PCA CASE No. 2021-26

PERMANENT COURT OF ARBITRATION

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

- vs -

THE GOVERNMENT OF CANADA

Respondent

TRANSCRIPT OF ARBITRATION PROCEEDINGS
Held at the offices of Arbitration Place
333 Bay Street, Suite 900, Toronto, Ontario
on Wednesday, February 7, 2024, at 9:00 a.m.

VOLUME 3
FURTHER REVISED TRANSCRIPT
CONDENSED TRANSCRIPT WITH INDEX

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Toronto, Ontario
--- Upon resuming on Wednesday, February 7, 2024 at 9:00 a.m.

PRESIDING ARBITRATOR MILES: It's 9 o'clock. So are we all set?

Welcome back, everybody. Welcome to -- gosh, it's like three little birds on a wire; isn't it? Welcome to the experts.

Mr. Terry, any housekeeping before we start?

MR. TERRY: Nothing from us.

PRESIDING ARBITRATOR MILES: And I understand from Mr. Aragón the arrangements here this morning, so thank you for that.

Any housekeeping from Respondent?

MS. SQUIRES: No, none.

PRESIDING ARBITRATOR MILES: No. Thank you so much.

Okay. Perfect. Please proceed.

Actually, no, don't. I need all three of you, please, to make the affirmation.

Mr. Milburn, should we start with you. It should be in front of you, the

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expert affirmation, please.

MR. MILBURN: I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

MR. TOBIS: I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

MR. TETARD: I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.

AFFIRMED: CHRIS MILBURN, EDWARD TOBIS AND PIERRE-ANTOINE TETARD

PRESIDING ARBITRATOR MILES: Wonderful. Thank you, all.

I didn't introduce us. I think you have been in the room so you know who we are, Wendy Miles, Professor Gotanda and Justice McLachlin. Thank you for coming today.

If you get uncomfortable, you are quite crowded, there.

Mr. Tetard, it's fine for you to sort of move aside if it's not dealing with your bits, so just be comfortable.

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And if there's a point at which you can move back down to the back to make more room, that's fine. Just as you wish.

But don't, now that you are all three, collectively, in witness questioning mode, not to discuss anything with the team.

So, if you peel away, please don't discuss anything about the case with anybody else on the counsel team, the client team or anybody.

Have you come to an arrangement as to whether the experts can speak to one another?

MR. TERRY: We haven't discussed that. I guess the question is whether Canada has any objection to that.

PRESIDING ARBITRATOR MILES: It's probably going to be more pragmatic and sensible for them to be able to speak to one another because it is a collective report, but tell me if you have any objection to that.

MS. SQUIRES: I don't think in principle. I think that makes sense.

The report is divided up between what everybody is supposed to speak to, so

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I guess if everyone is staying kind of within their lane and someone is not veering out, that's fine.

Maybe proceed and see how it goes and, if there is any issue, I will speak up.

PRESIDING ARBITRATOR MILES: It was more during the breaks I was talking about.

MS. SQUIRES: Oh, yes, by all means.

PRESIDING ARBITRATOR MILES: Thanks. No, I don't want them having a tete-a-tete during cross, no. No.

MS. SQUIRES: Sorry.

PRESIDING ARBITRATOR MILES: But thank you for your patience for that. You are more patient than I am, no.

Mr. Terry, please proceed.

MR. TERRY: Thank you very much. And I don't have any questions to start off.

I will note, however, as Ms. Squires mentioned, that we have a protocol that we discussed with Canada so that Canada knows which questions to put to which witnesses.

But I will turn things over to

Mr. Tetard, Mr. Milburn and Mr. Tobis to make their presentation.

EXPERT PRESENTATION BY MR. TETARD, MR. MILBURN AND MR. TOBIS:

A. [MILBURN] Thank you and good morning, everyone.

So we have a slide presentation for you this morning and we will just jump right in and start with some introductions.

My name is Chris Milburn. I am a Professional Accountant and a Chartered Business Valuator. I have over 25 years of experience in valuation and the quantification of economic damages. And I have testified a number of times in investor-state disputes involving natural resource projects.

A. [TOBIS] Good morning, members of the Tribunal. My name is Edward Tobis. I am a managing director at Secretariat. I am a Chartered Professional Accountant and a Chartered Business Valuator. I have nearly 15 years of experience working in a financial capacity with a variety of industry groups around the globe, including with large energy and infrastructure projects such as this one. I have acted as an

expert witness in international arbitrations and commercial litigations on multiple occasions.

A. [TETARD] Good morning, members of the Tribunal. My name is Pierre-Antoine Tetard. I am a chief commercial officer at BlueFloat Energy.

I have 18 years of experience in the investments in the energy industry. I have a background in investment banking, private equity and project development, initially on onshore wind, moving to offshore wind in 2014, working with Jérôme Guillet for about a year in 2014, 2015.

In 2016, I joined Ørsted where I stayed just under four years working on international projects, M&A, project financing, market industry standards.

A notable transaction I worked on is the acquisition of Deepwater by Ørsted.

I left Ørsted in 2020 and joined BlueFloat Energy later that year.

BlueFloat Energy is a global developer of offshore wind projects. BlueFloat is developing over 30 projects, representing more than 30 gigawatts of gross capacity.

And over half of our 30 gigawatt pipeline have site control.

I am an observer to the board of BlueFloat Energy. Thank you.

A. [MILBURN] So our agenda today, we are going to have a brief background. We are going to discuss a little bit about NAFTA 1 and then we will talk about the market approach, the income approach to value and then finish off with our damages conclusions.

Slide 4.

So starting off with the background. Slide 5.

So I think our mandate is probably pretty clear. We are here as independent experts on valuation and damages and we have issued two reports in this matter.

Slide 6.

So, on the next two slides, we will review a number of key valuation and damages concepts.

The first is full reparations.

So the objective of our damages analysis is to restore the Claimant to the financial position they would have occupied absent

the alleged breaches, so this is known as the full reparation standard.

And, under this standard, risks that are related to the alleged breaches are properly excluded.

Dr. Guillet did not apply a full reparation standard and he continually referred to political risks that are related to the alleged breaches.

The main element of our damages assessment is a valuation of the project, absent the alleged breaches. And we performed that in compliance with our professional practice standards and international valuation standards.

The value term we used in our valuation is fair market value, and we provide the definition here.

Dr. Guillet did not state the value term that he used in his reports. But, in our view, his valuation does not meet the definition of fair market value in a number of respects.

Slide 7.

PRESIDING ARBITRATOR MILES: Mr. Milburn, I don't understand what you mean when

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you say Mr. Guillet did not follow a full reparation standard.

First of all, the application for standard is our job, not Mr. Guillet's job or yours, respectfully.

A. [MILBURN] Yes, absolutely.

PRESIDING ARBITRATOR MILES: But what do you mean, he valued the investment to put the wronged party in the position had it not -- it would have been in had it not been for the breach.

How is that not applying a full reparation standard?

A. [MILBURN] Well, what I am referring to is that he refers to a number of risks that we think should properly be excluded.

So he refers to political risks such as the risk that, when the moratorium was lifted, market participants would still attach risk to it and would value the project at a lower amount because there was a moratorium in the past.

He, he refers to risks that, for example, the project could be expropriated in future, which we think that should be excluded

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because that's related to the alleged breaches that are being complained of in this case.

PRESIDING ARBITRATOR MILES: So the issue between you is what risk should we eliminate in the valuation approach that we apply.

And, ultimately, that's a question for us as to what the position would be had the alleged breaches not occurred.

A. [MILBURN] Precisely.

PRESIDING ARBITRATOR MILES: And the difference between you is whether construction risk, for example, going forward is still a risk.

A. [MILBURN] Yes, that is a risk, yes.

PRESIDING ARBITRATOR MILES: Okay. I understand what you're saying.

He would say, of course, and he will have his opportunity to say that he is applying a full reparation standard. He is just applying it appropriately to the loss that is alleged to have occurred here and you're not.

A. [MILBURN] I am not sure he addressed the issue of full reparation. I am not sure how he will address that.

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PRESIDING ARBITRATOR MILES: Right. We can ask him if he was applying something that wasn't full compensation. Thanks.

A. [MILBURN] Yes.

A. [TOBIS] Moving on to Slide 7 where we continue our discussion of some key valuation damages concepts.

In Dr. Guillet's reports, in our view, he has misapplied some fundamental business valuation principles which really should not be contentious issues for any professional valuator.

First, value is primarily a function of two key components: Expected amount and timing of future cash flows, and the risk of achieving those cash flows.

The greater the expected future cash flows, the higher the value and the greater the risk, the lower the value.

Second, value is at a point in time. This means that information that was not known or knowable, as at the valuation date, referred to as hindsight, cannot be used to derive the value of an asset as of a valuation date.

However, hindsight can be

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considered, in limited circumstances, simply to confirm the reasonability of assumptions that were known or knowable as at the valuation date.

In contrast, in Dr. Guillet's report, he has inappropriately, one, included hindsight transactions in his actual valuation assessments at as the valuation date, which should be disregarded.

And, two, referred to impairments in certain offshore wind projects in mid-2023.

What Dr. Guillet fails to note is that these 2023 impairments were due to the post-COVID economy which caused drastic increases in inflation rates, interest rates, as well as supply chain disruptions. These were factors that were not known or knowable as of February 2020, prior to the COVID pandemic.

When negotiating an open market transaction as at the valuation date, neither the buyer or the seller would have the benefit of such hindsight events that will take place at a future date.

Third, contingent consideration must be considered in a fair market value assessment.

For example, if a buyer were to acquire an asset for a $50 million payment up front today, plus a $100 million contingent payment in one year from now, Dr. Guillet would incorrectly argue that the value of this transaction is simply the first $50 million payment and would completely exclude the value of the second payment.

Just because a contingent payment is sometimes difficult to value does not mean it should not be valued.

Failing to consider the value of contingent consideration significantly understates the value of a transaction.

Slide 8.

PRESIDING ARBITRATOR MILES: Mr. Tobis, can we just stay on Slide 7.

So, the first row in the table, you say Mr. Guillet misapplied fundamental business valuation principles which should not be contentious for any potential valuator. And you say it's a primary -- primarily a function of cash flows and timing.

That's if one is applying the

income assessment methodology.

A. [TOBIS] Sorry, these principles would apply in any valuation methodology.

PRESIDING ARBITRATOR MILES: Well, if I am applying investment costs methodology, then what is the expected cash flow relevance to that?

A. [TOBIS] Even when applying an expected cost methodology, the assumption is yet, you are assuming those costs are representative of the amounts, the present value of the amounts you would receive back from this asset in the future.

It's still, ultimately, a function of the cash flows you expect to receive just expressed in a different way.

So the cost approach is typically used in situations where you don't have sufficient information to run a DCF model.

And, in those cases, use the best objective information you have as the costs and you assume that a notional buyer would not be willing to pay any more than the costs that have already been incurred since, if someone else has

spent those amounts, that must mean that they considered the value of this project to be at least the present value of those costs.

So it's a roundabout way to ultimately getting back to that same fundamental valuation principle which is listed in Chapter 1 of any valuation textbook, under any valuation method.

PRESIDING ARBITRATOR MILES: For any valuation.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: Of any business, even if it's not an income generating business.

A. [TOBIS] Of any financial asset.

So, for example, if you're valuing art, someone purchasing art might be purchasing it for their own preference or benefits but not from a financial perspective.

We are specifically talking about valuing financial assets or businesses where the goal of the purchaser is to generate profits and make money.

PRESIDING ARBITRATOR MILES:

So I ask you even if it's not an income generating business and you said yes, but then you seem to say no.

A. [TOBIS] So for a business that's not currently income generating but --

PRESIDING ARBITRATOR MILES: No, never. For an asset, an investment that doesn't generate income.

A. [TOBIS] Any financial asset, even today, then if someone is paying money for it, they anticipate to eventually generate cash from those assets.

There's been a lot of early stage startups in the tech space that weren't generating profits that their market capitalizations were in the billions of dollars.

The logic of that is because investors in those shares were anticipating that those companies will eventually generate income and turn a profit.

The fact that, today, they are not income generating does not mean that you wouldn't value them on the expected future cash flows.

The only time this would not

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apply is an asset such as art or, you know, an instrument, let's say, or some collectible, trading cards, that there is literally someone is buying it just for their personal preference, not that they anticipate financial gains.

PRESIDING ARBITRATOR MILES: In your second row, you talk about hindsight cannot be used in a valuation analysis; can I not do an ex post valuation analysis.

A. [TOBIS] If you were to do an ex post valuation date analysis, that would mean moving the valuation dates to a current date and that would require a whole set of new assumptions and forecasts and economic inputs.

Effectively, what that would mean is today, you know, February of 2024, we would use -- we would be doing ex post analysis in using today's inputs. You can't --

PRESIDING ARBITRATOR MILES: So would hindsight be used?

A. [TOBIS] It wouldn't be called hindsight because we would be moving the valuation date.

If we are doing a February 1st, 2024, valuation date, that's our

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valuation date. And there's no such thing as hindsight because we are using information today.

PRESIDING ARBITRATOR MILES: You have applied an ex ante analysis; haven't you?

A. [TOBIS] Yes.

Sorry, and if I may add.

If you refer in an ex post situation where you are looking at a past lost profits and future lost profits, in those circumstances, then you'd be using hindsight for past losses but that wouldn't be a valuation. That would be damages.

PRESIDING ARBITRATOR MILES: All right, Slide 8.

A. [MILBURN] An important component of the damages analysis, under a full reparation standard, is the but-for scenario that would likely have prevailed, absent the alleged breaches.

The but-for scenario we have been instructed to assume is listed here on this slide, along with the key assumptions that we use which are based on opinions of the technical experts.

Slide 9.

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A. [TETARD] Key areas of agreement between the experts.

We agree on the following assumptions or inputs:

That the capital costs have decreased between NAFTA 1 and valuation date.

That the project PPA price is above PPA prices observed in the market as of valuation date.

That capital available to offshore wind has increased significantly.

Project development stage, we do not fully agree on it but we agree on the following:

That the project has secured revenue that was not fully permitted; the four milestones impacting value preFID are revenue grid, site control and permits; and the market approach or comparable transactions, we agree it is a useful approach to be used to value the project and transactions that are close to reach or have reached FID at financial close are not comparable.

Slide 10.

PRESIDING ARBITRATOR MILES:

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Just on Slide 9, you don't conduct any sensitivity analysis on a change in the PPA price; do you?

A. [TETARD] I am not sure we do. I will have to check the report.

PRESIDING ARBITRATOR MILES: I don't think it's actually your area of expertise.

Mr. Milburn, do you conduct a sensitivity analysis on the price?

A. [MILBURN] No, we don't.

The basis of our but-for scenario is that the FIT contract would have been unfrozen and so the PPA revenue terms in that contract would have remained so there would have been no change --

PRESIDING ARBITRATOR MILES: Well, there was a change. They go up for inflation.

A. [MILBURN] Right --

PRESIDING ARBITRATOR MILES: Starting, from every year, incremental inflation rise even to the start date for the gap and then they drop off after 20 years to what you forecast as the actual price.

A. [MILBURN] Yes.

PRESIDING ARBITRATOR MILES:

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So those are the only changes up, except for the fall off at the end of the tariff; yes.
A. [MILBURN] Yes.
PRESIDING ARBITRATOR MILES: So no sensitivity analysis.
A. [MILBURN] No.
PRESIDING ARBITRATOR MILES: For a lower renegotiating tariff price.
A. [MILBURN] No.
PRESIDING ARBITRATOR MILES: Okay. Thanks.
And those were your instructions, presumably.
A. [MILBURN] Yes.
A. [TETARD] Slide 10.
Key areas of differences, disagreements between the experts.
On the valuation methodology, we believe both market approach and income approach or DCF should be used. This is based on years of experience evaluating similar projects.
Definition of site control.
We believe that an exclusive and/or priority position to develop the site would be considered effective site control from a risk

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and value perspective.
The fundamental question is can any other developer take over the project's position it has on the same site.
This is in line with how other offshore wind developers see site control. No other party could develop the same site.
Dr. Guillet's definition seeks to be overly strict and disconnect with industry reality.
And I am going to read the block on the right:
"The 48,000 acres of Crown land that wind stream applied for AOR status on covered all areas required for the project and more."[as read]
On project milestones. Grid access milestone is achieved in accordance with conclusions of NAFTA 1.
Site control is achieved in accordance with the definition just listed.
According to Dr. Guillet, none

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of these two milestones are achieved.
Relevance of the PPA price.
In our view, the PPA price known is relevant as soon as it is known. It creates the economic value envelope the project can work with.
Without a PPA price known, the project progress is in a relative stage of darkness, not knowing whether it will have an economic rationale.
Dr. Guillet insist it isn't relevant until close to FID or financial close or past full permitting.
Floating wind farms.
Floating wind farms are not comparable to bottom-fixed projects. They are two different technologies at different stages of technological maturity that are on two different cost trajectories, but while fixed reach critical mass in the mid-2010s, floating as of today hasn't. Dr. Guillet insists they are comparable.
US offshore wind lease transactions.
These transactions involve lease only i.e. site control. No PPA, no grid,

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no permitting.
From that standpoint, we believe they could be used as a floor to project value.
Slide 11.
PRESIDING ARBITRATOR MILES: Mr. Tetard, Slide 10, site control.
Have you read the award?
A. [TETARD] I have read the award.
PRESIDING ARBITRATOR MILES: Do you understand that the Tribunal has found that the Claimant did not yet have site control?
A. [TETARD] I have read and respect the decision of the Tribunal.
PRESIDING ARBITRATOR MILES: So what is your opinion based on that? The Tribunal is wrong?
A. [TETARD] My interpretation of the decision is that the definition of site control might have been used or interpreted by the Tribunal, might have -- is different from how site control is evaluated by the industry, particularly when it comes to defining a milestone in a project development

stage of a project.

I think it's a question of definition, Madam President.

PRESIDING ARBITRATOR MILES: Might the same be said for the Tribunal's interpretation of grid connection?

A. [TETARD] Correct.

PRESIDING ARBITRATOR MILES: Okay.

A. [TOBIS] Slide 11.

On the next two slides, we will discuss a couple key aspects from the NAFTA 1 award.

So, as we just heard from Mr. Tetard, the NAFTA 1 Tribunal concluded that the project had a grid connection.

We note that having guaranteed grid access upon the receipt of an NTP meets the definition in the industry of having grid connection from the perspective of assessing a project's development stage.

Second, in NAFTA 1, Dr. Guillet and Canada argued that the project was not feasible and had no material value.

The NAFTA 1 Tribunal rejected

these arguments and, as we now know, they assessed the value of the project in NAFTA 1 to be $31 million.

Dr. Guillet continues to make these same previously rejected arguments despite the thousands of pages of additional technical expert evidence filed in this arbitration, which confirms the even greater feasibility of the project as of February 2020, due to the advancements in the offshore wind industry and technology since NAFTA 1 which we will discuss shortly.

Slide 13.

On this slide --

PRESIDING ARBITRATOR MILES: Just can I come back to Mr. Tetard.

What do you understand, from the face of the award, that the Tribunal interpreted to mean by grid connection?

Because, plainly, it wasn't a connection in the electrical sense.

So what do you understand them to have meant?

A. [TETARD] I think the Tribunal understood that, of course, the project

had not a physical connection yet, didn't have a grid connection fully negotiated yet.

But that the project had secured a priority position in the process of being granted in the future when the project is more advanced, this grid connection agreement, which seals the contractual obligations between the parties.

That the Tribunal was, in my view, well educated about the process, the regulatory process in Ontario as to how a project obtained a grid access.

PRESIDING ARBITRATOR MILES: What about the construction process? I have checked the Wood report again this morning to see if I can find an answer to this.

Were there to be converters and transformers or just transformers? What was required, physically, for the connection; do you know?

A. [TETARD] I did not go into that level of detail, technical detail.

PRESIDING ARBITRATOR MILES: Did you read the expert reports?

A. [TETARD] Yes, but -- yes,

but I don't remember that level of detail.

PRESIDING ARBITRATOR MILES: Okay.

But for offshore wind, there is the additional feature that doesn't exist for onshore wind where you have your underwater -- your underground cable, underwater, and then your transformers at the wind farm which you would have onshore. But, if it's far enough offshore, you need a converter as well.

You don't know if that was the case here?

A. [TETARD] I don't know if that was the case here.

PRESIDING ARBITRATOR MILES: And you don't know whose cost that would have been, the TSO or the -- or the developer?

A. [TETARD] My understanding was that it was the developer. At least the transmission asset from the project, all the way to the grid connection points was the cost of the developer, including, actually, the substation at the point of connection was the cost of the developer.

PRESIDING ARBITRATOR MILES:

Okay.
A. [TETARD] That's my understanding because we included them in our CAPEX, in our construction costs. So I believe it was the scope of the developer.
PRESIDING ARBITRATOR MILES: Okay. So that all sits also, therefore, at the risk of the developer?
A. [TETARD] The costing and the scheduling of these assets will be the risk of the developer.
PRESIDING ARBITRATOR MILES: But also the delay risk or the obstruction risk, if, for example, a cable had to run through a marine site that was protected that wasn't otherwise anticipated, all of that would sit with the risk of the developer?
A. [TETARD] In the circumstances, my understanding is yes.
PRESIDING ARBITRATOR MILES: And have you factored that into your risk discount, Mr. Milburn?
A. [MILBURN] Yes, I believe that would have all been looked at by the technical experts and I think they were satisfied

that there was no significant risk there.
The Wolfe Island project had a very similar underground -- underwater cable that was on the lake bed and so they would have followed the same process that they had used.
PRESIDING ARBITRATOR MILES: Is it -- I am sorry, I am not that close to the expert reports. You may not be either. I think it's in the Wood report.
Could they connect to the same cable or did they have to run their own cable entirely?
A. [MILBURN] I believe they would have had to run their own cable but it would have been along, perhaps, a similar route.
PRESIDING ARBITRATOR MILES: I understand.
A. [MILBURN] As to the same I think the Lennoxville station onshore there.
PRESIDING ARBITRATOR MILES: I understand.
Do you remember how far it was?
A. [MILBURN] Not -- I am going to say like 15 kilometres or somewhere in

that range.
PRESIDING ARBITRATOR MILES: Yeah, 10 is what I was thinking but someone may clarify.
Okay. Thank you.
A. [TOBIS] Slide 13.
On this slide, we show a summary of how the Tribunal came up with the quantum of the NAFTA 1 award.
It is important to recognize, in the NAFTA 1 arbitration, Dr. Guillet used the valuation date of February 2011.
The Tribunal then relied on transactions from 2009 to 2013 to derive what they considered to be a value of the project as of the date of the award, September 2016.
As you'll note from this slide, the NAFTA 1 Tribunal did not consider any transactions from 2014 to 2016 in their assessment.
One of the key questions on valuation is, in this case, did the value of the project increase between NAFTA 1 and February 2020, and, if so, by how much?
We heard several comments from

the Tribunal on Monday about how the value of a project can potentially increase over time, even in the absence of significant development activities, but simply due to industry factors.
For example, we heard how a development stage gold mine could potentially significantly increase in value over a given time period, based on changes in the price of gold alone.
We agree with this analogy. And, in the following slides, we will discuss the various factors that contributed to the increase in the value of the project since NAFTA 1.
A. [MILBURN] Slide 14 --
PRESIDING ARBITRATOR MILES: Just before you do that.
You accept that Dr. Guillet disagrees with you that -- and I'm sure he will disagree that gold is the right analogy for a market comparables analysis for an early stage development.
Because, as I understand his report, he says the price paid on the market comparables, when divided by the multiplier for capacity, is largely the same. It hasn't moved

very much at all. Perhaps 3 percent. But it hasn't moved very much at all.

So the transaction price, on an early stage development project, doesn't, in fact, shift on the market comparables he's provided us with. Doesn't shift at all to take into account all the factors I am sure you are about to discuss which is lower construction prices, improved technology, improved efficiency.

So do you have anything -- I mean, first of all, if you think I am interpreting Dr. Guillet's report wrong, say so. But I understand that's his analysis. He will speak to that himself.

If you think he is wrong, why is he wrong when his numbers say what they say, other than you say he has chosen the wrong numbers?

A. [TOBIS] Excellent question. And I can't speak for Dr. Guillet. I could only speak for what's written in his report and my understanding of that.

As we will get into in our presentation, as you alluded to, we strongly disagree with the numbers that he has used to draw

these conclusions and his implied assessment that the value of what he refers to as early stage projects haven't changed.

This industry analysis, we will deal with the smell test on that analysis, is one reasonability check to help demonstrate why his numbers are wrong, in addition to various other issues which we will be discussing later, but including floating wind projects, including transactions with many math errors, transactions that he hasn't provided any information on, et cetera.

So we think that he has artificially created this pattern to make it look like early stage projects have not moved in value over this ten-year period. But it just does not pass the smell test and it's just simply not credible, for all the reasons we will get into. And that pattern would just not be evident in any other industry.

The example of gold, which I believe was Professor Gotanda said on Monday, we value a lot of gold mines as well and other resource based sectors where projects similarly go through a development trajectory from very early

stage through and as they mitigate risk and can go onwards.

But we have seen several times, in all other industries, as business valuators, that the value of an asset is definitely impacted by the expected revenues, no matter what stage that asset is in.

And even if an asset has not moved significantly through development, if the underlying revenue or commodity has increased or the industry has improved, that asset just reasonably increases in value over time.

PRESIDING ARBITRATOR MILES: Professor Gotanda has got a question but can I just cut in on there just for a moment.

You mentioned commodities and if you were to compare gold with electricity as the commodity, the gold price has appreciated over the years, the, the -- you're assuming electricity will appreciate over the years, and that would then make the commodity comparable like for like, gold/electricity.

But that's not what we have got here; right? We have got a tariff agreement. You say you know what the price is and it will

never change and it will increase inflation.

But that's, that's -- I don't think the example of the gold commodity actually works at all here.

First of all, we are not talking about -- as an early stage development project, we are not talking about sale of electricity. We are talking about the sale of an early-stage development project.

So we are not talking about the sale of gold. If anything, we are talking about the sale of an exploration license for a piece of dirt that may or may not have gold under it.

That's what we are talking about, if we are comparing exact comparables.

So Professor Gotanda raised the gold so I will -- now that I have probably confused the commodities comparables a little bit, I might leave him to try and dig me out of it.

But is -- gold does not feel, to me, to be the correct comparable here because we are not selling gold. We are not even selling electricity. We are selling an early-stage development project.

A. [TOBIS] Should I respond now or wait for Professor Gotanda.

You made a lot of excellent points. Obviously, we are valuing an offshore wind project and not a gold mine.

Our point was just the analogy of how market factors can impact the value of a -- what we are calling development stage asset.

If anything, in our case, the risk is even less than in a gold mine.

When you are valuing a gold mine, unless you have contractually sold forward all your future productions, you know exactly how much gold is there. There is still risk around the price that you will sell that gold at.

In this case, we have a contract that guarantees a price that contractually increases inflation by full inflation up to COD and then by partial inflation for the remainder of the contract.

So, if anything, it's even less risky than a gold mine. Obviously, we are not drawing any direct comparables from a gold mine. There is a lot of differences in industry function.

But what we are -- even in the case of a gold mine, you would have to incur capital costs to construct the mine. And that's a big input. There is a lot of costs up front similar to offshore wind and the revenues come after that.

If your expected cost of construction have come down but your projected revenues have gone up, basic valuation principles tell you the value of that asset has gone up, even if it's at an early stage, even if it's just an exploration property.

An exploration property where you have sufficient certainty that there is some gold actually in that ground.

Here, we have a contract that knows there is electricity to be sold in a contractual amount for that electricity.

So the analogies -- which, again, wasn't in our report but is something that we keyed into an opening, the analogy of why the industry impacts the value in asset was reasonable to us, just to help demonstrate the point of the unreasonability of Dr. Guillet's conclusions on this.

CO-ARBITRATOR GOTANDA: Getting back, though, to the market.

If I read both reports -- many reports, in this case, there is agreement that the market price can affect the value in the end.

In fact, if I read Dr. Guillet's report correctly, he says that it actually increased it a minute sort of amount and the factors that the price, he agrees the price did go down on, at some point.

The one question, though -- and I am sure he will have a chance to speak to that.

But the one point where I think you disagree, and this is where I want a little clarification on is.

In the dates that you're choosing for the market comparables are much different.

In other words, he uses a backward looking -- I think it might have been from 2015, 2016. I think, if I remember correctly, you are looking more at the 2018, the more recent sort of transactions.

Could you help provide a

little information on that and why that is right? Because that makes a huge difference, I think, in this case; right. It's.

A. [TETARD] May I take this one.

Absolutely. The period that you choose to select your comparables makes a big difference.

And we actually have a comment on this later on the slide.

I think Dr. Guillet goes back 12 years in his sampling and we limited it to three years from 2017 to February 2020.

Why we believe that sample of years is relevant and reasonable and justifiable is because the offshore wind industry has experienced its inflection point in the years 2016, '17 and '18.

It's from those years that offshore wind was set on its new trajectory, on its new -- it was a new market from that, from those years.

In 2016 and '17, the offshore wind market observed with the listing of DONG Energy at the time.

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It observed the first tenders of PPAs in Europe under $100 -- sorry, 100 euros per megawatt hour.

And this result surprised the industry. The industry was not expecting that prices of offshore wind had gone lower so fast.

It was a very important moment because it made understood the decision makers, the industry, that offshore wind was on a trajectory to become cost competitive, maybe not exactly, but cost competitive to other renewable technologies.

Before that, offshore wind was looked at as an expensive renewable energy technology.

A very important point.

And the other marker in those years was -- I think it was 2018 -- is when another tender in Europe produced a zero bid.

A zero bid meaning that the developer was asking a revenue contract of zero to the government. It was only asking for access to the grid and the rights to build their project. They were not asking for subsidies.

They were considering that

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their project could, by themselves, source other forms of PPAs to corporate or even directly on the wholesale market and secure their contract.

So, from those years, this is when you see, you know, an increase of the market. The market becomes attractive to new investors. New forms of capital arrive in the sector. The market grows.

And so we are looking at the valuation date of 2020.

What we wanted to make sure was that we would select years that were not too recent, that were big enough so that we could find some transactions, but not too distant to make sure that the market context of February 2020 was, to some extent, reflected in the precedent transactions to make them comparable.

PRESIDING ARBITRATOR MILES: Mr. Tobis, I just wanted to check something you said in your answer before.

That you said the value in the smell test, that if the value doesn't go up, it doesn't meet the smell test, I think, was generally your point.

When you talk about value in

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that context, here, the revenue doesn't go up because the tariff is the tariff is the tariff, other than inflation, which is then backed out with your discount rate to your net present value; right?

So leave that aside.

The value doesn't change. The revenue doesn't change. If anything, the operating costs or the construction costs or the efficiency may improve on the costs side.

So when you say the value doesn't go up, it doesn't get past the spell test, is that on the basis of profit rather than revenue?

A. [TOBIS] It's on the basis of multiple components.

So, first, the fact that the price increases by inflation would still increase the value.

Another component, which we will be getting into in the next few slides, as you mentioned, is the capital and OPEX.

Another component is financial risk. So did the actual discount rates or IOR rates you use if you are doing income approach are

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lower because there is less capital raising risk in a newer valuation date.

So your revenues are higher, your costs are lower and there is lower risk. All those components combine -- and there's the technology is better known so there's less risk about, you know, construction overrun, being over budget or over time.

I believe Dr. Guillet has referred to, in some of his presentations, that the offshore wind industry has an enviable track record of building on time and on budget.

That kind of statement would not have existed in 2015 which was prior to when even there's any operating offshore wind farms in North America.

So the combination of all the factors that we will be getting into shortly in our slides, all those would be combined to contribute to increased value.

PRESIDING ARBITRATOR MILES: So in the net present value calculation applying the weighted average cost of capital, you say that doesn't back out inflation?

A. [TOBIS] It's converting

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all the future cash flows into a -- as I am sure you are quite familiar, into your present value, S-curve valuation date so it's converting everything into 2020 dollars.

If you had some FIT prices don't have inflationary increases, so if the FIT price was fixed, which it does happen in other jurisdictions, then you would see that downward adjustment on value.

The fact that this one does have a full inflation increase to COD, and especially given the inflation rates since the FIT contract was signed, that would, I guess, you could view it as maintain the value of the project at this increased FIT contract price.

PRESIDING ARBITRATOR MILES: But if it were a FIT price with no inflation and the effect of the net present value would be to reduce it.

A. [TOBIS] Yes, yes.

PRESIDING ARBITRATOR MILES: Then a FIT price with inflation, the effect of the net present value is to create a nil sum game so there is no benefit to inflation in the net present value.

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A. [TOBIS] It depends on the relationship between the risk free rate used in the discount factor and the assumed inflation, actual historical inflation rate applied to the contract.

So the discount rate we are using to calculate the net present value, the first component of a discount rate -- which Mr. Milburn can get into. It's more in his sections of the report, but I am happy to explain the risk free rate.

Which represents, as of our valuation date, what the expected risk free rate is going forward. The FIT contract was increased by actual inflation rates from 2010 to 2020 which do not necessarily align with what our risk free rate is as at our valuation date.

So it isn't necessarily a complete offset the way, when we have run the math, it actually results in a value increase due to that slight disconnect between actual inflation rates and what -- in February 2020, risk free rates were quite low. You know, this was prior to pandemic, prior to the inflation jump.

So because there is a

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disconnect between the inflation rates that were used to increase the FIT contract and, effectively, the impact of inflation in our net present value calculation, the combined impact of that is an overall increase in value --

PRESIDING ARBITRATOR MILES: So I hadn't fully appreciated that Mr. Milburn will come to it.

So your weighted average cost of capital calculation does not account for the inflation in its entirety.

A. [TOBIS] It accounts for expected inflation as of February of 2020.

PRESIDING ARBITRATOR MILES: But it doesn't account for the full inflation in the model across the non-market risk.

A. [TOBIS] It accounts -- it accounts for inflation over the projected period. The expected inflation as of February 2020.

That inflation rate, just the specific rate of inflation isn't the same as the actual rate of inflation from 2010 to 2020.

So I am just saying that we are both accounting for inflation but, especially as we have seen in the last few years, inflation

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rates can jump all over the place.

So I am just saying there is slightly different inflation so it wouldn't be correct to say it does not account for inflation. I am just saying there are different rates being used.

PRESIDING ARBITRATOR MILES: I see it doesn't account entirely?

The inflation that you're putting in the benefit of is not backed out fully in the application of your discount rate. Your discount rate is too low to back it out entirely.

A. [TOBIS] Yes --

PRESIDING ARBITRATOR MILES: I understand you said why that is but just, mathematically, that is what your model does.

A. [TOBIS] Right.

It doesn't account entirely for the growth in inflation from 2010 to 2020 -- the benefit of the growth in inflation since the FIT contract outweighs the impact of inflation in our model. So the net impact outweighs the increase in value.

PRESIDING ARBITRATOR MILES: Yes, that is what I was asking. Thank you.

A. [MILBURN] Slide 14.
So now we are going to get into some of the developments between NAFTA 1 and the valuation date.
Next slide.
And the first development is with respect to the PPA price. So we have had a lot of discussion on it already.
But.
The first development is that the project's PPA price increased due to inflation by 17 percent over the period from NAFTA 1 to today, so that's based on actual changes in the inflation rate.
And that results in a direct increase in the project's value, since an increase in price increases the project's revenues and profits over the 20-year life of the FIT contract.
Secondly, since NAFTA 1, the PPA prices that you will receive by other onshore wind projects, as shown in the chart here, they decreased over the period.
So this chart shows that -- and this is US projects, PPA prices decreased from 2016 to 2019.

And, all else equal, a project with a higher PPA price would attract a premium relevant to projects that had a lower PPA price.
And this principle was recognized by Dr. Guillet in his reports.
Slide 16.
A. [TETARD] On Slide 16, as we see on the graph, construction cost of offshore wind, expressed in million per megawatt, have decreased. Dr. Guillet acknowledges, through the quotes, 40 percent decrease between 2015 and 2020.
Noting that Canada, Dr. Guillet mentioned that costs dramatically increased, leading to major developers announcing large impairments and losses in 2023.
As Mr. Tobis said, this is hindsight information. As of valuation date in February 2020, there was no sign of CAPEX increase coming.
Slide 17.
PRESIDING ARBITRATOR MILES: I am sorry to go back.
Slide 15, you said Dr. Guillet acknowledged that increased PPA price corresponded with an increase in project value.

Does he accept that in respect of early stage projects?
A. [MILBURN] I am not sure. I mean, he would have to answer that.
I think this is a quote on this chart is from his report and he is recognizing the concept that a higher tariff, if all else equal, a project with a higher tariff is comparably more valuable than a project with a lower tariff, as it would command a premium in the market because of the higher tariff.
PRESIDING ARBITRATOR MILES: Paragraph 29 of his first statement.
You keep going. I will read it.
A. [TETARD] We are on Slide 17.
As you can see on the graph showing both onshore and offshore investments, if we move to the next slide, 18, where we only show the relevant data which is offshore wind --
PRESIDING ARBITRATOR MILES: I am sorry. I have just answered my own question.
At the end of his paragraph, he says "these projects were mostly at fully

permitted stage or close so, in his opinion, not relevant.
So to -- so just so I am understanding the difference between the two approaches to methodology, I think he is fairly consistent that early stage development projects, he says -- I am not saying it's right -- should be valued on market comparables, PPA price. Tariff is irrelevant to that market comparable valuation exercise, he says.
And I just had understood your point on Slide 15 as saying that's not what he says. And I have checked the paragraph. It is what he says because he is referring to fully permitted so financial close or financial investment decision stage of the project.
So he would call that late-stage development.
So, sorry, I am just trying to keep that clear in my head.
As I said, I am not saying he is right. But where you're in common ground and different ground, I want to keep clear.
Sorry about that. You were on 17.

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A. [TETARD] On Slide 17.
Thank you.
Slide 18 --
PRESIDING ARBITRATOR MILES:
No dispute on the cost decreasing. Great news for wind.
A. [TETARD] We agree.
We can see larger amounts of capital have been deployed in offshore wind projects in the second half of the decade versus the first half.
About three times more on average per year during the more recent period, giving strong indications that availability of capital was growing in the industry. Meaning more developers, more equity investors, more lenders joining the market and increasing their investment amount.
I am sure that Dr. Guillet will be pleased to read so many quotes from his reports, and also from the public presentations that he made.
On the slide, as a consequence of the market growth, bullet 2, there has been decent, if regularly shrinking, premium for

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construction risk and early development permitting risk.
This means that the market risk reception for permitting risk was going down.
Bullet 3, there are buyers for almost every profile of risk.
Yes, this is real. Other market participants, including the sponsors, have shown significant interest in this project.
Bullet 4, benchmark IR has gently gone down over time and that the returns expected for riskier assets in the sector has also shrunk gently over time. The lower cost of capital naturally given to the growth -- given the growth of the industry.
Slide 19.
A. [MILBURN] So another development was that the global offshore wind industry grew significantly since NAFTA 1.
As shown in this chart here, the amount of new installed capacity increased significantly in the three years from 2017 to 2019, as compared to the prior years. And growth in the industry is a positive factor for the project value.

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And Slide --
PRESIDING ARBITRATOR MILES:
Does it not potentially create tension, though, on the supply chain?
So turbines are tricky and there's a limited number of suppliers and these are pretty large turbines.
So, stress on the supply chain; is that not a factor that one would need to discount for, at least in terms of delay?
A. [MILBURN] Well --
PRESIDING ARBITRATOR MILES:
And price.
A. [MILBURN] Well, there's many, obviously, many factors. That would be one factor that might be, you know, a concern.
But with the growth in the industry, the technology is improving, there is more capital coming in, they are getting better at manufacturing the turbines and so on, and streamlining their development schedules.
So, obviously, there's factors that go positive and negative.
But, in general, as the field is growing, that leads to opportunity and an

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increase in value, generally, within the industry of these projects.
PRESIDING ARBITRATOR MILES:
Does the Wood report talk about supply chain pressure?
A. [MILBURN] I believe so.
I think he -- I thought he concluded that there was no significant supply chain issues because all of the technologies are used across many different well-established industries.
PRESIDING ARBITRATOR MILES:
Yes.
But turbines, right, are not commoditized like a photovoltaic panel. They are highly technical engineering feats. And there's only really three main manufacturers of large wind turbines -- of the actual turbine.
Siemens being one of them whose name comes up repeatedly in the reports. They can only produce based on their capacity.
So the growth in the industry may create a bottleneck in the supply chain for the turbines, in particular. I'm less worried about the blades and foundations and cabling, but turbines, you don't recall that coming up?

Mr. Tetard, you are waving your hand at me so you have clearly got something to say.

A. [TETARD] Yes. Thank you, Madam President.

Just a sidenote that the turbine that is considered for this project is a, is a 4.3 or 4.5 megawatt turbine which is a turbine that is not used in -- so call it deep offshore wind project such as in the North Sea.

It's a turbine model that has just been used on a project in the Netherlands, on a lake called Lake IJsselmeer, which has a similar model.

So we are talking about an onshore turbine actually here.

And the -- yeah, the supply chain, while it -- there are also only three names but the market is a bit bigger.

PRESIDING ARBITRATOR MILES: Thank you. I had not realized that. So that is helpful.

Okay. Thank you very much. Not quite commoditized yet but more along the spectrum.

A. [TETARD] Some people already call these turbines, selling turbines is like selling fridges.

PRESIDING ARBITRATOR MILES: Which is probably why there is such financial pressure on the three names.

A. [TETARD] Slide 20.

So significant developments in the North American market.

In December 2016, the first offshore wind farm in North America is built, Block Island.

On the same month, Equinor pays 42.5 million US dollars to acquire these rights. It is the first time ever that such amounts of these first lease rights in the county. It doesn't come with PPA, nor grid, nor permits.

In October 2018, Ørsted buys Deepwater for 110 million cash consideration.

Deepwater was the pioneering and arguably leading offshore wind developer in the US by then.

In December 2018, several of these rights are released or sold by BOEM to several developers for double the price paid on a

dollar per acre by Equinor two years earlier. No revenue, no grid, no permits either.

In February 2019, Eversource acquires 50 percent of New England's Deepwater's asset, as previously acquired by Ørsted.

The market is or was aggressively expanding and more lease standards were in the making.

Slide 21.

So --

PRESIDING ARBITRATOR MILES: Are these all lease -- would all of the examples in your Slide 20 fall within the category that Dr. Guillet, rightly or wrongly, criticizes as the projects that you had to have leased the land before you could bid for the project?

A. [TETARD] I am not sure I understand the question, Madam President.

PRESIDING ARBITRATOR MILES: So I understand that he says those leased land related projects were particularly price sensitive because you weren't able to participate in the auction unless you had already leased the land.

So, therefore, you could sit on the land, a bit like supermarkets do in the UK.

You could sit on the land -- perhaps I shouldn't say that.

You can sit on the land and not develop it because nobody else can bid if they don't have the land.

Have I understood him right? And, if I have understood him right, do you agree?

A. [TETARD] But I am not sure I have understood him myself. So. In his approach to this.

There is -- every market has its own regulatory framework and the order in which you can secure the four key milestones that we talk about differ from a market to another.

In the US, the way it's being organized is, first, you secure a lease. That's called site control.

After that, you run your environmental surveys, you develop your project, and you become eligible to participate to what -- I can't remember the terms in the US, not a specialist. But to contract standards.

That's when you then can secure a long term PPA.

In Canada, it was the

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opposite. You were applying for a PPA and then you were awarded access to the land to develop it, and then that gives you the possibility to look at the grid and develop your project so --

PRESIDING ARBITRATOR MILES: Offshore or onshore or both?

A. [TETARD] Well, we are talking offshore.

PRESIDING ARBITRATOR MILES: In Canada.

A. [TETARD] Yes. Talking about the Windstream project as an offshore project, yes.

PRESIDING ARBITRATOR MILES: Right. But what land are you leasing?

A. [TETARD] The sea area, sorry. Or the seabed.

PRESIDING ARBITRATOR MILES: So you agree with Dr. Guillet that there is a difference in these US lease projects that any difference in the regulatory environment may or may not be a factor in price.

But there is a difference in these US project structuring because you need the lease first?

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A. [TETARD] It's a different approach. It's a different -- yes, it's a different approach.

It's just that the way the US approach this is by monetizing, at the earliest, this access to land. Sorry, I am calling "this land" but, you're right. It's a sea area.

PRESIDING ARBITRATOR MILES: Well, some of it is land because, the shore of New York, we have Block Island. Some of it is land.

A. [TETARD] Right.

PRESIDING ARBITRATOR MILES: In the US.

But the difference is you have property and lease rights in what you're selling here and, our Windstream, there wasn't?

A. [TETARD] In the case of Windstream, I understand that there was no cost associated, there was no competition associated in securing the land or the sea area.

Instead, the competition was on the PPA.

So it was being awarded the PPA that was granting the project, itself, to permitting, grid, and future construction.

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PRESIDING ARBITRATOR MILES: We might come back to your comment that the competition was on the PPA, but I might leave that to someone else.

A. [TOBIS] Just one quick clarification on this Slide 20.

The transactions referred to, they weren't all leasing transactions. For example, the last one, which we will be discussing later in our slide, was a transaction for a -- the actual revolution wind in South Fork wind farms, which had PPA contracts already. Wasn't purely a leasing transaction.

PRESIDING ARBITRATOR MILES: Okay. So 5 is just the lease and 6 had the lease and the PPA?

A. [TETARD] Also, Number 3 is an M&A transaction. It is Ørsted buying Deepwater; Deepwater having a number of assets, including leases and PPAs.

PRESIDING ARBITRATOR MILES: So bullet 3 and bullet 6, there were PPAs in place?

A. [TETARD] Yes, and they are the same assets considered in those

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transactions.

First, Ørsted buys Deepwater. And then Ørsted sells part of Deepwater to Eversource.

A. [TOBIS] Slide 21.

So we were just discussing the leasing transactions.

And, on this slide, we have extracted some figures from our first reports that show the upper trend in the amounts that were paid to acquire offshore wind leasing rights in the US in the period leading up to the valuation date.

As we just heard from Mr. Tetard, these were much earlier stage projects with no revenue contract, no permits or grid agreements in place.

And, further, as you heard from Mr. Milburn, the PPA prices that were being awarded on US other projects at the time, especially leading up to the valuation date, were significantly lower than the PPA price of the Windstream project.

As you can see, this upward trend further demonstrates that the offshore wind industry's growth between NAFTA 1 and

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February 2020.

Slide 22.

PRESIDING ARBITRATOR MILES: The problem with scripts, Mr. Tetard just told us that two out of the eight did have PPAs, Number 3 and number 6.

A. [TOBIS] Sorry, those Number 2 and 6 aren't included on this chart. Those are different transactions.

PRESIDING ARBITRATOR MILES: Oh, I see. So that's not tracking the items on Slide 20?

A. [TOBIS] No. There are some overlap. Two of the items on Slide 20 also show up in this slide.

This is -- sorry, the last four items on Slide 20, because those are the more recent ones from December 2018. As well as the December 2016 one.

But Slide 21 does not include that -- what we call transaction 3 and 6 from the previous slide.

Slide 21 is simply the leasing transactions.

CO-ARBITRATOR MCLACHLIN: All

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leasing transactions?

A. [TOBIS] Slide 21 is all leasing transactions.

All these transactions are just simply to acquire leasing rights. No permits, no PPA, no grid.

What it demonstrates is the amounts the buyers were paying just simply to purchase leasing rights drastically increased between 2012 and the most recent ones prior to the valuation date of December 2018.

Slide 22.

A. [MILBURN] So, just to recap, all five of these factors have a positive impact on the project's value.

Also, all lease factors are independent of the project's ability to advance its development from the date of NAFTA 1 to the valuation date.

But, notwithstanding all of these positive market developments since NAFTA 1, Dr. Guillet insists the project's value didn't change from 2011 to the valuation date in 2020, which, in our view, is simply not tenable.

Slide 23.

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A. [TETARD] Moving to -- moving on to the market approach valuation of the project.

On Slide 24, so we have previously expressed that there are no two perfectly comparable projects and transactions.

To obtain a valuable sample of comparable transactions, one must set relatively strict criteria.

We discuss here the criteria applied by both experts in composing the selection of relevant and comparable transactions.

PRESIDING ARBITRATOR MILES: Mr. Tetard, could I ask you a prefatory question to your discussion. You are moving into the market approach now, so you are going to be spending some time there.

A. [TETARD] Yes. We going to spend some time on select transactions, yes.

PRESIDING ARBITRATOR MILES: Okay. Keep going.

A. [TETARD] Date of transaction, we commented earlier.

We limit transactions up to three years prior to valuation date. Our view is

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that market context matters.

Dr. Guillet's transactions date back 12 years prior to valuation date.

On the development stage, we do agree that the project or the transaction volume of project has to be in the development phase and must not have achieved financial close.

Revenue certainty.

We only select transactions where projects have secured the PPA or other revenue contract. As expressed earlier, PPA price certainty matters greatly.

Dr. Guillet does not apply such filter.

Availability of reliable information.

We only use public information. Dr. Guillet also includes transactions where no public record exist, hence cannot be crosschecked.

Floating comparable.

We believe floating offshore wind is not comparable to bottom-fixed, as previously expressed.

Future contingent

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consideration.

We believe they must be included and risk weighted discounted as of transaction date. If not, value of the transaction is not accurately reflected.

Dr. Guillet states several times he excludes contingent consideration.

Exclusion of premium transactions with above market price PPA.

We disagree also given Windstream itself had above market price PPA.

Dr. Guillet excludes subjectively several transactions he calls outliers, including those with above market price PPA like the project.

And finally, in transactions involving both undeveloped acreages and identified projects, we allocated value based on analyzing undeveloped acres value based on publicly-available information.

Dr. Guillet himself arbitrarily allocated 50/50 of value between the two assets. This approximate approach has an impact of 30 percent on valuation.

Slide 25.

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A. [TOBIS] In this slide, we show summary of the ten comparable transactions used in our valuation.

And the ones that we have highlighted in green are the ones that Dr. Guillet had also included valuation multiple in his report.

We note that these four transactions, in particular, were all at least one and a half years away from FID, financial close, as of the transaction date. Some several years -- several time longer, several years away.

Therefore, we will spend the next few slides discussing why these four transactions, in particular, should be considered in a comparable transactions analysis for the project at the valuation date.

Slide 26.

A. [TETARD] So Revolution Wind and South Fork.

So I was personally involved in the acquisition of Deepwater by Ørsted in 2017/2018.

This transaction included the South Fork Wind and Revolution Wind projects,

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50 percent of which were acquired by Eversource a few months later.

Contrary to what Dr. Guillet claims, that projects do not get valued using DCF prior to FID or IOC, these projects were valued using DCF, although had made little progress in the permitting process and were not anywhere close to FID.

Also contrary to what Mr. -- to what Dr. Guillet said, these two projects were not the subject of impairment announced by Ørsted in November 23rd.

In fact, even during the challenging years of 22/23, both projects successfully passed their FID and are in construction today.

This transaction is very important as it is the only transaction in the relevant sample that takes place in North America. It also includes other very comparable features, as we can see on the next slide, Slide 27.

These projects were several years away from FID. Revenues was largely secured but, in fact, the Revolution Wind project, the bigger of the two projects, had yet to fully

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negotiate the terms of the PPA.

Permitting was little progressed. Site control was achieved, as well as grid. Although, actually, information for the US projects could not be found.

Similar wind speeds and PPA contract terms.

The biggest difference with the project being the PPA price secured.

As you can see, tariff at COD $254, Canadian dollars for the project, versus a weighted average of 139, which is almost double for the project.

And this raises the question that a significantly superior PPA price could command on a superior valuation for the project.

Slide 28.

A. [TOBIS] On this slide, will show how we have calculated the transaction multiple from the February 2019 Revolution Wind and South Fork transaction just discussed by Mr. Tetard.

We also show how the multiple was calculated based on Guillet 2.

Based on this transaction, the

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Windstream project would have an implied value of $131 million, based on Dr. Guillet's approach after he corrected for the math errors from his first report to his second report. The implied value of the project would be $104 million.

We have included this transaction in our market approach. And Dr. Guillet has inappropriately excluded the multiples from this very comparable Revolution Wind and South Fork transaction as of 2019, from his valuation of the project.

Slide 29.

On the next few slides, we will discuss the sale of a minority interest in what we refer to as the LEM project in France, which was sold by EDPR in December of 2018.

As at the transaction date, these projects had significant permitting risks due in part to the various litigations they were involved with at the time.

And these wind farms were several years away from reaching FID, which we now know did not end up occurring until April of 2023, i.e., approximately four and a half years after the transaction date.

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On the screen here are extracts from EDPR's 2019 audited financial statements audited by PwC where they describe this transaction.

EDPR explains that the transaction amount included contingent consideration and that they and their auditors calculated the fair value of this contingent consideration after considering the probability and discount associated with the contingent consideration.

The slide also shows that EDPR recognized an accounting gain on sale which provides evidence on the total cost that are being incurred on each site as of the transaction date.

Slide 30.

On this slide, we have taken numbers directly from the previous slide which was EDPR's audited financial statements -- the highlighted number there -- and demonstrated that the fair value of the total consideration paid in this transaction implied a multiple of 9.4 times the costs incurred.

This is relatively consistent with the value to cost multiple implied in our

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valuation of approximately 10X, i.e., approximately 300 million divided by 30 million.

Slide 31.

On this slide, we show the implied project value based on the multiples derived from the LEM transaction.

We also show the original and corrected calculations conducted by Dr. Guillet for this transaction.

The key issue that remains with Dr. Guillet's corrected calculations is that he has still inappropriately excluded the 36.4 million euros fair value of the contingent consideration.

As described in the prior slide, the fair value of this contingent consideration was set out in EDPR's audited financial statements.

From a valuation perspective, it is simply wrong to exclude the contingent consideration when calculating the valuation multiple from this transaction.

As a result, Dr. Guillet's valuation multiple from this transaction is significantly understated.

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Slide 32.

PRESIDING ARBITRATOR MILES: Give me a minute here.

What did they value the contingent payment as? What percentage of its actual value?

A. [TOBIS] If we go back up to Slide 29.

They just indicate what the fair value of the contingent consideration is but they don't say what the undiscounted value is.

So they say, for example, the first highlighted note, the contingent consideration was -- the fair value of that was 16.4 million euros.

They don't -- they don't indicate what the un -- you know, the actual amount was before any risk adjustments.

That's the risk adjusted present value of the contingent consideration.

PRESIDING ARBITRATOR MILES: I see. I see.

So we don't know whether it's 2 percent or 90 percent?

A. [TOBIS] Exactly. We

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don't know. We don't know what the specific terms were.

PRESIDING ARBITRATOR MILES: And we don't know what it was contingent upon and we don't know the timing.

A. [TOBIS] Exactly.

We are relying upon PwC as the auditors that is part of the process they would do. Because that number directly impacts the financial results of EDPR presented to the public markets and their shareholders.

And, as a former auditor myself, I know the amount of diligence that would go into auditing that figure to ensure that it is reasonable and reliable.

CO-ARBITRATOR MCLACHLIN: But are you saying, then, that this contingency factor is very tailored to the specific, specifics of a particular thing, of a particular development?

A. [TOBIS] Yes.

Every contingent payment would be exactly as you said. Tailored to the terms of that contingency. When is the payment expected to be made and what's the risk of achieving those milestones.

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I could speculate that, in this case, they might have expected an additional 100 million euro payment in two years, subject to hitting a milestone. The auditors considered the chances.

After impact, considering the risk and timing of that amount, they said the fair value of that payment today is 16.4 million euros.

PRESIDING ARBITRATOR MILES: And this process requires you to apply probability analysis; does it? Or somebody to apply a probability analysis?

A. [TOBIS] Yes, it depends on what the terms of the contingency are.

Some contingent payments, even though they are called contingent, they are effectively, more or less, guaranteed the issue is just timing.

So then it's applying time discount to the payment.

PRESIDING ARBITRATOR MILES: Is that right for development stage offshore wind? Because the timing must correspond to a development stage.

So if the timing is 31st

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December 2025 because that's the date we have programmed for financial close or financial investment decision. But financial close doesn't happen because we have global financial crisis and all the banks pull out, then it can't just be timing.

A. [TOBIS] Yes. Sorry, my comment was just in general for contingent consideration.

But you are correct. Likely with development stage offshore wind projects.

From what we have seen -- and I am sure Mr. Tetard can speak to his industry experience -- usually, those contingent payments are subject to meeting certain milestones.

So to quantify the fair value of them, as the auditors have done in this case, they would have had to consider probability factors.

Not dissimilar from what we have done in our DCF approaches in our report as well. Assessing probability factors of achieving certain milestones.

PRESIDING ARBITRATOR MILES: But this is the market comparables?

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A. [TOBIS] Right.

Our view is that the comparables in DCF work hand in hand, just to understand how valuation works.

But, with this particular contingent consideration, yes, the auditors and management would have had to derive a probability of receiving that contingent consideration and considered the timing of when that would be paid.

And then calculated the fair value of that which would imply the net present value of that payment on transaction date since they needed to report that amount in the audited financial statements.

And this is commonly applied on not just any industry, but multiple M&A transactions with various forms of contingent payments, earnouts and so forth.

This is common practice across the board.

PRESIDING ARBITRATOR MILES: But, in the words of Lewis Carroll, it's jam tomorrow? Right.

It's not money -- it's not jam today. Your money today is we will pay you a

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million for where you are in your early stage development.

If and when you ever reach financial close, we will give you 100 million.

And then this, for the audited statements, they are giving a contingent value to the chance of reaching the 100 million stage?

A. [TOBIS] That's partially correct.

So, in any transaction --

PRESIDING ARBITRATOR MILES: Which part is incorrect?

A. [TOBIS] I will explain.

Everything you said is correct and perhaps I will add one nuance on top of that.

Any transaction, a buyer can, in theory, say I will give you, as you describe, 1 million today and 100 million in two years from now if you meet a certain milestone.

In the alternative, I will give you $5 million today and then no future payments.

They are always -- from a buyer and seller perspective, there is that amount. From a financial perspective, it would be

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indifferent between receiving the amount today versus receiving the amount in the future.

Today's amount, again which is fundamental to business valuation, represents the net present value of that future payment after risk adjustments.

A seller might say I would rather have 5 million bucks upfront and forego the chance of getting 100 million in two years from now. Or a buyer might say the same thing. I would rather just take you off the table right now and give you 5 million today.

But that 5 million, as you heard, is greater than the 1 million payment in the multistructure process.

So what the auditors are doing, and what we are doing as well in our report, is coming up with what is the cash equivalent value, today, had a buyer and seller decided to end this whole process on day one and come up with one cash equivalent number; what would that number have been.

It would have been less than the upfront payment plus the contingent consideration because you have to account for

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risk.

How much less?

That's what we are here for and that's what the 16 million represents.

They are saying had we -- effectively, the auditors and management are saying -- and perhaps they have got this number from negotiations, which is where I have seen myself where it comes up.

In M&A negotiation process, EDPR and Sumitomo might have, at one point, said, okay, let's make a deal where you give me 16 million today. And they said, actually, no, let's structure it contingently.

And the auditor said that's pretty good evidence of what the today value of that contingent consideration is because it was negotiated between the buyer and seller.

PRESIDING ARBITRATOR MILES: In our language, you are basically valuing a loss of chance?

A. [TOBIS] No, I wouldn't describe it that way.

PRESIDING ARBITRATOR MILES: Well, a probability analysis is a chance of

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getting somewhere and you agreed it was a probability analysis.

A. [TOBIS] I think every valuation -- and, technically, in that term, could be described in that way.

Every valuation is the value of the cash, my expected cash flow. So there's a chance of receiving future cash flows.

And what valuators do we, as I am sure you are quite familiar, is that's what a discount rate is and risk factors.

So every valuation is, technically, what's the today's value of a future cash flow amount.

PRESIDING ARBITRATOR MILES: Right.

But the discount rate and risk factors are in your DCF.

This is the loss of chance in a market comparable.

So you are saying, in my early stage development, I believe I will get payment X, now, in my early stage development.

But I have a structured transaction that I am due X to 2 in three years' time and five years' time, if I hit these events.

And you are giving that a present value for the probability that you will hit that point?

A. [TOBIS] So I am not giving -- in this case, I am not giving any present value. I am relying on what the auditors and EDPR assessed in open market context.

What they would have done is, what we have seen in M&A context, is they would have -- every transaction, specifically, that I can speak to, would have prepared a model. And they would have said what is the value, what we think the value of this project is today, and one cash equivalent value.

We think that value is -- if you flip to Slide 30 -- we think the value of these two projects is 79.2 million euros. That's the total value.

Now let's figure out how to structure the payment.

Either you could write me a cheque today for 79.2 million, because that's the value of the project today.

Or, just for whatever business

purposes and tax reasons or whatnot, we could structure it in a way, well, you will give me 42 million today and perhaps 100 million in two years from now, subject to meeting milestones.

And, therefore, the -- you still get to the same point. Where the value of that whole project, as of valuation date, is still 79.2 million.

It's just -- it's the same thing as, you know, half a dozen of one or a dozen -- whatever the phrase is.

PRESIDING ARBITRATOR MILES: Six and one-half dozen of the others.

Professor Gotanda had his finger on the button.

CO-ARBITRATOR GOTANDA: So if I understand correctly -- go back to Slide 29.

Correct me if I am wrong here because my understanding of the accounting principles are not all that great. I have seen it before.

They complied -- this is actually set out -- the way they did this is actually set out, in very relatively rigid accounting principles, if I remember correctly.

In the sense that they didn't just pull this calculation out of -- you know, made it up.

There is a provision, if I remember correctly, on how to actually do this so that it's relatively standard sort of practice; isn't it? I could be wrong.

A. [TOBIS] Are you talking from IFRS accounting standpoint?

CO-ARBITRATOR GOTANDA: From an accounting standpoint and auditing standpoint, if I remember correctly -- it could be not in accounting. It could be in auditing.

The process of valuing something that is contingent payment in the future is -- there are standards that have -- that need to be followed.

In other words, there are standards and guidelines to do it.

In other words, they didn't just make this process up. It's a pretty standard procedure to do this.

A. [TOBIS] Exactly on point. I'd be happy to walk through, in detail, the various IFRS standards on fair value assessments.

But, in a nutshell, IFRS requires companies to calculate under the IFRS definition of fair value, especially in a transaction context.

That definition, more or less, lines up exactly with what we call fair market value. There are slight little wording nuances but, ultimately, it's the same thing.

What is the price that would be paid in an open market context for the data on this date.

IFRS assessed other various valuation approaches that should be used to assess fair value.

What's interesting is it actually sets out a -- using a future cash flows approach as an appropriate standard, it doesn't distinguish between stages of development.

It ultimately says come up with a number that would be appropriate in an open market context to value this asset on that date.

So there are very rigid IFRS standards on valuation and they, more or less, line up with general business valuation principles.

We have been involved in many cases where auditors have been sued or companies have been sued for misreporting valuation concepts. There are very strict penalties in place.

As Professor Gotanda noted, these aren't just plucking numbers out of the air. These are very strictly applied auditors that, as I can speak myself, work very hard to ensure every number in a public financial statement is as accurate to the best of their ability.

CO-ARBITRATOR MCLACHLIN: How do you compare -- naive question, perhaps.

But you have these contingency factors which you say have to be valuated and you say they are different for different projects, obviously.

And one project might have very high contingency and then another. And you get your comparables together and you say, well, this is the rate.

But how does that work in a comparable analysis?

Because don't you have to go into the background of the different

contingencies, notwithstanding what a particular company is valued at. It may be valued at more or less, depending on those contingencies.

So how do we take a figure when we don't know what those contingencies are?

A. [TOBIS] Excellent question.

If you go back to Slide 30 for a second.

Ultimately, all we are concerned with, the proper way to do a comparables analysis -- and, again, this is what we previously thought was non-contentious amongst valuators -- is -- what we are concerned with is that 79.2 million that what is the fair value of all consideration payments on transaction date.

Every transaction will get to that day one implied value differently because every transaction structuring will have different contingencies, different risk factors.

And, to compare apples to apples, we need to put everything on the same platform.

CO-ARBITRATOR MCLACHLIN: Exactly.

A. [TOBIS] Where we come up with that what the is the cash equivalent value today, of the amount that was paid in this transaction.

In some transactions, there just isn't enough information available to properly do that assessment.

Usually, when we do comparable transactions, if we don't have enough information that we can get comfortable on to understand what the cash equivalent value of the transaction amount was on transaction date, we will exclude that. We will only include transactions where we have sufficient information.

In this case, we had what we considered to be very objective and reliable information that helped us derive the cash equivalent value of this transaction on transaction date, that's 79.2 million. And that's the only number we care able.

Again, half a dozen of one or a dozen of the other. It doesn't matter, from the way we are treating it, whether the specific contingency factor is in each transaction.

CO-ARBITRATOR MCLACHLIN:

Thank you.

PRESIDING ARBITRATOR MILES: So time check.

I have a bunch more questions on this. But one that you might be able to answer very, very quickly.

At Slide 29, EDPR sold a 13.5 percent stake in return for these payment amounts; right.

So if one were then to calculate EDPR's value on a discounted cash flow, they would have to give them -- help me -- 86.5 percent of those cash flows; right?

It's not all theirs, they have sold part of the enterprise to somebody else?

A. [TOBIS] I think I understand your question.

Sorry, did you want to try this one?

A. [TETARD] No, I think if EDPR sells 13.5 percent of the equity of the project to Sumitomo, it means that Sumitomo acquires 13.5 percent of the future assets and liabilities, positive and negative cash flows of this project.

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PRESIDING ARBITRATOR MILES: I think we will take the break. Yes, yes.

A. [TETARD] I want to make sure I understood your question.

PRESIDING ARBITRATOR MILES: Yes, right.

So, therefore, EDPR is not entitled to 100 percent of the value of the project.

Your DCF, Mr. Milburn, assumes that Windstream always keeps 100 percent of the project.

So it never assumes -- or does it? Is this in your debt equity ratio?

Are you discounting, somewhere in there, for part of Windstream to be sold to equity investors?

A. [MILBURN] No.

Our calculation is to the Claimant who owned 100 percent of the project, so there's no such an --

PRESIDING ARBITRATOR MILES: And you are assuming any financing, that they will continue to keep 100 percent. So they can't sell any equity.

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A. [MILBURN] Well, they could.

We are assuming they are entitled to -- they own 100 percent on the valuation date, so they are entitled to 100 percent of the value.

A. [TOBIS] If I may just add.

Our valuation would be the same thing as assuming that they were going to sell 100 percent of the equity on valuation date.

If, on February 18, 2020, Windstream decided to sell 100 percent of the equity to a third party, what our conclusions represent is here is what he what we think they would get in one cash payment on day one.

Obviously, they can structure it however they want in any kind of ways, but here is our conclusions represent the cash equivalent value to 100 percent of Windstream on valuation date.

PRESIDING ARBITRATOR MILES: So the question I would like you to think about in the break -- and we are going to take a break -- is I can't put my fingers on it immediately.

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But, at some point, in this structured transaction analysis, for the contingent payment -- so it's not upfront plus contingent, necessarily.

These things can be structured all sorts of ways. And, quite often, there is an in between of carrying the OPEX or DEVEX, either past or future.

So whoever is putting money in in the structure transaction approach will pick up some of the development cost.

You are shaking your head, Mr. Tetard.

A. [TETARD] It can. But this is not the assumptions that we have made.

But it can be a way of structuring the transaction where the acquirer only acquires part of the project at different milestones.

But we have not assumed it this way.

PRESIDING ARBITRATOR MILES: I have read your report. So I am assuming you are not disagreeing with the fact that they can be structured to have that development expenditure.

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A. [TETARD] It can be. It can be done this way.

PRESIDING ARBITRATOR MILES: I hope so because that's what you said in your report.

A. [TETARD] Then maybe I am not understanding the question presently.

PRESIDING ARBITRATOR MILES: Maybe.

So that is not what I want your help with.

What I want your help with is, if I understand Dr. Guillet correctly, he is saying early stage development, market comparables, don't need a DCF. Just need to look at what other projects buy and sell for at that time.

And what we have been talking about for the last 20 minutes is do I or don't I put in contingent future payment into that number.

If you are to take a structured transaction approach and you do attribute -- as, Mr. Tobis, you have very eloquently said financial accountants and auditors do do -- attribute a value to the future

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contingency of the possible payment at the next stage.

How do you calculate the amount of that future contingent payment other than a DCF?

A. [TOBIS] I think you hit the nail on the head.

Which is why, as you have seen from our reports and here discusses, DCF really needs to be used hand in hand with a market approach. These are two tools in the valuation practitioner's toolbox and --

PRESIDING ARBITRATOR MILES: If you have a structured transaction approach -- you don't always have a structured transaction approach.

If you do, then -- so two separate questions.

If you don't have a structured transaction approach, though, then, arguably, Dr. Guillet's approach, at the first stage payment, early stage, some -- a person owns some land and they have not got any money to develop it. But they are selling the chance early on.

That might not necessarily --

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they might just have an upfront payment.

Dr. Guillet's approach that you don't need DCF for that is a different proposition to if you move into a structured transaction approach that requires a financial close payment.

A. [TOBIS] So I think a helpful way to think about it would be that, in typical M&A transactions, the investment bankers sell a site. They will, first -- they will negotiate and then figure out what's the actual cash equivalent value of this business or asset today. What number.

And they will likely use a combination of DCF and market approaches, transaction structure, and say, today, we think this asset is worth a million dollars.

Had we sold it today for one payment, we would ask for one million dollars for this.

How they get to that million dollars, they might have more relied on DCF, more relied on market approach. They will usually do some kind of football field chart. That's later in our presentation.

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Then, when they come to negotiations, and they sit down at the bargaining table, they say we agree that the value today would be a million.

Let's figure out a different complex way to structure this that, effectively, gets back to the same present value of a million dollars, we are going to structure with multitiered payments on certain earnouts and so forth.

But that's just step two. That's just negotiations. That's between the buyers and sellers. And they come up with -- and this is why investment bankers charge so much money, they are coming up with these structuring approach.

Then it's a way to move risks around between clients, but it starts first with the value today. The cash equivalent value today.

So, in this example, I wasn't involved in negotiating this transaction but I would have assumed, based on experience with other transaction in the market, they first would have come up with we want to ensure that the value of what we are selling this for is equivalent to 79

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million euros.

Okay, now let's structure this in a way that still gets us back after accounting for probability and risk and timing that still gets us back to that approximately 79 million euros today value.

Does that answer your question?

PRESIDING ARBITRATOR MILES: No, it does. It's excellent. Thank you.

The bit I struggled with in Dr. Guillet's report was he said, when he was responding to Mr. Tetard's comments about the time you worked together -- and I can't find the place so I am going to misquote him.

But he said, yes, but, at early stage development, we were approaching it from the buy side. What are we going to pay to acquire an early stage development.

Whereas, we would look at DCF to see what we could sell it for at financial close.

Did I get that right? You are looking confused.

I don't want you to tell me

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whether he is right or not. But am I recollecting what he said correctly or do you not remember?

A. [TETARD] I would need to read the paragraph again to.

PRESIDING ARBITRATOR MILES: All right. I will try and find it on the break as well.

But my recollection is that he said that, yes, we would look at DCF to what we could sell it for in the future. But in terms of what we've priced for what we'd acquire it for, early stage development, we would look at market comparables.

I struggled to see -- and including for the reason you just said, Mr. Tobis -- how those two things can be disconnected in the same way.

And I also couldn't see how that took into account if you were the acquirer and the acquirer -- so if you were buying an early stage development intending to keep it at financial close, so it was a structured transaction. So you are buy-buy. You are not buy-sell, if you follow.

So that analysis -- and we

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will speak to Dr. Guillet about it.

But if you could help me to try to understand what's wrong with that analysis because it doesn't feel right. To me, that would be helpful.

And Dr. Guillet, this afternoon, will tell me what's right with it and why I am wrong.

And, if I find the paragraph, I will tell you. It's in his first report. If someone just word searches "sell", they will find it.

We are going to take the break. We are 15 minutes late.

But, before we do that, what shall we do? Give us a time check. What have we got?

MR. ARAGÓN CARDIEL: 28 minutes and 30 seconds, so there's 1.5 minutes left.

PRESIDING ARBITRATOR MILES: Okay. So that's your time deducting what we have spent. So you have got one and a half minutes left, now.

Ms. Squires, are you the

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damages boss for the government?

MS. SQUIRES: For better or for worse.

PRESIDING ARBITRATOR MILES: What should we do?

We may go into the breakout room and my co-arbitrators may tell me to just zip up and leave everybody alone. That's quite possible.

But, but, unless they do that, I am finding this quite helpful.

They have got one and a half minutes left. That's not entirely because of my interruptions but they have had to stop-start, stop-start.

Could we give them a bit more time?

MS. SQUIRES: Yes, I think that's fine, a bit more time. I think we are finding it helpful as well, the questions and the answers.

So I think, yeah, we have no problem with a little bit more time.

PRESIDING ARBITRATOR MILES: And we would afford Dr. Guillet the same courtesy.

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MR. TERRY: Of course, yes.

PRESIDING ARBITRATOR MILES: Okay.

Now, then, the question, gentlemen.

Mr. Milburn, you sort of been tucked in the back there. I think we are going to come to you at Slide 36 with a vengeance.

So we don't want to kick out your time but, roughly, what was your timing from Slide -- we are up to Slide, I think more or less -- have we done the comparables.

I think we are up to Slide 36 now. I think we are up to the income approach.

But how much longer did you have planned in your presentation, if you're uninterrupted?

A. [MILBURN] I think we are on Slide -- we are on Slide 32. So I think we still had a few important market transactions to walk through.

And then talk about Dr. Guillet's comparable transactions and why we disagree with them.

And then get into the income

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approach which was going to be relatively quick, so there were sort of five minutes on the income approach.

So we probably have, I think, maybe 15 minutes total.

PRESIDING ARBITRATOR MILES: Okay. All right. Well, that seems very reasonable.

So, all right, so we will take the break now. We will come back at 11.

So we will come back at 11.

I will find the part in Dr. Guillet's report that I am referring to.

But we look forward to hearing the rest of your presentation.

Thank you very, very much.

And you remember, no discussing anything between counsel and one another.

A. [MILBURN] Thank you.

--- Upon recess at 10:48 a.m.

--- Upon resuming at 11:07 a.m.

PRESIDING ARBITRATOR MILES: Our apologies for coming back late.

If anybody wanted to briefly

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to try to enlighten me on what was paragraph 116 of Dr. Guillet's first report, now is your chance.

A. [TETARD] Thank you.

It doesn't make a lot of sense.

Because what we are saying here is that we are taking the same project. When we buy them, we don't value them. We just pay a multiple.

But, once we have them, we value them using a DCF so that we can anticipate what our future profits, when we sell them at financial close.

So, with the same project, at one end, you don't value them to buy them but you value them to sell them.

I think what -- and this is -- when we put together that investment proposal, trying to raise these fund together in 2014, 2015, we did not value projects to buy them. We did not. We did not carry any valuation of the projects that we were intending to buy. We didn't get to that stage, unfortunately.

What Jérôme is explaining here is we needed an input, an assumption, as to how

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much was going to cost us to buy a project. To put it in our financial model.

So that's what he is saying.

And he is insisting that because this is what we did, at the time, I was convinced that this was the way to value early stage development projects.

Which, to me, is going a bridge too far in the sense that, no, we did not value those projects. We did not. We simply assumed that we could buy them for a price and we could sell them for another.

I don't know if that is helpful.

CO-ARBITRATOR MCLACHLIN: Depends what you mean by "valuing".

PRESIDING ARBITRATOR MILES: That is exactly what I was going to say.

You are trying to find what a reasonable willing buyer would pay a willing seller. And, if that's finger in the air, then that's a lot of this process; isn't it.

Okay. All right.

But, in terms of methodology, the market comparable methodology, he is saying,

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at the early stage development, on base of milestones and pricing, what are we going to pay for them, I think.

A. [TETARD] That's correct.

What is important to read as well is that, even though those projects that we were assuming we would acquire for such price, these projects were, at that moment, at an early stage or at a development stage, still years away from financial close.

But we were then creating a DCF model for those projects in anticipation to then reach financial close, maybe three years later, in order to know what the value of that project, three years later, could be.

PRESIDING ARBITRATOR MILES: Yeah, I think --

A. [TETARD] Right.

PRESIDING ARBITRATOR MILES: I think the point he is making -- and you have helped me understand it a bit better I think.

I think, from what I understand is the point he is making is, for a fund, which was the purpose of the exercise that you and he were undertaking, I want to be able to buy something at the lowest possible price.

A. [TETARD] Yes.

PRESIDING ARBITRATOR MILES: And sell it at the highest possible price.

A. [TETARD] Yes.

PRESIDING ARBITRATOR MILES: And I need to show what my KPIs are on my fund.

So I need to show that, if I buy it for X, I can sell it X, whatever. X times 2, X times 3.

So, in order to do that, I have to look at my selling price and see -- to see what the return is on my fund investment. And I need to tell that to my fundraisers or whoever is providing me money in my fundraising.

So I think that makes more sense. That's helpful.

And, if I understand what you're saying, if you can get away with buying the early stage development projects in a portfolio, as cheap as possible, including on a market comparables approach, of course you would do that.

And a portfolio is exactly the right -- we are so moving outside the scope of this case now, I think.

But a portfolio, if 1 in 5 in your portfolio goes and sells for a good financial close price, then it's worth it; isn't it?

A. [TETARD] Success.

PRESIDING ARBITRATOR MILES: Unfortunately, it wasn't. You didn't get the fund up and running; did you?

A. [TETARD] Correct.

And we didn't have access to acquisition opportunities, really. We never got a data room opened. We never looked at wind reports or, you know -- so we didn't carry valuation of those projects we wanted to acquire.

PRESIDING ARBITRATOR MILES: Okay. All right.

José Luis, that was all my time.

So Slide 32 and I will put my listening ears on.

A. [TETARD] Slide 32.

So it's another interesting precedent which is the Formosa 1 project, a project I was involved in also, personally, at my time at Ørsted.

It's a first project in new

market with untested permitting and regulatory regime, in a market with no existing supply chain, with challenging technical characteristics such as earthquakes and typhoons, yet attracting experienced and international developers -- in this case, Ørsted and Macquarie -- as well as the international lending community.

A transaction date.

The project hasn't yet secured all its key permits. It has secured some but not all and hasn't fully secured its PPA price. It has some indication but not fixed.

Although the PPA price is similar to the project, it is not inflation adjusted during its tenure of 20 years. It's a key difference between those two projects.

Other factors include political risk proceeding in Taiwan commanding a higher cost of capital and higher CAPEX for Formosa 1, given soil conditions and typhoon imposing the use of over engineered typhoon type certified wind turbines.

All factor combined, the project would likely command a higher multiple than this transaction. And, based on this

transaction, the project would be worth just north of $100 million, according to our calculation.

Slide 33.

The NNG project is arguably more advanced than the project, having obtained its permits and having achieved several other development activities. Hence, being perceived as less risky. Therefore, commanding a higher value.

Yet, it is not near achieving its financial close as it only happens 18 months later.

It also includes an above market PPA price which also is an important factor explaining its superior value.

According to information available in the public domain, we end up calculating a multiple of 1.71 million per megawatt; while Dr. Guillet, also based on information available in the public domain, calculates a multiple of 2.05 million per megawatt.

On the bottom left side of the slide, reference is made to a transaction aborted on this project at a value of 100 million euro, just two years earlier.

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The jump of value to 600 million was largely explained by the falling costs of developing offshore wind in recent years, while benefitting from a 15-year inflation-linked PPA secured three years prior to the transaction.

Slide 34.

A. [TOBIS] So, on this slide, we just show what the impact or market approach would be if we were to just use the four transactions described above, which were all at least one and a half years away from financial close and, in some cases, even much, much longer, up to four or five years away.

As you can see, using just these four transactions would result in implied project value of 200 to 250 million.

Slide 35.

A. [TETARD] We do -- sorry, Dr. Guillet's comparable transactions are not comparable.

We challenge transactions Number 1 to 10 being older than three years prior to the valuation date.

As explained, transactions happening in the market context that is too

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different from the project evaluation date are unlikely to reflect the current state of affairs.

Transactions 11 to 17 consider projects that do not have a PPA price certainty or other forms of revenues.

And noting transaction 17, it may seem confusing, but what Dr. Guillet includes here are only the undeveloped acres of that transaction.

Transaction 18 is a floating project. We challenge the comparability between floating and bottom-fixed project.

And transaction 19 to 23 are hindsight information which we disregarded.

Slide 36. Section on income approach valuation of the project.

Slide 37. So we produced a DCF model to project the future class flows, in negative and positive anticipated for the effect, based on information produced by experts, as commonly done for this stage of development as the project.

For the purpose of this exercise, value must be expressed in cash equivalents as at the valuation date.

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This approach from a reasonable perspective, a reasonable purchaser would be indifferent between paying 293.4 million dollars upfront and paying 46.1 million upfront and the larger amount of 376.4 million at financial close.

The choice of associating a second payment as of financial close is in recognize that a project, having achieved such milestone, is largely derisked, being fully diligent and contracted being confidence to a purchaser disburse a larger amount than.

The 15 percent IR adopted in our calculation is high because it accounts for the risks associated with the project stage of development, as of valuation date, including permitting, design, procurement, financing and general project schedule.

Our central case leads to a valuation of 293.4 million.

A. [MILBURN] Slide 38.

We also conducted a version of our DCF analysis where we calculated the net present value as of financial close and then applied a risk adjustment factor for the

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probability that the project would have successfully advanced through permitting and obtained financing and reached financial close.

Based on our analysis of the number of similarly situated projects that reached financial close in the period leading up to the valuation date, we applied a 55 to 60 percent risk adjustment to reduce the project's value at financial close of 575.2 million, which is seen under the "totals" column, to arrive at the value of the project as of the valuation date as of -- in the amount of 330.7 million.

Slide 39.

And, here, we just see a comparison of the income approach relative to the market approach.

So our conclusions under both the market and income approaches are consistent.

It's always important for a valuator to consider and perform multiple valuation approaches where possible.

And the fact that we obtained similar results under two of the three main valuation approaches that are available to us gives us comfort that our conclusions are

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reasonable.

Slide 40.

A. [TOBIS] On this slide, we summarize the impact of the various sensitivity calculations that we included in our second report, based on some of the issues that were raised by Dr. Guillet in his first report.

In the rejoinder, Dr. Guillet has raised a new argument that the project would potentially not have an 18-month extension period available after the revised MCOD of January 31st, 2025, which provides additional buffer in the schedule.

First, we understand, from Claimant's counsel, and as we heard in openings, that, legally, that 18-month extension and buffer time period would still be available to the project even if it was ultimately required.

We understand that this is due, in part, to the fact that the Grasshopper FIT 4 contract, referred to in Dr. Guillet's report, was different from Windstream's FIT 1 contract.

For example, the FIT 4 contract did not have clause 8.1(d), which is the clause of Windstream's contract that allowed the

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developer to purchase an additional 18 months as buffer time or extension periods at a rate of $0.15 per kilowatt per day.

Second, although as noted earlier, the COD based on the technical expert reports, which were prepared under a worst case scenario, is already one and a half months prior to the MCOD.

If one were to assume this 18-month buffer beyond the MCOD was no longer available, the proper way to account for this in a valuation would be to look at the project differently, likely leading to a partial reduction in value.

It would not reduce the value of the project to zero, as Dr. Guillet has suggested.

To do this risk adjustment properly, we would require additional technical and engineering expert evidence.

We had some discussions with Mr. Ian Irvine who is the author of the Wood report and Two Dogs reports that we relied upon. And we have conducted some rough additional sensitivity analysis to assess the potential

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impact of additional risk that would be associated in this hypothetical scenario.

However, we have not had the opportunity to produce any reports with these analyses, as this issue was only raised by Dr. Guillet in his rejoinder report.

Slide 41.

A. [MILBURN] This brings us to our damages conclusions.

So this last slide presents our conclusions, the components of which are the fair market value of the project, then we deduct the NAFTA 1 award. We also deduct the letter of credit amount. And then we add pre award interest.

And, under the income approach, our damages conclusion ranges from 291.4 million to 333 million.

And, under the market approach, the range is from 281.8 million to 297.7 million.

And we have a few slides, reference slides with some additional footnotes and explanations, but that concludes our presentation. Thank you.

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PRESIDING ARBITRATOR MILES: Can I just come back on the IRR and the haircut, briefly.

So I think it was Slide 37.

So when you take the first -- to get to a 15 percent IRR, you manipulate your discount rate in order to achieve that 15 percent IRR.

Is that what you do in your DCF model?

A. [TETARD] I do not manipulate the discount rate. I mean, the 15 percent IR is the discount rate.

PRESIDING ARBITRATOR MILES: You assume, across the lifetime of the project, all costs in, all revenue out, a 15 percent return, 15 to 16 percent, I think --

A. [TETARD] Between 14 and 16. 15 percent, yes.

PRESIDING ARBITRATOR MILES: So you assume that is what you will make over -- if you put in a dollar, you will get back $1.15; is that right?

A. [TETARD] I would get $1.15 after one year if I was putting one dollar,

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yes.
PRESIDING ARBITRATOR MILES: Right.
So you -- as I understand the way you've -- I have to say your IRR has confused me a lot.
A. [TETARD] I am sorry about that.
PRESIDING ARBITRATOR MILES: It's not something I have come across in the way you have approached it and it seems to me to be prescriptive, not descriptive in your DCF.
So you have taken an assumption and made your DCF fit the assumption, is what it looks like to me.
So your assumption is 15 to 16 percent IRR across the lifetime of the project; correct?
A. [TETARD] It is an assumption, yes.
PRESIDING ARBITRATOR MILES: So you assume, for an offshore wind project lifetime, my return on investment, 15 percent.
A. [TETARD] For a project at this stage, I believe the market would be

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attracted -- attracted by acquiring this project and generate a 15 percent equity return over the lifetime of the investment.
PRESIDING ARBITRATOR MILES: This is what I want to come to.
You say they would think about a 15 percent return looking at the value at this stage of the project, is what you just said.
A. [TETARD] Yes.
PRESIDING ARBITRATOR MILES: But the 15 percent IRR is necessarily calculated across the whole lifetime of the project.
A. [TETARD] Necessarily -- well, not necessarily but, in that case, it was, yes.
PRESIDING ARBITRATOR MILES: In your case, it was.
A. [TETARD] Yes.
PRESIDING ARBITRATOR MILES: And you say -- manipulate was perhaps too motive a word.
But you did not use an -- did your -- when you calculated your discount rate, did it just happen that there was a 15 percent return across the whole project?

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A. [TETARD] In this approach, I am not calculating a discount rate. The discount rate is 15 percent.
So, if I do an NPV 15 of all the cash flows, I get to zero.
So NPV 15 equals zero.
I do not make any discount rate calculation.
I assume that I want to generate a 15 percent return on my investment which leads me to be able to pay for this project this much.
Because I believe this project will cost this much to get to financial close; that, at financial close, the project will cost X CAPEX and I will be able to raise an amount of that.
And that, after two years of construction, I will generate 30 years of positive cash flows.
PRESIDING ARBITRATOR MILES: So you're not dealing at all with a net present value here?
A. [TETARD] I am not dealing with net present value, or, in other words, by

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using a discount rate of 15, I calculate that my net present value is zero.
PRESIDING ARBITRATOR MILES: I have read that in your report, in the footnote and I still don't understand what you are doing and you haven't helped me but perhaps cross-examination might help me.
My separate and related question was on the haircut. So on the 55 to 60 percent haircut.
First of all, the comparables that you use to get this 55/60 percent number are different comparables to what you use for your market comparable methodology?
A. [MILBURN] Yes, I believe so.
PRESIDING ARBITRATOR MILES: There is a couple of overlaps. There's a French one, I think, is an overlap. No, it's a different date, actually, interestingly enough.
A. [TOBIS] I might be able to help elaborate on that.
For the transaction market comparables approach, there needs to have been an actual transaction in this offshore wind farm that

we could derive the value from.

For this assessment of the probability of financial close, we are not looking at transaction multiples. There could be a project that was never sold once it was operated by the same company from beginning to end.

We are simply looking at the progress of each of these projects. How likely is it -- was it that these projects were able to advance to financial close.

So it's a totally different analysis so it's not the same wind farms.

PRESIDING ARBITRATOR MILES: I get it. I get it.

A. [TOBIS] The French one overlaps but the dates are different so it's different assessments.

PRESIDING ARBITRATOR MILES: I get that.

My question is this:

You were applying the 55 to 60 percent discount rate, basically a haircut, to your entire DCF net present value.

A. [MILBURN] Yes, that's correct.

PRESIDING ARBITRATOR MILES: Yeah. So your net present value around 500 million; 55 to 60 percent gets you down to your 200 and something million.

A. [MILBURN] That's right.

PRESIDING ARBITRATOR MILES: The percentage, the 55 to 60 percent is obtained -- and I think this table is at paragraph 104 of your report, page 72 of your report.

You say 55 to 60 percent of the market comparables you have chosen for this purpose reach financial close.

It's possible, isn't it, that a project can reach financial close but not reach COD?

A. [MILBURN] Yes, it's possible.

But our DCF is calculated as of the financial close date and then we apply a discount rate of future cash flows which would include the risk of getting to the commercial operations.

So we have got the timing of all the cash flows that are necessary and we have

got a discount factor in there to reflect industry level risk of a project at that kind of similar stage.

I would also add that I think a construction risk is relatively low in the grand scheme of things. I think once you get to financial close, it's pretty, pretty high chance you are going to make it to commercial operations.

PRESIDING ARBITRATOR MILES: Clearly you have not done as much construction arbitration as I have.

A. [TOBIS] But for the alleged breaches.

PRESIDING ARBITRATOR MILES: Specifically, on that construction risk, I did have another question about that.

You talk about, at 6.107 of your report, it would be worth 575.2 million to the notional purchaser if the -- once the project achieved financial close, it would be worth 575.2 million to the notional purchaser, with the difference representing the return for the additional risks associated with investing in the project at its current development stage.

And when I look back in your

report to what risks you say they are, so the risks that are removed, in order for you to get to the 572 value, those risks look to me to be what's at 6.98 of your report, permitting risk, environmental approvals, financing risk and construction execution risk.

Perhaps construction execution risk had some magic nuance that I wasn't reading, but I'd understood that, reading together paragraph 6.98 and 6.107 of your first report, to mean that once you get to financial close, there is no construction risk.

Now I understand, Mr. Milburn, what you just said to me that your discount rate factors in a risk, and I am sure you will be cross-examined on whether or not that does that adequately. I am not going to do that.

But I think you have assumed here that your total income in this model, pre haircut for development stage, is without any construction risk at all?

A. [MILBURN] Again, I think there's -- I think, in the cash flows themselves, there is assumptions as to what the amounts of CAPEX that would be necessary and the timing of those cash flows. So that's based on the experts.

So that reflects the likely, again, timing and amount of the cash flows that we think is reasonable.

And then we do discount it by the discount rate over that period which includes a beta risk factor in there that includes industry-level risk for Windstream projects.

A. [TOBIS] If I may add on top of that, just to add on to what Chris just mentioned.

In the capital cost that we derive from various technical experts, there are, I mean, 10 to 12 percent contingency factors.

So risk in a DCF model can be captured either in the cash flows or in the discount rate or in a haircut.

So we looked at these -- one, the contingency factors and the capital costs; two, that these cash flow schedules were prepared on a worst-case scenario basis; and, three, all the various examples of float built into the CAPEX schedule.

So we assess that there is construction risk, as you correctly note. But, if

you also account for that in the discount or haircut, you are double counting that risk, so.

PRESIDING ARBITRATOR MILES: I think I understand all of that and whether or not it's the right discount rate in the DCF properly to account for the construction risk is an entirely separate inquiry.

What I am looking at is just in your report. What you have put pre haircut and post haircut.

And it seems to me you treat the financial risk in your report, not necessarily in your model, but in your report, by reading 6.98 and 6.107 as the construction risk being eliminated as at financial close.

Right, so -- right. So you back out 55/60 percent because that includes three buckets of risk, one of those buckets of risk is construction risk.

A. [TOBIS] I will just add two points on that.

Construction risk is significantly mitigated at financial close because, at that point, you have all your contracts signed.

Part of the construction, the schedule is even starts prior to financial close. So you have already secured funding -- and Mr. Tetard can speak from his experience -- but my understanding that the contracts, a lot of them might be fixed-price contracts, et cetera.

So, one, it's significantly mitigated.

The second point is we had access to a database from 4C Offshore which we referred to extensively in our report.

And although I'm just sharing some information from that database, in that example, we didn't identify wind farms that, once they achieved financial close, they did not eventually reach COD.

So that gave us further comfort that there was a little to no risk of -- you asked earlier about going from financial close to COD. Other than industry-level risk that's captured in the cash flows and the discount rate that Mr. Milburn described.

PRESIDING ARBITRATOR MILES: Okay. So it's not just in the discount rate, the discounted cash flow, then. Construction risk,

you have spread it into both.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: All right. I see.

I thought we did, in this case, I thought, on the record, there was a decision about the government compensating for a project that was partly constructed.

Was that just not offshore?

A. [TOBIS] Are you referring to the White Pines project?

PRESIDING ARBITRATOR MILES: That's what I am referring to.

Was that onshore?

A. [TOBIS] Yes, that was onshore. It was in Ontario so there is no offshore wind in Ontario.

PRESIDING ARBITRATOR MILES: Okay.

A. [TOBIS] My understanding of that -- again, it's more legal facts.

But is my understanding is that -- or my assumption is that the amount that was compensated was the assumption of the value of that project, given its stage of development, its

PPA contract, onshore wind price, bid contract price is reported lower than offshore prices and that's what was assessed to be the value of that project at that stage of development.

PRESIDING ARBITRATOR MILES: I was more mentioning it for the fact that we do have preset of partly constructed wind farms just not offshore.

A. [TOBIS] One other point that may be helpful on this point is in Schedule 3 of our report.

If we turn to it.

PRESIDING ARBITRATOR MILES: Which report?

A. [TOBIS] Of our first report.

If you notice, there are two transactions for the Moray East offshore wind farm. We didn't discuss them earlier.

But this is the same wind farm that there is two transactions and two dates; one was in March of 2018 and one was in November of 2018.

And financial close of this wind farm was December 2018.

So as you -- the first transaction we have noted was that a value of .34 million per megawatt hour as it was further away from financial close.

The same wind farm sold for a value of .72 per megawatt hour as it was closer to financial close.

CO-ARBITRATOR MCLACHLIN: Can you give me a page.

A. [TOBIS] Sorry. It's page 183 of our first report.

PRESIDING ARBITRATOR MILES: Say it again.

A. [TOBIS] On page 183 of our first report, I am just drawing the Tribunal's attention to the Moray East transactions.

So there's two transactions for the same wind farm. One is Row 3 and one is on Row 6 of that schedule.

The first transaction, we have a value of .34 millions per megawatt. The second one is .72 so nearly double.

It's the same wind farm, just further along its development trajectory, closer to financial close.

What this demonstrated to us is that it's quite reasonable that, as a project moves closer to financial close, in this case, the value roughly doubled which is broadly in the range of the haircut we applied.

I imagine when Dr. Guillet has referred to the second transaction, in particular, being what he considers too close to financial close, it was on the development trajectory, that is right. It is closer and obviously much closer than Windstream was.

We still considered this in our analysis, given it had such a low PPA price, we considered that to be offsetting risk factor. But that's just a total separate issue.

I am just pointing out here to your earlier comment about how value can increase double, let's say, as the same project goes on its development trajectory which gave us further comfort on that haircut factor that Mr. Milburn was discussing earlier.

PRESIDING ARBITRATOR MILES: But you don't think we should use any of these -- either of the Moray East for our comparable transactions.

A. [TOBIS] We have included all ten in our, call it our primary market approach.

In our presentation, we presented another calculation focusing just on the four that were much further away from financial close to give the Tribunal an alternative calculation in case they find that more appropriate.

PRESIDING ARBITRATOR MILES: Okay. So those two weren't included on your slide?

A. [TOBIS] Yes. Those two weren't included in that Slide 25, yes.

PRESIDING ARBITRATOR MILES: And they are also not included in the list of mostly different comparables to get your 55 to 60 percent haircut?

A. [TOBIS] Correct.

That was a different analysis. This was based on wind farms that had transactions and that other analysis was simply based on looking how long it takes a wind farm to move from stage to stage.

PRESIDING ARBITRATOR MILES:

Right.

But because we have the two different transaction times, we have some stage to stage information in this chart, but you haven't --

A. [TOBIS] This one didn't meet the criteria that we needed it to meet in order to be included in that haircut factor.

PRESIDING ARBITRATOR MILES: Fair enough.

Okay. Ms. Squires. They're all yours. I am turning my mic off.

MS. SQUIRES: Thank you.

CROSS-EXAMINATION BY MS. SQUIRES:

Q. Good morning, everyone. As you know, my name is Heather Squires and I am counsel for the Government of Canada in these proceedings.

I am going to ask you all a few questions about the expert reports you have provided in this arbitration.

Before the hearing began, we asked the Claimant to provide us with copies of your expert reports with colour coded version to let us know who spoke to which section.

So you can see there is a binder floating around with all the binders in front of you there that has those colour-coded versions.

But I know your counsel has also provided you with copies so feel free to use whichever one you want when I am referring to your first or second report. It's fine.

I will note, though, that the presentation this morning led me to be a little bit confused on the colour coding because it did seem a bit like you were each speaking to each other's topics.

For now, I will leave that.

But when I am asking questions, I have arranged my script based on the text that was provided by the Claimant's counsel, so if I am asking a question that's better referred to someone else, please let me know and we can go from there. Because I have structured it in a certain way.

Also in front of you, you have a binder. There's two different -- there's three binders. The content is in two different binders in content.

Mr. Tobis and Mr. Milburn, you have copies of the same binder, so that will be your cross bundle. And, Mr. Tetard, you get special treat of your own binder and that will be your cross bundle.

If you don't understand a question I am asking, please ask me to clarify. I am more than happy to take the time to give you some context.

If the answer to my question leads to a yes or no right off the bat, I appreciate you gave me that and then follow-up with your context after that, just so we can keep the transcript a bit clear.

I don't know if we are going to be going to confidential information this morning but, if we do, I will let you know in advance. And I think you know the drill by now.

We will let our friend Alfonso know. He will shut down the lights for us and we will go into confidential session and we will go from there.

Sound good so far?

A. [TETARD] Yes.

Q. Now, I understand from

Claimant's counsel that you have listened to the opening arguments and you know that the Tribunal has questions on certain points that they are interested in.

So the way I have tried to structure the questions this morning is in categories related to those types of questions.

So the first thing that I would like to do is to come to you, Mr. Tetard.

And I'd like to spend a bit of time discussing the inputs you have used into the DCF analysis -- CAPEX, OPEX, those types of things.

And, after that, we will spend a bit of time on one question that the Tribunal has been asking a fair bit about and that's the development stage of the project. So early development, late development, these types of things?

Once that's done, we will probably wrap up questions for you, like President Miles said, please don't go far but we might be done with you.

Then I am going to come to you, Mr. Tobis, and I want to have a discussion

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about the sunk costs in this arbitration.
The reason I am bringing that up is twofold.
The Tribunal has asked some questions in advance of the hearing about value created of the investment since the Windstream I arbitration. And that goes a bit to the sunk costs, I believe you noted in your report.
But, also, we have had a lot of discussion this morning about contingent payments.
And, in your report, you structure the contingent payment. That first payment is based on a multiple of sunk costs that have been incurred.
I want to go through a bit of the sunk costs so we can figure out what went into, if we are in the world of contingent payments, what that contingent payment would be for this project.
Mr. Milburn, you may have noticed I have not mentioned you so far.
You are along for the ride a little bit this morning so you can take a deep breath, relax. I am not sure I am going to come

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to you entirely but we will see how things go, given the presentation. But I will leave you in suspense.
A. [MILBURN] All right.
Q. Okay.
So now, having laid that out, I do want to though turn to a couple of questions that came out of the presentation.
First, Mr. Tobis, you may or may not be aware but the question of the valuation date in this arbitration is very much a legal question. So the Tribunal can decide whether they want to award damages as of the date of the breach or damages as of the date of the decision, the award?
If the Tribunal decides to use the date of the award as the proper date to value the Claimant's losses, you would agree with me that everything happened between 2020 and 2023 would go into that valuation?
So all of the discussion on the increases in inflation rate, the supply chain issues, projects being cancelled, that would then go into the valuation because the valuation date then would become sometime after today?

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A. [TOBIS] Yes.
Q. The second question I wanted to ask arose out of something that you said on Slide 12 with respect to projects taking impairments as a result of those changes in the market.
So, if a purchaser was to buy 100 percent of the Windstream investment in 2020, at the current stage of development, when financial close arrived for the project in 2023, per the Claimant's own schedule, it is possible that that purchaser would have to take an impairment on the project; correct?
A. [TOBIS] That would be completely irrelevant as of a February 2020, valuation date because the amount they would pay at that date, they don't know what's happening in 2023. They are making assumptions about the future.
So what you're describing is a current date valuation.
Q. I understand.
So, as I mentioned, that's a legal question, right, the valuation date.
But, outside the world of --

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if we are just talking about the purchase of the project. In 2020, based on a DCF.
By the time you reach financial close, if that DCF is no longer accurate because interest rates have skyrocketed, because the contracts you have to sign are costing you a lot more, it is possible -- I don't need you to say it is certain.
It is possible that that purchaser would take an impairment at that time?
A. [TOBIS] If you're in the world of hindsight, then, legally, you are saying this is the scenario, yes.
Q. One other question for you, Mr. Tobis.
You mentioned, just towards the end, that you used the 4C database to determine the construction risk, and that you said you did not identify wind farms that, once they achieved financial close, they did not eventually reach COD.
Those are your words; correct?
A. [TOBIS] Correct.
Q. In looking at that database, did you determine whether any projects

were constrained by a FIT contract where they only had, on their own development schedule, two years to reach commercial operation date?
So I understand this is the case when you have all the time in the world, projects go from financial close to operation.
If you only have two years to do that, did you look at the 4C database and determine what risk is involved in that?
A. [TOBIS] That information was not available.
Q. Okay.
Mr. Tetard, a question for you that came out of the presentation and out of some questions from President Miles.
We spoke a bit about the supply chain constraints, or possible constraints because of more activity in the market. And you mentioned a reference to turbines being like refrigerators. Yeah, there is a lot of them.
But, in terms of other components or items that will be required to build this project, are you aware that the turbines had to be brought in to Lake Ontario via the Great Lakes system and the complex locks that exist in

the St. Lawrence Seaway?
A. [TETARD] I was aware, yes.
Q. Now, not every vessel that can be used for an offshore wind farm can fit through those locks; is that correct?
A. [TETARD] The vessels to transport the turbines are adapted to the capacity to the size of such turbines.
And I understand that some -- this had been done before for onshore wind projects.
So it was not identified as an issue that vessels used to import those turbines would have encounter any issue for delivering --
Q. That was onshore -- sorry. Those onshore wind turbines that came in, they were not 4.5 megawatt turbines; correct? They were 2.3 --
A. They were smaller, yeah.
Q. And you just mentioned that the vessel size depends on the turbine size?
A. [TETARD] To some extent it does, yes.
Q. Have you done any

analysis or seen any analysis on the record about whether, specifically, a vessel that can fit a 4.5 megawatt turbine can fit through the Great Lakes seaway?
A. [TETARD] I personally didn't because I am not an engineer. I do rely on my experts for this kind of analysis and I was not presented with a red flag from that perspective.
Q. Okay.
PRESIDING ARBITRATOR MILES: Were you presented with a green flag from that perspective?
BY MS. SQUIRES:
Q. Sorry, I will bring up the green flag.
In the Two Dogs turbine selection criteria, they looked at whether one of the criteria in selecting the 4.5 megawatt turbines was that it could be brought into the Great Lakes.
They have relied on a vessel called the RD McDonald; are you familiar with that vessel?
A. [TETARD] I am not familiar with that vessel.

Q. So they have picked out one particular vessel.
For those that were around for the Windstream I arbitration, there was quite a bit of discussion on cross-exams with Weeks Marine and Baird about that vessel because it wasn't built at the time. It was new vessel.
If that is the only vessel available to fit through the Great Lakes lock system and that is somehow tied up with another project because of the boom in the offshore industry in the United States, you would agree with me that that presents a risk to the Claimant's ability to get that vessel; correct, if there's only one?
A. [TETARD] If there is only one vessel and that vessel is not available, yes, it's an issue.
Q. But the assumption here is that that vessel would be available?
A. [TETARD] That it would be available -- I don't know which vessel was used for the technical evaluation of transporting those turbines. So, that, I can't say.
But those vessels, those

transportation vessels, yes, need to be booked in advance and so that's something that would have happened.

Q. Okay. Thank you.

Okay. Let's move on to a few different things.

So let's talk a bit about the inputs that went into the DCF and I want to talk specifically about CAPEX and OPEX which I understand, from the colour coding of the reports, you were responsible for inputting into the discounted cash flow; correct?

A. [TETARD] I was -- generally, it was a joint effort but I was generally involved, yes.

Q. Okay.

I would like to turn now to Schedule 2 of the first Secretariat report. So that's tab -- I don't know what binder you are going to use.

For anybody who is using the binder Canada prepared, that's the Secretariat report is at Tab 1 of the Secretariat bundle. It's page 179 in the PDF.

We are going to turn to

Schedule 2. I will give everyone a moment to get there.

A. [TOBIS] I apologize. The schedules, in particular, asked us to look at the schedules were allocated under my colour coding.

So, depending on what your questions, are Mr. Tetard helped identify the inputs, but the actual schedule creation is under my colour coding. So I am just giving that advance notice, depending where we go with these questions.

Q. That's fine. Frankly, it doesn't bother me who answers the question at this point.

Are we all there? Schedule 2. Okay.

So, here, we see the CAPEX that was used to develop the DCF; correct?

And, in here, we have things like the cost of the gravity base foundations, the wind turbines, management and insurance costs, those types of things; correct.

And the.

A. [TETARD] Correct.

Q. And the turbines are a

pretty big chunk. They make up about 22 percent of the CAPEX, on my math.

A. [TETARD] I will trust your math.

Q. I don't know if I would but, okay.

We are going to leave the schedule for just a minute, just we have established now that you have put the 296 million in for the wind turbines.

And I want to go to the Two Dogs report on turbine selection which is at Tab 1 of your cross bundle.

I would like to turn to Chapter 4, page 18.

So, here, it notes the five criteria that were used to select the wind turbines for the project as it's designed in this arbitration; do you see that?

A. [TETARD] I see Slide -- sorry, page 18, yes.

Q. So let's move forward in that chapter a little bit to Section 4.3 which is on page 23.

And it notes there in, the

second paragraph, that there were four types of turbines that were:

"Selected for further analysis as they are believed to present the lowest technology risk and shown to meet the selection criteria."[as read]

Do you see that?

A. [TETARD] Okay.

Q. So let's move on, then, to Table 10. That's on page 29.

This is a table listing off the CAPEX and the OPEX for those four different types of turbines; do you see that?

A. [TETARD] Table 10?

Q. Table 10, yes.

A. [TETARD] Okay.

Q. So it has a different amount there for the CAPEX and OPEX, depending on the particular turbine that you're looking at; correct?

A. [TETARD] Yes.

Q. And, depending on the

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turbine, it results in a different cost of energy for the project, there in the last row across; correct?

A. [TETARD] Yes. Those are ways of calculating but, yes.

Q. Okay.

And then, to get to Two Dogs' conclusion, we move down to page 30. And we can see there, under Section 6.6, that Two Dogs noted that:

"COE is an appropriate basis on which to rank turbines."[as read]

So that's the cost of energy; correct?

A. [TETARD] Um-hmm.

Q. And that the 4.5 megawatt turbine was shown to have the lowest cost of energy and, therefore, considered the most appropriate to deploy for the Windstream project; correct?

A. [TETARD] Correct.

Q. Now, it was these 4.5 megawatt turbines that were used to develop that CAPEX we just saw in Schedule 2; correct?

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A. [TETARD] Correct.

Q. If these selected turbines were not available to Windstream and one of the others had to be chosen, you would agree with me that the CAPEX and the OPEX of the project would change; correct?

A. [TETARD] The CAPEX, the OPEX and the energy yield of the project would change.

PRESIDING ARBITRATOR MILES: The, what? Can you say that last word again. The CAPEX, the OPEX and the?

A. [TETARD] The energy yield. The power produced by the turbines.

Q. And all these of those inputs go into your current DCF, your current valuation?

A. [TETARD] Correct.

Q. Now, are you aware that Windstream had negotiated a turbine supply agreement with Siemens?

A. [TETARD] Yeah. I am not sure it was a negotiated turbine supply agreement at the time. But I was aware the existence of a relationships and, you know, long -- between the

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project and the OEM, yeah.

Q. So I can take you to the exhibit if you want.

Ms. Baines did confirm for the IESO, in 2017, in the context of the decision on FIT termination, that the turbine sales agreement that it had with Siemens remained in place.

Are you aware of that?

A. [TETARD] No.

Q. Okay.

So we are going to go into confidential session for a minute because I do want to go to the turbine sales agreement for a couple of minutes.

So, Alfonso, over to you.

--- CONFIDENTIAL TRANSCRIPT COMMENCES AT 12:02 p.m.

MR. HAUSER: We are in confidential mode now. Thank you very much.

BY MS. SQUIRES:

Q. We are going to open up now Exhibit C-0576 which is at Tab 2 of your cross bundle.

This is the Siemens turbine supply agreement for Wolfe Island Shoals offshore

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wind farm. It's dated December 19th, 2011; do you see that?

A. [TETARD] Is it signed?

Q. I believe there's a signed -- I don't know if that copy is signed, the version that you have. If not, we will dig it up.

I will say that the turbine sales agreement is in about six different exhibits throughout the last -- both Windstream arbitrations and the schedules are actually a separate exhibit from this.

So I don't -- perhaps your counsel can or Claimant's counsel can address this in redirect. I don't think there is any dispute that this was signed between Windstream -- there we go, signed. Sorry.

PRESIDING ARBITRATOR MILES: It is going to matter for your questions.

MS. SQUIRES: No.

PRESIDING ARBITRATOR MILES: I don't think it matters. Just answer the questions.

A. [TETARD] Okay.

PRESIDING ARBITRATOR MILES: Just answer the questions. It doesn't matter.

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BY MS. SQUIRES:
Q. We are going to turn to the schedules and, as I mentioned, for some reason, they have been exhibited separately.
But let's turn to Tab 4 of your binder. This is Exhibit R-0270. And this is Schedule A1 which deals with the contract price for those turbines.
So if we turn to the second page, and we can see there the third line of that first paragraph says that:
"This is a turbine sales agreement for the SWT-2.3DD-113WTGs."[as read]
Do you see that?
A. [TETARD] Yeah.
Q. So 2.3 megawatt turbines, not 4.5; correct?
A. [TETARD] Yeah.
Q. Now, it says, in the first line, the very first line, it sets a contract price.
The contract price shall be 1.7 million euros per megawatt installed; do you

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see that?
A. [TETARD] Actually, no, sorry. I'm on Exhibit 4 and you said page 2.
Q. Yeah. So if you just turn around and look at the screen behind you, it might help a little bit. It's the very first sentence under "contract price".
A. [TETARD] Okay, yeah.
Q. So it says there 1.7 million euro per megawatt installed; correct?
A. [TETARD] Installed, yeah.
Q. So, for a 300 megawatt wind farm, if we multiply that by 1.7 million euro, that's about 508 million euros in 2014 prices for the turbines; correct?
A. [TETARD] For 300 megawatts. Sure.
Q. It's just math.
A. [TETARD] Can I do the math.
Q. If you would like to, you can absolutely do the math.
A. [TETARD] So 1.7 times 300.
Q. Is 508.

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A. [TETARD] Very good.
Q. Million euros, not dollars.
A. [TETARD] Okay.
Q. That is not the value you have used for turbines in your discounted cash flow; correct?
A. [TETARD] I don't think it is.
Q. No. You have used 295 or 296 Canadian dollars, not 508 million euros; correct?
A. [TETARD] Um-hmm. This contract was for 130-units.
Q. Um-hmm.
A. [TETARD] Is that right? I don't think we are using 130 units.
Q. So the price -- it does say 130 units. I know, right now, we are not using 130 units.
A. [TETARD] Yeah, yeah.
Q. The price is per megawatt installed though; correct?
A. [TETARD] Right.
But it's not -- we are not

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using the same machine so you can't really compare a price per megawatt of a 2.3 megawatt turbine versus a 4.5.
Q. I agree.
Because your discounted cash flow uses a different turbine than the one in the signed turbine sales agreement between the Claimant and Siemens?
A. [TETARD] That's not what I am saying.
I am saying you are comparing what we are putting in our model, what is the turbine we assume in our model is different than this turbine.
Q. Yes.
A. [TETARD] Right.
Q. Did they have a turbine sales agreement for the 4.5 megawatt?
A. [TETARD] No, it didn't.
Q. Did they have a turbine sales agreement for the 3.2 megawatt?
A. [TETARD] No.
Q. That's what this; is it not?
A. [TETARD] This one is a

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2.3.
Q. Sorry, 2.3 -- for the 2.3, they had a turbine sales agreement?
A. [TETARD] Right. But that was not going to be used; right.
Q. Exactly.
A. [TETARD] This TSA, this contract was not going to be used.
Q. And where is the evidence that this TSA was not going to be used, was going to be terminated, was going to be renegotiated; where is that evidence?
A. [TETARD] No, I don't have that evidence.
Q. Let's move on to something else.
A. [TETARD] There is just one small detail.
Q. Sure.
A. [TETARD] It says it's installed so it means that Siemens would have done the whole transportation and installation activities. Okay.
Q. Okay.
A. [TETARD] Understood.

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Q. So let's move on to a different input into your DCF, a different CAPEX.
And President Miles asked this morning about the electrical infrastructure, transformers, this sort of thing.
And I want to talk specifically, if we turn back to Schedule 2 in your report where you have listed off the CAPEX, I want to talk -- oh, we can come out of confidential session.
--- CONFIDENTIAL TRANSCRIPT ENDS AT 12:07 p.m.
MS. SQUIRES: Are we good to go?
MR. HAUSER: One second, please. I am confirming. One second.
MS. SQUIRES: Okay. Thank you.
MR. HAUSER: We are ready to go. Thank you.
MS. SQUIRES: Okay. Thank you so much.
BY MS. SQUIRES:
Q. Let's turn back to Schedule 2 in the first Secretariat report.
Under the CAPEX.

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CO-ARBITRATOR MCLACHLIN: Page, please.
MS. SQUIRES: Sorry, that is on -- Schedule 2 is on page.
A. [TETARD] 175.
MS. SQUIRES: 175.
CO-ARBITRATOR MCLACHLIN: Thank you.
BY MS. SQUIRES:
Q. So, under the CAPEX there, we also have something referred to as the offshore substation; do you see that?
A. [TETARD] I do.
Q. So this is the substation, if I understand correctly, where the cables from the turbine would kind of meet there and then would connect to the underground cable that then goes to shore; is that correct?
A. [TETARD] It's not an underground cable but that's right.
Q. Underwater cable?
A. [TETARD] Underwater and then on land, yeah.
Q. And the amount there that you have included is 52.2 million?

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A. [TETARD] Right. I can see that, yeah.
Q. Okay. So let's turn to Tab 6 in your cross bundle.
And what we are looking at there at Tab 6 is the report filed by Wood in this arbitration. And I want to turn to page 106.
And the last paragraph on that page, there is a sentence that says:
"The project offshore substation will be island-based and is arranged as a typical land-based substation."[as read]
Do you see that?
A. [TETARD] Yes.
Q. And it notes that the substation is currently designed as an extension to Pigeon Island; do you see that?
A. [TETARD] Okay.
Q. What we are talking about here is a land-based substation, not a platform based substation; correct?
A. [TETARD] Yeah, that's the

way it's described here. It makes sense since the substation is on land. But, yeah.

Q. In the second last paragraph on that same page, Wood notes that:

"Offshore wind project substations are either island-based or platform-based."[as read]

So like we just spoke about:

"Island-based structures provide a significant potential to reduce substation cost by allowing the construction of the substation using typical land-based construction methods."[as read]

Do you see that?

A. [TETARD] Yeah.

Q. So onshore substations are cheaper than offshore platforms?

A. [TETARD] Makes sense to me.

Q. Now, if Pigeon Island was

not available for use as the offshore substation and a platform-based substation was required, you would agree with me that the CAPEX in your discounted cash flow would change; is that correct?

A. [TETARD] Likely.

Q. Okay.

And are you aware -- are you aware that the Claimant was told by the Canadian Coast Guard that they could not install even a met tower on Pigeon Island?

No, okay.

Let's turn now to talk about the project itself and its stage of development. We are going to move off of discounted cash flow for a couple minutes and I want to talk about the stage of development for the project.

And then, after that, we will move to talk about market comparables.

So let's turn to Appendix 2 in the first Secretariat report. So it's at page 117 of that report.

A. [TETARD] Sorry, can you repeat?

Q. We are in Appendix 2, not

Schedule 2.

A. [TETARD] Yeah.

Q. So Appendix 2 of the report. It's at page 117.

A. [TETARD] Okay.

Q. I understand from counsel for the Claimant that you drafted this appendix, it's entirely in the blue highlighting; correct?

A. [TETARD] Yes.

Q. So I want to turn to paragraph A2.2.

So, there, you note three phases of an offshore project's life: Development, construction and operation; correct?

A. [TETARD] Correct.

Q. And, for the development stage, you note that it starts with site identification and ends with financial close or final investment decision; correct?

A. [TETARD] Correct.

Q. And, if we move down to the next paragraph, A2.3, here, you note that the appendix will focus on the development stage because that's where the project would have been as of the valuation date; correct?

A. [TETARD] Yes.

Q. So let's keep going now down to subsection C which is immediately before paragraph A2.4.

This is entitled "development Phase 1 - from site identification to shovel ready status"; do you see that?

A. [TETARD] Sorry, which section?

Q. Paragraph A2.4.

A. [TETARD] Yeah.

Q. That's under the heading "development Phase 1"?

A. [TETARD] Yeah, I am there.

Q. So you also identify, in a few paragraphs later, a second development phase, development Phase 2 or the preconstruction phase; correct?

A. [TETARD] Yes.

Q. So, in your report, as you drafted it, you have the two different development phases; correct?

A. [TETARD] Exactly. So it's not that it's different. It's that those are

-- you can look at them like this, but it's a continuum. So those phases tend to overlap, sometimes, quite a lot, actually.
Q. Sometimes they can overlap. Sometimes by a lot. Not always. Depends?
A. [TETARD] Depends on the regulatory framework, depends on the pace at which you want to go.
Q. So if we turn to paragraph A2.11.
There, you note, when a project has obtained its permits, site control, grid access and revenue clarity, the project is considered shovel ready and can initiate its preconstruction phase; do you see that?
A. [TETARD] Yes.
Q. And then, if we just keep moving a little bit further in paragraph A2.16, under that second development stage -- and I understand they can move together, but just as it's written here.
Under the second development stage, you note that that stage usually includes three activities: Completing the full and final

project design, procurement and contracting, and financing; correct?
A. [TETARD] Yes.
Q. Now, you note, in paragraph A2.16, that the three activities in development Phase 2, as you have described it, can be achieved within a time frame of two to three years; correct?
I am just asking what you said on the report.
A. [TETARD] Yeah, but it depends on the complexity of the project. It varies a lot.
Q. Okay.
A. [TETARD] Yeah.
Q. Now, in order to have the full and final project, as designed here, the project would have had to move through all of its permitting processes correct?
A. [TETARD] Correct.
Can I also mention something.
In this development Phase 1, I mention and the development shovel ready stage, when we talk permits, there are a number of different permits. There are some permits that

you will need to do your activities that are part of this Phase 2 in development. For example, your on site investigations. Right.
Q. Um-hmm.
A. [TETARD] But those permits will be necessary.
What will not be necessary to have achieved as permitting will be those permits that give you the right to build.
These final permits you can have them during your Phase 2 development that I described.
Right. So that's why I am saying a lot of the things overlap.
Q. Okay. So just so I am sure I am following you.
A. [TETARD] Yeah.
Q. Permits on the right to build --
A. [TETARD] -- are necessary to give you comfort that you can build.
Q. Right.
And they would -- you would get those permits in Phase 1 or Phase 2? Depends?
A. [TETARD] Correct.

Q. Okay.
Are you aware of how the renewable energy approval process worked in Ontario?
A. [TETARD] I am not a specialist.
Q. Okay.
If I was to tell you that all permits -- the reason that that was created was to have all permits required for the renewable energy project to come in one package at the end?
A. [TETARD] Okay.
Q. So, in that case, you would have to wait for all your permits to be ready before you have your full and final project design and then you can move forward; correct?
A. [TETARD] So you would need to wait for this final grouped permits to carry out your on site measurements? That doesn't sound right.
Q. No.
So you may have heard testimony earlier this week from Ms. Baines. There's been questions on access, applicant of record status and site control.

A. [TETARD] I heard about that.

Q. So you're aware that there was a process to achieve applicant of record which gave you the right to do testing?

A. [TETARD] Correct.

Q. And then after that --

A. [TETARD] Yeah.

Q. -- you would then proceed to get all the other permits you needed, all environmental permits, land tenure, land use permits; that would all be separate from the wind testing ability?

A. [TETARD] Wind or soil or environmental testing, yes.

Q. That would all come after?

A. [TETARD] That's exactly what I meant; okay.

Q. Okay.

So the Claimant's expert, Ms. Powell, who speaks about the renewable energy process and the timelines to achieve that renewable energy permit, she says that it's reasonable to assume that the -- that renewable

energy process would have been completed in approximately three years.

So this is the Claimant's expert, not Canada's.

A. [TETARD] Um-hmm.

Q. So she says three years to get the renewable energy permit?

A. [TETARD] Yeah.

Q. The REA.

If that is true, and then we were to build further time on to get any necessary procurement, contracting and those sorts of things in place that were not available to be done prior to that permit, you would need more time, then, before you reach financial close; is that correct?

A. [TETARD] That's what I am saying.

So these final permit, you would not have needed to have almost finalized your final design procurement activities.

Q. So your position is you did not need a renewable energy permit to figure out a design of the project?

A. [TETARD] You may be. You may approach this in this way.

Q. In the event you moved through environmental permitting and you find shipwreck on the lake bed and --

A. [TETARD] Of course.

Q. -- and we know from -- I am just going to finish my question then I will let you answer.

A. [TETARD] Yes.

Q. We know, from the record, from the experts filed by the Claimant, that there is quite a bit of -- I am just going to use shipwrecks as -- quite a bit of shipwrecks in the area.

If, through the renewable energy process, the Claimant is not able to place certain turbines in certain areas or it loses certain turbines, you'd agree with me that then impacts what's going forward? The design --

A. [TETARD] That's right.

Q. So you would need the renewable energy process to have taken place before you know what the project, the full and final design of the project?

A. [TETARD] That's what I am saying, is that the project is the one carrying

out all the environmental and site surveys; right. So it received information as soon as it becomes available.

So that is based on the information received, based on-on site measurements. At that point, a project can start while it progresses its permitting process. It can progress its own design and procurement process.

Q. So that design and procurement process, then, would be occurring prior to financial close?

A. [TETARD] Of course.

Q. And that cost, then, would be borne entirely by the complainant?

A. [TETARD] Yes.

Q. There would be no debt financing?

A. [TETARD] There would be no debt financing.

Q. Have you seen any information on the record about a financing plan for the Claimant to pay for anything, all of those permitting, contracting prior to financial close?

A. [TETARD] Yes, there is

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a -- that's what we call the DEVEX budget, development budget.
Q. And can you walk me through, in the DEVEX budget -- so, in the DEVEX budget, can you break down for me what is being actually used there; what is going into the DEVEX budget?
A. [TETARD] Yes. So it's that schedule we are looking at earlier, the sources and use -- they have a line, DEVEX, for $49 million. That's the budget.
Q. I am just going to grab my copy.
CO-ARBITRATOR MCLACHLIN: What page are you at?
A. [TETARD] It is page 175. This is the same table we were looking at earlier.
And this DEVEX, this includes the cost relating to study, stakeholder engagement, site investigation, technical advisory, legal fees and other advisory fees to obtain the data and the information required, as well as to secure the procurement and funding of the project to reach financial close.
Q. So what we are talking

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about there is the work that went into that renewable energy permit?
A. [TETARD] And everything else. But, yeah.
Q. I am just trying to get some specificity on what you mean by "everything else"?
A. [TETARD] I am going to -- sorry.
The definition of DEVEX that we have on page 51, it includes costs relating to studies, stakeholder engagement, site investigation, technical advisory, legal fees and other advisory fees, to obtain the data and information required, as well as to secure the procurement and funding of the project to reach financial close.
So the category studies and site investigation and technical advisory and legal would feed the impact, the environmental application, for example. The environmental permitting application.
Q. I am going to bookmark this for a second because I think I might have another question on it. I am pretty certain I

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have another question on this but I am going to give my brain a minute to catch up with the reports.
Okay.
Let's move on to talk about site control. And I know we have had a bit of a discussion about that this morning.
And I want to turn to paragraph 2.12 of the first Secretariat report.
Here, you make a comment that:
"As of the valuation date, the project had an exclusive and priority position secured on the site the project would be built on, but still required complete site control."[as read]
Do you see that?
A. [TETARD] Yes.
Q. And then, if we look at footnote 24, which you refer to for this, you cite to Mr. Baines' first witness statement in the Windstream I arbitration; correct?
A. [TETARD] Yes.

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Q. And that witness statement, it can be found at Tab 12 of your binder, if you want to go there. It's dated August 18th, 2014.
A. [TETARD] 2014?
Q. 2014. Yes. On the last page of the witness statement, you can see Mr. Baines signed it on August 18th, 2014.
A. [TETARD] Yes, I can see. Sorry.
Q. Sorry, I was looking down and I need a yes or no into the mic so that I also pay attention myself, it seems.
A. [TETARD] Okay.
Q. Now, you don't cite to anything past this for any propositions with respect to site control; this is what you rely on; correct?
A. [TETARD] I rely on different things. I rely on conversations with Ian. I rely on conversations with Torys. I am trying to understand how it works to get to, call it final site control. I tried to understand the mechanisms as to how a developer or a company can secure a unique position on the site via, yes, via

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conversations.
Understanding how does it work in Ontario to get through the final sort of milestone which is signing a long term lease agreement with the owner of the area.
Q. Yes.
Would you agree with me that nothing has changed with respect to site control since the Windstream I arbitration for the Claimant?
A. [TETARD] I am not sure I can say that.
Q. Would anybody else like to answer the question?
A. [TOBIS] I can do my best to just add, in addition to the witness statement of Ian Baines, there was a document on the record. I don't have the exhibit number with me now. It was the letter from Minister Cansfield that confirmed our understanding of site control as well.
So, again, it wasn't just information from our client. It was looking at the underlying documents that supported our assumptions around site control.

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We also, I think we had looked at current maps in the Ontario registry showing the retail application.
So our understanding is that Windstream is still considered an applicant for the applicant of record system. And, even as at the current date, which means today, they still have this exclusive and priority position on this portion of the lake bed.
And, therefore, in theory, had the contract not been cancelled, their applicant of record application status -- I might be misusing the words, not exactly precisely. But their priority access still existed as of the valuation date.
Q. I want to pick up on something you said there, because I think it's extremely important.
You said you might be missing the words exactly. And it's extremely important that the words are said correctly in this context.
The Claimant did not have applicant of record status; correct?
A. [TOBIS] Correct. They were applicants to the applicant of record status

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which is what gave them the priority and exclusive position, especially according to Minister Cansfield's letter.
Q. Okay.
So what they had -- and you can correct me if I am wrong -- was a priority in line to have their application for applicant of record considered first?
A. [TOBIS] That's one way to put it.
But what that means is no other offshore wind developer could have accessed that site to carry out studies or even apply for a FIT contract -- I mean, no one else could access that site except for Windstream.
Q. No one else's application to access that site would be considered before Windstream's application was considered?
A. [TOBIS] Exactly.
Q. Okay.
A. [TOBIS] And that still shows today on the Ontario government website.
Q. Right.
So what we are talking about there, when we talk about priority status, is that

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Windstream was before anybody else to have their application considered, but not yet that Windstream had priority over the land; correct?
There is a distinction there.
A. [TETARD] Yeah, that is correct. That is correct.
And also noting that Windstream was the only company in Canada having a Feed-In Tariff, PPA, in relation to that area. Right.
So who else? Who else was going to be next in line?
Q. I agree with you.
But you would also agree with me that getting applicant of record status does not guarantee you will then get site control; correct?
So it does not guarantee -- applicant of record status does not guarantee that you will then get that final piece of the puzzle, the land tenure. That is a separate process you have to go through.
So even if I agree with you there was no one else around --
A. [TETARD] That is what I

am trying to explain, that obtaining that status of AOR, in the world of offshore wind, would be considered as having site control.

Because what I am saying is signing the long term tenure --

PRESIDING ARBITRATOR MILES: Mr. Tetard, just stop a minute.

A. [TETARD] Yes.

PRESIDING ARBITRATOR MILES: We do have limited time and you may have very successfully taken Ms. Squires off track.

I would actually like you to answer her original question, which is -- if I can find it now.

Has anything changed --

Ms. Squires, you might have it written down.

But has anything changed, factually, in respect of the status of site access since the first award. She asked you that question and you said I can't say that.

I am asking you that question. Has anything factually changed?

A. [TETARD] I am sorry. What I meant by "I can't say that" is because I don't know.

PRESIDING ARBITRATOR MILES: Do you know -- are you able to tell us anything, factually, that has changed in respect of site access?

A. [TETARD] I cannot say that, no.

MS. SQUIRES: I think perhaps my --

PRESIDING ARBITRATOR MILES: I'm sorry, is the answer a no?

A. [TETARD] It means I don't know anything that has changed.

PRESIDING ARBITRATOR MILES: So you cannot say anything that has changed?

A. [TETARD] Correct.

PRESIDING ARBITRATOR MILES: Okay. All right.

Perhaps you were coming back to it but I think we have gone down a rabbit hole.

MS. SQUIRES: I am going to get out of the rabbit hole because I do have one more question on site control, but I am not going to go down it --

PRESIDING ARBITRATOR MILES: Right.

Mr. Tobis, you referred to a letter that, I assume, postdated the award.

A. [TOBIS] The letter I was referring to, it's referenced in footnote 24 of our first report.

PRESIDING ARBITRATOR MILES: Does it predate or postdate the award?

A. [TOBIS] 2009. So it predates the award.

PRESIDING ARBITRATOR MILES: So it predates the award as well. All right.

A. [TOBIS] If I could just answer.

My understanding, looking at maps today, is that nothing has changed on the issue of site control as of the valuation date compared to the previous. They are still in the same priority position that they had in NAFTA 1.

So that's my understanding of the facts.

PRESIDING ARBITRATOR MILES: Okay.

So if a Tribunal has of fact has decided, on the basis of assessing all the evidence, that there was no site access on the

27th of September 2016, factually, in your expert opinion, nothing has changed.

A. [TOBIS] Partially.

And, to elaborate on Mr. Tetard's point earlier, we would -- we are not here to reargue any conclusions of the prior Tribunal. We agree they may have recognized that from a legal perspective.

Actually, legally, they did not have what we would consider site control.

But Mr. Tetard and the way we are looking at it, from a valuation standpoint, they have what would be considered site control for the purposes of assessing the stage of the project.

So it's similar to the concept of de jure and de facto. You know, de facto, legal did not have what the Tribunal said in their award. You know, site control.

But, as a valuator, we would -- or Mr. Tetard, in his experience, would consider this to be site control, so it's a little nuanced difference.

Not disagreeing with the prior Tribunal. Just applying a slightly different

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definition as to how it would be looked at from a valuation standpoint.

PRESIDING ARBITRATOR MILES: Okay. With respect, I am not sure that made sense.

But my question to you was, factually, nothing has changed. You said partially.

Partially, what facts have changed?

A. [TOBIS] Sorry. Factually, nothing has changed.

PRESIDING ARBITRATOR MILES: Thank you.

BY MS. SQUIRES:

Q. I am going to talk about something that has changed with respect to site control, as far as your assumptions that you have, that the Claimant has provided to you for your report.

And I want to turn to paragraph 2.18 of the first Secretariat report.

Here, you can see the instructions that you received -- or that Secretariat received from counsel.

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And if we look at subparagraph 4 -- and, Mr. Milburn, I can see this is in yellow so, if you want to have your moment, this might be it.

A. [MILBURN] This is it. This is it.

Q. Are you ready?

A. [MILBURN] We will see.

Q. Now, we can see here, in this subparagraph, subparagraph 4, that you were instructed to assume that MNRF would have permitted Windstream to proceed through MNRF's Crown land application process and granted Windstream site release; do you see that?

A. [MILBURN] Yes, I do.

Q. So Ms. Baines confirmed, and we have talked about this at length, the Claimant had not yet received site release, no applicant of record status.

So, for the purposes of your valuation, you were instructed to assume that the project was further ahead in gaining site control than it was in the real world.

A. [MILBURN] Well, the assumption is, as stated in our report, that they

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would have been permitted to proceed through the application process and been granted site release.

So, to the extent that's further along than they actually were, that's an assumption we have been instructed to make.

Q. So the answer to my question is yes?

A. [MILBURN] Yes.

Q. Okay. I think -- I am conscious of the time. I am wondering if it might make most sense now -- I have just a couple short questions on grid access, and then I don't know if it makes sense to take the lunch break before I move on to market comparables, or if you would like me to just keep going. I am in your hands.

PRESIDING ARBITRATOR MILES: José Luis, what is the time check? We have not interrupted much. What is the time check in terms of the chess clock?

MR. ARAGÓN CARDIEL: So far, Respondent has used 49 minutes today, almost 50.

PRESIDING ARBITRATOR MILES: Of what?

MR. ARAGÓN CARDIEL: There is time allocated for the entirety of the hearing,

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not for the specific examinations.

PRESIDING ARBITRATOR MILES: Okay. All right.

How much in cross-examination have we used; an hour and a half?

MR. ARAGÓN CARDIEL: Today, 50 minutes, five-zero.

PRESIDING ARBITRATOR MILES: Of cross-examination?

MR. ARAGÓN CARDIEL: Yes, excluding Tribunal questions.

MS. SQUIRES: We have used 59 minutes?

MR. ARAGÓN CARDIEL: 50? No, 49 today, excluding Tribunal questions and just today.

MS. SQUIRES: But we have quite a bit more time set aside. I guess we could burn up all our time, if we wanted to.

--- Off-the-record discussion re timing.

PRESIDING ARBITRATOR MILES: More important than where we have been is where we are going.

So how much longer do you have in your questions?

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MS. SQUIRES: Quite a bit of time, not too much more with Mr. Tetard but --
PRESIDING ARBITRATOR MILES: Numbers, numbers. Hour, two hours, six hours, four weeks?
MS. SQUIRES: Two hours. Around two hours, a bit more.
MR. TERRY: Madam President, just a reminder to everyone that we do -- we certainly provide in the schedule that there can be overflow of the experts into tomorrow, if necessary. So just in terms of considering the options here.
PRESIDING ARBITRATOR MILES: So you budgeted three hours cross?
MS. SQUIRES: That's correct.
Originally, in the schedule, if it helps clarify things, we were going to cross Mr. Tetard separately from Mr. Milburn and Mr. Tobis, and then we have agreed with counsel for the Claimant yesterday to just merge everything together for the benefit of, I guess, us, but also the Tribunal, so that all three experts would be present together for questions.
PRESIDING ARBITRATOR MILES:

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But you never had three hours cross time in the schedule, even broken up. You had an hour with Mr. Tobis and Mr. Milburn and an hour and a half with Mr. Tetard, so that's two and a half hours.
So that's okay. But you budgeted for three hours cross?
MS. SQUIRES: Yes.
PRESIDING ARBITRATOR MILES: You have used oneish. Have you done one hour's cross. It's been 50 minutes.
But, through your budget, how far are you through? Are you a third through?
MS. SQUIRES: Yes, I am a third through for sure.
PRESIDING ARBITRATOR MILES: Okay. All right.
We will just see how much you get through by one. Then we will take the lunch break and we will talk about whether we take a shorter lunch break. We may well.
I understand about tomorrow. I would like not to eat up tomorrow because, frankly, we would really like to spend some time tomorrow working out very important issues on question of law and what we need to hear from. So

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we don't want to chew up this entire arbitration with the damages experts.
MR. TERRY: Understood.
PRESIDING ARBITRATOR MILES: So let's get through as much as we can today and all of it, if we can.
And you have only got one.
MR. TERRY: Exactly.
PRESIDING ARBITRATOR MILES: Okay, I will stop wasting time. Ms. Squires, you can carry on to 1.
MS. SQUIRES: Thank you.
BY MS. SQUIRES:
Q. Mr. Tetard, in the presentation this morning -- my next question will be for you, Mr. Tobis, because, despite it being designated to Mr. Tetard in the report, you spoke to it this morning.
You noted that having guaranteed grid access on receipt of NTP meets the definition of having grid connection from the perspective of assessing a project's development stage.
So you used the word "guaranteed" grid access; do you recall that?

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A. [TOBIS] Yes.
Q. The grid access that the Claimant had was conditional approval; correct?
A. [TOBIS] Can you take me to the document that says that?
Q. I can.
Let's turn to your report at paragraph 212.
A. [TOBIS] Okay.
Q. And it says -- you note there about -- note there about grid access and it's referenced to a footnote 23.
So, if we go down to footnote 23, we are, again, relying on Mr. Baines' witness statement from the first Windstream I arbitration?
A. [TOBIS] His witness statement and the exhibits, the factual exhibit that's referenced there. Not exclusively his witness statement.
Q. Right.
So the exhibits he has then referenced in that first witness statement?
And it says there, in that footnote that he notes that, Mr. Baines, WWIS received a notification of conditional approval on

November 8th, 2010; do you see that?
A. [TOBIS] Yes.
Q. So conditional, not guaranteed, is what he is saying?
A. [TOBIS] That's what the words there say, yes.
Q. And nothing has changed with respect to grid access since the first NAFTA arbitration; correct?
A. [TOBIS] Not to my understanding.
I could clarify my comment in the presentation that what we were saying this notice is what's considered grid connection when we are assessing the project stage of development and the NAFTA 1 Tribunal reached the same conclusion.
Once you reach your NTP, the grid connection is there waiting for you. Obviously, they can't connect to the grid because they haven't built their wind farm yet.
They have the FIT Contract and they have this notice which is all you need, and if we are looking at other projects from a comparable perspective and saying, you know, want

to compare apples to apples of grid connection or not, this is the definition.
And the NAFTA 1 Tribunal reached the same conclusion which we were surprised to see it was even brought up again as an issue in Dr. Guillet's report.
Q. I am not going to go down the rabbit hole of grid access like we just did with site control but just one question.
That conditional grid access approval was done in 2010. Your but-for valuation world is now in 2020.
It's possible that that grid access would have to be reassessed as of 2020; correct?
A. [TOBIS] I can't discuss completely hypothetical situations, what's possible.
What I understand, from the factual record, is that nothing has changed. That grid connection, that promise, that letter still exists as of 2020. I haven't seen anything to imply otherwise.
We could discuss all kinds of hypotheticals. There could have been an

earthquake at the project site. Who knows. Those are macro factors that nobody accounted for.
So, once we are in the realm of what's possible, we are kind of leaving the world of what we do in valuation.
Q. Are you aware that the Windstream project was to connect at the Lennox station and that is the same station the Claimant took us to yesterday with respect to gas plants and issues of transmission capacity after 2010?
A. [TOBIS] I am familiar with reading that in the Two Dogs and Wood report. But I think that would probably be an issue to ask Mr. Irvine. I think he is in the room now but.
Q. All right. We are going to move on to market comparables.
PRESIDING ARBITRATOR MILES: Can I just -- somebody had turned my mic off. There is a message.
Mr. Tobis, you said the Tribunal found there to be grid access. They didn't. They found the Claimant did have a grid connection.
In your mind, is there a difference?

A. [TOBIS] I think, in the perspective we are looking at it, which is the perspective of assessing the project stage of development and how to use this in a comparables analysis, the words I think might be used a little loosely. We just walked through what the actual -- what we are talking about here, which document gave that promise to grid.
Whether it's sometimes called grid connection or sometimes called grid access, from our perspective, the definition that's applied in the valuation world is this is what's considered, call it what you want, grid connection, grid access. This is hitting that checkmark on the milestone stage.
I respect that people looking at all these words, as we discussed earlier -- site control, grid connection -- there could be slightly nuances and differences and definitions applied from a legal standpoint versus a valuation standpoint.
We are not expressing any opinion on law. We are coming from the world of valuation and finance and this is how we would look at it from a valuing risk perspective.

BY MS. SQUIRES:
Q. Okay. I want to talk just for a little bit about the comparable projects that you have relied on.
And perhaps, first, just a question of clarification.
In the presentation this morning, you have taken us through four projects of the ten.
You are not presenting that as the new valuation for us to use; it's just an alternative valuation; is that correct?
A. [TOBIS] Correct.
Q. Now, you walked us through -- you walked us through, Mr. Tobis -- or Mr. Tetard. I can't recall. So please jump in -- the Revolution and South Fork wind projects; do you recall?
A. [TETARD] Yeah, I do.
Q. And you mentioned that the projects were similar to the Claimant's project, for various reasons. You listed them off: Revenue was largely secured, permitting was little progressed.
These sorts of things; correct?

A. [TETARD] Correct.
Q. In your comments, you noted that the transaction, I believe, was in 2017 to 2018; correct?
A. [TETARD] Yeah, so there are -- there are two transactions around those assets.
Q. Okay.
A. [TETARD] The first transaction is Ørsted acquiring them from Deepwater.
Q. Um-hmm.
A. [TETARD] So when they acquire Deepwater, they buy those assets.
Q. Yes.
A. [TETARD] And then the second transaction where the figures are derived from is when Eversource buys 50 percent of those project.
Q. And that --
A. [TETARD] So I am involved in the transaction of Ørsted buying Deepwater. I am not involved in the transaction of Eversource acquiring 50 percent of these assets that were bought of Deepwater.

Q. Okay. I appreciate that your personal knowledge may go to one but not the other.
My question won't relate to your personal knowledge.
A. [TETARD] Okay.
Q. The timing of the transactions, the Deepwater -- Ørsted acquiring Deepwater was in 2017 to 2018, per your presentation. And then that second transaction by Eversource was a few months later.
So we are talking about transactions that were in 2017 to 2018?
A. [TETARD] So the first transaction closes, I think, November 2018.
Q. Okay.
A. [TETARD] And the second is February 2019.
Q. Okay. 2019 --
A. [TETARD] I am sorry. Not November 2018. October 2018.
Q. And the second one --
A. [TETARD] And the second one, February 19. So it's four months.

A. [TOBIS] I think just the reference to 2017 is just the due diligence began in 2017.
A. [TETARD] It's actually a bit different. It's that the conversations between Ørsted and the sellers of Deepwater were, were quite extended.
Q. It's okay. We don't need -- you guys are all sequestered so that's a good topic for your break.
Okay. So February 2017 for the first transaction -- sorry, 2019 -- sorry, I am going to start again.
February 2019 for the transaction that you used in your table for the valuation?
A. [TETARD] Yes.
Q. Now it came into -- now, by the time it had -- that transaction had taken place, certain work had been done on the project; is that correct?
A. [TETARD] Very little.
Q. Very little; okay.
And it's coming into construction -- when did it begin construction?

A. [TETARD] So there are two projects. The smaller one, South Fork, FID in '22. And Revolution Wind, FID in October '23.
Q. So Revolution Wind starting construction -- the transaction took place in 2019 with very little work done. Construction began in October 2023?
A. [TETARD] Correct.
Q. So about, what are we talking about there, four years? Over four years?
A. [TETARD] Yeah.
Q. Okay. That's when construction began?
A. [TOBIS] 4.8 years.
Q. Pardon. 4.8 years?
A. [TOBIS] Yeah, it's on our slide at 27.
Q. So construction starting at 4.8 years?
A. [TOBIS] Sorry, that's 4.8 years just to financial close. But yeah, I guess.
A. [TETARD] To FID.
A. [TOBIS] Yeah. To FID.
Q. Okay. So the project took 4.8 years to go from nothing to financial close --

A. [TETARD] So the bigger project of the two took 4.8 years.
Q. Okay.
A. [TETARD] The smaller project of the two took three years.
Q. You have valued them together; correct?
A. [TETARD] Yes, we did.
Q. Yes. Okay.
If those projects had a PPA similar to the Claimant where a termination right arose if they had not reached commercial operation in five years, you would agree with me that, to avoid termination, Revolution Wind -- or these projects had .4 of a year left to get all the turbines in the water and reach commercial operation before termination could happen?
A. [TETARD] So a point of comment here.
South Fork took three years, therefore, it had the two years to build.
Q. Okay.
A. [TETARD] To be within --

Q. I understand that.
A. [TETARD] Correct. Okay.
And the second comment is between February 2019. And then we have COVID and the war in Ukraine.
Q. Right. So things slowed down?
A. [TETARD] So things slow down.
Q. And that's exactly the time, in the Claimant's development schedule, that they would have been doing the exact same things?
A. [TETARD] It -- I don't know because those projects were bigger. They were in different location. They were more complex.
Q. But, just on the project schedule, Mr. Tetard, they start -- they reach financial close on February 2023?
A. [TETARD] Yes.
Q. They are moving through the same time periods here, as you're talking about for Revolution Wind.
But I think I want to go back to my question.

A. [TETARD] Yeah.
Q. 4.8 years to reach financial close or final investment decision for the project --
A. [TETARD] Or three years for the smaller project.
Q. Because you have lumped them all together. We have no way of parsing them out to actually figure out big project, small project. You've lumped them all together.
4.8 years to reach financial close; correct?
A. [TETARD] For the big project of 700 megawatts, yes.
Q. Okay. So the big project --
A. [TETARD] Yes.
Q. It took 4.8 years to reach financial close?
A. [TETARD] Yes.
Q. If it had a FIT contract that required it to reach commercial operation in five years, that big project would have --
A. [TETARD] An issue.
Q. -- .2 of a year left to

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get all the turbines in the water before it could be terminated?

A. [TETARD] Yes, yes. Your math is correct, yes.

A. [TOBIS] Can I jump in.

This a significantly larger project of 700 megawatts. It wouldn't have a contract of five years to build. It's apples to oranges.

You can't end up being built in an ocean that's 46 metres in depth versus 30 metres in a lake bed. It's an apples to oranges timeline comparison.

Each contract has its own schedules, its own timelines, and you really just can't compare them on that sense.

PRESIDING ARBITRATOR MILES: And that would affect how you value them?

A. [TOBIS] Of course.

PRESIDING ARBITRATOR MILES: Thank you.

BY MS. SQUIRES:

Q. Okay. So --

A. [TOBIS] No two projects are the same which is one of the reasons why

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comparables tend to be done in conjunction with the DCF approach.

BY MS. SQUIRES:

Q. Okay. So -- is there a question, or?

PRESIDING ARBITRATOR MILES: No.

MS. SQUIRES: Okay.

BY MS. SQUIRES:

Q. I actually think we can probably let market comparables sit right --

PRESIDING ARBITRATOR MILES: Hang on. I think there is a question.

Justice McLachlin does have a good question.

You acknowledged, Mr. Tobis, that COVID delays did enter into the timeline on your valuation on this project.

A. [TETARD] I did and, not only that, availability of vessels for during that time.

The vessels that have very specialist for bigger turbines which the project --

PRESIDING ARBITRATOR MILES:

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So my question is to the modelers, to Mr. Milburn and Mr. Tobis.

Did you factor in the COVID-related and/or Ukraine-related additional delays in your model?

A. [TOBIS] So this goes back to --

PRESIDING ARBITRATOR MILES: I know you have a sensitivity analysis on delay. If that's where it is, just say that's where it is.

A. [TOBIS] That's not where it is.

It goes back to the question of valuation date and hindsight.

So, our understanding, it's a legal issue. We were legally instructed to do a valuation as of February of 2020.

So we put ourselves as if we are standing on that date making projections based on information known or knowable at that date. At that date, no one knew what was going to happen with the COVID pandemic so our model is based on that.

If we were asked or if we were instructed to do a valuation at the current date,

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a lot of things would change. The COVID impact would be taken into account.

But as it stands today, actually, inflation, you know, in February 2024, inflation and interest rates are coming back down.

So what happened in 2023 might not even be relevant today. You might not even have the same value today. We haven't done that analysis. We could. It would be different and multiple different inputs.

PRESIDING ARBITRATOR MILES: Yeah, I understand that. Thank you.

Does this impact -- Dr. Guillet put, in his market comparables set, a couple that postdate our valuation date. Maybe three, I think?

Is that right? Just yes or no. Am I remembering that right?

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: Does he add some?

A. [TOBIS] He added going out about six months post valuation date, he included a few comparable transactions. We can look up maybe three, four, five of them.

PRESIDING ARBITRATOR MILES: So just taking your analysis. Those comparables could be impacted by unknowable facts at the validation date like COVID.

A. [TOBIS] Yeah.

What's interesting is the ones that were shortly after the valuation date in mid 2020 were actually quite a bit even higher than what our valuation date is referenced in our report in September of 2020. There was a very large transaction. It was Empire Wind transaction.

So those -- I mean, we didn't rely on those. They were hindsight. But that, in the year or the six months a year after that valuation date, those ones were very high.

Things only started getting rough in 2023 as government started increasing interest rates around the world which causes a whole whirlwind of impacts.

PRESIDING ARBITRATOR MILES: And fuel price, presumably.

A. [TOBIS] Yeah. In 2020, if I remember, interest rates dropped significant when all the active values in multiple industries

skyrocket in value.

If you were valuing this in September 2020, I think our valuation would be significantly higher than February 2020.

PRESIDING ARBITRATOR MILES: Your value would -- your costs would be significantly higher.

A. [TOBIS] No, not in September of 2020. Because, again, just everyone remembers, in the pandemic, governments drastically reduced interest rates in March and April of 2020.

PRESIDING ARBITRATOR MILES: Oh, I see.

A. [TOBIS] And then inflation went down. It went almost negative.

So September 2020, costs are even lower. There's lower inflation. Value is skyrocketing. It only started getting shaky in 2023 which is when some of these impairments.

I read, just prepping for this hearing, that in February, just last week, Ørsted announced they are taking a U-turn and actually going back into the full steam ahead in certain other US offshore wind projects.

Which just goes to show that the valuation date is important. Obviously, if we are valuing this in July 2023 when you are in the midst of this super high interest rate and high inflation rate, you reach a different conclusion.

PRESIDING ARBITRATOR MILES: What date was the IRA?

A. [TOBIS] Sorry, IRA?

PRESIDING ARBITRATOR MILES: The Inflation Reduction Act, what date was that?

A. [TOBIS] In the US, Biden administration, are you referring to? I don't know the exact date.

PRESIDING ARBITRATOR MILES: He influenced more than COVID.

A. [TOBIS] Probably, yeah.

MS. SQUIRES: I don't have any other questions on the market comparables and we are right on one o'clock to take the break.

PRESIDING ARBITRATOR MILES: Oh, okay. All right. So does that mean you have about an hour 45 still or does it mean.

MS. SQUIRES: Yeah, an hour and a half -- about an hour and a half, I would

say, when we come back.

PRESIDING ARBITRATOR MILES: Okay. That's fine.

How do you feel about us coming back at 1:30?

MS. SQUIRES: That's okay with me.

PRESIDING ARBITRATOR MILES: So we are going to come back at 1:30.

Please, no discussing the matter of -- and just be careful because we are in a communal dining area.

So I think what I would like to do, please, is could we just all pause and let these three gentlemen go and get their lunch, take it to their breakout room and then we will all leave in a couple of minutes so that they are not caught in conversations in the hall or overhearing them.

Okay. Thanks.

--- Upon luncheon recess at 1:03 p.m.

--- Upon resuming at 1:33 p.m.

PRESIDING ARBITRATOR MILES: All right, Ms. Squires, when you're ready, please.

BY MS. SQUIRES:

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Q. Okay. Welcome back.
So we are going to move on to a new topic, sunk costs.
And, as I mentioned earlier, I am bringing this up for a couple of reasons because there has been some Tribunal questions with respect to value created after the Windstream I award.
Also because there has been some questions about the contingent payment and how that would be structured.
And I understand from the report that the contingent payment is structured as such that it would arise out of sunk costs that have been paid since the Windstream I award, generally speaking.
A. [TOBIS] I will wait until we see the questions on it.
Q. I am not going to ask you about the structuring of the contingent payments. I am going to focus on the sunk costs.
So I want to turn to Schedule 3 in the first Secretariat report.
Which I understand, Mr. Tobis, you were responsible for putting together?

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A. [TOBIS] Yes.
Q. Now, just to confirm, this is Windstream Energy LLC's sunk costs; correct? Or past costs incurred?
CO-ARBITRATOR MCLACHLIN: Could you direct me to the page.
MS. SQUIRES: Sure. I do not have the page number -- 176.
CO-ARBITRATOR MCLACHLIN: Thank you.
BY MS. SQUIRES:
Q. So my question when you're ready, Mr. Tobis, is just confirmation that this is Windstream Energy LLC's sunk costs?
A. [TOBIS] I believe that's the case.
Q. So I want to take a look at some of the numbers that went into your calculation.
Now, based on this table, you arrive at costs incurred since NAFTA 1 by subtracting costs incurred as of -- subtracting costs incurred as of December 31st, 2015, from costs incurred as of February 18th, 2020, the valuation date; correct?

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A. [TOBIS] Yes.
And I could clarify that date, December 31st, 2015, in that column. That's for the year ending December 31st, 2015.
Some of the costs subtracted, the NAFTA 1 costs were the costs that were included in the Deloitte cost schedule that was presented in NAFTA 1. But, in certain categories, it only represented costs incurred or accrued up to, let's say, May or June of 2015.
Q. Okay.
If I understand correctly what you just said, is that the December 31st, 2015, column, those were taken from the Deloitte report, but the Deloitte report only goes up to June?
A. [TOBIS] June of 2015.
Q. June of 2015?
A. [TOBIS] Yes.
Q. Okay.
So what you have done to arrive at costs incurred since NAFTA 1 is take costs incurred up to June of 2015 and subtract that from costs incurred as at the valuation date and that gives you the delta?
A. [TOBIS] The other way

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around.
Q. Sorry, yes.
A. [TOBIS] We came up with the total costs as of the valuation date and backed out the costs included in the Deloitte report, for the most part, which were up to June of 2015.
Q. So I am just a little curious about the dates there because the first NAFTA award was September of 2016.
So I just seeking some clarification.
Are you not over counting time, then, in your sunk costs of costs incurred since NAFTA 1?
A. [TOBIS] So costs that would have been incurred between June of 2015 and September of 2016, the date of the award, would be, in this approach, would be included in the post NAFTA 1 costs.
The NAFTA 1 costs that we are referring to here are the costs that were considered by the Tribunal based on the expert reports and NAFTA 1. So, in the NAFTA 1 award, there is a reference to 17 million of total costs

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incurred.
Q. Yeah.
A. [TOBIS] That's based on, primarily based on the costs that were calculated by Deloitte up until June of 2015.
Q. Yeah.
So the answer to my question then is, yes, you're over counting costs in the last column because you're not counting costs incurred from September 2016 onward; you're counting costs incurred as of June 2015 onward?
A. [TOBIS] I wouldn't describe it as over counting. I would describe it as, factually, what it is.
That is the costs that were considered by the Tribunal in the NAFTA 1 award were primarily only costs up to June of 2015.
The only one that's a bit of a nuance is the first row because that's based on the costs from WWIS' financial statements.
So, for that one, we used their December 2015 financial statements. So that one, actually, that's what I meant earlier when there's a slight distinction between June 2015 and December 2015 in this category.

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Q. Yes, I understand that.
Okay. So, in the second last column, you've indicated certain totals, then, for December 31st, 2015, and you have indicated 18.26 million?
A. [TOBIS] Yes.
Q. So I am clear that on where we are, the difference between that and the Deloitte number is because of the June to December time period reflected in the capital costs by WWIS in the first; and, also, because you've added in, I believe, a couple costs that Deloitte didn't have to consider. There's two extra things.
You've added in a couple things than Deloitte. That's the difference at how you arrive at 18 instead of the 17; correct?
A. [TOBIS] We could reconcile it exactly to the Deloitte report. I understand it's primarily due to the category on Row 1.
I think we used the same categories as Deloitte, so we didn't add any different categories in what's called column B there.
Q. Okay.

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A. [TOBIS] Just Deloitte project costs capitalized, I think they might have been using the December 2014 financial statements. So, actually, for that category, at least there is a year's worth more of costs in that row.
Q. Now you have mentioned, a second ago, the Windstream I award?
A. [TOBIS] Yes.
Q. So I assume you have read it?
A. [TOBIS] Yes, I have.
Q. Okay. So I want to call it up right now. It's RL-109 and it can be found at Tab 3 of your binder.
And I want to turn specifically to paragraph 481.
A. [TOBIS] Yes, I am very familiar with this paragraph.
Q. You knew where I am going.
So you can see here, at the start of the paragraph, the Tribunal is assessing Deloitte's sunk costs at the 17 million, so the number that you have used.
And then you can see -- I can

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give everyone a bit of time to read the paragraph but, as you said you're familiar, we will skip forward.
You can see they have noted some problems with that number from an evidentiary perspective?
And, at the end, they say:
"Based on this yardstick, the Claimant's sunk costs would amount to some 8 to 10 million."[as read]
Do you see that?
A. [TOBIS] Yes.
Q. Okay.
So the number that you relied on to calculate the 2015 sunk costs has already been reduced by the Windstream I Tribunal; correct?
A. [TOBIS] Part of the reason for that reduction is that, in the Deloitte calculation of costs, they were including a lot of amounts that were accrued, in particular, on the interest amounts which I imagine we might get into.
PRESIDING ARBITRATOR MILES:

Mr. Tobis, can I just ask you to do something for me and for the transcript, is listen to the question and answer the question.

So most of the questions are designed to be yes/no. The number you relied on has already been reduced by the Windstream I Tribunal; correct?

A. [TOBIS] Correct.

PRESIDING ARBITRATOR MILES: Then you provide or ask if you may provide a further explanation if you want to; okay.

A. [TOBIS] May I provide a further explanation.

Q. I don't think I need a further explanation. I just wanted to make sure that you understood that that number had been reduced.

A. [TOBIS] I understand.

Q. Okay.

CO-ARBITRATOR GOTANDA: Can I ask just a quick question.

The interest seems a bit high under the circumstances.

Now, I understand they are fronting the capital and, you know, that it's

going to be high.

But interest rates, at that time, were near zero or very low and weren't they -- it just -- I haven't done the calculation real quick in my head but 12 and a half, yeah. I thought it was around 12 percent compound.

A. [TOBIS] Yes, that's right. The interest that was paid by Windstream to its investors for fronting the money for the 6 million letter credit was paid at 12.5 percent rate that was a contractual amount.

I guess, given the stage of the investment at the time, that's -- that was Windstream's cost of debt. Low interest rates would be to businesses that weren't in maybe the same kind of risk category of Windstream.

CO-ARBITRATOR GOTANDA: Yeah. Okay.

A. [TOBIS] If it helps, the last slide of our presentation, the appendix, we had a walk through that interest calculation. I am happy to answer questions on it, if it would be helpful.

CO-ARBITRATOR GOTANDA: I will come back to that later but after.

BY MS. SQUIRES:

Q. I am going to come to that as well so maybe we will save all of our questions for the same time.

Okay. If we were, for the sake of argument -- let's come back to Schedule 3 so it's in front of us.

For the sake of argument, if we were going to reduce the costs incurred up to December 31st, 2015, to reflect what the Tribunal found, that would, on this, on the numbers here, that would make the costs incurred, both before and after the NAFTA 1 award, pretty similar. 8 to 10 million, the Tribunal said, and you have costs incurred after NAFTA 1 as 9.4?

A. [TOBIS] No --

Q. Follow -- no, it's a mathematical question, Mr. Tobis.

A. [TOBIS] Yes. The majority component of that reduction, from the paragraph award you put up, was the 6 million letter of credit. That's included in our column B as a pre NAFTA 1 cost. So that would cause column B instead of being what's shown as 18 million, if it's 8 to 10 million, that's what they said.

But the final column there is separate from that. Those are costs in addition. That's separate.

So they, the 27 total -- 27.7 million costs there, you reduce that by, let's say, 10 million. That's what NAFTA 1 reduced the costs by. That whole 10 million would be applied to column B, not to the costs since NAFTA 1 award.

Again, it's hard to know exactly -- they use rounded numbers in that paragraph so hard to know exactly which amounts. But the largest one is that letter of credit and perhaps there would be some slight other reductions to the costs since NAFTA 1 award under their approach. But it's hard to infer from what's written in the award.

Q. So I can take you back to the paragraph and I am going to come to the $6 million letter of credit for sure.

And maybe this point is inconsequential, in any event, but the Tribunal did consider the $6 million; you're correct.

A. [TOBIS] Um-hmm.

Q. But they also said that

not all of the costs incurred by the Claimant after May 2012 can be considered arbitration costs.
So, in that respect, they were talking about technical expert reports and these sorts of things. So they considered more than just the $6 million letter of credit; correct?
A. [TOBIS] Correct.
Can I elaborate on that point?
Q. No. My point was really just -- I think we can move on. My point wasn't -- let's move on.
PRESIDING ARBITRATOR MILES: Mr. Tobis, you have done this before. You know how this works. Mr. Terry can come back and give you a chance in re-examination. It's just on his clock.
A. [TOBIS] I understand, yes.
BY MS. SQUIRES:
Q. Yes, staying on Schedule 3 and I want to discuss the first line but you refer to as project costs capitalized by WWIS.
A. [TOBIS] Yes.
Q. And we see, in the last

column, that that amount is $449,000 since NAFTA 1; correct?
A. [TOBIS] Correct.
Q. So it also notes there, in the third column, that you would go to note 1 to learn more about this number.
So let's go to note 1 which is on the next page in the document.
And it refers there to two financial statements; one in 2019 and one in 2015; do you see that?
A. [TOBIS] Yes.
Q. And it refers to incomplete project value for both of these; correct?
A. [TOBIS] Correct.
Q. Now let's look at Exhibit C-2261. That's at Tab 4 of your binder.
And that is the unaudited financial statement for the 2019-fiscal year for Windstream Wolfe Island Shoals Inc.?
A. [TOBIS] Correct.
Q. I want to make sure what's being reflected here in this statement. And so let's look at page 3.

So, on page 3, there, we have some unpaid share capital and we have incomplete project listed as 4,784,546. So that's where you get the number; correct?
A. [TOBIS] Correct.
Q. And these are unaudited financial statements; is that right?
A. [TOBIS] Correct. They are prepared under the notice to reader standards by PwC.
Q. But my question is are they unaudited financial statements?
A. [TOBIS] They are unaudited financial statements.
Q. Did you independently evaluate what the Claimant has included in these financial statements? Not somebody else, you?
A. [TOBIS] No.
Q. Okay. Let's turn to the reply memorial filed by the Claimant in this arbitration. And there's an excerpt of that at Tab 1 in your bundle and I want to turn to paragraph 82.
A. [TOBIS] Got it.
Q. So here. We can see some

arguments from the Claimant and I am not asking you at all to comment on legal interpretation or anything that comes out of this.
But we can see here that the Claimant is noting, quoting them:
"The engineering and environmental work done to progress the project both before and after the moratorium."[as read]
And then I want to look at the ones that are specifically post the Windstream I award.
So we are going to scroll down. So we are going to go through -- there's a giant list here. If you want some time to look at the ones that are all there.
But if we get down to the very end of the list, at subparagraphs 8 and 9, that's when you get to the two studies that were done after the Windstream I award.
It's on page 36.
A. [TOBIS] Yes.
Q. So subparagraph 8 notes that:

"In February of 2017,
Ortech prepared an
updated project
description report that
was submitted to MOE and,
in the spring of 2017,
also prepared an updated
wind resource
assessment."[as read]

Do you see that?
A. [TOBIS] I do.
Q. Have you reviewed any invoices with respect to these reports?
A. [TOBIS] I don't recall. I remember seeing some but I have not obviously referred to those invoices.
Q. Do you know how much Windstream Wolfe Island Shoals or Windstream Energy paid for this report?
A. [TOBIS] I think I recall hearing, in Ms. Baines' testimony, a number that was in the sub 100,000. I don't remember the exact number but I recall her talking about it.
Q. So Ms. Baines provided us with a couple numbers. They were the quotes. My

colleague Ms. Dosman took her to the documents. They were quotes from Ortech in advance of performing the work.
My question is about payments after the work has been done.
Have you reviewed any invoices with respect to the work that was done?
A. [TOBIS] No.
Q. Have you done any valuation of what that report would have been worth on the market to an independent buyer?
A. [TOBIS] No.
Q. Are you aware that that document is a public document in this proceeding?
A. [TOBIS] It sounds familiar.
Q. Now let's look at subparagraph 9. This is another study that was conducted after the Windstream I award and this is the CSR report.
A. [TOBIS] I see it.
Q. And let's turn to Tab 14 of your binder. This is Exhibit C-2720A and this is an invoice from CSR to WWIS in the amount of --
A. [TOBIS] Sorry, which tab?

Q. Sorry, Tab 14.
A. [TOBIS] That's not what I have in Tab 14.
Q. Are you in the right binder? You're not in one of your colleagues' binders, Mr. Tetard?
A. [TOBIS] No.
Q. Okay. There must be an error in the filing. Just give us one second.
Sorry, just give us a second and we will find it for you. It's at Tab 12.
You need your binder. You can have my binder if you want. There's no secret notes in it.
A. [TOBIS] Thank you.
Q. Okay. So we have the invoice. This is an invoice in the amount of -- amount due of $50,000, $50,712; correct?
A. [TOBIS] Correct.
Q. Have you seen a record of this invoice being paid by the Claimant?
A. [TOBIS] No.
Q. Have you done any valuation of what this report would be worth on the market to an independent buyer?

A. [TOBIS] No.
Q. And you're aware that this report is also a public document in this arbitration?
A. [TOBIS] I will take your word for it.
Q. Okay.
I want to turn now to another line in Schedule 3. So let's turn back to Schedule 3?
A. [TOBIS] All right.
Q. I wouldn't put that schedule very far away. We are going to use it a little bit this morning.
A. [TOBIS] I have it here, open, ready to go.
Q. I want to turn to the line that's entitled "IESO cost reimbursement relating to the 2018/2019 proceedings". It's the fourth line from the bottom; you see that?
A. [TOBIS] I see it.
Q. The total there is $750,000; correct?
A. [TOBIS] Correct.
Q. And if we turn to note

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14, which is where you provide your description of where you get that number on page 180, to see where this number comes from, it notes that this is from a legal settlement with the IESO from 2018/2019 dispute; do you see that?
A. [TOBIS] I do.
Q. Ms. Baines confirmed for us that this was not a settlement. It was payment of the IESO's costs related to the domestic application; is that correct?
A. [TOBIS] Correct.
Q. If the Tribunal were to award Canada to pay sunk costs in this arbitration and these numbers were included, this would, in effect, be making Canada reimburse the Claimant for its legal costs in the domestic application; is that correct?
A. [TOBIS] It would, in effect, be reimbursing, yes, the cost, the 750 that the Claimant had to cover for the IESO. We would consider that a project development cost. Yes, that is what would be the impact.
PRESIDING ARBITRATOR MILES: You might just have to speak a bit more clearly because Lisa got that but I didn't.

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A. [TOBIS] Sorry, I was just processing the question.
The short answer is yes.
BY MS. SQUIRES:
Q. Okay.
I want to turn now to another item in Schedule 3 and I want to look at the management fees, the unpaid ones, to White Owl Capital, and the unpaid management fees to 905085 Inc., which we also know by the name Controltech.
A. [TOBIS] Yeah.
Q. And those are discussed in notes 4 and 6, respectively. So we will turn to notes 4 and 6.
A. [TOBIS] Um-hmm.
Q. If we turn there, we can see that you rely on two documents to arrive at these numbers, C-2409 and C-2492. So let's have a look at those numbers.
A. [TOBIS] Um-hmm.
Q. So let's turn first to C-2409. It's at Tab 8 of your binder.
A. [TOBIS] Yeah.
Q. You're there.
Did Secretariat prepare this

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document?
A. [TOBIS] No.
Q. In looking at this document, is there any evidence at all as to who prepared it?
A. [TOBIS] It was prepared by David Mars.
Q. But I am asking, in looking at this document, is there any evidence as to who prepared it?
A. [TOBIS] Not what I see right here, no.
Q. Is there any evidence as to the date it was prepared?
A. [TOBIS] Not on what you're showing on the screen now, no.
Q. You can take time to look for the full document if you want.
A. [TOBIS] I'd say no.
Q. Okay. Let's turn to page 2.
This page is entitled "905085 Ontario Inc. accruals", and the date rage is June 30th, 2015, to February 18th, 2020; do you see that?

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A. [TOBIS] Yes.
Q. And, if we go down to the end of page 12, we see, for the total time period, we arrive at a total of 2.728 million; do you see that?
A. [TOBIS] I do.
Q. And, if we go on to the next page, we see that's where we start the White Owl Capital accrual; correct?
A. [TOBIS] Correct.
Q. And these are two different entities on the same document; 905085 and White Owl Capital are not the same entity but they are in the same document here?
A. [TOBIS] They are not the same entity and they are being shown in the same document here.
Q. Okay.
So White Owl Capital accruals are for the same time period; correct?
A. [TOBIS] Correct.
Q. And, if we go to the end of that document, we see a total of 1.5 million; you see that?
A. [TOBIS] Yes.

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Q. And then we see, if we go back to that very first page, we see those numbers reflected in the last column under "total". The 2.7 is there and the 1.5 is there; correct?
A. [TOBIS] Correct.
Q. Now, I am having trouble matching these numbers up with what's in Schedule 3 so I am hoping you can help.
Let's turn back to Schedule 3.
And, for the White Owl Capital management fees in the schedule, you have included $945,000 for the period up to February 18th, 2020; do you see that?
A. [TOBIS] Yes.
Q. Okay.
So that's not the 1.5 million that we saw in C-2409, the document you relied on; correct?
A. [TOBIS] Those numbers are not the same; correct, yeah.
Q. Okay.
And the same is true for 905085. You use 1.593 million but, in the document we just looked at, it was 2.728 million; correct?

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A. [TOBIS] Correct.
Q. Okay.
Now, this document starts counting as of June 30th, 2015, and these past costs incurred are December 31st, 2015.
So am I correct in assuming that you're calculating as well that six-month period in your numbers here?
A. [TOBIS] Yes, it's picking up where the Deloitte report left off.
Q. Okay.
Let's look, then, at the other documents that you rely on. And that's an invoice that goes to some of these underlying amounts.
So let's turn back to note 4 and you can see we are going to talk about an invoice underlying the White Owl Capital management fees.
And, to determine that number, you pointed to one document that you say is C-2492. So I want to turn there. This is at Tab 9.
A. [TOBIS] Um-hmm. Yes.
Q. This looks like an invoice from David Mars from Kinetic Blueprint

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Inc. -- or LLC, sorry, to Windstream Energy LLC; do you see that?
A. [TOBIS] Yes.
Q. It is not to the Claimant from White Owl; is that correct? There is no reference to White Owl?
A. [TOBIS] David Mars is White Owl. I know he structured the --
Q. My question is whether there is a reference to White Owl on this document?
A. [TOBIS] This document does not contain a reference to White Owl.
Q. And this document is dated September 1st, 2020?
A. [TOBIS] I --
Q. You can see that under "invoice date"?
A. [TOBIS] That might be the month and days switched around.
Q. So maybe it's January 1st, 2020?
A. [TOBIS] Or January 9th, 2020.
Q. It's 2020; right. That,

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we can agree on?
A. [TOBIS] It's 2020, yes.
Q. So, this document, if it's September 1st, 2020, this document was created after the Notice of Intent in this arbitration; correct? That was February of 2020?
A. [TOBIS] If that is September, yes, it would be after the Notice of Intent.
Q. If it was January, it was created a month before -- six weeks before the Notice of Intent; correct?
A. [TOBIS] Yes.
Q. Okay.
And now, if we look at the details of what's here, these are for consulting services from 2015; correct?
A. [TOBIS] Sorry, are you referring -- which line on Schedule 3 are you referring to?
Q. Right now, I am still on the Kinetic Blueprint invoice.
A. [TOBIS] Where does this relate to in the cost schedule so I can orient and I can give you the price --

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Q. Yeah, for sure.
You refer to it in note 4 for where you derive values for White Owl Capital's management fees following the Windstream I award.
A. [TOBIS] Right.
Q. Okay.
A. [TOBIS] Okay.
Q. So, when I look at what's invoiced here, it's for consulting services that occurred in June, July, August, September, October, November 2015; do you see that?
A. [TOBIS] I do.
Q. So did you review any invoices for management fees of White Owl Capital after November 2015? Invoices is my question.
A. [TOBIS] No. We had an agreement or a contract, I think it was a NAFTA 1 exhibit about the amount per month that was paid to White Owl. And the other exhibit in the three refers to the monthly fee amount of C-1891 and C-1892.
Q. Mr. Tobis, my question was just about whether you reviewed any other invoices, not agreements?
A. [TOBIS] No.

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Q. Now, I want to look at the amount you note for interest paid net of interest earned.
So we are going to come to talk a little bit about interest. We have been waiting to get there.
A. [TOBIS] Um-hmm.
Q. And I want to look at note 8 on page 178 of the first Secretariat report.
So we can see, under note 8, two documents that you refer to: C-2082, and then you also refer to C-1889 for the calculation of the interest, total interest as of June 2015.
You see those two documents referred to there?
A. [TOBIS] Yeah.
Q. So, if I understand correctly, these are the two documents, C-2028 and C-1889, that you relied on to calculate the interest; correct?
A. [TOBIS] There was another document that probably should have been listed in that footnote. It was the document that had the agreement of the 12 and a half percent but this

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was --
Q. Do you know --
A. [TOBIS] I don't have the exhibit number off by heart. I remember looking at it in preparation. I think it's referenced on the slide in our presentation, if it's helpful.
C-1529.
Q. So you're referring to -- okay, C -- we are going to back here now. I am going to back to Windstream I in my mind.
You are referring to C-1529; correct?
A. [TOBIS] Correct.
Q. So that was an agreement between the shareholders in Windstream, so William Ziegler, individuals like that, and the Claimant, Windstream Energy?
PRESIDING ARBITRATOR MILES: Hang on. You might be entering confidential territory.
MS. SQUIRES: I don't believe so.
PRESIDING ARBITRATOR MILES: It's blanked out in earlier proceedings.
So, Mr. Terry, are we okay?

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MR. TERRY: Just one moment. We are okay.
MS. SQUIRES: There we go. We got the go ahead.
BY MS. SQUIRES:
Q. Okay. So you have referred to that document at C-1529.
Now, two questions I want to ask you about that document.
Are you aware that, in the Windstream I arbitration, my colleague Mr. Spelliscy took Mr. Low to that document where Mr. Low confirmed that that number is, in fact, not interest, it is a fee?
A. [TOBIS] Yes, I read the transcripts from Windstream I.
Q. Are you also aware that, in the Windstream I arbitration, my colleague Mr. Spelliscy took Mr. Low to that document where it was confirmed that it was an unsigned document; correct?
A. [TOBIS] Correct. Happy to elaborate but correct.
Q. That's fine. Okay.
So we have these three

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documents, C-2082, C-1189 and then the one we just spoke about.
And I have to admit I am a bit confused again about these documents. So let's go to them.
Let's start with C-1889 and that's at Tab 14 of your binder.
A. [TOBIS] Um-hmm.
Q. And this is where you say the interest as of June 19, 2015, came from; correct?
A. [TOBIS] No, the interest, as of June 2015, came from the Deloitte report, Schedule 3B. Deloitte had derived it from this document.
Q. So I will agree with you there. This is the same document that Deloitte relied on and the reference to that is the Deloitte report paragraph 6.25A, for the record.
And, I have to admit, as you can see when we haul this up. We are going to haul it up. Can we have C-1889 on the screen, please.
Okay. This is not an invoice or any sort of formal business document, any

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exchange about collecting fees; correct?
A. [TOBIS] This is a summary of the accrued interest as of the date of the Deloitte report --
Q. Fee. Sorry, fee?
A. [TOBIS] Accrued fees, sorry, as of the date of the Deloitte report. It was unpaid at that time.
Q. Who prepared this document?
A. [TOBIS] I understand it was Mr. Mars.
Q. But it doesn't say on this document who prepared it?
A. [TOBIS] It does not say.
Q. Okay.
Do you know when this document was prepared?
A. [TOBIS] I recall you asked Mr. Low that question as well.
It says June 19th, 2015.
Or, sorry, your colleague asked him that and so I assume it was prepared sometime in 2015 and Deloitte relied upon it in their June 2015 report.

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Q. So Mr. Low was asked about this?
A. [TOBIS] Yes.
Q. He said he did not know who prepared it. It was not Deloitte. And he did not know when it was prepared?
A. [TOBIS] I know it was prepared by Mr. Mars.
Q. Okay.
Now, let's look at what else you referred to. Because we have looked -- that's the document for 2015.
Let's look at what you now refer to for the 2020 date. And I want to turn to that document.
It is -- I don't want to turn to the document yet but I want to turn to note 8 in your schedule.
A. [TOBIS] Um-hmm.
Q. And we can see you are referring to C-2082, Windstream payouts; do you see that?
A. [TOBIS] I do.
Q. Now, before we leave the schedule, because I am going to lump a bunch of

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things in here together, I want you to confirm you also rely on C-2082 and it's the only document you cite to in your report for what you rely on, for notes 5, note 7, note 8, note 9, 10, 11, 12, 13, 14, 15, 16, 17; correct?
A. [TOBIS] I will take your word for it. It seems about right.
Q. So those lines, for the record, correspond to the letter of credit, what you say is interest paid or earned, which I am going to correct to be a fee, legal fees paid incurred to advance the project, public relations fees, data room fees, expert report, expert report fees, which I understand were not included they were excluded?
A. [TOBIS] Correct.
Q. Government relations fees, accounting fees, equity expenses reimbursement, and tax payments.
You relied on C-2082 as your only evidence to support that.
So let's turn to that document. So that document's at tab 10 of your binder?
PRESIDING ARBITRATOR MILES:

Was there a question before you got there? Do you want him to confirm?
MS. SQUIRES: He can confirm if he can.
A. [TOBIS] I confirm.
Q. Okay.
So let's turn to that document, C-2082.
Did Secretariat prepare this document?
A. [TOBIS] No. This document was emailed to me by David Mars and we walked through it, he explained what each item was --
Q. Okay.
But, on this document, there is no evidence of who prepared it?
A. [TOBIS] No. I know it was prepared by David Mars.
Q. Is there any evidence as the date to which it was prepared?
A. [TOBIS] I know it was prepared at the end of 2020, the last date listed in the last row of this document.
Q. So this document was

prepared after the Notice of Intent was filed in this arbitration, end of 2020, you just said?
A. [TOBIS] Yes. Because it's including also costs --
Q. Okay.
Did you independently evaluate the invoices that led to these numbers?
A. [TOBIS] I don't recall. I understand there is an invoice available for each of these numbers but --
Q. But you did not review that.
Earlier today, in your presentation, you mentioned your --
PRESIDING ARBITRATOR MILES: Hang on, hang on. Slow down.
MS. SQUIRES: Sorry, sorry.
PRESIDING ARBITRATOR MILES: Getting a little bit excited post lunch. Give him a moment to answer, please.
So you haven't got the transcript, have you. So hang on.
You said you did not independently evaluate the invoices that led to these numbers. Mr. Tobis said I don't recall. I

understand there is an invoice available for each of these numbers but -- you jumped in, but you did not review that.
I don't -- maybe you did answer. I don't recall.
Did you independently evaluate the invoices that led to these numbers, Mr. Tobis?
A. [TOBIS] I do remember looking at several of these invoices. For example, the Torys invoices in 2017, 2018, that are included in note 9.
I think those, ultimately, weren't produced. They were considered, I guess, confidential.
But I independently reviewed the amounts that were on those invoices that matched the amounts in Mr. Mars' schedule here of the total payments he's made.
There might have been other items like that as well. I gained comfort over the reasonability of the numbers on the spreadsheet. I appreciate those invoices aren't in front of us today but I was comfortable that these were all reasonable and real expenditures incurred by Windstream.

MS. SQUIRES: I have a follow up to that, if I may.
PRESIDING ARBITRATOR MILES: Yes.
BY MS. SQUIRES:
Q. So I understand, if we turn to note 9.
So you have referred to some invoices that were paid to Torys?
A. [TOBIS] Yes.
Q. That you have taken out of the number. So you have taken a number from 2082 and you have subtracted from that some invoices because they were not suitable to be included as sunk costs?
A. [TOBIS] Yes. Because they related to this arbitration and I didn't want to make the same issue --
Q. Yes. But the ones you left in for sunk costs, you did not review invoices for those; right?
A. [TOBIS] No, I did as well.
Q. You did. You haven't cited to any of them?

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A. [TOBIS] No, we haven't produced them because they are confidential.
Q. Okay.
A. [TOBIS] But I reviewed them, as an expert, to ensure that the numbers put in my report appeared reasonable.
Q. They are not on the record?
A. [TOBIS] Those invoices are not on the record.
Q. The Torys invoices?
A. [TOBIS] The Torys invoices.
And I recall reviewing several other of these invoices. I don't believe they are on the record. But I have reviewed several of these invoices when preparing the schedule. We walked through them with Mr. Mars. And some of them might have been screen shared with me. I will have to go back and check my notes.
But I remember gaining comfort over the reasonability of the numbers on the C-2082 schedule.
Q. Okay.
So in terms of what we have on

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the record in this arbitration, then. We have C-2082 and we have your testimony that you reviewed the Torys invoices and some other specific invoices?
A. [TOBIS] Correct.
Q. Okay.
I want to turn now to one final series of questions on sunk costs -- actually two, and then we are going to move on.
Yesterday, Ms. Baines indicated, in her testimony, that her and Mr. Baines have not been paid for services rendered since the Windstream I award because of an arrangement that they had with the investors. And she referred to it as skin in the game.
Given that, if we come to line 5 in schedule -- sorry, if we come to Schedule 3, and we look at the management fees for 905085 Ontario, it says there that, since NAFTA 1, the amounts paid, so not accrued but paid, have been $523,000.
Can you tell me where that number comes from?
A. [TOBIS] So 905085 Ontario received a cheque for $2 million in May of 2017.

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That cheque related to all their accrued fees up to that date.
1.477 million of those fees were accrued up until June of 2015 which were included in the Deloitte schedule in NAFTA 1, which means that the remaining amount of those fees, the 523,000, which is the difference between column A and B, reflects their accrual from June of 2015 until May of 2017 when the amount was paid.
Q. So some of the 523 was for services rendered prior to the NAFTA 1 award?
A. [TOBIS] It depends how you define the NAFTA 1 award. It goes back to our earlier discussion.
The column B relates to costs that were included in Deloitte's cost schedule in the NAFTA 1 award.
So 523,000 I will just factually say was accrued costs from June 2015 until May of 2017.
Q. Okay.
But we can take as agreement that the NAFTA 1 award date isn't September 2016. You don't dispute that. You have a different

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interpretation of what is meant by "after the NAFTA 1 award", but you agree with me that the award itself is September of 2016?
A. [TOBIS] The award is September 2016; correct.
Q. Okay.
Let's turn now to Exhibit C 2020 at Tab 15 of your binder.
A. [TOBIS] Sorry, I don't have a Tab 15 in my binder.
Q. Oh, my goodness. I apologize for this.
There we go, 13.
Okay. Now this is an exhibit that Secretariat indicated it reviewed in preparing its first report. It's listed in the documents that you reviewed.
And you note Secretariat refers to this document as Wolfe Island Shoals expenses 2016 to 2019.
Do you know who prepared this?
A. [TOBIS] Can you please take me to where we have referenced this in our report. That may help refresh my memory on this.
Q. Yeah, absolutely.

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I don't have the exact page number but it's in the first report, Secretariat's first report where you list off all the documents that you reviewed.
A. [TOBIS] Yes.
Q. In that list of documents, C-2020 appears.
A. [TOBIS] Was it referred to in any footnotes?
Q. I cannot find it anywhere in your report but it does say that you reviewed it?
A. [TOBIS] Okay. We could check this but let's continue.
Q. Okay.
A. [TOBIS] If it's there, the list of documents reviewed, then, yes, we reviewed it and it informed our view in our report.
Q. Absolutely.
If it wasn't you that reviewed it, I know Secretariat -- I am using the term singularly, but there's three people. So maybe somebody else looked at it. They can jump in. Not a problem.

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So do you know who prepared this document?
A. [TOBIS] I can't say with 100 percent certainty. I will assume it was Ms. Baines.
--- Reporter appeals
Q. At the bottom of the page there, we can see four red checks?
A. [TOBIS] Yup.
Q. Is that because these numbers weren't finalized; do you know? Do you know what that check means?
A. [TOBIS] That's very common in any accounting spreadsheet. It's just the way to make sure that your math is right.
Q. Okay.
A. [TOBIS] This is obviously a column that's been down added and check if any of our spreadsheets have that.
Q. That means the math is right?
A. [TOBIS] Yes.
Q. Okay.
A. [TOBIS] When the number next to the check is zero, it means that you

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reconciled to the columns in the spreadsheet.
Q. Okay. Perfect. You can see I am not an accountant.
A. [TOBIS] It's okay.
Q. Now --
A. [TOBIS] I am not a lawyer either, so.
Q. There we go. Even.
Let's move to the top.
And I want to look at the row where it says "incomplete project". So it's to the left-hand side. It says "Wolfe Island Shoals" and, right underneath that, it says "incomplete project"; do you see that?
A. [TOBIS] Oh, now, you just refreshed my memory what the schedule is.
Q. Okay. I feel like you may have looked at it.
A. [TOBIS] Yes.
Q. Now, we see there are numbers right across the top that go across the that row for 2015, 2016, 2017, 2018, 2019; correct?
A. [TOBIS] Correct. Those numbers reconcile to the financial statements that

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we looked at earlier.
Q. Right.
So those -- this incomplete project, those numbers are reflected in the unaudited financial statements and then they are then included in your Schedule 3 as project costs capitalized; correct?
A. [TOBIS] Yeah, I see that.
And we had asked Ms. Baines to provide this to us so we could have a better understanding of the numbers on the financial statements. We wanted to see what the breakdown of the cost spend each year was, what the various categories were.
Q. Okay. So this, so this helps us determine what kind of things went into the incomplete project. What's made up of that value.
A. [TOBIS] Exactly.
Q. Okay.
Now -- and just so I am clear on how this spreadsheet works, if we just take the 2015-year for incomplete project, we add the 4.335435 million to the 2016 expenses, that's how we end up at the balance for fiscal year 2016?

A. [TOBIS] Perfect.
Q. There we go. I am learning.
And the WEI there, referenced in the columns with the date, that's Windstream Energy Inc.?
A. [TOBIS] I will take your word for it.
Q. I don't know. I am asking?
A. [TOBIS] I, I don't know either. I don't remember.
Q. Okay.
I want to turn down to the fourth line item, government relations.
It says 6806 Wolfe Island government relations; do you see that?
A. [TOBIS] I do.
Q. And, for the time period that this document covers, we have three entries: One just over 12,000, one for 20,000, and one for just over 71,000; do you see that?
A. [TOBIS] I do.
Q. So we are at about $103,000 there?

A. [TOBIS] Yeah.
Q. Okay.
So, using this, here, we have government relations fees that are then captured in that incomplete project value; correct?
A. [TOBIS] Correct.
Q. And then, in turn, in your capitalized cost in Schedule 3; correct?
A. [TOBIS] Correct.
Q. Okay.
So if we -- let's turn back to Schedule 3. And we see the project capitalized cost there at the top.
A. [TOBIS] Yes.
Q. And, if we go about five lines from the bottom of Schedule 3, we can see that for, in the period post NAFTA 1, you have included 220 -- you have included $270,000 for government relations; correct?
A. [TOBIS] Correct.
Q. So have you ensured, through your calculation, that you are not double counting any government relations here, given what we know about how money flowed from WWIS to Windstream Energy Inc. to Windstream Energy; have

you done a check to make sure that nothing is overlapping here?
A. [TOBIS] Yes, of course --
Q. Where --
A. [TOBIS] -- we discussed this with Mr. Mars and Mr. Baines and we understand that some of these fees were paid directly to the WIS entity and some were paid -- the cheque was written out of the Windstream Energy entity. But there is definitely no double counting here.
Q. Okay.
Where on the record can we see the evidence to help us ascertain exactly what government relations fees were paid by which entity if we wanted, ourselves, to go back and recreate that?
A. [TOBIS] Well, the numbers in Row 13 are the ones paid by the American entity, Windstream Energy. And the numbers you referred to on the screen before were paid by the Canadian entity.
We obviously want to ensure there is no double counting. We put a note next to each other, no double counting, no double

counting. That's one of the checks we will do on our work.
Q. I want to be clear, I am not at all questioning your integrity in preparing this document in any way. I am trying to recreate it.
In terms of the invoices, when we talked about C2082 which is where you derive the number for February 18, 2020, you said you looked at some invoices, you had some conversations.
I guess my general point is we have to take your word for it, that that was done but there's nothing on the record to help us determine that for sure; is that correct?
A. [TOBIS] So, in C-2082, you can see some line items for Rubicon, for example. And, November 2018, there's a $90,000 payment made, wire payment made --
Q. Yeah?
A. [TOBIS] -- so that's the evidence we relied upon.
That might have been one, I might have seen the invoice for that. I might have to check my notes. It might have been

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confidential. Its government relations emblem was written on the invoice.
But I gain comfort that if this C-2082 spreadsheet said they paid $90,000 to Rubicon on November 2018, I gain comfort that that was reasonable.
Q. Okay. But we haven't reviewed the invoices.
Just for the sake of completion -- I am going to move on to the haircut which I like the term of. We are going to move on to that in a second.
There are several other things as well on this Exhibit C-2020 that also overlap in categories like legal fees, management fees, these sorts of things. You have ensured that there is no duplication there?
A. [TOBIS] Correct.
Q. And while we are on C-2082, if we could call it up again.
Sorry, C-2020. Sorry, Ryan.
We can see, about halfway down the page, we have "6815 Wolfe Island REA"; do you see that?
A. [TOBIS] The row that has

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no costs in it.
Q. That's right. I am just asking you to confirm no costs were spent with respect to the renewable energy approval, based on this document?
A. [TOBIS] No, I don't think you can conclude that. An accountant can categorize costs in all different kinds of categories.
I imagine Ms. Baines can answer. She might have categorized the costs spent on an REA in one of the other categories on the spreadsheet. You can't conclude from that that no amounts were spent on REA. All you can conclude is that row is empty.
Q. Okay.
Just give me one second.
Sorry, one more question on Schedule 3 and then we are going to hopefully put it away.
A. [TOBIS] I still got it here.
Q. There we go. Okay.
Line 7, the $6 million security deposit that the Claimant provided the

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IESO.
A. [TOBIS] Yeah.
Q. You have that as a sunk cost incurred as of December 31st, 2015; correct?
A. [TOBIS] Correct.
Q. And that security deposit has been returned to the Claimant; correct?
A. [TOBIS] Correct.
Q. You don't make any deduction from that in your sunk costs calculation?
A. [TOBIS] We take it out of our final damages conclusion in our conclusion slide. So we took it out.
Q. Right.
But, in this 9 million here, you make no deduction for that?
A. [TOBIS] In this schedule, which isn't a damages conclusion, it's not been deducted.
Q. I understand that's not -- it's for the Tribunal to decide what the damages value is here.
And I want to make it clear that, if the Tribunal were to look at this and

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award costs incurred since NAFTA 1 as sunk costs in this proceeding, and they were to look at that 9.4 million, that, if the Tribunal was to award the Claimant 9.4 million, they would be paid twice for the letter of credit; is that correct?
A. [TOBIS] No. The 9.4 million does not include the 6 million in that total. So they wouldn't be paid twice. If they were to award 27.7 million, potentially.
Q. I understand the 9.4 million is not included -- the 6 million is not included in that 9.4 million because this is as of February 18, 2020.
But we know that, since this time there, has been an inflow to the company of $6 million.
So if the Tribunal was awarded -- if the Tribunal awards $9.4 million, with the information we have now, knowing that $6 million of that has flown back to the company, you would agree with me that, to be properly made whole, it would have to be 3.4 million?
A. [TOBIS] No, I don't agree. I can elaborate if you want but my answer is no.

Q. Let's turn on to something else then.

Let's turn to the project stage risk adjustment factor. And I have just a couple short questions about this. I think Dr. Guillet is wanting to speak about this as well.

We have already gone through the methodology of calculating that net present value using the 15 percent IRR and then we have taken the haircut of the 57 percent; correct?

PRESIDING ARBITRATOR MILES: Ms. Squires, just before we move on to that topic, can I just ask a question that's been puzzling me. You may not know the answer.

Did the letter of credit -- I am sorry.

Did the $6 million that was held in respect of the letter of credit accrue interest?

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: And where is that reflected? Who earned that interest and where is it reflected and at what rate? I know that's three questions. So let's

take them one at a time.

A. [TOBIS] It's explained in the last slide of our presentation in the appendix.

PRESIDING ARBITRATOR MILES: The one that -- all right, then, maybe we won't waste.

A. [TOBIS] Just to simply answer. You are welcome to walk through it after.

But, to simply answer, it was paid to three entities at the rate of 12 and a half percent. And it was paid out in actual cash, an actual cheque was written in May of 2017.

PRESIDING ARBITRATOR MILES: No, no, no.

So you've borrowed the money from Lucky Star and Co.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: And you pay them 12 and a half percent interest.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: The money sits in an escrow account somewhere. The money sits somewhere.

As the money sits somewhere,

for example, in a bank.

A. [TOBIS] Um-hmm.

PRESIDING ARBITRATOR MILES: That nobody can touch it -- you need to be quiet, Mr. Mars. You are not giving evidence. You are not testifying in this hearing. So, please, no commentary from you, okay. Thank you.

If somebody wants to call you, they will, and you will be testifying under oath like everybody else.

So my question was did -- are you aware, in the information you have, having, it looks to me like you fairly carefully audited the information available, was there any interest accrued on the 6 million?

A. [TOBIS] If I am understanding your question correctly, note 7 of our Schedule 3 where you refer to the interest that was earned on the 6 million -- so this 6 million was sitting in a bank and it was generating very low amounts of interest. I think we calculated $46,000 in the last couple of years.

We deducted that amount from the total cost because that's an offsetting. That was money that was benefitted to Claimants. We

wanted to keep them even. So we added the interest paid and took off the interest earned. That's why the row is -- sorry, it's page 178 of our first report.

PRESIDING ARBITRATOR MILES: So your note to Schedule 3. Which note?

A. [TOBIS] Note 7, the bottom part in note 7, it says "interest earned in UBS account". It shows negative.

PRESIDING ARBITRATOR MILES: Got it.

And this is referring to that same exhibit that Ms. Squires was talking about that you rely on for a bunch of your --

A. [TOBIS] Yes, yes. These numbers come from that same exhibit.

PRESIDING ARBITRATOR MILES: I see.

So earned interest of 46,000 Canadian dollars.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: Paid interest about 5 and a half million or fees --

A. [TOBIS] Yeah, I think

that was over the entire time period.

I should point out that this 6 million was continuing to accrue interest to investors since May of 2017. I don't -- we haven't included, in any of that continuing accrued interest -- well, sorry. Fees -- there's a distinction between fees and interests.

We have only included the amounts that have actually been paid. That's a distinction between us and Deloitte on that point.

At the time of the Deloitte report, those fees were unpaid, accrued and there was questions, are they even real. Who knows. It's an unsigned document.

In our case, we are including only the fees that were paid. Technically, since May 2017, they are still accruing more fees on this amount. We just haven't included those as well. We were trying to be reasonable in preparing the schedule.

PRESIDING ARBITRATOR MILES: So, sorry, I am just trying to look in real-time and I am not sure.

So on the line in your Schedule 3, in the line interest paid, net of

interest earned, and you have got 46,000 in square brackets there.

That's where you have accounted for interest earned on the 6 million sitting in UBS?

A. [TOBIS] Yes.

There, and also in the first part of note 7, if you notice when the money came back from BMO, it came back at 6.126 million.

Initially, they put in 6 million. They also had to pay 120,000 in fees and they got back 6.162.

So that's further interest earned that's deducted from our total costs.

So, really, there's 162,000 of interest earned up until -- in that category. And then there's also the additional 46,000 of interest earned in the second part of note 7.

Again, it's a very, obviously, much lower rate of interest than what they were paying to investors to borrow this money -- interest or fees. I apologize.

PRESIDING ARBITRATOR MILES: Okay. So the 46, if I look at note 7, relates to interest earned, like proper bank interest earned.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: Since the award.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: But I thought your Schedule 3 also tried to tell me about costs before the award and I'm not -- I don't think I am seeing any interest earned before the award.

A. [TOBIS] That would be captured in the first part of note 7. That's the 42 -- the 42,000. Because the 6 million --

PRESIDING ARBITRATOR MILES: Oh, I see.

A. [TOBIS] -- was put in and then they took out 6.162 million.

So that's -- they had to replace their letter of credit so that's the interest up to that date.

Perhaps, you know, to be more meticulous or to put that 42,000 amount in the pre NAFTA 1 category, we were trying to be consistent with how the previous experts looked at costs.

And so that is just where it -- these were relatively minor amounts in the

context of the cost numbers we are talking about, but we tried to be as meticulous as possible.

PRESIDING ARBITRATOR MILES: I see. That's helpful. Thank you.

IRR, Ms. Squires.

BY MS. SQUIRES:

Q. Okay.

So the project stage risk adjustment factor, I understand from this morning that this involved discounting the cash flows using that 15 percent IRR that you have assumed.

And then, once you arrive at that number, you use the 57 percent probability of reaching financial close and that's how you got your number.

I am looking at -- I am scanning all three here. I am not sure who -- Mr. Tetard, looks like he is waiting for a question.

Is the question best to you? You are turning the mic towards your colleague. So I will ask the question and then you guys can confer.

A. [MILBURN] I think I can answer.

Q. I just want to confirm that's basically the process of what happened?
A. [MILBURN] I think you're mixing. We did two --
Q. That's most likely.
A. [MILBURN] We did two DCF scenarios, intentionally.
One used the IRR method which Mr. Tetard spoke to.
The other one, just a more traditional DCF, where we discounted by a cost of equity, and that's the one that we apply the adjustment for risk to.
Q. Right. Okay.
PRESIDING ARBITRATOR MILES: And what was the IRR in your second model?
A. [MILBURN] It was a 10 percent discount rate.
PRESIDING ARBITRATOR MILES: That was your WACC; that's your 10.58 or something.
A. [MILBURN] Yeah --
PRESIDING ARBITRATOR MILES: Okay, okay.
A. [TOBIS] Effectively, a

simple way to think about it is the 10 percent discount rate plus the risk factor in our second income approach is the same thing as just using a 15 percent discount rate in the first approach.
Mathematically, it kind of gets complicated but it's, ultimately, as if the transaction structuring approach, it's as if we used a 15 percent discount rate.
BY MS. SQUIRES:
Q. Okay.
So my question relates a bit more to the probability of reaching financial close. So the 57 percent. So I want to just turn there.
Now, Windstream's project schedule had it reaching financial close in three years; correct?
A. [MILBURN] Yeah, that's correct.
Q. Now, in the projects that you have used, the eight projects that you relied on to calculate your probability of reaching financial close, have you accounted for the probability of reaching financial close in three years?

A. [MILBURN] I think the way that we did it was we identified -- this is at paragraph 6.103 of our first report, sub 2.
We selected projects that obtained revenue clarity during the period from January 2010 to February 2017 and then we assessed which of those had reached financial close within the three-year period before our financial -- sorry, three-year period before our valuation date.
Q. Right.
So you have looked at the three-year period before the valuation date to see which projects reach financial close.
But you didn't determine which of those projects only took three years to reach financial close.
Do you see the distinction I am making there?
So some of those projects took more than three years to reach financial close, even if they did reach that financial close in that three-year period; is that correct?
A. [MILBURN] Yes, I think that's correct. It was --

Q. So, if we wanted to assess the probability of a project reaching financial close by the valuation date and being able to do so within three years, we would have to add an extra level -- extra criteria to your list; is that correct?
A. [TOBIS] We comment on that in our second report and I can't find the exact paragraph reference right now but we responded specifically to that point.
That analysis would not be helpful at all, given, as we discussed earlier, every project is unique and there's different sizes and different construction profiles, different water depths, ocean verse lake.
So you can't just compare a three-year timeline of Windstream's project to some other project in the North Sea that's triple the size and has a different construction schedule. That's not the right way to compare timelines.
Mr. Irvine, who is here today, in the Two Dogs report, extensively confirmed the project timelines by comparing to comparable projects in various places in similar conditions,

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lake beds, et cetera. And that's how it was the right way to assess the three-year time frame, not by this analysis which was capturing a different -- was a totally different apples to oranges analysis, from what you're describing.

Q. So Mr. Irvine's calculations in the Two Dog report relate to construction schedules; correct?

A. [TOBIS] Construction schedule, CAPEX, wind turbine selection. A whole bunch of technical issues.

Q. And he didn't opine on anything that happens prior to construction in terms of timelines?

A. [TOBIS] Ms. Powell is the one that gives evidence on the permitting process.

Mr. Irvine and Wood and Two Dogs review certain aspects of that as well, given that some construction activities are even beginning prior to financial close. Ones that, as Mr. Tetard explained, certain design categories can start prior, you know, and they are funded by equity holders.

Q. Okay. I am quite familiar with Mr. Irvine, having had him sit in

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this exact seat in front of me eight years ago for a nice lengthy discussion.

Let's -- okay. The last thing I want to take you to, before I hand you over to Claimant's counsel, is the market comparable or the -- the valuation that you have done by looking at the lease transaction for US offshore projects.

So let's turn to the first Secretariat report at paragraph 7.16 -- 7.16.

So there. Good.

Okay. So this is the first paragraph where you're discussing those offshore wind lease transactions.

And, if we turn to the next page in Figure 7.5, we can see the numbers that you provide; correct?

A. Correct.

Q. Okay.

So, unlike in a market comparables that Mr. Tetard has done or Dr. Guillet has done, what you have used here is a value per acre of land that the project -- that was purchased, I guess, for these projects; correct?

A. [TOBIS] Because these

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were so early stage, the appropriate way to value such early stage assets are on a dollar per acre basis.

Q. Okay.

So, using this method, you conclude, at paragraph 7.21, that the Claimant would have been able to sell the project for a minimum of $68 million as of the valuation date; correct?

A. [TOBIS] That sentence says:

"This would imply a minimum value of approximately $68 million for the project."[as read]

Q. So you come at it minimum of approximately 68?

A. [TOBIS] That's what it says.

Q. And, if we look at footnote 209, you base your calculation of the acreage on Exhibit C-0877, a technical report that was done on December 2nd, 2020.

And you indicated that, based

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on this, the project will be located on approximately 48,000 acres of shallow water shoals; correct?

Sorry, 2010. Sorry, I think I might have misspoken and said 2020.

2010.

A. [TOBIS] Yes, that's what my footnote says.

Q. So let's turn to page 54 of Secretariat's first report.

And I want to look at paragraph 6.36.

This might be for you, Mr. Milburn. I will toss it out there.

Now, this is the section dealing with the base land rent fee for the area of the seabed to be occupied by the project; correct?

A. [MILBURN] That's correct.

Q. And it notes there, in the second line, this would result in a total area of 31,778 acres; do you see that?

A. [MILBURN] Yes, I do.

Q. And that's based on the project layout, as it's currently designed for

this arbitration; correct?
A. [MILBURN] Correct. That's the footprint of the wind generators.
Q. Okay.
So, well, the land-based rental fee is paid on not just where the foundations are placed; right? It's based on all of the Crown land that you have a lease over?
I guess I could just make my question maybe -- if, in fact, this is the total area the acreage of the project and not the $40,000, it would lower the valuation -- 40,000 acres, sorry. Dollars.
A. [TOBIS] No, no. I suspected that's where we were going with this. We thought long and hard about this.
Q. Okay. Good. I am not the only one.
A. [TOBIS] I am glad you asked.
An important aspect of valuation, especially when using market comparables, is ensure what the valuation base you are using is comparable.
Q. Yes.

A. [TOBIS] So you're apples to apples. I know I have said that a few times so far.
When we are looking at acreages from those offshore lease areas, we are looking at the total acreages that they received some form of site control over.
Any project that was ultimately built on those sites wouldn't all use those acreages.
So, here, Windstream had what we call, from a valuation standpoint, site control over 40,000 acres.
So, to compare that apples to apples to those transactions, we have to use the full acreage. If we want to do this analysis based just on the acreages that would be used in the layout, we would need much more insider knowledge about each of those lease area transactions, which we don't have.
So either we could do total acres and total acres, or component of total acres or component of total acres.
To do otherwise would be mixing and matching which would be inappropriate.

Q. Okay. I understand.
So you have derived this value, then, out of the assumption that they have site release and site control of certain areas of land, as described in the project description; is that correct?
A. [MILBURN] Yeah, I believe so. That was from the Wood report.
Q. Okay.
And, again, to go back to a point about site control.
They did not yet know that they could access or lease that site, as of the valuation date; correct? It's an assumption that's been made?
A. [MILBURN] Yeah, I believe so. I mean, they were early in the process there.
Q. Okay. I don't think I have anything else for you. You are released from me, at least.
A. [TOBIS] Thank you.
A. [MILBURN] Thank you.
CO-ARBITRATOR GOTANDA: Can I jump in and ask my question.
I want to go back to the

interest IRR and tie it up all together. I know it was a little disjointed.
So you needed to pay 12.5 percent to get the investors to fund the letter of credit. That, I get. And that makes sense.
There's little risk, right, though, after Windstream I, given what the Tribunal says there.
It's not risk free but there is actually, at that point, if Canada's taking the letter of credit, they are paying for it. The Tribunal makes that pretty clear; right.
So, so there's little risk, isn't there, at that point? That doesn't mean 12.5 is inappropriate. I am not saying that at all. It's just that the risk, at that point, is relatively low.
A. [MILBURN] I mean, you would hope so. I mean, I think there's also just the cost of money.
CO-ARBITRATOR GOTANDA: Right. Right.
A. [MILBURN] Right. They couldn't use that money in an alternative

investment.

CO-ARBITRATOR GOTANDA: Yeah -- I am sorry, I am talking over you. I won't do it again. I promise.

That was at a time, though, that the interest rates were really low.

So, so, it's a low risk. Relatively low risk at that point.

Here is where it relates to this IRR, or your internal rate of return, yeah.

15 percent seems, to me, a bit low given 12 percent -- 12.5 is what they were paying here for almost a pretty sort of not risky investment.

So the industry, if I understand the Respondent's expert correctly, he was saying it should be 30 to 40 percent. He was saying 18 to 20, if you got a fully developed ready to go permitted, all of that, project. You went to 15. And I read -- I understand why you went to 15.

I am trying to square that, though, in this entire sort of circumstance that we are in where, in the letter of credit, they were getting 12 and a half.

They should, it seems like, to me, an investor, if they were getting 12 and a half just for this letter of credit that seemed relatively to pay for that -- they got to be requiring more than 15; shouldn't they, for something at an early stage development?

And my -- what I am trying to figure out here is, if they paid more, you know, an investor were needed to pay more, maybe not 40 percent, but perhaps anything above 20 might make this -- might put the whole thing under water; wouldn't it?

I haven't done the calculation. But, just looking at your numbers here, going from 15 to, say, 25 would put -- would essentially wipe out all the profits; wouldn't it, in this case?

A. [TETARD] We didn't run that calculation using a 25 percent IR because my view is that 25 percent is not what this project would have been sold for.

It wasn't 25 percent for this kind of project that had a PPA, where it was in the process of degree, process of getting land, did not justify 25 percent return.

CO-ARBITRATOR GOTANDA: And we will hear from the Respondent's expert.

But what -- if I read his report correctly, what he was saying was I have looked at comparable transactions and they were requiring 30 to 40 at early stage development.

And, if I understand your correctly, you're saying -- well, 25 would not have been sufficient; right. Yeah. And that's even at a later stage.

So I am trying to figure out how the 15, actually, in the real world -- I understand what you're saying in terms of you looked at -- you have got this, you know, the FIT. And you've got sort of an income stream but it's not the same as, is it -- and here is where your chance to explain.

Given all of these circumstances, it just seems hard to believe that that contract alone and just a little more is going to allow you to run with a, you know, with a 15 percent. When, geez, they are paying 12 and a half for almost -- I am not calling it a risk-free letter of credit.

This is a lot more risky and

if it's a lot more risky, isn't it going to be closer to 20 or more. And that now, please, tell me why, why the 15 seems right?

Because I don't see any market sort of data on that. You looked at other projects and that's what they did, or maybe I am missing it, so.

A. [TETARD] So I would not comment on the 12 and a half percent because I didn't look at this. I didn't consider this.

What I considered is what is the expected return that an experienced offshore wind potential buyer would expect to generate for this project. And that's how I get to this 15 percent.

The next milestone where you see another market for experienced developers or investors is call it FID or financial close.

At that point, the market would go down to around 10 percent. Because the risk would have increased.

The next milestone is when the project gets into operation. And, there, you will expect maybe 7 or 8 percent.

So we can see this decrease in

return requirement at different stages of a project.

This, this 15 percent was describing a range between 14 and 16 percent. This is what we were observing in the market at the time.

It's not that there are libraries of private transaction records that you can access in the public domain, unfortunately.

So but, in my reasonable opinion, this is the rate of return that I would have used as a potential interested buyer for a project like this one.

Again, which had a contract, which had a path to create, a path to site, and an experienced team that had proven its ability to develop an onshore wind project nearby, a few years earlier.

CO-ARBITRATOR GOTANDA: It's a real big difference, though, between the two experts. And I guess we will ask tomorrow but, literally, it makes -- at least from my just glancing -- and, again, I haven't run the numbers.

But a 10 percent, you are off by more than 10, but even a 10 percent swing here

is -- would devastate the --

A. [TETARD] We haven't checked. We haven't checked this sensitivity but it would be a very important impact. I don't know if it brings to a zero or not but, yeah.

CO-ARBITRATOR GOTANDA: Or close to it. I mean, it could be pretty close to what the last Tribunal awarded in the end, but --

A. [TETARD] I don't know.

CO-ARBITRATOR GOTANDA: So I am trying to figure -- help us.

How do we choose, if we went down this path, how do we choose that right number because it makes the world of difference here?

A. [TOBIS] Can I just point to two aspects to respond to some of your questions.

Footnote 360 of our second report, we say -- we note that, all else equal, using a 20 percent IRR in our transaction structuring approach, instead of 15 percent, would result in a value of approximately 147.3 million for the project as of the valuation date.

So it's about -- we are talking about sensitivities. It's approximately

reduction of half.

We didn't run beyond 20 percent. In our view, that would just be in a territory of just unreasonable.

We also noted, in Figure 6.4 of our second report, on page 96, we extracted a chart from one of Dr. Guillet's presentations where he showed, at least this is what he is saying in the public record what expected IRR, an early development project with no debt. So that would be our project and, this presentation, 20 to 25 percent.

We could run, you know, another sensitivity slightly above 20 percent. Mr. Tetard explained, his experience in the market at the time, that 15 was appropriate. Obviously, you might have slightly different views.

But I don't think -- of the 30 to 40 numbers where the numbers changes just afterwards, that is not what he is saying in the public domain.

If the Tribunal finds that number in footnote 360 be helpful, then that gives a sense of the impact.

The second point is, that 12

and a half percent, my understanding of that, that only the rate up until the first payment was -- the payment was made after NAFTA 1.

You're correct. The risks would have gone down after that. And my understanding is the new accrued interest is only at 8 percent.

So it's a big distinction. It's about a one third drop, 8 percent to 15 percent is different.

Also, as we see in other sectors, interest rates on the predevelopment process are higher. As the project would get into development, they would have access to much cheaper capital.

So you wouldn't assume that high interest rate for the entire project life. The 15 percent that Mr. Tetard is saying is the blended rate over the life of the project which incorporates the post financial close.

A. [MILBURN] Sorry, one more point.

Just as reference, when you're comparing to the 15 percent.

So, in our secondary DCF, we

use a 10 percent which we independently derived and that starts with a risk free rate of 1.45 percent which is as of the valuation date.
So that's for a project that was at financial close before the risk adjustment for getting there.
So that's more of a comparison between the 15 -- like with a risk adjustment, essentially.
CO-ARBITRATOR GOTANDA: Right.
But the risk adjustment would go higher, according to the Respondent's expert.
A. [MILBURN] Right. Right. He thinks it would be higher, yes.
PRESIDING ARBITRATOR MILES: And what happens to this 147.3 million if you apply the sensitivity analysis?
A. [TOBIS] I think we could easily run those calculations on a break. It would probably take us ten minutes to do, if it's helpful.
I imagine the percentage impact of each of those sensitivity analyses will be relatively the same. Obviously, the absolute dollar figure will be different.

If we want to just back of the napkin it for now. Assume it's the same percentage and just on a lower dollar amount. And happy to run the calculations on a break. We have our models here. We can do that.
PRESIDING ARBITRATOR MILES: So, if we look at Slide 40, it's about 12 -- 15 percent; is it? Impact? For each of the sensitivities.
No, the top one is much higher.
A. [TOBIS] Yeah, the top one is the highest.
PRESIDING ARBITRATOR MILES: The top one has 15.
The next one is 5 --
A. [TOBIS] 1 percent, 3 million out of 300 million.
The last one is about -- it's 10ish, 5 to 10 percent. It impacts slightly differently on each approach, just the way the math comes out.
But the rough ranges, you said, are correct.
PRESIDING ARBITRATOR MILES:

Although -- I am sorry. I was taking the value from the transaction structure approach and looking at the impact from the project stage, sorry.
You go back -- right. This is what comes off and this is the new value. Oh, so we don't have the old value to put it against.
A. [TOBIS] To get the old value, for example, the first one, you would add the two numbers together. And the old value is also showed in the other slide with our main conclusions.
PRESIDING ARBITRATOR MILES: Would you run those in the break for us.
So these numbers that are on Slide 40, just out of curiosity, against the number in 360 of your second report, footnote 360 of your second report.
A. [TOBIS] Sure.
PRESIDING ARBITRATOR MILES: Yeah. You have got your model with you.
A. [TOBIS] Yes.
PRESIDING ARBITRATOR MILES: Yes. So just run the 20 percent IRR and then run those three sensitivities. That would be

interesting.
A. [TOBIS] To confirm that we have all our checks and balances, would we have permission to speak to some of our other team members that are here to ensure we run these numbers properly.
PRESIDING ARBITRATOR MILES: Within Secretariat?
A. [TOBIS] Yes, within Secretariat. We don't have to but.
PRESIDING ARBITRATOR MILES: You can do that. It's just really out of curiosity.
A. [TOBIS] We can do it on our own. It's no problem.
PRESIDING ARBITRATOR MILES: Yeah, no, that's fine. Within Secretariat.
A. [TOBIS] Yes, within Secretariat.
PRESIDING ARBITRATOR MILES: And just while we are on those sensitivities, I asked you this question but just -- and I think you said you agreed.
These don't include the six-month delay, these sensitivities? If you take

the six months off your window.

A. [TOBIS] That's what sensitivity 2 is.

PRESIDING ARBITRATOR MILES: Oh, that is the -- okay.

A. [TOBIS] It means --

PRESIDING ARBITRATOR MILES: No, I don't think it is. I don't think it is.

You are already six months into your five-year contract.

A. [TOBIS] Yes.

PRESIDING ARBITRATOR MILES: When the breaches in the first proceedings first occurred or first began.

So I think Dr. Guillet said you haven't got five years from your date of recommencement through to your date of end. Because you are already six down. You spent over and over it. So you have only got four and a half.

At one point, in your second report, you adjusted for that six months. I think you added in a penalty; is that one of these?

A. [TOBIS] Yes, that's the second row --

PRESIDING MEMBER MILES: That is the second row --

A. [TOBIS] That second row in the schedule called "revised MCOD due to REA appeal".

So that approximately 3 million impact is the impact of that scenario. It captures the penalty payment which is really the only difference, the penalty payment.

MS. SQUIRES: May I ask a question of clarification on that. Because I think it might be helpful.

The second sensitivity analysis was in the event the REA appeal period is not adopted; correct? So that you lose that six months; correct?

A. [TOBIS] Is it described in our report --

Q. It's the six months for the REA appeal; correct?

A. [TOBIS] Yes.

Q. The six months the presiding arbitrator is referring to is not the six months for the REA appeal. It's a different six months that was used by the Claimant prior to

the moratorium, prior to the force majeure event happening.

So you have not done a sensitivity analysis that accounts for the fact that, as of project reoperation date, you already have four and a half years.

And then, in addition to that, you have not done, if you were to use that, if you were to take your REA appeal one, the sixth months you have there, in order to account for the six months for the prior to force majeure, you would need another six months added on there.

These are two different events of six months we are talking about?

A. [TOBIS] I think if we refer to Figure 6.1 of our second report, Section 6(a), it will explain all that, that I don't think they are two separate issues.

I am happy to go through the weeds on it, but we explain how we capture for the -- we already incorporated the six months from May 2010 to November 2010 and then, basically, we say you get that six months back because of the REA appeal being added to force majeure.

If you don't get that six

months back then, yes, your revised MCOD becomes, I think July 2015. It's set out in our report.

And that's what this sensitivity is -- it's basically saying.

I can't count that six months -- in no scenario that we have are we recounting that six months from May to November of 2010.

Q. Okay.

So, on that point, there is a project development schedule here that takes 58-months; correct?

A. [TOBIS] The worst case scenario, yes.

Q. 58 months with a one month buffer --

A. [TOBIS] One and a half months.

Q. One and a half months; okay.

If you count this six months they have already used, that puts the total time needed for the project as six months plus 58 months.

So now we are at 64 months for the project?

PRESIDING ARBITRATOR MILES: Ms. Squires, I think we will leave this for your submission.
MS. SQUIRES: Okay. Yeah.
PRESIDING ARBITRATOR MILES: I have got very careful notes of the six month and I think Mr. Tobis is right.
If you disagree, you are welcome to make submissions on that on Friday.
But he -- we all know he has accounted for a six month period in the sensitivity analysis. So all we want you to do on the break is run that the once.
You can make a submission later on that, if you want.
What we will do now, I think -- Mr. Terry, are you going to be very long? Do you want to take a break before re-exam or should we get it done?
I would quite like to get it done, if you're happy to do that. But, if you want time to consult, that's fine too.
MR. TERRY: I don't think I need time to consult but I don't want to finish, complete everything because, of course, the

experts are going to go and consider over the break and then come back with their answers to you.
So we could either -- I have only got brief, sort of five or a little more minutes worth of re-examination. I could either do it now, in which case, I think we would have to keep the experts sequestered and do that.
Or we could send them off now and then come back in 15. They could answer your question.
PRESIDING ARBITRATOR MILES: Why don't we do this.
Why don't you proceed. You just run those numbers. There's only three numbers. And just give them on a piece of paper to Ms. Squires, probably, is appropriate. And Ms. Squires can talk to Mr. Terry and we can get those numbers.
If we have more questions, the rules are you are staying anyway. So I think we can just get those back as numbers, unless you feel they require further explanation.
But we will ask your questions now. Or you can just come back and read the

numbers into the record, perhaps, afterwards.
But, either way, you re-examine, now and if they open up further questions, you can come back.
MR. TERRY: Okay.
RE-EXAMINATION BY MR. TERRY:
Q. Okay. I have one re-examination question for Mr. Tetard and the rest, I think, for Mr. Tobis.
For Mr. Tetard --
PRESIDING ARBITRATOR MILES: Can you not have just one for Mr. Milburn? I feel quite bad for him.
A. [TOBIS] He can help with mine.
MR. TERRY: He certainly has license to jump in if he wants.
BY MR. TERRY:
Q. Mr. Tetard, do you recall when the Tribunal president was asking you questions about the cable, the amount of cable that was required for the project?
A. [TETARD] Yeah, the distance, yes.
Q. And we have a document

that I would like to bring up from the Wood report. If we could go to the page 2 of the executive summary.
And I know, Madam President, this was also your particular request so I won't -- if I could just direct the witness to read -- and we haven't highlighted this -- but it's in the first paragraph, if you can just read the first paragraph, please, particularly the --
A. [TETARD] The first paragraph of the executive summary.
Q. Of the executive summary?
A. [TETARD] So:
"Wood --"[as read]
Q. You don't have to read it out loud but if you can just review it, please.
A. [TETARD] Oh, okay.
PRESIDING ARBITRATOR MILES: I think you can cut this short.
I don't think Ms. Squires is going to object to cross-examination. I see that there's 28 kilometres long of cable but then it's 10K offshore. So.
MR. TERRY: Exactly.
PRESIDING ARBITRATOR MILES:

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You can just cut straight through it. Why are they different.

BY MR. TERRY:

Q. And, Mr. Tetard, I appreciate this isn't your document.

But could you explain, from this, your understanding of the length of the cables and the reference here in the report?

A. [TETARD] So the cable of 28 kilometre long is distance between the substation of the project all the way to the onshore Lennox terminal station. Which is where there is grid capacity to connect the project.

Q. All right.

And unless, Madam President, you have other questions, I know you were particularly concerned about the cabling?

PRESIDING ARBITRATOR MILES: Not concerned, just curious.

MR. TERRY: Okay.

PRESIDING ARBITRATOR MILES: So these are transformer stations, there is no converter there?

A. [TETARD] I need to ask my engineer.

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PRESIDING ARBITRATOR MILES: Okay. What do you understand the Lennox terminal station to be, a transformer or converter?

A. [TETARD] Possibly both. I am not sure. Because I don't know what are the technical requirements of the cable for 28 kilometre between the site and the connection point.

PRESIDING ARBITRATOR MILES: The point being there's lots of bits of infrastructure that can cost money that go between a windmill and somebody's house?

A. [TETARD] Sure. Yes. I agree. Here we stop at the grid, right, the project connects to the grid.

PRESIDING ARBITRATOR MILES: Fair enough we stop at the grid, yes fair enough.

BY MR. TERRY:

Q. Okay. For Mr. Tobis, do you recall, and if I could ask the award paragraph 481 to be brought up, please.

And, Mr. Tobis, do you recall being asked questions by Ms. Squires about paragraph 481 of the award?

A. [TOBIS] Yes, I do.

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Q. And do you recall being asked questions about the number you calculated for 2015 sunk costs have been already reduced by the Tribunal?

A. [TOBIS] Yes.

Q. And you said, in answer to Ms. Squires' question, you responded, correct, but said that you wanted to make a further explanation?

A. [TOBIS] Yes.

So part of the reason for the difference between 17 million and 8 to 10, obviously, the biggest component was the 6 million.

But, also, in the -- what Deloitte did in the NAFTA 1 arbitration is they included some costs related to the actual arbitration in itself, some of the expert report costs and the various engineering reports that were done in 2014, 2015, they were challenged on that because, technically, arbitration costs should be considered separately.

My understanding is those were part of the costs the Tribunal took out to get to 8 to 10 million. Again, they don't do a very line

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by line reconciliation from 17 to 8 to 10. But, after watching Deloitte's testimony and reading this, that was my understanding.

In our case, that wouldn't have applied because amounts that were spent on engineering reports in 2014, 15, related to the NAFTA 1 arbitration, when we are valuing it in 2020, those are real costs that has helped the project get to where they are at February 2020. Those reports were included in the -- in Windstream's reapplication 2017. That was real engineering work that was done.

So, at the time of NAFTA 1, it was somewhat of a legal issue whether you count that toward sunk costs or not.

But, at the time of NAFTA 2, I would definitely consider that to be a legitimate sunk cost for the project.

And that, in addition to the point I think I did get to make about accrued fees verse actual fees. So Deloitte had included -- the fees to the investors, at that time, were accrued. There were questions as to is this real? Are they not? Are they actually going to get paid?

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We included the fees that actually were paid. The cheques written to the investors for interest/fees, so we -- our costs amount is -- stands on more solid ground than the costs in the NAFTA 1 award.

So, that being said, the 6 million is the 6 million, but I am not sure how much, based on that methodology in NAFTA 1, how much of that reduction would apply to our sunk cost calculation for this arbitration.

Q. And next question that -- Ms. Squires, do you recall her asking you several questions about the documents you relied on to compile the sunk costs in your Schedule 3?

A. [TOBIS] Yes, I do.

Q. And what types of records are generally acceptable to prove or establish sunk costs in valuation?

A. [TOBIS] It's really case dependent and depends -- representing costs is our primary approach or just as information for the Tribunal to consider.

So, again, we consider the same type of evidence that was considered by Deloitte. And, other than the 6 million letter of

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credit and some expert fees, seem to have been mostly accepted by the NAFTA 1 Tribunal.

Some cases, you needed to do very forensic deep dives and look at every invoice and bank statement.

We didn't think that, this case here, given the credibility of these costs in the first round, what they related to, given the agreements we saw, we didn't consider them to have required a very deep dive forensic analysis.

I should also point out the costs from the PwC notice to reader report, that that was not an audited report but it still was something that was signed by PwC and that those numbers would go on the company's tax returns.

As a professional accounting firm, they would still have an obligation to ensure that costs that are on their financial statements that they are signing, even though they're unaudited, are legit and reasonable and plausible.

They are reporting to the Canadian government those costs as well in their tax returns, that they line up. And there is different levels of assurance provided over them.

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But I wouldn't consider the numbers straight off those financial statements to be not reliable.

Q. And, again, for Mr. Tobis.

You were taken to various documents you said were prepared by Mr. Mars.

How do you know they were prepared by Mr. Mars?

A. [TOBIS] Mr. Mars emailed them to me directly. And then we had a call during COVID. Everything was video calls.

But, yeah, he walked them through me. I ask him a lot of questions about them. He screen shared and showed what support he had and I made sure I understood every -- you can see all the notes on the schedule, every item in that document to make sure I knew what it was.

--- Reporter appeals

A. We applied a strict criteria to those costs. As noted in our schedules, some of them we didn't include in our calculation of sunk costs. We didn't think they met the appropriate criteria.

We went line by line with them and he told us directly I prepared this. He sent

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it to us and we walked through it. I had no reason to believe he was lying to me in any way.

Q. Next question relates to document C-1529 which you were taken to.

If that can be brought up, please.

And this was a document, you were asked if Mr. Low, the expert at Windstream I, had confirmed it was unsigned and you said yes, and then you asked to elaborate and weren't able to.

Could you please elaborate?

A. [TOBIS] Yes.

So, at the time of NAFTA 1, in reading the transcript, Deloitte had included accrued fees, primarily based on this document and the schedule that was prepared by Mr. Mars.

And I understood there were some questions about the authenticity of this document and had it been signed, did all the witness know about it, et cetera. There was maybe some more questions about those accrued fees.

What we have done differently is we are using fees that are actually paid. A check was written. We are no longer in a world of, you know, uncertainty or what -- I don't really care if this document exists, is real or not. Obviously, it's better if it is. But, if an actual amount was paid, that's the amount I am using in my costs.

I didn't include any additional accrued fees beyond 2017. You know, I didn't have, for all I know, Windstream is continuing to accrue fees to its investors at 8 percent. I didn't have sufficient evidence that I felt comfortable including those additional fees in my cost schedule.

That's the distinction between how we treated these fees versus how they were treated by Deloitte in NAFTA 1. We applied a stricter criteria.

Q. And final question, Mr. Tobis.

You were asked whether the return of the $6 million letter of credit, that amount should be deducted from the sunk costs. Again, you said no and you asked to elaborate and you weren't able to.

Could you please elaborate?

A. [TOBIS] Maybe I will hand

this one off to Mr. Milburn so he is not.

A. [MILBURN] Wow, thanks. Thanks so much.

MR. TERRY: Congratulations. You get the last word.

A. [MILBURN] All right.

Yeah. I don't see any reason why, the 6 million would be deducted from a damages calculation in this hearing. It's already been deducted in the first one, so. It should not be deducted.

MR. TERRY: I have no further questions. Thanks. And thank you, panel members.

PRESIDING ARBITRATOR MILES: Thank you so much.

Just before we do break, if I may, I do have one more question.

Let me try and ask it.

Mr. Milburn, I think you can answer it.

If the first -- so I will ask it to you and then, Mr. Tetard and Mr. Tobis, wade in if you want.

If the award in these proceedings has determined that the value of the

project, at the valuation date applied in that award, is 31 million Canadian dollars.

And I accept you don't agree with the methodology, but it was through a market comparables methodology approach.

If we were to accept your argument that the loss accrued, post award, to where we are now, from subsequent alleged breaches, shouldn't we value it at a market approach -- market comparables approach? Should we value it at an income assessment?

Should we not start by deducting the income assessment valuation that Deloitte had assessed as at the first valuation date?

So, if I put it another way, you have two competing valuations based on two competing methodologies.

So you have market comparables. I don't remember what Deloitte's market comparables was, but their income assessment was around 300, depending if it was with or without the 5-mile. And they had two different numbers for expropriation. But it was around 300.

If the purpose of the award was to make whole, based on the valuation methodology and application of that methodology, that the Tribunal decided this is what it means to make you whole at the date of that award, then don't we restart the clock on value from that point?

So, if we are to apply an income assessment, we could only apply the differential between the income assessment from what Deloitte said it was before and what you say it is now?

And, if we do that -- if you are with me so far.

If we do that, then, to Professor Gotanda's point that the Claimant could do nothing at all but the market could move around it, not like gold, but like offshore wind, the market could move around it.

Where that market would move is the differential; isn't it?

A. [MILBURN] Okay. There was a lot there.

But I think, if I understand your question, in order to make them whole, as of our valuation date, due to the new breaches, it should be the fair market value as of today, regardless of which approach that you use.

And then relative to what they have already been paid.

So you wouldn't go back and change the amount that they got -- deduct some amount they never got paid --

PRESIDING ARBITRATOR MILES: No, I didn't explain my question well. Let me explain my question differently.

Assume, for me, that the Tribunal in the Windstream award made the Claimant whole for the loss that it had suffered. So it zeroed it.

So you are whole. You have had your full reparation. I am not giving you your 6 mill because you haven't lost it. But I have made you whole at that date.

Just work with me.

A. [MILBURN] Okay.

PRESIDING ARBITRATOR MILES: Just work with me and assume, assume, for the sake of argument, that that is what this Tribunal did.

Therefore, they are starting

at the 28th of September 2016 or perhaps at the valuation date. You have got that wiggle room at zero.

So any appreciation in value, either because of things the Claimant did, which is not very much, or because of the movement in the market, which you say is quite a lot, that appreciation of value, you have been made whole once for what happened up to then.

A. [MILBURN] Right.

PRESIDING ARBITRATOR MILES: Now you can only start from zero and what you've appreciated.

A. [MILBURN] Yes.

PRESIDING ARBITRATOR MILES: If we chose to -- if we found there to be a breach and we found there to be a loss, and we chose to value that loss on an income approach.

A. [MILBURN] Um-hmm.

PRESIDING ARBITRATOR MILES: Logically, don't we then have to deduct what the income approach would have been prior to that date?

A. [MILBURN] No, I don't think so.

I think what we have done is essentially, what you have just described.

So the loss that they have now experienced is equal to the value of the project for the alleged breaches as of 2020, less what they have already received, which, as you say, is essentially the value of the entire project back in 2016, less the letter of credit.

So, assuming that they got the valuation correct back in 2016, regardless of what method you use, you have got to get the right value. We think that's approximately the right value.

We think the DCF value that Deloitte did probably was overstated and didn't really properly reflect the risks like we think we have.

So I think what we have done is what you're describing.

CO-ARBITRATOR GOTANDA: I am not sure -- I am sorry.

PRESIDING ARBITRATOR MILES: You go ahead, Beverley.

CO-ARBITRATOR MCLACHLIN: I was just going to say haven't you overlooked the

assumption that was put to you by Madam President.

Assume the Tribunal made the Claimant whole as of the date. So we are then starting at zero.

That is what was put to you.

A. [MILBURN] Yes.

CO-ARBITRATOR MCLACHLIN: And how do you, on that assumption, what would your answer be.

A. [MILBURN] Sorry, maybe I am not understanding what you mean by starting at zero.

Because, at that time, in the actual case, they had the FIT contract that was basically worthless.

CO-ARBITRATOR MCLACHLIN: So you were asked to assume.

A. [MILBURN] So that's zero.

CO-ARBITRATOR MCLACHLIN: Yes.

You may not accept the assumption but you're an expert.

And the question was if you assume that en commencer à zéro, you start at zero at that date, what would your answer be?

A. [MILBURN] Again, unless I

am not following what you mean by starting at zero.

They are starting the whole project again from zero.

CO-ARBITRATOR MCLACHLIN: No. Assume that, in legal terms -- this may be the problem -- that the Claimant has been made whole. Nothing is owed for anything, including that fifth contract.

Just assume that. I know there are arguments to the contrary.

But, if you were just to assume that, that, at that point, they had made whole. And we are just looking at what happened after.

I think that's -- is that correct?

PRESIDING ARBITRATOR MILES: Yes.

CO-ARBITRATOR MCLACHLIN: So the question had that assumption in it. That you are not going back before the date of the award for any kind of loss.

PRESIDING ARBITRATOR MILES: And perhaps -- were you going to say something?

CO-ARBITRATOR GOTANDA: Yes, if I can just -- I don't know if I am helping at all.

But I know how you did it and you subtracted out to avoid double counting.

A. [MILBURN] Yes.

CO-ARBITRATOR GOTANDA: But, what it looks like -- I am just playing devil's advocate. I am not sure I agree.

But what it looks like is almost you are getting two bites at the apple; right.

And so, to avoid the two bites at the apple, I think what we are asking is taking -- and now I am hearing you disagree with what Deloitte did.

But Deloitte valued it up to, using an income sort of approach, up to the date of the last, let's say, award. Then you do your analysis post that.

It's almost the difference, shouldn't it be, between the two?

I understand you're saying no because we are subtracting out already what the Tribunal awarded to make you whole.

But you see the concern is that the Tribunal made you whole until, as of that 2017, 2016, 2017 date, it's only that going forward.

So, if you value the whole project the way you've done under the income approach, that almost gives you two bites at the apple in the sense that you get to redo how the damages, overall for the project, are calculated.

And so I think what the Tribunal is trying to ask is avoid that, apples to apples. Then you only get this difference.

How do you do that?

PRESIDING ARBITRATOR MILES: And I think there's a much easier way to ask the question. Sorry for complicating it.

If you were just calculating incremental value for the improvement to the value of the project from the date of the last award, to today, just the appreciation only, don't you have to deduct value before appreciation date on the same methodology?

A. [MILBURN] No. Fair market value is fair market value regardless of the methodology that you're using.

So assuming they were made whole back in 2016, that's the value. It's not a different value if you do a DCF. DCF value isn't higher than market comp value. It's all fair market value.

So they received fair market value back in 2016. Now -- that's what we have calculated, is the increment in value that they should now receive.

They have now received 31 million less 6 of it. Now the value has increased and they should get the difference.

PRESIDING ARBITRATOR MILES: So, on your analysis -- just sense checking it -- in the course of eight years -- oh, not, not eight year, four years, this project, on the basis of an FIT that was about to become terminable, and a letter of credit that was repaid in full, that, in four years, this project appreciated, in its fair market value, in terms of what a willing buyer would purchase from a willing seller, $260 million?

A. [MILBURN] Yes. That's our conclusion based on the but-for scenario.

PRESIDING ARBITRATOR MILES:

Okay.

A. [MILBURN] That, that we have been instructed to assume. That's exactly right.

A. [TOBIS] Just flagging there that that 30 million, as we noted in our presentation, in NAFTA 1, that was based on transactions from 2009 to 2013.

It, ultimately, was a 2011/2012 valuation date. They referred to it as a 2016 value by using the 2016 exchange rate but there is some inconsistency in how that number was derived.

A. [MILBURN] If I may also.

This is also why it's important to do both approaches. So we get to that conclusion through both market comparables and through the DCF.

PRESIDING ARBITRATOR MILES: Right. The Tribunal 1 valued the project at that date. Full stop. End of; right? This is not an appeal court.

A. [TOBIS] Agreed.

PRESIDING ARBITRATOR MILES: But my question arose from the changing the

methodologies as opposed to what happens with the market comparables.

I accept, if you asked my question, just dealing with market comparables, then you're much more in like for like territory in terms of the methodology. I understand that. So I understand that's the point you're making.

But you don't get to revisit what they valued at that date.

A. [TOBIS] 100 percent.

PRESIDING ARBITRATOR MILES: All right, so that was meant to be one question. I did wince before I asked it. We are at two hours.

Did you have anything that you wanted to ask that arises out of that?

MS. SQUIRES: No, I am good.

PRESIDING ARBITRATOR MILES: Mr. Terry?

MR. TERRY: Same with us. Nothing more.

PRESIDING ARBITRATOR MILES: Okay. Very good.

Can you please go away and do your homework.

--- Upon recess at 3:30 p.m.
--- Upon resuming at 3:51 p.m.

PRESIDING ARBITRATOR MILES: My apologies. So.

MR. TERRY: Madam President, if I may, just before we start with Dr. Guillet, and we have conferred with the other side on this.

Mr. Tobis is sitting here just solely so he can present the results of the conversation.

PRESIDING ARBITRATOR MILES: Perfect.

Thank you, Mr. Tobis.

A. [TOBIS] So, prior to the break, you asked us to run additional sensitivity calculations based on the 20 percent IRR scenario.

Just to recap. In footnote 360 of our second report, we noted that if we use a 20 percent IRR in our transaction structuring approach, instead of 15 percent, this would result in a value of approximately 147.3 million for the project at the valuation date.

In Slide 40 of our presentation this morning, we summarized the alternative calculations that we had done in our

report. If it's possible to get that slide up or it might be helpful just to bring it up in front of you. Slide 40 of our presentation from this morning.

So, starting from Row 1. One year delay in COD using a 20 percent IRR. The impact would be 179.6 million and the new value would be 113.8 million.

Going down to Row 2. Provides MCOD to the REA appeal. The impact would be 148.5 million. The new value would be 144.9 million.

Going down to Row 3. Equity requirement, 25 percent instead of 20 percent. The impact would be 169.6 million. The new value would be 123.7 million.

Now moving over to the project stage risk adjustment factor approach.

PRESIDING ARBITRATOR MILES: I don't think you need to do that. Because this IRR only related to the transaction structure and approach.

As I understand it, your model took off its 55/60 percent on the whole with the 10 percent WACC; didn't it?

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A. [TOBIS] It did. What we ran, if it's helpful, is 20 to 15 as a 30 percent -- 33 percent increase in that discount factor so that same adjustment could be applied --

PRESIDING ARBITRATOR MILES: Oh, I see. You are marrying it up. All right. Off you go.

So what would it change your WACC to?

A. [TOBIS] To approximately 13 percent. We round our WACC to the nearest percentage, as we explained in our report.

The impact would be negative 138.6 million. New value of 192.1 million.

In Row 2, and, again, we are in the project stage risk adjustment approach. The impact would be negative 112.3 million. The new value would be 218.5 million.

In Row 3. Equity requirement of 25 percent instead of 20 percent. The impact would be negative 123.1 million. The new value would be 207.7 million.

I should just note all of these impacts are standalone impacts. They cannot be added together. It would be different math.

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Happy to do it, if requested.

But, for now, as presented, they are all standalone impacts.

Thank you.

PRESIDING ARBITRATOR MILES: Understood.

Thank you very, very much, Mr. Tobis.

Okay. All good.

Dr. Guillet, welcome.

DR. GUILLET: Good afternoon.

PRESIDING ARBITRATOR MILES: We will ask you separately to give your affirmation.

DR. GUILLET: I solemnly declare on my honour and conscience that my statement will be in accordance with my sincere belief.

AFFIRMED: DR. JÉRÔME GUILLET

PRESIDING ARBITRATOR MILES: Perfect. Thank you.

And you have seen the process. Speak clearly. Make sure the mic is working. Speak slowly and don't over speak.

Right. Ms. Squires, just give

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me a moment to sort my papers.

Please proceed.

MS. SQUIRES: I don't think I have anything for you, Dr. Guillet. You can go ahead and start your presentation.

EXPERT PRESENTATION BY DR. GUILLET:

DR. GUILLET: Thank you.

Next slide.

So I will do quick introduction of who am I am and what I am speaking here. I will provide my views on evaluation of the project, both from the original report and the comments I made in the 2015 report and the comments I made in my first report for the second arbitration.

And then I will go into a detailed discussion of some of the items of the second report.

So that's me. Probably last time I wore a tie.

I have been 30 years in the energy finance, starting in oil and gas and moving to renewables. And I have been in offshore wind finance since 2004, so we are getting close to 20 years.

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I did the very first offshore wind debt financing, and the second, and the third, and the fourth.

And then I founded Green Giraffe based on that. And we have been involved in the very large majority of offshore wind projects that have been done to date.

And involved in every aspect of these projects from very early development to financing and refinancing.

I don't know if you can show the next slide.

PRESIDING ARBITRATOR MILES: Dr. Guillet, why is it called Green Giraffe?

DR. GUILLET: Yeah, I got that question a lot.

It came out of the mind of one of my colleagues and it stuck around and it's pretty much unforgettable and irresistible. It's good. Since I am gone, I didn't bring the toy giraffes but, if you want one, I can send it.

So the next slide, which you see is just a sample of a few projects I worked on directly. So, across the years, across the continents and across the phases.

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And the one thing that you can see from this graph is that these projects take a long time and we have been involved for a very long time in many of them. In some cases, five, seven, eight years.

And you can see that the development phase of these projects can be, can be very long. And this is a point that I will get back to again and again. The development in offshore wind takes time.

Next slide.

So first a quick recap.

I was already involved as an expert in the first arbitration. I was quoted in various ways from that early report as well as from the second.

So the -- in the first, the first time around, I was asked to value the project as it was then back in '15 or '16.

And I explained the different ways to value project, depending on the phases of development, and I will show in the next slide.

And saying that early development projects, fundamentally, are based on milestones.

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And I think the Secretariat team agreed on the milestones, site control, grid access, permits and revenue regime, and I will discuss these a bit later as concerns the project.

And the valuation is based on whether these milestones are met or not. It's going to be country-specific because, in different countries, the requirements are different. The bottlenecks can be different.

So the -- each of the many milestone may have more importance and they are not always allocated in the same order. So this is, indeed, done on a case-by-case basis.

But there is still and there has been strong consistency across the years. And the fact that some of my projects in the database and the references that I use are old is not an argument against them. It actually shows that there is consistency throughout the years and throughout the countries to evaluate these early stage projects.

And what we have seen is that fully permitted projects, so those that have met the four milestones, also known as ready to build. Before FID can be worth something, around 200,000

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euros per megawatt.

And projects before that are going to be a worth a fraction of that. And that fraction is going to be linked to, well, how close you are to meeting the milestones, how many of them you need to work on and how likely you are to reach these milestones, as perceived by the market.

DCF methodologies at that stage are -- I mean, you can run DCF methodology to see what the projects will be worth, ultimately, at site. Let's hope that this is what it's going to be worth at the end.

But, at this stage, the assumptions that you need to put in are so volatile that the numbers you can get are essentially useless.

And some of the conversations you had earlier today show that. That the numbers can move very much by simply moving one assumption. And the assumptions are on the cost side of the project. They can be on the revenue side if you don't have the certainty, or if you -- they are on the interest rate. They are on the inflation assumption that you make. And an

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important one is they are on the date when you actually start having revenues.

Because when you're in early development stage, the first question is this going to take four years or is this going to take seven years or is this going to take 15 years? And all of these have happened.

And, obviously, if you have to discount from 15 years later into the future, the value is not the same.

And, essentially, a DCF methodology, at this point in time, you can make it say whatever you want it to say.

So it's not very useful. It gives a reference point or a target point far into the future, but that's not what the market uses to value projects at this stage.

Just to finish on the 2015 report, it also covered -- I was asked to discuss some of the assumptions already used in the Deloitte DCF market value.

And I noted that most of these assumptions were very highly optimistic. I would that say it's normal for a developer to present optimistic assumptions and it's not unfair.

But if you look at it from the perspective of lenders and the investors, they are obviously going to discuss each of these assumptions.

And maybe, as an aside, your question, the last question you asked to the Secretariat team about the deduction of the value of the 2015.

I mean, if you say that the DCF should be used in 2020, it should also have been used in 2015, and then you should, indeed, deduct the value calculated as of 2015 from a whatever number you find for 2020.

So I would actually be curious to see the 2015 numbers, as calculated by Secretariat, as of the first award date as a reference point. That is an interesting question and we can see if the assumptions are as aggressive as they are for the second one.

The next slide.

PRESIDING ARBITRATOR MILES: Well, we know, and Secretariat have given evidence on this, that the assumptions by Deloitte were a lot more aggressive.

So it's not quite right,

despite my question to them, that you simply deduct the Deloitte DCF number. You would need to run the model using the same assumption.

DR. GUILLET: Yeah, they should run their version of their model as of 2015.

PRESIDING ARBITRATOR MILES: I think what we were looking for was what was the incremental increase in value.

So if the market comparable valuation isn't the right deduction, nor is the Deloitte valuation, to be fair. That's the only one we have.

Since I have interrupted you, I may as well keep going, hey.

I was interested that you said that the DCF is essentially useless. We generally have a rule never to put our hurdle higher than we need to reach.

Essentially useless is pretty high statement for a DCF.

Why would anyone ever, ever, ever use it, prior to financial close, if it's essentially useless?

DR. GUILLET: Well, you don't

use it to buy a project. You use it to see how much it's going to be worth if you meet all the milestones.

PRESIDING ARBITRATOR MILES: What about at financial close?

DR. GUILLET: Yes, at financial close, it's relevant.

PRESIDING ARBITRATOR MILES: What about a week before financial close?

DR. GUILLET: It's still relevant.

PRESIDING ARBITRATOR MILES: What about a month before financial close?

DR. GUILLET: Still relevant.

PRESIDING ARBITRATOR MILES: What about a year before financial close?

DR. GUILLET: Well, then, it starts depending on what's missing to get to financial close.

PRESIDING ARBITRATOR MILES: Which brings me to my question that I have about the award at paragraph 474.

I have never really understood whether the Tribunal decides, at 474, that DCF -- that the appropriate method of valuation, of

market comparables is appropriate at early stage development, which I had understood to have been your position in those proceedings; or whether, as the last sentence of that paragraph suggests, that DCF isn't used for any project until financial close which would include late stage development.

And it may be that they just didn't make clear in that paragraph which.

But am I correct that, your opinion in those proceedings and now, is that this is an early stage development and DCF is inappropriate for early stage development.

DR. GUILLET: Yes, I would say it's definitely inappropriate for early stage.

There is a grey area and, in particular, from ready to build to financial close. So, from fully permitted to financial close, where the DCF starts eliminating the value of the project, so to speak.

So you still have a large risk that you don't get financial close.

And, in 2015, that risk is probably higher than it is -- it was in 2020 and it is now. There were several projects that failed to reach financial close even though they were

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fully permitted.

Cape Wind being the most famous or infamous one and there were other cases.

So there was still a lot of risks, in that case, where the value could fall to zero because it failed to reach financial close.

So that was -- financial was a real step and Green Giraffe exists because we were good in that phase and we make projects happen so we made money from that.

That risk has receded and you asked the question whether projects that have reached financial close reached COD. It's pretty much always the case.

These days, projects that are fully permitted will almost always -- will always reach financial close because it's worth it and it's just a matter of competence to bring them there.

Unless you have an event of God that happens and stops projects in their tracks, which can happen, but it is within the control of developers once you are ready to build to get to financial close, usually.

So, in that phase, you do use,

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you start looking at DCF and, indeed, if you have a tariff which is out of the market, then this is going to influence your valuation, because the valuation, the development premium that you get at financial close is based on, in principle, competitive auction-based tariff.

If you have got a tariff that is out of the market, there is a different and future revenue that can justify a premium.

And how much of that premium goes to the developer is linked to the risk of getting there to the financial close. But it's also linked to the commercial power between the buyers and the sellers and whoever is in charge of financial close.

So it's going to be a tricky question but there is something there and that's what's happened on projects like NNG and Saint-Brieuc, and I will go through these in my presentation.

PRESIDING ARBITRATOR MILES: So just you mentioned fully permitted.

When you -- I think you were using fully permitted, if not interchangeably, at least very close in the development cycle to

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financial close; is that right?

DR. GUILLET: No, no.

Fully permitted is the same as ready to build and the difference between the two is contracting and financing.

PRESIDING ARBITRATOR MILES: Okay, okay.

So late stage development but when you haven't quite got your construction agreement signed up.

DR. GUILLET: Um-hmm.

PRESIDING ARBITRATOR MILES: So the Tribunal used "fully permitted" in a fairly scientific way and I just want to make sure it's the same way you are using it today.

At paragraph 478 of the award, they said -- they talk about projects that are not fully permitted, (i.e. that do not have one of site control, permits, a revenue regime, grid access).

So they were -- one could say there's four factors, one is permitting. Or one could say fully permitted requires four factors, one is permitting.

DR. GUILLET: It requires all

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four. So if you are missing one of the four, in principle, you are not fully permitted.

PRESIDING ARBITRATOR MILES: Right.

So fully permitted means permitting, plus grid access, plus revenue regime, plus site control.

DR. GUILLET: Yes.

PRESIDING ARBITRATOR MILES: And, when you use it, you use it in that way, consistent with the Tribunal.

DR. GUILLET: Yes.

PRESIDING ARBITRATOR MILES: Okay. Thank you for that.

DR. GUILLET: So the image on the screen essentially shows the phases and I am not going to bother you with all the tasks and risks.

But, as you can, see the value -- and that's where you have got the value based on milestones up to the development and move to IR driven.

One of the important lines is timing, again. And, as you can see, there is a lot of volatility and uncertainty or wide range of

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outcomes in terms of the timing of the early development phases.
And that's the biggest risk at that stage. Usually, you'll get there eventually. Most projects that get developed, unless there's a technical factor that prevents it. These do happen.
But if you don't have a technical factor, it's going to be linked to political risk or the regulatory environment and then it's a matter of time. Maybe the next government will allow the projects to go ahead or something like that.
So the timing can be, can be very uncertain.
And maybe mention that I put a mention of the investment which is the cost. The value is not driven by cost. Basically, developer has done a good job if they manage to spend less than what they will get to reach a milestone.
So the premium is the difference between the value, as you can sell the project, based on the milestone value, minus the cost.
And we are -- and this is very

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relevant because we are seeing, these days, projects, developed by the likes of the oil and gas companies, they spend zillions on the projects and then they get nowhere and they say offshore wind is expensive.
Yeah, well, if you spend so much on the phase that has a limited value in absolute terms, you are never going to make money on these projects.
So cost discipline, in that phase, is very important. So you can't just put in costs and say that creates value. There is a value and you need to make sure that your costs are below the value that you can expect.
If we move to the next slide.
PRESIDING ARBITRATOR MILES: Just before you leave that slide. There is a technical question that you probably can't answer but I don't have the authors of the Wood report to ask.
But you distinguish between fixed-bottom foundations and offshore and floating foundations.
So what is a semi-floating gravity-based foundation? I know I have got

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pictures of it in the Wood report but is it floating or is it not floating and how is it semi-floating? Do you know? You maybe don't know.
DR. GUILLET: I expect that it's, because it's transported empty, it's put on the soil and then it's filled with ballast and then it will become a fixed foundation at the right location.
That's been done -- I don't know if that's what they had planned for this one.
But, in one of the early projects that I worked on, C-Power, that's what they did. There was concrete foundations. They were empty. They were carried floating by barge to the site. They were dropped down there and filled with sand to stand by matter of gravity.
So I suspect that is.
PRESIDING ARBITRATOR MILES: Oh, I see. Like an anchor on a boat.
DR. GUILLET: It's an empty glass you carry. You put it in the water. You fill it with sand and it will hold there.
PRESIDING ARBITRATOR MILES: But it doesn't fall over because of gravity,

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because of the weight on the bottom. You have to have enough weight for the height of the turbine.
DR. GUILLET: Yes.
PRESIDING ARBITRATOR MILES: Funky. Why don't they do those in the ocean? Because of the tides?
DR. GUILLET: They have done it with a number of projects, usually when it's not too deep.
The main issue is that it's actually quite complicated on the port side. These are huge -- I mean, you have to see one of these foundations to -- it's bigger than this room and it's the size of the building, basically.
So, on a case side, you can't put that many.
On my project, it was done with six foundations and then they realized it was too complicated so they went for the steel motor piles for the next phase which was 60 turbines instead of six.
So the logistics of offshore wind are humongous.
PRESIDING ARBITRATOR MILES: Yeah. Technology is improving all the time so we

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are pleased about that.

DR. GUILLET: It's not such complicated technology but it's big. It's big.

PRESIDING ARBITRATOR MILES: Moving along.

DR. GUILLET: So, in Slide 8, I have shown the tables which are sort of the before and after. I have taken into account the corrections on the couple of mistakes that I made in my '22 report.

And the one project that -- where Secretariat provided enough data for me to add.

So that's for the late-stage projects. Ready to build or close to that.

And, as you see from the line that's -- I don't know how visible it is -- that's highlighted. The average is between 0.18 or 0.22, depending on how you weigh the projects, instead of 0.17, 2.19 under my old calculations.

That's excluding the windfall projects which I will discuss in a minute.

But, basically, these numbers have been very consistent over a time. Maybe, as I said, there has been a very gentle increase over

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time as cost of capital has gone down and the risks have been perceived to be a bit less in the late phase.

But it's a very small increase and one factor that pushes the price of project fully developed down is the fact that, well, since all the costs have gone down, costs of construction, costs of capital, the development site cannot stay immune to that.

So the premium that you get from the development side cannot stay as high as it's been if all the other parts of the cost of the project are squeezed.

So the value of projects, at that stage, has not moved much.

And, if you look on the next slide, which is the early stage projects, then the numbers there have moved even less.

There's a couple of projects that have slightly higher numbers and we will discuss this. They are mainly linked to some of the US projects.

But, basically, you are below the 100K per megawatt range quite consistently.

So that's -- these are the

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tables from my reports. The first one and the updated one. So there's no new information there.

PRESIDING ARBITRATOR MILES: Just, again, so I am looking at like for like on your Slide 8, paragraph 478 of the award.

The Tribunal took late stage numbers at .1 --

DR. GUILLET: Yeah. So, in the early report, I say it was from .01 to .1.

PRESIDING ARBITRATOR MILES: Overall valuations projects at early stage, .01 to .1. Whereas, late stage, from .1 to .5.

And then evidence on fully permitted, .2 to .7, so similar to Messrs. Taylor and Low's evidence.

But they distinguish those to approximately 4 million per megawatt for projects that have reached financial closure.

So are you, here, late stage? Is this at financial closure?

DR. GUILLET: The 4 million, that's after financial. That's the value of project under construction or under operation and that value is fully driven by NPV.

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These are based on revenue. These are revenue driven. They are projects that are operating or will be operating very soon with high certainty. So they are based on the revenue flows from the operational phase.

PRESIDING ARBITRATOR MILES: So I am just trying to match what you are saying on Slide 8 with the stages in the award.

And, at paragraph 478 of the award, it says -- sorry, just let me -- early stage, they value from the low, .1, the projects that are not fully permitted -- that's the four features -- to .2 for fully permitted early stage projects, to approximately 4 million euro per megawatt for projects that have reached financial closure, and up to euro 4.5 million per megawatt for projects that have reached commercial operation.

So they give two different prices between commercial -- or values between commercial operation and financial closure.

DR. GUILLET: Probably because you have the construction risk between the two. So that's to take into account the construction risk which is real, but.

PRESIDING ARBITRATOR MILES: Yes.

So what you are doing here, you are not financial close.

DR. GUILLET: Basically, at financial close -- financial close is with the banks. FID is just investor on its own deciding to.

PRESIDING ARBITRATOR MILES: No, I understand.

What is your stage at Slide 8?

DR. GUILLET: So Slide 8 is just before financial close. It's right between ready to build or around ready -- so it's before financial close.

It's that 0.01 to 0.5.

On Slide 7, maybe it's going to be clearer because you have all the phases on one slide.

If you go back to Slide 7 of my presentation.

So late development --

PRESIDING ARBITRATOR MILES: Yes. So where is financial close on this slide?

DR. GUILLET: It's at the end

of the late development phase.

So this is between ready to build which, here, is called shovel ready, which is the same thing.

PRESIDING ARBITRATOR MILES: So it's the line between the last two boxes? The line between the last two rows?

DR. GUILLET: No, that's COD.

The milestone is at the end where you have the tick.

COD is the last tick, so between four and five.

FC is between second to last, so between third column and fourth column.

And shovel ready, which is ready to build, is at the end of the second column.

PRESIDING ARBITRATOR MILES: I think that's what I said. What I tried to say.

DR. GUILLET: Okay. Then we agree.

PRESIDING ARBITRATOR MILES: There are five grey columns. At the end of grey column Number 3 before grey column Number 4, that line is financial close.

DR. GUILLET: Yes.

PRESIDING ARBITRATOR MILES: Yes, okay.

But that's not what Slide 8 represents.

Slide 8 represents what is in the second row -- second column.

DR. GUILLET: No. Slide 8 is the third column and Slide 9 is the second.

PRESIDING ARBITRATOR MILES: Okay. Thanks.

DR. GUILLET: So then if we move to Slide 10.

PRESIDING ARBITRATOR MILES: When you say early, you mean early and mid on your own chart?

DR. GUILLET: It's a continuum. But, yes, it can be. It's somewhere -- well, mid is basically when you're getting close to getting all the permits and early is where you are starting out.

So where was the project or where is the project, that's what I am looking at Slide 10. So that has been discussed already, to some extent.

Site control was the project at exclusive right to apply to an application.

I understand that, from a developer's perspective, indeed, the fact that you're ahead of the others has some, some interest because that means you can focus on the zone and work on it without anybody else taking the zone away from you.

And, in some markets, this is a very relevant -- you identify a site. You do some studies, preliminary studies. You try to see if it's good. And then someone else comes along and says I want this site and you get nothing.

So having that priority right is a first step towards site control. From what I understood, it was not formal site control.

So, from an investor's perspective, it would be seen as a good chunk of the milestone site control but maybe not the full milestone.

And whether that's valued at 50 or 80 or 90 percent of the milestone is going to be linked to the perception of each investor.

But it's, it's, let's say it's on its way to being achieved, on its way.

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Grid connection would tend to be in that same position. There was some a grid connection agreement which was subject to technical feasibility studies which may or may not -- I have no idea if the grid was congested in that that area.

In some markets, that can be a real obstacle. In this one, I can't comment.

It would have needed to be updated with all the delay but I am willing to say that it's well on its way again but it's not formally there either is how I see it.

Permits is where the project is least advanced and I think this was acknowledged by the project side.

There's everything needed to be done, at least most of the work needed to be done, even if some, some preliminary work had been done. A lot of permits needed to be obtained.

And I did not say that, without the moratorium, the perception would be negative.

But the reality was that this is a new market so the ministries have never done this. So they are going to learn on the spot.

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They are going to ask colleagues from other countries, how do you deal with this issue. They are going to deal with their stakeholders which may also be influenced by stakeholders from other countries. Information circulates.

So the permitting process for a first project in any country is always going to be slower because you create the precedents, you have to test the administrative machinery in a country. So it's not a criticism but it's a fact that simply things have not been done.

When you are in the UK and this has been done 50 times by others and by yourself, you know who the people are, they know what the standards are, they know what precedents have been set, what's needed to get a permit. So you have a better visibility, both in terms of content and in timing.

So, in a new market, even if you ignore there was no moratorium, let's say, in 2010, before the moratorium, the signals were positive but it was still a challenge together because this simply had not been done before.

And the tariff, obviously, that's the PPA was in place. But -- and that's

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something I was involved with other developers at the time and they told me, very explicitly, we think Windstream made a mistake to go for the PPA so early because the clock is ticking. They don't have a lot of time to get to permitted and then get the project build.

So these are the developers. Did not ask for the PPA because they did not want to get the clock ticking. They wanted to get a bit further on the other preliminary work on the project before getting the PPA.

Ironically, they got less in their own litigation than Windstream got the first time round.

But, in terms of project development, the fact that there is a deadline to the PPA is a terrible thing. It means that there is a cliff effect and there is a risk that your project loses all value because you have missed out on the deadline.

So this one, the PPA is real. It's a high level PPA. It's a good -- on its own, it's a good PPA. If you had financial close and you had that PPA, it's great.

But the fact that you only

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have four years to develop or five years, plus or minus whatever the little leeway was, that is a massive challenge and, as we have seen, very few projects have ever made it in such a short timeline, even in mature markets.

So, from a valuation perspective, that would actually be seen as a major hurdle.

PRESIDING ARBITRATOR MILES: And the same question I asked the Claimant's experts on paragraph 475 of the award where the Tribunal noted that the Claimant did have an FIT contract and a grid connection and it did not yet have site control.

If I understood your site control explanation properly -- and I want to make sure I did -- you say they did have site priority and that wasn't nothing. That's important.

DR. GUILLET: These are worth something. It is enough for a developer to say we can continue to work, at least with -- but no other developer is going to take this away from us. We don't know if the site is good enough and will work, but at least no one will take it from us.

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So that is worth a little something. From the developer's perspective, that is true.

PRESIDING ARBITRATOR MILES: It's like a dibs.

DR. GUILLET: Yeah, that's exactly what it is.

PRESIDING ARBITRATOR MILES: And the Tribunal did find they had a grid connection, so I see you equivocated a little bit on that but that's -- you accept that's what the Tribunal found.

DR. GUILLET: Yeah. They were decently well on their way to grid connection. They had made good progress. There were certain technical milestones to be met and I can't comment as to whether they were just the factual tick the box thing or if there was a genuine technical issue.

In some markets, congestion of the grid is a real issue and that's what these studies do. They tell you -- so I am not sure if the study that haven't been done were just, you know, do we need a bolt of that size in that hole or do we need something more substantial to make

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it work.

But I am willing to accept that it was well on its way.

PRESIDING ARBITRATOR MILES: Yeah, all right.

And I am not aware but tell me if you are aware of any evidence on the record in these proceedings before us that suggests there was a grid congestion or any other connection problem anticipated?

DR. GUILLET: I don't have any information on that, no, in either direction.

PRESIDING ARBITRATOR MILES: Yeah.

So I just want to come back to the paragraph I went to -- oh, just in the award, the Tribunal uses grid access and grid connection interchangeably.

When you talk about the four elements of fully permitting, do you distinguish between grid connection and grid access in that conversation?

DR. GUILLET: That's going to be, I would say, country by country specific.

The reality is that you need

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to have the right to access the grid and that can be regulated in many different ways. And then you need to have the physical ability to inject power into the grid in that location.

And, as a side note, and whether it's counted as grid or as permits, often, you need permits for the onshore connection. The landfill, through the beach and, on some projects, actually getting the permits for the onshore grid connection can be the most difficult part of the whole permitting process. Because that's where you have people that may object to the construction and to the transformer station and things like that.

So this is real.

Access to the grid on the commercial and right basis, in some markets, is an issue. In the US, you have got queues. In some other markets, you've got queues to get on to the grid. You wait in line to get access to the grid. And the grid operator will grant connection rights, which may include the necessity to build reinforcements to the grid.

So there may be some delays there as well. They say, okay, I will give you

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the rights to connect in a place.

PRESIDING ARBITRATOR MILES: That's fine.

So my question was, was there anything that you have seen, in the evidence on this case, to suggest there is a grid congestion or connection problem and I think your answer was no.

DR. GUILLET: I am not aware.

PRESIDING ARBITRATOR MILES: Good. We don't have to solve for the whole world.

DR. GUILLET: No.

PRESIDING ARBITRATOR MILES: In respect of the test that the Tribunal applied in order to decide to apply a market comparable method, it appears to apply a fairly binary test.

There are four requirements for fully permitted and, if you don't have one of them, you are not fully permitted, therefore, you don't move from early stage to late stage.

My question to you is it actually that binary or is it more nuanced and more subtle?

DR. GUILLET: It can be both and it -- sorry to say, depends. It's not a --

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let me explain.

In some countries, you have permits that cannot be granted until you have actually done things so there is -- so it's step by step process.

And, when it's well mapped, you don't have the last permit but you know exactly what you need to do to get there.

So banks and investors will say, okay, we haven't ticked the box but we know that it takes one month when you have submitted such application to get it and you can submit that application because you have done this before.

So there's a clear process and it's accepted, you are not formally fully permitted but you know what it takes to get there.

And, conversely, you have got situations where you have got the permits but there is a legal appeal against it and it can be the bird society appealing in something.

And then you may have all your permits. As long as this appeal is not resolved, one way or the other, you cannot move. Because this is a deal breaker.

If the appeal is accepted and

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the permit is rejected, you have no project. And, if the appeal is rejected and the permit is unappealable, then you're fully permitted. And we have seen cases of both.

So and, but that's what the legal due diligence will tell you when you do that on a country by country or a project by country basis, is that permit that we are missing, is this something that can be contested, or is it something that the government or the regulatory body is obliged to give you if you do X, Y and Z and you know exactly how to do X, Y and Z.

PRESIDING ARBITRATOR MILES: Okay.

DR. GUILLET: And that's the kind of things that haven't been tested in Ontario, for instance.

Will there be something that trips the project? We don't know yet. That's the thing.

So Slide 11, yeah, Slide 11. Is essentially a summary of that which is to say that all these elements matter, not just valuation. And any of the others can trip and depending on how close you are to fully permitted.

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Okay.

And the tariff, the fact that you don't have a PPA, for instance, can, these days, the zero bids were mentioned by the Secretariat team.

Some investors have decided to go ahead with projects on a fully merchant basis. So they rely on revenues from the wholesale market without PPA or a tariff. It's daring but it's been done so you can actually go forward even without a PPA.

So it's not even an indispensable bid of fully permitted. It's a good one, obviously, because having revenue certainty allows you to attract cheaper capital. It usually makes your cost of electricity cheaper in the end. So it makes the projects more attractive. But it's not 100 percent indispensable.

So and, again, to point out that the, the main obstacle to the DCF valuations is that they are very volatile and, between 15 and 20, everybody was used to things improving. So your numbers only went in one direction.

And then, from 2020, some -- I am not trying to say that insight. I am just

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saying it's volatile and we have seen the volatility, in one way and then the other direction over the course of four years. Nasty drop in prices and nasty increase in prices. And each of these makes the numbers.

And I think it was mentioned, if you did the valuation in late '20, instead of early '20, you got a different result.

The thing is the project, under development, it's a five- to ten-year endeavour. You can't rely on the prices of the value of interest rates or the cost of steel or the cost of turbines at a given moment until you actually know when you are going to order them.

PRESIDING ARBITRATOR MILES: It took me a while to get this from your model but I think I understand it. I want to make sure I do.

In this slide, you say, in your sub headline, the PPA is only one item and what remains a qualitative exercise.

And I think where you diverge most with the Claimant's expert is you say the level of tariff in your FIT contract or your contract difference or whatever your PPA is, your

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level of tariff is wholly and completely irrelevant at early stage development project valuation.

All I care about is that you have got a revenue regime. I don't care if you are getting 2P a megawatt or 2 million.

DR. GUILLET: Well, you do care a little bit that it's enough to be -- that you know that it's going to cost something so you need to have something in the end --

PRESIDING ARBITRATOR MILES: A realistic revenue regime.

DR. GUILLET: A realistic is the right threshold.

PRESIDING ARBITRATOR MILES: But once you get past that baseline, you say it makes no difference whether you are making --

DR. GUILLET: Once we get there, we will calculate how much more money we can actually make once we are ready to make the jump.

And maybe to say something on models.

I have a mathematical training and I have been in banks for a long time. When I

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see the model, the first thing I try to do is cheat and get the outcome I want by modifying the assumptions in the least visible way possible. And that's very easy to do.

So these models are very complex. There are a lot of assumptions. Very long -- I mean, when you have a 30-year exponential, because that's what interest rates are and discount rates are, exponential, you modify your inflation assumption from 2 percent to 1.5 percent, you get a lot more money on one side or not. So it is very easy.

So when you are at a point where the assumptions can vary from single to triple or the costs can vary from 1 to 50 percent more, the numbers that you get from that model are, even from an order of magnitude perspective, they are very hard to pin down.

PRESIDING ARBITRATOR MILES: Market comparable method is still a model; isn't it?

DR. GUILLET: It's a multiple of megawatts.

PRESIDING ARBITRATOR MILES: It's still a model.

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DR. GUILLET: Well, it's just a rule of three. It's per megawatt.

PRESIDING ARBITRATOR MILES: Yes. But it's a model. It is what you feed into the model will determine what the multiple is going to be. I mean, it's, as with any model, rubbish in, rubbish out, I think is the point you were trying to make.

DR. GUILLET: It's just one assumption so it's just one calculation. It's not five different assumptions with the exponential over 30 years. You don't have a build up of -- at least the link between your assumptions and your result is immediate and immediately understandable.

PRESIDING ARBITRATOR MILES: Did you have your finger on the button?

CO-ARBITRATOR GOTANDA: I just have a question before you head on to the second report in your opinion.

I just want your opinion on what the Tribunal did.

Did the Tribunal then get it right? Because I have read your reports and I couldn't quite figure out whether you were saying,

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in the end, the value is zero today and it would have been back then too.

In other words, I wasn't quite sure whether you were saying the Tribunal actually got it wrong, just out of curiosity. I know we are not going to revisit that decision but.

DR. GUILLET: No, no. When I say zero, I mean the value hasn't changed so they got compensation, they shouldn't get more.

CO-ARBITRATOR GOTANDA: Okay. It's from the 30 whatever, 30-something million.

DR. GUILLET: On my side, the -- I mean I can't comment on the law but it didn't seem unfair that they got a little something. It was maybe on the high side.

So it was not ungenerous but it was the right ballpark.

CO-ARBITRATOR GOTANDA: Okay. So it hasn't changed from the where the Tribunal.

DR. GUILLET: Yes.

CO-ARBITRATOR GOTANDA: Stopped in 2016, and 2017.

DR. GUILLET: Yeah, yeah. It was a fair decision, roughly fair decision then and the number hasn't moved from that today, essentially.

CO-ARBITRATOR GOTANDA: Thank you.

DR. GUILLET: That's the short version of my report.

Yeah, and then from next slide.

PRESIDING ARBITRATOR MILES: You would say your market comparables, they move about 3 percent?

DR. GUILLET: Well, the thing is it's an order of magnitude and, as you can see, it can move around. So when I say it's 10, it can be anything from 8 to 12 which is already a 30 to 40 percent gap.

So a 3 percent variation is not noticeable within rounded numbers.

So I cannot give you a 10 percent precision on these numbers. They are rounded estimates order of magnitude.

PRESIDING ARBITRATOR MILES: I thought you gave us a number. I thought you said if you take the market comparables, the multiple hasn't moved very much. It's moved by from .6 to .66, or something, which equates to 3 percent.

I thought that's what you said; did I misunderstand?

DR. GUILLET: Yeah. I said it's a round number and it's another round number which is very close. It's essentially the same thing.

If the numbers look -- 1 and 1.1 to me are the same, essentially the same valuation in this case.

You can't give too much precision to what is a rough estimate. And, usually, I try to give ranges. So the average is something you calculate. It's the average of 20 numbers that exist. So it's a precise number but it has no significance other than as a first rough estimate.

And you can't get better than that. To get better, then you will go into the specifics of each project. And not just the specifics of each project. It's also the specifics of the market. Whether it's a buyer's market or a seller's market, it depends. And the profiles of both the seller and the buyer.

If the owner is someone that has a lot of money and doesn't need to sell, they

can wait and say I will wait for the market to get better. And then I will sell when there's a hungry oil and gas company that needs to put a wind turbine on their next yearly report.

And if it's right now that they all hate offshore wind, I'll wait because they don't want to buy my asset.

But some sellers cannot wait. They need to sell. The only buyers are the people left in the market, there is only one or two, and that's the price they are offering me. It's that or go bankrupt. I will sell at a lower price.

So the quality of the buyer and the nature of the -- the quality of the buyers and the nature of the seller do make a difference for the very same project.

Which is why the starting point is sort of a vaguely objective intrinsic value of the project and then the commercial deal that will, that will come in, if you're lucky and we will get to the US projects in a minute, you get buyers that are ready to pay stupid amounts for projects and, if you're lucky, at that time, you get an amount.

But saying my business model

is to have a project and expect that I will get stupid buyers, that's a tough business case to make.

I mean, you can be lucky. That's the thing. But, essentially, they are saying our project is worth what the luckiest guys in the market got and that's not the standard that should be used.

CO-ARBITRATOR GOTANDA: Is that right, though, in terms of, if we have buyers who are willing to pay more, that sets the market -- I will give you an example.

Basketball teams, if you do a DCF analysis of revenue from a basketball team no one would ever buy an NBA basketball team. But they are worth billions because people are willing to pay that for that. Right.

So if people -- if companies are willing to pay more than, and perhaps over value, at this point in time, that does set the market price, though, even under the comparables analysis; wouldn't it?

Or would you just say they are all outliers?

Because I don't think you

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could say that they are all outliers if the market, all of a sudden, is reset higher than what everyone else thought the market should be at. It's just a reset of the price.

DR. GUILLET: Agreed. But not all transactions are at the outlier level.

CO-ARBITRATOR GOTANDA: I agree. I agree.

DR. GUILLET: That's why they are exceptional and we can explain why they happen and it's been a handful of cases.

And, again, I accept that it's hindsight but the impairments that have been taken on some of these projects, not long after they were -- these payments were made show that the prices were crazy and the buyers acknowledged it not long after they made the payments.

So but you can't know -- I agree. Beforehand, you can't know.

CO-ARBITRATOR GOTANDA: Yeah.

DR. GUILLET: But what we do know is this is a market that has seen cycles of the utilities coming in and out. You know, offshore wind sucks. We love offshore wind. Offshore wind sucks. We love offshore wind.

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And the oil and gas companies are doing the same.

So we had a cycle where they all bought in. Right now, we are in a phase where they are all selling and, in two years' time, there will be a phase where they are all buying in too.

So, if you have got capital and you have got something to sell and you get the timing right, you can get above the standard price. And that's a good commercial.

But whether to say that's the price that you can expect, that's a tougher case to make because you don't know if the oil and gas companies will come into the market in one year's time, in two years' time or five years' time or ever. And maybe the politics of the sector will get toxic and the good times never come again.

So it's a bet. Again, you can't make the valuation -- the numbers that I propose are numbers that have been valid, basically, throughout all the phases with the -- they are dampened so the variations and, especially in the early stages, the variation are much less than the late stage.

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But that value stays there throughout.

PRESIDING ARBITRATOR MILES: So, early on in the answer, you said if you have the money to spare and you're not a seller who has to sell, if you can sit on the asset, you would sit on it and wait until prices have improved.

As I understand your opinion in these proceedings is prices ain't going to improve on an early stage development or at least haven't, at all over the last ten, possibly 15 years, you are saying early stage development is flat, doesn't improve. That seems to be your opinion.

DR. GUILLET: Yes. Effectively, yes.

And the additional comment is that, in this case, you have a deadline so you can't wait.

PRESIDING ARBITRATOR MILES: Well, just the general point.

DR. GUILLET: But the general point is, yes, the volatility on the early stage project has been fairly low.

PRESIDING ARBITRATOR MILES:

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So, and then your second point, I understand from your response to my earlier question, is, because you round so much in your use of comparables, your roughly right approach is so rough that it doesn't have any sensitivities at all to reflect movement in the market. Like, for example, a 3 percent movement, 5 percent movement.

But your approach is so rough that you're not picking up any appreciation in value that may occur?

DR. GUILLET: Well, what you have to remember is that it's a market that is consistent but it's a lumpy market. The number of transactions is not that high. I mean, I have been involved in that market for 15 years and I have been able to find 20ish --

PRESIDING ARBITRATOR MILES: 23.

DR. GUILLET: -- transactions over that period so it's a couple -- I don't have all of them but I have a good number of them because I was involved.

So and there's been a bit more activity in very recent years. But that may be post 2020 when new markets have opened for the

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sectors. We certainly have transactions in Australia and Vietnam and Taiwan and other places.

The buyers are a small group of players. Not a lot of people are willing to take early development risks.

So you, it's a small set of developers that sell to slightly bigger or larger developers that are willing the take early development risk which are typically some of the utilities and some of these IPPs that have been funded with investor money or funds from fund money.

It's a small market. So the number of buyers is very small and the number of transaction is not that large.

Most of the investors in offshore wind are -- they want to be in the operating phase where you have the stable cash flows and the revenues prediction.

They are low IRR players, the pension funds, and they want to invest billions. And, when you tell them I want 20 million for my project, I don't know where to find 20 million. I know where to find a billion but I don't know where to find 20 million.

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So, the buyers are not so many.

PRESIDING ARBITRATOR MILES: But, again, it's the dibs approach. So what the Claimant's experts have said in their report about the structure transaction approach where you reserve an upfront amount with a contingent amount at financial close, that enables you to come in at the billions level. It doesn't have to be limited financial close; right. You can -- commercial operation date could be when you pull in your big payment.

So, if there's so much competition later in the project, then that's an incentive on buyers to come in with a structured payment.

And you haven't really dealt with it -- maybe you're going to so I'll let you finish and we will see if you --

DR. GUILLET: I didn't specifically but I can comment on this and the example that was given earlier today was actually quite telling.

Which is you can either get 5 million today with full certainty or you get 100

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million in X years' time if you meet the milestone but with an un -- a probability that's a lot below.

And that example of 5 to 100 kind of gives you the kind of probability that you will get the 100 million.

PRESIDING ARBITRATOR MILES: So were the Claimant's experts accurate when they said that, for the structured transaction approach, you only took the upfront payment and ignored, for the purpose of the purchase price on your market comparables, you ignored the contingent payment entirely?

DR. GUILLET: I have explained that in my report.

I have taken into account the payments that are certain request or quasi. So a payment that says I will pay you X today and X with certainly one year's time, I have taken into account the payment in one year's time.

Or, if I will pay you in one year's time if you submit the application, that's something that's fully within the control of the developer, that's something that can be counted as a certain payment.

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If the contingent payment is I will pay you a second part of the price when you get that milestone, that doesn't count because, at that point, the project will be worth more so the first payment is the value of the project now and the second payment will reflect the value of the project later.

So the value of the project today is still linked to the first payment so it is --

PRESIDING ARBITRATOR MILES: How do you know, precisely, what those contingency milestones are if the Claimant's -- if these are the Claimant's data points and they were unable to derive that information from the annual reports where they are getting these valuations.

DR. GUILLET: But that's the point. These contingent payments -- unless you are actually part of the transaction, you will never know what they are.

And even if and you see the annual accounts, they are ex post, so they are --

PRESIDING ARBITRATOR MILES: Thank you.

DR. GUILLET: So they will

know if the risk of being met or not already, to some extent.

The information on these contingent payments is hard to tell and the value -- I mean, if you want to discount it by some probability or percentage or something else, that's going to be very investor-specific.

PRESIDING ARBITRATOR MILES: So I am just trying to understand your methodology and approach.

So it is fair to say that, unless you have got proof that it's a milestone that you think, in your opinion, is one that can be met at early stage, you're disregarding it.

If the information isn't there, you're not counting any future payment obligations.

DR. GUILLET: Or if it's conditional to something happening linked to the development work.

PRESIDING ARBITRATOR MILES: Or if you don't know what it's conditional upon.

DR. GUILLET: Yeah.

PRESIDING ARBITRATOR MILES: If you have got 1 million today, 100 million in

the future but you don't know what the 100 million is for, you just ignore it.

DR. GUILLET: Yes. Because, if you get to that stage, maybe you could sell the project for that 100 million or 50 or 200. It's, it's going to -- the milestone payments, typically, reflect what you're going to be getting to.

So if you get milestone payments that give you, you know, you get ten when you get site control. You get 50 when you get the grid connection. And you get 200 when you're fully permitted. You are just matching the actual increase in the value of the project so they are not providing new information compared to the risk you are taking.

If the investor says you have just got site control which is worth 10, but I will give you 20 and you don't get any later milestones but you still have to do the work, that's maybe a deal that is attractive to the developer because they need the cash up front but they are going to get less in the future if they are actually successful.

So that's going to be,

depending on how the seller and the buyer rate their changes of the milestone happening and their ability to finance the work up to there.

PRESIDING ARBITRATOR MILES: Are you saying that we should accept your methodology, your approach, which is along the development milestones, as you have identified them, in place of the valuation standards that are applied in public listed company's financial accounts for valuing these contingent structured payment amounts?

DR. GUILLET: I have no idea what these standards are so I couldn't tell you.

PRESIDING ARBITRATOR MILES: Well, just let me put it this way.

If an early stage development is valued in audited financial accounts to incorporate a net present value of a contingent, contingent payment amount, so an amount hasn't yet been paid, and that's audited and that's in accordance with financial standards, let's just assume that.

Are you saying, no, we shouldn't do that. We should take your approach because your approach is better?

DR. GUILLET: I would say that both are legitimate, honestly. That's -- I would end up saying it's the preference of the investor.

If you got audited numbers, it's obviously a number that has some reality and, if you're in a big company, you can cover your backside.

Whether your own perception -- I am comfortable in my abilities to assess projects but I don't want to impose that on anyone. Again, it's the market so people may have different views.

Following an audited number is never crazy. It can be wrong but it's never unreasonable.

PRESIDING ARBITRATOR MILES: But it's the same valuation standards, isn't it, that apply when you're valuing your assets for your purpose of your financial accounts.

They are the same valuation standards that we are asked to apply in an international arbitration damages assessment?

DR. GUILLET: No, I would tend to think that the big four will use NPV calculations that I tend to think are not appropriate at early stages of projects.

So you end up with a number that they have calculated. You have a model behind it. But, like I said, this is, to me, these numbers are highly arbitrary. But they come from a serious name so they are acceptable but, to me, they don't mean much.

PRESIDING ARBITRATOR MILES: So when I say the same valuation standard is proper now, international valuation standards capital V, capital S, how people apply those valuation standards may vary, almost invariably vary between Claimant's experts and Respondent's experts in international arbitration.

But they are the same standards that are applied in company accounts as what are applied -- as what we are asked to apply; correct?

DR. GUILLET: I have no idea. I don't understand company accounts, you may be surprised to --

PRESIDING ARBITRATOR MILES: Do you know what valuation standards you are applying as a valuation expert?

DR. GUILLET: I am not even

sure I understand the question.

PRESIDING ARBITRATOR MILES: Gosh, okay.

Okay. You carry on with your presentation.

DR. GUILLET: So the last part of my slides are about discussing some of the items and the ping-pong that's been happening between me and Secretariat on some of the topics.

Part of it is being to try to reject some of my comparables and some of it has been to say that their comparables are more relevant.

A lot of quotes, I publish a lot. So there's a lot of public information out there when I write. Most of it is about construction projects and a lot of their arguments are about applying arguments that I have made about construction stage or operation stage project and saying they apply to the same extent for projects under development which I have said I did not think was true and I didn't, didn't say.

There has been a lot of nitpicking of some of the examples that I have chosen to exclude some of my data points, like

saying that the Scottish projects are not UK round 3 projects which is silly.

They were at the same time and they are mostly the same regulations with the minor changes in rules.

PRESIDING ARBITRATOR MILES: Maybe if you are talking to a Scottish person.

DR. GUILLET: No.

PRESIDING ARBITRATOR MILES: It was a joke. It was a joke.

DR. GUILLET: No, but the stages are fairly similar -- fair enough.

There is the ping-pong on the PPA being the valuation and I will get to that in the last slide on the -- saying that there was no revenue certainty from a vast number of projects in Europe that had Feed-in-Tariff at the time between 2010 and 2015.

Basically, a project in Germany before 2014 that had site control. They had guaranteed Feed-In Tariff and they had guaranteed access to the grid.

So they were in a better stage than the project from the moment they had site control or a right to site control -- site

exclusivity.

And there were dozens of such projects. They were all killed when Germany changed the rule between 2014 and 2017 which means that when you take your sample, and that's the 55 percent or 57 percent probability, that's been -- if you want to calculate a success rate for projects, you need to have a full sample.

So if you ignore all the German projects which had site control and those tariffs and grid from the get-go and all of these failed, you are losing out a massive number of projects.

The same with the UK projects in 2010. They all had the right to the ROC system.

The system was changed later on but, when they started, and they got the initial leases to do the development work, they expected to be able to get the ROC system which was a fixed revenue plus. It was the best of all worlds. You had a minimum guarantee and you had the upside of the merchant prices. The same in Belgium.

So there's a massive number of

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projects that were not taken into account by Secretariat for no good reason.

One item, and I suspect that this will come again, which is the standard, the question that was applied to the technical advisor in terms of is the project feasible and can it be built in this period or can it be developed in that period.

When you ask a technical advisor like Sgurr, which is a good advisor, ask them show me a plan on how to build this that's realistic. And then you go and say I am the lenders. Now take your lenders' advisor hat and tell me what's the worst possible scenario that you think could happen. And can we withstand that?

They are not answering the same question. They are looking at the same projects but they are not answering the same question.

So the developer is looking what's the best and fastest way to build the project and show me something which is plausible. And I acknowledge that the scenarios are plausible. But that's not the standard that needs to be met by investors and then by lenders when

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you finance the project.

And which is why the cliff effect is so important because the lenders will not finance a project if there is a risk that you can lose your PPA along the way.

And, that risk, they are going to look at what's the 1 percent chance that it happens, not the 50 percent chance that it doesn't happen.

So the discussion on whether the assumptions are aggressive or less aggressive, that's a bit of a ping-pong which is legitimate between developers and financiers because that is something that happens when you are actually close enough to be able to calculate what the project is worth and how you are going to share it.

So the next slide.

In terms of, again, the comparables, the floating projects have been excluded or Secretariat would like to exclude the floating projects. And, here, I would like to make a distinction between the construction phase and the permits phase.

It's true that floating wind is not a mature technology in terms of

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construction and operations. But, in terms of development, it's not very different.

You need to identify a site at sea, get wind measurements, identify the site constraints.

It's actually potentially easier because you are farther away from shore, you don't need to deal with the view or the coastline, the impact on the coastline. You can choose your site to be away from shipping lanes and fishing grounds and things like that.

So, potentially, you have even fewer obstacles. There is fewer ministries that care about what happens 100 kilometres from shore rather than 10 kilometres from shore.

So, in terms of development and permitting, it's not that difficult to develop a floating project than it is from a fixed bottom project.

So, from the valuation perspective of early development, given that you are not welcoming at all the uncertainty of the construction costs and the financing of that, they are, they are relevant, from my perspective. So that may vary.

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And then the other way around in the comparables that Secretariat brings, and maybe we can look at that in the last slide in a minute.

Their comparables are very different from the project.

Let me say something about the outliers. And, in my reports, I pointed to two categories of outliers. One were the European ones and, really, there is two and three which is NNG and the French projects.

These got tariffs early in the process and were delayed by appeals, legal appeals. In the case of NNG, that was a bird society that appealed against the environmental permits.

And, France, it was a number of appeals. There are some -- a lot of people trying to block them and used every tool of the law to delay things.

And what happened is that, when these projects came out of these appeals, so they finally became fully permitted, they had tariffs that had been decided several years before and the market had changed in the meantime.

So, suddenly, you are with a project that has 100 plus tariff when the new projects bidding are bidding at 50 or 60. So that difference, when you're fully permitted, is worth a lot.

But they had more value because they were fully permitted. Because the only thing that was blocking was one appeal or one small thing.

So, when the transactions happened, these projects were already in a position where the NPV did matter because they were fully permitted and close enough to financial close.

So they got some of that and that's literally windfall effect. They were lucky. They were lucky that they were delayed, in a sense.

And, in the case of France, the French government actually said, hey, guys, your tariffs are way too high compared to what's in the market. Let's renegotiate them down.

And that's something that you pointed out yesterday or two days ago. That's a risk that could happen there.

And, actually, banks these days don't like tariffs that are out of market because they can see it as a risk that someone is going to say, hey, this is too much. We are going to take it away from you.

It has happened in a number of jurisdictions and so banks don't like to lend against too high tariffs.

So they wouldn't give credit for the high valuation.

And, if I was the project and I got, at the end of the moratorium, I would go to government and say can you extend the PPA by several years so I can actually develop it and I will give you a lower price.

That would actually be a rational approach to keep some value to that asset that otherwise dies because it has this cliff effect.

So that was the first category of windfall effects.

The other category of outliers were the US project and these very high lease payments that have been mentioned this morning for some of the US projects.

And, indeed, these lease payments were made to projects that were very early stage, that had no permits, that had no good connection. But they had the expectation of high tariffs. And, in that sense, they are similar to the project because, once you get a lease, you almost know for certain that you are going to get a PPA because only projects with leases can bid for the state processes that drive the PPAs.

Because the lease is a federal process and the PPA are a state process so there was sort of a bottleneck at the federal level. And then, at the state level. So it's actually a novel way to get federal debt paid by the New York and Massachusetts rate payers.

But it was still a bet because, indeed, these projects were not permitted. So, at the time they were made, you could say, okay, New York is very keen to offshore winds so we will get the tariff and the federal government is -- seems keen to make these projects happen.

So it's about parking money for a few years and hoping that we can get that money back later on.

So the bet was racy. It was the one way that the oil and gas companies could beat the competition. Because, otherwise, they have no competitive advantage in offshore wind. Their cost of capital is more expensive.

So having very large tickets and pushing out the competition was their way to grab projects and say, hey, we are doing green stuff. And, as it turned out, they overpaid by quite a bit in these markets and have had to take impairments.

For some of these big player, it's a rational bet to make because utilities are a whiny lot. So they make one way bets. If they win, they keep it. And, if they lose, they go back to government and say give me another chance or give me a new tariff.

So they say we will do the bet. It's highly political. We are going to bet on the very highly, highly political environment around these projects.

Except that, in this case, in the US, it ended up biting them back because the politics of offshore wind became quite toxic. It became one of those issues that have been very

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polarized between Democrats and Republicans and who knows where it's going to go.

PRESIDING ARBITRATOR MILES: Why do you say the expectation of high tariffs was relevant to them being an outlier?

DR. GUILLET: Well, I mean, at some point, if you put a lot of money, you do expect to get it back. It's just that, essentially, they put the probability of not getting the permits at 100 percent, which was a very high, high threshold to meet.

So that's where they're -- the price they paid are based on the assumption that these permits will be obtained and that's something is say, well, that's because the political will is very strong. And, if it's not there, we will make sure that it is -- that's the kind of bets that they made.

And I think they misread the US political environment because most of these bets were made by European companies.

PRESIDING ARBITRATOR MILES: Mr. Aragón, how are we on Dr. Guillet's time?

MR. ARAGÓN CARDIEL: 32 minutes as compared to the 38 minutes used by

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the Secretariat experts.

PRESIDING ARBITRATOR MILES: Very good.

Time check for you. You have six minutes.

If you have got more to get through, you've only got two slides to go but you have six minutes. Our interruptions don't count against your time, nor do your answers to our interruptions, by the way.

DR. GUILLET: I have got one more slide which I will go quickly through.

PRESIDING ARBITRATOR MILES: No, don't rush. You have got six minutes.

DR. GUILLET: That's fine. I want to focus on the conclusion so that just get to Slide 14.

That was just the tables on the comparables just to say that the sample that Secretariat has used as comparables to the project are -- most of them are very late-stage process, close to financial close or at least fully permitted, in the sense not comparable at all.

And I have seen how they have tried to say that the development phase is

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anything before financial close and, whether you are at 5 percent of the way or 95 percent of the way, it's the same phase. It's the same value. But it's not. The 5 percent developed project is not worth the same as a 95 percent developed project.

So the table in 7.1 had the comparables, they are mostly more dense projects.

The second table, which is the table used to calculate that proportion of project that reach, that actually reached financial close, the sample is way too, the sample is way too small.

They ignore a vast number of projects the Germans, the UK round three and Belgium projects, just to give a few examples, that were at the same stage of development and did not get there. And especially did not get there in the time that was needed to get there.

And, finally, the last slide on conclusions. So, again short version of my report, I don't believe the project is worth more than it was in 2015.

Projects under development are valued on a milestone basis per megawatt with the

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gold standard will be in the fully permitted at 200,000 per megawatt. Early stage projects are worth a fraction of that. The fraction depending on the advancement of development across the four milestones.

The project itself was an early development project so it was, at the beginning, it was at the bottom of that range in the 0.01 to 0.1 range that I presented in the first report and I believe is still correct today.

So the first Tribunal put it at the top of that range which is fine. It's within the range and I believe it's still there.

And, again, I don't believe the DCF method is reliable at that stage and I don't think it provides very useful information. It's just too volatile and too sensitive to the assumptions you use. And, as the market has shown, in all directions over the past 15 years, the assumptions do move the underlying, whether it's interest rates, steel prices, cost of turbines, they move.

Finally, the guillotine-like risk of the termination of the PPA under very strict deadline that includes the permitting phase, which is the most uncertain, time wise, presented a very high risk and that's why it would have been very hard to sell the project without a renegotiation of that deadline.

And I do believe that this is backed by multiple comparables across 15 years and multiple jurisdictions.

CO-ARBITRATOR GOTANDA: I have one question unrelated to this but because your valuation -- and I understand you are not an accountant.

I want your thoughts on the costs associated with the letter of credit for the FIT.

That would be a legitimate project cost; wouldn't it?

In other words, let's just take one aspect of it. The bank requires -- there is a fee and it's not inconsiderable but there is a fee that goes along with that; that would be a legitimate project cost, in your mind?

DR. GUILLET: Probably. I would need to check under what condition it can be repaid or not.

CO-ARBITRATOR GOTANDA: Right.

DR. GUILLET: But, if that's what you need to get a grid connection, that is an unavoidable cost. So that is something that would be credited to the project, indeed, as a specific item, yes.

CO-ARBITRATOR GOTANDA: Right, right.

I am not asking you to weigh in on the amount.

But the financing costs, if you needed to do it, because these are considerable, those would be legitimate project costs too?

DR. GUILLET: I believe so.

As you discussed earlier, I don't know what would be the legitimate rate because I don't have access to -- I didn't study the exact underlying risk.

But, yes, it's a legitimate cost.

CO-ARBITRATOR GOTANDA: Right, okay. Thank you.

PRESIDING ARBITRATOR MILES: Just on your last point on the value of the DCF and coming back to where you started of

characterizing it as essentially useless.

In your professional opinion, is there no value at all in running a DCF as a reality check against your market comparable valuation or, indeed, your costs, investment costs valuation, if you do one, and you don't?

DR. GUILLET: As a reality check, it will bring you some level of, yeah, maybe see if it's realistic. But, honestly, you can tell that from the price up front.

If your price is at 50 or 80 or 100, you have got a pretty good idea if you're going to be able to get below that and make a profitable project.

Whether your returns is going to be 8 percent or 12 percent or 15 percent, which is an important question when you're going to need to attract investors later on. But, at this point in time, you can show scenarios that will show returns that look like what the investment they want but the credibility of that, to me, is quite low.

PRESIDING ARBITRATOR MILES: We are at an hour and a half -- thank you, Dr. Guillet. That was very helpful.

We are at an hour and a half.

Mr. Terry, should we make a start? Maybe -- I don't know. What would you like us to do? We could make a start and run for as long as Lisa permits us to, maybe 30 minutes. That may be too long. It's late in the day. 15 minutes, take a break for 15, and then come back. And should we do that?

MR. TERRY: I am in the Tribunal's hands. I am ready to go. But I am I guess looking at everyone else and the amount of energy and ability to keep going.

But I can certainly start and go for as long as everyone felt comfortable going.

PRESIDING ARBITRATOR MILES: The energy may not improve.

How about we do this.

We go for another 15. So you make a start, get into it and so we will stop at 25 to. But we will just stop for ten minutes. We will stop at 25 to and come back at quarter to 6.

And then, how long we go from there, we will talk about that when we come back at quarter to 6. I don't think we will finish but you tell us at quarter to 6. Okay. Off you go.

MR. TERRY: Okay. And we do have some briefs, some documents to bring up to you. I think the witness already has them.

CROSS-EXAMINATION BY MR. TERRY:

Q. Mr. Guillet, just to confirm, you should have in front of you a document we called "cross-examination breach of Jérôme Guillet"?

A. I do.

Q. And, excuse me, I might have said Mr. I meant to say Dr. Guillet.

And you should also have a copy of your December 12th, 2022, report?

A. I have them.

Q. And also a copy of your October 27th, 2023, report?

A. Yes.

Q. I have highlighted some portions of this report just to make the examination more efficient.

I'd like to start, please, Dr. Guillet, with the report that you presented when you were with Green Giraffe at the first hearing. And this is at Tab 1 of the Guillet cross brief.

And you'll see there this is your expert report dated November 6th, 2015.

A. I see it.

Q. And I want to focus on the model and the assumptions that you applied in your project comparables. And this is, of course, what you testified before the previous Tribunal.

So if we could go to page 26.

And if I could just start with the paragraph just below the table you have there.

You distinguish between projects sold prior to being fully permitted and you call those early stage development projects; correct? Yes?

A. In that report, I am not calling them anything in that sentence.

Q. Right.

I am combining, if you look, you say projects sold prior to being fully permitted. And, then above, you have your early stage comparables.

I take it you mean the same thing when you talk about projects sold prior to being fully permitted and early stage; is that correct?

PRESIDING ARBITRATOR MILES: The heading says early stage. If you can look at the first highlighted line, it says "transactions for offshore wind projects - pre FC/FID - early stage".

DR. GUILLET: Yes. And I guess, later in my reports, I fit that phase into early and mid, just to make sure I using the same.

So early development in my presentation today and the later reports is probably an earlier phase. I split it into more details.

So this the early stage of 2015 covers more ground than in the later reports.

BY MR. TERRY:

Q. Okay. I will come to that later on. To be frank, I wasn't aware that you made distinctions between early and mid stage before you got to late stage. But we will come to that later on.

Let's stick right now with what you told the previous Tribunal.

So, if I could just look at that paragraph, it starts:

"Projects sold prior to being fully permitted."[as read]

You say, in bracket:

"Meaning that they do not have one of site control, permits that are no longer subject to appeal, a revenue regime and grid access."[as read]

That's your definition of early stage projects or projects sold prior to being fully permitted; correct?

A. In that report, yes.

Q. Right.

And then you say:

"They uniformly have very low valuations, below 0.1 million euros per megawatt, substantially less than euros 30 million and typically closer to euros 10 million for a 300 megawatt scale project (or may have no material

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value at all, depending
on the
circumstances)."[as read]
A. Yes.
Q. All right.
And then above, in the table you have there, you have listed transactions for offshore wind projects - pre FC/FID - early stage, and you list six projects?
A. Yes.
Q. Okay. Now if I can go to the next page, page 27 -- sorry, before we do that, I just want to look at the --
PRESIDING ARBITRATOR MILES: As I have interjected, you said, in your answer, when Mr. Terry asked you what I thought was an uncontroversial question, that you have categorized these.
This was your definition of early stage, those four factors that you and I talked about. And he said that was your definition of early stage and your answer was "in that report, yes".
Is your definition different now?

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DR. GUILLET: In the presentation that I showed today, I have actually called early development which was even before site control and mid development which was up to shovel ready.
So early development, as it's being used for the tables, is correct. But I have probably, since I am really focusing on very early stage project myself, I have started making that distinction but it would be early stage projects prior to being fully permitted would be appropriate.
BY MR. TERRY:
Q. I if I may --
A. So the mid would be part of early. It's the later part of early but it's still early stage.
Q. And if I just may clarify, you mentioned that you made that distinction in your presentation.
But you didn't make that distinction in the two reports that you've provided?
A. That's right. That's correct.

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Q. Okay.
A. So let's stick to early stage for prior to being fully permitted, yes.
Q. So I'd like to look now at the second paragraph, the one that's highlighted under the one I just talked about.
And this one, here, you're talking about projects that are fully permitted. And, again, you have a very precise definition for this; meaning that they have each of site control, permits that are no longer subject to appeal, a revenue regime and grid access.
That's your definition for projects that are fully permitted; correct?
A. Yes.
Q. And you say they do have value and that value has been typically expressed as a multiple of the project's nameplate capacity, with 0.2 million euros per megawatt being a good average figure?
A. Yes.
Q. And if we could go to next page, please, page 27.
So I'd like to look at the tables at the top of page 27, and this is labelled

Page 1111

"transactions for offshore wind projects pre FC/FID the late stage".
And so I take it this is your list of comparables that you define in your early report as late stage?
A. Yes, in the subsequent reports as well.
Q. Okay.
And one thing I should note here is the comparables for both -- well, for late stage, they range in dates from 2008 to 2013; correct?
A. In that report, yes. That's 2015 report.
Q. And just, I should have done this before.
But, in the early stage table, if we go back to that for a moment, the comparables range from, again, 2009 to 2013; correct?
A. Yes.
Q. All right.
So going back to the late stage table, consistent with your definition, you have got, you have got a column on the far right

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which is headed "status"; do you see that?
A. Yes.
Q. And if we look at the, just below the chart, the asterisk, you say -- beside the asterisk, you say "status of site control/permits/grid connection/revenue regime - see all details in annex 3".
And, in the column for every one of these projects, you have got the status of "Y/Y/Y/Y"; what does that mean?
A. Yes, yes, it has. It has these items.
CO-ARBITRATOR MCLACHLIN: It's got four Ys.
BY MR. TERRY:
Q. So each of these projects here has all of site control --
A. They are fully permitted. Yes.
Q. Sorry. It has all site control permits, including permits not subject to appeal, grid connection and revenue regime?
A. Yes.
Q. And we can see that, if we turn to annex 3, which is excerpted on the next

Page 1113

page.
This is -- is this the table that you're referring to when you said look to annex 3 to see a bit more detailed information about permitting status?
A. Yes.
Q. All right.
And this is the same, the same nine projects?
A. The same list of projects.
Q. All right.
And, on each of them, you've, under the heading "site control permits revenue regime and grid access" -- sorry, we lost the document.
A. Yes. I have it on paper under my eyes.
And, yes, I provide a brief description of what they have for each of the four categories.
Q. And this table, with the information you provide here, confirms that each of them has each of those four categories?
A. Yes.

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Q. So, each of them, are you are confirming they are fully permitted?
A. Yes.
Q. And your evidence, as we have heard at the first hearing, was that when the Windstream project was an early stage development project?
A. Yes.
Q. If I can take you to the next tab. This is at Tab 2 of the brief. I have got a copy here of the presentation that you made to the Windstream Tribunal.
A. Yes.
Q. Dated February 18th, 2016; correct?
A. Yes.
Q. And, if I turn to the page that's excerpted here, you, in fact, have positioned the Windstream project, and we can see it's somewhere in the middle between you say start and fully permitted; correct?
A. Yes.
Q. All right.
Now, this is a presentation, of course, that you made to the previous Tribunal.

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I would like to take you now to the Tribunal's award and the statements that it made of comparable transactions.
And this is at Tab 3 of the brief.
If I could start, please, with paragraph 477.
You can see the Tribunal says:
"The most comprehensive evidence relating to the comparable transactions methodology was provided by Dr. Guillet of Green Giraffe, and the Tribunal, therefore, takes his evidence as a starting point of analysis."[as read]
And I take it you've read the award; have you, Dr. Guillet?
A. Not recently but, yes.
Q. Okay.
But you can see the Tribunal here is relying upon your evidence and your comparable transactions methodology?

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A. Okay.
Q. All right.
And then, and then I am just going to read what they say about your testimony. They say, paragraph 478:
"Dr. Guillet testified that offshore wind projects have relatively consistent values in Europe. Depending on the development stage, the project value may range from below 0.1 million per megawatt per projects that are not fully permitted (i.e.--"[as read]
And they quote your definition here:
"That do not have one of site control, permits, a revenue regime, and grid access, to 0.2 million per megawatt for fully permitted early-stage

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projects to approximately --"[as read]
And let me stop there.
That is the information that's consistent with the testimony you provided to the Tribunal; correct?
A. Yes.
Q. And then:
"To approximately euro 4 million per megawatt for projects that have reached financial closure and up to euro 4.5 million megawatt for projects that have reached commercial operation."[as read]
And then the Tribunal says:
"As to the early-stage projects, specifically, Dr. Guillet's evidence on actual transactions before the Tribunal shows that the overall valuations of such

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projects range from 0.01 million per megawatt to approximately euro 0.1 million per megawatt, depending on the development stage. Whereas late development stage projects have been sold for prices ranging from euro 0.1 million megawatt to euro 0.5 million per megawatt."[as read]
And feel free to check, if you want.
But, as I read it, those statements there as to the range of values for early stage and late-stage projects correspond with the tables that you provided to the Tribunal; is that correct?
A. In my previous reports, yes, so not in today's presentation where I have made this distinction between early and mid. But they should be put together.
So Slide 7 of my presentation,

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you can put 7 early and mid correspond to early stage in the reports. So to avoid any ambiguity.
Q. Just to be clear, Dr. Guillet, I am just talking about what the previous Tribunal did.
A. Yeah, yeah.
Q. And they relied on your tables that you provided to them, at the time, to come up with their comparable transaction ranges; correct?
A. Yes, that's what it looks like.
Q. All right. You agree?
A. Yes, that's what's written.
Q. Okay.
And then if I could turn to the next paragraph, paragraph 479.
Dr. Guillet's evidence on early stage projects covered six different transactions.
Whereas Mr. Goncalves' evidence covered three of the transactions considered by Dr. Guillet, as well as one additional transaction on an early-stage project

(Luchterduinen) which was not included in Dr. Guillet's evidence.

:

"The multiples of these seven transactions range from 0.01 million per megawatt to approximately euro 0.1 million per megawatt, with a median of approximately 0.08 million per megawatt and an average of approximately euro 0.01 million per megawatt. As noted above, Messrs. Taylor and Low did not consider early stage projects."[as read]

So you'd agree with me, I assume, that the Tribunal here was relying on the six different transactions you provided plus one additional transaction from Mr. Goncalves, who was another expert for the Respondent, Canada, to describe -- and then goes on to assess medians and

averages based on those comparables you have provided with Mr. Goncalves' additional one.

A. That's what I read as well, yes.

Q. Okay.

And then, finally, at paragraph 480, so last paragraph I would like to take you to here, the Tribunal says:

"Depending on whether one relies on the median or the average multiple and, subject to any further adjustments that may be required, as noted above, the evidence on comparable transactions, thus, suggests that the value of the project would fall between euro 18 million based on the average multiple of euro 0.06 million per megawatt and euro 24 million based on the median multiple of euro 0.08 million per

megawatt."[as read]

So you can see the Tribunal reaches their decision on the range of value based on the six comparable transactions plus the one from Mr. Goncalves; correct?

A. Yes.

Q. And the six transactions that you provide; correct?

A. Yes.

Q. Now, I would like to leave the last proceeding and turn now to the reports that you have provided in this proceeding.

And the first report, specifically, to start with and that's at December 12th, 2022, report.

PRESIDING ARBITRATOR MILES: Sorry, Mr. Terry. You were in full swing.

MR. TERRY: Again, I am happy to stop at whatever point makes sense for everyone else here.

PRESIDING ARBITRATOR MILES: Let's do it now because we have stopped.

So I definitely want to hear where you are going today.

So let's come back at -- we

are at 5:40. Let's come back -- should we come back at 5:50.

MR. TERRY: Sure.

PRESIDING ARBITRATOR MILES: And talk about how long we think we might usefully go for. And it's going to depend on how long you think you will be. And, if we reach into tomorrow, how do we use the least amount of time tomorrow on this.

That's what we are trying to achieve.

MR. TERRY: That sounds fine to me. Thank you.

PRESIDING ARBITRATOR MILES: But still being useful tonight so we are not all so weary that it's less productive.

MR. TERRY: Sorry, I just want to confirm. Ms. Shelley was just mentioning to me.

Are the three experts that we heard from this morning, are they still sequestered at all? Because we weren't sure whether you would still want to hear from them. We are happy if they are sequestered. That's fine. I just want to clarify that.

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PRESIDING ARBITRATOR MILES: Yeah, I think best they are -- if you had of needed them but you seem perfectly well equipped. If you had needed them for your cross of Dr. Guillet, we could have talked about that. But it seems you are all good. It's not your first time at this rodeo.

MR. TERRY: At this point, I am fine.

PRESIDING ARBITRATOR MILES: All right. We can talk about it if that arises.

But, otherwise, we will leave them sequestered, gentlemen. You have one another's company tonight. But staying under the shroud of silence vis-à-vis the team, if you could, please. And we will need you all here tomorrow as well.

If you have been chatting, you can't have because we haven't had a break. We are going to have one now but you are still sequestered; do you understand.

A. [TOBIS] Yes?

PRESIDING ARBITRATOR MILES: Very good.

Ten to.

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Sorry, Dr. Guillet, it's not your first time either but you are not to talk to anybody at all about the case.

--- Upon recess at 5:42 p.m.

--- Upon resuming at 5:55 p.m.

PRESIDING ARBITRATOR MILES: Mr. Terry, it's kind of up to you. We could go an hour now and then finish off in the morning. It depends how much you have got.

I think two and a half hours is around about what Ms. Squires had. You may not need as much.

MR. TERRY: I am happy to go now for -- I mean, as you suggested, about an hour or so and see where we are at that point in time.

PRESIDING ARBITRATOR MILES: Yeah. You can maybe stop at quarter to 7 and check in there. I would like Lisa to be out of the building by 7.

--- Off-record discussion re timing

PRESIDING ARBITRATOR MILES: We will have a hard stop at quarter to 7 today, wherever we are. And we will come back tomorrow and do what we can.

--- Off-record discussion

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BY MR. TERRY:

Q. Dr. Guillet, I was just starting to take you to your December 12th, 2022, report. And I'd like to start by again looking at the methodology and assumptions that you apply in this report with respect to comparables.

A. Okay.

Q. So if we can go, please, to paragraph 24.

A. Yes.

Q. And, at paragraph 24, you say:

"In this report, I confirm that the methodology to value offshore wind farms proposed in the Green Giraffe report was still fully applicable to the valuation of offshore wind farms in 2020."[as read]

So you confirm that here that the methodology --

A. I do.

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Q. Okay.

:

"That methodology is based on the development stage of offshore wind projects, whereby investors differentiate between early stage development, late stage development, projects under construction and operating projects."[as read]

So that's the methodology you are applying --

A. Yes.

Q. -- to this report?

And then, if we go to paragraph 26, you say:

"Late development phase projects are projects that are 'fully permitted', meaning that they benefit from, one, site control; two,

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permits that are no longer subject to any potential appeals process; three, a price regime for the sale of electricity (whether under a Feed-In Tariff, power purchase agreement, with a fixed price formula or a contract for differences); and, four, grid access, as further explained in paragraph 47 and subsequent."[as read]

A. Yes.

Q. And you answer that's the methodology you're applying; yes?

A. Yes.

Q. And, at paragraph 27, you state:

"I confirm that I continue to consider that a fully permitted project has a value of approximately 0.2 million

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euros per megawatt and this value has remained stable over the years."[as read]

And that's consistent with what I think you were telling in response to the Tribunal questions --

A. Yes.

Q. -- and in-chief as well?

A. Yes.

Q. All right.

And if -- and then, at paragraph 28, if we can go a little further down, you state that:

"Early stage development projects will be worth a certain percentage of this figure, increasing towards 0.2 million euros per megawatt as they progress closer toward achieving a permit. The actual percentage will depend on how much progress has been made or

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as assessed by investors to be made to each of the milestones required to have a fully permitted project. Early stage projects are generally valued between 0.01 and 0.1 million euros per megawatt."[as read]

And then you have a reference to paragraphs.

So that, again, you are applying the same methodology and, really, we see the same figures of million euros per megawatt that we also saw in the Green Giraffe report.

A. Yes.

Q. And then you state, at paragraph 31, you say:

"My position today is that the valuation of the project, as of the valuation date, would not be different than the value articulated in the Green Giraffe report."[as read]

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A. Yes.

Q. Okay.

A. Which I stated today again.

Q. All right.

Now, as in the Windstream I report, you have two comparable tables, the early development stage and the late stage. And I would like to turn to those now.

And the early development stage table is at page 19 of your report.

A. Yes.

Q. And we can see here you have 23 comparable transactions.

A. Yes.

Q. And transaction dates ranging from 2008 up to 2020?

A. Yes.

Q. And then, if I go to the -- to Table 7, which is at page 26 of your report.

Here, you have got a heading that says -- sorry. If I go to the heading "late stage development projects".

And, again, you define these at paragraph 68 as projects that are fully permitted, meaning they have all four of the features identified previously: One, site control; two, unappealable permits; three, grid access; and four, revenue regime.

So the same definition you applied in the Green Giraffe report in 2015; correct?

A. I do try to be consistent. I hope we don't need to repeat it every single time. And, basically, if it's not stipulated in full each time, it's still the same fully permitted, is a well-defined concept.

Q. Okay.

And then at, if we look in this table, there are 24 comparable transactions that you have put forward.

A. Yes. We -- I haven't counted them recently but I trust your number. I probably have counted them in the summary tables. But, yes.

Q. And the transaction dates range from, as with the early stage development from 2008 to 2020?

A. Yeah. They were meant to -- I mean, basically, they are all the transactions for which I had information that I believed to be reliable and useable to have as wide a sample as possible.

So that's the -- essentially, the standard is well what stage of development and then whether I have the information.

So, every project for which I had information, I put it in. I do note that these are the values prior to the corrections that were made in my 2023 report.

Q. And in terms of all the transactions for which you had information, and why did you go back to 2008?

Was that a particular date that you chose, for some reason, in both tables?

A. That's the earliest transaction for which I had information. And there were not a lot of projects before that.

Q. Okay.

So in terms of the methodology you were applying to determine what should be in your tables, you took all the transactions you had knowledge of over the past 12 years? Or was it

more than 12 years and then included those in the transaction pool?

A. Yeah, effectively. So all those for which I had direct information, having been directly involved, and those for which I deemed that the public information was sufficient, which is not always the case. When you have press releases, they give partial information and it's not possible to guess or to identify a like for like price.

So, when it was possible enough or close enough, I tried to use these. But, otherwise, when I considered that information was too partial, I just didn't have the information.

Q. I want to ask you some questions focusing on the reliability of the information in your tables.

A. Sure.

Q. And if I could start with the -- I think it's on the same table. I will have to get my reading glasses on.

It's the -- I would like to start with the Ørsted project.

And that's the -- that's the

project that's listed five from the bottom, Ørsted US assets?

A. Yeah.

Q. And Ørsted, as you have pointed out here, this was a transaction that involved 50 percent of the total assets which you have described as 860 megawatts?

A. Yes.

Q. And to come up with that amount of 0.12, if we look at the far right column, .12 euros per megawatt, what you did -- this is in the Spruce report.

You divide the transaction amount, which you describe as approximately 100 million euros, by the full megawatt capacity of 860; is that correct?

A. Yes --

Q. That's what gave you the original 0.12?

A. Is that where I made the mistake or where I have the number right? Is this one where the calculation errors are.

Q. And, just to clarify, this Ørsted US asset is the one also referred to as South Fork and Revolution Wind?

A. Yes.
Q. Yes. Okay.
A. I mean, if you want me to acknowledge that I made calculation errors, I have written it like I write in my report. So if you want to spend half an hour to restate that.
PRESIDING ARBITRATOR MILES: This is not that. I am looking at your second report table.
Mr. Terry, if it's just as easy to use his second report table, but Ørsted doesn't have a correction. It's only the Empire and Beacon.
MR. TERRY: No. Actually, in fairness, Ørsted has been corrected in his second.
PRESIDING ARBITRATOR MILES: I'm sorry --
MR. TERRY: My point isn't to embarrass the expert. I just want to be -- I just want to go through and have the Tribunal and all of us understand the errors that were made and then I just have certain other questions that follow from that.
PRESIDING ARBITRATOR MILES: Okay.

BY MR. TERRY:
Q. Indeed -- well, first of all, this was pointed out to you by Secretariat when they filed their reply report in response to your's; correct? This mathematical error?
A. It was in the Secretariat report and then I acknowledged it -- in the second Secretariat report and then I acknowledged it and corrected it in my second 2023 report.
Q. Right.
So if we go to -- and we can see that in the October 27th, 2023, report. We can see in late -- this is page 58, Table 7, late stage transactions.
And you can see the US Ørsted assets have gained -- you have, as I understand it, bearing in mind your rounding practice, you have doubled the value from 0.12 to 0.23 million euros per megawatt; is that correct?
A. Yes.
Q. Right.
And that's based on the fact that this transaction was not for the whole 860 megawatts but, but at least, in this chart, you have reflected that, in your view, the transaction

was for 430 megawatts --
A. Yes.
Q. 50 percent.
A. Yes.
Q. Now, there is a second error that Secretariat pointed out with respect to this sale.
They stated that the total megawatts was actually not 860 megawatts, but was actually 834 megawatts.
And if I could turn up Tab 4 of your -- of the brief.
This is a press release with respect to Ørsted divesting 50 percent of the South Fork, Revolution Wind and two New England offshore wind lease areas to Eversource.
Have you seen this document before?
A. No, but I see it's an Ørsted press release.
Q. All right.
And you will see, if we look down -- we have highlighted the numbers -- the transaction involved, if I am adding correctly, Revolution Wind, 704 megawatts. And then South

Fork, 130 megawatts. With a total of 834 megawatts.
And that's what Secretariat pointed out to you; do you recall that?
A. Yeah. It's a 3 percent mistake. And since I am doing an approximation by splitting the value 50-50, to me, it's a smaller error than the error I am making by making an estimate as to how the value allocated between the early stage and late stage of the project.
So it has no impact on the results of my estimate.
Q. And just to -- I don't want you to do the math right now, although you have mentioned you have some expertise in math.
But when we did the math and you applied, you actually changed the 860 to 834, the number changed from 0.23 to 0.24.
But I take it you don't consider that material?
A. Material, no. No.
Q. Oh. And then apologies. Just for the record, the exhibit number for this press release is C-2209.
Now, if we could go back to

Table 7 in your first report.
I'd like to ask you some questions about the LEM project.
A. Yes.
Q. And, this one, you can see listed just above the Ørsted project.
A. Yes.
Q. And you can see, in your first report, you stated the value of the transaction is 0.15 million euros per megawatt?
A. Yeah. And I corrected to 0.32 in the next one.
Q. All right. So if we could change to -- if we could go to Table 7 of the second report.
You changed that from 0.15 to 0.32. And that, again, was after Secretariat pointed out the errors that you had made; correct?
A. Yes.
Q. And, again, that's an increase of more than two times the original valuation you had?
A. Exactly. Two times. But, yes, in this case, even more because -- yeah, two times.

Q. Now, this is -- and I don't want to belabour this point because we have spent a lot of time on it.
The LEM transaction included both and upfront payment and contingent consideration; correct?
A. Yes.
Q. And the 0.32 number you have here does not include the contingent consideration?
A. I would need to check my records because this is a transaction on which we were involved as advisors to Sumitomo. So I would actually have information as to what's the conditional payments were related to.
I don't have this information off the top of my head right now so I can't tell you.
But the standard that I have applied, as I mentioned, was that, if the payment was certain or quasi certain, or at least a very high probability of happening, I would include it into the transaction value.
And, if it was conditional to milestones or to future things happening that were

not certain, I would not include it.
From the numbers that I have seen that you have provided, it seems I have not included, which would mean that I did consider it to be at risk and consistent with the methodology which, I explained, I would not have included it.
But, as discussed with the president, I accept that using the audited numbers from DPR is a legitimate position.
I tend not to because I think it brings more confusion than clarity. Because you start comparing different things that are increasingly different, depending on how the milestones and how the conditions are to these payments.
So it's my personal belief that it is simpler and fairer to not use these conditional payments but I accept that this is a personal position.
Q. I'd like to take you to Tab 5 of the brief.
And you'll see that this is the independent auditor's report dated December 31st, 2019, of EDP?
A. Yes which we have seen

earlier today already, yes.
Q. The document number is C-2260.
And I believe, Dr. Guillet, we have seen information about this but we haven't seen the actual auditor's report yet.
If we can go to the second page, you will see the auditor was PwC and this is the independent auditor's report on the consolidated annual account; do you see that?
A. Yes. I mean, you are going to make the point that you have just made and I can repeat it. I accept that it's --
PRESIDING ARBITRATOR MILES: Let me ask his questions. It works better that way.
BY MR. TERRY:
Q. If we could go to the next page, please.
And, yes, we have had discussion of this earlier, but this is, this auditor's report states, in the sections we have highlighted here, the report deals with, among other things, with the contingent consideration.
And, the sections we have

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highlighted, you will see that the first one is with respect to the sale by EDP Renewables of 13.5 percent of the equity consolidated company, Eoliennes en Mer Dieppe Le Tréport, by 39,077,000 euros. And then there is an amount in the highlighted portion that says:

"The above sale price includes a contingent consideration according to the relevant agreements signed."[as read]

And I want to highlight these key words:

"Which fair value, as of December 31st, 2018, amounts to 16,408,000 euros."[as read]

Do you see that?

A. I didn't get the name of the company.

Q. Yeah, you can see the reference above in the bullet. It's -- this is the LE transaction; right? You recognize the same transaction that we discussed in your comparables

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tables?

A. I know, just checking which paragraph are you reading --

Q. Sorry, I apologize if I was confusing.

I am reading, if we go down the first bullet, the bullet that says according to the sale agreements celebrated in 2018 between Sumitomo Corporation and EDPR and then there's two bullets below that.

So I was just reading from the first bullet. Do you see that?

A. Yes.

Q. And, the second bullet, it says:

"EDP Renewables sold 13.5 percent of the equity consolidated company."[as read]

And it says:

"The above sale price includes a contingent consideration, according to the relevant agreements signed, which

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fair value, as of December 31st, 2018, amounts to 20,143,000 euros."[as read]

And, again, in both these statements, there's a reference to the fair value.

Mr. Guillet, seeing these auditors' report, does that change your view as to whether it's appropriate for you, in your valuation here presented to the Tribunal, to include these contingent amounts as part of the value of the LEM project?

A. It does not.

As I have said, I accept that it's a reasonable position to take, but I stand by my position which I believe is also reasonable.

Q. Now, I would like to just go to two other upward adjustments you made in your Table 7 after Secretariat pointed out additional errors.

So if we could use the same table here.

First of all, the -- the Seagreen 1 transaction, there are two Seagreen transactions. This is the one in green, that

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happened in 2018. You can see it's seven -- you can see that one?

A. Yes, I can see it.

Q. If the Tribunal can see it too, you have a number there that's written in bold, 0.25 million euros per megawatt?

A. Yes.

Q. And the bold numbers here are information that you have put it in bold because it's information that's changed between your first and second reports; correct?

A. Correct. It was 1200 in the first one.

Q. Right.

So you referred -- and when you're referring to 1200, you had inadvertently used, for the megawatt amount, you had used some of the number 1200 in that column and that had previously given you a valuation of 0.22 million euros per megawatt?

And, as a result of Secretariat pointing out an error to you, you changed the amount of the megawatt and that gave you a new value of 0.25 euros per megawatt; correct?

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A. Yes.
Q. And then one other example here in the project before that, the Neart na Gaoithe, NNG. You have a figure of 1.33 for the value there.
And, again, in response to Secretariats pointing this out to you that you had made an error, you changed that from 1.25 to 1.33; correct?
A. Yes.
Noting that, on this one, the value I use is actually higher than what Secretariat had. So there's variability in these numbers.
But, to me, this is, you know, second order. It's better to be approximately right than exactly wrong is an old saying.
Q. And then if I could go to table --
A. And, by the way, the Seagreen project ended up being 1,075 so neither of these numbers is correct, in terms of what's actually been built.
So there is some variability in these numbers that's in error as to the

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development phase of the projects.
Q. Right.
But we, of course here, first of all, are focused on what was known in 2020; correct?
A. Yeah, yeah.
But I am saying that these are second order errors and they -- there is always small changes at the margin of these projects.
Q. Right.
And we are also focused on when the transaction occurred, what the buyer and seller viewed as being in terms of information at the time, the megawatts, all that information. We are focused on what was known at the time, not what's happened since then.
A. Okay.
Q. Correct.
Now, there's also one other example I would like to point out from your early stage project. And if we could go to Table 4 on your first report.
This is not Table 7 but Table 4, which -- excuse my delay -- yeah, Table 4. Yeah, Table 4 is at page 19 of your

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first report.
A. Yes.
Q. And this is the Empire and Beacon transaction.
And, again, this is similar to the Ørsted transaction that we discussed. This is a purchase of 50 percent of the assets and you made the same calculation error here and you -- so the 0.15 was, in fact, half as much of the value as it should have been; is that correct?
A. Yes, I will acknowledge my errors as many times as you ask. Yes.
Q. And that was then changed to 0.28. And, in Table 4, the revised table of your -- which is page 57 of your second report; correct?
A. Yes.
Q. All right.
Every one of these errors that you made resulted in you understating the million euros per megawatt valuation for each of these projects; correct?
A. As it happens, yes.
Q. Now, Secretariat was only able to point out these errors because it knew the

Page 1151

transaction price because the information about these comparables was on the public record; is that correct?
A. I don't know.
Q. All right.
What I am getting at here is, if a lot of the transactions you describe in your tables don't have the transaction price. They just say "ND" in the case where the transaction price should be in the table.
So if you look, for example, at the early development stage chart which is Table 4, page 57 of your second report.
If I can pull up a little bit. I mean, we have highlighted in green, going down there, in the amount euros per million of the transaction, there are 13.
So more than half of your 23 comparables list "ND" for the transaction amount.
And then what you do for the million euros per megawatt is you have greater or less than values for those.
So perhaps you can -- and we see similar numbers on the late stage table at page 58. Not as many but there are five

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transactions there that have the ND instead of the actual amount.

And I understand that ND, you footnote that at footnote 43 of your first report, ND means "not disclosed", i.e. the information is available to Green Giraffe but subject to confidentiality undertakings.

And NA, which I take -- does NA mean "not applicable" -- or, "not available". It means it's not available to Green Giraffe.

And I just note that some of these, there are some references in the early stage transaction table -- if we can go back to that for a moment -- when there is a reference to NA. For example, we see US Wind, and we see the AquaVentus examples towards the bottom that included the reference to NA rather than ND.

So, so, I do recall, Dr. Guillet, that, when you did your first report, you also had some reliance on confidential information?

A. It's the same, yes.

Q. Sorry, the Green Giraffe report. You indicate you had access to confidential information at that time.

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Is this the same database of confidential information you're relying on?

A. Yes.

Q. And just -- I just want to be clear about this.

You left Green Giraffe in, perhaps you can remind me of the date?

A. In the summer of 2021.

Q. And now you are -- you have a company called Snow; is that correct?

A. Yes.

Q. So this database of confidential information, just so I can understand how you -- no longer being with Green Giraffe, how do you still have access to this confidential information?

A. As part of the agreement for my departure of Green Giraffe, the then ongoing mandates for arbitration, and there were three of them at the time that were under Green Giraffe's name but essentially performed by me, were transferred to me as part of the departure settlement. And that included me being authorized to keep access to the database of underlying data.

So I do have access to the

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data and I have the right to have access to it. But it's still subject to the same confidentiality undertakings, but I do have access to the data points.

Q. And if you were going to obtain a waiver of those confidential undertakings, would that be from Green Giraffe that you would have to obtain it?

A. No. It would be from each of the parties involved in the transactions.

I mean, some of them are pretty old so they are probably released. I'd need to -- I don't know who I would need to discuss to but I would need to get some legal advice. But I guess, potentially, some of the older ones are probably out of confidentiality undertakings.

Maybe. I don't know. To be checked.

Q. And who actually compiled this information? The confidential information?

A. Well, me together with people in my team at Green Giraffe.

Q. So, after Secretariat pointed out the errors you had made, did you go

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back and check your confidential information to see whether you had made similar errors?

A. I don't believe I did, no.

Q. And how exactly can we or the experts of the Tribunal validate the valuation you're providing if you're not able to disclose the actual transaction price?

A. I guess you can't.

Q. Now I'd like to now look a little more closely at some of the transactions you decide in your reports would fall into the late stage category rather than the early stage category.

And I'd like to go to a new table, Table 8 at page 25 of the -- of your first report, the October 22nd, report.

CO-ARBITRATOR MCLACHLIN: December.

MR. TERRY: Sorry, December 22nd.

BY MR. TERRY:

Q. Now you have a table here that is similar to the -- very similar, at least in structure, to the table we saw earlier in annex

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3 of the Green Giraffe report; correct?
A. Yes.
Q. And you state, at the top, paragraph 72:
"The following table shows the permitting status of the project at the moment of transaction and hence provides background for the valuation of the individual projects."[as read]
Now --
A. Yup.
Q. -- in contrast to the annex 3 table we looked at earlier, under the "permit" column, there are a number of projects that you state do not have, do not fulfil the permit qualification or are under appeal; correct?
A. Yes.
Q. All right.
And I'd like to look at each of these.
Starting with the Dungeon one.

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And these are highlighted, just to make it easier.
But the Dudgeon transaction from 2012. Under "permits", you state "no".
And then I would like to look at where you have placed this Dudgeon project. If we could go to -- we should probably go to the second report on this Table 7.
We see the Dudgeon project. You described it's a late stage development project and the value here is 0.30 million euros per megawatt.
So, if we apply the methodology that you used in your Green Giraffe report for the previous Tribunal, because this project does not have the -- as you put it, the Y, the yes for the permit status, we would put that under the early stage development transaction table. And that would, of course, add a transaction that had a valuation of 0.30 million euros per megawatt.
I am talking about if you applied the same methodology that you used in your first, your Green Giraffe report; is that correct?
A. No, it's not. Because, as I have said, I think, in different places,

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fully permitted, it's a formal status. But you can be close to enough that the transactions will be considered late stage.
Fully permitted, if you look at it from 0 to 100 percent, being 5 percent fully permitted or 95 percent fully permitted is not the same thing.
We can discuss some of the others where I have the explicit information.
On Dudgeon, I don't remember, to be honest, what was the missing piece but for Gemini, which is the next one in --
Q. --
A. To explain, there is a reason why I consider it to be late stage. It's professional judgment that they were close enough to be fully permitted that it was comparable to the other full permitted transactions.
Q. Okay. Looking at what you just said. You said "on Dudgeon, I don't remember, to be honest, what was the missing piece". But you say, in your professional judgment, you decided to put it into the late stage transaction.
Without knowing what the

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missing piece was?
A. No, I did know but it's a 2012 transaction. I have compiled this database over the years. So, if you ask me on a transaction from 2012, I would need to go back into my archives and see what I can find about it.
But, right now, off the top of my head, I don't remember.
What I do remember is that, if I decided to put it in this table and not the other, is because it was close enough to being fully permitted.
And that's why I am pointing out to Gemini or Neart na Gaoithe, which are others in the same situation where I have put no to the permits, because it's formally no but it's something that they are going to get at a known date.
Q. Listen, Dr. Guillet. We will take each of the examples in turn. But I just want to be clear.
My understanding -- and you said this very clearly in your evidence.
In your Green Giraffe report, the last Windstream Tribunal, you weren't

exercising professional judgment. You were very clear with your late stage transaction projects. They checked all those boxes. There was -- everything was either was fully permitted and there were no permits under appeal.
That's correct; isn't it?
A. That's the standard for fully permitted, yes.
But, again, these values are estimates.
So the professional judgment is it close enough, does it risk -- what's the risk to get there.
If the risk is considered by the investors to be low, then they will accept the valuation as if that last permit was already there. For instance, if it's a permit, if it's something specific. And for those where I have the memory today of the examples, I will give it to you.
But, if you applied that standard, the project has no site control, no grid, no PPA, no, no permits. It's worth zero.
Q. Dr. Guillet --
A. If you want to apply that

standard and not accept that there's professional judgment applied to these evaluations, that's fine. But then let's apply it to the project to the same extent.
Q. Dr. Guillet, I am talking about the -- I am not talking about what assumption I am coming at. I am talking about your model and your assumptions.
And I am trying to understand if there is a difference between the model and assumptions you applied in the first Green Giraffe report --
A. There is no -- the fully permitted is a very precise definition. But whether the projects are late stage or not is not as precise.
I was not asked -- I am not providing the valuation of fully permitted project. I am providing valuation of late stage development projects, which is a range. As I have written in a number of places, there is a continuum.
And, basically, I am saying these projects are close enough to be fully permitted to be relevant for that table.

But, again, it's in my professional judgment.
Q. I apologize. I am just having trouble understanding exactly what you're saying here.
If we go up just above this late-stage development -- actually, yeah. If we go to your first report.
At table -- yes, Table 7, page 26.
You say:
"Late stage development projects that are fully permitted, meaning they have all four of the features identified previously, site control, unappealable permits, grid access, and revenue regime."[as read]
And that's the same definition you applied --
A. No, you don't read the end of the sentence. I say have a higher value.
Q. Yes, have a higher value.

But I am focussed here on, again, the methodology and assumptions you are applying here in defining whether something is fully permitted or not?
A. I am not saying that all these projects are fully permitted. I am saying they are late development stage projects. They are fully permitted or close enough to it.
And fully permitted means a higher value but close enough to fully permitted, you get close enough to the value.
So they are representative of what you can get for a fully permitted value.
Q. Let me be as clear as possible -- and maybe I will go back to the Tab 1 of the brief because I just want to understand, again, what you were doing -- what you were testifying in the first Windstream hearing versus now.
And if I go to the annex -- if I look at this table, the table that's at the late stage development table on page 27, for status, site control permits, grid connection, revenue regime, you have, as we described, before you have "yes" in all the columns.

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And then, if we go to the next page, we have got the annex 3 table.

And, under "permits", you have all of them have permits. There is no, there is no -- I don't see any "no" there. I don't see any under appeal there.

So, the first time around, you were applying a test that required projects, in this case, to use a permit example, to have all the permits; correct?

A. Not necessarily.

It happens that those that I brought in this category of late stage were all fully permitted. But it doesn't mean that all stage, late stage projects should exclude projects that are close enough to being fully permitted.

And, basically, that's the judgment call I made to include some projects that are close enough to being fully permitted.

We can go round in circles on this topic for as long as you like.

Q. Dr. Guillet, early on in the testimony, you made the point, you said that you had mathematical training and you said, when you see a model, the first thing you try to do --

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A. Is how to game it.

Q. -- is how to game it. By modifying the assumptions in the least visible way possible and that's very easy to do.

Are you modifying the assumptions you used in this case? That you used in the first time?

A. In this case, it's not least visible possible since it's being put very explicitly "no" in the columns. So the information is fully transparent.

Q. But you are modifying your assumptions?

A. No.

Again, I am not saying I am valuing only fully permitted projects. I am valuing late stage development projects.

You are choosing to say that late stage development only strictly includes fully permitted projects.

I am -- again, we can go around in circles. Yes, some of these projects are not fully permitted. If you want to exclude or if the Tribunal wants to exclude them for that reason, that's obviously up to them to do so.

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I am just expressing my professional judgment that those that I included in that table that are not formally fully permitted are close enough to warrant and be included as representative of late stage projects.

I can't say it any clearer. And, if you want to say they are not fully permitted, yes, I acknowledge that some of them are not fully permitted. And I hope most of the cases, if you want to go through them, I can explain to you why, formally, they are not fully permitted and why that does not matter too much in terms of valuation.

MR. TERRY: Madam President, I am just thinking that now might not be a bad point at which to stop, if we are going to stop this evening. I am looking at the time.

PRESIDING ARBITRATOR MILES: Okay. That's fine.

Mr. Terry, I think -- and I hope you will come to it -- that the award at paras 474 and 478 are also not entirely consistent on this.

So if that's part of where you're heading, that, I have to say, would be very

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helpful.

MR. TERRY: Yes. Thank you.

PRESIDING ARBITRATOR MILES: Okay, all right.

Dr. Guillet, you have done this before. You understand the rules. It's not meant to be fun; okay. I am sorry. I have been cross-examined and it's the least fun position in the room.

But it's really important. There are hundreds of millions of dollars at stake in a claim and it's really, really important that we understand this very, very precisely.

And for us, the Tribunal, where we have an earlier award, we need to understand, very precisely, what the Tribunal's done and what you're telling us to do here.

So be patient. It's late. We don't usually go this late so we apologize for that. And we thank you for enduring us and Mr. Terry.

And, this evening, you will need to dine alone and so please don't.

THE WITNESS: I am still on European time so I will go to bed fairly quickly.

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PRESIDING ARBITRATOR MILES: You need to dine for breakfast alone.

And what should we do tomorrow?

How about we come in at 9 as per normal.

I hope -- is there anybody who matters -- you all matter.

But is there anyone who critically matters for tomorrow who has a problem with 9? No. Sort of looking at the dads in the room. No child care responsibilities or anything tomorrow.

Okay. Nobody is shaking heads at me. Okay. All right. I am going to assume 9 works.

Let's come in at 9. Do you have an idea?

MR. TERRY: I think well less than an hour. I, you know, any of these predictions are always fraught but I think I can be quite efficient going through the rest of the cross-examination.

I will bear in mind what you mentioned as well about those paragraphs.

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PRESIDING ARBITRATOR MILES: Okay. Then here is what I propose, is our plan had been for Thursday morning to get together and clarify additional questions that we wanted to address in closing. And they will be, as I forewarned, predominantly legal questions.

So we can do that. If we finish up by 10, then we can go away and do that and I think we can email those to you so, if you have offices or places to get back to, you can do that. I don't think we need to reconvene.

But we will, in any case, try to get that to you around noon, lunchtime so you have the afternoon to work on your closings to answer our questions. And we really will want you to focus on our questions. So if you focus on our questions, we will interrupt you less. That's a carrot.

All right, gentlemen, Dr. Tetard, Mr. Milburn and Mr. Tobis. You are still under witness sequestration.

Mr. Tobis and Mr. Milburn, I think it's Dr. Tetard's first time so make sure he understands well what -- you obviously can speak to one another and we will see you at 9 in the

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morning.

Did you have something else to say?

MR. TERRY: Only we sort of left hanging out there a little bit the process for, the timing for closing submissions.

Again, we are flexible but perhaps, if we would be happy to discuss it in the morning or if you want to give direction when you give us the questions.

I can't speak for everyone but we are sort of at your.

PRESIDING ARBITRATOR MILES: I think the best we could do right now -- and you should have read the tea leaves on this already -- is don't draft up two hours worth of presentations at us each for Friday. That's not going to work.

Let us think about our questions. But it's mostly useful to us if it's iterative, as you'll appreciate, it's an unusual case where there already is an award that gives rise to a whole series of legal issues, potentially, that we wouldn't normally face.

And we really want to understand your respective positions on those,

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including what they mean for damages, if we were to get there.

So don't be having people up all night writing big long speeches.

MR. TERRY: Message received.

PRESIDING ARBITRATOR MILES: That's all I can give you right now.

We will see how we go tomorrow, hey. And, if we think it's useful to come back and have a bit more of a conversation, we might do that.

So we will finish off Dr. Guillet. If we need to come back to all the experts, at this stage, we are not anticipating that. Then we will take a coffee break, we will have a word and come back in before we dismiss everybody for the day tomorrow and give you a little bit clearer indication. But you might have our questions by then.

MR. TERRY: That's great. Thank you.

PRESIDING ARBITRATOR MILES: Okay. Thank you, all, very, very much.

--- Whereupon matter adjourned at 6:48 p.m., to resume Thursday, February 8, 2024, at 9:00 a.m.

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