1 PCA Case No. 2012-17
2
3 AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NAFTA
4 AND THE UNCITRAL ARBITRATION RULES, 1976
5
6 BETWEEN:
7 MESA POWER GROUP LLC (USA)
8 Claimant
9 - and -
10
11 GOVERNMENT OF CANADA
12 Respondent

13 ARBITRATION HELD BEFORE
PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING
14 ARBITRATOR)
THE HONORABLE CHARLES N. BROWER
15 MR. TOBY T. LANDAU QC
held at Arbitration Place
16 333 Bay Street., Suite 900, Toronto, Ontario
on Friday, October 31, 2014 at 9:00 a.m.
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1 Toronto, Ontario
2 --- Upon resuming on Friday, October 31, 2014
3 at 9:00 a.m.
4 THE CHAIR: Let me go on the
5 record, then. Good morning, everyone. We are
6 starting the sixth and last day of this hearing.
7 I also greet those who are in the viewing room. We
8 will now hear oral argument, and we'll start, of
9 course, with the Claimant, Mr. Appleton. You have
10 the floor.
11 CLOSING SUBMISSIONS BY MR. APPLETON:
12 MR. APPLETON: Thank you very
13 much, Madam President, and to the members of the
14 Tribunal. I first, of course, would like to thank
15 you very, very much for the time that you've spent,
16 and obviously you've read the materials, and you've
17 spent a lot of care in the preparation for this
18 hearing. I'm sure that myself and Mr. Spelliscy,
19 on behalf of Canada, and certainly all of our
20 delegations thank you very, very much for this
21 attention to the detail.
22 I hope that we're able to just
23 refresh some of your memory with some of the
24 testimony that's occurred during this hearing and
25 to be in a position to be able to assist you as you

1 make your deliberations, and hopefully you will be
2 able to hear me clearly today.
3 Now, I also understand that we
4 will distribute some materials by way of
5 demonstrative aids, but I'm going to start while
6 that's going on so that we can get everything
7 going.
8 The testimony of the witnesses
9 that you have heard confirms that what we have said
10 in our opening statement is true. And the story of
11 what happened to Mesa, not only is true, it is
12 clear; it is simple; it is egregious; and it is
13 outrageous.
14 As we said in our opening, the
15 Mesa story is a story of a secret process, secret
16 deals, arbitrary rules, and selective enforcement
17 of those rules in the service of political
18 expediency rather than public integrity and
19 transparency that the ratepayers of Ontario deserve
20 and that those proponents who would come here
21 should expect.
22 There is nothing innocent or
23 discretional in entering into a secret deal with
24 one foreign investor to the detriment of other
25 investors which Ontario was actively encouraging to

1 invest.

2 Did the government want to

3 establish a renewable energy program? Yes. Was

4 this a laudable goal? Yes. But under the NAFTA,

5 Ontario cannot give favourable treatment to one

6 investor over another. Under the NAFTA, Ontario

7 was bound to protect investors from NAFTA parties

8 and their investments like Mesa and its investments

9 in Ontario. And if Ontario wanted to give

10 additional benefits to a foreign investor, it was

11 also bound under the NAFTA to provide those same

12 benefits to investors and investments of a NAFTA

13 party. Ontario did not do this.

14 By entering into a secret deal

15 with the Korean Consortium, Ontario's investment

16 environment for renewable energy lost the veneer of

17 a transparent process motivated by laudable

18 environmental goals and instead painted

19 a disturbing picture of favoritism and systemically

20 unfair and unlawful regulatory conduct.

21 The evidence that has been present

22 to you unequivocally and conclusively demonstrates

23 what really happened. Canada has done its best to

24 portray the investor's case as being a tall tale of

25 speculative intent. And as we have seen, it is far

1 from a tall tale. Canada's picture confuses
2 political expediency with bona fide policy
3 objectives. Canada's picture confuses the ordinary
4 statutory authority of public officials to do
5 specific things, in specific circumstances, in good
6 faith, and with carte blanche licence to do
7 anything they want to withhold information at will,
8 to distort information at will, and to abuse the
9 authority entrusted to them.
10 Meanwhile, what Canada does say is
11 much less important than what it fails to say.
12 Canada is conspicuously silent about some of the
13 fundamental issues in this case. Canada does not
14 address the fact that the local content
15 requirements imposed by Ontario under the FIT
16 Program were always violative of the NAFTA.
17 Canada did not even defend its
18 conduct in any of its written pleadings, nor did it
19 do so this week. Canada knows it was wrong.
20 Canada does not address the fact
21 that the treatment provided to the
22 Korean Consortium by Ontario, under the GEIA, was
23 more favourable than the treatment provided to
24 Mesa. Canada did not even defend its conduct in
25 any of its written pleadings. Canada, again, knows

1 that it's wrong.
2 Canada does not address the fact
3 that the Korean Consortium did not have to meet any
4 requirements of any kind with respect to the
5 guaranteed priority access to the first
6 500 megawatts of transmission access -- I can pause
7 for you, if you like.
8 THE CHAIR: I'm starting to cough.
9 MR. APPLETON: -- which was
10 accorded to the Korean Consortium in September
11 2009, more than three months before the GEIA was
12 even signed, at a time when Sue Lo and Rick
13 Jennings confirmed that there was no binding
14 agreement between Ontario and the
15 Korean Consortium.
16 Canada cannot defend this, so it
17 argues that there is no damage to Mesa arising from
18 this harm, but Canada is wrong. Canada ignores the
19 fundamental legal duty and responsibility of public
20 servants who exercise any statutory or
21 discretionary authority to do so fairly,
22 reasonably, and in good faith.
23 These are not issues of
24 technicality or semantics. These omissions go to
25 the heart of this case, and these omissions go to

1 the heart of the rule of law, the rule of law which
2 is the bedrock of international law enshrined in
3 the NAFTA in Article 1105, and it is the bedrock of
4 Canadian law, and it applies at all times to all
5 public servants, be they elected Ministers or
6 public servants, and covers also the code of
7 conduct of the Ontario Power Authority.
8 Canada's own witnesses recognize
9 those duties here; that they had failed to comply
10 with them -- sorry, they recognize these duties
11 here, but they failed to comply with them. And the
12 rule of law in international law and in domestic
13 law is what this case is fundamentally about,
14 because, at it's essence, the rule of law is as
15 simple as the basic facts of this case and applies
16 to the exercise of all public authority. It says
17 that no public authority, no matter how
18 discretionary it may be, is unfettered.
19 Put simply, the rule of law
20 requires that all public authority must be
21 exercised fairly and in good faith and on the basis
22 only of relevant considerations assessed
23 reasonably, honestly, objectively, transparently,
24 and impartially, and only for the purpose which the
25 authority was granted.

1 Anything else or anything less is
2 an abuse of authority, an abuse of public trust,
3 abuse of process. That makes any resulting act or
4 decision a breach of jurisdiction and, therefore,
5 ultra vires.
6 The unquestionable meaning and
7 practical application of these bedrock principles
8 comes from the Supreme Court of Canada, and those
9 cases are on the record and are also clearly
10 reflected in the Ontario Power Authority's employee
11 code of conduct, which is Exhibit C-582.
12 OPA witness Jim MacDougall and
13 others acknowledge that these bedrock fairness
14 principles proscribe what was at all times expected
15 of them as public servants. What these basic
16 principles of fairness, reasonableness, and good
17 faith require of all public servants is
18 a fundamental fact in this case that Canada
19 ignores.
20 The Ontario government made a bad
21 deal when it entered into a secret MOU, so secret
22 that it did not even tell the Ontario Power
23 Authority, the very body that would be responsible
24 for implementing any subsequent agreement. The
25 Ontario government signed the GEIA agreement in the

1 face of evidence of the success of the FIT Program
2 without Cabinet approval and to the dismay of the
3 organization that would eventually be forced to
4 implement it. When the Korean Consortium didn't
5 comply with the terms of the GEIA, the Ontario
6 government still didn't cancel the deal. Instead,
7 Ontario continuously permitted Samsung to have
8 priority access, the same access which blocked Mesa
9 out of the Bruce Region.
10 Canada purports to downplay this
11 by citing a January 2010 press backgrounder and
12 purports that the Premier of Ontario was all ears
13 for similar deals. This may be so, but as we saw
14 during the hearing, his hands were tied. Although
15 many other companies approach Ontario with
16 a similar deal, the Ontario government rejected all
17 of these.
18 Worse, Ontario's transmission grid
19 could not even sustain the GEIA and the FIT Program
20 at the same time. As a result, the OPA was forced
21 to constraint the interest of investors under the
22 FIT Program to ensure that the government's special
23 deal with the Korean Consortium was protected.
24 This was a violation of NAFTA Articles 1102, 1103,
25 and 1105. Ontario should have either given all

1 renewable energy investors it was attempting to
2 attract the same deal or not given anyone a special
3 deal. But Ontario did not do either. Instead, it
4 chose to give favourable treatment to a non-NAFTA
5 party investor.
6 Now, it must be held accountable
7 for breaching the obligations of the NAFTA
8 Article 1103 Most Favoured Nation Treatment
9 obligation by providing more favourable treatment
10 to the Korean Consortium than it accorded to Mesa
11 in like circumstances.
12 Canada also ignores the basic
13 underlying fact that all of the actions of public
14 officials, be they the OPA, when directed by the
15 government, or the Ministry of Energy or the
16 Premier's office, and all of their decisions were
17 subsequent to a duty to exercise a public authority
18 fairly, reasonably, and in good faith. This
19 manifest failure of the public officials involved
20 to respect and adhere to these two fundamental
21 principles that Canada has tellingly chosen in this
22 arbitration to ignore makes everything done by
23 those public officials unlawful, each and every
24 step of the way.
25 Throughout, Mesa itself acted in

1 good faith and spared no expense to satisfy all of
2 the regulatory requirements and to be a good
3 corporate citizen of Ontario and Canada. Mesa was
4 prepared to invest over $1.2 billion in Ontario.
5 It made actual out-of-pocket investments of over
6 $160 million in its renewable energy projects
7 targeted in Ontario. Both Mr. Pickens and
8 Mr. Robertson testified that they believed in
9 a fair, transparent, rules-based process would
10 ultimately prevail in Ontario. That's the basic
11 expectation of investors in the rules-based
12 program.
13 There is nothing better that they
14 or Mesa could possibly have done. Until these
15 proceedings, Mesa had no idea of the parallel
16 universe of deception and concealment that was
17 occurring behind their backs to deprive them of
18 fairness and equality. Their only recourse is to
19 seek redress from this Tribunal under the NAFTA.
20 And as we've review the evidence
21 from this hearing, we will see clear examples of
22 gross unfairness where Mesa was told that it could
23 not have information, but where others, like
24 NextEra, had better access, and they received
25 sensitive information about undisclosed FIT Program

1 changes.

2 We can all ask ourselves this

3 question: In any of our dealings with government

4 officials, would any of us feel that we have been

5 treated fairly if government officials knowingly,

6 arbitrarily, and for no proper purpose -- in fact,

7 for an improper purpose -- concealed critically

8 important information preventing us from doing what

9 we were otherwise entitled to do or provided us

10 with erroneous information and then concealed from

11 us the actual content of the secret agreements, all

12 to take the political pressure off themselves?

13 This whole process was not carried

14 out in good faith. This was not honesty. This was

15 not fairness. This process was infused with raw

16 politics, arbitrariness, and an egregious abuse of

17 authority.

18 And what was it intended to

19 do? It was intended to send Mr. Pickens and his

20 Mesa team packing back to Texas where they came

21 from and instead to favour those with inside

22 connections to the government who would be able to

23 profit from what appeared to be a transparent

24 process, but which in reality was not. It was a

25 cesspool. It was shameful. I feel very badly

1 after seeing what went on here for my fellow
2 Ontarians and the ratepayers of Ontario. They are
3 having to bear the burden of the shameful
4 behaviour.
5 Mesa came to Canada expecting
6 a fair process, a transparent rules-based process
7 for renewable energy generation projects, but Mesa
8 did not come expecting the system to be rigged
9 against them. Political favoritism, cronyism, or
10 simple arbitrariness cannot be allowed to win the
11 day, and politicians and officials whose highest
12 duty is to preserve the rule of law cannot be
13 allowed to abuse the system entrusted to their care
14 to run roughshod over the rights of investors we
15 welcome to this country to invest in legitimate
16 projects and to whom NAFTA guarantees fair and
17 equity treatment, national treatment, and
18 Most Favoured Nation Treatment, and, of course,
19 protections against prohibited local content rules.
20 So now that we have completed the
21 witness hearing, we are able to review the facts,
22 and the facts demonstrate the violations of the
23 NAFTA alleged by Mesa.
24 Now, I'm going to turn to my
25 colleague Mr. Mullins to piece some of the evidence

1 together and spare my throat a little bit, and then
2 I will come back and have some more
3 comments. Thank you. Mr. Mullins, please.
4 CLOSING SUBMISSIONS BY MR. MULLINS:
5 MR. MULLINS: Good morning,
6 members of the Tribunal. On behalf of my client,
7 I appreciate the time that you've given this case,
8 a very significant case to our client and, as
9 Mr. Appleton said, to the people of Ontario.
10 It's been a long week of evidence,
11 so we thought it would be helpful for are for this
12 proceeding -- obviously we understood what you'd
13 like for the post-hearing briefs. We thought it
14 would be helpful to tie the evidence together from
15 the beginning to the end, and it might accomplish
16 two things: To talk about there were
17 simultaneously events going on, the
18 Korean Consortium deal and the FIT Program, and how
19 they are interrelated and how it affected our
20 client.
21 I'd also like the opportunity, in
22 addition, to remind the Tribunal of some of the
23 evidence we got in 1782.
24 Upon reflection of the evidence
25 that I saw this week, I went back to the deposition

1 of Colin Edwards, and I want to present to you some
2 portions of that that show you exactly what's going
3 on and what Pattern was thinking and what they
4 were, and I think you'll find it very telling as to
5 what happened here.
6 First slide. That slide, please.
7 As we learned from these
8 proceedings, Samsung approached the
9 Government of Ontario in August of 2008 for
10 a special deal on renewable energy. And as
11 Mr. Jennings admitted, on examining, we asked him:
12 "Can you tell the Tribunal
13 what Samsung's experience was
14 with renewable energy at the
15 time they approached you?
16 "ANSWER: So they were
17 certainly a very large
18 international conglomerate
19 that was substantially well
20 financed. They had not,
21 themselves, developed, as far
22 as I know, wind or solar.
23 Again, this was a very large
24 component, financially sound
25 entity that was look

1 continuing to invest in
2 Ontario. Yes, they were not
3 an internationally known
4 developer of renewable
5 energy." [As read]
6 In other words, Samsung had no
7 experience whatsoever with developing wind or solar
8 power.
9 That's completely
10 undisputed. This was an unsolicited bid, and the
11 Government of Ontario rather than trying to
12 determine whether any other investor, whether
13 a company that actually was in the industry of
14 energy could provide a better deal for the
15 ratepayers of Ontario, decided to strike a deal
16 with the first company that came to them.
17 Why didn't the government seek a
18 better deal? According to Mr. Jennings, it was
19 solely to protects Samsung's commercial offer. He
20 said it was unusual for the government to shop
21 around contracts to ensure that ratepayers who
22 ultimately will pay the price are getting the best
23 deal. Absolutely no effort is made at all to
24 determine if anyone else would be preferable.
25 As you saw from Mr. Jenning's

1 testimony, well, you know, they defended the
2 decision because Samsung is big and renowned.
3 Remember, I think, the Chair asked -- I think it
4 was Mr. Jennings. She said, "Well, there are a lot
5 of big companies in the world, Mr. Jennings." And
6 any reader of a financial paper knows big and
7 famous companies fall all the time, and it is not
8 simply sufficient to say, "Well, I'm going to cut
9 a special deal with somebody just because I've
10 heard of them." Without criteria or analysis, how
11 in the world can Ontario possibly know that it was
12 getting a better deal from Samsung than any other
13 company, large or small?
14 The answer is simple: It could
15 not. Despite this, despite absolutely no analysis
16 whatsoever, in December of 2008, the Government of
17 Ontario entered into a secret Memorandum of
18 Understanding with Samsung and the Korean Electric
19 Power Company -- we'll call KEPCO -- an agreement
20 reserving 2,500 megawatts of capacity of Ontario's
21 grid for exclusive negotiations and requiring
22 confidentiality.
23 Now, did the government ask the
24 OPA or any other entity running the transmission
25 group and its allocation before doing this? We

1 know the answer. The answer is no. As confirmed
2 in this hearing, the OPA did not know. The OEB did
3 not know. No one knew until the MOU was signed,
4 and the public did not even know about a potential
5 deal until the FIT Program had already been
6 announced.
7 And that is going to be a crucial
8 fact. There has been some talk about, "Well, you
9 know, the die was cast. You can't complain for
10 stuff that we did before you got involved." The
11 die was cast, and there is clear violations well
12 within the time period after we began investing,
13 and we'll go through those facts in a moment. Now,
14 this incredibly, not only do they enter into
15 an MOU, they don't even follow it.
16 Now, read the MOU. It
17 required -- required -- the parties to conduct
18 a feasibility study. So even if you believed the
19 witnesses to say, "You know, we thought it was
20 a big company, and we thought they could do a great
21 job, so what we're going to do, we're going to test
22 it out. So we're going to allow a feasibility
23 study to determine whether a final agreement will
24 be feasible."
25 And then it says, we're going to

1 enter into a conditional agreement -- read the
2 MOU -- a conditional agreement before entering into
3 a final agreement. Guess what? Neither happened.
4 Neither one of them. They'd even file the MOU the
5 date signed.
6 The Auditor General, later, would
7 do a scathing report about the failure to do the
8 most basic study, a report that was not -- those
9 factual findings were got contested either by the
10 Ministry of Energy or the OPA.
11 None of this stopped the
12 Government of Ontario from entering into a binding
13 framework later in 2010.
14 And this is a crucial fact,
15 members of the Tribunal. They entered a binding
16 agreement well after our clients invested. There
17 is simply no dispute about that.
18 Now, why Ontario was doing a deal
19 with Samsung, frankly, remains a mystery. Again,
20 before the OPA is made aware of the deal, the OPA
21 had consulted with the public and stakeholders from
22 March 2009 to July of 2009, through webcasts and
23 teleconferences, with respect to the development of
24 the FIT Program. So while the FIT Program was
25 launched in September 2009, it was obviously made

1 public -- this is not something that came up
2 overnight -- throughout 2009. It was notified that
3 it was coming in.
4 Now, I do need to -- that slide is
5 confidential, so could we go confidential, please?
6 --- Upon commencing confidential session at 9:31
7 a.m. under separate cover
8 --- Upon resuming in public session at 9:32 a.m.
9 MR. MULLINS: Thank you. Are we
10 back? What the OPA does not know was that the
11 government simultaneously was negotiating with
12 Samsung.
13 Then, in May of 2009, the
14 Government of Ontario released the Green Energy and
15 Green Economy Act. This program empowered the OPA
16 to exercise the powers of the government and carry
17 out a Feed-in Tariff program. The purpose of the
18 FIT Program was to encourage foreign investors to
19 invest in Ontario by developing in renewable energy
20 projects in exchange for a fixed term and
21 fixed-price contracts.
22 One of those companies that was
23 attracted by the OPA's public consultations was my
24 client Mesa Power. Mesa, unlike Samsung, had
25 significant experience in the development of energy

1 projects and was expanding into clean energy and
2 renewable energy. Mesa successfully has developed
3 the 278-megawatt Stephens Ridge wind project, which
4 was later sold. It established a strategic wind
5 and energy partnership with General Electric
6 company, one of the most powerful and largest
7 companies in the world. It had agreement for a
8 reliable supply of whirlwind turbines. Mesa hired
9 some of the most experienced wind developers in
10 Ontario who previously had developed the largest
11 wind projects in Ontario.
12 Please go to the next slide.
13 Now, we asked Mr. Jennings, about,
14 "Wasn't it reasonable for potential stakeholders to
15 recognize the FIT Program was coming in, in 2009
16 and to rely on the fact that your country was
17 seeking investment?" He answered yes. So the
18 legislation was intended to promote it, and there
19 was specific consultation with stakeholders, some
20 of them I was involved in, so it was prospective
21 investors who not only knew about the program but
22 had been involved in the consultations of it. So
23 in the FIT Programs, there's consultations. In the
24 secret Korean Consortium deal, there's not even
25 consultation with the OPA.

1 Now, the Government of Ontario
2 suspected and was counting on investors commencing
3 their investment in Ontario before the launch of
4 the FIT Program, and this is precisely what Mesa
5 did. It was looking to invest in Ontario since the
6 summer of 2009, and it closed on the acquisition of
7 the Twenty-Two Degrees project in August of 2009.
8 That's when our client, at a minimum, began
9 investing in Ontario. It is a significant date.
10 The guaranteed FIT
11 price -- guaranteed FIT price -- was 13.5 cents per
12 kilowatt hour for a 20-year period, backed by
13 Ontario's ratepayers, and obviously was very
14 attractive.
15 The FIT Program appeared to have a
16 predictable rules-based and transparent process.
17 It turns out that last part was completely untrue.
18 Mesa expected, as it would be
19 reasonable of any investor, that if you played by
20 the rules and you did hard work, you'd obtain
21 a contract. And what was a great benefit for Mesa
22 was the location of the wind sites to develop, the
23 Bruce Region. There was reliable wind there, and
24 it was confirmed by wind studies for all sites it
25 chose.

1 Now, at the time, neither the FIT
2 proponents, again, nor the OPA itself knew that
3 transmission capacity, which was expected to be
4 awarded on this FIT Program that had been publicly
5 announced, would be poached by the
6 Korean Consortium. No one knew, not even the
7 Korean Consortium, because this didn't happen until
8 later, that it would eventually be taken into
9 Bruce Region in 2010 after our client had already
10 invested and picked its site. Remember, they
11 picked their sites in November of 2010;
12 right? Korea didn't take their selection to Bruce
13 in 2010.
14 So we keep an hearing at the
15 opening and throughout the proceedings, "Well,
16 shouldn't you have inspected to know that Korea was
17 here? Did you not read these public
18 announcements?" No announcement could possibly
19 have told anyone that we were going to go to the
20 Bruce, because it hadn't happened yet. Not even
21 the Korean Consortium knew they were going to Bruce
22 in 2009.
23 In fact, as Mr. MacDougall
24 admitted during his testimony, he, as one of the
25 main FIT supporters, was not pleased with the

1 secret deal with the Korean Consortium when he
2 found out. And Arbitrator Landau specifically
3 asked him to follow up on a question that
4 Mr. MacDougall, who I think you will find was
5 fairly candid in these proceedings -- he said he
6 was disappointed, and Mr. Landau followed up. "Can
7 you explain that? Why not? Why were you not
8 pleased?" And Arbitrator Landau went on:
9 "What I'm driving at is, as
10 somebody who was involved in
11 the designing of the FIT
12 Program, what kind of an
13 impact did you see from the
14 existence of a contract with
15 the Korean Consortium?" [As
16 read]
17 Remember, this was still secret
18 from the public. This was during the time period
19 when only OPA knew. Mr. MacDougall responds:
20 "Well, certainly leading
21 into, well, the FIT Program
22 design, we knew that there
23 was thousands and thousands
24 of megawatts of interest of
25 project development in

1 Ontario, as witnessed by some
2 of the prior renewable energy
3 procurement activities. So I
4 knew that there would be more
5 demand for contracts than
6 there would be supply of
7 contract capacity. So my
8 professional reaction was
9 this just creates less supply
10 of FIT contracts availability
11 because a portion of the
12 available grid capacity will
13 necessarily need to be
14 allocated to the
15 Korean Consortium." [As
16 read]
17 None of this is told to the
18 investors in 2009. That testimony is very telling.
19 This is because, by definition, by Mr. MacDougall's
20 definition, the Korean Consortium was necessarily
21 competing with FIT developers due to their priority
22 access and would result in less contracts to be
23 awarded on the FIT Program. He was wondering what
24 was going on.
25 Here is one of the most important

1 things in the case, and I hope the Tribunal caught
2 this in testimony. It was only an MOU -- if we go
3 to the next slide -- because I asked Mr. Jennings
4 about this because I wanted to be clear. I asked
5 him, "You could walk away from this; right?"
6 So I asked him:
7 "Q.So, if, for example, at
8 any time Ontario or the
9 Korean Consortium says "You
10 know what, this is not
11 working for me" they can just
12 walk away from it; right?
13 A. So that's generally what
14 an MOU is. I would have to refamiliarise myself
15 with what -- there were specific things about the
16 roles and relationships of each party." [As read]
17 Of course, they could walk away.
18 They could walk away before January 2010, before
19 August 2009 when my client began investing, before
20 November 2009 when my client started picking wind
21 sites and filing FIT applications. Of course, they
22 could walk away. So this idea that all the bad
23 acts occurred before we invested is absolutely
24 ludicrous.
25 Now, when the FIT Program was

1 launched in September 2009, as we heard this week
2 from Mr. Jennings, the program was actually
3 a continuation of an extremely successful renewable
4 energy initiative. And, in fact, Mr. Jennings
5 admitted that the FIT Program received an
6 overwhelming response:
7 "Q.And in fact you got an
8 overwhelming response to the
9 FIT Program in 2009; correct?
10 A. Yes, yes." [As read]
11 When the program opened, there was
12 a two-month window which proponents could submit
13 their applications. It's called the launch period.
14 Sue Lo admitted during the hearing this week that
15 the OPA received close to 10,000 megawatts in
16 applications between October 1, 2009 and November
17 30, 2009. Again, no agreement had been signed with
18 the Korean Consortium at this time. Why did they
19 not pull the plug then?
20 Now, Ontario has told you, "Well
21 we needed this anchor tenant." We have now
22 uncontroverted evidence that, by the time Ontario
23 undertook any legal obligation to Samsung, there
24 were thousands and thousands of tenants clamouring
25 for the mall space. And some of these tenants were

1 high-profile tenants -- like NextEra, our joint
2 venture party, GE -- that actually could be
3 an anchor tenant if that was your real theory.
4 Ironically, the anchor tenant had
5 absolutely no experience at all. But even if you
6 believe this anchor tenant theory, by the time they
7 signed that agreement, they didn't need it. They
8 had real evidence, not just a survey back in 2009,
9 but real evidence. They had 10,000 megawatts of
10 capacity before they signed the agreement, which,
11 Mr. Jennings told you, they didn't have to sign.
12 Now, these wind projects that were
13 being submitted were actually ironically more
14 shovel ready than the ones that end up in the GEIA
15 program, meaning they were in more advanced stages
16 of development and would be ranked ahead of others
17 that were not as ready. And shovel readiness was a
18 yardstick in which the FIT applications were
19 ranked.
20 Now, knowing that its TTD and
21 Arran projects were in the advanced stage in
22 development with turbines on order and with a very
23 local experience, local development team, and with
24 leases dating back to 2003, Mesa reasonably
25 expected its projects would be very highly ranked

1 in the region -- and we'll talk about that in
2 a moment -- and Mesa was not wrong on that.
3 Both of Mesa's original projects
4 were located in the Bruce transmission region.
5 Mesa was aware that a new transmission line was
6 coming to that area, and when approved -- and it
7 was approved timely. We talk about appeals and
8 when you knew that the line was coming. The
9 reality is that the line came in on time, and we
10 were within the region for the original two
11 projects, and then our later two projects, as well,
12 would have been in the Bruce Region. In fact, the
13 approval for the line came later.
14 Now, what happens? We've heard
15 constantly through opening, through questioning,
16 "Well, we told everybody about this deal when you
17 needed to know about it." It is complete reverse
18 history. Although the OPA was informed of the
19 secret deal, it also kept the deal quiet. The OPA
20 kept the deal quiet, and meanwhile the investors
21 are being lured into Ontario through the FIT
22 Program, all the while believing they had a fair
23 process in which all the available capacity on the
24 FIT Program would be available to the FIT
25 proponents, but the secrecy continued.

1 As we heard from Mr. Jennings, we
2 asked him, "So if, for example, at any
3 time" -- sorry, next slide, please. I apologize.
4 So we asked Mr. Jennings:
5 "Q.So, if I understand your
6 answer then, the plan was to
7 not publicly reveal the
8 status of these negotiations
9 until you obtained Cabinet
10 approval; correct?
11 A. Which is -- yes, which is
12 standard practice for anything that goes to
13 Cabinet." [As read]
14 So what Mr. Jennings tried to tell
15 us is, "Well, we had to keep this quiet because we
16 had to go to the cabinet." I asked the Tribunal to
17 read the Auditor General's report. It states that
18 no Cabinet approval was obtained. None. It was
19 discussed with the Cabinet. They didn't get
20 Cabinet approval.
21 The secrecy actually continued
22 until the Toronto Star broke this story, and the
23 actual details of the deal were not provided. That
24 article did not disclose the generation capacity,
25 did not disclose the value of the economic adder,

1 that Samsung would not have to manufacture any
2 components. We heard, you know, we're going to
3 have this manufacturing component, but the reality
4 is that Samsung did not have to manufacture
5 anything. That's been very clear through the
6 testimony. And it did not reflect that Samsung
7 would get priority transmission. This is back in
8 the September 2009 article. The article did not
9 disclose that the deal was not only with Samsung
10 but with its partner KEPCO; much less did it
11 disclosure that Samsung or the Korean Consortium
12 would bring another investor into the deal, all
13 without the need for appropriate approval, and did
14 not disclose that Samsung had already entered in
15 negotiations with Pattern in August of 2009. We
16 obtained that testimony through a deposition of
17 Mr. Colin Edwards at Pattern, that Pattern had
18 already been part of the deal in August of 2009.
19 Now, we have heard so much about
20 how forthright Ontario was about this deal.
21 Nothing can be further from the truth. What was
22 the reaction to the Star's story when it broke in
23 September 2009? The Ontario government said they:
24 "Regretted --"
25 Regretted.

1 "-- the fact that the secret
2 deal had become known and
3 prematurely entered into the
4 public domain." [As read]
5 And the reason the government may
6 have wanted this secrecy was perhaps because it was
7 about to publicly launch a FIT Program on September
8 24, 2009, and perhaps it didn't want the FIT
9 investors from backing out of the FIT Program and
10 try to get a similar deal.
11 Ontario was interested in getting
12 the FIT Program to work for the Korean Consortium,
13 not the only way around. But we don't need to
14 speculate. Here's the thing: Originally, the
15 secrecy was not about protecting the
16 Korean Consortium's commercial terms. You saw
17 evidence that the Korean Consortium, in fact, to
18 this deal public.
19 Mr. Jennings, in fact, admitted that. We asked
20 him:
21 "Q. You would agree with
22 me--"
23 We showed him the e-mail from
24 Mr. Yoo from Samsung.
25 "Q.You would agree with me,

1 sir, though Mr. Yoo from
2 Samsung did not have any
3 problem releasing the MOU as
4 of February of 2009?
5 A. Yeah, yes, he's looking to do
6 that."
7 [As read]
8 The reason this secret deal was
9 wasn't released is because the
10 Government of Ontario was not ready to answer the
11 questions the media and other government official
12 would have.
13 So did the Ministry of Energy put
14 the brakes on the secret deal when the news was
15 leaked? No. Instead, immediately after the
16 newspaper leak, Deputy Premier Smitherman provided
17 a Ministerial Direction to the OPA, ordering it to
18 set aside 500 megawatts of electrical transmission
19 capacity for unnamed proponents -- this directive
20 didn't even name who the proponents were -- even
21 before any binding deal had been signed with the
22 Korean Consortium. This directive does not state
23 the unnamed proponents also were received in the
24 Bruce Region, because obviously it hadn't happened
25 yet. It didn't happen until a year later. Nor,

1 obviously, until years later, that any applicant in
2 the Bruce Region could be bumped out. It couldn't
3 have done so because that happened afterwards,
4 years afterward.
5 The cloak of secrecy continued.
6 Ontario continued negotiations of what would be
7 known as the GEIA in secret. According to leaked
8 press reports, there were concerns that the deal
9 would take too much out of the provincial purse,
10 Mr. Smitherman was attacked by his
11 colleagues about the deal specifics in the press.
12 He ends up resigning. These press reports also
13 consistently mention that Samsung would be building
14 a wind turbine manufacturing plant in Ontario.
15 This was the information given to the investors,
16 and it was completely false.
17 But the deal was opposed by the
18 Cabinet and, thus, was not approved. So the
19 investors were being told that this was being
20 imposed by the Cabinet, so the investors reasonably
21 believed this deal may not go forward while they
22 are being required to participate in the FIT
23 Program. And, in fact, in November 2009, the chief
24 of staff of the Ministry of Energy and Document
25 C-683 actually instructed Samsung to keep all the

1 information about its relationship with Ontario
2 secret. The chief of staff of the Ministry of
3 Energy told Samsung the following. This is
4 Document C-683. You, Samsung:
5 "...should not be going ahead
6 with any public announcements
7 on this or any other piece of
8 the deal because it would put
9 the government 'in a
10 difficult position.'" [As
11 read]
12 On January 24, 2010, months after
13 my client began investing in this country, months
14 after it had filed FIT contracts, that's when,
15 without Cabinet approval, despite the fact that the
16 FIT Program was wildly successful in the quotes
17 from Cabinet's own witnesses, the
18 Government of Ontario announced that it had
19 negotiated and signed the GEIA with the
20 Korean Consortium, a renewable energy development
21 agreement, guaranteed exclusive access to 2,500
22 megawatts of transmission capacity over five
23 phases. The GEIA was signed by the Deputy Minister
24 of Ontario in the presence of the Premier of
25 Ontario. By this time, our client had invested in

1 Ontario in months earlier.
2 Ontario trumpeted this agreement
3 as a $7 billion investment in renewable energy in
4 Ontario that would boost manufacturing jobs.
5 Ontario also admits in its press backgrounder that
6 the contracts executed under the GEIA will be the
7 same as those under the FIT Program and subject to
8 the same base rates as that provided the FIT
9 providers, but Ontario didn't make the GEIA public.
10 We've heard, "Oh, we had to keep
11 the GEIA confidential while we're negotiating
12 it." There wasn't a lot of logic to that once you
13 signed it, and, in fact, it wasn't a lot of logic
14 to it that they ended up releasing it after we sued
15 to go get it in California. That's when it became
16 public.
17 Withholding this agreement,
18 Ontario did not divulge the extraordinary generous
19 terms granted to the Korean Consortium and what
20 little those investors had to do in exchange for
21 these benefits. Most important, in spite of the
22 after-the-fact arguments by Canada in these
23 hearings, Ontario did not tell the public that the
24 Korean Consortium would receive priority
25 transmission and, in effect, be able to jump the

1 capacity line which every other investor was in
2 line for. It doesn't say they. They point to
3 words like "assurance of transmissions." As
4 explained by Mesa industry expert Seabron Adamson,
5 that's a vague term, and it doesn't say "Much of
6 anything."
7 The agreement was already signed.
8 If there had been a need to keep the deal
9 confidential until it was signed, there wasn't such
10 a need once it was signed. There was no reason to
11 keep this contract quiet.
12 The only reason, we found out,
13 that they kept it confidential, as Ms. Lo told us,
14 was to protect the commercial interest of Samsung.
15 That's what she said they did. Samsung needed to
16 keep it quiet so they could negotiate the deal to
17 try to obtain contracts and projects to fill up its
18 obligations under the GEIA.
19 Instead of engaging in a fair,
20 competitive, and transparent request for proposal
21 process, the Government of Ontario conducted secret
22 meetings in negotiation with Samsung that
23 culminated in signing an agreement which lacked
24 public support.
25 While the Ministry of Energy

1 originally believed they Cabinet approval, as
2 testified by Mr. Jennings, when the approval could
3 not be secured, the Ministry changed course and
4 entered the agreement without getting Cabinet
5 approval.
6 Go to slide 6.
7 The press was horrible to this
8 deal. McGuinty's own Ministers vehemently opposed
9 the deal in a rancourous Cabinet meeting.
10 Next slide. The leader of
11 opposition said it was entered without the most
12 basic of public reviews. Ms. Lo's response to this
13 was, of course, they are upset. They are the
14 opposition.
15 Once the Ontario's opposition
16 leader caught wind of Samsung's deal, he requested
17 it to be vetted by the Auditor General, but it was
18 too late by then. It had already been signed.
19 As noted earlier, Ontario's
20 Auditor-General, whose task it is to assess
21 commercial viability of significant decisions by
22 the government, was surprised to learn that no due
23 diligence had been carried out before the Samsung
24 deal was entered into. It was rush through in an
25 unusual approval process without the typical

1 commercial checks and balances.
2 If you go to slide 8, it finds
3 that:
4 "The normal due diligence had
5 not been followed." [As
6 read]
7 And he goes on to say.
8 "According to the Ministry,
9 the decision to enter into
10 the agreement with the
11 consortium was made by the
12 government. Cabinet was
13 briefed, but no formal
14 Cabinet approval was
15 required." [As read]
16 And earlier:
17 "For large projects such as a
18 consortium agreement, we
19 expected but did not find the
20 comprehensive and detailed
21 economic analysis of business
22 case had been prepared."
23 Ironically, it actually had been
24 required in the MOU and completely ignored.
25 Transparency, a fundamental element of the rule of

1 law, clearly was not followed before entering into
2 the agreement, and this happened -- the agreement
3 was signed after we invested, but there was still
4 a chance for Ontario to pull back to protect my
5 client and other investors even after they signed
6 the agreement, as early as 2010. Samsung didn't
7 even comply with the agreement they entered.
8 Ms. Lo explained, after receiving
9 the benefits of the special deal, she said, they
10 incredibly wanted the same benefits that the FIT
11 proponents had and excluding these extensions of
12 time.
13 Go to slide 9.
14 She goes on. We asked her
15 questions, and so I'm asking her at the beginning
16 of these questionings, about -- remember, I'm
17 asking her a question:
18 "Okay. So you had the
19 opportunity to tell the
20 Korean Consortium that we are
21 not going to proceed with
22 this GEIA until you had
23 agreed to make the changes;
24 correct?" [As read]
25 This is what I'm asking her by:

1 "They are now in breach of
2 the agreement; right?
3 "ANSWER: I don't think it
4 was as blunt as that. It was
5 a delicate negotiation
6 because we also didn't want
7 to see the entire GEIA
8 nullified.
9 "QUESTION: You exercised
10 that leverage with the
11 Korean Consortium?
12 "ANSWER: Yes."
13 In other words, they threatened
14 the Korean Consortium. They knew they could have
15 backed out of this agreement. They knew they
16 already had 10,000 megawatts of applications, and
17 they still didn't get out it, and they had a chance
18 to get out of this agreement before these contracts
19 were awarded, and they still did not do it. And
20 then she goes on to talk about how the
21 Korean Consortium wanted some benefits that the FIT
22 proponents had received, ironically, the special
23 they deal they got.
24 Had the Government of Ontario
25 exercised its leverage and taken the opportunity to

1 terminate the contract, then the Korean Consortium
2 would have not reserved 500 megawatts in Bruce, and
3 my client, Mesa, would have received contracts for
4 TTD and Arran and the other projects.
5 In fact, with respect to the two
6 projects, you heard yesterday that Canada's own
7 expert admitted that, had the GEIA deal not been
8 done, our clients would have gotten two projects in
9 Bruce. He admitted that yesterday in his slides
10 and on questioning from Arbitrator Brower.
11 You know the deal of the Samsung
12 deal, but for now let me complete the relevant
13 timeline of events.
14 Now, the FIT Program itself had
15 elaborate rules that our client thought would be
16 followed. After announcing first round contract
17 award, the OPA advised stakeholders in March of
18 2010 and May of 2010 that an ECT would be
19 run -- now, this is when they announced it. We saw
20 the webinars -- and that the ECT would begin in
21 August of 2010.
22 In May of 2010, Mesa submitted
23 applications for two additional projects,
24 Summerhill and North Bruce. These projects were
25 geographically situated next to the TTD and Arran

1 projects, and such, they were an ideal location for
2 generating wind off of Lake Erie. And all these
3 projects were in the Bruce region.
4 Now, in July of 2010, Mesa and the
5 other proponents were informed that the ECT was
6 temporarily postponed, in July of 2010. Now, Mesa
7 itself was not concerned about this delay as it
8 remained confident that, once the ECT was run, its
9 TTD and Arran projects would receive contracts, or,
10 worse, they would be placed in a special secure
11 queue called the "FIT production line."
12 Now, at this point, I would like
13 to talk a little bit -- and I told this at the
14 beginning -- about the testimony of Pattern
15 Energy's Colin Edwards.
16 I took this guy's deposition
17 a couple of years ago in California in the 7282
18 applications. My old mentor, Sandy Downberg (phon)
19 he is a former ADA president, wonderful lawyer,
20 I think he would say that Pattern has no dog in
21 this hunt; right? They are not in this case. And
22 Mr. Edwards' testimony, extremely candid, and
23 I will be referring to it in some of my remarks
24 here.
25 His testimony is nothing less than

1 devastating to Canada's arguments. For one thing,
2 while most FIT proponents were limited to the FIT
3 program, Pattern -- remember, they'd been
4 negotiating since August of 2009 -- had submitted
5 ten projects in the FIT program, he testified and,
6 meanwhile, was also a joint-venture partner of the
7 Korean Consortium.
8 Go to slide 10.
9 Pattern submitted a number of
10 projects to the FIT Program in November of 2009.
11 He says:
12 "At the same time, we were in
13 negotiations with Samsung."
14 [As read]
15 Now, Mr. Edwards had the overall
16 responsibility for the Canadian wind development
17 business and -- for Pattern in its joint venture,
18 and he says that of these ten projects, once -- he
19 only got one in the FIT Program, and what he tells
20 us is that, at that point, he then took five of his
21 projects, including the one he wanted, four that
22 failed, and he put it in the GEIA.
23 One of these, Merlin, had gotten
24 a knit contract, and so he got his security deposit
25 back. Other FIT proponents who had gotten

1 contracts were not allowed to jump into the GEIA.
2 And Pattern began to buy
3 low-hanging fruit. I think Arbitrator Brower had
4 asked one of the witnesses, "Did it look like
5 Pattern was going around and grabbing some of these
6 lower-ranked projects?" I actually had the exact
7 same question that arbitrator Brower had two years
8 ago.
9 If you go to slide 11.
10 So my question to Mr. Edwards:
11 "Q. And how would that affect
12 your decision, the ranking."
13 [As read]
14 This is in the context of me
15 asking him about what projects you're buying. He
16 says:
17 "A. We would -- parties who
18 are ranked higher on the list
19 would be more likely to stay
20 in the queue in the hopes of
21 keeping their project and
22 receiving the FIT contract,
23 knowing that there was
24 transmission capacity coming
25 to this area."

1 "Q. And the lower ones, well,
2 they would be low-ranking
3 fruit; right?
4 "A. The low-ranked parties
5 would have a lesser chance to
6 get a FIT contract.
7 "Q. And it would be more
8 easily able to buy their
9 assets in order fulfil your
10 obligations under the GEIA as
11 a joint venture; correct?
12 "A.Perhaps." [As read]
13 Well, in fact, it wasn't perhaps.
14 I went through a list of the projects he bought.
15 Listen to this: Pattern, after the rankings come
16 out, they buy Rank No. 13, No. 16, No. 17, No. 33,
17 No. 34, and No. 44 of the West London region,
18 low-hanging fruit. Fruit was on the ground. He
19 admitted in his deposition that was his strategy.
20 These projects additionally
21 received the benefit of getting their deposits
22 back. The ones he bought, they got their deposits
23 back from FIT. This is all in his deposition.
24 Pattern and the Korean Consortium took advantage of
25 their priority access to buy FIT projects that were

1 low in the queue due to the fact that these
2 projects were at the bottom of the queue and were
3 unlikely to get a FIT contract.
4 Pattern even approached my client
5 and tried to get its contracts. Of course, our
6 client did not know they were going to be thrown on
7 the Bruce.
8 Make no mistake, the
9 Korean Consortium had exclusive control who was
10 going to be in the GEIA.
11 As part of the deal -- you
12 remember I talked to Mr. Jennings and Ms. Lo
13 about this. As part of a deal, Korean Consortium
14 and pattern -- this is in his deposition as well
15 they had an exclusive joint venture agreement
16 amongst themselves, and, in fact, they agreed
17 amongst themselves that there could be no other
18 joint venture agreement for up to 1,000 megawatts.
19 In other words, even if we wanted to be in the GEIA
20 program with Korean Consortium, we couldn't get in
21 because they already locked themselves in with
22 Pattern up to 1,000 megawatts. Not that Samsung
23 was going to allow us to do it anyway, not that
24 there was any ability to petition the Ontario
25 government to get into it, but they even bought

1 themselves in. This is, again, all in the
2 deposition of Mr. Edwards.
3 Make no mistake, This was not some
4 alternative program. You know, you have the fit
5 opportunity and the GEIA opportunity. The GEIA
6 opportunity was no opportunity at all for my
7 client. Who is fooling who? It was a sweetheart
8 deal given to one competitor and to get a jump out
9 of everybody else and then be able to shut people
10 out. Ms. Lo, herself, recognizes this in slide 12:
11 "Q. You recognise that the KC
12 bumped out people in the FIT
13 Program; right?
14 "A.Yes." [As read]
15 The GEIA partners would were not
16 just competing for capacity with the FIT projects.
17 They were waiting to see the rankings of the
18 projects so they could decide who they could buy at
19 a substantial profit. That was an unfair
20 competitive environment. Ms. Lo, in a candid
21 moment, admitted we are not dealing with an even
22 playing field.
23 Now, on September 17, 2010, while
24 Fit Program was underway, the Ministry of Energy
25 directed the OPA to reserve 500 megawatts in the

1 Bruce Region exclusively for the Korean Consortium.
2 That's when Mesa ends up being risked to be shut
3 out. It's because, at this point, Bruce Region is
4 what they picked, and they were locked out.
5 Mesa did not know that until it
6 discovered in this arbitration that Samsung didn't
7 even -- did not even use 50 megawatts of its
8 guaranteed capacity in the Bruce, and that was not
9 even shared with FIT proponents. Mesa also did not
10 learn until this arbitration that the Korean
11 Consortium's movement of 270 megawatts to the 500
12 kilowatt line revised upwards the Bruce area
13 transfer capability by the same amount. Mesa also
14 did not know there was more capacity in the
15 Bruce Region available, but the
16 Government of Ontario chose not to disclose so that
17 the Korean Consortium could use it for this hidden
18 capacity for phases 3 through 5 of its generation
19 capacity goals under the GEIA, but it got worse.
20 Inundated with the FIT success in
21 November 2010, the LTP is released, limiting the
22 total capacity that could be awarded for renewable
23 energy projects. Meanwhile the Korean Consortium
24 itself was taking 500 megawatts out of
25 1,200 megawatts for the Bruce.

1 Now, what happens? December 21,
2 2010, the OPA released its priority rankings to the
3 projects that had not received a FIT contract.
4 These rankings show that there will be
5 1,200 megawatts awarded in the Bruce and that my
6 client's two projects will be ranked eighth and
7 ninth. These were sufficiently high enough to get
8 them contracts, even with the limit of this 150
9 megawatts. These rankings also show that 300
10 megawatts will be awarded in the west of London,
11 and the majority of NextEra's projects would not be
12 eligible for a contract -- of NextEra's projects.
13 So what does NextEra do? Because
14 they are in west London. When they find out they
15 are going to be shut out, they are going to want to
16 make sure this happens.
17 So now we have jeopardy on two
18 fronts: One, the Korean Consortium's special
19 treatment which reduced the availability capacity
20 in the Bruce Region and now NextEra's efforts to
21 make sure that they would be able to jump into the
22 Bruce Region because they are going to be shut out
23 in the west of London.
24 Now, let's talk about the NextEra
25 story. It's clear from the beginning, the politics

1 overshadowed the regulatory process for Samsung's
2 and NextEra's benefit. Once Samantha's sweetheart
3 deal is locked in, it had a cascade effect, which
4 paved the way for Ministerial officials to give
5 special favour to those that had friends in high
6 places. This too was unbeknownst to Mesa which
7 was, again, relying on a process that it thought
8 would be immune from political interference.
9 Apparently my client did not have the same friends
10 in Ontario that its competitor NextEra had.
11 Now, due to the fact that the OPA
12 was planning on awarding the capacity activated
13 through the Bruce-to-Milton line, but no ECT was
14 going to be run -- remember they had simply
15 cancelled this by this point -- the Ministry of
16 Energy and the OPA discussed different
17 alternatives. The OPA, you heard, recommended
18 a revised TAT/DAT process limited just to the
19 Bruce Region. This process, it said, would be
20 familiar to proponents because it had already been
21 run. It was very similar to the process that had
22 already been run. It would not require a directive
23 from the Ministry of Energy and would not require a
24 connection-point change.
25 If I could go briefly to

1 confidentiality.
2 --- Upon resuming confidential session at 10:07 a.m
3 under separate cover
4 --- Upon resuming public session at 10:07 a.m.
5 MR. MULLINS: The next day,
6 despite this information being confidential, OPA
7 executive told you he felt uncomfortable sharing
8 this information with the Ministry of Energy, but
9 on April 14th, 2011, he informed the Ministry of
10 Energy of the dry run results, and I would ask the
11 Tribunal to look very carefully at his original
12 statement. He said "Oh, we didn't leave it there.
13 We didn't discuss it." I asked him, "But you showed
14 it to him?" Answer was "Yes."
15 Why would the Ministry of Energy
16 need it? You remember that Sue Lo said the
17 Ministry of Energy didn't care, you know, about the
18 results, and she, of course, was impeached on this
19 point because she was later shown an e-mail where
20 she was concerned about bumping out a high-profile
21 Canadian company called IPC in the west of London
22 region whose president, it turns out, was a Liberal
23 Party leader. She was concerned.
24 The Ministry of Energy requested
25 this recommendation and adopted a -- sorry, they

1 rejected this recommendation from the OPA and
2 instead adopted a five-day connection-point change
3 window amongst only two regions in the province
4 with a weekend's notice.
5 And the Tribunal has heard a lot
6 about how much time was allowed for the rule and
7 people have known about this.
8 Mr. MacDougall and Mr. Cronkwright told us the
9 true story. The government made the decision that
10 it had to change the rules, and they had to comply.
11 There were internal meetings about
12 these changes and discussions with select
13 proponents. This was a major change to the rules.
14 The Ministry made the decision to reject the
15 recommendations of the OPA.
16 It had no stakeholder
17 consultations, virtually no notice given to the
18 applicants. Mr. MacDougall told us how different
19 that was from other rule changes.
20 This is not a matter about whether
21 applicant could have started
22 Mr. MacDougall, who left the Ministry of Energy at
23 the height of this mess -- he didn't stay around
24 for this thing -- agreed that the amount of time
25 provided was not adequate notice to the parties

1 that invested millions of dollars in developing
2 their wind projects relying on a proper process.
3 Why did this not happen?
4 Ms. Lo, in a candid moment, with
5 questioning by the Tribunal, told us. It was all
6 politics. There was an election coming up, and
7 they were worried that they had to get contracts
8 awarded before an election. That's the reason they
9 rushed it. That's not a proper process. That
10 alone is not a legitimate purpose.
11 Many questions remain because many
12 documents were not provided, but this is what we do
13 know took place: We did not get a chance to depose
14 NextEra like Pattern, but we do know the following:
15 NextEra, knowing that it had a special
16 deal -- knowing that it would not receive a special
17 deal that Samsung had, had to find other ways to
18 get into the Bruce Region. So what do they do?
19 Well, on May 10, NextEra's
20 vice-president, Al Wiley, met with high government
21 officials. NextEra also proceeded to contact
22 directly, Sue Lo, the Assistant Deputy Minister, at
23 Ms. Lo's personal number discusses projects and
24 connection-point changes. By this time, the MOE
25 had already seen the dry run results.

1 The next day, on May 11th, Andrew
2 Mitchell, senior policy adviser in the Minister's
3 office, personally met with Mr. Wiley to discuss
4 whether connection-point window would be opened up
5 prior to the next round of FIT contract awards,
6 which he, in an e-mail, says was:
7 "A very significant issue for
8 NextEra."
9 This connection-point would be
10 contrary to what had been told to the applicants
11 because the rules and even the webinars had tied it
12 to a province-wide ECT, and, remember, that never
13 happened.
14 Now --
15 MR. LANDAU: Can I make a personal
16 plea, which is that you just slow down a little
17 bit?
18 MR. MULLINS: Yes, sure.
19 MR. LANDAU: Because I'm trying to
20 write down as much as I can. It's giving my hand a
21 pain at the moment.
22 MR. MULLINS: I apologize. I have
23 a lot, and then we are going to hear from
24 Mr. Appleton again, so I appreciate it though.
25 I think we're in good shape.

1 NextEra's meeting with
2 Mr. Mitchell was immediately followed by the
3 Ministry ordering a fundamental change that went
4 against the recommendations of the allocation
5 experts of the OPA.
6 On the same day, the decision to
7 change the FIT process to allow generees to switch
8 into an entirely new region was made, on May 12th.
9 Now that was admitted by Mr Cronkwright. Mr
10 Cronkwright admitted it.
11 While the decision had been made,
12 the Ministry of Energy held onto the decision four
13 weeks without holding stakeholder consultations as
14 was the OPA's preferred practice. Despite having
15 made the decision in May they waited until June 3
16 to announce it, given a weekend's notice. That is
17 on May 12, the decision that was made that reversed
18 the expected outcome of the process, the effect of
19 which took -- effect of which allowed NextEra to
20 take six contracts into the Bruce Region.
21 Following the May 12th high-level
22 meeting where the decision was made about the Bruce
23 allocation, Ms. Lo then schedules a meeting with
24 NextEra that night. She scheduled a meeting for
25 the next day.

1 Now, Mr. MacDougall was questioned
2 about NextEra's lobbying. That's Slide No. 14.
3 You never heard the reason they did it was because
4 NextEra had lobbied for that. He said, "Yes I had
5 heard that, after the fact, after I left the
6 OPA." He had heard that NextEra had been lobbying,
7 and that's what happened.
8 Indeed on May 13, Ms. Lo and
9 NextEra did meet, and immediately after the
10 meeting, NextEra followed up by sending her a list
11 of six project, and I believe it was Arbitrator
12 Brower that pointed out that e-mail and said,
13 "Well, Ms. Lo, why were they ending you these
14 projects?"
15 We now know that NextEra was
16 bundling to the government the NextEra six pack.
17 NextEra found the right audience.
18 Next slide. If you could keep on
19 going. Next slide. Keep going one more. Keep on
20 going.
21 So on May 12, the Minister of
22 Energy ordered the OPA to carry out the rule
23 change. As we heard this week, this information at
24 this time was not communicated to the FIT
25 proponents.

1 Next slide.
2 Mr. MacDougall was asked:
3 "Q. So you agree with me, as
4 at least May 31st, 2011,
5 Ms. Geneau --"
6 Now, she is with NextEra.
7 "-- knew that there was going
8 to be a connection-point
9 change window; right?
10 "A. Yes, I think she
11 suspected as much." [As
12 read]
13 How could she possibly
14 know? Well, it's pretty obvious.
15 Mesa was, therefore, left with a
16 rule change that projects now could connect to
17 locations outside the region that he was not
18 consulted on; was based on one business day's
19 notice. It was done in secret weeks before it was
20 decided based on political considerations and looks
21 like it was told to its competition.
22 In fact, Mr. Robertson, in his
23 statement, testified that NextEra, around the same
24 time period, began bragging that they were going to
25 bump out Mesa from the Bruce Region. And he wasn't

1 asked about that in his cross-examinations. All
2 the while complaints of unfairness by Mesa were
3 ignored with no opportunity to be heard.
4 Yet Canada purports that its
5 decision was justified because it was an approach
6 endorsed by CanWEA, but it can't be, because it
7 already made the decision before it got the CanWEA
8 letter.
9 Next slide. Keep on sliding down.
10 Okay.
11 And so what you see here is the
12 decision is made on May 12th, so it couldn't be the
13 CanWEA letter they got on May 27th. This letter
14 does not refer to any regional connection-point
15 change. In fact, the letter purports to be written
16 on behalf of all CanWEA members who they claim, you
17 know, want this connection-point change, but Mesa
18 wrote a letter several days later.
19 Next slide. If we go to the next
20 slide. That's May 30th, but go to slide 19.
21 We write a letter that says:
22 "The CanWEA letter does not
23 reflect the majority of the
24 applicants with megawatts on
25 the current queue list, and

1 we urge Ontario to stay the
2 course and avoid further
3 delay in awarding the
4 contracts." [As read]
5 Tab 20. But we're ignored. That
6 letter was rejected without investigation of
7 whether or not the CanWEA letter was true. And
8 you'll remember that Ms. Lo claimed that the
9 decision was based on the CanWEA letter, and
10 Mr. Cronkwright said he never heard anything like
11 that.
12 And within days, the FIT rule
13 change was made public in the form of a directive.
14 This allowed NextEra's projects to enter into the
15 Bruce Region. This was a significant change to the
16 process because no consultations were provided.
17 The OPA itself understood this was a significant
18 change and "would need to be clearly communicated
19 in an announcement." JoAnne Butler of the OPA
20 said:
21 "I am sure a directive can
22 micromanage the project to
23 get what we want. However,
24 that means we need a
25 directive." [As read]

1 Even the OPA officials thought it
2 was a significant change then.
3 Now, we heard from Mr. MacDougall,
4 when he was questioned on this topic:
5 "Well, in fact, this is the
6 only time that the Ministry
7 of Energy actually, up to
8 this point, had issued a
9 directive that required a
10 change in the FIT Rules.
11 "A. I believe so." [As read]
12 This was the first time that such
13 a change was carried out. Awarding of contracts
14 had always been carried out on a regional basis.
15 Ranking was released on a regional basis.
16 Applications were submitted on a region basis. At
17 the time, six transmission regions had already been
18 awarded contracts, and no project up to that point
19 had been allowed to switch in from one region to
20 another.
21 And as you heard from questioning
22 from Arbitrator Brower yesterday, Mesa's own expert
23 said:
24 "Had this rule change not
25 occurred that allowed NextEra

1 to go into the Bruce Region,
2 my clients would not have
3 lost two projects." [As
4 read]
5 He answered that to Arbitrator
6 Brower.
7 Now, that wasn't just Mesa's
8 understanding. Please read the following testimony
9 from Mr. Edwards two years ago.
10 Now, I asked him:
11 "Okay. Do you know of the
12 rules prior to NextEra doing
13 that?"
14 And he's talking about NextEra
15 going to the Bruce Region:
16 "Do you know if it had been
17 allowed for a project to go
18 into a new transmission area?
19 "ANSWER: My understanding is
20 that, when applications were
21 originally made in November
22 of 2009, that they were
23 confined to a given
24 transmission zone, and I have
25 been told that the

1 Ministerial directive of June
2 3, 2011, I believe, enabled
3 developers to change circuits
4 and to change transmission
5 zones.
6 "Q.Was that news to you when
7 it happened, news to Pattern?
8 "A. Yes.
9 "Q.And you had no advance
10 knowledge that that was going
11 on?
12 "A.No." [As read]
13 Pattern itself believed exactly
14 what you heard my client say: This was new; this
15 had not been allowed; this was a complete change.
16 Pattern was actively involved in Ontario at this
17 point as part of the joint venture project and also
18 a FIT contract owner.
19 Now, this was all about not what
20 you knew, but who you knew. Now, we may never know
21 exactly all that happened, but we do know the
22 following: These decisions were made with
23 discussions with NextEra, and, shockingly, NextEra
24 gets these contracts.
25 Now, Mr. MacDougall, on slide 23,

1 talks about the NextEra six pack you heard about,
2 how they were able to jump into this Bruce Region.
3 All this was unbeknownst to Mesa who did not know
4 that it was not in a transparent process, free from
5 political favoritism. Had it known that at the
6 beginning, perhaps it would not have invested in
7 this country.
8 As a result of these changes,
9 Mesa's attempts to secure help from officials were
10 left unanswered. They started to raise questions
11 at the OPA level. Didn't get any answers. They
12 also went to the Premier; didn't get any answers
13 there either. Meanwhile, NextEra, who had been
14 shut out of the west of London region gets four
15 contracts and Bruce.
16 Next slide.
17 Then a couple of days later,
18 NextEra starts giving money to the Liberal Party.
19 Why is a Florida-based company giving money to
20 a Canadian Liberal Party? The liberal Party won
21 the election in October 2011.
22 Now, the two-thirds directive,
23 slide 25, this was a change. They only allowed it
24 for two regions. It opens a five-day window for
25 only two regions on one business day's notice.

1 Now, Mr. MacDougall, slide 26:
2 "Q.Do you agree with me --
3 This is Mr. MacDougall.
4 "Q. -- that the June 3 change
5 was a major change in the FIT
6 front process? Don't you
7 think. June 3; right? I
8 mean, especially for people
9 that are proponents of the
10 Bruce region?
11 "A.Yes. That was a major
12 change, yes." [As read]
13 Go to slide 27. Compare all the
14 other rule changes: Five months' notice for FIT
15 Rules. Four months for 1.3.1; 4.3.2, five months;
16 1.4, one month.
17 The directive, the change rules.
18 None. None. Why? Because Ms. Lo told you they
19 had to do this before the election.
20 You heard from Cole Robertson.
21 This five-day change window, if you look at all the
22 options, it's just not realistic. I mean, it's
23 just not.
24 Slide 29. Mr. MacDougall says:
25 "Sir, is it adequate notice,

1 sir? It's a weekend.
2 "It's not very adequate."
3 [As read]
4 Now, the Ministry of Energy knew
5 all along that this would cause an upset in
6 projects in west of London. Ms. Lo admitted during
7 her testimony that their rush was in to get the
8 contracts in before the "brick was dropped."
9 Now, incredibly, Ms. Geneau
10 confided to Mr. MacDougall on his way out that this
11 FIT process "was chaos," and I would point you to
12 C-302, an e-mail from Ms. Geneau calling the FIT
13 program "chaos."
14 Now, we're not done, though.
15 Let's not for get the Koreans. In July of 2011,
16 despite being provided priority capacity, the GEIA
17 was amended.
18 Now, let's understand what we're
19 talking about here. At the same time my client is
20 shut out because it is not getting contracts in
21 this 2011 period, and then meanwhile, when NextEra
22 comes in, they now are amending the Korean
23 Consortium agreement because Korean Consortium
24 can't meet its obligations. The exact same month
25 that the awards were made in Bruce, they end up

1 reducing the EDA in the GEIA agreement, July of
2 2011. Meanwhile, though, Samsung is still getting
3 the full capacity.
4 Now, slide 30. Here's the deal.
5 It's not just me saying they could have gotten out
6 of this deal and awarded that capacity to my
7 client, perhaps other FIT proponents. They were
8 allowed to get out of the contract on 30 days'
9 notice, 14.2. Next slide.
10 Again, they had to use best
11 efforts, and they were not doing that. They had
12 the ability to get out of this agreement. Instead,
13 they amended it and start to revise it, and then by
14 the time it was over with, they were simply
15 reducing the phases instead of terminating the
16 agreement and awarding capacity.
17 Meanwhile, all this is being
18 delayed because, on slide 32, you remember Mr. Chow
19 was telling us that they were delaying. The reason
20 this process was delayed, as well, is because the
21 Korean Consortium was not finalizing its connection
22 points.
23 Slide 33: Mr. Cronkwright talked
24 about how the Korean Consortium delayed their
25 connection points, and eventually in the June

1 3rd direction, the OPA was directed not to wait for
2 them to do so. In other words, at that date, the
3 Korean Consortium delayed this process so long that
4 they eventually end up basically going ahead and
5 awarding the contracts due to the election.
6 At slide 34, Ms. Lo says:
7 "As we were working to
8 develop the Bruce-to-Milton
9 allocation process, the
10 Korean Consortium was still
11 unable to finalize the points
12 at which they wished to
13 interconnect in the
14 Bruce Region." [As read]
15 Despite this breach and other
16 breaches under the agreement, the Ontario
17 government did not hold the Korean Consortium
18 accountable, and this decision hurt my client in
19 its ability to get contracts in the Bruce Region.
20 By the fall of 2011, with Premier
21 McGuinty's leadership and decision under much
22 scrutiny, the Liberal government was under pressure
23 to maintain its position. The Liberal government
24 wanted to call an election at the right time. It
25 chose to do so on September 7, 2011. It was in the

1 Liberal Party's interest to ensure that, before
2 that date, it could try to appease its critics and
3 try to file it a success. Shortly thereafter, the
4 Liberal Party's leader resigned, and the FIT
5 Program was cancelled on June 12, 2013.
6 Incredibly, the GEIA is amended later to even
7 reduce the generous generation capacity the
8 Korean Consortium had priority access to.
9 Now, just briefly, there is no
10 doubt that the GEIA and the FIT are alike. Both
11 Mesa and their investors were competing for the
12 same thing: Power purchase agreements for access
13 onto Ontario's limited transmission grid. The only
14 difference between these initiatives was the
15 treatment provided to each. That's been
16 demonstrated by the uncontroverted evidence of
17 expert economist Seabron Adamson. The manufactured
18 commitments to the GEIA simply amounted to the same
19 domestic content requirements of the FIT Program.
20 In return, Samsung was eligible to receive
21 development adder payments of 437 million
22 originally, later reduced to only 110 million,
23 after it was too late to protect my clients. All
24 told, the deal offered Samsung the possibility of
25 nearly $20 billion on return for a supposed

1 $7 billion investment.
2 Obviously, that was a great deal.
3 Mr. Adamson says:
4 "The Korean Consortium was
5 required to sign contracts
6 with equipment suppliers --"
7 This is all they had to do.
8 "-- they would have had to
9 have signed anyway to meet
10 the Ontario minimum domestic
11 content rules." [As read]
12 And just a moment on the content
13 rules: Remember the testimony that, even before
14 they started the FIT Program, the Ministry of
15 Energy was told there may have been an issue with
16 NAFTA, and they proceeded anyway. You would think,
17 when they knew there was a NAFTA issue, they would
18 try to tread lightly, and they did the exact
19 opposite.
20 Canada purports there was
21 an advantage to have a dominant market player that
22 could manufacture its own equipment, but to come
23 clear, Samsung had no experience in this area and
24 eventually failed to make the effort to break into
25 it and eventually had to bring in Siemens in order

1 to meet its commitments.
2 On the other hand, when it entered
3 the market, Mesa had already partnered with GE,
4 with a long-standing reputation in the wind turbine
5 manufacturing area, and indeed Mesa had a contract
6 for supply of equipment it needed. Samsung bought
7 turbines from Siemens. Mesa would have bought them
8 from GE. Both were required to meet the domestic
9 content requirements, which, by the way, Canada has
10 no defence to.
11 Now, this brings us to the
12 employment creation theory. Canada says, well, we
13 had to do this deal with Samsung because of all the
14 jobs it would create. In fact, you heard evidence
15 that the FIT requirements, the FIT contracts would
16 have created jobs as well. Ms. Lo talked about how
17 the jobs were focused on in both programs.
18 It's just simply, simply
19 unbelievable.
20 The agreement was to split into
21 five phases the megawatts. In other words, they
22 didn't have to do 2,500 megawatts all at one time.
23 They had five phases.
24 All they were required to do was
25 point to these manufacturing plants. They weren't

1 required to build them. The first 500 megawatts of
2 transmission capacity was given away for free.
3 They didn't have to do anything for the first 500.
4 Nothing. Just give it away.
5 Mr. Adamson identified areas where
6 the GEIA provided better treatment, and you've
7 heard this in his testimony, and just remind you,
8 slide 36. Better access to government officials,
9 facilitated Aboriginal Consultations, guaranteed
10 access to 2500 megawatts, fast-tracked contract
11 approval. They didn't have to get ranked. They
12 didn't have to get ranked. They just got it.
13 And the fact that Pattern was
14 jumping in and out of it, what else do you need to
15 know? This is the same deal. Just one guy got
16 a better deal. You can't tell us, "Oh, it's
17 different because I gave them a better deal." You
18 can't. That's insane. The fact that they gave
19 them a better deal without rankings does not make
20 it different; it makes it improper. It makes it
21 violative of NAFTA is what it makes it.
22 Now, slide 37: Mr. Robertson told
23 us, "We would have been willing to do a deal like
24 Samsung had we been given the opportunity." Who
25 wouldn't? Who wouldn't do a deal where you are

1 guaranteed access? Anybody with a chequebook could
2 have made this deal. As proved by Samsung did it,
3 because they had no experience in the area;
4 right? Anybody with a lot of money could have cut
5 the deal that Samsung made, because they didn't
6 have any experience in the area; they just got
7 somebody with a lot of money. So that's not
8 a reason to claim you should get different
9 treatment.
10 Go back to Mr. Edwards. Again, he
11 was the guy no was there, and he was in both
12 programs, and I asked him, "Well, why would you
13 want to get into GEIA or the FIT?"
14 He says, "Look the fact we signed
15 a joint venture agreement and elected to
16 participate with Samsung is evidence that we
17 thought this was a better opportunity." Of course,
18 it was a better opportunity. He immediately took
19 five projects and put them right into the GEIA, and
20 then he got his deposit back.
21 THE CHAIR: Mr. Mullins, we will
22 see when is a good time to break.
23 MR. MULLINS: Yes. I was actually
24 about to say goodbye, ironically. I was about to
25 turn it over to my colleague Mr. Appleton, so this

1 would be a good time to have one.

2 THE CHAIR: I thought this was

3 a good time. Absolutely. Thank you. Could we

4 take a ten-minute break and then continue?

5 MR. APPLETON: Whatever you like.

6 THE CHAIR: Okay.

7 --- Recess taken at 10:31 a.m.

8 --- Upon resuming at 10:48 a.m.

9 THE CHAIR: We are ready to start

10 again. Could I ask someone to close the door in

11 the back and then, Mr. Appleton, you can proceed.

12 MR. APPLETON: I'm just making

13 sure that I'm on here. I'll start my timer.

14 Excellent.

15 CLOSING SUBMISSIONS BY MR. APPLETON:

16 MR. APPLETON: We would like to

17 turn to Canada's general jurisdiction and exception

18 defences to explain why they do not apply.

19 Let's start with consent to

20 arbitration. I want to point out, of course, I'm

21 not going to restate what we said in the opening

22 statements. We talked a lot about law in the

23 opening statement. I'm going to try to highlight

24 issues and if the Tribunal has comments I'm happy

25 to take them. We will try to FIT them within the

1 time as much as we can. Then of course we'll try
2 and keep whatever time that's left over to the end
3 by way of reserving for rebuttal.
4 So, let's start with consent to
5 arbitration. We addressed why Canada consented to
6 this arbitration in our briefs and in the opening
7 statements and there is nothing to add. To be
8 clear, Canada provided its consent to this
9 arbitration within the text of NAFTA Article 1122.
10 This is a clause compromissoire article of the
11 NAFTA and as such Canada consented to the
12 arbitration in the NAFTA.
13 Any alleged procedural violation,
14 which of course we say there is not a violation
15 here, but that Canada raises as such, could not
16 impair Canada's existing consent to arbitrate in
17 the NAFTA.
18 Let's talk a little bit about
19 time. Canada asserts that there could be no
20 possibility of breach in this case until July 4,
21 2011. As we have seen, clearly from the evidence,
22 from the testimony in this hearing, and from
23 Mr. Mullins' discussion of what we have seen
24 earlier this morning, this conclusion completely
25 ignores the evidence.

1 Let's return to the timeline we
2 saw during the opening slide. The notice of
3 arbitration was filed on October 4, 2011, the green
4 flag. The events giving rise to the 1106 claim
5 began almost 15 months before the NAFTA arbitration
6 filing. Whether that's July 7, 2010 or, arguably,
7 August -- whatever that date is, 2010, we say it
8 should be July 7, 2010, let's be quite
9 clear -- because that is the first date when the
10 investor received an e-mail from General Electric,
11 confirming that the 1.6-megawatt turbine was the
12 only turbine that would generate sufficient Ontario
13 local content for use by Mesa for deployment in
14 2011.
15 Remember that comes from
16 a document, BRG-123, a document brought to our
17 attention by Canada's expert, Mr. Goncalves in his
18 rejoinder report, and that's why we had to say,
19 yes, you're absolutely right, the date was July
20 7th.
21 Now, a second event giving rise to
22 the Article 1103, 1102, and 1105 claims, arose more
23 than 12 months in advance on September 17, 2010,
24 when Mesa learned that one-third of the
25 transmission that had been reserved to FIT

1 applicants in the Bruce Region, was being given in
2 priority to the members of the Korean Consortium
3 under the GEIA.
4 If you recall, that was
5 a ministerial directive and near the bottom it
6 identifies that now 500 megawatts are being
7 reserved. That is the first time that the public
8 would be aware of the impact of the
9 Korean Consortium and the Bruce Region.
10 We also note that means they had
11 an investment in Canada before it made its formal
12 FIT applications in November 2009. The definition
13 in NAFTA article 1139 is very broad and it
14 includes, as an investor, someone who is making
15 an investment.
16 The definitions of "investment"
17 and "investor", were modelled on the early
18 jurisprudence of the U.S. land claims Tribunal.
19 I'm sure that Judge Brower has
20 published a book on this, and has been affiliated
21 with that institution for some period of time,
22 would be somewhat familiar with some of the case
23 law that helped influence the very broad
24 definitions that were used in NAFTA Article 1139.
25 So, Mr. Robertson testified that

1 Mesa was acquiring leases in the summer of 2009.
2 In addition Seabron Adamson in his testimony, he
3 testified that advanced investments of inputs for
4 wind project would be very common. These are all
5 investments covered by the definition in Article
6 1139. As we heard this week, the initial
7 investment made by Mesa included an investment in
8 August 2009 before any public news of the GEIA was
9 available.
10 If you'll recall, Mr. Robertson
11 discussed Exhibit C-0461 which had an operating
12 agreement that would be used for its investments in
13 Ontario and which evidences Mesa's efforts to start
14 its in investment in Ontario through the corporate
15 process which we would expect to see in any
16 complicated investment between a foreign investor
17 coming into another country to be able to make
18 an investment. So, clearly, that NAFTA claim,
19 anyway we look at it, arose well before April 4,
20 2011 and that is the question.
21 So let's talk about procurements.
22 Our response to Canada's contentions on
23 procurements are twofold. Again, Canada cannot
24 rely on the Article 1108(7)(a) procurement
25 exception. That's the exception to MFN and

1 national treatments because that exception is no
2 longer in force for Canada because of the operation
3 of better treatment provided by Canada to investors
4 and their investments under the Canada/Czech or the
5 Canada/Slovak treaties so that exception with
6 respect to Canada is spent.
7 I would imagine that exception is
8 still available for the Government of United States
9 and the Government of Mexico unless they similarly
10 have made other treaties. I have not made that
11 investigation and it is irrelevant to our
12 consideration. All we are looking at here is
13 whether the Government of Canada has taken actions
14 that make that exception no longer applicable and,
15 in fact, they have through these two treaties.
16 So, as a result, there is no
17 defence to Canada under Article 1108(7)(a) because
18 we don't ever have to look at government
19 procurement for those NAFTA violations.
20 But, in any event, we would always
21 have to look with respect to Article 1106 because
22 there is no similar provision in the Canada/Czech
23 treaty, and it is also relatively easy because the
24 measures in question do not actually constitute
25 government procurement.

1 Now, as we said in our opening,
2 the NAFTA contains a definition of procurement in
3 Chapter 10 which is the government procurement
4 chapter. It just simply didn't contain a explicit
5 definition for its use in Chapter 11.
6 A treaty of course is to be
7 interpreted in accordance with its ordinary meaning
8 to be given to the terms of the treaty and the
9 context. The context is defined by Article 31(2)
10 of the Vienna Convention and it tells us that we
11 looked to the text of the treaty as an important
12 part of the context. We look there first.
13 Canada has provided no reason to
14 deviate from the ordinary rules of treaty
15 interpretation as contained in the Vienna
16 Convention on law treaties and therefore the
17 Chapter 10 definition should be applied.
18 I of course took you through in
19 the opening the decisions of other NAFTA Tribunals
20 that have come to the same conclusion and even the
21 arguments of Canada that came to the same
22 conclusion in previous cases because that's
23 a logical, ordinary, normal meaning to be given
24 government procurement and the facts on the record
25 are clear that there is no government procurement

1 here.

2 The ratepayers are the consumers,
3 not the government. The ratepayers are ultimately
4 billed each month. As stated by Mr. Jennings,
5 slide 4, the next slide, so the ratepayers, the
6 consumers, ultimately are billed each month. Those
7 bills are paid by them and that covers the
8 electricity that's consumed.

9 So, the OPA simply acts as
10 a pass-through. Moreover, this week we heard from
11 various OPA officials and it is made clear by both
12 Canada and the OPA officials that the OPA is not
13 part of the government.

14 When questioned, Mr. Cronkwright
15 testified here on slide 41:

16 "Question: You are basically
17 saying the Ontario Power
18 Authority is not the
19 government per se?
20 "Answer: That's right". [As
21 read]

22 So he's admitted it.

23 Mr. Chow testified, slide 42:

24 "Question: Were you the only
25 government person involved in

1 the group?
2 "Answer: I'm not
3 a government person. I'm
4 from the OPA." [As read]
5 We have the OPA, an entity that is
6 not government, acting as a pass-through or
7 clearing house between generators and ratepayers.
8 Now, that's not to say that there is not state
9 responsibility for the OPA and we'll talk about
10 that separately, about attribution; that's
11 a different question.
12 Sue Lo stated that the GEIA is
13 actually a commercial agreement. I saw Ms. Lo
14 earlier today. I believe she's even around. Slide
15 43, if we can refresh your memories with her
16 testimony. She says at page 84:
17 "Question: You would agree
18 with me that this was a sole
19 source contract, the GEIA?
20 "Answer: No, I think that in
21 the previous statement you
22 showed me it's a commercial
23 agreement." [As read]
24 This is not governmental. We've
25 already described why the title isn't taken by the

1 OPA, the power doesn't go to the OPA, the payment
2 doesn't come from the OPA; it comes from the
3 ratepayers.
4 Under the definition there would
5 be in Article 1001(5), it doesn't comply. In the
6 WTO we have clear rules that make it easy about
7 commercial resale. Here we don't have to worry
8 about the commercial side. We simply have to
9 understand is this procurement. That's not what
10 procurement tastes like, feels like, and it doesn't
11 meet the definition set out in 1015, because it is
12 sold to others.
13 As we know, it was designed not to
14 be governmental for the purposes of subsidy. We
15 saw that testimony as well, that when they looked
16 at it would this violate subsidy, and they said,
17 no, this is not going to be a governmental subsidy
18 because it is paid for by the ratepayers. Well, it
19 is going to be designed to be able to avoid
20 subsidy. It is also going to avoid governmental
21 procurement.
22 There are many ways to design this
23 program. The OPA could have designed a program.
24 That could have been a procurement program. The
25 Government of Ontario could have done it. But this

1 is not procurement. They chose another way,
2 probably for another reason to avoid the issue of
3 subsidy. In fact, Mr. Jennings has given testimony
4 about that this was not a governmental subsidy. He
5 had said, at slide 44:
6 "Question: So, in fact, the
7 Ontario electricity system is
8 not heavily subsidized, is
9 it, sir?
10 "Answer: No.
11 "Question: In fact, it is
12 not subsidised at all, is it?
13 "Answer: No, it is not." [As
14 read]
15 Canada hasn't even met its
16 evidentiary burden to be able to even raise this
17 defence. We'll deal with this on costs and the
18 issues that go with it. But, in fact, Mr. Jennings
19 has testified that it is not a subsidy. The other
20 documents we'll take you to show it was not
21 a subsidy.
22 There was evidence on the record.
23 Canada said there was no evidence. In fact, there
24 was evidence exactly to the contrary of what they
25 were saying, that somehow this could be, in some

1 circumstance, a subsidy. It's not. It's not
2 a governmental subsidy. There is something funny,
3 but that's not the subsidy. That's just not what
4 it is. Canada's subsidy defence must fail. This
5 matter needs to be addressed in costs.
6 Now, let's turn to MFN; we have
7 had a lot of discussion about MFN. I first deal
8 with likeness and then turn to treatments.
9 Throughout this arbitration, Canada has contended
10 its own subjective perception is relevant to the
11 determination of likeness. The test for
12 determining likeness is objective.
13 The likeness test is relevant as
14 it is a comparison of treatments offered and given
15 to enterprises by a state. Such an analysis must
16 be done objectively on the facts and not based on
17 the perception of a state whose conduct is
18 disciplined by the very rule in question.
19 The investor suggests that the
20 relevance of nationality is, in fact, determined by
21 the nationality comparator in each of these
22 provisions and it is by properly using that
23 comparator, that the Tribunal arrives at
24 a determination of whether or not differences in
25 treatment are nationality-based. That is the

1 relevance here. That's the only relevance.
2 Now, Judge Brower had asked some
3 questions and so I'd like to try to deal with one
4 of them. I believe it's the last question he had
5 raised yesterday. His question was as follows:
6 I think I'm going to put it up on the slide if we
7 can do that just to make sure that I get it right:
8 "Whether a foreign investor
9 could seek damages directly
10 for a violation of the NAFTA
11 under either NAFTA Articles
12 1102 or 1103 and seek damages
13 in addition arising from its
14 ownership interest that
15 the foreign investor holds in
16 the Canadian subsidiary." [As
17 read]
18 There is a simple answer to Judge
19 Brower's question but I'm not entirely sure if the
20 question is exactly what Judge Brower wants so I'm
21 going to discuss the pieces that go with it because
22 I think this will comprehensively deal with the
23 issue and then hopefully put the issue to bed. If
24 there are still more questions I would encourage
25 the Tribunal to ask.

1 So, we have to look to the NAFTA,
2 of course. The first issue that we need to look at
3 is the way in which a NAFTA claim is submitted.
4 NAFTA Article 1116 provides that an investor of
5 a party may, on its own behalf, submit a claim to
6 arbitration that another party has breached the
7 NAFTA and a claim made by that investor may include
8 damages arising both to the investor and its
9 investments. So the terms "Investor" and
10 "Investments" are defined in NAFTA Article 1139.
11 The term, "Investor of a party,"
12 means a national or enterprise of such party that
13 seeks to make, is making or has made an investment.
14 It is very broad and Mesa has met each of these
15 three definitions at some point, as I'm pretty sure
16 all investors probably do.
17 The term, "Investment," is very
18 broad. It goes for a page and a half in the NAFTA.
19 It includes many different types
20 of investments. I'm not going to go through them
21 all but it includes an enterprise, equity or debt,
22 real estate or other property, tangible or
23 intangible, acquired in the expectation of economic
24 benefit or other business purpose. These are just
25 a couple of the many examples. They are manifold.

1 It includes it; they are not even limited there.
2 It was designed to be exceedingly broad.
3 So, if I can just pull up the
4 slide, so the first one here, Article 1116, you see
5 here that Mesa as a U.S. company, I've just used
6 one of the project companies, TTD, it's Canadian,
7 so I'll use that. If you bring a claim under
8 Article 1116, the U.S. investor can bring the claim
9 against Canada. Also on behalf of its Canadian
10 investment, TTD.
11 Go to the next slide.
12 There is another provision in
13 NAFTA, Article 1117. But it is not in issue in
14 this case. We brought this under Article 1116.
15 Under that claim, you can bring
16 a claim on behalf of the Canadian company against
17 the Canadian Government, if it's owned by
18 an American national.
19 So, in that claim, under 1117,
20 then, even though Mesa, as a U.S. entity, controls
21 TTD, normally the normal rule is that the Canadian
22 entity could not have an international process
23 against the Canadian Government. You'd have to go
24 to a local court; that would not be permitted.
25 Here a special rule is set up that TTD could bring

1 a claim if it was brought under 1117, but only if
2 it's brought under 1117. So it has to be an
3 enterprise of another party that the investor owns
4 or controls directly or indirectly.
5 In such circumstance, and only in
6 such circumstance, a foreign investor is able to
7 bring a claim in the name of a local subsidiary
8 against its own government. Because otherwise it
9 is going to run afoul of the general rules of
10 international law, but that's permitted.
11 Let's look at some of the
12 implications now of Articles 1102 and 1103 because
13 they also are involved in some of this.
14 First, let's just look at the
15 definition of "Investment of investor of a party,"
16 which is relevant as we get through here.
17 The term, "Investment of
18 an investor of a Party". That's capital "P",
19 "Party", means an investment owned or controlled
20 directly or indirectly by the investor of such
21 party. So you could be in a corporate chain, and
22 here we have a corporate chain. Anywhere down the
23 chain then you are going to be covered.
24 So that also means that what would
25 normally be an investment, could in itself be

1 an investor because it owned something down the
2 chain. Companies themselves are not the only
3 investments because you could have -- in this
4 context, you could be engaged in economic activity
5 in the area. You could have real estate or
6 tangible or intangible property used for business
7 purpose. So it gets very complicated very quickly.
8 But the answer is actually relatively simple
9 because anybody could basically fit if you fit
10 within the rule. You have to look at specifically
11 who is seeking and which circumstance.
12 I'll give you some examples but
13 I'm making certain assumptions as we look at these.
14 So that's -- as I start putting through the arrows,
15 as you will see through, you have to understand it
16 is based on those assumptions. So there could be
17 a difference depending on what the factual
18 circumstance is, but I wanted to be able to answer
19 this so that we could really get it comprehensively
20 done because there has been a lot of confusion, and
21 I would actually suggest a lot of mischief-making
22 here and we're going to get this cleared up very
23 easily.
24 Let's look at slide 46. My
25 numbers might be out so let's look at the next

1 slide. It's absolutely clear that the NAFTA always
2 envisioned that claims could be brought by
3 a foreign investor on behalf of its domestic
4 investments. So here I'm using some examples. I'm
5 not saying these are the examples in this case.
6 I'm just using them because we all know that
7 Samsung is a Korean company so it's an enterprise
8 that is from Korea.
9 So that is going to be Samsung
10 Korea is what we are going refer to. Mesa is
11 American; TTD is a Canadian. These are our
12 examples and TTD is an investment of Mesa and of
13 course, as we know, TTD has multiple elements down
14 the chain as well, so it could also constitute
15 an investor or an investment.
16 So, if you are looking at the
17 comparative treatment provided Samsung -- that was
18 not in Judge Brower's question but I thought maybe
19 that might be where he was looking because that was
20 an issue in contention brought by Canada.
21 If we are looking at a comparison
22 of better treatment provided to Samsung, than
23 provided to Mesa, in like circumstances, then
24 Article 1103(1) applies. Let's go to the next
25 slide.

1 It could also be possible,
2 depending where Samsung is on this chain,
3 especially -- again, we have certain assumptions,
4 that it could invoke Article 1103(2) with TTD. It
5 would depend, if there are technical issues as to
6 whether Samsung Korea is an investment, whether
7 incorporated. But whatever it is, the main thing
8 here is we look at is there better treatment to
9 Samsung than better treatment to Mesa. So,
10 generally, we look on the top line to the top line
11 and the bottom line to the bottom line, but there
12 could be factors that make the arrows go two ways
13 which is why I've done that.
14 Now, let's go to the next. If we
15 have a situation where the investment, Samsung
16 Canada, is treated better than Mesa, again we have
17 to figure out, well, which Mesa is it and where is
18 it in the chain, because they are a different Mesa,
19 or different AWA and various other entities. So
20 normally, without question, Samsung Canada would be
21 compared to TTD Canada.
22 That would normally make sense and
23 that would be Article 1102, national treatments,
24 where you are looking at better treatment to
25 a Canadian company. So, if Samsung Canada was

1 an investor itself and had investments, which it
2 probably does in these wind projects, because we
3 know that they have wind projects under Samsung
4 Canada, then the better treatment provided to
5 Samsung Canada is better treatment to an investor,
6 that triggers Article 1102(1).
7 If Samsung Canada could never be
8 an investor and could only be an investment,
9 as a factual determination, not an issue so I can't
10 tell you, I think it's unlikely, then you could not
11 have this. You could not have that comparison. So
12 you have to look to that situation.
13 In the purposes of these case,
14 these conceptual problems aren't going to arise and
15 I will give you examples specifically to make it
16 easy for the actual facts but I want to go through
17 the theoretical facts, because it is broad and it
18 was always designed to be broad and I'll explain to
19 you in a minute why.
20 Let's go to the next one. Here we
21 have the situation where Samsung Korea has better
22 treatment than provided to TTD, and TTD Canada owns
23 TTD Alberta and several other things, as we see.
24 There are various companies, one with wind leases,
25 one which is operating, et cetera, et cetera, so

1 TTD Canada, it constitutes an investor on its own
2 and so you would compare Samsung Korea as
3 an investor to TTD Canada, actually that would be
4 1103(1), and if Samsung Korea actually ended up
5 being an investment, it would be 1103(2), that
6 would really be more applicable, I think, to the
7 line below, Samsung Canada certainly if
8 it's -- next slide, please. Samsung Canada you
9 have a direct line, there is no question and again
10 it is a question of fact. That's our problem. You
11 have to look at specifics rather than going
12 generally but I want to identify it.
13 Now let's look to the next slide.
14 Let's go back then, sorry, and keep us here for
15 a second.
16 So, the specific answer is there
17 is no impediment to an investor from the United
18 States to bring a claim on its own behalf and on
19 behalf of its Canadian investments, and certainly
20 this claim here, brought under 1116, that's
21 certainly permitted.
22 If there was an Article 1117
23 claim, which there is not, then it would have
24 another shape that would be permitted. But this is
25 all without controversy in the NAFTA and the reason

1 is simple: Because what we want to understand here
2 is that we're looking at relative obligations.
3 Article 1102 and Article 1103
4 compare the treatment given to someone else.
5 That's different from NAFTA Article 1105 which sets
6 out a specific type of treatment. Or just like if
7 we had Article 1110 of expropriation, another type
8 of treatment. So if you are comparing on that type
9 of treatment then we do not look at a situation
10 that is comparative. In that situation we look at
11 actual, what it is. If you hit that requirement
12 has it been arbitrary. Has it been a breach of
13 fair and equitable treatment? Is it unfair?
14 But here we always must look at
15 a comparator so we are always identifying, is Mesa
16 treated differently than someone else in like
17 circumstances? Then we look at that nationality
18 and we will compare usually investments to
19 investments. That's Article 1102(2) or 1103(2) for
20 MFN and we look at is the investor being treated
21 differently from another investor? That is
22 Article 1103(1) for MFN and Article 1102(1) for
23 national treatment.
24 That is the normal route that we
25 could look at but the facts -- facts are funny

1 things so you have to actually look at them.
2 That's what you've been doing so we can figure out
3 and sometimes an investor can end up
4 being investment and sometimes the investment can
5 end up being an investor because of what they are
6 doing.
7 So that's why I couldn't give you
8 a simple answer but the general reason here was:
9 The best treatment in the jurisdiction is what 102
10 and 1103 were designed to do and that's reflected
11 entirely in Article 1104 which says that if there
12 is a difference between the treatment, between
13 Article 1102 and 1103, that best treatment in the
14 jurisdiction must be provided. That was the design
15 of the NAFTA.
16 So if a Canadian investment is
17 treated better, that should be the basis and if
18 a Korean investor is treated better, that would be
19 the basis.
20 As you know, our view is the
21 wording of Article 1103 is very clear that it was
22 never designed to say, "Well, you can treat some
23 Americans better than others, any other party,"
24 which is what the words in 1103 would apply to
25 Mexicans or Americans.

1 That was the whole idea of that
2 NAFTA so better treatment to an American triggers
3 MFN because otherwise there would be an issue as to
4 whether it would be triggered, it would be covered
5 and that would leave a big lacuna in the regime and
6 since 1104 tells us we're looking for the best and
7 your bringing all those to rise up with the tide,
8 that's the idea here.
9 Now, I'm not sure if I've been
10 able to answer your question but I thought I might
11 as well give you something comprehensive to be able
12 to address this and if you have more questions
13 we're very happy to deal with those at
14 an appropriate time. But we wanted to make sure
15 that we could explain this very, very clearly.
16 Now, I just wanted to point out
17 that of course there is no provision in NAFTA that
18 excludes from comparison of better treatment of
19 domestic investments, from foreign investment.
20 There's nothing because of course of the design of
21 the NAFTA.
22 So, Judge Brower, you
23 asked -- actually, we should go back just before
24 I go there.
25 I also like my favourite thing,

1 one of my favourite international law experts
2 recently passed away, Andreas Lowenfeld, and you
3 couldn't have a case without talking about a
4 quality of competitive opportunities which was
5 a principle that was very dear to him.
6 I had the privilege of teaching
7 with him for many, many years and the issue of
8 quality of competitive opportunities is at the
9 heart of Articles 1102 and 1103; the requirement to
10 treat the investors fairly so that they can know
11 what's going on.
12 The absence of transparency has
13 a very significant impact on the ability to have
14 a quality of competitive opportunities. So if one
15 entity has better information, that clearly would
16 have to be a breach of that. If they had better
17 access, it is a breach of that. If they are given
18 priority access, that's a breach, and that is what
19 the telltale tells us, to start looking at Article
20 1102, national treatment, and Article 1103.
21 I'm like a dog. I know where to
22 sniff once I see that. That's where I'm going.
23 Maybe if I'm lucky I'll find a truffle. Maybe I'll
24 find something else. You have to be careful where
25 you look sometimes. But the fact is simple, that's

1 the main principle that's being addressed.
2 Let me deal with Judge Brower's
3 second question about the law of damages related to
4 MFN. I will talk about damages later but let me
5 try to address them.
6 First of all, Judge Brower was not
7 surprisingly unfamiliar with MFN damages but
8 certainly with respect to NAFTA because there are
9 no NAFTA damage awards that you can really look at
10 generally about Article 1103, but there are in
11 Article 1102 and we think since they are both
12 looking at the same basis, we can look at things to
13 help us to understand what to do.
14 Again, you have to look at the
15 situations of each case. But I think a very
16 helpful case to assist you, a very persuasive case
17 to assist you, would be Cargill. Cargill looked at
18 the requirement for MFN treatment to track that of
19 national treatments. So that's the first bit.
20 Where Tribunals have awarded
21 damages for national treatments Cargill also helps
22 us on that too because the Tribunal in
23 Cargill -- and by the way, that is the Respondent's
24 schedule of legal authorities, RL-45 so it is in
25 the record.

1 The Cargill Tribunal agreed with
2 the Claimants, that the failure to provide
3 treatment as favourable as that provided -- in this
4 case, it was in Mexico -- so that in that
5 situation, the appropriate measure of damages was
6 the overall damage, the economic success of the
7 investor arising from the measure. That is exactly
8 the situation.
9 So in Cargill the investor was
10 treated more less favourably than domestic
11 investors in like circumstance. So, in that case,
12 the Tribunal held that the appropriate approach to
13 assessing damage is to determine a present value of
14 lost cash flows.
15 A similar approach was taken by
16 the NAFTA Tribunal in Feldman, although on the
17 facts in Feldman they found the Claimant hadn't
18 documented the false profits so they took the
19 approach but they couldn't give the award because
20 of evidential issues. They had to find some other
21 way to calculate damage but that was because of a
22 problem of evidence, not because of a problem of
23 approach.
24 Also, the ADM Tribunal which was
25 looking at a similar situation as Cargill, a

1 separate tribunal -- I think actually the late
2 Professor Lowenfeld sat on that one -- applied the
3 same principle of lost profits they would probably
4 have reasonably anticipated.
5 So, there is no reason why the
6 overall damage, the economic success of the
7 investor approach, should not apply the
8 compensating harm for less favourable
9 treatment under NAFTA Article 1103. It's a logical
10 outcome of the restitutio in integrum approach in
11 the Chorzow Factory case to a situation where the
12 nature of the breach is the failure to accord
13 treatment that's less favourable.
14 As you've seen in our pleadings,
15 it is necessary to determine what the position of
16 the investor would have been in the Ontario wind
17 market if it had been treated as favourably as
18 a member of the Korean Consortium, which of course
19 is an investor of a non-NAFTA party and therefore
20 invokes Article 1103.
21 Of course, there were many
22 factors, not only the priority access but
23 systemically risking of the process of all of the
24 benefits that would be given to the
25 Korean Consortium. That also would affect the

1 discount rate and those are all detailed in
2 Mr. Low's report. He was quite meticulous in
3 identifying the considerations and to identify, if
4 the treatment was extended under the GEIA, why it
5 would work in that way.
6 Now, you also asked a separate
7 part of the question as to whether or not you have
8 to look to more than one breach to be able to get
9 you there. So the easy issue here is that if you
10 look at Article 1103 as the basis for the harm,
11 because of the GEIA's unbelievable terms, then you
12 basically will get all of the damage that would be
13 applicable in this case, and so that makes it
14 relatively easy.
15 If you were to find though that
16 you weren't going to give all of the benefits of
17 the GEIA, then that would change and then you would
18 have to look at what you would look at.
19 There are cases of course that
20 tell you very clearly that you have to look at each
21 type of breach and to identify what the losses
22 would be. But quite regularly, if the losses are
23 subsumed, the Tribunal doesn't need to go there if
24 they specify why. So I would just identify that
25 the MFN breach has the largest scale and scope for

1 what would go on, and that's been laid out by
2 Mr. Low in his report.
3 I'd like to talk about national
4 treatment if, in fact, that satisfies you.
5 Canada purports to restrict the
6 factors that might objectively justify different
7 treatment to the determination of likeness, rather
8 than to the analysis of whether treatment is less
9 favourable. So the test for likeness is objective,
10 and here where there is a regulatory process of
11 general application itself that is the focus of
12 concern, it is appropriate to view all entities,
13 domestic and foreign, because the same fundamental
14 process applies to them all.
15 Now, the NAFTA Tribunal in Grand
16 River stated -- and we'll look at that
17 slide -- that:
18 "... the identity of the
19 legal regime(s) applicable to
20 a Claimant and its purported
21 comparators to be
22 a compelling factor in
23 assessing whether like is
24 indeed being compared to like
25 for purposes of Articles 1102

1 and 1103." [As read]
2 So you can take into account the
3 legal and regulatory analysis, you can do that.
4 But you have to figure out what the real issue is
5 at stake. If you change the name, it doesn't mean
6 that you are not like.
7 If you simply apply a measure,
8 that doesn't become the basis, the name of the
9 measure or simply treating somebody differently by
10 legislative fiat, it is not the basis. You must do
11 a test to see if, in fact, they really are like or
12 not and it known as the "Occidental Tribunal" in
13 assessing the comparators? This cannot be done by
14 addressing exclusively the sector in which the
15 particular activity is undertaken; we have to look
16 and understand.
17 In this context you've seen
18 tremendous evidence that FIT and GEIA are really
19 interchangeable. The GEIA proponents wanted to be
20 treated like FIT in some circumstances, and
21 certainly not like FIT in others.
22 They all got the FIT contract,
23 they all got the same price, or actually better,
24 because you could get a little adder, if you could
25 point to things. You didn't have to do it; you

1 just had to point.
2 They had to follow the same local
3 content. They had to follow the same process for
4 regulatory environmental. They just got better
5 treatment but they were like in that respect.
6 So, Mesa was seeking to obtain
7 permissions to obtain access to the Ontario
8 electricity grid and obtain renewable power PPAs
9 just like the proponents under the GEIA, very like
10 circumstances in respect to seeking long-term
11 renewable power agreements and seeking transmission
12 access to the grid.
13 Now, national treatment allows
14 a regulatory process to produce different outcomes,
15 as long as that process demonstrably treats the
16 parties with evenhandedness to ensure that
17 investors are granted equal opportunities.
18 To be evenhanded the treatment
19 need not to be identical. Article 1102(3) makes
20 clear that best treatment needs to be provided and
21 that evidence is clear that that best treatment was
22 provided to the Korean Consortium.
23 This again leads to the issue of
24 burden of proof. Each side of course, as you know
25 under international law, has the burden to prove

1 the facts upon which it relies and comment to NAFTA
2 Tribunals and most explicitly Feldman, and some of
3 the WTO, appellate body of recent rules and
4 international treatment, is the notion that the
5 nature and magnitude of the difference of treatment
6 between those in like circumstances, once that's
7 been established by the Claimant, that burden
8 shifts to the responding state to show that its
9 difference, both its nature and magnitude, can be
10 fully accounted for by legitimate regulatory
11 considerations.
12 In this present case, not only has
13 Mesa established that nature and magnitude of the
14 difference of treatment, Canada has actually not
15 filed any defence on the issue of treatment.
16 In these circumstances, it is
17 clearly reasonable to require a full demonstration
18 on Canada's part that all differences of between
19 the investor and the Canadian entities subject to
20 the same regulatory process are fully accountable
21 on objective regulatory considerations unrelated to
22 nationality, and Canada has not done this.
23 Due to the difficulties with the
24 discovery process in this case and the extensive
25 redactions of material, the investor can only

1 partially infer what were the internal
2 deliberations of government that reveal the exact
3 range and relevant way the considerations would
4 affect the treatment that it received, and this is
5 a strong reason for putting the onus on the
6 responding state to establish that the objective,
7 legitimate considerations can fully account for the
8 difference in treatment. We say that Canada simply
9 can't do that here. They haven't and they cannot.
10 Now let's look at some of the
11 facts applied to Most-Favoured-Nation in national
12 treatment. NAFTA Article 1102 provides that Canada
13 provide treatment no less favourable than it
14 provides the Canadian investors and their
15 investments were in like circumstance with the
16 Claimants and that likeness must be considered for
17 all of those who seek such regulatory environmental
18 permissions, the test for likeness in this case.
19 So all of the regulatory
20 permissions that are involved here for access to
21 the grid, for all the issues that we deal with are
22 subsequent for that. A test for likeness in this
23 case must address all those who seek such
24 governmental permissions for projects where there
25 could be potential environmental review or where

1 there could be potential access to the grid, or
2 there could be this issue about aboriginal
3 considerations, all of these are the types of
4 things that we look at.
5 Throughout the course of this week
6 and our pleadings, we have met this burden on
7 likeness. In respect to likeness, when questioned
8 about the GEIA and the FIT, Sue Lo admitted the
9 following:
10 "Question: We talked
11 a little bit about this but
12 again the FIT program had
13 a local content requirement.
14 "Answer: Yes.
15 "Question: And both the FIT
16 Program and the GEIA had
17 20-year FIT contracts.
18 "Answer: Yes.
19 "Question: Both the FIT
20 Program and the GEIA were
21 being paid the same amount of
22 money per megawatt with the
23 exception of the adder.
24 "Answer: Yes.
25 "Question: Both the FIT

1 Program and the GEIA had
2 foreign investors?
3 "Answer: There were
4 a variety of investors." [As
5 read]
6 Of course we know the answer here,
7 which is, "Yes."
8 We heard from Mr. MacDougall this
9 week, and he stated the following here on slide 56,
10 Day 3, page 287. He says:
11 "Question: So I was aware
12 that the two would be running
13 in parallel and as you know,
14 as one of the lead spokes
15 people for the FIT Program,
16 I wasn't terribly pleased by
17 the competing development
18 opportunities that were
19 running in parallel."
20 Then he said the following:
21 "Well, certainly leading
22 into -- well, in the FIT
23 Program design, we knew there
24 were thousands and thousands
25 of megawatts of interest of

1 project development in
2 Ontario, as witnessed by some
3 of the prior renewable energy
4 procurement activities. So
5 I knew there would be more
6 demand for contracts than
7 there would be supply of
8 contract capacity. So my
9 professional reaction was,
10 this just creates less supply
11 of FIT contracts available
12 because a portion of the
13 available grid capacity will
14 necessarily need to be
15 allocated to the
16 Korean Consortium." [As read]
17 Slide 58, sets out where
18 Mr. Jennings admitted that FIT and GEIA projects
19 are interchangeable:
20 "Question: Isn't it true
21 that had Ontario not entered
22 the GEIA with the
23 Korean Consortium, it could
24 have entered more FIT
25 contracts and specifically

1 would have gone so in the
2 Bruce Region?
3 "Answer: Well, whether we
4 would have or not, there
5 certainly would have been
6 more space available for
7 other projects, yes."
8 FIT proponents were in the same
9 like circumstances as the GEIA proponents, the only
10 difference being that the GEIA proponents were
11 treated more favourably. The fundamental element
12 of competition for the same limited amount of
13 access to the government-controlled transmission
14 grid and for the same type of renewable purchase
15 agreements, fundamentally demonstrates that Mesa
16 was in like circumstances with GEIA proponents from
17 any other NAFTA party or from a non-party like
18 Samsung, and even Ontario treated FIT proponents
19 interchangeably with GEIA proponents.
20 Ontario announced in November 2010
21 that they would reserve 1200 megawatts of
22 transmission in Bruce for FIT proponents. On June
23 3, 2011, Ontario announced the 450 megawatts up to
24 1200 megawatts that was allocated for the Bruce,
25 450 megawatts was allocated to the

1 Korean Consortium for GEIA projects. So even
2 Ontario has treated GEIA and FIT interchangeably.
3 The investors made reference to
4 a number of Canadian investments and investors who
5 were in like circumstances to Mesa, such as
6 Boulevard Canada, and during the hearing we heard
7 from Sue Lo, who finally explained to us what the
8 "breakfast club" was, a private cabal of
9 high-ranking government officials who would meet
10 from a variety of different places.
11 I had worked for the Government of
12 Ontario for three years, so these were the most
13 senior people you could get, the head of the civil
14 service and the senior person from the Premier's
15 office, that's the B Club, the club that nobody
16 else gets to go to, a very high level, and the B
17 club, in their discussions, had set out
18 a discussion that International Power Holdings
19 Canada was protected. International Power Canada's
20 senior executive was the former president or maybe
21 still the president of the governing Liberal Party
22 of Ontario, and then became the president of the
23 Federal liberal Party of Canada. He was
24 a highly-connected insider.
25 The lobbyist who had been

1 connecting Ms. Lo. She had talked about
2 Mr. Lopinski, a very high-ranking former official
3 of the Premier's office. I have no doubt that
4 Ms. Lo knew who Mr. Lopinski was. Mr. Lopinski was
5 a senior operational advisor in the Premier's
6 office before and was, again, on the current
7 Premier's election campaign and this was in the
8 papers. It is notorious. It is well known.
9 I believe it was covered in
10 Mr. Wolchak's statement too.
11 A similar. So these are special
12 deals given to those who are connected, who are
13 local, and that triggers 1102. That's where we
14 look at national treatments and when we look at the
15 better treatment to Samsung, that's where we look
16 at 1103. And the better treatment to Pattern.
17 That also triggers 1103.
18 But of course, if you look at
19 Samsung, you never really have to go so far as to
20 look at Pattern, but they are all getting better
21 treatment. Everyone is getting this. The only
22 people who aren't getting it are the ones who play
23 by the rules, like Mesa who believe that it is
24 a rules-based system, like Mesa, and they are the
25 people who are treated badly, because there is

1 another game in town and only those on the inside,
2 the B club or the senior officials, the C club or
3 the A club, they are the ones who get in.
4 Now, let's talk about treatments.
5 Canada is required to provide treatment no less
6 favourable to Mesa than it provided to Canadian
7 investors and investments, and you heard this week,
8 repeatedly, that Canada did not provide this same
9 level of treatment to Mesa and its investments.
10 Canada still has not addressed Mesa's arguments in
11 that respect.
12 I talked briefly about local
13 content. There is no question that Canada imposed
14 local, prohibited, content requirements on Mesa in
15 the FIT Program. Mesa had to disrupt its normal
16 decision-making in order to conform to these
17 internationally wrongful measures.
18 Mr. Low confirmed in his expert
19 report on value, and in his testimony, that Mesa
20 incurred harm as a result of the local-content
21 rules, and that it would suffer further harm in the
22 future as a result. And Canada has filed no
23 defence to the local-content claim, and has not
24 provided any evidence to refute Mesa's proof that
25 it has been harmed of any substantial element. It

1 just simply says there's no harm. It does nothing
2 else. It just says no.
3 I'd like to talk about
4 attribution. It is clear that all the measures in
5 these claims are attributable to Canada. Let me
6 know you why. First, with respect to MFN. You've
7 seen the secret MOU in the GEIA.
8 They were negotiated and signed by
9 the Government of Ontario. The Minister of Energy,
10 the Premier of Ontario, these are all integral
11 parts of the Government of Ontario. They are
12 clearly directly responsible. ILC Article 4
13 clearly is in effect.
14 So the breach of Article 1103 with
15 respect to the GEIA is completely attributable to
16 the Government of Ontario. Moreover, the Minister
17 of Energy specifically directed the Ontario Power
18 Authority to enter into PPAs that were
19 substantially similar to FIT contracts.
20 The reservation of a 500-megawatt
21 gift to the Korean Consortium, that first phase
22 where they had to do nothing for, was directed by
23 the Minister of Energy. The priority access and
24 further technical and regulatory assistance to the
25 Korean Consortium was directed by the Minister of

1 Energy.

2 The same reasoning applies to

3 national treatment. Ontario's actions are equally

4 attributable to Canada as the Canadian subsidiaries

5 of the Korean Consortium, such as Pattern Renewable

6 Holdings Canada, ULC received this preferential

7 treatment.

8 Also, we can look at

9 Boulevard Power, the Canadian operation of NextEra,

10 and here we're looking at that it got treatment

11 directed or dictated by Article 4.01 of the GEIA

12 which was signed by Ontario, not the OPA.

13 The treatment under the GEIA is

14 signed by Ontario, directed by Ontario, provided by

15 Ontario, Canada's directly responsible. So it does

16 raise the issue though about chapter 15 of the

17 NAFTA and lex specialis.

18 Canada suggests Article 8 of the

19 ILC Articles are somehow inapplicable with respect

20 to acts and omissions of the OPA because of Chapter

21 15, and Chapter 15 contains Article 1503(2) which

22 Canada says lex specialis on state responsibility.

23 In order to assess this contention

24 we need to look at two things. First, what do the

25 ILC Articles say about the effect of lex specialis

1 on the applicability of the ILC Articles, that is
2 Article 55, and then whether Article 1503(2) of the
3 NAFTA or whether ILC Article 8 is applicable to the
4 OPA's course of conduct in this case.
5 Just to be clear, the course of
6 conduct of the OPA is attributable to the
7 government as a result of ILC Article 8. The ILC
8 Article refers to situations where an entity, in
9 fact, is acting on the instructions or under the
10 direction or control of the state. But with
11 respect to the first issue, given ILC Article 55,
12 a lex specialis does not render the ILC Articles
13 inapplicable.
14 The articles are only applicable
15 to the extent that state responsibility is governed
16 by a special rule. That's what Article 55 says.
17 On the second issue, Article
18 1503(2) clearly establishes that normal actions of
19 state enterprises are attributable to the state and
20 it thus clarifies the understanding of the parties
21 that state enterprises are not to be treated like
22 Article 4, organs of the state, where essentially
23 all of "the conduct of an ILC Article 4 organ is
24 attributable to the state."
25 1503(2) duplicates, in essence, or

1 largely duplicates what you see in ILC Article 5
2 which deals with state enterprises. Article 5
3 says:
4 "The conduct of a non-organ
5 is attributable to the state
6 where the entity in question
7 has been empowered to
8 exercise governmental
9 authority and the conduct in
10 question constitutes such
11 an exercise." [As read]
12 So different tests.
13 In sum, Article 1503(2)
14 establishes attribution of conduct of state
15 enterprises and that they must operate in a manner
16 akin to ILC Article 5 and ILC Article 4 and this
17 makes a lot of sense as many state enterprises
18 including the OPA exercise commercial-for-profit
19 activities where the act based on the same
20 incentives and considerations as private market
21 actors and not as implementers of public policy and
22 regulators.
23 It is understandable that one
24 would not want such activity attributable wholesale
25 to the state. But, as opposed to the situation

1 under ILC Article 5, Article 1503(2) doesn't speak
2 at all to the situation addressed in the ILC
3 Article 8, which is where one organ of the state is
4 giving a specific direction or instruction to be
5 carried out by a state enterprise or an employee of
6 a state enterprise or by somebody completely
7 different.
8 Let's take a hypothetical. Let's
9 say the Interior Minister of a country decides that
10 an investor's plant is to be destroyed. But
11 instead of having of the military do it, someone
12 that is clearly part of the state, the Minister
13 operates through a state enterprise or some
14 employees of a state enterprise that are instructed
15 by the Minister to destroy the factory.
16 Can the state really avoid the
17 international responsibility simply by using
18 a state enterprise as an instrument to effect the
19 state of affairs? Here, an organ of the state is
20 determined to bring about a specific decision and
21 is instructed that it happen.
22 There is simply no language in
23 Article 1503(2) that addresses this issue or that
24 suggests that ILC Article 8 is inapplicable. Such
25 a result would allow a huge escape hatch from

1 international responsibility and this was clearly
2 never intended by the NAFTA parties.
3 So, in the situation of the OPA,
4 its actions under the FIT represent conduct that
5 originates with the actions of the state. We've
6 seen that both under Article 25.3.5 of the
7 Electricity Act where the Ontario Minister of
8 Energy used a statutory power to direct the OPA to
9 follow directions from the Ontario Government; and
10 also under Article 25.3.2 where governmental
11 authorities actually delegated, delegated to the
12 OPA.
13 Now, the conduct of the OPA
14 initially in this dispute is not technical. It's
15 not an exercise of a governmental authority as to
16 context unless it's been set out. The FIT is not
17 a price of any commercial operator. It is
18 a government-created entitlement that is
19 conditioned and Canada has indeed belaboured this
20 point on the compliance with extensive rules,
21 regulations and requirements.
22 So how is the OPA's rule of
23 determining who is entitled to sell electricity at
24 a regulated price different from core examples of
25 the exercise of governmental authority in Article

1 1503(2) such as granting licences or approving
2 commercial transactions. Other than by grant of
3 governmental entitlement no-one would be able to
4 sell electricity by the rates established in the
5 FIT.
6 The OPA was allocating
7 governmental entitlements and enforcing the laws,
8 regulations and requirements with respect to those
9 entitlements. And it is an authority, the power
10 authority, its role here was clearly with respect
11 to the exercise of governmental authority.
12 Ontario of course used its power
13 under the Electricity Act to delegate or direct, so
14 direction would be ILC Article 8, or delegation
15 under the Article 25.3.2 of the Electricity Act,
16 and they make it clear the Minister is directing
17 and is responsible for these acts. Ontario is in
18 charge of these acts. Ontario is the puppet
19 master.
20 It is making the OPA do things and
21 we heard testimony that, in fact, the OPA was happy
22 to do this because then the blame would go to the
23 government because the government is in control of
24 these things.
25 The following actions, there were

1 a number of actions which harm Mesa and they are
2 directly attributable through directions. So, for
3 example, on June 3rd, we can go there, the Minister
4 of Energy directed the OPA.
5 Here you see under 25.3.2, that is
6 about the FIT program. It instructs to open the
7 five-day window for interconnection. That's
8 directed.
9 Here on April 1st, under 25.3.2
10 that's a delegation of governmental authority. It
11 was instructing the OPA to negotiate PPAs with the
12 Korean Consortium. Again, there is a large list
13 which we've set out in the memorandum.
14 So, hence the limited consultation
15 window and the resulting harm that allow the
16 connection-point change between regions is directly
17 attributable to Ontario through this mandatory
18 directive. This was a clear exercise of
19 governmental power.
20 Similarly, there is no question
21 that Canada, through Ontario, is responsible where
22 the Minister directed the OPA on April 1 to give
23 priority to projects within the scope of this
24 direction, when assessing transmission availability
25 with respect to the FIT.

1 Again, there is specific direction
2 exercising governmental authority for a specific
3 action which with result in the farm. The same
4 reasoning applies to the Minister's direction on
5 the 500-megawatt reservation of transmission
6 capacity, the gift on December 17, 2010.
7 I would like to turn the damages.
8 What does this all mean to our client?
9 Slide 60 is a chart, and this is
10 the slide number 7 from Mr. Low's summary and it
11 provides a clear summary that breakdown of damages
12 for each NAFTA breach, the total losses claimed for
13 all NAFTA are 704.1 million to 768.2 million.
14 You heard the testimony from
15 Mr. Low and Mr. Goncalves about the elephant in the
16 room, as the difference in approach to quantifying
17 damages. That is displayed on slide 61 here on the
18 monitors before you.
19 This difference reflects an amount
20 of $500 million this accounts for the majority of
21 the difference between the valuation experts and
22 the difference relates fundamentally to the
23 interpretation and application to the NAFTA to
24 damages.
25 The question is simple: In

1 interpreting the Most-Favoured-Nation clause
2 relating to evaluating damages, do you assume that
3 a party should be given the most favourable
4 treatment or do you attempt to take away the
5 benefits of the more favourable treatments that
6 have already been given to some other party and
7 calculate damages on that basis?
8 You've heard from Bob Low, the
9 investor's chartered business evaluator on this
10 point and he was consistent, credible and gave his
11 professional opinion which he's been doing in
12 numerous other cases, for many, many years, over 60
13 cases, and his damages analysis is premised on
14 giving the most favourable treatment to the
15 investor.
16 Mr. Goncalves had no basis for his
17 approach. We saw that on cross-examination, other
18 than his own view, his own experience which he said
19 he had none in NAFTA.
20 Canada's valuation approach with
21 respect to NAFTA Article 1103 can simply be
22 dismissed as illogical by the following
23 hypothetical.
24 So, let's assume that ABC Company
25 is interested in accessing the Ontario wind market

1 and wants to enter into a business arrangement
2 similar to that of the Korean Consortium. So
3 company ABC can attract a manufacturing facility
4 for the Province of Ontario. Company ABC is not
5 participating in the FIT Program. Under BRG's
6 basis of damages, the elimination of the wrongful
7 action by Canada would leave company ABC in the
8 position of not receiving a long-term fixed price
9 contract or any relief whatsoever.
10 Canada would thus have breached
11 its NAFTA MFN obligations with respect to ABC Corp
12 but it would receive no compensation for that
13 breach. This just doesn't make any sense. The
14 only damage approach that gives meaning to the MFN
15 principle is that which was adopted by Mr. Low, and
16 which was to provide the most favourable treatment
17 to the investor which is what the NAFTA tells us
18 that we should be doing and now as we've talked
19 about this in relation to Judge Brower's question,
20 which other Tribunals would give us an indication
21 would be the appropriate approach as well.
22 Now, the second largest difference
23 in the quantification of losses to the lost of
24 equity, when looking at lost profits, slide 53,
25 which is Mr. Low's slide, the cost of equity is in

1 line of the OPA's, his cost of equity, whereas
2 Mr. Goncalves' cost of equity is significantly
3 higher and this difference alone accounts for
4 $120 million between them.
5 Now, let's go to slide 46.
6 Mr. Goncalves suggested that the
7 OPA's 11 per cent cost of equity represented
8 a project already in operation and no longer
9 reflected any of the risks of development.
10 This is simply incorrect. Mr. Low
11 indicated that on the basis of OPA's own documents,
12 a presentation of the 11 per cent rate of return
13 does reflect the risks of development.
14 Next, it's important to note that
15 if the Tribunal finds a breach, damages are
16 certain. Canada's own expert concedes that at
17 least two of Mesa's four projects would be awarded
18 contracts and that causation is proven for each of
19 all the four projects.
20 Remember, Mr. Goncalves opined on
21 causation and note that means our version of the
22 transmission allegation must be correct.
23 Mesa could not get those
24 contracts. Mr. Goncalves says the contracts were
25 awarded exactly as Mesa has shown in the evidence

1 and Mr. Chow has suggested that the provincial
2 rankings were key. Finally, at the end of his
3 examination, I believe I finally, from a question
4 from the President, he admitted that when faced
5 with an OPA document from the FIT team, Exhibit
6 C-617, that it was the exact opposite of what he
7 was saying, and that the rankings were by region,
8 not by province.
9 The FIT team, you will remember,
10 stated the area ranking as more important than the
11 provincial ranking, and Mr. Goncalves must agree
12 with the FIT team or otherwise he would not have
13 said that Mesa would have gotten contracts in the
14 Bruce but for the GEIA or the FIT pool change.
15 Next slide. Contrary to what
16 Mr. Goncalves presents Mr. Low's report does not
17 provide an all-or-nothing conclusion. Mr. Low's
18 first and second reports provide a clear breakdown
19 of all the components of his conclusion of losses
20 by project for the Tribunal to consider alternative
21 loss scenarios, if they need to go there.
22 Now, I'd like to turn briefly to
23 the MTSA obligations. We have here a chart that
24 identifies the MTSA and various documents that
25 support it. We thought that might assist you.

1 While in May of 2008, Mesa signed
2 a master North American turbine supply agreement
3 and paid the deposit thereafter, that was
4 an agreement, as you heard Mr. Robertson's
5 testimony, that would be for all of North America.
6 The MTSA was amended in November of 2009 for the
7 express reason of using turbines for the FIT
8 projects.
9 Immediately after the amended MTSA
10 was signed, Mesa submitted its launch applications.
11 You will see, the numbers change dramatically
12 between May and November 2009.
13 Shortly thereafter, they filed the
14 North Bruce and Summerhill applications in May 2010
15 and while Mesa waited for the Bruce area to open
16 transmission and saw the one-year extension from GE
17 in February 2011.
18 Then it receives notice in July
19 2011 that it did not obtain contracts. Mesa
20 thereafter tried to mitigate its losses by using
21 the turbines elsewhere but it was unable to do so.
22 This resulted in Mesa breaching the amended MTSA in
23 December 2011 and forfeiting some of the
24 deposit -- you see that there -- and then the
25 remainder of the deposit in 2012.

1 We thought this would be helpful.
2 Mesa had to keep those wind turbines available, so
3 they could be able to deal with contracts that
4 could have been awarded under the FITs.
5 That is what you needed to do to
6 be shovel ready. One of the important elements of
7 the launch criteria is to be able to deal with it
8 and it would be required for your planning to know
9 what your turbines were and where to site them
10 because you'd need to know that.
11 So, in conclusion, investors are
12 entitled to expect fairness from governments when
13 they were investing millions of dollars in a public
14 process. Instead, the story about the Ontario FIT
15 Program is nothing but shocking and egregious to
16 any reasonable observer.
17 We'd like to close off in the
18 words of Mr. Pickens, T. Boone Pickens, a man who
19 came from Texas to bring investments and a promise
20 of clean energy security to Ontario.
21 Let me just pull up what
22 Mr. Pickens said at page 288 on Day 1.
23 He said:
24 "Well, you always feel bad
25 when you lose, and then you

1 look to see why you lost, and
2 here we lost because we
3 didn't have a level playing
4 field." [As read]
5 Now, the evidence shows us the
6 disappointing fact that despite outward
7 appearances, Ontario was not a good place to invest
8 because the rules were not followed, and the
9 playing field was not level.
10 This was not fair and Mesa was
11 harmed. Members of the Tribunal, you have the
12 ability, and only you have the ability, to provide
13 a remedy to this unfairness and we ask that you
14 find for Mesa and compensate it for this wrongful
15 behaviour. Thank you very much.
16 THE CHAIR: Thank you. So this
17 leads us now to the lunch break. Maybe you tell us
18 how much time the claimants have left because they
19 are entitled to rebuttal, if they wish.
20 MR. DONDE: The claimants have 28
21 minutes left.
22 THE CHAIR: Fine. Should we
23 resume at, would you say, one o'clock?
24 MR. APPLETON: Perhaps quarter to
25 one. Yes.

1 THE CHAIR: Quarter to one.
2 I think give a little margin, yes.
3 Let me turn to Canada. Is it fine
4 or would you like to have a little bit more
5 time? I think you would.
6 MR. SPELLISCY: I think it should
7 be fine.
8 THE CHAIR: Should be fine. Good.
9 Then have a good lunch. 12:45, that's what I
10 understood, no?
11 --- Lunch recess at 11:57 a.m.
12 --- Court reporter, Teresa Forbes continues
13 --- Upon commencing at 12:46 p.m.
14 THE CHAIR: Fine. Now we're
15 ready. Mr. Spelliscy, you're ready too.
16 MR. SPELLISCY: You bet.
17 THE CHAIR: Okay. So you have the
18 floor for Canada's closing argument, please.
19 SUBMISSIONS BY MR. SPELLISCY:
20 MR. SPELLISCY: Good afternoon,
21 Professor Kaufmann-Kohler, Judge Brower. Let me
22 take the time right off the bat to also thank you
23 on behalf of the Government of Canada for the
24 attention you have paid to this case. It is a
25 complex case with technical details about

1 electricity system that we have all struggled to
2 wrap our heads around, and I think you have done an
3 exceptional job on it.
4 I think as well here, at least the
5 written submissions that were originally submitted
6 by the claimant, have made the case seem quite
7 complex, as well. But as we have seen this week, I
8 think the case has gotten a little bit simpler.
9 So let me walk through a little
10 bit of what was originally at issue, because I
11 don't really intend to address it at all, much of
12 it, today. I'm going to try to be relatively
13 focussed today. I am estimating hopefully that we
14 will be around two hours in our submissions here.
15 So let me get started. Let me
16 take some time to try to separate the wheat from
17 the chaff here so that we know what is really at
18 issue.
19 You will remember in our opening
20 presentation I took you to two sets of slides. I
21 took you to a slide that had the Ontario measures
22 on them and the slide that had the OPA's measures
23 on them, and both sets of measures were at issue.
24 Let me talk to you about the
25 latter first. As you will recall, in its written

1 submissions the claimant alleged, as a breach of
2 NAFTA, that the ranking of the claimant as TTD and
3 Arran projects during the launch period violated
4 Article 1105, as well as some of the technical
5 decisions made by the OPA about whether, in the
6 Bruce-to-Milton allocation process, to award
7 contracts to certain projects connecting at
8 particular circuits or on particular lines also
9 violated Canada's obligations under Articles 1102,
10 1103 and 1105.
11 But we heard almost nothing about
12 that from the claimant this week, and we heard
13 nothing about that from the claimant this morning.
14 On the first point, during the
15 examination of the claimant's expert Mr. Timm, we
16 looked at the FIT rules and we looked at section
17 13.4 after Mr. Landau directed Mr. Timm to it, and
18 we saw, and Mr. Timm confirmed, that this provision
19 made clear that the OPA had the discretion to
20 determine what evidence would be deemed acceptable
21 in order to be awarded a criteria point.
22 Canada submitted the testimony of
23 Mr. Duffy in this arbitration, who explained in
24 depth in his witness statement what the OPA did,
25 why it made the decisions it did, and why the

1 claimant did not succeed to obtain any criteria
2 points.
3 In short, he explained how the OPA
4 exercised the discretion that it had, and why it
5 did so in a fair and reasonable manner.
6 He was available to give testimony
7 in front of this Tribunal, but the claimant did not
8 even call him as a witness.
9 Instead, they relied on the
10 testimony of Mr. Timm, but he clarified on the
11 stand that he actually was not offering an opinion
12 on the quality and the outcome of the OPA ranking.
13 He did not conclude that, in fact, the claimant
14 should have gotten any of the criteria points. He
15 didn't assess that.
16 He relied upon the testimony, at
17 least in cross-examination only, of Mr. Robertson,
18 who -- and we'll put this evidence in our
19 post-hearing submissions -- basically admitted that
20 the claimants didn't provide the evidence necessary
21 to get the points.
22 The claimant here in this case and
23 this proceeding so far, it has it in its written
24 submissions, but here at this hearing it has become
25 clear they have simply failed to put in the

1 evidence necessary to prove that the conclusion of
2 the OPA launch period process with respect to their
3 TTD and Arran applications would have been any
4 different than it was had their alleged wrongs not
5 occurred. They have failed to show it was a breach
6 of NAFTA.
7 So if we look at the OPA measure
8 slide, we see, again, the second grouping of
9 measures, and that was the technical decisions made
10 by the OPA in awarding contracts as part of the
11 Bruce-to-Milton allocation. For the Tribunal to
12 remember, we had allegations in the written
13 submissions about connections on the L7S circuit,
14 connections to the Bruce-to-Longwood, the
15 500-kilovolt line, enabler requested projects.
16 Again, we have heard virtually
17 nothing from the claimant this week on those
18 claims, and this morning we heard nothing.
19 As Shawn Cronkwright told us on
20 Wednesday when he was here, he said there are only
21 a few people in Ontario who have a sophisticated
22 enough knowledge of the system to be able to
23 explain why the OPA made the decisions they made.
24 The claimant had one of them here
25 on Tuesday, Bob Chow. They didn't ask him a single

1 question about any of these allegations.
2 Now, perhaps the claimant is
3 dropping these claims about OPA conduct. Maybe it
4 is dropping these allegations entirely, and, if
5 they are, I think they should say so, because it
6 would save everybody a lot of time in the post
7 hearing submissions and in writing and drafting any
8 part of the award. But to the extent they are
9 still challenging them, we have fully addressed
10 them in our previous submissions, including the
11 opening and all of our written submissions, so I
12 don't propose to come back to them in this closing
13 argument, at all.
14 So let's instead focus on what the
15 claimant did pay attention to this week, and that
16 is the measures of the Government of Ontario. You
17 will recall I also took you to a slide in the
18 opening where we had those measures listed, and you
19 will recall the measures that were being challenged
20 were: One, the domestic content requirement of the
21 FIT program; two, the treatment accorded to the
22 Korean Consortium under the Green Energy Investment
23 Agreement; and, three, the June 3rd Ministerial
24 direction with respect to the allocation of the
25 Bruce-to-Milton line capacity.

1 I want to be clear right at the
2 start, because we heard arguments from the claimant
3 on this this morning, there is no dispute, never
4 has been, that these measures are attributable to
5 the Government of Ontario. These are government
6 actions.
7 Canada argued that and admitted
8 that in its counter memorial. What we're talking
9 about with respect to attribution is the OPA
10 measures that we showed on the previous slide, not
11 these measures.
12 And so if this now is the full
13 extent of the challenge being made by the claimant,
14 then, in fact, the issue between the parties about
15 the OPA and whether its acts are attributable to
16 Canada simply drops away. Only the claimant can
17 tell us that.
18 I want to come back to something
19 Judge Brower asked specifically, and it really was
20 the focus of all of yesterday, and it is a question
21 of what really matters here. What caused or even
22 could have caused the claimant any losses?
23 And the claimant, from its
24 presentation this morning, seems to still not
25 understand that it is its obligation to show how

1 the alleged wrongful conduct caused its losses.
2 At one point this morning
3 claimant's counsel said Canada has not met its
4 obligation to refute the damages claims. That has
5 got it totally backwards. It is the claimant's
6 obligation to prove not just causation, but also
7 quantum, and we will address that at length in our
8 submissions.
9 And this is important because, as
10 you are all well aware, a NAFTA tribunal is not a
11 domestic court. It is not a court of general
12 jurisdiction where they can review all of the acts
13 of government. It can review the acts of
14 government that actually caused harm to the
15 claimant.
16 Contrary to what the claimant said
17 yesterday in some of its questions, and contrary to
18 what it said this morning, it is no different for
19 Articles 1102 and 1103. You still have to prove
20 how the alleged more favourable treatment actually
21 caused the claimant harm.
22 This morning, we heard reference
23 to Cargill. Cargill does not say otherwise. In
24 Cargill, the question was a methodological one
25 about whether to award lost profits and for what.

1 The tribunal in that case still applied the same
2 "but-for" test that international law requires. It
3 looked for: But for the alleged wrongful conduct,
4 what was the most realistic and probable scenario
5 in which the claimant would have found itself?
6 That is exactly what Mr. Goncalves
7 analyzed. Cargill did not say that the appropriate
8 standard for damages is to bring the claimant up or
9 to give the claimant the discriminatory treatment
10 about which it is complaining. You remove that
11 discriminatory treatment.
12 Here, you remove the priority
13 transmission access given to the -- given in the
14 GEIA. That is what caused the claimant harm and
15 that is what Mr. Goncalves has done.
16 But this pervades other aspects, I
17 think, so far, of its submissions, because there
18 are numerous allegations that have been raised this
19 week that simply would not have resulted in losses
20 to the claimant.
21 So let's focus on causation for a
22 few moments. For example, in the context of the
23 Green Energy Investment Agreement, the GEIA, the
24 claimant has complained about the phase 1
25 allocation of transmission capacity to the Korean

1 Consortium; phase 1, not phase 2.
2 We heard about it this morning, as
3 well. They called it a gift. But that capacity
4 was not in the Bruce region. It did not have an
5 impact on whether or not the claimant's FIT
6 projects could connect to the electricity system.
7 It did not have an impact on whether or not the
8 claimant got contracts.
9 I think this morning claimant's
10 counsel said Canada says it did not, but it did,
11 but left it at that. We had no explanation of how
12 it was possible that it could connect.
13 The claimant has also complained
14 about the economic development adder provided to
15 the Korean Consortium. But as Ms. Lo explained in
16 her testimony, the job counting was still going on.
17 When the claimant brought this claim in alleged
18 damages, it had not been paid. It could not have
19 affected and caused the claimant harm, because it
20 had not happened.
21 The claimant has also complained
22 about the capacity expansion adder or capacity
23 expansion option in the GEIA, but, again, the fact
24 is, as the evidence confirmed at this hearing, this
25 was not used in the Bruce region. The Korean

1 Consortium did not increase phase 2 capacity by 10
2 percent, and so it had no effect on whether the
3 claimant's projects could get FIT contracts.
4 Let's think about the June 3rd
5 direction. With respect to the June 3rd direction,
6 the claimant seems to have raised complaints during
7 the course of this hearing, anyways, in its
8 questioning of the witnesses, that developers
9 outside of Bruce and west of London regions were
10 not able to participate in the Bruce-to-Milton
11 allocation process.
12 They phrased it in various ways.
13 They said a province-wide ECT wasn't run. They
14 said people in other regions of the province were
15 not able to change their connection points into the
16 Bruce or west of London regions during the
17 connection-point change.
18 But how could whether other
19 projects in other parts of Ontario had the
20 opportunity to switch connection-points impact the
21 claimant's projects? They are not in the Bruce
22 region. Whether or not someone in northern Ontario
23 got an opportunity to change its connection points
24 is simply not causally related to whether or not
25 the claimant could obtain a FIT contract in the

1 Bruce region.
2 And let's just think about the
3 other point that the claimant has consistently come
4 back to in this regard, and it has come back to it
5 again today, and that is why developers in other
6 regions weren't allowed to switch-in to the Bruce
7 or west of London region.
8 How would it benefit the claimant
9 to have more people come into the Bruce and west of
10 London region to compete for transmission access
11 that the claimant was competing for? If other
12 developers in other regions were allowed to compete
13 for transmission access in the Bruce region, there
14 would be more people competing, not less.
15 Increased competition, far from
16 causing harm to the claimant, limiting the number
17 of developers who were able to compete for the
18 Bruce-to-Milton transmission capacity was to the
19 benefit of anybody already in the Bruce region,
20 like the claimant.
21 And a similar conclusion is
22 reached when we think about the notice that was
23 provided to developers about the Bruce-to-Milton
24 allocation and the length of the connection-point
25 change. We heard a lot about this this morning,

1 that it was inadequate. They had slides on this.
2 But Mr. Goncalves spoke to you
3 directly, in response to a question I believe from
4 Judge Brower yesterday, what would have happened if
5 there had been more notice or the period were
6 longer.
7 No one is going to switch out of
8 the Bruce region. That's where the capacity is.
9 More notice and more time would only lead to
10 increased transmission -- or competition for the
11 transmission capacity. More developers would have
12 switched in.
13 So a lack of more notice and a
14 short time frame did not cause the claimant any
15 harm. So let's try to get down to what is really
16 left and what really should matter here, which is
17 the things that actually could have -- could
18 have -- caused the claimant harm, the things the
19 claimant would have to prove. It's not for Canada
20 to prove this or refute it. It is for the
21 claimant.
22 So with respect to the Korean
23 Consortium and the alleged treatment that they were
24 accorded, as I understand it, the claimant is
25 complaining about two primary things, now, anyway,

1 first, that the negotiations of the GEIA were not
2 fully transparent, and, second, they seemed to be
3 complaining that the Korean Consortium was afforded
4 priority transmission access in the Bruce region
5 and that that was not available to them.
6 We're going to come back to those
7 two things. With respect to the June 3rd
8 direction, the only real remaining claim, the only
9 part of that direction that could have caused harm
10 to the claimant, was that projects from west of
11 London were permitted to change their connection
12 points through the Bruce region. That is the
13 claimant's allegation, that they should not have
14 been permitted.
15 That's what this Tribunal can
16 assess, whether that change in connection points is
17 a violation of Canada's obligations under NAFTA.
18 So these allegations, what we have
19 on the screen there, that is what we're going to
20 focus on in this closing presentation. In our post
21 hearing submissions, of course we'll be more
22 fulsome. We're going to try to be relatively
23 targeted here and be efficient about what we do.
24 But as we go through this, there
25 is one thing that I want you to keep in mind, and

1 that's the claimant's obligation to provide
2 evidence of the wrongful conduct. The claimant has
3 the burden of proof. I want you to think about
4 what has been provided here.
5 The claimant's questions and its
6 allegations this morning have been loaded with
7 innuendo about corruption, about political
8 cronyism, about, in their slide, bags of money
9 being paid for favours.
10 Those are serious allegations
11 against government in Canada. They should not be
12 made lightly, and there is no evidence to support
13 them.
14 Each one of Canada's witnesses who
15 was asked about this rejected any allegation that
16 there was corruption, that there was political
17 cronyism. Insinuation is not enough and it should
18 not be enough. They need evidence.
19 We see no merit in these
20 allegations, and I do not really propose to address
21 them in much more detail in any of our submissions
22 today orally. We do have some responses in our
23 written submissions, but I am just going to leave
24 them to the side.
25 So now let me explain to you how

1 we're going to structure the remainder of Canada's
2 remarks this morning, and because even I am getting
3 a little bit tired of hearing my own voice, there
4 will be some welcome relief over the next few
5 hours.
6 First Ms. Squires is going to come
7 back, and she will explain to you why the
8 claimant's claims are beyond the jurisdiction of
9 this Tribunal.
10 Second, Mr. Neufeld, who you have
11 not yet heard from this week, will come up and
12 explain why the claimant's Articles 1102, 1103 and
13 1106 claims are precluded because of the exception
14 for procurement in Article 1108.
15 Now, as I explained in the opening
16 when we went through those demonstratives, this
17 Tribunal could stop there, because the reality is
18 that this dispute is beyond the jurisdiction of
19 this Tribunal or outside of the scope of Chapter
20 11.
21 But we will also show you today
22 and in our post-hearing non-briefs why there is no
23 merit to any of the claimant's allegations of
24 wrongdoing. Now, this part gets a bit complicated
25 because, as you will remember from the slides I

1 just showed you, the treatment accorded under the
2 GEIA and the challenges to the June 3rd direction
3 are all alleged to violate all of 1102, 1103 and
4 1105. It is complete overlap.
5 So in an effort to avoid
6 repetition, we're going to approach it in the
7 following way. First, Ms. Kam will come up and she
8 will explain to you the legal standards in Articles
9 1102 and 1103. Then Ms. Marquis will explain the
10 legal standard under 1105.
11 Then I am afraid you will have to
12 suffer through me again. I will discuss the
13 evidence that we have heard during this hearing,
14 and I will show how neither the treatment that was
15 accorded to the Korean Consortium, nor the June 3rd
16 direction, violated any of Canada's obligations
17 under Articles 1102, 1103 or 1105.
18 Mr. Watchmaker will then discuss
19 with you the issue of damages, and he will focus on
20 the issue of causation and the appropriate approach
21 to calculating damages in international law.
22 Counsel making these presentations
23 will be happy to address any questions you have,
24 but I will also stand up at the end to give a brief
25 closing remark and will be available to answer any

1 questions you have on any of these topics, as well,
2 if that is what you prefer.
3 With that, I will give the floor
4 to Ms. Squires.
5 SUBMISSIONS BY MS. SQUIRES AT 1:08 P.M.:
6 MS. SQUIRES: Good afternoon,
7 members of the Tribunal. In the course of my
8 submissions today, I will speak to three
9 jurisdictional bars in the claimant's claim:
10 First, that this Tribunal is without jurisdiction
11 over all the claims, as the claimant failed to
12 respect the conditions placed on Canada's consent
13 to arbitration under NAFTA Chapter 11.
14 Second, and in the alternative,
15 even if the conditions required to submit a claim
16 to arbitration have been met, the claimant has made
17 numerous arguments which are outside the
18 jurisdiction of this Tribunal. First, the claimant
19 has made claims with respect to the alleged
20 breaches that occurred before the claimant made its
21 investments in Ontario, and, second, the claimant
22 has made claims based on the actions of a state
23 enterprise, the Ontario Power Authority, who is not
24 acting in the exercise of delegated government
25 authority.

1 And I will turn to each of these
2 in turn, but before I move to these points I would
3 like to remind the Tribunal that it is not Canada's
4 burden to prove that this Tribunal does not have
5 jurisdiction.
6 As NAFTA and international
7 arbitration tribunals have consistently affirmed,
8 it is for the claimant to establish that its claims
9 fall within the jurisdictions -- within the
10 Tribunal's jurisdiction. Further, as the tribunal
11 in ICS Inspection held, a state's consent to
12 arbitration shall not be presumed in the face of
13 ambiguity.
14 And with that in mind, I would
15 like to turn to my first point, and that is the
16 issue of consent to this arbitration. A NAFTA
17 party's consent to arbitration is neither universal
18 nor unconditional. As Article 11022 indicates,
19 Canada, the United States and Mexico have only
20 consented to arbitrate disputes under Chapter 11
21 provided that procedures set out in the NAFTA have
22 been followed.
23 These procedures are that
24 indicated in Articles 1118 to 1121. It is only
25 when these conditions are satisfied that the NAFTA

1 parties have consented to arbitrate.

2 And all three NAFTA parties agree
3 on this point, as both the US and Mexico have
4 indicated in their 1128 submissions to this
5 dispute.

6 Quite simply, these articles
7 cannot be ignored at the claimant's discretion.
8 Article 1120 indicates one such condition on
9 Canada's consent, and it indicates that claims may
10 only be submitted to arbitration provided that six
11 months have elapsed since the events giving rise to
12 the claim.

13 Now, the exact meaning of this
14 phrase has been the subject of much dispute between
15 the parties. However, it cannot be disputed that
16 this phrase must be interpreted in accordance with
17 its ordinary meaning, applying the customary
18 international law principles of the Vienna
19 Convention on the Law of Treaties, Article 31.

20 If we look then at the plain
21 language meaning of the term "events giving rise to
22 a claim", there is only one meaning. Every event
23 which gave rise to the claim must have occurred at
24 least six months prior to the submission of that
25 claim in order for consent to crystallize.

1 And this interpretation makes
2 sense when you consider the policy reasons behind
3 Article 1120. The six-month period gives the
4 respondent an opportunity to learn about the
5 measure at issue before the formal submission of a
6 claim.
7 This is especially important where
8 a sub-national government is involved, much as we
9 have here with the Government of Ontario.
10 Now, the claimant has put forward
11 an interpretation of Article 1120 that is simply
12 incorrect. In the view of the claimant, Article
13 1120 allows claims to be submitted to arbitration
14 provided that at least some of the events giving
15 rise to the claim have passed.
16 In fact, if you follow the
17 claimant's interpretation, a claimant could submit
18 its claim to arbitration before all of the events
19 in issue have actually even occurred, and this
20 cannot be the correct interpretation, as it goes
21 against the very purpose of Article 1120 that I
22 just mentioned.
23 However, for the sake of argument,
24 even if Canada were to accept the claimant's
25 position, the requirements of Article 1120 have not

1 been met. In fact, the claimant cannot even meet
2 its own test.
3 Under Article 1116, a claim does
4 not arise until the investor has allegedly suffered
5 harm arising from a measure that it alleges
6 breaches the NAFTA.
7 So even if some events occurred
8 more than six months prior to the submission of the
9 claim to arbitration, those events must still be
10 events which give rise to a claim in order for the
11 six-month clock to start.
12 And this becomes very important
13 when we look at the facts of this particular
14 dispute, and I want to highlight a few pertinent
15 dates for the Tribunal in that regard.
16 On July 6th, 2011, the claimant
17 filed its notice of intent. On October 4th, the
18 claimant submitted the claim to arbitration.
19 Now, if we count back six months
20 from that date, it will take us to April 4th, 2011.
21 And if we look at events which predate that
22 claim -- predate that date, sorry, what we see are
23 numerous events, but those are simply not events
24 that give rise to a claim, for example, Ontario and
25 Samsung entering into the GEIA, or the release of

1 the FIT rankings or the signing of the MOU.
2 These are all events, but they
3 simply do not -- they simply are not events that
4 give rise to a claim.
5 If we look at events, however,
6 that post-date April 4th, 2011, we see the June 3rd
7 direction that the claimants have put at issue, but
8 we also see the July 4th FIT contracts offer as
9 part of the Bruce-to-Milton allocation process.
10 And it wasn't until the claimant
11 failed to receive a contract on this date that any
12 alleged harm arose and, as such, this is the
13 pertinent date for the cooling-off period.
14 As a consequence of the claimant's
15 failure to wait six months since this event giving
16 rise to a claim, this Tribunal is without
17 jurisdiction.
18 Now, even if the Tribunal finds
19 that the requirements of 1120 have been met, the
20 Tribunal is still without jurisdiction over certain
21 of the claimant's claims; namely, those which are
22 with respect to alleged breaches which occurred
23 before the claimant owned any investment in Canada.
24 Article 1116 provides, in part,
25 that:

1 "An investor of a Party may
2 submit to arbitration under
3 this Section a claim that
4 another Party has breached an
5 obligation under..."
6 Section (a). That must be read,
7 of course, with Article 1101(1), which indicates
8 that Chapter Eleven applies to measures which are
9 adopted or maintained by a party that relate to
10 investors of another party or investments of
11 investors of another party.
12 Therefore, for Chapter Eleven to
13 apply to a measure relating to an investment, that
14 investment must be of an investor of another party
15 at the time of the alleged measure. Now, as the
16 tribunal in Phoenix Action indicated, a tribunal is
17 thus limited, ratione temporis, to judging only
18 those acts which occurred after the date of the
19 investor's purported investment. The claimant must
20 then demonstrate that it was an investor at the
21 relevant time.
22 NAFTA tribunals have also
23 submitted this proposition. For example, the
24 Glamis tribunal indicated that NAFTA arbitrators
25 have no mandate to evaluate laws and regulations

1 that pre-date the decisions of a foreign investor
2 to invest.
3 The Gallo tribunal, as well,
4 reached the same conclusion and, in doing so, cited
5 the Phoenix Action case I just mentioned.
6 Now I would like to turn to look
7 at the facts of this case and how that would apply
8 here. Both the TTD and Arran projects were
9 incorporated on November 17th, 2009. For North
10 Bruce and Summerhill, their incorporation date was
11 April 6th, 2010.
12 The Tribunal then only has
13 jurisdiction with respect to measures which
14 occurred after these dates, as those measures
15 relate to those investments.
16 For example, the claimant has
17 alleged that the signing of the MOU with the Korean
18 Consortium in December of 2008 and the GEIA on
19 January 21, 2010 was not transparent; hence, a
20 violation of Article 1105.
21 Yet the MOU predates the
22 incorporation of all four of Mesa's projects, and
23 the signing of the GEIA predates the incorporation
24 of both Summerhill and North Bruce.
25 As such, the Tribunal is without

1 jurisdiction over these measures as they relate to
2 those particular investments.
3 I would like to now turn to my
4 last point, and that's the point of attribution,
5 and it has been extensively discussed by the
6 parties in their written submissions.
7 However, I am going to be
8 extremely brief here today because, as my colleague
9 Mr. Spelliscy explained, it's not even clear to
10 Canada anymore that the claimant is even
11 challenging certain measures of the OPA.
12 As I previously mentioned, Chapter
13 Eleven only applies to measures adopted or
14 maintained by a party, and there seems to be no
15 dispute here in that regard. As such, the Tribunal
16 must ask itself when it is considering the measures
17 challenged in this arbitration: Are those measures
18 of the Government of Canada? If they are not, the
19 Tribunal does not have jurisdiction over them.
20 But before I get into the measures
21 at issue, I would like to highlight for the
22 Tribunal what Canada does not challenge. We do not
23 dispute that the decisions taken by the Government
24 of Ontario are attributable to the Government of
25 Canada. Of course, the actions of sub-national

1 governments are attributable under the NAFTA.
2 In this regard, if the claimant is
3 challenging the June 3rd, 2011 direction, of course
4 this is attributable to Canada. It was a measure
5 carried out by Ontario in order of Canada.
6 The same applies to the Minister's
7 direction to the OPA to negotiate power purchase
8 agreements with KC, for example.
9 However, the claimant has pointed
10 to numerous acts of the OPA which are not
11 attributable to Canada, and it is those acts which
12 I would like to focus on for the remainder of my
13 time.
14 This includes the ranking of the
15 FIT applications and the decision to offer a FIT
16 contract to some applicants and not others. And in
17 this regard, I have three points to make: The
18 first, that the OPA is not an organ of the state;
19 the second, that the OPA, a state enterprise, was
20 not exercising delegated government authority with
21 respect to the alleged breaches; and third and in
22 the alternative, that if the Tribunal finds the OPA
23 is not a state enterprise, the actions of the OPA
24 are not attributable to Canada pursuant to Article
25 8 the ILC's articles.

1 Turning to the first question of
2 whether the OPA is an organ of the state, while
3 Canada extensively briefed the Tribunal on these
4 questions in its counter memorial and reply on
5 jurisdiction indicating that the OPA is not a de
6 jure or de facto organ of the state, the claimant
7 appears to have not pursued this option in its
8 reply or even here today.
9 While I am happy to answer any
10 questions the Tribunal might have on that matter, I
11 will move on to my second point in that regard, and
12 that deals with the OPA as a state enterprise.
13 Article 1503 establishes that a
14 NAFTA party is responsible for the actions of state
15 enterprises only when such enterprises exercise any
16 regulatory, administrative or other governmental
17 authority that a party has delegated to it.
18 As the tribunal in UPS explained,
19 Article 1503(2) can create a lex specialis, that
20 the rules of customary international regarding
21 attribution do not apply to measures taken by the
22 state enterprise in the context of the NAFTA.
23 I would like to pause here for one
24 minute to address the specific comments that the
25 claimant made this morning, and that was with

1 respect to Article 55 of the ILC's Articles. I
2 want to make it clear that Article 55 makes clear
3 to the international community the residual
4 character of the ILC's Articles, that the articles
5 do not apply where and to the extent the conditions
6 for the existence of an internationally wrongful
7 act or the implementation of international
8 responsibility of a state are governed by special
9 rules of international law.
10 And that is precisely what we have
11 here. Article 1503(2) has created that lex
12 specialis. As such, the Tribunal is faced with two
13 questions in this regard. First, is the OPA a
14 state enterprise; and, second, was the OPA
15 exercising delegated government authority with
16 respect to the measures alleged to breach the
17 NAFTA?
18 Quite simply, the answer to the
19 first question is, yes, the OPA is a state
20 enterprise, and the answer to the second, no, the
21 challenged measures of the OPA were not the result
22 of delegated government authority.
23 Turning to the question of whether
24 the OPA is a state enterprise. In its memorial,
25 the claimant agreed with Canada that the OPA was a

1 state enterprise. It stated the same in its notice
2 of arbitration. In its reply memorial, in one
3 section it indicated that in fact it was a state
4 enterprise, and in another section it wasn't.
5 And, quite frankly, I am unsure
6 today in the claimant's earlier submissions whether
7 or not they see the OPA as a state enterprise.
8 But for the sake of clarity, I
9 will indicate to you that it is. Article 1505 of
10 the NAFTA provides a definition of state enterprise
11 relevant to this dispute, one which the OPA meets.
12 Article 1505 indicates that a
13 state enterprise is an enterprise which is owned or
14 controlled through ownership interests by a party.
15 The OPA falls within this
16 definition, as it is a non-share capital
17 corporation created by Ontario. Further, there are
18 numerous indicia of Ontario's ownership of the OPA
19 which demonstrate the OPA is in fact a state
20 enterprise and which demonstrates that Ontario owns
21 the OPA in this regard.
22 And I would refer the Tribunal to
23 authority CL-0401, the Electricity Act, in support
24 of this, where numerous provisions support the
25 proposition that the OPA is a state enterprise,

1 such as section 25.23, indicating that on winding
2 up of the OPA, the remaining property of the OPA
3 following all debt payment belongs to the
4 Government of Ontario; section 25.4(2) and (8),
5 that the Minister of Energy appoints and dismisses
6 the board of directors of the OPA; and section
7 25.22(2), that the Minister of Energy approves the
8 OPA's business plan.
9 Now, the next question for the
10 Tribunal to assess is whether the OPA was
11 exercising delegated government authority with
12 respect to the measures alleged to breach the
13 NAFTA, and in response to this Canada submits it
14 was not.
15 It is important to note the mere
16 fact the OPA is a creature of statute does not, in
17 and of itself, form the basis of attribution to the
18 state of the subsequent acts of the OPA.
19 Both the UPS tribunal and the Jan
20 De Nul tribunal have spoken to this issue.
21 Specifically, the Jan De Nul tribunal noted that
22 there is something important about government
23 authority, and what matters is not the service
24 public element, but the use of the puissance
25 publique or governmental authority. As such,

1 attribution of activities of a state enterprise to
2 the state requires a careful analysis of whether
3 the measures in question are an exercise of
4 government authority.
5 I would like to turn to those
6 measures now, but again I would remind the Tribunal
7 the claimant may have in fact even dropped these
8 claims.
9 The claimant has challenged the
10 OPA's design and administration of the FIT program.
11 There is nothing governmental about these acts.
12 The OPA's ranking of the
13 claimant's TTD and Arran projects in the launch
14 period and the OPA's award of contracts as part of
15 the Bruce-to-Milton allocation are simply not
16 examples of delegated government authority.
17 I would like to turn now to my
18 final point. The claimant had argued here today
19 that certain measures of the OPA are attributable
20 to Canada under Article 8 of the ILC Articles, and
21 this is misguided in several ways.
22 For starters, the claimant has
23 used this article to indicate that the June 3rd
24 direction and the set-aside to the KC are
25 attributable to the Government of Ontario. But to

1 this, we would say of course they are. These are
2 actions of the Ontario government itself.
3 But if we look at the actions of
4 the OPA that I just mentioned, the story is quite
5 different. Now, the ILC has specifically addressed
6 instances where a state has established an entity
7 via statute in its commentary to Article 8. It
8 noted that these entities are considered separate.
9 Prima facie, their conduct in carrying out their
10 activities is not attributable to the state unless
11 they are exercising elements of government
12 authority within the meaning of Article 5.
13 As such, the fact that a state
14 establishes a corporate entity is not a sufficient
15 basis for attribution.
16 Now, I have already discussed the
17 contents of Article 5 in discussing delegated
18 government authority, so I won't repeat myself
19 here, but suffice to say, once you get to Article
20 8, it brings you back to the exact position we were
21 in when we were discussing state enterprise.
22 I would also note attribution
23 under Article 8 is exceptional and only applies
24 where the private entity acts on the instructions
25 of a state or under the state's direction or

1 control.
2 In examining the proper test, it
3 is one of the fact of control, and as the ICJ in
4 the Genocide Convention case indicated, analysis
5 under Article 8 requires one to look at whether
6 effective control is exercised in respect of each
7 operation in which the alleged violations occurred.
8 Now, let's take a look and apply
9 that to this case. The OPA's ranking of the
10 claimant's TTD and Arran projects in the launch
11 period, the OPA's decision on what to include in
12 the TAT table, the OPA's award of contracts as part
13 of the Bruce-to-Milton process are not examples
14 that fall under this category.
15 The claimant has not pointed to a
16 single direction from the Minister of Energy to the
17 OPA ordering it or directing it or instructing it
18 to carry out these alleges breaches and nor can
19 they. There simply are no directions.
20 Those end my submissions on the
21 jurisdictional issues in this arbitration, and I am
22 happy to answer any questions you may have.
23 Otherwise, I will yield the floor to Mr. Neufeld,
24 who will speak to the issue of procurement.
25 THE CHAIR: Thank you.

1 SUBMISSIONS BY MR. NEUFELD AT 1:27 P.M.:
2 MR. NEUFELD: Good afternoon,
3 Professor Kaufmann-Kohler, Judge Brower,
4 Mr. Landau. It is a real honour to be before you
5 today. There is a lot of truth that has come
6 through this hearing, but none more true than this.
7 I have never heard my colleague Ms. Squires speak
8 as slowly as she has just now.
9 --- Laughter.
10 MR. NEUFELD: She is from
11 Newfoundland.
12 --- Laughter.
13 MR. NEUFELD: My job is to talk to
14 you about procurement, and I have about 20 minutes
15 to do that. Please don't hesitate to interrupt me
16 to ask a question if you have anything.
17 Just to key this up -- sorry,
18 about that. So a lot of ink has been spilled over
19 one word, the word of "procurement", and there's
20 probably good reason for this. That's because if a
21 measure constitutes procurement, then Articles
22 1102, 1103, and 1106 do not apply.
23 Admittedly that is a drastic
24 outcome, so it is no wonder the claimant has made
25 every attempt to escape the application of such a

1 broadly worded exemption.
2 But the NAFTA parties chose this
3 language expressly in order to preserve their right
4 to continue to influence policy through the use of
5 procurement programs, the likes of Buy America and
6 the United States and many other programs
7 throughout the NAFTA territories.
8 The right of the NAFTA parties is
9 preserved when the exemption is interpreted, as it
10 should be, according to its ordinary meaning, in
11 its context, and in light of the NAFTA's object and
12 purpose.
13 As previous NAFTA Chapter Eleven
14 tribunals have said, the ordinary meaning of
15 "procurement" in Article 1108 is to get or to gain
16 a good or service.
17 The claimant disagrees, and to
18 escape the application of the procurement
19 exemption, it argues that you should supplant it
20 with other treaty provisions, some in NAFTA, some
21 not. But no matter how much it twists and it
22 turns, and no matter how much its position evolves,
23 it cannot escape the characterization that it first
24 gave the FIT program.
25 In its memorial, this is how the

1 claimant described it. At paragraph 180, the
2 claimant submitted that the program permitted
3 different companies to compete for contracts to
4 generate energy from renewable resources -- from
5 renewable sources.
6 At paragraph 194, the claimant
7 admits that in order to transmit and sell
8 wind-generated power on the Ontario grid, Mesa
9 needed a power purchase agreement.
10 At paragraph 181, the claimant
11 cites to the Auditor General's report, which refers
12 to the quantities of power the FIT program was
13 intended to procure.
14 Yet despite its early
15 characterization, the claimant has since engaged in
16 verbal acrobatics to avoid these words. In its
17 reply, the claimant calls the program governmental
18 assistance, like financing transaction or
19 guarantee. It also calls it a cooperative
20 agreement, a loan, a fiscal incentive.
21 But the reality is that like
22 hundreds of other FIT applicants, the claimant
23 applied for its wind power to be procured. It
24 applied for power purchase agreements, and now it
25 is complaining that it wasn't awarded any.

1 Instead, the energy is being
2 procured from other providers because, in its view,
3 they were treated more favourably. We have already
4 shown you, and shortly my colleague Ms. Kam and
5 Mr. Spelliscy will speak to the fact, that there is
6 absolutely no merit to the claimant's allegations
7 of favouritism.
8 But even if there were, Article
9 1102, the claims of Article 1102, 1103 and 1106,
10 would be barred. Those are the exact types of
11 claims that are precluded by Article 1108.
12 Let me pause to give you a little
13 bit of a road map of where I will take you. Now
14 that I have set out the ordinary meaning, I will
15 focus on the claimant's attempts to escape its
16 application and consider first the claimant's
17 arguments with respect to the Canada-Czech Foreign
18 Investment Protection Agreement; next, its attempt
19 to pilot in the description that is found in NAFTA
20 Chapter Ten; and then the words that it likes in
21 GATT Article III:8.
22 Afterwards, we will turn to the
23 claimant's additional -- what we can boil down to
24 the conditions and limitations they would like to
25 place on the ordinary meaning of the word.

1 And, finally, we will come back to
2 where we started with the contested measures to
3 show they involve procurement.
4 So let's turn to the claimant's
5 escape routes. First, the claimant runs to the
6 Canada-Czech FIPA because that agreement does not
7 contain a procurement exemption, and it argues that
8 because the MFN provision of NAFTA allows a US
9 investor to be treated no less favourably than a
10 Czech investor, the procurement exemption in NAFTA
11 must be invalid for use.
12 The claimant's argument is, well,
13 confused. It is wrong in more ways than one, but
14 one particularly egregious just error deserves your
15 attention. The claimant invokes Article 1103 to
16 oust the procurement exemption; yet it needs to
17 prove it isn't a procurement to access Article
18 1103.
19 The claimant's attempt at escape
20 route is what Joseph Heller would call a Catch-22.
21 NAFTA Article 1108 couldn't be clearer. It states
22 that Article 1103 does not apply to procurement by
23 a party. The very purpose of 1108 is to preclude
24 the application of 1103, meaning it is impossible
25 for the MFN provision to oust the application of

1 the procurement exemption.
2 Second, the claimant seeks to
3 evade the ordinary meaning of the words in Article
4 1108 by importing NAFTA Chapter Ten's description
5 of procurement, with all of its conditions and all
6 of its limitations, into Chapter Eleven.
7 According to the claimant, it is
8 logical to believe that the drafters of NAFTA
9 presumed the definition of procurement, that it
10 would be internally consistent throughout the
11 NAFTA.
12 Well, in reality, importing the
13 conditions that are relevant to Chapter Ten into
14 Chapter Eleven would be anything but logical. The
15 NAFTA contains definitions applicable to the entire
16 agreement. Those are found in the early part of
17 the NAFTA.
18 And you have heard from each NAFTA
19 party now that the description in Chapter Ten is
20 meant for Chapter Ten, not Chapter Eleven.
21 The US agrees that the terms used
22 in Chapter -- the term used in Chapter Eleven is a
23 carve-out, whereas in Chapter Ten it is a carve-in.
24 And Mexico states it even more
25 bluntly. The Chapter Ten sets out the scope and

1 coverage for Chapter Ten. It does not apply to
2 Chapter Eleven.
3 It even goes so far as to say that
4 the description was never intended to have effects
5 on other chapters.
6 So you are welcome to consult
7 Chapter Ten. That description can be a relevant
8 context, but this is for interpretive purposes. It
9 is not to apply it to Chapter Eleven.
10 Those additional limitations and
11 conditions can't be imported into Chapter Eleven,
12 because context, after all, is as important for its
13 differences as its similarities.
14 Third, the claimant seeks to avoid
15 the application of the ordinary meaning of the
16 terms of Article 1108 by invoking a GATT provision
17 and related WTO jurisprudence.
18 Here the claimant attempts to
19 pilot the concepts of not with a view to commercial
20 resale, and purchased for governmental purposes
21 into Article 1108.
22 These concepts are nowhere found
23 in Chapter Eleven. They are particular to GATT
24 Article III:8.
25 But what is more interesting,

1 although they can't be found in Article 1108, they
2 can be found in other NAFTA chapters, such as NAFTA
3 Chapter Fifteen.
4 So while NAFTA parties purposely
5 chose to exclude those concepts in the procurement
6 exemption found in Chapter Fifteen, the parties did
7 not include them in Chapter Eleven.
8 I think I said excludes, and I
9 certainly meant "include".
10 While the NAFTA parties purposely
11 chose to include those concepts of procurement, the
12 procurement exemption found in Chapter Fifteen,
13 they did not include them in Chapter 11.
14 Again, these provisions may serve
15 as context for interpretive purposes, but it is
16 their differences that are important.
17 The claimant also chose to
18 mischaracterize the WTO jurisprudence. In the
19 claimant's opinion, the appellate body found that
20 many of the measures in the FIT program are not
21 procurement and that the terms of the FIT program
22 did not govern government procurement of
23 electricity.
24 The claimant's summary of the
25 appellate body decision is patently false. First,

1 the panel recognized that Ontario was engaged in
2 procurement. When it focussed solely on the
3 ordinary meaning of that term, not the other bells
4 and whistles that Article III:8 contains, the panel
5 stated clearly that: We have concluded that the
6 Government of Ontario's purchases of electricity
7 under the FIT program constitute "procurement".
8 Likewise, the appellate body
9 concluded that the product purchased by Ontario
10 under the FIT program and contracts is electricity,
11 and it said again: In the case before us, the
12 product being procured is electricity.
13 Neither the panel nor the
14 appellate body ever doubted that Ontario was
15 engaged in procurement, just that the issue in that
16 case was about the importation of generation
17 equipment, generating equipment, rather than the
18 procurement of electricity itself.
19 The claimant in this case is in a
20 very, very different situation. The claimant here
21 is complaining -- it is not complaining about its
22 generating equipment being procured. It is
23 complaining about not having obtained a FIT
24 contract to sell its electricity.
25 So I want to make one thing

1 absolutely clear. A determination that the
2 claimant's 1102, 1103 and 1106 claims are barred
3 would, in no way, be inconsistent with what the
4 appellate body has found.
5 In its effort to escape the
6 ordinary meaning of procurement found in Article
7 1108, the claimant would like to impose additional
8 conditions and limitations on what does and does
9 not constitute procurement. In particular, the
10 claimant argues that its necessary for the procurer
11 to acquire the electricity, or title to it, and the
12 assets used to generate it.
13 It also argues that it is the
14 government that must consume it, use it for its own
15 exclusive use, and it argues that the procurer has
16 to pay for it, not the ratepayers. We have heard a
17 lot about the ratepayers.
18 None of these conditions can be
19 found in the ordinary meaning of the term
20 "procurement". The French word or the Spanish word
21 I think reinforce that. Those equally mean to gain
22 or to get, to purchase. There is no extra
23 conditions. In French we use the word "achats
24 effectues" or in Spanish "compras realingadas".
25 To pilot in these extra conditions

1 would improperly constrain the ability of NAFTA
2 governments to use procurement as a policy tool,
3 something they specifically reserve for themselves.
4 It would mean that NAFTA parties
5 would no longer be able to favour their domestic
6 industry in the procurement of infrastructure
7 projects. For example, a NAFTA party wouldn't be
8 able to insist that domestic steel be used to
9 construct a toll road since, according to the
10 claimant, use of that road wouldn't be for the
11 government; it is for people.
12 And it would be a toll road. So
13 other people would be paying for it. It wouldn't
14 be the government. So there, too, it would fail
15 according to the claimant's test. Finally, let's
16 assume that the government gave the road to a PDP
17 to manage. Well, that clearly would make it an
18 ineligible, according to the claimant, because it
19 wouldn't have title to it anymore. It wouldn't
20 possess it.
21 NAFTA parties have not given away
22 the right to procure general infrastructure or, for
23 that matter, electricity.
24 The panel, the WTO panel in
25 renewable energy, agreed -- in Canada renewable

1 energy agreed. It stated in the clearest terms
2 that Japan's argument that procurement implies
3 governmental use, benefit or consumption does not
4 sit well. It's not immediately apparent from the
5 ordinary meaning -- meanings of these terms.
6 Perhaps the clearest way to show
7 that these conditions have no obligation in Chapter
8 Eleven, indeed they make no sense at all, is to
9 consider how they would apply to the procurement of
10 a service, because we all know Chapter Eleven, the
11 carve-out for procurement, is meant to apply as
12 much to a service as it is to a good.
13 But the acquisition of a service,
14 getting title to it or consuming it, is impossible
15 in many instances.
16 For example, the parcel handling
17 services that Canada Post procured for -- that
18 Canada Customs procured from Canada Post in the UPS
19 decision, they were -- they are not acquired or
20 consumed by Canada. Yet the UPS tribunal held that
21 they were procured.
22 The facts were as follows in
23 Canada Post -- in UPS, sorry. Canada entered into
24 a service contract with Canada Post whereby Canada
25 Post provided data entry and duty and tax

1 collection services.

2 Canada Post workers scanned each

3 parcel, recorded the information, and then

4 collected the duties and taxes upon delivery of the

5 parcel.

6 In that instance, it doesn't make

7 sense to talk about title, and it certainly doesn't

8 make sense to talk about consumption. These

9 conditions are irrelevant to whether a service is

10 being procured.

11 What's more, the issue of who

12 ultimately pays for the service didn't affect

13 whether it was a procurement because, in that case,

14 it was the person receiving the parcel at the door

15 that paid the service fee, not the procurer, not

16 Canada.

17 In sum, none of the conditions the

18 claimant seeks to impose form part of the ordinary

19 meaning of procurement.

20 The last point I would like to

21 address with respect to the claimant's limitations

22 conditions is the nexus argument.

23 It argues there must be a nexus

24 between the measure at issue and the procurement.

25 Now, finally here, finally, there's something that

1 we can agree on with the claimant; namely, that
2 just as the ADF tribunal has already found and
3 articulated, the pertinent issue here is whether or
4 not the measure at issue constituted or involved
5 procurement. That is the nexus.
6 Yet the claimant argues that
7 Canada has not met its burden of proof by failing
8 to demonstrate the nexus between the measures at
9 issue and the FIT procurement program. The
10 claimant is mistaken.
11 Canada has repeatedly stated that
12 no matter how the claimant frames its 1102, 1103,
13 and 1106 claims, what it is complaining about is
14 the fact that it was unable to have its electricity
15 procured.
16 The claimant chose to participate
17 in the FIT program, and all of the allegedly
18 discriminatory treatment that it contests is
19 provided in the context of the FIT procurement
20 program. But if you want to be more sure, let's
21 break it down.
22 The claimant alleges that Canada
23 breached Article 1102 through the June 3rd
24 direction or through the OPA's awarding of
25 contracts to NextEra and Suncor. Now, these

1 measures were adopted in the context of the FIT
2 procurement program and apply solely to the
3 applicants for FIT contracts. On their face they
4 involve procurement.
5 It also argues with respect to
6 Article 1103 that the GEIA, the set aside, the
7 government allocated 500 megawatts. This all
8 breaches 1103. And here, whether the measure is
9 characterized as a purchase of electricity from the
10 Korean Consortium or the effect it had on the FIT
11 program, either way, we're talking about
12 procurement.
13 And, finally, the claimant argues
14 that the domestic content requirements of the FIT
15 program violate Article 1106. On this point, the
16 claimant urges you to separate out those domestic
17 content requirements from the rest of the measure.
18 But as the WTO panel recognized,
19 these were the prerequisites of the program. They
20 were the requirements that govern the procurement.
21 And, in fact, the claimant is
22 asking you to do the same thing that the claimant
23 in ADF asked that tribunal to do, and that tribunal
24 refused. So should you.
25 In that case, the claimant tried

1 to isolate the ground provisions through the buy
2 American program from the State of Virginia's
3 procurement program, but the tribunal did not find
4 the investor's argument persuasive. There was
5 extensive argument over this.
6 Despite the claimant's attempt to
7 distinguish between the domestic content provisions
8 and the procurement process, the Tribunal would
9 have none of it. It concluded that the US state
10 had every right to impose domestic content
11 requirements within its procurement process without
12 violating NAFTA Chapter Eleven.
13 I am a little bit confused when
14 the claimant alleges we don't have a substantive
15 defence to Article 1106 when an exception applies
16 so blatantly to the measures at issue.
17 Ultimately, the finding of the ADF
18 tribunal turned solely on whether the highway
19 interchange project constituted or involved
20 procurement. That is the nexus.
21 It resisted the claimant's push to
22 separate out the domestic content requirements of
23 buy America from the rest of the procurement
24 process. You should do the same thing here.
25 It's a fact that electricity in

1 Ontario would not be available to people and
2 industry throughout the province if the government
3 did not purchase it. Green energy produced by
4 solar panels or wind turbines would absolutely not
5 be procured without this program. The claimant in
6 the -- or a similar program.
7 The claimant in this case chose to
8 participate in the FIT program, a program designed
9 to procure energy from renewable energy sources.
10 That comes directly from its statutory mandate, and
11 when the government acted on that statutory mandate
12 and directed the OPA to establish the FIT, it
13 described it as a program to introduce a simpler
14 method to procure and develop generating capacity
15 from renewable sources of energy.
16 There can be no doubt that the FIT
17 program constitutes procurement in the ordinary
18 sense of that term by a party or state enterprise.
19 And that's where the claimant has
20 come full circle. After all of its verbal
21 acrobatics and its great attempts to recharacterize
22 the FIT program, it ultimately cannot escape the
23 obvious. When the claimant's witness Mr. Robertson
24 on Monday was considering whether the FIT program
25 was the only way that Ontario could buy

1 power -- his words, "buy power" -- he said the
2 following:
3 "The feed-in tariff process
4 had been the only large-scale
5 renewable procurement
6 process."
7 Finally the verbal acrobatics have
8 stopped, and despite Mr. Robertson's counsel's
9 attempt to throw out a safety net, Mr. Robertson
10 made things clearer still.
11 On re-direct, Mr. Appleton asked
12 the following:
13 "During your testimony you
14 mentioned that the FIT was a
15 procurement process. Did you
16 mean 'procurement' in the
17 legal sense under the NAFTA?"
18 And Mr. Robertson answered that he
19 used the word procurement in the sense of every
20 utility when they are going out and issuing power
21 purchase contracts, at that point typically called
22 a procurement process.
23 Unlike his lawyer, who seems to be
24 looking to redefine the term, Mr. Robertson was
25 using it in its ordinary industry sense.

1 In fact, every witness described
2 the FIT program as a procurement process. Rick
3 Jennings made clear that renewable energy is
4 procured through government decisions. And Sue Lo
5 talked about having to slow down the pace of
6 procurement.
7 Jim MacDougall referred to the
8 renewable energy procurement targets and FIT's open
9 procurement rules, and Bob Chow described how he
10 was responsible for transmission planning in
11 support of the procurement of which the FIT program
12 is one.
13 Finally, Shawn Cronkwright stated
14 clearly that:
15 "I'm procuring under the
16 obligations that we have as
17 an entity and satisfying
18 those obligations."
19 And he added that:
20 "The Korean Consortium wasn't
21 a program. It was a discrete
22 procurement initiative."
23 After all is said and done, when
24 you boil the term down to its ordinary meaning, the
25 way it is commonly used, it appears we can all

1 agree procurement means to gain or to get, and in
2 this case what's being procured is electricity.
3 Accordingly, Articles 1102, 1103,
4 and 1106 do not apply to the conduct at issue in
5 this arbitration.
6 That concludes my statement.
7 Thank you very much. I will now leave you in the
8 capable hands of Ms. Kam on national treatment and
9 MFN.
10 THE CHAIR: Thank you. Ms. Kam.
11 SUBMISSIONS BY MS. KAM:
12 MS. KAM: Good afternoon,
13 Professor Kaufmann-Kohler, Mr. Landau and Judge
14 Brower.
15 Once again, my name is Susanna
16 Kam, and I will be providing the closing remarks on
17 Canada's approach to the law in response to the
18 claimant's NAFTA Articles 1102 and 1103 claims.
19 Next Ms. Marquis will explain
20 Canada's position on the law on Article 1105,
21 following which Mr. Spelliscy will then apply the
22 facts to the case -- apply the law to the facts of
23 this case and explain why the claimant has failed
24 to demonstrate that Canada has breached any of
25 these obligations.

1 So let's begin. Canada's position
2 is simple. As previously explained by Mr. Neufeld,
3 Articles 1102 and 1103 do not apply in this case
4 because of the procurement exemption in Article
5 1108.
6 Even if they did, in applying the
7 legal test for Article 1102 and 1103, the claimant
8 has nevertheless failed to demonstrate a violation
9 of these provisions.
10 NAFTA Articles 1102 and 1103
11 ensure the treatment of foreign investors in
12 accordance with the principles of national
13 treatment and most-favoured nation treatment.
14 The central objective of both of
15 these provisions is to protect against
16 nationality-based discrimination. This purpose has
17 been long recognized by NAFTA Chapter Eleven
18 tribunals.
19 For example, the tribunal in
20 Loewen concluded that Article 1102 is directed only
21 to nationality-based discrimination and that it
22 prescribes only demonstrable and significant
23 indications of bias and prejudice on the basis of
24 nationality.
25 Similarly, the ADM tribunal found

1 Article 1102 prohibits treatment which
2 discriminates on the basis of the foreign
3 investor's nationality. Nationality discrimination
4 is established by showing that a foreign investor
5 has unreasonably been treated less favourably than
6 domestic investors in like circumstances.
7 Specifically in this case, Article
8 1102, the national treatment provision, requires
9 that the treatment Canada accords to US investors
10 and investments be no less favourable than which it
11 accords in like circumstances to its domestic
12 investors and investments.
13 In contrast, Article 1103, the MFN
14 treatment provision, requires that the treatment
15 Canada accords to US investors and investments be
16 no less favourable than which it accords in like
17 circumstances to the investors and investments of
18 any other party or of a non-NAFTA party.
19 So what must the claimant do in
20 order to demonstrate a breach of 1102 and 1103?
21 In order to demonstrate a
22 violation of Articles 1102 and 1103, the claimant
23 is required to satisfy a three-part legal test with
24 respect to each of its claims.
25 First, it must demonstrate that

1 Canada accorded both the claimant and the
2 appropriate comparators "treatment" with respect to
3 the establishment, acquisition, expansion,
4 management, conduct, operation and sale or other
5 disposition of investments.
6 Second, the claimant must
7 demonstrate the treatment at issue was accorded "in
8 like circumstances."
9 And, third, it must demonstrate
10 that the treatment it was accorded was less
11 favourable than the treatment accorded to the
12 appropriate comparator investors or investments.
13 As determined by the Tribunal in
14 UPS, failure by the investor to establish one of
15 those three elements will be fatal to its case.
16 This is a legal burden that rests squarely with the
17 claimant.
18 Contrary to the claimant's
19 assertion, the burden of proof does not shift to
20 Canada to demonstrate legitimate regulatory
21 considerations.
22 With this legal framework in mind,
23 I would now like to turn to addressing two issues
24 with respect to the claimant's application of the
25 legal test in this case. These are as follows:

1 First, the claimant's inappropriate comparison of
2 the treatment accorded to foreign investors under
3 Article 1102, as well as the inappropriate
4 comparison of the treatment accorded to an investor
5 of the same nationality under Article 1103.
6 Second, I will address the
7 claimant's inappropriate comparison of the
8 treatment accorded under two different regimes.
9 First, as a threshold issue before any two
10 instances of treatment can be compared for the
11 purposes of 1102 and 1103, the claimant is required
12 to identify the appropriate comparators.
13 However, contrary to the
14 claimant's views, the appropriate comparator in
15 respect of these provisions cannot just be any
16 investor or investment. Here, in the context of a
17 dispute between a US investor and Canada, the
18 appropriate comparator investors and investments
19 for the purposes of Article 1102 are Canadian, and
20 the appropriate comparator investors and
21 investments for the purposes of Article 1103 are
22 either Mexican or nationals of a non-NAFTA party.
23 Based on the foregoing, Canada
24 specifically opposes the claimant's comparison of
25 itself to Pattern, Samsung Canada, Boulevard and

1 NextEra.
2 As acknowledged by the claimant
3 throughout this hearing, Pattern, Samsung Canada
4 and Boulevard are Canadian subsidies of foreign
5 investors, and NextEra itself is a US investor
6 headquartered in Juno Beach, Florida.
7 Let me first address the issue of
8 why Pattern, Samsung Canada and Boulevard are
9 inappropriate comparators under Article 1102.
10 This provision specifically
11 provides that each party shall accord to the
12 investors or investments of another party treatment
13 no less favourable than in accordance and like
14 circumstances to its own investors on investments
15 of its own investors.
16 Therefore, in the context of the
17 claimant's 1102 claim, the only relevant
18 comparators are domestically-owned entities of
19 Canadian investors.
20 This is consistent with the
21 purposes of national treatment. As explained in
22 the United States 1128 submission, Article 1102,
23 paragraphs 1 and 2 are not intended to prohibit all
24 differential treatment among investors or
25 investments.

1 Rather, they are intended only to
2 ensure that the parties do not treat
3 domestically-owned entities that are in like
4 circumstances with foreign-owned entities more
5 favourable based on the nationality of ownership.
6 In order to demonstrate
7 nationality-based discrimination, the claimant must
8 show US investors or investments are treated less
9 favourably than Canadian investors or investments
10 because of their nationality.
11 In this regard, Canada rejects the
12 claimant's assertion that Pattern, Samsung Canada
13 and Boulevard qualify for national treatment
14 consideration merely because they are Canadian
15 investments. Regardless of this characterization,
16 they are the investments of foreign investors.
17 The oddity of the claimant's
18 approach is apparent from the fact it compares the
19 same treatment accorded to the same investors under
20 both Article 1102 and 1103.
21 It means that whenever a foreign
22 investor makes investments through a local
23 enterprise, as so many do, that the limitations in
24 Article 1102 and 1103 seem to disappear.
25 Mr. Appleton has offered his

1 opinion on the design of NAFTA, but all three NAFTA
2 parties disagree. Judge Brower asked for an
3 authority and the claimant has not provided one.
4 This is because there are none.
5 Absent any comparison to a
6 Canadian investor or investment, there can be no
7 violation of Article 1102 and -- 1102.
8 Therefore, the claimant's
9 comparison of itself to Pattern, Samsung Canada and
10 Boulevard, which are all foreign-owned entities,
11 must be rejected.
12 With respect to Article 1103, the
13 claimant, a US investor, has attempted to compare
14 the treatment accorded to it with the treatment
15 accorded to NextEra, who is also another US
16 investor.
17 In doing so, it misinterprets the
18 phrase "investors of any other party" in Article
19 1103 as applying to any investor including those of
20 the same nationality as the claimant.
21 Such an interpretation must be
22 rejected. Similar to national treatment, MFN
23 treatment is designed to prevent against
24 nationality-based discrimination. As such, some
25 diversity in nationality between the comparators is

1 required.

2 Therefore, the only appropriate

3 comparators under Article 1103 can be an investor

4 or investment of any other party, other than the

5 party of which the claimant is a national, or of a

6 non-NAFTA party.

7 As explained by the UN Conference

8 on Trade and Development, this diversity of

9 nationality is required because, in order to

10 establish a violation of MFN treatment, the

11 difference in treatment must be based on, or caused

12 by, the nationality of the foreign investor.

13 This position was also reiterated

14 by Mexico in its 1128 submission.

15 Moreover, this interpretation is

16 also consistent with section 8(2) of the IL C's

17 Draft Articles on most-favoured nation clauses,

18 which specifies that the extent to which a

19 beneficiary state may lay an MFN claim is

20 determined by the treatment extended by the

21 granting state to a third state or to persons or

22 things in the same relationship with that third

23 state.

24 The phrase "any other party" as

25 opposed to the phrase "non-party" is used in

1 Article 1103 because NAFTA is a multilateral
2 treaty. In the context of a NAFTA investor-state
3 dispute, there is still a contracting party to the
4 treaty, in this case Mexico, who is a non-party to
5 the dispute.
6 The reference to any other party
7 is not uncommon in the context of other
8 multilateral treaties. As was pointed out during
9 Canada's opening, Article 91 of the Energy Charter
10 Treaty compares the conditions accorded to
11 companies and nationals of any other contracting
12 party or any third state.
13 The simple fact is there is no
14 basis on which to conclude any difference in
15 treatment is due to the nationality of one of the
16 comparators if they are both of the same
17 nationality.
18 Thus, the comparison of treatment
19 that was accorded to two US investors cannot
20 possibly lead to a finding of nationality-based
21 discrimination.
22 In summary, due to the claimant's
23 failure to identify appropriate comparators, its
24 1102 and 1103 claims against Pattern, Samsung
25 Canada, Boulevard and NextEra must be dismissed.

1 Now I will move on to addressing
2 the issue of why investors under different regimes
3 are not in like circumstances for the purposes of
4 1102 and 1103.
5 As explained by the Tribunal in
6 Merrill, the proper comparison between investors
7 which are subject to the same regulatory -- is
8 between investors which are subject to the same
9 regulatory measures under the same jurisdictional
10 authority.
11 Canada's position is that
12 investors who have not concluded an investment
13 agreement with the host state are not in like
14 circumstances with investors who did.
15 From the outset, the government's
16 ability to enter into investment agreements is
17 recognized by the UN Conference on Trade and
18 Development. Its 2010 most-favoured nation
19 treatment publication specifically states that if a
20 host country grants special privileges or
21 incentives to an individual investor through a
22 contract, there would be no obligation under the
23 MFN treatment clause to treat other foreign
24 investors equally.
25 The reason is that a host country

1 cannot be obliged to enter into an individual
2 investment contract. In this case, "freedom of
3 contract prevails over the MFN clause."
4 Moreover, with respect to the
5 legal test for Article 1103, the publication goes
6 on to expressly state that the foreign investor
7 that did not enter into a contract is not in like
8 circumstances with the third foreign investor that
9 did conclude the contractual arrangement with the
10 host state.
11 With respect to Articles 1102 and
12 1103, the Tribunal's role is not to second-guess
13 the Ontario government's policy choices. To
14 require international tribunals to evaluate the
15 merits of government's reasons for entering into
16 investment agreements would require the Tribunal to
17 step into the shoes of government and discharge the
18 function of elected officials.
19 This would greatly undermine
20 government's ability to make public policy
21 decisions. It would also make tribunals ultimately
22 responsible for determining the appropriate means
23 for achieving public policy goals.
24 This is not what investor-state
25 arbitration is designed to do. As stated by the

1 tribunal in Paushok, it is not the role of the
2 tribunal to weigh the wisdom of legislation, but
3 merely to assess whether such legislation breaches
4 the treaty.
5 This brings us back to the legal
6 test of 1102 and 1103 which, in summary, places the
7 burden of proof on the claimant to establish
8 whether or not there has been nationality-based
9 discrimination.
10 In applying these tests, the
11 claimant is required to identify comparators who
12 are of the appropriate nationality and accorded
13 treatment pursuant to the same regime.
14 If the Tribunal has no further
15 questions, I will now turn it over to my colleague,
16 Ms. Marquis, who will provide Canada's position on
17 the law as it pertains to the claimant's 1105
18 claims in this dispute.
19 THE CHAIR: Thank you.
20 SUBMISSIONS BY MS. MARQUIS AT 2:05 P.M.:
21 MS. MARQUIS: Good afternoon,
22 Madam Chair, Judge Brower, Mr. Landau. I should
23 also be brief in addressing the legal standard
24 under Article 1105.
25 In particular, in view of the

1 claimant's opening and closing remarks, I have in
2 fact narrowed my presentation here today to address
3 just two overarching issues.
4 So I will attempt to guide you
5 through my slides, but there may be slight
6 discrepancies. You have a full presentation for
7 your records, and if you will just follow me.
8 The claimant has in its opening
9 and in its closing today made vague allegations
10 regarding the lack of transparency or the unfair
11 and unlawful regulatory framework.
12 In its opening, claimant had some
13 introductory remarks on Article 1105 and the
14 standard under the law. We were promised to hear
15 more in the closings, but nothing was brought
16 forward.
17 First I want to address these
18 allegations, and then I would like to take the
19 Tribunal to the correct standard that it should
20 apply under Article 1105.
21 Now, as I said this morning, the
22 claimant has advanced a proposition that NAFTA
23 Article 1105 requires a state to act completely
24 transparently. NAFTA Article 1105 does not contain
25 any such independent obligation for a NAFTA party

1 to fully disclose, for example, any and all
2 commercial deals that it enters into.
3 The claimant also seems to have
4 made much of the idea of what its legitimate
5 expectations under Article 1105 were and the
6 purported requirement under this Article to provide
7 a stable and unchanging regulatory environment.
8 In the recent decision of Mobil
9 versus Canada, the tribunal addressed this very
10 issue and provided that no such legitimate
11 expectations existed.
12 Further, for the
13 claimant -- sorry, further for the claimant to
14 provide a claim of legitimate expectation, it must
15 seek to establish it was given specific assurances
16 on which it could reasonably rely to make its
17 investment.
18 Finally, the claimant has, once
19 again, reiterated that Article 1105 requires a
20 stand-alone good-faith obligation.
21 There is no such thing. Good
22 faith is not a stand-alone obligation under Article
23 1105. Rather, it is a principle which bears upon
24 the application of other substantive obligations.
25 This was consistently recognized by NAFTA

1 tribunals, and most recently by the ADF tribunal.
2 Having addressed these arguments
3 briefly, I now want to turn you to the correct
4 legal standard that the Tribunal should seek to
5 apply in looking at Article 1105. The claimant is
6 straining to get away from the plain meaning of
7 Article 1105. Because it has offered no new
8 arguments, I will in fact be brief.
9 With Article 1105, the parties
10 agreed to accord investors of another party the
11 minimum standard of treatment. It reads in
12 relevant part as follows:
13 "... and requires that each
14 party shall accord to
15 investments of investors of
16 another party treatment in
17 accordance with international
18 law, including fair and
19 equitable treatment and full
20 protection and security."
21 What does that mean? The 2001
22 note of interpretation issued by the Free Trade
23 Commission tells us Article 1105 requires no more
24 and no less than the customary international law
25 minimum standard of treatment.

1 Second, the note further explains
2 that the concepts of fair and equitable treatment
3 and full protection and security do not require
4 treatment in addition to or beyond that which is
5 required by the customary international law minimum
6 standard of treatment.
7 Now, the claimant has argued, at
8 least in its written submissions, that the note is
9 not binding for two reasons, first because it would
10 constitute only one source of interpretation of
11 Article 1105, and, second, because it would, in
12 fact, be nothing more than a legal amendment.
13 Once more, this is incorrect, but
14 I -- we have fully briefed on this and I will just
15 turn you to our written submissions.
16 Of course the text of the NAFTA
17 itself in Article 1131(2) provides that an
18 interpretation of the Free Trade Commission is
19 binding on the Tribunal.
20 Since this note of interpretation
21 was adopted now over 13 years ago, not one single
22 NAFTA tribunal has found that Article 1105
23 guarantees that a standard of treatment that
24 extends beyond the customary international law
25 minimum standard of treatment.

1 The claimant here is asking that
2 the Tribunal ignore the unambiguous wording of
3 Article 1131 and the binding nature of the note of
4 interpretation. It should not do so.
5 While the claimant did not mention
6 it this morning at all, it also has seemed to imply
7 that the customary international law standard has
8 evolved and would now somehow have converged with
9 the autonomous, fair and equitable treatment
10 standard which can be found in other investment
11 treaties.
12 These allegations are meritless
13 and once more have been fully refuted in our
14 written submissions.
15 If you will give me just one
16 moment. It is claimant which has the burden to
17 discharge and demonstrate the existence of a rule
18 of customary international law. It has failed to
19 discharge this burden, and as the Cargill tribunal
20 said, it is not a place of the tribunal to assume
21 this task.
22 The Tribunal has merely stated
23 that Article 1105 must be examined pursuant to a
24 flexible standard under which the customary
25 international law and autonomous, fair and

1 equitable treatment would have merged, but it has
2 been nothing more than to state it. It has not
3 proven it. This is incorrect and should not be
4 given any weight.
5 Let me now turn you to the high
6 threshold required to establish a breach of Article
7 1105. We are now I see, in your presentation, at
8 the slide of S.D. Myers.
9 Now, the purpose of Article 1105
10 is to establish a floor below which treatment
11 cannot fall, and avoid what might otherwise be a
12 gap.
13 What is this threshold? It is a
14 threshold so high that it is described as guarding
15 against unfair or manifestly arbitrary actions by
16 the state.
17 The claimant has alleged that
18 Canada sustains there has been no evolution to the
19 standard since the Neer decision. This is
20 completely false.
21 Canada has never held that the
22 standard for customary international law has not
23 evolved. To the contrary, it has recognized in all
24 of the cases it has defended against under NAFTA
25 that it is, in fact, a standard simply which

1 evolved from when it was first laid out in the Neer
2 decision.
3 Canada's position is that to
4 understand the standard, we only need to look back
5 to the past five years to show where the tribunals
6 are standing today. This is most efficiently done
7 by looking at three cases, Glamis, Cargill and,
8 finally, Mobil.
9 Now, the Glamis tribunal stated
10 that the violation of the customary international
11 law minimum standard of treatment requires an act
12 that is sufficiently egregious and shocking, a
13 gross denial of justice, manifest arbitrariness, a
14 complete lack of due process, evident
15 discrimination or a manifest lack of reasons.
16 This was then followed by the
17 Cargill award, where we stated and where we could
18 see a government's conduct towards the investment
19 may not amount to gross misconduct, manifest
20 injustice or, in the classic words of the Neer
21 claim, bad faith or willful neglect of duty.
22 The tribunal aptly summarized the
23 minimum standard of treatment, which you should
24 look at under Article 1105, when doing an analysis.
25 In its words:

1 "To determine whether an
2 action fails to meet the
3 requirement of fair and
4 equitable treatment, a
5 tribunal must carefully
6 examine whether the
7 complained of measures were
8 grossly unfair, unjust or
9 idiosyncratic, arbitrary
10 beyond a merely inconsistent
11 or questionable application
12 of administrative or legal
13 policy or procedure so as to
14 constitute an unexpected and
15 shocking repudiation of a
16 policy's very purpose and
17 goals or to otherwise grossly
18 subvert a domestic law or
19 policy for an ulterior motive
20 or involved an utter lack of
21 due process so as to offend
22 judicial propriety."
23 Finally, the Mobil tribunal in
24 2012 told us in its decision on liability, after a
25 lengthy review of all awards of all NAFTA decisions

1 on this high threshold, and confirmed that the
2 required threshold was that the conduct be
3 arbitrary, grossly unjust, idiosyncratic, or
4 discriminatory.
5 Article 1105's objective is not to
6 prevent a government from making legitimate public
7 policy changes or even to reflect a requirement
8 that an investor may legitimately believe that no
9 material change would be made to the regulatory
10 framework under which it invested.
11 The Mobil decision confirmed once
12 more this very thing, saying that nothing in
13 Article 1105 prevented a public authority from
14 changing the regulatory environment to take account
15 of new policies and needs, even if some of those
16 changes may have far-reaching consequences and
17 effect, and even if they impose significant
18 additional burdens on an investor.
19 In the words of the tribunal,
20 "Governments change, policies change, and rules
21 change."
22 In closing, Canada asks that the
23 Tribunal reject claimant's wrongful interpretation
24 of Article 1105, and I will now turn the floor to
25 Mr. Spelliscy, who will address how the obligations

1 under the law of Article 1102, 3 and 5 can be seen
2 from the facts. Thank you.
3 THE CHAIR: Thank you.
4 MR. SPELLISCY: I think I am going
5 to --
6 THE CHAIR: Would you like to have
7 a break now?
8 MR. SPELLISCY: Sure.
9 THE CHAIR: Would this be a good
10 time?
11 MR. SPELLISCY: Yes, I won't make
12 my two-hour promise, so let's have a break right
13 now.
14 THE CHAIR: Fine. Let's take ten
15 minutes now and resume at 2:30.
16 --- Recess at 2:18 p.m.
17 --- Upon resuming at 2:34 p.m.
18 THE CHAIR: So we're ready to
19 listen to you again, Mr. Spelliscy.
20 FURTHER SUBMISSIONS BY MR. SPELLISCY:
21 MR. SPELLISCY: Yes, hello again.
22 As I mentioned at the beginning, I'm now going to
23 discuss why the measures that I identified in those
24 slides, in the Ontario slide, do not breach any of
25 Canada's obligations under Article 1102, 1103, or

1 Article 1105.

2 And it's been a while, so let's

3 pull that slide up to remind ourselves what it is

4 that we are talking about in terms of the

5 allegations.

6 I think we're just waiting for

7 the...

8 THE CHAIR: Here it is.

9 MR. SPELLISCY: Great. On the

10 first, which is the domestic content requirements

11 of the FIT program, you just heard from Mr.

12 Neufeld, who has explained to you why these

13 measures cannot be challenged under NAFTA because

14 of Article 1108.

15 After me, Mr. Watchmaker will

16 explain why these measures also cannot be brought

17 to this NAFTA arbitration, because the claimant has

18 not proven that it has suffered any loss as a

19 result.

20 I'm going to move on and I'm going

21 to focus on the remaining two claims and show why

22 any allegation they have breached NAFTA is without

23 merit.

24 So let's take the first allegation

25 under the GEIA, the one that I identified earlier.

1 There's been a lot of focus. It's that the
2 negotiations of the GEIA were not fully
3 transparent.
4 Now, as far as I can understand
5 this, this is an allegation of a breach of Article
6 1105 of NAFTA. As Ms. Marquis just explained,
7 there is no independent duty of transparency that
8 is part of Article 1105. The question is whether
9 the actions of the government are so egregious, so
10 wrongful that it amounts to conduct that
11 essentially shocks the judicial conscience and
12 renders the conduct in question manifestly
13 arbitrary, discriminatory, shocking or otherwise
14 egregious.
15 Let's look at the negotiations in
16 question and let's see if it meets that standard.
17 First, the claimant has at times suggested
18 throughout this hearing that in order for Canada to
19 comply with its 1105 obligations, Ontario was
20 required to disclose, in full, its commercial
21 negotiations with Samsung and the Korean Consortium
22 even while they were ongoing.
23 There is no merit to this. Such a
24 level of public disclosure is not required by
25 customary international law. In fact, there is

1 really no legal system in the world that would
2 require that amount of disclosure. Even Canada's
3 own access to information laws allow third party
4 business confidential information to not be
5 disclosed to the public.
6 As a result, it is unsurprising
7 that the claimant has failed to provide any legal
8 support for its assertion that Article 1105
9 requires NAFTA parties to act with complete
10 transparency in respect of its commercial
11 negotiations, because the fact is commercial
12 negotiations simply do not work that way. It would
13 make no sense, and it would prejudice the positions
14 of both the developer and the government.
15 Let's think about it from the
16 perspective of the developer that made the proposal
17 to the government. And the claimant put some of
18 these slides up in the opening, but I think they go
19 the entire opposite way.
20 As Rick Jennings has explained:
21 "I think you were talking
22 about treating people fairly
23 or transparently, or
24 whatever. If someone came to
25 you with a proposal, in

1 effect, and you in effect
2 stole it and shopped it
3 around to other people, that
4 wouldn't seem to be a very
5 fair way of dealing with
6 people..."
7 And as Sue Lo explained, it is
8 inappropriate to provide the agreement to another
9 competitor at the time the Korean Consortium is
10 still working out their proposal.
11 That's the way commercial
12 negotiations work. And even after the agreement is
13 signed, there were reasons of commercial
14 sensitivity to not fully release the terms. Sue Lo
15 explained. She said even after its signature, it
16 was necessary at least for a while to keep some of
17 the negotiations and terms confidential in order
18 not to prejudice the Korean Consortium, because
19 they were still negotiating with manufacturing
20 plants. They were still in deliberations with
21 trying to assemble developers to develop their
22 project.
23 If the specific terms had been
24 released at that time during the negotiations when
25 they are trying to assemble the consortium, or

1 during or immediately after where they are still
2 trying to develop the partners, the Korean
3 Consortium's negotiating position would be
4 prejudiced with respect to those potential
5 partners, because they would know exactly how much
6 and what the Korean Consortium was getting from the
7 government.
8 It is for these reasons that
9 governments respect the commercial confidentiality
10 of private businesses and will refuse to release
11 that information without their consent.
12 But I want to think about it from
13 the government perspective, as well. If the
14 government always had to release the terms of its
15 commercial deals with developers while they were
16 being negotiated or even afterwards, all of the
17 terms, the complete contract, it would be
18 handicapping itself in any future negotiation with
19 others.
20 And I think if we just pause on
21 that, we can see why a position requiring complete
22 transparency, releasing the full terms of whatever
23 the agreement was while the negotiations were
24 ongoing or even after it was signed, cannot be the
25 correct position.

1 Think of it this way. If the
2 government were to negotiate an initial deal with
3 one developer on terms that it had to publicly
4 release right away, there is little chance that it
5 could ever be able to come to better or more
6 advantageous terms with another developer, because
7 it would be out there, what it gave up the first
8 time.
9 Complete transparency in the sense
10 that the claimant says is required would lock the
11 government in and prevent it from being able to
12 successfully conclude a better deal.
13 And, in fact, I would note that on
14 the claimant's theory of most-favoured nation
15 treatment, if it concluded a better deal, it could
16 be in violation of its treaty obligations, because
17 it wouldn't be according most-favoured nation for
18 national treatment. That simply cannot be correct.
19 We saw the slide: Freedom of
20 contract still prevails over MFN. The same is true
21 of national treatment, and that is why that
22 governments all over the world keep some terms of
23 the commercial deals confidential.
24 As Rick Jennings explained in his
25 testimony: If you are having a commercial

1 negotiation with someone, it would generally not be
2 the case that we would be negotiating it in public.
3 But let's be totally clear here,
4 because while not all of the details of the green
5 energy investment agreement and its negotiation
6 were released, the government was in fact as
7 transparent as possible in the circumstances.
8 Article 1105 does not require more.
9 Now, we have pulled the documents
10 up at various times in the hearings and you have
11 them in our opening slides. I don't need to go
12 through them again. We don't need to look at the
13 same exhibits.
14 We will recall there was a press
15 release on September 26th. The claimant has said
16 that that press release was in response to an
17 accidental leak. Why or how that information
18 released doesn't matter. It was released. The
19 negotiations were acknowledged. The public was
20 aware.
21 And a few days later we saw the
22 Minister of Energy issued a direction to the OPA
23 telling it to hold in reserve 500 megawatts of
24 capacity for a renewable energy generating facility
25 whose proponents have signed a province-wide

1 framework agreement.

2 Considering the press release just

3 a few days earlier, there was no question or should

4 have been no question who it was. Now, why isn't

5 it specific here? Because the deal is not done

6 yet. But nobody was being misled by that.

7 And as we saw, too -- we had it up

8 on the screen numerous times -- a month later, on

9 October 31st, 2009, five years ago today, the

10 Toronto Star published another article in which it

11 granted -- or which it was reported that the deal

12 with the Korean Consortium would give them priority

13 access to the grid.

14 All of this happened before the

15 claimant applied to the FIT program. Now, we've

16 heard some discussion this week and some discussion

17 today about when the claimant's investments were

18 allegedly made. We saw what evidence they've

19 produced, a resolution. But the resolution is not

20 approving. The resolution is authorizing something

21 to be done.

22 We don't have the purchase

23 agreement in the record. We don't have anything of

24 that sort. There is a complete lack of evidence as

25 to when they say their investment was made. So

1 their submissions are nice, but it is not evidence.
2 And I think even if we come back
3 to this -- and I think my colleague Mr. Watchmaker
4 will come back to this, because even if they had
5 made their investments, there will become an issue
6 of causation that they haven't actually addressed,
7 if this lack of transparency was a breach.
8 He's going to come back to that in
9 a minute.
10 Now, what did the claimant
11 know? We heard Mr. Pickens say that he didn't
12 believe he was aware of some of these negotiations
13 that were ongoing.
14 I asked: Were you ever informed
15 about them, about the press releases or the -- what
16 was being published? He said, I don't recall. I
17 said: You don't recall that ever happening? He
18 said, No.
19 It is not that he couldn't have
20 been aware. It is just that he wasn't briefed.
21 Then on January 21st, after these
22 negotiations are out, after the claimant applies
23 for two projects to the FIT program, the agreement
24 with Samsung is finally signed.
25 There was a press release and a

1 detailed backgrounder that described the key terms
2 of the GEIA. Sue Lo has given you evidence. The
3 key terms were disclosed.
4 In his testimony, Mr. Robertson
5 said, in explanation as to why they didn't really
6 react to this: We knew it was a good deal, but
7 what that meant for us all at the time, we didn't
8 really know.
9 That claim just doesn't withstand
10 scrutiny. We have seen a lot of it, but let's just
11 pull it up again. It is the backgrounder that was
12 released. It is R-076. I don't want to belabour
13 this too much, because we have looked at it, but if
14 we see on the bottom of the second page, it talks
15 about assurance of transmission in subsequent
16 phases.
17 Now, we have heard time and again
18 this week, and everybody seems to agree, about the
19 importance of transmission access, access to the
20 grid.
21 Today and in their questions that
22 were in front of this Tribunal, the claimant has
23 suggested they could not understand what assurance
24 of transmission capacity meant, and that they
25 didn't know it meant priority transmission access.

1 Let's just think about what it
2 means to be assured of something. It means to be
3 guaranteed it. That's its ordinary meaning. No
4 matter how the claimant might think about it,
5 everyone would have understood what that meant,
6 that the Korean Consortium was being guaranteed
7 transmission capacity.
8 This is even more obvious because
9 everyone was aware of the September 30th, 2009
10 direction months earlier that had reserved out of
11 the FIT program 500 megawatts of transmission
12 capacity.
13 With that in mind, there would
14 have been no question what this language meant. It
15 refers to that, the first phase, and talks about
16 the next phases.
17 This morning, the claimant harped
18 on the fact and came to the fact that it stated
19 that even if it understood there was going to be
20 priority access, it could not have known that the
21 KC, the Korean Consortium, would seek projects in
22 the Bruce region, because they hadn't done it yet.
23 But, again, it just doesn't make
24 sense. We saw in the map that we had up on our
25 screen in our opening presentation the Bruce region

1 has a strong wind resource. Bob Chow testified:
2 "As soon as the agreement
3 with the Korean Consortium
4 was signed... for most
5 people, they would know that
6 the wind regime in the Bruce
7 area was amongst the
8 strongest in the province,
9 and so that was the best area
10 where one could have a wind
11 contract. It was a recipe
12 for success."
13 There would have been no surprise
14 to anyone that the Korean Consortium, with a
15 guarantee of transmission capacity, looking around
16 the province, was going to the Bruce region.
17 Now, Mr. Pickens, again the
18 ultimate alleged owner of the investment here, said
19 he was unaware of what was going on. He testified
20 about this January 21st announcement. I said, Do
21 you recall being briefed on it? And he said, I
22 don't recall.
23 But, again, Mr. Robertson was
24 aware. And as we saw in the slide, he said:
25 "I knew the minute these

1 releases were made. Well,
2 maybe not the minute, but
3 within a few hours that they
4 were made, I was notified and
5 reviewed."
6 So he was aware. And what did the
7 claimant do after they were aware? Well, four
8 months later they made more applications to the FIT
9 program.
10 We're going to get to a little
11 more of what they didn't do in a few minutes. But
12 what I think I want to just focus your attention on
13 here is we're not talking about a complete -- an
14 obligation of complete transparency. There is no
15 independent obligation under Article 1105 to be
16 transparent about your commercial negotiations.
17 In this case, the government acted
18 perfectly reasonably and as transparently as
19 possible by disclosing the fact of the negotiations
20 and the key terms of the deal at relevant times.
21 People were aware as long as they were paying
22 attention.
23 Now, let's turn to the second
24 alleged breach associated with the green energy
25 investment agreement, and that is that the Korean

1 Consortium was afforded priority transmission
2 access in the Bruce region.
3 I can't completely tell, but it
4 appears to me that the claimant is no longer
5 alleging that the mere entering into of the GEIA is
6 a violation of NAFTA, I think, and I think that is
7 good, because we have explained in our written
8 submissions any such claim would be frivolous.
9 But it does seem to be continuing
10 to allege that the treatment accorded to the Korean
11 Consortium under the GEIA and, in particular, the
12 allocation of the 500 megawatts in the Bruce region
13 is a violation, and, as I understand at this time,
14 of national treatment and MFN treatment.
15 Now, Ms. Kam has explained to you
16 why the concerns about the national treatment
17 Article are improper. There is no Canadian
18 investor involved here. But it really doesn't
19 matter, because we both agree -- the claimant and
20 Canada both agree the Korean Consortium is a
21 foreign investor that would be subject to -- the
22 treatment of which would be subject to MFN.
23 Let's be clear here on the things
24 not in dispute. There is no dispute that both the
25 Korean Consortium projects and the claimant's

1 projects would be wind projects. There is no
2 dispute they would produce electricity and that
3 that electricity would be fed into the grid.
4 And there is no dispute that the
5 projects of the Korean Consortium and the projects
6 of the claimant were competing for transmission
7 capacity in the Bruce region. Of course, every
8 generator competes for transmission capacity, even
9 nuclear generators, and there are other types of
10 generators, as well. There is only one
11 transmission system.
12 And, finally, there is no dispute
13 that the power purchase agreements that each
14 received looks similar in most respects. It is
15 actually provided for right in the green energy
16 investment agreement.
17 The claimant wants to paint that
18 as determinative of the like circumstances analysis
19 for 1102 and 1103, but it is not. As Ms. Kam just
20 explained to you, you can't compare the treatment
21 accorded under an investment agreement with the
22 treatment accorded to someone without an investment
23 agreement for the purposes of national treatment
24 and MFN. UNCTAD has had this position since 1999.
25 We showed you the 2010 update, but it is over 15

1 years old now.

2 Why? Ms. Kam explained the reason
3 is obvious, and we said it before. Investment
4 agreements provide more favourable treatment than
5 is available in the typical regulatory program. If
6 they didn't, no one would sign investment
7 agreements. They would just go into the standard
8 regulatory program, but investment agreements are
9 signed all over the world.

10 Put simply, the national treatment
11 in MFN clauses in NAFTA do not deprive any NAFTA
12 party of its ability to enter into investment
13 agreements and provide the investors with those
14 investment agreements with treatment that may offer
15 additional benefits.

16 As Ms. Kam said, freedom of
17 contract prevails. If this wasn't the rule, then
18 tribunals would be required to assess what
19 governments were doing to evaluate whether or not
20 the investment agreements were good enough. That's
21 not their role, and you can imagine the chaos if
22 every investment agreement ever signed could be
23 challenged on the grounds that the government did
24 not get enough in return.

25 So let's look at what the record

1 is in this case. It is both programs, the GEIA
2 procurement and the procurement pursuant to the FIT
3 program, were separate and distinct. They are for
4 the same product, but they are separate programs
5 and distinct programs.
6 The claimant seems to try to avoid
7 this problem by arguing, in essence -- and I heard
8 it this morning -- that the GEIA is a bad deal for
9 Ontario, and by arguing that the claimant would
10 have, but was prevented from entering into a
11 similar deal to get priority access.
12 Let's focus on those claims. On
13 the first, the claimant seems to be pushing the
14 idea that the GEIA was a bad deal for two reasons:
15 One, because it was not needed; or, two, because
16 the government should have, it seems, picked
17 someone else to do it, maybe the claimant, maybe
18 someone else.
19 They seem to be challenging the
20 qualifications of Samsung to be a partner of the
21 government in this regard.
22 Now, in challenging the idea that
23 the agreement was not needed, the claimant has
24 placed emphasis on the fact that the GEIA, in
25 committing to 2,500 megawatts over five years, was

1 substantially less than the total megawatts offered
2 in the end under the entire FIT program. But
3 that's not the appropriate comparison.
4 If we wanted to compare, we would
5 look at what the Korean Consortium and the claimant
6 were committing to Ontario in 2009 when those
7 commitments were made. So let's pay attention to
8 that.
9 During the negotiation of the
10 GEIA, the Korean Consortium committed to 2500
11 megawatts of wind and solar generation in five
12 phases. In November of 2009, when that negotiation
13 was ongoing, the claimant had two applications to
14 the FIT program for a total of 265 megawatts, a
15 tenth of the commitment being offered in terms of
16 transmission or in terms of generation of the KC.
17 Now, a lot has been made also
18 about what happened after these negotiations, and
19 the claimant has suggested this week that Ontario,
20 by the time it signed the GEIA, Ontario knew the
21 FIT program was a success, that it had an
22 overwhelming number of applications, lots of
23 megawatts, and there was therefore no reason for
24 the GEIA.
25 They have suggested today that

1 Ontario should have walked away from the deal
2 before it was signed. Now, I'm not sure what the
3 allegation is. I'm not sure that Ontario's failure
4 to walk away from the GEIA is a breach of something
5 in NAFTA.
6 It is clearly not. NAFTA does not
7 require a government to walk away from a
8 negotiation or an agreement. But let's even look
9 at what Ontario knew about the FIT applications it
10 had received in January of 2010 when the claimant
11 says it knew the program was a success, because the
12 claimant is right. During the FIT program launch,
13 the OPA received about 1,000 applications. I think
14 we heard 9,000, 10,000 megawatts of applications.
15 We have heard the claimant talk
16 about a survey done by the OPA in the summer of
17 2009 saying there is going to be 15,000 megawatts
18 of interest.
19 But the fact is that while the
20 number -- on its face, the number makes -- of
21 applications makes the FIT program appear quite
22 successful in January, as Mr. Duffy has explained
23 in his witness statement, approximately 95 percent
24 of the applications would have failed and been
25 rejected.

1 The launch period closed on
2 December 1st, 2009. The OPA began evaluating.
3 That is what it would have understood in 2010.
4 There were lots of applications, but they weren't
5 good applications.
6 What did Ontario know in January
7 of 2010? They knew, as Mr. Duffy has explained,
8 that the FIT program was at risk of becoming a
9 massive failure.
10 Knowing the mistakes that were
11 made and the failure rate amongst the applications,
12 what confidence would the government have had, in
13 January of 2010 when it signed the GEIA, that FIT
14 applications would lead to projects?
15 Remember, the government wants to
16 create jobs. Applications don't create jobs.
17 Projects create jobs, and that's what the
18 government wanted to assure.
19 And so let's compare the
20 confidence it would have had in the FIT program at
21 the time. Now, there's no dispute the FIT program
22 ended up being successful and developers were able
23 to bring their projects to completion, at least
24 some of them. But hindsight is a wonderful thing.
25 We're talking about what the government would have

1 believed and thought in January of 2010.
2 What did they know about the FIT
3 program or about the Korean Consortium? They knew
4 that the Korean Consortium had committed at least
5 to 2,500 megawatts of wind and solar.
6 As Mr. Jennings has noted, the
7 GEIA was for 2,500 megawatts in five phases, and
8 quite ambitiously have those phases go ahead quite
9 quickly, shovels in the dirt, jobs.
10 The Government of Ontario also
11 knew that KC had at least committed to attract
12 manufacturing plants on an accelerated schedule to
13 Ontario. As Mr. Jennings testified earlier this
14 week:
15 "The Korean Consortium had
16 agreed to make a commitment
17 to bring in four
18 manufacturing plants which
19 was actually, from the
20 government's perspective,
21 seen as very crucial. That's
22 what they wanted to
23 demonstrate to the Green
24 Energy -- they wanted to
25 demonstrate the Green Energy

1 and Green Economy Act, and so
2 they also agreed to do a very
3 aggressive schedule of phases
4 for bringing projects much
5 more quickly than we could
6 expect through the FIT or any
7 other program."
8 So what they would have believed
9 about the Korean Consortium in January of 2010 was
10 that it could be an anchor or a marquis tenant for
11 the province at a time when the FIT program was
12 still at the risk of being a failure and at a time
13 when we're still suffering the effects of a severe
14 financial crisis.
15 As Mr. Jennings further testified:
16 "The Korean Consortium was
17 seen as a marquis project
18 that would show that Ontario
19 was pursuing green energy in
20 a large way."
21 Now, the claimant has said, well,
22 that's not enough, and this morning they relied
23 upon Mr. Adamson, who they said showed that the
24 obligations in the Green Energy investment
25 agreement were not significant enough, in his view.

1 They said his evidence is uncontroverted, but that
2 is not true.
3 His evidence is controverted by
4 Mr. Jennings and Ms. Lo, who were involved in the
5 negotiation of the GEIA rather than looking at the
6 deal in hindsight, and who have told you, both,
7 what value Ontario saw in the green energy
8 investment agreement.
9 There was nothing wrongful about
10 the government deciding to enter into the GEIA
11 while the FIT program was ongoing. Governments are
12 allowed to pursue separate procurement initiatives
13 at the same time.
14 It was a rational and reasonable
15 policy choice and not one adopted in order to
16 effect some sort of nationality-based
17 discrimination.
18 Now, as I said earlier, this
19 morning the claimant also seemed to advance an
20 argument -- I think they did in some of their
21 questioning, as well -- that NAFTA's been violated
22 because Ontario should have picked someone else
23 other than Samsung to do this because Samsung
24 wasn't qualified, or that they should have somehow
25 controlled the partners that Samsung brought in.

1 They said that the government
2 didn't seek a better deal and that it should have.
3 But it is not the role of an international tribunal
4 to pick the partners that a government enters into
5 investment agreements with. Again, think of the
6 havoc that would be wreaked in the international
7 system if every time a government signed an
8 investment agreement the competitors of that
9 company could bring a challenge to investor-state
10 arbitration that the government should have picked
11 someone else.
12 Of course competitors are going to
13 say that, and that's why that is not what these
14 provisions on national treatment and MFN are about.
15 Now, on to the second criticism
16 that they've offered on the 500-megawatt set-aside
17 for the Korean Consortium, and that's that the
18 claimant somehow couldn't have entered into an
19 agreement similar to the GEIA.
20 But let's be clear here. The
21 answer is we will never know, because they did not
22 try. They could have, but they did not. As we saw
23 during the week and in our opening -- and I won't
24 pull it up again here -- when the GEIA was entered
25 into, the Premier of Ontario invited companies to

1 make proposals. The claimant's own expert,
2 Mr. Adamson, also acknowledged there was nothing
3 stopping other investors from approaching the
4 government to propose an investment agreement that
5 would include priority transmission access.
6 And even Cole Robertson
7 acknowledged they could have approached the
8 government to negotiate a deal. It is just they
9 didn't see the need to.
10 Specifically, he said, We
11 felt -- and this is after he was aware of the
12 January 21st backgrounder. He said:
13 "We felt good about our
14 projects, so we didn't feel
15 the need to go on a, forgive
16 the term, 'wild goose
17 chase' on trying to find
18 something else as opposed to
19 sticking in the process that
20 we were in, that we thought
21 would be carried out fairly,
22 and that's where we were."
23 [As read]
24 Now, that's the claimant's choice
25 to make. Nobody can force them to try to negotiate

1 an investment agreement with the government, just
2 like nobody can force the government to negotiate
3 an investment deal with them, but it now has to
4 live with that choice.
5 It has tried to avoid this choice
6 by arguing that it couldn't have gotten the exact
7 terms of the GEIA without knowing what they were.
8 Well, that's not relevant to an Article 1102, 1103
9 analysis of whether they were prevented from
10 negotiating.
11 As explained by Sue Lo, investors
12 come forward all the time to the government with
13 their own proposal. It's not about copying
14 somebody else's proposal. That's not what
15 investment proposals are about. Different
16 companies have different strengths.
17 Further, in arguing even that they
18 couldn't get the exact same deal the Korean
19 Consortium got, the claimant forgets one obvious
20 fact. Circumstances change over time.
21 The claimant waited. It didn't
22 move. It never tried to negotiate a deal. Might
23 the terms and conditions of anything the claimant
24 tried to negotiate have been different than the
25 GEIA? Well, of course they could, but that's

1 because the needs and requirements of Ontario with
2 respect to electricity change over time.
3 Circumstances change and circumstances impact the
4 terms that you are going to get.
5 MFN and national treatment does
6 not require the government to enter into the exact
7 same deal with investors every single time someone
8 approaches, regardless of the current situation in
9 which the government finds itself.
10 The fact is that the claimant
11 still could have tried to negotiate a deal, even if
12 they weren't sure they could get the same terms.
13 Here I do want to pull up a
14 document, because I think we haven't seen it
15 yet -- we have seen the document. It is the GEIA,
16 but we haven't looked at this clause yet. It is
17 clause 8.7, and it is Exhibit C-0322.
18 The clause says that:
19 "Ontario will not provide to
20 any other renewable energy
21 project or developer the
22 benefit of an economic
23 development adder or similar
24 incentive which is greater
25 than the one it gave to the

1 Korean Consortium, unless the
2 developer has entered into an
3 agreement with Ontario or one
4 of its agencies with a value
5 and scope comparable to or
6 greater than that provided
7 for in this agreement, the
8 GEIA."
9 The GEIA itself contemplates that
10 the Ontario government might negotiate other deals
11 with other investors and that, in fact, the
12 benefits of those other deals might exceed even
13 what the Korean Consortium was able to obtain.
14 Now, as Mr. Jennings has also
15 confirmed, the government would potentially have
16 been open to negotiating another deal. He said the
17 decision obviously would be the government.
18 Now, somebody who works in the
19 government as a public servant, the decision is
20 always the government's. And it would have been
21 ultimately cabinet at the time. He said:
22 "I think the province
23 continued to talk to people
24 because there remained an
25 interest in promoting green

1 energy jobs and
2 manufacturing."
3 Despite all of this, despite the
4 announcements, despite the fact it was aware
5 someone else was negotiating a deal, a deal that it
6 says it wanted, Mesa never even asked, as
7 Mr. Pickens has said when I asked him. I said:
8 "In fact, to your knowledge,
9 neither you nor anyone in any
10 of your companies ever asked
11 about negotiating such an
12 agreement with Ontario?"
13 He said "yes." And I clarified:
14 You didn't do that. Nobody asked; right? And he
15 said, "Right".
16 THE CHAIR: Mr. Landau has a
17 question for you, and I think it is easier if he
18 asks it now while we're on the topic.
19 MR. SPELLISCY: Sure.
20 MR. LANDAU: I didn't want to
21 break your flow and we have been holding back
22 generally, actually, but this is -- just give me a
23 moment. If you are moving on to the next --
24 MR. SPELLISCY: I will move on
25 next to the Bruce-to-Milton allocation.

1 MR. LANDAU: What you have
2 addressed at the moment on the last subheading in
3 terms of the fact of the priority access that was
4 given under the GEIA, the way I have understood
5 your submissions is really focussed upon MFN, is
6 what you're saying is that according to your case,
7 a government has a right to enter an investment
8 agreement. Once the government enters into an
9 investment agreement, it is on a different track,
10 and that track is separate from a non-investment
11 agreement track, and, therefore, it is not like
12 circumstances, to put it in a very, very
13 broad-brush way.
14 But I think what you haven't
15 addressed is whether or not there is an Article
16 1105 issue, because if you take it out of the
17 criteria of like circumstances, one with an
18 investment agreement and one with not, what about a
19 situation where the fact of concluding investment
20 agreement adversely encroaches on the other track.
21 So you are not talking about MFN. You're just
22 talking about the possibility of 1105 treatment,
23 because it has now been undermined by an investment
24 agreement.
25 MR. SPELLISCY: I think you

1 are -- this is what I mentioned. I wasn't sure the
2 claimant was even still pursuing this, because most
3 of what I heard was 1102 and 1103.
4 MR. LANDAU: Yes.
5 MR. SPELLISCY: But I think it
6 comes back and we have argued this in our written
7 submissions, as well, that to say a government
8 cannot enter into an investment agreement because
9 of the customary international law minimum standard
10 of treatment, we see no merit to that.
11 Governments must be allowed to
12 contract, procure to obtain what it is that they
13 need to get to serve their populations.
14 And if the question comes down to
15 whether or not what the government did here was so
16 manifestly egregious or arbitrary, which it would
17 have to in the minimum standard of treatment, you
18 have the explanations of Ms. Lo, of Mr. Jennings as
19 to why the government did what it did.
20 It entered into, the government,
21 the green energy investment agreement because it
22 saw value in it. It saw value in the circumstances
23 in which it was. It believed they would be a
24 marquis tenant, which would increase investor
25 confidence. It believed they would be an anchor

1 tenant, which would bring in manufacturing,
2 manufacturing that could help to serve not only the
3 Korean Consortium, but also the FIT proponents.
4 When we had that slide up there,
5 that Siemens slide, the press release from Siemens,
6 that was proven out. They came for Samsung, but
7 said we can help FIT proponents, as well.
8 And you've got the government
9 understanding that they will help bring in
10 manufacturing commitments, not that they are
11 necessarily going to manufacture themselves, but,
12 as I said I think at one point during this week,
13 jobs are jobs for the government. If Samsung or
14 Korean Consortium attracts somebody, brings them
15 in, that still creates the jobs for people to start
16 working in Ontario.
17 I think in response to that, I
18 would say for Article 1105 violation, it then falls
19 back to: Is the government's decision to enter
20 into the investment agreement manifestly arbitrary?
21 Is it discriminatory?
22 You have more than sufficient
23 evidence, I would submit, to say that it was not.
24 Now, people might disagree about whether it is or
25 is not a good enough deal for Ontario, but, as we

1 saw from some of the case law that was up before,
2 governments have to make controversial choices.
3 Just because they have to make
4 controversial choices doesn't mean it is a
5 violation of Article 1105. We saw the slides, and
6 the claimant has put some of them up as proof of
7 something wrong, but I don't think that they go
8 there.
9 Yes, it was a controversial deal.
10 It was debated hotly even within the government's
11 own party, but that's what governments do. They
12 get the input. They have the policy. They need to
13 debate. They need to discuss. They need to make a
14 decision.
15 And here you have the reasons why
16 they made the decision they made. The claimant may
17 disagree. The claimant may think they should have
18 gotten a better deal, but that is not a basis for
19 an Article 1105 violation, and it shouldn't be the
20 role of international tribunals to start second
21 guessing the wisdom without the proof of some sort
22 of egregious behaviour that would rise to a
23 violation of Article 1105.
24 THE CHAIR: Does that answer you?
25 MR. LANDAU: Yes.

1 MR. SPELLISCY: I am happy to come
2 back to it.
3 MR. LANDAU: Sorry, I didn't want
4 to take very much time, but just I'll be very, very
5 quick. Your answer has focussed upon whether or
6 not it was a good decision to enter into the GEIA,
7 but my question is more focussed upon treatment to
8 the investor.
9 Maybe if you could take away the
10 focus from whether or not it was a good decision.
11 If, just for the sake of argument, if that decision
12 adversely impacts on an investor or an investment,
13 aren't we then in Article 1105 territory?
14 MR. SPELLISCY: Article 1105 is
15 not meant to protect investors from any adverse
16 impact that they might have from government
17 decision-making. Again, we're in a world of
18 limited resources here.
19 Transmission capacity is not
20 unlimited. So any time that the government gives a
21 contract to one generator, it necessarily is going
22 to adversely impact another generator.
23 And so when we talk about when
24 there is a distinction between entering into an
25 investment agreement versus a treatment accorded

1 under the investment agreement, it is a pretty fine
2 distinction we're making, because I would say
3 exactly the same thing I said to you with entering
4 into the investment agreement.
5 The reason why they gave -- we
6 know the reason why they gave Samsung 500 megawatts
7 of priority transmission access, and that's because
8 in order for Samsung to develop their projects, you
9 have the evidence of Ms. Lo and Mr. Jennings that's
10 what the negotiation was. And it was in exchange
11 for the benefits and the value that Ontario wanted.
12 It was a negotiated solution.
13 You've also had the testimony of
14 people as to why, because when you're trying to
15 develop 2,500 megawatts, you need to make sure that
16 those 2,500 megawatts can get on the grid, and so
17 priority transmission access for large projects is
18 essentially a must.
19 You don't want them to be squeezed
20 out by smaller projects which aren't giving you the
21 same value in return.
22 So I think what I would say to
23 that is that the reasons for entering into the
24 investment agreement apply equally to the reasons
25 why the particular treatment was accorded under

1 that investment agreement. I don't want to have
2 any dispute.
3 Yes, we have shown in our slides,
4 in our damages, and I was surprised that the
5 claimant seemed surprise here that our damages
6 expert had concluded that if the green energy
7 investment agreement, the treatment accorded under
8 it, was wrongful, that it did affect and impact the
9 claimant. We have had that position since our
10 counter memorial. We never said that the
11 transmission capacity set aside for the Korean
12 Consortium didn't impact the claimant. Of course
13 it did. It is just it wasn't wrongful for the
14 government to grant that treatment to the Korean
15 Consortium in these circumstances.
16 THE CHAIR: That's clear, yes.
17 Thank you.
18 MR. SPELLISCY: Let's move on,
19 then, to the claimant's allegations regarding the
20 Bruce-to-Milton allocation.
21 Now, throughout this hearing the
22 claimant has focussed on the fact that other
23 developers were awarded FIT contracts and it was
24 not offered one, and specifically it has focussed
25 on the fact that it did not obtain a FIT contract

1 as a result of the Bruce-to-Milton allocation
2 process because of the decision on June 3rd to
3 allow a change in connection points.
4 We showed you in our opening, and
5 I won't go back to it here, but the fact is the
6 claimants did not submit good applications. If you
7 don't submit good applications, you don't end up
8 with contracts.
9 But I think to think carefully
10 about the allegations about the change in
11 connection point that was permitted, which is an
12 allegation -- again, it is 1102, 1103 and
13 1105 -- that it was discriminatory and that it was
14 a violation of the minimum standard of treatment,
15 but I think my answer to both, and the evidence has
16 shown this week, would be the same.
17 The change in the connection point
18 window, which allowed developers within the Bruce
19 and west of London region to pick a connection
20 point in either region, was not manifestly
21 arbitrary or evidence of nationality-based
22 discrimination, because the fact is that it was
23 always part of the FIT program.
24 And it all starts with one thing
25 the claimant I think has been consistently confused

1 on: There's no such thing as an independent area
2 ranking. It was one ranking, the provincial
3 ranking.
4 The borders that were drawn
5 between the areas by the OPA, they are imaginary
6 lines on the map. They never were intended to
7 affect how projects could make use of the rights
8 that they had in the FIT program. And this is a
9 case that starts with the FIT rules themselves.
10 It starts with how projects were
11 ranked. If we pull up -- it's article 4. -- I
12 think it is 4.2(d) and 5(d). You'll see it there.
13 It says:
14 "A project is assessed in the
15 order of its time stamp, and
16 for projects that fail the
17 initial connection test, they
18 go to the economic connection
19 test, the connection
20 availability management
21 section."
22 And it says again that they are
23 assessed in the order of time stamp. For launch
24 period projects, we have heard the time stamp was
25 adjusted based on how many criteria points they

1 received -- they obtained, and for post launch it
2 was just the time the application was received.
3 But there was only one time stamp.
4 You can look through every single FIT rule. There
5 is no time stamp for the area. There is one. Each
6 project got one and only one, and it reflected the
7 ranking the project had in the province.
8 Now, when the OPA published the
9 rankings of the projects that had failed the
10 initial connection availability test, which was all
11 of the projects in the Bruce, because the line
12 wasn't in service yet, it ordered the projects into
13 areas to help developers understand who was closest
14 to them.
15 That's for informational purposes.
16 That didn't somehow give them a new time stamp.
17 They had only the one time stamp. That was the
18 ranking in the province. As Bob Chow has
19 explained, it is again for the purpose of
20 information display. There is no regional ranking,
21 per se. There is only a provincial ranking. The
22 testing, the connection testing, is in the sequence
23 of the provincial ranking. Regional ranking is for
24 information purposes.
25 When the OPA would go back to do

1 its connection tests, it didn't do it region by
2 region. It found the highest ranked in the
3 province and started with that one, and then just
4 went down the list.
5 So with this in mind, let's come
6 back to talk about the connection-point change
7 window that was part of the Bruce-to-Milton
8 allocation process.
9 And I think we should first talk
10 about the OPA's views and what they had been saying
11 on it. And you have seen some of these slides, but
12 I think we should pull at least some of them, two
13 or three of them, up again, because it starts in
14 March of 2010, in our presentation that we looked
15 at by the OPA with some the witnesses.
16 This was the OPA's presentation to
17 FIT developers on how the OPA would run the
18 economic connection test process. As we can see
19 from page 14, the OPA says:
20 "An applicant, after an
21 applicant receives a TAT
22 result, they may request a
23 change in connection point
24 for their project."
25 There is no limitation at all

1 presented. It doesn't say that they could only do
2 so within a region, because of course in November
3 or March of 2010, nobody knew their region. The
4 OPA hadn't published the rankings and hadn't
5 grouped them into those regions for informational
6 purposes.
7 This statement was clearly
8 directed towards all applicants. It was not a
9 fetter or some sort of chain on their ability.
10 So now let's go to the December
11 21, 2010 rankings in the three-point font, and we
12 can look at it again. We have looked at it many
13 times this week, and we have seen they say, in note
14 number 3, which is a header to the entire table,
15 not just to Bruce, not just to west of London, to
16 the entire table, and it says:
17 "FIT applicants will have the
18 opportunity to request a
19 change of connection point
20 prior to the ETC.
21 Connection-point changes
22 could impact the ECT outcome
23 for other applicants
24 requesting a nearby
25 connection point."

1 A nearby connection point. Not
2 all nearby connection points happen to be in the
3 same regions. Electricity doesn't work that way.
4 There is no limitation on connection-point changes,
5 none at all.
6 And I think it is important to
7 remember that this is almost a fundamental tenet of
8 the approach to how we do law in regulation. As
9 Jim MacDougall explained:
10 "There was no explicit
11 restriction on how
12 connection-point changes
13 could be permitted or
14 prohibited or limited. But,
15 in general, with the FIT
16 rules and the FIT contract,
17 if it is not prohibited, then
18 people can do it."
19 That is the way it usually works.
20 If something is not prohibited, then it is allowed.
21 There was no prohibition anywhere in the FIT rules
22 that would have prevented people from changing
23 across these artificial lines created by the OPA.
24 That is why Shawn Cronkwright
25 confirmed in his testimony when I said:

1 "I'd just like to clarify.
2 Did the OPA think they needed
3 a direction from the Minister
4 to allow the connection-point
5 changes?
6 He said:
7 "No, because that was
8 envisioned as part of the
9 rules in the original
10 design." [As read]
11 MR. BROWER: Why did there need to
12 be anything done, a direction or anything else? If
13 people could apply any time, they could apply any
14 time.
15 MR. SPELLISCY: So the direction
16 comes out because of the need to allocate the
17 Bruce-to-Milton capacity. And we have to remember
18 there is a change here. The connection-point
19 change window is only allowed for the Bruce and
20 west of London, and it imposes a cap on the
21 procurement. Those things were different.
22 That was not contemplated in the
23 FIT rules, but, as I come back now in the Bruce
24 region where the claimant applied, we have heard
25 the cap was physical. There was 1,250 megawatts,

1 1,200 megawatts of capacity. 500 went to the
2 Korean Consortium. It is just math. That is what
3 is left.
4 It wasn't true for the west of
5 London; right?
6 So now I think we've looked at
7 what the OPA had been telling...
8 THE CHAIR: I understand there was
9 a change in the rules in the sense that those who
10 were in other regions could not make a
11 connection-point change, whereas under the rules
12 actually everyone should have been able to make
13 such a change.
14 MR. SPELLISCY: Yes.
15 THE CHAIR: Is this correct?
16 MR. SPELLISCY: Yes, this is one
17 of the changes of the direction. This is one of
18 the changes that direction made. But, again, as I
19 talked about in the very beginning of my remarks
20 this morning, that didn't matter to the claimant.
21 They were in a region where they could make a
22 change.
23 THE CHAIR: I understand your
24 point about that not affecting the claimants, yes.
25 MR. SPELLISCY: So now let's come

1 to the other side of the equation, to the
2 developers, and how they understood what the OPA
3 had been telling them. And we come to a slide that
4 we've seen again and again, and it is the letter
5 from the president of CanWEA to the Minister of
6 Energy. It is on May 27th.
7 Again, we've seen this. I don't
8 need to go through it. He wrote to express the
9 majority view of the members that the OPA should
10 immediately do what they have been promising to do
11 and open the change window.
12 They make no mention here of their
13 understanding about some sort of regional
14 limitation on connection-point changes, none at
15 all. In fact, as we'll see in a second, their
16 actions showed they didn't believe one existed.
17 CanWEA confirmed to the Minister
18 on this date that its members had invested
19 significant resources in the previous months to
20 prepare their interconnection strategies.
21 And we're going to look at what
22 that preparation entailed in a second, but I would
23 just like to pause, because we've gone around on
24 this, and there is a question. On June 3rd the
25 direction is issued. That's the Ministerial

1 direction.

2 The claimant has said that the

3 CanWEA letter, that this couldn't have mattered,

4 because people from the OPA believed that the

5 decision had been made on May 12th.

6 But the claimant has also said and

7 acknowledged it wasn't an OPA decision. It was a

8 government decision. So we should be looking not

9 at what the OPA believed. We should be looking at

10 what the Government of Ontario believed.

11 And we've pulled up the documents

12 in the opening slide. There was e-mails after

13 this, after May 12, on May 20th between Andrew

14 Mitchell at the Ministry of Energy in the

15 Minister's office and Sue Lo and Rick Jennings on

16 May 20th, still debating about whether there would

17 be a connection-point change window, bouncing ideas

18 back and forth.

19 The people at the OPA may not have

20 been aware of that, but the fact is the government

21 was still deciding it. And in fact, as anybody in

22 government knows, a decision is not made until the

23 elected official in charge makes the decision.

24 That decision was made on June

25 3rd, and there is no reason to think if CanWEA, the

1 industry association, had come out differently than
2 they had, that the Minister's reaction might not
3 have been different. But they came out in full
4 support.
5 MR. APPLETON: Excuse me,
6 Mr. Spelliscy, sorry. The live feed has gone down
7 for half of the room.
8 MR. SPELLISCY: You mean the
9 transcript feed? Is that something that can be
10 reset by the court reporter?
11 --- Technical difficulty
12 --- Upon resuming at 3:38 p.m.
13 THE CHAIR: Ready to start again?
14 MR. SPELLISCY: Before you begin,
15 would you like us to give you the documents?
16 THE CHAIR: We have one, so we're
17 fine. I am happy, Mr. Spelliscy.
18 MR. SPELLISCY: I was just about
19 to start talking about what developers would have
20 understood from what the OPA had been saying for
21 several years, and I think -- remember they had
22 said to the Minister that they had been investing
23 significant resources in the previous months to
24 prepare their interconnection strategies.
25 Let's see what those strategies

1 were. When the connection-point change window
2 opened up ten days later, 39 developers changed
3 connection points and a very significant number
4 moved from the west of London to the Bruce region.
5 What does that show? That would
6 show that for months developers had been preparing
7 to change their connection points in this way,
8 without regard to regional boundaries, obviously
9 understanding that this was permitted.
10 And if we think about the system
11 electrically, this is just common sense. Remember
12 Mr. Chow's testimony that it is not about some sort
13 of hard geographical line. It is about how the
14 electricity system works together.
15 So to understand this, I want to
16 take a look at a map, and it was a map that was
17 actually prepared by the claimant and we showed it
18 to Mr. Robertson, because I think in looking at
19 that map, we can understand some of the problem
20 with the claimant's theory is.
21 The map shows that Bruce region.
22 You can see at the call-out there at the dotted
23 line is the bottom of the Bruce region.
24 It shows a number of projects,
25 including the claimant, which is the pink one

1 there, and that is the Twenty Two Degree project,
2 according to the claimant's map. It also shows at
3 the bottom straddling that region is the Goshen
4 project, and I want to focus on the one in the
5 middle, the Bluewater project.
6 That project was ranked by the OPA
7 in the west of London area in the December
8 rankings. But the TTD and the Goshen projects
9 which surround it were located by the OPA in the
10 Bruce area.
11 When Ms. Squires questioned
12 Mr. Robertson about this map, his explanation was
13 that he didn't know why NextEra decided to locate
14 the Bluewater project in the west of London region.
15 But that is just not how it works
16 in the FIT rules. When the applications are made,
17 the applicants didn't specify a region. The
18 regions were the construct of the OPA. Developers
19 merely picked connection points, or, in the case of
20 the Bluewater project, didn't pick a connection
21 point. It had the OPA just put them in a region.
22 Now, why was the OPA willing to
23 put people in regions without consulting developers
24 in advance? Bob Chow has explained in his witness
25 statements because the regional lines didn't

1 matter. If they did -- if they did, if they were
2 going to have the impact that the claimant says
3 they do, then obviously the OPA would have wanted
4 for developers to determine the region they were
5 applying to.
6 I think if we look at this map, we
7 can actually see just why the claimant's position
8 on how connection point changes would be allowed
9 just makes no sense electrically.
10 In essence, the claimant's
11 position would be that the region's represented
12 boundaries and that meant that the Bluewater
13 project, which the OPA had placed into the west of
14 London area, could not connect in the Bruce region.
15 Despite being surrounded by Bruce
16 projects and despite having the Seaforth
17 transmission station, which is the Bruce region
18 connection point, practically on its property,
19 under the claimant's interpretation that project
20 could not connect to that station.
21 There would have been no
22 reasonable justification for the OPA to prevent
23 developers from changing connection points across
24 regional lines when it just might have made sense
25 for them to do so.

1 Now, I want to pause very briefly,
2 because the claimant has suggested that the
3 Minister shouldn't have paid attention to the
4 letter of CanWEA, that it should have paid
5 attention to a letter that the claimant wrote on
6 its own behalf with nobody else contesting the
7 CanWEA letter.
8 But we've heard time and again
9 complaint letters come in. Governments can't make
10 everybody happy with every regulatory policy
11 decision that they make. It is just not possible,
12 and it is not what is required by Article 1102,
13 1103 and 1105.
14 The fact is, with the
15 Bruce-to-Milton allocation and the change in
16 connection points, the OPA and the Government of
17 Ontario, in directing them to do so, respected the
18 expectations that developers had had for years as
19 to how this process would play out, at least for
20 those developers in the Bruce and west of London
21 regions, which are the only ones that matter in
22 this arbitration.
23 And with that, I will segue to my
24 colleague, Mr. Watchmaker, who will now discuss
25 damages.

1 THE CHAIR: Thank you.
2 Mr. Watchmaker.
3 SUBMISSIONS BY MR. WATCHMAKER AT 3:43 P.M.:
4 MR. WATCHMAKER: Madam Chair, good
5 afternoon. My goal today will be to give you
6 additional comfort in disposing of these claims.
7 Of course, what I hope to convince you off is that
8 you should feel at ease in dismissing the
9 claimant's case in its entirety.
10 With respect to damages, the
11 claimant in a sense had a straightforward burden:
12 Show how the measures caused it actual loss.
13 Instead, what you have before you
14 is a claim based on a fundamentally flawed theory
15 of damages, including absent or improbable
16 causation, and a valuation that does not even pass
17 a modicum of reliability.
18 Like the jurisdictional issue of
19 consent, if the claimant fails to prove causation
20 or fails to present credible valuation, whether
21 there's merit to its claims or not, its case must
22 fail.
23 Let's quickly situate ourselves.
24 I don't intend to spend too much time here, but
25 let's just look at the claims of loss that the

1 claimant makes.

2 So we have seen these dollar

3 figures before. The only thing I want to indicate

4 to you are two things. First, as you know, we

5 right now do not know how much the Article 1105

6 claim is, because that claim has been conceptually

7 altered and there are no accurate figures in the

8 record as of this date for that claim.

9 The other thing to notice is that

10 the Article 1106 claim of $110.8 million, as was

11 confirmed by Mr. Low yesterday, is included in the

12 sums of the other figures there above.

13 Okay, that by way of background.

14 This is how I would propose to proceed through

15 these issues today. First, I will present the key

16 legal principles relevant to your assessment of

17 damages. Second, I will demonstrate the flaws in

18 the claimant's damages claim. Finally, I will

19 address the conclusions we can draw from our

20 discussion.

21 Now, there should be no great

22 debate on what the appropriate legal standards are

23 in this case, and yet there is. It should go

24 without saying that the objective of an award of

25 damages is reparation; that is, it is a remedy that

1 seeks not to reward, but to correct the economic
2 harm suffered as a result of the alleged breaches.
3 It should also go without saying
4 that causation is a necessary condition of
5 reparation. Furthermore, the evidentiary standard
6 to be applied is plain: The claimant bears the
7 burden of demonstrating proof of causation and
8 quantum.
9 Beginning with the evidentiary
10 standard, the party alleging a violation of
11 international law giving rise to international
12 responsibility has the burden of proving its
13 assertion. This is well-settled law.
14 For instance, the tribunal in
15 Thunderbird held that with respect to the burden of
16 proof, tribunals must apply the well-established
17 principle that the party alleging a violation of
18 international law giving rise to international
19 responsibility has the burden of proving its
20 assertion.
21 Of course this evidentiary
22 standard is also codified in the rules governing
23 these proceedings. Article 24 of the UNCITRAL
24 arbitration rules requires that each party shall
25 have the burden of proving the facts relied on to

1 support his claim or defence.
2 So why is this evidentiary
3 standard relevant here? Because despite filing two
4 expert valuation reports and two memorials, you on
5 the last day of the hearing are still waiting for
6 the claimant to provide evidence of how the
7 measures at issue caused actual quantifiable harm,
8 as well as evidence of quantum.
9 The second relevant legal
10 principle is the standard for awarding damages, and
11 that standard revenue requirement a damages award
12 to repair the harm caused.
13 So the objective of the award of
14 damages, again, to repair the harm actually caused
15 by the wrongful conduct, indeed, this objective is
16 provided for in the text of NAFTA and by the
17 applicable rules of international law that we are
18 all familiar with. Again, this is well-settled
19 law.
20 Article 1116 is clear. The claim
21 can only succeed if liability is established and
22 the investor has incurred loss or damage by reason
23 of, or arising out of, that breach.
24 And of course this is a standard
25 recognized in international law more broadly, as

1 well going back at least close to 90 years to the
2 factory of Chorzow case. The oft-cited finding in
3 that case was:
4 "Reparation must, as far as
5 possible, wipe out all the
6 consequences of the illegal
7 act and reestablish the
8 situation which would, in all
9 probability, have existed if
10 that act had not been
11 committed."
12 We need to pause here. With
13 respect to every alleged measure, then, keep in
14 mind the situation, which would in all probability
15 have existed if that act had not been committed.
16 And let's remind ourselves this case has been cited
17 and applied by hundreds and hundreds of
18 international tribunals, including investment
19 tribunals just like this one.
20 And if we were not certain enough
21 of this standard, it was confirmed by the ILC in
22 its articles on state responsibility, as well.
23 What is required by international law is full
24 reparation for the injury caused by the
25 internationally wrongful act.

1 This is also consistent with more
2 recent jurisprudence. For example, in Duke Energy,
3 the tribunal essentially enunciated, quoting, in
4 fact, the Chorzow factory case.
5 In fact, this is so well settled
6 that both the claimant and Canada referred to this
7 legal standard in their respective pleadings.
8 However, while the claimant invoked these
9 well-settled propositions of international
10 reparation in its written pleadings, it then
11 assesses damages without regard to them.
12 Instead of repairing the alleged
13 harm, the claimant proposes an approach to damages
14 that extends the wrongful conduct to the claimant
15 and only the claimant, in effect rewarding it.
16 In cross-examination yesterday,
17 Mr. Low said, in relation to the claimant's
18 discrimination allegations, that:
19 "The 'but-for' test under
20 Article 1103 is not to put
21 the investor back into the
22 position of what it had, but
23 the 1103 test is to provide
24 the better treatment."
25 Later, in response to a question

1 from Judge Brower, he responded that the
2 compensation for that breach is the treatment.
3 This position contradicts 90 years
4 of international legal jurisprudence. In support
5 of this unusual position, the claimant appears to
6 posit two untenable and vague theories of how NAFTA
7 constitutes some form of, perhaps, lex specialis on
8 reparation because of Articles 1103, which we heard
9 about, or 1104, which it pleads in its written
10 pleadings.
11 Neither of these provisions says
12 what the claimant believes they do. As we know,
13 Article 1103 provides for most-favoured nation
14 treatment. Article 1104, which does not in and of
15 itself impose any substantive legal obligation,
16 simply ensures that where there is a difference in
17 treatment provided to Canadian nationals and
18 investors of third party states, that US and
19 Mexican investors must be provided the better of
20 the two.
21 On their face, neither provision
22 requires the provision of the best treatment in the
23 jurisdiction as the claimant espouses. But, more
24 importantly, neither provision alters a century,
25 almost a century, of international jurisprudence on

1 reparation.

2 In response to Judge Brower's

3 request for some legal authority for its unusual

4 damages theory, the claimant this morning suggested

5 you read three NAFTA cases. As Mr. Spelliscy has

6 already told you, you should indeed read these

7 authorities, because they don't support the

8 claimant's theory.

9 Canada is unaware of any case

10 directly on point. However, Canada can identify at

11 least one case in which a similar theory of damages

12 was advanced and rejected concerning an improbable

13 "but-for" theory of damages.

14 That case was Merrill & Ring

15 Forestry v. Canada. Merrill & Ring involved

16 allegations of Articles 1102, 1105, 1106 and 1110

17 violations by Canada arising out of treatment of

18 exporters under Canada's log export control regime.

19 That regime required log exporters

20 to offer their logs up for domestic auction before

21 being permitted to offer them into allegedly more

22 lucrative export markets. The claimant in Merrill

23 advanced a "but-for" theory of damages based on it,

24 and it alone, being freed from Canada's log export

25 regime, while all of its competitors would continue

1 to be subject to that regime.

2 As a result, the claimant's

3 "but-for" world estimated significant premium

4 prices for exported logs that would not be

5 subjected to the competition of other Canadian log

6 exporters who were still subject to the export

7 restrictions of the regime.

8 The claimant's valuator calculated

9 damages on the basis of these premium-priced export

10 logs for both past and future losses.

11 The Tribunal in Merrill & Ring

12 recognized this "but-for" scenario was improbable.

13 The Merrill tribunal held:

14 "Here, again, Canada's

15 criticism is persuasive.

16 Either all log exporters are

17 outside the regulatory regime

18 or they are all in. One

19 cannot selectively place

20 different exporters in

21 different categories of the

22 scenario. Thus, if the log

23 export control regime was

24 contrary to NAFTA, the

25 probable counter factual

1 would be to remove the harm.
2 You remove the harm by
3 eliminating the regime not
4 only for the claimant, but
5 for all exporters."
6 Canada notes that the counsel and
7 the damages value in Merrill & Ring are the same
8 counsel and valuator in the case before you. The
9 "but-for" theory was wrong then and it is wrong
10 now. Yesterday the claimant sent Mr. Low up to
11 defend its unusual theory of damages. Mr. Low was
12 forced to disagree with the very international
13 legal principle of reparation that the claimant
14 itself relied on in its reply memorial.
15 By contrast, Mr. Goncalves's
16 valuation is entirely consistent with that legal
17 principle of reparation.
18 Also yesterday, I think I heard
19 Judge Brower plead: Just don't tell us any
20 stories.
21 Yet a day later, there is yet
22 another story, a lesson in ABCs, as it were, about
23 how the normal international legal principle of
24 reparation would somehow leave a foreign investor
25 without a remedy. It is just not right.

1 But even in the ABC scenario
2 posited by the claimant, Mr. Goncalves's approach
3 would be exactly the same: Examine the most
4 probable "but-for" scenario by removing the
5 wrongful conduct.
6 So let's go back to the proper
7 standard, and I think I am going to skip ahead on a
8 couple of slides you have there and go straight to
9 the slide that is causation, Duke Energy.
10 Here is the Chorzow factory test
11 again:
12 "Any award should wipe out
13 all of the consequences of
14 the illegal act and
15 reestablish the situation
16 which would, in all
17 probability, have existed if
18 that act had not been
19 committed."
20 Keep this in mind, as well. Even
21 if the claimant wanted to propose its unusual
22 theory of damages, it could have -- could have --
23 alternatively presented a much more reasonable
24 theory based on this 90 years of jurisprudence, but
25 it hasn't done that.

1 And, as a result, if you find no
2 liability as a result of the GEIA, then Mr. Low's
3 entire base case falls apart. And if that happens,
4 then the claimant's entire proof of loss is
5 invalidated and any finding of liability is
6 meaningless.
7 But let's presume for a second
8 that that is not the outcome. There are other
9 reasons to dismiss much of the claimant's damages
10 case, and that brings me to the flaws in the
11 claimant's damage claim.
12 And to see these flaws, let's
13 apply the factory of Chorzow standard. What is the
14 situation which would, in all probability, have
15 existed but for the wrongful conduct?
16 When we do that, we see that
17 assumed breaches of NAFTA could not have caused
18 many of the damages claimed. And we see that the
19 claimant's approach to valuation is flawed and
20 biassed.
21 Now, Canada has already mapped out
22 the causal problems with the claimant's case in its
23 counter memorial and rejoinder memorial.
24 Mr. Goncalves has, in great detail, also mapped out
25 these problems in both of his expert reports.

1 I don't propose to repeat these
2 pleadings, but we will refer you to them in our
3 post-hearing submissions.
4 We have also established in our
5 pleadings that the claimant's valuation reports are
6 entirely unreliable. Again, I don't propose to
7 repeat these submissions here. Right now, I would
8 like to focus on what you have heard this week.
9 So let's look at whether the
10 claimant here has demonstrated that each of its
11 allegations of harm has caused specific losses that
12 are sufficiently clear, direct and certain.
13 Recall the claims that
14 Mr. Spelliscy has mapped out for you earlier. I
15 present them in a slightly different way here for
16 the purposes of damages assessment. The first is
17 the claimant's Article 1106 claim that the domestic
18 content requirements caused the claimant to use
19 undesirable wind turbines and, as a result, it lost
20 $110.8 million.
21 Specifically, they claim that the
22 domestic content requirements caused them to use a
23 less efficient GE 1.6xle turbine instead of the GE
24 2.5xl turbine. As a result, they claim as losses
25 the alleged future revenues that the larger turbine

1 would return.

2 However, the claimant has not

3 shown and cannot show that these alleged future

4 losses were caused by the FIT program's domestic

5 content requirements, and I would like to slip into

6 confidential session for just one second.

7 --- Upon resuming confidential session at 4:01 p.m.

8 under separate cover

9 --- Upon resuming public session at 4:02 p.m.

10 MR. WATCHMAKER: So let's look at

11 another one of the claims. Second is the Article

12 1105 claims which we have heard this week, that the

13 negotiation of the GEIA was cloaked in secrecy and

14 that, as a result, the claimant could not negotiate

15 a similar deal, causing it to lose some as of yet

16 uncalculated 1105 losses.

17 But, again, what actual losses

18 could have possibly been caused by the

19 confidentiality of the GEIA? The confidentiality

20 of the negotiations could only have resulted in any

21 actual harm during the period in which the claimant

22 first made its investment up to the time it first

23 became aware or should have become aware of the

24 negotiations.

25 The GEIA negotiations were

1 publicly disclosed on September 26th, 2009. The
2 only plausible losses that could have been caused
3 by the secrecy of the GEIA, assuming it's a breach,
4 were any investment costs spent by the claimant up
5 to this date.
6 But of course the claimant has
7 failed to prove any such causation or any
8 quantifiable losses arising from this alleged
9 breach.
10 You have not seen a single invoice
11 on the record from this period of time. The only
12 invoice in the entire record relates to the GE
13 turbine agreement.
14 Let's look at the third claim.
15 What about the claimant's broader GEIA claim? This
16 is the main claim in this case, that the GEIA is
17 discriminatory under Articles 1102 and 1103. As
18 Mr. Goncalves explained to you yesterday, both in
19 direct testimony and in response to questions from
20 Judge Brower, the only way in which the GEIA could
21 have caused the claimant any losses was in the
22 application of the 500-megawatt priority access set
23 aside that caused the TTD and Arran projects not to
24 receive FIT contracts on July 4th, 2011. The
25 Summerhill and North Bruce projects were ranked far

1 too low to obtain FIT contracts.
2 However, the issue of causality
3 with respect to this claim is more complicated than
4 just obtaining contracts. While Mr. Low ignores
5 all of the significant completion and project risks
6 in his valuation, Mr. Goncalves rightly analyzes
7 and assesses their impacts.
8 The result is a vastly-reduced
9 quantum valuation of no more than 19.4 million, and
10 it is further complicated because, as Mr. Goncalves
11 has found, the quantums of past losses claimed are
12 based on unaudited and unverified information from
13 the claimant without sufficient documentary
14 support.
15 Remember, again, except for the
16 turbine deposit, there isn't a single invoice in
17 the record of this arbitration, not one.
18 Finally, what about the
19 connection-point change window? How could it have
20 caused the claimant harm? Here the allegation is
21 that but for the connection change window, projects
22 in the west of London would not have been permitted
23 to change connection points causing the claimant to
24 lose contracts for its TTD and Arran projects.
25 Again, as Mr. Goncalves confirmed

1 in his direct testimony yesterday, when you remove
2 the connection change projects, TTD and Arran fall
3 down below the 750 megawatts available capacity and
4 get contracts, but Summerhill and North Bruce do
5 not.
6 Now, the same comments I just made
7 with respect to the quantum of valuation problems
8 also apply to this scenario. Where does that leave
9 you? There are significant and substantial flaws
10 in the claimant's case that can be usefully
11 summarized as follows, and I apologize these are
12 not up on a slide.
13 First, the claimant proposes a
14 theory of damages and causation that is at odds
15 with 90 years of international jurisprudence on
16 reparation. If you find a breach of NAFTA, your
17 duty is to repair any actual and proven harm caused
18 by removing the harmful conduct, not by rewarding
19 the claimant with a windfall.
20 Second, in considering an
21 appropriate "but-for" counter factual scenario on
22 which to base a valuation, jurisprudence directs
23 you to consider what the most probable position the
24 claimant would be in, but for the breach.
25 The claimant's "but-for" position

1 is simply improbable. Priority access cannot be
2 provided to all FIT proponents. If we have learned
3 nothing from this case, we now know that
4 transmission capacity is a limited resource.
5 Third, the claimant has not only
6 failed to provide you with evidence that the
7 challenged measures have caused it any loss. It
8 has also failed to provide you with sufficient
9 verifiable evidence that it has suffered losses of
10 those quantums.
11 And, fourth, when afforded the
12 ability to cross-examine Canada's expert, the
13 claimant took hours to ask him not a single
14 question of substance. That should be a clear
15 indication of the veracity and strength of
16 Mr. Goncalves's testimony.
17 For these reasons, you are
18 perfectly justified to deny the claimant's case for
19 wont of proof, causation and quantum of loss.
20 Thank you for your attention, and
21 I will turn Canada's argument over to Mr. Spelliscy
22 to conclude.
23 MR. SPELLISCY: Thank you. I
24 think unless the Tribunal has any questions they
25 would like to ask me at this time, then we would

1 just reserve our remainder of time in rebuttal, but
2 it is up to the Tribunal.
3 THE CHAIR: Any questions at this
4 stage? No. Thank you.
5 So would the claimants wish to
6 rebut?
7 MR. APPLETON: Yes, I am sure we
8 do. Perhaps we might get a time update just to
9 make sure that we're aware. We know on the other
10 side there were a number of interruptions, Mr.
11 Donde, along the way.
12 THE CHAIR: What is Canada?
13 MR. DONDE: Twenty-three.
14 MR. APPLETON: Do you want a
15 moment?
16 MR. MULLINS: Can we take five
17 seconds to --
18 THE CHAIR: No. You can have a
19 few minutes just to prepare your rebuttal, if you
20 wish. I think it would be more efficient.
21 Absolutely.
22 --- Recess at 4:09 p.m.
23 --- Upon resuming at 4:13 p.m.
24 REPLY SUBMISSIONS BY MR. MULLINS:
25 MR. MULLINS: Members of the

1 Tribunal, I will try to be brief. I learned from
2 Ms. Squires that we have the same Irish heritage
3 and apparently, when I ended up in North Florida,
4 we have the same speed of speech. So I will try to
5 be careful.
6 I am going to try to deal with
7 some issues that I talked about, and then
8 Mr. Appleton will talk about those issues and try
9 to be efficient.
10 I thought it was telling that
11 Canada started response with damages. Just so
12 we're clear, there's been a lot of talk by the
13 front and end of the argument that we haven't
14 proven causation.
15 Causation has been admitted.
16 Mr. Goncalves has said that if it weren't for --
17 "but-for" the reservation of the 500 megawatts in
18 Bruce, we would have gotten contracts, at least two
19 of our projects.
20 Mr. Goncalves has admitted but for
21 the reservation -- the change in the window for the
22 FIT -- we showed this on the slide -- we would have
23 gotten the contracts.
24 Mr. Goncalves put them both
25 together and said the two -- you find both of them,

1 we would still get contracts. There's no question
2 that we have proven causation, and this wasn't a
3 surprise. It was in Mr. Goncalves's rejoinder
4 report. We can read it. It is in paragraph 45.
5 We understood that.
6 So we came here today -- this
7 week, we weren't focussed on causation. He
8 admitted it. What surprised us was some of the
9 testimony coming from Canada's witnesses. And the
10 arguments we hear today, we're still hearing that
11 somehow it's a province-wide ranking and the areas
12 don't make a difference.
13 That is completely inconsistent
14 with what Mr. Goncalves is saying. If it was all
15 province wide, how come, then, if we show a
16 violation, we automatically are entitled to a
17 contract? In other words, by him admitting we have
18 shown causation, he's saying that our rank at eight
19 and nine is enough to get us the contract, period,
20 period. There is no more analysis you need to
21 think about.
22 So we hear all of this discussion
23 about our applications, and did you get these extra
24 credit points, you should have been ranked higher.
25 It is all irrelevant, because Mr. Goncalves has

1 admitted our eight, nine ranking was fine, because
2 he's saying we got ranked eight and nine, and if
3 you hadn't given that stuff to Korea, you would
4 have gotten the contract.
5 So that's what surprised us. That
6 is what surprised us. It had nothing to do with
7 causation.
8 What Mr. Watchmaker is confusing
9 is causation and methodology. What you heard him
10 say is, Well, we haven't shown you how we have lost
11 damages. We haven't shown you causation.
12 We have proven causation; they
13 have admitted it. The distinction is methodology.
14 How do you calculate lost profits? That is not a
15 causation issue. Mr. Brower?
16 MR. BROWER: Excuse me. Isn't the
17 distinction also between two projects and four
18 projects?
19 MR. MULLINS: There is a
20 distinction and the evidence will show two things.
21 First, as Mr. Low suggested or testified, on the
22 MFN causation essentially is assumed. Our
23 interpretation of MFN, if -- we're entitled to the
24 most-favoured nation, and so, therefore, if we're
25 not given it, there is your causation. So that is

1 the four projects.

2 On the Article 1105, on the two

3 projects it is -- again, it's been admitted. On

4 the other two projects, our position is the

5 evidence shows there was sufficient capacity to

6 award more capacity. If you go through the whole

7 record of it, then you award all of the capacity in

8 Bruce. They reserved it.

9 We believe that based on that

10 evidence, and Mr. Low testified about this, that by

11 management expectations, there was sufficient

12 capacity in order to award more projects.

13 Now, the other critical point, but

14 just not to leave this point, by Mr. Goncalves

15 admitting in his expert report that the reservation

16 of the transmission to the Korean Consortium caused

17 harm to Mesa, he says this. He says that is

18 causation, right? You reserved it. That happened

19 in September 2010.

20 So remember these arguments, how

21 we're wrong about when the damages are? He's

22 basically admitting we were damaged in 2010,

23 because he's admitting causation occurred, because

24 that happened in September 2010.

25 If you have any doubts about that,

1 any question whether or not we suffered real
2 damages when Bruce came in, all you need to listen
3 to is read Mr. Edwards' deposition, because
4 once -- once we were lower-ranked on some of our
5 projects, Mr. Edwards came calling to try to get
6 some of our low-hanging fruit.
7 Obviously if you are lower ranked,
8 you have damages, and so what happens is by
9 shutting us out of the first 500, it's not a great
10 project. Those guys in Bruce automatically, on
11 that day, it's not worth as much a value.
12 But of course the irony is, if
13 they hadn't done what they did with NextEra, we
14 still -- we could have gotten a contract, but it is
15 what it is.
16 Now, I am trying to go through my
17 notes to make sure I don't repeat myself and so I
18 will be efficient.
19 Now, Mr. Spelliscy also accused
20 us. He made a lot of accusations and said: You
21 back them up. You better be careful what you say,
22 Mr. Mullins.
23 There is no -- we have proven our
24 case. There is no innuendo here that decisions
25 were made on politics. Ms. Lo sat in front of you

1 and admitted it. She admitted that the main reason
2 that this thing was sped up on the FIT program, for
3 example, was politics, not any legitimate reason
4 other than politics to make you look good.
5 This is not about innuendo. Here
6 is some of the evidence we have seen. The Ministry
7 of Energy obtained confidential results of the
8 regional rankings, got them. Ms. Lo denied she got
9 them. Originally, Mr. Cronkwright showed them to
10 the Minister of Energy.
11 The Minister of Energy had high
12 governmental meetings with NextEra. Sue Lo, in an
13 e-mail -- you saw the e-mail -- was worried about
14 protecting IPC, which was owned by Mike Crawley,
15 the president Mike Crawley, the liberal party
16 leader.
17 This letter is showing NextEra
18 knew the change window beforehand. We asked
19 Mr. MacDougall about that. There was evidence
20 NextEra gave political funds. There is evidence
21 Sue Lo, after the decision was made on May 12, met
22 NextEra immediately after and decided -- and talked
23 to them.
24 There is evidence, asked by Ms.
25 -- found by a document from Arbitrator Brower that

1 she asked NextEra for the rankings.
2 And what is really disturbing
3 about this is this is supposed to be an even
4 process where people are trying to act in good
5 faith. Why in the world is the Ministry of Energy
6 finding the results? Why are they looking at the
7 results of the dry run? Why are they getting where
8 the rankings were for NextEra?
9 Now, we heard a lot about that
10 there was -- what the developers' expectations were
11 with the CanWEA situation. The undisputed evidence
12 from developers, from testimony, is Colin Edwards
13 and Cole Robertson.
14 They testified that the change
15 with the -- going to different regions was new.
16 That is what the testimony is.
17 And Mr. Spelliscy was talking
18 about, well, you know, it looks like Article 1105
19 is only about non-disclosure. Arbitrator Landau
20 saw through that in his questioning. It is not
21 just about non-disclosure. There are
22 misrepresentations here.
23 Just to give you an example, in
24 the press backgrounder we keep on hearing about,
25 they talk about 16,000 green energy jobs. That's

1 not true. There is nothing in the GEIA about that.
2 They talk about $7 billion of revenue. There is
3 nothing in the GEIA about that.
4 And beyond that, the most
5 egregious misrepresentation is the Premier telling
6 us, Well, we're all ears.
7 The truth is that everybody that
8 showed up and asked for a GEIA-like deal was told
9 to go pound sand, and it got to the end where the
10 last e-mail we showed you said, We can't do this
11 deal. It says, We cannot give you a special deal
12 under the GEIA.
13 And why? Why is that? Well,
14 Mr. Spelliscy showed us in his slide at page 120,
15 paragraph 8.7, the government -- he didn't
16 highlight this part of the sentence. It says:
17 "The Government of Ontario
18 agrees that it shall not
19 provide or permit to be
20 provided by its agencies..."
21 It's not just the Government of
22 Ontario, its agencies:
23 "... to any other renewable
24 energy project or developer
25 the benefit of an economic

1 development adder or similar
2 incentive which is greater
3 than the economic development
4 adder, unless that developer
5 agrees to have the same
6 scope."
7 In other words, what they are
8 saying is they couldn't enter into another
9 agreement unless the scope was identical, and that
10 was not possible. He just told you that was not
11 possible.
12 And they are telling me, well, you
13 know, we're being criticized we couldn't get out of
14 it. Well, you know, what could we have done?
15 I'll tell you what you could have
16 done. You could have done the feasibility study
17 you were supposed to do in the MOU. You could have
18 done the contingent agreement you were supposed to
19 do. You didn't do that either.
20 You could have done, you know,
21 maybe a stakeholder comment period on it. You
22 didn't do that either. There was a lot of things
23 you could have done.
24 They entered into an agreement.
25 The Premier is telling us, We're all ears. He

1 doesn't tell you his hands are tied.

2 It is not just about transparency,

3 but, by the way, we're supposed to compete when it

4 is confidential for 2008 to 2009. We're supposed

5 to guess this thing is going on. They were

6 contractually required in the MOU not to disclose

7 it to anybody, and then they regret it comes out.

8 They don't tell you all of the

9 terms. They skip the fact in early fall of 2009

10 all of the terms have not been given. Then they

11 give the press backgrounder, and then they don't

12 release their agreement. And they are telling

13 we're supposed to go to you and give you the same

14 deal, and then they say, Well, we couldn't release

15 it then, because now we had to protect Samsung.

16 And they are saying, Well, you

17 know, gosh, nobody called us and asked for it.

18 And that's the other thing. My

19 client is being criticized for believing in the FIT

20 program. He's looking at this deal. He's being

21 told, Well, Samsung is going to make 16,000 jobs

22 and $7 billion of revenue, and Mr. Robertson is

23 saying, I just want the 540 megawatts. I figure I

24 got a fair deal here.

25 Now he is being criticized for

1 believing in Ontario's good faith, you know, and
2 this idea that we're supposed to predict that
3 assurances is automatically ten -- a year down the
4 road, we're going to be kicked out.
5 When I was a kid, I used to go to
6 Disney World all the time, and this is what this
7 is. The Korean Consortium was told, You can go
8 into Disney World first. You get to go on Splash
9 Mountain, okay?
10 Meanwhile, my client is waiting in
11 line in Space Mountain, and we're supposed to know
12 when you say, Look, you got -- the Korean
13 Consortium has access to Disney World. That meant
14 we're supposed to know that after Space Mountain,
15 the Korean Consortium, they can go to Space
16 Mountain, kick my client out of the line, and then
17 they shut down the park. They can still keep it
18 open. That's what they are supposed to predict a
19 year down the road.
20 It is insane. You know, at the
21 end of the day, the Korean Consortium did not have
22 to do anything. We weren't told they didn't have
23 to build anything. We weren't told any of this
24 stuff. And clearly now, if we look at the
25 agreement, there is no way they could enter one,

1 anyway.
2 THE CHAIR: Mr. Mullins, it would
3 really help us if you try to answer, you are
4 rebutting, you are not repeating what you've said
5 already in the opening and this morning, because we
6 know it. I mean, you can trust us. We take notes
7 of everything. Now I've stopped because it was
8 repetitious.
9 MR. MULLINS: I thought those
10 points were rebuttal to some of the stuff I heard.
11 THE CHAIR: Yes, yes, of course,
12 but if it is nothing new, then there is no need to
13 repeat.
14 MR. MULLINS: I can follow up as I
15 stand here. Mr. Watchmaker chided us on our ABC
16 model. We said, well -- you know, that
17 hypothetical we gave.
18 But he said under Goncalves's
19 "but-for" model, it would still work. I didn't
20 hear how ABC gets damages. He didn't say. He said
21 it would still come out. There was no analysis of
22 how ABC gets any damages under the so-called
23 Goncalves rule. There is nothing.
24 With the comments from the Chair,
25 I don't want to repeat myself.

1 THE CHAIR: Thank you.
2 MR. MULLINS: I hope I was
3 responding to the question. I really intended to
4 do so, especially with the idea about the
5 causation, which I really --
6 THE CHAIR: You made your point
7 very clear.
8 MR. MULLINS: If there is any
9 other questions on the factual issues or causation
10 issues, otherwise I will turn it over to my
11 colleague.
12 THE CHAIR: No, we have heard a
13 lot of information a few days now. Of course we
14 could ask many questions, but I think it is smarter
15 if we go home and we analyze what we have heard.
16 MR. MULLINS: Okay, thank you so
17 much for your time.
18 THE CHAIR: Thank you. It was
19 clear.
20 MR. MULLINS: Thank you so much.
21 MR. APPLETON: Just before, a
22 procedural question. Where are we for the time
23 just so we're all clear?
24 MR. DONDE: Fourteen minutes have
25 been used.

1 MR. APPLETON: That means 14
2 minutes are left?
3 MR. DONDE: Yes.
4 REPLY SUBMISSIONS BY MR. APPLETON:
5 MR. APPLETON: Excellent. All
6 right. We will go from there. Thank you very
7 much. Can you hear me now?
8 All right. I will try to raise
9 specific questions that have arisen in the
10 commentary this afternoon.
11 First of all, Canada took us to
12 look at the testimony of Mr. Robertson. If you
13 recall, Canada didn't take you to page 214 at line
14 20 and 21 when Mr. Robertson was asked:
15 "Did you mean procurement in
16 the legal sense under NAFTA?"
17 He said:
18 "I am not a lawyer. I'm
19 definitely not an
20 international trade lawyer.
21 I did not mean definition of
22 procurement as I heard it
23 used in the openings of both
24 Canada and Mr. Appleton."
25 I think we're all pretty clear the

1 selective bits that came out was not accurate or
2 appropriate. With respect to the testimony of --
3 I believe this is the testimony of Mr. Cronkwright.
4 Was it Mr. Cronkwright? Yes. This would be on
5 October 29th.
6 MR. MULLINS: Yes.
7 MR. APPLETON: Page 21. Here it's
8 absolutely clear that he has confirmed that -- I
9 will just read through:
10 "... and so anything the OPA
11 procures would not be
12 government procurement. Is
13 that correct?"
14 Is the question. Sorry. Excuse
15 me, I will start further back. "Are you a
16 government employee", is basically the question.
17 "ANSWER: Not that -- I'm an
18 employee, but I work with the
19 government. Thank you."
20 "QUESTION: And then you
21 would agree the OPA -- you
22 said you are basically saying
23 the OPA is not government per
24 se?
25 "ANSWER: That's right.

1 "QUESTION: And so anything
2 the OPA procures would not be
3 government procurement; is
4 that correct?
5 "ANSWER: It's procurement
6 under the opex and
7 obligations we have.
8 "QUESTION: But not
9 government procurement,
10 because OPA is not
11 government; correct?
12 "ANSWER: I'm not a
13 government employee. I don't
14 draw a pay cheque from the
15 Ontario government." [As
16 read]
17 Just to identify that everybody
18 can take something from the record, twist it and
19 turn it and make it -- all around.
20 You are the Tribunal. You need to
21 decide in substance, in pith and substance, what
22 this is, and we know that there is a definition, a
23 simple definition. In fact, I believe maybe even
24 both sides have said something about this
25 definition, and that what we have, it does not meet

1 the definition of procurement in its ordinary
2 sense.
3 It also doesn't meet the
4 definition in the NAFTA, and Canada has still not
5 answered -- maybe they will do it in their time
6 left today -- if the definition to them in the UPS
7 case was to follow Article 1001(5) and to apply all
8 of it, including its exceptions for UPS for this
9 very same exception, why does the definition of
10 NAFTA change some six or seven years later?
11 It doesn't. It can't. And in any
12 event, other NAFTA tribunals have applied Chapter
13 Ten to give meaning, and that is completely
14 consistent with the Vienna Convention.
15 And then we might look at special
16 meanings under things like Article 31(3)(c) of the
17 Vienna Convention, which is exactly why we might
18 want to look to the WTO definition.
19 And all of these definitions tell
20 us the same thing. If you don't buy it, if you
21 don't get it, if you don't use your money, you're
22 using somebody else's money, it is something else.
23 That's the key thing about the procurement. That
24 is why it just doesn't work. It is something
25 different.

1 And by the way, this argument made
2 by Mr. Neufeld -- if you recall, he's the gentleman
3 that told you about Catch-22 and Joseph Heller. I
4 felt we were in the twilight zone. His suggestion
5 to you is that fundamentally procurement can't be
6 applied from the Czech Treaty because somehow the
7 Czech Treaty itself is procurement and, therefore,
8 it is covered by the exemption. That makes no
9 sense.
10 I looked at the transcript. I
11 mean, maybe --
12 THE CHAIR: I don't think that was
13 the argument. The argument is that you cannot use
14 MFN to get into the MFN provision, I think.
15 MR. APPLETON: No, not apply. In
16 fact, the procurement was involved, and unless
17 Canada is buying a bit from the Czechs, that
18 wouldn't apply.
19 The exception under Article
20 1108(7)(a) only applies to procurement itself. It
21 doesn't exempt it. Sectoral agreements are covered
22 by annex 4. Annex 4 covers international
23 agreements. It covers bilateral investment
24 treaties.
25 All international investment

1 treaties which were negotiated before the NAFTA
2 came into force were excluded under annex 4, I
3 believe annex 4(1), but under -- and then there is
4 a sectoral -- if you remember in my opening, I
5 believe I took us through the sectoral exclusions.
6 I believe it is annex 4, part 3.
7 THE CHAIR: I don't think that was
8 the issue, but you will go back to the record for
9 your post-hearing brief, and then you can address
10 this if you think it is necessary. I think the
11 argument was somewhat different.
12 MR. APPLETON: Sure. So let me
13 respond to a point made by Mr. Watchmaker about
14 damages.
15 Canada has raised the issue about
16 the GEIA being inconsistent with Article 1105 in
17 its pleadings. There is no question that it has
18 raised that. There is no question it is on the
19 record.
20 Also, Canada has raised the issue
21 the investor has been unable to separately quantify
22 the Article 1105 damages here. The investor has
23 always stated it was prepared to do so in advance
24 of this hearing. The investor is still prepared to
25 do so now if the Tribunal wants to wait and have it

1 in that way.
2 But that information can be
3 obtained from the reply report of Mr. Low and the
4 models that were provided to Canada's expert.
5 So there is no conceptual or new
6 issues raised here, and we leave it to the Tribunal
7 to determine how to proceed with this issue, to
8 deal with it now or to leave it to post-hearing
9 briefs, but Mr. Low testified that each project's
10 losses are broken down in his report, and I think
11 that is important to identify.
12 Canada has challenged the
13 documentary evidence with respect to past costs.
14 The only person who has testified in these
15 proceedings with professional qualifications and
16 business valuation -- that was Mr. Low -- has
17 clearly confirmed he had all the evidence that he
18 would ordinarily require to verify past costs.
19 And the fact that we only had 48
20 minutes left to examine Mr. Goncalves should not be
21 in some way interpreted that somehow we didn't put
22 questions to him. We put a lot of questions to him
23 and he told us a lot of things; in fact, far more
24 than I would have expected and, in many respects,
25 far less.

1 So, you know, it was clear in our
2 submission he is not the right expert to be able to
3 provide the type of information to this Tribunal,
4 and his professional judgment with respect to
5 issues does not seem to extend properly to the
6 business valuation.
7 Then to make a fundamental
8 assertion that we should apply the standard which,
9 in his opinion, without any proof, without any
10 other support, just his opinion, is the difference
11 of $500 million is very problematic, which brings
12 me to the issue of the Chorzow factory case.
13 The theory of damages which has
14 been advanced by the investors in this case is
15 consistent with the Chorzow factory case, because
16 Chorzow tells us that reparation is to correct the
17 harm of the breach and to bring you back to where
18 you would have been, in probability, if the breach
19 had not occurred. And the obligation here, the
20 wrongful act, is not providing the treatment that
21 was required to be provided. That's the breach.
22 So where you would have been if
23 that had not occurred would be to have that
24 treatment, not the absence of that treatment. It's
25 exactly that.

1 Now, quickly, very, very quickly,
2 about Merrill. I believe that Mr. Watchmaker's
3 comments are completely inappropriate about
4 Merrill.
5 The issue in Merrill was that the
6 Government of Canada did not provide information
7 that was machine readable, about hundreds of
8 thousands of export transactions.
9 It was only provided to counsel
10 and an expert by sitting in the viewing room for a
11 day and we could write down anything we wanted, but
12 nothing would be provided to us in machine readable
13 form.
14 Therefore, it was impossible to do
15 a market calculation based on the best available
16 information, and, therefore, an alternative had to
17 go in. The alternative was based on the only
18 information available in that market, which was
19 based about an export premium, and that tribunal
20 found that that alternative was not good enough.
21 It wasn't good enough, but the
22 answer really should have been to give us the
23 information in a way that could be assessed. It is
24 not reasonable to have to write down hundreds of
25 thousands of data points in a very short period of

1 time.

2 I don't think it is fair and

3 appropriate to take it out of context, and the

4 cases here have been taken out of context. The

5 Mobil case would suggest to you Article 1105. The

6 parties agreed on what the meaning of Article 1105

7 would be by special agreement. It is not a basis

8 of a finding. It is a basis of a special agreement

9 by the parties.

10 Let me turn to the turbine

11 deposit, Article 1106. The law of damages asks:

12 What is the most proximate cause? The amended MTSA

13 was entered for the purpose of the FIT program.

14 That evidence is clearly on the record.

15 The turbines were required for

16 domestic content requirements of the FIT program

17 and required an adequate supply of turbines to meet

18 that criteria. By the way, the criterion, that is

19 extra credit. That is extra credit. You don't

20 need it to have a FIT contract. Many people got a

21 FIT contract without having those extra criteria.

22 So the fact that we might not have

23 focussed that much on the criteria is because it

24 simply wasn't necessary since we knew our ranking

25 and we knew, from the dry run, we would have been

1 in a position to be able to get contracts.
2 But the application was filed days
3 within the amended MTSA. Obviously this is the
4 proximate cause of the loss. Canada's contention
5 on this is simply not reasonable and, in light of
6 the facts, it just ignores them.
7 Now, Canada is simply wrong on the
8 issue of state responsibility where here the idea
9 is to remove the better treatment of Samsung. I
10 think it is worth sending you back with that point
11 before we finish.
12 The NAFTA tribunal can only
13 provide a monetary award. It cannot provide
14 specific performance, and it cannot order the
15 removal of more favourable treatment. That is just
16 not a power you have. The NAFTA says that you must
17 give a monetary award here.
18 The means of achieving restitutio
19 in integram through damages must be to award
20 damages that put the investor in the position it
21 would have been if it received the more favourable
22 treatment.
23 Secondly, the test of the NAFTA
24 makes clear that the primary obligation here is to
25 provide treatment no less favourable. It is not to

1 refrain from the granting of favourable treatment.
2 Do I have any time left?
3 MR. DONDE: You have four minutes.
4 MR. APPLETON: Okay, excellent.
5 On jurisdiction, Canada's counsel
6 is reading the word "all" into all -- into the
7 six-month requirement, but it does not say all
8 events giving rise to the claim. It simply says
9 those events or sufficient events, events giving
10 rise to a claim. And they ignore the issues.
11 They ignore the evidence and say
12 somehow we haven't proven our claim. We have lots
13 of evidence about that. It is completely
14 irresponsible at this point to not narrow the
15 issues and to somehow not take into account what we
16 have heard through this process, again, an issue
17 that could be addressed by costs.
18 Canada says the decision of the
19 OPA on the contracts and connection were made
20 without governmental authority. How could an
21 entity ever accomplish the results of giving an
22 entitlement to market actors to receive a price
23 that is not voluntarily offered by other market
24 actors but that is required to be paid by virtue
25 of governmental regulatory program, in this case,

1 the FIT. That is governmental. Everything about
2 that is governmental.
3 And of course the FIT has a
4 provision under the Electricity Act. Powers were
5 delegated to the OPA under section 25.3(2). These
6 are powers, governmental powers, that are delegated
7 to them. And that covered all types of issues,
8 including the decisions that were made about the
9 FIT contracts and how to accord that. I believe it
10 is the September, I believe, 24th direction. We
11 will obviously deal with that when we get the
12 post-hearing brief.
13 Canada forgets that the only
14 government procurement is covered by an exception,
15 that they don't have the relevant meaning here
16 shown by Canada's counsel, is that by contracting
17 energy by the Samsung consortium, that would also
18 be procurement. And that just emphasizes that the
19 exception only applies to procurement by a party or
20 state enterprise.
21 And of course someone who was
22 procuring renewably generated electricity in
23 Ontario, Mr. Robertson said that it was just that
24 the someone is not the government or the OPA.
25 I am not sure if that came out

1 right.
2 I probably have one minute left?
3 MR. DONDE: One-and-a-half.
4 MR. APPLETON: One-and-a-half,
5 thank you.
6 --- Laughter.
7 MR. APPLETON: Let's talk about
8 the international law standard of treatment.
9 The conduct that violates
10 international law standard of treatment is
11 completely present in this case. We did not spend
12 a lot of time talking about the Free Trade
13 Commission interpretation, because I have written
14 about it extensively in the submissions,
15 particularly the 1128 response. It is one of my
16 favourite topics, so I am happy to talk about it.
17 But the fact of the matter is --
18 THE CHAIR: You have one minute
19 left.
20 --- Laughter.
21 MR. APPLETON: But the fact of the
22 matter is is that the conduct here in this case,
23 while we believe does not need to meet an
24 outrageous threshold, unlike a due process
25 threshold, it does in fact meet it.

1 The violation of what we see is
2 egregious and outrageous and should make anyone on
3 the Clapham omnibus be upset and angry and not be
4 pleased, because it is an outrage and a willful and
5 egregious set of actions.
6 People in Ontario that came here
7 to invest should have expected a program to be run
8 fairly and openly and not without this type of
9 thing.
10 If Canada does not believe that
11 that type of behaviour, that lack of disclosure,
12 that lack of candour is somehow not outrageous,
13 then I seriously question the time I spent in the
14 public service and all of those other very fine
15 people who work for the public service who do
16 cherish those things, because our public and the
17 people who are engaged, the people who invest,
18 deserve better and deserve more. And that is a
19 fundamental issue that I am sure you are going to
20 have to consider as you decide what Article 1105
21 means.
22 Whether it is a modern context or
23 an old context, this would always, always be
24 off-side with that type of thing. This behaviour
25 is abominable and is exactly the type of behaviour

1 that, in the worst situation.

2 Neer, in my view, is the highest

3 standard you could ever find. Even for Neer, which

4 is a denial of justice case, that would violate

5 Neer. It is completely unacceptable. And with

6 that, I thank you for your time.

7 THE CHAIR: Thank you.

8 Does Canada wish to rebut? Do you

9 need -- do you want to do it like that? Do you

10 need a few minutes?

11 REPLY SUBMISSIONS BY MR. SPELLISCY:

12 MR. SPELLISCY: I can do it right

13 now. Thank you, Madam Chair, Ms. Kaufmann-Kohler,

14 Mr. Landau, Judge Brower. I actually don't think I

15 need to make remarks in response to that unless

16 there are specific questions. I think all of our

17 submissions have been made already. I think that

18 you have heard all of these arguments before. I

19 think you understand it.

20 I will come back to something I

21 said at the beginning of the week. This is a case

22 about an investor who is disappointed that he

23 didn't get more favourable treatment than everybody

24 else in the FIT program, but NAFTA isn't there to

25 protect against that.

1 You see that in their damages
2 analysis. They want more favourable treatment than
3 everybody in the FIT program. You see that in
4 their 1102 and 1103. That is not what NAFTA is
5 for.
6 If there is no other questions,
7 that's fine.
8 THE CHAIR: I don't think we have
9 further questions.
10 MR. SPELLISCY: Okay.
11 --- Whereupon submissions conclude at 4:45 p.m.
12 THE CHAIR: Thank you. So I thank
13 you very much. This was very helpful and, as I
14 said before, we will have to now go home and
15 reflect on all of this, digest and analyze.
16 MR. SPELLISCY: I have a question
17 of procedure.
18 PROCEDURAL MATTERS:
19 THE CHAIR: Yes. I was about to
20 come to this. We will, of course, now issue an
21 order that summarizes what was agreed yesterday.
22 Is there anything that needs to be
23 added on the record? I mean, in the sense of any
24 questions, any additions on procedure, any
25 complaints, because this is the time to complain if

1 you have any complaints about the procedure?
2 MR. BROWER: You have one minute.
3 THE CHAIR: Thirty seconds.
4 Anything further?
5 MR. APPLETON: I would like to add
6 something to the record just before we finish, but
7 I don't know if you want to do it now or after you
8 do your procedural matter. And it is a small one.
9 THE CHAIR: Is there any
10 procedural issues that are still outstanding on
11 your side?
12 MR. APPLETON: No. So I would
13 just like to add something to the record before we
14 close off. Why don't we deal with the procedural
15 things, and we would like to just note something on
16 the record?
17 THE CHAIR: I think you can do it
18 now, because unless there are other things, we have
19 nothing further.
20 MR. APPLETON: We just wanted to
21 formally thank those watching the NAFTA proceeding,
22 either live or by closed-circuit, because
23 eventually this will come out on the Internet
24 through the rebroadcast.
25 We think it is important there be

1 a transparent process, and we want to identify the
2 support of the Tribunal in making sure that that
3 was done. I think it is important that the public
4 know that, and they should hear that from the
5 parties involved in the process.
6 I also wanted to just make sure we
7 thank the secretary, the team at Arbitration Place,
8 Teresa and Lisa, who did wonderful jobs with the
9 transcripts, and the Permanent Court of Arbitration
10 who has been working very hard behind the scenes to
11 make all of this happen.
12 And I would like to just thank my
13 colleagues, both those at Appleton & Associates and
14 Astigarraga Davis, and our experts and witnesses,
15 and also counsel from the Government of Canada and
16 counsel from the Government of the United States
17 and the Government of Mexico that have been here,
18 because they have all been part of this process and
19 I think it is important to acknowledge it on the
20 record.
21 And of course we want to thank the
22 Tribunal. I got Mr. Donde at the beginning, I
23 believe, yes? Yes. But I would like to thank the
24 Tribunal. It is obviously a complex case, and we
25 all value the work that you have done to date and

1 what you will need to do to be able to sort through
2 this. So thank you very much.
3 THE CHAIR: Thank you.
4 MR. SPELLISCY: I do actually have
5 one procedural question.
6 THE CHAIR: Yes, please.
7 MR. SPELLISCY: The closing
8 statement presentations that you have, my
9 understanding is that some of the transcript
10 references in there are probably from the rough
11 versions of the transcripts and that there are also
12 parts where the page numbering on the confidential
13 versions and the public versions was different.
14 And so I am wondering if the
15 Tribunal, for your reference, I leave it to you,
16 but there are references on there, on the pages on
17 the closing argument, to transcript references, and
18 if you are not looking at the right transcript it
19 might be difficult.
20 So I am wondering if you would
21 like the parties, after the final, final transcript
22 comes out, to reprovide you with the closing
23 sides -- no changes in substance, of course, but
24 with the references to the transcript corrected so
25 that they are appropriate to the final record.

1 THE CHAIR: I think that would be
2 helpful to us, so when we work on it we will have
3 the right references to the transcript. If both
4 parties could do this within a week from getting
5 the final transcript, would that be acceptable?
6 MR. APPLETON: No. I would like
7 to change it slightly, if that is possible.
8 THE CHAIR: Yes.
9 MR. APPLETON: I think that the
10 slides should not be touched. However, we have no
11 problem if each side wanted to file an errata sheet
12 just to note if there is something. In that way,
13 we don't touch any of the slides in any way, but if
14 there is something that changes and a party would
15 like to deal with that, I have no problem
16 conceptually with it. I just think the record
17 should be closed in this way as to what was
18 produced, and that way there is no risk of that and
19 so that's why I have a slightly different approach.
20 I thought I was going to get out of here without
21 any procedural discussion, I'm sorry.
22 THE CHAIR: No. That is fine, I
23 suppose. So we have -- we freeze what we have
24 today, but you can add extra pages where you have
25 changes, I mean changes to the transcript

1 references; of course no other changes goes without
2 saying.
3 MR. APPLETON: My suggestion would
4 be an errata page.
5 MR. LANDAU: A list.
6 MR. APPLETON: Yes, thank you, a
7 list. I am trying to learn from Judge Brower.
8 THE CHAIR: Whatever is easy for
9 us to consult, you will find out.
10 Good. Is there anything else on
11 Canada's side? Fine. Then it remains for me to
12 thank all of those who participated in this
13 hearing. Certainly the court reporters, PCA, the
14 Arbitration Place, the technicians, as well, who
15 did a very good job, the public that we have not
16 seen, but has seen us, the party representatives
17 who have been sitting here for long hours very
18 patiently, the non-disputing parties, as well.
19 The counsel teams, of course. It
20 was a long week and very intense week, and we are
21 grateful for all of the work you did for explaining
22 the case to us in a very efficient, diligent
23 manner, also in a very friendly manner, which is
24 nice, because it allows us to focus on the real
25 issues and not be distracted by procedural

1 skirmishes.

2 So I hope I have forgotten no one

3 when thanking everyone. It allows me now to close

4 this hearing and wish safe travels to everyone and

5 a very restful and well deserved weekend. Goodbye

6 to everyone.

7 --- Whereupon the hearing adjourned at 4:52 p.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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8
9 Teresa Forbes, CRR, RMR,
10 Computer-Aided Transcription
11
12 I HEREBY CERTIFY THAT I have, to the best of my
13 skill and ability, accurately recorded by
14 Computer-Aided Transcription and transcribed
15 therefrom, the foregoing proceeding.
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22 Lisa M. Barrett, RPR, CRR, CSR
23 Computer Aided Transcription
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