

Third-Party Information Liability Disclaimer

Some of the information on this Web page has been provided by external sources. The Government of Canada is not responsible for the accuracy, reliability or currency of the information supplied by external sources. Users wishing to rely upon this information should consult directly with the source of the information. Content provided by external sources is not subject to official languages, privacy and accessibility requirements.

Désistement de responsabilité concernant l'information provenant de tiers

Une partie des informations de cette page Web ont été fournies par des sources externes. Le gouvernement du Canada n'assume aucune responsabilité concernant la précision, l'actualité ou la fiabilité des informations fournies par les sources externes. Les utilisateurs qui désirent employer cette information devraient consulter directement la source des informations. Le contenu fourni par les sources externes n'est pas assujéti aux exigences sur les langues officielles, la protection des renseignements personnels et l'accessibilité.

PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE

PROF. GABRIELLE KAUFMANN-KOHLER

THE HONORABLE CHARLES N. BROWER

MR. TOBY T. LANDAU QC

held at Arbitration Place

333 Bay Street., Suite 900, Toronto, Ontario
on Thursday, October 30, 2014 at 9:04 a.m.

VOLUME 5

PUBLIC ONLY

A.S.A.P. Reporting Services Inc.© 2014

1105-200 Elgin Street	900-333 Bay Street
Ottawa, Ontario K2P 1L5	Toronto, Ontario M5H 2T4
(613) 564-2727	(416) 861-8720

1 APPEARANCES:

2

3 Barry Appleton For the Claimant

4 Dr. Alan Alexandroff

5 Kyle Dickson-Smith

6 Celeste Mowatt

7 Sean Stephenson

8 Edward Mullins

9 Sujey Herrera

10 Shane Spelliscy For the Respondent

Heather Squires

11 Raahool Watchmaker

Laurence Marquis

12 Susanna Kam

Rodney Neufeld

13

Also Present:

14 Alicia Cate

Jennifer Kacaba

15 Saroja Kuruganty

Lucas McCall

16 Alex Miller

Harkamal Multani

17 Darian Parsons

Adriana Perez-Gil

18 Melissa Perrault

Chris Reynolds

19 Cole Robertson

Sejal Shah

20 Michael Solursh

Mirrun Zaveri

21

22 Teresa Forbes, CRR, RMR, CSR Court Reporter

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

INDEX

PAGE

AFFIRMED: ROBERT LOW	5
Examination In-Chief by Mr. Appleton	5
Cross-Examination by Mr. Watchmaker	30
Re-Examination by Mr. Appleton	88
Questions by the Tribunal	106
AFFIRMED: CHRISTOPHER GONCALVES	136
Examination In-Chief by Mr. Watchmaker	136
Cross-Examination by Mr. Appleton	156
Questions by the Tribunal	204
Procedural Matters	221

1 Toronto, Ontario

2 --- Upon resuming on Thursday, October 30, 2014

3 at 9:04 a.m.

4 THE CHAIR: The silence shows that
5 everyone is ready to start day 5 of this hearing.
6 Good morning to everyone.

7 Good morning, Mr. Low. You have
8 been with us for a few days already, so you know
9 how this proceeds. Can you confirm that you are
10 Robert Low?

11 THE WITNESS: Yes, I can.

12 THE CHAIR: Yes, good. You are
13 executive advisor in evaluation district services
14 group of Deloitte in Toronto; is that right?

15 THE WITNESS: That's correct.

16 THE CHAIR: You have provided two
17 expert reports. One was dated November 18, 2013
18 and the other one April 29, 2014.

19 THE WITNESS: That's also correct.

20 THE CHAIR: That's correct. And
21 you know that you're heard as an expert witness in
22 this arbitration. As an expert witness you are
23 under a duty to make only such statements that are
24 in accordance with your belief. Can you please
25 confirm that this is what you intend to do?

1 THE WITNESS: I can.

2 AFFIRMED: ROBERT LOW

3 THE CHAIR: Thank you. I will now
4 turn to Mesa's counsel, Mr. Appleton, for direct
5 questions.

6 EXAMINATION IN-CHIEF BY MR. APPLETON AT 9:05 A.M.:

7 Q. Testing. Excellent. That
8 technology works. Good morning, Mr. Low.

9 A. Good morning.

10 Q. Mr. Low, as you confirmed to
11 the president this morning, you have submitted two
12 expert reports in this arbitration with Mr. Richard
13 Taylor. Who is Mr. Richard Taylor?

14 A. Mr. Richard Taylor is a
15 partner at Deloitte who leads the valuation
16 practice in the greater Toronto area, and Richard
17 and I have worked together for about 25 years at
18 the various firms that we have both worked at.

19 Q. What type of qualifications
20 does Mr. Taylor have?

21 A. Mr. Taylor's qualifications
22 are virtually identical to mine, chartered
23 accountant, chartered business valuator.

24 Q. Now further to the Tribunal's
25 direction, can you confirm that your working file

1 has been brought with you to the arbitration?

2 A. Yes.

3 Q. Great. Let's talk a little
4 bit about your qualifications and your curriculum
5 vitae, which is in appendix D to your first report.
6 You can look at, if you like. I am sure you
7 probably know.

8 You are an executive advisor in
9 the Deloitte financial advisory group, and before
10 that you were a partner at Deloitte. Is that
11 correct?

12 A. That's correct. And my
13 principal function is I lead the dispute practice
14 in the Greater Toronto Area.

15 Q. And the CV says that you have
16 worked since 1978 fairly exclusively in the damages
17 valuation area; is that correct?

18 A. Yes. That has been my
19 practice since 1978, over 35 years.

20 Q. Is it safe to say that you
21 have been engaged in a wide variety of damages and
22 business valuation matters over the course of that
23 time?

24 A. Very much so.

25 Q. Could you tell us the number

1 of dispute resolution matters in which you have
2 given testimony about damages and valuation?

3 A. I haven't kept exact track,
4 but it would be in excess of 60 times.

5 Q. You're a chartered accountant
6 with more than 40 years of experience?

7 A. That's correct. I'm a
8 chartered accountant.

9 Q. Could you give me an example,
10 then, of a relevant dispute that you may have
11 participated in where you gave testimony about
12 damages and valuation?

13 A. One that comes to mind I will
14 refer to as the Pearson airport case, the airport
15 that you transited to come into Toronto. And it
16 was over a 57-year contract for a consortium to
17 lease terminals 1 and 2 at the airport.

18 The contract was terminated by the
19 government, and there was extensive litigation over
20 the value of that contract.

21 Q. What was the general quantum
22 in dispute?

23 A. It was approximately \$600
24 million.

25 Q. Often airports are the basis

1 of disputes, as the members of the Panel know. And
2 if not, sometimes we all feel like they should be.
3 --- Laughter.

4 MR. BROWER: Could I ask, is that
5 the Lockheed case, if you can say?

6 THE WITNESS: No, it was not.

7 BY MR. APPLETON:

8 Q. Mr. Low, I see that you are a
9 chartered business valuator.

10 A. Yes.

11 Q. Can you tell us what this
12 designation is?

13 A. A chartered business valuator
14 is a designation awarded by the Canadian Institute
15 of Chartered Business Valuators. It is an
16 organization of people who are dedicated to the
17 field of business valuation and damages, and they
18 provide education leading to an examination,
19 qualification process, and continuing education,
20 publications and discipline of members.

21 Q. When I read your CV, just for
22 my own interest, I saw that you have sat on the
23 final examination committee for the Canadian
24 Institute of Chartered Business Valuators. Can you
25 just tell us what that means?

1 A. The final examination
2 committee is -- I was appointed, effectively by
3 your peers, to assist in the process of reviewing
4 the examinations as have been written by candidates
5 who are trying to get the designation of chartered
6 business valuator, as well as the other information
7 that they have to put forward in order to qualify
8 in being awarded the CPV designation.

9 Q. And who is this Canadian
10 Institute of Chartered Business Valuators?

11 A. It started back in the early
12 '70s with a number of people who were devoted to
13 that field, and it has grown. It is a fairly
14 substantial organization, was underneath the
15 chartered accountant organization for a while, but
16 it is now independent of that.

17 In addition, currently I sit on
18 the publications committee of the CICBV peer
19 reviewing articles in the journal that is produced,
20 and I sit on the discipline committee.

21 Q. So when I see on your CV it
22 says CBV, that means chartered business valuator?

23 A. That's correct.

24 Q. And when I see it says CA,
25 what does that mean?

1 A. Chartered accountant.

2 Q. I see. Now, you have served
3 as an arbitrator in commercial disputes, as well?

4 A. I have, only a few times, and
5 they have all related to a question of damages.

6 Q. All right. So as you have
7 heard and as the president has explained to other
8 experts as they come in, the Tribunal has permitted
9 experts to give a presentation -- and we're always
10 careful when we talk to experts, it is limited up
11 to 20 minutes -- setting out the conclusions in
12 their reports, their methodologies, and to explain
13 the divergences between the experts.

14 In this case, that other expert of
15 course would be Mr. Goncalves, who I expect that we
16 will hear from later today, who has filed a number
17 of reports.

18 Could you, please -- actually, do
19 you have a presentation?

20 A. Yes, I do.

21 Q. I understand that the
22 presentation is in the binders -- and someone will
23 tell me at what tab -- at tab C. And we will also
24 hand out a copy to make it easier for the members
25 of the Tribunal and for Canada. Once we do that,

1 we will start your 20 minutes, okay?

2 --- Binder distributed

3 BY MR. APPLETON:

4 Q. All right. Could we put that
5 up somewhere? All right. So your 20 minutes can
6 begin now. Let's hear your presentation, sir.

7 A. Thank you. If I could have
8 the next slide, please? We've prepared a report --
9 two reports with respect to economic losses that
10 are assumed to have occurred as a result of
11 breaches of NAFTA, NAFTA Articles 1102, 1103, 1105
12 and 1106.

13 The basic approach that we have
14 used in all of these articles in determining the
15 economic loss is the discounted cash flow approach,
16 and we deemed that to be the most appropriate
17 approach in this instance for the following
18 reasons: That the revenues can be forecast with a
19 relatively high degree of confidence.

20 There are wind studies, and we
21 have taken a conservative approach or the typical
22 approach to how to apply those. And the FIT
23 contract, 20 years, with a designated price, with a
24 partial inflation protector to allow that to be
25 predictable.

1 The majority of the capital costs
2 would have been contractual, and we refer there to
3 the MTSA, which is for the turbines, one of the
4 principal capital costs to be incurred, and the
5 EPC, or the balance of plant construction costs,
6 have been estimated by an independent consultant,
7 Mortenson.

8 The operating costs are expected
9 to be relatively stable, and in fact BRG has agreed
10 or Mr. Goncalves has agreed with those operating
11 cost estimates.

12 And there isn't any novel
13 technology. It is not something new. It is really
14 quite predictable. And, in fact, Mr. Goncalves
15 basically adopts the same discounted cash flow
16 approach and, indeed, the majority of the data that
17 we have used, other than a few factors that I will
18 discuss later in the presentation.

19 As a result, we believe that the
20 discounted cash flow approach can be estimated in a
21 reliable manner with a relatively high degree of
22 confidence; that is, it is not speculative in this
23 instance.

24 Next slide. Thanks. This
25 discounted cash flow approach obviously was adopted

1 by us. Mr. Goncalves has applied the same
2 discounted cash flow approach as Deloitte with, as
3 I said, a few variables being different, and I will
4 discuss those momentarily.

5 In addition, the OPA as, at least
6 in this dispute, an independent body and before the
7 FIT program was enacted, applied a discounted cash
8 flow approach in establishing the FIT pricing.

9 And, indeed, we heard the other day from
10 Mr. Jennings that the OPA price or the FIT price
11 was set and it was set using this discounted cash
12 flow approach in order that the applicants could
13 recover their costs and be entitled to a
14 commercially-reasonable rate of return.

15 And so, again, the discounted cash
16 flow approach, I think, is quite reasonable and
17 appropriate in this instance.

18 We have approached the NAFTA
19 Articles 1102 or the economic losses related to
20 Articles 1102, 1103, 1105 and 1106 having regard to
21 the benefits of the amended GEIA and that these
22 should be reflected in the economic losses.

23 This principally takes the form in
24 1103 of the Most Favoured Nation-type of analysis
25 and that the best treatment awarded should be

1 compensated to Mesa in this instance. So we have
2 looked at the treatment provided to the Korean
3 Consortium under the amended GEIA.

4 So principally what does this
5 include? In our opinion, it includes priority
6 access to the four -- I apologize, I have a little
7 bronchitis -- priority access to four projects that
8 Mesa had totalling 565 megawatts reduced risk to
9 development for a couple of reasons, but largely
10 due to the government assistance in the regulatory
11 process, in that there was a group set up to assist
12 the Korean Consortium with that process and that
13 should have been available then to Mesa, as well.
14 And the priority access, in addition, reduced the
15 risk to development.

16 We then heard discussion of the
17 economic development adder, and this has to do with
18 the likeness. And according to the evidence of
19 Mr. Seabron Adamson, really it equates what was in
20 the GEIA to the domestic content requirements and
21 that it was an ability to point to a manufacturer
22 and say, Here's our partner.

23 The economic development adder is
24 a payment, in addition, that would be received over
25 the 20-year life of the project. So it's been

1 present valued on the discounted cash flow basis,
2 as well.

3 In addition, we have looked at the
4 10 percent capacity expansion that GEIA provided
5 for, plus or minus 10 percent, as the better
6 treatment. We have determined the value of the
7 plus 10 percent capacity expansion. And as
8 indicated by Susan Lo in her evidence the other
9 day, the Korean Consortium, in fact, did use more
10 than 500 kilowatts in their first two phases.

11 The last point I would like to
12 make is that we have used the timing under the
13 amended GEIA to push back the timing that would
14 have been in the Mesa projects, in that we think
15 they would have been ready earlier, but we have
16 moved these back in time to accord with the timing
17 in the amended GEIA.

18 With respect to NAFTA Article 1106
19 related to domestic content, as you can see under
20 the 1.6xle turbine the words "base case", all of
21 the damages that we have determined in our
22 calculations for 1102, 1103 and 1105 were based on
23 the use of the 1.6xle turbine, and Mesa had to make
24 a decision early on believing that contracts were
25 going to be awarded, and in August of 2010 were

1 told that the 2.5xls would not be available to
2 qualify for domestic content until 2012.

3 So the decision was made. The
4 planning started to be undertaken, the development
5 undertaken with respect to use of the 1.6xle.

6 Why are they different? The
7 2.5xle, while costing more, generates more power.
8 It is a more efficient turbine. The effect -- and
9 we have quantified this separately -- of the
10 application of the 2.5 turbines into these projects
11 versus the 1.6 results in a loss, due to the
12 domestic content rule and having to qualify, of
13 \$106 to \$115 million.

14 On the next slide, we have
15 indicated in this circle -- the circle is
16 equivalent to the entire \$106 to \$115 million loss.
17 And what we have tried to demonstrate here is that
18 indeed it is the revenue loss, the efficiency of
19 the 2.5 turbine relative to the wind studies and
20 the FIT rate, that is generating most of the loss.

21 There would have been more revenue
22 in these four projects had they proceeded with the
23 2.5xl turbine.

24 The next largest component is the
25 operating cost. And simply stated, a number of the

1 operating costs are determined on a per-turbine
2 basis. The 2.5xl process involves fewer turbines.
3 They are more expensive, but they involve fewer
4 turbines, and, therefore, the operating costs, when
5 determined on a per-turbine basis, would be lower,
6 and that accounts for approximately 25 percent of
7 the losses, as well.

8 Lastly, we have looked at the
9 capital costs of using the 2.5 turbines versus 1.6.
10 And over the four projects, while each 2.5 turbine
11 is more expensive than a 1.6 because they use fewer
12 of them, they virtually nil out the greater
13 per-turbine cost offset by fewer turbines, and, in
14 fact, there's a slight cost advantage to the use of
15 the 2.5s versus the 1.6s.

16 That's the domestic content loss.
17 In summary, then, our total economic losses that we
18 have determined from our reply report are \$704 to
19 \$768 million. All of these have been determined on
20 this discounted cash flow basis and effectively are
21 lost profits that have resulted from Mesa not being
22 treated in the same fashion as the Korean
23 Consortium.

24 The base case is separately
25 identified from -- other than the risk advantage,

1 is built into the base case. The economic
2 development adder, as you can see here, and the
3 capacity expansion are quantified separately. And,
4 in fact, in our report -- reports, you can see that
5 we've separately identified these categories for
6 each of the four projects, and then there is a very
7 small economic development adder that would be
8 applicable to the capacity expansion.

9 The sum of all of those is \$358 to
10 \$406 million. To that, we have added NAFTA 1106,
11 the domestic content damages, for \$106 to \$115
12 million, and I commented on the previous slides how
13 that was determined.

14 So the total damages, on a lost
15 profit basis, are \$464 to \$521 million. In the
16 base case, we have deducted the entire cost of
17 acquiring the turbines, including the amount that
18 was put on deposit with GE. So that has already
19 been deducted in coming to these lost profits that
20 I have already talked about.

21 So we have added back here the
22 General Electric deposit that was forfeited, and
23 the basis for doing that is that our approach is
24 that all four projects would have proceeded. All
25 four projects would have required 347 turbines to

1 be used. The MTSA deposit and the MTSA itself
2 related to 333 turbines and, accordingly, the
3 deposit would have been applied to the purchase of
4 all of those turbines and would not have been lost,
5 and, accordingly, we have added \$157 million to the
6 damages as a sunk cost.

7 The other sunk costs relate to
8 professional fees, acquisition costs of the
9 properties, land rent while properties were being
10 held and developed, and project development costs
11 such as the wind studies and other things as Mesa
12 was preparing these properties for development.
13 And that amount is \$8 million, and there is a table
14 in our first report, schedule 1B, that provides an
15 analysis of that by category and by property.

16 So the out-of-pocket costs are
17 approximately \$165 million for a total claim under
18 NAFTA Articles 1102, 1103, 1105, and including
19 1106, of \$629 to \$686 million.

20 To that, we have added interest
21 from the date of the claim to November 1, 2014, the
22 end of this hearing, in the amount of \$75 to \$82
23 million. That was based on the prime rate of
24 interest in Canada and was compounded annually.

25 That results in the total claim of

1 \$704 to \$768 million.

2 I would now like to touch on the
3 principal differences between Mr. Goncalves'
4 conclusions and my own. As indicated, our approach
5 applies the benefits and the treatment accorded to
6 the Korean Consortium to the discounted cash flow
7 approach.

8 Mr. Goncalves's approach to the
9 economic loss does not consider the application of
10 NAFTA or, in fact, the articles that have been
11 breached.

12 So on the left-hand side of this
13 schedule, you can see a comment labelled "Deloitte"
14 on the right-hand side, BRG or Mr. Goncalves.

15 As I have talked about, our
16 economic losses are consistent with the NAFTA MFN,
17 Most Favoured Nation, benefits or approach
18 affording to Mesa the best treatment provided under
19 Article 1103.

20 With respect to Mr. Goncalves's
21 approach, in spite of indicating in his reports
22 that he was instructed to assume that there were
23 breaches of these NAFTA provisions, his economic
24 losses, to use his words, "have been determined
25 independent of NAFTA".

1 So what's the impact of that
2 between the two reports? In my report, the four
3 projects have been included and they reflect the
4 benefits from the amended GEIA, the better
5 treatment. In addition, the GE deposit would not
6 have been lost.

7 Under Mr. Goncalves's approach, he
8 has included only two projects, being TTD and
9 Arran, and he has included no benefits of the
10 amended GEIA. He has not accorded Mesa the
11 benefits of the better treatment pursuant to, for
12 instance, Article 1103. And, in addition, he has
13 excluded from his conclusions all of the GE
14 deposit.

15 The difference in this
16 methodological approach of according the treatment
17 under Article 1103 or 1102 versus Mr. Goncalves's
18 approach is a reduction from my conclusions of \$500
19 million solely attributable to this difference.
20 And I believe that the difference -- the approach
21 taken by Mr. Goncalves is wrong.

22 So the midpoint of my range from
23 the previous analysis was \$658 million. The \$500
24 million reduction, which indeed I have taken from
25 Mr. Goncalves's report, is \$500 million, leaving

1 \$158 million left.

2 The next largest difference
3 between us is the cost of equity that was used in
4 determining the weighted average cost of capital
5 that has then been applied in the discounted cash
6 flow approach over 20 years.

7 The cost of equity component that
8 went into my conclusion was 11-1/2 percent to
9 12-1/2 percent. You might recall that you have
10 heard this before. The OPA, in setting the FIT
11 price, the recovery of costs and the commercial
12 rate of return appropriate to investors in the FIT
13 program, was determined as 11 percent.

14 Mr. Goncalves's rate of return on
15 equity is 20 percent to 21-1/2 percent. I suggest
16 that is not even in the ballpark of reasonable.

17 The difference, again, as
18 quantified in his own report, is equal to \$120
19 million. As I indicated before, he had reduced our
20 claim, by virtue of the methodological difference,
21 by \$500 million. This further \$120 million would
22 reduce the damages to \$38 million.

23 There's other minor differences to
24 other issues that he has that account for
25 approximately half of the 38, and he is left with

1 \$19 million of losses that he believes is
2 appropriate.

3 The two large items are this
4 methodological difference of not applying the
5 better treatment and the discount rate. They
6 account for the vast majority of the differences
7 between us.

8 That's the end of the summary.

9 MR. APPLETON: Thank you. We
10 appreciate -- we know that I can commiserate with
11 personally, trust me.

12 MR. BROWER: You make quite a
13 team.

14 MR. APPLETON: Apparently it is
15 what we require of all our experts now.

16 BY MR. APPLETON:

17 Q. Something that we have been
18 very lucky with through the course of this hearing
19 has been that experts and witnesses generally
20 haven't relied on a lot of technical words, but you
21 did rely on one word I just want you to clarify.

22 At the beginning of your summary,
23 you talked about EPC, and I assume that you meant
24 engineering, procurement and construction costs.

25 A. Yes.

1 Q. I just want to make sure we
2 have a clear record for it.

3 Now, Mr. Low, thank you very much.
4 Could you, please, advise the Tribunal if you have
5 any observations to make in response to the
6 comments arising since your last expert report was
7 filed?

8 A. Yes. There are three items
9 that I would like to address orally, and they deal
10 with the calculation of the weighted average cost
11 of capital at September 17, 2010. They deal with a
12 change to the determination of damages under
13 Article 1105, and a reference that we made in our
14 report to a certain rate of return that I would
15 like to clarify.

16 So with respect to the calculation
17 of the weighted average cost of capital, in our
18 reply report we did adopt a valuation date of
19 September 17, 2010. We had, in our first report,
20 used a valuation date in January 2010. And when we
21 did our calculation of the weighted average cost of
22 capital, in our reply report we did not go through
23 the mechanics of adjusting that weighted average
24 cost of capital calculation.

25 Mr. Goncalves, in his second

1 report, pointed out that we had not done that, and
2 it was his view that the components of that
3 calculation had changed sufficiently that our
4 calculation was in error.

5 In that regard, I have updated
6 that calculation to September 17th, put in the
7 appropriate factors, some very similar to what he
8 had done. Some are slightly different by virtue of
9 either sources or however we have determined the
10 data, but I have redone that calculation using a
11 September 17th input date.

12 The effect of that is that the
13 cost of equity increased slightly, and the weighted
14 average cost of capital increased even less,
15 because the interest component was still fixed and
16 maintained the same. The effect of that was
17 to -- I'm sorry, reduce the damages slightly.

18 With respect to 1105, my first
19 report and the reply report included the benefits
20 of the GEIA in the Article 1105 damages. And I had
21 spoken with counsel before and as we were producing
22 those reports, and, with the belief that the
23 fairness was a fairly egregious breach in this
24 instance, had concluded with counsel that the
25 benefits of the GEIA should be included in 1105.

1 Subsequent to the second BRG or
2 Mr. Goncalves' report, again sitting with counsel,
3 it was determined that the benefits of the GEIA
4 should not be included in the 1105 damages. And,
5 accordingly, I went through a process of
6 eliminating those.

7 And a couple of them are very easy
8 to see, in that we simply take the economic
9 development adder, which in our schedules is
10 separately quantified, and the capacity expansion
11 quantification out of the calculations.

12 However, removing the GEIA
13 benefits also removes the government assistance
14 benefit that reduced the risk to the project. And,
15 accordingly, I would have increased the rate of
16 return required on the equity component in the cost
17 of capital to reflect that the government
18 assistance would no longer be available.

19 And I then had to look at the four
20 projects separately, and the first two, TTD and
21 Arran, are slightly more advanced than are
22 Summerhill and North Bruce and I would have added a
23 further incremental increase to the cost of
24 capital.

25 The effect of all of those is a

1 fairly significant reduction to the amount that I
2 had quantified under 1105 to remove the benefits of
3 the GEIA from that component of the articles that
4 we have calculated.

5 The third item that I would like
6 to refer was pointed out by Mr. Goncalves in his
7 reply report, and we had referred, when talking
8 about our conclusion with respect to the weighted
9 average cost of capital, to the OPA 11 percent and
10 to a Scotiabank article that included a pre-tax
11 unlevered cost of equity amount.

12 Our reference to that cost of
13 equity was not correct. It should not have been
14 there. It wasn't relevant to the conclusion.

15 However, there is an important
16 distinction I would like to make. All of the Bank
17 of Nova Scotia rates cited in that presentation
18 represented what is called an internal rate of
19 return. By definition, an internal rate of return
20 is the return that results in the net present value
21 of the future cash flows being forced to zero, such
22 that there is no value.

23 So it indicates what the total
24 return on the project is, but it's not
25 necessarily -- and, frankly, is not -- the

1 commercial rate of return on investment. It is
2 simply -- which is the risk of the projects. It
3 is: What is the return having regard to all of the
4 circumstances?

5 But it forces the conclusion to
6 zero. So Mr. Goncalves in his second report states
7 that, from the same document, the after-tax levered
8 internal rate of return of approximately 23 or 24
9 percent is the relevant proxy for the cost of
10 equity, and because his return of 20 to 21-1/2 is
11 lower, slightly lower, than that, he believes that
12 that demonstrates his cost of equity is
13 conservative.

14 Effectively, though, by being
15 close to an after-tax internal rate of return, his
16 calculation is close to forcing the conclusion to
17 zero. He has not applied a commercial return on
18 investment. He has applied an IRR or close to an
19 IRR that forces the conclusion to zero.

20 I think this demonstrates that
21 Mr. Goncalves didn't understand what that IRR was,
22 didn't understand the valuation and financial or
23 damages theory that go along with applying costs of
24 equity to a damages claim. Those are my comments.

25 Q. Thank you. Thank you very

1 much, Mr. Low. One last question. Are your
2 corrections to your expert report to the benefit of
3 Mesa Power or to the benefit of the Government of
4 Canada?

5 A. The last item with respect to
6 the rate of return has no impact on my
7 calculations.

8 The discount rate change to the
9 proper calculation at September 17, 2010 and the
10 1105 removal of the benefits of the GEIA are both
11 to, if you wish, the benefit of Canada. They would
12 both reduce the damages under, for instance,
13 Article 1105 that I believe are appropriate for
14 Mesa to claim.

15 MR. MULLINS: Mr. Low, just for
16 the record, because I am looking at the transcript
17 and I don't know if you are accurately quoted, but
18 you never said anything about the original date you
19 used for the weighted cost of capital, because I
20 think the transcript is telling January 2010. Was
21 that accurate?

22 THE WITNESS: Yes. I think it was
23 January 21, 2010.

24 MR. MULLINS: Okay, thank you.

25 THE WITNESS: What was in the

1 first report.

2 MR. MULLINS: Okay, thank you.

3 BY MR. APPLETON:

4 Q. All right. So just to come
5 back to the answer before we got there, so
6 just -- I am going to just restate my question so
7 we're very clear.

8 To the extent that there is a
9 change caused by your calculations here, those
10 changes, to the extent there is any, would be to
11 the benefit of Canada?

12 A. That's correct.

13 MR. APPLETON: Thank you very
14 much. It is Canada's witness.

15 --- (Off record discussion)

16 THE CHAIR: So, we will proceed to
17 the cross-examination. Is Canada ready? All
18 right.

19 MR. APPLETON: Mr. Low, would you
20 like this wireless microphone?

21 THE WITNESS: I think I am okay.

22 MR. APPLETON: It is coming
23 through.

24 CROSS-EXAMINATION BY MR. WATCHMAKER AT 9:45 A.M.:

25 Q. Good morning, Mr. Low,

1 members. My name is Raahool Watchmaker. I will be
2 asking you some questions today about your damages
3 assessment. I understand you have bronchitis, so
4 if you do need a break, do let me know.

5 A. Thank you.

6 Q. Now, I want to make sure
7 you've got your materials before you. You've got
8 our binder. You've got your reports. Do you also
9 have the reports of Mr. Goncalves with you?

10 A. I do.

11 Q. Now, Mr. Low, you have been
12 here all week, so you know how this goes. Counsel
13 prefers a "yes" or "no" answer, but feel free to
14 give whatever context you need after that.

15 We are both here to help the
16 Tribunal in their deliberations. So it is
17 important for the record, when they are looking at
18 it in the future, to have a clear response to the
19 questions.

20 A. I will endeavour.

21 Q. Now, obviously we will be
22 dealing with some confidential information and if
23 we do get into confidential information, I will
24 make clear that the feed be cut, and then we will
25 proceed once we have that confirmation, okay?

1 Now, your introduction, your
2 summary, was quite helpful and I am hoping that it
3 might actually cut out a lot of initial questions
4 that I have. But why don't we start by confirming
5 your instructions with respect to your reports?

6 Now, I understand that you were
7 asked to prepare an expert's report quantifying the
8 estimated economic losses suffered by the claimant
9 as a result of the alleged actions of the
10 Government of Canada; is that right?

11 A. That's correct.

12 Q. Okay. And so really that's
13 the fundamental purpose of your report, to quantify
14 the economic losses, if any, suffered by the
15 claimant as a result of the allegations?

16 A. Correct.

17 Q. Okay. Now, as I understand
18 it you, in appendix B of your report -- maybe you
19 could turn there. This is your original report,
20 and I believe it is on page 53.

21 A. Yes.

22 Q. I think the members are
23 struggling to get there. I believe there is a lot
24 of charts before the page numbering starts up
25 again.

1 A. If I could assist, it is
2 about six pages from the back.

3 Q. There you go. Thanks. So
4 this appendix is your restrictions, major
5 assumptions, qualifications, limitations.

6 A. Yes.

7 Q. And if we focus on the third
8 paragraph, you say here that your report has been
9 based on information, documents and explanations
10 that have been provided to you; right?

11 A. That's correct.

12 Q. And I expect in this respect
13 you mean information, documents and explanations
14 provided to you by your client, the claimant;
15 right?

16 A. They are the documents that
17 have been made available in this process.

18 Q. Right. Okay. And a little
19 further down in the paragraph, you say the validity
20 of your conclusions rely on the integrity of such
21 information.

22 A. That's correct.

23 Q. So you're essentially saying
24 your conclusions are based on the assumption that
25 the information, documents and explanations that

1 you have been provided are accurate and true;
2 correct?

3 A. That's correct.

4 Q. In the last sentence of this
5 paragraph you say you are not under any obligation
6 or agreement to investigate the accuracy of any
7 third party information, nor have you performed any
8 investigative procedures to independently verify
9 the accuracy of any third party information. Do
10 you see that?

11 A. I see that. That's largely
12 related to the independent research that we do on
13 comparable companies, and as such. While we
14 haven't audited, for instance, Mesa's information
15 or the documents that have been provided, the third
16 parties really meant not from the parties in this
17 matter, but independent materials that we have
18 obtained.

19 Q. So just so I understand your
20 testimony, your testimony is that the claimant,
21 your client, would be a third party to your report;
22 is that right?

23 A. No. That's not how I
24 interpret this and the way these are written.

25 The third parties are people

1 external to this process, meaning -- so the
2 claimant and the respondent, the Government of
3 Canada and Mesa, are parties to this. Third
4 parties are people outside of that process.

5 Q. So then we can assume that
6 you have performed investigative procedures to
7 independently verify the accuracy of the
8 information, documents and explanations of the
9 claimant?

10 A. Most of the documents I have
11 taken as, on their face, being reliable. I
12 haven't -- to use an accountant's term, I haven't
13 audited information here.

14 So, for instance, if I have two
15 documents that are at variance, then I would look
16 at that and try to assess that. But we haven't
17 done an audit of all of the documents that are
18 here. So we have relied on the documents largely
19 as they have been presented to us.

20 Q. Okay. And we're not just
21 talking about documents; right? We're talking
22 about information and explanations, as well, and
23 your answer is the same?

24 A. That's correct.

25 Q. Okay. Now I would like to

1 turn to page 3 of your report. It is actually the
2 covering letter. Now, at the top of this page, it
3 says "confidential", but I don't believe there is
4 any confidential information. I believe it has
5 actually been declared to be a public document.

6 It's page 3.

7 A. I think that's the case,
8 but -- yes.

9 Q. And this is similar to the
10 chart that you put up on the screen earlier, and I
11 just want to confirm a few things about the
12 subcategories and categories that you had up on the
13 screen earlier.

14 So your base case scenario, you
15 say that it's based on the assumption -- this is
16 at -- sorry to jump around here, but you say this
17 at page 23 of your report. You say that it's based
18 on the assumption that Mesa would have obtained FIT
19 contracts for the projects and would have developed
20 the wind farms in accordance with the DCRs and
21 operated the projects to the intent of their FIT
22 contracts.

23 That's at paragraph 4.1(a)(i) of
24 your report. Does that sound correct?

25 A. Yes, it does.

1 Q. And I think you explained
2 earlier that you have included three separate
3 categories under your base case, economic
4 development adder, the capacity expansion and the
5 economic development adder applicable to the
6 capacity expansion, and these are all alleged
7 incremental losses that derive from the GEIA;
8 correct?

9 A. That's correct.

10 Q. These are all future losses;
11 correct?

12 A. All of these losses are
13 future losses.

14 Q. Okay.

15 A. Effectively, if you want to
16 think about it this way, under our reply report
17 these projects would be coming in to their COD
18 start of true operation and providing power this
19 year. So even today the cash flows are still in
20 the future.

21 Q. That's true of the 1106
22 allegation there, as well; right?

23 A. Yes.

24 Q. Now, in your opening
25 presentation, then, I just want to confirm, while

1 we're on the topic of Article 1106, you put up a
2 pie chart?

3 A. Yes.

4 Q. Just to be clear, none of the
5 losses in that pie chart represented losses that
6 have already been suffered. Those are all future
7 losses; correct?

8 A. Those losses are all future
9 losses, yes.

10 Q. Okay. And so you also have a
11 line item here for past costs incurred. So that is
12 essentially just sunk costs; correct?

13 A. Those are sunk costs. They
14 are, as I indicated, professional fees, rents on
15 the lands and development costs.

16 To the extent there are
17 development costs in there, we believe that there
18 are amounts that could be attributed to NAFTA 1106,
19 in that Mesa, because of the domestic content
20 requirement, was using consultants and others who
21 were more expensive than they believed they could
22 have used in other circumstances, but we have not
23 quantified that amount.

24 Q. Okay. So to be clear, you're
25 saying that there could be sunk costs attributable

1 to an Article 1106 violation, but you haven't
2 calculated what those are or separated them out.
3 They are not represented here on this chart;
4 correct?

5 A. We have not separated them
6 out. We believe they exist, but haven't quantified
7 them.

8 Q. So am I correct in saying the
9 vast majority of these sunk costs are really the
10 turbine deposit?

11 A. I was talking solely about
12 the \$8,100,000.

13 Q. Okay.

14 A. The GE deposit is a different
15 question.

16 Q. But it is also a sunk cost?

17 A. It is a sunk cost, but it is
18 effectively not part of 1106.

19 Q. Just let me confirm that you
20 have claimant's reply memorial.

21 A. I don't have that in these
22 documents.

23 Q. We will provide it to you.

24 A. Thank you.

25 Q. Can you turn to paragraph

1 886, please?

2 A. I have it.

3 Q. Okay. So here the claimant

4 says:

5 "Under the 'but-for' test,
6 once a violation has been
7 established, the remedial
8 objective of an international
9 tribunal is to place the
10 injured investor in its
11 investment in a position they
12 would have been in, but for
13 the illegal conduct."

14 It goes on to quote the S.D. Myers
15 tribunal, which said:

16 "Compensation should undo the
17 material harm inflicted by a
18 breach of an international
19 obligation."

20 Do you see that?

21 A. Yes, I do.

22 Q. From an valuation
23 perspective, I assume you agree with the claimant
24 on such an approach?

25 A. This issue is, to use an

1 expression, the elephant in the room between
2 Mr. Goncalves and myself.

3 The issue here -- if I was to
4 express this, the "but-for" test under Article 1103
5 is not to put the investor into the -- back into
6 the position of what it had, but the 1103 test is
7 to provide the better treatment.

8 And so I disagree with this
9 analysis. Effectively, this "but-for" test is
10 where I am now with respect to Article 1105, but I
11 don't believe that it is the appropriate analysis
12 or method for determining the losses under Articles
13 1102 or 1103 that provide for the better treatment,
14 is how I interpret those articles.

15 Q. So that I understand, I think
16 you said you disagree with the claimant's approach
17 to the "but-for" test stated here?

18 A. I don't think this is the
19 claimant's -- this is your analysis of what the
20 "but-for" should be. This is not my analysis of
21 what the "but-for" should be.

22 Q. This is the claimant's reply
23 brief; correct?

24 A. Oh, sorry, investors. Well,
25 sorry.

1 As I said, the "but-for" test in
2 the case of 1102 and 1103 is, I think, to put them
3 in the place that should have been provided with
4 the better treatment. So it is not exactly the way
5 these words are, but can be interpreted, in any
6 event.

7 Q. Mr. Low, are you a lawyer?

8 A. No, I'm not. I'm a damages
9 person.

10 Q. Are you purporting to
11 interpret Article 1103 of NAFTA?

12 THE CHAIR: Well, you have -- I'm
13 sorry, but you asked the question about this
14 paragraph. I think we understood the valuation
15 expert's understanding that under 1102 and 1103, it
16 is not just a matter of undoing the harm, but it is
17 placing the investor in the position in which it
18 would be had it been granted better treatment, and
19 for 1105 it is undoing the harm. Is this a correct
20 restatement of what you said?

21 THE WITNESS: That is a correct
22 statement. Thank you.

23 THE CHAIR: Thank you.

24 BY MR. WATCHMAKER:

25 Q. That better treatment, as I

1 think you summarized this morning, is the GEIA
2 treatment; right?

3 A. That's correct.

4 Q. And just to summarize the
5 elements of that, that is the priority access to
6 the transmission grid, facilitation services by the
7 government, the economic development adder, and the
8 capacity expansion option; is that right?

9 A. That's correct.

10 Q. Okay. And, again, to be
11 clear, that assumption essentially supports your
12 entire base case, which supports your damages
13 valuation for Articles 1102, 1103, 1105 and 1106;
14 correct?

15 A. That's correct, until the
16 description I have given of the change to 1105, but
17 in my reply report, yes.

18 Q. So then, in essence, to
19 correct the harm to the claimant as a result of
20 Canada's alleged discriminatory treatment, under
21 your valuation base case you provide the
22 discriminatory treatment to the claimant?

23 A. I provide my analysis of what
24 the better treatment was and that should have been
25 provided to Mesa, yes.

1 Q. So you're extending the
2 wrongful conduct to the claimant; correct?

3 A. I'm not claiming that it is
4 wrongful. I'm claiming it was a breach of NAFTA.

5 And if there is a breach of NAFTA,
6 which is what I have been told to assume, then from
7 a damages perspective, I believe that leads to a
8 quantification of the better treatment.

9 Q. Would you agree with me that
10 under the FIT program, no FIT applicant received
11 GEIA-like treatment, did they?

12 A. That's correct.

13 Q. Okay. But in your "but-for"
14 counter-factual world, you're extending that
15 treatment to the claimant and no other FIT
16 applicant; is that right?

17 A. I am extending it to the
18 claimant on the basis that 1103 provides for the
19 better treatment and, therefore, I have quantified
20 it. It doesn't accrue to all other FIT claimants
21 or FIT applicants.

22 Q. Would you agree with me that
23 there are real and physical transmission capacity
24 constraints in any electricity system, Mr. Low?

25 A. That's my understanding.

1 Q. So by definition, it would be
2 impossible to provide priority transmission access
3 to all FIT applicants; correct?

4 A. I think that's a fair
5 statement. It would not be possible to do that.
6 I'm not suggesting that it should be done. I'm
7 simply suggesting that there is compensation due to
8 Mesa for the better treatment provided to the
9 Korean Consortium.

10 Q. So you're saying that your
11 economic analysis is focussed only on Mesa's
12 conditions?

13 A. My economic analysis is
14 actually focussed on the Korean Consortium
15 conditions as being the better treatment.

16 Q. But in your "but-for"
17 counter-factual, you're not concerned at all with
18 how other FIT applicants might be treated in that
19 counter-factual world; correct?

20 A. That's correct. I don't
21 think that's the analysis that's appropriate.

22 Q. So you think that it is
23 probable that if GEIA-like treatment is found to be
24 a violation of NAFTA, that the Government of
25 Ontario would extend that violating treatment to

1 the claimant, but to no other FIT applicant?

2 A. If other FIT applicants had
3 qualified under NAFTA and raised this as a breach,
4 I presume they would be entitled to it, as well.

5 I am not aware that others have
6 come forward, so this is solely applicable to Mesa
7 at this point, to my knowledge.

8 Q. Would you accept that if the
9 GEIA is not a breach of NAFTA, that you would have
10 to go back and do a significant amount of
11 revisions?

12 A. Ask the question again,
13 please.

14 Q. Would you accept that if we
15 assume that the GEIA is not found to be a violation
16 of NAFTA by this Tribunal, that you would have to
17 do a lot of revisions to your reports?

18 A. There would be revisions
19 required. Basically, I have talked about that
20 already this morning, in that the amendments to
21 1105 to remove the benefits of the GEIA largely
22 reflect that issue of not reflecting the benefits
23 of the GEIA.

24 And other than the discount rate
25 amendment, the removal of the other benefits is

1 really quite similar.

2 Q. Would it not impact your
3 inclusion of damages related to Summerhill and
4 North Bruce?

5 A. Not necessarily, no.

6 The management of Mesa believed at
7 the time that with the -- in 2010, with the belief
8 that there was requirements for additional power in
9 Ontario, that they would have been able to
10 develop -- excuse me, develop all four. And
11 effectively in quantifying the values that we have,
12 the other alternative is that, as Mesa did with
13 other projects, it could have sold these projects
14 and realized the value at the valuation dates, and,
15 therefore, realized effectively what's happened
16 here before people -- before circumstances changed,
17 power use declined and other circumstances such
18 that we now find ourselves in.

19 Q. The Summerhill and North
20 Bruce projects, they were ranked extremely low in
21 the provincial rankings, weren't they?

22 A. They were ranked low, yes.

23 Q. Have you done any analysis to
24 determine whether there was enough transmission
25 capacity available in the Bruce region to actually

1 allow for those two projects to achieve FIT
2 contracts, even excluding the Korean Consortium,
3 set aside? Have you done any of that analysis?

4 A. I have looked at that, and at
5 the valuation dates there was not sufficient
6 capacity. But by 2018, there was a view that there
7 was going to be sufficient capacity in the Ontario
8 market, and there was a prospect that Summerhill
9 and North Bruce would have been developed.

10 Q. What was the view that there
11 would have been enough capacity based on?

12 A. I believe that we have heard
13 that the expectation was that there would be an
14 additional 10,700 megawatts of power required from
15 renewable resources by 2018.

16 Q. You're talking about the LTEP
17 cap or target of renewable energy generation in
18 Ontario?

19 A. I believe that's where the
20 number came from, and I think it was -- I think it
21 was Mr. Jennings that gave some evidence with
22 respect to that.

23 Q. Have you assessed how much of
24 that generation capacity has already been
25 committed?

1 A. No. No, I haven't.

2 Q. So you don't know, do you,
3 how much generation capacity is actually available
4 in the Bruce and whether or not the Summerhill and
5 North Bruce projects could actually obtain
6 contracts, given that capacity, do you?

7 A. Given where we are and the
8 Bruce-to-Milton line coming into play, once that
9 has been used, which it has, there was not
10 sufficient capacity at that time.

11 Q. Okay.

12 A. If I could add, again, the
13 way we have done our schedules of breaking out
14 components and projects, should the Tribunal
15 determine that for some reason there are only two
16 projects going to be awarded, it is possible to get
17 to those numbers with the analyses that are in our
18 reports.

19 Q. Now, you do understand that
20 damages have not been bifurcated in this case;
21 correct?

22 A. I do understand that.

23 Q. So the Tribunal has to make
24 its decision on jurisdiction, merits and damages at
25 the same time; right?

1 A. That's my understanding.

2 Q. Your base case is based on
3 the assumption that the GEIA is a violation of
4 NAFTA; correct?

5 A. That's correct.

6 Q. So you've already --

7 A. For 1102, 1103 and 1106 and,
8 in the reports, 1105 amended as I talked about this
9 morning.

10 Q. Now, if the GEIA is not found
11 to be a violation of NAFTA, you would also, I
12 believe you said, need to adjust for the GEIA-based
13 assumption, the facilitation services under the
14 agreement would have a significant impact on
15 completion and project risk, as well; correct?

16 A. It would have --

17 MR. APPLETON: Excuse me, sorry,
18 Mr. Low. Stop. I have been listening very
19 carefully to Mr. Watchmaker. He has asked the
20 witness to make a legal assumption he didn't say.
21 He gave him an answer to the question about whether
22 or not the GEIA violated the NAFTA, and he said
23 that it's the government's conduct that violates
24 the NAFTA rather than the GEIA itself.

25 But Mr. Watchmaker has summarized

1 his comment and put it back into that question. I
2 believe that is improper. I am sure Mr. Watchmaker
3 could rephrase it to make it a proper question.

4 THE CHAIR: I have some issue with
5 the way this question was worded, as well. It
6 seems to me that what Mr. Low has done is assumed
7 that not giving treatment according to GEIA was a
8 breach of NAFTA.

9 It doesn't say anything about
10 whether the GEIA in and of itself is a breach, or
11 do I misunderstand something?

12 MR. APPLETON: In fact, I believe
13 he testified exactly directly on that question that
14 the GEIA itself was known as a legal agreement, but
15 it was the effect. So he has been asked that. He
16 has answered that question. He has given his
17 testimony, and I am afraid Mr. Watchmaker, I'm sure
18 inadvertently, has misconstrued the answer in the
19 question, and I don't think that is fair to ask any
20 witness.

21 THE CHAIR: In any event, we will
22 not rely on Mr. Low's testimony for these legal
23 issues. It goes without saying. So maybe you
24 could rephrase the question, because I'm unclear
25 where we exactly stand now.

1 BY MR. WATCHMAKER:

2 Q. Sure. So my question is,
3 simply: Assuming that there is no breach as a
4 result of GEIA, you would have to update your work,
5 as you have said you have already done with respect
6 to 1105, specifically with respect to completion
7 and project risk; correct?

8 A. That's correct. I have
9 indicated this morning that removing the impact of
10 the GEIA or the better treatment from 1105 would
11 result in an increase in the discount rate cost of
12 equity to reflect the lack of some of the benefits
13 of government facilitation, and that that would
14 have the impact of reducing the damages.

15 THE CHAIR: That is clear, and you
16 have well explained it before and you have said
17 also in what respect it would reduce.

18 What impact would it have on the
19 1102 and the 1103 claim?

20 THE WITNESS: Assuming that the
21 GEIA was not a breach of 1102 and 1103?

22 THE CHAIR: The fact of not giving
23 the same treatment, yes.

24 THE WITNESS: If one removed the
25 treatment from 1102 and 1103, then you'd be in the

1 same order of magnitude as 1105 at that point,
2 which is what I spoke about this morning.

3 Although I haven't provided the
4 quantum of it, it is lower than what is in my
5 reports as they are stated here. And one would
6 have to assess whether at that point -- in my view,
7 they still had the opportunity for four projects
8 and/or could have sold all four projects, but the
9 analysis could be done on the basis of two
10 projects.

11 BY MR. WATCHMAKER:

12 Q. Well, I would like to come
13 back to that point. Is that actually correct,
14 Mr. Low? The violations of Article 1102 and 1103
15 deal with national treatment and MFN treatment,
16 discrimination; correct?

17 A. Yes.

18 Q. So if there is no
19 discriminatory treatment under the GEIA, there
20 wouldn't be an 1102 or an 1103 damages valuation,
21 would there?

22 A. There, I think, is still a
23 breach of 1102 and 1103. If one removes the GEIA,
24 because under 1102 it would still have the Canadian
25 subsidies of the Korean Consortium, but removing

1 the GEIA entirely, then I think you are left with
2 the other factors of either treatment that was
3 provided to Boulevard as a subsidiary of
4 NextEra -- so I think there still can be applicable
5 breaches of those, but they don't provide you with
6 the benefits of the GEIA.

7 So it effectively becomes similar
8 to what I have called, if you will, my revised
9 1105.

10 Q. But Boulevard --

11 MR. APPLETON: Excuse me. It is
12 the same type of issue, again. Now it is lightly
13 different. Mr. Watchmaker has asked this witness,
14 who is not a lawyer, about discrimination, which we
15 do not believe is a part of Article 1102 or 1103.
16 We have submissions to deal with that and we made
17 submissions on that.

18 So I want to put it on the record
19 formally. So I do not believe it is
20 appropriate -- you can comment, but please just let
21 me get it out there -- that it's not appropriate to
22 make a damages expert give testimony about legal
23 findings of international law obligations,
24 especially when they are, at best, contentious and,
25 in our view, completely wrong.

1 THE CHAIR: I understand. I don't
2 think it depends on whether they are wrong or not.

3 There's part of the submission --
4 what I would like to understand is in terms of
5 valuation and not in terms of law. If I look at
6 the computations for losses due to 1102 and 1103,
7 and I remove the fact of better treatment not
8 having been granted, what remains in your
9 computation?

10 I don't know whether I should go
11 to page 7 of your -- that's the summary. There's a
12 table there of your second report or there's the
13 same table I think further down. Let me see if I
14 find it.

15 THE WITNESS: If I might, Madam
16 Chair --

17 THE CHAIR: Can you answer my
18 question just conceptually?

19 THE WITNESS: Certainly.
20 Conceptually, if I could turn you to the reply
21 valuation report, so that is the one dated April
22 29, 2014.

23 THE CHAIR: Yes, yes.

24 THE WITNESS: And if you go to the
25 page preceding the appendices, so right at the

1 back, this provides more detail.

2 THE CHAIR: Yes.

3 THE WITNESS: Rather than the
4 summary.

5 THE CHAIR: I understand that this
6 provides detail and, in particular, allows to see
7 what is claimed per project, and that is, I think,
8 what you referred to before when you said if you
9 want to take only two projects, you can deduct.

10 But that does not give me an
11 answer to my question, unless I misunderstand
12 something, and my question is: If you remove the
13 component of better treatment, in terms of
14 valuation, from the claimed breaches of 1102 and
15 1103, what remains on the account of these
16 provisions?

17 I understand your position on
18 1105.

19 THE WITNESS: Okay, okay. The
20 answer on the face is, in first place, quite
21 simple, in that you would take the numbers for the
22 economic development adder on this page and the
23 capacity expansion and the EDA applicable to the
24 capacity expansion and simply remove them.

25 THE CHAIR: Yes.

1 THE WITNESS: So at that point,
2 you would be left with the base case of \$301 to
3 \$343 million.

4 However, those numbers are
5 somewhat high, because, as I indicated, I would
6 have to change the cost of equity to remove the
7 benefit of the government assistance, and that has
8 an impact. It would lower these damages, not by an
9 enormous amount, but we're not talking amounts.

10 So it would have the impact of
11 reducing the \$301 to \$343 million to reflect the
12 benefit of the assistance under the GEIA.

13 The balance, the past costs, the
14 GE contract penalties which are referred to here,
15 would remain consistent.

16 In addition, NAFTA 1106 is added
17 into that top schedule, and, what one would have to
18 do, the details of 1106 are at the bottom. And,
19 again, you would have to take only the base case,
20 being the \$96 to \$104 million, instead of the total
21 that is there. And that also would be somewhat
22 reduced by the change to the discount rate.

23 THE CHAIR: Thank you.

24 MR. LANDAU: Just to follow up on
25 that, I am just wondering -- I am not asking you

1 any question of law, but just whether you can
2 articulate what it is you would actually be -- what
3 you are valuing at that point in terms of the
4 breach.

5 If you take out of the equation
6 the GEIA and the alleged preferential treatment,
7 what is it that is on your table that you're
8 valuing at that point under Articles 1102 and 1103?

9 THE WITNESS: 1102 and 1103, or at
10 that point 1105, would I think all be similar, in
11 that they are the value of the projects as they
12 would have existed under the FIT program.

13 MR. APPLETON: Excuse me. I'm not
14 sure whether it started from Mr. Landau or if it
15 came from Mr. Low. 102 is another obligation; I
16 think you mean 1102 or 1105.

17 THE WITNESS: 1102, 1105.

18 MR. APPLETON: Just to make sure
19 we completely understand.

20 THE WITNESS: My apologies.

21 THE CHAIR: But I understand your
22 answer to be what you would then value is the fact
23 of not having been granted a FIT contract. Is that
24 the answer?

25 THE WITNESS: That's correct.

1 MR. LANDAU: That's fine, thank
2 you.

3 THE CHAIR: Thank you.

4 BY MR. WATCHMAKER:

5 Q. Why don't we move on? I
6 would like to take a look at the treatment of one
7 of the sunk costs alleged by the claimant. You
8 have included the entire forfeited \$153 million GE
9 turbine deposit as a sunk cost; correct?

10 A. That's correct.

11 Q. Now, I think we will need to
12 go into confidential session at this point. So
13 could the public feed be cut off?

14 --- Upon resuming confidential session at
15 10:22 a.m. under separate cover

16 --- Upon resuming public session at 10:26 a.m.

17 BY MR. WATCHMAKER:

18 Q. Can you turn to tab 12 of
19 your binder, the big white binder there?

20 A. This one?

21 Q. Yes. This is Exhibit BRG 86.
22 Are you there?

23 A. I think so. A news article?

24 Q. Yes. This is an article
25 dated July 7th, 2009.

1 have been ordered from GE and
2 will be delivered in the
3 first quarter of 2011, and
4 Pickens does not have any
5 place to put them."

6 Do you see that?

7 A. I can read that, yes.

8 Q. There is no mention of
9 Ontario here; correct?

10 A. There is not. I believe the
11 due diligence process had commenced, but they had
12 not yet purchased the TTD project.

13 Q. Did you investigate --

14 A. -- in July.

15 Q. Okay. Did you investigate
16 the claimant's involvement in trying to place
17 turbines at any of these sites?

18 A. I'm not sure exactly which of
19 these sites are being referred to or what happened
20 to the four states that are referenced here.

21 I am familiar with some of the
22 projects that preceded either coincident or after
23 the Ontario projects.

24 Q. So you wouldn't know if the
25 claimant succeeded in bringing any of these

1 projects into commercial operation; correct?

2 A. If you're talking about these
3 references to smaller wind projects in Wisconsin,
4 Oklahoma, Kansas and possibly Texas, it is my
5 understanding that Mesa has developed and sold
6 projects, but has not built out a project that
7 would include any of these four.

8 Q. But you apportioned none of
9 the GE deposit to any of these projects; correct?

10 A. No, I've not.

11 Q. Mr. Robertson also mentions a
12 number of projects Mesa was involved in, and at
13 paragraph 13 of his reply witness statement -- I am
14 not sure if you've got it there, but he refers to
15 projects in Minnesota, Michigan and Missouri.

16 Do you recall that? It is
17 actually up on the screen.

18 A. Yes, I'm familiar with
19 those -- or somewhat familiar with those projects
20 and what the circumstances were.

21 Q. Okay. And you will recall
22 from the other day Mr. Robertson noted there was no
23 geographic limitation in their agreement; correct?

24 A. I believe it was intended as
25 North America.

1 Q. So that we're clear, you
2 haven't allocated any amount of the GE deposit to
3 any of these projects either, have you?

4 A. I have not. Again, I think
5 this is a fairly simple concept, in that assuming
6 these four projects had proceeded in Ontario, the
7 turbines would have been ordered. They would have
8 been used. The GE deposit would not have been
9 forfeit, and it's really quite that simple,
10 that --

11 Q. Sorry, finish, please.

12 A. The assumption is that under
13 1102 and 1103 and the benefits of the GEIA, the
14 four projects would have proceeded. Had they
15 proceeded, these deposits would not have been lost.

16 I mean, it really is that simple a
17 concept.

18 Q. Okay. But isn't it also the
19 case that if any of these other projects had
20 succeeded, the MTSA could have supplied turbines to
21 those projects, as well?

22 A. That's correct. And my
23 understanding is that Mesa, particularly once July
24 4th, 2011 came along, did its best to try to use
25 turbines or allocate turbines to other projects,

1 and various circumstances resulted in their
2 inability -- once these projects appeared to be
3 terminated or not going to proceed, they attempted
4 to mitigate their damages, but were unsuccessful.

5 Q. But in the period of time
6 we're talking about right now, that article I
7 showed you and Mr. Robertson's testimony, we're
8 talking about a period of time prior to the FIT
9 program's denial of the contracts to the claimant,
10 are we not?

11 A. I can't much speak to the
12 ones that came before. I'm not familiar
13 necessarily with the states that were mentioned and
14 the specific projects that were there.

15 Again, my view is simply that
16 under the approach to damages economic losses that
17 I have taken, that the GE deposit would not have
18 been forfeit and that Mesa tried to mitigate that
19 damage, which they are obligated to do by
20 attempting to develop other projects, and for
21 various reasons was not successful in doing that.

22 Q. Okay. Maybe we can go back
23 in confidential session.

24 --- Upon resuming confidential session at

25 10:32 a.m. under separate cover

1 --- Upon resuming public session at 10:33 a.m.

2 BY MR. WATCHMAKER:

3 Q. So, again, this is a press
4 report dated April 21st, 2010. This is about four
5 months after the signing of the MTSA; correct?

6 A. Yes.

7 Q. The first paragraph, it says:
8 "All necessary approvals have
9 been obtained for the Goodhue
10 wind project in Minnesota."

11 Do you see that?

12 A. Yes.

13 Q. This article reports the
14 Minnesota Public Utilities Commission had given
15 American Wind Alliance, including Mesa Power,
16 approval of the project's purchase power agreement.

17 Do you see that?

18 A. Yes, I can see that.

19 Q. There is also reference to
20 Mesa using GE turbines. Do you see that reference?

21 A. I see that, yes.

22 Q. Had Mesa's Ontario projects
23 received all necessary approvals, Mr. Low?

24 A. They had not, no.

25 Q. Had Mesa's Ontario projects

1 received power purchase agreements?

2 A. No.

3 Q. My understanding is that Mesa
4 eventually sold this project to a third party. Is
5 that your understanding?

6 A. That's my understanding.

7 Q. And subsequent to that sale,
8 the project actually failed to come into
9 operation. Do you recall that?

10 A. Yes. It's my understanding
11 that there were environmental or bird issues, I
12 think, some form of problems with eagles --

13 Q. So you don't --

14 A. -- that prevented the project
15 from proceeding.

16 Q. But you don't apportion any
17 amount of the forfeiture of the GE turbine deposit
18 to this project that had all necessary approvals
19 and an approved power purchase agreement, do you,
20 Mr. Low?

21 A. No. Again, I don't on the
22 basis that that being factual, because it appears
23 to have been and I think you have stated it fairly,
24 the basis of the economic losses that we have
25 quantified here is that the four projects would

1 have proceeded.

2 Those turbines would have been
3 used in Ontario, and, accordingly, the deposit
4 would not have been forfeited.

5 Q. Well, again, some of the
6 turbines could have been used on this project;
7 correct?

8 A. If that project had
9 proceeded, yes.

10 Q. If we can go back into
11 confidential session for a few minutes.

12 --- Upon resuming confidential session at
13 10:36 a.m. under separate cover

14 --- Upon resuming public session at 10:45 a.m.

15 MR. WATCHMAKER: Madam Chair, I am
16 in your hands as to whether or not to take a break
17 or continue.

18 THE CHAIR: If you have now closed
19 this topic.

20 MR. WATCHMAKER: I have closed
21 this topic, yes.

22 THE CHAIR: Fine. It may be a
23 good time for a break. I am sure your voice will
24 appreciate a break. And you know, because I have
25 been telling this to every witness and expert, they

1 should not speak during the break to anyone during
2 your testimony.

3 THE WITNESS: Absolutely.

4 THE CHAIR: Let's take 15 minutes
5 and resume at 11:00 or 11:05? 11:05. Good.

6 MR. WATCHMAKER: It seems
7 inevitable.

8 --- Recess at 10:46 a.m.

9 --- Upon resuming at 11:10 a.m.

10 THE CHAIR: Apologies. We are a
11 little late, but we're ready now. So
12 Mr. Watchmaker can start if Mr. Low is ready, as
13 well.

14 THE WITNESS: I am.

15 THE CHAIR: Fine.

16 BY MR. WATCHMAKER:

17 Q. The court reporter has given
18 me a mic, so I don't mean to shock everyone if my
19 voice is now louder, but apparently I was dropping
20 off earlier in the day.

21 Mr. Low, earlier you said that you
22 had included the projected value of the claimant's
23 ability to use the GE 2.5-megawatt turbine into
24 your Article 1106 future loss valuation; is that
25 right?

1 A. That's correct.

2 Q. And am I correct in my
3 understanding that you use August 7th, I believe it
4 is 2010, as your valuation date?

5 A. I think is August 5.

6 Q. August 5, sorry. Have you
7 seen any invoices from the claimant, as of that
8 date, showing any payments made?

9 A. Absolutely not. They hadn't
10 ordered any, nor taken delivery of any turbines, so
11 there were no invoices at this point. There were
12 only contracts.

13 Q. Okay. And you've essentially
14 assumed that those turbines were available for use
15 and assumed that they were available at the prices
16 that I believe Mr. Robertson and management
17 provided to you; is that correct?

18 A. I believe they were
19 available, but the pricing of the 2.5 turbines is
20 based on a representation from Mr. Robertson in
21 both the representation letter he gave me and his
22 witness statements with respect to what he had
23 determined with GE the pricing of the 2.5 would
24 have been.

25 Q. Okay. But besides that

1 management letter and Mr. Robertson's testimony,
2 there is no documentary evidence in the record
3 confirming they were available for those prices;
4 correct?

5 A. There are no documents in the
6 record with respect to the 2.5 pricing.

7 Q. Okay. Could we turn to
8 paragraph 4.4.1(b) of your first report, please?

9 A. Yes.

10 Q. Here you say that the US
11 Export-Import Bank prepared a letter of intent
12 indicating that they were interested in financing
13 the claimant's projects; correct?

14 A. Yes, there was a letter.

15 Q. Okay. I would like to go
16 into confidential session.

17 --- Upon resuming confidential session at

18 11:14 a.m. under separate cover

19 --- Upon resuming public session

20 BY MR. WATCHMAKER:

21 Q. Now, Mr. Low, I understand
22 from your direct examination this morning you have
23 updated your discount rate to reflect changes to
24 your Article 1102, 1103 and 1105 and dates of
25 breach; correct?

1 A. That's correct.

2 Q. So you now use for all of
3 these claims the date of September 17th, 2010?

4 A. Yes.

5 Q. This is the date that the
6 Minister of Energy directed the OPA to set aside
7 500 megawatts of transmission capacity in the Bruce
8 region for the Korean Consortium; right?

9 A. That's correct.

10 Q. And you selected this date as
11 your date of breach because the set-aside is
12 alleged to be a violation of those articles of
13 NAFTA; right?

14 A. In part, the selection of the
15 breach date is that of counsel, rather than my
16 particular selection of the date.

17 Q. Right.

18 A. But that is the basis of it.

19 Q. Okay. So from a valuation
20 perspective, can you please explain what
21 quantifiable losses were actually caused to the
22 claimant on September 17th?

23 A. The reservation of -- excuse
24 me -- transmission capacity on September 17th had
25 an effect on the prospects for obtaining FIT

1 contracts by the Mesa projects, by virtue of that
2 reservation. It reduced the available capacity in
3 the Bruce region.

4 Q. So I think you said it
5 reduced the prospects that they would obtain
6 contracts; is that right?

7 A. That's correct. It's the
8 first indication in a series of things that occur,
9 that there will be an effect -- as I understand it,
10 this being part of a legal point, there will be an
11 impact on Mesa, and that was the first date that it
12 was known.

13 Q. Okay. But the
14 Bruce-to-Milton transmission line didn't even
15 receive final approval until May 10th, 2011, isn't
16 that right?

17 A. That's correct.

18 Q. And, Mr. Low, the
19 Bruce-to-Milton allocation didn't happen until June
20 3rd of 2011; is that correct?

21 A. That's also correct.

22 Q. So the denial of actual
23 contracts didn't happen until that time; correct?

24 A. That's correct.

25 Q. July 4th?

1 A. I believe that's the date.
2 However, from September 17th, 2010 on, that was
3 foreseeable.

4 Q. Foreseeable. But my question
5 was: What quantifiable losses were actually caused
6 as of that date?

7 A. As of that date, from a value
8 perspective, the expectation for FIT contracts on
9 the part of Mesa had to have been significantly
10 diminished because of the reservation of capacity
11 in the Bruce.

12 So in a value sense, it's
13 determinative at that date that there was an impact
14 on the prospects for these projects, and,
15 accordingly, a decrease in the expected value of
16 those projects.

17 Q. And it's your testimony that
18 the decrease in value is the entire valuation that
19 you have conducted based on September 17th being
20 the valuation date?

21 A. Effectively that ends up
22 being the result. There are subsequent events that
23 happen that crystallize it, but to my
24 understanding, September 17th is the first date
25 that Mesa became aware, and that's the reason that

1 the date is selected, and the infringement on its
2 value occurs on that date.

3 Q. You say that the infringement
4 on its value occurs on that date, but I am still
5 not quite understanding what specific losses.
6 Could you enumerate some of the specific losses
7 that occurred on that date?

8 A. Sure. It's on that date that
9 Mesa becomes aware of an impact on its projects
10 specifically, and it's on that date -- and I am
11 treading into legal ground here -- that it becomes
12 aware of a breach of Article 1103.

13 Article 1103, as I understand it,
14 then entitles Mesa to the better treatment accorded
15 the Korean Consortium, and, accordingly, then the
16 value on that date, had Mesa been accorded that
17 better treatment, is reflected in the economic loss
18 conclusions that I have determined.

19 Q. But on September 17th, you
20 will agree with me there was still a possibility
21 that the claimant would have received FIT
22 contracts; correct?

23 A. I think at that point, as I
24 understand the availability of transmission
25 capacity, that was significantly affected.

1 However, I'm not sure that that's
2 really the relevant point. I think the relevant
3 point, as I understand it, is that that is the
4 first date on which Mesa became aware of the impact
5 of the breach of 1103, and that it was at that
6 point entitled to the benefits -- the better
7 treatment under 1103; and the better treatment,
8 therefore, gets you into all of the issues that
9 we've talked about of the four projects, the
10 government assistance, transmission access, and
11 that becomes the damage.

12 Q. Okay. Well, you used an
13 interesting word earlier on and I think it
14 is -- and I don't think it's a term of art. But
15 you said "crystallize".

16 I think it is probably important
17 from a valuation perspective. When did losses
18 crystallize? And I would suggest to you, did
19 losses not crystallize when they failed to get
20 contracts?

21 A. I'm going to try to answer
22 your question strictly from a damages perspective,
23 and I will try to avoid the law.

24 Q. Yes.

25 A. And I think I am treading

1 fairly close here. So my understanding of Article
2 1103, for example, is that it entitles the
3 claimant, if it is found to have been in breach, to
4 the benefits under the GEIA, the better treatment
5 afforded the Korean Consortium, and the first date
6 on which that became apparent to Mesa was September
7 17th, 2010.

8 And that then crystallizes the
9 damages pursuant to 1103. The fact that it may
10 have taken subsequent events to determine that it
11 impacted all four, we know, for example, at July
12 4th, 2011 they weren't awarded any contracts.

13 Let me make a hypothesis, that if
14 on July 4th, TTD and Arran had been provided
15 contracts under the FIT program, then I still think
16 there would have been a loss under 1103 for the
17 other two projects due to the better treatment to
18 the Korean Consortium, but part of the loss would
19 have been mitigated by virtue of Mesa receiving the
20 contracts.

21 So they didn't receive the
22 contracts, so the loss is the entire piece.

23 THE CHAIR: Can I ask just one
24 follow-up question? Sorry for the interruption.

25 Your answer was focussing on the

1 better treatment. You say that in September 17th,
2 2010, it became obvious that the better
3 treatment -- that they were entitled to the better
4 treatment and that is how you justify this
5 valuation date.

6 Now, let's assume we do not adopt
7 the idea of the better treatment and simply adopt a
8 view that what matters is the fact that they have
9 not been awarded FIT contracts. How would then
10 your answer be to the question of: What loss
11 occurred on September 17th, 2010?

12 THE WITNESS: I think, on that
13 basis, the loss at September 17, 2010 would be the
14 loss of the four projects without the benefits of
15 the GEIA.

16 So it would become -- if there is
17 no breach of 1103 by virtue of the better treatment
18 to the Korean Consortium, then you would be back
19 into the loss of the projects without the benefits
20 of the GEIA.

21 THE CHAIR: I understand that, but
22 September 17, 2010 Mesa would not know whether it
23 will be awarded the contracts, or not.

24 THE WITNESS: I think if you look
25 at -- and there's some charts in the -- I believe

1 it is the first report of Mr. Goncalves. And it
2 shows the rankings of the projects and puts Mesa
3 out at eight, nine, and then the high 30s for the
4 other two.

5 The September announcement, at a
6 minimum, cuts off the award that may have been
7 possible for the other two, and then it takes a
8 continuing action of the change point window,
9 access point change, and that in combination
10 results in the fact that TTD and Arran are not
11 awarded contracts, as well.

12 THE CHAIR: Yes.

13 THE WITNESS: But I think the
14 starting point is still September 2010.

15 THE CHAIR: Thank you.

16 BY MR. WATCHMAKER:

17 Q. Okay. Now, you have also
18 changed your Article 1105 valuation date; correct?

19 A. That's a complicated
20 question. There was -- I'm not sure where I should
21 be going with this, because it's been the subject
22 of debate for the last three or four days, in that
23 it was -- the date of 1105 was December 21, 2010.
24 We had wanted to change it to September 17, 2010,
25 had proposed that.

1 That was among the things that
2 were initially rejected, and I think in the last
3 round of what I was allowed to speak to, that
4 change of valuation date to September 2010 was not
5 included. There was only the calculation of
6 discount rate.

7 THE CHAIR: No. But unless I am
8 mistaken, the valuation date issue that we debated
9 over the last few days related to 1106, and it was
10 the question of whether that could be moved from
11 September to August. And if I am wrong, of course
12 counsel will correct me.

13 THE WITNESS: The 1106 date was a
14 move from August 5th to July. It was moving --

15 THE CHAIR: Then it was confirmed
16 that it was August 5th.

17 THE WITNESS: Yes. So we did not
18 change 1106. Although it is not in evidence,
19 because it was withdrawn, the so-called "correction
20 letter" was also going to change 1105 from December
21 2010 to September 17th, 2010.

22 THE CHAIR: Right.

23 THE WITNESS: And I think as this
24 progressed during the hearing, that was one of the
25 items that kind of fell off the table.

1 THE CHAIR: It was not revived in
2 your last letter?

3 THE WITNESS: Right.

4 THE CHAIR: Yes, that's clear.

5 MR. WATCHMAKER: My apologies, I
6 think I misspoke.

7 BY MR. WATCHMAKER:

8 Q. You have adjusted your
9 discount rate?

10 A. We have.

11 Q. Okay.

12 A. To reflect the actual
13 calculation at September. The valuation date
14 didn't change. It's the calculation of the
15 weighted average cost of capital components that
16 changed.

17 Q. You have also removed the
18 economic development adder and the capacity
19 expansion option?

20 A. Two different questions. One
21 is the calculation of the weighted average cost of
22 capital, that affects 1102 and 1103, and 1106 as it
23 relates to 1102 and 1103.

24 The second question relates to my
25 suggestion that 1105 should not include the

1 benefits of the GEIA, and so the change in the
2 discount rate is then to reflect a difference,
3 rather than the calculation, if you will.

4 Q. If I recall the numbers in
5 the chart, they were still quite high. You're
6 continuing to include the Summerhill and North
7 Bruce projects under that claim; correct?

8 A. That's correct.

9 Q. And on what basis --

10 A. On a higher risk -- excuse
11 me, a higher risk of attaining those, we suggested
12 there should be an incremental risk, first of all,
13 to the overall cap rate -- sorry, capitalization
14 rate or discount rate, cost of equity, to reflect
15 the removal of the benefits of the GEIA, and then a
16 further increase to the risk reflecting the state
17 of those projects when there's no benefit of the
18 GEIA, that you could absolutely move them forward.

19 Q. Okay. Well, we've already
20 talked about how much capacity might be available
21 in the Bruce, so I don't intend on going back on
22 that.

23 I've just got a few more
24 questions. Could you please turn to page 22 of
25 your original report? This page has confidential

1 information on it, but I want to look at a
2 non-confidential paragraph. It is paragraph
3 4.1(a)(3). I don't know if there is a public
4 version we could use?

5 It is at page 22 of the original
6 report. You see here -- Mr. Low, are you there?

7 A. I believe I am, yes.

8 Q. So you say here:

9 "The additional 10 percent of
10 capacity is considered to be
11 an incremental loss that has
12 been quantified based on the
13 assumption that the claimant
14 would have the ability to
15 increase the capacity of its
16 projects by 10 percent that
17 was offered to the Korean
18 Consortium as part of the
19 GEIA."

20 Do you see that?

21 A. Yes.

22 Q. Now, I would like to actually
23 look at the GEIA provision dealing with this, and I
24 don't think it is in your bundle, but it is Exhibit
25 C-322. I would like to look at section 3.4

1 specifically.

2 A. In this binder?

3 Q. I don't think it is in that
4 white binder. Maybe we could try to find that. It
5 is section 3.4 and it is claimant's Exhibit C-322.
6 So it is section 3.4.

7 So the first part of this
8 provision says:

9 "The Korean Consortium may
10 adjust the Targeted
11 Generation Capacity for each
12 phase of the Project,
13 specified in Articles 3.1 and
14 3.2, within the range of plus
15 or minus 10 percent."

16 Do you see that?

17 A. I do.

18 Q. And then the phrase at the
19 end of this provision limits its scope by adding
20 "subject to Targeted Generation Capacity of 2,500
21 megawatts overall for the project."

22 Do you see that, Mr. Low?

23 A. Yes, I do.

24 Q. So would you agree with me
25 that this provision deals with a 10 percent

1 adjustment to the generation capacity of a phase of
2 the entire Korean Consortium's project, but that
3 the generation capacity of the entire project is
4 capped to the consortium's overall total of 2,500
5 megawatts?

6 A. I would agree that that is
7 how that reads, yes.

8 Q. And that means your
9 additional damages for this capacity expansion
10 option, that's not really appropriate, is it,
11 Mr. Low?

12 A. No. I believe it is
13 appropriate, and there's a combination of things
14 that have to be taken into account to consider
15 that.

16 One is that the Mesa projects
17 effectively could be considered a phase. They are
18 pretty close to being a 500-megawatt phase. They
19 have 565 in combination.

20 Mesa has indicated that if it had
21 known that this type of arrangement was possible,
22 that they would have been prepared to undertake the
23 kind of obligation that was in the GEIA, at least
24 as interpreted by us with the manufacturing
25 commitment being point to a supplier, and would

1 have been prepared to undertake 2,000 or 2,500
2 megawatts.

3 So within that context, these
4 projects would have been a phase of that entire
5 commitment, if the -- if Mesa had been aware of the
6 opportunity of this better treatment.

7 Q. I would like to stay on a
8 valuation perspective, though.

9 The provision says that the entire
10 project is capped to the consortium's overall total
11 2,500 megawatts. Now, wouldn't you agree that that
12 means that they cannot generate -- pardon the
13 pun -- any additional revenues for their project
14 overall?

15 A. That's correct. What they
16 can do is advance the revenues and the
17 profitability of the project by moving capacity
18 from later projects that won't be ready for several
19 years to projects that are currently available and
20 ready.

21 And, effectively, that's what
22 we've done in our calculation, in that relative to
23 the Korean Consortium projects, it would appear
24 that TTD and Arran, at least, if not all four, were
25 certainly advanced further than where the Korean

1 Consortium was.

2 Therefore, this advancement would
3 be attributable to this phase or these four
4 projects.

5 Q. But, sir, even if we were to
6 treat the claimant's projects the way you're
7 suggesting, okay, wouldn't they be capped at their
8 total nameplate capacity? There's no additional
9 10 percent to the nameplate capacity that the
10 Korean Consortium gets here, is there?

11 A. No. But the piece that I
12 think you're missing is that one could have
13 attempted to determine what the balance of the
14 benefit or better treatment under the GEIA was of,
15 say, okay, Mesa could develop 2,000 or 2,500
16 megawatts of power. So the difference between the
17 565 megawatts with the 10 percent adder would
18 simply have come out of that residual.

19 But we didn't do that, because
20 there's simply not enough factual basis on which to
21 determine effectively all of the benefit that
22 accrued to the Korean Consortium under this
23 agreement.

24 So there's a very significant
25 piece of future value that could have accrued to

1 Mesa that we haven't dealt with at all. Therefore,
2 I still think is appropriate to advance this 10
3 percent into what effectively could have been the
4 first phase and, as we heard from Susan Lo, was
5 effectively done by the Mesa -- or the Korean
6 Consortium.

7 Q. So if I understand your
8 testimony, it's that if the claimant was afforded
9 this capacity expansion, you are treating all of
10 the claimant's four projects as a single phase, and
11 you're increasing the generation capacity of that
12 single phase by 10 percent and calculating the
13 value of that future revenue; is that right?

14 A. That's correct.

15 Q. Okay.

16 A. And subsequent phases, if
17 Mesa had been permitted, the benefits, the total
18 benefits of this agreement would have been reduced,
19 and we haven't dealt with that second piece at all.

20 MR. WATCHMAKER: Madam Chair,
21 Members, those are my questions.

22 THE CHAIR: Yes. Thank you.

23 --- Cross-examination concludes at 11:46 p.m.

24 THE CHAIR: Any re-direct
25 questions? Mr. Appleton, do you need a few

1 minutes?

2 MR. APPLETON: I think just a
3 couple of minutes. Do you want to take a mini
4 break?

5 THE CHAIR: No, preferably not,
6 but you can take a few minutes, because if
7 everybody leaves, then it is going to be much
8 longer.

9 MR. APPLETON: I will hook
10 everything up. Sorry, Mr. Low, we just have to
11 hook up to the microphone. You can hear me?

12 RE-EXAMINATION BY MR. APPLETON 11:50 A.M.:

13 Q. All right. Mr. Low, thank
14 you. We have a few questions for you, but I thank
15 the Tribunal for providing us with a short minute
16 to get organized. I have been able to reduce the
17 re-direct questions as a result.

18 Now, I am going to ask you to just
19 recall some of the testimony. It was a full
20 morning. Mr. Watchmaker asked you a lot of
21 questions and we have a lot of information here.

22 First of all, he had asked you a
23 question at the very beginning about some of the
24 standard practices that you might do. He took you
25 through some letters and asked you about whether

1 you had gone back to sort of audit or check certain
2 information.

3 Would you traditionally do an
4 audit in calculating lost profits within the
5 60-plus testimonies that you provided as a damages
6 expert?

7 A. I cannot recall one
8 circumstance where -- in any of my actual
9 testifying cases, where I undertook an audit of the
10 information provided.

11 Q. So what you did in this case
12 would have been the standard practice?

13 A. Absolutely.

14 Q. I see. Now, Mr. Watchmaker
15 asked you about Article 1106 damages. Do you
16 remember he was asking you about some of the slides
17 you talked about today, the pie chart?

18 A. Yes.

19 Q. Now, in your answer to him,
20 you said that the Article 1106 damages were all
21 future losses.

22 Now, I would like you to look at
23 your report, section 4.1. Is this the first report
24 or second report? Second report. That's what I
25 thought. Your second report.

1 Do you see that in front of you?

2 I don't know what tab that is, sir, in the binders.

3 A. I have my copy of the report.

4 Q. Tab B. Tab B. So I am going
5 to ask that they put section 4.1 up of the report,
6 because I am a little confused, for a minute.

7 Do you have the portion I want to
8 focus on? So can we just put it up?

9 So if you look here in 4.1, you
10 can see near the bottom, it says:

11 "We note that prior to the
12 time Mesa Power would have
13 obtained FIT contracts, it
14 incurred higher costs due to
15 the domestic content
16 requirements."

17 And so I am just confused, and
18 perhaps the Tribunal would be. Was there incurred
19 damage, as you have said here in your second report
20 with respect to 1106, or were all of the damages
21 future-related?

22 A. I believe I tried to make
23 this clear in my evidence, but there are incurred
24 higher costs at the dates of the breach that relate
25 to the past costs incurred, in that it is believed

1 that those costs were higher by virtue -- in order
2 to get the local domestic content up, that, for
3 example, Canadian consultants were used rather
4 than perhaps people that Mesa had dealt with before
5 where they believe the prices would have been
6 lower.

7 So in our analysis of the past
8 costs at schedule 1B of our first report, there is
9 an indication of a number of consulting costs,
10 pre-development costs, in the order of I think
11 \$5 million. And some portion of that represents an
12 increased cost incurred.

13 What we have quantified in Article
14 1106 are the future damages that would result from
15 actually finishing out the construction of the
16 project. But there are past costs incurred that
17 are the result of the domestic content requirement.

18 Q. So these incurred costs are
19 because of the requirement to have to obtain local
20 content that would require that you change what you
21 were doing. Is that what you're saying, or did I
22 misunderstand?

23 A. Yes. The domestic content
24 requirement had to be met and you could meet it in
25 a number of ways.

1 It wasn't necessarily that the
2 turbine, for instance, had to be 100 percent local
3 content. It didn't. But in aggregate, you had to
4 build up to meet the domestic content requirement.

5 Since, for example, the
6 turbine -- so 1.6, even though it was proposed to
7 meet the domestic content requirements, there were
8 still other costs that had to be supplemented for
9 Mesa to attain the entire domestic content
10 requirement.

11 So having local consultants, local
12 people installing the towers, et cetera, you would
13 build up, and part of that was in the past costs.

14 Q. The reason, Mr. Low, might be
15 because there is a cap on what you are allowed to
16 quantify within the domestic content by component
17 category?

18 A. By component, that's correct.

19 Q. So, therefore, you would have
20 to make it up in other areas. You can't just get
21 it in one?

22 A. That's correct.

23 Q. I understand, okay. Now I
24 get this.

25 Now, you were asked by

1 Mr. Watchmaker that if the FIT program had been
2 launched -- sorry, if the FIT program had not been
3 launched, would the General Electric deposit have
4 been lost? And I believe that you said that if
5 things had played out the way they had, it would
6 have been lost. That's my recollection.

7 I have a couple of questions
8 arising from that. Is it true that Mesa was in the
9 FIT program between November 2009, when they
10 applied, to July 4, 2011, which is at least a
11 20-month period?

12 A. At least, yes.

13 Q. Yes. And wasn't it important
14 to the FIT program that the applicant could
15 demonstrate they had an equipment supply contract?

16 A. That was a requirement, yes.

17 Q. Then wouldn't it be
18 reasonable for Mesa to allocate the turbines under
19 the MTSA to the Mesa FIT project during this time
20 period?

21 A. That is certainly my view,
22 yes.

23 Q. So do you think it is really
24 possible to determine what the effect would have
25 been if there had been no FIT program?

1 A. It's a very extreme
2 hypothetical. I mean, it takes it out of the
3 entire context of this hearing, frankly.

4 Q. Okay. Mr. Watchmaker also
5 asked you a series of questions about a letter from
6 the Ex-Im Bank. Do you remember that?

7 A. Yes.

8 Q. Did you rely on the Ex-Im
9 Bank letter to set your debt rate?

10 A. No, we did not.

11 Q. Did you rely solely on the
12 Ex-Im Bank letter to determine the interest rate on
13 debt in your report?

14 A. No. The --

15 Q. Sorry.

16 A. What we did was we had
17 reference to the Ex-Im Bank letter. It was
18 available.

19 We had information through our own
20 practice in Toronto of what reasonable interest
21 rates were for project finance at the time, and
22 these are referred to in my report.

23 And the actual rate that we
24 adopted for, if you will, the Ex-Im Bank portion
25 was, frankly, considerably in excess of what was

1 quoted in the Ex-Im Bank letter. And in
2 combination with the project finance piece and the
3 term piece of the financing, we ended up for an
4 aggregate interest rate of 5.38 percent.

5 And there is evidence in the
6 market at the time, through reference to quotes of
7 participants in the wind market and actual
8 transactions that occurred, that suggest that that
9 5.38 percent was absolutely reasonable in the
10 context of what was happening in the marketplace at
11 the time.

12 And those are referenced in our
13 report.

14 Q. Do you know where?

15 MR. LANDAU: This is your
16 paragraph 4.4.1.

17 MR. APPLETON: Thank you,
18 Mr. Landau. Of the second report?

19 MR. LANDAU: First.

20 THE WITNESS: The first report.

21 BY MR. APPLETON:

22 Q. First.

23 A. Thank you. So
24 specifically -- thank you for pointing the place.
25 Specifically, the Ex-Im Bank letter suggested the

1 3.66 percent interest rate. What we effectively
2 used was 4.75 percent, and then the balance of the
3 required financing based on a term limit, seven.

4 In the following paragraph, you
5 can see that we have had reference to a
6 transaction -- this is February 2013 -- which is
7 about the time that Mesa would have had to raise
8 financing under the term of the projects pursuant
9 to the GEIA, that the rate for -- \$450 million
10 raise by Brookfield Renewable Energy Partners on a
11 Canadian wind farm project was 5.13 percent.

12 And as I indicated, our average
13 was 5.38 percent. Accordingly, the market would
14 suggest that that was -- our conclusion was
15 reasonable of what the interest rate should be.
16 But it did not rely on the rates in the Ex-Im Bank.
17 We put it into a Canadian context in what we
18 believed was available in the market.

19 Q. Okay. Now, Mr. Low, are you
20 prepared, right now, to discuss with the Tribunal
21 what the quantum of damages would be if the losses
22 were limited only to the failure to obtain each of
23 the four projects? Don't answer. I am going to
24 ask the Chair whether I can proceed to ask those
25 questions.

1 A. Could you just --

2 THE CHAIR: I was reading.

3 MR. APPLETON: Sorry. I am happy
4 to rephrase.

5 THE CHAIR: Can you please repeat?

6 MR. APPLETON: Yes. I was asking
7 Mr. Low if he was prepared right now to discuss
8 with the Tribunal what the quantum of damages would
9 be if the losses were limited only to the failure
10 to obtain each of the four projects.

11 MR. BROWER: Take out the GEIA.

12 THE CHAIR: That means taking out
13 the better treatment aspect, what we discussed
14 before in conceptual terms.

15 MR. APPLETON: It was your
16 question.

17 THE CHAIR: Yes. Is there an
18 objection with asking the question?

19 MR. SPELLISCY: Well, I guess I am
20 a little confused, because I think if you were to
21 do so, if you were to do so, he would essentially
22 be giving the calculations that he arrived at for
23 his 1105 valuation, which the ruling was we can
24 discuss this conceptually, but that we were not
25 going to get into calculations.

1 It seems to me now, if I am
2 understanding what he is being asked to do right
3 now -- I might not be, but if I am, he's
4 essentially providing the calculation that the
5 Tribunal said he shouldn't provide.

6 THE CHAIR: Yes. I have asked
7 myself whether I should ask the question of a range
8 of reduction, and then I refrained from doing so.

9 Obviously we cannot go into the
10 actual calculations, but it would be useful to the
11 Tribunal to have the range. Obviously we cannot
12 award damages on oral testimony about a range
13 without having gone into the calculations, and if
14 we were to reach this point, we would have to get
15 more input from Mr. Low, but then of course also
16 from Canada's expert.

17 Having said that, is it acceptable
18 that the expert answers what the range of reduction
19 will be?

20 MR. SPELLISCY: I think as long as
21 there is no ability to put similar questions about
22 what he's about to say to Mr. Goncalves, who will
23 not have had the ability to assess the
24 calculations, then that would be fine.

25 THE CHAIR: Thank you.

1 MR. APPLETON: What do you think?

2 MR. MULLINS: Madam Chair, we're
3 fine with that. I do think, based on what the
4 Chair has just, we would like to revisit the
5 procedures going forward.

6 We could have Mr. Low continue to
7 testify, but I think we do have comments now based
8 on the ruling from the Tribunal.

9 THE CHAIR: Which ruling?

10 MR. MULLINS: We can do this in
11 front of Mr. Low or do this on break, but if the
12 Chair is saying that we are -- if the Chair is
13 simply said they cannot award damages based on the
14 testimony of Mr. Low, then I think it would be best
15 at this point to have a later hearing to allow the
16 Tribunal to have the full testimony. We're
17 prepared now to --

18 THE CHAIR: Yes. What I was
19 saying is if we reach this issue. I'm not saying
20 we will dismiss the damage claim because we don't
21 have the calculations.

22 I'm just saying that if we reach
23 this issue, which I do not know right now -- I am
24 just making assumptions, but then -- and we would
25 not follow Mr. Low's calculation as it is now in

1 his reports and we would rather go with the oral
2 testimony, then we need substantiation for that.
3 And you would certainly get a chance in providing
4 this, if it is needed, as would Canada be in a
5 position to respond. And if that requires a
6 hearing, then so be it.

7 MR. MULLINS: And that's fine to
8 the Tribunal. I had raised earlier that I am
9 concerned about how that might be communicated.

10 THE CHAIR: You have raised --

11 MR. MULLINS: And I would have
12 thought it would be more practical. You may come
13 to an internal decision amongst yourselves about
14 where you are headed, but once you communicate that
15 to us, and then now there could be an argument,
16 well, is this a ruling or a final award or award
17 that could be confirmed or sought?

18 And I thought what might be more
19 practical -- again, because I want to be most
20 efficient as possible and respectful of the time of
21 the Tribunal - that as long as there is an
22 outstanding issue and you have internal
23 discussions, it might be more efficient at this
24 point to let you have all of the evidence before
25 you, and then you can decide where you are going to

1 go.

2 But if you start saying, Look, I
3 don't need to go that now because I'm not going to
4 reach that issue, then there will be an argument if
5 that is a ruling or not.

6 I think given what the Tribunal
7 said, and I fully respect what you're saying, it
8 might be best at this point, with all of the
9 testimony from the experts, to have that latter
10 hearing to support all the evidence you need, and
11 then can you take that evidence and decide what you
12 want to do and how any award is to be given.

13 I respect efficiency, but I am
14 also concerned that any interim rulings might cause
15 more inefficiency as we will end up fighting in
16 some court somewhere about what the effect of that
17 is. That is my thought.

18 THE CHAIR: Would you like to
19 react now or later?

20 MR. SPELLISCY: I guess on a
21 couple of points. I am not sure what the concern
22 is here. We are under the UNCITRAL arbitration
23 rules here, which provide for partial awards.
24 Partial awards are not an issue if the Tribunal
25 needs to have a separate hearing. I don't know

1 what the exact concern is being raised.

2 My bigger concern is one of, Why
3 are we here now, because if we're now talking about
4 we're going to need a separate hearing and we're
5 bifurcating, this was our whole point weeks ago,
6 that if you wanted to do this, you should have
7 bifurcated weeks ago?

8 I fully subscribe to what the
9 Chair has said, which is you can come to your
10 deliberations, and if -- which is what we wrote in
11 our letter. If necessary, we can schedule another
12 hearing, but I would object to scheduling that
13 hearing and spending that time and resources having
14 another hearing before we're at that point. I just
15 don't think that it is a good use of time.

16 THE CHAIR: I think the Tribunal
17 has heard you all discuss this. There was no
18 indication of a partial award.

19 I mean, when I go into
20 deliberations, there may be issues that come up on
21 this topic, but not on others. The Tribunal could
22 at any time go back to the parties and say, I'm
23 missing information for this point. I did not
24 realize before it was really relevant for my
25 deliberation, and, therefore, please provide it in

1 one way or another.

2 That was more the idea. But I
3 think what we should do now is simply continue with
4 this examination, because we still have another
5 witness to hear today, and then at some point the
6 Tribunal will have a discussion during a break and
7 come back.

8 MR. MULLINS: I appreciate that.
9 I appreciate it sounds like if the communications
10 are more, 'we need more information on the
11 following topics', that might be a different issue
12 than an award.

13 I appreciate the education on
14 that.

15 THE CHAIR: I'm sorry if I was not
16 clear.

17 MR. MULLINS: No. I may have
18 over-complicated the issue. I have dealt with this
19 before and I am trying to avoid the problem.

20 THE CHAIR: No, I understand where
21 you are. That was not what I had in mind,
22 absolutely.

23 MR. MULLINS: Sorry for the
24 interruption.

25 MR. APPLETON: That's why we were

1 seeking procedural guidance to know where to go.

2 So I am unclear as to what we have decided, if we

3 decided anything. That is my ---

4 THE CHAIR: We have not decided

5 anything. The Tribunal has just given an

6 indication that if we were to reach this issue in

7 our deliberations, like other issues that we may

8 reach and that we require more information from the

9 parties, we would require it, certainly.

10 Having said that, I thought that

11 it would be acceptable that Mr. Low gives a range

12 of what the reduction is. It's a range and it's

13 not more than that.

14 MR. APPLETON: Okay, great.

15 THE CHAIR: I think that is -- it

16 was accepted, yes.

17 MR. APPLETON: Excellent. Okay.

18 Well then --

19 THE CHAIR: So, Mr. Low, can you

20 give us a range?

21 THE WITNESS: Removing the impact

22 of the GEIA from 1105 would be approximately a

23 \$125 million reduction to my previous conclusion,

24 which was \$657 million before interest. So the

25 amount is approximately \$530 million on a

1 non-GEIA-included basis.

2 If I could ask Mr. Appleton for a
3 point of clarification, you asked a question about
4 each project, I think, but I am not sure you want
5 to go there or if the total is sufficient.

6 THE CHAIR: I think for the time
7 being, the total is sufficient.

8 BY MR. APPLETON:

9 Q. So I think what would be best
10 here would be to ask the Tribunal. If they want
11 more information, they should ask you, rather than
12 us, because we're really in their hands in any
13 event. And now that we have the procedural
14 guidance, I think we can turn it back over. Thank
15 you.

16 THE CHAIR: That means you have no
17 further re-direct questions?

18 MR. APPLETON: I only had that
19 procedural question to get some procedural
20 understanding from the Tribunal, which is not part,
21 in essence, of my re-direct. And now that that is
22 resolved, we're finished. Thank you.

23 --- Re-Examination concludes at 12:11 p.m.

24 THE CHAIR: Do my colleagues have
25 questions for Mr. Low?

1 QUESTIONS BY THE TRIBUNAL AT 12:11 P.M.:

2 MR. BROWER: I will begin just by
3 observing you apparently have sat as arbitrator and
4 it is much better, isn't it?

5 --- Laughter.

6 THE WITNESS: It's an easier task.

7 --- Laughter.

8 THE WITNESS: On a damages
9 perspective, only. I think the law is a little
10 more complex.

11 MR. BROWER: You testified earlier
12 in your testimony this morning that you have
13 calculated damages which are assumed to have been
14 incurred or assumed to have occurred.

15 Now, that embraces to me two
16 things. One, you have made it clear that you're
17 proceeding on the assumption, which is part of your
18 instructions, that there has been a breach of these
19 various articles of NAFTA which have been referred
20 to. That is one; right?

21 THE WITNESS: Yes.

22 MR. BROWER: But you are also
23 assuming that these four contracts would have
24 succeeded?

25 THE WITNESS: That's correct.

1 MR. BROWER: So you have not been
2 asked to do any analysis of whether the alleged
3 breach in each case would, in fact, have caused
4 damages. You have calculated what the damages
5 would be had losses been caused by the breaches,
6 and your take-off point for that is the FIT
7 contracts for which applications have been made
8 would in all four cases have been won.

9 THE WITNESS: If I might, I think
10 I would express it a little differently. Under
11 Articles 1102 and 1103 --

12 MR. BROWER: Right.

13 THE WITNESS: -- the assumption
14 that has been made is that there is a breach of
15 those NAFTA articles.

16 MR. BROWER: Right.

17 THE WITNESS: From a damages
18 perspective, once that assumption is made and if
19 the Tribunal found that were to be the case, then I
20 think the damages result from that breach and
21 attributable to that on the basis of the better
22 treatment to the Korean Consortium.

23 And I think it's been reasonably
24 demonstrated through the evidence of the various
25 parties, whether put forward by Canada or Mesa,

1 that the Korean Consortium has been able to put
2 forward a number of projects that were low-ranked,
3 whether they picked them off in the market because
4 people were about to forego them anyway or
5 whatever, how they've done it, they have managed
6 from virtually a cold start of having no projects
7 of being able to develop at least the first two
8 phases of 1,000-some-plus megawatts of power.

9 Had Mesa been provided with that
10 better treatment, I don't think there's any
11 question that these four projects would have been
12 developed under that kind of circumstance.

13 The circumstance -- if I leave
14 that for a minute, because my own view from a
15 damages perspective is I think that's fairly
16 definitive.

17 The second question is for 1105
18 and particularly as I have amended my views of how
19 that should be interpreted. And there could be
20 some question of whether two or four projects
21 should go forward and something for the Tribunal to
22 consider.

23 Again, I think under 1105, to me
24 there is virtually no doubt that at least two were
25 going to be put forward and succeed. And I think

1 there is a good probability that all four could
2 have proceeded. And we've taken that probability
3 factor into account in the discount rate by
4 increasing the discount rate for the last two
5 projects.

6 But the last comment I would like
7 to make, as far as trying to explain the
8 probability, if you will, of the projects
9 proceeding is inherently built into the discount
10 rate that we've selected.

11 So whether it be the OPA sitting
12 back at the beginning of this whole process and
13 saying somebody coming into this and developing a
14 project should be entitled to an 11 percent rate of
15 return, some projects are going to go forward, some
16 projects aren't. But they are saying that's the
17 reasonable rate of return to be earned on those
18 projects, and therefore they set the price or they
19 believe they set the price to try to drive that
20 kind of rate of return.

21 So the prospect of whether any of
22 these projects goes forward is considered in the
23 rate of return that we've chosen.

24 So that's a very long answer to a
25 question, but I think there's various levels. It

1 depends on which article you're in, and I think
2 that the prospect of the projects going forward is
3 affected by which article, but is compensated for
4 in the discount rate.

5 MR. BROWER: Well, then I
6 understand you to be saying you actually have done
7 two things. One is to calculate the damages,
8 assuming damages have resulted, have been caused by
9 the breaches.

10 But you are also dealing with the
11 issue of whether or not -- and, if so, the extent
12 to which -- there is a causal connection between
13 the breach and the experiencing of damages. You
14 have used the word "probability" with respect to
15 two versus four, and you have taken the view that,
16 on your analysis, it is certain -- under some of
17 those articles it was inevitable, it was
18 unavoidable -- that the breach caused the damages
19 that you are calculating.

20 THE WITNESS: I think, sir, that
21 under Article 1102 and 1103, the better treatment
22 afforded the Korean Consortium indicates that these
23 projects would have gone forward.

24 They've demonstrated that it could
25 be done and would be done pursuant to the treatment

1 that they were provided.

2 However, when I said that the
3 prospect of them proceeding is, in part, dealt with
4 in the discount rate, we still applied that
5 discount rate.

6 So it's not a virtual certainty.
7 An 11 percent cost of capital has relatively a fair
8 amount of risk built into it. It's not a
9 certainty, but we think that the contingencies are
10 fully taken into account in that discount rate.

11 MR. BROWER: But these projects
12 were still competing with other projects which were
13 not covered by GEIA and were not brought up by
14 GEIA. So there's a competition factor there.

15 THE WITNESS: There is a
16 competition, unless you are under the better
17 treatment accorded the GEIA.

18 The GEIA projects did not have to
19 compete with the FIT projects. 1105, sir, I
20 absolutely agree with you, it is a different
21 circumstance. 1102 and 1103, I think, are -- have
22 a different thought process behind them of awarding
23 the better treatment, rather than assessing the
24 projects within the FIT program.

25 The better treatment under the

1 GEIA is outside of the FIT program.

2 MR. BROWER: But wouldn't every
3 other project, at least in this Bruce area where
4 the applications were made, be entitled to be
5 considered on the same basis, that they also get
6 the better treatment? So you are just on a
7 different plane of competition.

8 THE WITNESS: I think I'm heading
9 towards legal territory there.

10 MR. BROWER: Okay.

11 THE WITNESS: But I don't think
12 that's the case. I don't think the analysis is
13 that the same treatment is afforded everybody who
14 was in the FIT program.

15 I think the treatment is that
16 pursuant -- if there's a breach of 1103 under the
17 NAFTA --

18 MR. BROWER: Right.

19 THE WITNESS: -- then the
20 compensation for that breach is the treatment. And
21 it doesn't extend to everybody should get that
22 treatment. It is particular to this claimant and
23 the nature of the damages that arise from that
24 breach.

25 1105, I would agree with you, is

1 different, in that --

2 MR. BROWER: Right.

3 THE WITNESS: -- Mesa is still in
4 the competitive FIT pool under 1105.

5 MR. BROWER: Okay. Now, with
6 respect to two-and-a-half, whatever it is, MW, kW,
7 and the --

8 THE WITNESS: 2.5x1 versus 1.6x1e.

9 MR. BROWER: 1.6.

10 THE WITNESS: It is easier just to
11 use the numbers.

12 MR. BROWER: Okay. So the point
13 you made is that the 2.5s were not available with
14 sufficient local content?

15 THE WITNESS: In 2011.

16 MR. BROWER: At the time that
17 acquisition need --

18 THE WITNESS: At the time Mesa
19 believed they had to commit to the projects.

20 MR. BROWER: Right.

21 THE WITNESS: The one factor that
22 I think has to be remembered is that -- and it's a
23 bit of an anomaly here because of the moving
24 valuation dates and construction timetables.

25 If, in actual fact, Mesa was

1 accorded the GEIA and fell into the GEIA timetable,
2 the 2.5s would have been available with the
3 domestic content requirement, and the 1106 claim
4 really would then become part of the base case.
5 It's not that it falls off the table. It just
6 changes character.

7 MR. BROWER: Right.

8 THE WITNESS: And would be part of
9 the base case, in that rather than the base case
10 being built off the 1.6 with the lower efficiency,
11 lower revenues, we would have built the base case
12 off the 2.5s.

13 But given the timing of the
14 breaches, we believe that the 1106 claim stood on
15 its own at that point in time.

16 MR. BROWER: And the GEIA timing
17 you just referred to is the timing under the
18 amended and restated agreement?

19 THE WITNESS: That's correct.

20 MR. BROWER: The delayed date.

21 THE WITNESS: Yes, sir.

22 MR. BROWER: But going back to the
23 situation as it was at the time turbines were
24 ordered or required, did any company other than GE,
25 do you know, offer at that time 2.5x1 that would

1 have had sufficient Ontario content?

2 THE WITNESS: Not that I am aware
3 of.

4 MR. BROWER: All right.

5 THE WITNESS: There are projects
6 that have used a Siemens 2.3. So my understanding
7 is they are different, but they have some
8 similarities. But that has happened post-2012.

9 MR. BROWER: Right.

10 THE WITNESS: Which is when the
11 2.5s were supposed to be available with the
12 domestic content requirement.

13 MR. BROWER: But is it your
14 understanding that Mesa was bound to make its
15 acquisitions from GE rather than from any other
16 source, had such a source been available, for 2.5x1
17 with the required amount of Ontario content, either
18 because they were contractually bound not to deal
19 with anyone else or because effectively they were
20 prevented by the fact that they had invested
21 150-some million in the contract with GE?

22 THE WITNESS: I believe those two
23 things go together. The MTSA has an exclusivity
24 provision in it.

25 MR. BROWER: Right, yes.

1 THE WITNESS: But there was an
2 investment of \$150-odd million that Mesa was trying
3 to use in addition.

4 MR. BROWER: So they were locked
5 two ways?

6 THE WITNESS: They were locked two
7 ways.

8 MR. BROWER: Can you explain to me
9 why there would have been a revenue increase? I
10 understand the cost situation, but why would there
11 be a revenue increase if 2.5xls were used rather
12 than the 1.6?

13 THE WITNESS: Yes. I can try to
14 explain that. The wind studies that were prepared
15 had both analyses for the 2.5 and the 1.6 turbines.

16 The wind analyses with the
17 characteristics of the wind in that area indicated
18 that the 2.5s were more efficient, that on the
19 basis of the amount of power that they would drive
20 per hour per day, because of the wind, was greater
21 than what could be derived from a 1.6. And it is
22 simply that increment of efficiency and power that
23 drives the incremental revenue.

24 I can get into some numbers and
25 stuff, but, conceptually, that's what it is. It is

1 the nature of the specifics of the site, the wind
2 characteristics as was determined in these wind
3 studies, that indicated that there was a benefit to
4 use the 2.5s.

5 They were more efficient, without
6 being significantly different in capital cost.

7 MR. BROWER: Well, the next
8 question may explain my total ignorance of
9 electrical engineering and power supply. But if
10 there is a limited transmission line and there is a
11 limit on the amount of megawatts that the system
12 will accept, how can you increase your output? How
13 will it be accepted?

14 I mean, there is not sort of an
15 endless capacity to absorb, as I understand it.

16 THE WITNESS: No. And that's
17 correct. I'm not an electrical energy expert.

18 MR. BROWER: Welcome to the club.

19 --- Laughter.

20 MR. BROWER: There's a lot of us
21 here.

22 THE WITNESS: Let me explain it
23 this way in the context of wind.

24 Wind is not like, say, hydro power
25 where you have a relatively constant stream of

1 water that flows by a dam, absent rain storms or
2 whatever.

3 MR. BROWER: Right, yes.

4 THE WITNESS: The wind is going to
5 vary. It's going to go up and down. These,
6 therefore, have variability in them anyway.

7 The revenue projections that we
8 have used are based on the 50 percent probabilities
9 in the wind studies. So there's a 50 percent
10 probability the wind will be higher; a 50 percent
11 probability the wind will be lower. That's the
12 standard methodology that's used.

13 So to the degree that the turbine
14 can be more efficient, it's going to generate
15 somewhat more power, but it will still fall within
16 the range of what has been contracted, that
17 the -- that variability will absorb that
18 difference.

19 And we're talking about -- because
20 it varies by which of the projects, but the maximum
21 variance is 8 percent, and I think one of them
22 could be as low as 1-1/2 or 2 percent different.

23 So it is relatively minor in the
24 scheme of how much incremental power is driven, but
25 because there are no extra costs, the revenue

1 virtually falls to the bottom line. There's no
2 incremental cost. It is simply that the turbine is
3 turning and generating power.

4 MR. BROWER: Well, it sounds to me
5 like you really mean greater net revenue, because
6 the emphasis is on the costs being lowered because
7 of whatever the characteristics are of the 2.5xl,
8 not that there is a lot more money coming in.

9 THE WITNESS: It actually is that
10 there is more money coming in. The incremental
11 power that you can sell virtually has no costs
12 against it, because all of your costs are already
13 fixed. The maintenance per turbine is already
14 fixed.

15 So if you can increase the revenue
16 that, call it, 5 percent increase in revenue,
17 rather than being diluted by cost down to the
18 bottom line, is literally going to go to -- that
19 5 percent revenue increase is going to go right
20 into your income.

21 MR. BROWER: That I understand,
22 but you're putting out more power than what you
23 have been permitted contractually.

24 THE WITNESS: It is actually not
25 more than what you have been permitted. It still

1 falls within the required capacity. It is just
2 they do it more efficiently, such that you will get
3 more power within that scope of when the wind is
4 blowing.

5 MR. BROWER: Well, I think I have
6 done as well as I can on that.

7 --- Laughter.

8 THE WITNESS: I think I have, too.

9 THE CHAIR: Do you have anything?

10 MR. LANDAU: There is only one
11 issue I want to go back to, and that is on your
12 choice of valuation dates.

13 It may be that the answer to this
14 is, in the scheme of things, what's driving this is
15 the instruction you have been given by counsel as
16 to what valuation date to use. If that is the
17 case, then that's fine and that's the position, and
18 it becomes simply a legal issue to debate.

19 But what I wanted to ask you is,
20 if that is not the case, if in fact there is an
21 economic analysis you have done that has driven you
22 to the choice of valuation date, what is the
23 significance in economic terms -- from your
24 perspective, valuation terms, what's the
25 significance about the date that a party becomes

1 aware of something?

2 I mean, the easiest way is to look
3 in your chart. I'm looking, for example, in your
4 second report, paragraph 7.11, where you summarize
5 dates of breach. And granted this has gone through
6 other developments since, but here you articulate
7 your reasoning.

8 So if you look under 1102, on this
9 day Mesa Power became aware of the better treatment
10 and 1103 is consistent; you say consistent with
11 that. 1105, to an extent, is also along similar
12 lines, because it's about when something perhaps
13 becomes available.

14 But can you explain to me, from
15 your valuation perspective, why the date of
16 becoming aware, which might be a fortuitous event,
17 is serving it in terms of incurring of loss?

18 THE WITNESS: Two responses, sir.
19 The selection of the date of breach is a legal
20 issue.

21 MR. LANDAU: Right.

22 THE WITNESS: From a value -- this
23 is largely a valuation exercise. From a
24 value-cum-damages perspective, the day that
25 something happens has an impact on the future

1 prospect. It may not be the entire impact because,
2 as I said, you effectively had to wait until there
3 were no contracts awarded to know whether the
4 impact was only on two or on four of the projects.

5 But the effect on value can happen
6 when you find something out, even if the impact is
7 going to be in the future.

8 So let me take a different
9 example. If you are operating a manufacturing
10 company that produces paper bags for the grocery
11 industry, the day -- and you're in the City of
12 Toronto somewhere. The day the City of Toronto
13 says, You know what, we don't want -- actually, I
14 should probably go the other way, because it has
15 come back again.

16 You're manufacturing plastic bags
17 for the grocery industry. The City of Toronto
18 says, We're either going to charge you for every
19 plastic bag that's going into the -- effectively
20 that's going into the landfill, or we're going back
21 to paper.

22 The day that is announced, it has
23 changed the value of that business. So I see that
24 kind of impact happening here.

25 But the circumstance under NAFTA

1 1102 and 1103 I think is different, because it is
2 not that "but-for" scenario that's been talked
3 about. It's an award of better treatment, and that
4 is why I think it links to when you have a
5 knowledge of when that better treatment is.

6 But that's where I begin to get
7 into the legal side of it.

8 MR. LANDAU: Right, right.

9 THE WITNESS: I think.

10 MR. LANDAU: In which case I won't
11 ask you any more questions.

12 --- Laughter.

13 MR. BROWER: You can still belong
14 to the club.

15 --- Laughter.

16 THE CHAIR: May I ask you to go to
17 your first report, paragraph 4.18?

18 THE WITNESS: Certainly.

19 CHAIR: Page 28.

20 THE WITNESS: I have it.

21 THE CHAIR: That is where you have
22 set out the assumptions on which you have
23 established your valuation.

24 I was asking myself: What happens
25 if one assumption fails in the Tribunal's judgment?

1 And you will correct me if I misunderstand the
2 assumptions, but it seemed to me that assumption
3 (A) to (C) must all -- (A) to (D), sorry, must all
4 be cumulatively met for there to be a loss.

5 Now I am speaking in economic
6 terms, at least I am trying.

7 THE WITNESS: Yes.

8 THE CHAIR: And I am not looking
9 at the legal aspects.

10 THE WITNESS: I understand.

11 THE CHAIR: By contrast,
12 assumption (E) if it is not met as set out there,
13 would simply reduce the loss; is that correct?

14 THE WITNESS: With respect to (E),
15 the time line would impact the loss depending
16 whether you advance it or delay it.

17 THE CHAIR: So that's a question
18 of amount?

19 THE WITNESS: Yes, that's correct.
20 So with respect to the other assumptions here, we
21 have effectively tried to put -- I think I have
22 tried to put Mesa into the position that it would
23 have been had it been provided the better treatment
24 under the GEIA. And I think it has been proven
25 out.

1 So (A), the projects would have
2 obtained a FIT contract. Well, they would have
3 obtained a GEIA contract that looks like a FIT
4 contract, but we've stated would have obtained a
5 FIT contract.

6 I think it's fair to say that the
7 Korean Consortium has been able to do that, and so
8 we're simply saying that we had four projects that
9 look like, feel like, may have been better than
10 some of the Korean Consortium projects and should
11 be accorded, then, the same benefit of the GEIA,
12 the better treatment.

13 With respect to the next one, all
14 environmental and associated approvals are
15 received, this is a two-step one.

16 Number 1, at the time that this
17 was occurring, there was nothing known by Mesa that
18 would have suggested they were going to have any
19 difficulties in this area of approvals. TTD was
20 well advanced in this process, and the others are
21 not that far away. They are not located where
22 there are native issues, as some of the other
23 projects have had issues. And the government was
24 required to assist with this process.

25 So, again, while it is stated as

1 an assumption, I think it falls within the context
2 of what the benefits of the GEIA were.

3 The fact of financing, that is a
4 risk that financing can be secured. Given what we
5 know from our research was happening in the
6 industry -- and that's the paragraph that
7 Mr. Landau referred to before -- where there is
8 interest in funding these projects, we're past the
9 recession. People do have money. They are looking
10 for what are effectively infrastructure projects to
11 finance.

12 So I don't think obtaining the
13 financing is a particular issue. And that Mesa had
14 the financial capacity is more of a factual
15 question, and I think Mr. Pickens indicated that he
16 had the money. Not all of us can write
17 \$150 million cheques to GE, so...

18 But the second thing I want to say
19 about all four of those is, while we indicated here
20 they are assumed, they are all part of the "risk"
21 of getting a contract, whether it be GEIA or FIT,
22 and are all part of the risk rate that we assumed
23 was reasonable here.

24 So I will go back to the --

25 THE CHAIR: So my question was

1 relatively simple. If one assumption fails, does
2 it mean there are no damages, or now are you
3 telling me something different by saying there is a
4 risk incorporated in the discount rate?

5 THE WITNESS: There is a risk
6 incorporated in the discount rate that deals with
7 each and every one of these, because each and every
8 one of these would have been built into the risks
9 that the OPA looked at when they said -- because
10 when they are looking at this, they know that not
11 everybody who starts into this process is going to
12 come out the far end.

13 So they are saying, We think that
14 the commercial rate of return for getting into this
15 venture, starting through it and getting to the
16 end, is an 11 percent rate of return. And that
17 effectively takes each and every one of these into
18 account.

19 So I don't think it is as simple
20 as saying, What if one of these fails? I think
21 they are all reasonable in the context of the GEIA
22 and the benefits, but I also think they are all
23 encompassed in the rate of return, anyway.

24 THE CHAIR: Thank you. Then --

25 MR. LANDAU: Sorry, can I just ask

1 one follow-up?

2 THE CHAIR: Yes, of course.

3 MR. LANDAU: Why do you say that
4 all of these are covered by the OPA 11 percent? Is
5 that to say that the OPA itself was building in the
6 possibility that proponents might not have
7 sufficient financial capacity themselves? Do you
8 think the OPA was looking at that?

9 THE WITNESS: I wasn't part of the
10 process, so...

11 MR. LANDAU: You're asserting that
12 this is an important point for your analysis,
13 because you're asserting the 11 percent OPA, in a
14 sense, that discount factor, for you, is
15 encapsulating these assumptions. So it is your
16 analysis.

17 THE WITNESS: Yes, it is an
18 important factor, I will agree with you.

19 I think it is effectively an arm's
20 length benchmark here independent of the parties,
21 and that was done in advance of any of this
22 actually happening.

23 When I look at what went into
24 it -- and they have various factors. So the amount
25 of financing that they believed might be

1 appropriate, there are a number of factors that go
2 into their determination.

3 The risk -- the return on
4 investment that I think that they put forward had
5 to encompass the fact that there were risks of
6 undertaking these projects, that -- let me take it
7 to an extreme.

8 Somebody who gets through the
9 process and has an up-and-running facility, wind
10 project, that wind project becomes worth an
11 incredible -- relatively incredible amount of
12 money, because the risks are then all behind them.
13 The risk, once you are up and running, of operating
14 that facility is no longer 11 percent.

15 It's probably down around 7 or
16 8 percent, like a utility rate of return, at that
17 point, because that is really what it is.

18 So I think the 11 percent
19 encompasses the risk of getting to that stage.

20 MR. BROWER: But it doesn't get
21 you to that stage. The whole point is that that is
22 the reward for someone who has taken all of the
23 risks and succeeded, but it is no guarantee to
24 anyone that they are going to get the contract.

25 I understand it is built into the

1 rate, but, as a matter of causation, did the breach
2 cause this person not to win that FIT contract?

3 That's a fundamental issue.

4 THE WITNESS: I agree that's a
5 fundamental issue, particularly if you're in -- I
6 apologize -- particularly if you're in 1105.

7 Under 1102 and 1103, I think it is
8 not the same issue, because awarding the same
9 treatment I believe is far different than but for
10 these acts these would have been -- these would
11 have proceeded.

12 And so you almost need two
13 different mind sets to think about these, because I
14 think they are very different circumstances.

15 MR. BROWER: Okay, I understand.
16 I understand that. I mean, that's a basic issue,
17 frankly, whether the failure, if that were the
18 case, of Canada to accord, let's say, Most Favoured
19 Nation treatment means that the resulting -- that
20 you have to progress from there to say, Ah-hah, the
21 fact they should have been treated -- that they
22 shouldn't have been -- that they shouldn't have had
23 to contend with the GEIA agreement pre-empting a
24 substantial amount of the available capacity that
25 was in the FIT program necessarily, I think that is

1 a legal issue as to whether the result is that the
2 damage to that unsuccessful applicant has to be
3 calculated on the basis that you have to sort of
4 assume causation, because if Canada had not
5 breached the agreement in that regard, they would
6 have had guaranteed access. I mean, that's
7 something that we have to think about.

8 THE WITNESS: If I might comment,
9 and I will try to stay away from the legal
10 interpretation.

11 MR. BROWER: That's what you're
12 here for.

13 --- Laughter.

14 THE WITNESS: Under 1105, I
15 believe you're absolutely correct that that
16 causation issue is much more directly linked.

17 Under 1103, from a damages
18 perspective, as I read it, Canada's obligation is
19 to provide the better treatment, period.

20 And, therefore, I think you can
21 look at the Korean Consortium and what it did and
22 say, then, Mesa should be accorded those same
23 benefits in treatment. And, therefore, it was
24 guaranteed access; subject to meeting the
25 qualifiers of bringing jobs, it was guaranteed

1 access to the transmission system.

2 And that -- so that's where I
3 think these 1102 and 1103 become very different
4 than 1105 and...

5 MR. BROWER: In this respect,
6 you're operating on the basis of your own expertise
7 and not on the basis of instructions from counsel
8 to make that assumption?

9 THE WITNESS: With respect to that
10 view of how to interpret from a damage perspective
11 1103 --

12 MR. BROWER: Yes.

13 THE WITNESS: -- that is my view.

14 MR. BROWER: Right, thank you.

15 Okay.

16 THE CHAIR: Can you then turn,
17 please, to your second report, page 6, where you
18 have the summary, and page 7?

19 I must say -- and you will forgive
20 me if I missed something during your examination or
21 in your reports -- I am not entirely clear how you
22 compute the amount of losses for under Article
23 1106.

24 If I look at paragraph 1.3 on page
25 6, close to the bottom it says: Consistent with

1 your initial report, the losses related to Article
2 1106 are included in the losses for Articles 1102,
3 1103, 1104, 1105 and are not additive thereto.

4 Then I turn to the next page, and
5 then I see that on the first top-half I have the
6 damages for 02, 03, 04, 05, and then I have a line
7 that says NAFTA 1106 with an amount.

8 THE WITNESS: Yes.

9 THE CHAIR: And it says below, and
10 I believe, if I understand, that below is a
11 breakdown for the amount on this line above, but
12 you have added it to the damages in 02, 03, 04, 05.

13 THE WITNESS: Yes. Let me explain
14 that. I believed that the benefit of the 2.5
15 versus the 1.6, is the domestic content rule,
16 should be included in the damages for 1102 or 1103
17 or 1105, but we wanted to separately quantify the
18 amount, which was determined on the basis of the
19 difference between the 2.5s and the 1.6 and what
20 happens.

21 So the bottom part of this page
22 that says NAFTA 1106 and below are the net
23 differences from using a 2.5 versus a 1.6.

24 And what we were trying to
25 communicate is we've included it in the upper

1 portion. We think it is appropriate to be inside
2 NAFTA 1102, 1103 and 1105, and, therefore, we would
3 not want the Tribunal to take the total for 1102,
4 3, 4 and 5 of, give or take, \$650 million, and then
5 add 1106 to it again.

6 We were trying to be clear, and I
7 guess weren't very, that we didn't want additive
8 things. We've already included it up above, but
9 here's the detail of how it was determined.

10 THE CHAIR: So what you're saying
11 is if there was a breach of 1106, we should take
12 into account the loss that you have established for
13 1106?

14 MR. BROWER: You just said "1106"
15 twice.

16 THE CHAIR: Sorry, I misspoke.

17 If there is a breach under 1102,
18 then we should consider the amount that you have
19 established for 1106 as part of the loss for 1102?

20 THE WITNESS: That is correct.
21 That is how I have dealt with this, yes.

22 THE CHAIR: Yes, yes. So it was
23 the additive that was misleading in my reading, but
24 it is clear now. Thank you.

25 THE WITNESS: Thank you.

1 THE CHAIR: I have no other
2 questions. No follow-up questions? So that means
3 we can adjourn now for lunch, and that ends your
4 examination, Mr. Low. Thank you very much.

5 THE WITNESS: Thank you.

6 THE CHAIR: Should we start again
7 at two o'clock with Mr. Goncalves? Yes. Good.

8 --- Luncheon recess at 12:56 p.m.

9 --- Upon resuming at 2:05 p.m.

10 THE CHAIR: Everyone ready?
11 Mr. Goncalves, you're ready?

12 THE WITNESS: Yes.

13 THE CHAIR: So can you please
14 confirm to us that you're Christopher Goncalves.

15 THE WITNESS: I am.

16 THE CHAIR: You're director at
17 Berkeley Research Group's energy practice in
18 Washington, D.C.?

19 THE WITNESS: That's correct.

20 THE CHAIR: You have provided two
21 expert reports, the first one dated February 28th
22 and the second one June 24, 2014.

23 THE WITNESS: June 27th, correct.

24 THE CHAIR: June 27, yes. I
25 misread my notes. Absolutely. You are here as an

1 expert witness. As an expert witness, you are
2 under a duty to make only such statements in
3 accordance with your sincere belief. Can you
4 please confirm that this is your intention?

5 THE WITNESS: Yes, of course.

6 AFFIRMED: CHRISTOPHER GONCALVES

7 THE CHAIR: Thank you. So we will
8 first proceed with direct examination,
9 Mr. Watchmaker.

10 EXAMINATION IN-CHIEF BY MR. WATCHMAKER AT 2:06

11 P.M.:

12 Q. Good afternoon, Members.
13 Mr. Goncalves, my name is Raahool Watchmaker,
14 counsel for Canada. I only have a few questions
15 for you in direct examination.

16 Could you please summarize for the
17 Tribunal your qualifications?

18 A. Well, I lead the energy
19 practice at BRG. I have been in the energy and
20 financial industries for approximately 25 years.

21 I began my career as a banker in
22 corporate finance at a large global bank, where I
23 initially learned valuation and financial analysis.

24 I have been advising energy
25 companies, governments, state entities, banks on

1 project finance, due diligence, and other entities
2 in the energy sector ever since, including a
3 variety of what I call business advisory,
4 development advisory, transactional advisory,
5 strategic advisory regarding energy projects,
6 values, prices, commercial terms and conditions, as
7 well as more recently, over the last ten years or
8 so, providing expert testimony in dispute
9 resolution proceedings.

10 Q. Okay. And I understand you
11 have prepared a summary of your expert testimony in
12 this matter for the Tribunal?

13 A. That's correct.

14 Q. Would you like to present
15 that summary, please?

16 A. Sure. Copies are coming.

17 --- Copies of expert report distributed

18 A. So this is a summary of the
19 analysis that I provided, focussing particularly on
20 the second report, of course, because it is the
21 most current, but really for both reports
22 throughout the arbitration. Next slide.

23 There are four sections to the
24 presentation: First, just a quick overview of how
25 we view our responsibilities in this matter;

1 second, a summary of our approach; third, a summary
2 of our analysis of causation; and, finally, a
3 summary of the analysis of quantum.

4 With respect to responsibilities,
5 next slide, we were asked -- focussing first on
6 instructions, we were asked to provide an
7 independent analysis of the alleged causes of harm
8 and applicable damages to Mesa Power.

9 In doing that, we were asked to
10 assume that the alleged violations were in fact
11 inconsistent with Canada's treaty obligations. And
12 in relation to that, we were asked to provide
13 independent analysis of the damages evaluation
14 prepared by Mr. Low and Richard Taylor from
15 Deloitte.

16 Next slide. Our view of our
17 responsibilities in providing this work are that we
18 act with independence, be as transparent as
19 possible, strive for accuracy wherever possible,
20 and be realistic.

21 I won't read every bullet on the
22 slide, but it is there in front of you.

23 Next slide. With respect to our
24 approach -- and this is a section I think is very
25 important given what Mr. Low described as the

1 elephant in the room. I thought it was a very apt
2 characterization.

3 We have taken very different
4 approaches in our approach to damages, quantum on
5 this matter. So I just wanted to highlight how we
6 see that in the flow of analysis and process that
7 we go through.

8 We both assume from the outset,
9 under liability, that the NAFTA was breached, and
10 that the various allegations are correct and that
11 Canada is liable.

12 With respect to causation, as far
13 as we can tell, there is really no apparent
14 analysis in the Deloitte report. A lot of the
15 statements regarding causation that we see in the
16 reports talk about the breach, and then they say,
17 as a result, the damages due are the following.
18 But the causation seems to be limited to that
19 statement about "as a result".

20 So in Deloitte's counter factual,
21 they assume that all of the Mesa projects get FIT
22 contracts because of the KC treatment, of course,
23 with the GEIA terms and benefits embedded.

24 I should quickly qualify I am not
25 referring here to the statements Mr. Low made

1 regarding 1105. I am referring to what was stated
2 in his reports before, so I have not updated this
3 to reflect the new statements, although I did hear
4 them.

5 Then with respect to damages, I
6 think they all get the GEIA terms and assumptions
7 about access to the grid, about the risk embedded
8 in the DCF calculations -- that's the discount
9 rate -- the cost of equity, as we heard earlier
10 today, for all of the valuations.

11 So those assumptions, in our view,
12 are pervasive throughout the Deloitte analysis.
13 Looking at the bottom, assuming liability, as well,
14 we then look at causation case by case, and we look
15 at the cause of harm. We focus on the GEIA, the
16 connection change and domestic content, and we
17 conclude that the GEIA and/or the connection change
18 caused TTD and Arran, only, to lose transmission
19 access and FIT contracts, but the domestic content
20 had no impact.

21 With respect to our counter
22 factual to establish the harm created but for the
23 violations, we then look for the most probable
24 scenario of the Mesa projects as they would have
25 existed without the GEIA terms in the market.

1 So we're not ascribing to the Mesa
2 projects the GEIA terms, but trying to put them
3 back in the position they would have been in, but
4 for the breach. We interpret the GEIA to be the
5 breach, not the source of damages. And that's the
6 summary there.

7 Next slide. Why did we do this?
8 By conflating the cause of harm and liability, we
9 were concerned that Deloitte wasn't providing
10 enough information to the Tribunal to make
11 decisions. So we sought, instead of an
12 all-or-nothing approach with respect to the GEIA,
13 what I would call an à la carte approach, where
14 even if the GEIA is not a breach, you could ascribe
15 damages for the other alleged violations. And,
16 also, even if the GEIA is considered a breach, the
17 damages don't incorrectly include the terms of the
18 GEIA in the calculation of damages. They are truly
19 based on a "but-for" scenario that is designed to
20 put Mesa back in the situation it would have been
21 if there had been no breach.

22 Next slide. This is just a quick
23 summary. This comes from our first report. You
24 can find it there, but it is just intended to be
25 helpful to the Tribunal about how we organize our

1 delivery. I don't talk a lot about NAFTA articles.
2 This will map the NAFTA articles and the way
3 Deloitte does it to the way we do it.

4 I refer mostly to the breaches
5 themselves, GEIA, the connection change point
6 window and domestic content in my analysis.

7 But we do understand the Tribunal
8 needs to get back to the NAFTA articles, so we
9 provided this as a reference tool.

10 Next slide. Okay. With respect
11 to causation, next slide, I have brought in here a
12 series of charts from the attachment to our first
13 report where we sort of lay out how we look at the
14 problem and determine the harm caused to Mesa.

15 So the first point gives you the
16 provincial rankings. I have heard in the hearings
17 there's been some confusion about this, whether the
18 rankings were provincial or were at the regional
19 level.

20 Here we give you the provincial
21 rankings the way they were actually performed, and
22 then I am going to switch in the next
23 slide -- sorry, go back, please. What I wanted to
24 emphasize here is this TTD and Arran were number 91
25 and 96, I believe, and North Bruce and Summerhill

1 were 318 through 322 or thereabouts. There were
2 four projects associated with those.

3 And now I will look at it in the
4 Bruce so we can understand what Mesa has alleged
5 about being ranked number 8 and 9, and so forth.

6 Next slide. Okay. This is the
7 Bruce region application of the provincial
8 rankings. So at the bottom, I keep the provincial
9 rankings numbered as they were at the provincial
10 level, but take out all the projects that weren't
11 in the Bruce region.

12 So you can see on the left you see
13 the orange projects are the west of London. The
14 blue projects were FIT-contracted capacity. You
15 have some other projects there, and then you have
16 TTD and Arran showing up down the chain a little
17 bit, and then Summerhill and North Bruce.

18 You see in the actual scenario,
19 with only 750 megawatts of transmission, none of
20 the projects obviously got FIT contracts.

21 Next slide. Turning to the GEIA
22 counterfactual, we then take away the breach,
23 which is the 500-megawatt allocation of
24 transmission capacity to the Korean Consortium. So
25 you now have, at that dotted brown bar, a

1 1,250-megawatt available transmission capacity.

2 And as you can see, TTD and Arran make the cut and
3 get FIT contracts in that scenario, but Summerhill
4 and north Bruce did not.

5 Next slide. In the next scenario,
6 for the connection point change window, we don't
7 adjust the transmission capacity, because we're not
8 assuming that breach, but we do remove the west of
9 London projects that came in and, as we've heard,
10 allegedly bumped out TTD and Arran and the Mesa
11 projects.

12 So what happens there, when you
13 remove the connection change projects, is that TTD
14 and Arran fall down below the 750-megawatt
15 available capacity and get contracts, but
16 Summerhill and North Bruce do not.

17 Next slide. Finally, we've then
18 combined both of those breaches, the GEIA breach
19 and the connection point change window, so that you
20 have the additional transmission capacity, as well
21 as the removal of the west of London projects, so
22 you now have 1,250 of transmission.

23 And in that scenario, as well, TTD
24 and Arran both get FIT contracts, but it is not
25 quite enough to get contracts for Summerhill and

1 North Bruce, which are still well above the cut.

2 Next slide. With respect to
3 domestic content and the use of the allegedly more
4 efficient turbines, we simply couldn't get
5 comfortable that those damages were not
6 speculative. We did a fair amount of independent
7 research and evaluation on this, and what we found
8 is there were a bunch of assumptions built into the
9 assumption of damages.

10 Those were that the turbines were
11 economically less efficient, that the turbines were
12 available at economically beneficial prices, that
13 the turbines were not compliant with domestic
14 content -- sorry, the larger turbines were not
15 compliant with domestic content.

16 And, therefore, Deloitte concludes
17 the economic impact should be factored into the
18 base analysis, which includes the GEIA terms and
19 benefits.

20 In our analysis, counter factual
21 removal of the domestic content requirements
22 does not confer FIT contracts without other
23 violations.

24 So standing alone, it doesn't
25 matter if you have these domestic content

1 requirements on their own, because there is no FIT
2 contracts. That's the actual scenario that I
3 showed earlier.

4 But if you assume other breaches,
5 as well, and then compound with the alleged
6 domestic content violation, we had some other
7 concerns about whether there was actually, in the
8 real world, any caused harm, harm caused. And
9 those were because the smaller turbines may have
10 been more efficient economically, and more
11 appropriate for the local wind regime.

12 This gets fairly technical. I am
13 sure we can talk about it. The larger turbines, in
14 our research, may not have been available at
15 beneficial prices. We haven't seen any evidence
16 that they were. And the larger turbines may have
17 actually complied with domestic content. Again, we
18 talked about that somewhat in with the fact
19 witnesses.

20 So those were the kinds of
21 information we reviewed. As a result, we conclude
22 there was no harm caused and the damages would be
23 speculative.

24 Next slide. With respect to the
25 GE deposit, just to summarize, this is a chart that

1 comes from our second report, I believe it is. But
2 the bottom line -- and I won't go through it,
3 because this is something that's been talked about
4 at great length in terms of the history of the MTSA
5 and its various amendments. All this does is put
6 this on a chronology, map it against some of the
7 various projects we have been talking about in the
8 Mesa portfolio, and look at the impacts.

9 But the bottom line is that we
10 didn't find that the Mesa MTSA -- sorry, that the
11 Ontario breaches caused Mesa to sign the original
12 MTSA to incur the turbine deposit or to forfeit the
13 deposit. So we couldn't establish in our minds a
14 direct causal link between that alleged harm and
15 the breaches in Ontario.

16 Next slide. Finally, turning to
17 quantum, there's been a lot of discussion of
18 valuation dates. I won't repeat the Deloitte
19 assumptions. Those have been summarized very well
20 by Mr. Low in the prior session.

21 Just a few comments on those.
22 Regarding Articles 1102 and 1103 and the September
23 17th date, our view was that publicly reserving
24 transmission for the Korean Consortium in
25 accordance with the terms of the GEIA caused no

1 immediate or direct harm to Mesa.

2 And as you see, in our assumption
3 we assumed July 4th, the date that the FIT
4 contracts were not awarded, is the date the harm
5 was actually crystallized and became apparent to
6 Mesa.

7 For Article 1105, the December 21
8 date -- and I think there was some discussion about
9 that and which day should be appropriate, but,
10 anyway, the lower ranking did not result, in our
11 view, in the loss of a FIT contract, and, as a
12 result, no harm was caused.

13 It was the beginning, perhaps, of
14 the harm, but the harm was actually crystallized on
15 July 4th, in our view.

16 Then finally, with 1106, as I've
17 said, we were unclear there was actually any harm
18 caused at all, so certainly not on August 5th,
19 2010, because there was no harm, in our view, or at
20 least the harm would be speculative to conclude.

21 Next slide. There's been a lot of
22 discussion of the cost of capital in an effort to
23 be helpful and sort of put the major components of
24 this down on paper. We have mapped ours against
25 Deloitte's and provided some comments on the

1 differentials.

2 There are differences both in the
3 cost of equity and the cost of debt. That's a
4 little more complicated than I can summarize in an
5 introduction, but I would only say that it does
6 come from my experience working with development
7 projects that are in the early stages of
8 development or the middle stages of development,
9 and valuing development projects that had been
10 bought and sold between developers, that I assume
11 that a higher discount rate, and particularly a
12 higher cost of equity, is appropriate at this stage
13 of development.

14 Again, I'm not assuming, in my
15 calculations, any benefit from the terms of the
16 GEIA. So the lower-risk profile that Mr. Low
17 referred to, the various facilitation benefits and
18 so forth, don't factor into my calculation here at
19 all.

20 And I do believe these are
21 reasonable figures in light of where the Mesa
22 projects would have actually have been on July 4th,
23 2011 had they received FIT contracts.

24 This, I should emphasize, is only
25 focussed on TTD and Arran, of course, because we

1 don't value Summerhill and North Bruce for the
2 reasons discussed.

3 And next slide, last slide. This
4 is a summary from our second report of the
5 differences between us and Deloitte in the final
6 results. There are a lot of footnotes -- we can
7 talk about those -- simply to clarify some of the
8 points.

9 But the main points I would draw
10 your attention to are -- and I should also say this
11 table does not include any sort of interest
12 damages. We understand that's a matter of dispute,
13 and we're not calculating those at this time.

14 Deloitte's number was on the order
15 of \$657 million for all damages. As Mr. Low said
16 correctly earlier, the difference between us on the
17 matters of causation is about \$500 million, so that
18 is the MOE substantial difference. So our damages
19 without the causation problems would be about \$156
20 million.

21 The discount rate accounts for
22 about \$120 million of damages. The GE turbine
23 treatment -- this is not the turbine agreement
24 itself and the causation issues, but some things
25 about how the payments work under the turbine

1 agreement -- was about 12 million, and the
2 valuation date it was about \$42 million.

3 These are not additive, because
4 we're running each of these individually through
5 the pro forma, through the project models, to
6 determine damages. So it doesn't lend itself to a
7 strict calculation on the right-hand column.

8 And I will leave it there for now.
9 We can go into the details in the rest of the time.
10 Thanks very much.

11 Q. Thank you, for that summary,
12 Mr. Goncalves. Do you have any corrections to make
13 to your report at this time?

14 A. I do. There are two that I
15 would like to make to my second report. First, on
16 page 12, paragraph 40(b) we mistakenly
17 wrote -- this is something of a typographical
18 error -- the economic development adder of 0.27
19 percent. That is obviously incorrect. It should
20 read 0.27 cents per kilowatt-hour. So that is a
21 correction we wanted to make.

22 And the next one regards what
23 Mr. Low discussed earlier at paragraph 154(e). We
24 referred to -- in an effort to correct something
25 Deloitte had done in its reply report previously,

1 we referred incorrectly to the pre-tax unlevered
2 cost of equity, but the words "cost of equity" in
3 the second and third lines of that paragraph, and
4 actually the second, third and fourth -- no just
5 the second and third, should be changed to IRR.
6 He's correct the reference is to IRR.

7 I would also like to note that
8 this is -- I think the error arose -- it was our
9 mistake, that the error arose, because he referred
10 at paragraph 7.4(e) and 7.6 of his report to the
11 Scotiabank numbers and called it the return on
12 equity, and we picked it up and incorrectly
13 switched to cost of equity, because that is, after
14 all, what we're discussing, and didn't look
15 carefully back to the fact that it references an
16 IRR.

17 I heard his comments earlier
18 today. I will be happy to address them. He's
19 correct an IRR is different than a cost of equity,
20 and I don't have any issue with those comments.

21 Q. Okay. Do you have any
22 specific responses to make as a result of Mr. Low's
23 testimony this morning?

24 A. Well, there's a number of
25 things that I would like to address, but I

1 think -- how much time do I have?

2 Q. Well, you can -- we've got
3 time, but we do have to get to cross-examination.

4 A. Let me just maybe -- there's
5 a lot of detail in this discussion. So let me
6 maybe just focus on what I think are major points
7 and those would be -- I think I've addressed
8 causation adequately in my summary, so I won't
9 repeat that, but I do think that is the biggest
10 difference and a very, very important distinction.

11 I think with respect to the
12 discount rate, which is the second-biggest issue in
13 terms of differences between us in quantum, I know
14 that we're different kinds of experts, and I don't
15 have the credentials he has as a CPA, but what I
16 have is a lot of experience in the trenches or in
17 the field, if you will, dealing with developers and
18 business people on valuing assets, arranging
19 transactions, doing due diligence for banks
20 regarding transactions.

21 So these issues are familiar as an
22 energy expert. And what I would say is that an 11
23 percent cost of capital, at this stage of a project
24 where I think the Mesa projects would actually have
25 been on July 4th, 2011, is far too low.

1 And the reason is because
2 developers who buy projects at that stage of
3 development or value projects or evaluate returns
4 at that stage of a project are looking at all of
5 the risks that are ahead of them for permitting,
6 financing, construction, to get to the point of
7 operations, and that's really -- I have written a
8 fair amount about that.

9 I have provided some background in
10 my reports on that. But that's really the core of
11 the issue between us on the discount rate.

12 I also have several more technical
13 issues with the proxy group he selects to calculate
14 his cost of equity. His statements that Mesa Power
15 would have been less risky than that proxy group, I
16 view it as exactly the opposite. I think Mesa
17 Power would have been more risky than the proxy
18 group he selects for a variety of reasons.

19 Those have to do with the
20 geography of the other parties being largely in
21 Europe, the regulatory environments and the
22 benefits they enjoyed, the debt-to-equity ratios on
23 their balance sheets which were better than 80/20.
24 Cost of equity of course also reflects somewhat the
25 leverage in the project. At 80/20 for the Mesa

1 projects, the leverage is quite high, at least
2 compared to the proxy group.

3 It is also high compared to -- he
4 cited the OPA analysis. It is high compared to the
5 70/30 debt-equity ratio assumed in the OPA
6 analysis. Additionally he focusses on their cost
7 of equity, but doesn't take into account their cost
8 of debt, which was 7 percent higher than ours and
9 far higher than his. He doesn't look at their
10 WACC, which would have been higher still than his.

11 And, finally, on the OPA analysis,
12 he doesn't -- I heard what he said about that it
13 would have taken into account all of this
14 development risk, but I fully disagree. That was
15 essentially the equivalent of a regulated rate of
16 return for an operating project to determine the
17 price that they would get from the FIT contract
18 escalated for inflation over a period of time.

19 And that presumes that the project
20 is in operation. It would be applicable from the
21 first date of operation through the end,
22 presumably, or until regulatory change.

23 Whereas when you're valuing a
24 project two or three years before operation, at
25 least a couple of years before operation, there's

1 several risks ahead that the equity investor needs
2 to take into account. And I have tried, in the
3 analysis we did, to capture those kinds of risks,
4 the fact that the equity was only 20 percent of the
5 capital structure, therefore having greater risk
6 than on a 70/30 or 60/40 capital structure, and I
7 think this is the other main area of difference
8 between us.

9 Q. Okay, Mr. Goncalves, I just
10 have two things mostly for the record. You
11 mentioned the word "WACC". Can you just for the
12 court reporter spell out that acronym?

13 A. It is simply a reference to
14 the weighted average cost of capital.

15 Q. Okay. And I think I saw the
16 Members struggling a little to write, so I would
17 remind you to slow down a little bit.

18 A. I will do my best.

19 Q. With that, I will present
20 this witness for cross-examination, Madam Chair.

21 THE CHAIR: Thank you. Can I give
22 the floor to Mr. Appleton?

23 CROSS-EXAMINATION BY MR. APPLETON AT 2:32 P.M.:

24 Q. Okay. Let me check the
25 technology before we go. You see the challenges we

1 have? We're on? Can you hear me? Yes? No? Can
2 you hear me now? Yes. Excellent.

3 Well, good afternoon,
4 Mr. Goncalves. You know that we don't have a lot
5 of time today, so let's just get started. There
6 should be a binder in front of you that we have
7 provided.

8 Let's talk a little bit about
9 qualifications. With respect to this claim for
10 Canada, it's fair to say you're the only damages
11 expert witness?

12 A. That's correct.

13 Q. Yes. And you're just a
14 damage witness, sir; right? You didn't go beyond
15 the area of damages in your report?

16 A. I frequently serve as both
17 damages and/or industry expert. Certainly in some
18 of my analysis on causation and discount rate,
19 there is an element of my industry expertise coming
20 through, but I am functioning here as a damages
21 expert, yes.

22 Q. Right. For this report
23 you're a damages expert, not something else;
24 correct?

25 A. Correct.

1 Q. Right. Now, your full CV is
2 attached to your report; correct?

3 A. Correct, mm-hm.

4 Q. So I am going to run through
5 a few points?

6 A. Sure.

7 Q. You have a BA in
8 international relations and a master's from the
9 School of Advanced International Studies at Johns
10 Hopkins; correct?

11 A. Mm-hm.

12 Q. You mentioned you were a
13 different kind of expert from Mr. Low; right?

14 A. Correct.

15 Q. Right. You don't have a
16 degree in business?

17 A. No. I have a degree in
18 international economics.

19 Q. I like the School of Advanced
20 International Studies. Many people at the American
21 Society of International Law go there. We train
22 many great diplomats there. It is a wonderful
23 program, but your degree is not in business, as I
24 said.

25 Are you recognized as a member of

1 any organization that certifies business valuator?

2 A. No, no certification in that
3 regard.

4 Q. Do you have any articles in
5 economics journals?

6 A. I've written for several
7 publications. I wouldn't call them economic
8 journals. I have an article coming out in the
9 Energy Bar Association.

10 Q. I understand, but my question
11 was about economic journals?

12 A. No.

13 Q. Are you a qualified
14 accountant?

15 A. No.

16 Q. Do you have an accounting
17 degree?

18 A. No.

19 Q. Do you have a law degree?

20 A. No. On those last two
21 questions, let me add although there's no degree, I
22 was trained in all of these matters at an
23 investment bank as a part of the training program
24 for financial association.

25 Q. So I see that the training

1 program gave you training in law?

2 A. No. I didn't say that.

3 Q. You said the last two. I
4 will check that.

5 A. Okay, sorry.

6 Q. I asked you about law, sir,
7 and accounting.

8 A. I was trained in accounting,
9 analytical accounting, corporate finance, financial
10 analysis. We had various modules in our training
11 program that included professors coming in from
12 what Harvard, Chicago, Rice, and various
13 universities to train the bankers on the job.

14 Q. How does that answer my
15 question if you have an accounting degree? Did
16 they give you a degree?

17 A. I was simply adding
18 information to answer your question.

19 Q. I can see that, but you
20 didn't answer my question.

21 A. I answered your question. I
22 do not have an accounting degree.

23 Q. Thank you.

24 MR. SPELLISCY: Just to interject,
25 and this can come out of my time, he did answer the

1 question. It is clear. It says "no" in the
2 transcript. I think Mr. Appleton needs to respect
3 the right of the witness to give some context and
4 some qualifications since he is asking about
5 qualifications.

6 MR. APPLETON: That is completely
7 improper. The question was quite direct. He was
8 capable of answering it.

9 MR. APPLETON: Do you have -- are
10 you a lawyer? Do you have an accounting degree?
11 And he told us that he went to --

12 THE CHAIR: I don't think we need
13 to belabour this. We understand what your
14 background is.

15 BY MR. APPLETON:

16 Q. Okay. So you haven't been
17 recognized by any professional body that certifies
18 damage valuers and business valuers; correct?

19 A. Correct.

20 Q. In how many hearings have you
21 testified where you personally have calculated lost
22 profits?

23 A. A couple.

24 Q. Would you tell us?

25 A. I haven't counted them, but I

1 have been involved in six different hearings, and I
2 think there were two where there were damages.

3 Q. But I didn't ask about
4 whether there were damages. I asked where you
5 personally calculated them, sir.

6 A. There were actually others
7 where I calculated damages, but I wasn't involved
8 in giving the testimony.

9 Q. Yes?

10 A. So does that answer your
11 question?

12 Q. No, my question was quite
13 specific. How many hearings have you testified in
14 in which you have personally calculated the lost
15 profits?

16 A. Two.

17 Q. Two. Do you normally do
18 damage valuations, sir?

19 A. It is a part of what I do in
20 both commercial and investment disputes.

21 Q. Okay. I will try this again.
22 Do you normally do damages valuations?

23 A. What do you mean by
24 "normally"?

25 Q. For example, we heard from

1 Mr. Low that he's done -- I can't remember -- 60
2 was the number? There were 60 disputes.

3 A. I heard that, yes. I've
4 worked with many individuals like Mr. Low in my
5 career, and I am aware there are people who do it a
6 lot more than I do. As I stated, it is something I
7 have done more recently in addition to the other
8 things I do in my profession.

9 Q. Okay. Let's talk about your
10 experience in the energy sector. It is set out in
11 your CV; correct?

12 A. Absolutely.

13 Q. Is this a complete listing?

14 A. I am sure there is a few
15 things missing, but it has several of the -- it
16 certainly has a complete listing of my employment
17 history, and it must also have a relatively
18 complete history of projects I have worked on.

19 I'm always aware that there are
20 some that I forget to put in there, but they should
21 be mostly be in there.

22 Q. Before you were engaged by
23 Canada on this Mesa claim, did you have any
24 specific experience with wind power or the FIT
25 program?

1 A. The FIT program, no. With
2 respect to wind, and I think this actually might be
3 one that is not in my CV, but I was an advisor to a
4 California wind company years ago in their efforts
5 to set up a joint venture in eastern Europe, in the
6 early days after the wall came down, and there was
7 a lot of change in the eastern European market.

8 So I attended several trade
9 conferences with them. I helped them negotiate the
10 terms of a joint venture with the east European
11 company for the manufacture of wind turbines and
12 development of boutique wind farms in and around
13 central and eastern Europe.

14 Q. Did they have a feed-in
15 tariff program?

16 A. They didn't at that time, no.

17 Q. Which country were you
18 involved in, sir?

19 A. That was Germany.

20 Q. In Germany?

21 A. Sorry, Germany had a feed-in
22 tariff program. The markets they were aiming at in
23 eastern Europe did not.

24 Q. It's very important that you
25 listen carefully to my question so we get a very

1 clean transcript.

2 A. Sure.

3 Q. All right. You agree with me
4 about that?

5 A. Sorry, agree with what?

6 Q. You agree it is important?

7 A. Please restate so I know what
8 I'm agreeing with.

9 Q. You would agree with me it
10 would be important to have a clean transcript?

11 A. Yes, I agree with you.

12 Q. We wouldn't want people to
13 misunderstand us, what we're both talking about.

14 A. I agree.

15 Q. Are you an expert on
16 regulatory systems in Canada?

17 A. No, I'm not.

18 Q. Are you an expert about
19 regulatory systems in Ontario?

20 A. No.

21 Q. Okay. Now, sir, you had a
22 section in both of your reports about disclosure.
23 Do you remember this?

24 A. Vaguely, yes.

25 Q. Okay. So have you made all

1 of the disclosures to the Tribunal in the
2 disclosure section, sir?

3 A. As far as I know.

4 Q. Isn't it true, sir, that
5 you're acting as a valuation expert in another
6 NAFTA case for Canada?

7 A. Yes, that's correct.

8 Q. And did you disclose that in
9 your report, sir?

10 A. No.

11 Q. You did disclose this on your
12 website, didn't you?

13 A. I don't think so.

14 Q. We can take you to it if
15 you --

16 A. It's possible.

17 Q. Wouldn't you think it would
18 be relevant to disclose to the Tribunal if you have
19 repeated engagements from the same party?

20 A. It didn't cross my mind,
21 honestly.

22 Q. But you said in your
23 disclosure statement, sir, the first time that you
24 had no relationship prior to this with the
25 Government of Canada.

1 A. Well, this is the first one.

2 I think -- let's go, please, to the statement.

3 Q. Sure. Let's look at your
4 first report. That's fine. Your first report, and
5 let's look at the disclosure section. It's right
6 at the front. It's your report. I am sure you can
7 find it. Then we will go to exactly the same
8 section in the second report.

9 A. Yes. So what this says is
10 that:

11 "I confirm I am not aware of
12 any issue that would
13 constitute a conflict of
14 interest or detract from my
15 providing a wholly
16 independent opinion in
17 relation to this matter.
18 Additional disclaimers or
19 disclosures are provided in
20 attachment 2."

21 Which is where?

22 Q. Okay. Perhaps you might look
23 at the section below that, sir, on page 15, which
24 is started disclosure of interests. You see the
25 numbers 3, 4. 5. Number 3 you see it says that you

1 confirm you're not aware of any issue causing a
2 conflict. You see that?

3 A. Right, correct.

4 Q. Number 4, what you didn't
5 read out, you can confirm --

6 A. Sorry, where are you looking?
7 I see 5, 6, and 7.

8 Q. You do not see 3, 4, 5 and 6?

9

10 A. Those are very different
11 paragraphs. Sir, are we talking about the same
12 report?

13 Q. Perhaps I am looking at the
14 second report. Let me just -- I'll take it back.
15 So the attachments to the February 28th report.
16 That's the first report, or is that the second
17 report? Let's just look. That's the first report
18 in the attachments.

19 I'm sorry, I find your numbering
20 system quite confusing, sir, just so you
21 understand, because you have three reports. You
22 put various things in various sections.

23 It is called "disclosures", and
24 the first page is called "attachments", and it
25 should be in tab B of the binder. Why don't we

1 just go to the binder?

2 A. Page 15; correct?

3 Q. Yes, sir.

4 A. Yes.

5 Q. It says here, number 4, that

6 "he", and I assume "he" is you, sir:

7 "... can confirm he has not
8 previously been instructed or
9 retained by either the
10 claimant or respondent."

11 A. Correct.

12 Q. And, in addition, he has not
13 had previous engagement by Appleton & Associates?

14 A. Correct.

15 Q. And you have not been
16 instructed by any member of the arbitration
17 tribunal, including Professor Gabrielle
18 Kaufmann-Kohler, The Honourable Charles M. Brower,
19 or Toby Landau, Q.C., but you have appeared before
20 Judge Brower before?

21 A. That's correct.

22 Q. You have made that disclosure
23 because you thought it was important that everyone
24 that sees your report understand your relationship;
25 correct?

1 A. This is standard feature of
2 our reports, yes.

3 Q. So let's turn, then, if you
4 don't recall what you said in your second report.
5 We will go to your second report. And in the same
6 section, in the same type of report -- so I believe
7 it will be at tab -- I imagine it would be at tab E
8 in the section called "Disclosures".

9 It might be in the first one.
10 Sorry, I thought we were going to just get some
11 agreement on this. There is a section on
12 disclosures. It is actually in your second report.
13 It is in the -- which is at tab D. It is on page 2
14 under the title "Disclaimer and Disclosure", and
15 this is June 27th of 2014.

16 A. You're talking about 1.3 on
17 page 2 of my second report?

18 Q. Yes. We'll make sure the
19 Tribunal members can get there, sir. So let's give
20 them a moment.

21 THE CHAIR: Second report?

22 MR. APPLETON: Page 2. It is tab
23 D of the binder. Tab D, page 2, 1.3, disclaimers
24 and disclosure.

25 MR. BROWER: There is 1.1.

1 MR. APPLETON: No, 1.3 at the
2 bottom of the page, disclaimers and disclosure. We
3 will wait for Judge Brower to get there and I will
4 be turning to 1.3. You can read that while we're
5 waiting. You're there, Judge Brower?

6 MR. BROWER: I've got it.

7 BY MR. APPLETON:

8 Q. So here, can you show me
9 where you disclosed this new engagement with the
10 Government of Canada?

11 A. Of course it's not there.

12 Q. Did you not think that would
13 be important, or would you like -- or were you not
14 engaged at that time?

15 A. You know, I don't recall the
16 date of engagement. It is possible that between
17 the first report and the second report we became
18 engaged on the second matter.

19 It is probably an oversight not to
20 have put it in there, in hindsight, that there was
21 something that had come up. I would have been more
22 than happy to disclose it, and I do not view it as
23 a conflict of interest.

24 Q. Okay. So the answer is you
25 didn't disclose it, and we know you put on your

1 website the following information, and I can take
2 you there if you don't believe me, but it says:

3 Confidential matter:

4 "Lead damages and industry
5 expert for two investment
6 disputes regarding wind power
7 investment projects in North
8 America. Each of the
9 UNCITRAL disputes was argued
10 under Chapter Eleven of the
11 investment provisions of the
12 North American Free Trade
13 Agreement and concerned
14 allegations regarding fair
15 and equitable treatment
16 amongst other matters under
17 the treaty."

18 So you thought it was important
19 enough to go on the website?

20 A. I think that might show up on
21 a CV.

22 Q. Does it show up on your CV
23 here, sir?

24 A. Well, there is a timing
25 issue; right?

1 Q. But --

2 A. This was submitted at the
3 very beginning, before --

4 Q. We will move along. We all
5 know why we're here.

6 Now, Mr. Goncalves, let's look at
7 the foundation of your report, sir. You have
8 stated in paragraph 3 of your second report that
9 you were asked to assume that the alleged
10 violations were in fact inconsistent with Canada's
11 treaty obligations; correct?

12 A. Which paragraph? That's
13 correct, though.

14 Q. All right. So, in fact,
15 actually before we go there, I think we should
16 probably turn to your instructions. Are you in the
17 second report?

18 A. I am.

19 Q. So let's look at section 1.1
20 in the second report.

21 A. Yes.

22 Q. This sets out all of your
23 instructions in this matter, sir?

24 A. Say again?

25 Q. I'm sorry. It's going to be

1 hard to hear. Does this set out all of your
2 instructions in this matter, sir?

3 A. That's correct, yes.

4 Q. Now, but in your engagement
5 letter, sir, you were instructed differently,
6 weren't you?

7 A. I don't recall that.

8 Q. Did you look at your
9 engagement letter before you came today?

10 A. No, I didn't.

11 Q. I see. Well, we'll go show
12 you and maybe that will refresh your memory.

13 Now, you just told us you're the
14 lead damage witness; correct?

15 A. Sorry.

16 Q. You told us you were the lead
17 damage witness?

18 A. Yes.

19 Q. You told us you didn't go
20 beyond damages in your report?

21 A. No, I didn't say it exactly
22 that way, but...

23 Q. Did you go beyond --

24 A. I said I'm the lead damages
25 expert.

1 Q. Did you go beyond the area of
2 damages in your report?

3 A. I stated earlier that I have
4 industry expertise and that that informed my view
5 of damages, damage assumptions and causation, and
6 so forth. Is that going beyond damages? I think
7 it is part and parcel of estimating damages.

8 Q. The reason I ask, sir, is
9 that your website says you're an industry expert in
10 this dispute. That's what raises this question.
11 It says you're damages and industry expert.

12 A. I just said the same thing.

13 Q. I see. Well, that's not
14 exactly what you said. Now, doesn't your original
15 engagement letter also engage you as a damages and
16 industry expert?

17 A. I don't recall, as I said,
18 but it would make sense that it does.

19 Q. Can we go into confidential
20 mode for a moment, please? I am going to put
21 something on the screen. There are two versions of
22 the engagement letter. One is confidential and one
23 is not.

24 --- Upon resuming confidential session at 2:50 p.m.
25 under separate cover now deemed public

1 BY MR. APPLETON:

2 Q. Can we pull up the
3 confidential version of the engagement letter? It
4 is in the binder, I believe at tab G. Let me make
5 sure I am right. Yes. And, actually, if you can
6 just look at page 1. You can look at it, too, sir,
7 page 1 in the binder in front of you.

8 A. In the binder?

9 Q. Yes, in the binder at tab G.
10 And if we look at the bottom of the page, it says
11 that you have been compensated up to \$1 million for
12 this engagement. Do you see that, sir?

13 A. Yes.

14 Q. I am going to go back to the
15 public so the public can hear, and we're going to
16 turn to tab H. So tell me when we can go public?

17 Q. Now we're going to go back to
18 tab H, which has some of that material that has
19 been removed.

20 Now, sir, weren't you required to
21 provide alternative views as part of your
22 engagement?

23 A. What are you referring to?

24 Q. Well, we can look directly,
25 actually. I need to pull up the next book here.

1 If we look at -- I believe it is
2 on page 7. Here, page 7. If we look at that, it
3 says -- you can pull it up on the screen, if you
4 like:

5 "The contractor must also
6 present an alternative view,
7 if any, and must present a
8 written final report with its
9 findings which is to be
10 included in Canada's counter
11 memorial and rejoinder as an
12 expert report."

13 And your report was put into both
14 the rejoinder report and in the counter memorial,
15 wasn't it, sir?

16 A. Correct. Yes.

17 Q. Do you see that?

18 A. I see, yes. I am reading the
19 language there.

20 Q. Is this not the document that
21 instructs you?

22 A. Yes.

23 Q. Canada provided it as it was
24 required to here, sir.

25 A. Say again?

1 Q. Canada was required to
2 provide it here. That's why we have it.

3 A. I understand.

4 Q. Yes. It also says:
5 "The contractor will also be
6 required to advise on and
7 will provide expertise on the
8 regulatory side of the
9 Ontario power market."

10 Correct?

11 A. Correct.

12 Q. What you told us is you had
13 no expertise in that; right?

14 A. I did.

15 Q. Yes. And it says -- oh, this
16 is very interesting. Just while we're here, it has
17 a little note at the bottom of that paragraph:

18 "Please note that if this
19 case were appealed, called a
20 set aside proceeding under
21 NAFTA, then this would likely
22 take place in an Ontario
23 court on very narrow grounds
24 for which our expert witness
25 would not be required to

1 appear."

2 That's a legal matter. You don't
3 have to comment on that. I just found that
4 surprising. Let's go to part (5) below,
5 "Tasks/technical specifications".

6 Can we look at (b) here? It says
7 that your job here, (a) says you are to provide an
8 expert report.

9 A. Where are we?

10 Q. Let's go to (a)?

11 A. Sorry, (a) where?

12 Q. Five; at 5.1(a).

13 A. 5.1(a)?

14 Q. Do you see it?

A. Yes.

15 Q. It says that these are your
16 technical specifications for this report. You are
17 to prepare an expert report commenting on the
18 claimant's expert reports and addressing the
19 conclusions and presenting an alternative view, if
20 any, of the damages valuation. Do you see that?

21 A. I do.

22 Q. And then it says in (b)

23 "Advise Canada and provide
24 expert evidence on

25 Ontario's regulatory

1 system with respect
2 respect to electricity and
3 the FIT program."

4 A. Yes. I need to comment on
5 this. I believe at the time we were -- when we
6 signed this contract, we were discussing a
7 subcontract with an Ontario expert who was going to
8 be a part of our team on this.

9 And that changed along the course
10 of the engagement, but that's --

11 Q. So did you receive other
12 instructions, sir, that we haven't seen?

13 A. Did I what?

14 Q. Other instructions that haven't
15 been produced?

16 A. Not that -- subsequent to
17 this?

18 Q. Yes.

19 A. There were discussions along
20 the way about the work and the scope, just like
21 with any client at any time. But I'm just
22 referring back to when we set this up, we were
23 talking about engaging a subcontractor in Ontario.

24 Q. I understand. I'm just
25 trying to understand the nature of what you have

1 been engaged to do so the Tribunal understands; right?

2 A. That's fair.

3 Q. Of course it's fair. It is
4 absolutely essential that we disclose this
5 information. So the question here is: You didn't
6 disclose this information that is in this
7 engagement letter in your report? We see that,
8 correct? Can you show me where you talk about
9 those points, the requirement --

10 A. No. We summarized the --

11 Q. You didn't say alternative
12 views, did you?

13 A. We were asked to provide an alternative view of
14 damages from the view that
15 Deloitte prepared as independent experts in the
16 matter.

17 Q. And you were paid up to a
18 certain sum to do that, weren't you?

19 A. Sorry?

20 Q. You were paid up to a certain
21 sum to do that alternative view, weren't you?

22 A. Well, if you read the
23 contract closely, we were paid on a time-and
24 materials basis for the work we did, just like with
25 every other client.

1 Q. I am trying not to refer to
2 the confidential information is what I'm saying.

3 A. I see.

4 Q. So let's talk about your
5 alternative view. Let's turn to that.

6 A. Absolutely.

7 Q. Okay. So let's go and look
8 at paragraph 42 of your second report.

9 A. Sorry, I didn't hear your
10 paragraph.

11 Q. Actually, let's look at
12 paragraph 3. Paragraph 3 says that you were asked
13 to assume that the alleged violations were in fact inconsistent with
14 Canada's treaty obligations.

15 Does that sound about right to you, sir?

16 A. Yes. Correct.

17 Q. And then at paragraph 42, if
18 you go down to 42, it says:

19 "We were asked to assume that
20 the treatment of the KC and
21 Mesa Power breached Canada's
22 MFN'S obligation under the
23 NAFTA."

24 A. Mm-hm. Yes.

25 Q. Okay. Now despite this -

1 let's turn to paragraph 28. Is this the first
2 report or second? Let's check 28 of this report to
3 see if it says, "Our analysis of the cause and
4 quantum". Is that this report or the other?
5 Sorry, I find it a little confusing.

6 A. That's correct.

7 Q. Same report. So it says:
8 "Our analysis of the cause
9 and quantum of damages is
10 independent of NAFTA and
11 based on standard practices
12 for assessing damages in
13 international arbitrations."

14 Do you see that, sir?

15 A. Yes.

16 Q. All right. How do you make
17 an expert report on damages in a NAFTA case that is
18 independent of NAFTA?

19 A. Can you repeat that, please?

20 Q. How do you make an expert
21 report on damages in a NAFTA case that is
22 independent of NAFTA?

23 A. It's very simple.

24 Q. Hmm.

25 A. Simply put, I look at this

1 and I have understood from my client, and from
2 everybody in this room virtually, that the alleged
3 breaches of NAFTA or the alleged violations
4 constitute breaches of NAFTA.

5 That's an assumption that we make.
6 And based on that assumption, we set about trying
7 to determine a counter factual to put the investor,
8 Mesa Power, back in the situation it would have
9 been in but for those violations, not to give it
10 the terms and conditions in the violations, but to
11 put it back in the condition it would have been,
12 but for the violations. That is the core
13 difference here.

14 Q. I understand what the core
15 differences are.

16 A. And that is my view of the
17 appropriate counter factual for determining damages
18 based on experience in an international
19 arbitration.

20 Q. And you prepared your damage
21 report on what you said were standard practices.
22 Yes?

23 A. Yes.

24 Q. And these are based on
25 standard practices in the NAFTA claims?

 A. No. I said in international arbitration.

1 Q. But this is a NAFTA claim.
2 This is international law arbitration, but it is a
3 NAFTA claim?

4 A. I understand that.

5 Q. So your understanding of
6 standard practice in a NAFTA case is to do a
7 damages analysis --

8 A. Right.

9 Q. Let me finish the question,
10 and then I will wait and listen to your answer.

11 A. I'm listening.

12 Q. So your understanding of
13 standard practices in a NAFTA case is to do a
14 damages analysis independent of the NAFTA; is that
15 correct?

16 A. That doesn't sound right.

17 Q. It doesn't, I agree.

18 A. I am not sure I understood it
19 fully.

20 MR. SPELLISCY: Would
21 counsel -- counsel should let the witness finish
22 his answer.

23 MR. APPLETON: I thought the
24 witness was finished, but -- and I have asked the
25 question. I have got an answer. I think we can

1 move along on this.

2 MR. SPELLISCY: I'm sorry, you
3 didn't get an answer. He started his answer.

4 THE CHAIR: I think we got back to
5 the question of what the damage compensation should
6 do, whether it should give better terms or give the
7 terms of better treatment or whether it should undo
8 the harm.

9 And I understand when you say
10 "independent of NAFTA" you are having in mind the
11 idea of the objective of undoing the harm. Is that what
12 you were saying?

13 THE WITNESS: That's correct.

14 THE CHAIR: So then we can move
15 on.

16 THE WITNESS: Possibly --

17 MR. APPLETON: But I need to
18 understand what he's doing with this, because it is
19 a very significant assumption and divergence
20 between the parties.

21 THE CHAIR: Fine.

22 BY MR. APPLETON:

23 Q. So, for example, you made no
24 effort to determine what the most favourable
25 treatment under NAFTA Article 1103 is in this case, did you?

1 A. Not for purposes of
2 calculating damages.

3 Q. And if we were to assume for
4 the purpose of damages that Mesa was entitled to
5 this most favourable treatment, then your results
6 would have to be different, wouldn't they?

7 A. If you were to assume that
8 the proper approach to calculating damages for the
9 breach was to give Mesa the terms embedded in
10 NAFTA, then I would have to recalculate damages, yes.

11 Q. Yes. You can't deny that
12 Mr. Low's analysis of MFN damages is correct, in
13 the event that the Tribunal determines the MFN
14 treatment required the same benefits to be given to
15 the claimant as those given to the Korean
16 Consortium; correct?

17 A. For those NAFTA
18 articles -- we heard a lot of discussion today
19 about 1102, 1103, 1105, et cetera. For those NAFTA
20 articles that convey the MFN treatment, if the
21 Tribunal concludes that the proper remedy is to
22 give the benefit of the KC terms to Mesa Power,
23 then the conceptual approach that Mr. Low takes is
24 the appropriate one for that calculation.

25 But I wouldn't go so far as to say

1 it's correct because, as we've discussed many times
2 and you see in my report, we have identified
3 several significant technical quantitative
4 differences between our reports, including
5 principally the discount rate. So I wouldn't go so
6 far as to say the actual numbers are correct, if
7 you see the distinction.

8 Q. But the conceptual approach
9 would have to be different. That's what you have just told us?

10 A. I have.

11 Q. Yes. Now, at paragraph 42 of
12 your second report, where we just were before, you
13 say you were asked by Canada to assume that the
14 treatment of the Korean Consortium and Mesa Power
15 breached Canada's MFN obligations under NAFTA;
16 correct?

17 A. Yes.

18 Q. But then you say at paragraph
19 43 that this interpretation is not relevant from a
20 damages perspective?

21 A. Correct.

22 Q. Now, I just asked you if you
23 looked at NAFTA Article 1103, and you said "not for
24 the purpose of calculation of damages". So why did
25 you look at NAFTA Article 1103?

1 A. Well, we wanted to understand
2 the general provisions, and of course when you
3 read -- part of my scope was to respond to the
4 report of Mr. Low, and his report is organized, and
5 so forth, around the NAFTA articles. So I wanted
6 to understand what it says.

7 But I didn't spend any time trying
8 to interpret it, and I think I can help you with the
9 prior question by simply saying we were not
10 asked to assume at any point that -- a legal
11 interpretation.

12 We were not asked by counsel at
13 any point to assume that a legal interpretation of
14 NAFTA requires that the GEIA terms, or the terms
15 for MFN, should be ascribed to Mesa Power.

16 It is our view, from common
17 practice, that the "but-for" scenario for Mesa
18 Power is to be back in the position it most
19 probably would have enjoyed but for the breach.

20 Q. But you heard from Mr. Low,
21 in his professional opinion, that that is not
22 correct, from his --

23 A. I understand his perspective,
24 yes.

25 Q. Yes. All right. And you'd

1 agree with me the treaty obligation in NAFTA
2 Article 1103 says that Mesa, as an American
3 investor in Canada, is entitled to treatment
4 equivalent to the best treatment provided to a
5 non-NAFTA party investor like a Korean --

6 MR. SPELLISCY: That's a legal
7 question.

8 THE WITNESS: I can't say. That is
9 really between you and counsel.

10 MR. SPELLISCY: It is obviously a
11 legal question that this witness is not able to
12 answer.

13 MR. APPLETON: Let's parse it,
14 because he actually makes determinations about
15 issues that are just like this in his report.

16 THE CHAIR: We understand that the
17 expert said his instructions did not include an
18 assumption that Mesa would be given the better
19 terms of the Korean Consortium. So he has not
20 addressed this, and if I am -- if I am not right,
21 you will correct me.

22 MR. APPLETON: I believe he said,
23 We weren't asked to assume. So, therefore, it is
24 his judgment, he says, based on standard practice.
25 I am trying to ask him what the nature of the

1 standard practice is, and so that's what I am
2 trying to understand.

3 BY MR. APPLETON:

4 Q. And so you haven't disclosed
5 any basis for your standard practice in your
6 report, have you?

7 A. No. I've stated it based on
8 experience.

9 Q. I see. All right.
10 Now, you agree with me that Samsung started to receive
11 treatment from Ontario, as pleaded by Mesa, under
12 the GEIA when it was signed in January of 2010, at
13 least by that point.

14 A. Depending on what you mean by
15 started to achieve -- sorry, started to receive
16 treatment, I don't actually have a working
17 knowledge of when they started to receive the
18 benefits of the GEIA, but from the point it was
19 signed, they had access to benefits.

20 Q. You have been here all week,
21 I believe?

22 A. I have, yes.

23 Q. You have seen that there were
24 various directives, including a directive in
25 September of 2009 --

26 A. Correct.

1 Q. -- before this was signed?
2 They gave certain priority access. You saw that
3 there was an MOU?

4 A. Mm-hm. I am familiar with
5 this.

6 Q. I am trying to stay away from
7 the controversial issues. In any event, by the
8 time the GEIA is signed, it would be fair to say
9 Samsung started to receive some treatment in
10 Ontario?

11 MR. SPELLISCY: I don't think that
12 was a question for an expert witness. It is a
13 question for a fact witness or it appears to be a
14 submission by counsel, but...

15 MR. APPLETON: No, Mr. Spelliscy,
16 the witness has said that he has industry
17 expertise, and his engagement talks about industry
18 expertise and he says he went beyond this. So I
19 believe it is fair for him to answer that question.

20 MR. SPELLISCY: I think I will ask
21 the Tribunal here. Industry expertise is not the
22 same as saying he knows when Samsung started to
23 receive treatment, which is a question of
24 fact. This is not a fact witness.

25 MR. APPLETON: Well...

1 THE CHAIR: What was the question?

2 BY MR. APPLETON:

3 Q. Would you agree with me that
4 Samsung started to receive treatment from Ontario,
5 as pleaded by Mesa, under the GEIA when it was
6 signed in January 2010?

7 A. And I said in response I
8 believe they had access to the benefits as soon as
9 the agreement was entered. When they actually
10 started to receive those, I just couldn't say.

11 Q. Okay, fine. Have you seen
12 the Toronto Star article?

13 A. I recall that.

14 Q. Would that give you the
15 information to answer this?

16 A. I don't know. Let's look.

17 Q. Okay. How about the press
18 backgrounder? You saw that?

19 A. I recall that.

20 Q. That was January 21, 2010.
21 Would that give you enough information to be able
22 to answer that question?

23 A. It might. Let's look at it.

24 Q. If you like. We can pull it
25 up.

1 A. Sure.

2 Q. I will pull that in a moment.

3 Let's go through, because it is not in the binder
4 and I don't want to break the binder flow.

5 THE CHAIR: Yes, absolutely, it is
6 quite the binder flow. I know that you are acutely
7 aware of the time that passes.

8 MR. APPLETON: I am quite aware.

9 THE CHAIR: Fine.

10 MR. BROWER: That's why he's
11 talking twice as fast as normal.

12 MR. APPLETON: Thank you, Judge
13 Brower, for noticing.

14 --- Laughter

15 BY MR. APPLETON:

16 Q. Assuming that...

17 You told us that you're relying on
18 experience for only using a "but-for" MFN
19 calculation, but didn't you just say you had no
20 NAFTA experience, Mr. Goncalves?

21 A. I did.

22 Q. Yes. Okay. So how can the
23 assumption that MFN applies and has been breached
24 be consistent, then, with what you say in paragraph
25 12? We can look at paragraph 12. You say:

1 "Mesa would not have had
2 access to the GEIA items for
3 any of its projects, but for
4 the violations."

5 A. I say this assumption
6 presents -- sorry, we have to refer to what we're
7 talking about. I think this is an assumption
8 Deloitte makes that they get the benefits.

9 This assumption presents an
10 inaccurate counter factual scenario for damages
11 analysis, because Mesa Power would not have had
12 access to the GEIA terms, but for the violations.
13 There is no realistic or probable counter factual
14 scenario in which that would have occurred, as
15 detailed in section 3.2.

16 Q. But you told us that --

17 A. That is my view.

18 Q. You told us if Mesa was
19 entitled to the better treatment under MFN, then --

20 A. Oh, and I will comment on
21 that.

22 Q. Why don't you let me finish
23 my question?

24 A. Please.

25 Q. Then we would be happy to

1 hear your comments, okay.

2 So you told us that if Mesa was
3 entitled to the better treatment under the MFN
4 obligation, then wouldn't Mesa have had access to
5 treatment equivalent to that under the GEIA?

6 A. No.

7 Q. I see.

8 A. I think -- I understand that
9 the fact that Mesa didn't have access to the better
10 treatment is a breach of NAFTA. That's my
11 understanding from counsel.

12 Based on that, I take a standard
13 approach to damages to put -- as I've said many
14 times, put Mesa back in the realistic probable
15 scenario it would have enjoyed but for that breach.

16 Q. I see. So --

17 A. That's the bottom line.

18 Q. So under your theory, then,
19 Mr. Goncalves, Canada can violate its MFN
20 obligations to those who did not receive the MFN
21 treatment to which they were entitled, and yet they
22 are not damaged under your theory?

23 A. Say that again?

24 Q. Under your theory, Canada can
25 violate its MFN obligations which is owed to

1 investors and investments and those who did not
2 receive the most favourable treatments to which
3 they were entitled are not damaged?

4 A. I didn't say that. If they
5 didn't receive treatment that counsel or the
6 Tribunal determines they should have had, in my
7 view, Canada would have breached NAFTA and,
8 therefore, damages would be due.

9 Q. So do you think MFN is for to
10 put the person back, but putting them back means
11 not giving them the most favourable treatment at
12 all; right?

13 A. Putting them back in the
14 scenario they would have had had there been no harm
15 caused.

16 Q. But they were required to
17 have the most favourable treatment. That is what
18 the treaty required that they have. That's what
19 they were supposed to do. So just to make sure we
20 understand.

21 You say you put them back to
22 breach. You don't put them back to where they were
23 entitled to be. Is that what you're telling us?

24 A. It sounds like I need to be a
25 lawyer to answer that question.

1 MR. SPELLISCY: I am going to say
2 the question of where they are entitled to be by
3 the MFN clause is a purely legal question.

4 Mr. Goncalves has explained again
5 and again what he did, and I don't know. Maybe
6 counsel isn't concerned about his time, but we're
7 going over the same ground again and again and again.

8 MR. APPLETON: Mr. Spelliscy, this
9 is the essential question that leads to \$500
10 million of damage.

11 MR. MULLINS: I would ask counsel
12 to quit trying to coach his witness while we're
13 trying to ask questions.

14 MR. SPELLISCY: I am pretty sure I
15 can object. When it is a legal question the
16 witness is not entitled to answer, counsel. So
17 this can come out of my time. I have about seven
18 hours, I think.

19 So the reality is that we're
20 trying to push through this. We're trying to get
21 this done and we're spending time again and again
22 coming back to legal questions that this witness
23 has said he did not address.

24 Counsel is testifying into the
25 record as to what he thinks the MFN clause means.

1 That is not a question for Mr. Goncalves. He has
2 explained what he has done. Counsel can spend the
3 time as he wants, but every time he asks a legal
4 question I am going to speak up.

5 MR. APPLETON: Mr. Spelliscy has
6 confused that the expert has given his view as to
7 what the damages result is on the MFN clause, and
8 to this expert, he says that you don't get the most
9 favourable treatment; you get the least favourable
10 treatment.

11 And that is the fundamental
12 difference between these reports, and I believe it
13 is appropriate that this expert answer the question
14 so that the Tribunal understands the basis upon
15 which he has come to this fundamental conclusion
16 upon which everything else sits. That is the
17 question.

18 THE CHAIR: Was this a conclusion
19 of yours, Mr. Goncalves, or was this an
20 instruction?

21 THE WITNESS: I would like to
22 clarify exactly how this discussion occurred
23 between me and counsel for Canada.

24 THE CHAIR: Yes.

25 THE WITNESS: I looked at this

1 case independently, both before and after we were
2 retained on this second matter, because I always
3 look at everything independently, and it does not
4 matter that I was retained on another matter for
5 Canada, because it doesn't change my view.

6 THE CHAIR: That's a different
7 issue. Let's put that aside.

8 THE WITNESS: But I wanted to say
9 it.

10 With respect to this specific
11 issue, I looked at this scenario. I developed a
12 view, based on my experience with UNCITRAL
13 proceedings and other international arbitrations
14 under ICC, about how to look at the proper counter
15 factual and seek to put Mesa back in the realistic
16 position they would have been in but for the
17 breach.

18 I discussed it with Canada,
19 counsel for Canada, and I said: Is there anything
20 about NAFTA that I am missing that I need to
21 know? Because this is my first NAFTA case. My
22 other experiences are in different types of
23 matters.

24 And they said, No, you don't need
25 to assume anything different about NAFTA than other

1 cases.

2 So that was an instruction, but it
3 was also my theory to begin with, that they
4 verified with the legal instruction.

5 THE CHAIR: So you applied as a
6 standard for your valuation the rule that you
7 should place the party that is harmed back into the
8 position in which it would be had the breach not
9 occurred?

10 THE WITNESS: Correct.

11 THE CHAIR: That is what you did,
12 and you did not attach weight to the type of
13 breach, whether it was 1105 or 1102 or 1103 or
14 1106?

15 THE WITNESS: Exactly correct. My
16 approach is the same for all of the alleged
17 breaches.

18 THE CHAIR: Fine. I think that is
19 clear, and the rest is legal and we will have to
20 assess it.

21 BY MR. APPLETON:

22 Q. So just to confirm, then, so
23 when you say that your approach is independent of
24 NAFTA, as you answered President Kaufmann-Kohler's
25 question, you have told us you provided no support

1 for this in your report other than your statements;
2 is that correct?

3 A. Say that again?

4 Q. You provided no other support
5 in your report other than your statements?

6 A. For that assumption, correct.

7 Q. Yes. Can you refer me to any
8 generally accepted accounting principle that tells
9 us not to follow the terms of the treaty?

10 A. No, I wasn't referring to
11 generally accepted accounting principles.

12 Q. I can see that. Can you
13 refer me to any text that tells us where to ignore
14 the terms of a governing contract or the treaty in
15 the calculation of damages?

16 A. Not sitting here today.

17 Q. And you have told us you were
18 not instructed by your client to take this
19 position?

20 A. My view of the appropriate
21 way to calculate damages was confirmed by the
22 client based on their interpretation.

23 Q. So this was just your
24 decision?

25 A. Sorry?

1 Q. This was just your decision?

2 A. It was my view, and I checked
3 it with counsel to make sure that it was not at
4 odds with what NAFTA requires. So I did ask the
5 question, to be clear.

6 I did ask the question: Is there
7 anything different about this treaty or NAFTA that
8 would require me or cause me to calculate damages
9 differently than I'm accustomed to in other matters
10 that are not under NAFTA? And the answer was, No,
11 there's not.

12 Q. So if the Tribunal comes to a
13 different conclusion, then the calculations in your
14 report would have to be wrong, wouldn't they, sir?

15 A. With respect to 1102 and
16 1103, as I have said before, the conceptual
17 approach would need to be changed.

18 With respect to 1105, I have heard
19 a lot of discussion here this week about what it
20 does and doesn't require. I will leave that alone
21 because, again, there is a lot of complex legal
22 interpretation involved there.

23 So I would say there would be some
24 parts of the conceptual approach that would need to
25 be changed if you draw a different conclusion -- if

1 the Tribunal were to draw a different conclusion
2 than I was instructed, and some parts that I think,
3 from what I heard this week, would stand.

4 THE CHAIR: Just to clarify this,
5 does that mean that what relates to damages arising
6 out of breaches of 1102 and 1103 would have to be
7 changed conceptually if we were to go along with
8 the idea that better treatment must be accorded?
9 However, the part of the damage computation for
10 damages arising out of 1105 would stand according
11 to -- in your approach? Is that what you're
12 saying, or is it something different?

13 THE WITNESS: I think so. But as
14 I indicated, I think I would need to think through
15 a little bit more and receive a little more clear
16 legal instruction than I have been able to divine
17 from the discussions this week to answer you
18 clearly.

19 THE CHAIR: Fine.

20 MR. APPLETON: We're done with
21 this witness.

22 THE CHAIR: Oh, you're done with
23 this witness?

24 MR. APPLETON: We're done. We
25 have nothing further now.

1 THE CHAIR: Fine. Any re-direct
2 questions on Canada's side?

3 MR. SPELLISCY: No.

4 THE CHAIR: No? Do my
5 co-arbitrators have questions?

6 QUESTIONS BY THE TRIBUNAL 3:20 P.M.:

7 MR. BROWER: My first question is
8 totally irrelevant to these proceedings, but since
9 you have -- as was pointed out on page 15 of the
10 attachments to your first report under disclosure
11 of interests, it is on the attachments, which is
12 tab B in my book here. See page 15? You were
13 taken to it before, disclosure of interest, and
14 down in (6) at the very bottom, it says you have
15 appeared before me previously. Can you refresh my
16 recollection as to which case it was?

17 --- Laughter.

18 MR. BROWER: Sorry about that.

19 THE WITNESS: As I recall, you
20 were on the Tribunal for El Paso v. Macae I correct
21 on that.

22 MR. BROWER: No. El Paso versus?

23 THE WITNESS: Petro Brass.

24 MR. BROWER: Well, I am happy for
25 the credit, but I did not sit on that.

1 THE WITNESS: Then I am mistaken,
2 but I was trying to remember where it was. If I am
3 wrong I apologize, but I think -- I thought it was
4 that one.

5 MR. BROWER: Maybe you dreamed it.
6 --- Laughter.

7 MR. BROWER: Okay, good. Well,
8 that relieves me of any embarrassment on my part.
9 --- Laughter.

10 THE WITNESS: The embarrassment is
11 entirely mine.

12 MR. BROWER: If I could take you
13 now to, where are we, tab D in the binder in front
14 of you, which is your second expert report.

15 Now I am looking at the
16 confidential copy, but I don't think what I am
17 looking at is confidential.

18 MR. APPLETON: Which tab?

19 MR. BROWER: "D". It's the second
20 expert report, confidential version.

21 MR. APPLETON: If I can assist
22 you, Judge Brower, the version, if it is marked
23 confidential, this would be Canada's designation.
24 That is on the cover page. Then they want the page
25 with confidential information. So if the page

1 doesn't have "confidential" marked on it, I believe
2 that page might not be confidential.

3 MR. BROWER: It does not.

4 MR. APPLETON: Would that be
5 right, Mr. Spelliscy?

6 MR. SPELLISCY: That is consistent
7 with the Tribunal's procedural order. So if it
8 doesn't have the word "confidential" on the top and
9 there is no gray boxes in it, then there is nothing
10 confidential on that page.

11 MR. BROWER: Well, if you can
12 follow me in the binder on the same document, you
13 can confirm for me that "confidential" is not on
14 the page, Mr. Spelliscy?

15 MR. SPELLISCY: Sorry, I missed
16 the page number. Did you give it?

17 MR. BROWER: Sorry?

18 MR. SPELLISCY: I missed the page
19 number that we're looking at.

20 MR. BROWER: That's because I
21 didn't give it yet. Page 2. This is tab D, second
22 expert report, confidential version.

23 MR. SPELLISCY: Anything on page 2
24 is fine.

25 MR. BROWER: Okay, thank you.

1 Now, I am looking at paragraph 3. Are you there
2 with me, Mr. Goncalves?

3 THE WITNESS: Yes.

4 MR. BROWER: Before the A, B, C,
5 the next previous sentence reads as follows:

6 "The focus of our analysis
7 was and remains to analyze
8 the cause and quantum of harm
9 to Mesa Power, if any, that
10 resulted from the alleged
11 violations."

12 Then you continue with:

13 "We focussed on analyzing
14 (a) whether Mesa Power was
15 harmed."

16 Which considering the foregoing
17 seems to embrace both cause or principally cause,
18 because (b), which follows, refers to the way in
19 which Mesa Power was harmed.

20 There is one other page in this
21 which is not marked "confidential" in mine. This
22 is page 9. We're okay?

23 THE WITNESS: Yes.

24 MR. BROWER: Okay. Paragraph 28,
25 right at the beginning, you write:

1 "Our analysis of the cause
2 and quantum of damages is
3 independent of NAFTA..."

4 Et cetera, et cetera, et cetera.

5 So I deduce from this that you have dealt not just
6 with quantum of damages, but also the issue of
7 causation as between the assumed breach leading to
8 damages.

9 THE WITNESS: That's correct.

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

14 THE WITNESS: I am.

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

20 THE WITNESS: Correct.

21 MR. BROWER: Okay.

22 THE WITNESS: That's right.

23 MR. BROWER: So that takes care of
24 causation, as it were, with respect to those two?

25 THE WITNESS: Mm-hm.

1 MR. BROWER: But you exclude any
2 causation with respect to North Bruce and
3 Summerhill?

4 THE WITNESS: That's correct. I
5 hope it is clear that that brown dotted line is the
6 available transmission -

7 MR. BROWER: Right.

8 THE WITNESS: You got it.

9 MR. BROWER: Yes.

10 THE CHAIR: Just to clarify on
11 this, I understand this to say: If the
12 transmission capacity reservation for the GEIA is a
13 breach, because that -- it's not the contract it
14 was the consortium such that is at issue here in
15 your analysis.

16 Here it is only the transmission
17 capacity, or do I miss something? What are you
18 doing here?

19 THE WITNESS: I wouldn't say that
20 only the transmission capacity access was a breach.
21 I would say that all of the treatment was a breach.

22 If you find that all of that
23 treatment was a breach, then what happened to
24 Mesa --

25 THE CHAIR: No. My question is a

1 different one.

2 THE WITNESS: I'm sorry.

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

6 THE WITNESS: Yes, yes.

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

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

11 THE CHAIR: Absolutely, yes.

12 THE WITNESS: -- is the lack of
13 access to transmission capacity, and I hope that it
14 is clear -- I know I was moving fast when I
15 introduced this -- that the difference between the
16 prior slide, 11, the actual scenario where you have
17 750 megawatts of available transmission and this
18 one on slide 12 is the additional 500 megawatts of
19 capacity.

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

25 MR. BROWER: Okay. So as --

1 THE WITNESS: Is that clear?

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

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

10 MR. BROWER: Yes, okay. Let's go
11 to the next one, slide 13. Now, this is an
12 interesting addition, as well, because confirm or
13 disaffirm my understanding from this chart and your
14 testimony that if the only breach were the
15 connection point change window -- let me pause
16 there, because what do you mean by connection point
17 change window?

18 THE WITNESS: That's a very good
19 question. This was -- this relates to the
20 allegation that there should have been no
21 connection point change. There was a lot of
22 discussion in the last few days about the timing of
23 the change, and so forth. But I think the
24 allegation -- and I have to confess here I am now a
25 little confused what the actual allegation is.

1 The way I understood it before --

2 THE CHAIR: Whatever the
3 allegation is, what we must understand is what you
4 did on this chart, so explain that to us and don't
5 worry about the allegation.

6 THE WITNESS: Okay. What I
7 assumed is that the breach would be or was the
8 implementation or the fact of the connection point
9 change that was implemented.

10 And based on that, what happened
11 in fact is that several projects from the west of
12 London region were allowed to change their
13 connection point into the Bruce.

14 So if I can clarify the impact by
15 going back to, again, slide 11, the actual
16 scenario, what really happened before the counter
17 factuals, if you focus on the orange bars, the west
18 of London projects far off to the left.

19 MR. BROWER: Mm-hm.

20 THE WITNESS: Those projects are
21 the ones that changed into the region.

22 MR. BROWER: All right.

23 THE WITNESS: And there are some
24 other impacts that are a little technical about
25 smaller-sized projects that got allowed to connect

1 because they fit, but that is not a major point.

2 Going back to slide 13, I have
3 removed those. So that if the connection point
4 change had not been implemented, if it had not
5 happened, then those projects wouldn't be in the
6 Bruce. The transmission capacity would still be
7 750, because I'm not making the GEIA adjustment
8 here.

9 MR. BROWER: Right.

10 THE WITNESS: And TTD and Arran
11 also in this scenario would have gotten FIT
12 contracts. They would have been harmed.

13 MR. BROWER: So --

14 THE WITNESS: But not Summerhill
15 and North Bruce, of course.

16 MR. BROWER: But your slide 13
17 assumes also that the GEIA agreement was a breach?

18 THE WITNESS: No.

19 MR. BROWER: Because that's how
20 you get to 750.

21 THE WITNESS: This was in
22 isolation.

23 MR. BROWER: Isolation.

24 THE WITNESS: That assumption
25 comes up on the next slide, slide 14, the

1 combination.

2 MR. BROWER: Okay. So if the
3 only -- let me make it clear here. The allegation
4 of the claimant, as I understand it, with respect
5 to the connection point change window is twofold:
6 One, that the opportunity to change your connection
7 point was announced pursuant to a direction of the
8 Ministry on a Friday to be available Monday through
9 Friday of the following week to apply for a change.
10 That's one aspect of it, and the other is that that
11 kind of change should not have been permitted at
12 all.

13 So if the connection point change
14 window on either of those bases or both of those
15 bases were found to be in breach of the treaty,
16 then, again, as a matter of causation, you say
17 Arran and TTD were home free. They would have
18 gotten their contracts?

19 THE WITNESS: I wouldn't say it
20 just that way, and there is a reason. I'm glad you
21 brought that up, because that is what I was
22 referring to earlier that I've become a bit
23 confused about this week, is if you assume that the
24 implementation of the connection point change or
25 the fact that it occurred is the breach, then I

1 come to this conclusion, because you remove the
2 west of London projects.

3 MR. BROWER: Right.

4 THE WITNESS: There was a lot of
5 discussion this week about the timing and the way
6 in which it was implemented and the fact that it
7 was at the last minute and it wasn't adequately
8 transparent, and so forth.

9 MR. BROWER: Right.

10 THE WITNESS: From my perspective,
11 if you allowed more time with more notice, but you
12 say that the connection point change was actually
13 appropriate, then you could have had more projects
14 coming into the region from other regions, and
15 almost certainly if even one more project came or
16 maybe two, TTD and Arran would not have had -- in
17 fact, even without more projects coming, we
18 conclude they would not have had contracts.

19 So I think the only breach that
20 would lead me to this conclusion is the one that
21 the change point connection should not have
22 happened at all.

23 MR. BROWER: I see, okay, okay.
24 That is very clear. Okay. So it is two up and two
25 down. I got it.

1 THE WITNESS: Okay.

2 MR. BROWER: Those are my
3 questions.

4 THE WITNESS: Thank you.

5 THE CHAIR: Mr. Goncalves, can I
6 go back to your last slide, which is also a figure
7 that I noticed in your report, figure 11 on page 51
8 of your second report, which of course you know
9 better than I.

10 I would like to make sure that I
11 understand exactly what you have done and how this
12 does not add up and why not, because you start with
13 Deloitte's total damage figure -- I take the column
14 on the right now, the total one.

15 And then you factor in what you
16 call inaccurate causation, so you take out what
17 you -- part of the loss that you considered not
18 caused by the breach; is that correct?

19 THE WITNESS: Yes.

20 THE CHAIR: That gives you a
21 figure of 156. And then you have a number of other
22 elements that you have then limited to TTD and
23 Arran, because you do not consider the two other
24 projects. And there you have looked at the
25 discount rate, that you think they have too -- Mesa

1 has too low a discount rate and you want to use a
2 higher one. It was of course a net present value
3 that would be lower, lower by 120 million; is that
4 right?

5 THE WITNESS: Correct.

6 THE CHAIR: Then you have looked
7 at GE turbine treatment, which is not the same
8 thing like deposit, I understand?

9 THE WITNESS: That's correct.

10 THE CHAIR: That's a different
11 issue. And that gives 12 million. Then you have
12 the issue of the valuation date. That gives you
13 minus 42, and then you end up with 19. And somehow
14 I don't understand how these different deductions,
15 what their relationship is, because obviously they
16 cannot be added up.

17 THE WITNESS: Yes. That's an
18 excellent question. I did try to address this in
19 paragraph... I guess it was in the other report
20 that I did that, but at any rate --

21 THE CHAIR: 174 and following
22 maybe?

23 THE WITNESS: Here we go. It's
24 footnote 157 at the bottom of page 51.

25 MR. BROWER: Which report?

1 THE WITNESS: Second report, page
2 51, footnote 157. And I do understand that this is
3 a point of confusion. What we've done with the
4 model is analyze each item in isolation, but there
5 are some overlapping or compounding effects when
6 you combine them, so that you can't simply extract them out and add them
7 up perfectly.

8 For example, I address this on the
9 PowerPoint presentation in footnotes 3 and 4, where
10 I indicated that there is effectively some amount
11 of overlap, for example, with the valuation date.
12 You're not only changing the date in terms of the
13 amount -- or the time at which you set the net
14 present value to when you are discounting, but you
15 are also updating several features of the discount
16 rate to be appropriate for that date and time.

17 So there is a different cost of
18 equity and, in particular, a different cost of
19 debt. Well, that would seem to overlap the issue
20 of the discount rate.

21 THE CHAIR: So that means --

22 THE WITNESS: There are some
23 features that are in common and some that are
24 different.

25 THE CHAIR: So that means if we

1 were to consider that you are right on the
2 valuation dates, but that you are wrong on the
3 discount rate, then we could not simply deduct \$42
4 million, because that would mean that we're taking
5 something away under the heading of discount rate
6 because of the overlap?

7 THE WITNESS: I think that is
8 correct. There may be -- I have to think it
9 through a bit. There may be a solution within some
10 of the other tables in our report, 53, 54. We have
11 taken even further breakdowns of these components.

12 But simply put, I think the only
13 clean way to come up with a proper result, once the
14 theory of damages is -- or the conclusions
15 regarding breach and damages -- breaches is decided
16 is to put it all into the model and come up with a
17 result.

18 THE CHAIR: I don't have the
19 model.

20 --- Laughter.

21 THE WITNESS: I understand that.
22 Sometimes that happens in these arbitrations.
23 Sometimes it doesn't. But, yes, the answer to your
24 question is, yes, there would be some elements of
25 overlap there.

1 MR. BROWER: Don't throw the Bible
2 away. You never know what may be....

3 THE WITNESS: I have seen it
4 happen before.

5 THE CHAIR: We might, if needed,
6 ask both parties' experts to work on whatever
7 models they have and come up with answers to
8 specific questions that we would have --

9 THE WITNESS: I understand.

10 THE CHAIR: -- because otherwise
11 it could be difficult to handle on our part.

12 Any further questions for Mr.
13 Goncalves?

14 MR. BROWER: That's it.

15 THE CHAIR: No? Then this ends
16 your examination. Thank you very much.

17 THE WITNESS: Thank you.

18 --- Whereupon examination adjourns at 3:40 p.m.

19 PROCEDURAL MATTERS:

20 CHAIR: So now we have a number of
21 procedural points that we would like to address for
22 trying to be efficient so you can have time to
23 prepare for tomorrow, and in that sense the
24 Tribunal has a number of suggestions that they
25 would like to make so it channels the debate, and

1 then you can comment on them.

2 I will try and make all of them
3 together, and then you can come back on the
4 different points.

5 We have provided earlier on that
6 there would be post-hearing briefs. In terms of
7 purpose and content of the post-hearing briefs, the
8 Tribunal would expect your commenting on the
9 evidence gathered this week and putting it into
10 context with your case that as it has been pleaded.

11 Of course, we do not
12 expect -- it's not only that we do not expect. We
13 do not wish you to repeat what you have already
14 explained in the briefs before. That is not the
15 exercise.

16 However, what would be helpful for
17 us is really to have a discussion of: This is what
18 we find in the transcript and this confirms or
19 rebuts, refutes, something that I find in this
20 document or that the other side has argued and I
21 have argued.

22 MR. LANDAU: Just one little
23 footnote, if I may, to what you have just said.
24 With the reference to the word "discussion", I
25 think the -- I hope I am speaking for all Members

1 of the Tribunal is that there is a kind of plea for
2 less narrative and just kind of bullet points and
3 make it sort of just -- it can be -- it can be
4 scaled right back, because we have already a huge
5 amount of useful, we have a lot of narrative in all
6 of the rounds of submission and pages and pages,
7 and it kills trees and trees, and in the end it
8 would be much easier for us, if possible, to scale
9 it back in terms of pros.

10 MR. BROWER: I want to put it, if
11 possible, even more strongly.

12 --- Laughter.

13 MR. BROWER: I personally avoid
14 reference to the word "brief" and I refer to them
15 as post-hearing submissions.

16 The whole point of this is this is
17 the time for you at the end of the hearing, so all
18 of the evidence is in, to list -- I call it
19 list -- or more like a bill of particulars, what
20 are the factual points that you wish to accept, and
21 then why.

22 And the "why" is witness statement
23 first or second of Mr. X, or whoever, paragraph
24 such and such, okay, transcript, day, page,
25 witness, lines such and such, document.

1 It is a road map. It needs to be
2 on basically the factual issues. And as we will
3 come to I think in a moment, this is particularly
4 key in connecting the dots on causation, getting
5 from the claimed breach to damages.

6 Just don't tell us any stories.
7 We have heard all of the stories, I think, or at
8 least we've heard all of the stories we're going to
9 hear by the time we receive those post-hearing
10 submissions.

11 What we need is the road map, and
12 that has two advantages for you, and that is it
13 ensures that we don't miss anything. If you
14 connect all of the dots for us and give us the road
15 map, then we know we've got what we need and you
16 are protected against the possibility that we might
17 overlook something in this vast record.

18 Also, without making any promises
19 as to the timing of a result, let me put it that
20 way, or a first result, it certainly facilitates
21 putting together whatever it is that we have to put
22 together.

23 So please err on the side of not
24 narrating anything. Just give us your case on the
25 facts. It may be necessary to an extent on the

1 law, too, but to the extent that's done, it has to
2 be the same way. Okay, is that clear?

3 THE CHAIR: I am not sure it is
4 that clear. If I were counsel, I would be a little
5 bit disturbed --

6 --- Laughter.

7 THE CHAIR: -- by the different
8 indications they got. Let me just kind of
9 summarize, and, in the end, you're in control of
10 your cases and you know what is effective at this
11 stage of the hearing.

12 I think it is important that you
13 know that what we want here is a discussion of the
14 evidence. Obviously you can do it in short form,
15 but then we need to understand what you mean.

16 And what I think it is not
17 needed -- and I think it is important, because if
18 you have now gotten the impression that you have to
19 repeat everything that was already in your previous
20 submissions, then that is not what we expect. It
21 would be huge work to have to assemble everything
22 again, and it would be quite duplicative.

23 Of course we will look at what you
24 have submitted earlier when we make our order. Is
25 it clear like this? I have other points, but maybe

1 I carry on, unless you have something specific on
2 this.

3 MR. SPELLISCY: You can carry on.
4 I can ask my questions at the end.

5 THE CHAIR: Good. We start of one
6 simultaneous submission. For the time limit, we're
7 very much in your hands. You may wish to have a
8 short consultation among counsel.

9 You understand that we value
10 something that is concise and effective, but we do
11 not think that we should put a page limit. I don't
12 think we would expect something more than 100
13 pages, but that gives you a range. There is no
14 obligation to write 99 pages.

15 --- Laughter

16 MR. MULLINS: You may want to
17 consult with your colleagues.

18 --- Laughter.

19 THE CHAIR: But it gives you an
20 indication of what we have in mind. There is one
21 specific issue that Judge Brower just touched on
22 where we would like a little more -- would
23 appreciate the parties specifically addressing,
24 which is really it is causation.

25 We have spoken about causation a

1 lot and we understand a number of things, but it
2 would help us to have a specific description of the
3 causation change from each alleged breach to each
4 claimed loss so that we have a clear understanding
5 of the flow of events and what the result of these
6 events are.

7 We have also thought whether we
8 have other specific issues, but we think we have
9 covered the ground well, and this is the only point
10 right now that we think of. You can of course
11 address it tomorrow, but we can also address it in
12 your post-hearing briefs.

13 There are two procedural aspects
14 that are outstanding at this stage. One is the
15 claimant's 1105 damage valuation, and the second
16 one is the respondent's subsidy defence that we
17 have said we would address at the end of the
18 hearing.

19 The Tribunal's suggestion is to
20 handle this in the following fashion. If in our
21 deliberations we come across -- we think that this
22 is relevant to the outcome of the case, then we
23 would come -- and it applies to the two aspects.
24 We would revert to the parties and ask specific
25 questions, and then we will take it from there.

1 If you think that requires a
2 hearing, then it requires a hearing, but we will
3 see, depending on what it is. It may also be that
4 in the deliberations, as I mentioned earlier, we
5 may come across other points where we thought now
6 that it was clear and when we work closer we
7 realize that one or the other issue needs more
8 input from the parties, but that would be only
9 limited input on specific questions.

10 With respect to further
11 proceedings, once we have -- we need to agree on
12 the time limits for the post-hearing briefs. At
13 some point we also need to have a corrected
14 transcript, and you would have to agree on
15 transcript corrections.

16 There is another point -- then
17 also we would like to have, after the post-hearing
18 brief, cost submissions, and you may wish to agree
19 among yourself about what level of detail. Is it
20 just a statement of the costs incurred or is it a
21 discussion of what should be considered, what
22 should not be considered?

23 Another point that we will have to
24 deal with is the release of the recording of the
25 hearing on the PCA website. It seems to us, but

1 obviously we can hear the parties about this, it
2 seems to us the reason for the closed-circuit was
3 that there could still have been an issue of
4 subsidy defence and witnesses being heard.

5 And if that is still the case,
6 then I think the release should take place at the
7 moment when the Tribunal has said that this is not
8 relevant, or it is relevant and it has been dealt
9 with.

10 So that would be the Tribunal's
11 suggestion, subject to your views, of course.

12 So in terms of further procedures,
13 then we would go into -- once we have done all of
14 this, we would go into deliberation and handle this
15 as we -- as I mentioned before, we would hope to
16 get to a final award, but I cannot say that there
17 will not be other issues that may come up in the
18 course of the deliberation on which we would revert
19 to you.

20 That's it in terms -- I may have a
21 few things for tomorrow, but for beyond tomorrow,
22 that is all what the Tribunal had in mind of
23 putting forward to you. I don't know whether you
24 want a short recess to discuss these points. Some
25 points may also have to be discussed among counsel

1 on both sides, and you may have common views on
2 certain things.

3 Should we take --

4 MR. BROWER: I would like to speak
5 to a couple of issues that I feel they should cover
6 tomorrow more precisely.

7 THE CHAIR: You can do so,
8 absolutely.

9 MR. BROWER: Issues that at least
10 I would and I think probably all of us would
11 appreciate being addressed tomorrow and in the
12 post-hearing non-brief, I would be interested to
13 see some persuasive authority to the effect that
14 where the MFN provision of NAFTA is breached, the
15 measure of damages suffered, if and when suffered,
16 is frankly along the lines of what Mr. Low has
17 presented as opposed to what Mr. Goncalves has
18 presented. This is not a position that I have had
19 the experience of having presented to me before.

20 Similarly, the question before us,
21 I think, is how it can be that a foreign investor,
22 a national of a NAFTA treaty party investing in
23 another treaty party, can take advantage of that
24 foreign investor status, but through in this case a
25 Canadian subsidy also claim non-national treatment,

1 which is what I have understood the position to be
2 on the part of the claimant.

3 I think that's it, but I might
4 point out that there hypothetically could be -- in
5 putting together the chain of causation, it could
6 be that more than one breach is required to get
7 there. What I'm wondering about is do you need
8 just, for example, a breach of MFN to get through
9 causation to damage, or would you need in addition
10 a breach of 105 -- 1105, I'm sorry. That's what
11 has tickled my fancy, in particular.

12 THE CHAIR: Fine. Should we take
13 a ten-minute break now for you to consider the
14 different points, or do you want to react right
15 away?

16 MR. MULLINS: We might -- unless
17 the Panel really feels they want to talk today, we
18 could use this time to talk to our opposing counsel
19 and maybe talk in the morning before we start
20 arguments, or however.

21 I think some of this sounds like
22 we might want to come up with a brief schedule. We
23 might want to think that through, and timing and
24 that kind of thing. That may take more than ten
25 minutes, and I would hate to have you sit around

1 and wait for us, but whatever works for the Panel.

2 THE CHAIR: Absolutely. That is a
3 possibility. I don't think there was anything
4 difficult in here. Let me just then say how I see
5 it tomorrow.

6 We have on both sides reserved
7 three hours maximum for closing. You can reserve
8 time out of the three hours for rebuttal,
9 sur-rebuttal.

10 We should, if at all possible, end
11 by five o'clock, which, if we simply stick to the
12 schedule, should not be a problem. I must confess
13 that I have changed my flight.

14 MR. MULLINS: Then I withdraw my
15 suggestion.

16 --- Laughter.

17 THE CHAIR: But we can do it
18 tomorrow morning, but then maybe we start a little
19 earlier tomorrow morning or have a shorter break.

20 MR. MULLINS: We can use the time
21 left now. We still have time left in the day.

22 MR. APPLETON: But I do think it
23 would be helpful for the disputing parties if you
24 might give us some very general ballpark as to what
25 you were looking for with respect to timing,

1 because we know that you're very busy Tribunal.

2 THE CHAIR: About the post-hearing
3 briefs?

4 MR. BROWER: Is that what you
5 mean?

6 MR. APPLETON: Yes. Not for
7 tomorrow. Tomorrow we roughly can figure out -- we
8 roughly know the order of who goes first and who
9 goes second, so that part we know. It's about for
10 us to talk to each other effectively, are you
11 thinking about post-hearing briefs within two
12 weeks, two months, two years? Let's hope it is not
13 two years. But, you know --

14 THE CHAIR: Two days.

15 MR. APPLETON: That's what I'm
16 trying to figure out. We need a transcript to be
17 certified and come together...

18 THE CHAIR: It all depends also on
19 your other matters and how your team is available.
20 I would say something like four weeks, six weeks,
21 something along these lines would seem reasonable
22 to me, but...

23 MR. APPLETON: So, for example,
24 because those deadlines start to hit into the
25 holidays.

1 THE CHAIR: Yes.

2 MR. APPLETON: And many of the
3 staff, perhaps on both sides, certainly for our
4 side, have had no holidays, as they have been doing
5 this through. So they all have these pent-up
6 holidays coming in. That is what we're trying to
7 figure out.

8 We will talk with Canada and see
9 what we can do in the next few minutes, and then we
10 will come back.

11 MR. SPELLISCY: Just to be clear,
12 I deny staff holidays all the time.

13 MR. LANDAU: It's on record.

14 --- Laughter.

15 THE CHAIR: Right. Would you like
16 to take a few minutes now? You can also think
17 about a time limit for submissions on costs, but
18 that can be logically, like, two weeks after the
19 post-hearing briefs, because obviously you have to
20 gather the costs of the post-hearing briefs and
21 whether you want just statements of costs, or
22 whether you want an opportunity to comment on your
23 opponent's statement.

24 MR. SPELLISCY: And what detail.

25 THE CHAIR: And in what detail in

1 terms of entitlement to costs.

2 MR. APPLETON: Does the Tribunal
3 have any views of any form to guide us here?

4 THE CHAIR: I would say what we
5 certainly need is a statement of costs. You can
6 give some explanations. Was it about
7 entitlement? You may have arguments about: This
8 was caused by the other party, and therefore they
9 should bear the costs, and so on.

10 Then I would give a short time
11 limit, like two weeks after that, if there is any
12 wish to comment on the opponent's submission, for
13 instance, to say this cost is too high, or without
14 an obligation to file a reply. Does that make
15 sense? Good.

16 MR. APPLETON: Excellent. Thank
17 you.

18 MR. BROWER: So we will wait
19 around?

20 --- Recess at 4:01 p.m.

21 --- Upon resuming at 4:28 p.m.

22 THE CHAIR: Fine. I see you are
23 ready to resume. Should I first -- could I give
24 the floor to the claimant? Mr. Mullins.

25 MR. MULLINS: Thank you. Members

1 of the Tribunal, you'll be happy to know that
2 counsel have been able to come up with a
3 recommendation for a schedule, and so we propose
4 the following: December 18th, 2014 for post
5 hearing submissions, not briefs. We
6 then -- simultaneous, as requested by the Tribunal.

7 And then for cost submissions, we
8 are proposing to follow simultaneously on February
9 3rd, 2015 with also an agreement internally by
10 January 15th to agree on format, so there is no
11 surprises and we can kind of agree what each side
12 is doing, and then try to work as possible to match
13 what each side is doing so there is no fights.

14 Then once we file the submissions
15 on February 3rd, both sides will respond to those
16 submissions on February 26th.

17 THE CHAIR: 26th?

18 MR. MULLINS: Yes, yes, Madam
19 Chair.

20 And just obviously beyond the
21 holidays, counsel have travels and other briefs and
22 stuff. So hopefully these dates will work out for
23 the Panel, and they worked out with the schedules
24 of counsel.

25 THE CHAIR: Is this an agreed

1 proposal?

2 MR. SPELLISCY: Yes. Of course,
3 yes.

4 THE CHAIR: Yes. That's
5 wonderful. Should we have a date for an agreed
6 corrected transcript, or you would not want to go
7 through this? I don't need it. As long as you can
8 work with the transcript as it is, it is fine, and
9 if there are any issues that come up, we could also
10 take it from there.

11 MR. APPLETON: The transcript
12 that's being produced -- and I will put it on the
13 record now how wonderful the team with Teresa and
14 Lisa have been, really wonderful transcripts. They
15 certify them themselves based against the oral
16 hearing. And they have been doing that, I believe,
17 the next day or -- really like almost overnight.
18 We're getting them first thing in the morning.

19 So the real issue is about
20 confidentiality between the restricted or the
21 confidential. So that is the only issue. And we
22 had one issue that we identified amongst counsel
23 where there was a document that was marked as being
24 "confidential", but actually had been declassified,
25 so that will have to be marked appropriately so it

1 will form part of the public transcript, rather
2 than the private part.

3 But with that one exception, we
4 think it would be relatively easy. We had not
5 discussed not having to worry about the transcript.
6 Personally I'm very much in favour of that. That
7 would speed everything up. So I am very interested
8 in what Mr. Spelliscy has to say about that.

9 THE CHAIR: So are we.

10 MR. SPELLISCY: I am not sure what
11 the question was to me.

12 THE CHAIR: No. The question was:
13 Can we simply live with the transcript as it
14 is? And if there is a major issue that you
15 discover as you work on it, you could raise it, but
16 that would not be expected. Then we have the other
17 issue, which is: What is the public version and
18 what is the confidential version? And that needs
19 to be sorted out somehow, some time, but it is not
20 that urgent, unless there is something that escapes
21 me.

22 MR. SPELLISCY: We're perfectly
23 fine working with the certified versions that they
24 have produced, the final versions.

25 THE CHAIR: All right. And how do

1 you want to go about the public-confidential
2 version? I mean, you have been going
3 through -- you have gone through this exercise
4 before, so...

5 MR. APPLETON: Well, some
6 exercises have been less successful than others.

7 THE CHAIR: So let's try to copy
8 the successful ones.

9 MR. APPLETON: We haven't had one
10 yet, but we're hoping.

11 It would seem to us that -- why
12 don't we give the parties maybe two weeks, after we
13 get all of the certified versions back, to be able
14 to look at that just to see if there is anything.
15 That would be the time to notify with respect to if
16 something that is 'off' with respect to
17 confidential and restricted.

18 Otherwise, I think there is
19 no -- nothing that will prevent the Tribunal from
20 being able to deal with things. You have the
21 restricted version and, as far as I can tell, it is
22 completely complete, as I have looked at those
23 already.

24 And perhaps we're on the way to
25 get what Judge Brower wants with everybody with

1 point-forms and as short as possible.

2 MR. BROWER: I'm not the only one.

3 --- Laughter.

4 THE CHAIR: It shouldn't be
5 difficult, because each time something confidential
6 was raised, it was said. So you can do a search of
7 "confidential" and you should be able to locate all
8 the passages that are relevant.

9 Two weeks for that? Is that fine?

10 MR. APPLETON: It would be two
11 weeks from the receipt.

12 THE CHAIR: From receipt.

13 MR. APPLETON: Because it might
14 take a few days, especially they have been going
15 non-stop. But, yes, two weeks from the receipt of
16 the final.

17 THE CHAIR: Fine. Good. Is there
18 anything further that you -- yes. The Tribunal had
19 some thought about receiving USB keys. I don't
20 know whether that has been discussed among the
21 parties.

22 There is, in those that we have
23 received before the hearing on both sides, a few
24 things missing. So it would be nice to have a
25 complete one, plus it would be good that we have

1 the expert presentations, because now we only have
2 them in hard copy, the opening and closing
3 presentations, and possibly the indices of the
4 witness expert bundles, because in case we need to
5 go back to a tab number and I do not have the
6 exhibit number, having the indices electronically
7 would make it more efficient to look for.

8 MR. APPLETON: Counsel discussed
9 part of your request already. We had agreed on a
10 process by which anything that was introduced here
11 at the hearing, which are demonstrative slides and
12 presentations, would be given the next number for
13 each side, "C" or "R", and it would be done
14 chronologically.

15 So the opening slides would be the
16 next number. For example, Mr. Goncalves's
17 presentation today would be the next one for
18 Canada, and if Canada has slides in closing, that
19 would be the next one.

20 We would identify, though, we
21 would like sort permission from the Tribunal if
22 there are items that are missing. Maybe the
23 Tribunal has already advised the parties and I
24 don't know about it, or --

25 THE CHAIR: No, we have not. We

1 have not.

2 MR. APPLETON: If you advise us,
3 we will work on that to get that done. So I think
4 that that shouldn't be all that difficult.

5 With respect, though, to your last
6 request about the indices, it's a little bit more
7 tricky. We have already had some problems with
8 this, so that's why I'm asking or identifying.

9 With respect to the experts that
10 we have produced, all of their documents are
11 identified, because we have forced all of them to
12 put into a common record with us.

13 So, in other words, none of the
14 witnesses have separate exhibits. We have already
15 scheduled them into a number, and I believe that
16 they always have an index in the reports of the
17 documents, as well; right? I don't think there is
18 one that does not.

19 With respect to Canada, though,
20 for example, BRG, they have their own numbering
21 system, and there are other witnesses that didn't
22 do a schedule. They sometimes referred to a
23 website in some of their things and it is a general
24 website. It doesn't have anything else.

25 So I am not sure how you want to

1 handle that, and I am not sure it is necessary at
2 this time.

3 THE CHAIR: I wouldn't want
4 anything to be done other than simply receiving
5 these sheets that we have in front of the witness
6 binder that lists what is in the tabs, because in
7 case on the transcript it only says "tab 10" and
8 not the exhibit number, which sometimes happens, or
9 in our notes we have only tab 10, it will help us.
10 I mean, we can also do it on the paper, but it
11 would be nice to have it electronically.

12 MR. APPLETON: Okay.

13 THE CHAIR: It is nothing but just
14 these sheets that we have in the front of each
15 witness bundle.

16 MR. APPLETON: Okay. Well, then
17 that does raise one other issue. It is very minor.

18 Both sides had put in the
19 engagement letters for witnesses in the witness
20 bundles, but they weren't formally a part of the
21 record. They were produced by order and exchanged,
22 but they didn't have a number.

23 So we will need to -- anything
24 that was put in the bundle, I believe for both
25 sides, are the only document that was not already

1 on the record other than the presentations that
2 were in some of the witness bundles. They would
3 need to be scheduled, as well.

4 THE CHAIR: Yes. I mean, we have
5 the engagement letters, because we received them.
6 Even if they had no number, we received them and we
7 looked at them.

8 MR. APPLETON: Yes.

9 THE CHAIR: So I don't think it is
10 necessary to complicate matters with this. If we
11 have what you have in here on both sides, then that
12 is -- that will be fine.

13 MR. MULLINS: Madam Chair, did you
14 need the indices just for the experts or for the
15 witnesses, as well?

16 MR. LANDAU: All of them.

17 MR. MULLINS: It sounded like this
18 was the issue.

19 THE CHAIR: Witnesses is probably
20 more important.

21 MR. LANDAU: Yes.

22 MR. MULLINS: Yes.

23 MR. APPLETON: So just to confirm,
24 each bundle that was put up, because it would have
25 been referred to in the transcript, because we

1 didn't know if you wanted that, we always would
2 give you the other number, to Mr. Mullins's
3 chagrin. So you will get that, and I am sure
4 Canada can do that easily, no problem.

5 THE CHAIR: Yes, I suppose. Fine.
6 Is there anything else that we would need to agree
7 on now?

8 MR. SPELLISCY: I had two
9 questions that I would like on the post-hearing
10 submissions, non-briefs.

11 For these, I assume it goes
12 without saying that the evidentiary record is
13 closed, so no new exhibits are to be cited?

14 THE CHAIR: Thank you for
15 mentioning. Yes, it was implied. No new exhibits,
16 unless the Tribunal requests something specific,
17 but, otherwise, the record would be closed, yes.

18 MR. SPELLISCY: And my other
19 question, because Judge Brower had talked about the
20 roadmap with the facts. Is the Tribunal looking
21 for submissions on issues of law, as well, in these
22 post-hearing submissions, or do you want them to be
23 evidentiary submissions?

24 THE CHAIR: Yes. We have
25 discussed this and I would not wish to exclude that

1 you want to discuss some aspects of the law, in the
2 sense that -- if I now think about causation,
3 causation is a legal issue, but it is also factual.

4 And we have heard evidence about
5 causation here, so you may wish to say, Well, on
6 the basis of what we heard about that, that is the
7 legal consequence of this.

8 So I would say that it is in your
9 judgment how much law you want to include. There
10 may be other issues where there are legal
11 consequences from the evidence that was taken this
12 week. Does that answer the question?

13 MR. SPELLISCY: Yes, I understand.

14 THE CHAIR: Are there any other
15 points that we would need to raise before we close
16 for the day? No.

17 MR. BROWER: Do we meet at 8:30?

18 THE CHAIR: No. We meet at 9:00
19 and we start. Yes, that will be fine. Good. So I
20 am not wishing you a good evening, because that
21 would be...

22 MR. APPLETON: Just think
23 about -- we talked about tomorrow, because we will
24 have a lot of surprises. The idea would be we
25 start at 9:00. I assume since there are three

1 hours, maybe there would be some time reserved for
2 rebuttal, but it is probably still too long for the
3 transcript to go without a break.

4 So I assume that you would like at
5 some point --

6 THE CHAIR: In the middle of the
7 three hours, approximately, I would say we would
8 have a break. That would lead us to about 12:30.
9 Then we would have an hour lunch, and then we would
10 carry on until five o'clock with a break again.

11 MR. APPLETON: Three hours.

12 THE CHAIR: Three hours gets us to
13 4:30, plus the break would give about five o'clock.
14 Is that...

15 MR. APPLETON: I am just worried
16 about the time. I think it should be workable, but
17 imagine, for example -- because let's say, for
18 example, that we were to use two hours and 45
19 minutes, so we would finish -- and we start right
20 at 9:00, so we finish before 12:00.

21 Would you have Canada start then,
22 or no? You would want to take the break, I
23 imagine.

24 THE CHAIR: It would be more
25 logical to have the break, but then we could have

1 an earlier lunch. That would make sense.

2 Maybe the lesson to be drawn from
3 this is that we need to tell the Arbitration Place
4 to be ready a little earlier so that we have more
5 flexibility.

6 MR. APPLETON: Yes. That was my
7 point.

8 THE CHAIR: Nothing
9 further? Fine. Then have, all, a good evening.
10 It will be a busy evening, but we are almost there.
11 --- Whereupon the hearing adjourned at 4:43 p.m.,
12 to be resumed on Friday, October 31, 2014 at
13 9:00 a.m.

14

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately recorded
by Computer-Aided transcription and transcribed
therefrom, the foregoing proceeding.

Teresa Forbes, CRR, RMR,
Computer-Aided Transcription