

PCA Case No. 2012-17

AN ARBITRATION UNDER CHAPTER ELEVEN 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 (PRESIDING  
ARBITRATOR)

THE HONOURABLE CHARLES N. BROWER,  
MR. TOBY T. LANDAU QC  
held at Arbitration Place,  
333 Bay Street, Suite 900, Toronto, Ontario  
on Sunday, October 26, 2014 at 9:13 a.m.

VOLUME 1

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6

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7 Sylvie Tabet

Heather Squires

8 Raahool Watchmaker

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9 Susanna Kam

10 Rodney Neufeld

11 Also Present:

Alicia Cate

12 Jennifer Kacaba

13 Saroja Kuruganty

Lucas McCall

14 Alex Miller

15 Harkamal Multani

16 Darian Parsons

Adriana Perezgil

17 Melissa Perrault

18 Chris Reynolds

19 Cole Robertson

20 Sejal Shah

21 Michael Solursh

22 Mirrun Zaveri

23

24 Teresa Forbes, CRR, RMR, CSR, Court Reporter

25 Lisa Barrett, CRR, RMR, CSR, Court Reporter

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Toronto, Ontario

--- Upon commencing on Sunday, October 26, 2014

at 9:13 a.m.

THE CHAIR: Fine. It looks like we are ready to start. I am pleased to open this hearing and welcome you all here. And when I say this, I am also welcoming those who are viewing the hearing at a nearby venue.

Let's start with the introductions of those who are in attendance. You don't need me to introduce the Tribunal, as we have already met on various occasions; on my right, Judge Brower, on my left Mr. Landau. We also have the Tribunal's secretary on my far right, Mr. Donde.

We have the court reporter. You have given us lists of people in attendance over the time of the hearing. It would be good if you could briefly, for the record, list who is present now at the start of the hearing.

Can I first turn to you, Mr. Appleton, to state who is here on behalf of the claimants?

MR. APPLETON: Yes. Can you hear me? Can you hear me on this microphone?

THE CHAIR: I hear you without the

1 microphone.

2 MR. APPLETON: I think for today  
3 we will keep the microphone on because of the  
4 throat.

5 Thank you. Actually, before we  
6 begin, we would just like to also greet all of  
7 those people who are now watching this hearing live  
8 in terms of the closed circuit hearing room. We  
9 think it is important that this is a transparent  
10 process and we want to thank the Tribunal,  
11 Arbitration Place and the Permanent Court of  
12 Arbitration for the efforts that they took to be  
13 able to facilitate a transparent and open process  
14 today.

15 With respect to our delegation, we  
16 have a delegation list which we circulated and we  
17 will make sure there is another copy for the court  
18 reporter today.

19 I am the lead counsel from the law  
20 firm of Appleton & Associates, international  
21 lawyers. During this hearing, you will also hear  
22 from Kyle Dickson-Smith from our firm, who is  
23 beside me here on right, and you will hear from  
24 Mr. Ed Mullins from the firm of Astigarraga Davis  
25 Mullins & Grossman, who is here on my left.

1                   We also should acknowledge the  
2 presence of a party representative here today. We  
3 have Cole Robertson from Mesa Power Group. Mr.  
4 Robertson, wave your hand. He's with us today.  
5 Thank you. I think we can turn it over to Canada.

6                   THE CHAIR: Thank you. Can I turn  
7 over to Canada? Should I give the floor to you,  
8 Mr. Spelliscy? Yes.

9                   MR. SPELLISCY: Sure. I will come  
10 up to the microphone so the folks in the room can  
11 hear me. My name is Shane Spelliscy, and I am lead  
12 counsel for the Government of Canada on this case.  
13 With me today I have the Director and General  
14 Counsel of the Trade Law Bureau, Ms. Sylvie Tabet.  
15 You also have other counsel that you will hear from  
16 this week, including Heather Squires, Raahool  
17 Watchmaker.

18                   Behind us we have our team of  
19 paralegals, Melissa Perrault and Darian Parsons, as  
20 well as the graphics persons for us, Christopher  
21 Reynolds, and we have more counsel sitting behind  
22 them. From your left to right: Rodney Neufeld,  
23 Laurence Marquis, Susanna Cam.

24                   Then we have client  
25 representatives here, as well, who I should

1 acknowledge, and my understanding is here from the  
2 Ontario Ministry of Energy is Jennifer Kacaba and  
3 Mirrun Zaveri. I think they are in the back there.  
4 We have Michael Solursh and Saroja Kuruganty from  
5 the Ministry of Economic Development, Employment  
6 and Infrastructure and the Ministry of Research and  
7 Innovation.

8 We have Lucas McCall, who is a  
9 trade policy officer of the Department of Foreign  
10 Affairs in the back, and we have Sejal Shah, who is  
11 counsel at the Ontario Power Authority.

12 My understanding is that we also  
13 have representatives from the United States and  
14 Mexico who have actually joined us, I think. Yes,  
15 you can see.

16 THE CHAIR: Yes. I have not yet  
17 come to you, ladies. I understand we have Ms.  
18 Adriana Perezgil for Mexico and Ms. Alicia Cate for  
19 the United States; is that right? Thank you.

20 MR. SPELLISCY: Great. I think  
21 that is everything. The Government of Canada of  
22 course welcomes the Tribunal to Toronto and is  
23 grateful you can sit with us this week.

24 Before we do get started, I do  
25 have a procedural issue I would like to discuss,

1 but I can do that at whatever time the Tribunal  
2 feels is appropriate.

3 PROCEDURAL MATTERS:

4 THE CHAIR: I would like to go  
5 through some procedural points before we start, and  
6 then of course if there are procedural issues that  
7 the parties wish to raise, we will hear them before  
8 we go to the oral argument.

9 I understand that there are no  
10 fact witnesses in attendance now. You remember  
11 that we have this rule that they would not attend  
12 before their examination except, of course, for  
13 Mr. Robertson, who is here also, not only as fact  
14 witness, but also as party representative.

15 We will hear today the opening  
16 arguments and we will then start afterwards with  
17 the witness examination, first with Mr. Pickens,  
18 and, if we get to it, to the start of the  
19 examination of Mr. Robertson.

20 The opening, as you know, should  
21 take no more than two hours, and you can set time  
22 aside for rebuttal and sur-rebuttal, and of course  
23 the time will count towards your total hearing  
24 allocation.

25 The total allocation, as you know,



1 is 17 hours per party. The Tribunal's secretary  
2 will keep the time and advise you every evening  
3 after the hearing by e-mail of the time that you  
4 have used and what is remaining.

5 We will of course deduct the time  
6 for Tribunal questions and other procedural issues.

7 We should also recall how we will  
8 handle confidential, restricted access information.  
9 The Tribunal will rely, as we have agreed, on the  
10 parties, on counsel, to mention when something is  
11 about to be addressed that may fall within a topic  
12 that includes either confidential information or  
13 restricted information. That will be heard in  
14 camera And the transcript will be marked as such.

15 And, in addition, if it is  
16 restricted information, Restricted Access  
17 Information, then persons not entitled to hear it  
18 would have to leave this room.

19 There was a question whether the  
20 non-disputing parties would wish to make oral  
21 presentations, or not, in addition to your written  
22 submissions. Do you know already? This would  
23 obviously, if at all, be after the presentations of  
24 the oral arguments of the parties today.

25 Can I ask Mrs. Cate?

1 MS. CATE: On behalf of the United  
2 States, I would like to reserve our right to make  
3 an oral submission.

4 It will be the same position as  
5 the US.

6 MS. PEREZGIL: We will be the same  
7 position as the US.

8 THE CHAIR: Which means you will  
9 reserve your right, but you are not intending at  
10 this moment to make presentations.

11 So I understand there is a  
12 divergence among the parties about this. Since the  
13 issue may not arise at all, I suggest that we do  
14 not resolve it as long as it does not arise, all  
15 right?

16 There was an issue, as well, about  
17 the timing of the respondent's oral argument,  
18 before or after lunch. The Tribunal will suggest  
19 now that we wait to see how the hearing evolves,  
20 and then take it from there once we have reached  
21 the end of the claimant's oral argument.

22 That is all that I should say in  
23 terms of organization of this hearing so far. Is  
24 there anything that the parties would like to raise  
25 before we start with the oral argument?

1 Mr. Appleton? Mr. Mullins?

2 MR. MULLINS: No, ma'am.

3 THE CHAIR: No, fine. There is  
4 one thing on behalf of Canada, I understand.

5 MR. SPELLISCY: Thank you, Madame  
6 President. Yes, hopefully this is just a very  
7 brief and quick clarification, and that is that as  
8 the Tribunal is aware, on October 17th there was a  
9 submission that the Tribunal ruled would  
10 potentially prejudice Canada's due process rights  
11 if it was admitted.

12 The claimant, as the Tribunal has  
13 known, has elected to withdraw that submission from  
14 the record, which is acceptable to Canada. I do  
15 want to just clarify two things because, given the  
16 unusual circumstances, the claimant's withdrawal  
17 letter said it withdraws the document that it  
18 filed.

19 And I am sure that the use of the  
20 term the singular document was not intentional  
21 there, but I do want to clarify that, in fact, the  
22 letter constitutes a withdrawal of the record of  
23 the entire submission, which is not just the  
24 modifications that were made to the expert report,  
25 but also the exhibits.

1                   I also wanted to clarify the  
2 effect that the withdrawal will have on this  
3 hearing. As the Tribunal noted, allowing the  
4 claimant to modify its expert evidence a week in  
5 advance of the hearing could potentially prejudice  
6 Canada's due process right. Obviously the same due  
7 process violation would arise if the same  
8 modification was made at this hearing.

9                   So what I want to do is just  
10 clarify there should be no doubt that what could  
11 not be done a week before cannot also be done from  
12 the stand.

13                   I think that this should have been  
14 relatively obvious. I don't expect dispute on  
15 this, but I also think it is good to have a ruling  
16 from the Tribunal in this regard, that the  
17 claimant, the witnesses, the counsel, may not refer  
18 to the submission or the contents thereof during  
19 the course of these arguments for exactly the same  
20 reasons the Tribunal ruled on its October 20th  
21 ruling on this.

22                   And I think we may not get there,  
23 but if the situation does occur where there is  
24 reference to these documents, then I think we're  
25 going to be in a position where we're going to be

1     requesting immediate bifurcation of the hearing. I  
2     don't want to get there, but that is why I want to  
3     have this rule clear up at the front, that  
4     reference to the content, the subject of these  
5     documents, unless these documents are already in  
6     the record -- and I recall the claimant pointed out  
7     one exhibit that was already in the record. That  
8     is fine, obviously, for something already in the  
9     record.

10                     We're not going to object to that,  
11     but to the extent these modifications have been  
12     withdrawn, we want to make sure the effect is that  
13     the submission has been withdrawn and it is not  
14     going to be just remade here orally.

15                     THE CHAIR: Thank you. I think  
16     the points are clear.

17                     What I would suggest is because  
18     there is no rush on this issue and it's an issue  
19     for Friday, it's good that you raise it now. What  
20     I would suggest is at some point I give the  
21     floor -- not now -- to the claimants for you to  
22     answer this, probably sometime this afternoon, and  
23     then the Tribunal will consider it. And I suppose  
24     that by tomorrow, we could have a rule by the  
25     Tribunal.

1                   Yes. Mr. Landau tells me that it  
2 is also an issue for the opening submission. Is  
3 there an intent on the part of the claimants to use  
4 this October 17th submission in the opening? If  
5 so, we would have to deal with it now.

6                   MR. APPLETON: Can you hear me?

7                   THE CHAIR: Yes.

8                   MR. APPLETON: Yes. I am rather  
9 taken aback by the fact that given that this is not  
10 a new issue for my friend, that he did not avail  
11 himself of the opportunity to follow the procedural  
12 direction of the Tribunal to raise such issues by  
13 Friday or whatever that deadline was.

14                   This is not a new issue, and it  
15 would have been easier and much more efficient for  
16 everyone had we not conducted a trial by ambush and  
17 having these issues raised without notice.

18                   Having said that, I am happy to  
19 confirm that there will be no discussion whatsoever  
20 about any matter that is contained in that October  
21 17th document, but there will be some significant  
22 need to have discussion with this Tribunal about  
23 that October 17th document, procedurally, and the  
24 impacts, because we do not -- it should go very  
25 clearly on the record now we do not agree with the

1 characterizations that have been made by Canada at  
2 all, and we want to make that formally noted on the  
3 record immediately. But we will of course come  
4 back to this when we have the opportunity later on  
5 today.

6 THE CHAIR: So your immediate  
7 answer to my immediate question is that you will  
8 not refer to the submission in your opening, and  
9 the rest of course we will deal with at some later  
10 point that will be a good time to do this in the  
11 course of this day?

12 MR. APPLETON: That is correct.

13 THE CHAIR: Did I understand you  
14 correctly?

15 MR. APPLETON: That is absolutely  
16 correct. Thank you, Madame President.

17 THE CHAIR: Fine. Any other  
18 procedural issues that we should resolve before we  
19 start with the opening arguments? The claimant has  
20 already said "no". I understand that this was all  
21 for the respondent.

22 Good. Then this allows me to give  
23 Mr. Appleton the floor for your opening, please,  
24 Mr. Appleton.

25 MR. APPLETON: Thank you. I just

1 need a minute.

2 THE CHAIR: Do you have a  
3 PowerPoint presentation? Here it is.

4 MR. APPLETON: Yes.

5 THE CHAIR: Thank you.

6 MR. APPLETON: We should probably  
7 put that up on the screen now. Put the first slide  
8 on.

9 --- Off record at 9:27 a.m.

10 --- Upon resuming at 9:29 a.m.

11 OPENING SUBMISSIONS BY MR. APPLETON:

12 MR. APPLETON: Are we live to  
13 everyone in the hearing room now? Yes. Thank you  
14 very much.

15 Madame President, members of the  
16 Tribunal, the rule of law is what this case is all  
17 about. This is a story about an administrative  
18 process done at the direction of the Government of  
19 Ontario which on its face appeared, at least in the  
20 beginning, to be open, fair, and transparent. But  
21 as we will soon see, something very different was  
22 afoot.

23 Once we scratch the surface, we  
24 find that the ostensibly good public purpose of  
25 Ontario's encouragement of renewable energy was



1 actually subverted for an inappropriate purposes.

2           The integrity of Ontario's  
3 electricity system depends on the good faith of the  
4 officials administering it and on its protection  
5 from political and other inappropriate  
6 interference. That protection did not occur here.

7           Instead, politics and special  
8 influence prevailed over the fair and transparent  
9 administration of public policy and good  
10 governance.

11           This abusive behaviour harmed Mesa  
12 who, in good faith, relied on the mistaken belief  
13 that Ontario would follow Canadian laws and the FIT  
14 program rules in its administration of the Ontario  
15 FIT program, and this abuse harmed Ontario's  
16 ratepayers, who had to bear all of the costs for  
17 these mistakes.

18           Mesa was given every reason to  
19 believe that its sole means of access to the  
20 transmission grid for renewable power generators  
21 was through the Feed-In Tariff, the FIT program.  
22 Mesa did not know about special, more favourable  
23 treatment which was offered to certain Korean  
24 renewable power investors and their investments,  
25 but not to their competitors. Those competitors

1 were the FIT proponents like Mesa Power.

2                   The NAFTA contains a powerful set  
3 of obligations designed to protect the equality of  
4 competitive opportunities of all investors covered  
5 by that treaty, and we will spend some time looking  
6 at these NAFTA obligations, such as Most Favoured  
7 Nation and national treatments, which ensure that  
8 treatment equal to the most favourable treatment in  
9 Ontario is provided to investors like Mesa.

10                   This morning we will begin by  
11 taking the Tribunal through certain non-contentious  
12 facts and the governing legal principles in this  
13 dispute. We do not propose in this opening  
14 statement to address all the legal questions before  
15 you in detail, as this has been covered in the  
16 briefs and we know the Tribunal has read the  
17 briefs.

18                   Instead, we will highlight some  
19 factual issues to assist the Tribunal during the  
20 witness examination phase of this hearing, and then  
21 we will review the governing legal principles to  
22 assist the consideration of the evidence during  
23 this hearing, and we intend to return to both law  
24 and evidence in the closing statement after the  
25 conclusion of the witness examinations.

1                   We will start with a review of  
2                   certain non-contentious facts. First, we will look  
3                   at Ontario's Feed-in Tariff for renewable energy,  
4                   the FIT program.

5                   In May 2009, Ontario passed the  
6                   Green Energy and Green Economy Act. This Act  
7                   authorized the Ontario Minister of Energy to create  
8                   a renewable Feed-in Tariff program. On September  
9                   24, 2009, the Ontario Minister of Energy who, at  
10                  the time, was serving as the Deputy Premier of  
11                  Ontario, issued a mandatory order to the Ontario  
12                  Power Authority to create a Feed-In Tariff program  
13                  for renewable energy.

14                  By statute, the Ontario Power  
15                  Authority had to follow the government's  
16                  directions. The FIT, as this program is well  
17                  known -- and that's the thing, FIT -- had written  
18                  rules to govern applications from various  
19                  proponents who sought access to transmission into  
20                  the public Ontario electricity grid for the purpose  
21                  of obtaining renewable power purchase agreements.

22                  To obtain transmission access and  
23                  thus to be able to obtain a contract, all  
24                  applicants were required to meet onerous Ontario  
25                  local content requirements.

1                   For wind projects operational in  
2                   the year 2011 or later, at least 50 percent of the  
3                   local content had to be sourced from Ontario. And,  
4                   in fact, because of certain caps within the  
5                   subcategories of the FIT program, Ontario local  
6                   content requirements, proponents had to acquire  
7                   well more than 50 percent Ontario local content to  
8                   meet the program's mandatory minimum local content  
9                   requirements. So a very high level.

10                   Now, a successful applicant under  
11                   the FIT program would receive a 20-year contract  
12                   backed by Ontario's ratepayers at a fixed price of  
13                   13.5 cents per kilowatt-hour. Make no doubt about  
14                   this, this was a highly attractive rate.

15                   Unsurprisingly, as a result of  
16                   these highly attractive terms, there were many,  
17                   many applications for Ontario FIT contracts.

18                   On the monitor before you, you  
19                   will see slide 1. You will see a map of Ontario's  
20                   transmission regions. FIT contracts were awarded  
21                   based on transmission regions. Ontario accepted  
22                   applications for the FIT starting in the fall of  
23                   2009.

24                   Now, slide 2 on the monitors sets  
25                   out a time line about the FIT program. You will

1 see that Ontario started to accept applications for  
2 the FIT in the fall of 2009. We're going to try to  
3 adjust the screen for those in the viewing room.

4 But as you can see here at least  
5 on the slides, you will see that we start in the  
6 fall of 2009. The first FIT contracts were awarded  
7 on April 8th, 2010 for all regions other than the  
8 Bruce. You will see the significance of this Bruce  
9 region in a moment. That's that region out in  
10 western Ontario on the side of Lake Huron. That is  
11 the Bruce.

12 On February 24, 2011, another 40  
13 FIT contracts were awarded, but none in the Bruce.

14 On June 3rd, 2011, the Minister of  
15 Energy issued a mandatory direction which ordered  
16 the Ontario Power Authority to issue a second round  
17 of contracts in the west of London region and a  
18 first round of contracts, finally, for the Bruce  
19 region.

20 This direction allowed projects in  
21 the west of London region and the Bruce region to  
22 change their interconnect points between regions  
23 into the transmission grid.

24 Despite the fact that the program  
25 had been set up years prior, only one business

1 day's advance notice was given of this change, and  
2 only five days were provided to effect the change.

3                   On July 4, 2011, 25 FIT contracts  
4 were finally awarded in the Bruce and west of  
5 London transmission areas, and the FIT program  
6 operated until June 2013, when Ontario announced it  
7 was terminated.

8                   So that's the public program.  
9 That's the FIT. Now I am going to turn to the  
10 GEIA.

11                   The FIT program was the public  
12 face of Ontario's renewable energy program, but as  
13 it turns out, there was another route to obtain the  
14 very same renewable power purchase agreements, and  
15 these were through secret terms mostly unknown to  
16 the public ratepayers that were paying for it.

17                   On January 21, 2010, a signing  
18 ceremony took place between the Premier of  
19 Ontario -- that's him standing in the back row by  
20 the flags -- the Ontario Minister of  
21 Energy -- that's him right at the centre of the  
22 room -- and senior executives from a Korean  
23 consortium comprised of Samsung and Korea Electric,  
24 known as KEPCO. That is everybody else around the  
25 table.

1                   The new deal, titled the Green  
2 Energy Investment Agreement, GEIA, was clouded in  
3 secrecy. Very little of substance was released to  
4 the public about the signing. A press backgrounder  
5 with very limited disclosure about the terms of the  
6 deal was produced. The actual terms of the GEIA  
7 were kept secret and remained secret until after  
8 this arbitration was filed.

9                   Also kept secret from the public  
10 was the fact that the GEIA was not the first  
11 agreement between Ontario and the Korean  
12 consortium. On December 12, 2008, more than one  
13 year earlier, Ontario and Samsung became party to a  
14 secret memorandum of understanding. This secret  
15 MOU, which is contained in Exhibit C-536 so you can  
16 note it -- we will be no doubt looking at that  
17 through the course of this hearing -- made Ontario  
18 and Samsung exclusive partners on renewable energy  
19 production and would have wide-ranging impact on  
20 the FIT program.

21                   Ontario, not the Korean  
22 consortium, demanded that this deal be kept secret.  
23 The chief of staff to the energy Minister wrote to  
24 Samsung to ensure that it kept the information  
25 about this MOU secret, so the public would not be

1 aware about the exclusive relationship between  
2 Ontario and the Korean consortium. And according  
3 to Ontario's Auditor General, even the Ontario  
4 Power Authority, the entity that would eventually  
5 administer the renewable energy program, was  
6 unaware of even the existence of this MOU until the  
7 summer of 2009, more than six months after it was  
8 entered into.

9                   Thus, in 2010, when the GEIA was  
10 announced, the public and FIT applicants were  
11 misled. Indeed, while a government press release  
12 stated that the GEIA -- sorry, that under the GEIA  
13 the Korean consortium would receive assured access  
14 to electricity transmission in Ontario in exchange  
15 for jobs and manufacturing plants, the public was  
16 not aware of the actual terms of the GEIA, which  
17 said something very different, or the public was  
18 not aware of the existence of the earlier secret  
19 MOU. And this information did not become public  
20 until after this arbitration commenced.

21                   The Ontario public was also  
22 unaware that the Korean consortium actually was not  
23 contractually obligated to produce any jobs or to  
24 make any manufacturing commitments -- sorry, any  
25 manufacturing investments in Ontario under the



1 GEIA.

2 Now, in slide -- sorry, on  
3 September 30th, 2009 before the GEIA was signed,  
4 the Ontario Power Authority was ordered by the  
5 energy Minister to give priority access to  
6 applications for FIT contracts made by persons who  
7 had signed a province-wide framework agreement with  
8 Ontario.

9 Now, at the time of the  
10 announcement, there was no one who had publicly  
11 acknowledged as having signed a province-wide  
12 framework agreement with Ontario.

13 The OPA identified from surveys  
14 that it expected to receive many more FIT  
15 applications than could be accommodated by  
16 Ontario's transmission capacity. Yet from this  
17 limited pool, the GEIA nonetheless gave the Korean  
18 consortium 2,500 megawatts of priority transmission  
19 access, 2,000 megawatts for wind, another 500  
20 megawatts for solar.

21 In addition, the Korean consortium  
22 could receive an extra payment, an economic  
23 development adder, if it could demonstrate that  
24 others, not it, created manufacturing jobs in  
25 Ontario as a result of the renewable energy

1 projects owned by the Korean consortium.

2 The Korean consortium did not have  
3 to invest in these facilities. It simply had to  
4 identify the manufacturers of its purchases in  
5 Ontario within a certain time frame. And if it did  
6 this, if it did this identification, it would  
7 receive an additional top-up payment beyond the  
8 13.5 cents per kilowatt-hour contract price given  
9 under the FIT program.

10 Moreover, in any case, the first  
11 500 megawatts of priority transmission access  
12 simply was provided as a gift to the Korean  
13 consortium, as it actually was not required to do  
14 anything special to receive the priority  
15 transmission access for this 500 megawatts.

16 The Korean consortium was also  
17 able to increase the size of its projects on its  
18 own initiative by up to 10 percent within the  
19 overall 2,500 megawatt transmission allowance.

20 As a result of the GEIA, the  
21 Korean consortium obtained priority access to the  
22 electricity grid, special access to governmental  
23 officials to address regulatory issues in  
24 connection with their projects, and a fast-track to  
25 over \$18 billion in revenues from renewable energy

1 projects in Ontario -- and this was all  
2 sole-sourced -- all without competition from its  
3 numerous worldwide competitors, such as the FIT  
4 applicants such as Mesa Power.

5 I would like to turn to Mesa Power  
6 now. Mesa Power is a Dallas technologies-based LLC  
7 incorporated in the State of Delaware. Mesa was  
8 founded and is owned by T. Boone Pickens, a  
9 legendary energy sector investor, well known for  
10 his efforts to focus on energy security and to wean  
11 North America off its dependency on foreign oil.

12 You will hear from Mr. Pickens  
13 later on today and during this hearing from a  
14 senior Mesa executive, Cole Robertson.

15 Mesa Power came to Ontario to  
16 invest in the FIT program in 2009 in good faith and  
17 with high expectations. Mesa filed applications  
18 for four wind projects located in western Ontario  
19 in the Bruce transmission region on the side of  
20 Lake Huron.

21 These projects are illustrated  
22 here on slide 7. Two of these projects, Twenty Two  
23 Degree, also known sometimes as TTD, and Arran are  
24 coloured in blue here on the map.

25 These projects issued applications

1 on November 24, 2009 during the launch phase of the  
2 FIT. The other applications, North Bruce and  
3 Summerhill, were filed on May 24, 2010 and they are  
4 identified here in gold. You will see these later  
5 projects are adjacent to each of the initial  
6 projects.

7 Mesa filed over 3,000 pages of  
8 material to support these applications. In total,  
9 Mesa applied for 565 megawatts of transmission  
10 capacity and power generation contracts for these  
11 four projects.

12 Mesa would have invested more than  
13 \$1.2 billion in the construction of its four wind  
14 projects, and Mesa made actual investments in  
15 Ontario in these Ontario projects of over  
16 \$160 million, which has now been lost. \$160  
17 million has been spent on these four project  
18 investments here under the FIT program in Ontario.

19 Mesa believed that it would be  
20 treated in a fair and transparent manner and that  
21 the FIT rules would be applied fairly and  
22 transparently and in accordance with the rule of  
23 law and due process. Mesa did not expect that it  
24 would be misled by public officials or to be denied  
25 basic fairness by the Ontario government.

1                   But what Mesa did not know is that  
2                   a die had been cast by Ontario with its secret MOU  
3                   with the Korean consortium or that Ontario would  
4                   unfairly distribute the remaining transmission  
5                   capacity.

6                   Mesa's applications, by the way,  
7                   started as a joint venture between Mesa Power and  
8                   General Electric, a Fortune 100 company that  
9                   manufactures wind turbines and is one of the  
10                  largest companies in the world. The Mesa-General  
11                  Electric joint venture was known as the American  
12                  Wind Alliance.

13                 Mesa submitted projects originally  
14                 developed by an Ontario company called Leader Wind,  
15                 at the time the most experienced wind developer in  
16                 the Province of Ontario, as it had just developed  
17                 the largest wind project here in Ontario.

18                 On July 7, 2010 while the FIT  
19                 applications were pending, Mesa and General  
20                 Electric unwound their partnership with each  
21                 company taking back projects contributed by them to  
22                 the partnership, and with Mesa paying some  
23                 additional funds to General Electric and keeping  
24                 the American Wind Alliance for itself.

25                 Now, this is really not

1 significant, as Mesa retained its interest in the  
2 Ontario wind projects at issue in this arbitration.

3 Now, I would like to talk a little  
4 bit about the Ontario electricity system. The OPA  
5 issued 20-year-long power purchase agreements to  
6 FIT proponents and the Korean consortium under the  
7 GEIA.

8 GEIA contracts were nearly  
9 identical to those of the FIT, and they essentially  
10 had the same regulatory and local content  
11 requirements -- in fact, not essentially -- had the  
12 same regulatory and local content requirements.  
13 Both the FIT and the GEIA contracts had a 20-year  
14 term at the same 13.5 cents per kilowatt-hour base  
15 rate, as you heard GEIA could get more because of  
16 the ability of the adders.

17 The OPA received ratepayer  
18 payments for these FIT and GEIA power contracts and  
19 forwarded these amounts to the electricity  
20 generators. Electricity under a FIT contract never  
21 was delivered to the power -- by the power  
22 generator to the OPA.

23 Let me rephrase that. Electricity  
24 supplied under a FIT contract was never delivered  
25 by that power generator to the Ontario Power

1 Authority, nor does the title to that power under a  
2 FIT contract ever pass to the Ontario Power  
3 Authority. As displayed here on the slide you will  
4 see, FIT power was instantaneously sold directly to  
5 the ratepayers through the IESO-controlled power  
6 grid.

7                   So the power cannot -- since power  
8 can't be stored, the ratepayers' funds eventually  
9 make their way to the IESO, who then eventually  
10 forward these funds to the Ontario Power Authority.

11                   The FIT rate is paid for by the  
12 ratepayers. The OPA then pays FIT generators from  
13 ratepayer funds which have already been collected.

14                   The OPA has no interest in  
15 obtaining the possession of such electricity, given  
16 that it does not consume the electricity for its  
17 own use, nor does it manage or control the  
18 production or transmission of electricity in  
19 Ontario.

20                   Now, there's been a great deal of  
21 discussion during this arbitration about the  
22 relationship of the OPA and the Government of  
23 Ontario. Let's be absolutely clear. Canada is  
24 responsible for the activity at issue in this  
25 arbitration that was done by the Ontario Power

1 Authority.

2                               Let me show you how. Under  
3 section 25.35 of the Electricity Act, the Ontario  
4 Minister of Energy used his statutory power to  
5 direct the Ontario Power Authority to follow  
6 directions from the Ontario government. Set out  
7 here in slide 10, you will see the section of the  
8 Ontario Electricity Act. It says:

9                               "The Minister may direct the  
10                              OPA to develop a feed-in  
11                              tariff program..."

12                             In addition, the Minister has  
13 another power to direct the OPA in section 25.32 of  
14 the Act, which contains a very general power of the  
15 Minister to delegate governmental authority to the  
16 OPA and to direct them to do that. Let's look at  
17 that. That is here in slide 11. It is section  
18 25.32, which says:

19                             "The Minister may direct the  
20                              OPA to assume...  
21                              responsibility for exercising  
22                              all powers and performing all  
23                              duties of the Crown..."

24                             And in Canada, when you see the term  
25 "Crown", as you would see I assume in the United



1 Kingdom, it means the powers of the government.

2                   When such instructions are given,  
3 the OPA must comply with the direction. A large  
4 number of mandatory instructions were given to the  
5 OPA by the Ministry of Energy for matters at issue  
6 in this arbitration, including the creation and  
7 operation of the FIT program and the last-minute  
8 changes made to it.

9                   The investor has set out a  
10 detailed listing of these mandatory instructions at  
11 paragraphs 145 to 148 of its memorial.

12                   Now, Canada likes to characterize  
13 the OPA as a third party to this arbitration like  
14 someone you just met at a cocktail party and it  
15 doesn't know very well. This is very, very far  
16 from the truth. The record is clear that the OPA  
17 works hand in glove with the Government of Ontario.  
18 And as a matter of international law, it actually  
19 operates as a part of the state for the purposes of  
20 state responsibility, because of these orders made  
21 under statutory authority which invoke the clear  
22 operation of Article 8 of the ILC articles of state  
23 responsibility.

24                   Now, over this next week the facts  
25 will become even clearer. Mesa should have been

1 awarded these contracts if the rules were applied  
2 fairly and in good faith by Ontario. We will  
3 revisit the facts after we have had the benefit of  
4 the completion of the expert and the witness  
5 testimony, but now I would like to turn to the law.

6 Canada has engaged in  
7 internationally wrongful acts against Mesa with  
8 respect to four NAFTA obligations, and these  
9 obligations include: Most Favoured Nation  
10 treatment, national treatment, the imposition of  
11 prohibited performance requirements, and the  
12 international law standard of treatment.

13 And we're going to look at each of  
14 these four NAFTA obligations. We will start with  
15 Most Favoured Nation treatment. This is generally  
16 known as MFN treatment, and you will hear people  
17 interchangeably referring to it as MFN or Most  
18 Favoured Nation treatment.

19 MFN is a rule and a principle of  
20 the NAFTA set out in article 102 in its  
21 interpretive sections, and Most Favoured Nation  
22 treatment is an obligation in five different NAFTA  
23 chapters; yet, MFN treatment is undefined in the  
24 NAFTA.

25 Indeed, terms like MFN treatment,

1 other terms like national treatment or fair and  
2 equitable treatment, are not specifically defined  
3 in the NAFTA; yet, they have been used in an  
4 undefined fashion by more than 1,000 bilateral  
5 investment treaties and in countless other  
6 international economic instruments like treaties of  
7 friendship, commerce and navigation, the GATT, the  
8 WTO.

9                   So the NAFTA drafters, like the  
10 drafters of these other agreements, knew  
11 that -- they chose to rely on the living meaning of  
12 these well-known but undefined international law  
13 terms. That's a meaning that comes from  
14 international tribunal decisions and from customary  
15 international law.

16                   The meaning of the Most Favoured  
17 Nation treatment must accordingly be based on the  
18 ordinary meaning of this term, understood in its  
19 context and in light of the NAFTA's object and  
20 purpose, and this is the way the Vienna Convention  
21 on the law of treaties mandates that we would  
22 proceed.

23                   Now, the purpose of MFN treatment  
24 is straightforward. MFN generalizes automatically  
25 the advantages granted by one state to any other

1 included in the MFN arrangements.

2 If we can go back, Professor  
3 Schwarzenberger back in 1945 gave a very useful  
4 definition. He said: An MFN obligation in the  
5 treaty means that anybody's advantage accrues to  
6 everybody's profits.

7 It is a very straightforward term.  
8 Paragraph 1 of NAFTA Article 1103, which enshrines  
9 this MFN treatment for the purpose of investment as  
10 set out here in slide 13, it states:

11 "Each party shall accord to  
12 investors of another Party  
13 treatment no less favorable  
14 than that it accords, in like  
15 circumstances, to investors  
16 of any other Party or of a  
17 non-Party with respect to the  
18 establishment, acquisition,  
19 expansion, management,  
20 conduct, operation, and sale  
21 or other disposition of  
22 investments."

23 Paragraph 2 of Article 1103, which  
24 is set out on slide 14, extends this very same  
25 obligation to the investments of those investors

1 that were covered in paragraph 1.

2 Article 1103, therefore, has two  
3 simple criteria of interest to us in this  
4 arbitration. The first: Are there investors or  
5 investments from a non-party or from any other  
6 party in like circumstances; and is there treatment  
7 less favourable provided to the claimant rather  
8 than to those investors or investments who are in  
9 like circumstances?

10 Now, under MFN treatment, Canada  
11 needs to show that it is in like -- sorry, and this  
12 is the test that Mesa has to show to prove its  
13 claim that it is in like circumstances and that it  
14 has received less favourable treatment from Canada.  
15 That's the test that it needs to address.

16 Now, under MFN treatment, Canada  
17 needs to show that it is in like circumstances to  
18 an investor from a non-party or from any other  
19 NAFTA party other than Canada.

20 Under NAFTA Article 1102, national  
21 treatment, which we will discuss a little later  
22 this morning, the comparator is a local Canadian  
23 investor or investment, rather than a non-party or  
24 any other NAFTA investor.

25 That's the primary difference in

1 the structure of the wording of national treatment  
2 and MFN treatment.

3                   So let's look to the first test,  
4 "like circumstances." A determination that the  
5 investment or the investors are in like  
6 circumstances is the first requirement for  
7 establishing the existence of a breach of MFN  
8 treatment under NAFTA Article 1103.

9                   Here, this requires the  
10 consideration of whether Mesa's investments seeking  
11 renewable energy power purchase agreements under  
12 the FIT program were in like circumstances to those  
13 investments seeking renewable energy power purchase  
14 agreements owned by investors from non-NAFTA party  
15 states or from any other NAFTA party state.

16                   The like circumstances test does  
17 not require the investments to be in identical  
18 circumstances. This test requires the Tribunal to  
19 consider a comparison between the circumstances of  
20 foreign and domestic investments, which only need  
21 to be "like".

22                   There can be many differences in  
23 circumstances, but once the threshold of likeness  
24 is met, a comparison of treatment follows.

25                   So what is clear is that likeness

1 needs to be considered in the circumstances. Where  
2 the question of likeness arises in the context of  
3 government regulations and administrative  
4 considerations, likeness requires the Tribunal to  
5 consider all of those who are competing for similar  
6 regulatory or administrative permissions.

7 Now, in this NAFTA claim, all of  
8 those who, like Mesa Power, sought regulatory  
9 permissions for renewable energy contracts are in  
10 like circumstances. This is the class of  
11 investments whose treatment needs to be considered.

12 Of course, determining likeness is  
13 not a mechanical exercise. The WTO frequently is  
14 asked to consider this very question, and has  
15 recognized that judgment needs to be applied and  
16 that the interpretation and application of the test  
17 of likeness must further the objectives of equality  
18 of competitive opportunities.

19 That is the interest at stake  
20 here. Likeness is a functional test. The mere  
21 fact that a measure at issue may treat investors  
22 under a different regulatory regime does not, in  
23 itself, determine likeness.

24 Likeness requires a substantive  
25 assessment of the competitive landscape. This

1 requires an analysis of whether there are economic  
2 actors competing for a limited amount of Ontario's  
3 electrical transmission access and for renewable  
4 power purchase agreements, and it is within the  
5 overall context of the competitive environment that  
6 the regulatory means used to deliver the treatment  
7 could be considered to determine its relevance and  
8 its weight.

9                   Now, in this NAFTA claim, all of  
10 those who sought 20-year renewable power purchase  
11 agreements, like Mesa Power, are in like  
12 circumstances because they were actively seeking to  
13 obtain the same type of results from the same  
14 decision makers at the same time.

15                   Expert economist Seabron Adamson  
16 will testify before you later this week. His  
17 report details the electricity market in Ontario  
18 and the operations of the FIT and the GEIA.

19                   And in his report, Mr. Adamson  
20 notes that the GEIA requires a GEIA proponent to  
21 have nearly identical contracts that are based on  
22 the FIT contract terms, and he observes that they  
23 were the same parties to the contract under the  
24 GEIA and the FIT.

25                   I just check those off,



1 check-check.

2 And he observed that there was the  
3 same duration of contract under the GEIA and the  
4 FIT, and you check that off, too.

5 And there were the same payment  
6 terms and base price under the GEIA and the FIT.  
7 Check that, as well.

8 And there were the same local  
9 content requirements under the GEIA and the FIT.  
10 Check that again.

11 And there were the same  
12 environmental requirements under the GEIA and the  
13 FIT, double-check.

14 Proponents to the FIT and the GEIA  
15 both competed for the same supply of renewable  
16 energy power purchase agreements and competed for  
17 the same supply of electricity transmission access  
18 in Ontario.

19 A review of the terms of the FIT  
20 and the GEIA demonstrate that they are essentially  
21 like. Now, evidence in the record also shows  
22 likeness. In his sworn declaration before a New  
23 York district court, Zohrab Mawani, a former  
24 Samsung employee who is was directly engaged in the  
25 GEIA projects, confirmed that the proponents for

1 renewable power purchase agreements under both the  
2 FIT and the GEIA were all competing for a limited  
3 amount of renewable energy PPAs, because of a  
4 limited but large amount of available transmission  
5 access.

6 Here on slide 16, we have repeated  
7 Mr. Mawani's sworn testimony, he says:

8 "There is a finite amount of  
9 transmission capacity in the  
10 Province of Ontario and  
11 companies that seek PPAs in  
12 Ontario are in competition to  
13 obtain access to this limited  
14 transmission capacity."

15 Samsung Korea competed against  
16 these other companies for transmission access in  
17 order to sell power under PPAs.

18 Similarly, in his deposition, Mr.  
19 Edwards, Pattern's senior developer, was questioned  
20 as follows. The question:

21 "And just so we're clear,  
22 Pattern is a competitor of  
23 Mesa for -- for Power  
24 Purchase Agreements, right,  
25 in Ontario?"

1                   And the answer was, "Yes."

2                   Notably, Pattern, Mr. Edward's  
3           company, is a joint venture partner with Samsung, a  
4           member of the Korean consortium.

5                   Expert Seabron Adamson carefully  
6           compared the terms of the FIT and the GEIA and  
7           concurs with Mr. Edward's assessment. Here on  
8           slide 18, Mr. Adamson sets out his conclusion from  
9           that expert report. He says:

10                                "There is no practical  
11                                difference between FIT  
12                                program participants and GEIA  
13                                participants (the Korean  
14                                consortium and its  
15                                development partner, Pattern  
16                                Energy) in terms of the  
17                                fundamental circumstances of  
18                                their competition for wind  
19                                PPAs in Ontario."

20                   The very terms of the GEIA make  
21           clear that the GEIA does not require job creation,  
22           nor does it require manufacturing by the Korean  
23           consortium. The GEIA had the same local content  
24           requirements as the FIT. So a GEIA project had to  
25           use the very same significant amount of local

1 content for its projects to qualify as did a FIT  
2 project.

3 What the GEIA requires is only  
4 that a member of the Korean consortium identify  
5 where manufacturing jobs from their energy projects  
6 arise. The Korean consortium was not required to  
7 actually create manufacturing plants, only to point  
8 to where jobs were created in connection to the  
9 purchases related to the construction of its own  
10 wind farms. The Korean consortium only had to  
11 point. It was not required to do anything more.

12 So the local requirement in the  
13 GEIA project would count twice, once for the  
14 minimum content under the FIT, and once again for  
15 the GEIA. The GEIA required nothing more.

16 Slide 19 sets out Mr. Adamson's  
17 report, which says:

18 "The economic exchange  
19 required in the GEIA is very  
20 one-sided. In return for the  
21 Economic Development Adder  
22 (estimated at the time by the  
23 Minister of Energy to have a  
24 value of \$437 million) the  
25 Korean consortium was

1 required to sign contracts  
2 with equipment suppliers it  
3 would have had to have signed  
4 anyway to meet the Ontario  
5 minimum domestic content  
6 rules to obtain PPAs."

7 On slide 20, Mr. Adamson continues  
8 by stating:

9 "The GEIA's manufacturing  
10 commitment - the requirement  
11 to designate manufacturing  
12 partners through agreements  
13 to supply essential  
14 components - appears in  
15 practice to be little or no  
16 different than the need for  
17 every FIT developer to have  
18 local component suppliers  
19 under the FIT rules."

20 Mr. Adamson concludes that the  
21 manufacturing commitments of the GEIA were not  
22 really additional to those commitments otherwise  
23 imposed by the FIT on slide 21. It says:

24 "The manufacturing  
25 commitments of the Korean

1 consortium amount to little  
2 or nothing more than the  
3 domestic content requirements  
4 imposed on FIT participants  
5 such as Mesa."

6 Cole Robertson stated in his reply  
7 witness statement that Mesa was prepared to meet  
8 the very same obligations as those imposed under  
9 the GEIA, such as meeting the GEIA's so-called  
10 manufacturing commitments.

11 So quite simply, there could not  
12 be any objective regulatory distinction between  
13 renewable energy producers seeking to obtain  
14 transmission access and PPAs under the FIT or under  
15 the GEIA.

16 FIT proponents were in like  
17 circumstances with GEIA proponents, the only  
18 difference being that GEIA proponents were treated  
19 more favourably.

20 The fundamental element of  
21 competition for the same limited amount of access  
22 to government-controlled transmission grids and for  
23 the same type of renewable power purchase  
24 agreements fundamentally demonstrate that Mesa was  
25 in like circumstances with GEIA proponents like

1 Samsung and its joint venture local partners, such  
2 as Pattern, from any other NAFTA parties or from a  
3 non-NAFTA party.

4 So in this arbitration, the  
5 Tribunal will see that treatment has been provided  
6 to others in like circumstances with Mesa from  
7 non-NAFTA party states, such as Korea, as well as  
8 from other NAFTA party states, such as the United  
9 States where Pattern is based.

10 And even Ontario treated FIT  
11 proponents interchangeably with GEIA proponents.  
12 Ontario announced in December 2010 that it would  
13 reserve 1,200 megawatts of transmission capacity in  
14 the Bruce region for FIT proponents.

15 In September 2010, Ontario  
16 announced that 500 megawatts in the Bruce region  
17 was allocated to the Korean consortium for the GEIA  
18 projects. So even Ontario has treated the GEIA and  
19 the FIT interchangeably with respect to these  
20 allocations.

21 In its press statements, Ontario  
22 noted that the Korean consortium would receive the  
23 same rate as FIT proponents and would receive FIT  
24 contracts.

25 Now, in such circumstances where

1       there is more favourable treatment accorded to  
2       another investor from a non-NAFTA party, such as  
3       Korea, who is in like circumstances, there is a  
4       clear MFN treatment violation. And it is evident  
5       that the members of the Korean consortium under the  
6       GEIA are in like circumstances to Mesa under the  
7       FIT in seeking access to Ontario's transmission  
8       grid and seeking renewable power purchase  
9       agreements.

10                       Indeed, it is the height of hubris  
11       for Canada to provide unequal benefits to one  
12       competitor, and then claim that those very same  
13       benefits make the more favourably treated  
14       competitor different from others and, thus, immune  
15       to international treaty scrutiny.

16                       The better treatment cannot define  
17       the likeness. The measure cannot define the  
18       likeness. The title that we give to something  
19       doesn't define the likeness. It is a functional  
20       assessment that must be done by this Tribunal.

21                       Don't be fooled by Canada here.  
22       The benefits of the MOU and the GEIA were exclusive  
23       to the members of the Korean consortium. The terms  
24       of the MOU between the Government of Ontario and  
25       the Korean consortium have been in force since



1 2008. They established an exclusive partnership  
2 between Ontario and the Korean consortium.

3                   Given the lack of transparency in  
4 this process, no other investor, other than those  
5 involved in the GEIA, could have been aware of the  
6 extensive benefits available to the Korean  
7 consortium in Ontario. The secrecy of the GEIA and  
8 the terms of the MOU thus effectively made its  
9 terms exclusive.

10                   For these reasons, it is clear  
11 that Mesa was in like circumstances with the  
12 members of the Korean consortium and with their  
13 joint venture partners, and, thus, it should be  
14 entitled to receive treatment as favourable as that  
15 accorded to the Korean consortium.

16                   And I point out Mesa was not  
17 offered nor accorded treatment as favourable as  
18 that offered to the Korean consortium.

19                   I would like to turn to treatment.  
20 The second element of MFN is to establish that more  
21 favourable treatment is being provided to an  
22 investor or an investment of an investor from a  
23 non-NAFTA party state or from another NAFTA party  
24 state.

25                   Canada is required to provide

1 treatment as favourable as that given to other  
2 investors or investments from a non-NAFTA party or  
3 any other NAFTA party who are in like circumstances  
4 to Mesa.

5 So the same better treatment  
6 provided by Canada to foreign investors and  
7 investments of those investors from, let's say,  
8 Europe or Asia must be provided to Mesa under the  
9 MFN treatment obligation.

10 Here there is better treatment  
11 provided to others. There is overwhelming evidence  
12 that the treatment of Koreans and investments of  
13 Koreans under the GEIA is more favourable than the  
14 treatment given by Ontario under the FIT to Mesa.

15 Canada has not offered any  
16 evidence to contest the investor's evidence of more  
17 favourable treatment being provided to members of  
18 the Korean consortium under the GEIA rather than  
19 those like Mesa under the FIT. They can't.

20 MFN treatment applies in the case  
21 where a state provides more favourable treatment to  
22 investors of a third state than is provided under  
23 its treaty with an investor. Whenever a state  
24 makes the decision to provide broader trade  
25 liberalized treatment to investors from a third

1 state, this better treatment automatically must be  
2 provided to a foreign investor in like  
3 circumstances.

4 The investor has filed expert  
5 evidence and evidence arising from market  
6 participants which all confirm the more favourable  
7 treatment that was provided to investors from  
8 non-NAFTA parties, like the Korean consortium, than  
9 to Mesa.

10 Canada did not file any evidence  
11 to contest that more favourable treatment was  
12 provided. In fact, Canada did not file any defence  
13 to this evidence which demonstrated more favourable  
14 treatment.

15 Zohrab Mawani from Samsung, or  
16 formerly from Samsung, confirms on slide 23:

17 "Samsung Korea's guaranteed  
18 access to transmission  
19 capacity under the GEIA  
20 allowed Samsung Korea to be  
21 in a better competitive  
22 position than those companies  
23 without guaranteed  
24 transmission access like Mesa  
25 Power Group."

1                   He continues on slide 24 by

2       stating under oath that:

3                   "The GEIA included a number  
4                   of beneficial provisions that  
5                   provided treatment superior  
6                   than that offered to other  
7                   competitors for PPAs under  
8                   the feed-in tariff program."

9                   And that:

10                  "Samsung had the opportunity  
11                  to meet with OPA  
12                  representatives to negotiate  
13                  certain contract terms that  
14                  were more advantageous than  
15                  those available in the  
16                  standard FIT contract."

17                  Colin Edwards testified in his  
18       deposition that Pattern switched from being a FIT  
19       proponent to a GEIA proponent. Pattern was in  
20       both. When asked if Pattern had discussions with  
21       Ontario about the GEIA being a better deal than  
22       FIT, Colin Edwards states here on slide 25:

23                  "The fact that we signed a  
24                  joint venture agreement and  
25                  elected to participate with

1 Samsung is evidence that we  
2 thought this was a better  
3 opportunity."

4 After examining the evidence of  
5 better treatment under the terms of the GEIA over  
6 the terms of the FIT, expert economist Seabron  
7 Adamson concludes, as set out here on slide 26,  
8 that:

9 "It is undisputed that the  
10 GEIA provided a superior  
11 treatment to the Korean  
12 consortium than was provided  
13 to FIT wind developers."

14 Indeed, the existence of better  
15 treatment that was provided simply cannot be  
16 debated. It is a fact.

17 I would like to talk about  
18 diversity of nationality, which is an element that  
19 is involved in Article 1103. Article 1103, just  
20 like NAFTA Article 1102, national treatment,  
21 requires that there be a demonstration of diversity  
22 of nationality between the nationality of the  
23 investor and the nationality of the host state. No  
24 further diversity of nationality is required.

25 Nowhere does the text of Article

1 1103 refer to a requirement to establish  
2 intentional nationality-based discrimination. All  
3 that the text in Article 1102 or 1103 require is  
4 that there be an investor, or an investment, from  
5 one NAFTA party that is treated less favourably  
6 than an investor or an investment from another  
7 state.

8           So while there is a requirement to  
9 identify nationality for the purposes of  
10 comparison, there is no requirement to establish  
11 any intent of any kind.

12           Now, finally, we would like to  
13 turn to some miscellaneous issues raised by Canada  
14 which we believe to be irrelevant to the Tribunal's  
15 determination of the MFN issue.

16           First, we would like to point out  
17 that there are sectoral exclusions to the MFN  
18 obligation in NAFTA Chapter Eleven, and these are  
19 explicitly set out in Annex 4 of the NAFTA.

20           Here outlined in slide 27, you  
21 will see that there are the sectors that were  
22 excluded by Canada, and these sectors were excluded  
23 by each state. So each state had the right to  
24 identify what it wanted to exclude. Canada  
25 excluded the sectors of aviation, fisheries,

1 Maritime matters, and telecommunication transport  
2 networks and telecommunication transport services.

3           These were the only sectors  
4 excluded from MFN. Canada took no sectoral  
5 exclusion for the production of energy to MFN  
6 treatment. It had the right to. It had the full  
7 ability to exercise the right to exclude sectors  
8 when it filed its annex, but it did not.

9           Thus, the provisions in the  
10 investment agreements are covered by the scope of  
11 MFN treatment obligations unless an exception or a  
12 reservation applies. The terms of the NAFTA  
13 clearly say what is excluded and what is covered.  
14 No such sectoral exception applies here to the MFN  
15 obligation under NAFTA Article 1103.

16           In conclusion about MFN, Mesa as a  
17 FIT proponent is in like circumstances with the  
18 non-NAFTA party Korean consortium and with Pattern  
19 Energy, an investor from another NAFTA party who  
20 received more favourable treatment under the GEIA.

21           As a result, Mesa was entitled to  
22 receive the same treatment, which it did not  
23 receive.

24           I would like to turn to national  
25 treatment. As with MFN, likeness under the NAFTA

1 national treatment provision in Article 1102 needs  
2 to be determined in the circumstances.

3 In this regard, likeness requires  
4 the Tribunal to consider all companies who are  
5 competing for similar regulatory and administrative  
6 permissions. This is the class of investments  
7 whose treatment needs to be considered.

8 Those who are like Mesa for the  
9 purpose of national treatment are those Canadian  
10 companies who received better treatment from Canada  
11 in obtaining renewable power purchase agreements.

12 And these companies are: The  
13 Canadian subsidiaries of the Korean consortium; and  
14 Pattern Renewable Holdings Canada, ULC, a Canadian  
15 subsidiary of Pattern; and Boulevard Power, the  
16 Canadian subsidiary of NextEra.

17 They qualify for national  
18 treatment consideration because they are Canadian  
19 investments and meet the definition in the NAFTA as  
20 such. And like Mesa, these companies sought  
21 regulatory permission from governments and are in  
22 like circumstances.

23 Now, we have already considered in  
24 detail why the Korean consortium is in like  
25 circumstances with Mesa. For the same reason, the



1 Canadian subsidiaries of the Korean consortium are  
2 also in like circumstances with Mesa, and, thus,  
3 NAFTA Article 1102, the national treatment  
4 obligation, has been breached by Canada's better  
5 treatment to these investments.

6 Now, the evidence is clear, with  
7 respect to the members of the Korean consortium,  
8 that there was better treatment. Canada did not  
9 file any evidence to demonstrate the Canadian  
10 subsidiaries of the Korean consortium also did not  
11 receive more favourable treatment.

12 And as we have demonstrated in our  
13 pleadings and as you will see over the next week,  
14 better treatment was provided to the Canadian  
15 companies, such as Boulevard Power and Pattern  
16 Renewable Holdings Canada.

17 Now, finally, with Article -- as  
18 it was with the MFN obligation in Article 1103,  
19 there is no requirement to establish intent with  
20 respect to national treatment in Article 1102. The  
21 text of Article 1102 makes clear that there is a  
22 requirement to demonstrate a divergence of  
23 nationality between the more favourably treated  
24 investment and the claimant.

25 That divergence of nationality or

1 diversity of nationality, to use a US term, is all  
2 that needs to be established, nothing more.

3 Now, I would like to turn to  
4 performance requirements under article 1106. Now,  
5 slide 29 here will set out the text of Chapter  
6 Eleven's article 1106(1) performance requirement  
7 obligations.

8 This obligation sets out a list of  
9 industrial policies which the NAFTA parties agreed  
10 to prohibit. This was a very important NAFTA  
11 obligation, the performance requirements provision,  
12 and the reason that these obligations were banned  
13 in the NAFTA was on account of the inherently  
14 discriminatory and market disruptive effects caused  
15 by local content rules.

16 Indeed, the extent of this NAFTA  
17 obligation is broader than just requiring the NAFTA  
18 parties to engage in these policies against one  
19 another, because these industrial policies are  
20 considered so disruptive to fair process and free  
21 trade that the NAFTA parties agreed to no longer  
22 engage in these policies against any investor or  
23 any investment from any state party or of a  
24 non-party in its territory.

25 These industrial policies were

1       outlawed completely in the NAFTA. Despite the  
2       clarity of this outright ban, this Tribunal will  
3       see that Ontario shamelessly broke these promises  
4       not to engage in performance requirements like  
5       local content requirements.

6                       In the FIT, Ontario engaged in  
7       policies that provided a preference to goods and  
8       services from Ontario as a requirement of obtaining  
9       access to the electricity grid and obtaining a FIT  
10      contract.

11                      Ontario also imposed minimum  
12      domestic content levels as a requirement for  
13      transmission access and a power purchase contract.  
14      Thus, there are two express violations, as you can  
15      see here under paragraph (b) and (c) of Article  
16      1106(1).

17                      And the investor provided witness  
18      evidence directly from Mesa Power and from its  
19      expert independent valuator, Robert Low, to  
20      establish that Mesa suffered damage arising from  
21      the imposition of the prohibited local content  
22      requirements.

23                      And even more telling, Canada has  
24      filed, by its own choice, no substantive defence of  
25      any kind to the Article 1106 case brought by the

1 investor. It is as if it doesn't exist. It is  
2 like a part of our pleading is gone. It has  
3 vanished.

4 Canada has no defence to liability  
5 for Article 1106 violation. Quite frankly, how  
6 could it? It's clear on its face and the NAFTA is  
7 clear on its face. It is an outright prohibition.

8 Now I would like to turn to  
9 Article 1105, the international law standard of  
10 treatment. NAFTA Article 1105 requires Canada to  
11 accord the international law standard of treatment  
12 to investments of investors from the NAFTA parties.

13 The text of this obligation is set  
14 out here in slide 30. Paragraph 1 of Article 1105  
15 provides that the international law standard of  
16 treatment includes the provision of fair and  
17 equitable treatment, as well as full protection and  
18 security. These international law obligations are  
19 well established and well known.

20 Good faith is an integral part of  
21 the fair and equitable treatment standard. You  
22 can't have fair and equitable treatment without  
23 good faith. Many NAFTA and non-NAFTA awards  
24 recognize the duty to act in good faith as a  
25 distinct independent obligation within the

1 international law standard.

2 An example would be a lack of  
3 candour concerning the basis for policy decisions.  
4 This fundamental obligation of good faith needs to  
5 be considered in the context of the highly  
6 developed legal and regulatory framework in North  
7 America where citizens have a basic expectation of  
8 due process, natural justice, transparency and the  
9 applicability of the rule of law.

10 Now, similarly, the obligation to  
11 provide full protection and security is a specific  
12 element of the international law standard, and in  
13 its modern expression, this obligation requires  
14 governments to provide a stable, legal and business  
15 environment to foreign investors.

16 Full protection and security in  
17 itself includes protection of the rule of law and  
18 of fundamental fairness.

19 And with respect to the protection  
20 against arbitrariness, the state breaches its  
21 customary international law obligation when it acts  
22 arbitrarily, for instance, on prejudice or  
23 preference rather than on reason or fact.

24 Arbitrariness also occurs when  
25 discretionary decisions by governments are based on

1 the irrelevant considerations and when relevant  
2 considerations are ignored.

3 Now the long-standing  
4 international customary law protection against the  
5 abuse of rights applies in the context of abuses of  
6 administrative authority. Here on slide 31 we set  
7 out three basic forms of abuse of rights: First,  
8 where a state hinders an investor in the enjoyment  
9 of rights; two, where there is a fictitious  
10 exercise of a right; or, three, where there is  
11 abuse of discretion in the exercise of governmental  
12 power.

13 A government cannot exercise its  
14 power to abuse a foreign investor by capriciously  
15 exercising discretionary rights. Similarly,  
16 ignoring relevant decision-making criteria and  
17 focussing on irrelevant criteria, such as political  
18 considerations, would also constitute an abuse of  
19 process.

20 Now, the duty of transparency is  
21 clearly contained within the fair and equitable  
22 treatment concept in the NAFTA. It compels  
23 openness and clarity of a host's legal regime and  
24 procedures, and the need for transparency is a  
25 necessary aspect to enable good faith, the rule of

1 law and due process rights.

2                   So each of the aspects of the  
3 international law standard are relevant to this  
4 arbitration, and the NAFTA was drafted to enshrine  
5 a holistic view of the law that would embrace  
6 international public law and international economic  
7 law, as well.

8                   In our closing, we will return in  
9 some detail to the proper application of the  
10 international law standard and the requirements of  
11 proper reliance on the rules of international law,  
12 including but not limited to the Vienna Convention  
13 on the Law of Treaties and the international law  
14 which has been adopted by the parties as permitted  
15 under Vienna Convention Article 31(3)(c).

16                   But now we would like to turn to  
17 Canada's general jurisdictional and exception  
18 defences to explain why they do not apply.

19                   Canada contends that Mesa did not  
20 bring its claim in a timely fashion, and this  
21 failure goes to Canada's consent to arbitrate. In  
22 particular, Canada contends that Mesa's claim was  
23 brought within a six-month waiting period before  
24 the filing of the notice of arbitration.

25                   As a result, Canada contends, the

1 notice of arbitration is untimely, and then Canada  
2 makes another leap of logic and concludes that this  
3 means that Canada's consent to this arbitration  
4 contained in NAFTA Article 1120 is of no force or  
5 effect, meaning that this Tribunal has no  
6 jurisdiction to rule on this matter.

7 This is entirely ridiculous. In  
8 coming to this assertion, Canada ignores the  
9 investor's pleadings and the evidence provided by  
10 the investor, and simply declares that there could  
11 not possibly be any breach of the NAFTA until July  
12 4, 2011, when Ontario announced the winners of the  
13 FIT contract for the Bruce region.

14 This is simply nothing short of an  
15 exercise in creative writing by Canada. Canada's  
16 entire challenge here is without merit.

17 First, let's look to Canada's  
18 consent to the arbitration in the NAFTA -- it's in  
19 the NAFTA article 1122. It is displayed here on  
20 the monitors before you. First, it says:

21 "Each Party consents to the  
22 submission of a claim to  
23 arbitration in accordance  
24 with the procedures set out  
25 in this Agreement. The



1 consent given by paragraph 1  
2 and the submission by a  
3 disputing investor of a claim  
4 to arbitration shall satisfy  
5 the following..."

6 And they give us the requirements,  
7 (a), (b) and (c): Chapter II of the ICSID  
8 Convention and the Additional Facility Rules,  
9 Article II of the New York Convention, and Article  
10 1 of the Inter-American Convention.

11 We will show you why there is no  
12 impediment to the Tribunal's jurisdiction arising  
13 from any lack of consent.

14 Slide 33 sets out the text of  
15 Article 1120. This requires that "six months have  
16 elapsed since the events giving rise to a claim."  
17 The events giving rise to a claim. So the only  
18 preliminary factual question is whether the events  
19 giving rise to a claim in this case arose at least  
20 six months prior to the filing of the notice of  
21 arbitration. And we have set out these events on  
22 the time line here on slide 34, which is shown on  
23 the monitors.

24 Now, just to situate you on the  
25 slide, the green flag is identified October 4th,

1 2011. This is when the notice of arbitration was  
2 filed. So the six-month waiting periods is set out  
3 by the red ribbon.

4 The events giving rise to the  
5 Article 1106 local content claim began almost 15  
6 months before the NAFTA arbitration filing, on July  
7 7, 2010, the first of the red flags.

8 For the Article 1106 local content  
9 claim, while the investor knew that there was a  
10 violation of NAFTA when it filed its obligations,  
11 but the first date that the investor knew of the  
12 loss was on July 7, 2010 when the investor received  
13 an e-mail from General Electric confirming that the  
14 1.6 megawatt turbine was the only turbine that  
15 would generate sufficient Ontario local content for  
16 use by Mesa for deployment in 2011.

17 A second event giving rise to the  
18 Articles 1103, 1102 and 1105 claim arose more than  
19 12 months in advance of the NAFTA notice on  
20 September 17, 2010, marked here with a second red  
21 flag. And that is when Mesa learned that more than  
22 one-third of the transmission that had been  
23 reserved to FIT applicants in the Bruce region was  
24 now being given in priority to the members of the  
25 Korean consortium under the GEIA.

1                   So it is abundantly clear that the  
2 investor's claim met the procedural requirements of  
3 the NAFTA, well more than the minimum six-month  
4 period before the notice of arbitration was filed.

5                   There is simply no support for  
6 Canada's contentions, and Canada is well aware that  
7 its argument here is simply an exercise in fantasy.  
8 These objections must be dismissed. And to this  
9 end, the investor has set out detailed submissions  
10 on how its claim meets NAFTA's procedural  
11 requirements at paragraphs 839-889 of its memorial  
12 and paragraphs 817-859 of the reply.

13                   We spent a lot of time identifying  
14 why this cannot be correct. We also point out that  
15 there is no requirement that all of the events in  
16 the claim arise six months before the notice of  
17 arbitration.

18                   What is required is that the  
19 events for a claim first arise at least six months  
20 before the filing of the notice of arbitration.  
21 And in this regard, the Ethyl tribunal, and you can  
22 see at slide 35, at the very beginning of the NAFTA  
23 dispute process the Ethyl tribunal wrote:

24                   "Resolution of disputes would  
25                   not be best served by a rule

1                   absolutely mandating a  
2                   six-month respite following  
3                   the final effectiveness of a  
4                   measure until the investor  
5                   may proceed to arbitration."

6                   The Ethyl tribunal rejected the  
7                   application of rigid approaches and preferred  
8                   practical and efficient approaches.

9                   And of course, there are other  
10                  breaches which arose after these initial breaches,  
11                  including the Ministry of Energy and the OPA's  
12                  improper conduct regarding last-minute changes to  
13                  the FIT rules in June of 2011 and the improper  
14                  award of contracts in June 2011, but these are  
15                  simply additional actions which violate the NAFTA.  
16                  These are not the events that first gave rise to  
17                  the claim.

18                  And the NAFTA does not require  
19                  that every breach arise more than six months before  
20                  the claim is submitted to arbitration. It only  
21                  requires that claims first arise in that period of  
22                  time. And the reason is simple: Because otherwise  
23                  a respondent would be able to ensure that the  
24                  Tribunal would never have jurisdiction to rule on  
25                  its behaviour if it continued to engage in wrongful

1 behaviour, and simply by continuing to harm a  
2 victim, to torture a victim, could never remove the  
3 authority of an international tribunal to be able  
4 to rule on that treatment.

5 But that is what Canada is asking  
6 you to do, and that would make international law  
7 highly ineffective. That cannot be right and it  
8 cannot be countenanced.

9 Now, clearly this NAFTA claim  
10 arose before April 4, 2011. And so for each of the  
11 NAFTA Chapter Eleven breaches of international  
12 treatment under Article 2, for MFN under Article  
13 1103, for the international law standard of  
14 treatment under Article 1105, and for the local  
15 content issues under 1106, the breaches of the  
16 NAFTA and the harm to the investor first arose  
17 before April 4, 2011, six months before the filing  
18 of the October 4, 2011 notice of arbitration.

19 And the fact that Canada continued  
20 to engage in internationally wrongful behaviour in  
21 violation of the NAFTA does not, in any way, impair  
22 the jurisdiction of this Tribunal to rule on this  
23 claim that is before it.

24 Now, the investor has set out its  
25 arguments about this in its response to the 1128

1 submissions. In particular, it relies on  
2 paragraphs 118 to 127 therein.

3 And in that submission, it is  
4 clear that other NAFTA tribunals, including the ADF  
5 tribunal, specifically rejected the contention that  
6 a procedural defect could have the effect of  
7 negating a NAFTA party's consent to arbitration,  
8 the other argument that Canada makes here, that  
9 somehow the six-month rule removes its consents.

10 Now, the ADF tribunal carefully  
11 reviewed NAFTA Article 1122, that long article I  
12 took us through, and found the consent in Article  
13 1122 that meets the requirements of the New York  
14 Convention, The Inter-American Convention and the  
15 ICSID Additional Facility Rules.

16 And the ADF tribunal found that  
17 the confirmation of the existence of consent  
18 between the NAFTA parties -- that is, the state  
19 parties -- set out in Article 1122 was clear. The  
20 ADF tribunal, like this current arbitration  
21 Tribunal, was constituted under the UNCITRAL  
22 arbitration rules.

23 And so they found that the  
24 state-to-state consent was clear and that all that  
25 was required was the filing of the consent to

1 arbitration by the investor to perfect that  
2 consent, and those procedures are the procedures  
3 laid out in Article 1122.

4                   And the ADF tribunal found this by  
5 reviewing the consents and they dismissed the  
6 contention that a procedural irregularity would  
7 result in an impediment to a consent to  
8 arbitration. The ADF tribunal concluded the effect  
9 of these provisions made the consent of the parties  
10 to the arbitration clear and effective and that  
11 there is no additional effect to the procedures  
12 contained in Article 1120, which Canada relies on  
13 here today.

14                   So if the consent to arbitrate  
15 provided in the text of NAFTA is sufficient to  
16 satisfy the requirements to establish the  
17 jurisdiction of these other rules according to ADF,  
18 surely it must be sufficient to satisfy the  
19 requirements to establish the consent necessary for  
20 this NAFTA Tribunal.

21                   We believe the ADF tribunal's  
22 approach is correct. We also believe it is  
23 identical to the situation in this current  
24 arbitration. Insisting that an investor must file  
25 a new arbitration claim with respect to any

1 potential procedural error is inefficient and  
2 inimical to the overall objectives of the NAFTA,  
3 and to somehow suggest that would mean that there  
4 is no consent to arbitrate and that the responding  
5 party doesn't have to respond, doesn't have to  
6 follow the rules of the NAFTA, doesn't have to  
7 consent and follow the process, would completely  
8 defeat the purpose of dispute resolution under the  
9 NAFTA. It cannot be permitted to occur again.

10 Now, I would like to talk about  
11 the actions of the Ontario Power Authority. The  
12 actions by the Ontario Power Authority at issue in  
13 this claim, as we had mentioned earlier, are  
14 attributable to Ontario as a result of the  
15 operation of Ontario law.

16 And we have seen the Electricity  
17 Act, which permitted the Minister of Energy to  
18 direct the Ontario Power Authority to carry out  
19 acts. The investor set out the formal directions  
20 issued by the Ontario Minister of Energy as we have  
21 seen earlier at paragraphs 145 to 148 of the  
22 memorial.

23 Canada has not denied that these  
24 instructions were made. I don't know how they  
25 could, but they haven't, nor have they denied the



1 statutory effectiveness upon the Ontario Power  
2 Authority under this Ontario law, the Electricity  
3 Act, of these directions.

4 ILC Article 8 makes Canada  
5 responsible for situations where the OPA was acting  
6 under the instructions, direction or control of the  
7 state. Ontario made specific directions and, thus,  
8 these orders made Ontario and Canada directly  
9 responsible for the OPA's actions.

10 Now, I would like to ask the  
11 Tribunal. I could take a brief pause here before  
12 we finish, if you would like, or I can continue. I  
13 don't know what the court reporter would like or  
14 what the Tribunal would like.

15 THE CHAIR: How much more time do  
16 you think you would need for this part of your  
17 argument? Are you going to use the entire two  
18 hours or do you plan on reserving time for  
19 rebuttal?

20 MR. APPLETON: I would  
21 think -- well, I will have to see. I am a little  
22 slower because of my voice issue.

23 THE CHAIR: Your voice works --

24 MR. APPLETON: So far --

25 THE CHAIR: -- pretty well.

1                   MR. APPLETON: Yes, I am happy  
2 this morning. I wasn't so happy yesterday, let's  
3 put it that way. We will see how it goes the rest  
4 of the day.

5                   I would think that we have at  
6 least another 15 to 20 minutes to do, perhaps  
7 slightly more than that, so it is really a question  
8 of what your preference is. I am happy to  
9 continue.

10                  MR. APPLETON: I think we --

11                  THE CHAIR: What I would suggest  
12 is that we have a rather short break.

13                  MR. APPLETON: We will stay here,  
14 yes.

15                  THE CHAIR: Short breaks are  
16 difficult to enforce, as experience shows, but I  
17 would say just could we have ten minutes and not  
18 more than ten minutes?

19                  MR. APPLETON: Excellent.

20                  THE CHAIR: And we will resume in  
21 ten minutes.

22                  MR. APPLETON: I will go nowhere  
23 else, I promise.

24                  THE CHAIR: Thank you.

25 --- Recess at 10:47 a.m.

1 --- Upon resuming at 11:03 a.m.

2 THE CHAIR: Are we ready to  
3 resume? Can I ask someone to close the door in the  
4 back? Thank you. Mr. Appleton, you can continue.

5 MR. APPLETON: If we do that, I  
6 have to see if I am live.

7 MR. BROWER: Yes, you appear to be  
8 live.

9 MR. APPLETON: Thank you,  
10 Mr. Brower. And you can hear me? Thank you very  
11 much. Very, very good.

12 So I left off as we were about to  
13 turn to Canada's Article 1108 defences. So Canada  
14 has attempted to rely on two defences, both  
15 contained in Article 1108 of the NAFTA, one with  
16 respect to subsidy and the other about procurement.  
17 Both of these defences fail.

18 I will turn first to subsidy.  
19 Canada raised a most unusual defence in paragraph  
20 65 of its rejoinder memorial. Canada first alleged  
21 that in the event the FIT program did not  
22 constitute procurement, then the FIT program  
23 constituted a government subsidy.

24 Then on September 15, 2014, Canada  
25 clarified its position. It stated that the FIT was

1 not a subsidy and that it would not produce any  
2 evidence that the FIT was a subsidy.

3 So, first, Canada says that it has  
4 a government subsidy defence to Mesa's claims and  
5 defends the existence of that claim over our  
6 objection, and then ten days later Canada has a  
7 change of face and says that it will not provide  
8 any evidence to support its government subsidy  
9 defence, because Canada says there is no evidence  
10 to support its defence that the FIT is a subsidy,  
11 because there is no subsidy.

12 Well, this begs the obvious  
13 question. If there is no government subsidy, how  
14 can there be any government subsidy defence?

15 Canada has not even established a  
16 prima facie case for there to be a government  
17 subsidy. The burden of proof is on Canada to  
18 establish the facts for this defence, even though  
19 Canada freely admits that there is no evidence of  
20 subsidy. And Canada has not met this burden and  
21 has refused to meet this burden. There is  
22 absolutely no bona fide defence of government  
23 subsidy here.

24 At the heart of this issue is a  
25 factual statement that the Ontario Power

1 Authority's forwarding of ratepayer funds to pay  
2 for the FIT demonstrates that the FIT program is  
3 really a form of governmental assistance.

4 Many government programs  
5 constitute governmental assistance, including every  
6 government health care or public education program,  
7 but none of these, to our knowledge, constitutes a  
8 subsidy. Canada isn't saying that these basic  
9 public education or health programs are subsidies,  
10 and the reason is because the term "subsidy" is not  
11 coextensive with the term "governmental  
12 assistance", a logical flaw in Canada's argument.

13 A subsidy under international law,  
14 under Canadian domestic law, under US domestic law,  
15 requires proof of benefit in addition to  
16 governmental assistance.

17 Mesa never alleged that the FIT  
18 program constituted both governmental assistance  
19 and a benefit. Mesa merely stated what the WTO  
20 found, which was the FIT program was a form of  
21 governmental assistance.

22 There is no legal basis to support  
23 Canada's government subsidy defence. There is no  
24 factual basis either.

25 If we turn to slide 37 on the

1 monitors here before you, we see Exhibit C-0173,  
2 and this is a briefing note to the Ontario Minister  
3 of Energy about the FIT program.

4           And we see the Ministry officials  
5 here advising the energy Minister in the fall of  
6 2010 that the FIT program did not represent a  
7 subsidy, because it was funded by ratepayer funds,  
8 rather than by government funds.

9           I will read it: Does not  
10 represent a subsidy because FIT prices are paid for  
11 by the province's electricity customers.

12           Thus, the FIT program was designed  
13 not to constitute a governmental subsidy, because  
14 the payment for the renewable energy did not come  
15 from the government at all, but directly from the  
16 ratepayers who consume the power. Accordingly, the  
17 government subsidy defence must be dismissed in its  
18 entirety.

19           I would like to turn to  
20 procurement. Now, Canada relies on Article 1108(7)  
21 and 1108(8), which both have procurement exceptions  
22 to avoid three of its NAFTA obligations. But upon  
23 examination, it is clear that these exceptions  
24 simply do not apply.

25           Canada's Article 1108(7)(a)

1 exception only applies to Chapter Eleven's national  
2 treatment -- that is Article 1102 -- and Most  
3 Favoured Nation treatment, Article 1103,  
4 obligations, and it acts to prevent these  
5 obligations from applying where there is  
6 procurement by a party or a state enterprise.

7 By comparison, the Article  
8 1108(8)(a) exception exempts the Article 1106  
9 minimum local content prohibition.

10 So at the outset, it is important  
11 to note that the procurement exception in  
12 1108(7)(a), so 1108(7), no longer has legal effect  
13 for Canada, because Canada has spent this power.  
14 Canada offered more favourable treatment to  
15 non-NAFTA party investors under two other treaties;  
16 namely, the Canada-Czech Investment Treaty and the  
17 Canada-Slovak Investment Treaty. Both of these  
18 treaties were signed after the NAFTA came into  
19 force.

20 Now, we have provided an analysis  
21 of the underlying obligations in these third party  
22 treaties and in the NAFTA in our reply memorial at  
23 paragraphs 185 to 188, and in our Article 1128  
24 response at paragraphs 63 to 70. So we're not  
25 going to review that here. We want to highlight

1 where that is.

2 The treatment provided by Canada  
3 under these two other treaties is substantively  
4 broader and, thus, more trade liberalizing than the  
5 treatment provided by Canada to investors and  
6 investments in like circumstances under the NAFTA.

7 MFN and national treatment  
8 obligations under both treaties are not reduced by  
9 a procurement carve-out. Accordingly, such  
10 treatment must be considered to be more favourable  
11 treatment than that provided by a more restricted  
12 MFN and national treatment obligation than  
13 otherwise would exist under the NAFTA.

14 Thus, the broader and more trade  
15 liberalizing behaviour must be extended by Canada  
16 to its other NAFTA treaty partners because of the  
17 NAFTA's MFN obligation in Article 1103. As a  
18 result, Article 1108(7)(a) no longer has effect for  
19 Canada, because Canada provided better treatment to  
20 others.

21 Now, the more favourable treatment  
22 provided by Canada to investors from the Czech  
23 Republic or the Slovak Republic does not have any  
24 effect on Canada's reliance on the exception with  
25 respect to performance requirements in Article



1 1108(8)(a).

2 So the Tribunal must look to the  
3 meaning of that exception with respect to Article  
4 1108(8)(a) and, therefore, the effect on  
5 performance requirements under 1106.

6 Now, the applicable rules of  
7 treaty interpretation in international law are  
8 codified in Articles 31 and 32 of the Vienna  
9 Convention Law of Treaties.

10 Article 31(1) of the Vienna  
11 Convention instructs this Tribunal to interpret the  
12 treaty in good faith and in accordance with the  
13 ordinary meaning to be given to the terms of the  
14 treaty in their context and in the light of its  
15 object and purpose. Thus, the entire treaty  
16 provides context to the meaning of the terms used  
17 in that treaty.

18 When looking at the term  
19 "procurement", it is notable that the NAFTA  
20 contains Chapter Ten, which is dedicated to the  
21 topic of government procurement. Chapter Ten must  
22 provide the context to the undefined term  
23 "procurement" in Chapter Eleven.

24 And Chapter Ten contains a  
25 definition of procurement. It is here on slide 38.

1 This is in Article 1001(5), and its definition of  
2 procurement states the following:

3 "Procurement includes  
4 procurement by such methods  
5 as purchase, lease or rental,  
6 with or without an option to  
7 buy. Procurement does not  
8 include:

9 "(a) non-contractual  
10 agreements or any form of  
11 government assistance,  
12 including cooperative  
13 agreements, grants, loans  
14 equity infusions, guarantees,  
15 fiscal incentives, and  
16 government provision of goods  
17 and services to persons or  
18 state, provincial and  
19 regional governments."

20 The provision of goods and  
21 services to persons are exempt from the definition  
22 of procurement. Governmental assistance is also  
23 exempt from the definition of procurement. These  
24 are what we have here with the FIT program.

25 Now, NAFTA tribunals have relied

1 on NAFTA Chapter Ten to give meaning to the  
2 undefined term "procurement" in Article 1108.

3 It's been considered by two  
4 tribunals, and both of these tribunals relied upon  
5 the definition in NAFTA Chapter Ten to give meaning  
6 to the term "procurement" in Article 1108.

7 Now, the NAFTA tribunal in ADF  
8 reviewed Article 1108 and concluded that the  
9 tribunal, in considering the meaning of Article  
10 1108's procurement, should look at the definition  
11 for the term in the procurement chapter, Chapter  
12 Ten.

13 The UPS tribunal relied on the ADF  
14 award, and the UPS tribunal concluded that the  
15 definition of procurement in Article 1001(5)  
16 provided context for the interpretation of  
17 procurement in Article 1108.

18 The ADF tribunal looked to the  
19 ordinary meaning of the term "procurement", and  
20 that is set out here in slide 39. The ADF tribunal  
21 found, in its ordinary or dictionary connotation,  
22 procurement refers to the act of obtaining as by  
23 effort, labour or purchase.

24 Thus, government procurement  
25 refers to the obtaining by purchase by a

1 governmental agency or entity of title to or  
2 possession of, for instance, goods, supplies,  
3 materials and machinery.

4 Now, what is interesting here is  
5 that Canada itself argued this definition of  
6 procurement in NAFTA Article 1001(5) was the right  
7 definition in the UPS case. The position taken by  
8 Canada just a few years ago on the meaning of  
9 procurement agrees entirely by the meaning advanced  
10 by Mesa in this arbitration.

11 Let's go look at what Canada had  
12 to say, as set out here in slide 40 on the monitors  
13 before you. We see Canada stated in its  
14 counter-memorial in the UPS case that:

15 "The absence of a definition  
16 of 'procurement' is itself a  
17 suggestion that the parties  
18 intended the term to be given  
19 its ordinary meaning  
20 throughout the NAFTA, subject  
21 to the exclusions in Article  
22 1001(5)."

23 This was the approach taken in the  
24 only Chapter Eleven arbitration to consider the  
25 exception in Article 1108(7). So it begs the

1 question: What has changed in the fundamental  
2 basis of interpretation in NAFTA between the UPS  
3 argument made by Canada and the argument here where  
4 they say exactly the opposite?

5 Canada's argument runs afoul of  
6 the decisions of other NAFTA tribunals and the  
7 simple, basic obligations and terms and  
8 instructions that we have in the Vienna  
9 Convention.

10 And, finally, I point out that the  
11 tribunal, a recent tribunal in Mobil Oil v. Canada,  
12 so a NAFTA tribunal, also came to the conclusion  
13 that it was appropriate to look at NAFTA Chapter  
14 Ten to give meaning to undefined terms in Chapter  
15 Eleven.

16 In Mobil Oil, the tribunal needed  
17 to give meaning to the term "research and  
18 development expenditure" that was in Article 1106.  
19 There was no definition, but "research and  
20 development" was contained in Chapter Ten in the  
21 context of procurement.

22 The Mobil Oil tribunal concluded,  
23 based on the Vienna Convention, that it should look  
24 at the treaty as a whole, a very reasonable  
25 approach. And this is exactly the approach that

1 Canada argued should be followed in UPS and the  
2 approach taken by the tribunal in ADF, and this is  
3 the correct approach to be taken in this claim.

4 The Tribunal should apply the  
5 definition in Article 1001(5) to the meaning of the  
6 term "procurement", and when we apply that  
7 definition, it is absolutely clear that the FIT  
8 program is not government procurement.

9 And, finally, the transaction that  
10 takes place under a FIT contract does not  
11 constitute procurement under any ordinary  
12 definition of the term. Instead, the FIT is a  
13 payment conduit which is akin to a financial  
14 transaction.

15 Ontario does not purchase the  
16 electricity for its own use, and, indeed, it  
17 doesn't even take title to it. And as set out here  
18 on slide 41, we have an extract from Mr. Adamson's  
19 expert report and he confirms:

20 "The OPA never receives or  
21 takes title to the  
22 electricity generated, which  
23 is sold directly into the  
24 IESO grid and is paid for by  
25 the IESO under its normal

1 settlements process... the  
2 OPA is simply a payment  
3 conduit, receiving ratepayer  
4 funds and passing them on to  
5 the FIT suppliers through the  
6 PPA contract payments."

7 The power goes directly to the  
8 ratepayers and never to the OPA. And as a result,  
9 the transaction under a FIT never meets the general  
10 definition of the word "procurement" suggested by  
11 the ADF tribunal, since the renewable energy under  
12 the contract is never obtained in any way by the  
13 OPA. Instead, the power under the FIT PPA goes to  
14 ratepayers through the IESO grid.

15 Ontario designed the program.  
16 They could have designed it some other way. As we  
17 see, they designed the program specifically this  
18 way so the ratepayers would pay. They did this to  
19 make sure there would be no subsidy, but it also  
20 ensured it could never be a governmental  
21 procurement, because the government doesn't pay.  
22 It just doesn't pay.

23 And of course NAFTA Article  
24 1001(5) excludes the provision of goods and  
25 services to persons from the definition of

1 procurement.

2                   So, thus, the goods and services  
3 are not used by the government itself, but used by  
4 all the ratepayers, and these cannot be covered by  
5 the term "procurement" here. As seen here on slide  
6 42, electricity which is produced under a FIT  
7 contract is "provided to those persons" and not to  
8 the Government of Ontario.

9                   The power under a FIT contract is  
10 never obtained by the Ontario Power Authority, and  
11 it does not get the title to this power. It  
12 doesn't use this power. The power goes to the IESO  
13 grid and on directly, instantaneously to the  
14 customers.

15                   This power is not used by the  
16 Ontario government. It is always resold to others  
17 at market rates using the commercial grid. In this  
18 way, Ontario is always engaged in commercial  
19 activity with respect to the electrical power  
20 market.

21                   This transaction cannot meet the  
22 definition of procurement in Article 1001(5),  
23 because it is a sale to others where the good or  
24 service is provided to others.

25                   Furthermore, Ontario made it



1 abundantly clear public money is never spent on the  
2 purchase of power under the FIT program. The funds  
3 for the purchase all come from the ratepayers,  
4 third parties to the FIT.

5 The cost for the FIT purchase is  
6 all paid by the ratepayers, a matter specifically  
7 identified by Ontario's Auditor General.

8 The Vienna Convention requires  
9 this Tribunal to consider the ordinary meaning of  
10 procurement in light of its context, object and  
11 purpose, and, accordingly, the activities arising  
12 from the FIT contract cannot constitute procurement  
13 by any of the ordinary meanings of the term and in  
14 the context of its meaning in the NAFTA.

15 Canada, as the party relying on  
16 the exception, bears the burden to establish its  
17 own defence and to demonstrate that the exception  
18 applies, and Canada has not met this burden.

19 You don't meet this burden simply  
20 by calling something something. You have to prove  
21 that it is actually that project -- it has to  
22 actually have that meaning. We can't just put a  
23 sign on something and make it something else.

24 And as a result, Article  
25 1108(8)(a), and to the extent applicable, Article

1 1108(7)(a), does not apply as an exception in the  
2 issues in this arbitration.

3 Canada can't make its case. It is  
4 not procurement. It doesn't meet the definition of  
5 procurement. And with respect to Article 1108(7),  
6 Canada can't even rely on this anymore, because  
7 that obligation is gone once it gave the better  
8 treatment under the Czech and the Slovak treaties.

9 So it is clear for the following  
10 reasons that Canada has not established the  
11 procurement exception. Ontario does not engage in  
12 the procurement. The activities involve a sale of  
13 goods to persons and are, thus, outside the  
14 definition of procurement in Article 1001(5);  
15 because the activities involve financial assistance  
16 and, thus, are outside of the definition of  
17 procurement in Article 1001(5); because the  
18 activities do not meet the ordinary meaning of  
19 procurement because the OPA does not take title to  
20 the power, it does not take delivery of the power  
21 and because the power is paid for by the individual  
22 ratepayers and not by Ontario.

23 Indeed, there is no evidence that  
24 Canada designed the FIT program to be -- sorry,  
25 excuse me.

1                   There is evidence, as we saw, that  
2                   Canada designed the FIT program to be paid by the  
3                   ratepayers in this way to avoid characterization of  
4                   the FIT as a government subsidy, and for this very  
5                   same reason the FIT cannot be considered  
6                   governmental procurement.

7                   Canada could have procured. It  
8                   could have done this. It could have engaged in the  
9                   process. It chose to do a different process, and  
10                  it is not entitled to have the benefit of the  
11                  exception for a process that it specifically did in  
12                  a different way that wouldn't meet those  
13                  obligations.

14                  And because Canada is not entitled  
15                  to rely on Article 1108(7)(a) because of the  
16                  Canada-Czech and the Canada-Slovak treaty, we're  
17                  really only focussing on Article 1108(8), and here  
18                  it simply does not meet the definition of  
19                  procurement any way you slice it. This argument  
20                  just doesn't fly. Canada's defence needs to be  
21                  dismissed.

22                  So in conclusion, the investor  
23                  will review the evidence and the law in our closing  
24                  arguments. We will return in some detail to the  
25                  proper application of the NAFTA and international

1 law, and the requirement of the proper reliance on  
2 the rules of international law, including the  
3 Vienna Convention on the Law of Treaties, and we  
4 will in the closing discuss damages.

5 Now, in conclusion, the Tribunal  
6 should consider the following: (a) that there is  
7 compelling evidence already in the record that  
8 demonstrates the proponents for renewable energy  
9 power purchase agreements under the FIT are in like  
10 circumstances to proponents for renewable energy  
11 power purchase agreements under the GEIA.

12 There was no real difference in  
13 likeness between the proponents, despite the fact  
14 that there was a substantial difference in the  
15 favourability of treatment between those being  
16 accorded the more favourable treatment under the  
17 GEIA than those under the FIT.

18 Two, that the national treatment  
19 claim is similar to the MFN claim with respect to  
20 the better treatment obtained by the Canadian  
21 investments of the Korean consortium.

22 Three, that the local content  
23 requirement explicitly violated the terms of NAFTA  
24 Article 1106(1) and that there is evidence of harm  
25 caused to Mesa in the record. Remember, this is

1 the claim where Canada hasn't even filed a defence.

2 And, four, that there are  
3 violations of the international law standard of  
4 treatment, especially fair and equitable treatment,  
5 present in this case.

6 We have addressed conclusively why  
7 Canada's arguments that it has not given its  
8 consent to this arbitration are simply misleading  
9 and not meritorious and why the government subsidy  
10 exception defence and the procurement defence  
11 should not be accepted by this Tribunal.

12 In our introduction of the  
13 international law principles that govern this  
14 arbitration, we referred to the rule of law as the  
15 bedrock of NAFTA.

16 Mesa always intended to treat  
17 Ontario with respect and to act in full compliance  
18 with environmental values, laws and regulations.  
19 Mesa believed Ontario offered it an honest and  
20 transparent process that would be administered by  
21 responsible government officials, that would be  
22 administered fairly and in good faith, and that  
23 would be determined in an objective and fair  
24 manner.

25 Mesa did not expect to be denied

1 basic fairness by the Government of Ontario, from  
2 which it was entitled to expect fair and  
3 transparent treatment.

4 Now, the NAFTA acts to protect  
5 claimants from these breaches of fairness, from the  
6 imposition of internationally wrongful local  
7 content rules, and from the lack of equal  
8 treatment.

9 In the coming days, we will see  
10 how Canada took these types of actions and how Mesa  
11 was harmed. But the NAFTA provides a remedy to  
12 these harms, and this remedy is in compensation,  
13 and only this Tribunal can address these wrongs  
14 committed by Canada and the Government of Ontario.  
15 And it is this compensation remedy that the  
16 investor respectfully requests from this Tribunal.

17 So we thank you very much, and  
18 we're ready to turn to Canada.

19 THE CHAIR: Thank you,  
20 Mr. Appleton.

21 Can you just check how much time  
22 the claimant has used for their opening?

23 MR. DONDE: One hour, 43 minutes.

24 THE CHAIR: One hour, 43 minutes.

25 I am just saying this in case you wish to have

1 some --

2 MR. APPLETON: My timer is a  
3 little different. I have 1:41. I have been timing  
4 while we have been on.

5 THE CHAIR: You can fight about  
6 this if you need the time, but if you don't need  
7 it --

8 MR. APPLETON: That sounds good.

9 THE CHAIR: Good. So the  
10 Tribunal's suggestion would be that we continue  
11 directly with hearing the beginning of Canada's  
12 argument. Do you have a time estimate of how much  
13 time you think you will need overall?

14 It doesn't commit you, but it  
15 would give us some idea for planning purposes.

16 MR. SPELLISCY: Yes. Thank you,  
17 Professor Kaufmann-Kohler. I am looking at it and  
18 thinking I am going to use close to the two hours,  
19 which would put us about 1:30, prior to a lunch  
20 break.

21 I also note that unfortunately I  
22 have to raise a procedural due process issue first,  
23 and so what I am wondering is, if I raise that now,  
24 we could go somewhat into the opening. I find it a  
25 little bit odd to break the opening during a lunch

1 break. We're getting close to noon. If the  
2 Tribunal feels it could wait until 1:30 or 2:00 for  
3 lunch, I could probably do so, but you might be  
4 hungry. But I do have an issue to raise in advance  
5 of starting the opening statement.

6 THE CHAIR: Fine. So why don't  
7 you raise this issue now, and then we will take it  
8 from there.

9 OPENING SUBMISSIONS BY MR. SPELLISCY:

10 MR. SPELLISCY: Thank you. This  
11 actually comes back to the issue that I raised  
12 right at the beginning of the hearing today, and I  
13 think now it is an issue that does need to be  
14 resolved.

15 In the claimant's opening  
16 presentation, two slides, slide 34 and at slide 36,  
17 the claimant represents that the date of harm for  
18 its 1106 breach was July 7th of 2010.

19 The first time that the claimant  
20 ever raised that valuation date was in its October  
21 17th, 2014 submission, which it said it withdrew  
22 from the record. Prior to that, it claimed that  
23 its Article 1106 loss occurred on August 5th.

24 In its reply at paragraph 824, it  
25 said it was August the 5th. In its expert report,



1 its reply expert report of Mr. Low at paragraph  
2 7.11, it said the date was August 5th. And that  
3 cited to the witness statement of Mr. Robertson in  
4 paragraph 23, which said that date was August 5th.

5 In its October 20th order in  
6 respect of this, the Tribunal said in its second  
7 paragraph that:

8 "The Tribunal notes, in  
9 particular, that the  
10 claimant's 'correction' of  
11 the Deloitte report attaches  
12 new documents, changes the  
13 discounted rate calculations  
14 and certain valuation dates  
15 in section C."

16 It continued:

17 "It is of the view that these  
18 modifications are not  
19 corrections as contemplated  
20 in paragraph 37."

21 One of those modifications was  
22 moving the valuation date for the 1106 breach from  
23 August 5th to July 7th. The Tribunal ruled with  
24 the hearing less than a week away. There is a risk  
25 the respondent's due process right be prejudiced if

1 these modifications are admitted into the record.

2 This morning I got up and  
3 explained our position that what could not be done  
4 in writing a week before because of a due process  
5 risk could not be done at this hearing. And yet  
6 that is what happened this morning.

7 We're not in a position to examine  
8 on this date -- our expert is not in a position to  
9 comment on the valuation of this date. This was a  
10 direct due process risk that we identified.

11 The Tribunal never required the  
12 claimant to withdraw this information from the  
13 record. It gave the claimant a choice, withdraw or  
14 we bifurcate quantum.

15 The claimant chose to withdraw.  
16 We're not saying this can't come into the record.  
17 The Tribunal has never said it, but the question  
18 is: If they are going to be making these  
19 modifications, what are Mr. Goncalves and Mr. Low  
20 doing here this week?

21 We won't be able to have them  
22 answer questions on this and we won't be able to  
23 ask questions on this, and this is exactly why I  
24 raised this concern this morning, because we are  
25 concerned.

1                   Now, you will see here that this  
2                   refers to an exhibit that is in the record. That  
3                   is true. That is there. There is no problem you  
4                   can refer to that document, but what the Tribunal  
5                   ruled and what is clear is you cannot change your  
6                   valuation date at this late stage, and that is the  
7                   prejudicial situation you're in.

8                   You change that valuation date,  
9                   all the calculations change, all the spreadsheets  
10                  change. Our expert, Mr. Goncalves, has said he  
11                  does not have time in a one-week period to re-look  
12                  at this, to look at how that is going to impact  
13                  things.

14                  In terms of when they say that  
15                  that harm occurred, we do not have time to prepare  
16                  to examine on this, and this is exactly the due  
17                  process right we had, the due process concern we  
18                  had in our letter where we flagged that we will be  
19                  in a position where we can't effectively examine  
20                  witnesses on this. And this is where we find  
21                  ourselves.

22                  So this morning, I said that if  
23                  reference came up, I was going to have to stand up  
24                  and I was going to have to say: All right, well,  
25                  now we have to bifurcate.

1                   So I think the issue has actually  
2                   been raised and joined now, and we need a decision  
3                   from the Tribunal as to how this is going to  
4                   proceed. Thank you.

5                   THE CHAIR: We may have some  
6                   questions. Why don't -- I have one or two, yes,  
7                   please.

8                   MR. BROWER: The one thing you say  
9                   was that in the record was simply that slides 34  
10                  and 36 present July 7, 2010 --

11                  MR. SPELLISCY: Yes.

12                  MR. BROWER: -- as a date, anyhow,  
13                  from which damages may be -- when the claim can be  
14                  considered to have arisen and damages potentially  
15                  measured from then. You said otherwise it was  
16                  August 5th, also of 2010?

17                  MR. SPELLISCY: Yes.

18                  MR. BROWER: Right, okay.

19                  MR. SPELLISCY: In all of the  
20                  materials submitted prior to October 17th, it was  
21                  August 5th.

22                  MR. BROWER: I see. Thank you.

23                  THE CHAIR: But that applies only  
24                  to the 1106 claim. It does not apply to the others  
25                  where we have the September 17th, 2010 valuation

1 date or breach date on slide 34.

2 That was not changed. We will of  
3 course give the floor to the claimants afterwards,  
4 but do I understand this correctly?

5 MR. SPELLISCY: Yes, I think that  
6 is fine. The date we're talking about here is the  
7 1106 part. Obviously one way that the Tribunal  
8 could go would be to hear the other aspects of the  
9 damages claim, but I think that that gets to a  
10 point of inefficiency, because if we have to have  
11 the damages experts come back anyways to discuss  
12 this new breach to this new date of valuation, the  
13 new dates of the alleged breach, and if we have to  
14 have some fact witnesses come back to be examined  
15 on the question of when that harm was actually  
16 suffered, then there doesn't seem to be much point  
17 in doing it now, because we are going to require an  
18 extra hearing day, anyway, later.

19 MR. LANDAU: Can I just ask? As I  
20 understand it, the issue which you raise turns upon  
21 whether or not the valuation date has changed.

22 And if the valuation date has  
23 changed, then, as I understand it, what you're  
24 saying is that causes due process issues, because  
25 that will impact directly on the quantum evidence.

1                   But if -- I don't know whether  
2                   this is the case, but if what is being said in  
3                   these slides is that the 7th of July 2010 is a date  
4                   where the events giving rise to the claim first  
5                   arose, and if that is -- that's not being put  
6                   forward as a valuation date, then there wouldn't be  
7                   a due process issue.

8                   MR. SPELLISCY: Well, I think that  
9                   will come down to the claimant to clarify what they  
10                  are trying to do.

11                  Certainly the way that they have  
12                  presented all of their arguments to date is to line  
13                  those two dates up.

14                  MR. LANDAU: I see.

15                  MR. SPELLISCY: So in every case  
16                  you have, as they say in their reply memorial in  
17                  paragraph 824, they say the date of the breach, the  
18                  date the claim arose, the date of the breach, is  
19                  August the 5th, and then their expert then I think  
20                  values from that. So my understanding is they have  
21                  always lined that up.

22                  I think if their explanation is,  
23                  No, no, no, we still intend to value from August  
24                  5th, although we claim the date of the breach is  
25                  July 7th, then I think it is a bit of an odd

1 situation. We would have to look at that.

2 But that is certainly never how  
3 they presented it and certainly not in their  
4 October 17th submission that they have withdrawn  
5 how they presented it. They lined those two dates  
6 up.

7 THE CHAIR: Any other questions  
8 from my co-arbitrators? No. Then can I give the  
9 floor to the claimant to comment?

10 FURTHER SUBMISSIONS BY MR. APPLETON:

11 MR. APPLETON: Yes. Thank you  
12 very much. Again, all of this would have been so  
13 much easier if Canada had advised us on Friday, by  
14 the deadline, of some of its concerns. We would  
15 have had clearer rules and approaches to go with  
16 here.

17 I believe the Tribunal, first of  
18 all, has very correctly identified the issues. We  
19 gave a slide about an issue with respect to when  
20 the breaches arise with respect to the timing of  
21 this arbitration.

22 But I also point out that the  
23 document that we're talking about, which  
24 Mr. Spelliscy has raised so much concern about, is  
25 a document raised by his own damage expert. BRG

1 123 means that it is a document raised by  
2 Mr. Goncalves, who is here in the courtroom today,  
3 and it is a document that they brought. It is  
4 Canada's document that they know about, and he is  
5 complaining about the effect of a document brought  
6 to the attention of everyone by his own damage  
7 witness in his own rejoinder damage report.

8                   That, to me, is perplexing, that  
9 somehow now that Canada has objected to its own  
10 evidence. It is just like this issue with subsidy.  
11 Is it there or is it not there? We don't know.  
12 They won't tell us.

13                   Here we have a situation, again,  
14 they object to us discussing their own  
15 documents. How could that possibly be? We will  
16 talk. We will talk later today in response to the  
17 issues raised this morning by Mr. Spelliscy, and I  
18 believe that when we go through that we're going to  
19 have a much better understanding of what we can or  
20 cannot do, because it seems to me perplexing.

21                   If the suggestion of Mr. Goncalves  
22 is that he is not capable of being able to make any  
23 change based on hearing testimony or questions from  
24 the Tribunal, then he's probably the wrong expert  
25 to be before this Tribunal, because that is what



1 happens with valuation issues. They listen to each  
2 other, they narrow the issues, and they change  
3 calculations based on that.

4 But, in any event, we will get  
5 there. For this purpose of this objection, which  
6 is I think nothing but an idea to stall for time,  
7 to be able to have time to respond to our opening,  
8 which I hope this that is not what this is, the  
9 fact of the matter is this document which he raised  
10 objection to, are we now going to strike part of  
11 your rejoinder report so this document isn't here?  
12 Is that the idea?

13 The document BRG 123, and I have a  
14 copy of Mr. Goncalves's report in front of me, is  
15 referred to at page 16 of the report, BRG 2. If  
16 you want to go there, it is -- it may not be  
17 necessary, because we're not expecting the  
18 valuation witnesses today so you wouldn't have  
19 their materials out.

20 But on page 16 he refers to this  
21 e-mail, an e-mail from Mr. Michael Volpe of GE to  
22 Mark Lord from Mesa of July 7, 2010.

23 Now, how could that be an  
24 objection? How could that somehow have a due  
25 process? The only due process issues here are the

1 effects that we're having as a result of this  
2 harassment. It is entirely inappropriate and we  
3 shouldn't be wasting any more time for these  
4 scurrilous matters.

5 If the issue is that we are  
6 concerned, I can tell you without question that  
7 this is about the timing of the claim, which is  
8 what, in fact, my evidence was -- sorry, my  
9 statement was. The evidence is from Canada. I  
10 can't see how they could have any objection to  
11 that. We should not be wasting any more time, and  
12 with all due respect I think it is quite clear that  
13 we need to put Canada on to put their opening so  
14 that they can't get any benefit from this delay.

15 MR. LANDAU: Sorry, Mr. Appleton,  
16 before you -- you can speak from there?

17 MR. APPLETON: Yes, sure.

18 MR. LANDAU: I just want to be  
19 clear on what your client's position is in terms of  
20 two issues, firstly, the valuation date for Article  
21 1106 claims.

22 MR. APPLETON: Yes.

23 MR. LANDAU: And, secondly, the  
24 timing issue with respect to the six-month waiting  
25 period, as a preliminary -- as a separate issue.

1                   So on the first of those, do we  
2     take it that paragraph 824 of your reply and, for  
3     example, 832 remain as pleaded? 832 says harm  
4     first arose from these breaches on August 5th,  
5     2010. 824 says:

6                   "The dates on which breach  
7                   and damage for each NAFTA  
8                   article first arose are..."

9                   So the point of the question is:  
10    Is the 5th of August 2010 still the valuation date  
11    as asserted by your client?

12                  MR. APPLETON: From the  
13    perspective of the point of whether or not the  
14    breach arose more than six months earlier --

15                  MR. LANDAU: That is not the  
16    question.

17                  MR. APPLETON: I know that.

18                  MR. LANDAU: I asked you just the  
19    question on valuation first.

20                  MR. APPLETON: The issue on  
21    valuation requires me to give the answer with  
22    respect to how we want to approach the valuation  
23    evidence, generally.

24                  If you would like to talk about  
25    that now, I can start, but I thought that I would

1 be given an opportunity to consider that and come  
2 back in the afternoon.

3 I obviously have had no  
4 opportunity to consider the question this morning,  
5 because I had to proceed immediately to the opening  
6 statement. I would certainly be happy to give you  
7 some impressions if that would assist you.

8 MR. LANDAU: Forgive me. This is  
9 a rather specific question which should be capable  
10 of a "yes" or "no", because the issue has already  
11 been ventilated between the parties and in front of  
12 the Tribunal as to whether or not the valuation  
13 date is being changed.

14 MR. APPLETON: Yes.

15 MR. LANDAU: So the question is:  
16 Is it being changed?

17 MR. APPLETON: Mr. Landau, the  
18 procedural order for the examination of witnesses  
19 permits the witnesses to be able to identify  
20 differences between their position and also to  
21 address issues that arose since they filed their  
22 witness evidence.

23 This letter, BRG 123, being added  
24 to the evidence arose since Mr. Low filed his  
25 witness statement. He is entirely entitled, in the

1 context of his direct evidence, to be able to  
2 comment on matters that arose after he filed his  
3 witness evidence.

4 I would imagine that BRG 123 would  
5 be an issue that he would want to comment on, and  
6 as we have already seen -- I don't want to  
7 pre-judge his evidence -- we have already seen that  
8 he believes that Mr. Goncalves was correct and  
9 that, therefore, the date should shift slightly.

10 As Judge Brower has identified,  
11 the shift in the date is relatively minor. It is  
12 from August to July. So it is not a large change  
13 of the date.

14 I believe that it is important  
15 that the Tribunal have accurate information with  
16 respect to knowing when the six-month period ties  
17 in, and therefore we provided that information to  
18 the Tribunal, which is our view as to when the  
19 breach would arise, because by looking at that  
20 letter, it would appear now, years later, that they  
21 would have the requisite knowledge one month  
22 earlier. That was because of the point being  
23 raised by Canada and the letter from BRG.

24 So that's why, in our view, the  
25 date for the damage has two composite requirements.

1 One is you must be aware of a loss -- a breach of  
2 the NAFTA. The other is you must be aware of the  
3 harm.

4 The awareness of the harm would  
5 appear to have occurred, based on that e-mail at  
6 BRG 123, one month earlier than an almost identical  
7 e-mail which was received on August 5th, and that's  
8 why we wrote in our memorial about August 5th, and  
9 it was brought to our attention by Canada and BRG  
10 that virtually the same information was expressed  
11 in an e-mail of July 7th -- was it July 7? July  
12 7th.

13 Therefore, that's why we have  
14 identified that date. So our view will be that  
15 that should be the appropriate date, once it was  
16 brought to our attention by Canada, to clarify the  
17 issues after their last pleading.

18 There must be some value to  
19 Canada's rejoinder pleading, and we take our call  
20 conscientiously to review it and see if we can  
21 narrow the issues, and if they put forward and it  
22 would suggest a different date, that is where we  
23 would take that view.

24 So our view is that the dates for  
25 the purpose of the breach should be the 7th of

1 July, not the 5th of August, and I believe that it  
2 is appropriate, but that will be for the Tribunal  
3 to rule.

4 If the Tribunal decides that this  
5 evidence from the valuation expert -- he is the one  
6 that identified it -- isn't appropriate, he will  
7 leave his whole report in with a date that follows  
8 the same information, but would be off by one  
9 month.

10 So that is something that we will  
11 need to discuss when we have that discussion,  
12 whether or not it is permissible for an expert to  
13 comment on evidence brought to his attention after  
14 the filing of his report.

15 So that is why I say that the  
16 items are linked and that is the difficulty, but I  
17 don't see how, what the purpose of the issue of the  
18 six-month period -- that that could be material,  
19 since the differences between July and August of  
20 2010 have no impact on the points whatsoever that  
21 have been filed, none.

22 They are all either 18 months or  
23 19 months before the six-month -- or before the  
24 filing of the notice of arbitration.

25 But I wanted to give you what I

1 believe is going -- where I am trying to get to,  
2 but I would like the opportunity to consider these  
3 issues, because I think they are important. And  
4 certainly by the way Canada has addressed them,  
5 they seem to be, I think, more important than they  
6 are.

7 THE CHAIR: Do you have any  
8 further questions?

9 MR. LANDAU: No. I just  
10 -- well...

11 THE CHAIR: We will need to  
12 briefly discuss it among arbitrators to see how we  
13 go further on this.

14 Would Canada wish to reply now?

15 MR. SPELLISCY: I do apologize,  
16 but I think I would like to raise a couple of  
17 things before the Tribunal goes into deliberations.

18 THE CHAIR: Yes, yes.

19 FURTHER SUBMISSIONS BY MR. SPELLISCY:

20 MR. SPELLISCY: One is that BRG's  
21 valuation date that they put forward is not this  
22 date. It is July 4th, 2011. It is after this. So  
23 this date does not come from BRG.

24 We have talked, and the claimant  
25 has said this is BRG's letter. It is not BRG's



1 letter. It is an e-mail internal to the claimant  
2 that the claimant has had since July 5th or July  
3 7th, 2010.

4 They chose not to base their  
5 damages on it. This is not something that BRG  
6 found. It came from the claimant's production. It  
7 is their document, not our document.

8 We're not saying that the document  
9 can't come into the record. It is already in the  
10 record. We put it in the record. But what we are  
11 saying is that you can't change the valuation date  
12 that you propose one week prior to the hearing.  
13 And that was what the Tribunal's ruling was.

14 And I have scanned through that  
15 answer and I actually didn't see a "yes" or "no" to  
16 Arbitrator Landau's question, but from the answer,  
17 it appeared to me that the answer was, yes, they  
18 are changing the valuation date.

19 I think the Tribunal in its letter  
20 was clear that doing that would result in a  
21 modification to the expert evidence that would pose  
22 a risk to Canada's due process rights.

23 So what should we do? We have  
24 this part of the hearing at a future date if it is  
25 necessary. That was a relatively simple choice for

1 the claimant to make. Instead, it filed a  
2 one-sentence letter that said: We withdraw.

3 It didn't raise the point about,  
4 Well, we think we can do this in response. It is  
5 clear now that what they are intending to do was to  
6 raise the exact same changes that they made that  
7 were disallowed in writing a week before and that  
8 they are intending to do it on the stand. So we  
9 have exactly the same due process concern.

10 This is not about what is  
11 permissible. This is not about a response. It is  
12 about the timing of when you do things, and it is  
13 about the timing in the procedure and procedural  
14 rights.

15 So if they want to change their  
16 valuation dates because they think that is  
17 important, fine. We will send Mr. Goncalves and  
18 Mr. Low home and we will have that part of the  
19 hearing at some later date, if it is required.  
20 We're amenable to doing that.

21 We think of course that changing  
22 it a week before, you could have -- let's remember  
23 that the BRG expert rejoinder report came in July,  
24 and the claimant waited until a week before the  
25 hearing to raise this.

1 Thank you.

2 THE CHAIR: Thank you.

3 Mr. Appleton, are there other things that you  
4 intend to tell us on this issue, on this procedural  
5 issue, other than what you have mentioned now, or  
6 have you said what you wanted to say?

7 It is just for us to understand  
8 the scope of what we need to decide now.

9 FURTHER SUBMISSIONS BY MR. APPLETON:

10 MR. APPLETON: Again, Madame  
11 President, as you know, I haven't had the  
12 opportunity --

13 THE CHAIR: That is why I am  
14 asking you, yes.

15 MR. APPLETON: So I am sure it is  
16 likely that I will have other points to discuss  
17 with the Tribunal about this larger issue. I would  
18 have assumed we would have done that sometime  
19 perhaps at the end of the day today so the Tribunal  
20 would have been able to determine it tomorrow.

21 So I would still like that  
22 opportunity, because I believe there are issues  
23 that need to be done and we need to have some  
24 ground rules to understand some things.

25 For example, what's to happen if a

1 witness raises an issue? Are we going to be  
2 excluded -- once an item is in evidence, in  
3 testimony, it will no longer be able to go there?  
4 Are we now no longer able to talk about documents  
5 that are already in the record?

6 What are we to do with the normal  
7 process of the rule that says -- all of these  
8 things.

9 THE CHAIR: I think you have  
10 answered my question in that you have not --

11 MR. APPLETON: Yes, I need to work  
12 through.

13 THE CHAIR: -- not finally  
14 answered the topic so far.

15 MR. APPLETON: Yes, I need to work  
16 through this.

17 THE CHAIR: That's clear. So let  
18 us just have a brief conversation of how we go  
19 further about this, because we also have other  
20 things to do today and we should make sure that we  
21 make progress.

22 We will just take a break now and  
23 the Tribunal will confer.

24 --- Recess at 11:54 a.m.

25 --- Upon resuming at 12:21

1 --- Reporter change, Lisa Barrett

2 THE CHAIR: We have considered the  
3 issues at this stage, and this is not a ruling;  
4 this is an attempt to clarify things and tell you  
5 a few things how we understand it at this stage and  
6 at the same time ask some questions.

7 It seems to us that we must  
8 distinguish the issue of the six-month period  
9 computation and the issue of the damage  
10 calculation. The six-month period does not affect  
11 the damage expert evidence, and, therefore, we do  
12 not consider that to be an issue now. And it seems  
13 that this is agreed from looking at the nodding on  
14 both sides.

15 So I will concentrate now on the  
16 damage computation. The issue arises with respect  
17 to the claim for 1106 only. We understand, and, of  
18 course, the client will correct us if our  
19 understanding is incorrect -- we understand that  
20 there is a change in the valuation date in what we  
21 can discern from the explanations, because in the  
22 reply memorial, paragraph 824, 832, for example, it  
23 is clear that the valuation date is August 5th and  
24 not July 7.

25 Now, we'd like to have

1 a confirmation of this. It is true that the  
2 procedural rules that we apply here provide for  
3 an expert witness to have the opportunity in direct  
4 to address matters that have arisen after filing  
5 the expert report or the witness statement and also  
6 to address matters that arise out of oral testimony  
7 that was given before.

8 That is not the question. The  
9 question is: It seems to us that changing the  
10 valuation date goes beyond this exercise that is  
11 accepted in the procedural rules of addressing  
12 evidence that was put in after the expert's report.  
13 So we have a question for the claimant about the  
14 change of the valuation date.

15 Assuming the claimant were to say  
16 that the valuation date for 1106 is, indeed,  
17 changed, then we have a question for Canada. There  
18 are still five full days with 24 hours each day  
19 until we hear the damage experts. Can your expert  
20 run a computation with a different valuation date?  
21 And if he cannot in this time, why not? So that is  
22 the question to Canada. It's a hypothetical  
23 question for the time being.

24 And then what we want to say, as a  
25 general matter, is that we would prefer at this

1 stage not to have to bifurcate for reasons of  
2 efficiency and costs. At the same time, it goes  
3 without saying that we will comply with due  
4 process, and whatever needs to be done for that, we  
5 will do.

6 So that is all that we can say  
7 right now. Maybe you think about these questions  
8 over lunch, and you come back just after the lunch  
9 break. We will break now because it doesn't make  
10 sense at this hour to start with Canada's opening,  
11 and we will start, first, listening to your answers  
12 to these two questions, and then we will continue  
13 with Canada's opening statement, and we will start  
14 at 1:30.

15 I hope this was clear. If it is  
16 not, then you may ask any clarification that you  
17 wish at this stage. Mr. Appleton?

18 MR. APPLETON: I think that was  
19 clear.

20 THE CHAIR: Thank you. Mr.  
21 Spelliscy? Fine, then have a good lunch.

22 --- Luncheon recess at 12:25 p.m.

23 --- Upon resuming at 1:32 p.m.

24 THE CHAIR: I hope you all had  
25 a good lunch, and we can resume now. We first have

1 the two questions that the tribunal has asked from  
2 counsel, and then we will move to Canada's opening  
3 argument.

4 Mr. Appleton, you have the floor  
5 for the question.

6 MR. APPLETON: Actually, Mr.  
7 Mullins will be speaking for me. I'm going to rest  
8 my voice for a minute.

9 THE CHAIR: Fine. Mr. Mullins.

10 MR. MULLINS: Thank you, members  
11 of the tribunal. To answer your question, we want  
12 to make the record about exactly what happened,  
13 because I think there has been some confusion.  
14 What's happened is, based on the last statement  
15 from the expert for Canada, our expert looked at  
16 his calculations. There was no change in  
17 methodology. He just looked at certain complaints  
18 and issues raised by the expert for Canada.

19 This is not uncommon where experts  
20 get into what they call a hot tub. I'm sure you  
21 are familiar with the program where sometimes we  
22 would have hearings where you'll have experts talk  
23 at the same time, and the tribunal will ask  
24 questions. We feel this is appropriate and  
25 consistent with the tribunal's orders and obviously



1 makes a lot of sense. What doesn't make sense is  
2 that someone's locked into position and then is not  
3 able to react to a legitimate complaint from the  
4 other side.

5           The irony here is that all the  
6 changes we're talking about go to the benefit of  
7 Canada. Frankly, we were shocked that they made  
8 any complaints about this because, by making the  
9 changes at issue, it lowered the damages in every  
10 category. For example, in the 1106, it decreased  
11 the damages by roughly \$1.5 million.

12           For other things like the change  
13 in discount range, the change could be \$20 million  
14 to the benefit of Canada, and for 1105, close to  
15 \$90 to \$100 million. Obviously, these are  
16 substantial damages being sought. We were shocked  
17 that Canada was complaining about the fact that  
18 this is to their benefit.

19           And we're fine if they want to  
20 take the higher numbers. What we don't want is the  
21 following: That our expert witness is  
22 cross-examined and says, "Isn't it a fact that that  
23 your discount rate is wrong?" And then he can't  
24 answer because of some ruling from the tribunal  
25 about some due process violation. Our experts

1 should be able to say, "Well, based upon the  
2 different calculation, this is how you come out,"  
3 or, "Based upon a different change in the 1105,  
4 this is what the change in damages would be."

5 We don't think this is  
6 inconsistent with what tribunals have done in the  
7 past. We think it was consistent with the order.

8 We are extremely concerned that we  
9 will have our due process violation -- or rights  
10 violated if our experts cannot react to  
11 a legitimate cross-examination question that was  
12 all premised on the idea that he was simply  
13 reacting to what their expert did.

14 That's our concern. Again, if the  
15 answer is we're going to keep the higher numbers,  
16 that's fine, but then I'll just say we are not  
17 going to get cross-examined on it. We're trying to  
18 get the truth here, and we're perfectly happy to  
19 try to get the truth and have credibility through  
20 our experts. So we are perfectly happy to have him  
21 respond to questions and explain on certain  
22 assumptions how the damages would be affected.  
23 That's our position. So we ask that we change the  
24 valuation date. It's really a matter of reacting  
25 to what their expert did. We're not changing

1 methodology. We're just simply saying that certain  
2 things that they raised -- and my expert will do it  
3 much better than I'm doing it right now -- but he  
4 can explain why things change and how the effect of  
5 it, but, again, I can tell you, because we looked  
6 at this over lunch, it's all to the benefit of  
7 Canada.

8 THE CHAIR: I don't think this is  
9 noted, but the valuation date to me, in a damage  
10 computation, is an important date. I mean, it may  
11 play to the favour of one or the other, but it's an  
12 important date, and, therefore, I still must say I  
13 understand what you're saying about the reaction to  
14 evidence provided by the other side. There is no  
15 issue with that. What we would like to understand  
16 is: Have you changed your valuation date or not?  
17 Or maybe you tell me. I don't want to tell you  
18 now, and then we'll go ahead like this.

19 MR. MULLINS: I'm sorry. I kind  
20 of jumped two steps ahead. I am less concerned  
21 about the valuation date. It is a \$1.5 million  
22 issue. We are perfectly happy to keep the date  
23 that our expert originally picked.

24 Our bigger concern is the other  
25 things that are our letter of corrections go to

1 much more significant issues, and we don't want any  
2 ruling today or right now to, in effect, say,  
3 "Okay. You can't make any of these evaluations, or  
4 we're going to be able to cross-examine you and say  
5 your expert didn't know what he was doing, and he  
6 can't respond because he was trying to correct it."

7           So I know you are focused on the  
8 valuation date, but there are much more things in  
9 that letter with much more significance. Again,  
10 millions of dollars to Canada's benefit. So I just  
11 want to make sure that our expert is being able to  
12 say, "Look, yes, if you're right, Mr. Gonzales,  
13 this is how the damage is affected, and this is how  
14 we get there." We thought we were giving them  
15 a favour by telling them upfront. We could have  
16 waited until the hearing until they got  
17 cross-examined. And now we are being accused of  
18 all kinds of, you know, scurrilous acts.

19           So I hope I answered your  
20 question. Again, I think the 1106 is sort of not  
21 a major issue when you are talking about a \$700  
22 million claim. It's a \$1.5 million issue. It's  
23 really sort of the other issues that are much more  
24 significant, and that's all we're saying. That's  
25 why we are raising it now, because that's what we

1 wanted to talk about, because we knew there were  
2 potential ramifications based on what you will be  
3 ruling on, and we also think, that Mr. Gonzales has  
4 had plenty of time to calculate. We've given him  
5 this analysis. He has had it now. As you pointed  
6 out, he's got this week, and he'll have the benefit  
7 of the testimony. Both experts are going to be  
8 here. I imagine they may change their ideas on  
9 some things based on how the testimony goes. We'll  
10 be asking questions, and I assume you're going to  
11 have some questions, and they may have to change  
12 their analysis based on what you've asked them.  
13 That's why we're here.

14 THE CHAIR: Thank you. Mr.  
15 Spelliscy, on the question from the tribunal?

16 MR. SPELLISCY: I guess my answer  
17 to the question from the tribunal is going to  
18 necessarily change a little bit because of what  
19 I just heard, because it now strikes me that we are  
20 not just talking about the change in the valuation  
21 date for 1106. We are now talking about the  
22 claimant wanting to do, at this hearing, all of the  
23 corrections that it previously did and to introduce  
24 them, and that is a huge concern.

25 We're not now talking about simply

1 running a different valuation date. In fact, they  
2 said they'd be willing to give that up. We're now  
3 talking about everything else that they tried to  
4 do, all of the due process concerns that we  
5 identified. And so the question will be: Well,  
6 when is that coming? How much time will we have?

7 A week is not enough for us to  
8 handle that. Two weeks was not enough for us to  
9 handle that consistent with our due process rights.  
10 The tribunal recognized that on October the 20th,  
11 and I think that the idea that somehow this is  
12 a question of the claimant's due process rights is  
13 a red herring.

14 The reality is the tribunal said,  
15 "You are allowed to put in this evidence, but if  
16 you're going to put in the evidence, we'll have the  
17 quantum hearing later." They didn't pick that  
18 option. They said, "We will withdraw it." We  
19 didn't prepare any questions. We didn't prepare  
20 any responses. We took them at their word that  
21 they were not going to be introducing this  
22 evidence, and so we are not prepared to do it, and  
23 certainly I think, you know, in terms of what could  
24 be done on the 1106 valuation, I think now that  
25 that question isn't so much relevant anymore

1 because it is obvious that the claimant wants to do  
2 far more than that.

3 I think also on the question of  
4 the response, it is pretty clear that what this is  
5 is a sur-reply, as we said in our letter. The  
6 claimant had Mr. Goncalves' report since July. If  
7 it reviewed that report, it could have made  
8 a request sometime in the intervening four months  
9 to make those changes. We could have then had  
10 legitimate time to respond and have our expert  
11 review it. We were denied that because they sat on  
12 it. They sat on it until a week before, and they  
13 sat on it based on documents that they've had in  
14 their possession for years. And they chose to do  
15 it this way.

16 So I do want to somewhat try to  
17 respond to what you had actually asked, and I think  
18 in terms of thinking about, well, what can be done,  
19 I think, you know, sure, if Canada worked 24 hours  
20 a day for the next five days and ended up exhausted  
21 and tired at the end, we might be able to do this,  
22 but I don't think due process really requires that.

23 I'm sure that our expert could put  
24 something together, but the question is: What can  
25 really be done consistent with due process? What

1 can be done to help us understand what the claims  
2 are being made?

3                   And I think to do that, I think  
4 you have to understand the extent of the changes  
5 that are being suggested here. We laid all this  
6 out in our letters. The claimant responded in  
7 a long letter of its own, and the tribunal ruled  
8 already. These are significant modifications to  
9 the expert evidence. If the claimant wants to  
10 introduce them, fine, we will have an opportunity  
11 to respond, and we'll do that separately.

12                   What we can't do that is this week  
13 because what it would require is not just  
14 communications among Mr. Goncalves and Mr. Lo, but  
15 we are also talking about changes to how some of  
16 the cross-examinations are going to go, to the  
17 questions that will be asked.

18                   In order to actually try to do  
19 this, what would have to happen is the native Excel  
20 spreadsheets would have to be produced; they were  
21 not. All we have is a paper version. Our experts  
22 would then have to audit them line item by line  
23 item.

24                   When the last valuation dates were  
25 changed -- and that was in the reply submission of



1 the claimant, and I note that this change wasn't  
2 made, even though other valuation dates were  
3 changed there -- our experts went through and did a  
4 line-by-line audit and found mistakes and errors.  
5 They have to be allowed the same opportunity to do  
6 that, and they can't do that while they're here  
7 trying to prepare for their testimony, listening to  
8 relevant testimony that they may have to respond  
9 to.

10 It cannot, in our view, be done,  
11 and so I think ultimately where we are at this  
12 point right now is we are back to the exact same  
13 question that the tribunal posed to the claimant in  
14 its October 20th letter. If you would like this  
15 information in the record, then elect bifurcation.  
16 If you would like it not, then withdraw it.

17 The claimant picked withdraw it.  
18 I think we're back to exactly the same question  
19 that the tribunal asked the claimant: Would you  
20 like this information on the record? It seems to  
21 me the answer from them is "yes," which means that,  
22 as much as the tribunal wouldn't like that to  
23 happen, as much as we prefer to have this hearing  
24 all at once, I don't think there's a choice that's  
25 been left. It was the claimant who proposed to

1 proceed this way. We either proceed this way, and  
2 it has the effect, but I think now we have to take  
3 a real look and say, "Okay, at this point, you are  
4 essentially electing to bifurcate."

5 THE CHAIR: I think, unless my  
6 colleagues have questions, I would briefly give the  
7 floor to Mr. Appleton and again to you, and then we  
8 stop this debate and go over to the openings, and  
9 the tribunal will obviously have to consult on this  
10 issue because it is not going away. It is becoming  
11 worse. So we certainly need to do the right thing,  
12 but before we close this debate for the time being,  
13 Mr. Appleton, or Mr. Mullins, would you like to  
14 react to what you just heard?

15 MR. MULLINS: I'd be delighted to.  
16 I have not heard counsel deny that this isn't in  
17 Canada's favour. He didn't deny that.

18 I also have not heard, and I think  
19 I heard to the contrary, that they don't intend to  
20 cross-examine my experts on these issues. So the  
21 plan, I think, is that what he wants to do is  
22 cross-examine on issues that his expert came up and  
23 not allow our expert to respond. We gave them this  
24 information ahead of time, and we're being punished  
25 for it. I cannot imagine, had we not done that, we

1 would be in this situation, because our expert  
2 would have had to deal with it. Maybe they would  
3 have complained then too. At this point, I don't  
4 know. There has been no change in the methodology.  
5 None. I cannot imagine why Canada is raising this  
6 issue. Are they really going to cross-examine our  
7 witness and look at the figures and try to increase  
8 the damages to their client? Is that the plan? If  
9 the answer is they're willing to accept our  
10 original numbers and they're willing to concede  
11 that they're not going to cross-examine on any of  
12 the changes and they are willing to accept the  
13 numbers, then that's fine. But they can't have it  
14 both ways. If they are going to attack the  
15 credibility or analysis of our expert, he's got to  
16 be able to respond to that, especially when it's to  
17 their favour, and that's our concern.

18                   We've been completely open. We've  
19 given them our analysis. They've had this since  
20 October 17, and they've done any analysis they need  
21 to do. So our position is we can leave the reports  
22 as it is, and they'll agree that they're not going  
23 to go into those issues, or they can take the  
24 analysis we've given them and deal with that. But  
25 they can't have it both ways. We certainly don't

1 think there is any reason to bifurcate. The idea  
2 that an expert can't alter his analysis during  
3 an arbitration where we're going to have witnesses,  
4 and they're both here, why are they here?

5                   You're here. You're going to ask  
6 questions. Counsel is going to ask questions.  
7 They're going to be cross-examined. There is  
8 always going to be some give and take. And the  
9 idea that everybody is locked in, to me, is  
10 patently absurd. But we're willing to do that.  
11 But we are not going to have a situation where they  
12 cross-examine our guy and he can't answer. That is  
13 not fair and violates our rights.

14                   THE CHAIR: Any reaction to this?  
15 It's not an obligation; it's an opportunity.

16                   MR. SPELLISCY: I think I will try  
17 and be brief. The claimant's counsel is saying  
18 this is to Canada's benefit. I don't know that.  
19 I haven't done the evaluation. Whether the  
20 corrections in the calculations are done right,  
21 I don't know that. I haven't done that. I haven't  
22 looked at that. Neither has my expert. They're  
23 talking about, well, we reduced the damages by this  
24 much. Maybe a correct reduction based on their new  
25 valuation dates would be far greater. That's the

1 concern here.

2                   Now, on the idea of  
3 cross-examination and whether we were going to  
4 question, of course we were going to question their  
5 witnesses on the theories that they presented. He  
6 presented a valuation date. We will question him  
7 on that.

8                   The question now is he presented a  
9 theory of Article 1105 damages which is totally  
10 different than the theory they're now advancing.  
11 Of course, we would question them on that, on  
12 whether that made any sense. He presented new  
13 evidence. That's not -- documents upon which to  
14 base a theory that aren't in the record at all that  
15 have been in the claimant's possession for years.  
16 We have pointed out again and again those documents  
17 should have been in the record, but they weren't.  
18 So it comes down to it's not a question -- and the  
19 claimant's counsel keeps coming back to this. It's  
20 not a question of the claimant being allowed to  
21 respond. It's a question of the timing of that  
22 response and allowing the other side an adequate  
23 opportunity to evaluate what was done. And that's  
24 what the issue is here. We are, in essence,  
25 sitting here right now arguing about exactly what

1 we argued about when this was filed on the 18th and  
2 the 20th.

3           The claimant is just raising the  
4 exact same positions. The tribunal considered  
5 those positions and made the ruling it made. The  
6 claimant is asking us to forget that that ruling  
7 has come out that you shouldn't do that. We can't  
8 be in a position. And to say that we've had this  
9 since October 17th, but on October the 20th or  
10 October the 21st, the claimant said, "We withdraw  
11 it." Well, we're only five days after that, and to  
12 suggest that we should have been working on  
13 something that the claimant withdrew from the  
14 record, suspecting that they were going to try and  
15 do orally what they were told they couldn't do in  
16 writing, I think, is ludicrous. Thank you.

17           THE CHAIR: We will leave this  
18 issue for the time being. We will, of course, take  
19 it up again relatively soon because the parties  
20 need to know how the hearing will evolve, but for  
21 the time being, we will now hear Canada's opening  
22 argument.

23           MR. SPELLISCY: I think you  
24 probably have them behind you, sitting on the  
25 counters behind you.

1                   I will raise one technical issue  
2 first. I'm told by some of the people on our side  
3 in the back of the room that they are actually  
4 having difficulty with the split screen, seeing  
5 some of the slides because they're small. It is  
6 not objectionable to anybody. While people won't  
7 be able to see my handsome face while I'm  
8 arguing -- I'd be fine to have my disembodied voice  
9 up there on the slide on the whole screen. People  
10 will still be able to hear.

11                   THE CHAIR: Is this fine with the  
12 claimant? I think we did this before just to make  
13 sure that the people in the viewing room also see  
14 what happens in the hearing room, but if this is  
15 not a good solution, then we can change, at least  
16 for the time being.

17                   MR. MULLINS: We have no objection  
18 to opening. But certainly during examination, we  
19 think we're going to have to have the split screen.

20                   THE CHAIR: We'll go back to the  
21 split screen during the witness examination and see  
22 how it works then, absolutely.

23                   MR. SPELLISCY: Well, good  
24 afternoon again.

25                   THE CHAIR: So now you have the

1 floor.

2 FURTHER SUBMISSIONS BY MR. SPELLISCY:

3 MR. SPELLISCY: We heard a lot  
4 this morning of allegations. We heard a lot of  
5 characterizations about the facts. What we didn't  
6 do is walk through a lot of the actual evidence  
7 that's so far on the record. So I think one of  
8 things that you'll see in the presentation that I'm  
9 about to give is I'm going to walk you through some  
10 of that evidence. I'm going to walk you through  
11 what's already in the record, and in that way, when  
12 you start to hear what the witnesses are saying and  
13 when you hear what the testimony is here, I think  
14 that will give you a little more context, and I do  
15 note that some of what I will reference today is  
16 confidential information. I will take the  
17 appropriate precautions and break at the time that  
18 we need to do that. I think there are two  
19 instances where we need to do that. I think they  
20 are about an hour -- just over an hour in, but  
21 I will certainly alert for the feed to be cut off  
22 at that time.

23 And with that, let's get started.

24 Over the course of the next couple of hours and, in  
25 fact, over the course of this entire week, what we



1 hope to be able to show you is why this claim  
2 simply cannot proceed. The claimant is attempting  
3 to bring claims to arbitration here which are  
4 excluded from the scope of Chapter 11 because they  
5 are not the acts of government or acts of delegated  
6 governmental authority because they have heard  
7 prior to the claimant even making its investment in  
8 Canada, because they are explicitly excluded from  
9 Chapter 11 by Article 1108, and because they did  
10 not cause the claimant any damages.

11 In fact, as I will get to later,  
12 the only claim that is within the scope of the  
13 obligations in Chapter 11 is the claimant's  
14 allegation, at least it made in its written  
15 submissions -- we didn't hear much about it this  
16 morning -- that the Bruce-to-Milton allocation  
17 process, the June 3rd directive, violated Article  
18 1105. But that claim is barred as well because as  
19 I will explain to you, the conditions of Canada's  
20 consent to arbitration were not respected by the  
21 claimant, and as a result, this tribunal lacks  
22 jurisdiction to hear this claim.

23 Now, this might seem like  
24 a drastic result in the end, but what I hope to be  
25 able to show you is that, in these circumstances,

1 it is not only an appropriate conclusion, but it's  
2 the only possible one that you can draw as a matter  
3 of law. But even if you did go further and even if  
4 you did consider claims of the claimant here, we  
5 will show you that there is nothing to them as  
6 a matter of merit.

7                   Let me take a little more time to  
8 explain that point: This is a case which is, as  
9 the expression goes, about sour grapes. It is  
10 a case about an investor who took a business risk  
11 and is unwilling to accept that that risk did not  
12 pay off. It is a case about an investor who wanted  
13 Ontario to buy what it was selling, and when it  
14 failed in the procurement process that it applied  
15 to, it looked for someone to blame. It's pointed  
16 the finger at the government, but as the evidence  
17 in the record shows, it has only itself to blame  
18 for its failures.

19                   Indeed, while the claimant would  
20 have you believe -- and it seems so this morning --  
21 that the FIT Program and the GEIA are the source of  
22 its problems, the record shows otherwise. This  
23 story actually starts long before any of those  
24 measures occurred. About a year prior to any of  
25 the measures in question, the claimant bet over

1     \$150 million in the form of a nonrefundable deposit  
2     in a turbine purchase agreement with General  
3     Electric that it would be able to develop a massive  
4     wind farm, not in Ontario, in Texas, which is known  
5     as the Pampa Project. At the time that it did so,  
6     the claimant had no prior experience developing  
7     wind farms, no contracts to sell the wind power, no  
8     permits, approvals, or anything else. There  
9     weren't even the wires to carry the electricity.

10                     Now, this was certainly the  
11     claimant's risk to take, but not all risks pay off,  
12     especially in a nascent industry like the renewable  
13     energy industry, and it turned out the result for  
14     Pampa was exactly as one would expect. It failed.  
15     And this is how the claimant ends up in Ontario,  
16     carrying a \$150 million albatross around its neck.

17                     So what did the claimant do in  
18     those circumstances? Did it approach the  
19     Government of Ontario, trying to negotiate  
20     a specific commercial deal? No. Many other  
21     companies did, and one of those companies we've  
22     heard a lot about this morning, Samsung. Samsung  
23     was able to successfully conclude an investment  
24     agreement with the government. The claimant,  
25     however, never approached the government about

1 an investment agreement.

2                   Instead, it applied to the FIT

3 Program. So what was that program? It was

4 a standard offer procurement program that Ontario

5 directed a state enterprise called the Ontario

6 Power Authority to run. The goal of the program

7 was to procure renewable energy generation, but to

8 do so also in a way that stimulated jobs in the

9 local economy. Applicants to the FIT Program

10 competed with each other for access to space on the

11 existing transmission grid. So in essence, when

12 the claimant decides to apply to this program, what

13 it decides to do is to compete for limited

14 transmission capacity with hundreds of others of

15 experienced developers, all with the same idea, all

16 with the same hopes and dreams. And in a standard

17 offer program like the FIT Program, developers

18 can't compete on price. They can't compete on

19 other terms that allow themselves to differentiate.

20 Instead, they are evaluated on the quality of their

21 applications with respect to pre-existing specified

22 criteria.

23                   Now, this morning we heard almost

24 nothing about the claimant's applications to the

25 FIT Program. The fact is, as the evidence will

1 show you, they were poorly done. They were sloppy.  
2 They seemed to rely on an assumption that they  
3 would be well received simply because of who was  
4 involved, Mr. Pickens and General Electric. That  
5 was not enough. The FIT program was administered  
6 without regard for who was submitting it, without  
7 regard for reputation and name.

8                   The sole question for the Ontario  
9 Power Authority in scoring the applications was  
10 whether the required information was provided. The  
11 claimant's applications were scored by the OPA in a  
12 process monitored by an independent third party,  
13 exactly as they deserved. And as a result, they  
14 were not highly ranked in the process. And when  
15 the time came to hand out contracts, they did not  
16 get one. And ultimately that is what this case is  
17 about. On July 4, 2011, the claimant was not  
18 offered a FIT contract. If they had put together  
19 better applications, they may well have been.

20                   And I think that this is  
21 an important part to remember. This is not a case  
22 where the claimant had an operating wind farm and  
23 the government decided to revise the contract after  
24 all the capital was expended. This is a case about  
25 a claimant simply failing in the procurement

1 process in which it applied to. The claimant asked  
2 that this tribunal find that this failure results  
3 from a failure of NAFTA Chapter 11.

4 As I will show this morning and as  
5 the evidence will prove this week, its claims are  
6 meritless.

7 For example, the claimant alleges  
8 a breach of the National Treatment Article, Article  
9 1102. But in order to prove such a breach, the  
10 claimant must prove that it received less  
11 favourable treatment than the treatment accorded in  
12 like circumstances to Canadian investors.

13 But here, as we heard this  
14 morning, the claimant compares itself to entities  
15 which are not Canadian investors; they are the  
16 investments of U.S. and Korean investors. Such  
17 investments cannot be the basis for claim under  
18 Article 1102.

19 And now, as we'll find out later,  
20 there are indeed Canadian investors who actually  
21 applied to the FIT Program and applied in the same  
22 areas that the claimant did. The claimant ignores  
23 those, and it does so for an obvious reason. All  
24 applicants to the FIT Program received the same  
25 treatment. There was no discrimination.

1                   And so instead of looking to the  
2 Canadian nationals who were accorded treatment in  
3 the same circumstances that it was, the claimant  
4 tries to stretch and distort Article 1102 into  
5 something that it is not. The tribunal should deny  
6 those efforts.

7                   The claimant also alleges a breach  
8 of Article 1103, and that's, in fact, what they  
9 spent almost all of their presentation on this  
10 morning. That's the MFN clause, NAFTA. In order  
11 to prove such a breach, the claimant would have to  
12 prove that it was accorded treatment that was less  
13 favourable than that accorded in like circumstances  
14 to an investor of some third state. The claimant  
15 cannot do so.

16                   In its written submissions, it  
17 referred to the treatment accorded to NextEra.  
18 NextEra, formerly known as Florida Power and Light,  
19 is a US company. It is not a national of a third  
20 state. It is a US national.

21                   It also spent much of its time  
22 talking this morning about the Korean Consortium,  
23 and, well, Samsung and the Korean Consortium are  
24 obviously nationals of the third state. The  
25 claimant tries to get you to understand that the

1 one fact that is important is not. The Korean  
2 Consortium was not seeking a contract under the FIT  
3 Program like the claimant was.

4           Again, there are investors from  
5 third states who were FIT applicants in this  
6 program, like the claimant, but the claimant  
7 doesn't point to those. And, again, the reason is  
8 obvious. They received the same treatment that the  
9 claimant did. The FIT Program was designed and  
10 implemented on a nationality-neutral basis. There  
11 is no violation of Articles 1102 or 1103 here.

12           The claimant also alleges that the  
13 treatment it was accorded violates the customary  
14 international law minimum standard of treatment in  
15 Article 1105.

16           Now, in order to prove such  
17 a claim, the claimant is required to show how the  
18 treatment that it was accorded is of the egregious  
19 sort that sort of shocks the judicial conscience.  
20 The classic example is a denial of justice. To  
21 meet its burden, though, in this case, the claimant  
22 conjures up a conspiracy theory that defies reason  
23 and suggests distorted interpretations of the FIT  
24 rules and the FIT program that do not withstand  
25 scrutiny.



1                   Further, it ignores -- and it  
2 ignored this morning -- the sloppiness of its own  
3 efforts. It demands that it be given treatment  
4 that would be contrary to the expectations of  
5 everyone else in the FIT Program, and it ignores  
6 all the legitimate policy reasons why the FIT  
7 program developed the way it did.

8                   Ultimately, the claimant can offer  
9 all the speculation it wishes, make all of the  
10 unsupported allegations that it wants, and cast all  
11 the aspersions it desires. Nothing changes the  
12 fundamental facts of this case. The claimant was  
13 afforded a level playing field. There was no  
14 favoritism, no unfairness, no discrimination, and  
15 no manifestly arbitrary or other egregious act.

16                   The claimant simply failed to  
17 succeed. NAFTA is not an insurance policy to  
18 protect investors from their own bad business  
19 decisions or their own mistakes. There is no  
20 breach of NAFTA in this case.

21                   I would like to pause here and  
22 explain how I will structure the remainder of my  
23 remarks. In the next part of my presentation,  
24 I will give you an overview of some of the relevant  
25 facts and walk you through some of the relevant

1 exhibits and documents already in the record. Then  
2 I will highlight, to the best my ability, at least,  
3 which of the measures are being alleged to be  
4 a breach of NAFTA.

5                   Now, this is certainly a little  
6 bit complicated because, in the written  
7 submissions, the claimant seems to challenge  
8 everything from the Electricity Act itself to  
9 conversations and meetings that the government had  
10 with other investors.

11                   They were much more focused today  
12 in their oral remarks, but I will at least  
13 highlight in their written submissions the  
14 challenges that they made so that we can understand  
15 perhaps from them if they are, in fact, dropping  
16 some of these claims.

17                   In the next part of my remarks,  
18 which will be the third part, I will explain why  
19 the challenge to the measures are outside of the  
20 scope of Chapter 11 and not within the jurisdiction  
21 of this tribunal.

22                   And finally, I will discuss why,  
23 even if this tribunal were to consider the  
24 claimant's allegations, did not have any merit, and  
25 even if they did, why the claimant's request for

1 damages, at least as what stood before today, is  
2 grossly overinflated.

3                   So now let's go to the facts. And  
4 I won't attempt to go through all of them here.  
5 There are too many, and they are fully detailed in  
6 our written submissions. Rather, what I will do  
7 here is try to give you some signposts. And in  
8 this regard, I will note that, in the materials  
9 that we have provided to you, there is a timeline  
10 at the back. It's rather large; it's been folded  
11 in. I won't be specifically referring to the  
12 timeline at the end, but if you want to take a look  
13 at it, at the end of the day, so that you can  
14 situate yourself on where some of these key events  
15 are, then I think you are more than capable of  
16 doing so.

17                   There will be four major areas  
18 that I will cover today in my discussion of the  
19 relevant facts. First, I will talk to you about  
20 the FIT Program, which is a program to which the  
21 claimants applied. Second, we'll discuss the  
22 Green Energy Investment Agreement with the Korean  
23 Consortium, which was being developed at the same  
24 time the FIT Program was being developed. We'll  
25 then talk about the claimant's applications to the

1 FIT Program, and finally we'll come to the  
2 Bruce-to-Milton allocation process, which would  
3 have been the first time that the claimant could  
4 possibly have gotten a contract.

5                   So let's start with the first, the  
6 FIT Program. To understand the story of the FIT  
7 Program, we need an understanding of where Ontario  
8 found itself at the beginning of the new millennium  
9 in terms of its power systems and the challenges  
10 they presented, both as a matter of infrastructure  
11 and as a matter of the environment.

12                   By 2003, Ontario was faced with  
13 electricity growth, but in the past decade, it had  
14 not added significant generation capacity. At the  
15 time, its generation assets were largely nuclear  
16 and hydro, but it also was reliant upon coal. That  
17 accounted for about 25 per cent of the capacity,  
18 and the new government promised to close the  
19 coal-fired plants for health and environmental  
20 reasons. As Sue Lo, who is now an Assistant Deputy  
21 Minister at the Ontario Ministry of the Environment  
22 and who was previously an Assistant Deputy Minister  
23 at the Ministry of Energy explained:

24                   "Ontario's was a system that  
25                   was heavily reliant on

1 coal-burning generation  
2 plants, which polluted the  
3 air and possibly increased  
4 the risk of respiratory  
5 illness. Studies that the  
6 Government of Ontario had  
7 done indicated that the  
8 potential health and social  
9 costs of relying on coal were  
10 in the order of billions  
11 annually." [As read]

12 So there was a desire to get rid  
13 of coal by 2014. But, of course, you can't just  
14 take a major source of electricity supply out of  
15 the grid. You do that, and the lights go off. So  
16 in deciding to eliminate coal generation, the  
17 government knew that it would need to procure new  
18 types of generation as well. Ontario looked to  
19 refurbishing nuclear power plants into natural gas  
20 facilities, but it also decided, as many  
21 jurisdictions had, to make a push for green  
22 renewable energy sources.

23 And I think it's important here to  
24 step back and also understand the broader context  
25 in which all of this decision-making and this

1 pushing is happening. At the same time these  
2 decisions are being made, the world economy is  
3 falling apart in the financial crisis. By the time  
4 we get to the fall of 2008, things are bad. Banks  
5 were failing, including some of the largest in the  
6 world. Unemployment rates were exploding, and  
7 whole industries, like the auto industry, were on  
8 the verge of collapse, requiring government  
9 bailouts.

10 As Canada Governor-General said in  
11 her speech from the throne at the beginning of  
12 2009, it was a time of unprecedented economic  
13 uncertainty. The credit crunch had dragged the  
14 world economy into a crisis from whose pull we  
15 cannot escape. The impacts of this were being felt  
16 everywhere but particularly in Ontario which had a  
17 large manufacturing sector. When credit dries up,  
18 people can't buy goods, and when they aren't buying  
19 goods, then the business of making them dries up as  
20 well. And this is what happened in Ontario, idling  
21 plants, idling workers, and creating a  
22 unsustainable situation. As Sue Lo has explained:

23 "In these circumstances,  
24 Ontario determined that not  
25 only would it use Green

1 Energy to fulfil its power  
2 needs but that it would use  
3 its purchasing power as a  
4 government to acquire that  
5 energy in a way that  
6 stimulated the economy and  
7 created jobs and investment  
8 opportunities in the  
9 province." [As read]

10 Now, I just want to pause on that  
11 policy point. A government's purchasing power is  
12 one of the most effective tools that it has in the  
13 times of economic crisis to stimulate growth and  
14 create jobs. There is a reason why, in Canada, in  
15 the U.S, and elsewhere, stimulus programs during  
16 the financial crisis included infrastructure  
17 projects. It is because government money can be  
18 spent in a way that puts people back to work. The  
19 ability to do this is a fundamental tool in the  
20 government's toolbox. That is also why governments  
21 the world over have carefully circumscribed any  
22 international procurement commitments that they've  
23 entered into.

24 So in the face of this context of  
25 the need for new energy but the fiscal crisis,

1 Ontario embarks on a procurement effort to change  
2 the face of energy production in Ontario, and there  
3 were several aspects to this initiative.

4           The one that has the most  
5 relevance is, of course, the FIT Program, because  
6 that's the one the claimant applied to. And so the  
7 other is a Green Energy Investment Agreement, and  
8 we'll get to that in a little bit. Right now  
9 I want to focus on the FIT Program, not  
10 an agreement that the claimant wasn't a party to.

11           The FIT Program finds its origins  
12 in Ontario's Green Energy and Green Economy Act of  
13 2009. That Act was introduced into the Ontario  
14 legislature and was made public on February 23,  
15 2009, and the proposed escalation added  
16 Section 25.35 to the Electricity Act. This article  
17 authorized the Minister of Energy to direct the OPA  
18 to establish a FIT Program.

19           And as we can see on the slide,  
20 that article makes clear that the FIT Program was  
21 to be designed to procure energy from renewable  
22 energy sources and was expressly designed to be  
23 a program for procurement.

24           I think here's a good time to stop  
25 just for a second to explain the Ontario Power



1 Authority. Obviously, we have had a lot of  
2 submissions on it, but it is the OPA that's being  
3 directed here. The Ontario Power Authority is an  
4 independent state enterprise. It is a corporation  
5 created by the Government of Ontario and owned by  
6 the Government of Ontario. It is created pursuant  
7 to the 2004 Electricity Restructuring Act.

8           The Electricity Restructuring Act  
9 amended the Electricity Act by adding to Article 25  
10 to create the OPA, and, among other things, the OPA  
11 was to ensure adequate and reliable and secure  
12 electricity supply and was given the express power  
13 to enter into contracts relating to the procurement  
14 of electricity supply and capacity.

15           That's what the OPA was designed  
16 to do: Procurement. And in accordance with its  
17 role, when the legislation was introduced into the  
18 Ontario legislature for the Green Energy and Green  
19 Economy Act, the OPA began its work on the FIT  
20 Program and the development of it, including  
21 holding numerous stakeholder presentations.

22           During these sessions, all aspects  
23 of the proposed program and rules were discussed,  
24 consulted on, evaluated, and considered. Jim  
25 MacDougall, the manager of the Feed-in Tariff

1 program at the time of its development, in 2009,  
2 explains:

3 "Representatives from all  
4 sectors of the energy  
5 industry, energy  
6 associations, nongovernmental  
7 organizations, and aboriginal  
8 consumer groups  
9 participated." [As read]

10 In the very first stakeholder  
11 presentation to the public, which was held on March  
12 17, 2009, the OPA clearly described what the FIT  
13 Program would be.

14 It said:

15 "A FIT Program provides a  
16 simple standardized  
17 procurement method to  
18 contract for renewable energy  
19 supply technologies." [As  
20 read]

21 The GEIA was passed and received  
22 Royal Assent on May 14, 2009. A few months later,  
23 after a summer of public input, meetings, and  
24 consultations with all relevant stakeholders, on  
25 September 24, 2009, the Ministry of Energy directed

1 the OPA to create the FIT Program. Let's take  
2 a look at that direction.

3 As we can see from that, the OPA  
4 was to establish a Feed-in Tariff program that was  
5 specifically designed to procure energy from a wide  
6 range of renewable energy sources. One week later,  
7 on September 30, the FIT Rules are released, and  
8 the OPA opens the process to applications.

9 So now let's try to understand how  
10 the FIT Program was designed to happen. The first  
11 step was for an applicant to submit an application  
12 to the OPA. The OPA would then review the  
13 application for completeness and eligibility. Now,  
14 this first stage of the review was designed to  
15 consider formalities, really. Are all the right  
16 boxes checked? Are all the right parts of the form  
17 filled out? It was not a substantive review like  
18 the review for criteria points we will discuss  
19 shortly, and it wasn't intended in its design to be  
20 a major choke point to eliminate applications.

21 However, intentions do not always  
22 play out in the real world, as Mr. Duffy, the  
23 manager for generation procurement at the OPA, has  
24 testified:

25 "Approximately 95 per cent of

1                   the applications would have  
2                   failed and been rejected  
3                   simply on the grounds that  
4                   they provided insufficient or  
5                   incomplete information to  
6                   establish their completeness  
7                   and eligibility." [As read]

8                   That's an obvious problem.

9           Remember, the FIT Program is intended to do two  
10           things: Help change Ontario over to a Green Energy  
11           infrastructure and to stimulate economic jobs and  
12           growth. But if 95 per cent of the projects had  
13           failed at this first stage, the whole initiative  
14           would have failed, as it would not have created  
15           enough energy to accomplish its goals. In essence,  
16           the consequences of failure of this landmark  
17           initiative were understood by the OPA, and so it  
18           reached out to applicants and helped them to ensure  
19           their applications were complete.

20                   In fact, they reached out to the  
21           claimant as well. As Mr. Duffy has testified, if  
22           the OPA had not reached out, the applications for  
23           the Arran and TTD Wind Projects would have been  
24           rejected at the first stage of our review.

25                   Now, let's come back to the

1 schematic that we had up showing the steps in the  
2 FIT Program, and we see that once the OPA had a  
3 collection of eligible and complete applications,  
4 it then had to figure out how to rank those  
5 applications in terms of who would get contracts.

6                   Now, one might ask why this step  
7 is necessary. Why couldn't everyone just get  
8 contracts? It seems to be part of what the  
9 claimant's theory is. Well, to understand why not,  
10 one has to understand about electricity. In  
11 essence, one can think about electricity in terms  
12 of supply and demand. It is generated and it is  
13 consumed, but things are more complicated because  
14 of the history of how and where it is generated to  
15 how and where it is consumed.

16                   First, generations centres are  
17 typically far away from population centres, that  
18 is, population centres that consume that  
19 electricity, so you need a way to transmit that  
20 electricity, and in Canada, the distances can be  
21 vast. And as a result, when you speak about  
22 electricity, it is all about the wires and, in  
23 particular, how much can be transmitted across  
24 those wires. And in this sense, an electricity  
25 system is not all that different from a road

1 network. You need to have highways in the right  
2 places so the cars can get from the places where  
3 people live to the places where they need to go.

4 But the problem is that, unlike  
5 with cars, electricity simply can't idle, waiting  
6 for the traffic to clear. As Rick Jennings,  
7 an Assistant Deputy Minister of the Ministry of  
8 Energy, has testified:

9 "The challenge of electricity  
10 is that, unlike other goods  
11 or services that may be  
12 procured, electricity, once  
13 generated, must be  
14 simultaneously transmitted  
15 and consumed. It cannot  
16 simply be stored away in a  
17 warehouse waiting for demand  
18 to allow it to be brought out  
19 of mothballs." [As read]

20 What does that mean? It means you  
21 have to consume what you generate. Supply must  
22 always equal demand. If there is too much supply,  
23 the wires can't handle it. They sag; they short  
24 out; they fail. If there is too little supply,  
25 people flip on that light switch and nothing

1 happens. So what you need is an electricity  
2 infrastructure system and generation resources  
3 capable of being flexible, and you need to have the  
4 flexibilities of government to respond to changes  
5 in demand and supply.

6 As Rick Jennings explains, this  
7 has to be done with three principles in mind:  
8 Reliability, cost, and sustainability.

9 So in considering how to design  
10 the FIT Program, the OPA had to deal with the fact  
11 that not all projects could come onto the grid at  
12 the same time because of transmission constraints.  
13 That would impact reliability, and, further, that  
14 any system that allowed more generation than was  
15 needed would not only lead to such issues, but that  
16 it could not, in the end, be either cost effective  
17 or sustainable.

18 What the OPA adopted is the most  
19 basic principle of ordering and ranking possible.  
20 Get in line, and we'll look at you in that order.  
21 But for the start of the program, this would create  
22 a race to the front, and then it's a question of  
23 policy. Is that what the government wants?

24 Let's come back to the ideas  
25 behind the FIT Program here: To transition to

1 renewable energy, sure, but also to create jobs and  
2 stimulate the economy and to do so as quickly as  
3 possible.

4                   And what projects are going to do  
5 that? It's the ones that are closest to operation,  
6 the ones that are most shovel ready, and a simple  
7 ordering by time of filing won't get you that at  
8 the start of the program.

9                   As Richard Duffy explains:

10                    "In an environment of limited  
11                    transmission capacity, a  
12                    simple ordering by timestamp  
13                    would reward those who got  
14                    their FIT applications in  
15                    quickly rather than those  
16                    whose projects were the  
17                    furthest advanced in terms of  
18                    development." [As read]

19                   So the OPA creates the launch  
20 period for the FIT Program when it opens to  
21 applications on October 1, and all applications  
22 filed in this time period were to be considered to  
23 be filed at the same time, and then their  
24 merit-based criteria would adjust their order in  
25 the position in the queue.



1                   In short, it was simple: The more  
2 points you were awarded, the higher rank you would  
3 get, which meant you would be considered for a  
4 contract sooner. And in figuring out what those  
5 criteria points should be, the OPA looked to its  
6 past practices in its past programs and chose four.  
7 First, was the program exempt from the renewable  
8 energy approval process, which is essentially an  
9 environmental approval process?

10                   Second, did the applicant already  
11 at the time of application own or have a firm order  
12 for major equipment components?

13                   Third, had the applicant  
14 successfully developed a similar facility to the  
15 project in the past?

16                   Fourth, did the applicant have the  
17 financial capacity to successfully develop the  
18 project?

19                   These are laid out in the FIT  
20 Rules in detail, and the requirements of proof for  
21 these criteria were also laid out in the FIT Rules.  
22 All of this had been publicly discussed in advance.

23                   Now, in the interest of time and  
24 efficiency, I don't propose to go to these right  
25 now, but we will come back to them when we actually

1 look at the launch period applications filed by the  
2 claimant.

3 Let's come back to our program  
4 schematic here, at least as it was initially  
5 designed, and once the ranking was determined, we  
6 see the next stage is whether the project passed  
7 what was called the transmission and distribution  
8 availability tests, the TAT/DAT.

9 In essence, these were the initial  
10 tests done to see if the OPA believed there was  
11 enough existing capacity on the transmission and  
12 distribution systems to add the project to the  
13 grid.

14 If you pass these tests,  
15 a contract can be awarded. But that's not the end  
16 of it, because while the OPA does the planning, it  
17 doesn't actually control the wires. So there was  
18 still other assessments that had to be done, other  
19 tests, before a connection would be permitted,  
20 including environmental assessments, but also  
21 technical assessments done by the transmitters. As  
22 a result, passing the TAT/DAT or even being granted  
23 a FIT contract did not guarantee that your project  
24 would ever reach commercial operation.

25 Now, up on that schematic there,

1 as it was initially contemplated, if the project  
2 failed this test, it says it would be terminated,  
3 but ultimately some more flexibility is introduced  
4 by the Ontario government and the OPA. The FIT  
5 Rules designed the Economic Connection Test. So  
6 let's talk about that because it didn't factor  
7 at all, I think, in the claimant's remarks this  
8 morning, but certainly a lot was made of it in the  
9 written submissions.

10 The Economic Connection Test was  
11 designed by the OPA as part of the FIT Program to  
12 accommodate expansion, if feasible. The FIT Rules  
13 provided that the intent of the test was to ensure  
14 that the cost of connecting a project that would be  
15 borne by rate pairs were reasonable. And so what  
16 is key here is that the Economic Connection Test  
17 would never have guaranteed anyone a contract.

18 The question was always whether it  
19 would be economic to develop additional capacity,  
20 and expanding the transaction system can be very  
21 expensive and very time consuming. As I said  
22 earlier, every system has its limits, and  
23 governments have to make decisions on what could be  
24 done based on principles of reliability,  
25 sustainability, and cost effectiveness.

1                   Now, other than its intent and  
2     purpose, the details of what actual steps the ECT  
3     would contain were essentially left undescribed in  
4     the FIT Program and the FIT Rules, and the OPA was  
5     responsible for figuring that out, and it did so in  
6     a series of public presentations by Bob Chow, who  
7     will be here this week, including presentations in  
8     March and May of 2010.

9                   The first step would be  
10    essentially a window to change connection points.  
11    This was part of what was called the "individual  
12    project assessment phase," and this phase was  
13    essentially an opportunity for everyone to readjust  
14    to most efficiently use the system resources with  
15    the knowledge of what had happened in the first  
16    TAT.

17                  So as Bob Chow explains, during  
18    this period, companies would have been allowed to  
19    change connection points; enabler-requested  
20    projects would have been able to decide what  
21    to do -- I'll talk about what those are in  
22    a second -- and generators would be able to decide  
23    whether they were willing to bear the cost of  
24    paying for upgrades.

25                  Why was this contemplated?

1 Because when you are applying to the FIT Program,  
2 developers would have had no idea where other  
3 developers were trying to connect. You went in  
4 blind. And so some might have picked a particular  
5 connection point, but everybody else might have  
6 been piling up on that connection point, not  
7 knowing it. Others might have elected to be a  
8 request to what is called an enabler, which meant  
9 they were seeking other nearby proponents to join  
10 with them to share the cost of the connections.  
11 But they might find out after the first test was  
12 run and after the first results were published that  
13 no one nearby wanted to be an enabler with them,  
14 and so they had to be allowed to readjust.

15 The second phase of the Economic  
16 Connection Test after everybody readjusted for  
17 efficiency was an analysis done by the OPA to see  
18 if the expansion was what it believed was economic.  
19 But that wasn't the end of it, because the OPA  
20 isn't the final approval body. Even if the OPA  
21 thought that an expansion could be economic, it  
22 would still need to be approved, permitted, and  
23 constructed. None of these things are certain. So  
24 a project that might even have passed even the  
25 second phase of the ECT, again, would not

1 necessarily be offered a contract and would have no  
2 guarantee of commercial operation.

3                   So that's the FIT Program in a  
4 nutshell. It was a first of its kind in North  
5 America and certainly a first for Ontario. It was  
6 an initiative adopted at a great time of great  
7 economic uncertainty that had the challenging goals  
8 of stimulating jobs while reinventing the  
9 electricity system, and it was into this program  
10 and this environment that the claimant applied.

11                   Now, I want to mention one other  
12 thing that was raised this morning, and that's  
13 about the domestic content requirement. I've  
14 obviously already explained to you the policy  
15 reason for why those were included and what the  
16 Ontario government was seeking to accomplish. But  
17 I think it's also important to remember in this  
18 context that you had to meet your domestic content  
19 requirements not at the time of application. You  
20 did not have to have domestic content when you  
21 applied to the FIT program, and, in fact, Mr. Duffy  
22 testified people got contracts even without showing  
23 that they had any domestic content under  
24 a contract. And that's because you just had to  
25 meet those requirements before you came into

1 operation, which was years into the future.

2 Now, before I get into what  
3 happened with respect to the claimant's  
4 applications to this program, I want to spend a few  
5 minutes talking about the GEIA, because this  
6 morning was almost entirely devoted to it, but,  
7 again, the claimant -- this is a Green Energy  
8 Investment Agreement. It's between Ontario and the  
9 Korean Consortium. The claimant is not a party to  
10 it.

11 The claimant has suggested,  
12 somehow, that there was a secret. That's not true.  
13 Let's go through some of the history here, and  
14 we'll see what was publicly known and what the  
15 claimant knew before deciding to invest in Ontario.  
16 In the summer of 2008, Samsung reached out to  
17 Ontario to see if they could negotiate a specific  
18 deal with the government. It was not the other way  
19 around. The government didn't invite it; this was  
20 a Samsung-initiated deal, but the government was  
21 certainly interested. Rick Jennings and Sue Lo  
22 told you why, and Sue Lo, in her witness statement,  
23 has explained that Samsung was offering not only to  
24 help bring jobs and manufacturing to Ontario, but  
25 to act as an anchor and a marquis tenant in the

1 renewable energy sector.

2 Remember the context of everything  
3 that's happening here is the fiscal crisis, and  
4 while Ontario was hoping to incent investors with  
5 the FIT Program, it was unclear whether there would  
6 be sufficient interest in that program. It was  
7 unclear whether that capital would get off the  
8 sidelines. In short, Ontario was worried that they  
9 were going to throw a party, and no one would come.  
10 Getting Samsung to commit a marquis name was a huge  
11 win in and of itself for investor confidence.

12 Now, in December 2008,  
13 a Memorandum of Understanding was signed between  
14 Samsung and Ontario, and the claimant has made much  
15 of this. In reality, there is not much to it.  
16 It's a deal to try and negotiate with each other.  
17 And if we go to the MOU and we look at paragraph 4,  
18 it provides that:

19 "The parties agree to  
20 cooperate and negotiate  
21 exclusive with each other in  
22 good faith in connection with  
23 wind and solar procurement of  
24 2,000 megawatts of wind power  
25 and 500 megawatts of solar."



1 [As read]

2 But look to the next paragraph.

3 It says:

4 "Nothing in this MOU shall  
5 affect the rights of the  
6 Government of Ontario or the  
7 Ontario Power Authority  
8 concerning any current or  
9 future Government of Ontario  
10 or Ontario Power Authority  
11 programs related to renewable  
12 energy procurement." [As  
13 read]

14 So what is the agreement really  
15 here? Ontario agrees to negotiate exclusively with  
16 Samsung towards an agreement for 2,000 megawatts of  
17 wind and 500 of solar, and Samsung agrees to do the  
18 same. That was important. Ontario did not want  
19 Samsung also to go off to another jurisdiction to  
20 see if it could get a better deal elsewhere.

21 Now, with respect to this clause,  
22 recall also that Ontario is using renewable energy  
23 to replace, at least in part, its reliance on Coal.  
24 There were more than 2,500 megawatts needed, and  
25 the second paragraph recognizes this and allows

1 Ontario to embark on programs for other procurement  
2 initiatives.

3 In fact, it's exactly what the  
4 Premier of Ontario himself said when announcing the  
5 Green Energy Investment Agreement publicly on  
6 January 21, 2010 when it was signed. Specifically,  
7 he said:

8 "If there are other companies  
9 out there who have in mind to  
10 put in place this kind of  
11 manufacturing infrastructure  
12 that enables us to go beyond  
13 meeting our own demand, our  
14 own needs here in Ontario, to  
15 reach into the Ontario  
16 market, we are all ears."

17 [As read]

18 Other companies did exactly that.  
19 They reached out. They negotiated both before and  
20 after the GEIA was announced. You have the  
21 evidence in the record. I'll take the time since  
22 we didn't do written submissions to point to some  
23 of the new evidence, R204 and R205.

24 Now, none of these negotiations  
25 were ultimately successful, and that's because none

1 offered the same value to the Government of Ontario  
2 that Samsung did, but, importantly, the claimant  
3 was not one of those companies. Instead, it only  
4 applied to the FIT Program in November of 2009, in  
5 May of 2010.

6           The claimant made a lot of the  
7 confidentiality of these negotiations this morning.  
8 Of course, no party is required to disclose the  
9 terms of its commercial deals, certainly not while  
10 negotiations are ongoing. I need only remind the  
11 tribunal that the claimant has fought hard to keep  
12 all of the contents of its deals confidential even  
13 long after they've been terminated. Ontario is no  
14 different. But in this case, any claim that the  
15 claimant could not have known about this deal with  
16 Samsung prior to making its first investments in  
17 Ontario simply does not withstand scrutiny.

18           Let's look at what the claimant  
19 would have known prior to making its investments  
20 and prior to applying to the FIT Program. On  
21 September 26, 2009, before the FIT Program even  
22 launches, the Minister of Ontario and Samsung  
23 jointly issued a press release explaining that:

24                       "Efforts are progressing well  
25                       toward the signing of an

1 historic framework  
2 agreement." [As read]

3 And while they indicated that the  
4 contents of an agreement were commercially  
5 sensitive, they both committed to giving a formal  
6 public presentation once the agreement was signed.  
7 Then, on September 30, the claimant pulled this  
8 exhibit up, but now with the context, we can  
9 understand it:

10 "The Minister of Energy  
11 directed the OPA to hold in  
12 reserve 500 megawatts for  
13 proponents who have signed a  
14 province-wide framework  
15 agreement." [As read]

16 That's four days after the joint  
17 press release with Samsung.

18 What happens over the next couple  
19 of months? On October 31, in an article in one of  
20 Canada's largest newspapers, the Toronto Star, it  
21 was reported that the deal with Samsung would give  
22 them priority access to Ontario grid space. It's  
23 these parts of the GEIA and particularly the  
24 priority access to Ontario's grid space that the  
25 claimant is concerned about here. The claimant did

1 not make its investments until November of 2009,  
2 after all of this was publicly released.

3 Now, that's the claimant's choice  
4 to make, but let's be clear: It made it with the  
5 full knowledge of at least the competitive  
6 environment, and it chose to apply to a standard  
7 offer program with hundreds of other applicants.  
8 It may not have known of the exact terms of this  
9 commercial deal, but it knew that it was out there,  
10 and it knew exactly the terms that it's concerned  
11 about now.

12 So at this point, I want to now  
13 come back to what's really relevant here, and it's  
14 the FIT program, and look at these applications  
15 that were actually filed by the claimant, and the  
16 claimant didn't discuss this at all this morning,  
17 besides pointing, I think, to where they were.

18 But let me go through this in  
19 a little more detail because I think it's a key to  
20 understand. The claimant made two applications  
21 during the launch period which were ranked  
22 according to those merit criteria I had discussed  
23 earlier, which were the TTD and the Arran projects,  
24 and two afterwards, the North Bruce and the  
25 Summerhill. Those were ranked purely according to

1 the time that the OPA received them and nothing  
2 else.

3 Now, as I discussed earlier, there  
4 are limits as to how much electricity can be  
5 transported on the transmission infrastructure, and  
6 those limits apply at different bottlenecks in the  
7 system. The claimants, all of their applications,  
8 were in an area of Ontario known as the  
9 Bruce Region, so let's take a look at a map. This  
10 shows the transmission capacity coming out of the  
11 Bruce Region at the time of the launch of the FIT  
12 Program. The Bruce Region is shaded in orange. It  
13 is down there at the bottom there because the  
14 capacity was zero, and everyone knew it was zero.  
15 The claimant applied to connect its projects in  
16 a region in which there was no possibility to  
17 connect at the time that it filed its applications.

18 Now, it did that because it was  
19 betting on a new line called the Bruce-to-Milton  
20 line receiving its final approvals, but it did that  
21 also knowing that it would need good applications  
22 because of the strong wind resource in that area,  
23 and that's shown by the purple blob on the OPA's  
24 map there. And if there is a strong wind source,  
25 it would know that others would want to relocate



1 All applications, everyone's.  
2 "-- were assessed solely on  
3 what was within the four  
4 corners of the paper in front  
5 of the OPA. The OPA would  
6 not assume; it would not do  
7 any other research; it would  
8 not contact anyone to confirm  
9 any facts." [As read]

10 That applied to everyone. So  
11 let's go through this and compare what the claimant  
12 submitted with what the FIT Rules required to get  
13 points.

14 I'm sorry. Here's where we're  
15 going to have to go into confidential session, so  
16 if we can cut the feed for a second here.

17 MR. APPLETON: Confidential or  
18 restricted?

19 MR. SPELLISCY: Confidential.

20 It's your application.

21 --- Upon commencing the confidential session under  
22 separate cover

23 --- Upon resuming in public

24 MR. SPELLISCY: As can be seen,  
25 the claimant did not file good applications. And



1 as a result, their applications were not highly  
2 ranked.

3 The first FIT contracts were  
4 awarded in April of 2010, 184 in total for  
5 2,500 megawatts. In addition, there were 242 large  
6 FIT projects that received rankings. They sought  
7 a total capacity of 6,000 megawatts. These  
8 rankings, which included the claimants, were  
9 published by the OPA on December 21st, 2010. Out  
10 of those 242 projects, the claimant's Arran and TTD  
11 projects came in at 91st and 96th in the province.

12 Now, what you can also see from  
13 these numbers is a huge amount of interest that the  
14 FIT Program actually developed and then generated.  
15 It was for more than the government had expected to  
16 launch, and the applications were still coming in,  
17 including the final two for the claimant, which  
18 didn't come in until May of 2010.

19 The success of the program was  
20 causing the impact on the ratepayers to sky rocket.  
21 While Ontario had been worried that no one would  
22 show up to the party, the reality turned out to be  
23 that too many guests came. At the same time, this  
24 is coupled with the decrease in electricity demand  
25 via brought on by the continued economic

1 difficulties that had stretched now for several  
2 years.

3                   And so Ontario was faced again  
4 with the need to review its policies and programs  
5 in light of the core principles that I keep coming  
6 back to. Would it still believe the policies in  
7 place would lead to a reliable, sustainable, and  
8 cost-effective electricity system?

9                   With that in mind, let's come to  
10 the final part of the facts, the Bruce-to-Milton  
11 allocation, and this involves how Ontario was  
12 looking to deal with the success of the FIT program  
13 in 2010.

14                   As Sue Lo has explained, the  
15 culmination of these supply, on the FIT side, and  
16 demand factors confirmed that Ontario would need to  
17 slow down the rate of its procurement of renewable  
18 energy. As a result, we saw on the slide that I  
19 pulled up earlier from Mr. Chow that the ECT was  
20 originally planned to be run in August of 2010, but  
21 it was not. It was postponed. Instead, in the  
22 fall of 2010, the Ministry of Energy began work on  
23 what was known as a long-term energy plan, or LTEP.  
24 This LTEP was published on November 23, 2010, and  
25 it introduced a target of 10,700 megawatts of

1 renewable capacity by 2018.

2 Now, we've seen some of the  
3 numbers from the FIT Program. By the time that the  
4 LTEP was published, Ontario was already approaching  
5 this target, and as such, it had necessary  
6 implications for how the FIT Program could be  
7 pursued. In particular, it had implications for  
8 how that allocation on the Bruce-to-Milton line  
9 would happen. The plan had always been to allocate  
10 that capacity through an Economic Connection Test.

11 But by the fall of 2000, the  
12 situation had changed in terms of how much  
13 renewable energy needed to be procured as was  
14 recognized in the LTEP. So while the Ministry  
15 still wanted to allocate this new capacity on this  
16 new line for these projects in the region with a  
17 strong wind resource, it wanted to do so through  
18 a more limited offering than a full province-wide  
19 Economic Connection Test.

20 In early 2011, discussions started  
21 between the Ministry of Energy and the OPA. As  
22 Shawn Cronkwright has testified, at the time, both  
23 the OPA and the Ministry were proposing running  
24 essentially what was a revised ECT process toward  
25 the capacity, which would include a chance for

1     proponents to change connection points prior to  
2     that capacity being allocated, as we saw, which had  
3     always been contemplated.

4                     The plan originally was to award  
5     contracts in June of 2011.  However, as time went  
6     on and the decision wasn't made on how to proceed,  
7     the OPA began to get nervous, not about the  
8     process, but about the time for the work involved.

9                     As Mr. Cronkwright has testified:

10                    "As time passed, we became  
11                    concerned about our ability  
12                    to complete the process in  
13                    the time that remained."  [As  
14                    read]

15                    Some steps would take a long time  
16     for the OPA to manage, and so the OPA recommended  
17     that, if contracts were still desired to be awarded  
18     in June, a simpler process be used.  They  
19     recommended what has been called in the pleadings  
20     and the documents "A special TAT/DAT."  Those are  
21     those transmission tests I talked about earlier.

22                    What was special about it was that  
23     the ideas were not contemplated in the published  
24     FIT Rules.  Those rules did not contemplate another  
25     TAT would be run for projects that had failed the

1 initial one, like the claimants' projects.

2 So what happens? On May 10th of  
3 2011, the Bruce-to-Milton line received its final  
4 regulatory approval as the Minister of Natural  
5 Resources directed the Niagara Escarpment  
6 Commission to issue the final required development  
7 permit, and this final approval sets everything in  
8 motion.

9 Two days later, on May 12th,  
10 options are presented, both the ECT like process  
11 that had been originally proposed and a special  
12 TAT/DAT process, and they were put to senior  
13 officials in the Ontario government.

14 So let's look at what was being  
15 prepared for that May 12 meeting. We can see the  
16 preparations in an exchange of emails on May 11th,  
17 the day before, and if you look at the last email  
18 in the chain -- and it will come up -- which starts  
19 at the bottom of the second page, you see that the  
20 Ministry staff are asking the OPA to further flesh  
21 out the ECT like process option.

22 Shawn Cronkwright from the OPA,  
23 who is the Manager of Generation Procurement, and  
24 who is here to testify this week, responds at  
25 10:00 p.m. the night before the meeting. In his

1 response, he compares the special TAT/DAT with the  
2 approach on which more information is being  
3 requested, the revised ECT approach.

4 And let's look at what he says.

5 He says:

6 "Based on what appears to  
7 being proposed, what we are  
8 actually back to now is  
9 running a Bruce-to-London  
10 area regional IPA." [As  
11 read]

12 Which is the first step in the ECT  
13 process. And then he confirms in this email in  
14 2011 that that process had always contemplated  
15 connection point changes, generator paid upgrades,  
16 and new plant and service transmission  
17 developments, like the Bruce-to-Milton line.

18 He then concludes:

19 "The advantage of this  
20 process is that it would be  
21 consistent with the FIT  
22 Rules." [As read]

23 So what happens at this meeting,  
24 and here I need two minutes of confidential session  
25 again so that we can look at actually what happens.

1 --- Upon resuming the confidential session under  
2 separate cover

3 --- Upon resuming in public

4 MR. SPELLISCY: We can now come  
5 back out of the confidential session.

6 On May 27th, 2011, a week after  
7 the exchanges we were just discussing, the Canadian  
8 Wind Energy Association, or CanWEA, which is the  
9 industry organisation for renewable wind producers  
10 in Ontario, wrote to the Ministry of Energy. Let's  
11 take a look at that letter in detail.

12 CanWEA wrote that it:

13 "... was writing to express  
14 the view of the majority of  
15 our members that the  
16 Government of Ontario and the  
17 Ontario Power Authority  
18 should follow through with  
19 the established  
20 Feed-in Tariff process by  
21 immediately opening the  
22 window for pointed  
23 interconnection changes."

24 [As read]

25 They said developers were told by

1 the OPA on numerous occasions that the opportunity  
2 would exist to change their connection. They  
3 confirm:

4 "Over the past several months  
5 our members have collectively  
6 invested significant time and  
7 money to prepare their  
8 strategies, their  
9 interconnection strategies."

10 [As read]

11 One week after this letter with  
12 the information that he's had from his staff in the  
13 briefing and the support of what he understands is  
14 a majority of the industry, the Minister of Energy  
15 issues a direction to the OPA regarding the  
16 allocation of the capacity. Let's quickly look at  
17 the June 3rd direction which played a significant  
18 part at least in the written phase here:

19 "The direction notes that the  
20 LTEP and its energy target  
21 and directs the OPA to: (1)  
22 Allow generator paid  
23 upgrades. (2) Reserve  
24 capacity for smaller FIT  
25 projects. (3) Allow



1 connection-point changes over  
2 a period of five business  
3 days but only for projects in  
4 the Bruce and west of London  
5 regions. (4) Allocate  
6 750 megawatts in the  
7 Bruce Region; and (5)  
8 allocate 300 megawatts in the  
9 west of London Region."

10 The reasons for this decision are  
11 explained by Sue Low. She says that the goal in  
12 designing it was to develop a fair process for  
13 allocating this capacity that would meet developer  
14 expectations by including the relevant components  
15 of an ECT without actually being a province-wide  
16 ECT.

17 As we have seen this morning, that  
18 evidence, the evidence in the record, supports what  
19 Ms. Low has explained.

20 We didn't hear about it this  
21 morning but in the written submissions the claimant  
22 asked the tribunal to ignore these events, and  
23 ignore these reasons for the allocation being made  
24 consistent with the FIT Rules and instead argues  
25 that the government's decision was motivated by the

1       desire to help another company, NextEra, a US  
2       investor.

3                       What proof does it have? It has  
4       the fact that a meeting happened on May  
5       11th between NextEra and Andrew Mitchell from the  
6       Minister of Energy's office.

7                       Let's look at that evidence.  
8       We'll bring up the slide and we'll look to  
9       NextEra's own summary of it. Andrew, meaning  
10      Andrew Mitchell from the Minister's office was  
11      clear that a decision has not been made yet on  
12      whether or not to open the point of interconnection  
13      amendment window and whether, if so, to do so on  
14      a province-wide or just for Bruce-to-Milton and  
15      west-of-London basis. So NextEra is told nothing  
16      specific about what's going on and obviously no  
17      commitments were made to it. they themselves say  
18      so.

19                      So what does NextEra ask for next?  
20      He asked for a meeting with Sue Low to explain why  
21      the point of inter-connection window is  
22      significant. But let's continue in the chain of  
23      this document. NextEra does not get a meeting  
24      scheduled until May 13th, after the meeting where  
25      the Premier's office expressed their preference or

1 process with the change window.

2 As we've seen just now, regardless  
3 of the points that NextEra may have made on May  
4 13th, if that meeting did, in fact, even occur,  
5 whether or not there would be a change window was  
6 still very much in play by at least May 20th, so  
7 the claimant's suggestion that this decision  
8 somehow was made to benefit NextEra, simply based  
9 on the timing of a couple of meetings, is belied by  
10 the evidence.

11 Let's come back to reality and see  
12 what happens after this direction is issued by the  
13 Minister on June 3rd. Well, as CanWEA noted  
14 developers were ready. As a result there were  
15 a number of moves in this five-day period, 39 in  
16 total. The easiest way to understand exactly what  
17 happened is to start with the rankings on December  
18 21st that were published for the Bruce Region and  
19 those will come up for you. Then we can amend that  
20 ranking by adding in those projects from the  
21 West-of-London region that switched into the  
22 Bruce Region, that either received a contract or  
23 that didn't and were ranked in the Bruce Region  
24 after.

25 You can see those in the next

1 table and they're highlighted in blue or white,  
2 depending on how good your colour sight is there on  
3 the screens.

4 This table here now shows the  
5 developers applying into the Bruce Region after the  
6 change in connection-point window closed on June  
7 10th, and what we can see is that a number of very  
8 highly-ranked projects in the West-of-London region  
9 decided to switch into the Bruce Region to take  
10 advantage of the capacity there.

11 Unsurprisingly, they got  
12 contracts, as shown by the green highlighting on  
13 the slide in front of you. That is, after all,  
14 what a ranking is supposed to accomplish. From  
15 a policy point of view it was the best result  
16 possible. The higher-ranked projects got  
17 contracts, rather than the lower-ranked projects.

18 The results of the Bruce-to-Milton  
19 allocation were published on July 4th and two days  
20 later, on July 6th, the claimant filed its notice  
21 of intent to go to arbitration. Three months after  
22 that, three months after the events giving rise to  
23 this claim, the claimant submitted this claim to  
24 this tribunal.

25 I will now turn to the second part

1 of my remarks today, which is simply to identify  
2 the measures described above that the claimant  
3 alleges are a breach of NAFTA. Again, I said this  
4 is made complicated today because not many of these  
5 were mentioned today but I'll at least go from what  
6 the pleadings were.

7 First, the claimant seems to be  
8 challenging acts of the Government of Ontario  
9 associated with three groupings  
10 and measures and in particular it seems to be  
11 alleging as follows: That the domestic content  
12 requirements of the FIT Program violated  
13 Article 1106; that the Green Energy Investment  
14 Agreement violated Articles 1102, 1103 and 1105;  
15 and that the June 3rd direction violated 1102,  
16 1103, 1105. That's Ontario.

17 I think we heard nothing about it  
18 today but the claimant in its written submissions  
19 also challenged certain acts of the OPA and in  
20 particular, in its written submissions, is alleging  
21 that. The OPA's ranking that we just looked at, of  
22 the claimant's TTD and Arran project in the launch  
23 period violated Article 1105 and that the OPA's  
24 awarding of contracts to certain projects  
25 connecting at certain parts of the transmission

1 system as part of the Bruce-to-Milton process  
2 violated Articles 11102, 1103, 1105.

3 Some of those allegations in the  
4 written submissions are quite complex. They have  
5 numerous sub-parts but I think we can leave that  
6 aside for the moment and just focus on these  
7 general groupings.

8 With that, I'm going to come now  
9 to the third part of my presentation, and that is  
10 explaining why these allegations are outside of the  
11 scope of Chapter Eleven and beyond this tribunal's  
12 jurisdiction.

13 Now what I'm going to do in this  
14 section is explain a number of provisions of NAFTA,  
15 and why they block, as a matter of law, the  
16 claimant's claim from proceeding any further and,  
17 in particular, we're going to look at, first, why  
18 the claimant's challenges to the measures of the  
19 OPA, if they're still making them, cannot proceed  
20 because those acts are not subject to the  
21 obligations in Chapter Eleven.

22 We will then examine why certain  
23 of the claimant's allegations with respect to the  
24 Green Energy Investment Agreement are beyond the  
25 jurisdiction *ratione temporis* of this tribunal.

1 Then I will discuss why all the claimant's claims  
2 for breaches of Article 1102, 1103 and 1106 are  
3 included by NAFTA Article 1108.

4 Next I will show how many of the  
5 claimant's other claims cannot be brought because  
6 they did not result in damages to it. That makes  
7 them beyond this tribunal's jurisdiction. Finally,  
8 I will show that the claims are barred from  
9 proceeding because the claimant did not respect the  
10 conditions of Canada's consent.

11 Let's first start with the acts of  
12 the OPA. For that we go to Article 1101 to start  
13 because that act says that in order for Chapter  
14 Eleven to apply, the measure has to be adopted or  
15 maintained by a party. If we go and we look at our  
16 own measures, the two slides that we have there,  
17 there were a number of the acts of the Ministries  
18 of the Government of Canada, the entering into the  
19 GEIA, the June 3rd directive. There is no dispute.  
20 Those are subject to the obligations in Chapter  
21 Eleven.

22 The June 3rd direction which  
23 directed the OPA to act in a certain way, that's  
24 an act of the Government of Canada. It is subject  
25 to Chapter Eleven.

1                   But in its written submissions the  
2 claimant also challenged the two other things  
3 I mentioned, the ranking of the launch period  
4 applications and the awarding of contracts to  
5 certain applicants.

6                   So the question arises: What is  
7 the OPA?

8                   As I mentioned earlier, the OPA is  
9 a corporation owned by the Government of Ontario  
10 with independent legal personality.

11                   The question here is when will the  
12 acts of such a corporation be subject to the  
13 obligations in Chapter Eleven?

14                   The claimant mentioned Article 8  
15 of the ILC Articles but that does not apply here  
16 because NAFTA sets up its own rule on when state  
17 enterprises are subject to the obligations in  
18 Chapter Eleven. As the tribunal in UPS confirmed:

19                   "Chapter Fifteen provides  
20 a *lex specialis* regime in  
21 relation to the attribution  
22 of acts of monopolies and  
23 state enterprises of the  
24 party." [As read]

25                   Let's go to chapter 15 and let's



1 look at Article 1503(2) which is the NAFTA  
2 provision on state enterprises and we see that the  
3 rule for state enterprises that the acts are only  
4 subject to the obligations in Chapter Eleven where  
5 the entity is exercising delegated governmental  
6 authority.

7 There are two questions. Is the  
8 OPA a state enterprise? I've already answered that  
9 one. Yes, it is.

10 The second one, and we can look at  
11 that. We can go to Article 1505 of NAFTA because  
12 it defines what a state enterprise is. It says  
13 it's an enterprise owned or controlled through  
14 ownership interests.

15 The only argument that the  
16 claimant presented in its written submissions to  
17 the contrary was based on Annex 1505 to this  
18 article but that annex is irrelevant. It  
19 specifically says for the purposes of  
20 Article 1503(3). We are not talking about  
21 Article 1503(3), we are talking about  
22 Article 1503(2).

23 Let's turn to the second question  
24 which is the specific question of whether in  
25 ranking the launch period applications, and coming

1 to the determinations that it did, and in  
2 determining which applications or which contracts  
3 could connect to which points on the technical  
4 electricity system in Ontario, in its view.

5           Was the OPA exercising delegated  
6 governmental authority in those acts? It was not.  
7 An entity does not exercise delegated governmental  
8 authority simply because it has been created by  
9 state or is owned by it. There is something unique  
10 about governmental authority.

11           As the tribunal Jan de Nul  
12 explained, what matters is not the service publique  
13 element, but the use of the "prerogative de  
14 puissance publique" or governmental authority.

15           Some examples of governmental  
16 authority are provided in Article 1503(2) itself.

17           That article provides:

18           "Governmental authority  
19 includes such things as the  
20 power to expropriate, grant  
21 licenses, approve commercial  
22 transactions, impose quotas,  
23 fees or other charges." [As  
24 read]

25           In the particularly challenged

1 measures of the OPA here, it did none of these  
2 things. It carried out technical analysis based on  
3 criteria points and it made technical decisions  
4 based on things like capacity and transmission  
5 limitations. None of those acts are exercises of  
6 delegated governmental authority.

7                   So now I want to take you through  
8 actually a demonstrative on the screens in front of  
9 you to help you walk through and I'm going to be  
10 coming back to this in a number of parts in our  
11 session over the next few minutes.

12                   Let's go back to the slide that we  
13 had earlier concerning the challenged measures of  
14 the OPA. You will see it up there. We saw that  
15 the claimant again was challenging the two  
16 groupings and measures that we've discussed.  
17 However, as we just saw and as we can see  
18 represented on the screens in front of us, these  
19 claims are barred from proceeding under  
20 Article 1503(2) because these acts are not subject  
21 to the obligations in Chapter Eleven of NAFTA.

22                   Now let's talk to the second point  
23 that I identified above, the limits of tribunal's  
24 jurisdiction rationatum point.

25                   For that we go back to Article

1 1101 and we see that another limitation on the  
2 scope of Chapter Eleven is that the measure has to  
3 be related to the investor of another party.

4 Logically and fundamental to this notion is that  
5 the investment in question must exist at the time  
6 of the alleged measure.

7 As the tribunal in Gallo  
8 explained recently in context of another claim  
9 under NAFTA:

10 "It does not need extended  
11 explanation to assert that  
12 a tribunal has no  
13 jurisdiction, *ratione*  
14 *temporis*, to consider claims  
15 arising prior to the date of  
16 the alleged investment." [As  
17 read]

18 The claimant invested first in  
19 Ontario in the Arran and TTD projects in November  
20 of 2009. Prior to that, Ontario had no NAFTA  
21 obligations with respect to the claimant. Hence,  
22 when we're talking about the confidentiality or  
23 exclusivity clauses with an MOU with Samsung, the  
24 fact is they cannot be challenged by the claimant  
25 under NAFTA.

1                   Further, with respect to the North  
2 Bruce and Summerhill investments of the claimant,  
3 they're not made until May of 2010, after the  
4 Green Energy Investment Agreement is signed and  
5 publicly announced. As a result, no claim with  
6 respect to these projects can be brought even for  
7 the Green Energy Investment Agreement itself.

8                   Now let's go back to our  
9 demonstrative and this time we are going to look at  
10 the one for the Ontario measures. We'll see that  
11 one of the challenges was to the Green Energy  
12 Investment Agreement there and the benefits  
13 accorded to the Korean Consortium under it.

14                   The claimant has alleged that  
15 those benefits were a breach of Canada's  
16 obligations under NAFTA. But for those claims, as  
17 we can see, much of this claim is barred because of  
18 the *ratione temporis* limits in Article 1101 of  
19 NAFTA.

20                   Now let's move to the next limit  
21 on the scope of the obligations in NAFTA that  
22 I talked about. That is the exclusion presented by  
23 Article 1108 which the claimant has actually talked  
24 about this morning. Let's pull up Article 1108.  
25 It is called, "Reservations and Exceptions". There

1 are a number there but the ones identified by the  
2 claimant and the ones that are relevant are  
3 Article 1108(7) and 1108(8). Article 1108(7) and  
4 Article 1108(8) provide that Articles 1102 and 1103  
5 and eventually 1106 do not apply to procurement by  
6 a party or a state enterprise.

7                   There is no definition of  
8 procurement in Chapter Eleven, but there are  
9 Chapter Eleven tribunals, as the claimant  
10 identified you've interpreted the term. Let's go  
11 back to the Vienna Convention analysis. What's  
12 it's ordinary meaning? As the tribunal in ADF  
13 explained the term with its ordinary meaning, and  
14 the claimant quoted some of this today, but we'll  
15 quote some of the rest, is, "to get, to gain". The  
16 tribunal in UPS actually adopted a similar  
17 definition.

18                   So these particular Articles in  
19 1108 what do they do? They function as a carve-out  
20 for when the NAFTA parties themselves or the state  
21 enterprises decide to enter into the market and  
22 acquire, get or obtain goods and services.

23                   The claimant talked a lot about  
24 Chapter Ten this morning. We're not saying we've  
25 never said that Chapter Ten is in context. But we

1 have said that it is as relevant in its differences  
2 for what it does. We have to look at the different  
3 purposes of Chapter Ten and Chapter Eleven. All  
4 three NAFTA parties have agreed in this  
5 arbitration; chapter Ten imposes obligation on the  
6 parties with respect to certain types of  
7 procurement. It is doing something quite different  
8 than Article 1108 which is carving out obligations.

9                   Ultimately, the NAFTA parties made  
10 the express choice to broadly carve out procurement  
11 obligations by the governments and state  
12 enterprises for Chapter Eleven and then to  
13 specifically impose certain limited obligations on  
14 limited types of procurement in Chapter Ten.

15                   Tellingly, when the NAFTA parties  
16 agreed to impose some obligations on procurement in  
17 Chapter Ten, they excluded provincial and state  
18 procurement. That's not because provinces and  
19 states don't procure; of course they do. It is  
20 because the NAFTA party wanted the provinces and  
21 states to have a free hand when it came to  
22 procurement initiatives in terms of 1102, 1103 and  
23 1106.

24                   That is why it makes sense that  
25 procurement is defined in a limited way in Chapter

1 Ten because you want to impose the limited  
2 obligations but the exclusion must be understood  
3 broadly in Chapter Eleven. Both have the same  
4 result, and it is a result that I mentioned for the  
5 policy reason earlier. Governments want limited  
6 obligations on the procurement powers.

7                   So is the FIT Program  
8 a procurement measure? It is. In fact, we don't  
9 have to go far to understand this. I've already  
10 walked through the evidence from the statute  
11 creating the OPA to the statute authorising the  
12 creation of the FIT Program to the direction to the  
13 OPA to establish the FIT Program. There is no need  
14 to bring them up again. As you will recall, all  
15 make clear that the FIT Program is designed to be  
16 a procurement program.

17                   Let's go one step further and  
18 let's look at what the OPA actually does. In the  
19 FIT Program itself, the OPA enters into Power  
20 Purchase Agreements. Why? In order to acquire the  
21 renewable generation that Ontario has determined  
22 that it wants to acquire.

23                   The undisputable fact is that if  
24 the OPA did not enter into these procurement  
25 contracts, such power would not be produced. You



1 don't need a contract with the OPA to sell power  
2 into the grid in Ontario. You don't need one. But  
3 the reality is that the market prices are too low  
4 to justify the costs of renewable energy  
5 investment.

6 So in order to get renewable  
7 generation that the government wants, the OPA is  
8 required to pay for it, through PPAs. That is  
9 procurement.

10 The claimant contends that this  
11 tribunal should ignore these basic facts because of  
12 restrictions found in other treaties. In  
13 particular, in its written submissions, at least  
14 restrictions found in the GATT and the WTO. We'll  
15 get to some of that in the closing. But just note  
16 that the same limitations are not found in NAFTA.  
17 The NAFTA exception is broader. Thus, the  
18 claimant's claims for 1102, 1103 and 1106 are  
19 excluded from the coverage of Chapter Eleven.

20 So let's go back to Ontario  
21 measures slide and the demonstrative that we're  
22 building up. As we are showing you on this slide,  
23 Article 1108 walks the complaints about the  
24 domestic content requirements of the FIT Program.  
25 As well as 1102, 1103 complaints about the GEIA and

1 the 1102, 1103 complaints about the more favourable  
2 treatment allegedly afforded to NextEra.

3 Let's go to our OPA measures  
4 slide. If we look at that we see that Article 1108  
5 would also exclude any claims under Articles 1102  
6 and 1103 that other companies were being treated  
7 more favourably in being allowed to make certain  
8 connections as part of the July 4th award of  
9 contracts.

10 Finally, with respect to the scope  
11 of Chapter Eleven we'll come to the fourth point  
12 that I noted above. That is the fact that claims  
13 cannot be brought where damages have not been  
14 suffered.

15 Let's look to Article 1116 and we  
16 see that there are limitations on the ability to  
17 bring a claim and one includes the requirement that  
18 the investor in question has incurred loss or  
19 damage by reason of arising out of that breach.  
20 It's this last point that I want to focus on  
21 because tribunals are not courts of plenary  
22 jurisdiction.

23 It is not enough for the claimant  
24 to simply show a breach and to simply show  
25 separately that its business failed. For you to

1 bring a NAFTA claim there must be a causal link  
2 that you establish and there must be actual loss or  
3 damages.

4 As the NAFTA tribunal in Feldman  
5 accurately stated:

6 "A Chapter Eleven tribunal  
7 can only direct compensation  
8 in the amount of loss or  
9 damage actually incurred."

10 [As read]

11 For example, for a claim of breach  
12 of Articles 1102 and 1103, it is not enough to show  
13 simply that a claimant received less favourable  
14 treatment. That just establishes a breach. The  
15 claimant must also show how that less favourable  
16 treatment resulted in actual loss to it. It must  
17 establish how it suffered a loss in the "but-for"  
18 world which would have, in all probability, existed  
19 if the measure had not occurred.

20 Similarly, the claimant alleges  
21 a breach of Article 1106. It must show how that  
22 breach of the imposition of domestic content  
23 requirement resulted in specific actual losses;  
24 i.e., how much more did it actually cost it to use  
25 the domestic content requirement. If we apply that

1 rule we see that a number of the challenge measures  
2 had no actual impact on the claimant at all.

3 Let's go back to our demonstrative  
4 slide on the Ontario measures. The claimant  
5 challenges the domestic content requirements of the  
6 FIT Program. However, the fact that the claimant  
7 did not spend an actual cent, the fact is he did  
8 not have to spend an actual cent more because of  
9 those requirements. It entered into a contract for  
10 the purchase of wind turbines from GE before the  
11 FIT Program even existed, and while it claims to  
12 have renegotiated that deal there is no evidence  
13 that it cost them anything to do that.

14 Hence there are no actual damages  
15 related to the domestic content requirements of the  
16 FIT Program in this case.

17 With respect to the GEIA, we have  
18 explained in our submissions how none of the  
19 alleged breaches, aside from the allocation of the  
20 transmission priority to the Korean Consortium in  
21 the Bruce Region, could have possibly caused any  
22 harm to the claimant. So anything other than that  
23 1102 and 1103 claim could also be blocked by this  
24 requirement in the Article 1116, and if we could  
25 pull it up for the GEIA as well.

1                   Finally, with respect to the June  
2 3rd Ministerial Direction:

3                   "The claimant has failed to  
4 show how many aspects that it  
5 complained about in its  
6 written submissions other  
7 than the cap on procurement  
8 and the ability to change  
9 connection points could have  
10 possibly caused it any  
11 damages." [As read]

12                   There would have been no  
13 difference in the "but-for" world. So much of  
14 those claims too would also be blocked by this  
15 requirement in Article 1116. if we look at our  
16 page for the measures of the OPA that the claimant  
17 has challenged, we reach a similar conclusion.

18                   The claimant has failed to show  
19 how the acts of the OPA, like allowing certain  
20 connections as part of its award of contract, could  
21 have caused it any damages. Again, for many of  
22 those acts which were identified, the situation  
23 would not have been different.

24                   Now, where does that leave us? If  
25 you go to the next slide and we look at the screen

1       there, you will see that all the claims that the  
2       claimant has, at least in part, the ones that  
3       they've thrown are outside of Chapter Eleven,  
4       because of various hurdles, various roadblocks to  
5       their proceeding.

6                       But when I said earlier that some  
7       of these claims that are quite complex, I think if  
8       we take it down one level of granularity we can see  
9       that in, fact, there is no block on a couple of  
10      claims. In fact, there are still claims relating  
11      to the alleged breach of Article 1105 concerning  
12      the June 3rd direction and that's on the cap on  
13      procurement and the change in connection points.  
14      That's what's left.

15                      Now, again as I mentioned earlier,  
16      that might seem like a drastic reduction but it  
17      makes a lot of sense. The fact is that the  
18      claimant could not have had a FIT contract until  
19      the Bruce-to-Milton allocation was completed.  
20      There was no capacity before that moment. So any  
21      claim that it had arose no earlier than when it did  
22      not receive such a contract on July 4th, 2011.

23                      Any claim that either of those  
24      measures, breaches, Article 1105, is without  
25      merit -- and I will get to that in a second. But

1 leaving that aside, it is at least a claim that  
2 could have been brought after arbitration.

3 Now, let's come back to the last  
4 point that I identified above, which is the bar  
5 that results because the claimant did not respect  
6 the conditions to Canada's consent to arbitration.

7 The claimant has talked about  
8 this. I won't go into as much detail as he did.  
9 We'll address this in our closing. But let's look  
10 at Article 1122. We see, as the claimant pulled  
11 up, that it provides a NAFTA's party consent that  
12 the claim has been submitted in accordance with the  
13 procedure set out in these agreements.

14 Those procedures are outlined in  
15 the preceding articles, Articles 1118 and 1121, and  
16 they include a cooling-off period of six months  
17 from the events giving rise to the claim.

18 Obviously, you don't have a claim until you've  
19 suffered loss. We've looked at that. We've seen  
20 that in Article 1116(2), and so the claimant could  
21 not have suffered a loss prior to the allocation of  
22 the capacity in the Bruce Region. It could not get  
23 a contract before then so, in fact, that  
24 cooling-off period, six months, runs from that  
25 date.

1                   If that cooling-off period is not  
2           respected there is no consent on behalf of the  
3           state to arbitrate. This isn't procedural.  
4           Consent is a fundamental question of jurisdiction.

5                   This was recognised by the  
6           tribunal in Methanex where it held that:

7                                 "In order to establish the  
8                                 necessary consent to  
9                                 arbitration all preconditions  
10                                and formalities required  
11                                under Articles 1118-1121 must  
12                                be satisfied." [As read]

13                   So the question is: Did the  
14           claimant satisfy those preconditions or  
15           formalities? It did not. All the claimant had to  
16           do was wait six months after the award of contracts  
17           on July 4th, which was a point at which it  
18           allegedly a suffered a loss. There would have been  
19           no prejudice to it in doing so but instead it chose  
20           to ignore the clear procedural rules in NAFTA.

21                   So, if we come back to the slide  
22           that we had up earlier showing the one claim that  
23           could have arbitrated and we pull that one up, we  
24           see that it was blocked by Article 1122 of NAFTA.

25                   Because of the claimant's choice



1 Canada has not consented to arbitrate these claims  
2 but, in fact, I want to pause here because as July  
3 4th was the first time the claimant could get  
4 a contract, the reality is that all of its claims  
5 arise solely from this event and they would all be  
6 blocked because of a lack of consent to arbitrate.

7 So, if you look up at that slide  
8 you can now see all of the hurdles to this claim  
9 proceeding in this case.

10 This brings me to the final part  
11 of my presentation, and what follows is that I will  
12 very briefly highlight the key flaws in all of the  
13 claimant's arguments on the merits.

14 I will show you why the claimant's  
15 claims for breach of Article 1102 have no merit;  
16 why its claims for breach of 1103 have no merit;  
17 why its claims for breach of 1105 have no merit;  
18 and why, finally, the claimant's damages arguments  
19 are deeply and fatally flawed.

20 Let's start with Article 1102,  
21 NAFTA's national treatment. There are a number of  
22 allegations at issue in this obviously but first  
23 I want to take a step back. As this title states,  
24 this obligation is about national treatment.

25 This obligation is about not

1 ensuring that everyone everywhere is treated  
2 identically. It is about nationally-based  
3 discrimination. We have never said it is about  
4 intent but it is still about nationality.

5 In situations where nationality is  
6 not important, situations where the evidence is,  
7 that some Canadian investors do well, but others  
8 don't, some U.S. investors do well, but others  
9 don't, this provision is not violated.

10 The reason is simple. Ultimately  
11 many regulatory programs result in winners and  
12 losers. Article 1102 does not guarantee that all  
13 U.S. investors will always be winners. It just  
14 requires state measures to be nationality neutral.

15 As the tribunal in Lowan  
16 explained, this article is directed only to  
17 nationality-based discrimination and it proscribes:

18 "... only demonstrable and  
19 significant indications of  
20 bias and prejudice on the  
21 basis of nationality." [As  
22 read]

23 A U.S. investor cannot prove  
24 a breach of Article 1102 by referring to the  
25 treatment afforded to other American companies and,

1 as the claimant itself admitted in its opening  
2 remarks this morning, that is what it is trying to  
3 do. It has talked about, in its submission,  
4 Pattern Energy, which as a California company,  
5 Boulevard Associates, which is a subsidiary of  
6 Florida Power & Light, and NextEra which it is now  
7 called, and Samsung Canada which is a subsidiary of  
8 Samsung.

9 Those, as I mentioned at the  
10 beginning of my remarks, are investments of foreign  
11 investors in Canada. They are not Canadian  
12 investors, and thus they cannot serve as a basis  
13 for an Article 1102 claim.

14 In fact, I think that some of the  
15 real proof of this is shown in the fact that the  
16 claimant wants to use the same treatment to prove  
17 a breach of 1102 and 1103, but national treatment  
18 and Most-Favoured Nation treatment do not overlap.

19 Leaving aside for the moment this  
20 most fundamental problem, I want to come back to  
21 how NAFTA's nationality-based discrimination  
22 prohibition is operationalised in 1102.

23 In order to show you that even  
24 if these comparators were Canadian, and they're  
25 not, but even if they were, there has still been no

1 breach of NAFTA here. If we look at the slides and  
2 we pull up the relevant language, the first  
3 question is whether there is treatment about the  
4 claiming investment of nationals.

5                   The second is whether that  
6 treatment was accorded in like circumstances.  
7 Let's pause on that for a second because we've  
8 heard about like circumstances at length this  
9 morning. We would agree there are a number of  
10 factors that go into considering it, but one that  
11 has been consistently emphasised is that the  
12 treatment must be accorded by the same entity and  
13 in the same program, but again that's a rather  
14 obvious point.

15                   People under different regulatory  
16 programs are treated differently. People under the  
17 FIT Program are treated differently in terms of the  
18 contracts and the rates that they get than people  
19 under other procurement programs in Ontario.

20                   It is for this reason, why here,  
21 that -- and I'll explain this more when we get to  
22 the GEIA because it is really more about 1103. But  
23 even if Canadian investors were the ones who  
24 entered into the GEIA, that's a separate investment  
25 agreement. It is not the same regulatory program

1 and so the treatment is not accorded in like  
2 circumstances. But, as I say, I'm going to come  
3 back to this more in 1103 where I'll discuss this  
4 in more detail.

5 The final question for  
6 Article 1102 is whether the treatment afforded to  
7 U.S. investors is less favourable than that  
8 afforded to Canadians, and again I want to leave  
9 aside the claim that somehow the subsidiaries of  
10 Samsung or Pattern Energy, the U.S. investors could  
11 somehow be used under the GEIA under this Article.

12 What I want to focus on, instead,  
13 and I'll get to Article 1103, but what I want to  
14 focus on here is the other entities that actually  
15 applied to the FIT Program which, in its written  
16 submissions, the claimant alleged received more  
17 favourable treatment than Boulevard Associates and  
18 Suncorp.

19 Now, a guarantee against less  
20 favourable treatment in like circumstance does not  
21 mean that everyone is guaranteed the same outcome.  
22 It does not mean that everyone gets a contract.  
23 The same outcome, the same contract, that's all  
24 impossible to guarantee. Rather, when it's  
25 a program at issue, a regulatory program, it is

1 about guaranteeing the same process to the people.

2                   If we look at the treatment  
3 accorded to those who were FIT applicants in the  
4 Bruce Region, the claimant has failed to show that  
5 the treatment was, in any way, less favourable.  
6 FIT applicants were afforded the same treatment.  
7 All were assessed by the OPA in terms of the  
8 scoring of their applications in the same way. All  
9 were subject to the June 3rd direction. All had  
10 access to the same information in making their  
11 decisions.

12                   Again, we don't dispute, and there  
13 is no question, that the outcome of the treatment  
14 was different for different companies, but that's  
15 in the nature of any procurement programs. Not  
16 everyone can be a winner. 1102 doesn't require  
17 that and if we look at the FIT Program, again what  
18 we see is that some Canadian investors ended up  
19 winners, some losers; some U.S. investors ended up  
20 winners, some losers; and the same with nationals  
21 of third states. What does that show?  
22 Objectively, the measures were enacted on  
23 a nationality-neutral basis.

24                   Now let's turn to Article 1103.  
25 Article 1103 provides a very similar obligation to

1 Article 1102 but instead of regulating  
2 discrimination vis-a-vis Canadians, it regulates  
3 a treatment accorded to nationals of third parties.

4           So, if we look at this provision,  
5 and again, we will see the same three-part test  
6 that we saw in 1102, and the first task remains the  
7 same though, to identify the right set of  
8 comparators. So let's look at this language  
9 because the claimant has focused on it. This  
10 morning it said that an investor from any NAFTA  
11 party other than Canada would qualify under that  
12 provision, so I want to understand this because the  
13 language there says:

14                           "... of any other party or of  
15                           a non-party." [As read]

16           The typical MFN clause in  
17 a bilateral treaty, and we pull up one of our own  
18 bilateral treaties here, one of Canada's, contains  
19 a reference only to investors of a non-party. It's  
20 a bilateral treaty.

21           But of course, in a multi-lateral  
22 treaty that doesn't work. It would exclude  
23 a relevant comparison. The parties to a trilateral  
24 treaty do not want to give license for one party to  
25 favour the investors of essentially what is the

1 non-disputing party and it is for this reason why  
2 in multi-lateral treaties, the MFN clause looks the  
3 same as in NAFTA. We can look to the Energy  
4 Charter Treaty in one of the MFN clauses there. We  
5 pull that up, it has the same language that NAFTA  
6 has: Any other contracting party or any third  
7 state.

8                   None of this is meant to  
9 revolutionise the MFN clause and somehow allow  
10 comparisons between the claimant and an investor  
11 from the same state as the claimant. Where it is  
12 two investors from the same state who are being  
13 compared then there is no nationality-based  
14 discrimination and the MFN provision doesn't apply.

15                   Now let's come back to  
16 Article 1103 and again, as with 1102, the  
17 overarching fact is that Article 1103 does not  
18 guarantee that every particular investor will be  
19 a winner and nor does it guard against all  
20 differential treatment. What it protects against  
21 is nationality-based discrimination. Let's focus  
22 here on the allegations regarding the Korean  
23 Consortium because it is at least an investor of  
24 a third party. Here what I would like to do is  
25 focus on the second part of the test which is in



1     like circumstances.

2                     The claimant has talked a lot  
3     about this and it's looked at the contracts under  
4     the FIT Program, and the contracts under the GEIA  
5     and had a slide where it went through all the  
6     similarities. But of course they looked alike.  
7     That was part of the rule itself, that was part of  
8     the GEIA, that they be modelled on FIT contracts.  
9     But that doesn't change the fundamental fact, the  
10    one that matters: Contracts under the GEIA are not  
11    FIT contracts. The claimant is not alleging here  
12    that the contracts, that the FIT contracts entered  
13    into for other third-party investors were somehow  
14    more rich or more valuable than the FIT contracts  
15    it sought to obtain. All FIT contracts were the  
16    same. The GEIA contracts were different. They  
17    were under a different program. That is critical.

18                    As UNCTAD noted in its oft-cited  
19    study of the MFN clause:

20                            "Freedom of contract prevails  
21                            over the MFN clause. The  
22                            foreign investor that did not  
23                            enter into a contract is not  
24                            in like circumstances with  
25                            the third foreign investor

1                   that did conclude the  
2                   contractual arrangement with  
3                   the host state." [As read]

4                   There could not be a clearer  
5                   statement of the law in this regard. This rule  
6                   makes perfect sense.

7                   If an investor without  
8                   an investment agreement can prove a breach of MFN  
9                   by referring to the treatment accorded to another  
10                  investor who had an agreement, there would be no  
11                  such thing as investment agreements. No party  
12                  enters into an investment agreement if there is not  
13                  some benefit for it doing so and such agreements  
14                  are signed all over the world by numerous states,  
15                  many of whom had treaties guaranteeing MFN treaty.

16                  Holding that the benefits granted  
17                  in such investment agreements violated MFN would  
18                  destroy the ability of states to enter into the  
19                  bilateral deals with investors necessary to bring  
20                  development. But it would also mean, essentially,  
21                  that a state could never try to negotiate for  
22                  itself a better investment agreement with somebody  
23                  else because it would breach the MFN clause. That  
24                  is not right.

25                  Now, the claimant has spent a lot

1 of time seeming to try and get around this by  
2 trying to argue that Ontario did not get value for  
3 what it gave to Samsung and the GEIA. They brought  
4 in an expert to do an analysis of the terms of the  
5 GEIA. They've had quotes from him up this morning.  
6 His conclusion is that Ontario gave up too much and  
7 got nothing in return.

8                   You've also heard this morning,  
9 from counsel, that he's obviously trying to  
10 convince you of the same and he's actually put up  
11 bits of sworn testimony from witnesses who are not  
12 here and we have no opportunity to cross-examine.

13                   Rick Jennings and Sue Low, they  
14 have offered testimony to explain why they believe  
15 that the claimant is wrong, couldn't find it in  
16 their witness statements. We'll hear it this week.  
17 The GEIA had value for Ontario, mentioned earlier,  
18 was an anchor tenant, was a Marquis tenant. There  
19 are other reasons they felt it would stimulate  
20 manufacturing and jobs. We'll likely hear from Mr.  
21 Adamson this week that he disagrees, that he  
22 believes the Ontario government is wrong in it's  
23 evaluation.

24                   But in the end I don't think it  
25 matters who's right and who is wrong on that

1 substantive analysis. Even if Ontario negotiated  
2 poorly that doesn't give rise to a breach of MFN.  
3 Investment tribunals are not set up to second guess  
4 the wisdom of policy decisions made by governments.  
5 The fact is that governments are constantly called  
6 upon to make controversial decisions. There is no  
7 question the GEIA was controversial at the time.

8                   Many people disagreed with it.

9 Many thought that too much was given up. But  
10 tribunals simply can't be put in a position where  
11 they're being asked to take sides in such  
12 controversies. They can't be asked to evaluate  
13 whether a government entering into an investment  
14 agreement gave up too much or got too little.  
15 Those are decisions for elected officials to make  
16 and the evidence on the record here shows that this  
17 was all extensively discussed by the government.  
18 Ultimately, we've heard a lot about the public and  
19 the ratepayers from the claimant this morning.

20                   Well, if the people of Ontario  
21 feel like too much was given up and not enough  
22 obtained in return, they have a remedy, a vote.  
23 What cannot happen is for investment tribunals to  
24 sit in judgment of the quality of the choices made.  
25 What investment tribunals can do is to determine if

1 there was been a breach of the provisions of an  
2 investment treaty. As UNCTAD so aptly noted, when  
3 it comes to investment agreements, freedom of  
4 contract prevails over the MFN clause.

5 Now I would like to briefly touch  
6 on the claimant's allegations regarding 1105. If  
7 we pull up that article we can see that  
8 Article 1105 establishes a floor for treatment.  
9 That floor is set as a customary international  
10 volume minimum standard of treatment, that this is  
11 a case that was definitively clarified by the NAFTA  
12 parties in the 2001 note of interpretation which  
13 confirmed that 1105(1) proscribes:

14 "The customary international  
15 law of minimum standard of  
16 treatment of aliens as  
17 the minimum standard of  
18 treatment to be afforded to  
19 investments of investors of  
20 another party." [As read]

21 Under Article 1131(2) of NAFTA,  
22 that interpretation is binding on this tribunal.  
23 Indeed, every tribunal since that note has  
24 considered itself to be bound to apply the  
25 customary international law minimum standard of

1 treatment. Now, of course, that doesn't answer the  
2 question of what is that standard. So let's look  
3 at that.

4 As the tribunal in Aziniana  
5 explained:

6 "Article 1105(1) was not  
7 intended to provide foreign  
8 investors with blanket  
9 protection from  
10 disappointment." [As read]

11 Similarly in SD Meyers the  
12 tribunal explained:

13 "It is not an open-ended  
14 mandate to second-guess  
15 government decision-making as  
16 governments have to make many  
17 potentially controversial  
18 choices." [As read]

19 What it really is, is a very basic  
20 standard and the threshold for breach is high.

21 We don't have to go very far back  
22 in history to see what the current thinking on the  
23 threshold is. We have recent decisions, Glamis,  
24 Cargill, Mobil. They all basically say the same  
25 thing. As the Glamis tribunal described it:

1                    "... 1105 protects against  
2                    acts which are sufficiently  
3                    egregious and shocking, the  
4                    gross denial of justice,  
5                    manifest arbitrations,  
6                    complete lack of due process,  
7                    evident discrimination or  
8                    manifest lack of reasons."

9                    [As read]

10                    The claimant cannot prove that the  
11                    standard has been breached.

12                    As I noted at the beginning of  
13                    today, these claims are really just about  
14                    a disappointed investor looking to blame the  
15                    government when its gamble did not pay off.  
16                    Ultimately, the claimant's Article 1105 claim is  
17                    based on the global assertion that everything that  
18                    Ontario and the OPA did with respect to the  
19                    consideration of the claimants' launch period  
20                    applications, from the ranking to the ultimate  
21                    award of contracts, is a violation of Article 1105  
22                    but the evidence doesn't support that.

23                    With respect to the rankings we  
24                    walked through it and Mr. Duffy's testimony, which  
25                    stands unchallenged, is that those applications

1 failed to receive the points because they did not  
2 objectively qualify for them. There was nothing  
3 arbitrary or unfair at all about that, with respect  
4 to the Bruce-to-Milton process. The parties had  
5 debated at length how similar it was or not to the  
6 original process envisaged for awarding the  
7 capacity on the Bruce-to-Milton line.

8           The evidence in the record, which  
9 we walked through earlier, from the time in  
10 question, shows that all believed, all involved who  
11 believed that it was similar to what was envisaged.  
12 The only differences were the cap that was being  
13 proposed in order to control megawatt purchases.  
14 This didn't matter that much in the Bruce Region  
15 because the limit was physical and that's where the  
16 claimant applied but the claimant has focused on  
17 this and its effects but let's think about that.

18           Article 1105 does not require the  
19 government to buy electricity that it cannot afford  
20 and that it does not need. Nothing in Chapter  
21 Eleven does.

22           We have heard at length as to why  
23 that particular approach that was adopted was  
24 followed as opposed to other approaches and options  
25 that were also being discussed, and it was because



1 it was considered the fairest approach that would  
2 respect developer expectations.

3 But I want to pause here because  
4 even if the process adopted for the Bruce-to-Milton  
5 allocation was different than what was originally  
6 planned, and it really wasn't, but even if it was,  
7 that doesn't matter. Remember what the tribunal in  
8 Mobil recently said:

9 "Article 1105 is not and was  
10 never intended to amount to  
11 a guarantee against  
12 regulatory change or reflect  
13 a requirement that an  
14 investor is entitled to  
15 expect no material changes to  
16 the regulatory framework  
17 within which an investment is  
18 made. Governments change,  
19 policies change and rules  
20 change." [As read]

21 The claimant no doubt would have  
22 preferred an approach that benefited it to the  
23 detriment of the majority of the other developers  
24 who applied to the FIT Program but Article 1105  
25 does not require that. You have seen and heard all

1 the evidence presented so far in our written  
2 submissions and today that I've gone through.  
3 There is nothing here that violates Article 1105.  
4 Finally, in what time I have remaining I'll briefly  
5 touch on the issue of damages.

6 Let's recall Article 1116 here and  
7 the burden that it places on the claimant to  
8 establish how the measures in question cause it  
9 losses.

10 The claimant has failed in this  
11 regard to meet its burden of proof. We've already  
12 talked about this with respect to a number of  
13 claimants and how they are not even within the  
14 scope of Chapter Eleven but if we look at it from  
15 the other angle and we see that, in fact, some of  
16 its biggest items in its claims have no connection  
17 to the measures in question here.

18 For example, this morning the  
19 claimant said, and it put up on the screen that it  
20 had invested \$160 million into Ontario; that is not  
21 true. \$150 million of that seems to be in relation  
22 to a contract with General Electric with the  
23 turbines.

24 It did not enter into that  
25 contract as a result of any measure of the

1 Government of Ontario. It entered into that  
2 contract and put that money at-risk before the FIT  
3 Program, before the GEIA, before any of it even  
4 existed.

5 Sure, one can think of it this  
6 way: Even if the FIT program in Ontario never  
7 existed, the claimant still would have lost this  
8 sum. Similarly, the claimant is seeking to recover  
9 hundreds of millions of dollars for its later  
10 applications for Summerhill and North Bruce.  
11 Again, those applications are ranked solely in  
12 accordance with the time at which they were  
13 received. They were just put in line.

14 Those projects would not have  
15 received contracts, even if none of the allegedly  
16 wrongful behaviour ever happened. As we can see,  
17 they were simply too far down the list because of  
18 nothing more than when their application was filed.

19 As I will show throughout the  
20 course of this week, the claimant's claims for  
21 damages amount to an attempt to have Ontario insure  
22 the claimant's bad business decisions. The vast  
23 majority of the losses have nothing to do with  
24 anything that Ontario allegedly did. Further, the  
25 claimant has failed to provide anything amounting

1 to reasonable documentary evidence of its alleged  
2 sunk costs.

3                   Even if we look at the remaining  
4 10 million that's left out of the 160 million, we  
5 don't have an invoice. We don't have any bills.  
6 We have no hard proof of any of their sunk costs,  
7 and its is alleged future losses are remote and  
8 speculative and based on error.

9                   Now that I've been talking for  
10 a while I want to wrap up here, and I will close  
11 with just these final thoughts: After Chapter  
12 Eleven is not there to provide investors with the  
13 ability to challenge the results of a procurement  
14 process, unless they can show that the customary  
15 international law of minimum standard of treatment  
16 has been violated.

17                   In this case, the evidence is  
18 clear: The actions of Ontario and the OPA in  
19 implementing the FIT Program were consistent with  
20 all of Canada's obligations.

21                   The reason that the claimant did  
22 not get a FIT contract has nothing to do with  
23 anything egregious done by the Government of Canada  
24 or the OPA. Both acted reasonably and consistent  
25 with rational policy at all times. And, moreover,

1 both acted in a way that best respected the  
2 expectations of the participants in the program.

3 The reason the claimant did not  
4 get a contract is much simpler; it submitted bad  
5 applications. That is no fault of the government  
6 and it is not the basis upon which an after claim  
7 can be founded. Thank you.

8 THE CHAIR: Can I have from the  
9 secretary the time? It was a little below two  
10 hours.

11 MR. DONDE: One hour and 48  
12 minutes.

13 THE CHAIR: That's what I have  
14 here.

15 MR. SPELLISCY: I won't dispute  
16 that.

17 THE CHAIR: And since on both  
18 sides you still have some time left within your  
19 maximum 2 hours, we will take a break now but just  
20 to know what happens after the break, does -- does  
21 the claimant wish to use the time for rebuttal?

22 MR. APPLETON: We think it would  
23 be more useful to remaining the use the remaining  
24 time for witness examination than rebuttal on the  
25 opening statements.

1                   THE CHAIR: Fine, and that results  
2 the question for the respondent because if there is  
3 no rebuttal there is no surrebuttal and the  
4 tribunal certainly thinks it is more useful to go  
5 over to the witness examinations.

6                   So we can now take a break. We  
7 can take until let's say four o'clock. And then we  
8 will start with -- we will continue with the  
9 examination of Mr. Pickens. Good. Thank you.

10                   Then we will start with -- we will  
11 continue with the examination of Mr. Pickens.  
12 Good. Thank you.

13 --- Recess taken at 3:40 p.m.

14 --- Upon resuming at 4:01 p.m.

15 SWORN: THOMAS BOONE PICKENS:

16                   MR. APPLETON: Are we swearing  
17 witnesses in?

18                   THE CHAIR: I will ask them to  
19 speak the truth. So I will start and I do this --  
20 and then I pass him over to you.

21                   MR. APPLETON: Right. Thank you.

22                   THE CHAIR: Is everything fine,  
23 Mr. Pickens? Welcome here. We are pleased that  
24 you are with us. For the record, I would like to  
25 ask you that you confirm that you're Thomas Boone

1 Pickens --

2 THE WITNESS: Yes.

3 THE CHAIR: -- known as T. Boone  
4 Pickens?

5 MR. APPLETON: Sorry, Madam  
6 President, I don't believe we're transmitting.

7 THE CHAIR: Oh, we should, of  
8 course, stream this. Is it not being done?

9 SPEAKER: Yes, it is.

10 THE CHAIR: How come we don't have  
11 the pictures on these screens?

12 --- (Pause)

13 Now we do. Yes, fine. So sorry  
14 about that, but we have it on the transcript -- we  
15 have the start on the transcript and the  
16 confirmation of the identity of Mr. Pickens.  
17 You're the ultimate owner of the Mesa Group?

18 THE WITNESS: Yes.

19 THE CHAIR: You have given one  
20 written statement in this arbitration, that was  
21 dated 29th April 2014; is that correct?

22 THE WITNESS: Yes, that's here in  
23 front of me.

24 THE CHAIR: That is what you have  
25 in front of you, absolutely. And as you know you

1 are heard here as a witness. As a witness you are  
2 under a duty to tell us the truth. Can you please  
3 confirm that this is what you will do.

4 THE WITNESS: Yes.

5 THE CHAIR: Thank you. Now you  
6 know how we proceed: I will first give the floor  
7 to Mr. Appleton for his questions, and then we will  
8 turn to Canada's counsel, and the tribunal may have  
9 questions as we go along or at the end. Thank you.

10 THE WITNESS: Yes.

11 EXAMINATION IN-CHIEF BY MR. APPLETON:

12 MR. APPLETON: Can you hear me on  
13 this?

14 THE WITNESS: I can't hear you.

15 MR. APPLETON: Yes, nobody can.  
16 We're all dead. We'll try this. You can hear me  
17 now; yes?

18 THE WITNESS: Yes.

19 MR. APPLETON: Thank you, Madam  
20 President. You took some of my questions away.  
21 That is wonderful. Thank you very much.

22 Q. So you are T. Boone Pickens?

23 A. Yes.

24 Q. What does the "T" stand for?



1                   A.    Thomas.

2                   Q.    And you are 86 years old,

3    sir?

4                   A.    Yes.

5                   Q.    I see that you're wearing

6    an assistive audio device; you can hear everything

7    clearly now?

8                   A.    Yes, I can.

9                   Q.    But if you don't understand,

10   you will let us know?

11                  A.    I will.

12                  Q.    I'm sure that myself, counsel

13   for Canada, the tribunal will happily repeat

14   everything, whatever you might need so that you can

15   hear -- yes?

16                  A.    Yes.

17                  Q.    Very good.  Now, you're the

18   founder and chairman of BP Capital; correct?

19                  A.    Yes.

20                  Q.    And BP Capital is the owner

21   of all the equity -- or sorry, you are the owner of

22   all the equity in Mesa Power Group; is that

23   correct?

24                  A.    Yes.

25                  Q.    Now, you submitted that one

1 witness statement here that is in front of you in  
2 the binder, on April 29, 2014; correct?

3 A. Yes.

4 Q. And you had a chance to read  
5 that before you came here today?

6 A. Yes, I did.

7 Q. Did you have any corrections  
8 to make, sir?

9 A. No.

10 Q. All right. Now in your  
11 witness statement you refer to the "Pickens Plan".  
12 Could you briefly tell the tribunal what this is?

13 A. The Pickens Plan, I presented  
14 at or announced it at the Washington Speakers  
15 Bureau, July the 8th, 2008 and it was a plan for  
16 America. We needed an energy plan for America. We  
17 didn't have one. We're the only country in the  
18 world that doesn't have one, and that was where  
19 I started. Simply what the plan was: Get on your  
20 own resources and get off OPEC oil, because on OPEC  
21 oil you are paying for both sides of the war and  
22 just -- we had plenty of resources in America which  
23 were renewables, wind and solar, and natural gas  
24 and oil. We had resources, did not need anything  
25 from OPEC. That was the whole thing.

1                   Q.    And Mr. Pickens, you've had  
2                   a considerable career in the energy business.  
3                   Could you tell us about your business involvement  
4                   in Canada before you made your investment in  
5                   Ontario in 2009?

6                   A.    I got out of school as  
7                   a geologist in 1951, Oklahoma State University, and  
8                   went to work for Philips Petroleum. I worked for  
9                   them for three and a half years. I left and went  
10                  out on my own. That was in November of '54. Then  
11                  I started a company in the United States, PEI, and  
12                  then I started a company in Canada, Alteron Gas  
13                  (phon.), and so I was involved in Canada from  
14                  '59 to '79. I went to Canada with almost -- I have  
15                  to smile when I tell this story, I went there with  
16                  less than \$100,000 in '59, and sold out 20 years  
17                  later for 610 million to Dome Petroleum, and so  
18                  that 20 years in Canada was not the end of  
19                  investing in Canada. I had other investments in  
20                  Canada over the years, after that.

21                                I was in Calgary last weekend for  
22                                a function there at the Hotchkiss Brain Institute,  
23                                to which I've been -- I've been a sizeable  
24                                contributor to that, but I still have great  
25                                Canadian connections and did very well in Canada

1 and it was -- it was very much like operating in  
2 the United States. Rule of law was practised in  
3 existence and all, and it was really a great  
4 experience to -- I can't remember who it was that  
5 said it, but it was one of the premiers of Alberta  
6 said, "The best ambassador, non-Canadian ambassador  
7 for Canada is Boone Pickens," because always -- my  
8 experiences were so good that I enjoyed telling  
9 people about it, just like I enjoy telling you now.  
10 I would tell somebody in the hallway, if they asked  
11 me, so it -- it was a good period in my life.

12 Q. Mr. Pickens, I can't ask  
13 anything else after that. I'm going to turn the  
14 questions over to Canada.

15 As the president explains, Canada  
16 will ask you some questions. They'll be standing  
17 over there. They will give you some binders to  
18 look at, and various things from there, and at any  
19 time the tribunal might ask you questions, so we'll  
20 proceed that way.

21 THE WITNESS: Can I tell another  
22 Canadian story?

23 THE CHAIR: Yes, you can.

24 THE WITNESS: When -- I have four  
25 children, and we moved to Canada. My oldest

1 daughter graduated from Henry Wise Wood High  
2 School, but my second daughter was -- she was in  
3 the ninth grade and she came home and we had a  
4 family -- you could ask for -- to be the one to  
5 present at dinner, and she said, "i want to tell my  
6 story tonight at dinner." And she was very anxious  
7 to do it.

8                   When she got around to it she  
9 said, "You, the family, have to understand we're in  
10 a minority here," and I said, "Pam, tell us about  
11 us being in a ..." She said, "We are foreigners in  
12 a foreign country." And I said, "I told you all of  
13 that before we ..." She said, "I know, but  
14 I experienced it today." And I said, "Tell me.  
15 What was it that you experienced?" She said, "They  
16 sang the national anthem and it wasn't the Star  
17 Spangled Banner." And she is a big singer. So  
18 I said, "How far did you get into the national  
19 anthem before you realized everybody else was  
20 singing another song?" She said, "I was too far in  
21 because they all quit and started laughing at me."  
22 ---(LAUGHTER)

23                   THE CHAIR: Fine, so I think we  
24 can now go over to Canada's questions, Mr.  
25 Spelliscy. Will you stand there, I assume, and

1 take your microphone.

2 CROSS-EXAMINATION BY MR. SPELLISCY:

3 Q. Good afternoon, Mr. Pickens.

4 A. Good afternoon.

5 Q. My name is Shane Spelliscy  
6 and I'm counsel for the Government of Canada. As  
7 Mr. Appleton indicated, I am going to be asking you  
8 some questions today in connection with your  
9 testimony so as far this dispute. And as  
10 Mr. Appleton indicated, if you don't understand my  
11 question -- not just if you don't hear it, but if  
12 you don't understand what I am asking you, just  
13 stop me and I'll clarify. It is important that we  
14 understand each other here.

15 A. Thank you.

16 Q. In this respect, if you can  
17 answer a question "yes" or "no," I would appreciate  
18 you doing that for the record first. I will then  
19 offer you any opportunity that you want to explain  
20 your answer, to offer context, whatever you need.

21 I don't expect us to go all that  
22 long today. If you do need a break, just let me  
23 know and I'll find an appropriate time to take one  
24 as soon as possible.

25 A. Thank you.

1                   Q.    I believe that won't be  
2    needed, but if you do need one, let me know.

3                   And just to let you know as well,  
4    there are a couple of confidential documents that  
5    we will likely turn to, so I'm going to pause when  
6    I get there and I'm going to tell them to turn the  
7    feed off, so we will just take a few moments to  
8    allow that to happen.  So before offering any sort  
9    of comment on the document in front of you, please  
10   let them turn the feed off before we get to it.

11                  A.    Okay.

12                  Q.    Before we get started, I do  
13    have to confirm just one thing.  As you are aware,  
14    you were required to be sequestered prior to your  
15    testimony this morning and I want to make sure that  
16    since the start of today you have not had any  
17    discussions with counsel or anyone else about what  
18    has happened so far, that you weren't watching the  
19    hearing or anything like that.  If you could  
20    confirm that for the record.

21                  A.    Yes, I have not had any --  
22    talked to anybody.

23                  Q.    Perfect.

24                  I would like to start with just  
25    a few questions -- and I should just say you have

1 a binder there, there are a lot of tabs in it,  
2 hopefully we won't have to get to all of them, but  
3 I'd like to start with a few questions about the  
4 structure with respect to some of the companies  
5 that you discuss in your witness statement.

6 So you control what you call the  
7 Mesa Group of Companies; correct?

8 A. Yes.

9 Q. And the original company in  
10 that group was Mesa Petroleum; right?

11 A. Yes.

12 Q. Now, Mesa Petroleum was  
13 an oil and gas company; correct?

14 A. Yes.

15 Q. It had no investments in  
16 renewable energy production at all; correct?

17 A. No.

18 Q. You say in your witness  
19 statement that you left Mesa Petroleum in 1996; is  
20 that correct?

21 A. Yes.

22 Q. And it was in 1997 that you  
23 resigned from the board of directors; is that  
24 right?

25 A. Yes.



1 Q. And that's when you sold all  
2 of your shares as well, in 1997?

3 A. Yes.

4 Q. As of 1997, then, you no  
5 longer had any affiliation with Mesa Petroleum;  
6 right?

7 A. No. Well, just a second,  
8 I still was a shareholder.

9 No, you are exactly right. I sold  
10 the shares coincident with me leaving.

11 Q. With you leaving. So all of  
12 your shares --

13 A. There was a couple of months  
14 in there, but it's very close.

15 Q. Now let's turn to the Mesa  
16 Power Group and ask a little bit about that.

17 So, Mesa Power Group in its first  
18 formation, I think was formed in 2007; is that  
19 correct?

20 A. I think that's right, I'm not  
21 sure.

22 Q. You're not exactly sure, but  
23 that sounds about the right timeframe?

24 A. Yes.

25 Q. So that's -- I mean just to

1 give it -- it's about a decade or so after you left  
2 Mesa Petroleum -- "yes" or "no" for the record.

3 A. Yes. Yes.

4 Q. Thank you. So then to be  
5 clear, Mesa Petroleum and Mesa Power Group, they  
6 are not related at all? They are not the same  
7 entity?

8 A. No.

9 Q. I think earlier you said and  
10 you confirmed that you are the sole member of Mesa  
11 Power Group?

12 A. Yes.

13 Q. I think you confirmed, but  
14 we'll get it for the record again, when you formed  
15 Mesa Power Group LLC, you had never developed  
16 a wind energy project anywhere; correct?

17 A. That's correct.

18 Q. In fact, you had never  
19 developed any sort of renewable energy projects  
20 at all; you were just oil and gas?

21 A. That's right.

22 Q. Now, if you can turn to your  
23 witness statement that you have in front of you  
24 there, and if you could look at paragraph number 2  
25 in your witness statement. There, in the first

1 sentence, you attribute Mesa Petroleum's success,  
2 at least prior to you leaving, I guess, to:

3 "... careful management and  
4 hard work of our  
5 employees ..."

6 Do you see that?

7 A. Yes.

8 Q. But I want to be clear, the  
9 employees who were managing Mesa Petroleum and  
10 making it successful, those were not the same  
11 employees who were managing the Mesa Power Group;  
12 correct?

13 A. Yes.

14 Q. They were not the same  
15 employees?

16 A. They were not.

17 Q. So Cole Robertson is the  
18 vice-president of finance for Mesa Power; is that  
19 correct?

20 A. Yes.

21 Q. He joined Mesa Power in June  
22 of 2008 -- about that date?

23 A. Yes.

24 Q. When he joined he was placed  
25 in charge of the day-to-day operations of Mesa

1 Power; correct?

2 A. Yes.

3 Q. And to be clear, Cole  
4 Robertson never worked at Mesa Petroleum; right?

5 A. No.

6 Q. Now, in paragraph 3 of your  
7 witness statement, you speak about Mr. Robertson's  
8 qualifications. But when he was hired in 2008,  
9 when he worked for Mesa, his only previous  
10 employment had been at Ernst & Young; correct?

11 A. Yes.

12 Q. And that was in their asset  
13 management practice; are you aware of that?

14 A. I'm not sure what group.

15 Q. But when you did retain him  
16 and you gave him the responsibility for Mesa  
17 Power's day-to-day operations, he had no direct  
18 experience in the electricity industry; correct?

19 A. I don't think so.

20 Q. And he had never developed  
21 a wind energy project; correct?

22 A. Correct.

23 Q. So at the time of his hiring,  
24 he didn't have any direct experience in renewable  
25 electricity generation; is that correct?

1                   A.    I'm pretty sure that's -- I'm  
2    trying to remember whether he did or didn't, but  
3    I think that's correct.

4                   Q.    You think that's correct.  
5    Mesa Power's first project was the Pampa project in  
6    Texas; right?

7                   A.    When you say "the first," we  
8    were looking at more than one project than Pampa.  
9    But that was central at that time.

10                  Q.    But all of the first projects  
11    were in Texas?

12                  A.    Pardon me?

13                  Q.    All of the first Mesa Power  
14    projects were located in Texas?

15                  A.    I think so.

16                  Q.    The Pampa project, it began  
17    around 2007; does that sound right?

18                  A.    It sounds right.

19                  Q.    Now, in order to supply that  
20    project in Texas, Mesa Power entered into  
21    a contract to purchase wind turbines from  
22    General Electric; is that right?

23                  A.    Yes.

24                  Q.    Here's where we're going to  
25    go into the confidential section because I want to

1 look at that contract with General Electric. So if  
2 we can just cut the feed to the room.

3 We're confidential.

4 --- Upon resuming the confidential session under  
5 separate cover

6 --- Upon resuming in public

7 BY MR. SPELLISCY:

8 Q. Let's talk a little bit more  
9 generally about Mesa Power's experience to date in  
10 the wind power industry and then we'll come to your  
11 investments in Ontario.

12 In addition to the Pampa project,  
13 which didn't work out, Mesa also pursued a project  
14 called Goodhue in Minnesota; are you aware of that?

15 A. Yes.

16 Q. And that project also you  
17 were unable to successfully develop; correct?

18 A. No, we didn't develop it. We  
19 sold the project.

20 Q. You sold it. But you sold it  
21 before the development was completed?

22 A. Yes.

23 Q. Now, in your witness  
24 statement you talk about Mesa's successful  
25 development of the Stephens Ranch Wind Project, but

1 I want to clarify, Mesa didn't actually bring that  
2 project into operation, did it?

3 A. No, we did not build it out.

4 Q. You sold it before it was  
5 built out; correct?

6 A. Yes.

7 Q. In fact, the Mesa Group has  
8 never actually brought a single wind farm into  
9 actual operation; correct?

10 A. That is correct but we have  
11 an interest in the Stephens Ranch deal, so ...

12 Q. But you didn't actually bring  
13 that into operation?

14 A. No, we did not.

15 Q. I want to talk about the  
16 investments now into Canada by the Mesa  
17 Power Group. Now, your first investments into  
18 Canada were in November of 2009; correct?

19 A. I don't know the date.

20 Q. If we look -- I don't know if  
21 this will refresh you, but if we look at tab 12 in  
22 your binder.

23 A. Can you read it to me?

24 Q. I can.

25 A. Okay.

1                   Q.    These are from the Registrar  
2   of Corporations of Alberta under the Alberta  
3   Business Corporations Act, and it is the  
4   Certificate of Incorporation, and it says:

5                               "Twenty-two Degree Holding  
6                               ULC was incorporated in  
7                               Alberta on 2009/11" --  
8                               meaning November -- "17." [As  
9                               read]

10                   Does that sound about right with  
11   your recollection?

12                   A.    Yes.

13                   Q.    And you are aware that the  
14   other Arran project is about the same time --

15                   A.    Yes.

16                   Q.    -- in fact the same day?

17                   Now, the FIT applications for  
18   those two projects, are you aware they were filed  
19   in November of 2009, as well, shortly after the  
20   projects were incorporated; does that sound right?

21                   A.    Yes.

22                   Q.    Now, of course before you  
23   invested, I assume you did your due diligence on  
24   these projects and in the market in Ontario?

25                   A.    Due diligence meaning what?



1 Q. Well, you invested the  
2 market, what the market conditions -- you  
3 investigated the market, what the market conditions  
4 were like?

5 A. You are asking me if I did  
6 that?

7 Q. Or if you had somebody do it  
8 and brief you on it?

9 A. Cole Robertson did that work.

10 Q. Did he brief you on the  
11 results?

12 A. Yes, he did.

13 Q. Now, your other two projects,  
14 they came later, right? They came in 2010, the  
15 Summerhill and the North Bruce projects?

16 A. I don't remember the names of  
17 those projects.

18 Q. You don't remember the names  
19 of the Summerhill and the North Bruce?

20 A. No. I don't. If you tell me  
21 that, I know you're reading from some ...

22 Q. Sure, I can point you to it.  
23 I mean, I think that if we go to Tab No. 13 in your  
24 binder, there is another Certificate of  
25 Incorporation, and this is for North Bruce Holdings

1 ULC, and it says it was incorporated in Alberta on  
2 April the 6th, 2010. Does that sound approximately  
3 right?

4 A. Yes.

5 Q. Other than for those  
6 companies, your companies made no further  
7 applications to the FIT Program, just for those  
8 four that I mentioned; are you aware of that?

9 A. I'm not aware of that but if  
10 that's the case, yes.

11 Q. Now, if you look at  
12 paragraph 17 of your witness testimony, you talk  
13 here about the fair competition to obtain power  
14 purchasing agreements. You say that it was fairly  
15 run and transparent; that's what you expected?

16 A. Yes.

17 Q. Now, considering there's  
18 competition then, when you made the applications  
19 you believed that a quality application would be  
20 needed in order to win that competition; right?

21 A. Give me the question again.

22 Q. When -- you are talking about  
23 the "competition to obtain," so you recognized it  
24 was a competition.

25 A. Yes.

1                   Q.    So then you understood that  
2    in order to win that competition, a good  
3    application would have to be submitted; correct?

4                   A.    Yes.

5                   Q.    And knowing also that it was  
6    a competitive environment, you or at least Cole  
7    Robertson kept yourself informed of what was  
8    happening in Ontario, so you were briefed on it?

9                   A.    I was not -- let me give you  
10   30 seconds on my management style.

11                  Q.    Fine.

12                  A.    It is not the same as it was  
13   when I was 66, and so I did not -- I was not  
14   up-to-date, day-to-day operations on what took  
15   place on any of our projects, oil, gas, wind,  
16   whatever, but I did have briefings.

17                  Q.    So if something significant  
18   happened, you would be briefed on it?

19                  A.    I think so.

20                  Q.    Now, if we can -- if you can  
21   flip to what's tab 15 in your binder and I can read  
22   it to you. For the record it is R068.

23                  A.    In your binder?

24                  Q.    In this binder, yes. In the  
25   exhibits binder.

1 A. Okay, read it to me.

2 Q. This is an archived news

3 release, it says, and it says:

4 "Statement from the Minister  
5 of Energy and Infrastructure  
6 and Samsung C&T Corporation".

7 [As read]

8 It is dated September 26, 2009 at  
9 10:00 p.m.

10 We can -- if we read from the  
11 third paragraph down, it says:

12 "Both Samsung C&T Corporation  
13 and the Government of Ontario  
14 are pleased to confirm that  
15 efforts are progressing well  
16 towards the signing of  
17 a historic framework  
18 agreement."

19 A. Okay.

20 Q. Would this have been  
21 something that you were briefed on in 2009?

22 A. I don't remember that.

23 Q. So you don't recall then,  
24 sitting here today, if you were aware of the fact  
25 that negotiations between Ontario and Samsung were

1 going on prior to the applications that your  
2 company has made to the FIT Program?

3 A. No.

4 Q. Now, we discussed earlier,  
5 and you had mentioned about the Pampa project, and  
6 you had said that there were two reasons why it  
7 couldn't go ahead and one of them was because of  
8 a lack of transmission capacity. So with that  
9 experience, you were aware of how important and  
10 essential access to the transmission grid was;  
11 correct?

12 A. Yes.

13 Q. Were you ever informed then  
14 about any of the press releases or news articles  
15 that were being published with respect to the  
16 Green Energy Investment Agreement prior to your  
17 projects investing in the FIT Program?

18 A. I don't recall.

19 Q. You don't recall that ever  
20 happening?

21 A. No.

22 Q. You do recall that your  
23 companies applied for FIT contracts in the  
24 Bruce Region of Ontario; does that sound right?

25 A. No, I don't -- I know that --

1     yes, I know, of course, that we were trying to do  
2     something in Ontario, but when you're asking me  
3     specifically about filing a brief, I don't recall  
4     that.

5                   Q.     Were you aware when -- were  
6     you briefed on the fact that at the time those  
7     applications were made, there was no transmission  
8     capacity in the Bruce Region or do you not recall  
9     being briefed on that?

10                  A.     I don't remember that.

11                  Q.     Now, you've seen it today, on  
12     January 21st of 2010, the formal announcement --  
13     there was a formal announcement of the Green Energy  
14     Investment Agreement between Samsung and the  
15     Government of Canada; do you recall being briefed  
16     on that in January of 2010?

17                  A.     I don't recall.

18                  Q.     You don't recall. Let's take  
19     a look at -- it's the last tab in your binder.  
20     I can read out the relevant parts to you.

21                         Tab 21, just for the record, is  
22     R076, and it's a -- what's called an archived  
23     backgrounder from the Ontario Government. And it's  
24     on January 21st, 2010 at 10:32 a.m.

25                         You said you don't recall but

1 you've also said you would have been briefed on  
2 important developments and you've acknowledged also  
3 the importance of transmission capacity. So I want  
4 to look at some of what was publicly released in  
5 January of 2010 about the agreement and I'll try to  
6 read this out for you.

7                   If you look at the bottom of the  
8 first page of this document, it is under a heading  
9 called "Stimulating Manufacturing" and in the  
10 second small paragraph there it says:

11                    "In addition to the standard  
12                    rates for electricity  
13                    generation, the consortium  
14                    will be eligible for  
15                    an economic development  
16                    adder." [As read]

17                   Then it goes on to talk a little  
18 bit about that.

19                   So you don't recall being briefed  
20 in 2010 about the Korean Consortium being eligible  
21 for an economic development adder?

22                   A. No.

23                   Q. If you turn to the second  
24 page, and for everybody else I'm going to go down  
25 to the bottom heading that says "More Renewable

1 Energy," and in the last line there, that leads  
2 over to the next page, it says:

3 "Assurance of transmission in  
4 subsequent phases is  
5 contingent upon the delivery  
6 of four manufacturing plant  
7 commitments mentioned  
8 earlier." [As read]

9 So you don't recall being briefed  
10 that in the agreement signed between Samsung and  
11 the Government of Ontario that they had  
12 an assurance of transmission capacity?

13 A. No, I don't.

14 Q. Well, let's turn -- and we'll  
15 do this, we won't do too many more, I think I'm  
16 getting close to the finish here. If we turn to  
17 tab 18 in your binder which, for the record, is  
18 C119. And this is a direction from the Ministry,  
19 the Minister of Energy to the chief executive  
20 officer of the OPA. It is dated September 17, 2010  
21 and it says in the last paragraph on the first  
22 page, and I'll read it for you:

23 "I now direct the OPA in  
24 carrying out Transmission  
25 Availability Tests and



1 Economic Connection Tests  
2 under the FIT Program rules,  
3 to hold in reserve  
4 500 megawatts of transmission  
5 capacity to be made available  
6 in the Bruce area in  
7 anticipation of the  
8 completion of the  
9 Bruce-to-Milton transmission  
10 reinforcement, for phase 2  
11 projects of the Korean  
12 Consortium." [As read]

13 You don't recall being briefed in  
14 September of 2010, that the Korean Consortium had  
15 been reserved transmission capacity in the very  
16 region in which your projects were applying for  
17 projects?

18 A. No.

19 Q. So I want to come then and  
20 ask you about your testimony in paragraph 18 of  
21 your witness statement.

22 In this paragraph you talk about  
23 a communication that you had with the Ontario  
24 Minister, Deputy Premier Minister of Economic  
25 Development and Trade, Ms. Sandra Pupatello, in

1 April of 2011; correct?

2 A. Yes.

3 Q. Now, this call did not  
4 discuss Mesa's FIT applications, did it?

5 A. No.

6 Q. And certainly Minister  
7 Pupatello made no commitments about those  
8 applications; correct?

9 A. Correct.

10 Q. Other than this  
11 communication, you had no earlier communications  
12 with the Ontario Government about the FIT Program  
13 or the GEIA; correct?

14 A. Yes.

15 Q. Now, in fact, you never  
16 reached out and you never spoke with the Ontario  
17 Minister of Energy at all; correct?

18 A. Correct.

19 Q. And you never spoke with the  
20 president or chief executive officer of the Ontario  
21 Power Authority at any time; correct?

22 A. Correct.

23 Q. Your call with Minister  
24 Pupatello that you are referencing here, this is  
25 about 18 months after you initially invested in

1 Ontario, as we saw from the documents, November  
2 2009 to April 2011; does that sound right?

3 A. Yes.

4 Q. And as we see in the  
5 Summerhill and North Bruce projects, your other two  
6 that we saw, they were in April of 2010, so this  
7 conversation is about a year after those  
8 investments had been made; right?

9 A. Yes.

10 Q. So this call with Minister  
11 Papatello had nothing to do with the reason why you  
12 invested into Ontario, did it?

13 A. Her call?

14 Q. Her call.

15 A. No, it had nothing to do with  
16 it.

17 Q. Your investment was made at  
18 that point already?

19 A. Yes.

20 Q. Now, in paragraph 18, you  
21 have testified there, and it's the fourth sentence  
22 in, about halfway down and I'll read it to you:

23 "Minister Papatello did not  
24 make me aware that it was  
25 possible to participate in,

1                   or negotiate, a special  
2                   arrangement with Ontario,  
3                   whereby Mesa could circumvent  
4                   the requirements of the FIT  
5                   Program."

6                   Do you see that?

7                   A.    Yes.

8                   Q.    You would agree, even though  
9                   you weren't briefed on it, this conversation  
10                  happened about a year after the GEIA was publicly  
11                  announced in January of 2010; correct?

12                  A.    I'm getting mixed up on dates  
13                  but ...

14                  Q.    Well, we can go back and  
15                  look, but the announcement -- the press release  
16                  that I read to you -- was from January of 2010;  
17                  correct?

18                  A.    Okay, yes.

19                  Q.    Do you agree?  And so this  
20                  call is over a year after that happened?

21                  A.    Yes.

22                  Q.    But you weren't briefed on  
23                  any of this, so when you made your statement in  
24                  your witness statement here, that she didn't make  
25                  you aware, the fact is nobody had briefed you on

1 the fact that Samsung had entered into such a deal  
2 and that it had been publicly disclosed that they  
3 had entered into such a deal?

4 A. Yes.

5 Q. You never asked Minister  
6 Pupatello about negotiating an investment agreement  
7 with Ontario, did you?

8 A. No.

9 Q. In fact, to your knowledge,  
10 neither you nor anyone in any of your companies  
11 ever asked about negotiating such an agreement with  
12 Ontario?

13 A. Yes.

14 Q. You didn't do that, nobody  
15 asked; right?

16 A. Right.

17 MR. SPELLISCY: Thank you,  
18 Mr. Pickens, that was all the questions I have for  
19 you today.

20 THE CHAIR: Thank you. This  
21 doesn't entirely complete your examination. It  
22 won't be much longer, but if you just bear with us.

23 THE WITNESS: I couldn't hear you.  
24 Just a sec.

25 THE CHAIR: This does not yet

1 entirely complete your examination. There may be  
2 a few more questions, if you can bear with us.

3 Does Mr. Appleton have some  
4 redirect questions?

5 MR. APPLETON: I have one.

6 THE CHAIR: Yes, please.

7 RE-EXAMINATION BY MR. APPLETON:

8 Q. Good afternoon again,  
9 Mr. Pickens.

10 Do you remember when Mr. Spelliscy  
11 was asking you some questions about whether Mesa  
12 Power Group had developed a wind power project  
13 anywhere?

14 A. Yes, I remember.

15 Q. Besides Mr. Robertson, Cole  
16 Robertson who is here, did any other members of  
17 Mesa Power have wind experience?

18 A. We had, I think, Mark Ward  
19 had wind experience, but yeah, I believe that would  
20 be it.

21 Q. Would Mr. Robertson know of  
22 those --

23 A. Oh, yeah, Cole would know.  
24 And we could have had other people involved. I'm  
25 not sure. Ask Cole.

1                   MR. APPLETON: Thank you very  
2 much. Nothing further.

3                   THE CHAIR: Thank you.

4                   Do my co-arbitrators have any  
5 questions for Mr. Pickens?

6 QUESTIONS BY THE TRIBUNAL:

7                   THE CHAIR: I have one that goes  
8 more to your general assessment of what happened  
9 here. You have insisted both in your written  
10 statement where you have spoken about the  
11 particular fondness -- "I have a particular  
12 fondness for working in Canada," you wrote. And  
13 you have restated this today orally.

14                   The reason why you are here today  
15 obviously means that this time it did not work out  
16 well; what did go wrong?

17                   THE WITNESS: I'll go back in my  
18 recall again. I kind of look forward to doing  
19 business in Canada. And I had actually been at  
20 San Antonio when the NAFTA agreement -- I think it  
21 was signed there, but I was invited to be there and  
22 I remember I sat on the front row and I listened to  
23 what they had to say and it made a great deal of  
24 sense to me, NAFTA did, that we would work back and  
25 forth in North America, and I think from there,

1 that was where I started to think about the North  
2 American Energy Alliance, that North America could  
3 work together and cut out a lot of red tape and  
4 everything else if they -- if everything was above  
5 board and transparent, to companies that wanted to  
6 work back and forth.

7 And anyway, in that, I came up  
8 with a North American Energy Alliance which would  
9 be to get totally off OPEC crude.

10 And so -- then after the  
11 Minister -- after she called me, and encouraged me  
12 to come to Ontario and do business, and asked me to  
13 do some speaking engagements up here, and all,  
14 I felt like that -- and we were already into -- but  
15 I felt good about the call. I felt that we were  
16 going to be treated fairly. And -- but -- and  
17 then -- it said I was depressed over it, and  
18 I thought about it when I put "depressed" in there  
19 and I thought about it --

20 THE CHAIR: I think you said  
21 "disappointed," didn't you?

22 THE WITNESS: Did I say  
23 "disappointed" or "depressed"?

24 THE CHAIR: "Distressed".

25 THE WITNESS: "Distressed," not --



1 but I thought, "Is this too strong?" and I thought  
2 no, it really isn't, because I was disappointed  
3 that (A), a secret deal had been made with Samsung,  
4 and that we were now out and Samsung was in, and  
5 I -- and Cole briefed me on it, told me, he said,  
6 "Yes, they made a deal with Samsung." Later I know  
7 that the way I recall it in another meeting, we  
8 picked that up on discovery, that a secret meeting,  
9 yes, had been made between Ontario and Samsung.  
10 And that did -- that was very disappointing to me.

11 THE CHAIR: So the reason of your  
12 disappointment or being distressed was that Samsung  
13 made a deal with the Ontario Government or -- not  
14 that much that your FIT applications did not  
15 succeed and you didn't get contracts?

16 THE WITNESS: Yes, I --

17 THE CHAIR: What was it? Because  
18 there are two --

19 THE WITNESS: Well, the deal that  
20 was made with Samsung was not -- I didn't feel  
21 was -- it was made above board, and it was a secret  
22 agreement, and so I -- I felt like, you know, we  
23 lost. Well, you always feel bad when you lose, and  
24 then you look to see why you lost, and here we lost  
25 because we didn't have a level playing field.

1                   THE CHAIR: Fine. Thank you.  
2 That answers my question, and unless there is any  
3 follow-up question...

4                   MR. MULLINS: We just have one  
5 follow up question, follow up from the Chair's  
6 question.

7                   THE CHAIR: From the tribunal's  
8 questions, yes. So please go ahead.

9                   MR. MULLINS: Do you mind if I do  
10 it? I just thought of --

11                   THE CHAIR: No, you can do it.

12 FURTHER RE-EXAMINATION BY MR. MULLINS:

13                   Q. Mr. Pickens, to follow up on  
14 the Chair's question, between yourself and Mr.  
15 Robertson, who would be the best to be able to  
16 identify what Mesa's complaints are in this  
17 arbitration?

18                   A. Well --

19                   THE CHAIR: Yeah, maybe I should  
20 say, I wanted to have Mr. Pickens' personal  
21 opinion. I understand that you have made your  
22 submissions and Mr. Robertson will be able to  
23 explain tomorrow. I just wanted Mr. Pickens'  
24 personal opinion of what had happened.

1                   MR. MULLINS: I'll take that from  
2 the record. I just wanted to make sure that the  
3 Chair understood that and that's fine.

4                   THE CHAIR: Absolutely. That was  
5 the spirit of the question.

6                   MR. MULLINS: Perfect.

7                   THE WITNESS: I don't have  
8 a question?

9                   THE CHAIR: You don't have  
10 a question because I answered the question.

11                   THE WITNESS: Thank you.

12                   THE CHAIR: So, that completes  
13 your examination, Mr. Pickens. Thank you very much  
14 for your explanations.

15                   THE WITNESS: Well, thank you too,  
16 and you got me out and on my way home before  
17 I thought I was going to get home. Thank you.

18                   MR. APPLETON: Is the witness  
19 excused?

20                   THE CHAIR: Yes. So, you can  
21 either leave or you can stay; whatever you wish to  
22 do.

23                   THE WITNESS: I can't hear you.

24                   THE CHAIR: You can leave -- you  
25 hear me now? No, maybe I should wait.

1                   THE WITNESS: The reason I can't  
2     hear is because I have shot a gun too much and  
3     I have one other reason. It's because I'm 86. The  
4     other day I did a physical with Southwestern  
5     Medical and they called and told me, they said, "We  
6     have good news and bad news." And I said, "Well,  
7     give me the good news first." And they said, "You  
8     are going to live to be 114." And I said, "Okay,  
9     bad news?" And they said, "You won't be able to  
10    hear or see." And I'm already there. Thank you.

11                   THE CHAIR: Thank you. The  
12    question now is: Do we want to continue and start  
13    the examination of Mr. Robertson or do we do this  
14    tomorrow, which to me would seem more reasonable  
15    because it's five o'clock now.

16                   MR. APPLETON: It would seem to me  
17    that tomorrow would make more sense. We won't get  
18    very far anyways.

19                   THE CHAIR: And we would have to  
20    interrupt, which is never really good.

21                   MR. SPELLISCY: Let's do it  
22    tomorrow.

23                   THE CHAIR: You agree? And then  
24    tomorrow at some point the tribunal will come back  
25    to you on the issue of the damage expert evidence.

1                   Is there anything that we need to  
2 raise before we can close for the day? No? Fine.  
3 Then have a good evening and we will see each other  
4 tomorrow morning at 9:00.  
5 --- Whereupon at 4:59 the arbitration was adjourned  
6 to Monday, October 27, 2014 at 9:00 a.m.

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1 I HEREBY CERTIFY THAT I have, to the best  
2 of my skill and ability, accurately recorded  
3 by Computer-Aided transcription and transcribed  
4 therefrom, the foregoing proceeding.

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11 Teresa Forbes, CRR, RMR,  
12 Computer-Aided Transcription

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15 skill and ability, accurately recorded by  
16 Computer-Aided Transcription and transcribed  
17 therefrom, the foregoing proceeding.

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