispute. Further, the Applications were outside the procedures of this arbitration which allowed the Tribunal to subpoena

witnesses if necessary. Allowing the Applications would deprive the Tribunal of its “fundamental role of controlling the breadth and range of document disclosure” and would prejudice the Respondent’s due process rights to question witnesses who presented evidence in this arbitration.

3. Analysis

35. Among the various arguments advanced for and against the Claimant’s requests some of which have been reproduced above, the Respondent raised – and the Claimant did not convincingly rebut – that the Claimant should not be entitled to rely on an external evidence-gathering process at this early stage of these proceedings. Indeed, it is not established to the satisfaction of the Tribunal that the Applications are the only manner in which the evidence sought may be obtained at a time when not even the first round of submissions is completed.⁴ The Tribunal recalls that the Claimant’s Memorial on Merits has been filed and the Claimant must have received documents from the IESO and Hydro One (on 16 October and 16 December 2013 respectively). However, documents from the OPA (arguably the main entity involved in this case)⁵ are yet to be produced to the Claimant.⁶ Further, the Respondent’s Counter-Memorial on Merits and Reply on Jurisdiction is due on 28 February 2014.⁷ Thus, the record is still incomplete. The documents sought through the Applications may still be produced in the regular course of this arbitration. As long as this possibility exists, the Tribunal believes it should refrain from allowing the *ex parte* collection of evidence in different proceedings.
36. Further and in any event, the Applications do not appear to provide the information necessary to enable the Tribunal to determine whether the evidence sought is relevant and material to the issues in dispute. Besides providing a general overview of the

⁴ While arguing that the evidence that would be acquired from its 1782 Applications would be relevant and material, the Claimant itself seemed to recognise that the present stage of the arbitration was inapposite for the Tribunal to determine the issues in dispute, and to determine whether that evidence would be relevant and material (“[i]t is simply premature to determine the inadmissibility of a general class of evidence before we are aware of the extent of the issues in dispute and of the nature of the document production that will come from Canada under the existing set of Document Requests. An appropriate time [] would be once the evidence has been received and the issues in dispute are clearly set out by both sides, which would at the earliest occur after Canada’s Counter-Memorial is filed.”) (See Claimant’s communication of 16 December 2013).

⁵ See Claimant’s communication of 16 December 2013 (“Document production is still outstanding in connection to documents from the Ontario Power Authority, the public body directed by the Minister of Energy to carry out the key steps regarding renewable energy power purchase agreements ”)

⁶ They have been produced on 16 January 2014. However, since this Order provides reasons for the Tribunal’s rulings of 30 December 2013, it refers to the production from the OPA as forthcoming.

⁷ The Counter-Memorial has now been submitted. However, as mentioned above, this Order provides reasons for the Tribunal’s rulings of 30 December 2013 and therefore proceeds on the basis that the Counter-Memorial is forthcoming.

topics that are likely to be covered (some of which the Tribunal has denied in PO 4), the Claimant has not identified the evidence it seeks with any degree of specificity. In connection with Samsung, the Claimant merely seeks all documents responsive to the New Jersey Court's initial order. With respect to NextEra, the Claimant has not clearly indicated which questions it intends to ask in the deposition, nor does it explain how the questions may be relevant and material to the present dispute.

37. Finally, the Claimant does not seem to invoke any particular urgency. It could revive the Applications at a later stage when the record is more complete. At that stage, the Tribunal would be in a better position to determine relevance and materiality.
38. For the foregoing reasons, the Tribunal denies the Claimant's request to proceed with the Applications. The Claimant may reiterate these requests at a later stage if necessary. Having reached this conclusion, because it is not required to do so, the Tribunal does not comment on the other arguments made by the Parties in respect of the Applications.
39. The Tribunal notes that the Claimant designated portions of its correspondence and the text of the Applications as "Restricted Access" or "Confidential". In light of the Tribunal's decision to deny the Applications for the time being and considering that some of the information in question is allegedly protected from disclosure, the Tribunal allows the Claimant to withdraw the Applications and corresponding submissions from the record within seven days from the date of this order. Alternatively, the Claimant may comment on the Respondent's challenges to the designations in the Claimant's submission of 10 December 2013 within the same period.⁸

G. THE CLAIMANT'S RE-DESIGNATION OF INFORMATION AS CONFIDENTIAL IN ITS MEMORIAL

40. In its ruling of 16 December 2013, the Tribunal denied the Claimant's "Restricted Access" designations in respect of 11 pieces of information referred to in the Respondent's letter of 25 November 2013. However, the Tribunal gave leave to the Claimant to re-designate that information as "Confidential" information.

⁸ In its letter of 8 January 2014, the Tribunal noted that the Respondent had not objected to the Claimant's request of 2 January 2014 seeking an extension of the time limit for the Claimant to determine whether to withdraw its 1782 applications and corresponding submissions from the record. Therefore, the Tribunal granted the Claimant's request.

41. On 23 December 2013, the Claimant re-designated the information in question as “Confidential.” It claimed that the information was “financial and commercial information supplied by third parties that has been treated as confidential information by those parties” under the relevant provisions of the Confidentiality Order of 21 November 2012 (“the Confidentiality Order”).
42. On 3 January 2014, the Respondent challenged the Claimant’s re-designations by way of a chart explaining why each of the designations was inappropriate.
43. In its communication of 16 January 2014, the Claimant responded to each challenge in the form of a column in the Respondent’s chart. It stood by each of its designations, which it claimed were made in good faith and in accordance with the Tribunal’s rulings on confidentiality. However, because the Respondent had publicly released some information previously treated as confidential, the Claimant withdrew some of its confidential designations.
44. The Tribunal recalls that Article 1(b) of the Confidentiality Order defines “confidential information” as follows:
 - i. business confidential information;
 - ii. business confidential information relating to a third party;
 - iii. information otherwise protected from disclosure under the applicable domestic law of the disputing State party; and
 - iv. commercial, scientific or technical information supplied by third parties that has been treated as confidential information by those third parties.”
45. Article 1(c) of the Confidentiality Order then defines “business confidential information” as:
 - i. trade secrets;
 - ii. financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
 - iii. information the disclosure of which could result in material financial loss or gain to the disputing party to which it relates; and
 - iv. information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates. ”

46. Keeping these definitions as well as its previous rulings on confidentiality in mind,⁹ the Tribunal has reviewed each of the Claimant's designations. The Tribunal's determination in respect of each designation is contained in Annex A hereto, which forms an integral part of the present Procedural Order.

H. OTHER DESIGNATIONS IN THE MEMORIAL

47. In its communication of 20 December 2013, the Respondent objected to some of the Claimant's designations in its Memorial on the basis that they were "inappropriate and inconsistent with the Tribunal's Confidentiality Order." The Respondent challenged the designations by way of a chart explaining why each of the Claimant's designations were inappropriate.
48. In its response of 9 January 2014, the Claimant "declassified" 60% of the challenged designations. However, it maintained its position on the remaining designations, which "had been made in good faith and in a manner consistent with the terms of the Confidentiality Order". Its specific responses to each of the Respondent's challenges were contained in a column in the Respondent's chart.
49. The Tribunal's determination in respect of each requested designation is contained in Annex B hereto, which forms an integral part of the present Procedural Order.

I. DESIGNATIONS OF THE CLAIMANT'S EXHIBITS

1. The Respondent's position

50. In its communications of 20 December 2013 and 20 January 2014, the Respondent observed that, in contravention with the provisions of the Confidentiality Order, the Claimant had labelled the top of over 100 exhibits as either confidential or restricted access without identifying the information in the exhibits allegedly satisfying these designations. In the circumstances, the Respondent requested the Tribunal to "determine that none of the exhibits submitted by the Claimant to date contain any restricted access information"; to "order the Claimant to adhere to paragraph 2 of the Confidentiality Order and to specifically identify by enclosing in brackets, or using other

⁹ For instance in PO 4 the Tribunal observed: "[i]n determining a disagreement between the Parties as to the designation of information as "Confidential", the Tribunal must apply the terms of the Confidentiality Order. Of course, in applying the Confidentiality Order, the Tribunal should not adopt a formalistic approach; it should rather consider on a case-by-case basis whether the nature of the information at issue is such that it falls within the scope of the Order."

similar means, the specific information in its exhibits which it alleges is confidential information”; and to “allow the Respondent to review the specific designations of information as confidential in the Claimant’s exhibits once they have been appropriately filed.”

51. In response to the Claimant’s objections (below), the Respondent submitted that the Claimant’s position was inconsistent with the terms of the Tribunal’s Orders and that it would frustrate the ability to have a public hearing. It submitted that a correct interpretation of PO 1 and of the Confidentiality Order would lead to the inclusion of exhibits and expert reports as within “written submissions”, with the result that the provisions of the Confidentiality Order apply to both exhibits and expert reports as well. It also pointed out that the Claimant contradicted its earlier position where it had argued that the Confidentiality Order also applied to documents exchanged between the Parties. Finally, if, as the Claimant contended, the Confidentiality Order did not apply to exhibits, then there would be no obligation on the Parties to designate them as “Restricted Access” or “Confidential” at all.

2. The Claimant’s position

52. In its communications of 9 and 24 January 2014, the Claimant objected to the Respondent’s requests because it was “at odds with longstanding established arbitration practice as well as with the terms of the Confidentiality Order” and because “[s]uch approach would be unusual, highly burdensome, costly and could result in significant delay”. It pointed out that the Confidentiality Order regulated only “written submissions”. Thus, exhibits and expert reports, which were evidence and not “written submissions”, did not fall within the ambit of the Order. Further, it submitted that the Respondent had itself required two opportunities to identify some information as confidential which demonstrated that it would be cumbersome and problematic to apply the Confidentiality Order to exhibits.
53. In response to the Respondent’s submissions (above), the Claimant argued that the Respondent’s interpretation of the term “written submissions” was at odds with the understanding conveyed by the Tribunal at the procedural hearing. Moreover, several other tribunals had limited written submissions to memorials.

3. Analysis

54. The Confidentiality Order defines “Restricted Access” and “Confidential” information, and provides a mechanism for designating such information when contained in a “written submission”. The Parties disagree on whether exhibits and expert reports are “written submissions” under the Confidentiality Order.
55. The Tribunal recalls that the Confidentiality Order does not define the term “written submissions.” However, paragraph 10 of PO 1 entitled “Written Submissions” provides the following procedure for filing “written submissions”:
- “On the date on which the submission is due, the relevant Party shall submit an electronic version of its *written submissions, including its briefs, memorials, expert reports and witness statements, and an index of its exhibits* and legal authorities by e-mail (preferably, in MS Word format or “searchable” PDF format) to the other disputing party, to the Registry and to each arbitrator. Together with or within three days following the filing of its written submissions by e-mail, the submitting Party shall send by post or courier one copy of their *written submissions (without exhibits or legal authorities)* if possible in mini-bundle format and one copy of its exhibits in standard letter size to the other disputing party, to the Registry, and to each arbitrator as well as two copies to the President.”
56. The first reference specifies that written submissions must be filed by email including, in particular, expert reports and an index of exhibits. The second reference specifies that written submissions must then be filed by post or courier, whereby exhibits must not be filed in mini-bundles but in standard letter size. Accordingly, exhibits and expert reports are both “written submissions” governed by the Confidentiality Order. A Party wishing to designate information contained in its exhibits and expert reports as “Restricted Access” or “Confidential” must thus follow the procedure of the Confidentiality Order.
57. Further, it appears to the Tribunal that the Claimant’s position is somewhat inconsistent. On the one hand, it seeks the application of the Confidentiality Order to its exhibits and expert reports and has labelled them as “Restricted Access” / “Confidential”. On the other hand, it claims that the Order does not apply to exhibits and expert reports.
58. Finally, the Tribunal is aware that the Claimant relies on statements made by the Presiding Arbitrator at the procedural hearing. Upon a review of the transcript, the dialogue at the hearing does not appear conclusive.

59. For all these reasons, the Tribunal cannot follow the Claimant's position. The Respondent has requested the Tribunal to "determine that none of the exhibits submitted by the Claimant to date contain any restricted access information." Yet, the Tribunal cannot rule out that some information in the exhibits satisfies the requirements of "Restricted Access" information under the Confidentiality Order. Therefore, the Tribunal directs the Claimant to designate specific information in its exhibits which it alleges is "Restricted Access" or "Confidential" in accordance with the provisions of the Confidentiality Order within 10 days of this Order. The Respondent may then object to those designations (if at all) within a period of 10 days thereafter .
60. Finally, the Tribunal notes that in its letter of 16 January 2014, the Claimant requested the Tribunal to direct the Respondent to produce an un-redacted copy of Document 032013. This request was not pursued in the later correspondence between the Parties. Consequently, the Tribunal considers that no directions are required on this issue at present.

J. ENTIRE TRANSCRIPT OF DEPOSITION OF COLIN EDWARDS

1. The Respondent's position

61. In its communication of 3 January 2014, the Respondent requested the Tribunal to direct the Claimant to submit the entire transcript of the deposition of Mr. Colin Edwards ("the Transcript") into the record. It pointed out that the Claimant had only produced excerpts of the Transcript that suited its case. The full Transcript was necessary to ensure that it could be assessed accurately.

2. The Claimant's position

62. In its response of 16 January 2014, the Claimant opposed the Respondent's request. It contended that there was nothing improper in relying on an extract of the Transcript – the applicable procedural rules themselves contemplated the submission of extracts of exhibits. Further, it submitted that the request was untimely – it should have been made together with the Respondent's other document production requests. It argued that the reason why the Respondent did not have the Transcript was because it had refused to participate in the Section 1782 process as an interested party. Finally, it noted that the request did not meet the requirements of the applicable procedural rules; and suggested that it would be more appropriate for the Respondent to make its request after submitting its Counter-Memorial.

3. Analysis

63. As mentioned above (¶ 19), while it may be correct that the request was not made in accordance with the applicable procedural rules, what really matters is whether the request has been made in a timely fashion and whether sufficient reasons exist to order production (relevance and materiality to the dispute, etc.).
64. On timeliness, the Tribunal recalls that its decision to deny the Respondent's request to strike the extract of the Transcript from the record was conveyed to the Parties on 30 December 2013. Thus, it was only then that the Respondent became aware that the Transcript would be retained in the record. It then requested the entire deposition three days later on 3 January 2014. In the circumstances, the Tribunal cannot agree that the request is untimely. In fact, the Claimant itself does not explain how the request could have been made earlier.
65. On relevance and materiality, the Tribunal notes that the Claimant has not itself specifically contested the relevance and materiality of the Transcript. Further, the Tribunal believes that it would be advisable to have the full Transcript to ensure that it can be assessed accurately. In the circumstances, the Tribunal orders the production of the entire transcript of the deposition of Mr. Colin Edwards.

K. DOCUMENT PRODUCTION FROM HYDRO-ONE

1. The Claimant's position

66. In its communications of 24 December 2013 and 16 January 2014, the Claimant requested the Tribunal to strike the confidentiality designation affixed on documents by Hydro One and to direct the Respondent to produce all documents involving Hydro One that it had withheld from production, failing which it should draw an adverse inference.
67. On the first request, the Claimant submitted that the Respondent's confidentiality designations were contrary to the Tribunal's procedural orders because "[the Respondent had] not engaged in any independent analysis and demonstrated why Hydro One's designations should be followed." According to the Claimant, the onus was on the Respondent to establish that the designations satisfied the requirements of the Confidentiality Order "and mere assertions without any grounding in fact will not stand."

68. On the second request, the Claimant submitted that the Respondent despite being responsible for Hydro One, had suppressed relevant and responsive documents involving Hydro One. As Hydro One was a “state-enterprise” controlled by the Government of Ontario or otherwise was an “instrument” of the Government, it “[was] not an ordinary third-party to this arbitration”. Relying on the provisions of the NAFTA, the Vienna Convention on the Law of Treaties, and domestic legislation like the NAFTA Implementation Act, the Claimant submitted that “there [was] no proper basis” for the Respondent not to produce responsive documents. In particular, it denied the Respondent’s submission that Hydro One could not supply responsive documents because it was prohibited from doing so by the applicable legal framework. Even if that framework was found to apply, there were exceptions within which documents could still be produced by Hydro One.

2. The Respondent’s position

69. In its communications of 3 and 24 January 2014, the Respondent opposed the Claimant’s submissions, essentially because they were contrary to the Tribunal’s earlier procedural orders.

70. On the first request, the Respondent submitted that two documents produced by Hydro One contained information that had been designated as confidential in accordance with the Confidentiality Order. It added that the Claimant had misunderstood the Order and had not challenged the designations on the basis that the information contained therein did not meet the requirements of Confidentiality Order, but only on the basis that the designations had been made by Hydro One and simply reproduced by the Respondent.

71. On the second request, the Respondent argued that questions of its responsibility for the acts of Hydro One were irrelevant for purposes of document production. The Respondent was to use its “best efforts” to produce documents from Hydro One, which it had done. Both itself and Hydro One had done everything possible to produce the documents ordered by the Tribunal. The Respondent further contended that Hydro One was prevented from disclosing information relating to third parties who had refused to grant their consent. Neither of the exceptions cited by the Claimant applied here.

3. Analysis

72. On the first request, the Tribunal notes that the Claimant has only challenged the designations in question because they were made on the basis of input from Hydro

One. Although it had the opportunity to do so, the Claimant did not challenge the substance of the requests. It did not dispute the Respondent's specific submission that the technical information contained in the designations complies with paragraphs 1(b)(ii) and 1(b)(iv) of the Confidentiality Order.

73. The Tribunal recalls that in PO 4 it observed that the Claimant had not shown why the designation of a third party should have an effect in this arbitration. It denied the Claimant's designations on the basis that it was not established that the information at issue fell within the ambit of the Confidentiality Order. Further, in its decision of 16 December 2013, the Tribunal observed that when a designation is challenged by one Party, the other Party must establish that its designations comply with the requirements of the Confidentiality Order. It follows that a Party cannot rely on a third party's designation for its designation to be upheld. The Party making the designation must demonstrate that the information satisfies the requirements of the Confidentiality Order. In the present case, when the confidentiality designation was challenged, the Respondent submitted that the information contained preliminary confidential application data relating to FIT projects. It explained that it had not relied on the designation provided by a third party and that the information satisfied the requirements of the Confidentiality Order. The Claimant did not dispute this part of the Respondent's submission. In these circumstances, the Tribunal denies the Claimant's request.
74. On the second request, the Tribunal recalls that in PO 4 it observed that the Parties "should also use their *best efforts* to produce responsive documents which may be in the possession, custody or control of third parties with which the disputing parties have a relationship." It observed that the Respondent was to use its best efforts to produce all documents of Hydro One. Later in PO 5, the Tribunal observed that "Hydro One [was not] within [...] direct reach. This is the reason why in PO 4 the Tribunal did not require production directly [...], *but instead requested the Respondent to use its best efforts to ensure production.*" The Respondent has submitted that it used its best efforts to produce responsive documents. The Tribunal sees no reason to doubt the Respondent's submission. In the circumstances, the Tribunal finds itself unable to impose document production obligations on the Respondent in respect of documents from Hydro One.
75. The Tribunal is aware of the Claimant's submission that because of the "special" relationship between the Respondent and Hydro One, the latter is something more than an "ordinary" third party to the proceedings such that the Tribunal can exert

authority over it and compel it to produce responsive documents. The Tribunal does not see why that should be the case. Whatever may be the relationship between the Respondent and Hydro One – an issue on which the Tribunal does not need to comment at present – it remains that Hydro One is not a formal Party in this arbitration so that the Tribunal can exercise control over it and require it to produce documents that may be in its possession, custody or control. For all these reasons, the Tribunal denies the second request.

76. In any event, the Tribunal notes that Hydro One has refused to produce some documents on the ground that the applicable legal framework prevents it from voluntarily producing confidential information that belongs to third parties. It was known since 2 August 2013 when the Respondent so advised the Tribunal that the consent of third parties may be needed. The Claimant did not object at the time. Again in PO 5, the Tribunal noted that: “[...] Hydro One [...] may have to review a large number of documents, determine for each one whether it is responsive and whether it contains third party confidential information, *in which case they would have to seek that third party’s consent and, if obtained, then produce the document.*” At that stage too, the Claimant did not appear to raise any objections. Therefore, the Claimant cannot now be heard to say that it is prejudiced by the lack of production because third parties have withheld their consent.
77. In respect of the Claimant’s request to draw adverse inferences, the Tribunal reiterates its statements in PO 5: “at the present stage [...] the Tribunal considers it premature to make any determination concerning adverse inferences. The Parties are obviously at liberty to request that adverse inferences be drawn in the further course of the proceedings with respect to specific documents which have not been produced although their production was ordered.”

L. SUSPENSION OF THE CONFIDENTIALITY ORDER FOR THE RESPONDENT’S COUNTER-MEMORIAL AND SUPPORTING DOCUMENTS

78. In its communication of 27 February 2014, the Respondent requested the Tribunal to suspend paragraphs 2 and 3 of the Confidentiality Order in respect of the Respondent’s Counter-Memorial and supporting documents pending the resolution by the Tribunal of the outstanding disputes as to the Claimant’s application of the Confidentiality Order. On the same date, the Tribunal granted the suspension sought.

The Claimant commented on the Respondent's request in its communications of 27 February 2014 and 3 March 2014.

79. The Tribunal has now decided the pending disputes in connection with the Claimant's application of the Confidentiality Order. In light of its decisions, the Tribunal believes that it would be prudent for the Claimant to file a revised version of its Memorial and supporting documents complying with the Tribunal's decisions and reflecting the designations that the Claimant had withdrawn, something to which the Claimant does not appear to have objected.¹⁰ On receipt of the Claimant's revised submission, the Respondent will then appropriately identify the confidential information in its Counter-Memorial and supporting documents and produce a public version. The Claimant may then, if it so wishes, designate additional confidential and restricted access information in the Respondent's submissions and/or challenge the Respondent's designations.

III. OTHER MATTERS

80. In its communication of 14 January 2014, the Tribunal noted that the Claimant had not objected to the six business day extension sought by the Respondent to file its Counter-Memorial. Accordingly, the Tribunal granted the extension allowing the Respondent to make its submission by 28 February 2014 and extending the time limits for the subsequent submissions by the same period. A revised calendar reflecting these changes is attached as Annex C hereto.
81. To expedite the designation process, the Tribunal had directed the Parties to raise all challenges within a period of 10 days (rulings of 16 December 2013). To further assist the process, all future challenges should be made in a tabular form (an example of which appears at Annex D hereto), and sent to the Tribunal in MS Word format.

¹⁰ In its communication of 27 February 2014, the Respondent requested the Tribunal to direct the Claimant to file a revised version of its Memorial and supporting documents complying with the Tribunal's decisions and reflecting the designations that the Claimant had withdrawn. In its communication of the same day, the Claimant did not object to the Respondent's request. On the next day, the Tribunal requested the Claimant to confirm by 3 March 2014 whether its communication should be considered as a full response to the Respondent's communication of 27 February 2014. In its communication of 3 March 2014, the Claimant once again did not object to the Respondent's request concerning resubmission of the Claimant's Memorial and supporting documents. In the circumstances, the Tribunal understands that the Claimant does not oppose the Respondent's request.

IV. DECISION

82. In respect of requests (A)-(F), the Tribunal reproduces its decision, which was conveyed to the Parties on 30 December 2013:

"[...] the Tribunal:

- i. Denies the Respondent's request to strike portions of the Claimant's Memorial (¶¶517, 544, 558, 559, 560, 562, 574, 578, 580, 593, 612, 613, 615, 616, 617, 620, 622, 623, 625, 627 and 773, and Exhibits C-0184 (Declaration of Mr. Edwards), C-0131, C-0199, C201, C-0216, C-0222, C-0224, C-0229, C-404, C-0407, C-408, C-410 (excerpts of Transcript of Mr. Edwards), and Exhibit C-0406 (Declaration of Mr. Mawani);
- ii. Denies the Respondent's request to strike Part V, Jurisdiction, of the Claimant's Memorial;
- iii. Denies the Respondent's request to order the production of documents responsive to the Respondent's Document Requests Nos. 1, 2, 3, 4, 6 and 10 as they may relate to American Wind Alliance;
- iv. Orders the Claimant to produce the 2008 and 2012 MTSAs and all related change orders (to the extent not already produced), under the Respondent's Document Production Request No. 40, by 8 January 2014;
- v. Denies the Respondent's request to order the production of all documents responsive to the Respondent's Document Requests Nos. 41 and 42; and
- vi. Directs the Claimant to produce the Excel model that Messrs Taylor and Low used to create the Schedules in their Report by 8 January 2014;
- vii. Denies, for the time being, the Claimant's request to approve the applications which the Claimant proposes to make in the U.S. District Court for the District of New Jersey and the U.S. District Court for the Southern District of Florida. The Claimant may revive its request at a later stage;
- viii. In light of (vii) above, grants the Claimant until 8 January 2014 to withdraw such applications and corresponding submissions from the record. Alternatively, the Claimant may comment on the Respondent's challenges to the designations in the Claimant's submission of 10 December 2013 within the same period;
- ix. Directs the Claimant to comment on the Respondent's challenges to the Claimant's designations in the Claimant's Memorial and in the Witness Statement of Cole Robertson by 8 January 2014. Such comments shall be made in the form of a column next to the last column in the chart annexed to the Respondent's submission of 20 December 2013;
- x. Directs the Claimant to comment on the Respondent's challenges to the Claimant's designations in the exhibits submitted by the Claimant by 8 January 2014;
- xi. Notes the Respondent's statement that it does not seek to designate any further information in the Claimant's Memorial and accompanying witness statement of Cole Robertson and expert report of Messrs Low and Taylor as confidential information;

- xii. Subject to compelling reasons to the contrary provided by the Claimant by 8 January 2014 grants the 6 business-day extension sought by the Respondent for filing its Counter-Memorial. The time-limits for the subsequent submissions shall be extended by the same period;

[...].”

As mentioned above (¶ 39), item (viii) was subsequently modified. The Claimant may withdraw the applications and corresponding submissions from the record within 7 days from the date of this order. Alternatively, the Claimant may comment on the Respondent’s challenges to the designations in the Claimant’s submission of 10 December 2013 within the same period.

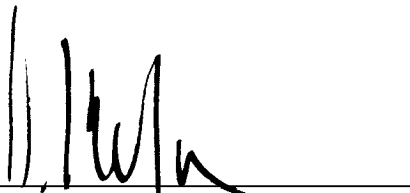
83. In addition, for the reasons set out above, the Tribunal:
- i. Decides request (G) in connection with the Claimant’s re-designation of information in its Memorial as confidential information, as stated in Annex A, which forms an integral part of this Order;
 - ii. Decides request (H) in connection with the Claimant’s other designations in its Memorial as stated in Annex B, which forms an integral part of this Order;
 - iii. In respect of request (I) in connection with the Claimant’s designations of its exhibits:
 - a. Denies the Respondent’s request to determine that none of the exhibits submitted by the Claimant to date contain any restricted access information;
 - b. Directs the Claimant to designate specific information in its exhibits which it alleges is “Restricted Access” or “Confidential” in accordance with the provisions of the Confidentiality Order within 10 days from the date hereof being specified that the Respondent may then object to those designations (if at all) within a period of 10 days thereafter;
 - iv. Grants request (J) in connection with the Respondent’s request to order the production of the entire transcript of the deposition of Mr. Colin Edwards. The transcript should be produced within a period of 7 days from the date of this order;
 - v. Denies request (K) in connection with the Claimant’s requests in respect of production from Hydro One;
 - vi. In respect of request (L) in connection with the suspension of the Confidentiality Order, directs the Claimant to submit within a period of 7 days from the date of this order a corrected version of its Memorial and supporting documents complying with the Tribunal’s decisions and reflecting the designations that the Claimant has withdrawn. Within a period of 10 days thereafter, the Respondent shall appropriately identify confidential information in its Counter-Memorial and supporting documents and produce a public version. The Claimant may then, if it so wishes, designate additional confidential and restricted access information in the Respondent’s submissions and/or challenge the Respondent’s designations.;

- vii. Directs the Parties to follow the calendar set forth in Annex C to this Order, unless either Party objects to any specific date within 7 days from the date hereof;
- viii. Directs that challenges to a designation made by a Party should be challenged by the other Party (if at all) within a period of 10 days from the designation in the form described above (¶ 81);
- ix. Reserves all questions of costs for subsequent determination.

Seat of arbitration: Miami, Florida, U.S.A

5 March 2014

For the Arbitral Tribunal:



Prof. Gabrielle Kaufmann-Kohter
President of the Arbitral Tribunal

