PCA Case No. 2012-17

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

BETWEEN:

MESA POWER GROUP LLC (USA)

Claimant

- and -

GOVERNMENT OF CANADA

Respondent

ARBITRATION HELD BEFORE
PROF. GABRIELLE KAUFMANN-KOHLER (PRESIDING ARBITRATOR)
THE HONOURABLE CHARLES N. BROWER,
MR. TOBY T. LANDAU QC
held at Arbitration Place,
333 Bay Street, Suite 900, Toronto, Ontario
on Sunday, October 26, 2014 at 9:13 a.m.

VOLUME 1

200 Elgin Street, Suite 1105
Ottawa, Ontario K2P 1L5
(613) 564-2727

333 Bay Street, Suite 900
Toronto, Ontario M5H 2T4
(416) 861-8720

APPEARANCES:

Barry Appleton	For the Claimant
Dr. Alan Alexandroff	
Kyle Dickson-Smith	
Celeste Mowatt	
Sean Stephenson	
Edward Mullins	
Sujey Herrera	
Shane Spelliscy	For the Respondent
Sylvie Tabet	
Heather Squires	
Raahool Watchmaker	
Laurence Marquis	
Susanna Kam	
Rodney Neufeld	

Also Present:
Alicia Cate
Jennifer Kacaba
Saroja Kuruganty
Lucas McCall
Alex Miller
Harkamal Multani
Darian Parsons
Adriana Perezgil
Melissa Perrault
Chris Reynolds
Cole Robertson
Sejal Shah
Michael Solursh
Mirrun Zaveri

Teresa Forbes, CRR, RMR, CSR, Court Reporter
Lisa Barrett, CRR, RMR, CSR, Court Reporter

INDEX

Toronto, Ontario

--- Upon commencing on Sunday, October 26, 2014 at 9:13 a.m.

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

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

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

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

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

THE CHAIR: I hear you without the

microphone.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROCEDURAL MATTERS:

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

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

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

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

The total allocation, as you know,

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

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

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

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

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

Can I ask Mrs. Cate?

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

It will be the same position as the US.

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

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

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

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

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

Mr. Appleton? Mr. Mullins?

MR. MULLINS: No, ma'am.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. APPLETON: Can you hear me?

THE CHAIR: Yes.

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

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

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

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

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

MR. APPLETON: That is correct.

THE CHAIR: Did I understand you correctly?

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

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

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

MR. APPLETON: Thank you. I just

need a minute.

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

MR. APPLETON: Yes.

THE CHAIR: Thank you.

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

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

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

OPENING SUBMISSIONS BY MR. APPLETON:

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

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

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

actually subverted for an inappropriate purposes.

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

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

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

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

were the FIT proponents like Mesa Power.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GEIA.

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

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

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

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

projects owned by the Korean consortium.

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

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

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

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

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

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

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

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

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

These projects issued applications

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

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

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

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

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

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

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

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

Now, this is really not

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

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

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

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

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

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

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

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

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

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

Authority.

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

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

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

> "The Minister may direct the OPA to assume... responsibility for exercising all powers and performing all duties of the Crown..."

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

Kingdom, it means the powers of the government.

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

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

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

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

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

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

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

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

Indeed, terms like MFN treatment,

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

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

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

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

included in the MFN arrangements.

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

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

> "Each party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

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

that were covered in paragraph 1.

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

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

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

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

That's the primary difference in

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

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

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

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

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

So what is clear is that likeness

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

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

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

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

Likeness requires a substantive assessment of the competitive landscape. This

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

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

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

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

I just check those off,

check-check.

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

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

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

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

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

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

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

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

> "There is a finite amount of transmission capacity in the Province of Ontario and companies that seek PPAs in Ontario are in competition to obtain access to this limited transmission capacity."

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

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

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

And the answer was, "Yes."

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

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

> "There is no practical difference between FIT program participants and GEIA participants (the Korean consortium and its development partner, Pattern Energy) in terms of the fundamental circumstances of their competition for wind PPAs in Ontario."

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

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

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

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

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

> "The economic exchange required in the GEIA is very one-sided. In return for the Economic Development Adder (estimated at the time by the Minister of Energy to have a value of $437 million) the Korean consortium was

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

On slide 20, Mr. Adamson continues by stating:

"The GEIA's manufacturing commitment - the requirement to designate manufacturing partners through agreements to supply essential components - appears in practice to be little or no different than the need for every FIT developer to have local component suppliers under the FIT rules."

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

"The manufacturing commitments of the Korean

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

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

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

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

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

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

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

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

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

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

Now, in such circumstances where

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

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

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

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

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

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

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

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

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

Canada is required to provide

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

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

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

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

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

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

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

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

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

> "Samsung Korea's guaranteed access to transmission capacity under the GEIA allowed Samsung Korea to be in a better competitive position than those companies without guaranteed transmission access like Mesa Power Group."

He continues on slide 24 by stating under oath that:

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

And that:

> "Samsung had the opportunity to meet with OPA representatives to negotiate certain contract terms that were more advantageous than those available in the standard FIT contract."

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

> "The fact that we signed a joint venture agreement and elected to participate with

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

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

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

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

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

Nowhere does the text of Article

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

That divergence of nationality or

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

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

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

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

These industrial policies were

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

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

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

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

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

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

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

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

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

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

international law standard.

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

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

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

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

Arbitrariness also occurs when discretionary decisions by governments are based on

the irrelevant considerations and when relevant considerations are ignored.

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

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

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

law and due process rights.

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

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

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

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

As a result, Canada contends, the

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

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

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

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

> "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. The

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIR: Your voice works --

MR. APPLETON: So far --

THE CHAIR: -- pretty well.

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

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

MR. APPLETON: I think we --

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

MR. APPLETON: We will stay here, yes.

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

MR. APPLETON: Excellent.

THE CHAIR: And we will resume in ten minutes.

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

THE CHAIR: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If we turn to slide 37 on the

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

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

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

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

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

Canada's Article 1108(7)(a)

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

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

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

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

where that is.

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

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

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

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

1108(8)(a).

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

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

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

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

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

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

> "Procurement includes procurement by such methods as purchase, lease or rental, with or without an option to buy. Procurement does not include:
>
> "(a) non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments."

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

Now, NAFTA tribunals have relied

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

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

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

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

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

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

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

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

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

> "The absence of a definition of 'procurement' is itself a suggestion that the parties intended the term to be given its ordinary meaning throughout the NAFTA, subject to the exclusions in Article 1001(5)."

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

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

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

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

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

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

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

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

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

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

> "The OPA never receives or takes title to the electricity generated, which is sold directly into the IESO grid and is paid for by the IESO under its normal

> settlements process... the OPA is simply a payment conduit, receiving ratepayer funds and passing them on to the FIT suppliers through the PPA contract payments."

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

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

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

procurement.

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

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

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

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

Furthermore, Ontario made it

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mesa did not expect to be denied

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

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

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

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

THE CHAIR: Thank you, Mr. Appleton.

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

MR. DONDE: One hour, 43 minutes.

THE CHAIR: One hour, 43 minutes. I am just saying this in case you wish to have

some --

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

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

MR. APPLETON: That sounds good.

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

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

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

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

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

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

OPENING SUBMISSIONS BY MR. SPELLISCY:

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

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

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

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

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

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

> "The Tribunal notes, in particular, that the claimant's 'correction' of the Deloitte report attaches new documents, changes the discounted rate calculations and certain valuation dates in section C."

It continued:

> "It is of the view that these modifications are not corrections as contemplated in paragraph 37."

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

these modifications are admitted into the record.

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

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

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

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

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

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

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

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

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

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

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

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

MR. SPELLISCY: Yes.

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

MR. SPELLISCY: Yes.

MR. BROWER: Right, okay.

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

MR. BROWER: I see. Thank you.

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

date or breach date on slide 34.

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

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

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

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

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

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

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

MR. LANDAU: I see.

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

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

situation. We would have to look at that.

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

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

FURTHER SUBMISSIONS BY MR. APPLETON:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. APPLETON: Yes, sure.

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

MR. APPLETON: Yes.

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

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

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

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

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

MR. LANDAU: That is not the question.

MR. APPLETON: I know that.

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

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

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

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

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

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

MR. APPLETON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But I wanted to give you what I

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

THE CHAIR: Do you have any further questions?

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

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

Would Canada wish to reply now?

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

THE CHAIR: Yes, yes.

FURTHER SUBMISSIONS BY MR. SPELLISCY:

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

THE CHAIR: Thank you.

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

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

FURTHER SUBMISSIONS BY MR. APPLETON:

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

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

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

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

For example, what's to happen if a

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

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

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

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

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

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

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

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

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

--- Upon resuming at 12:21

--- Reporter change, Lisa Barrett

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

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

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

Now, we'd like to have

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

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

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

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

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

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

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

MR. APPLETON: I think that was clear.

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

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

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

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

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

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

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

THE CHAIR: Fine. Mr. Mullins.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We're not now talking about simply

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

concern here.

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

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

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

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

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

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

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

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

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

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

MR. SPELLISCY: Well, good afternoon again.

THE CHAIR: So now you have the

floor.

FURTHER SUBMISSIONS BY MR. SPELLISCY:

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

And with that, let's get started. Over the course of the next couple of hours and, in fact, over the course of this entire week, what we

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

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

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

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

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

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

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

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

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

an investment agreement.

Instead, it applied to the FIT Program. So what was that program? It was a standard offer procurement program that Ontario directed a state enterprise called the Ontario Power Authority to run. The goal of the program was to procure renewable energy generation, but to do so also in a way that stimulated jobs in the local economy. Applicants to the FIT Program competed with each other for access to space on the existing transmission grid. So in essence, when the claimant decides to apply to this program, what it decides to do is to compete for limited transmission capacity with hundreds of others of experienced developers, all with the same idea, all with the same hopes and dreams. And in a standard offer program like the FIT Program, developers can't compete on price. They can't compete on other terms that allow themselves to differentiate. Instead, they are evaluated on the quality of their applications with respect to pre-existing specified criteria.

Now, this morning we heard almost nothing about the claimant's applications to the FIT Program. The fact is, as the evidence will

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> "Ontario's was a system that was heavily reliant on

coal-burning generation plants, which polluted the air and possibly increased the risk of respiratory illness. Studies that the Government of Ontario had done indicated that the potential health and social costs of relying on coal were in the order of billions annually." [As read]

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

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

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

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

> "In these circumstances, Ontario determined that not only would it use Green

Energy to fulfil its power needs but that it would use its purchasing power as a government to acquire that energy in a way that stimulated the economy and created jobs and investment opportunities in the province." [As read]

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

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

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

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

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

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

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

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

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

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

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

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

> "Representatives from all sectors of the energy industry, energy associations, nongovernmental organizations, and aboriginal consumer groups participated." [As read]

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

It said:

> "A FIT Program provides a simple standardized procurement method to contract for renewable energy supply technologies." [As read]

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

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

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

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

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

"Approximately 95 per cent of

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

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

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

Now, let's come back to the

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

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

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

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

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

> "The challenge of electricity is that, unlike other goods or services that may be procured, electricity, once generated, must be simultaneously transmitted and consumed. It cannot simply be stored away in a warehouse waiting for demand to allow it to be brought out of mothballs." [As read]

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

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

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

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

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

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

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

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

As Richard Duffy explains:

> "In an environment of limited transmission capacity, a simple ordering by timestamp would reward those who got their FIT applications in quickly rather than those whose projects were the furthest advanced in terms of development." [As read]

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

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

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

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

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

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

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

look at the launch period applications filed by the claimant.

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

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

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

Now, up on that schematic there,

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

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

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

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

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

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

Why was this contemplated?

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

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

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

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

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

operation, which was years into the future.

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

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

renewable energy sector.

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

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

> "The parties agree to cooperate and negotiate exclusive with each other in good faith in connection with wind and solar procurement of 2,000 megawatts of wind power and 500 megawatts of solar."

[As read]

But look to the next paragraph. It says:

"Nothing in this MOU shall affect the rights of the Government of Ontario or the Ontario Power Authority concerning any current or future Government of Ontario or Ontario Power Authority programs related to renewable energy procurement." [As read]

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

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

Ontario to embark on programs for other procurement initiatives.

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

> "If there are other companies out there who have in mind to put in place this kind of manufacturing infrastructure that enables us to go beyond meeting our own demand, our own needs here in Ontario, to reach into the Ontario market, we are all ears."
> [As read]

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

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

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

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

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

> "Efforts are progressing well toward the signing of an

historic framework agreement." [As read]

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

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

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

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

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

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

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

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

the time that the OPA received them and nothing else.

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

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

there and locate their project there as well, others, who it should know, would include the Korean Consortium, and that's, in fact, what happened.

In September of 2010, the Minister directed the OPA to hold 500 megawatts of capacity in the Bruce Region for the Korean Consortium. Given what was public knowledge at that time and before the claimant even filed its applications, any applications to the FIT Program, to suggest that this somehow caught them by surprise, just defies reason.

Let's look at the claimant's actual applications to the FIT Program. As I noted, Richard Duffy has testified at length about the problems of those applications and about how poorly they were put together, and I should note here that, unlike the completeness and eligibility review where the OPA reached out to applicants, that was not the case here. And Mr. Duffy has explained why in his testimony:

> "The OPA couldn't put itself in a position of assisting particular developers at this stage. All applications --

All applications, everyone's.

"-- were assessed solely on what was within the four corners of the paper in front of the OPA. The OPA would not assume; it would not do any other research; it would not contact anyone to confirm any facts." [As read]

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

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

MR. APPLETON: Confidential or restricted?

MR. SPELLISCY: Confidential. It's your application.

--- Upon commencing the confidential session under separate cover

--- Upon resuming in public

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

as a result, their applications were not highly ranked.

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

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

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

difficulties that had stretched now for several years.

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

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

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

renewable capacity by 2018.

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

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

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

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

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

As Mr. Cronkwright has testified:

> "As time passed, we became concerned about our ability to complete the process in the time that remained." [As read]

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

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

initial one, like the claimants' projects.

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

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

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

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

response, he compares the special TAT/DAT with the approach on which more information is being requested, the revised ECT approach.

And let's look at what he says.

He says:

> "Based on what appears to being proposed, what we are actually back to now is running a Bruce-to-London area regional IPA." [As read]

Which is the first step in the ECT process. And then he confirms in this email in 2011 that that process had always contemplated connection point changes, generator paid upgrades, and new plant and service transmission developments, like the Bruce-to-Milton line.

He then concludes:

> "The advantage of this process is that it would be consistent with the FIT Rules." [As read]

So what happens at this meeting, and here I need two minutes of confidential session again so that we can look at actually what happens.

--- Upon resuming the confidential session under separate cover

--- Upon resuming in public

MR. SPELLISCY: We can now come back out of the confidential session.

On May 27th, 2011, a week after the exchanges we were just discussing, the Canadian Wind Energy Association, or CanWEA, which is the industry organisation for renewable wind producers in Ontario, wrote to the Ministry of Energy. Let's take a look at that letter in detail.

CanWEA wrote that it:

> "... was writing to express the view of the majority of our members that the Government of Ontario and the Ontario Power Authority should follow through with the established Feed-in Tariff process by immediately opening the window for pointed interconnection changes."
>
> [As read]

They said developers were told by

the OPA on numerous occasions that the opportunity would exist to change their connection. They confirm:

> "Over the past several months our members have collectively invested significant time and money to prepare their strategies, their interconnection strategies." [As read]

One week after this letter with the information that he's had from his staff in the briefing and the support of what he understands is a majority of the industry, the Minister of Energy issues a direction to the OPA regarding the allocation of the capacity. Let's quickly look at the June 3rd direction which played a significant part at least in the written phase here:

> "The direction notes that the LTEP and its energy target and directs the OPA to: (1) Allow generator paid upgrades. (2) Reserve capacity for smaller FIT projects. (3) Allow

connection-point changes over a period of five business days but only for projects in the Bruce and west of London regions. (4) Allocate 750 megawatts in the Bruce Region; and (5) allocate 300 megawatts in the west of London Region."

The reasons for this decision are explained by Sue Low. She says that the goal in designing it was to develop a fair process for allocating this capacity that would meet developer expectations by including the relevant components of an ECT without actually being a province-wide ECT.

As we have seen this morning, that evidence, the evidence in the record, supports what Ms. Low has explained.

We didn't hear about it this morning but in the written submissions the claimant asked the tribunal to ignore these events, and ignore these reasons for the allocation being made consistent with the FIT Rules and instead argues that the government's decision was motivated by the

desire to help another company, NextEra, a US investor.

What proof does it have? It has the fact that a meeting happened on May 11th between NextEra and Andrew Mitchell from the Minister of Energy's office.

Let's look at that evidence. We'll bring up the slide and we'll look to NextEra's own summary of it. Andrew, meaning Andrew Mitchell from the Minister's office was clear that a decision has not been made yet on whether or not to open the point of interconnection amendment window and whether, if so, to do so on a province-wide or just for Bruce-to-Milton and west-of-London basis. So NextEra is told nothing specific about what's going on and obviously no commitments were made to it. they themselves say so.

So what does NextEra ask for next? He asked for a meeting with Sue Low to explain why the point of inter-connection window is significant. But let's continue in the chain of this document. NextEra does not get a meeting scheduled until May 13th, after the meeting where the Premier's office expressed their preference or

process with the change window.

As we've seen just now, regardless of the points that NextEra may have made on May 13th, if that meeting did, in fact, even occur, whether or not there would be a change window was still very much in play by at least May 20th, so the claimant's suggestion that this decision somehow was made to benefit NextEra, simply based on the timing of a couple of meetings, is belied by the evidence.

Let's come back to reality and see what happens after this direction is issued by the Minister on June 3rd. Well, as CanWEA noted developers were ready. As a result there were a number of moves in this five-day period, 39 in total. The easiest way to understand exactly what happened is to start with the rankings on December 21st that were published for the Bruce Region and those will come up for you. Then we can amend that ranking by adding in those projects from the West-of-London region that switched into the Bruce Region, that either received a contract or that didn't and were ranked in the Bruce Region after.

You can see those in the next

table and they're highlighted in blue or white, depending on how good your colour sight is there on the screens.

This table here now shows the developers applying into the Bruce Region after the change in connection-point window closed on June 10th, and what we can see is that a number of very highly-ranked projects in the West-of-London region decided to switch into the Bruce Region to take advantage of the capacity there.

Unsurprisingly, they got contracts, as shown by the green highlighting on the slide in front of you. That is, after all, what a ranking is supposed to accomplish. From a policy point of view it was the best result possible. The higher-ranked projects got contracts, rather than the lower-ranked projects.

The results of the Bruce-to-Milton allocation were published on July 4th and two days later, on July 6th, the claimant filed its notice of intent to go to arbitration. Three months after that, three months after the events giving rise to this claim, the claimant submitted this claim to this tribunal.

I will now turn to the second part

of my remarks today, which is simply to identify the measures described above that the claimant alleges are a breach of NAFTA. Again, I said this is made complicated today because not many of these were mentioned today but I'll at least go from what the pleadings were.

First, the claimant seems to be challenging acts of the Government of Ontario associated with three groupings and measures and in particular it seems to be alleging as follows: That the domestic content requirements of the FIT Program violated Article 1106; that the Green Energy Investment Agreement violated Articles 1102, 1103 and 1105; and that the June 3rd direction violated 1102, 1103, 1105. That's Ontario.

I think we heard nothing about it today but the claimant in its written submissions also challenged certain acts of the OPA and in particular, in its written submissions, is alleging that. The OPA's ranking that we just looked at, of the claimant's TTD and Arran project in the launch period violated Article 1105 and that the OPA's awarding of contracts to certain projects connecting at certain parts of the transmission

system as part of the Bruce-to-Milton process violated Articles 11102, 1103, 1105.

Some of those allegations in the written submissions are quite complex. They have numerous sub-parts but I think we can leave that aside for the moment and just focus on these general groupings.

With that, I'm going to come now to the third part of my presentation, and that is explaining why these allegations are outside of the scope of Chapter Eleven and beyond this tribunal's jurisdiction.

Now what I'm going to do in this section is explain a number of provisions of NAFTA, and why they block, as a matter of law, the claimant's claim from proceeding any further and, in particular, we're going to look at, first, why the claimant's challenges to the measures of the OPA, if they're still making them, cannot proceed because those acts are not subject to the obligations in Chapter Eleven.

We will then examine why certain of the claimant's allegations with respect to the Green Energy Investment Agreement are beyond the jurisdiction ratione temporis of this tribunal.

Then I will discuss why all the claimant's claims for breaches of Article 1102, 1103 and 1106 are included by NAFTA Article 1108.

Next I will show how many of the claimant's other claims cannot be brought because they did not result in damages to it. That makes them beyond this tribunal's jurisdiction. Finally, I will show that the claims are barred from proceeding because the claimant did not respect the conditions of Canada's consent.

Let's first start with the acts of the OPA. For that we go to Article 1101 to start because that act says that in order for Chapter Eleven to apply, the measure has to be adopted or maintained by a party. If we go and we look at our own measures, the two slides that we have there, there were a number of the acts of the Ministries of the Government of Canada, the entering into the GEIA, the June 3rd directive. There is no dispute. Those are subject to the obligations in Chapter Eleven.

The June 3rd direction which directed the OPA to act in a certain way, that's an act of the Government of Canada. It is subject to Chapter Eleven.

But in its written submissions the claimant also challenged the two other things I mentioned, the ranking of the launch period applications and the awarding of contracts to certain applicants.

So the question arises: What is the OPA?

As I mentioned earlier, the OPA is a corporation owned by the Government of Ontario with independent legal personality.

The question here is when will the acts of such a corporation be subject to the obligations in Chapter Eleven?

The claimant mentioned Article 8 of the ILC Articles but that does in the apply here because NAFTA sets up its own rule on when state enterprises are subject to the obligations in Chapter Eleven. As the tribunal in UPS confirmed:

> "Chapter Fifteen provides a lex specialis regime in relation to the attribution of acts of monopolies and state enterprises of the party." [As read]

Let's go to chapter 15 and let's

look at Article 1503(2) which is the NAFTA provision on state enterprises and we see that the rule for state enterprises that the acts are only subject to the obligations in Chapter Eleven where the entity is exercising delegated governmental authority.

There are two questions. Is the OPA a state enterprise? I've already answered that one. Yes, it is.

The second one, and we can look at that. We can go to Article 1505 of NAFTA because it defines what a state enterprise is. It says it's an enterprise owned or controlled through ownership interests.

The only argument that the claimant presented in its written submissions to the contrary was based on Annex 1505 to this article but that annex is irrelevant. It specifically says for the purposes of Article 1503(3). We are not talking about Article 1503(3), we are talking about Article 1503(2).

Let's turn to the second question which is the specific question of whether in ranking the launch period applications, and coming

to the determinations that it did, and in determining which applications or which contracts could connect to which points on the technical electricity system in Ontario, in its view.

Was the OPA exercising delegated governmental authority in those acts? It was not. An entity does not exercise delegated governmental authority simply because it has been created by state or is owned by it. There is something unique about governmental authority.

As the tribunal Jan de Nul explained, what matters is not the service publique element, but the use of the "prerogative de puissance publique" or governmental authority.

Some examples of governmental authority are provided in Article 1503(2) itself.

That article provides:

> "Governmental authority includes such things as the power to expropriate, grant licenses, approve commercial transactions, impose quotas, fees or other charges." [As read]

In the particularly challenged

measures of the OPA here, it did none of these things. It carried out technical analysis based on criteria points and it made technical decisions based on things like capacity and transmission limitations. None of those acts are exercises of delegated governmental authority.

So now I want to take you through actually a demonstrative on the screens in front of you to help you walk through and I'm going to be coming back to this in a number of parts in our session over the next few minutes.

Let's go back to the slide that we had earlier concerning the challenged measures of the OPA. You will see it up there. We saw that the claimant again was challenging the two groupings and measures that we've discussed. However, as we just saw and as we can see represented on the screens in front of us, these claims are barred from proceeding under Article 1503(2) because these acts are not subject to the obligations in Chapter Eleven of NAFTA.

Now let's talk to the second point that I identified above, the limits of tribunal's jurisdiction rationatum point.

For that we go back to Article

1101 and we see that another limitation on the scope of Chapter Eleven is that the measure has to be related to the investor of another party. Logically and fundamental to this notion is that the investment in question must exist at the time of the alleged measure.

As the tribunal in Gallo explained recently in context of another claim under NAFTA:

> "It does not need extended explanation to assert that a tribunal has no jurisdiction, ratione temporis, to consider claims arising prior to the date of the alleged investment." [As read]

The claimant invested first in Ontario in the Arran and TTD projects in November of 2009. Prior to that, Ontario had no NAFTA obligations with respect to the claimant. Hence, when we're talking about the confidentiality or exclusivity clauses with an MOU with Samsung, the fact is they cannot be challenged by the claimant under NAFTA.

Further, with respect to the North Bruce and Summerhill investments of the claimant, they're not made until May of 2010, after the Green Energy Investment Agreement is signed and publicly announced. As a result, no claim with respect to these projects can be brought even for the Green Energy Investment Agreement itself.

Now let's go back to our demonstrative and this time we are going to look at the one for the Ontario measures. We'll see that one of the challenges was to the Green Energy Investment Agreement there and the benefits accorded to the Korean Consortium under it.

The claimant has alleged that those benefits were a breach of Canada's obligations under NAFTA. But for those claims, as we can see, much of this claim is barred because of the ratione temporis limits in Article 1101 of NAFTA.

Now let's move to the next limit on the scope of the obligations in NAFTA that I talked about. That is the exclusion presented by Article 1108 which the claimant has actually talked about this morning. Let's pull up Article 1108. It is called, "Reservations and Exceptions". There

are a number there but the ones identified by the claimant and the ones that are relevant are Article 1108(7) and 1108(8). Article 1108(7) and Article 1108(8) provide that Articles 1102 and 1103 and eventually 1106 do not apply to procurement by a party or a state enterprise.

There is no definition of procurement in Chapter Eleven, but there are Chapter Eleven tribunals, as the claimant identified you've interpreted the term. Let's go back to the Vienna Convention analysis. What's it's ordinary meaning? As the tribunal in ADF explained the term with its ordinary meaning, and the claimant quoted some of this today, but we'll quote some of the rest, is, "to get, to gain". The tribunal in UPS actually adopted a similar definition.

So these particular Articles in 1108 what do they do? They function as a carve-out for when the NAFTA parties themselves or the state enterprises decide to enter into the market and acquire, get or obtain goods and services.

The claimant talked a lot about Chapter Ten this morning. We're not saying we've never said that Chapter Ten is in context. But we

have said that it is as relevant in its differences for what it does. We have to look at the different purposes of Chapter Ten and Chapter Eleven. All three NAFTA parties have agreed in this arbitration; chapter Ten imposes obligation on the parties with respect to certain types of procurement. It is doing something quite different than Article 1108 which is carving out obligations.

Ultimately, the NAFTA parties made the express choice to broadly carve out procurement obligations by the governments and state enterprises for Chapter Eleven and then to specifically impose certain limited obligations on limited types of procurement in Chapter Ten.

Tellingly, when the NAFTA parties agreed to impose some obligations on procurement in Chapter Ten, they excluded provincial and state procurement. That's not because provinces and states don't procure; of course they do. It is because the NAFTA party wanted the provinces and states to have a free hand when it came to procurement initiatives in terms of 1102, 1103 and 1106.

That is why it makes sense that procurement is defined in a limited way in Chapter

Ten because you want to impose the limited obligations but the exclusion must be understood broadly in Chapter Eleven. Both have the same result, and it is a result that I mentioned for the policy reason earlier. Governments want limited obligations on the procurement powers.

So is the FIT Program a procurement measure? It is. In fact, we don't have to go far to understand this. I've already walked through the evidence from the statute creating the OPA to the statute authorising the creation of the FIT Program to the direction to the OPA to establish the FIT Program. There is no need to bring them up again. As you will recall, all make clear that the FIT Program is designed to be a procurement program.

Let's go one step further and let's look at what the OPA actually does. In the FIT Program itself, the OPA enters into Power Purchase Agreements. Why? In order to acquire the renewable generation that Ontario has determined that it wants to acquire.

The undisputable fact is that if the OPA did not enter into these procurement contracts, such power would not be produced. You

don't need a contract with the OPA to sell power into the grid in Ontario. You don't need one. But the reality is that the market prices are too low to justify the costs of renewable energy investment.

So in order to get renewable generation that the government wants, the OPA is required to pay for it, through PPAs. That is procurement.

The claimant contends that this tribunal should ignore these basic facts because of restrictions found in other treaties. In particular, in its written submissions, at least restrictions found in the GATT and the WTO. We'll get to some of that in the closing. But just note that the same limitations are not found in NAFTA. The NAFTA exception is broader. Thus, the claimant's claims for 1102, 1103 and 1106 are excluded from the coverage of Chapter Eleven.

So let's go back to Ontario measures slide and the demonstrative that we're building up. As we are showing you on this slide, Article 1108 walks the complaints about the domestic content requirements of the FIT Program. As well as 1102, 1103 complaints about the GEIA and

the 1102, 1103 complaints about the more favourable treatment allegedly afforded to NextEra.

Let's go to our OPA measures slide. If we look at that we see that Article 1108 would also exclude any claims under Articles 1102 and 1103 that other companies were being treated more favourably in being allowed to make certain connections as part of the July 4th award of contracts.

Finally, with respect to the scope of Chapter Eleven we'll come to the fourth point that I noted above. That is the fact that claims cannot be brought where damages have not been suffered.

Let's look to Article 1116 and we see that there are limitations on the ability to bring a claim and one includes the requirement that the investor in question has incurred loss or damage by reason of arising out of that breach. It's this last point that I want to focus on because tribunals are not courts of plenary jurisdiction.

It is not enough for the claimant to simply show a breach and to simply show separately that its business failed. For you to

bring a NAFTA claim there must be a causal link that you establish and there must be actual loss or damages.

As the NAFTA tribunal in Feldman accurately stated:

> "A Chapter Eleven tribunal can only direct compensation in the amount of loss or damage actually incurred." [As read]

For example, for a claim of breach of Articles 1102 and 1103, it is not enough to show simply that a claimant received less favourable treatment. That just establishes a breach. The claimant must also show how that less favourable treatment resulted in actual loss to it. It must establish how it suffered a loss in the "but-for" world which would have, in all probability, existed if the measure had not occurred.

Similarly, the claimant alleges a breach of Article 1106. It must show how that breach of the imposition of domestic content requirement resulted in specific actual losses; i.e., how much more did it actually cost it to use the domestic content requirement. If we apply that

rule we see that a number of the challenge measures had no actual impact on the claimant at all.

Let's go back to our demonstrative slide on the Ontario measures. The claimant challenges the domestic content requirements of the FIT Program. However, the fact that the claimant did not spend an actual cent, the fact is he did not have to spend an actual cent more because of those requirements. It entered into a contract for the purchase of wind turbines from GE before the FIT Program even existed, and while it claims to have renegotiated that deal there is no evidence that it cost them anything to do that.

Hence there are no actual damages related to the domestic content requirements of the FIT Program in this case.

With respect to the GEIA, we have explained in our submissions how none of the alleged breaches, aside from the allocation of the transmission priority to the Korean Consortium in the Bruce Region, could have possibly caused any harm to the claimant. So anything other than that 1102 and 1103 claim could also be blocked by this requirement in the Article 1116, and if we could pull it up for the GEIA as well.

Finally, with respect to the June 3rd Ministerial Direction:

> "The claimant has failed to show how many aspects that it complained about in its written submissions other than the cap on procurement and the ability to change connection points could have possibly caused it any damages." [As read]

There would have been no difference in the "but-for" world. So much of those claims too would also be blocked by this requirement in Article 1116. if we look at our page for the measures of the OPA that the claimant has challenged, we reach a similar conclusion.

The claimant has failed to show how the acts of the OPA, like allowing certain connections as part of its award of contract, could have caused it any damages. Again, for many of those acts which were identified, the situation would not have been different.

Now, where does that leave us? If you go to the next slide and we look at the screen

there, you will see that all the claims that the claimant has, at least in part, the ones that they've thrown are outside of Chapter Eleven, because of various hurdles, various roadblocks to their proceeding.

But when I said earlier that some of these claims that are quite complex, I think if we take it down one level of granularity we can see that in, fact, there is no block on a couple of claims. In fact, there are still claims relating to the alleged breach of Article 1105 concerning the June 3rd direction and that's on the cap on procurement and the change in connection points. That's what's left.

Now, again as I mentioned earlier, that might seem like a drastic reduction but it makes a lot of sense. The fact is that the claimant could not have had a FIT contract until the Bruce-to-Milton allocation was completed. There was no capacity before that moment. So any claim that it had arose no earlier than when it did not receive such a contract on July 4th, 2011.

Any claim that either of those measures, breaches, Article 1105, is without merit -- and I will get to that in a second. But

leaving that aside, it is at least a claim that could have been brought after arbitration.

Now, let's come back to the last point that I identified above, which is the bar that results because the claimant did not respect the conditions to Canada's consent to arbitration.

The claimant has talked about this. I won't go into as much detail as he did. We'll address this in our closing. But let's look at Article 1122. We see, as the claimant pulled up, that it provides a NAFTA's party consent that the claim has been submitted in accordance with the procedure set out in these agreements.

Those procedures are outlined in the preceding articles, Articles 1118 and 1121, and they include a cooling-off period of six months from the events giving rise to the claim. Obviously, you don't have a claim until you've suffered loss. We've looked at that. We've seen that in Article 1116(2), and so the claimant could not have suffered a loss prior to the allocation of the capacity in the Bruce Region. It could not get a contract before then so, in fact, that cooling-off period, six months, runs from that date.

If that cooling-off period is not respected there is no consent on behalf of the state to arbitrate. This isn't procedural. Consent is a fundamental question of jurisdiction.

This was recognised by the tribunal in Methanex where it held that:

> "In order to establish the necessary consent to arbitration all preconditions and formalities required under Articles 1118-1121 must be satisfied." [As read]

So the question is: Did the claimant satisfy those preconditions or formalities? It did not. All the claimant had to do was wait six months after the award of contracts on July 4th, which was a point at which it allegedly a suffered a loss. There would have been no prejudice to it in doing so but instead it chose to ignore the clear procedural rules in NAFTA.

So, if we come back to the slide that we had up earlier showing the one claim that could have arbitrated and we pull that one up, we see that it was blocked by Article 1122 of NAFTA.

Because of the claimant's choice

Canada has not consented to arbitrate these claims but, in fact, I want to pause here because as July 4th was the first time the claimant could get a contract, the reality is that all of its claims arise solely from this event and they would all be blocked because of a lack of consent to arbitrate.

So, if you look up at that slide you can now see all of the hurdles to this claim proceeding in this case.

This brings me to the final part of my presentation, and what follows is that I will very briefly highlight the key flaws in all of the claimant's arguments on the merits.

I will show you why the claimant's claims for breach of Article 1102 have no merit; why its claims for breach of 1103 have no merit; why its claims for breach of 1105 have no merit; and why, finally, the claimant's damages arguments are deeply and fatally flawed.

Let's start with Article 1102, NAFTA's national treatment. There are a number of allegations at issue in this obviously but first I want to take a step back. As this title states, this obligation is about national treatment.

This obligation is about not

ensuring that everyone everywhere is treated identically. It is about nationally-based discrimination. We have never said it is about intent but it is still about nationality.

In situations where nationality is not important, situations where the evidence is, that some Canadian investors do well, but others don't, some U.S. investors do well, but others don't, this provision is not violated.

The reason is simple. Ultimately many regulatory programs result in winners and losers. Article 1102 does not guarantee that all U.S. investors will always be winners. It just requires state measures to be nationality neutral.

As the tribunal in Lowan explained, this article is directed only to nationality-based discrimination and it proscribes:

> "... only demonstrable and significant indications of bias and prejudice on the basis of nationality." [As read]

A U.S. investor cannot prove a breach of Article 1102 by referring to the treatment afforded to other American companies and,

as the claimant itself admitted in its opening remarks this morning, that is what it is trying to do. It has talked about, in its submission, Pattern Energy, which as a California company, Boulevard Associates, which is a subsidiary of Florida Power & Light, and NextEra which it is now called, and Samsung Canada which is a subsidiary of Samsung.

Those, as I mentioned at the beginning of my remarks, are investments of foreign investors in Canada. They are not Canadian investors, and thus they cannot serve as a basis for an Article 1102 claim.

In fact, I think that some of the real proof of this is shown in the fact that the claimant wants to use the same treatment to prove a breach of 1102 and 1103, but national treatment and Most-Favoured Nation treatment do not overlap.

Leaving aside for the moment this most fundamental problem, I want to come back to how NAFTA's nationality-based discrimination prohibition is operationalised in 1102.

In order to show you that even if these comparators were Canadian, and they're not, but even if they were, there has still been no

breach of NAFTA here. If we look at the slides and we pull up the relevant language, the first question is whether there is treatment about the claiming investment of nationals.

The second is whether that treatment was accorded in like circumstances. Let's pause on that for a second because we've heard about like circumstances at length this morning. We would agree there are a number of factors that go into considering it, but one that has been consistently emphasised is that the treatment must be accorded by the same entity and in the same program, but again that's a rather obvious point.

People under different regulatory programs are treated differently. People under the FIT Program are treated differently in terms of the contracts and the rates that they get than people under other procurement programs in Ontario.

It is for this reason, why here, that -- and I'll explain this more when we get to the GEIA because it is really more about 1103. But even if Canadian investors were the ones who entered into the GEIA, that's a separate investment agreement. It is not the same regulatory program

and so the treatment is not accorded in like circumstances. But, as I say, I'm going to come back to this more in 1103 where I'll discuss this in more detail.

The final question for Article 1102 is whether the treatment afforded to U.S. investors is less favourable than that afforded to Canadians, and again I want to leave aside the claim that somehow the subsidiaries of Samsung or Pattern Energy, the U.S. investors could somehow be used under the GEIA under this Article.

What I want to focus on, instead, and I'll get to Article 1103, but what I want to focus on here is the other entities that actually applied to the FIT Program which, in its written submissions, the claimant alleged received more favourable treatment than Boulevard Associates and Suncorp.

Now, a guarantee against less favourable treatment in like circumstance does not mean that everyone is guaranteed the same outcome. It does not mean that everyone gets a contract. The same outcome, the same contract, that's all impossible to guarantee. Rather, when it's a program at issue, a regulatory program, it is

about guaranteeing the same process to the people.

If we look at the treatment accorded to those who were FIT applicants in the Bruce Region, the claimant has failed to show that the treatment was, in any way, less favourable. FIT applicants were afforded the same treatment. All were assessed by the OPA in terms of the scoring of their applications in the same way. All were subject to the June 3rd direction. All had access to the same information in making their decisions.

Again, we don't dispute, and there is no question, that the outcome of the treatment was different for different companies, but that's in the nature of any procurement programs. Not everyone can be a winner. 1102 doesn't require that and if we look at the FIT Program, again what we see is that some Canadian investors ended up winners, some losers; some U.S. investors ended up winners, some losers; and the same with nationals of third states. What does that show? Objectively, the measures were enacted on a nationality-neutral basis.

Now let's turn to Article 1103. Article 1103 provides a very similar obligation to

Article 1102 but instead of regulating discrimination vis-a-vis Canadians, it regulates a treatment accorded to nationals of third parties.

So, if we look at this provision, and again, we will see the same three-part test that we saw in 1102, and the first task remains the same though, to identify the right set of comparators. So let's look at this language because the claimant has focused on it. This morning it said that an investor from any NAFTA party other than Canada would qualify under that provision, so I want to understand this because the language there says:

> "... of any other party or of a non-party." [As read]

The typical MFN clause in a bilateral treaty, and we pull up one of our own bilateral treaties here, one of Canada's, contains a reference only to investors of a non-party. It's a bilateral treaty.

But of course, in a multi-lateral treaty that doesn't work. It would exclude a relevant comparison. The parties to a trilateral treaty do not want to give license for one party to favour the investors of essentially what is the

non-disputing party and it is for this reason why in multi-lateral treaties, the MFN clause looks the same as in NAFTA. We can look to the Energy Charter Treaty in one of the MFN clauses there. We pull that up, it has the same language that NAFTA has: Any other contracting party or any third state.

None of this is meant to revolutionise the MFN clause and somehow allow comparisons between the claimant and an investor from the same state as the claimant. Where it is two investors from the same state who are being compared then there is no nationality-based discrimination and the MFN provision doesn't apply.

Now let's come back to Article 1103 and again, as with 1102, the overarching fact is that Article 1103 does not guarantee that every particular investor will be a winner and nor does it guard against all differential treatment. What it protects against is nationality-based discrimination. Let's focus here on the allegations regarding the Korean Consortium because it is at least an investor of a third party. Here what I would like to do is focus on the second part of the test which is in

like circumstances.

The claimant has talked a lot about this and it's looked at the contracts under the FIT Program, and the contracts under the GEIA and had a slide where it went through all the similarities. But of course they looked alike. That was part of the rule itself, that was part of the GEIA, that they be modelled on FIT contracts. But that doesn't change the fundamental fact, the one that matters: Contracts under the GEIA are not FIT contracts. The claimant is not alleging here that the contracts, that the FIT contracts entered into for other third-party investors were somehow more rich or more valuable than the FIT contracts it sought to obtain. All FIT contracts were the same. The GEIA contracts were different. They were under a different program. That is critical.

As UNCTAD noted in its oft-cited study of the MFN clause:

> "Freedom of contract prevails over the MFN clause. The foreign investor that did not enter into a contract is not in like circumstances with the third foreign investor

that did conclude the contractual arrangement with the host state." [As read]

There could not be a clearer statement of the law in this regard. This rule makes perfect sense.

If an investor without an investment agreement can prove a breach of MFN by referring to the treatment accorded to another investor who had an agreement, there would be no such thing as investment agreements. No party enters into an investment agreement if there is not some benefit for it doing so and such agreements are signed all over the world by numerous states, many of whom had treaties guaranteeing MFN treaty.

Holding that the benefits granted in such investment agreements violated MFN would destroy the ability of states to enter into the bilateral deals with investors necessary to bring development. But it would also mean, essentially, that a state could never try to negotiate for itself a better investment agreement with somebody else because it would breach the MFN clause. That is not right.

Now, the claimant has spent a lot

of time seeming to try and get around this by trying to argue that Ontario did not get value for what it gave to Samsung and the GEIA. They brought in an expert to do an analysis of the terms of the GEIA. They've had quotes from him up this morning. His conclusion is that Ontario gave up too much and got nothing in return.

You've also heard this morning, from counsel, that he's obviously trying to convince you of the same and he's actually put up bits of sworn testimony from witnesses who are not here and we have no opportunity to cross-examine.

Rick Jennings and Sue Low, they have offered testimony to explain why they believe that the claimant is wrong, couldn't find it in their witness statements. We'll hear it this week. The GEIA had value for Ontario, mentioned earlier, was an anchor tenant, was a Marquis tenant. There are other reasons they felt it would stimulate manufacturing and jobs. We'll likely hear from Mr. Adamson this week that he disagrees, that he believes the Ontario government is wrong in it's evaluation.

But in the end I don't think it matters who's right and who is wrong on that

substantive analysis. Even if Ontario negotiated poorly that doesn't give rise to a breach of MFN. Investment tribunals are not set up to second guess the wisdom of policy decisions made by governments. The fact is that governments are constantly called upon to make controversial decisions. There is no question the GEIA was controversial at the time.

Many people disagreed with it. Many thought that too much was given up. But tribunals simply can't be put in a position where they're being asked to take sides in such controversies. They can't be asked to evaluate whether a government entering into an investment agreement gave up too much or got too little. Those are decisions for elected officials to make and the evidence on the record here shows that this was all extensively discussed by the government. Ultimately, we've heard a lot about the public and the ratepayers from the claimant this morning.

Well, if the people of Ontario feel like too much was given up and not enough obtained in return, they have a remedy, a vote. What cannot happen is for investment tribunals to sit in judgment of the quality of the choices made. What investment tribunals can do is to determine if

there was been a breach of the provisions of an investment treaty. As UNCTAD so aptly noted, when it comes to investment agreements, freedom of contract prevails over the MFN clause.

Now I would like to briefly touch on the claimant's allegations regarding 1105. If we pull up that article we can see that Article 1105 establishes a floor for treatment. That floor is set as a customary international volume minimum standard of treatment, that this is a case that was definitively clarified by the NAFTA parties in the 2001 note of interpretation which confirmed that 1105(1) proscribes:

> "The customary international law of minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party." [As read]

Under Article 1131(2) of NAFTA, that interpretation is binding on this tribunal. Indeed, every tribunal since that note has considered itself to be bound to apply the customary international law minimum standard of

treatment. Now, of course, that doesn't answer the question of what is that standard. So let's look at that.

As the tribunal in Aziniana explained:

> "Article 1105(1) was not intended to provide foreign investors with blanket protection from disappointment." [As read]

Similarly in SD Meyers the tribunal explained:

> "It is not an open-ended mandate to second-guess government decision-making as governments have to make many potentially controversial choices." [As read]

What it really is, is a very basic standard and the threshold for breach is high.

We don't have to go very far back in history to see what the current thinking on the threshold is. We have recent decisions, Glamis, Cargill, Mobil. They all basically say the same thing. As the Glamis tribunal described it:

> "... 1105 protects against acts which are sufficiently egregious and shocking, the gross denial of justice, manifest arbitrations, complete lack of due process, evident discrimination or manifest lack of reasons."
> [As read]

The claimant cannot prove that the standard has been breached.

As I noted at the beginning of today, these claims are really just about a disappointed investor looking to blame the government when its gamble did not pay off. Ultimately, the claimant's Article 1105 claim is based on the global assertion that everything that Ontario and the OPA did with respect to the consideration of the claimants' launch period applications, from the ranking to the ultimate award of contracts, is a violation of Article 1105 but the evidence doesn't support that.

With respect to the rankings we walked through it and Mr. Duffy's testimony, which stands unchallenged, is that those applications

failed to receive the points because they did not objectively qualify for them. There was nothing arbitrary or unfair at all about that, with respect to the Bruce-to-Milton process. The parties had debated at length how similar it was or not to the original process envisaged for awarding the capacity on the Bruce-to-Milton line.

The evidence in the record, which we walked through earlier, from the time in question, shows that all believed, all involved who believed that it was similar to what was envisaged. The only differences were the cap that was being proposed in order to control megawatt purchases. This didn't matter that much in the Bruce Region because the limit was physical and that's where the claimant applied but the claimant has focused on this and its effects but let's think about that.

Article 1105 does not require the government to buy electricity that it cannot afford and that it does not need. Nothing in Chapter Eleven does.

We have heard at length as to why that particular approach that was adopted was followed as opposed to other approaches and options that were also being discussed, and it was because

it was considered the fairest approach that would respect developer expectations.

But I want to pause here because even if the process adopted for the Bruce-to-Milton allocation was different than what was originally planned, and it really wasn't, but even if it was, that doesn't matter. Remember what the tribunal in Mobil recently said:

> "Article 1105 is not and was never intended to amount to a guarantee against regulatory change or reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made. Governments change, policies change and rules change." [As read]

The claimant no doubt would have preferred an approach that benefited it to the detriment of the majority of the other developers who applied to the FIT Program but Article 1105 does not require that. You have seen and heard all

the evidence presented so far in our written submissions and today that I've gone through. There is nothing here that violates Article 1105. Finally, in what time I have remaining I'll briefly touch on the issue of damages.

Let's recall Article 1116 here and the burden that it places on the claimant to establish how the measures in question cause it losses.

The claimant has failed in this regard to meet its burden of proof. We've already talked about this with respect to a number of claimants and how they are not even within the scope of Chapter Eleven but if we look at it from the other angle and we see that, in fact, some of its biggest items in its claims have no connection to the measures in question here.

For example, this morning the claimant said, and it put up on the screen that it had invested $160 million into Ontario; that is not true. $150 million of that seems to be in relation to a contract with General Electric with the turbines.

It did not enter into that contract as a result of any measure of the

Government of Ontario. It entered into that contract and put that money at-risk before the FIT Program, before the GEIA, before any of it even existed.

Sure, one can think of it this way: Even if the FIT program in Ontario never existed, the claimant still would have lost this sum. Similarly, the claimant is seeking to recover hundreds of millions of dollars for its later applications for Summerhill and North Bruce. Again, those applications are ranked solely in accordance with the time at which they were received. They were just put in line.

Those projects would not have received contracts, even if none of the allegedly wrongful behaviour ever happened. As we can see, they were simply too far down the list because of nothing more than when their application was filed.

As I will show throughout the course of this week, the claimant's claims for damages amount to an attempt to have Ontario insure the claimant's bad business decisions. The vast majority of the losses have nothing to do with anything that Ontario allegedly did. Further, the claimant has failed to provide anything amounting

to reasonable documentary evidence of its alleged sunk costs.

Even if we look at the remaining 10 million that's left out of the 160 million, we don't have an invoice. We don't have any bills. We have no hard proof of any of their sunk costs, and its is alleged future losses are remote and speculative and based on error.

Now that I've been talking for a while I want to wrap up here, and I will close with just these final thoughts: After Chapter Eleven is not there to provide investors with the ability to challenge the results of a procurement process, unless they can show that the customary international law of minimum standard of treatment has been violated.

In this case, the evidence is clear: The actions of Ontario and the OPA in implementing the FIT Program were consistent with all of Canada's obligations.

The reason that the claimant did not get a FIT contract has nothing to do with anything egregious done by the Government of Canada or the OPA. Both acted reasonably and consistent with rational policy at all times. And, moreover,

both acted in a way that best respected the expectations of the participants in the program.

The reason the claimant did not get a contract is much simpler; it submitted bad applications. That is no fault of the government and it is not the basis upon which an after claim can be founded. Thank you.

THE CHAIR: Can I have from the secretary the time? It was a little below two hours.

MR. DONDE: One hour and 48 minutes.

THE CHAIR: That's what I have here.

MR. SPELLISCY: I won't dispute that.

THE CHAIR: And since on both sides you still have some time left within your maximum 2 hours, we will take a break now but just to know what happens after the break, does -- does the claimant wish to use the time for rebuttal?

MR. APPLETON: We think it would be more useful to remaining the use the remaining time for witness examination than rebuttal on the opening statements.

THE CHAIR: Fine, and that results the question for the respondent because if there is no rebuttal there is no surrebuttal and the tribunal certainly thinks it is more useful to go over to the witness examinations.

So we can now take a break. We can take until let's say four o'clock. And then we will start with -- we will continue with the examination of Mr. Pickens. Good. Thank you.

Then we will start with -- we will continue with the examination of Mr. Pickens. Good. Thank you.

--- Recess taken at 3:40 p.m.

--- Upon resuming at 4:01 p.m.

SWORN: THOMAS BOONE PICKENS:

MR. APPLETON: Are we swearing witnesses in?

THE CHAIR: I will ask them to speak the truth. So I will start and I do this -- and then I pass him over to you.

MR. APPLETON: Right. Thank you.

THE CHAIR: Is everything fine, Mr. Pickens? Welcome here. We are pleased that you are with us. For the record, I would like to ask you that you confirm that you're Thomas Boone

Pickens --

THE WITNESS: Yes.

THE CHAIR: -- known as T. Boone Pickens?

MR. APPLETON: Sorry, Madam President, I don't believe we're transmitting.

THE CHAIR: Oh, we should, of course, stream this. Is it not being done?

SPEAKER: Yes, it is.

THE CHAIR: How come we don't have the pictures on these screens?

---(Pause)

Now we do. Yes, fine. So sorry about that, but we have it on the transcript -- we have the start on the transcript and the confirmation of the identity of Mr. Pickens. You're the ultimate owner of the Mesa Group?

THE WITNESS: Yes.

THE CHAIR: You have given one written statement in this arbitration, that was dated 29th April 2014; is that correct?

THE WITNESS: Yes, that's here in front of me.

THE CHAIR: That is what you have in front of you, absolutely. And as you know you

are heard here as a witness. As a witness you are under a duty to tell us the truth. Can you please confirm that this is what you will do.

THE WITNESS: Yes.

THE CHAIR: Thank you. Now you know how we proceed: I will first give the floor to Mr. Appleton for his questions, and then we will turn to Canada's counsel, and the tribunal may have questions as we go along or at the end. Thank you.

THE WITNESS: Yes.

EXAMINATION IN-CHIEF BY MR. APPLETON:

MR. APPLETON: Can you hear me on this?

THE WITNESS: I can't hear you.

MR. APPLETON: Yes, nobody can. We're all dead. We'll try this. You can hear me now; yes?

THE WITNESS: Yes.

MR. APPLETON: Thank you, Madam President. You took some of my questions away. That is wonderful. Thank you very much.

Q. So you are T. Boone Pickens?

A. Yes.

Q. What does the "T" stand for?

A. Thomas.
Q. And you are 86 years old, sir?
A. Yes.
Q. I see that you're wearing an assistive audio device; you can hear everything clearly now?
A. Yes, I can.
Q. But if you don't understand, you will let us know?
A. I will.
Q. I'm sure that myself, counsel for Canada, the tribunal will happily repeat everything, whatever you might need so that you can hear -- yes?
A. Yes.
Q. Very good. Now, you're the founder and chairman of BP Capital; correct?
A. Yes.
Q. And BP Capital is the owner of all the equity -- or sorry, you are the owner of all the equity in Mesa Power Group; is that correct?
A. Yes.
Q. Now, you submitted that one

witness statement here that is in front of you in the binder, on April 29, 2014; correct?

A. Yes.

Q. And you had a chance to read that before you came here today?

A. Yes, I did.

Q. Did you have any corrections to make, sir?

A. No.

Q. All right. Now in your witness statement you refer to the "Pickens Plan". Could you briefly tell the tribunal what this is?

A. The Pickens Plan, I presented at or announced it at the Washington Speakers Bureau, July the 8th, 2008 and it was a plan for America. We needed an energy plan for America. We didn't have one. We're the only country in the world that doesn't have one, and that was where I started. Simply what the plan was: Get on your own resources and get off OPEC oil, because on OPEC oil you are paying for both sides of the war and just -- we had plenty of resources in America which were renewables, wind and solar, and natural gas and oil. We had resources, did not need anything from OPEC. That was the whole thing.

Q. And Mr. Pickens, you've had a considerable career in the energy business. Could you tell us about your business involvement in Canada before you made your investment in Ontario in 2009?

A. I got out of school as a geologist in 1951, Oklahoma State University, and went to work for Philips Petroleum. I worked for them for three and a half years. I left and went out on my own. That was in November of '54. Then I started a company in the United States, PEI, and then I started a company in Canada, Alteron Gas (phon.), and so I was involved in Canada from '59 to '79. I went to Canada with almost -- I have to smile when I tell this story, I went there with less than $100,000 in '59, and sold out 20 years later for 610 million to Dome Petroleum, and so that 20 years in Canada was not the end of investing in Canada. I had other investments in Canada over the years, after that.

I was in Calgary last weekend for a function there at the Hotchkiss Brain Institute, to which I've been -- I've been a sizeable contributor to that, but I still have great Canadian connections and did very well in Canada

and it was -- it was very much like operating in the United States. Rule of law was practised in existence and all, and it was really a great experience to -- I can't remember who it was that said it, but it was one of the premiers of Alberta said, "The best ambassador, non-Canadian ambassador for Canada is Boone Pickens," because always -- my experiences were so good that I enjoyed telling people about it, just like I enjoy telling you now. I would tell somebody in the hallway, if they asked me, so it -- it was a good period in my life.

Q. Mr. Pickens, I can't ask anything else after that. I'm going to turn the questions over to Canada.

As the president explains, Canada will ask you some questions. They'll be standing over there. They will give you some binders to look at, and various things from there, and at any time the tribunal might ask you questions, so we'll proceed that way.

THE WITNESS: Can I tell another Canadian story?

THE CHAIR: Yes, you can.

THE WITNESS: When -- I have four children, and we moved to Canada. My oldest

daughter graduated from Henry Wise Wood High School, but my second daughter was -- she was in the ninth grade and she came home and we had a family -- you could ask for -- to be the one to present at dinner, and she said, "i want to tell my story tonight at dinner." And she was very anxious to do it.

When she got around to it she said, "You, the family, have to understand we're in a minority here," and I said, "Pam, tell us about us being in a ..." She said, "We are foreigners in a foreign country." And I said, "I told you all of that before we ..." She said, "I know, but I experienced it today." And I said, "Tell me. What was it that you experienced?" She said, "They sang the national anthem and it wasn't the Star Spangled Banner." And she is a big singer. So I said, "How far did you get into the national anthem before you realized everybody else was singing another song?" She said, "I was too far in because they all quit and started laughing at me."

---(LAUGHTER)

THE CHAIR: Fine, so I think we can now go over to Canada's questions, Mr. Spelliscy. Will you stand there, I assume, and

take your microphone.

CROSS-EXAMINATION BY MR. SPELLISCY:

Q. Good afternoon, Mr. Pickens.

A. Good afternoon.

Q. My name is Shane Spelliscy and I'm counsel for the Government of Canada. As Mr. Appleton indicated, I am going to be asking you some questions today in connection with your testimony so as far this dispute. And as Mr. Appleton indicated, if you don't understand my question -- not just if you don't hear it, but if you don't understand what I am asking you, just stop me and I'll clarify. It is important that we understand each other here.

A. Thank you.

Q. In this respect, if you can answer a question "yes" or "no," I would appreciate you doing that for the record first. I will then offer you any opportunity that you want to explain your answer, to offer context, whatever you need.

I don't expect us to go all that long today. If you do need a break, just let me know and I'll find an appropriate time to take one as soon as possible.

A. Thank you.

Q. I believe that won't be needed, but if you do need one, let me know.

And just to let you know as well, there are a couple of confidential documents that we will likely turn to, so I'm going to pause when I get there and I'm going to tell them to turn the feed off, so we will just take a few moments to allow that to happen. So before offering any sort of comment on the document in front of you, please let them turn the feed off before we get to it.

A. Okay.

Q. Before we get started, I do have to confirm just one thing. As you are aware, you were required to be sequestered prior to your testimony this morning and I want to make sure that since the start of today you have not had any discussions with counsel or anyone else about what has happened so far, that you weren't watching the hearing or anything like that. If you could confirm that for the record.

A. Yes, I have not had any -- talked to anybody.

Q. Perfect.

I would like to start with just a few questions -- and I should just say you have

a binder there, there are a lot of tabs in it, hopefully we won't have to get to all of them, but I'd like to start with a few questions about the structure with respect to some of the companies that you discuss in your witness statement.

So you control what you call the Mesa Group of Companies; correct?

A. Yes.

Q. And the original company in that group was Mesa Petroleum; right?

A. Yes.

Q. Now, Mesa Petroleum was an oil and gas company; correct?

A. Yes.

Q. It had no investments in renewable energy production at all; correct?

A. No.

Q. You say in your witness statement that you left Mesa Petroleum in 1996; is that correct?

A. Yes.

Q. And it was in 1997 that you resigned from the board of directors; is that right?

A. Yes.

Q. And that's when you sold all of your shares as well, in 1997?

A. Yes.

Q. As of 1997, then, you no longer had any affiliation with Mesa Petroleum; right?

A. No. Well, just a second, I still was a shareholder.

No, you are exactly right. I sold the shares coincident with me leaving.

Q. With you leaving. So all of your shares --

A. There was a couple of months in there, but it's very close.

Q. Now let's turn to the Mesa Power Group and ask a little bit about that.

So, Mesa Power Group in its first formation, I think was formed in 2007; is that correct?

A. I think that's right, I'm not sure.

Q. You're not exactly sure, but that sounds about the right timeframe?

A. Yes.

Q. So that's -- I mean just to

give it -- it's about a decade or so after you left Mesa Petroleum -- "yes" or "no" for the record.

A. Yes. Yes.

Q. Thank you. So then to be clear, Mesa Petroleum and Mesa Power Group, they are not related at all? They are not the same entity?

A. No.

Q. I think earlier you said and you confirmed that you are the sole member of Mesa Power Group?

A. Yes.

Q. I think you confirmed, but we'll get it for the record again, when you formed Mesa Power Group LLC, you had never developed a wind energy project anywhere; correct?

A. That's correct.

Q. In fact, you had never developed any sort of renewable energy projects at all; you were just oil and gas?

A. That's right.

Q. Now, if you can turn to your witness statement that you have in front of you there, and if you could look at paragraph number 2 in your witness statement. There, in the first

sentence, you attribute Mesa Petroleum's success, at least prior to you leaving, I guess, to:

"... careful management and hard work of our employees ..."

Do you see that?

A. Yes.

Q. But I want to be clear, the employees who were managing Mesa Petroleum and making it successful, those were not the same employees who were managing the Mesa Power Group; correct?

A. Yes.

Q. They were not the same employees?

A. They were not.

Q. So Cole Robertson is the vice-president of finance for Mesa Power; is that correct?

A. Yes.

Q. He joined Mesa Power in June of 2008 -- about that date?

A. Yes.

Q. When he joined he was placed in charge of the day-to-day operations of Mesa

Power; correct?

A. Yes.

Q. And to be clear, Cole Robertson never worked at Mesa Petroleum; right?

A. No.

Q. Now, in paragraph 3 of your witness statement, you speak about Mr. Robertson's qualifications. But when he was hired in 2008, when he worked for Mesa, his only previous employment had been at Ernst & Young; correct?

A. Yes.

Q. And that was in their asset management practice; are you aware of that?

A. I'm not sure what group.

Q. But when you did retain him and you gave him the responsibility for Mesa Power's day-to-day operations, he had no direct experience in the electricity industry; correct?

A. I don't think so.

Q. And he had never developed a wind energy project; correct?

A. Correct.

Q. So at the time of his hiring, he didn't have any direct experience in renewable electricity generation; is that correct?

A. I'm pretty sure that's -- I'm trying to remember whether he did or didn't, but I think that's correct.

Q. You think that's correct. Mesa Power's first project was the Pampa project in Texas; right?

A. When you say "the first," we were looking at more than one project than Pampa. But that was central at that time.

Q. But all of the first projects were in Texas?

A. Pardon me?

Q. All of the first Mesa Power projects were located in Texas?

A. I think so.

Q. The Pampa project, it began around 2007; does that sound right?

A. It sounds right.

Q. Now, in order to supply that project in Texas, Mesa Power entered into a contract to purchase wind turbines from General Electric; is that right?

A. Yes.

Q. Here's where we're going to go into the confidential section because I want to

look at that contract with General Electric. So if we can just cut the feed to the room.

We're confidential.

--- Upon resuming the confidential session under separate cover

--- Upon resuming in public

BY MR. SPELLISCY:

Q. Let's talk a little bit more generally about Mesa Power's experience to date in the wind power industry and then we'll come to your investments in Ontario.

In addition to the Pampa project, which didn't work out, Mesa also pursued a project called Goodhue in Minnesota; are you aware of that?

A. Yes.

Q. And that project also you were unable to successfully develop; correct?

A. No, we didn't develop it. We sold the project.

Q. You sold it. But you sold it before the development was completed?

A. Yes.

Q. Now, in your witness statement you talk about Mesa's successful development of the Stephens Ranch Wind Project, but

I want to clarify, Mesa didn't actually bring that project into operation, did it?

A. No, we did not build it out.

Q. You sold it before it was built out; correct?

A. Yes.

Q. In fact, the Mesa Group has never actually brought a single wind farm into actual operation; correct?

A. That is correct but we have an interest in the Stephens Ranch deal, so ...

Q. But you didn't actually bring that into operation?

A. No, we did not.

Q. I want to talk about the investments now into Canada by the Mesa Power Group. Now, your first investments into Canada were in November of 2009; correct?

A. I don't know the date.

Q. If we look -- I don't know if this will refresh you, but if we look at tab 12 in your binder.

A. Can you read it to me?

Q. I can.

A. Okay.

Q. These are from the Registrar of Corporations of Alberta under the Alberta Business Corporations Act, and it is the Certificate of Incorporation, and it says:

"Twenty-two Degree Holding ULC was incorporated in Alberta on 2009/11" -- meaning November -- "17." [As read]

Does that sound about right with your recollection?

A. Yes.

Q. And you are aware that the other Arran project is about the same time --

A. Yes.

Q. -- in fact the same day?

Now, the FIT applications for those two projects, are you aware they were filed in November of 2009, as well, shortly after the projects were incorporated; does that sound right?

A. Yes.

Q. Now, of course before you invested, I assume you did your due diligence on these projects and in the market in Ontario?

A. Due diligence meaning what?

Q. Well, you invested the market, what the market conditions -- you investigated the market, what the market conditions were like?

A. You are asking me if I did that?

Q. Or if you had somebody do it and brief you on it?

A. Cole Robertson did that work.

Q. Did he brief you on the results?

A. Yes, he did.

Q. Now, your other two projects, they came later, right? They came in 2010, the Summerhill and the North Bruce projects?

A. I don't remember the names of those projects.

Q. You don't remember the names of the Summerhill and the North Bruce?

A. No. I don't. If you tell me that, I know you're reading from some ...

Q. Sure, I can point you to it. I mean, I think that if we go to Tab No. 13 in your binder, there is another Certificate of Incorporation, and this is for North Bruce Holdings

ULC, and it says it was incorporated in Alberta on April the 6th, 2010. Does that sound approximately right?

A. Yes.

Q. Other than for those companies, your companies made no further applications to the FIT Program, just for those four that I mentioned; are you aware of that?

A. I'm not aware of that but if that's the case, yes.

Q. Now, if you look at paragraph 17 of your witness testimony, you talk here about the fair competition to obtain power purchasing agreements. You say that it was fairly run and transparent; that's what you expected?

A. Yes.

Q. Now, considering there's competition then, when you made the applications you believed that a quality application would be needed in order to win that competition; right?

A. Give me the question again.

Q. When -- you are talking about the "competition to obtain," so you recognized it was a competition.

A. Yes.

Q. So then you understood that in order to win that competition, a good application would have to be submitted; correct?

A. Yes.

Q. And knowing also that it was a competitive environment, you or at least Cole Robertson kept yourself informed of what was happening in Ontario, so you were briefed on it?

A. I was not -- let me give you 30 seconds on my management style.

Q. Fine.

A. It is not the same as it was when I was 66, and so I did not -- I was not up-to-date, day-to-day operations on what took place on any of our projects, oil, gas, wind, whatever, but I did have briefings.

Q. So if something significant happened, you would be briefed on it?

A. I think so.

Q. Now, if we can -- if you can flip to what's tab 15 in your binder and I can read it to you. For the record it is R068.

A. In your binder?

Q. In this binder, yes. In the exhibits binder.

A. Okay, read it to me.
Q. This is an archived news release, it says, and it says:
"Statement from the Minister of Energy and Infrastructure and Samsung C&T Corporation". [As read]
It is dated September 26, 2009 at 10:00 p.m.
We can -- if we read from the third paragraph down, it says:
"Both Samsung C&T Corporation and the Government of Ontario are pleased to confirm that efforts are progressing well towards the signing of a historic framework agreement."
A. Okay.
Q. Would this have been something that you were briefed on in 2009?
A. I don't remember that.
Q. So you don't recall then, sitting here today, if you were aware of the fact that negotiations between Ontario and Samsung were

going on prior to the applications that your company has made to the FIT Program?

A. No.

Q. Now, we discussed earlier, and you had mentioned about the Pampa project, and you had said that there were two reasons why it couldn't go ahead and one of them was because of a lack of transmission capacity. So with that experience, you were aware of how important and essential access to the transmission grid was; correct?

A. Yes.

Q. Were you ever informed then about any of the press releases or news articles that were being published with respect to the Green Energy Investment Agreement prior to your projects investing in the FIT Program?

A. I don't recall.

Q. You don't recall that ever happening?

A. No.

Q. You do recall that your companies applied for FIT contracts in the Bruce Region of Ontario; does that sound right?

A. No, I don't -- I know that --

yes, I know, of course, that we were trying to do something in Ontario, but when you're asking me specifically about filing a brief, I don't recall that.

Q. Were you aware when -- were you briefed on the fact that at the time those applications were made, there was no transmission capacity in the Bruce Region or do you not recall being briefed on that?

A. I don't remember that.

Q. Now, you've seen it today, on January 21st of 2010, the formal announcement -- there was a formal announcement of the Green Energy Investment Agreement between Samsung and the Government of Canada; do you recall being briefed on that in January of 2010?

A. I don't recall.

Q. You don't recall. Let's take a look at -- it's the last tab in your binder. I can read out the relevant parts to you.

Tab 21, just for the record, is R076, and it's a -- what's called an archived backgrounder from the Ontario Government. And it's on January 21st, 2010 at 10:32 a.m.

You said you don't recall but

you've also said you would have been briefed on important developments and you've acknowledged also the importance of transmission capacity. So I want to look at some of what was publicly released in January of 2010 about the agreement and I'll try to read this out for you.

If you look at the bottom of the first page of this document, it is under a heading called "Stimulating Manufacturing" and in the second small paragraph there it says:

> "In addition to the standard rates for electricity generation, the consortium will be eligible for an economic development adder." [As read]

Then it goes on to talk a little bit about that.

So you don't recall being briefed in 2010 about the Korean Consortium being eligible for an economic development adder?

A. No.

Q. If you turn to the second page, and for everybody else I'm going to go down to the bottom heading that says "More Renewable

Energy," and in the last line there, that leads over to the next page, it says:

> "Assurance of transmission in subsequent phases is contingent upon the delivery of four manufacturing plant commitments mentioned earlier." [As read]

So you don't recall being briefed that in the agreement signed between Samsung and the Government of Ontario that they had an assurance of transmission capacity?

A. No, I don't.

Q. Well, let's turn -- and we'll do this, we won't do too many more, I think I'm getting close to the finish here. If we turn to tab 18 in your binder which, for the record, is C119. And this is a direction from the Ministry, the Minister of Energy to the chief executive officer of the OPA. It is dated September 17, 2010 and it says in the last paragraph on the first page, and I'll read it for you:

> "I now direct the OPA in carrying out Transmission Availability Tests and

Economic Connection Tests under the FIT Program rules, to hold in reserve 500 megawatts of transmission capacity to be made available in the Bruce area in anticipation of the completion of the Bruce-to-Milton transmission reinforcement, for phase 2 projects of the Korean Consortium." [As read]

You don't recall being briefed in September of 2010, that the Korean Consortium had been reserved transmission capacity in the very region in which your projects were applying for projects?

A. No.

Q. So I want to come then and ask you about your testimony in paragraph 18 of your witness statement.

In this paragraph you talk about a communication that you had with the Ontario Minister, Deputy Premier Minister of Economic Development and Trade, Ms. Sandra Pupatello, in

April of 2011; correct?

A. Yes.

Q. Now, this call did not discuss Mesa's FIT applications, did it?

A. No.

Q. And certainly Minister Pupatello made no commitments about those applications; correct?

A. Correct.

Q. Other than this communication, you had no earlier communications with the Ontario Government about the FIT Program or the GEIA; correct?

A. Yes.

Q. Now, in fact, you never reached out and you never spoke with the Ontario Minister of Energy at all; correct?

A. Correct.

Q. And you never spoke with the president or chief executive officer of the Ontario Power Authority at any time; correct?

A. Correct.

Q. Your call with Minister Pupatello that you are referencing here, this is about 18 months after you initially invested in

Ontario, as we saw from the documents, November 2009 to April 2011; does that sound right?

A. Yes.

Q. And as we see in the Summerhill and North Bruce projects, your other two that we saw, they were in April of 2010, so this conversation is about a year after those investments had been made; right?

A. Yes.

Q. So this call with Minister Pupatello had nothing to do with the reason why you invested into Ontario, did it?

A. Her call?

Q. Her call.

A. No, it had nothing to do with it.

Q. Your investment was made at that point already?

A. Yes.

Q. Now, in paragraph 18, you have testified there, and it's the fourth sentence in, about halfway down and I'll read it to you:

"Minister Pupatello did not make me aware that it was possible to participate in,

or negotiate, a special arrangement with Ontario, whereby Mesa could circumvent the requirements of the FIT Program."

Do you see that?

A. Yes.

Q. You would agree, even though you weren't briefed on it, this conversation happened about a year after the GEIA was publicly announced in January of 2010; correct?

A. I'm getting mixed up on dates but ...

Q. Well, we can go back and look, but the announcement -- the press release that I read to you -- was from January of 2010; correct?

A. Okay, yes.

Q. Do you agree? And so this call is over a year after that happened?

A. Yes.

Q. But you weren't briefed on any of this, so when you made your statement in your witness statement here, that she didn't make you aware, the fact is nobody had briefed you on

the fact that Samsung had entered into such a deal and that it had been publicly disclosed that they had entered into such a deal?

A. Yes.

Q. You never asked Minister Pupatello about negotiating an investment agreement with Ontario, did you?

A. No.

Q. In fact, to your knowledge, neither you nor anyone in any of your companies ever asked about negotiating such an agreement with Ontario?

A. Yes.

Q. You didn't do that, nobody asked; right?

A. Right.

MR. SPELLISCY: Thank you, Mr. Pickens, that was all the questions I have for you today.

THE CHAIR: Thank you. This doesn't entirely complete your examination. It won't be much longer, but if you just bear with us.

THE WITNESS: I couldn't hear you. Just a sec.

THE CHAIR: This does not yet

entirely complete your examination. There may be a few more questions, if you can bear with us.

Does Mr. Appleton have some redirect questions?

MR. APPLETON: I have one.

THE CHAIR: Yes, please.

RE-EXAMINATION BY MR. APPLETON:

Q. Good afternoon again, Mr. Pickens.

Do you remember when Mr. Spelliscy was asking you some questions about whether Mesa Power Group had developed a wind power project anywhere?

A. Yes, I remember.

Q. Besides Mr. Robertson, Cole Robertson who is here, did any other members of Mesa Power have wind experience?

A. We had, I think, Mark Ward had wind experience, but yeah, I believe that would be it.

Q. Would Mr. Robertson know of those --

A. Oh, yeah, Cole would know. And we could have had other people involved. I'm not sure. Ask Cole.

MR. APPLETON: Thank you very much. Nothing further.

THE CHAIR: Thank you.

Do my co-arbitrators have any questions for Mr. Pickens?

QUESTIONS BY THE TRIBUNAL:

THE CHAIR: I have one that goes more to your general assessment of what happened here. You have insisted both in your written statement where you have spoken about the particular fondness -- "I have a particular fondness for working in Canada," you wrote. And you have restated this today orally.

The reason why you are here today obviously means that this time it did not work out well; what did go wrong?

THE WITNESS: I'll go back in my recall again. I kind of look forward to doing business in Canada. And I had actually been at San Antonio when the NAFTA agreement -- I think it was signed there, but I was invited to be there and I remember I sat on the front row and I listened to what they had to say and it made a great deal of sense to me, NAFTA did, that we would work back and forth in North America, and I think from there,

that was where I started to think about the North American Energy Alliance, that North America could work together and cut out a lot of red tape and everything else if they -- if everything was above board and transparent, to companies that wanted to work back and forth.

And anyway, in that, I came up with a North American Energy Alliance which would be to get totally off OPEC crude.

And so -- then after the Minister -- after she called me, and encouraged me to come to Ontario and do business, and asked me to do some speaking engagements up here, and all, I felt like that -- and we were already into -- but I felt good about the call. I felt that we were going to be treated fairly. And -- but -- and then -- it said I was depressed over it, and I thought about it when I put "depressed" in there and I thought about it --

THE CHAIR: I think you said "disappointed," didn't you?

THE WITNESS: Did I say "disappointed" or "depressed"?

THE CHAIR: "Distressed".

THE WITNESS: "Distressed," not --

but I thought, "Is this too strong?" and I thought no, it really isn't, because I was disappointed that (A), a secret deal had been made with Samsung, and that we were now out and Samsung was in, and I -- and Cole briefed me on it, told me, he said, "Yes, they made a deal with Samsung." Later I know that the way I recall it in another meeting, we picked that up on discovery, that a secret meeting, yes, had been made between Ontario and Samsung. And that did -- that was very disappointing to me.

THE CHAIR: So the reason of your disappointment or being distressed was that Samsung made a deal with the Ontario Government or -- not that much that your FIT applications did not succeed and you didn't get contracts?

THE WITNESS: Yes, I --

THE CHAIR: What was it? Because there are two --

THE WITNESS: Well, the deal that was made with Samsung was not -- I didn't feel was -- it was made above board, and it was a secret agreement, and so I -- I felt like, you know, we lost. Well, you always feel bad when you lose, and then you look to see why you lost, and here we lost because we didn't have a level playing field.

THE CHAIR: Fine. Thank you. That answers my question, and unless there is any follow-up question...

MR. MULLINS: We just have one follow up question, follow up from the Chair's question.

THE CHAIR: From the tribunal's questions, yes. So please go ahead.

MR. MULLINS: Do you mind if I do it? I just thought of --

THE CHAIR: No, you can do it.

FURTHER RE-EXAMINATION BY MR. MULLINS:

Q. Mr. Pickens, to follow up on the Chair's question, between yourself and Mr. Robertson, who would be the best to be able to identify what Mesa's complaints are in this arbitration?

A. Well --

THE CHAIR: Yeah, maybe I should say, I wanted to have Mr. Pickens' personal opinion. I understand that you have made your submissions and Mr. Robertson will be able to explain tomorrow. I just wanted Mr. Pickens' personal opinion of what had happened.

MR. MULLINS: I'll take that from the record. I just wanted to make sure that the Chair understood that and that's fine.

THE CHAIR: Absolutely. That was the spirit of the question.

MR. MULLINS: Perfect.

THE WITNESS: I don't have a question?

THE CHAIR: You don't have a question because I answered the question.

THE WITNESS: Thank you.

THE CHAIR: So, that completes your examination, Mr. Pickens. Thank you very much for your explanations.

THE WITNESS: Well, thank you too, and you got me out and on my way home before I thought I was going to get home. Thank you.

MR. APPLETON: Is the witness excused?

THE CHAIR: Yes. So, you can either leave or you can stay; whatever you wish to do.

THE WITNESS: I can't hear you.

THE CHAIR: You can leave -- you hear me now? No, maybe I should wait.

THE WITNESS: The reason I can't hear is because I have shot a gun too much and I have one other reason. It's because I'm 86. The other day I did a physical with Southwestern Medical and they called and told me, they said, "We have good news and bad news." And I said, "Well, give me the good news first." And they said, "You are going to live to be 114." And I said, "Okay, bad news?" And they said, "You won't be able to hear or see." And I'm already there. Thank you.

THE CHAIR: Thank you. The question now is: Do we want to continue and start the examination of Mr. Robertson or do we do this tomorrow, which to me would seem more reasonable because it's five o'clock now.

MR. APPLETON: It would seem to me that tomorrow would make more sense. We won't get very far anyways.

THE CHAIR: And we would have to interrupt, which is never really good.

MR. SPELLISCY: Let's do it tomorrow.

THE CHAIR: You agree? And then tomorrow at some point the tribunal will come back to you on the issue of the damage expert evidence.

Is there anything that we need to raise before we can close for the day? No? Fine. Then have a good evening and we will see each other tomorrow morning at 9:00.

--- Whereupon at 4:59 the arbitration was adjourned to Monday, October 27, 2014 at 9:00 a.m.

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided transcription and transcribed therefrom, the foregoing proceeding.

Teresa Forbes, CRR, RMR,
Computer-Aided Transcription

I HEREBY CERTIFY THAT I have, to the best of my skill and ability, accurately recorded by Computer-Aided Transcription and transcribed therefrom, the foregoing proceeding.

Lisa M. Barrett, RPR, CRR, CSR
Computer Aided Transcription