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 Friday, February 9, 2024, at 9:01 a.m.

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CONDENSED TRANSCRIPT WITH INDEX

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Toronto, Ontario
--- Upon resuming on Friday, February 9, 2024
at 9:01 a.m.
PRESIDING ARBITRATOR MILES: Good morning, everybody, and welcome to our fifth and final day of this Windstream II arbitration.
Unless there's no housekeeping, Mr. Terry, you may proceed.
MR. TERRY: The only housekeeping my friend and I discussed. You may see the podium. It's up right now. It may go away.
I know that Ms. Sherkey, who is doing a fair amount of the slides, likes to be able to stand up. So the podium is very useful for her.
And I understand, from my friends, that they may actually take the podium down when they do theirs. I just wanted to mention that so there's no confusion around that.
CO-ARBITRATOR MCLACHLIN: Thank you.
MR. TERRY: Thanks.
CLOSING ARGUMENT BY MR. TERRY:
MR. TERRY: Good morning.

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In the 15-minute presentation, I am going to briefly set out our argument on merits and damages and we will leave the threshold issues, limitations, res judicata and issues estoppel for Ms. Sherkey because she is going to cover them right after I get done as the first part of the two-hour presentation.
So I will use my 15 minutes to explain, first of all, our submissions as to why Ontario's actions, post award, breached the FET obligation and the damages that arise.
And the damages that arise, we say, represent the value that would have been created but for Ontario's conduct.
And this is where we are in the but-for world and when the market comparables we heard so much about the last couple of days come in in terms of that assessment.
Second, I am going to talk about why Ontario's actions, post award, breach the expropriation obligation and the damages that arise.
And these damages, of course, are not in the but-for world but the value actually created in the FIT contract, post award,

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as it stood in the real world. For example, Windstream's costs that we also discussed.
So starting, first, with the fair and equitable treatment claim.
The FET claim, of course, deals with the fairness of Ontario's conduct post the Windstream 2016 award.
The Tribunal, of course, awarded Windstream damages resulting from Ontario's failure to address the legal and contractual limbo in which it had put Windstream.
But it also found, as we know, that the FIT contract was still in force, which was consistent with Canada's submissions to the Tribunal that the project was frozen until the science was done.
And the Tribunal found that there was additional value in the FIT contract that could be created if the parties renegotiated and restructured.
So there was that conditional language that we discussed.
We say Ontario breached the fair and equitable treatment, post award, by continuing the contractual and legal limbo; and

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failing to take steps to implement the commitment that had been made to Windstream.
And, reiterated by Canada in the submissions when it said the project was frozen, to freeze a project from the effects of the moratorium, all of which resulted in February 2020 in the termination of the FIT contract.
Now, for the law on fair and equitable treatment.
We are relying, actually, on the same determination that this Tribunal made and that, in our submission, Tribunals have reached consensus on, although recognizing there is no stare decisis among these Tribunals, that the standard from Waste Management is the one that applies.
And that is that:
> "The minimum standard of treatment of fair and equitable treatment --"[as read]

And this is quoting from Waste Management:
> "-- is infringed by

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conduct attributable to the state and harmful to the Claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the Claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety."[as read]

And they also say in that statement:

"In applying this standard, it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the Claimant."[as read]

And Waste Management and other

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cases have rejected the egregious standard that Canada and other states often argue for and the Waste Management standard should be adopted, in our submission.

And the Tribunal, you will recall, used some colourful language. The previous Tribunal, in describing, with respect to fair and equitable treatment, that the proof of the pudding is in the eating.

And that's at paragraphs 31 and 36 of the award.

The judgment of what is fair and equitable cannot be reached in the abstract. It must depend on the facts of the particular case.

"In other words, just as the proof of the pudding is in the eating and not in its description, the ultimate test of correctness of interpretation is not in the description, in other words, but in its application on the

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facts."[as read]

So it's a fact-specific assessment as to whether there's unfairness.

We say, in this case, Ontario's conduct was arbitrary and unfair and breached the FET standard.

And Ms. Sherkey will be going through this in more detail. But, our argument is that, despite the promise to freeze, the representations made before the Windstream I Tribunal and the Tribunal's finding of legal and contractual limbo, Ontario then took no steps to resolve the situation it created.

It made the deliberate decision -- and you recall the evidence of Mr. Teliszewsky on this.

Made the deliberate decision not to act. And we say that led to the termination of the FIT contract and it's provided no legitimate rationale for its failure to do so, as well as the failure to carry out the research that it stated it was going to do.

In terms of some of these -- this conduct, one, Ontario never clarified the situation after the award. It maintained the FIT

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contract and Windstream's 6 million line of credit. Of course that's the IESO that was maintaining the line of credit.

It never, Ontario never amended the regulations with respect to offshore wind, and we rely there on the evidence of Sarah Powell, which Ms. Sherkey will take you to, that you still -- offshore wind facilities are still eligible for REA under Ontario's legal framework, and that you can still, in terms of the application for grid access that we also heard about, you can still go on the website and see the fact they are the applicant for grid access.

So they have maintained that situation.

Second, Ontario decided, we say reflexively and immediately, that it would not act to remedy the legal and contractual limbo post award.

It did so -- and this is, again, the evidence of Mr. Teliszewsky -- without any meetings or discussions about its commitment to Windstream or if the circumstances warranted its involvement. It also stopped doing any research in respect of the moratorium.

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And you recall Mr. Teliszewsky's evidence that he was not aware of the commitment that had been made to Windstream.

Third, we say this is unlike many other times the Ontario government decided to get involved and direct the IESO in respect of other proponents, FIT contracts and PPAs. And you will recall the evidence of Michael Lyle on that. It had been done more than 100 times in the TransCanada case.

And, fourth, the IESO exercised the termination right relying on delay and conduct by the Ontario government as part of its reasons, including the lack of direction from Ontario.

So we rely on those facts, and Ms. Sherkey will be going into more detail, to make out our argument about unfair and inequitable treatment in this case.

And the loss, we say, is a loss of the opportunity for Windstream to create additional value in the FIT contract by reactivating the project.

And you'll see that slide we

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showed in our opening, which I think, I believe Ms. Sherkey will come to again, that this was not an obligation to create new value. It was an existing project. An existing project would have been unlocked or created simply by Canada fulfilling its promises to Windstream.

And that Canada claims Ontario had no obligation to renegotiate the contract. It was just an option.

But we say Ontario had an obligation which arises from fair and equitable treatment. They had that international obligation, that NAFTA obligation to treat Windstream fairly. And that's what gets you to the obligation, we say, to unblock the contract and allow Windstream to create value.

The damages for the FET violation here, as we say, we submit that the damages are to make the Claimant whole with the valuation date of 2020. And, again, we are in the but-for world with the comparables.

I don't want to speak -- Ms. Sherkey will speak more about the but-for assessment.

The one point I would make,

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though, is my friends have pointed out, a number of times in their submissions to some of their questioning, have made the argument that, even if the moratorium was lifted, there is still the problem of the AOR status.

And the way that this was dealt with by the previous Tribunal, in our submission, certainly the way it was argued, was that the AOR and the issues that happened around that were all part and parcel of the fact that the Ontario government, after originally setting up the regulatory framework to go ahead with offshore wind, started to make it more and more ambiguous and then get us in this state of legal and contractual limbo.

So you heard the evidence originally that there were applications closer to shore and then Ontario brought in the 5 kilometre setback. And all that was part of the set of issues that led to Ontario eventually putting in the moratorium.

So, in our submission, it's a reasonable assumption for the experts to make that the AOR issue would be resolved together with the moratorium in the but-for world.

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The loss claim, in this context, is the difference between the project value at 2020 and the project value at 2016.

We acknowledge that the amount of work that could be done in the project has been limited, we say, because, you know, of the blockages that have occurred from, as a result of Ontario's actions.

But, nevertheless, we have reliable 2020 valuations for projects of a similar stage from Windstream's experts. And we submit that the evidence of Dr. Guillet, while relied on, of course, in the first Tribunal, is unreliable and should not be -- and that the preference, in our case, the Tribunal should prefer the evidence of Secretariat.

Might I just get a time. I think I have got five minutes left.

MR. ARAGÓN CARDIEL: Five minutes left, yes.

MR. TERRY: Okay. Thank you.

That's the fair and equitable treatment claim, and I have tried to clarify as clearly as possible.

The expropriation claim,

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again, in many respects, can be expressed more simply.

Windstream's contract, the Tribunal found the FIT contract was still in force. That contract was taken completely, not just substantially, but completely in 2020. Windstream was substantially deprived of the value of the investment and it is entitled to be compensated for that loss.

And there's a two-step test for expropriation: One, has there been a taking, i.e. has the investor been substantially deprived of the value of the investment; if so, was it taken lawfully or otherwise excused by the police powers doctrine?

And that's the test that's being -- in our submission, has been broadly used and accepted by NAFTA Tribunals.

We have talked about how the FIT contract is an investment capable of expropriation.

And you will recall that, in our submission, number one, it fits the definitions in interest arising from commitment of capital, real estate or other property, tangible

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or intangible. And the evidence from Sarah Powell is that it constitutes intangible personal property.

And, therefore, we say there's a vested interest.

We rely on the sole effects approach that's been adopted by Tribunals with respect to the expropriation test. And that, of course, if you look at the severity of the economic impact, that's a decisive criteria for deciding whether or not there's been expropriation.

With respect to the Annex 14B of the CUSMA, which Canada suggests should be applied, which includes the investment-backed expectations and other, and other provisions, we will deal with that in more detail.

Essentially, we think -- and the Tribunal, of course, made a decision on this issue without reference to the CUSMA example. They use other examples. And rejected that argument.

We say, for that and other reasons, that that particular test should not be used by this Tribunal.

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But we also say that, even if it is applied, we do have investment-backed expectations. And, I mean, you heard the evidence of Nancy Baines and you have seen the witness statements of others. And that the government's action, in this case, did have an expropriatory character directed particularly at Windstream.

We also say this doesn't fall within the police powers exemption and I can elaborate on that more in our submissions.

In terms of the damages that arise from the substantial deprivation, the question is -- and we all know what the Tribunal said in Windstream I about the FIT contract having no value.

In expropriation, since we are not in the but-for world, the question is what additional value is added to it.

And we have the information of costs that was in Secretariat's report with respect to the project-related costs which, in our submission, should be included as value of the project with respect to expropriation.

And so, in this case, we are not relying on any sort of obligation on the

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government in contrast to the FET argument to unblock value.

And unless -- my time is done and so, right on time, so I will sit down and leave you in the good hands of Ms. Sherkey.

PRESIDING ARBITRATOR MILES: Thank you. Thanks very much, Mr. Terry.

MS. SHERKEY: Good morning. Oh, sorry, I didn't have a big enough coffee.

PRESIDING ARBITRATOR MILES: I was two sips down in mine.

Mr. Neufeld.

CLOSING ARGUMENT BY MR. NEUFELD:

MR. NEUFELD: So, on Monday, the Claimant and Canada gave opening statements that started from two very different starting points.

For Canada, the start is September 30th, 2016, when the parties were issued the Windstream I award. The award provided finality to the dispute.

For this Tribunal, and because it's faced with a new claim, the award also provides your clean slate from which you must proceed. It is the basis from which you must

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assess the Respondent's behaviour and whether it amounts to a breach of Article 1105 or 1110.

Because, by the time the award was released, the Windstream I award, the continuing contractual and regulatory limbo had ceased to exist.

As the Windstream I Tribunal held, the failure of the Government of Ontario to take necessary measures within a reasonable period of time after the moratorium to bring clarity to the regulatory uncertainty constituted the wrongful act.

The reasonable period of time has long since passed. And we know this because, as of May 4th, 2012, the Project was at a point it could no longer be developed.

And, on September 30th, 2016, the FIT Contract had no value.

It's for this reason that the Tribunal ordered Canada to make the Claimant whole through a payment of $25 million in damages and $3 million in costs, and Canada did that in March 2017.

The only part of the Claimant's investment that was not part of the

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damages order was its $6 million letter of credit, which I will come back to.

For the Claimant, the starting point is February 11th, 2011.

At this point in time, the Claimant's Project had been in force majeure for over two months because it had no site access to do wind testing or permitting work.

This is a day, of course, Ontario adopted the moratorium on offshore wind and Chris Benedetti, the Claimant's government relations advisor, asks whether its Project was frozen.

The Claimant argues the yes that followed that constituted a promise, which continues as part of a continuing breach scenario.

As counsel for Claimants said in its opening statement, the Claimant always emphasized there was a promise to freeze.

And you heard it emphasize it again this morning. The Claimant's reliance on the so-called promise to freeze, is just another attempt to reopen, relitigate its past complaint.

It argued, in Windstream I, that -- and, here, I am quoting from its own

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submission.

A direct -- as a direct consequence of the moratorium and the Respondent's failure to effectively freeze the Project as promised, its investments in the Project and the FIT Contract are now substantially worthless.

That argument was specifically considered by the Tribunal at paragraph 239 of its award.

And although the award did not find a breach on the basis of that promise or use the word "freeze", it did agree with the Claimant that it was no longer able to finance and develop its Project as of May 4th, 2012.

As you heard again this morning from Mr. Terry, the Claimant relies on arguments that Canada made in Windstream I. And it's particular to our Windstream I counter-memorial where we laid out the arguments on how it was frozen.

Now, Canada submitted to the Windstream I Tribunal, it says, until the moratorium was done. That's when the Project was supposed to be frozen.

But it purposefully, the

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Claimant purposefully overlooks how those arguments evolved afterwards.

Canada's rejoinder memorial makes clear that the Ontario government informed the Claimant that, in order to freeze the contract, it would need to secure contract amendments from the OPA.

And if you need to, have a look at paragraphs 117 to 121 of Canada's rejoinder in Windstream I which provides Canada's take on those negotiations. They failed to produce results because the Claimant asked for the moon.

The award found, at paragraph 379, as the negotiations between the OPA and Windstream failed to produce results, by May 2012, the Project had reached a point at which it was no longer financeable and could not be developed.

The Windstream Tribunal did not find that there was a promise to freeze.

Now, in Windstream II, the Claimant maintains that the core, the core of its case now remains the promise to freeze the Project from the effects of the moratorium.

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Claimant's counsel's choice of words is informative. That the promise remains the core of its case. It indicates that the core that was Windstream I is the core that is Windstream II.

Its words provide support to Canada's argument that the essential or the essence of its complaint has, in fact, not changed since 2013. And that it's, therefore, barred under res judicata as well as falling outside the time limit.

It's the Claimant's failure to satisfy these threshold matters that Canada has always viewed as the proper way of deciding this dispute. After all, the burden is on the Claimant to bring a claim that does more than just conjure up past complaints.

It has an obligation to set out a claim on a factual basis that is coherent and logically ties a post award measure to the damages it seeks. It has resoundingly failed.

But, even if Canada's admissibility and jurisdictional arguments fail, since the Windstream Tribunal did not find that there was a promise to freeze and there has not

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been a promise after the award, no liability can flow.

Now let's return to the security deposit that I mentioned.

On this, the Tribunal deducted it from the damages Canada was ordered to pay because it was still available -- those were the words of the Tribunal -- it was still available to the Claimant and could either be used as part of a reactivated contract or be returned to it.

Now, reactivating the FIT Contract was not seen as an obligation by the Windstream I Tribunal, or as the only path to avoid a future breach of the NAFTA, but rather, as an option available to the IESO and WWIS if they so chose.

Another option was terminating the FIT Contract in accordance with the applicable law.

Once again, though, the Claimant sees things totally differently.

For it, renegotiation was an obligation. It used the word "unblock" in its openings and I heard it again this morning. A suitably vague word to arrive at the result that

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it wants.

The Claimant needs, after all, not just to unblock a contract problem. It has to change the terms of that contract. It has to lift the moratorium. It needs an approval framework that works for it so that it can get its permitting done. And it needs site access, which we heard again this morning was a reasonable assumption to make.

We are not here for assumptions. All of those assumptions was exactly what it made when it signed back the FIT Contract. This would all get done. And here we are again.

For the Claimant, the FIT Contract still had additional value that could be added to a conditional investment that would have existed if the government and Windstream had worked together to achieve that.

There is no dispute, however, that the parties never did create new value. As Mr. Terry said in the opening statement, the parties have not reactivated the FIT Contract to create new value.

Nor did the Claimant succeed in trying to sell or partner, find a partner for

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its worthless FIT Contract.

The Windstream I Tribunal may have found that the security deposit remained available to the Claimant but you may not be too surprised to hear that that's not how the Claimant sees it.

In its view, Ontario's holding of the security was meaningful.

Note the fact that counsel said Ontario's holding of the security. Whereas the security deposit is actually held by the bank and can be drawn upon by the IESO. Ontario never held the security deposit.

But the blending of the IESO and Ontario is a theme that ran through the Claimant's opening statements.

You'll find, in the transcript, that the Claimant regularly refers to Ontario or to the government when the actor it should be referring to is, in fact, the IESO.

You have a few examples there in the slide.

In 2010, that's when the FIT Contract is first entered into by the government.

The government never entered

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into a FIT contract.
And it was speaking to the government about adding a year to the FIT Contract.
The government never returned the $6 million letter of credit.
It wasn't the government's to return in the first place. It was the IESO's.
If the government had worked with Windstream to reactivate and renegotiate the contract.
So this is all part of the messages that the Claimant would like for you to receive sort of uncritically.
And, Madam President, given the Claimant's efforts to conflate Ontario and the IESO, you will be forgiven when you asked Mr. Killeavy whether planning was a government issue. You will recall Mr. Killeavy's response. He said it's an Ontario ratepayer issue.
The government acts on behalf of the interest of Ontarians. The IESO acts in the best interest of the ratepayers of Ontario. Language is important.
The FIT Contract is not an

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Ontario contract. It is an IESO contract and it contains the requirement to post the security.
During our opening statements, there was some head scratching about where the amount of that security deposit is stipulated in the contract. Well, it's in Exhibit A.
Which provides that the applicant shall pay a security in the amount of $20 per kilowatt hour.
Since the Claimant has applied for a 300 megawatt Project, the security it had to put up was $6 million.
And there was further head scratching around why the IESO just didn't return it.
Well, the answer to this question lies in the applicable FIT Contract termination provision.
There are numerous provisions in the contract that allow for termination and, in some cases, the return of the security deposit. But only one was applicable in this instance.
Projects that have yet to receive notice to proceed, NTP, may be unilaterally terminated by the IESO pursuant to

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Section 2.4A, in which case, the IESO would have to pay the Project's preconstruction costs.
However, even if the IESO had wanted to proceed this way, which would have cost 1.1 million to terminate the WIS Project, it was prevented from doing so. Because following a direction from the energy minister of August 2nd, 2011, obliging the OPA to waive its pre termination rates for FIT 1 projects upon the request of any supplier, the Claimant had made such a request.
Section 9.1(g) and 10.1(h) also provide termination rights. But, again, they aren't applicable in the situation.
In 10.1(h), it's dealing with projects that have reached commercial operation.
And 9.1(j) doesn't apply to force majeure at all which, of course, we know this contract was in.
So the applicable termination provision was Section 10.1(g), and it would arise on May 4th, 2017.
Of course, the decision to terminate the Claimant's FIT Contract did not occur on that date or for some time after. But

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that was a result of the Claimant's domestic application.
A court application it never did see through.
However, you see that the termination, whether it's the decision of February 18th or the ultimate termination in February 2020, the one certainty is that it did not result in an expropriation or a breach of the minimum standard of treatment.
And, even if it did, it didn't result in any damages.
The Claimant has failed to prove that this or any other alleged measures caused it damages.
So, in the end, you have numerous paths available to you but they all lead to zero.
Okay. Before I turn it back to, I guess, Ms. Sherkey, I will just mention that our -- we have sort of divided up the questions between us. And we are going to turn life on its head and go from 6 to 1 in our answers.
Ms. Squires will -- the damages boss -- will deal with Questions 6 and 5.

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Ms. Dosman will deal with Questions 5 and 4.

And, Mr. Tian, Question Number 2.

And then I will come back for the very first question on res judicata.

And would it be a problem if we sat to do that and answered the questions? You don't mind; okay.

PRESIDING ARBITRATOR MILES: Not a problem at all. Wherever you are comfortable.

MR. NEUFELD: How was I for time?

MR. ARAGÓN CARDIEL: 15 minutes and a half.

PRESIDING ARBITRATOR MILES: 30 seconds. It wasn't my fault.

Ms. Sherkey, we are going to break at 10:30. Will that be okay with you?

CLOSING ARGUMENT BY MS. SHERKEY:

MS. SHERKEY: Yes.

Just a few housekeeping matters.

The answers are going to be --

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your questions are going to be answered through the submissions. I will deal with 1 to 3 and, Mr. Terry, 4 to 6. But they will kind of come up organically in the right topics.

Obviously, we have a lot of slides here. We are not going to get through each one individually, so we are going to stay nimble, address your questions, spend more time on some and move more quickly through others.

And so the first -- we are going to start with the two threshold issues and then I am going to take you through FET. And then Mr. Terry will take you through expropriation damages and damages encompasses loss and causation.

So let's jump right into the threshold issues and into Canada's argument that the claims are time-barred.

And I am going to jump right away into your Question 2 in addressing this.

And so, if we start at Slide 5, I have set out the language here of the relevant provisions.

And what we are going to spend some time talking about is -- the test is not

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controversial but what does it mean to first acquire knowledge of the alleged breach and that an investor knowledge that it has incurred loss.

And we say those are the very key words: Knowledge of the alleged breach and knowledge that the investor has incurred loss.

And the cases have answered this for us. So that's where we are going to start. What have the cases said on the meaning of those words, which is going to address the part of your question about the law.

To what extent, if at all, can elements of the knowledge of the alleged breach predate the three-year time period.

And so I have set out, on Slide 8, the parties agree on the applicable test. So we have set it out here.

We are going to go through the legal principles and then apply Steps 2 and 3 because we agree on Step 1.

If we turn over the page. We start with this test.

What do you have to know to have knowledge of the breach?

My friends, in their opening,

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used the word:

> "Knowledge that an alleged breach may happen."[as read]

That is not the test.

The case law is clear. We have put a little quote from Mobil on the side here.

It is not enough to suspect something will happen. Knowledge entails more than suspicion or concern. It requires a degree of certainty.

And I have excerpted from Infinito which dealt with this issue in quite a lot of detail and it wasn't the NAFTA. It was the Canada-Costa Rica treaty. But the same language of limitations is found in that treaty.

And where I started to highlight:

> "The Tribunal notes that the knowledge -- it's the knowledge of the alleged breach and not knowledge of the facts that make up the alleged breach. In

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other words, the limitations period only starts to run once the breach (as a legal notion) has occurred. While a breach will necessarily have been caused by facts, as discussed below, the moment at which a breach occurs will depend on when a fact or group of facts is capable of triggering a violation of international law."[as read]

And then it goes on to say that, with respect to loss or damage, that must flow from the alleged breach.

So it doesn't always postdate it. It can coincide.

What they don't say, but what logically flows from that, is that the loss cannot predate the breach.

And so I stop there and

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emphasize this. We are going to look at a few cases that facts can predate the breach. That makes sense. Something has to happen to give rise to a breach.

And there's also cases where breaches themselves straddle both sides of the cutoff date. This is not one of those cases, as I will explain. But that actually happens as well.

And so just looking at this point that you can have knowledge of the facts, if you turn over the page, we have highlighted a couple of examples of cases.

So Glamis Gold, the Claimant cited earlier events -- the challenged measure was a 2001 denial of its permit.

And the Claimant cited earlier events in its notice of arbitration, even calling them offending measures.

So the Respondent said those responding, those offending measures are out of time. But the Tribunal said, no, those were factual predicates to the claim. They weren't what was actually alleged to breach.

And so what the Tribunal sets out in the excerpt I have here, is they explain:

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"It is necessary that any action be preceded by other steps, but such factual predicates are not per se the legal basis for the claim. The basis of the claim is to be determined with reference to the submissions of the Claimant."[as read]

That's how you determine the alleged breach.

PRESIDING ARBITRATOR MILES: Ms. Sherkey, I don't have a question. Everything you are saying is very, very, very helpful. Can you just say it a little bit slower, for me. Not for Lisa. I just want to keep up. Thank you.

MS. SHERKEY: Of course.

So the key here is how you determine the basis of the claim. You do it by reference to the submission of the Claimant.

And does something form a factual predicate, we say the promise to freeze, for example, is the factual predicate. And I

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will get into this more when we apply this. You can have pre-existing facts but the question is what's the breach.

And a very useful example, in my submission, is over on the next page in Eli Lilly.

And, in this case, this had to do with an invalidation of the Claimant's patents by the Canadian courts.

Just a little background to the facts.

This case questioned the validity of what's called the promise utility doctrine where patents can be invalidated on the basis that they didn't fulfil the promise they set out to the public.

And so, in 2010 and 2011, Eli Lilly claims its patents were invalidated and it commenced this arbitration.

Canada argued, in that case, this is out of time. Yes, you brought the claim in time from when the Supreme Court of Canada denied you leave to appeal to the Court's invalidation of those patents.

But what you're really

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challenging is the judicial treatment of the promise utility doctrine.

The Claimant said that this promise doctrine, which was used to invalidate its patents, was a dramatic change in a Canadian patent law.

And the Respondent said you are looking at judicial decisions from 2002 up to 2008, to constitute whether or not that was a dramatic change. So you're looking at events that predate the limitation period. You can't do that.

And, in fact, one of the Claimant's prior patents was invalidated in 2008 on this promise utility doctrine.

So, when the Tribunal went to this, it said we have to find the alleged breach. And they did it, like in Glamis Gold, by reference to the Claimant's submissions. And they said the Claimant is challenging the invalidation of the patents. It's doing it by reference to the application of the promise utility doctrine. But what the actual breach is, is the invalidation of its patents.

And so it disagreed with the Respondent's attempt to, as the Tribunal said,

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recharacterize the Claimant's case into something else.

And the Claimant could not have the requisite knowledge that it would lose the patents until it happened.

And they noted there was an increased risk. There might have been knowledge of an increased risk or an increased likelihood that this would happen -- and that's set out at paragraph 169 -- because its prior patent was invalidated on this basis.

But investors are not required to bring claims for possible future breaches on the basis of potential and, therefore, necessarily hypothetical losses to their investments or the increased risks of such losses.

So you do not impute knowledge of a future breach or loss. The loss has to have happened.

And so, in this case, it was actually when the Supreme Court of Canada denied leave to appeal that the invalidation happened.

Of course many facts were known then. The lower courts had already invalidated the patent. That had happened.

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Potential loss had happened. They had been invalidated.

But while the appeal process was underway, the alleged breach had not, as a legal notion, had not formed.

And then the Tribunal goes on to say, of course, we can consider earlier events that provide factual background to a timely claim.

And, if we go over the next page, my friend relies on Bilcon and Rusoro as saying, well, the proper approach is that you break everything down, measure by measure, when you're trying to determine an alleged breach.

We say that's not the test and that's not consistent with the holdings in those cases.

I am going to highlight what Infinito found on the proper test and then I am going to take you into Rusoro.

So what Infinito stated was that there is a two-step test here.

First, you have to identify when a given act or omission was performed or completed.

So not when it started. When

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it was performed or completed.

And then the second step was to assess when the Claimant knew of that completion. And then the loss caused thereby.

And how do you do that analysis? You do it for each of the standards allegedly breached.

So you don't break it out measure by measure. You break it out breach by breach. And the Tribunal then goes on to say when was there knowledge of the alleged expropriation? When was there knowledge of the alleged FET claim?

So that's how you break it out.

And, when they did that analysis, they go into the expropriation analysis.

When they go into knowledge of expropriation, they don't break it down measure by measure. They look at what's the element of expropriation claim.

And the same with FET. They said what's FET. What's being claimed?

And, for example, in Infinito, they were saying, well, the FET claim is really two things: Your ability to operate this gold mine

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was frustrated; and, second, your ability to apply for new permits was frustrated.

And then they assess when they gain knowledge.

Each of those elements are made up of multiple measures. But it was an assessment of the breach of each standard.

And, if we flip over the page, we say Rusoro doesn't stand for anything different.

In that case, the alleged breach -- and this is what's interesting about Rusoro and Bilcon, unlike our case, we say.

The alleged breach straddled both sides of the cut-off date, not just facts that predated the claim. They alleged measures breached the treaty and measures were on both sides of the cut-off date.

But they said that's okay. Because this is a composite claim and, so, it really didn't crystallize until we were on the proper side of the line.

And, in that type of context, here, it was 2009 measures that were on the wrong side of the cut-off date.

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And the Tribunal said we have to look at whether those measures are sufficiently linked to the on-time measures to basically put them on the right side of the line.

And, at paragraphs 229, they note that you can look for such linkage to justify the totality of the act. They note, in paragraph 230, that's a legally sound approach but it depends on the facts and circumstances.

In this case, there was no link. The 2009 measures had to do with strict limitations on exporting gold, increased in exchange control requirements, and this, ultimately, leads, in 2011, to the nationalization, a decree that nationalized the gold sector.

And so the Tribunal said those are all separate measures with separate issues. So, at paragraph 321, with the key point:

> "In the specific circumstances of this case, we are going to break down the alleged composite claim into individual breaches."[as

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> read]

Not individual measures. Individual breaches.

And then it looked at the 2009 breaches which was made up of multiple measures and said you're alleging these 2009 measures breached the treaty. We think that claim is out of time. But your claim that the nationalization of the gold industry violated the NAFTA, that's in time. That's a separate breach.

And, in this case, unlike Rusoro and Bilcon, we are not alleging pre cutoff measures. There are pre cutoff facts.

But we are not saying that the alleged breach happened at multiple points of time. We are saying it happened at a single point of time. The breach happened when the FIT contract was terminated.

And that's what I am going to turn to now.

So, if we flip over to Slide 15, this deals with the other part of your question: What is the knowledge of the alleged breach in this case? When did the breach occur? Not may occur. Not likely occur. When did it

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occur? When were the facts capable of triggering an international violation? To take the words from Infinito.

Applying the Infinito standard, we are going to look at this on each breach alleged.

Starting with expropriation. We say the expropriation only occurred with the termination of the FIT contract. Nothing was taken prior to this date.

Facts were not capable of triggering a violation. In fact, we would have been in the same place as we were in Windstream I if we brought an expropriation claim before the FIT contract was terminated.

Like Eli Lilly where the loss did not occur until the Supreme Court of Canada denied leave, that's when the patents were invalidated. The FIT contract was not gone until it was gone.

And the breach of FET is similar. The breach is the termination of the FIT contract. The measures, we say, are why Ontario is responsible for that consequence. Ontario's conduct gave rise to that termination.

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But there was no breach until there was a termination.

Dealing with a few allegations my friends make about the timing, my friends have said, okay, but in 2017, you knew the termination right arose. And it was a real and tangible likelihood that the IESO would exercise its termination right. So you knew that.

And, if you look over on the next slide, we say that's suspicion, not knowledge. Particularly on the facts as you have them. Slide 16.

So the next slide, the transcript of Mr. Lyle is confidential.

PRESIDING ARBITRATOR MILES: Alonso, are you here with us today?

MR. HAUSER: I am, Madam President. I can confirm we are in confidential mode right now.

--- CONFIDENTIAL TRANSCRIPT COMMENCES AT 9:52 a.m.

PRESIDING ARBITRATOR MILES: Thank you very much and welcome back.

MR. HAUSER: Thank you.

MS. SHERKEY: The point here is just Windstream asked to be told that it should

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have known, in 2017, it was likely, is not the test. But it asked the IESO directly, are you going to terminate what happens on May 4th? It was told no decision. February, no decision. November, no decision.

And we heard from Mr. Lyle that the IESO didn't make a decision until between February 16th and 20th. We have excerpted his testimony here.

So, like in Eli Lilly, Windstream cannot be deemed to know of something before it happens. The IESO did not know what it was going to do.

And that's reiterated by Mr. Lyle on the next page where he says:

"The IESO undertakes a fact-specific exercise. [redacted] [as read]

And I asked him:

"It's not automatic that you will exercise that termination right."[as read]

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And he says:

"That's correct. We want to make a thoughtful and reasonable decision."[as read]

So the point is simple that you can't impute that knowledge to Windstream that the IESO would have exercised the termination right. All it knew was it was a possibility.

Now, the other point my friends make --

CO-ARBITRATOR MCLACHLIN: Are we out of.

MS. SHERKEY: We can come out of confidential mode.

--- CONFIDENTIAL TRANSCRIPT ENDS AT 9:53 a.m.

MR. HAUSER: Out of confidential. Thank you.

PRESIDING ARBITRATOR MILES: Thank you.

MS. SHERKEY: It says the measures challenged here were all known before Windstream I. They are the continued application. Windstream knew the moratorium was applied to it. It knew that research wasn't going ahead. And it

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knew that, up to that date, Ontario hadn't directed the IESO.

Yes, those were facts that were known. But that's not the test.

The measures all postdate the award in terms of what happened after 2016 when Windstream approached the government when it asked the government what it was doing. We have gone through those facts. And they then resulted in the termination of the FIT contract.

So I am not going to repeat myself on what we say the alleged breach is.

But we say Canada is conflating here knowledge of pre-existing facts with the conduct actually alleged to amount with the breach. There is no treaty breach divorced from the termination of the FIT contract.

And the point I just want to conclude on, for limitations, is the circularity of my friend's position.

If we go to the next slide.

If Canada's position was accepted, there was never a path to this claim. There was never a time this claim could have been brought. And I break this down into more detail

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over the next two slides.
But the point, the gist is, we were premature in Windstream I. But we are now too late, at any point after that, for the termination.
So there just could never be a claim on the termination of the FIT contract.
And, if you just look over on the next slide, we break this down into timelines.
Windstream I, too premature. Canada argued there was no expropriation because the moratorium was temporary.
The Tribunal, as we know, found the FIT contract was in force and finding no expropriation.
So what should Windstream have done? Brought a claim immediately after in 2016?
Under Canada's theory, it's both too early and too late. We are premature because we are in the same place as we were in Windstream I, the same finding. FIT contract is in force so you have no expropriation.
But we are also too late because Canada's arguments that we have had knowledge of facts since 2011 equally applies

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then.
Same with when you go to 2017.
We are both too early and too late.
And then when we bring the claim in time for what happens in 2018, when Windstream is advised of the termination right, now it's too late.
So those are all my submissions on limitation period.
So I will now -- sorry, I have one more slide on limitation period. If this was your question, I am happy to take your question.
And this is not anything that complicated.
If we go to the next slide.
When did we have knowledge of the loss?
It had to flow from the termination. The test is whether loss or damage has been incurred. Per Infinito, loss must flow from the breach.
Here, the loss only happened once the FIT contract was actually taken. It was only possible before that. It was possible the

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IESO could exercise its termination right but there was no loss until it happened.
PRESIDING ARBITRATOR MILES: Can we go back to Slide 10 -- 19, sorry. I am so sorry, 19.
Given that the Tribunal in Windstream I did find that there had been no expropriation, as you say on the left-hand side there. I understand this -- I understand your submissions and the essence of this slide in respect of expropriation.
I might need a little more help for breach of FET. Okay.
So if termination of the FIT contract was not a necessary predicate for the Tribunal to find breach of fair and equitable treatment in the Windstream I case, in order to make the Claimant whole for the harm caused by breach of fair and equitable treatment in the Windstream I case, then the fact of termination subsequently, I am struggling to see how that will reopen the fair and equitable treatment claim.
Expropriation, I understand. The Tribunal is very clear. They said to the prematurity point. You are too soon.

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But did they say you are too soon for a fair and equitable treatment claim?
MS. SHERKEY: Their finding on fair and equitable treatment, I think is important context. They didn't find that it had been taken or de facto cancelled in that context.
PRESIDING ARBITRATOR MILES: Yeah. But my question was that a necessary predicate for their finding on FET?
I understand they didn't find it. But did they need to to find breach of fair and equitable treatment, whole loss, whole remedy?
MS. SHERKEY: No. And I think that's important when you look at the language, particularly as they award damages for breach of FET.
So they say the breach of FET is the limbo that was created.
And, when they go to find damages, they say we are awarding -- and it's damages, of course, flowing from FET. They say it's damage to the investment, not the full value of the investment because the FIT contract is in force. Leading, of course, to the phrase we have talked a lot about. It is another matter that

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the parties can renegotiate and trigger -- renegotiate the FIT contract to create value.

And so they acknowledge the existence of the FIT contract and there was a finding of FET for creating the limbo and the FIT contract still exists.

PRESIDING ARBITRATOR MILES: So the finding of FET for creating the limbo, with what consequences? What consequences of finding limbo gave rise to damages in the first award?

MS. SHERKEY: Well, that was -- sorry, I just want to make sure I understand your question on consequences.

They value the project as at that time, including their finding that the FIT contract was not -- did not have value at that time, and recognized that the FIT contract can be renegotiated.

So the FIT contract is still in place, still existing. And that is, I would say, still tied to their FET finding because it's the basis of how they valued the FET breach.

CO-ARBITRATOR MCLACHLIN: What was the $25 million for? It was for breach of fair and equitable.

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And the question in my mind is did that put the Claimant whole for a breach of that obligation under the trade agreement at that time? Nothing to do with FIT. Nothing to do with expropriation. FIT remained. No argument about that.

But the Tribunal found a breach and it found 25 million, if you take off the 6. And was that to make the Claimant whole at that time for that breach of the trade agreement standard of fair dealing?

MS. SHERKEY: Yes. For that breach, for the damages up to that time, and then of course recognizing that there was still a valid existing FIT contract that, if renegotiated, would create further value.

And what happened afterwards, whether Windstream's entitled to that value, and we will come to this in res judicata, are fresh issues for you not considered.

But we would say that's also tied to the limitation period because now, going forward, you still have an existing FIT contract. You have this statement that the FIT contract can be renegotiated to create value.

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Windstream tries -- and we will talk about this in FET -- to get engagement from the government to clarify the situation that continues.

And until the termination of the FIT contract happens, there hasn't been a breach of FET in this second world, this post-2016 world. This question of whether there was an obligation under the government, under international law to renegotiate the treaty -- renegotiate the contract to create value, and whether that value was taken to Windstream is all post-2016 elements.

PRESIDING ARBITRATOR MILES: Why did the FIT have no value?

MS. SHERKEY: As found at the time that the Tribunal found it, it said it was unfinanceable as of May 2012.

PRESIDING ARBITRATOR MILES: Why?

MS. SHERKEY: Because of the contractual and legal limbo created by the government. The project, at that point of time, was no longer able to be developed within the timelines left of the FIT contract.

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If the FIT contract was redeveloped -- or renegotiated, that state of affairs would change.

That's where the creation of value would be and we say unlocked. You renegotiate the contract and now you have a financeable valuable project beyond what was awarded by the Tribunal in the first instance.

CO-ARBITRATOR GOTANDA: I guess where we are struggling is the obligation to renegotiate the FIT contract might not necessarily be tied to the termination of it.

The termination concludes, ultimately, your damage there -- put aside the expropriation claim.

The expropriation claim, one could make the argument and, given the first Tribunal's ruling, it seems like that's -- you don't have the expropriation claim, until it's -- it's not ripe until that happens.

But it's -- we need you to tie it tighter together for the FET claim.

Because one could make the argument that the claim arises as soon as post -- let's say, you know, Windstream I, they refuse to

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negotiate. And what if they said, at that point, and we are never negotiating with you?

Doesn't your claim arise instantly sort of then? You may not know the extent of your damage. I get that. But help us understand that.

That's where, I think, where we are struggling with on that.

MS. SHERKEY: Thank you, Professor Gotanda.

I think there's a factual and legal element to answering that.

The first is, on the factual side, the failure to clarify the situation, post award. And the Claimant immediately reaches out. We will talk about this in FET.

The Claimant immediately reaches out to the government. We want to meet. We want to meet. We want to meet. And the government says no, go to the IESO.

They don't say, no, you have been fully compensated. No, we will never meet with you. No, this contract will never be amended. They say go deal with the IESO.

We say that's problematic but

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no one is proceeding on the basis that this project can't proceed. That's no one's understanding. That's never clarified.

And so Windstream goes to deal with the IESO. Certainly, the government does not involve itself. That's a huge basis of this claim.

But the IESO's also saying it's not going to exercise its termination rights.

And, until it does, they have the Ontario action. They may see results there in the injunction. They haven't actually lost that creation of value, that ability to renegotiate until the IESO makes its decision to terminate.

So they know it's possible. They know the factual predicates the government is refusing to involve itself. It doesn't clarify the situation. But it's refusing to involve itself.

But, until the FIT contract is terminated, the actual failure to renegotiate and the actual loss of that value has not happened yet.

CO-ARBITRATOR MCLACHLIN: Well, I think part of the question was you don't

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have to have the quantification of the loss. If there was enough for the -- for a reasonable person in their position to conclude that the government was not going to negotiate, the loss was clear. It hadn't, perhaps, been quantified in terms of exactly how much they would lose.

But they knew that they could not go forward and that they would lose their investment.

So this gets us into that area where how, how precise does the knowledge of the loss have to be?

I think that's what's bothering me about your answer to my friend's question.

MS. SHERKEY: But they also don't know what the IESO is going to do, which we have heard is a multifactorial exercise.

The IESO is telling them we haven't made a decision. We know, on the facts, five and 6 out of times, this right had previously come up. The IESO didn't exercise it. Windstream was providing a lot of information to the IESO to inform its decision.

So it knew it was a

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possibility that the IESO was going to exercise it.

But, until the IESO actually did, the loss of the additional value was just a likely -- maybe not even likely. A possible outcome. One could argue how likely it is on the facts but we -- Windstream asked the IESO directly, are you going to terminate? And they said we don't know.

And so, at that point, they continued to ask the government to intervene.

CO-ARBITRATOR MCLACHLIN: I don't think that answers the question. You go back to termination.

But that's fine. I think we have the point. And there may be questions about exactly when the cause of action arose. That's all I was trying to get across.

And it may not -- you could mount a case that it doesn't require actual termination. That's all. And I wanted to give you an opportunity to respond to that, not whether the termination, when it occurred or whatever.

CO-ARBITRATOR GOTANDA: There were two questions, not slightly unrelated.

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The focus, though, is not on the IESO; is it? It's on Ontario.

MS. SHERKEY: Yeah, it's on Ontario.

CO-ARBITRATOR GOTANDA: Right. So the fact that the IESO may have said something is not what we focus on for whether or not there's a breach of it.

MS. SHERKEY: But, in my submission, it goes to the knowledge, construct over actual, that Windstream should have had in terms of the alleged breach and loss.

Because the alleged breach is the failure to renegotiate, the failure to implement the commitments made that result in the failure to renegotiate when they say the Ontario government had an obligation.

And that only forms once the FIT contract is terminated. Because, at that point, other outcomes could still happen. They had the Ontario application to enjoin that result. They could still meet and have settlement discussions with the IESO. They don't know what that result is going to be.

So the IESO's actions are

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relevant in terms of understanding what knowledge should have happened, although the breach lies with the Ontario government.

CO-ARBITRATOR GOTANDA: Right. But that's where I want you to help us connect the dots a bit more.

Because it's the Ontario government that says, under the facts, we are not talking to you. Probably the lawyers probably told them. In fact, the lawyers did tell them. Don't talk to them. Probably afraid of getting sued.

So if they're not at all going to take any steps, you know, at that point, their actions, it seems like -- and help me understand this -- are concluded at that point.

What the IESO does is, they can do whatever they want.

But your focus, really, is on Ontario; isn't it, for the FIT claim?

Help us just connect that a little closer to try to understand how that works for purposes of this.

MS. SHERKEY: Yeah. And I think it goes to the question of when did the

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breach crystallize.

Is the act of saying no -- right, when did it, as a legal notion, become an international wrong.

In 2016, December 2016, they get a letter saying go to the IESO.

What happens if you bring a claim at that point in time?

In my submission, you face a prematurity argument because you have a contract that's still existing, they would say you should have gone to the IESO and had those negotiations. You didn't know what the result would be.

And so there would be a whole load of elements of things they didn't know.

They needed to continue through the course with the IESO and, ultimately, get to a termination decision before those actions of the Ontario government actually had a consequence or a result on the Claimant's investment.

CO-ARBITRATOR GOTANDA: And here's the second part of that question, which is related to what you just said now.

NAFTA may not be perfect and

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the problem is it may allow you to bring one claim but perhaps another and you just may be stuck with that.

Is there anything that we have from the parties in the drafting that seems to help answer sort of this question?

Because it seems like, the language here seems ambiguously to have a requirement and to have this cutoff. And with the understanding that, for every wrong, there may not be a remedy in the end. But that's just how the, you know, the parties to the treaty drafted it.

MS. SHERKEY: I think, on limitation period, there is always a remedy but you have to act on it in time. I don't think there is a reading of that where you say there might just never have been a claim for you.

The knowledge has to arise at some point and then you have three years to bring it.

So I think that's the key question, as opposed to a possible outcome, whether fair or unfair, that there might just not be a remedy. As it relates to limitation period, I would say there always is.

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CO-ARBITRATOR MCLACHLIN: Would there always be a cause of action?
MS. SHERKEY: Yeah --
CO-ARBITRATOR MCLACHLIN: Even if there wasn't -- I mean, it seems we are getting -- I am having trouble following what you mean by there will always be a remedy.
MS. SHERKEY: I think I was responding, with Professor Gotanda's question, to maybe the way the NAFTA parties just drafted this fair or unfair, there might just not be a remedy for a certain type of breach. You might have another claim but not this claim, if I understood your question correctly.
CO-ARBITRATOR GOTANDA: In part.
I think maybe the question is perhaps the parties to the treaty and the treaty itself, ultimately, says you get to choose but which one you want, in the end. Sometimes -- it's not a perfect drafting for the Claimant, in this case. And you may have to live with that.
Is what -- perhaps the way they drafted it is such that maybe you can bring the expropriation claim only until the actual, in

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this case, it's terminated. But maybe the FET claim just arose earlier.
MS. SHERKEY: I see --
CO-ARBITRATOR GOTANDA: And there's this gap and that's just the language of the statute just is that way.
But maybe it's not and so that's the question for you.
MS. SHERKEY: I understand your point.
CO-ARBITRATOR GOTANDA: Right.
MS. SHERKEY: I think it's an interesting academic question, actually, very much so. And very much one that would depend on the facts.
I think the answer lies here looking into the facts.
We would just say that gap doesn't exist and maybe that unfairness helps -- that would result underlies the interpretation that that's not the right interpretation or result because it's imputing knowledge to the Claimant, we say, before they know that it has incurred a loss. It's imputing that they should have brought a claim because something might happen at that

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stage.
But we say, until the termination happened, the actual loss alleged, the failure to renegotiate and the loss of that creation of value was -- it would be imputing the possibility of something to them, as opposed to knowledge, as we have seen in the test.
PRESIDING ARBITRATOR MILES: In response to my earlier questions, you said the Tribunal found the FIT had no value when it became unfinanceable as of May 2012.
And you said the Tribunal further found that that was because of the -- I am adding words here -- you said it was because of the contractual and legal limbo created by the government.
The Tribunal found that the contractual and legal limbo was the breach of FET.
MS. SHERKEY: Yes.
PRESIDING ARBITRATOR MILES: Or the contractual legal limbo created by the government was the breach of FET.
And the Tribunal found that, at that point, the project could no longer be developed within the timelines of the FIT

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contract. Yes?
MS. SHERKEY: Yes.
PRESIDING ARBITRATOR MILES: And, on your Slide 20 in your box, the grey box, 2013 to 2016, you say Windstream argued that the FIT contract -- that the FIT contract was de facto taken.
You -- and you have put taken there for the purpose of expropriation. And I understand your argument well on expropriation.
I think, like my co-arbitrators, I am still struggling with your argument on FET.
So you also argued that the FIT contract was de facto gone because it had no value because it was unfinanceable from May 2012.
MS. SHERKEY: Yes.
PRESIDING ARBITRATOR MILES: And the Tribunal agreed with you on that. That the value in the FIT was eliminated by the conduct leading to the contractual and legal limbo.
MS. SHERKEY: Yes.
PRESIDING ARBITRATOR MILES: Yes. Okay. So we agree so far.
So if your FET -- if your fair

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and equitable treatment cause of action in the first arbitration was predicated on the de facto destruction of value in the FIT contract, and the Tribunal agreed with you that there had been de facto or actual destruction of the value in the FIT contract because of the conduct creating the legal and contractual limbo; yes?

MS. SHERKEY: Yes.

PRESIDING ARBITRATOR MILES: Then don't you have -- coming back to Slide 5 -- knowledge of the alleged breach, fair and equitable treatment, and knowledge of the loss, including the loss arising out of the de facto destruction of the FIT contract.

MS. SHERKEY: No. And I think the key here is the finding on the damage awarded at paragraph -- it's either 483 or 485.

PRESIDING ARBITRATOR MILES: Yeah.

MS. SHERKEY: Where they say we are valuing the breach flowing from 1105. It's damage to the investment, not full value, but it remains open on the parties to renegotiate.

PRESIDING ARBITRATOR MILES: So you put an awful lot of weight on the use of

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the word "damage" there, as distinct from loss of value.

But what did the Tribunal do to ascertain the value of the whole investment for the purpose of compensating loss in Windstream I?

MS. SHERKEY: Yes. And they determined the value of the project using the 2009 to 2013 comparables with the 2016 valuation.

PRESIDING ARBITRATOR MILES: In a but-for world.

MS. SHERKEY: In a but-for world.

PRESIDING ARBITRATOR MILES: And did that but-for world include the FIT contract sans destruction of value?

MS. SHERKEY: Yes. And then recognizing that it remains another matter that the FIT contract can be renegotiated to create value --

PRESIDING ARBITRATOR MILES: Right. Leave that aside.

The unrenegotiated and unreactivated FIT contract, in a but-for world, was that, in your submission, attributed value by the Tribunal in Windstream I?

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MS. SHERKEY: If I can have a moment, Mr. Terry was dealing with value so I just want to make sure I am not stepping on his toes.

PRESIDING ARBITRATOR MILES: And, to be fair, I am not clear in my mind whether this is an 1116, 1117 issue or res judicata issue. Or both. And we will flush that out during the day. Or neither.

MS. SHERKEY: And I think, I would love to have an answer that satisfies every one of your concerns, and I think we are going to circle in that, I think -- the key, it does fall on to that line, the additional value that could be created with the renegotiation.

We say that's something the Tribunal recognized was beyond what was awarded and that was where the parties were to go forward from and we say Windstream was deprived.

That's a whole new, both for res judicata and limitations, a whole new series of conduct. A whole new series of knowledge.

And so everything you are saying as to what they found there, yes.

But then the question here turns on the renegotiation to create that

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additional value not awarded and when knowledge of that loss, that claim arose.

PRESIDING ARBITRATOR MILES: Okay. You understand the challenge that you face for fair and equitable treatment if one of the facts that you reach back on is the existence of the FIT. And the value of the FIT. And the impact of the conduct causing legal and contractual limbo in respect of the FIT.

If they are facts you're relying on as necessary facts for a reactivated, renegotiated contract will be worth X because the original FIT contract was worth X, then you're going back into territory that the Tribunal has dealt with.

MS. SHERKEY: And maybe that's best dealt with in context when we talk about the FET breach and then Mr. Terry is going to take you through the loss that flows from that.

So it might be that that conversation comes up better in context tied back to what we have been discussing this morning.

PRESIDING ARBITRATOR MILES: Is it an 1116, 1117 issue, though? I think it must be. I mean, I have been thinking about it in res

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judicata previously.
But, if you had all of the knowledge of the alleged breach and the damage and loss, then you do enter into 1116, 1117 territory on FET, potentially.
MS. SHERKEY: If you did.
PRESIDING ARBITRATOR MILES: Yes.
MS. SHERKEY: But you have my submissions on why they don't.
PRESIDING ARBITRATOR MILES: I understand. Okay. All right. Very good.
That was really, really helpful. Thank you very much.
Did you have -- what were you going to do next?
MS. SHERKEY: Res judicata.
PRESIDING ARBITRATOR MILES: Should we make a start. Let's go.
MS. SHERKEY: Sure.
I think we talked through some -- there is a lot of overlapping issues here.
And do you mind if I take off my blazer. I run very hot these days.
So we are going to start with

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issue estoppel and I want to just address first, we agree on the test that's set out at paragraph 27. I don't -- I am not going to spend time on it. We are just going to cut -- jump right into applying it.
What does Windstream say is issue estoppel. You had asked that question.
We have summarized that at page 28. I don't plan to spend too much on it. It's in our materials.
But we say Canada has sought to relitigate factual issues that are set out in the award. We set that out in full detail in our reply memorial.
I just want to note that you heard it again from Mr. Neufeld this morning, on number (c), that Windstream abandoned the discussions.
Mr. Neufeld, I made the time note at 9:23 a.m., said that there were no results from the negotiations with the OPA because it was Windstream's responsibility as to why they failed.
And so that, in my submission, is not consistent with the findings by the Windstream I Tribunal.

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PRESIDING ARBITRATOR MILES: Are you referring to where he said because they asked for the moon?
MS. SHERKEY: Yes.
And, in fact, it's at paragraph -- in the FET finding, they -- the Tribunal actually says it's not Windstream that's responsible for that outcome. They talk about the failure to direct the OPA but they make a finding on that.
And they also make specific factual findings as to what happened in the negotiations. I laid those out in my opening.
PRESIDING ARBITRATOR MILES: Is abandonment the same thing as asking for the moon?
MS. SHERKEY: No.
PRESIDING ARBITRATOR MILES: No. Okay.
MS. SHERKEY: But I would say this is a further enhancement an addition to what they said in their counter-memorial.
And we also have an issue estoppel argument as it relates to the test on expropriation. And this deals with the Annex 14B

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issue, which Mr. Terry is going to deal with so I won't steel his thunder. But just flagging there is a point there.
So what I would like to address is Canada's arguments on issue estoppel.
And, as I went through their opening and, again, through their written materials, we have characterized this, brought this down to five issues.
And number one, to me, is really the nub of it. This full compensation issue.
And I think this circles on to everything we have been talking about this morning, which is Canada argues -- there's no further value here. You have been fully compensated. The project was found to have -- or the FIT contract was found to have no value. The Tribunal compensated you on that basis. So you're barred from arguing there is any further loss.
We have highlighted here what the Tribunal found. And, again, it comes back to that line at the end and what our claim is, which is that there was additional value that could be created that was not because the FIT contract

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wasn't renegotiated.
Also, because the FIT contract wasn't terminated, Ontario didn't clarify the situation.
IESO held on to the $6 million letter of credit. Windstream made efforts to move the project forward in the time period and incurred additional costs.
So we say there, as Mr. Terry touched on in his opening, there is additional value creation in that time period.
And whether all of that additional value beyond what was awarded is owing to Windstream, is not a res judicata issue. It's a merits issue.
You might not agree with us. We hope you will. But it's a new issue.
So I was going to move off this point unless you had any questions.
And Number 2.
Issue Number 2, we say, is quite tied to issue Number 1. It's almost like the flip side of the same coin.
Canada relies on the finding that the $6 million letter of credit was a

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substantial portion of the value of the FIT contract. So there was no substantial deprivation and says Windstream is barred from arguing there was a substantial deprivation in this case.
And, again, this goes back to the same point that we are talking about different value here.
We are talking about a 2020 termination of the FIT contract where the letter of credit was returned and the question is, is there any further value there; what is that value; and was Windstream substantially deprived of it? Those are all new issues for determination.
PRESIDING ARBITRATOR MILES: And, for both these issues, you are not distinguishing between expropriation and fair and equitable; you are saying it's the same either way?
MS. SHERKEY: Well, I think you have, in FET, the alleged loss is the loss of the value that could have been created. And remember the arrow. We will go to that in FET.
So we say whether or not Windstream was entitled to that value creation, that was barred, we say, by Ontario's conduct, is

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a new issue, a merits issue as to whether or not that was a wrong or a loss they had a right to.
On expro, the claim is for, as Mr. Terry explained in the opening, and we will get into more detail with you, it's for the costs incurred in the 2016 period. The efforts to move the project forward while Windstream had ongoing obligations under the FIT contract and whether those new costs incurred, post 2016, as part of the project value were taken is a new issue.
PRESIDING ARBITRATOR MILES: That's helpful.
Number 3, the promise to freeze. Canada says you cannot relitigate these pre-2016 facts.
And what Mr. Neufeld said this morning was he called it the so-called promise. And he said the Tribunal did not find a promise to freeze.
And I want to be very specific here about what was -- what the commitment is and what the Tribunal found.
The Tribunal found, at paragraph 371, that the conference call happened. It found that, during the call, the government

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officials confirmed that the project was not terminated, and that it would go forward once the studies have been completed. That's the Tribunal's finding.
And then it pastes excerpts from the transcript.
So it's not a so-called promise. It's a factual finding the Tribunal made that what was said on the call -- I have a printout of the transcript here; it's C-484 -- in fact happened.
And there are multiple statements in here, not just the one line from Mr. -- the one excerpt from Mr. Benedetti, Mr. Neufeld mentioned.
But a statement by Mr. Mitchell:

> "We acknowledge your project is unique and that it has a FIT contract and so, to that end, Perry is here. We have asked the OPA sit down with you and negotiate a number of

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pieces, including the force majeure provisions. We are going to attempt to create a solution that will be acceptable to you so that is NRG's position."[as read]

Andrew Mitchell again:

"There is really no way to proceed at this point. But, with respect to your FIT contract, we are going to work with the OPA to make provisions to ensure that there is a solution that is acceptable."[as read]

Ian Baines:

"What I am hearing very clearly is that the project has been terminated. Perry Checcini. No, you're not hearing that."[as read]

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PRESIDING ARBITRATOR MILES: You are in res judicata now, right.

So, in terms of issue estoppel, do you accept that, if the Tribunal made a finding as to the veracity or intent or effect of certain statements, conversations, facts that relate to this period that, if there is a fact in issue as to what was said or what was meant by what was said or what was the effect of what was said --

MS. SHERKEY: Yeah.

PRESIDING ARBITRATOR MILES: -- that we are bound by that determination of that fact in issue for this period.

MS. SHERKEY: Yes.

PRESIDING ARBITRATOR MILES: So we take the facts as that Tribunal found them.

MS. SHERKEY: As that Tribunal found them.

Now, the question is, and this is what goes. Does that fact exist. It's found by the Tribunal. It's not a so-called fact. It's a fact.

It would be, if we are now saying if Canada was saying it didn't happen, if

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we were trying to take opposite results, that's issue estoppel.

That's not the issue here.

The issue here is whether that fact is a factual predicate that is allowed to form the basis of a new claim and we say yes.

It was a fact that was before the Windstream I Tribunal. It found a breach of FET on the facts before it.

But whether those facts, as a factual event, then form part of what gives rise to a new treaty breach, a new obligation, is not exhausted. It's just a separate question.

And think, for example, of a gold mine. You may have a representation to induce a project.

We will move you through the process speedily and you will go through our regulatory process, something to that effect, as we have seen in other cases.

And there is a first claim on delay. The project is not terminated but there were delays in getting your EA approvals. The Tribunal finds that fact happened. Yeah, there were delays. You suffered damages. Here you go.

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And then, later, the gold mine is nationalized and they weren't allowed through the regulatory process.

That second claim is going to be based on the same fact, the same representation. But it's a new question of a new breach.

So facts can overlap. We say they are not exhausted.

CO-ARBITRATOR GOTANDA: That's not a preclusion issue.

The preclusion issue is the fact that the conversation occurred, as opposed to, right.

MS. SHERKEY: Yeah.

CO-ARBITRATOR GOTANDA: Yeah. Okay.

MS. SHERKEY: We say it occurred. The Tribunal found it occurred.

CO-ARBITRATOR GOTANDA: Right. Right.

MS. SHERKEY: So the question is what role, if anything, does that background fact have on finding a breach here in this instance. That's a merits issue for you to

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determine.
CO-ARBITRATOR GOTANDA: Right. Not a res judicata --
MS. SHERKEY: Not a res judicata issue.
CO-ARBITRATOR GOTANDA: Yeah.
MS. SHERKEY: So we say this is quite simple.
PRESIDING ARBITRATOR MILES: I did say we would stop at 10:30 but I would quite like you to keep going to 10:45 if you're okay.
MS. SHERKEY: I actually think I am going to be less than five minutes.
PRESIDING ARBITRATOR MILES: Okay. We can take the break when you're done.
But you won't get through res judicata.
MS. SHERKEY: I don't plan to be long on cause of action estoppel.
PRESIDING ARBITRATOR MILES: Let's see how you go. If you can get through by quarter to, then we will clean them up. Thanks.
MS. SHERKEY: Sure.
PRESIDING ARBITRATOR MILES: Thanks.

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MS. SHERKEY: So, issue Number 4, Canada argues that we are challenging the measures about the failure to lift the moratorium and the moratorium's application to the project.
And, again, we -- of course, we have to focus on what the Tribunal found.
The finding that is res judicata. The decision to impose the moratorium was not wrongful. It didn't breach the NAFTA. Absolutely. That finding is res judicata.
We are not alleging here, in any way, that the moratorium is wrongful. It's not even alleged to breach, itself, the NAFTA.
The question is whether its continued application, the failure to conduct research, led to the circumstances that created the conditions to terminate the contract that led to the termination right arising and being exercised. That's a separate issue.
Similarly, the Tribunal also said, in finding a breach of FET, that the failure to take the necessary steps or measures within a reasonable period of time after imposing the moratorium to bring clarity to the regulatory uncertainty surrounding the status and development

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of the project created by the moratorium breached Article 1105.
So, yes, the application of the moratorium is part of that uncertainty that leads to a breach. But they don't -- there is no finding as to whether a continued application, after this date, in ways that would give rise to the termination of the FIT contract, is a breach. It's just a separate issue.
And, on the final point -- and we talked about this quite a lot in opening -- on DCF.
I will make this very simple. It's not an issue that needs to be determined.
What you'll hear, in the damages, we are putting forward the comparable methodology. That's the primary valuation methodology for you to apply.
DCF can be used as a secondary reasonability check but we are agreed on the comparables methodology.
PRESIDING ARBITRATOR MILES: Okay. I had not appreciated that from a day with your three experts.
But your primary valuation

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methodology is the comparables?
MS. SHERKEY: Yes.
PRESIDING ARBITRATOR MILES: Okay.
And the DCF as a reality check.
MS. SHERKEY: Yes.
PRESIDING ARBITRATOR MILES: Okay.
CO-ARBITRATOR GOTANDA: So here's an issue, though, I do want you to address.
And that is Canada seems to be arguing that Dr. Guillet's evidence, that the Tribunal found that -- they basically say that it was comprehensive -- the most comprehensive evidence relating to comparable transactions methodology and that it included undisclosed confidential information that it did not see fit to exclude.
Is the finding of the Tribunal that it can -- that we are bound by undisclosed confidential information, is that collateral estoppel? And why?
MS. SHERKEY: No, I have a response and then I will look at Mr. Terry to see

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if I messed up his damages submissions.
But I think the answer is quite simple.
They decided on the basis of those valuations before them, in 2009, 2013, what was reliable enough for them. That was the evidence before them to assess on that valuation.
I do not believe it is a fair reading to say that means it's res judicata as to how that valuation methodology is to be applied in all circumstances going forward.
We know valuation standards say you -- what they say about hindsight, what they say about confidential info. You have to assess the reliability of the comparables before you. They are new comparables. It's new evidence on a new methodology.
And so we would say you are not bound to accept that, just because they accepted some confidential data, that you have to.
CO-ARBITRATOR GOTANDA: Well, I guess there's three points to that.
One is, is are we bound by the approach?
Second is are we bound by --

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if it's the same, exactly the same comparable is offered, are we bound to use that, even if it's now pointed out that that was in error?
And, three, are you arguing, at all, that, perhaps, we are not bound or perhaps you can address -- perhaps we are not bound under sort of general principles of res judicata?
I don't -- I have never seen an international case raised in this manner. I have seen it in domestic, having taught this issue domestic sort of US law. I don't know what the law is in Canada on this.
But there are well recognized exceptions to the application of collateral estoppel and res judicata, including, for example -- and I am not alleging at all this is the case here -- but fraud, for example. When there's fraud, you don't need to apply it. That's a very well recognized exception.
Less well recognized exception, under sort of domestic law, though, is violation of due process. You don't have a chance to challenge it or mistake.
And so what's your thought on that?

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MS. SHERKEY: If you're okay with it, Professor Gotanda, I think what makes sense is we will have your questions from the transcript and Mr. Terry will address them. Obviously, it won't be in the res judicata.
But, when he comes to the comparables methodology, I think it might be a more fruitful discussion with him, as he is engaging in that, to discuss that with you. So we will take your questions and answer them.
Is that okay with you?
PRESIDING ARBITRATOR MILES: I think that's a good idea.
I was just going to say it comes up from Slide 72 in Canada's closing slides and it is a new point.
MS. SHERKEY: Okay.
PRESIDING ARBITRATOR MILES: We hadn't been aware of the point until this morning.
But, if the earlier Tribunal did something wrong, I suppose, or got something wrong, what are the limits, if any, of collateral estoppel on that?
And it seems to be that Canada

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is saying, if they thought confidential was good enough, you are bound by that.
And, if that wasn't right -- whether it's right or not, we don't know. But, if that wasn't right, are you bound by collateral estoppel?
MS. SHERKEY: Yeah. And I think what we will need to take away and will talk about in the break, this is a new arising in closing, and so what time is needed to properly answer it for this Tribunal, will be something I think we will also discuss in terms of also answering the question.
PRESIDING ARBITRATOR MILES: The authorities are on the record. It's just easier for us, if you look at them, rather than we look at them.
You did say we all know what the International Valuations Standards say about confidentiality. I don't know what they say about confidentiality. I didn't know they said anything about it.
MS. SHERKEY: I might have misspoken. This is where I am not the damages person. I was thinking hindsight there --

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PRESIDING ARBITRATOR MILES: Yeah, you said hindsight and confidential.

So ex post, ex-ante approach to valuation methodology and the valuation date and how to treat that; that is built into the methodology standards.

MS. SHERKEY: Yes.

PRESIDING ARBITRATOR MILES: I am not aware of anything on confidentiality, so I will proceed on that basis unless told otherwise.

MS. SHERKEY: Yes, I apologize. I might be right but I leave it to my colleagues to confirm that.

PRESIDING ARBITRATOR MILES: And there may be a nuance in there, if you're looking at market comparables, what you can take into account and confidentiality may be implicit somewhere in there, but you'd have to show me that.

MS. SHERKEY: We will come back to that.

PRESIDING ARBITRATOR MILES: Did you want to say anything else quickly about res judicata?

MS. SHERKEY: It's just cause

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of action estoppel, which I think, unless the Tribunal will have lots of questions on it, I can -- I have a few slides but I think I can cut through it pretty quickly.

PRESIDING ARBITRATOR MILES: Why don't you just do that. And then we have a clean break so good.

MS. SHERKEY: Parties don't disagree on the principles. That was one of your questions. Agreed on principles. Principle on page 38, again, agreed.

It's what the Tribunal determined that matters, not what was alleged. We've got to focus on what was definitively settled.

And so, here, essentially, if we go to Slide 39, the question is -- and the parties agree -- does the prior claim concern the same claims based on the same factual and legal bases? Do the facts and circumstances arise from a single event and give rise to a right of relief?

We say no. You have my point. This is a case about Ontario's responsibility for the termination of the FIT contract. That is not what was before the Tribunal.

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Really, we think -- I understand the points of issue estoppel. We have talked about that and how it gives rise.

That's really where this discussion takes place, we say, as it relates to the causes of action. They are just distinct. Particularly, based on what the Tribunal found.

And, if you look at what my friend's arguments are, on paragraph 40, in my friend's opening, they didn't talk about what the Tribunal found. They talked about what Windstream argued and we heard let's just simply compare what was argued in Windstream I with Windstream II. And they had these fancy charts of the complaints in the two proceedings.

And we say this just isn't the right consideration. The question is what was found by the Tribunal. And you have my point on why the determination is different than what was ultimately found.

My friend, in opening, at Slide 41, asked the question, what would the Tribunal say. And he said the Tribunal would say it's already decided these issues.

Respectfully, that's just not

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a hypothetical that we can answer. It's now the question before you.

We also heard from my colleagues, in opening at Slide 42, that this case isn't about the termination of FIT contract. They say we are not challenging the IESO's exercise of discretion but we are using the termination as a hook to fish out all the old claims.

And so the termination of the FIT contract isn't the cause of action here.

And we -- that's just not our claim. And, again, you are to look at what our claim is, our submissions, as the -- we saw the case law on limitations that said that.

And the issue here is whether is Ontario is responsible for the termination. The fact that we are not challenging the IESO's contractual exercise isn't the question.

Just clarifying one point that came up in opening.

Ms. Miles, it arose -- Madam President, it arose out of a question you had in opening about Canada doing what it is alleging we did. It was successful in expropriation in arguing that the contract wasn't de facto

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cancelled. And Mr. Neufeld's response is that he doesn't think it was part of the arguments they ran.

We have put the excerpt here on one of their arguments in expropriation.

The moratorium was a temporary measure. That was one of their arguments in expropriation as to why there wasn't one. And they go on, at paragraph 486, that the Claimant asserts that the Tribunal should ignore these facts and conclude that the project has been cancelled.

This assertion misrepresents the current status of the project.

They go on to make their point that we say they have re raised, in this arbitration, that, if the contract wasn't frozen, it was due to the actions of Windstream and not accepting the OPA's offers.

And it's all part and parcel of their argument that it was a temporary measure.

PRESIDING ARBITRATOR MILES: And this is under the section of their brief -- sorry, I don't have it to hand -- dealing with expropriation?

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MS. SHERKEY: Expropriation, subheading temporary measure.

PRESIDING ARBITRATOR MILES: Did they make the same arguments under FET?

MS. SHERKEY: I will have to double-check that. I do not believe so but I will double-check that. I will come back to that after the break.

The last point here on this is identity of cause of action. I just -- Canada relied on Apotex III in their opening as highly relevant, because there was an event that happened after the first one, a new event, like they say the termination is new, but there was still res judicata.

And I think what's very important, in looking at what was ruled on in Apotex III, is that the Tribunal said -- and that had to do with the -- there was a tentative approval of the drug product, the drug application called ANDAs. That was found to not be an investment.

Then the ANDAs were made final. That was the new fact. They were made final. And they brought this new claim, saying,

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well, you dealt with tentatives, ANDAs, and now we have finals. That's a new fact. That's a new claim.

And the key point is what the Tribunal found, saying:

> "It's clear from the reasons that the parties distinctively put in issue ANDAs generally."[as read]

So just tentative ANDAs weren't what was in issue there. It also included final approved ANDAs and the Tribunal actually decided that issue.

So that's the key finding there.

And then, on identity of object, the point is very simple.

No dispute, Windstream argued, for the same relief it argued for the full value of its investment. But you have our position on what was awarded and the key part about renegotiating and additional value.

So those are the submissions on the two threshold issues.

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PRESIDING ARBITRATOR MILES: Ms. Sherkey thank you so, so much. And sorry to keep you up for so long. And, Lisa, apologies to you.

If the rest of the day is like this that, from my point of view, will be spectacular. That's incredibly helpful. So thank you very much.

And we will -- so we will take a break. How long do we need? Let's take 15 because a few things came up there.

So we will come back just short of 15. We will come back at five past 11. Okay.

--- Upon recess at 10:53 a.m.

--- Upon resuming at 11:09 a.m.

MS. SHERKEY: I have just two clean up clarification points.

On one point where we ended on international standards for confidential info, I was not wrong and I do have a source for you and I thought I would just give that to you now while it's fresh in our mind.

C-2278 is the International Valuations Standards, paragraph 23(j), requires

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the nature -- 20.3(j), as Ms. Shelley reminds me, is the nature and sources of information upon which valuers rely must be disclosed.

Section 105, para 30.7, sufficient info on transactions should be available to allow the valuer to develop a reasonable understanding of the comparable asset and assess the valuation metrics comparable evidence.

PRESIDING ARBITRATOR MILES: That's really helpful. You have taught me something.

I take it, from the last part of that, that that is in the market comparable methodologies?

MS. SHERKEY: Yes.

PRESIDING ARBITRATOR MILES: So not for DCF, necessarily?

MS. SHERKEY: That was focussed on the comparable methodology. 20.3(j) is general. The first one. The first one, nature and sources of information upon which valuer relies to be disclosed general.

PRESIDING ARBITRATOR MILES: And the Section 1.5, para 37, was the specific.

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MS. SHERKEY: Paragraph 30.7 is comparables.

PRESIDING ARBITRATOR MILES: That's excellent.

And, just while we are on it, the -- I understand -- I don't believe Dr. Guillet referred to the standards. Secretariat did, but the CVS, not the IVS.

Is that something that we need be concerned about? We don't believe the CVS are on the record.

MS. SHERKEY: Ms. Shelley is looking.

The other question while she looks -- can I have a time update?

MR. ARAGÓN CARDIEL: It's been one hour and 15 minutes since the start of your presentation.

MS. SHERKEY: Okay. So 45 minutes, which means I will need to be a bit nimble on FET to ensure that Mr. Terry has time to speak to you about expro and damages.

PRESIDING ARBITRATOR MILES: That's fine. Nimble is good.

If you could sort out, perhaps

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in the break and let us know after lunch, on the standards. If we could get agreement between the parties that, although neither expert, I think, has referred to the International Valuations Standards, that we may, that would be helpful.

And it may be they are in the party's submissions. They must be referred to somewhere, which is why they are an exhibit.

MS. SHERKEY: We will look at that.

PRESIDING ARBITRATOR MILES: It shouldn't be contentious. And I don't know what the difference is between the Canadian and the international, so.

All right, okay. Off you go.

MS. SHERKEY: So, for FET, I had ten slides here on the legal standard which I think, for the interests of time, I propose to move past, unless there is questions that you have.

They are all in the written submissions and we have highlighted them here.

But you heard Mr. Terry this morning. Waste Management is the standard applied by almost every NAFTA Tribunal and Canada has,

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itself, relied on it in its materials.

So the breach of FET.

We say this is a case of -- and we are going to move to Slide 60.

We say this is a case of arbitrary and grossly unfair conduct. I have given an excerpt here of what arbitrariness is.

We say it's not, as Canada suggests, limited to conduct that violates due process or does not respect legal rules.

And that's one element that may be arbitrary but the case law has found there are other elements, and we have given a description here from the Lemire case as well as cites to other cases, including the lack of a legitimate purpose, decisions based on discretion, prejudice, personal preference, reasons not matching up, reasons -- measure being taken for reasons different than what's put forward, as well as a willful disregard of due process and procedure.

So, as the Tribunal in Windstream I said, we can talk about the standards -- well, they don't say this. This is my add on.

But we can talk about the

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legal threshold to the end of the day. But, as the proof of the pudding is in the eating, we just got to look at the facts.

So we say here that there is a bunch of conduct that leads to the arbitrary and unfair gross result.

Despite the promise to freeze, despite the representations Canada made in Windstream I about the legal status of the FIT contract, and then despite the Tribunal's finding of legal and contractual limbo, we say Ontario then took no steps to resolve the situation it created.

Instead, it made an immediate and deliberate decision to take no further action and there's no legitimate rationale for this failure to do so and failure to renegotiate the contract.

And we have set out four categories.

Mr. Terry reviewed them with you, at a high level, this morning, and this is what I am going to walk through on the facts leading to the NAFTA breach.

So the first is the lack of

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clarification.

After the award, Windstream has an expectation and a belief that there is a path forward for the project.

I highlighted Ms. Baines' evidence for you in opening as to why it had that belief and where it came from.

And one of the key points is it immediately, if we go to the next slide, Slide 62, it immediately and clearly communicates this to Ontario. It sends letters asking to meet. It sets out its position that there is next steps for the project.

Ontario responds and says you should meet with the IESO. But they never respond to say you have been fully compensated, what are you doing trying to move this project forward. There's no path here. No one clarifies that situation.

On the contrary, everyone, we say, on the evidence, proceeds on the basis that there is a valid FIT contract and a potential path forward for the project.

And, if we look through this, we see, on internal documents noting, on the next

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slide, the FIT contract remains in force and, of course, you have my submissions from opening that the $6 million letter of credit is not returned to Windstream.

And, Mr. Neufeld, in opening, took you through termination rights in the contract to say, well, they couldn't have returned it. There wasn't an ability to terminate and, indeed, that doesn't arise until Section 10.1(g).

Contractually, that was right but that is not the only options available to the government, particularly on their position that Windstream's been fully compensated and there's no path forward.

We have seen many examples of terminations in this record.

TransCanada, the example I walked through with Mr. Lyle. The government made a political decision to terminate that contract when there was no contractual right. The OPA implemented it.

The same with a number of other greenfield sales. There was another of other examples. They passed legislation to terminate the White Pines project. They issued

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directives to terminate other contracts.

And so, if Windstream was fully compensated, they didn't have to keep the contract in force. There were means to terminate it. And there was, according to them, no damages. But Windstream would have had certainty as to what the status of affairs was and would have gotten its $6 million back.

PRESIDING ARBITRATOR MILES: Is there any factual evidence on the record, documentary or testimony, or that Windstream asked for the $6 million back or took any steps to try to renegotiate early termination to get the $6 million back?

MS. SHERKEY: No. Not in the post-2016 period. Because it was focused on moving the project forward and it was meeting and asking how can we do that, what can we do in that realm.

So it's the opposite. They had the obligation and they were trying to move it forward, but they're understanding that there was a path to do that. So they weren't looking for the early termination.

And if the government was

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saying there is no path, if the government was saying you have been fully compensated, don't incur project costs, don't take any steps here because you have no project, we say it was for them to clarify that situation.

PRESIDING ARBITRATOR MILES: And when you say the opposite, that's right, isn't it, on the facts, insofar as Windstream went to court to stop the IESO giving their $6 million back.

MS. SHERKEY: Yes, yes.

PRESIDING ARBITRATOR MILES: So they took affirmative positive steps --

MS. SHERKEY: Yes.

PRESIDING ARBITRATOR MILES: -- not to get their money back.

MS. SHERKEY: Yes. Well, took affirmative steps to preserve their project and the additional value, they say, should have been created, which ties --

PRESIDING ARBITRATOR MILES: And the consequence of that.

MS. SHERKEY: And the consequence of that ties up the 6 million.

Assuming the IESO would

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exercise its rights, right away, and it could have gone on indefinitely.

We don't know that hypothetical, if the IESO application was brought when the right would have been exercised.

They didn't have to exercise it. They just had the option to exercise it.

PRESIDING ARBITRATOR MILES: But Windstream knew, at the time it brought its injunction proceedings, that termination was imminent. That's why it brought the injunction proceedings.

MS. SHERKEY: The right was imminent but they didn't know if a decision would be made or not.

PRESIDING ARBITRATOR MILES: Okay.

And Canada never -- sorry, IESO never defended those injunction proceedings on the basis of but we are not going to terminate, don't worry?

MS. SHERKEY: No. They first said it was premature. We haven't exercised it. And then, when the parties reached the adjournment agreement for it to make that decision, that's

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when it was brought back on, with the decision having been made.

But, up until that point, the argument was you're premature.

PRESIDING ARBITRATOR MILES: Okay. Thanks.

And so, as Mr. Terry touched on, at Slide 64, the regulatory framework.

So the IESO contract is in force. Windstream never hears back from the Ontario clarifying the situation. The $6 million is held on to. The regulatory framework continues to envisage offshore wind, as the Windstream I Tribunal found. That continued after the award. That continues to this day.

There have been other amendments to the REA, but not to offshore wind.

And another point is that, in addition to retaining the $6 million security, Windstream's other applications, its AOR applications, are still pending. Nothing's been returned. Nothing's been cancelled.

Over on the next slide, 65.

Then, in addition, there's the public statements we went through in opening that

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are set out in Ms. Baines' witness statement. Ontario states research is being finalized. When asked if the project could be built, the government says yes.

So these all lead to the expectations, the understanding, as Windstream tries to move the project forward in this period, to the extent it could.

And then, what we have learned, in this arbitration, is that MEI has decided immediately, when it received the Windstream award, nothing further was required of it. It was not going to meet with Windstream. It was not going to take any steps.

And what we learned from Mr. Teliszewsky is there were no discussions before they made this decision. MEI wasn't meeting and said, hey, Windstream is trying to meet with us. Should we meet with them? Is a renegotiation of the contract something we should do? They have given directives in other cases. We saw the TransCanada example. There is the greenfield itself. There is a whole list of them in our evidence where they have clearly gotten involved in other contractual matters where they

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felt it was appropriate but they didn't have any such discussions in this case.

I have highlighted his evidence here on that point.

And, in fact, the commitment that was made, on February 11th, at the teleconference call, if we search over the page, as the chief of staff, he had no knowledge of this.

So there certainly weren't any discussions of whether there was an obligation on the government or what role that commitment has on this going forward. The chief of staff wasn't even aware of it.

And they not only decide, at MEI, that there is not going to be any dealings with Windstream. But, if you flip over the next page, they also communicate to all branches of the Ontario government; Premier's office, MNR, MOE, we see them all copied on this email.

We strongly suggest no political government representatives engage in dialogue with Windstream or their consultants/lobbyists at this time.

Then we have Ontario stopping

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to do research.

Research was the entire stated rationale of the moratorium. It -- Canada's position in Windstream I was that the moratorium was temporary. You saw the statement I just took you to that Ontario stated, after the award, when asked questions about the Windstream I award that was finalizing research.

Now, in this arbitration, we hear further confirmation that, in fact, this research isn't happening. There's no need to do it. And we say there's no credible basis for this.

And, again, this is all part of the circumstances that lead to the termination.

But when Canada, in this arbitration, says there's no need to do this research -- and they talk about, as well, in that paragraph where they say that, Ontario's energy needs in September 2016. There's no evidence before you on that.

There is no witness statement. There's nothing in this record that tells you why they stopped doing research. We just have the assertion that they have.

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We asked for documents to be produced on this. We don't have them. And, in fact, we have a document produced from a freedom of information request that says, given the new government's message on wind power, this is the Ford government who came in in June 2018. I don't think it's about doing more studies anymore.

So whatever rationale once existed for the moratorium seems to have been replaced by others.

And, ultimately, what this FET claim really comes down to is this failure to direct. Ontario's decision to not involve itself when we say it had made commitments to do so, that there was further value to be awarded and the government took no actions without any meaningful discussions.

Now, Canada's response on this is there was no need to direct.

Again, highlighting, in September 2016, Ontario was moving away from long-term energies. And, again, that's not the evidence before you as to was that was a motivation for the government.

Mr. Teliszewsky said that

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Ontario decided, after it received the award, there was nothing further required of it and they didn't have further meetings or discussions about it beyond informational updates.

So the evidence is not that the energy needs had any bearing on the decision.

Second, Canada says it's completely normal practice to refer parties to the IESO. That's what Ontario does and so it was completely reasonable here. The IESO is the contractual counterparties.

And we say there are two issues with this.

The first issue is over on the next page. This puts Windstream into a cycle of -- between MEI and IESO. These were not contractual issues with a contract. These were political issues that the IESO could not resolve.

The IESO did not make the commitments to Windstream. The IESO had no ability to talk about the moratorium, when it would be lifted, what its impact is. That was not the IESO's purview.

So the Ministry was sending Windstream to a party who could not address these

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political issues while -- and the IESO was saying we can't deal with those. Contractually, we are not going to amend your contract.

And so then the second issue, we say, with Canada's response on this is that it's just not true.

The Ontario government, in many instances, has used its directive power to involve itself in contractual relationships with other parties. There is significant evidence we have put forward that we can now confirm, in closing, is unchallenged.

Ms. Powell, I have excerpted her expert testimony here, explains these powers and why it would not be exceptional and she sets out a number of examples.

Mr. Smitherman does the same in his witness statement, as does Mr. Killeavy, who was cross-examined but not on these issues.

And, again, just in the interests of time, we have excerpted here examples of times they have involved themselves in other contractual matters and didn't say, sorry, you have to go to your contractual counterparty. We don't get involved in these things.

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And, in fact, one of those examples is Windstream itself when it was negotiating with the OPA, at the time, to sign the FIT contract and was asking for the extra year. The OPA said no. Windstream went to MEI. MEI didn't say no, we don't involve ourselves in these things. It went to the OPA. And said give them the extra year, and they did.

Slide 76 is confidential. What I propose to do, I think, just, with time, is I am not going to get too into the weeds of it. So I just propose not to put it on the page and talk at a high level, if that's suitable. We can see if we need to change that.

But, essentially, the point is it's the same slide I had in opening. It's detailed in our written materials.

The IESO's reasons for terminating the FIT contract all circle around the -- the Ontario government's conduct. Delay by Ontario government, in the moratorium, in the development of the project and the lack of direction from the government makes it very clear that it was because of the conduct of the government that the termination right arose.

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And this failure to implement the promise to freeze is, yes, a 2011 promise.

We say it was reiterated during the Windstream I hearing in what -- when you think, chronologically, of the events that lead to the post-2016 period, we have highlighted here the excerpt from the Windstream I award on what Canada's position was in the arbitration.

As well as, on the next slide, excerpts from the counter-memorial.

And, at the hearing, of times they made the statement about the contract being frozen, its ability to proceed when the necessary scientific research was completed and informed.

And, from the government's point of view, nothing prevents the Claimants from moving forward once the policy framework's in place.

So this leads to the breach.

We say there was no legitimate rationale for refusing to implement the commitments made. This wasn't about creating new value or a new project, sitting down to say let's come up with something brand new for you.

This was, we say, unblocking

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the impediments put there by the government. And that simple step of doing that would have had value creation recognized by Windstream I Tribunal that it was not awarding.

Canada says, well, we could have done that but we didn't have to do that.

And we say that obligation arises by virtue of the fair and equitable treatment that it is arbitrary, it is unfair to have made those commitments, to have recognized that there was still a path to further value, beyond what the Tribunal was awarded and blocking that from Windstream.

And then the failure to resolve the legal and contractual limbo for the period of time shortly after the moratorium was found by the Tribunal.

And then, with that finding, Ontario did nothing to change its conduct after the award. We talked through its failure to clarify the situation, to conduct legal research. It's holding on to this $6 million letter of credit, the AOR applications.

And we say this, like in Mobil, continues to breach its international

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obligations and its duties to perform its obligations in good faith.

The final point I will make on FET is a direct answer to your questions, which is you had asked, if you accept the limitation argument on some of the measures, but not all of them, what impacts does that have to your FET case?

Essentially, the FET case is B. That's the real heart of the issue.

So, if you remove A, we say there's no impact. It's still a background fact. Factually, the termination right arose because the contract remained in force majeure, the moratorium continued to apply. But the breach, the heart of everything is on Ontario's decision to take no steps to ensure the FIT contract was renegotiated.

So I hope that addresses your question.

And those -- those are the submissions on FET.

PRESIDING ARBITRATOR MILES: Very good. Thank you very much.

CLOSING ARGUMENT BY MR. TERRY (cont'd):

MR. TERRY: So I will be

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covering expro and damages and I will skip ahead on expro to Slide 96.

And, the part I am skipping, I already discussed in my opening, it's the sole effects point and also the vested rights point.

So this gets to the question of the application of CUSMA and the tests set out in Annex 14B of CUSMA.

And we have five arguments here.

First of all, we say this was actually -- this is res judicata from the previous Tribunal. Or issue estoppel from the previous Tribunal.

The argument was made not with CUSMA but with other similar provisions in other treaties, customary law and, for other reasons, that the Tribunal should apply this test. The Tribunal did not apply that test. They applied the sole effects doctrine instead.

So we would argue that that issue is already dealt with by the previous Tribunal.

And we have got, on the next slide, Slide 97, we show the arguments that were

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made in Canada's counter-memorial with respect to that issue.

The second reason, on Slide 98, is, just to be very clear, the CUSMA -- certainly with respect to claims being brought under CUSMA -- and, for example, there can be claims brought between the US and Mexico under CUSMA -- it's very clear that this test is applied through the treaties. And we have set that out on this slide.

But, here, we are dealing with a legacy claim under the NAFTA.

So you look to Annex 14C of the CUSMA and there's nothing there that indicates at all that the provisions that are set out in 14B, Annex 14B are applicable to legacy claims such as claims between Canada -- or from the US investor in Canada.

So, again, as we say here, if the state parties had wanted to make it applicable, they could have in drafting, in agreeing on language in the CUSMA in Annex 14C.

Third, the next slide, Slide 99, we say that Canada's not put forward evidence of state practice or opinio juris to establish

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that Annex 14B reflects the contents of customary international law and we set out, briefly, that customary international law, of course, requires state practice of opinio juris. State practice must be widespread and consistent and we just don't have that evidence from Canada.

The fourth reason, just on the next page, just looks to the jurisprudence on the sole effects and emphasizes, from this jurisprudence, that the intent, i.e. the character of the measure itself, whether it's intended to be expropriatory, is secondary and the focus is on what the effects, the economic effects on the investment are.

And that's, again, consistent, we say, that the test that's set out in the CUSMA should not be applicable in this case.

And then, finally, the fifth reason, on Slide 101, is that there's no broad public purpose exemption to expropriation in the jurisprudence. And, effectively, that's what Canada's trying to do, we would say, in trying to apply CUSMA to this case, is bring in the broad public purpose doctrine.

And, again, we have set that

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out on the next slide as well, 102 and 103.
So by way of -- those are the sort of preliminary matters on sort of what's required on expro.
Our argument, as I said, in opening is quite straightforward in terms of expropriation. We say that there was, to the extent the Tribunal did not find an expropriation of the FIT contract in the 2016 decision, clearly now, the FIT contract is gone.
Yes, I see you're about to have a question.
PRESIDING ARBITRATOR MILES: I was just wanting to check that your second to fifth reasons inclusive are all arguments that you put forward in Windstream I that led to your first reason?
MR. TERRY: I will just double-check and with my far more knowledgeable colleagues.
PRESIDING ARBITRATOR MILES: Are there any new arguments other than collateral estoppel?
MS. SHERKEY: Sorry, the -- your second and fifth reasons, in terms of this

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issue of the applicable test on expropriation?
PRESIDING ARBITRATOR MILES: No, I am sorry. I was catching up.
You had five reasons why Canada's test, on the basis of Annex 14B of CUSMA, should be rejected. The first was issue estoppel. And you had two, three, four, five.
Were two, three, four, five all arguments that you made in the first arbitration?
MS. SHERKEY: Two was not because there was no CUSMA. So, in terms of the actual direct applicability, no.
And third is kind of tied to that. Canada is now arguing that the CUSMA is reflected in customary international law.
Four and five were before the Windstream I Tribunal.
Five, in terms of police powers, there are some new authorities there that have come out more recently but the argument is the same.
PRESIDING ARBITRATOR MILES: That's helpful. Thank you.
MR. TERRY: I would like to go

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to Slide 105.
And, again, as I said before, our expropriation argument is straightforward.
We say that value has been created subsequent to the award. We provide the examples, as you have heard, in paragraph 105, about the costs that were incurred with respect to this issue.
And we later on, in the damages, have a slide that sets out Secretariat's determination of the costs incurred and also in response to your questions about -- your question about the incurring of those costs from the day of the hearing versus the date of the award.
So I will deal with that now, if that's okay.
CO-ARBITRATOR MCLACHLIN: How do you link the expenditures to the creation of value? Value is usually measured on what you get in the marketplace.
MR. TERRY: Yeah. We rely in this on Secretariat's report where they include project costs and general principles of damages were project cost, sunk costs are included as value in a valuation of a project.

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So there's, in the damages valuation, as we know from investment arbitration cases, is often Tribunals will choose sunk costs as opposed to full damages based on either comparables or DCF.
So that's what we rely upon.
CO-ARBITRATOR MCLACHLIN: Thank you.
MR. TERRY: All right.
PRESIDING ARBITRATOR MILES: Is that right? That's the second time your damages case has taken me by surprise this morning. The first time was when you said your primary damages case is comparables, not DCF. I now understand that to be your position.
But are you saying that's still not the case on expropriation? Your primary damages methodology for expropriation is the investment costs valuation methodology, not market comparables and not DCF?
MR. TERRY: The issue and, frankly, to be completely candid, I would be pleased if the Tribunal has a different perspective in this.
But we have thought long and

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hard on it and the difference is, with the fair and equitable treatment, in that context, as we say, and you have heard the argument that the value that was identified by the Tribunal, the additional value that could be created, we say there was an obligation to work to create that.

In the context of an expropriation, the question is, at the date of breach, what was -- what was the value that was expropriated, that particular time.

So we are in, as I say, we are in the real world as opposed to the but-for world there. And if we -- in the expropriation context, at least as we have analyzed it to this point in time, we can't make out an actual obligation in that context on the Ontario government to have worked with us to create that breach.

That's, as I say, that is, candidly, where we, as far as we have been able to go in terms of the expro argument, in this case, and that's why we are relying on sunk costs.

PRESIDING ARBITRATOR MILES: So I will try on how I think I understand it but I could be wrong.

In the International

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Valuations Standards, there is three primary different methodologies for valuing.

There's investment costs, so what you spent. So if you lose a house, what did you pay for the house.

Then there is market comparables.

And then there is discounted cash flow -- or there is income assessment which is discounted cash flow is the program that we use to get an income assessment.

I was just looking back to Secretariat to see if they had actually modelled the investment costs approach at all.

They certainly focused on the information and a lot of the cross-examination was on the information that would comprise an investment cost methodology.

And we know that the first Tribunal used what it called sunk costs as a reality check, in inverted commas. So we have all of that.

But the question -- and perhaps it doesn't matter. And perhaps Canada won't object to it.

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But I had not read those Secretariat reports as putting forward a valuation on the basis of an investment costs methodology.

Maybe they did, but I am just.

MR. TERRY: I think it is fair to say that, in putting forward that information, they weren't doing that on an investment cost methodology. But they did calculate the information.

And you heard, in cross-examination, what they did with respect to it. So the information is in evidence in that respect.

PRESIDING ARBITRATOR MILES: Okay.

And the reality is we, other than to test the, perhaps the accounting approach, the legitimacy of the accounting approach of treating particular invoices or costs incurred or costs pending or contingent costs treatment, it's not -- we don't really need a valuer to say what was spent. It's not like running a complex discounted cash flow, anyway.

I see, from their report, that they do have income approach and market approach.

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They don't have a section setting out the primary report on the sunk costs approach to expropriation.

Mr. Neufeld, are you going to -- I am not asking you to and I am hoping you won't.

But if this is a change in the way that -- if you understand this to be a change in the way the Claimant is putting their case, are you going to raise any objection to -- oh, Ms. Squires.

Are you going to raise any objection to that?

And, before you do, I just say I am comfortable that we have all the underlying information for this. I just don't think it's what the valuers have done.

MS. SQUIRES: I think it's fine. I think we are comfortable in responding to it as well.

PRESIDING ARBITRATOR MILES: Okay. That's perfect.

Thank you. And thank you for being very, very clear about that. That's unbelievably helpful and, frankly, makes a lot

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more sense. So thank you.
MR. TERRY: Yeah. And just in case there's any confusion, because, of course, what we have, in 2020, from an expropriation perspective, is still an unfinanceable project. Whereas, in the FET context, we have, if there's an FET breach, an obligation to work together so we can have the but-for world.
And perhaps you are going to tell me I am running very short on time.
PRESIDING ARBITRATOR MILES: He is like Dr. Death, isn't he.
José Luis has just said five minutes left.
And I didn't advertise it yesterday but we do have a little bit of wiggle room and this has been unbelievably helpful. So press on.
Do you have roughly a feel, without rushing?
MR. TERRY: I could probably do everything very comfortably in about 15 minutes. I might be able to do it a little shorter than that.
PRESIDING ARBITRATOR MILES:

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Don't do shorter than that. That's absolutely fine. That will only put you ten minutes over.
So you aim to do that and, if we have questions, we will just add them on top but keep a careful record so we give the same to Canada. Thanks.
MR. TERRY: If we turn to the next slide, and you will have seen this slide already from our opening. This goes through the various types of work that people carried out.
I think, from the evidence and the questioning, the Tribunal is aware of this work and the questions that have been raised with respect to it so I don't propose to spend time on this slide. It represents work carried out.
There was a point made about the project description report and this next -- these next two slides respond to that and, remember, Ms. Baines was being cross-examined by Ms. -- I think it was Ms. Dosman.
MS. DOSMAN: Correct.
MR. TERRY: On this point and the question was what exactly was the project description report and that it wasn't an actual application.

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And, at Slide 108, we set out here that the way that the, the regulations work -- and this is a site from the MOE, Ministry of Environment, tech bulletin, the draft project description report. The report that was filed. It gets submitted to MOE to identify Aboriginal communities. It's made available to the public the step prior to a formal application.
So you have to do this first before you have to get to a REA application.
Slide 109. This is just in the event that you do want to --
PRESIDING ARBITRATOR MILES: Sorry, just so I understand the regulatory process in Canada.
If, while you're undertaking that process, nobody else can come in on your area and duplicate that process. You have your dibs?
MR. TERRY: Yes, that's correct. That's how I understand the evidence.
PRESIDING ARBITRATOR MILES: Okay. I don't think there's a dispute about that.
Okay. Thank you.
MR. TERRY: On Slide 109, in the event you do want to consider a reasonable

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investment-backed expectation with respect to determining whether or not expropriation's occurred in this case, we have listed here some of the examples in the evidence that would support investment-backed -- reasonable investment-backed expectations.
CO-ARBITRATOR GOTANDA: And here is the question on reasonable investment-backed expectations.
So doesn't it go to the actual investment itself, as opposed to some of these, after the award, they promise the research would be finalized.
In terms of what I understand reasonable investment-backed expectations, maybe you can tell me what your understanding is.
But my understanding, for a reasonable investment-backed expectation, is making the investment. It was reasonable because it relied on X, Y or Z.
Post the award, when they don't -- the government stated that it would be finalized, is that part of a reasonable investment-backed expectation at that period of time? Are you following my question?

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MR. TERRY: I am and I don't think, I don't think my understanding of investment-backed expectations is different than what you're describing there.

In terms of -- our argument here is that they are making an additional investment -- and we have talked about the project-related costs being incurred over that period -- in reliance on what they're -- what representations they are hearing from the government, both, you know, direct -- and I won't go over the evidence Ms. Sherkey has gone over. But statements being made or the lack of any statements saying you're done.

And so they are relying on that to continue to carry out their work related to the project.

That's how I would characterize it in this particular circumstance.

CO-ARBITRATOR GOTANDA: Thank you.

MR. TERRY: And the next slide, Slide 110, the character of the measure was expropriatory.

In case, again, the Tribunal

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is concerned about that issue, our argument is that these measures were expropriatory in nature. They weren't sort of general regulatory measures. It was a particular issue that related, specifically, to Windstream and how it was being treated here and when -- and, in the discussion of the expropriatory measures, again, our argument would be that you don't have to get here but it's a distinct situation where we don't have to establish that, in this particular case, that -- it would be to the extent that you apply the CUSMA definition here, we would say the steps that the government took, in this respect, focusing specifically on Windstream and specifically not complying with the commitment, would be what the drafters of 14B would have in mind as being specific action taken with respect to specific investor as opposed to general regulatory action that have a public purpose.

PRESIDING ARBITRATOR MILES: So the Tribunal in Windstream I -- granted, not looking at CUSMA.

But the Tribunal in Windstream I found there wasn't expropriation because there hadn't been a full taking.

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MR. TERRY: Yes.

PRESIDING ARBITRATOR MILES: Remind me. Did it make any affirmative findings as to the other necessary elements of the cause of action of expropriation?

Would it have been an expropriation but for the not an entire undertaking or did they not do that analysis?

MR. TERRY: My friends can correct me if I have it wrong.

But, essentially, they did set out a test, the sole effects test, and then they went on and made the determinations that we have gone over in detail in the paragraphs with respect to prematurity, you know, and with respect to the substantial deprivation point. And --

PRESIDING ARBITRATOR MILES: They sort of went to end game. They went from, here is the test. You failed at the last hurdle. But did they actually make a decision on the first hurdles?

MR. TERRY: They didn't -- first of all, they didn't make any determination -- they didn't go through, say, the aspects of expropriation as to whether it was for

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a public purpose and all those matters.

They didn't make a particular determination on whether police powers applied or not. If that's what you're getting at.

PRESIDING ARBITRATOR MILES: It was because I was wondering if there was any collateral estoppel, any issues that we were estopped on that, on the way up to no taking. But it -- I don't think, I don't think there is, but.

MR. TERRY: I don't think so either. If my friends have a different view, we can reply later this afternoon on it.

PRESIDING ARBITRATOR MILES: Just one other, just trying to understand these investment-backed expectations.

Would you say the investment that backs the expectation are the costs incurred for 1 to 7 on page 106 of your slides, and then the expectation that arose out of that investment are the expectations on Slide 109?

MR. TERRY: I would agree in general. I just want to be careful not to -- for example, in terms of all the costs that we claim, based on the Secretariat report, would be part of the costs that we would say would relate to the

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work they did.
Now, you have heard some of costs, the interest on the letter of credit and those sort of matters, I am not sure if they fit squarely within these examples so I just would make that caveat.
I think on a brief examination of 109, I think you are correct with that as well but, if I could reserve to come back in case there is anything else that I find.
PRESIDING ARBITRATOR MILES: Thank you.
MR. TERRY: So if we could move now to damages.
We do have one Slide also on 112, but this is just -- people will be familiar with this, these provisions.
These are the familiar provisions in Article 1110 about unlawfulness and we have the argument there as to why the expropriation is unlawful in this case.
Of course, just the very fact that compensation is not paid is, on its own, enough to make it unlawful.
If we can go, then, to damages

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and start at Slide 116.
Just very briefly here.
This is jurisprudence on the test about making reasonable assumptions in the but-for world.
I won't go over this. This is well known jurisprudence.
And, on Slide 117, similar jurisprudence. To estimate damages, the Tribunal is required to make reasonable assumptions to assess the appropriate but-for scenario.
This entails conjecture as to how the parties would have evolved but-for the actual behaviour of the parties.
But that flexibility, reasonability, understanding that it requires -- entails conjecture is accepted in the jurisprudence when valuators, such as Secretariat, go about determining their valuation in the but-for world.
And, sorry, that's at Slide 117, the next slide over.
PRESIDING ARBITRATOR MILES: Let me ask my question.
You might be answering it and

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I might be jumping ahead.
But I understand that the but-for process, which we primarily use when we are applying DCF or market comparables, is to put you in the position had the breach not occurred, or make you whole.
And that is the quantification exercise, so what's the differential between the actual world and the but-for world.
That's the damages folks' job.
MR. TERRY: Yes.
PRESIDING ARBITRATOR MILES: The legal job is did the alleged breach cause that loss that the damages experts have valued.
And so the existence of a but-for and a differential is not the answer to causation; right? There's a step you need to establish, as a matter of law, in the middle.
MR. TERRY: Correct.
PRESIDING ARBITRATOR MILES: And that's what you are going to do.
MR. TERRY: Yeah, I will speak to that now.
PRESIDING ARBITRATOR MILES: Okay. Great.

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MR. TERRY: In terms of fair and equitable treatment, I think you have heard it already from Ms. Sherkey in fair and equitable treatment.
Our argument is that the breach, in this particular case -- and, please, forgive me if I am using looser language than Ms. Sherkey was using.
But the particular breach, in this case, is the failure of the Ontario government to intervene or to take steps in the way we have described, to cause the IESO to renegotiate the contract, the FIT contract in this particular case and allow the project to proceed.
And this is -- and our argument, of course, as you have heard more eloquently from Ms. Sherkey, is that that's in accordance with the commitment that had been made by Ontario. And Ms. Sherkey read you the particular transcript, the commitment to -- while all other offshore wind projects were not being allowed to go ahead, the Windstream I was being allowed to go ahead.
CO-ARBITRATOR MCLACHLIN: That's a breach so we have got to get to the

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connection. We are talking about the connection here.

MR. TERRY: Yes. So that's the breach.

And the connection is that, that particular breach, because the IESO was not directed by Ontario -- and Ms. Sherkey went through all the ways in which the IESO can be directed, both formal and informal, to take those steps to renegotiate the contract. The contract was then terminated because, of course, it had come to the expiry date.

PRESIDING ARBITRATOR MILES: I think it's just made sense to me now.

So Canada, you say, breach of FET, Canada's omitting to intervene, so it's a negative act, Canada's omission in intervening is a breach. We need to decide whether or not that's a breach.

If we decide there is a breach, your causation is, but-for their failure to intervene, the IESO would have done something different?

MR. TERRY: Yes. And, specifically, the omission was the omission to

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direct the IESO to uphold the commitment.

So we say, in that causation, it's very direct. The IESO is being told to do something by the government.

PRESIDING ARBITRATOR MILES: Mr. Neufeld, just when your team gets to it. It would be interesting to understand, as at now, in closing, if that's in dispute, if we were to find that the failure of Canada to intervene and direct the IESO were a breach of FET, is causation, at that point, in issue?

Ms. Squires, I should be talking to you.

I know, in your opening, you spent an awful lot of time on Biwater Gauff and you were, going to their point, there can't be causation if there is no loss. I don't think that's a universal view on all awards and certainly not in the dissent in that award.

But, leaving aside that argument which we will need to consider because you've pleaded very eloquently on that. But, for that, is that causation actually in dispute.

And, sorry, my penny is dropping a bit late on this point.

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Perhaps that is why you focused so much on Biwater Gauff. Because that point really can't be disputed. It doesn't mean their FET claim, necessarily, succeeds or gets close to succeeding, there's still the breach needs to establish.

But, in that causation, had the government intervened, would the IESO have done what the government directed it to do.

MR. TERRY: Yes. That's -- yeah. That's exactly right. That's the causation link.

So perhaps I will turn to the next slides which gets, as you say, to the experts' job of the but-for world. They are instructed to assume.

So there are some issues raised which we are just responding to in the but-for context and explaining why -- well, explaining the support for these and for the counterfactual and the but-for world.

First, the IESO would not have had the ability to terminate the FIT contract. And, again, if Ontario had upheld its commitments to Windstream, it would have directed the IESO to

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renegotiate or amend the FIT contract.

Secondly, the moratorium would have been lifted and we note that the -- a moratorium, just by its definition, is temporary but it was always certainly advertised by Ontario, at the time, as being temporary. And, you know, there's lots of evidence in the record in both proceedings on that.

The stated premise of the rationale was that it was temporary measure while the government conducted scientific research, as you have heard about.

And this was also canvassed before Windstream I. So applying reasonable assumptions in but-for, by definition, this measure cannot last and must be lifted.

Then, if we go to the next slide, we had issues that were raised about technical feasibility and whether or not the project would have been able to achieve commercial operation. This summarizes some of the relevant evidence here.

There were questions, by the way -- it's important to emphasize here that, at the previous hearing, Canada put forward its own

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set of technical experts to match Windstream's technical experts.

That wasn't done in this particular case and, of course, Canada didn't -- chose not to cross-examine Mr. Irvine, the primary technical expert for Windstream.

And, in this particular case -- and so, you know, in our submission, the best evidence is the experts on this one. There were questions put to other experts to damages experts, for example, to get information with respect to these issues.

But, if Canada had wanted to take these issues on squarely, in my submission, they had the opportunity to call these experts.

CO-ARBITRATOR MCLACHLIN: Can I ask you a question that's been bothering me. Perhaps it shouldn't.

But your case is that there should have been a renegotiation.

Had there been, there would have been a lot of possibilities. One would have been that the tariff price would have been changed, which may be a reason why you're not emphasizing the DCF at this point so much.

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But would it have affected -- if the price had been reduced, for example, what would it do to your comparables?

MR. TERRY: Yeah, I think, again, I hesitate because I am not an expert on this and I don't believe Secretariat gave evidence on that particular issue.

But the assumption would, presumably, be that, if the tariff price would lower, the project value would be lower. I mean, that's my common sense approach.

CO-ARBITRATOR MCLACHLIN: I just wondered if you had actually proved your case to the balance of probabilities on that question of what would have been renegotiated and how that would have affected damages.

So, in that general sense, you say you have established, on a balance of probabilities, that the comparables or the DCF figures put forward would have been those that would have been achieved on a renegotiation?

MR. TERRY: Well, what we have done with the experts -- and we certainly considered and the experts have considered this issue. Of course there's no, there's no

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particular evidence and it's difficult to make assumptions about what would happen in any particular negotiation in the future.

The experts have done sensitivity analysis with respect to certain issues. They have given ranges of damages.

You also, of course, have -- I will be getting to it but there's indicia of other -- other indicia that's useful for comparables analysis.

So the answer is we don't have and, of course, if the Tribunal directs the experts to do a sensitivity analysis on that, we don't have that evidence right now with respect to what would happen, what would be likely to happen in any particular negotiation.

We have the evidence that's provided with the experts and there's flexibility and sort of optionality that's provided.

So, in that respect, I don't -- again, Ms. Miles yesterday, mentioned a hospital pass. I mean, I appreciate, to some extent, that we would be looking to the Tribunal to use the evidence to -- if you were to go to make a determination of a breach and being do that

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to rely on the evidence, but we don't have that particular evidence in front of you.

CO-ARBITRATOR MCLACHLIN: That's very helpful because I just wanted to know what we are working with here.

MR. TERRY: Sure.

CO-ARBITRATOR MCLACHLIN: Thank you.

MR. TERRY: And we do, we have actually put these references in in a different context but we do refer, later on, at Slide 137, to some examples of cases where Tribunals have, as they are working their way through damages and they decide they are taking a different path and want more evidence, certainly Tribunals have directed the parties to provide additional evidence on that in certain circumstances.

I am not saying you should do that here. I am just using, providing examples where that's occurred.

PRESIDING ARBITRATOR MILES: Is the Econ One damages decision out? Or was that just the merits decision?

MR. TERRY: I believe -- I -- this is just from personal knowledge. I am not --

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my colleague who was pulling this case, Natasha Williams, I don't know if you heard from yesterday.

MS. SHERKEY: I just did a quick look at italaw and I only see the directions on quantum and I don't see a decision yet.

PRESIDING ARBITRATOR MILES: Yes, I don't think the decision is out yet.

CO-ARBITRATOR GOTANDA: There are cases -- and correct me if I am wrong on this -- in the record that don't have comparables that don't have an FIT contract.

MR. TERRY: Yes, there are certainly examples of those, yes.

CO-ARBITRATOR GOTANDA: Yes.

PRESIDING ARBITRATOR MILES: Just coming back to Justice McLachlin's question which I think puts the finger on the button.

So first on the -- as I understand the parties' quantum experts, Dr. Guillet says, in an early stage development, tariff price is irrelevant. He is pretty clear about that.

He says that it's -- the only two factors are the price paid on the sale of an

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early stage development, and the wind capacity.

So he gets his multiplier of .6 using those two factors. So those are the only variables in his equation.

So tariff price would not come in. Secretariat disagree with that. And this is the discussion about the New York lease cases is much higher tariff price because they are attached to those leases and they're outliers that Dr. Guillet chooses to exclude.

So we have that information so Claimant says tariff price affects market comparables valuation. Respondent expert says it doesn't. Everybody accepts tariff price has to impact a DCF because it's one of the main inputs into a DCF.

So I think, unless someone corrects me in the course of today, there's -- the data we need is clear on that.

What I wanted to come to, relatedly, is the next step.

If the breach is the omission in intervening. And the loss is the loss of a renegotiated, reactivated FIT. You would say -- and this is where we get to the overlapping but

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the entirely different but-for purposes.

The but-for on causation, the legal question, but-for the omission, there would have been a reactivated renegotiated contract, is your FET case.

And then what the experts say is, in their but-for world, here is what that reactivated and renegotiated contract would have been worth, in a but-for world, less the real world.

So they also use but-for but not in the legal sense.

Then they -- what they do is they back that. They take Secretariat, certainly on both -- well, on their DCF, for sure. They value the entire project. And then they discount it in different ways, either using the IRR with the structured transaction approach or they discount it with the haircut, with the 55-60 percent haircut.

And that's where they take whole lifetime value of this project back to what you're actually saying you lost here, which is not a whole contract but a reactivated and renegotiated contract.

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So wouldn't you say that, in the way they have modelled the quantum with the discounting optionality of either IRR or if we accepted the IRR were high enough or the haircut, that that accounts for impact that we may otherwise call break in the chain of causation.

So you might have had a renegotiated contract but you were never going to get to full project, that you have already accounted for that risk if you might not get that.

To put it another way, insofar as all a renegotiated reactivated contract gives you is a chance to run this project, that discounting for that probability of succeeding in that chance is already in your damages model, you would say?

MR. TERRY: Yeah. And I think, I mean, there is one thing also, of course, it's important to clarify here.

If you look at what the commitment that was made by the government to Windstream was to keep the project whole, so to allow it to proceed once the moratorium was done, the science had been done.

So, yes, we do say they should

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have directed the IESO to renegotiate and reactivate the contract.

But our case, I mean, at its highest, in this respect, is that keep whole means maintain the same tariff price, maintain the same contractual provisions.

Now, if you understand what I am saying there.

So, you know, that is, essentially, I think the starting point for the Secretariat model.

Certainly, it's the proposition that Justice McLachlin has put forward that, instead of the government making it whole, that what might happen instead, in the but-for world, is a renegotiated contract and some change in the tariff price or other provisions in the contract is certainly, you know, it's certainly within the realm of what could occur.

Secretariat has done its discounting and its analysis on the basis of the project had been kept whole.

I think they have described, in their report and in their evidence, the very sensitivity analysis they have done in response to

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certain issues that have been raised.

But, and I look at my colleagues and experts in the back to confirm that I am not misstating anything here.

But Secretariat has not, has not done an analysis that tries to, for example, to look at the various ways in which a contract might be negotiated and the various sensitivities that arise on that.

And that's, that's, I guess, where I point to some of the case law, if the Tribunal wants to have more work done in that particular area that you can use in terms of your deliberations, there are precedents for doing that.

CO-ARBITRATOR MCLACHLIN: Thank you.

PRESIDING ARBITRATOR MILES: I think what I was just trying to get to was because of the discounting, whichever approach you take, the evidentiary burden is not quite so high that the Claimant need show there would never be any regulatory impediment ever on this project. There would never ever be a technical issue or a construction issue on this project.

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That's all the risk that's built in in that haircut or in their IRR. The reason why an investor would expect a much higher IRR much earlier in the project is because all that uncertainty is still out there.

And unless there were, you know, a complete guillotine drop of, you know, you just can't build windmills this big or this small, then that risk is what you say you factored in.

And the question for us, if we ever were to get there, is have you factored in enough risk. But that's not a causation point. That's a valuation point.

MR. TERRY: Exactly, yes. I would agree.

I was on Slide 119 and I don't need to spend a lot of time on this one.

But if I could stay on Slide 119, briefly.

Is just that we do have the evidence about technical feasibility that comes from the experts, Wood and Two Dogs, that the principal who is at Wood is now at Two Dogs. That's why you see it's a different company name in the reference to Two Dogs.

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And just, you heard yesterday from Dr. Guillet he would not describe himself as a technical expert. And so there's no technical expert that's been brought in to rebut or respond to what Wood and Two Dogs say.

And, and we have also the evidence, the regulatory evidence, again, from Sarah Powell who testified in the last proceeding and provided witness statement in this proceeding, about the permitting requirements here and her conclusion that it was commercially reasonable for a developer with a FIT contract to assume it would obtain AOR status in due course.

With respect to the AOR status also, go to Slide 120.

And I referred to this in opening so I will be brief here.

But we included some further references here and some excerpts from the Tribunal's decision just to make the point that the site release issues and the AOR release issues, in our submission and my submissions, it was considered this way by the Windstream Tribunal, were really part and parcel of the moratorium and the ambiguity and the lack of

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clarity in the law that the Tribunal was dealing with there.

So it's reasonable, in our submission, for the experts to assume that, in addition to the moratorium being lifted, if it were to be lifted, then the AOR site release issues would also be clarified by the government and the project would be able to proceed.

Now if I can move now to Slide 122. And I will be brief. We have included some transcript references.

First of all, with respect to Secretariat properly applying valuation standards, you heard this evidence from them.

The one point I would add here is that -- and, President Miles, I think you had raised a question about the CBV provisions.

There is, in paragraph 3.6 of the first Secretariat report, they say that their valuation was proposed to be a level of comprehensive valuation report under the CBV and it's generally consistent with International Valuations Standards.

So I just give you that reference.

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So we have Secretariat, in our submission, properly applying valuation standards, choosing an appropriate period for comparables, making, we would say, that the proper determinations about hindsight and valuation analysis that you can't be using hindsight, which, we would say, is well established by law and by valuation principle.

And then, on the next slide, their assumption and contingent consideration must be included in a fair market value assessment. We obviously had a lot of discussion on that.

And then, for market approach, you have to select appropriate -- or you have to select comparable transactions.

And then multiple valuation methods and reasonability checks should be considered.

So very much consistent with damage valuation principles.

In the next set of slides, we set out why, in our submission, Dr. Guillet did not apply valuation standards. And he said he didn't apply any valuation standards. He admitted using hindsight.

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He didn't provide a rationale for his period of time for comparable transactions, other than saying that he just chose all -- he says -- I asked was that a particular date that he had chosen:

> "That's the earliest transaction for which I had information."[as read]

And my understanding from him was he just provided all the transactions he was aware of and put them in his tables.

He -- as we, on Slide 125, he did not include contingent consideration even when it was included in PwC auditor's report that we reviewed.

His early stage table includes transactions that are not comparable and that's, we would say, is a floating wind turbine transactions.

And then, on the next page -- and I don't have to belabour this. There were various issues during his cross-examination which came up with respect to stages of development and certain inconsistencies, I would submit.

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On the next page, Slide 127, he made errors in his calculations, all of which, it's important to note, they all understated his valuations.

And he did not check confidential data for errors and we will see the -- you can see, on the right side:

> "Did you go back and check your confidential information to see whether you made similar errors?"[as read]

I asked that question after the point with Secretariat.

And he said:

> "I don't believe I did, no.
>
> "QUESTION: And how exactly can we or the experts validate?
>
> "I guess you can't."[as read]

Just, in response, Professor Gotanda, to the questions you had raised with Ms. Sherkey about responding to Canada's point

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about res judicata with respect to the Tribunal's use of confidential transactions.

The three confidential transactions which the Tribunal relied on for their earlier -- for, in the first report, were from 2009, 2011 and -- well, there were two from 2011 and two from 2009.

And my -- our submission is that those are -- because they are so early with respect to the exercise you engage in here in 2020, they should be excluded just on the basis of not being in the comparable range.

I believe my friends from Canada -- I saw one of their slides and they seem to be circling a set of comparables that were later than that. And I am not sure, I don't know whether Ms. Squires wants to enlighten -- let us know now or come to it later, but I am not sure Canada is even relying on those particular comparables from Dr. Guillet now.

But, in any event, I would say there is a basis for you to exclude them and not rely on them just on the basis of comparables principles.

As you know, they were -- in

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addition to those three, there were ten others in the early stage report and five in the late stage report, and none of those were considered by Dr. Guillet previously.

CO-ARBITRATOR MCLACHLIN: Can I ask you this.

Did the Windstream I panel consider confidential comparables?

MR. TERRY: Sorry, that was what I meant to be addressing right there.

And I apologize if it's getting late in the submissions. Yeah, those are the ones I was discussing.

CO-ARBITRATOR MCLACHLIN: That is what you are discussing.

MR. TERRY: Sorry, I apologize if I was unclear there.

Those are the three confidential comparables, 2009 and two from 2011.

CO-ARBITRATOR MCLACHLIN: Okay.

CO-ARBITRATOR GOTANDA: I wonder if you wanted to elaborate any more on Canada's assertion that we are bound by, under preclusion principles, on using undisclosed

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confidential information.

They do note here, though, that, despite that, you said you are severely prejudiced by it.

So do you have anything to add to that.

MR. TERRY: I acknowledge, I think as discussed before, that I am not sure there's international, you know, investment case law or international jurisprudence on the point. There may be domestic law jurisprudence.

But, just aside from that point, you, as Tribunal members, are dealing with a different valuation date, a different set of comparables, first of all. And making your own determination, as CND expert, as to whether or not you want to rely on this confidential information.

All those, in my submission, are factors that, again, subject to looking at whether there's jurisprudence and what the jurisprudence says, since this came up recently.

But those are factors that would, in my submission, mitigate against applying a strict set of res judicata principles to those preclusion effect to those -- the determination

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made by the previous Tribunal.

The other thing I would that's important in this context is there was no -- in this particular hearing, there were some obvious mathematical errors that we went through that were -- that I was able to cross-examine Dr. Guillet on.

And, as part of that, I was able to find out whether he went back and checked his confidential information. That was not information that we -- you know, there were no errors at that time. Those questions didn't arise in the first, in the first hearing.

So there's additional information that's available to you in making that determination that wasn't available to the Tribunal, previously.

As I said, we were happy over the break or subsequently to see if there is actually case law that's addressed here.

Because I must admit that I don't have expertise in that particular area, in the international context, as to what would arise when the same witness is being -- has had a particular determination made about their evidence

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in this sort of context.

The key point I would focus on, though, is that those three confidential data points that were relied on by the previous Tribunal, there is another basis for excluding them here completely. So I don't think you have to deal with that particular issue.

And --

CO-ARBITRATOR GOTANDA: I am not so sure. Because, if I understand what Canada is saying, is it's broader. It's what they are saying is the approach. Not just the particular cases, but the approach itself, we are bound by that.

And I could be over reading that and they certainly will have a chance. But I wanted to give you a chance to respond to that and tell us what your view is on the approach of using undisclosed confidential information.

And whether we are bound by that, as a matter of preclusion, and then should there be an exception, is there an exception to any of the preclusion rules sort of apply in your argument here?

MR. TERRY: You heard earlier

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about in terms of whether Tribunal members should accept this sort of information and you heard what the standards were with respect to that issue, that information that Ms. Sherkey put forward.

I mean another factor to consider, in this particular case, is that the acceptance of the confidential information, I would submit, is bound up in the Tribunal's assessment that there were reliability of the expert overall.

There may be circumstances where a Tribunal decides it will not accept confidential information because it can't be tested and, for all the reasons set out in the standard, there may be circumstances in which the Tribunal decides that it's going to accept the confidential information and it's very hard to separate, to separate their determination on that, as a matter of principle, from their determination as to the matter of impression from the witness.

And, in my submission, it's -- you have the full ability to reach a different conclusion than the Tribunal with respect to the reliability of Dr. Guillet's evidence.

You have seen him dealing with

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a different set of transactions in a different context.

And I guess I can't say it more clearly than, as a Tribunal, you're able to make your own determinations with respect to how much you want to rely on the evidence of a particular expert and you're not bound by the Tribunal making a determination.

CO-ARBITRATOR GOTANDA: I will put it and you can decide if you -- do you believe that the Tribunal, relying on an undisclosed confidential information in the previous case, from your view, violated -- not from our view, we have not opined on anything -- violated your due process rights so fundamentally that a subsequent Tribunal shouldn't rely upon it?

That's the issue, or one of the issues.

MR. TERRY: We certainly made that argument before the previous Tribunal. The Tribunal did not agree with us. I think we would maintain the position that we had then. That we think our position is a better position.

But I just want to make clear, because I know it's come up a couple times here,

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we are not suggesting that, somehow, the previous Tribunal's decision should be revisited in any respect.

CO-ARBITRATOR GOTANDA: No. And our job is not to say they made a mistake or correct any mistakes or not follow them because of mistakes.

But, yet, there's certain principles that flow from an argument that we want to be very careful about with respect to due process claims.

MR. TERRY: Then if we could move on, we get to the losses.

And if I could go to Slide 130.

So this is Secretariat's evidence, just summarizing it. And I think we all understand the but-for counterfactual they were using and we are focusing on comparable transactions here.

We haven't put DCF in here but, as you heard, DCF is a check rather than the primary valuation method we are putting forward.

And this is the ten comparables were in their main report and you saw

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that they focused on four, in particular, in their presentation.

And those, of course, set out a range and we have discussed, I think, already the basis in which the experts came up with those ranges.

Now, if we go to the next page, Slide 131.

All right. We are not moving on the slide but -- sorry, this is a confidential slide because it includes information with respect to Mr. Lyle.

PRESIDING ARBITRATOR MILES: Do you want to talk about it?

MR. TERRY: Yes.

PRESIDING ARBITRATOR MILES: Okay.

Alonso, can we please go into confidential.

--- CONFIDENTIAL TRANSCRIPT COMMENCES AT 12:38 p.m.

MR. HAUSER: Confidential mode, Madam President.

PRESIDING ARBITRATOR MILES: Thank you very much.

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MR. TERRY: Just briefly, these are other -- we call them other indicators of loss here. But evidence the that, in our submission, can also be taken in account by the Tribunal that came out during the evidence over the last several days.

First of all, you will recall, in Dr. Guillet's report, Table 5 of his second report, when he applied the corrected numbers, corrected from his first report, there was a slide there that had the weighted average of his early stage transactions, in the pre-2015 period versus the 2015 to 2020 period, and that showed 3.7 times increase in the weighted average.

So and I recognize, in that slide, that he also had a project by project comparable, not with the weighted GW average. I think that was a different increase, from I think 0.6 to 0.7. So more significant increase in his weighted average.

So you can see the number you get from that.

This is also the evidence that's confidential from Michael Lyle, refers to the Ontario settlements paid out.

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You will recall that, when he was examined, he stated that there were reports of 231 million being paid to the various non-wind, primarily solar projects that are being cancelled,

[redacted]

And, again, we are just describing this as indicators of loss.

Then we also have the third bullet. You will recall that Secretariat had evidence with respect to a check where they look at the costs incurred, apply a multiple to that.

In the LEM transaction, they found that there was a multiple of 9.4 times costs incurred.

So, again, if you apply that to the context of costs incurred in our case, the

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number is 260.38 million.

And then there's also -- the number was, you will recall you asked, I think, Madam President, Secretariat to do an alternative calculation using -- or one of the Tribunal members did, using a 20 percent IRR. They did that and they came up with 147.3 million.

PRESIDING ARBITRATOR MILES: I was just wondering why you squared the factor at the same point but it's a footnote. It threw me.

MR. TERRY: And then we set out below, again, the evidence from the Secretariat with respect to applying a 20 percent IRR.

So, again, optionality here, as the Tribunal considers the damages evidence and what to apply.

On the next slide, there is a question the Tribunal had with respect to the appreciation of value between 2016 --

We can come out of confidential.

PRESIDING ARBITRATOR MILES: Alonso, let us out, please.

--- CONFIDENTIAL TRANSCRIPT ENDS AT 12:42 p.m.

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MR. HAUSER: We are back.
PRESIDING ARBITRATOR MILES: Thank you very much.
MR. TERRY: The approach that's taken by the experts with respect to the appreciation of value, the difference in value between the two, as you know, is set out in the slide.
Fair market value of the project, calculated as of February 18th, 2020, less the NAFTA 1 award, less the return of the letter of credit, provides the differential between the project value in 2016 and in 2020.
And that's how they calculate their damages in the market approach, and we set out the income approach below.
And then, finally, the last slide, starting at page 134, Slide 134, and I -- we have got three slides here, 134, 135 and 136 that were prepared, I think late last night in response to the Tribunal's question about the difference between sunk costs being calculated from the date of the award, September 27th, 2016, the first day of the award, and the June 15th, 2015, date which the day up to which Deloitte

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calculated costs.
I should say the Slide 135, I have been informed by my colleagues who were preparing this, can just be removed. It was an earlier version of a slide.
And I might turn -- I might have to turn to my colleague Ms. Shelley who prepared this.
But the first slide sets out the loss suffered by the Claimant, the sunk costs, as set out in the Secretariat report. And you'll probably recall seeing this particular summary of costs incurred.
And the second slide, the slide at 136, identifies, more particularly, the different types of costs here. This is an effort to determine which ones occurred after the date of the award versus the date between when Deloitte did their work and when the award occurred.
You can see that, for many of them, there is precise information that allows the numbers to be confirmed. These are the numbers in the right-hand column.
There are others, for example, if you look to the column, the third from the

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right, you will see that there are costs, capitalized costs, management fees, and also the interest paid, which have been prorated in the slide to come up with the new calculation of costs which would lower the amount from 9.48 to 6.17 million.
CO-ARBITRATOR GOTANDA: I have a question regarding that, that just dawned on me. And it comes from your causation, I think, your point.
If these are -- do you have a causation problem with respect to the cost claimed for the interest earned and interest paid?
Because, if I understand -- and here is where you are going to have to help me.
If I understand your argument on the expropriation, you're just looking at this period and I am going back to what were the things that, in the reasonable investment-backed expectations, you're required to keep the letter of credit going. You couldn't just -- you weren't induced to, in other words, create a new letter of credit, post Windstream I. If you didn't keep it up, you would have lost it, actually.

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MR. TERRY: Correct.
CO-ARBITRATOR GOTANDA: I get that. I think that's the kind of argument but I am not sure how it works on the causation argument. Because it didn't cause the loss post -- their actions didn't cause the loss, post of Windstream I.
Are you following me with this argument?
MR. TERRY: I mean I am not sure that I am but, I mean, our submission on this is that these are project-related costs that have to be incurred.
CO-ARBITRATOR GOTANDA: Absolutely. And, actually, everyone agrees with that. Both experts agree this is a project-related cost.
MR. TERRY: Right.
CO-ARBITRATOR GOTANDA: But it can be a project-related cost but not caused by the expropriation in that period.
You following me on that?
MR. TERRY: My submission is that once -- when the expropriation occurs, the question is what's the value of the investment at

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the time the expropriation occurs.
And, to do that, it's appropriate to look back at what the sunk -- has there been additional value created? Because, of course, the Tribunal said, in 2016, you know, the FIT contract has no value, it's not financeable. So, therefore, has there been additional value created?
The value that is being -- the value of the project, as of 2020, includes the various sunk costs that were required to, for example, maintain a contract, maintain the letter of credit, do everything to both advance the project, to the extent Windstream was able to, despite the government's, you know, omissions, we would say, and also to protect the project.
So that's our primary submission on that with respect to that point.
CO-ARBITRATOR GOTANDA: Right. And I am going to push back a little and here is where you have to help me because I am going to anticipate Canada's argument.
And Canada's argument would be, post Windstream I, you have to give us a reasonable time to terminate this letter of credit

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and so it's not -- again, it's back to the causation and is this a loss caused directly by the acts of Canada versus this would have been -- you would have incurred it anyway, post Windstream I. That should have been, to some extent, compensated by the previous Tribunal.
I am probably reading way more into what they would argue. I am not sure.
But you see the argument. I am trying to anticipate the argument so I understand, then, your position on that.
MR. TERRY: I think our submission is, is just simple. That, when you come to make the valuation in 2020, you have to value the value of the project at that particular time and that includes the project costs.
Now, in terms of anticipating what would happen earlier on, Ms. Sherkey dealt with that.
All through this period, we have got the evidence that Canada, first of all, is working with the government to try and -- right up to the end, Canada is trying to meet with the government, trying to deal -- Canada signals, earlier on, they suggest they should keep -- to

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Windstream that they should keep going with this, with the efforts and incurring the costs they are describing.
We have the evidence, in particular, I believe it was of Michael Lyle, in terms of the termination decision not being made until very late.
So, all through that period, Windstream was working on the basis that it made sense for it, from an investment perspective, to continue to incur these costs both to move the project forward, to protect the investment.
So that's -- I am not sure, again, Professor, if I am responding to your argument.
CO-ARBITRATOR GOTANDA: I think I got it. Yeah. Yeah.
MR. TERRY: The only general argument I also make is, of course, our submission is that you don't need to apply the reasonable investment-backed -- investment expectation.
CO-ARBITRATOR GOTANDA: Yes, I get that. Okay.
Okay. I would be interested to see what Canada's argument, if any, might be on

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that. Thank you.
MR. TERRY: And the, finally, last slide is just the one that references these two cases.
If the Tribunal would like a further breakdown of post NAFTA costs in any way, they have been done pro rata here.
But, if you want more particular information or if there are other damages issues that arise, we have examples of previous Tribunals that have found, if they don't have sufficient evidence, they have asked for more information.
Unless further questions, thanks for your patience. We are done.
MS. SHERKEY: If I could have an indulgence of 20 seconds.
Madam President, you had asked a question about some references and I just have an answer for you.
Which was, in limitations period, I had raised the point that Canada had argued the moratorium was temporary. You said that was in the context of expropriation. Do you have examples where they raised a similar argument

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in FET.
And I will just refer you to paragraphs 24, 445 and 555 -- 455.
PRESIDING ARBITRATOR MILES: Of what?
MS. SHERKEY: Of the counter-memorial of Canada and Windstream I.
PRESIDING ARBITRATOR MILES: Thank you.
It says, in the transcript, 555 to 455?
MS. SHERKEY: I misspoke. It should be 455, not 555.
So 24, 445, and 455.
PRESIDING ARBITRATOR MILES: I see. Just 455. Okay.
Perfect. Thank you.
So I am not here to make myself popular so I will have us back, please, at 1:20. Okay. It's like the nod my teenage son gives me. You are the boss but I am not happy about it.
We are going to come back at 1:20 because this is useful, unbelievably useful and valuable and I want to give you time as early

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as possible in the day while we are fresh and it will continue to be useful and valuable.
We took about three and a half hours this morning. We were only supposed to use two and a half hours this morning.
It may be that we absolutely don't need that sort of time because just the way the questions flow.
But you will absolutely get your two hours. Whether you need a third is -- we will see. You may not.
And then the 15 minutes each at the end for the end game.
All right. See you back here at twenty past, please.
--- Upon luncheon recess at 12:55 p.m.
--- Upon resuming at 1:32 p.m.
CLOSING ARGUMENT BY MS. SQUIRES:
MS. SQUIRES: Good afternoon.
So, as Mr. Neufeld mentioned this morning, we have structured our presentation to give you our closing remarks this afternoon in response to the six questions that were posed.
So we don't have any other kind of formal presentation. We were just going

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to answer the six questions. But I think it will take us a bit of time to work through them.
And, as you can tell by the fact that I am up here, we are going in reverse. So we are going to start with the causation question the Tribunal had.
So the Tribunal asked what is the loss that has arisen since the first Award and what breach caused that loss.
What I plan to do, over the next little bit, is walk the Tribunal through the various breaches at issue here, what the proper but-for scenario would be for each breach and, finally, what specific loss would arise out of that.
So three steps for each breach.
So I want to turn first to Article 1105.
CO-ARBITRATOR MCLACHLIN: Where are you in your --
MS. SQUIRES: We are turning to the first slide now.
CO-ARBITRATOR MCLACHLIN: Oh, okay. Sorry.

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MS. SQUIRES: It's because it's an excerpt from the Claimant so it's the Claimant's page 94.
So, in this arbitration, as you can see here on the slide, the Claimant argues that there was no legitimate rationale for Ontario's refusal to do anything to make good on its promises to Windstream and to continue the very conduct found to be in breach of the NAFTA.
It argued that, by continuing the course of conduct already found to breach Article 1105, Ontario failed to meet its international obligations.
So, the starting point of this breach, then, is the breach as it was found by the Windstream I Tribunal.
The Windstream I Tribunal found that, following the imposition of the moratorium, additional and more detailed regulations governing offshore wind were never developed.
The government let the OPA conduct the negotiations with Windstream even if the decision on the moratorium had been taken by the government and not the OPA. And, without

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providing any direction to the OPA for the negotiations, although it had authority to do so.

As a result, the negotiations between the OPA and Windstream failed to produce results. By May of 2012, the Project had reached a point at which it was no longer financeable.

For those reasons, the Tribunal found that the government's conduct vis-à-vis Windstream, during the period following the imposition of the moratorium, was a breach of a minimum standard of treatment as it appears in Article 1105.

The Claimant now argues that the continued application of that breach, such that the IESO was in a position where they could and did terminate the FIT Contract, is a new breach in this arbitration.

Assuming the Tribunal agrees, what counterfactual world would apply here so we can isolate the losses arising out of that breach, specifically.

The remainder of paragraph 370 on the Award provides some helpful guidance on what Ontario could have done to prevent an Article 1105 breach from happening. And, in doing so, it

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provides us an appropriate counterfactual world.

So we can see here on the slide that the Tribunal noted that the government could have done two things.

It could have prevented a breach of 1105 by either promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and reactivating Windstream's FIT contract.

Or, by amending the relevant regulations so as to exclude offshore wind altogether as a source of renewable energy, and terminating Windstream's FIT contract in accordance with the applicable law.

So I am going to deal with the second scenario there first. And we are going to walk through two different but-fors using the Tribunal's wording as the basis.

So, in the scenario, instead of a breach found by the Windstream I Tribunal continuing --

CO-ARBITRATOR MCLACHLIN: May I just say you are going awfully fast and I am struggling to keep up. Perhaps just a little more slowly.

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MS. SQUIRES: No problem. No problem.

So, in this scenario, instead of the breach found by the Windstream I Tribunal continuing, Ontario's regulations are amended to exclude offshore wind and, instead of the FIT Contract being terminated on February 18th, 2020, it is terminated instead on May 4th, 2017, when the IESO Section 10.1(g) termination rights first arose.

So what loss would arise out of that.

And I think two questions come up here.

The first goes to a question that Professor Gotanda asked.

So you can see on the slide here that, in our view, the loss that arises here would be the cost to the Claimant to maintain its letter of credit for an extra two years and nine months.

This morning, Professor Gotanda asked about Windstream maintaining the second letter of credit and how that pertains to the issue of causation.

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And if we were to turn back the Exhibit C-2082, we can see that the bank of credit -- the letter of credit from the Bank of Montreal was taken out after May 4th, 2017. So after both parties had a right to terminate the FIT Contract.

So, in this scenario, Windstream could have terminated the FIT Contract instead of taking out a second letter of credit and, as such, would not have incurred any interest costs.

Even leaving that aside, though, when we look at the loss that would arise out of that, I do want to take just a brief side track to discuss quantum.

And what the scenario would lead us to with respect to quantum.

And we are going to keep the same Exhibit C-2082 up because it is the only exhibit we have that demonstrates the interest paid on the letter of credit.

You can see on the slide there that we will highlight for you, interest payments, which, as we have corrected on the record, were actually a fee and not interest at all.

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So Windstream made these fees -- made -- paid these fees with respect to its first $6 million letter of credit and these fees were paid on May 8th, 2017.

So just four -- and you can see on this slide as well, the principal amounts that the individuals put forward behind that letter of credit.

So just four days after the termination right arose, you can see here that the principal was paid. And we see that, just below that, the return of that original letter of credit money. And we can see that that came back to Windstream on July 5th, 2017.

On June 26th, 2017, the new letter of credit was deposited at the Bank of Montreal.

So the Claimant then sends the money to Bank of Montreal, along with $120,000 fee, to secure the new line of credit.

And, eventually, we see that, on March 26th, 2020, that money comes back from the Bank of Montreal to the Claimant as $6.162 million, so they get their $6 million letter of credit back. They also get their fee

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back.

There are no interest payments on this ledger between May 8th, 2017, and the date of the valuation date.

The Claimant has not demonstrated that it has incurred any loss by maintaining the letter of credit from May 2017 to the termination date.

PRESIDING ARBITRATOR MILES: For this purpose, are you distinguishing interest from fees?

MS. SQUIRES: I think I am confusing myself. No -- yes. For the Bank of Montreal, it would be interest. In the previous letter of credit, it would have been a fee. That's correct.

PRESIDING ARBITRATOR MILES: So are you saying there was no interest and no fees incurred after the date of the Award?

MS. SQUIRES: There is no evidence on the record that there were interest or fees incurred after the date of the Award.

PRESIDING ARBITRATOR MILES: Interest or fees; that's your submission?

MS. SQUIRES: Correct.

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PRESIDING ARBITRATOR MILES: Okay.

MS. SQUIRES: So now on to the other but-for scenario that the Tribunal could apply with respect to a breach of 1105 and going back to the Tribunal's words.

In this scenario, what could have prevented the 1105 breach was Ontario promptly completing the required scientific research and establishing the appropriate regulatory framework for offshore wind and Windstream's FIT Contract is reactivated.

Now, unlike the previous option we just talked about, this scenario requires two assumptions. And these are the types of assumptions the Claimant would ask you to form, says you are required to make.

The first is that, by using the words "completing the required scientific research and establishing the appropriate regulatory framework", this necessarily leads to a lifting of the moratorium.

And, second, that a reactivation of Windstream's FIT contract means that the term -- at minimum, the termination right

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which made the Claimant's Project worthless, as of May 2017, is not in play.

And the reasons these assumptions must be made is that, if not, the counterfactual world reverts back to the real world, moratorium in place, termination rights in place.

So what loss arises out of that scenario?

CO-ARBITRATOR MCLACHLIN: I need to digest that. Thank you.

MS. SQUIRES: Good. Okay.

So we have included them on the slides as well for later on, but.

So, unlike in the previous scenario, here, we would be looking at much the same world as was evaluated in the Windstream I arbitration. Except for, this time, the Tribunal is left to determine the value of the Project as it existed on the valuation date here, February 18th, 2020.

The loss that would arise in this situation is the delta or appreciation, if there is any, in the fair market value between the Project, as it was valued in Windstream I, and the

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fair market value as it was -- as it was on the valuation date.

This would compensate the Claimant for the incremental increase in the value of the Project due to any market changes that occurred between the Windstream I Award and the valuation date. That was when the loss -- that was lost when the FIT Contract was terminated.

Now, Article 1110 -- and I have to admit this has changed a little bit, given what we heard this morning that the valuation model has now changed for them to be sunk costs only. So I am still going to provide the proper but-for and I will also respond to what the Claimant raised this morning.

So, in order to define the breach of Article 1110, we have used the Claimant's words in the Secretariat report at the paragraph 1.9, where they define the alleged breaches.

And recall that the Secretariat report has indicated that they have valued an expropriation claim.

The counterfactual world in this breach reverses the termination of the FIT

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contract. It would ensure that Windstream's FIT contract was "deferred, frozen, or on hold until the moratorium was lifted".

It would also assume that, on the valuation day, the moratorium is lifted and the Project can move ahead with an amended FIT Contract so that the 10.1(g) termination rights are no longer active.

The loss, in this scenario, is the same as would arise in the 1105 scenario I just discussed.

The difference though, now, according to the Claimant, is that they wish to value their expropriation claim on the basis of sunk costs.

And a loss that arises in this scenario, as you can see on the slide, is the fair market value of the investment as it existed on the valuation date here, less the fair market value of the investment as it existed on the date of the Windstream I Award.

Now the Claimant is relying on sunk costs to say this equals value.

Article 1110 requires that compensation be paid for the fair market value for

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the Project, but they have not demonstrated that costs and value are the same.

And the best example of this I can put forward at the moment is I asked the Claimant's experts whether they had valued two studies that they encapsulate in their sunk costs. And I asked whether they had valued those two studies as to what you could sell them for at the marketplace. Their answer was no.

If this -- so, therefore, they have not shown that costs translate directly into value.

And I would note that, if this is the fair market value of the Project, as the Claimants allege, that when you deduct the fair market value as it existed in Windstream I, the Claimant gets nothing because that is a negative value.

There's also been numerous questions with respect --

CO-ARBITRATOR GOTANDA: I am not following that.

PRESIDING ARBITRATOR MILES: No.

MS. SQUIRES: It's a bit of an

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artificial exercise.

So they are saying that, as of February 18th, 2020, the value of their Project was their sunk costs which is about 6 million right now.

In order to determine loss on the but-for world, you would subtract the fair market value as it existed in February 18th, 2020, from the previous fair market value.

PRESIDING ARBITRATOR MILES: That's not what they are doing.

They are applying a different method -- as of this morning --

MS. SQUIRES: Oh, I know. Yes, yes.

PRESIDING ARBITRATOR MILES: They are applying a different methodology.

MS. SQUIRES: Yeah.

PRESIDING ARBITRATOR MILES: And they are treating sunk costs as costs. Not as value. As costs.

MS. SQUIRES: Yes.

PRESIDING ARBITRATOR MILES: Because that is a valid International Valuations Standards methodology.

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That is the case that's been put this morning. Could you answer that case.

MS. SQUIRES: Yes, that's exactly where I am headed to next.

So, in the course of the cross-examinations of the witness of the experts from Secretariat, Canada raised numerous questions with respect to sunk costs.

And the Claimant drew our attention this morning to the International Valuations Standards and mentioned Article 20.3 about the nature and sources of information which values rely on and that they must be disclosed.

The Tribunal may recall that, on numerous instances, the Claimant's expert told us that they were relying on calls they had with Mr. Mars, emails from Mr. Mars, invoices that they had seen, none of which are on the record.

They have also not told us how they arrived at ensuring there was no double compensation being counted here with respect to the interaction of Schedule C -- Schedule 3 and Exhibit C-2020.

With respect to the management fees that they rely on.

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They relied on a post Notice of Intent invoice from a company that we do not know where it belongs in this chain, called Kinetic Blueprint, that involves fees paid in 2015.

On their accounting fees, they provided no invoices whatsoever. I don't think we dispute that they use an accountant, but we cannot tell which accounting fees they paid went to development costs and which went to other costs.

CO-ARBITRATOR GOTANDA: To be fair though, if I remember correctly, and you can correct me if I am wrong, I recall that the Claimant's experts, Secretariat, saying that they were relying on documents but they basically have been audited.

MS. SQUIRES: So the financial statements they relied on for the incomplete Project value which led to their capital costs were unaudited financial statements.

CO-ARBITRATOR GOTANDA: Oh, okay.

MS. SQUIRES: And those are on the record from 2015 to 2019. All WWIS financial statements are unaudited.

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CO-ARBITRATOR GOTANDA: Can I take you back to the -- and maybe have your answer to the letter of credit that the -- and the interest paid which I just heard your response there.

Their response, as I understand it, is that this was a legitimate cost because, post Windstream I, given what the Tribunal said, plus the fact that the -- I guess it was IESO said we are still considering what to do.

So they were left in the catch 22; weren't they?

They needed to maintain a letter of credit so they didn't -- and the argument is, if I understand it correctly, is that Ontario never stepped in and said we are not going forward with this.

So, therefore, they went ahead and incurred this and other costs and they wouldn't have done so but for the government taking some action to say, no, we are not, not going forward. And, therefore, these are what they are claiming is their legitimate sort of expenses in the end.

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MS. SQUIRES: That's right.

So that is the claim that they are making. That they continued to maintain the letter of credit, to spend this money, because they had a goal of continuing to develop the Project.

And, in response to that, I would draw the -- I am trying to get the exhibit number for you. But I would draw the Tribunal -- sorry, it's not a problem with the exhibit number. It's a problem with me being able to read handwriting.

I am going to draw the Tribunal's attention to Exhibit R-795.

That's a letter from Ms. Dolly Goyette at the Ministry of Energy to the Claimant in response to the numerous letters -- no -- yes, is that the right one? In response to the numerous -- the Ortech project description report, all the documents, the three documents the Claimant said it submitted in their "REA submission".

You can see, in this document, which is dated August 25th, 2017, that the Ministry of Energy told them that, if they wanted to proceed with any further studies or work on the

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Project, it was at their own risk.
CO-ARBITRATOR GOTANDA: But not the letter of credit; right? Isn't the letter of credit something different?
In other words, if they don't establish that project, maintain it, the Project is done.
So the fact that we have IESO saying we haven't decided yet, is not unreasonable given they just got the Award. They have to read it.
And then Ontario not going anything. Sitting in the Claimant's shoes, what they did, it seems like one could make the argument, wouldn't it, that they were acting reasonably and maintaining the letter of credit because they were, technically, it seems like, in this catch 22 situation, that they had to do that. Otherwise, there would be no Project.
MS. SQUIRES: Yes, right. I guess there is two points I would make to that. And, you are right, it does come down a little bit to what was reasonable in those circumstances.
I would say, first, there is a duty of mitigation on the Claimant and whether or

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not that would apply here.
But, most importantly, the Windstream I Award money, as we saw in 2082, was used to pay down all of the expenses.
So there were no costs because the Windstream I Tribunal's money was used to pay for those costs.
CO-ARBITRATOR GOTANDA: Yeah. But they wanted -- they desperately wanted this Project to go forward.
And given that there was this language from what the Tribunal said that, if you get together with the other side, you could create sort of value.
And then you have the IESO not saying we are not terminating yet, you know, the contract -- we are still trying to figure out whether or not -- what to do. And then you have Ontario not telling them anything or giving any direction.
So it's not unreasonable for them or maybe they were -- it was the appropriate course of action to maintain at least the letter of credit.
Putting aside further studies

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are at your own risk. But, the letter of credit, if they didn't maintain that, aren't they out at that point?
MS. SQUIRES: Yes. So the letter of credit did have to be maintained to keep the FIT contract. That is correct.
I think it does come down to, like you say, a test of what was reasonable to do in those circumstances.
But, ultimately, the letter of credit, we don't have any evidence of interest being paid on that letter of credit, cost to the Claimant for having proceeded in that way. And I think there's a very much an evidentiary question that would need to be addressed there as well.
CO-ARBITRATOR GOTANDA: Okay. That may be. But, thank you.
MS. SQUIRES: I am with you.
CO-ARBITRATOR GOTANDA: Yeah. Thank you.
MS. SQUIRES: So that brings me to Question 5 and that's the question on loss.
So this is ultimately how we would determine what is the quantum of loss I just described.

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And the Tribunal has asked us on what basis is each party claiming appreciation, or lack of, between the date of the first Award and the valuation date.
And, in addition to that, on what date was the Claimant made whole by the first Award.
So I am going to start with a question of what date was the Claimant made whole.
In the Windstream I Award, at paragraph 484, we can see that the Tribunal held that, in their view, the proper date of quantification of the damages to the investment was the date of the Award.
In their view, it was on that date that damages to the Claimant's investment crystallized. And, because of that, we say that the Claimant was made whole as of the date of the award.
Now, assuming we are starting from zero or the position where the Claimant was made whole by the Windstream I Award, the Tribunal has asked us how we would determine any appreciation value that has accrued to the investment.

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The Claimant argues that changes in the offshore wind market globally, but especially in the United States, since the Windstream I Award means that the Claimant's investment would have a higher fair market value, as of the date of the termination, than it did in September 2016 when the Windstream I Award came out.

In fact, we have heard from Secretariat that the Claimant believes these market increases have led to its Project going from a fair market value of $31 million to $300 million in under four years.

Now this sounds illogical and that's because it is.

When a correct basis for determining appreciation is applied, the Claimant's Project did not change in value over the relevant period.

So let's look at why.

In the first Windstream arbitration, the Tribunal held that the fair market value of the Claimant's investment but for the breach was $31 million.

In coming to that finding,

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they relied on a comparable transactions methodology, as we know. And derived a fair market value out of transactions that took place between 2009 and 2013 that were at a similar stage of development, as defined by Dr. Guillet.

It is that value that must be deducted from what the Tribunal considers the proper method to value the Project as it exists in February 18th, 2020.

Canada maintains that, given the Project has not changed at all since February 11th, 2011, and thus, remains an early stage project, the doctrine of res judicata applies to bar this Tribunal from applying a DCF.

And my colleague Mr. Neufeld will speak to that shortly when he outlines all of the issues that fall within that area.

But this means that what we have on the table, then, and especially after this morning -- as it does not appear anymore that the Claimant is relying on its DCF as its primary valuation methodology -- is two market comparables analysis for the Tribunal to choose from: That of Dr. Guillet and that of Secretariat.

I am going to explain to you

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why the one -- the valuation from Dr. Guillet should be preferred.

The Claimant's market comparables analysis arrives at a Project valuation of $300 million but that is because their market comparables approach is based on a flawed premise.

The Claimant's experts have been instructed to assume, among other things, that the Claimant was farther along in the site control process than it was; that it would have received all environmental permits; and that its conditional grid connection would have become guaranteed; and, importantly, that it would have been built within the five year timeline of the FIT Contract while relying on a FIT contract interpretation that has already been rejected by Ontario courts.

These types of assumptions should not be imported into a market comparables analysis. It brings with it the same level of impermissible speculation that makes the DCF inappropriate here as well.

PRESIDING ARBITRATOR MILES: When you say further along in the project than it

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was, according to what project development timeline or stages or whose?

MS. SQUIRES: So, here, I am talking about, if we look at the four factors that lead to fully permitted.

PRESIDING ARBITRATOR MILES: I understand.

So whose timeline are you relying on here?

MS. SQUIRES: I don't know if it matters, at the end of the day. As we mentioned, it's a spectrum.

PRESIDING ARBITRATOR MILES: Yeah. Okay. And Mr. Neufeld will come back to it because this goes to the heart of the issue estoppel on this point.

If we are relying on Dr. Guillet's development timeline schedule, and if the Tribunal took a decision in the first Award even to apply the market approach because of Dr. Guillet's evidence, expert opinion on his timelines, and Dr. Guillet has told us, in these proceedings, maybe he has, maybe he hasn't. This is for us to think about. That, actually, they are different now. I have changed my mind.

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Or not I have changed my mind. Let's be fair. The market's changed.

And you said nothing has changed since the date of the Award for valuation purposes. The valuation date has changed.

You accept that; don't you?

MS. SQUIRES: Yes. I mean, nothing has changed with respect to project development since that time.

PRESIDING ARBITRATOR MILES: Right.

So the valuation date has changed.

And, because of that change in valuation date, we have different ex-ante information available to us than what the Tribunal had in 2016.

And, indeed, Dr. Guillet has different ex-ante -- and a little bit of ex post. But different ex-ante information available to him than what he had when he gave his opinion to that Tribunal upon which it based its decision.

This is the point on your Slide 72 that comes to the point Professor Gotanda has raised on res judicata.

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But it's also a loss point as well.

If, for some reason, we did not accept Dr. Guillet's fairly binary judgment that valuation date does not change the multiplier and the market approach, and we looked to what the correct multiplier is as at today's valuation date.

Do you accept that that multiplier could have changed because what we know, at today's valuation date, is different to what the Tribunal knew at the previous valuation date?

MS. SQUIRES: So I accept that the multiplier could have changed based on the market.

I think everybody agrees that the Project has not itself moved along since the time it entered force majeure.

Our position would be, and consistent with the testimony of Dr. Guillet in the first and second arbitrations that, because of the Project's specific characteristics, it remains at the very beginning of the early stage development and that part of his diagram of stages of development has not changed.

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PRESIDING ARBITRATOR MILES: Okay. That's your submission.

Because he spent a lot of time with this whole new stage of mid stage development.

MS. SQUIRES: Yes.

PRESIDING ARBITRATOR MILES: Which didn't exist in his earlier opinion.

And the four elements of fully permitted, I think it's his evidence that they too are not linear.

MS. SQUIRES: Um-hmm.

PRESIDING ARBITRATOR MILES: That you weight those four factors in different ways in a combination of three and almost one, might be a very different state of certainty, because that's what we are looking for, than two other definite factors and two others quite close.

So they are not -- they don't work sequentially in that -- in an absolute way. And I think he was very helpful on that and I found him very candid that he has more information now.

So the facts haven't changed but the effect of the combination of facts and factors on how you value a development stage project, wherever it sits within that three parts of development, that might have changed.

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MS. SQUIRES: I do agree that the phases have developed over time. As you say, with Dr. Guillet's analysis, he has moved from a certain number of phases to five phases now and that has changed over time. I agree.

Fundamentally, at the end of the day, though, you have to place the Project, as it exists here, on that continuum.

And what we have is a Project that did not have access to its site and, in fact, as designed in this arbitration, it's on grid cells that were not even part of the application to which it alleges it had priority status.

It has made assumptions to get it further along in the development stage.

The most obvious of that is that site release would have been granted. It has to make those assumptions because it knows that, if it didn't, it's an early stage development project.

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There is a reason why the Secretariat report has almost two pages of assumptions.

And that's because they need this Tribunal to go back to a world where everything was perfect. We can get this built on time. We can do it faster than anyone else in the world. We can do it cheaper. We can renegotiate our turbine sales agreements.

All these things, they need to have them. They have assumed them all away for the purposes of their market comparables, just as they did for their discounted cash flow in the first arbitration.

PRESIDING ARBITRATOR MILES: Well, that's not quite right; is it? They took a 60 percent haircut on their discounted cash flow in their first valuation. And they put a 15 percent IRR on their structured transaction model. Both of those things do the opposite of assuming away risk.

MS. SQUIRES: I think it assumes some risk away.

PRESIDING ARBITRATOR MILES: 60 percent.

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MS. SQUIRES: Sure, 60 percent.

I think if you look back to the discounted cash flow model that Canada put forward in the Windstream I arbitration, when proper risk, when proper discount rates are applied, it actually discounts the Project back to zero so --

PRESIDING ARBITRATOR MILES: Well, I won't get you to define proper in that context.

MS. SQUIRES: Yes. I think that's a subjective analysis, I think.

I do want to -- before passing things over to my colleague, Ms. Dosman, I do want to take a couple minutes to address the comments with respect to the Claimant and the contents of Dr. Guillet's report and the confidential -- his reliance on confidential information.

PRESIDING ARBITRATOR MILES: Just before you do that, I just have a question following on from my earlier question.

At paragraph 475 of the earlier Award, I just want to understand, are you -- you have been very clear, as you have been

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throughout the arbitration, that you're relying on paragraph 475 for the finding, including, as I understand it, issue estoppel that the Claimant did not have site control.

You have been less clear about whether or not we are precluded from the Tribunal's finding that the Claimant did have a grid connection.

Can you just be clear as to what your position is on that.

MS. SQUIRES: Yeah. So I, I think this is a bit of a complicated factual issue.

PRESIDING ARBITRATOR MILES: So this -- so just so I understand.

Grid connection is a bit of a complicated issue but site control is not a bit of a complicated issue, in your submission.

MS. SQUIRES: No, no. I would say they are both complicated issues because the way it's been pled.

PRESIDING ARBITRATOR MILES: Okay. Okay.

MS. SQUIRES: So a couple of factual backgrounds to the grid assessment.

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The --

PRESIDING ARBITRATOR MILES: We don't have to go through the evidence and submissions again because we have got all the arguments on that.

I think what I am just really trying to understand -- and I think the answer sounds like it's a yes.

Are you maintaining your position that, either because it doesn't really mean grid connection, that we are not bound by that finding although we are bound by the site control finding?

MS. SQUIRES: Yeah. So --

PRESIDING ARBITRATOR MILES: Basically, how we get there, you have pleaded fully.

MS. SQUIRES: Exactly.

PRESIDING ARBITRATOR MILES: But you are saying we can -- you are asking us to assume there was no grid connection or to find that there was no grid connection?

MS. SQUIRES: I guess it would depend on a finding of whether the Tribunal there meant grid connection as it's defined for the

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purpose of valuation. And I believe Mr. Tetard raised the same questions himself when he read the Award.

PRESIDING ARBITRATOR MILES: Right.

And to which then, you would think, to be logically consistent, it would also raise the question as to what the Tribunal meant by site control.

MS. SQUIRES: I think, in the Award, there is very little discussion on grid connection. There is quite a bit of discussion on site control. They have walked through the site control process. They have a very good appreciation of what they are talking about there.

Paragraph 107 of the Award walks through all three steps in the process. It situates the Claimant in that process. We do not have that grid control so it's a bit harder to say.

PRESIDING ARBITRATOR MILES: Okay. I have your position. It does feel rather like you want to have your cake and eat it but I understand that that is your position. That's all right. I like cake too.

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But Mr. Neufeld will come to res judicata so you will come back around on this.

MS. SQUIRES: Perhaps he has no sweet tooth. We will see.

So the last point I want to make, before Ms. Dosman steps up here, is just a couple notes on Dr. Guillet's evidence and the confidential information that he does rely on, because it has, very clearly, become an issue.

As the Claimant has mentioned, as the Tribunal is aware, this issue was discussed before the Windstream I Tribunal submissions were made and, in the end, the Tribunal decided, based on the IBA Rules on the Taking of Evidence and the UNCITRAL Rules, Article 27.3, that the question of Dr. Guillet's reliance on confidential information went to the weight of that testimony.

When, in speaking about the res judicata effect of that this morning, Mr. Terry spoke about the fact that new things have come to light here. That, in the Windstream I arbitration, he did not ask about the underlying data and he did not know that there was any correction.

MR. TERRY: Sorry, that's not

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correct.

PRESIDING ARBITRATOR MILES: I didn't hear that either. I didn't hear that that's what he said.

Were you suggesting Mr. Terry didn't ask in cross-examination; was that what you were trying to say because he didn't say?

MS. SQUIRES: Sorry. In the Windstream I hearing, he mentioned that he did not ask about corrections to the report so did not know to then.

PRESIDING ARBITRATOR MILES: I did not hear Mr. Terry say that this morning.

Mr. Terry, do you want to clarify what you said?

MR. TERRY: What I certainly said -- what I believe I said, and certainly intended to say, was that, this time, there was a new avenue opened up because we had evidence of errors and that that, therefore, caused me to ask him questions about it and that we didn't have evidence of errors the first time.

I certainly recall asking him questions, in cross-examination, about the confidential nature but not that.

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MS. SQUIRES: Okay.

I am going to -- okay.

So, in the first Windstream I arbitration, there was no evidence of errors on the part of Dr. Guillet.

In the cross-examination of Dr. Guillet in the Windstream I arbitration, at page 185, my friend Mr. Terry -- and that's Exhibit C-2466 -- asked Dr. Guillet about the North Sea offshore wind project.

In response, Dr. Guillet said:

> "Maybe, well, North Sea. Sorry, North Sea one is not on the list. But, yes, it should be."[as read]

There were errors made in Dr. Guillet's report in the Windstream I arbitration and they were questioned.

Second, if there are concerns about Dr. Guillet's use of the numbers dating back to 2008 -- oh, yes?

CO-ARBITRATOR GOTANDA: I understand that. And I understand entirely that the Tribunal would give weight, can assess weight

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to testimony.
It's a different thing, isn't it, to allow evidence in when the other side can't test it at all? That, I think, is the complaint of the Claimants.
So it doesn't go to the Tribunal's weight of his testimony because -- and that -- and I am not even sure that, for our purposes, we can revisit that. But that's a different issue than allowing something in when you don't have the opportunity to test.
MS. SQUIRES: I agree.
And you are correct in that the evidence is useful when it can be tested.
PRESIDING ARBITRATOR MILES: This comes at the footnote of the Award at paragraph 497. Footnote 1041 of the earlier Award.
In relying on Dr. Guillet's evidence, the Tribunal keeps in mind that some third party confidential evidence underlying the Green Giraffe report was not made available to the Claimant. They refer back to paragraph 63 and 66 which is the document production exercise.
At paragraph 67 is where the

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Tribunal says we are not going to order production of the underlying information but the fact that it is not provided will go to the weight that we attribute to that evidence.
CO-ARBITRATOR GOTANDA: Right.
PRESIDING ARBITRATOR MILES: Did we do that?
CO-ARBITRATOR GOTANDA: No. No.
PRESIDING ARBITRATOR MILES: Remind me, Mr. Terry, did you request this data in these proceedings?
MR. TERRY: I don't believe so but I will check with the team.
PRESIDING ARBITRATOR MILES: I am glad you need to check too.
MR. TERRY: No. So you did not make a similar order.
PRESIDING ARBITRATOR MILES: Because we were not asked to.
MR. TERRY: Yes, yes. Correct. Correct. I didn't mean to suggest anything otherwise.
MS. SQUIRES: I will note on that point, however, the Claimant has made quite a

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few inferences or perhaps direct statements in its reply rejoinder that we should not be relying on Dr. Guillet's evidence because it's not readily available. Canada responded to that in the rejoinder memorial by drawing out the correspondence from Windstream I. So the opportunity was certainly there.
Despite all that, I am going to give you some comfort.
If you decide no weight should be given to certain parts of Dr. Guillet's evidence -- and, to be clear, because Mr. Terry mentioned this morning, it is not our position that you should go to this as your first valuation. We are still of the view that the 23 projects are relevant.
That being said, I am going to triage the data by two different points.
If we were first to focus only on projects which are valued based on transactions that go from 2016 to 2020, in doing so, we would arrive at a multiple of 0.056 million euros per megawatt.
For the Project, that translates into 16.8 million euros.

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You'll recall the Windstream I Tribunal valued the Project at 21 million euros per megawatt.
If we were then to reduce those Projects to take out ones that Dr. Guillet has either provided no information for or has only provided some information for, we would be down to three projects.
Those projects would give us an implied multiple of 0.07. That number may sound very familiar.
That is precisely the number the Windstream I Tribunal used to value the Project. That will get you at a value of 21 million euros per megawatt. Exactly the same.
So before I yield the floor -- no.
PRESIDING ARBITRATOR MILES: Ms. Squires, you are not going through any adding back in what would now -- if we were to take the finding in the earlier Tribunal that, by definition, having one of the four factors means the Project is early stage development. Therefore, any project that does not have one of the four factors is early stage development by

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definition.
Does that not mean we also have to -- we can take out all the non-disclosed.
But don't we also have to put in the four or five projects from Dr. Guillet's reports in these proceedings from what he calls a late stage development chart but, actually, he accepted, on cross, did not have one of the four features?
And, if we did that, excluding the 1.35 outlier, which is the Welsh one, doesn't that take us to -- I did the maths. That was .15 or 115 -- .15 I think it was.
But, to be consistent -- right. So the exercise you have done here --
MS. SQUIRES: I follow you.
PRESIDING ARBITRATOR MILES: -- is ignoring the late-stage projects that actually, by Dr. Guillet's own definition, didn't have one of the four features of fully permitting.
MS. SQUIRES: So I believe the response to that is you cannot place equal weight on all four and all four of the factors that go into full permitting.
And the reason of that is, in

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certain scenarios, one comes first and, in certain scenarios, one comes last.
PRESIDING ARBITRATOR MILES: Sure.
But isn't that resolved by the fact that there is a range, there is a range of values for each of those phases and that range takes that into account?
You might have a FIT contract and nothing else. But an FIT contract is, to use another judge's phrase, a thing written water. If there's absolutely no land, no property, no right to build anything. You just have a contract say in the never, never. You got to build something that's unbuildable. You would get this tariff that may be worth nothing.
But that's why we have a range. That's why we have .001 -- have I got too many zeroes?
MS. SQUIRES: .01 is the beginning.
PRESIDING ARBITRATOR MILES: .01 to 1 in that early stage development. That's precisely why.
Because the four factors are

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not binary -- are not linear. That's what I keep saying. That's, I think, what Dr. Guillet -- that's what I learned from Dr. Guillet.
MS. SQUIRES: I am with you on the early stage is 0.01 to 0.1. The Secretariat report --
PRESIDING ARBITRATOR MILES: Well, and that was what the earlier Tribunal said. It was based on what information was given to them. We have been given different information.
The Tribunal concluded if you don't have one of four factors, by definition, you're early stage development.
The Tribunal concluded, because of the market comparables Dr. Guillet gave them, and they checked against Mr. Low and others the Deloitte market comparable, they concluded that market comparables are projects that didn't have one of those four factors, were, by definition, early stage. And the market comparable multiplier taking those early stage projects gave a variable, gave a range from .01 to .1.
If we were to do exactly the same exercise that the Tribunal did on our own

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data, wouldn't we need to treat early stage development as all projects that do not have, for final, one of those four features, take all of those projects, which includes, after cross-examination, we know a number of projects in Dr. Guillet's second table on late stage development, and then take the range, the range that that gives us.
What we do in that range and whether or not we would consider this Project to be at the mean or the average, which is what the Tribunal did earlier, that's a separate question. We might say it belongs right at the early, early end of that range but doesn't the range change?
MS. SQUIRES: So perhaps just a point of clarification, if you don't mind.
The outside range would be the Secretariat number? Is that the outside range?
CO-ARBITRATOR MCLACHLIN: No.
MS. SQUIRES: I am trying to figure out what range we are working with.
PRESIDING ARBITRATOR MILES: I don't know. The mean I got was .15 so I can't remember what the range was. I think the range went up to .32. Because I took out the outlier.

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Actually, I think it got to .24 which was the amended item on the second chart which Dr. Guillet accepted was amended. I took out two outliers. I took out .32 of the first -- and, at this point, we are probably getting into such made up numbers, none of it made sense.

MS. SQUIRES: That's okay.

PRESIDING ARBITRATOR MILES: But maybe that's the point; right.

But, on this chart, I did not include .28, for the reasons Secretariat said, off this chart and I think neither have you.

And, on the late stage development chart, I excluded 1.35 or 1.3 something because it just seemed like such an outlier.

But took all of the other items that Mr. Terry had highlighted. I think you were in the room when we did it. I just added those up and divided them by 12. So eight from here and four from the other chart.

And that was how to get the mean. I can't remember what the highest number was. But I think it's about .24. So that would give you the range. The range would be .01 to .24.

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MS. SQUIRES: Right.

PRESIDING ARBITRATOR MILES: And, yes, that's different. That would match up, that would enter into the late stage development, even financial close of what Dr. Guillet said eight years ago. But we have a different valuation date so we have different information.

MS. SQUIRES: Just give me one second.

I agree with you. If you were to combine them in that way to create a range that goes from both experts' view as to what would constitute an early stage, then we would be looking there and would try to place the Project in that, using the market comparables.

I would note that Secretariat's multiple of the Project, on the projects that they use, when they have their full list of ten, that gives them a valuation of the Project of 1.01, which is quite at the higher in even the range we are talking about there.

So.

PRESIDING ARBITRATOR MILES: I just checked. Yes, it would.

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The highest in the range taken from Mr. Terry's cross-examination yesterday was .32. Because I omitted, as I said, the Welsh project that was 1.33.

So, including Seagreen 1, LEM, Ørsted, Saint-Brieuc, those four -- no, it's the late stage development chart. And then doing exactly what you did here, yeah.

MS. SQUIRES: Yeah, yeah.

Unless there are further questions.

CO-ARBITRATOR GOTANDA: So, just for clarification, I am a little confused.

Are you abandoning, then, the claim in Slide 72 that it's collateral estoppel as to including undisclosed confidential information?

MS. SQUIRES: Mr. Neufeld is shaking -- I don't believe so.

And Mr. Neufeld is shaking his head no at me because he would like to address this when he stands up to discuss the points on estoppel.

CO-ARBITRATOR GOTANDA: Okay.

MS. SQUIRES: I am estopped from talking about estoppel, it seems.

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PRESIDING ARBITRATOR MILES: Very good.

MS. SQUIRES: Thank you very much.

PRESIDING ARBITRATOR MILES: Thank you. We are going to be dreaming these numbers all weekend.

MS. SQUIRES: We have been doing it for eight years.

CLOSING ARGUMENT BY MS. DOSMAN:

MS. DOSMAN: Good afternoon. Hello again.

I think I will be relatively brief, although famous last words.

In Question 4, the Tribunal asked for more clarity on the Claimant's position with respect to CUSMA Annex 14B. And, in particular, whether it must look at investment-backed expectations as an element of the test.

We believe Canada's position on that is clear, set out in rejoinder at paragraphs 145 to 147, counter-memorial at 151.

PRESIDING ARBITRATOR MILES: And, to be fair, if it helps, your position was

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clearer to us than the Claimant's position prior to this morning.

MS. DOSMAN: Okay. Excellent.

To the extent the Tribunal is minded to do more reading on this topic, we have included a few references on Slides 28 through 31.

PRESIDING ARBITRATOR MILES: And those are the cases that get you to investment-backed expectations without CUSMA Annex 14B.

MS. DOSMAN: Correct.

PRESIDING ARBITRATOR MILES: Perfect. That's really helpful to have those. Thank you.

MS. DOSMAN: Love. Love that.

Okay. We can move, then, to Question 3.

PRESIDING ARBITRATOR MILES: I am sorry. Just what's your position on what the Tribunal did with that in the earlier Award?

MS. DOSMAN: You said it. They went straight to end game. They didn't do the full test.

PRESIDING ARBITRATOR MILES: Got it. Okay. Thanks.

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So we are not precluded one way or the other.

MS. DOSMAN: Correct.

PRESIDING ARBITRATOR MILES: Okay. Thanks.

MS. DOSMAN: I think I get the record for quickest question.

Question 3, the Tribunal asked us, accepting Canada's case that certain measures fall outside the three year limitation period, so if we take those elements out, what would the minimum standard of treatment basis be arising out of the remaining elements.

If you'll permit, I would like to make just one preliminary remark on -- responsive remark to Ms. Sherkey's submissions on the standard to be applied under Article 1105(1).

And it's really just a note of caution. Again, I did address the standard, in Canada's view, in our written pleadings and in our opening submissions.

And I won't return to that now but I would like to call up the case to which Ms. Sherkey took us, Lemire. It's CL-188.

And I flag this because of the

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need to be precise and careful about which cases we refer to in discussing the minimum standard of treatment.

As you know, we do have the note of interpretation that clarifies that, in the case of the NAFTA, fair and equitable treatment does not require anything more than that which is required by the minimum standard of treatment under customary international law.

And cases like Lemire involve very different treaty language in which, for example, here, this is the US-Ukraine BIT.

I am not going back to the BIT itself, just the Award.

At paragraph 256, they quote the relevant provision as including commitment that neither party shall, in any way, impair, by arbitrary or discriminatory measures, blah, blah, blah, investment.

So you have, in that treaty, an independent obligation with respect to "arbitrary indiscriminatory measures" and we don't have that in NAFTA.

So, for references to our submissions on the scope of the standard, I

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addressed it yesterday at Slides 151 to -- yesterday -- ah, Monday. Slides 151 to 156. And the references to our written pleadings at paragraphs 202 to 203 of the counter-memorial and 103 to 106 of the rejoinder.

So just sort of a note of caution on the standard.

PRESIDING ARBITRATOR MILES: I think it was the gross that I was interested in. Just the -- and, yes, you are right. It was Lemire, paragraph 262, at Slide 60, the Claimant was relying on.

MS. DOSMAN: Yes.

PRESIDING ARBITRATOR MILES: Arbitrariness has been founded on other bases.

I thought, it doesn't say it on the slide, but I thought that was the Claimant's answer to -- it is on the slide. Prohibits arbitrary and grossly unfair conduct.

Does grossly unfair get in the interpretation though?

MS. DOSMAN: Get in, sorry?

PRESIDING ARBITRATOR MILES: Sorry, that's my Kiwi accent.

Get into the interpretation

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note.
MS. DOSMAN: Interpretation note. Does it get into the minimum standard of treatment.
So Canada's submission is that egregious conduct is required.
That's also reflected in the Waste Management standard in the sense of them using language such as manifestly, arbitrary and that conduct must offend sense of judicial propriety.
So we say it's more than something that's simply arbitrary.
PRESIDING ARBITRATOR MILES: Okay.
MS. DOSMAN: It must be really quite severe.
PRESIDING ARBITRATOR MILES: But you are happy with Waste Management because --
MS. DOSMAN: We have cited to it, yes.
PRESIDING ARBITRATOR MILES: -- I got from the Claimant this morning. They were happy with Waste Management --
MS. DOSMAN: There are some

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elements in there that we don't necessarily agree with, with respect to the relevance of -- they make a reference to legitimate expectations which we think are potentially relevant but not always relevant.
So it's not a whole hearted endorsement but we are happy with the level -- with the acuteness of the language that the Waste Management Tribunal uses.
PRESIDING ARBITRATOR MILES: That's a very careful government answer.
For future reference, I don't understand the Claimant to be putting their case on legitimate expectations here.
MS. DOSMAN: No, no, no.
PRESIDING ARBITRATOR MILES: So, in terms of the Waste Management definition that's relevant for our proceedings, the parties are at one on that.
MS. DOSMAN: With the emphasis on manifestly arbitrary --
PRESIDING ARBITRATOR MILES: The bits that are good for you. You are in line.
MS. DOSMAN: You can tell it's Friday.

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So, to move on to your question then, and you will not be shocked by my answer which is that what is left, if we are looking at the period solely within the critical date of December 22nd, 2017, forward, is a simple exercise of a contractual right.
So the breach of Article 1105(1) was fully remedied by the Award.
There was no new breaching measure or activity that arose afterwards. I believe I heard this morning that the termination itself by the IESO is not being challenged as an independent breach.
And that's essentially what took place during that under three-year period.
So just brief recall. The IESO communicated its intention to terminate on February 20th, 2018.
And, as a result, WWIS reactivated its domestic application seeking to challenge the termination decision domestically. That was on April 20th, 2018.
And then, one year and nine months later, so January 15th, 2020, is when WWIS filed its notice of abandonment of that domestic

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application.
And then this arbitration was commenced one week after that.
So we have a somewhat protracted but otherwise fairly -- you know, it was a contractual termination that was a right for the IESO to exercise.
PRESIDING ARBITRATOR MILES: Okay.
MS. DOSMAN: And I will just warn you, the slides are a bit out of order. So, if you come back to them later, you can use your judgment, but.
Any other merits-related to which I can give a careful answer?
PRESIDING ARBITRATOR MILES: No, I think that's all clear. Thank you.
MS. DOSMAN: Oh, sorry. I had made a note to myself and, since I was ending on facts, it is sort of a segue.
Professor Gotanda, you had asked about the reasonableness of entering into the letter of -- the second letter of credit, so post the date at which termination could be exercised.

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And this sort of flows from my friend's comment that they aren't challenging the specific IESO decision. So we really have to look to Ontario here.

And, in my submission, Ontario was very clear with the Claimant that it was not interested in speaking to it.

So I think you can -- I agree there is another step to -- from we are not going to talk to, to we are not going to do anything to renegotiate your contract. But at least that.

For example, Andrew Teliszewsky, in paragraph 27 of his witness statement, refers to a conversation with a representative of the Claimant. And that was in October or November 2016. And he said he was very clear you have to talk to the IESO. The IESO is the contractual counterparty.

The same message was repeated in writing in two letters from the Ministry of Energy to David Mars. The first being December 6th, 2016, which is Exhibit C-2471, Exhibit 3, and the second being February 21st, 2017, C-2076.

So I guess I would just -- I

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think that could maybe play into the mix of what they could expect.

CO-ARBITRATOR GOTANDA: But that -- saying I refuse to speak to you is not the same as telling them this is not going forward and we are not going to direct IESO to do anything.

They never said that, did they, before they established the second letter of credit?

MS. DOSMAN: So, yeah, and this is why I acknowledge there is another step to get to that definitive of a statement.

But I do submit that they said speak to the IESO because they are the ones who are the contractual counterparty to you in this case.

CO-ARBITRATOR GOTANDA: That almost makes your position worse; doesn't it?

MS. DOSMAN: Does it? How so?

CO-ARBITRATOR GOTANDA: Because --

MS. DOSMAN: Am I fired from the Government of Canada?

CO-ARBITRATOR GOTANDA: Because the argument, then, would be the IESO said

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we are still thinking about it.

MS. DOSMAN: No, but the IESO is okay to still be thinking about it because that's not --

CO-ARBITRATOR GOTANDA: That's fine. They know, then, at that point.

MS. DOSMAN: But that itself is not a breach, from what I heard.

CO-ARBITRATOR GOTANDA: That is true.

MS. DOSMAN: Yeah.

CO-ARBITRATOR GOTANDA: But what we are trying to determine, though, is were they reasonable in that circumstance. That period of time, was it reasonable for them to take out that second letter of credit.

And by them -- by the affirmative act -- two affirmative acts; one is we are not talking to you; and the second is you have to go talk to the IESO. And then the IESO says we are not -- we haven't made a decision yet.

And the fact that they didn't, at that point, say -- Ontario say, no, or direct the IESO not to do anything or direct them to, you know, to tell them don't do this.

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It's reasonable, wouldn't it, under the circumstances for them to establish the letter of credit -- that's not saying there's a breach.

MS. DOSMAN: No, no, no, no. Yeah --

CO-ARBITRATOR GOTANDA: All I am focussing on here is whether the act of establishing the letter of credit, under that circumstance, was something that was, that was almost necessary. They would have been in a catch 22 had they not.

And, given that entire circumstance, including that affirmative direction, what do you think? Don't you think it was reasonable for them?

MS. DOSMAN: I don't know. They had just been through litigation that found a breach and that was remedied.

CO-ARBITRATOR GOTANDA: But the Tribunal told them you can get together with the other side and, therefore, we will then -- you can create value.

So I am trying to think of what the counter -- your counter argument -- and I

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will let you say it -- would be that their position, they shouldn't have done it.

MS. DOSMAN: So I guess the context for that decision to refinance -- you know, to put in a second letter of credit, is that there had been this long litigation, a breach was found. Ontario viewed the matter as resolved.

So Ontario, at that point, was seeing this as a contractual matter. Sure.

As the Windstream I Tribunal recognized, contractual counterparties can get together and change their minds. That's fine.

But Ontario -- and I do take my friend's case to be very much that of Ontario, rather than, you know -- the Ontario's decisions or omissions are at issue here.

That their line was that they did not give any indication that there would be movement, that they would take an affirmative action so as to interfere with that contractual relationship.

Instead, the message was go back to your contract. Go back to your contract. I see a furrowed brow.

PRESIDING ARBITRATOR MILES:

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That's my wrinkles. That's all.

Paragraph 483, the Tribunal didn't say IESO. The Tribunal said three times in that sentence.

On the other hand, the Tribunal does not consider it appropriate or necessary to make any further adjustments although the FIT contract could have been reactivated and renegotiated by the Parties.

MS. DOSMAN: Yes, to the contract.

PRESIDING ARBITRATOR MILES: Well, no. It's capital P. It's a defined term in the Award --

MS. DOSMAN: Okay. Okay. That's not how I --

PRESIDING ARBITRATOR MILES: -- the Parties.

Well, it's a capital P.

MS. DOSMAN: I accept that. Yeah.

PRESIDING ARBITRATOR MILES: So I think "Parties" is defined in the contract -- or memo. Let's have a look.

MS. DOSMAN: I am sure it is.

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PRESIDING ARBITRATOR MILES: Of course it's not.

MR. NEUFELD: No, this is another problem.

PRESIDING ARBITRATOR MILES: I see. So it's not actually.

So it would take a word search to see how proper noun parties is used in the Award. But then they say it's another matter that the Parties -- again, capital P -- can create such value.

It doesn't, it doesn't -- so would you say that paragraph 438 could be read or, in your submissions, should be read that that proper noun, Parties, is the Parties to the contract.

MS. DOSMAN: I would prefer to do a word search to make sure but I have always understood that.

PRESIDING ARBITRATOR MILES: That's your --

MS. DOSMAN: Yeah, that has been my understanding.

But, you know, if it is capital P Ontario, doesn't that strengthen the

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idea that -- doesn't Ontario's message that we are not going to speak to you undermine the reasonableness --

PRESIDING ARBITRATOR MILES: Well, I am not sure.

I think what both parties have sought to do today is separate out IESO had the contracting obligation. They had to dot the I and cross the Ps and sign -- cross the Ts and sign the piece of paper in the contract themselves.

But the IESO could have been directed on what to contract, how to contract, whether or not to renegotiate, reactivate, what to put in the terms of that contract, at all times by Ontario.

So Ontario had the control over the contract, although the operationalization of that control was IESO.

So, if I have understood that correctly as being the parties' positions, what that means, I think, for the question you posed -- and I am not sure why I am answering your questions, but here we are -- is, is that, for Ontario to communicate to Claimant qua contracting party, it's saying no, no, no. You deal with your

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contract with your contracting counterparty. But that's not the same as saying and we are going to have nothing to do with it.

MS. DOSMAN: Absolutely, yeah.

PRESIDING ARBITRATOR MILES: We are not going to talk to IESO. We are not going to give any directions. We out of this game.

They are just saying you do your contract negotiations between A and B. We are C. What C and B do, that's behind our curtain.

MS. DOSMAN: Fair enough. I think I acknowledged there was another step to take.

PRESIDING ARBITRATOR MILES: That was the step --

MS. DOSMAN: The communications would be part of the context.

I also just think, on attribution, I can feel my colleague Mr. Neufeld's brain exploding because I don't believe it's Canada's position that the two were one and the same for the purposes of the contract, so.

PRESIDING ARBITRATOR MILES: I

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don't think that's what I said.

MS. DOSMAN: Okay. Good. Good. I misunderstood.

PRESIDING ARBITRATOR MILES: I think I was trying to reflect both parties' positions as the absolute opposite. But I don't understand you to be saying that Ontario is claiming it had no directive.

MS. DOSMAN: Power, ability, theoretically.

PRESIDING ARBITRATOR MILES: Yeah. Over what the -- that it couldn't direct what the IESO did. In fact, we have got, I think, excerpted examples of other contract examples where it did direct.

MS. DOSMAN: I believe that's in our pleadings as well, an option not an obligation.

PRESIDING ARBITRATOR MILES: I don't believe there is an attribution argument made in these proceedings.

MS. DOSMAN: Good. I am not fired then.

I will leave you now.

CLOSING ARGUMENT BY MR. TIAN:

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MR. TIAN: Madam President, members of the Tribunal, good afternoon.

To answer the Tribunal's second question on time limitation, I will first address the legal issue on whether components of an alleged composite measure can be individually analyzed for time-bar purposes.

Then, I will present facts related to the Claimant's knowledge of the alleged breach and loss.

As a preliminary matter, Articles 1116(2) and 1117(2) not only cover actual knowledge but constructive knowledge as well.

Therefore, when my friend submitted, this morning, "you cannot impute knowledge of a future breach or loss", this ignores the clear language of the treaty provisions.

If a reasonable and prudent investor ought to have known the alleged breach or loss, then of course that knowledge can be imputed to the Claimant because he cannot willfully abstain from the inquiry in order to avoid actual knowledge.

The time-bar requirements for

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a series of associated actions, such as those challenges in this case, mandates the Tribunal to only analyze the measures falling within the limitation period.

The Spence tribunal correctly held that a series of associated actions may be divided up into those that meet the time-bar requirement and others justiciable, and those that do not meet the time-bar requirement and, thus, not justiciable.

Therefore, to the extent that the components of a series of measures took place prior to the critical date and the Claimant knew them, they could not form part of the basis of the cause of action.

Of course this does not prevent the Tribunal from considering background facts that predates the critical date.

However, as the Glamis Gold tribunal held and the parties appear to agree on this, such factual predicates are not per se the legal basis for the claim.

In this specific case, what are the background facts?

Failure to do the studies is

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not presented as a background fact.
Continued application of the moratorium is not presented as a ground fact.
Nor is a failure to direct the IESO, not to terminate or to freeze the FIT Contract.
These are the measures that the Claimant challenges. Even it's the essence of its claim. They are not background facts.
PRESIDING ARBITRATOR MILES: But, just be absolutely clear, and you have said it.
If we were to consider they are background facts in the way being put by the Claimant, you would accept that they are within the time-bar?
MR. TIAN: If they are indeed background facts, that means they would be outside of the limitation period and the Tribunal's basis for consideration of a breach would be informed by the measures within the limitation period, informed by those background information.
So this, in other words, the background fact cannot be the basis of any breach.
PRESIDING ARBITRATOR MILES:

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Oh, I am sorry. I thought you had said Glamis Gold does not preclude background facts that form part of the breach. And then I thought you were distinguishing measures which I still don't really follow.
But -- and I was asking you if we found these were background facts that were part of the breach, are we not precluded? I am confused.
I am sorry, what do you say Glamis Gold says?
MR. TIAN: It says the background facts are not per se the legal basis for the claim.
And, as we understand it, it refers to when they are background facts. That would not be part of a legal basis. Therefore, the Tribunal would only look at the legal basis of a cause of action that are not those background facts.
PRESIDING ARBITRATOR MILES: If the Tribunal finds that background facts are part of the cause of action but that the cause of action, as a whole, arises within the limitation period, in your submission, can we include those

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background facts that arose more than three years ago; yes or no?
MR. TIAN: Yes. Because the premise of the question is the cause of action arose within the limitation period.
PRESIDING ARBITRATOR MILES: Yeah. Good. Okay. That's what I thought you meant the first time. Then you sent me off in three different directions like a pinball.
Okay. Maybe it was me.
MR. TIAN: Sorry about that.
And there is an obvious disconnect in the Claimant's submissions when it says it is not challenging precut-off date measures.
Because all of the Ontario's measures and the last one from the IESO are precisely precut-off date measures.
CO-ARBITRATOR GOTANDA: So I am a little -- I just want to -- and this is my confusion on this probably.
So the statute requires -- the Article 1116 requires knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

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So, if you have facts leading to knowledge of the alleged breach, does that alone start the clock running that you have to be within -- in other words, the limitation -- the three-year limitation period for that; or does the fact that you also need the investor has incurred loss or damage?
MR. TIAN: The legal test is you need both.
So both the knowledge of loss and the knowledge of the alleged breach.
CO-ARBITRATOR GOTANDA: Right.
MR. TIAN: I think that's the distinction I am trying to make between background facts and measures.
CO-ARBITRATOR GOTANDA: Right.
MR. TIAN: Measures could be challenged independently as a cause of action. Whereas background facts, in Canada's submissions, cannot.
CO-ARBITRATOR GOTANDA: I see. I think I got it.
CO-ARBITRATOR MCLACHLIN: Background facts are just what you build your claim on or foundation.

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But the real question is when did the breach, when did these facts combine with other things to constitute a breach.

MR. TIAN: Precisely.

The Claimant has tried to label Canada's arguments as circular, that it is too early to challenge the termination as an expropriation claim in Windstream I and too late now.

However, this ignores the essence of its claim that is not the termination itself. But, rather, the circumstances that Ontario created leading to the termination of the FIT contract.

It cannot argue, on one hand, for liability that Canada -- rather, Ontario's measures breached the minimum standard of treatment and expropriated its investment, and then, on the other hand, that they are not looking for the same measures for time-bar purposes.

CO-ARBITRATOR GOTANDA: And that's where I get a little confused.

Because expropriation, at least the way I read the Windstream I Award, is that cause of action doesn't arise until there's a

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termination of the contract.

Am I misreading it or is that incorrect?

MR. TIAN: The cause of action, in case of expropriation, is somewhat linked with the loss or damage, for that respect.

And it is our standpoint that the knowledge of loss for the expropriation claim arose at least on May 2012 when the Claimant had knowledge that its Project could not move forward in a way that respects the FIT contract's timeline.

CO-ARBITRATOR GOTANDA: But then how does that square with the Tribunal's decision saying, essentially, that your claim is, essentially, not ripe here because the contract is still in force and it hasn't been, hasn't been terminated. Hasn't been taken, in other words.

If you can't bring the claim until they actually take the property, that's a different question as to whether or not you have incurred damage.

In other words, they haven't actually incurred -- the word I think that the Claimants are focusing on is they haven't incurred

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the loss or damage.

You may know that -- you think that there might be loss or damage but you actually haven't incurred it, and I think that's what the Court was saying. The Tribunal was saying -- the earlier Tribunal was saying. It just wasn't incurred yet.

And so, therefore, until that time where the contract is actually terminated, it's not incurred.

MR. TIAN: Canada understands the first Tribunal's Award not to mean that an expropriation would arise when the contract is terminated.

In fact, the Tribunal did not opine on that question. The Tribunal only opined that, back then, there was no expropriation. And it is up to this Tribunal to decide whether there is a viable claim of expropriation after the contract has been terminated in 2018 and effective in 2020.

So it wasn't the question that was specifically on the mind of the first Tribunal.

CO-ARBITRATOR MCLACHLIN:

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Where are you on your slides?

MR. TIAN: This one.

CO-ARBITRATOR MCLACHLIN: Okay, I will go back there. Thank you.

MR. TIAN: The essence of the Claimant's complaint -- that is Ontario's measures -- and the background fact -- that is any promise that was made in 2011 -- to the extent it is relevant at all or predate the critical date, the starting point of the limitation period analysis is the essence of the cause of action.

At paragraph 206 of the reply, the Claimant attempts to portray its cause of action as the composite measure arising from the sixth individual measures. Yet, it makes no submission as to how the six individual measures amount to a composite measure.

Nor does it make any submission on the effect of a composite breach on time-bar requirements.

The Tribunal must reject the Claimant's unsubstantiated attempt to amalgam all the challenge measures which means the Tribunal is to analyze each measure individually.

And, even if the six measures

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were to amount to a composite measure, the proper approach remains to analyze them individually for time-bar purposes.

When faced with a composite breach claim, the Rusoro Mining tribunal stated that the better approach of finding time-bar, consistent in breaking down each alleged composite claim into individual breaches, each referring to a certain government measure and to apply the time-bar to each of such breaches separately.

The Bilcon --

PRESIDING ARBITRATOR MILES: Just semantically, a measure may, in total, be the basis of a breach. But, on the other hand, a measure may not be the entirety of the breach.

Just, it's simple logic. A measure could be all that you're required to have a breach or a measure could be an element of a breach, depending on what the measure is and depending on how you're using the word measure. Again, whether you're using it as a thing, as a proper noun, or just a description like an element.

MR. TIAN: Yes.

PRESIDING ARBITRATOR MILES:

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Right. So I think I understand your position more clearly now.

But insofar as the Claimant's alleging a measure qua breach, your position is, if that measure qua breach occurred more than three years before the notice of intention itself; right?

MR. TIAN: Yes.

PRESIDING ARBITRATOR MILES: If, on the other hand, we decide that it's not the way the Claimant is treating -- is using the word "measure" in the context of its -- we consider it's using some of the elements as background facts that give rise to a breach that did occur within the three years, then you would accept that Glamis Gold says that that is part of the background facts and we can use those background facts that are older than three years?

MR. TIAN: To inform the actual alleged breach.

PRESIDING ARBITRATOR MILES: Well, right. But they be a necessary element of the actual breach. It's not just to inform. There could be four of the five required elements, all except loss predate.

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But, if the loss didn't occur until within the three-year period, then all of your elements of breach don't arise and you don't enter 1116/1117 territory until that loss arises; correct? It's not just to inform.

MR. TIAN: In Glamis, it is to inform.

CO-ARBITRATOR MCLACHLIN: May I come in.

Taking you back to Glamis Gold, three lines from the bottom, starting at four:

> "You may cite to earlier events as background facts."[as read]

In quotes.

That would be to inform.

> "Or factual predicates."[as read]

End quotes.

Factual predicates. That connotes that it's going to become an element of a breach that may arise later.

So it could be an element. It's a little more, I think, with respect, and

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this is a question, actually, for you.

But isn't it a little more than simply to inform.

You could have elements of a breach that had not constituted a breach before the limitation period because they weren't added to other things.

When you add something else after the period starts to run and, click, it all comes together and you have that magic thing called a breach. And, at that point, you can't describe that breach without going back to cite Glamis Gold again, the factual predicates.

So it seems, to me, it's pretty clear.

The question is whether your breach came after but you can certainly consider elements of the breach that came.

MR. TIAN: You can consider elements of the breach that are part of the background facts.

CO-ARBITRATOR MCLACHLIN: Thank you.

PRESIDING ARBITRATOR MILES: Okay. I think we are clear on that.

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MR. TIAN: If I may just add to that.

When you rely on it for a breach, that does not mean it would necessarily reset the time-bar to zero.

CO-ARBITRATOR MCLACHLIN: I don't understand that.

MR. TIAN: It means that it does not necessarily put the three-year period at the beginning of the very first background facts.

CO-ARBITRATOR MCLACHLIN: The beginning is when you have your cause of action.

MR. TIAN: Yes.

CO-ARBITRATOR MCLACHLIN: That's the critical question; right?

MR. TIAN: Yes.

CO-ARBITRATOR MCLACHLIN: We agree on that. Thank you.

MR. TIAN: And the Bilcon tribunal similarly echoed, in finding that it's possible and appropriate, as the tribunals in Feldman, Mondev and Grand River, to separate a series of events into distinct components; some time-barred and some still eligible for consideration on the merits.

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And, therefore, looking at the six measures individually, the Claimant still acquired knowledge of five of them before the critical date.

For knowledge of the alleged breach, the question becomes when did the Claimant first acquire actual or constructive knowledge of individual challenged measures and whether that is before the critical date.

Measure A, the Claimant challenges Ontario's failure to conduct further studies.

The Claimant was well aware that Ontario did not plan to conduct any further studies to lift the moratorium at the time of the Windstream I.

CO-ARBITRATOR MCLACHLIN: I have to question you on this because it's just not sitting -- I am not understanding why you would go back to test each of the individual measures if we have agreed that the critical thing is when the cause of action arises and you can look at components that arise before then.

So why would we then be testing each of the elements? It seems to me the

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test goes to when the cause of action arises.

So if, at some point here, a cause of action arises, then we apply the limitation period, but not before.

MR. TIAN: As Canada has understand the essence of the Claimant's case, the cause of action remains with Ontario's measures. Therefore, we are going to look at Ontario's measures to determine when the cause of action arose.

PRESIDING ARBITRATOR MILES: This does feel very similar to your opening. You have taken us through those dates.

I don't think it's in disputes what dates A, B, C, D occurred. It's E and F and failure to amend after the Award that postdate and that fall within the three-year period.

So you don't need to go through all these dates again. You have already done that.

You can see what we are still grappling with is a point -- well, the issue for us -- and it may be that you have made your submissions and it's for us to decide which is probably right.

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The question for us is when do we find the cause of action to have arisen and for the Claimant to have knowledge, possibly constructive knowledge of the cause of action and the loss arising out of that cause of action, and whether they are background fact or measures. The date is not in dispute. We know what dates they were. So we know what we have to do, as a matter of law, to claw back things that predate three years of the notice of intention.

So you don't need to go back through your opening submissions again on that.

MR. TIAN: So just one point on that.

Our position is that measure F, the very last one, is also time-barred.

CO-ARBITRATOR MCLACHLIN: Yes, that's your position.

MR. TIAN: Along with the four other Ontario measures.

PRESIDING ARBITRATOR MILES: And that goes to the point that you made in opening on continuing breach which I think was Rusoro you relied on for that. I may be wrong. That might have been continuing breach.

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But that was your point on continuing breach. If you start doing something that's a breach, you keep doing that same breaching thing, your time starts to run from the date you start doing it?

MR. TIAN: That is correct, from a legal standpoint. But, on the facts of this case, we have actual -- we have evidence as to the Claimant's actual knowledge of the measure F.

PRESIDING ARBITRATOR MILES: Right. But measure F is a continuing breach.

MR. TIAN: It's a continuing measure.

PRESIDING ARBITRATOR MILES: Okay. Okay. All right.

MR. TIAN: Therefore, looking at the -- all the time-barred measures, the Claimant's cause of action clearly arose before the critical date, and that informs its knowledge of the alleged breach.

Turning to the Claimant's knowledge of its loss or damage.

It points to the termination of the contract by the IESO in 2018 as its first

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acquisition of knowledge but that's not the essence of the Claimant's damage case.

The essence of its damage case, is its inability to develop the Project and to receive steady revenue provided by the FIT Contract.

PRESIDING ARBITRATOR MILES: So, Mr. Tian, I was trying to help you along.

You dealt with all of this in your opening. We understand your position on when you submit the individual knowledge of the individual measures slash elements/components arose. We have got that. You don't need to do that again.

MR. TIAN: Yeah, I am going with loss.

CO-ARBITRATOR MCLACHLIN: That would be Slide 58 then.

PRESIDING ARBITRATOR MILES: Oh, sorry. Right. Good. Slide 58.

MR. TIAN: And the Claimant knew of that inability to develop its Project in May 2012 when it could not develop the Project in time to meet the requirements of the FIT Contract.

And the Claimant's counsel

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acknowledged this morning that that's the moment where the consequences of Ontario's actions materialized. It was back then that the Project cannot be developed in time. It is no longer financeable back then.

And that inability to develop the Project, as of May 2012, marks the Claimant's first acquisition of the knowledge of the damage that it now seeks to recover in this arbitration.

Namely, the steady revenue provided by the FIT Contract.

Simply put, the Project was unbuildable as of May 2012 and any further income that would have derived from that FIT contract was irretrievably lost.

CO-ARBITRATOR MCLACHLIN: I just want to understand this.

You did have a moratorium and you did have a force majeure which would kind of put things on hold. And you did have, as the first Tribunal found, I think, everybody was on the footing that it might go forward eventually.

So why, I am having trouble understanding the 2012 date. That may be my problem. But perhaps you could address my

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concerns and tell me where I am confused.

MR. TIAN: The -- as of May 2012, the Claimant knew the Project could not be developed in time to meet the timeline of the FIT Contract.

And it would be the FIT Contract that would grant it the revenue that it seeks to recover.

CO-ARBITRATOR MCLACHLIN: Well, what do you say about the force majeure? What was the impact?

MR. TIAN: I am sorry, I --

CO-ARBITRATOR MCLACHLIN: If they had been -- maybe I am wrong. But they said we can't perform on time because of your moratorium, so now the reason they gave notice of force majeure, which was accepted, was that they wanted to put everything on hold.

Implication being that this will eventually be developed. We will get more time.

What do you say about that?

MR. TIAN: That's -- whether there is any such promise and whether that promise could be reasonably relied upon, is another

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question.
But the facts is that they were told by Ontario that there's no direction to be made and they were told by the OPA back then that the OPA is not prepared to renegotiate the contract.
CO-ARBITRATOR MCLACHLIN: So the moratorium was actually a termination, on your point of view, effective termination. They could never revive the thing?
MR. TIAN: Well, the May 2012 was the point where the Claimant had knowledge of its loss, absent further unconfirmed potential renegotiation.
CO-ARBITRATOR MCLACHLIN: Okay. I have your submission.
CO-ARBITRATOR GOTANDA: Just a quick question on 59.
Do you equate cause with incurred?
MR. TIAN: The language of the treaty is incurred.
CO-ARBITRATOR GOTANDA: Right.
MR. TIAN: And it is when the Claimant would have knowledge that it has suffered

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loss.
CO-ARBITRATOR GOTANDA: No, no, that's not what the treaty says; right. It's knowledge that the investor has incurred damage or loss.
MR. TIAN: So it has knowledge that it has suffered loss. And that is when it has knowledge where loss has been caused to it.
CO-ARBITRATOR GOTANDA: I am not sure if cause is the same as incurred but you say it is; right? That's your position?
MR. TIAN: Whether there is loss that has been caused by a breach, that's a question for damages.
All the Claimant needs to have known, for purposes of limitation period, is whether it has suffered loss.
CO-ARBITRATOR GOTANDA: An actual loss? Or --
MR. TIAN: A loss that the extent or quantification may be unclear but it has to have knowledge that it would have suffered an actual loss.
CO-ARBITRATOR GOTANDA: Yeah, some actual loss.

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MR. TIAN: Yeah.
CO-ARBITRATOR GOTANDA: You may not know the actual amount but you actually have to have suffered a loss.
MR. TIAN: Yes.
CO-ARBITRATOR GOTANDA: An actual incurred damage or loss.
Okay. Thank you.
MR. TIAN: The Claimant claims to have spent money to further developing its project after the Windstream I Award.
However, none of this cost arises within the limitation period. Only the CSR studies may have occurred after the critical date. Yet, the Claimant provides no proof of it ever being paid.
My colleague Ms. Squires just demonstrated that there is no loss in terms of fees. The Claimant maintains -- for the Claimant to maintain the 6 million letter of credit.
In any event, the Claimants knew abundantly well, when it signed the FIT Contract, on August 2010, that the letter of credit constitutes a condition. It knew with certainty the terms, the amount, and the

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conditions of return.
And when it chose to keep it after May 2012, it had knowledge that it could only be returned upon the termination of the FIT Contract, or otherwise, in accordance with its terms.
I will close my arguments with one final point.
The NAFTA parties intended for 1116(2) and 1117(2) to be a strict limitation period. This is consistent with the very purpose of limitation period provisions which provides legal certainty and predictability, a point that all three NAFTA parties have noted in this case. It should definitely not be easily set aside.
Thank you.
PRESIDING ARBITRATOR MILES: Just before you go, Mr. Tian.
You heard this morning Ms. Sherkey's characterization that, in the earlier Award, the Tribunal found that there was additional value in the FIT Contract that could be created if the parties renegotiated and restructured their contract.
And she said the value that

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would have been created but for Ontario's acts or omissions after the first Award is the loss that the Claimant is seeking in these proceedings in respect of its FET claim.

That loss they can't have known about in 2011; can they?

MR. TIAN: That's a hypothetical loss because value has not been created. The parties have not renegotiated.

PRESIDING ARBITRATOR MILES: Well, Mr. Tian, every single commercial or arbitration damages case is on the basis of a hypothetical loss. That is what the but-for is. It's always hypothetical.

So the Claimant's claim is that the loss that they suffered but-for Ontario's breach. Yes hypothetical. It always is.

That that value could only have been created after the Award because -- perhaps because, in part, given the background fact, maybe, of the Tribunal's finding that there was additional value that could be created if the parties renegotiated.

So if we take that background fact, that additional value that would have been

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created but for Ontario's breach in Claimant's case can't have been known in 2011; can it?

MR. TIAN: That would have been the exact same loss that it knew in February -- in May 2012.

Because the value that is to be created, in the Claimant's view, from the renegotiation of the FIT Contract and, eventually, the lifting of the moratorium is the value that is to be derived from the FIT Contract. If the steady revenue for a period of 20 years.

PRESIDING ARBITRATOR MILES: The Claimant's case that you're needing to answer is, in fact, that the Tribunal -- the Claimant argued, in the first proceeding, that they had de facto termination. We have lost the FIT.

They lost on that. The Tribunal said no, you have not lost the FIT. You have still got it. So there has been no taking. There has been no expropriation because you still have that asset. It's still yours.

Then, upon that finding, the Tribunal then made the comment, which the Claimant construes as a finding that there was additional value that could be created if the parties

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renegotiated and restructured.

How could they have known that in 2011 or 2012?

MR. TIAN: Because it's the same loss that they had thought they lost in May 2012. We are talking about the same -- quantum wise, we are talking about the same amount.

PRESIDING ARBITRATOR MILES: Okay. All right.

MR. TIAN: Thank you.

PRESIDING ARBITRATOR MILES: Can we take a brief break? Who is the boss? Ms. Squires, you're in the chief seat. Mr. Neufeld is reaching for his mic.

MR. NEUFELD: You are wondering how long I have?

PRESIDING ARBITRATOR MILES: Yeah.

MR. NEUFELD: How long would you like me to have?

PRESIDING ARBITRATOR MILES: Is it just you?

MR. NEUFELD: It's just me and it's just the estoppel question, so I think more

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depends on how interested you are in the estoppel questions.

PRESIDING ARBITRATOR MILES: Very.

MR. NEUFELD: I think, you know, I have a few things I need to say but I suspect that you will -- you will want to engage on other points.

PRESIDING ARBITRATOR MILES: All right. So shall we -- it's 3:23. Shall we come back at 25 to, please. So shortish break and then we will see how you go.

I was reflecting in the lunch break and not just to release us all early on a Friday afternoon. But I don't want you all to give 15-minute closings for the sake of giving 15-minute closings.

And I am actually finding myself thinking -- and we designed it this way so I don't want to take it away and I am not taking it away. But, if you don't want to use it, you are free to release it.

MR. TERRY: On our side, we were thinking just a couple of reply points, perhaps, and using it that way.

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MR. NEUFELD: Exactly the same point I was going to make.
PRESIDING ARBITRATOR MILES: Okay. Excellent.
All right. So let's come back at 25 to for Mr. Neufeld. Thanks.
--- Upon recess at 3:24 p.m.
--- Upon resuming at 3:39 p.m.
PRESIDING ARBITRATOR MILES: Okay, here we are.
CLOSING ARGUMENT BY MR. NEUFELD (Cont'd):
MR. NEUFELD: Hello again.
Okay. I am going to start, actually, just by flashing up the FIT Contract provision for force majeure, as there has been some questions around it, and I would like for everybody to walk away from this hearing with an understanding of what is in the FIT Contract and what force majeure means in these instances.
We are getting caught up on who the parties are and, of course, in this case, the parties are WWIS and the IESO.
Force majeure, you can see, at 10.3, for the purpose of this agreement, the term force majeure means:

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"Any act and cause or condition that prevents a party from performing its obligations (other than payment obligations) hereunder, that is beyond the affected party's reasonable control and shall include."[as read]
I need the next paragraph because I don't have it in front of me. There it is.
So:
"Any inability to obtain or to secure the renewal or amendment of any permit, certificate, license, approval."[as read]
I pause on this because those permits are all coming from Ontario, of course, and that's where the delay is. We understand that.
The reason they are in force majeure and the reason being so granted the

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request for force majeure is because, originally, they couldn't get access to their site. It was a government measure, government being a third party to this contract, that caused them not to get access to their site.
So the five-year time limitation to bring a project into MCOD can be paused in a situation like this but that doesn't change the term of your contract. Your five-year term will be pushed out from once that force majeure event is remedied.
I hope that's all crystal clear.
Okay. Now back to script.
Actually, not really because -- well, it is but. Yeah, let's show up the first slide of the regular slides there, Ryan, that I was going to go to.
You have seen already -- it seems to me you flipped through them, you have been referring to them already, what my project was last night and what I worked up into the late hours doing. I just want to walk you through the format first and then we can take up issues.
What the slide does is brings

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you through the three-part test which the Claimant and Canada agree on in terms of how to -- how we know something is issue estoppel.
And what you see in the top row decided by the Tribunal are quotes from the Tribunal. We did not take those words and twist them in any way, shape or form. So you can rest assured that those are quotations.
Then what I did is dug out where it was and by whom it was put in issue and why its resolution was necessary for you to have an understanding of why the Tribunal is estopped from reopening the issue.
Now the bottom part is the fun little part that you asked us to focus on what is not covered.
So that's sort of my little flourish, our little flourish on what the Tribunal sort of didn't do or, you know, what doesn't bind you effectively.
Now, before we get into this particular slide -- well, actually, no. Let's cover this slide first.
So the issue -- what was put in issue -- and it's, of course, it's difficult to

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compartmentalize these things and that's why, in this case, I think it applies to three different issues: It applies to the timing of the breach; it applies to when the project becomes non-financeable; it applies to the alleged promise to freeze.

And, you know, the argument that the Claimant raised in Windstream I was that, as a result of the moratorium and the government's refusal to insulate the Claimant against its consequences, the project had become substantially worthless and not financeable. We have all seen that. We have dealt with that already.

The Claimant also argued that the failure to carry out the promises to ensure that Windstream's project was frozen and not cancelled following the moratorium, which it could have done by changing contractual deadlines, amounted to a breach. And Ontario had definitively refused to fulfil its promise to ensure that the project was frozen and not cancelled.

So that issue was definitely before the Windstream I Tribunal. There is no doubt about that.

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Now, the findings of the Tribunal are before you. I don't need to read them out. We have referred to them so often in the last few days.

What, you know, I can add as our sort of interpretation beyond what the Tribunal has said is that the Tribunal did not determine that the breach continued beyond a reasonable period of time. I have stressed that a few times now.

Definitely not beyond the date of the Award.

The Tribunal also, we recognize, didn't use the word "freeze" or "frozen".

Just that the FIT Contract had not been amended and the Project was no longer financeable due to the force majeure termination right.

PRESIDING ARBITRATOR MILES: Just so we are precise.

The Tribunal did use the word "freeze" seven times and "frozen" 12 times but you would say only in summarizing the parties' respective positions, not in its reasoning and

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analysis --

MR. NEUFELD: Disposition.

PRESIDING ARBITRATOR MILES: Or just not in its disposition. Not in its reason or analysis.

MR. NEUFELD: No -- yes, because you'll find, from these slides, that I will dig out factual findings. I dug out findings of -- because, you know, an issue estoppel. We are worried about issues of facts as well as issues of law. And those findings are, you know, are equally barred from being reopened.

Now I'd like to come to the Claimant's Slide 78 that they showed this morning.

You will recall, in my opening, I really stressed the change in the story throughout the Windstream I pleadings. As we know, things evolve. Our cases evolve as we go along. And that's certainly what happened in Windstream I.

So my point to you when I opened today was that, throughout all of its arguments, it cites to our counter-memorial. And I had a little heart jump when I saw, oh, there is a hearing here. That's not the counter-memorial.

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What does that say? And this is a lesson in let's make sure we have all the words before us.

So, Ryan, if you could pull up the transcript from that day. And I think it's worthwhile providing all the context, so we will go to page 202. There, they are citing only page 203 and 204.

This goes to your very question, President Miles, about the temporary nature and the argument that Canada was making about the temporary nature of the non-expropriation, I will call it that way.

Which is what I turn to on page 202.

And then I say that the OPA was willing to preserve its opportunity to pursue a contract. This was made clear in the conference call which we heard again this week:

> "The OPA didn't want the Claimant's project to fail because of the government's lack of readiness to approve it. It was prepared to wait five years for the

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approval framework to be finalized as long as the Claimant was also prepared to wait."[as read]

And then a little bit further along:

"But instead of negotiating a solution around these provisions, the --"[as read]

I said that:

"The Claimant insisted on contract amendments that would not have just frozen the contract but would have rewritten it."[as read]

This was my comment about asking for the moon earlier today.

And, in response, the OPA reminded the Claimant that it wasn't in a position to grant the unreasonable requests.

Now, here we come to the kicker.

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So what the Claimant cites, on the next page, is:

"From the government's point of view, nothing prevents the Claimant from going through the Crown land site release process and applying for an REA once the policy framework is finally in place."[as read]

That's what they rely on.

The next sentence after that, I said:

"However, as the Claimant has indicated, it's no longer in a position to secure financing, which makes moving forward impossible."[as read]

We had moved on.

The promise was aired and understood by the time we got to the Tribunal and the Tribunal understood it too, which is why it makes a finding that the project is no longer

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financeable as of May 12th -- May 4th, 2012.

Okay. Let's keep going through the issues, then.

The next issue is something that -- so there are, by my count, five instances where the Claimant has asked for an extension -- either waiver of its termination rights or extension of the MCOD. And three of these happen in the Windstream I period and then a couple more happen after.

And, in each instance, the response was the same.

But the Tribunal also recognized that these were facts that the Tribunal put into its factual findings. Not in the contentious part where it said the Claimant has argued this and the Respondent has argued this. These are the Tribunal's factual determinations that it makes here.

Of course the same statements came from the IESO after the Award at the January 15th meeting, January 15th, 2017; and came from the IESO's letter from Michael Killeavy to Nancy Baines on February 9th, that they are not willing to extend the MCOD period. They are not

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willing to waive their termination right. That was made abundantly clear to the Claimant on those dates.

The third topic I threw in is one that we can probably skip. It's a horse that's been beaten to death. It's in our pleadings.

I suppose the only flourish here at the bottom is the Tribunal didn't find that lifting the moratorium was necessary in order for there not to have been a breach of 1105. I hope that's clear.

And then we come to expropriation, which you had discussed with Ms. Dosman earlier.

Here, too, I think we are clear. Yeah, we are abundantly clear. I don't think we need to -- because you had already said, well, they just jumped to the chase and that is definitely -- that's definitely our view which is sort of laid out at the bottom there minus the typo.

While the -- and I think the Claimant actually agrees with this position too, so there's no dispute here.

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I am pausing because I see you are still reading so I will wait. I will wait a little bit.

PRESIDING ARBITRATOR MILES: That's helpful.

You drafted that last night?

MR. NEUFELD: Yeah.

PRESIDING ARBITRATOR MILES: Good anticipation. Thank you.

MR. NEUFELD: It's amazing what comes at 2 o'clock in the morning.

Okay. The next slide is on the subject of delegated governmental authority and I understand you don't see this as an issue in the dispute.

I am happy to move on if you don't want to hear anything about it. I do stress, again, that the importance of the difference between the actors in this case, the IESO and Ontario.

If you need further indication -- and, you know, I was planning on coming back to this in my closing remarks but why don't I just throw it out here now.

To Professor Gotanda's

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question about the security and wasn't it reasonable and they -- you know, who is holding that security and is it acting with delegated governmental authority is a key determination in that factor, in that situation. And the Claimant hasn't even begun to unravel that ball of wax.

It could have, it could have pointed to these findings of the Windstream I Tribunal. It probably didn't want to because the Tribunal's pretty clear saying that the directions -- when acting pursuant to a direction, we know that's delegated, but you can't look at these things in abstracto. You have to look at them in concreto.

And it's absolutely essential, as we know, to look at the very act being undertaken to know whether it is an act carried out with delegated governmental authority.

You can also look to the Mesa tribunal decision where they look, again, at the OPA and what it's doing. And, interestingly, there, sure, they find there is delegations of governmental authority but it's with respect to the impugned measures in that case.

There is no finding in

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Windstream I or in Mesa that a decision under the contract is a delegation of power. There's no, there's no finding a decision to terminate a FIT contract is a delegation of governmental authority.

The next topic I threw in was on regulatory uncertainty and scientific research.

The Claimant sort of hammered on this one in its opening and I think we pretty much left it alone because our message to you has been consistent, let's start from the Award and go forward.

Well, here is what the Award says.

First of all, Canada put at issue the matter that the Claimant knew that its project required regulatory change in order to proceed and it accepted these risks when it invested in Ontario and it signed back that FIT Contract.

The regulatory framework for offshore wind projects remained undeveloped. That was Canada's argument in Windstream I.

The Tribunal finds, in its disposition on 1105, plus 1110 as well, but it's a

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necessary finding, is what I am saying, that, while the regulatory framework continued to envisage the development of offshore winds, additional and more detailed regulations governing offshore wind, specifically, were never developed.

And it's on this one that I would like to make sure that we are keeping our estoppel issues straight.

Again, you'll recall, in the opening, President Miles, you asked me, well, didn't the Tribunal accept your argument that the FIT Contract was still in force, and that's why it wasn't expropriated.

And I said, well, I don't remember arguing it that way which the Claimant took issue with again this morning. Saying that we had.

But look, again, at their Slide 43 and what's being put in issue.

Is it the fact that the FIT Contract remains in place? Or did it have to do with the scientific research and the deferral, what we call the deferral at the time the moratorium being presented as a temporary, temporary measure.

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Again, I think the easy way to keep this straight is just simply to go back to the Tribunal's words. What did the Tribunal say.

The other problem -- and I guess this is a point I am coming to -- is that we find nits in these awards. You are going to find problems. You are going to find the things that you scream at when you read it for the first time. You say they don't understand. Why didn't they get this. You know, it's frustrating.

We are not here to open up those things. We are not here to second guess. That's not the point. Let's move forward.

That's how you have finality and that's how you have certainty and that's how, you know, the legal world operates.

All right. The next topic was Project is an early stage project and the DCF is not available now.

Again, I would say this is a horse well beaten. If you want to discuss it further, I am more than happy to.

But this was clearly the foundation of the Tribunal's decision on damages.

Oh, we do. Yes.

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CO-ARBITRATOR GOTANDA: What do you make, though, out of your expert's opinion has evolved on what is early stage development?

MR. NEUFELD: Let's do that when I come to the slide on -- if that's okay by you. Or we can flip to it right now, if you like, on -- let's go to Dr. Guillet's slide. So it's, you know what -- it's the last one, Ryan.

And if I only have four more before that, that's boding well for an early afternoon, so that's good too.

So we have laid out in Slide -- is it 72, the --

CO-ARBITRATOR GOTANDA: Oh, no, no. 72 raises a whole different -- no, no. 72, no. 72, we will get to that.

MR. NEUFELD: Okay.

CO-ARBITRATOR GOTANDA: What I guess the question here is -- and I think the answer -- I will tell you what I think the answer is and you can tell me if I am wrong.

The fact that your expert's view has changed on this is just too bad.

If the Tribunal found it's an early stage project, as they defined it, under

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your reading of collateral estoppel, the fact that his view may change, he changes his mind entirely, it doesn't matter.

MR. NEUFELD: I do not disagree.

I -- now that you have met our expert, you know that he is stubborn enough that even if we told him he wasn't allowed to change his mind, he would have already changed his mind. But that's just --

CO-ARBITRATOR GOTANDA: But he has -- I guess here is the question I have, though.

Because he changes his mind and not entirely, to be fair to him. His thinking has evolved because there are just more transactions that he now is able to develop a more refined sort of view, so to speak, of this.

So one could make the argument here, couldn't you, that where the Tribunal says, yes, this is an early stage project, but could one say, if that was critical for the, say, valuation at that point in time, versus if they are looking to value it differently or even on a different claim, I think the answer is no.

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But does that change your view?

MR. NEUFELD: Well, there was a nasty little caveat there, "on a different claim", I am just going to ignore, I think.

CO-ARBITRATOR GOTANDA: Okay.

MR. NEUFELD: Because I go back to the first statement you made and you are stuck with it. We are stuck with it. That's the world we live in.

I do not disagree with that.

The fact that it gives me some comfort is the fact that early stage has not changed. I mean -- and this is -- we are talking about a project here that did not even do its wind testing. Right. It is the -- in my mind, it has always been of the earliest stages.

I know they have done a lot of expert work. I am not diminishing all the expert work they have done. But that was all in litigation. It was all before the Windstream I Tribunal. And then it was packaged up and presented as go forward.

And, again, I don't mean to diminish their experts. I don't mean to diminish

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them for doing it. You know, valid, valuable work. Sure. But not in this context. Right and so --

CO-ARBITRATOR GOTANDA: So then you would live with the categories -- the Tribunal lays it out in almost absolute terms and Dr. Guillet says now, not quite right. My thinking has evolved. And there's a spectrum more.

But we are stuck, aren't we, with those absolute. And so, if it doesn't fall in late stage, as was raised earlier, then it has to be then considered earlier stage or can you somehow say know that's a little different at this point.

MR. NEUFELD: No. I think it's an early stage project. That's the one thing that's abundantly clear from all this.

CO-ARBITRATOR GOTANDA: Okay. Consistent.

MR. NEUFELD: Yeah, at least that right. And that's why I said I try to give you comfort on that point.

CO-ARBITRATOR GOTANDA: And we will get to 72.

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MR. NEUFELD: Okay.

PRESIDING ARBITRATOR MILES: If I understood what you meant there, even if the -- even if the elements of the stage is changed, where this sits in early stage remains the same. If anything, it's the line between early and late might have become unclear.

MR. NEUFELD: Precisely.

PRESIDING ARBITRATOR MILES: But this one is so far down the line, in your submission, that it doesn't make any difference.

MR. NEUFELD: Precisely. Exactly.

PRESIDING ARBITRATOR MILES: It will make a difference to the calculation of a multiplier on the base of a mean, though; won't it?

MR. NEUFELD: Sure. Sure.

PRESIDING ARBITRATOR MILES: Or median.

MR. NEUFELD: Sure. Sure.

That's what the damages boss knows all about. Do you want me to get her back up for you?

PRESIDING ARBITRATOR MILES:

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And let you escape the numbers.

Just we have interrupted, can we come back to 66. I was looking at that paragraph 380 in its entirety. And thank you for pointing us to that. That is indeed the attribution paragraph and it's very interesting.

In my head, I was trying to figure out what it would mean for your collateral estoppel argument if it were the case that this Tribunal concludes that the failure of the Ontario government to take necessary measures, including, when necessary, by way of directing the OPA within a reasonable period of time after the Award to -- what's the characterization? To.

MR. NEUFELD: Bring clarity; is that? Are you looking for those words?

PRESIDING ARBITRATOR MILES: No, I am looking at the Claimant's characterization for construction.

MR. NEUFELD: Unblock.

PRESIDING ARBITRATOR MILES: To create, I suppose, additional value in the FIT contract, as a consequence of renegotiating and restructuring. Right.

If we were to find that

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constitutes a breach of 1105, so just substituting the not acting in a reasonable amount of time in directing after moratorium.

But, instead, it's not, not directing -- I don't know if it needs a reasonable amount of time or not. But not directing after the Award in relation to the creating value by restructuring.

If we read on, then, in 380, it was, indeed, the government that could have made that direction as a consequence of the Award.

So it cannot be said that the resulting regulatory and contractual limbo was a result of the Claimant's own failure to negotiate.

The regulatory limbo Claimant found itself in would follow the, rather than imposition of moratorium, the omission which was a result of the omission of the government and as -- Government of Ontario and, as such, is attributable to the Respondent, Canada.

So, so the Tribunal, therefore, need not consider whether the conduct of the OPA during the relevant period, a source that would be considered to be attributable to the Respondent.

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Just take that leap with me.
MR. NEUFELD: Um-hmm, um-hmm.
PRESIDING ARBITRATOR MILES: If we were to find that breach, as I now understand it to be characterized on FET under 1105, it would be the same; wouldn't it? It's still the direction of Ontario or the omission of a direction.
MR. NEUFELD: Yeah.
PRESIDING ARBITRATOR MILES: To the IESO.
So the fact that the IESO went ahead and terminated or refused to negotiate, doesn't matter if we find that the Government of Ontario breached NAFTA by not.
MR. NEUFELD: Directing.
PRESIDING ARBITRATOR MILES: Directing to create that additional value, I think is the instruction.
MR. NEUFELD: I don't disagree. Um-hmm, um-hmm.
PRESIDING ARBITRATOR MILES: Okay. That's helpful. Thank you.
MR. NEUFELD: All right. We were at, oh yeah, the DCF. That one we have dealt

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with now. The FIT Contract has no value. You have seen that in our pleadings. And that's probably the clearest statement of all from the Tribunal.
Likewise, the security deposit, that one, you have seen before.
Site access, this one has come up now the last couple of days.
So what was put at issue here was the Claimant argued that the Ministry of Natural Resources would grant -- it's a bit like its argument now.
It would grant WWIS's Crown land application, its AOR status in a timely manner. It's all based on an assumption, on a hypothetical. And it relied on that commitment and that's why it invested in --
PRESIDING ARBITRATOR MILES: Just in the box before in 69 -- sorry, two boxes before, Slide 69, the Tribunal did not find the FIT Contract would change in value between market forces.
Equally, it didn't find that it would not change in value. And it didn't find anything about that. It just said, as at the date

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of the Award, it has no value.
MR. NEUFELD: Right. Sure.
PRESIDING ARBITRATOR MILES: And it said value could be created in renegotiation, reactivation as to the question could value be created in any other way --
MR. NEUFELD: Yeah. No disagreement.
PRESIDING ARBITRATOR MILES: No. Okay.
MR. NEUFELD: Okay. So back to the site access.
Here, the Tribunal notes that, while the Claimant did have a FIT Contract and grid connection, it did not yet have site control, of course.
And I think we are all understood on that. But it raises the 3 o'clock in the morning miss that I didn't put grid access in here and there's an answer other than sleepiness and I should have put it in.
But it is not having my cake and eat -- actually, there is another saying that I really like. It's having your -- having sold your cow but wanting to --

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CO-ARBITRATOR MCLACHLIN: Get the meat.
MR. NEUFELD: Yeah. Have you heard that one before, Justice McLachlin?
CO-ARBITRATOR MCLACHLIN: I come from the west.
PRESIDING ARBITRATOR MILES: We are both farm girls, so.
MR. NEUFELD: So the grid access point is also referenced in 475, as I just read out.
The question, I guess, for you is do you read it in connection with -- is context for 475 also paragraph 140 of the Award?
If I were in a treaty right now, I would certainly argue it was.
We are not in a treaty and, hey, you know what, I am going to argue that it is too.
Paragraph 140 of the Award is, again, the factual determination that the Tribunal makes and, as Ms. Squires said this morning, they touched on this ever so slightly, as compared to AOR and site release, which I already walked through. But, grid connection, they didn't nearly

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as much.
But they do find, at paragraph 140, that, on November 8th, 2010, WWIS received a notification of conditional approval for connection.
So do you read 475, grid connection, in connection with paragraph 140's conditional approval for connection, because that's the grid connection that they are talking about? And I would argue that that is a proper reading.
Now back to our nits in awards.
Is that grid connection or isn't it? And we are stuck with the Award that we have.
PRESIDING ARBITRATOR MILES: And grid connection is used interchangeably with grid access, as I said earlier in the week, in the Tribunal's reasoning. And this is not unconnected to Professor Gotanda's question earlier on the stages of development.
MR. NEUFELD: Right.
PRESIDING ARBITRATOR MILES: As defined by Dr. Guillet because the Tribunal

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took those definitions.
MR. NEUFELD: Yeah.
PRESIDING ARBITRATOR MILES: And treated grid connection on the basis as it understood him to opine on that.
MR. NEUFELD: Yeah.
PRESIDING ARBITRATOR MILES: And it seems like, with many of the four factors for fully permitted, if, indeed, fully permitted itself, this is a spectrum.
MR. NEUFELD: Right. Right.
And given that's all the Award says, that's probably all I can say on that as well.
The last point is the one Professor Gotanda's been waiting for on Dr. Guillet's confidential information.
But, I mean, I think we see where we are going now. We are stuck with what we have.
CO-ARBITRATOR GOTANDA: Well, are we? Because -- and here is the push back and tell me how you think this is wrong.
Collateral estoppel, you actually have to decide the issue.

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MR. NEUFELD: Um-hmm.
CO-ARBITRATOR GOTANDA: Right.
And, here, I am looking at 475 and 477 and there is no explicit sort of finding to this as opposed to on the DCF and early stage. You know, there, you have, in the -- it's very clear. Explicitly clear by the language.
Here, you're almost doing it by implication, from what I see. As opposed to the Tribunal making a specific finding that it's to be used.
So I am wondering if this is a little bit of a stretch.
Also, too, I think we are limited by the Award itself. In other words, the fact that the Claimant may have argued something, if it's not actually in the Award right in that spot, it doesn't matter for purposes of collateral estoppel.
Doesn't it actually have to be in the Award itself?
MR. NEUFELD: It has to be decided by the Tribunal so.
CO-ARBITRATOR GOTANDA: Right. But we can't look to the transcripts as to what

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the parties argued because we don't know what the Tribunal actually took into account.
In other words, we have to look to the four corners of the Award and not go outside of that.
MR. NEUFELD: But one of those -- you know, R-0951 is the Tribunal decision.
CO-ARBITRATOR GOTANDA: I am looking at 49.
MR. NEUFELD: Sure. Sure. That's just what the parties put in issue. I agree 100 percent.
But 951 is the Tribunal decision and the Award is a Tribunal decision.
CO-ARBITRATOR GOTANDA: Right.
And then we go back to the Award at 475 and 477 and, there, the Tribunal doesn't actually explicitly make that finding; do they?
MR. NEUFELD: They use the word "accepted".
CO-ARBITRATOR GOTANDA: Accepted, though, is not the same as an explicit finding; that that's something that we are bound to follow.

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MR. NEUFELD: I am not sure I agree on that.

It's very hard not to read the word "I have accepted this" as not a commitment.

If you were entering an oral contract and you say I accept that.

CO-ARBITRATOR MCLACHLIN: But it's conditioned. Maybe it doesn't make any difference:

> "Accepted the evidence of Dr. Guillet as the most comprehensive evidence relating to comparable transactions, methodology."[as read]

Which included undisclosed confidential.

Anyway, it's a what did they accept question.

MR. NEUFELD: Um-hmm.

CO-ARBITRATOR MCLACHLIN: They said it was the most comprehensive. That is what I take from that.

MR. NEUFELD: Um-hmm.

CO-ARBITRATOR GOTANDA: And

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then they go on to say, though -- and it takes this evidence as the starting point of the analysis. That's different; isn't it, for, then it is the ultimate --

MR. NEUFELD: Well, is the Tribunal, in that instance, referring to we are going to take that as a starting point to determine what the whole pie is to take off the 6 million, you know --

CO-ARBITRATOR GOTANDA: Well, but it's not clear, is it, at that point. And it's got to be clear, I think, in order to apply.

MR. NEUFELD: A clear determination.

CO-ARBITRATOR GOTANDA: Right.

MR. NEUFELD: I mean, I see where the questions are coming from and I, I mean, my position is that acceptance is a determination but.

I think -- I don't think anything more can be said. Again, we have the Tribunal's words and that's what we have.

PRESIDING ARBITRATOR MILES: It may be, if we get to it, that that change in valuation date unravels all of this anyway.

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Because once you change -- unusually -- unexpectedly, for me -- perhaps not for valuers -- that change in valuation date does, here, seem to reopen the basis for the reasoning as to the appropriate methodology to use in early stage development because change of valuation date gives you a lot more information.

MR. NEUFELD: Um-hmm, um-hmm.

PRESIDING ARBITRATOR MILES: And, once you have more information, we have data before us that -- without even going into the confidential, we have more non-confidential data available to us.

MR. NEUFELD: Right. Right.

PRESIDING ARBITRATOR MILES: So, you know, we may not -- this may be a moot point but it is, nevertheless, an interesting point that, if a collateral issue is decided on the basis of a procedure that subsequent information tells you that basis is not legitimate -- and that's not what we are suggesting here.

But, hypothetically, if that were the case, are you bound by that issue estoppel in international law.

MR. NEUFELD: On that point, I

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haven't heard the argument from my friends at the other table that it's -- there's new information and there's a reason here. I haven't -- I haven't been presented with a case either.

PRESIDING ARBITRATOR MILES: To be fair, the new information was the mathematical errors that were apparent on the face of the additional confidential information, one can't find mathematical errors if one doesn't have the variables that you would need to conclude a mathematical error because they are confidential.

So finding on the face mathematical errors in the additional information that we have because of the change of date in valuation.

MR. NEUFELD: I should have been more precise with my words.

I haven't heard invocation of a specific exception in order to unravel or not use this finding, is what I am trying to say.

PRESIDING ARBITRATOR MILES: Right. You go ahead. We were going to say the same thing.

CO-ARBITRATOR GOTANDA: To be fair, though, you didn't raise this until today.

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MR. NEUFELD: It's in our pleadings.
PRESIDING ARBITRATOR MILES: Slide 72, the findings --
MR. NEUFELD: No, I am responding to your question on estoppel for sure. Sure, sure, sure.
PRESIDING ARBITRATOR MILES: Right. Right.
So that we are estopped from deciding that we can't use Dr. Guillet's confidential information or we can't use the Tribunal's conclusion using Dr. Guillet's information, that's new.
MR. NEUFELD: Right. No disagreement.
PRESIDING ARBITRATOR MILES: And, if there's subsequent information that makes it illegitimate for us to rely on Dr. Guillet's confidential information -- I am not suggesting there is but if, hypothetically, there were, then that's a new argument.
MR. NEUFELD: Right.
PRESIDING ARBITRATOR MILES: All right, sir.

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MR. NEUFELD: Well, that's it. Those are my estoppel points. I will sit down.
PRESIDING ARBITRATOR MILES: Thank you. Thank you very much.
Mr. Terry, did you have any -- or Ms. Sherkey or Ms. Shelley. Anybody.
MR. TERRY: Each of us have a couple of points. I think Ms. Sherkey will go first.
PRESIDING ARBITRATOR MILES: Okay.
REPLY CLOSING ARGUMENT BY MS. SHERKEY:
MS. SHERKEY: Just picking up where we ended on that confidential point. I don't have too much to add, but to say Mr. Neufeld said I haven't heard my friend that they are raising an exception.
I think, to be clear, our primary submission is issue estoppel doesn't apply. It was a finding that the Tribunal accepts the evidence before it. We accept the evidence of Mr. Guillet so that's not a binding principle upon you.
PRESIDING ARBITRATOR MILES: Got that.

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If it does apply.
MS. SHERKEY: If it does apply, there could be a question, then, of the role of the fact that this is new evidence, the issue of the mistakes within that evidence that's before you.
But we haven't had an opportunity to explore the cases. We don't think that's very well developed in international law. And whether there are exceptions to the application of res judicata in those circumstances is a brand new issue raised today and now before you.
And then we note your point that it could be moot.
So I have five targeted reply points.
If we could pull up C-2474, Exhibit 3.
Apparently, there are Zoom issues to get the document up. So Canada's counsel is going to helpfully put it up for us.
PRESIDING ARBITRATOR MILES: Do you need to do this for all five points?
MS. SHERKEY: No. I was going

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to say I could move on but if they have it.
PRESIDING ARBITRATOR MILES: Is this the Superior Court of Justice? What page?
MS. SHERKEY: It's Exhibit 3. It's the August 25th letter from the Ministry of Natural Resources to Windstream that Ms. Squires took you to. And the point is quite short and simple for how long it will take to get it.
PRESIDING ARBITRATOR MILES: Do you have a page number for the exhibit?
MS. SHERKEY: R-795 is another version of it that might be simpler.
Oh, there it is.
If we scroll to the second page and zoom in.
Ms. Squires took you to the top paragraph of this where it was the letter back to the project description report Windstream filed in February.
MNR responds to this and Windstream had provided a bunch of studies and said:
"In your letter, you also described the studies you have carried out to date.

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The Ministry has not published any final guidelines or policies specific to offshore wind."[as read]

And it goes on to say so any studies you carry out are entirely at your own risk.

The point is not don't proceed with the project. Don't take out a letter of credit. Don't do anything here because you have no project.

This was a specific letter that said, if you do studies and submit them to us as part of the REA, we can't guarantee that they will be accepted.

So that's point one.

Point two.

You heard from Mr. Neufeld about the letter of credit and he said that we, the Claimants, haven't made submission on delegated governmental authority. And that's important because it's the IESO that holds on to the letter of credit, not the Ontario government.

And I just want to emphasize

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what the points are with the letter of credit because, in my submission, that misses the point. It is not an issue of delegated governmental authority. It's no one said the IESO has breached the NAFTA by holding on to it.

The point about the letter of credit being held is twofold.

First, it comes up in Windstream's expectations about the ability of the project to proceed, the messages it was getting from the government and what we say it was the shared understanding that there was a contract and a path forward, potentially, for the project.

And, if the government's view was there was no such path, it should have returned the letter of credit. The IESO, directed by the government, we don't know. It's a hypothetical because it didn't happen. But the point is that informed Windstream's expectations.

As well as the second part, that's why it was also an expense incurred. And Mr. Terry's going to speak to you more about the timing of the expenses so I will leave it at that.

But delegated governmental authority has no role.

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Ms. Dosman gave a note of caution on what authorities to look at in interpreting the FET standard. And she raised that in response to the fact that I had taken you to Lemire which sets out here is what arbitrariness means.

And I just want the be clear.

The FET standard -- we didn't go through this -- but Article 1105 sets out FETs protected under the MST. We are all agreed there's Waste Management.

Waste Management says you can't have conduct that's arbitrary, grossly unfair.

So what does arbitrary mean? That's what we are interpreting. We are not now back at the language of Article 1105 saying you can't look at these other authorities.

There was a question of how parties was used in the award and I just want to take you to a few paragraphs of the award.

If we can pull up -- I don't know who has control.

PRESIDING ARBITRATOR MILES: I have word searched the award myself, and perhaps

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Professor Gotanda and Justice McLachlin want you to do this, but it's used consistently as parties to the arbitration throughout the award. I can see that from word search.

MS. SHERKEY: Yes.

And what I will also point out, at paragraph 387, is there's a use of lower case parties when talking about a different power purchase agreement. Parties to that power purchase agreement was used with a lower case P.

PRESIDING ARBITRATOR MILES: I only saw a lower case P in quotes. Was that in quotes?

MS. SHERKEY: No.

PRESIDING ARBITRATOR MILES: Oh, okay.

That's another power purchase agreement so it doesn't help you either way; does it?

MS. SHERKEY: The point being that, when they weren't talking about parties to the arbitration, they used lower case.

PRESIDING ARBITRATOR MILES: Also, when they weren't talking about parties to the OPA and this -- this IT, they use a lower

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case, so it cuts both ways.
MS. SHERKEY: I think when you see -- my submission would be you see that capital P used consistently through the parties to the arbitration, and then this is a lower case P when talking about different parties.
PRESIDING ARBITRATOR MILES: That would be persuasive if that was referring to the parties to our FIT. It's not.
MS. SHERKEY: Yes.
PRESIDING ARBITRATOR MILES: Right. Okay.
MS. SHERKEY: Lastly, Mr. Tian said, whether there is a loss that has been caused by a breach, that's a question for damages.
All the Claimant needs to have known, for purposes of limitation period, is whether it has suffered a loss.
So he distinguishes between knowledge of suffering a loss for limitations and whether there has been loss caused by a breach.
And I would submit that's not right.
I'll refer you back to Slide 9 where we included the quote from Infinito that

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says loss or damage must flow from the alleged breach. They are tied together.
And those are my reply points and it will be Mr. Terry now.
PRESIDING ARBITRATOR MILES: Can I just follow you up on one point that I think definitely was you.
The International Valuation Standards, at C-2278, you took us to two paragraphs. I had written them down as 30.7 and 20.3(j). The 20.3(j) must be wrong.
On the 30.7, to start, you said one was general and one applied only to comparables, market comparables methodology.
The 30.7 is clearly comparable transactions which must mean the 20.3.
MS. SHERKEY: Ms. Shelley is pulling up the reference to get that paragraph.
PRESIDING ARBITRATOR MILES: My 20.3 only goes to (e) so I am not sure what the (j) is but it was also the market approach.
MS. SHERKEY: I think it might be in a different section. There are two 20.3s.
If it makes sense, Mr. Terry could start while we just get that precise

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pinpoint for you.
PRESIDING ARBITRATOR MILES: Yeah. If you could get me the right reference. If you could give me a page number to the standards.
MS. SHERKEY: Sure.
PRESIDING ARBITRATOR MILES: The proper page number for the document, the numbers on the bottom, then at least I can look at the right thing.
Because they did look to me -- and, Ms. Shelley, you can confirm -- they did look to me that they both dealt with market comparables, which probably doesn't matter at this point but still.
Mr. Terry.
REPLY CLOSING ARGUMENT BY MR. TERRY:
MR. TERRY: This is really just a point of clarification on interest paid on the letter of credit. And some of the submissions that Ms. Squires is making on that.
And, first of all, if we could bring up, again, or you go to Slide 136 of our slides from this morning and if I could -- if I could have the "interest paid" line highlighted,

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please. About ten lines down, sorry.
So you see this is -- there is a line in the revised sunk costs that prorates the various costs.
And you'll see, if you look in the third column, that the interest cost that's been counted here runs from June 1st, 2015, to May 8th, 2017. And there's no further interest being counted after that date, May 8th, 2017.
And then there's a pro rata calculation that's made to reduce the interest of 3.962 million, in the last column, to just 1.249 million.
So that's all that's being claimed in terms of interest payments on the letter of credit in that chart.
And, in terms of where the 3.9 million comes from, there is, if I could bring up, please, or you could turn to page 45 of the presentation that Secretariat made.
And we won't have to, this time of day, go through this in too much detail. But you will see the reference to, at the bottom, to Exhibit C-282 -- sorry, C-2082. My apologies.
I will just wait for Madam

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President to get hold of the report. At page 45.
This is the exhibit that was used to do these calculations.
And you will see, if you look at the top, they calculate the total interest paid, and then they subtract the interest paid amount in the Deloitte report, and that's how they come up with the 3.9 million for that period, as we saw on the Slide 136 of our slides this morning. Going from the time that the Deloitte report finishes its calculation June 1st, 2015, to May 8th, 2017.
And this is also, if you want to -- the reference and detail to see all this is in Secretariat's first report, Schedule 3, note 8. And that includes a reference, also, it's based on Exhibit C-2082.
So that's where the interest is in the letter of credit.
Now, we did hear about interest after that amount that was accruing to the investors. And you may recall, if you look at Mr. Tobis' testimony -- we don't have to bring it up or maybe it is up. Okay.
This is his testimony from day

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3, I believe. It's page 287 -- or 271, sorry.
Since May of 2017, in Secretariat's calculations, they haven't included any of the continuing accruing interest.
And he says:
"In our case, we are including only the fees that were paid, technically, since May 2017."[as read]
Sorry.
"Since May 2017, they are still accruing more fees on this amount. We just haven't included those as well as we were trying to be reasonable in preparing the schedule."[as read]
So those are accruing fees. They have not been included.
So I just wanted to point that out just so the evidence is very clear for you with respect to the letter of credit of interest.
And that, unless there are any

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questions, that completes our submissions for the day.
PRESIDING ARBITRATOR MILES: Thank you.
MS. SHELLEY: Madam President, if I could just assist with the reference for you.
Under the general standards, which is IVS 101, the same document, so C-2278, it is 20.3(j) and you will find that on page 11 of the document. Or it's page 16 if you're in the PDF. But page 11 of the printed document.
PRESIDING ARBITRATOR MILES: We could have a discussion, if we wanted, about nature and sources. But not all the data. I see what you mean.
Okay. Got it. Thank you for that.
MS. SHELLEY: Thank you.
PRESIDING ARBITRATOR MILES: Mr. Neufeld.
MR. NEUFELD: Again, I had some points but I am not sure that we need to hear them. I think we can probably call it a day and I can use my time to thank the Tribunal for very diligently reading all the materials. We felt

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that personally. And, you never know. We have dealt with other Tribunals. You are always left questioning, right, what's understood and what isn't. And the questions, I can say, are both super helpful to know that you are engaged and have understood and traumatizing all at the same time.
So thanks for that.
Thank you, Lisa and Mr. Aragón. It's been less arduous than the first two-week hearing that we went through in this, although arduous nonetheless.
So just shout out to the absolute fabulous team that we rely on in Ottawa.
And a cordial thanks to the Claimant's counsel.
And, in fact, I really enjoyed meeting many of the Claimant's witnesses and I remember we had some really good chats. In fact, Mr. Baines offered for my son to get in touch about engineering at Queens. It's very touching.
Thank you very much.
MR. TERRY: If I may, if you don't mind, I would like to make a similar thanks.
It's been a very, very

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interesting week. I think all counsel really appreciated the attention that the Tribunal's given to this issue.

The challenging questions, the very thoughtful questions. And I think it's helped all of us, on this side as well, sort out these issues as we have gone through this.

And, similarly, I would like to thank José and Lisa very much for all the efforts through the long days.

I also appreciate the cordial nature all the way through in this proceeding. We have had very cordial relations with Canada and, of course, thanks for everyone else involved. Of course for our team.

And the only thing I would, as a little footnote, which might be worth mentioning is one other thing that happened that, for now, is probably res judicata from the first hearing, is that is counsel on our side and counsel on Canada's side that ended up meeting each other for the first time that are now married and they have a young child.

MS. SQUIRES: Not me, no.

PRESIDING ARBITRATOR MILES:

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Okay. Because you have had a child, there have been lots of Windstream babies.

Okay. Well, thank you all so much. We are honoured to be given this responsibility. It is a particularly tricky case because of the earlier proceedings and the earlier award.

It's important; right. It's really important for states, in an energy transition, for this to be considered very carefully.

It's really important for investors and developers in an energy transition. It's important for all of us, including all those babies, that we do everything we can and within our capacity and expertise to get this energy transition right.

So we appreciate your patience with us. We care deeply about these issues.

We huge respect to every single one of the advocates. It's been -- Mr. Tian, I understand that you're two years out of law school. I mean, wow.

MR. TIAN: First year call.

PRESIDING ARBITRATOR MILES:

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They never let me up on a first year call.

So extremely well done.

But wonderful to see the diversity. Really, really respect that.

But just the today, in particular, the level with which you engaged with our questions, I would guess that none of you has had much more than a couple hours sleep. So but it showed in terms of the preparedness and focus.

So all the questions I had yesterday are much, much clearer, to be honest, are much, much clearer in my mind. So well done, whatever the outcome. The teams were extraordinary.

And admiration, also, to the representatives of the government and representatives of Windstream for getting along so well when this has been such a long process for all of you.

José Luis, you are my hero. You know that.

And, Lisa, thank you.

And you can image how I feel the privilege of having these two wings so it's been a delightful week for me, personally, as

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well. So thanks.

I did want to say one little thing.

If we felt we got to it and we needed anything on the law on the Slide 72 point, I would like us to be able to ask, give the parties an opportunity to send us law on that. At this stage, we don't feel we need it.

But, if we were to reach a point in the drafting, so we won't close the proceeding but, otherwise, not anticipating any written submissions or anything additional.

Okay, so thank you.

--- Whereupon matter adjourned at 4:42 p.m.

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