

PCA Case No. 2012-17

AN ARBITRATION UNDER CHAPTER 11 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

THE HONORABLE CHARLES N. BROWER

MR. TOBY T. LANDAU QC

held at Arbitration Place

333 Bay Street., Suite 900, Toronto, Ontario  
on Thursday, October 30, 2014 at 9:04 a.m.

VOLUME 5

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1 APPEARANCES:

2

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4 Dr. Alan Alexandroff

5 Kyle Dickson-Smith

6 Celeste Mowatt

7 Sean Stephenson

8 Edward Mullins

9 Sujei Herrera

10 Shane Spelliscy For the Respondent

Heather Squires

11 Raahool Watchmaker

Laurence Marquis

12 Susanna Kam

Rodney Neufeld

13

Also Present:

14 Alicia Cate

Jennifer Kacaba

15 Saroja Kuruganty

Lucas McCall

16 Alex Miller

Harkamal Multani

17 Darian Parsons

Adriana Perez-Gil

18 Melissa Perrault

Chris Reynolds

19 Cole Robertson

Sejal Shah

20 Michael Solursh

Mirrun Zaveri

21

22 Teresa Forbes, CRR, RMR, CSR Court Reporter

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1 Toronto, Ontario

2 --- Upon resuming on Thursday, October 30, 2014

3 at 9:04 a.m.

4 THE CHAIR: The silence shows that  
5 everyone is ready to start day 5 of this hearing.

6 Good morning to everyone.

7 Good morning, Mr. Low. You have  
8 been with us for a few days already, so you know  
9 how this proceeds. Can you confirm that you are  
10 Robert Low?

11 THE WITNESS: Yes, I can.

12 THE CHAIR: Yes, good. You are  
13 executive advisor in evaluation district services  
14 group of Deloitte in Toronto; is that right?

15 THE WITNESS: That's correct.

16 THE CHAIR: You have provided two  
17 expert reports. One was dated November 18, 2013  
18 and the other one April 29, 2014.

19 THE WITNESS: That's also correct.

20 THE CHAIR: That's correct. And  
21 you know that you're heard as an expert witness in  
22 this arbitration. As an expert witness you are  
23 under a duty to make only such statements that are  
24 in accordance with your belief. Can you please  
25 confirm that this is what you intend to do?

1 THE WITNESS: I can.

2 AFFIRMED: ROBERT LOW

3 THE CHAIR: Thank you. I will now  
4 turn to Mesa's counsel, Mr. Appleton, for direct  
5 questions.

6 EXAMINATION IN-CHIEF BY MR. APPLETON AT 9:05 A.M.:

7 Q. Testing. Excellent. That  
8 technology works. Good morning, Mr. Low.

9 A. Good morning.

10 Q. Mr. Low, as you confirmed to  
11 the president this morning, you have submitted two  
12 expert reports in this arbitration with Mr. Richard  
13 Taylor. Who is Mr. Richard Taylor?

14 A. Mr. Richard Taylor is a  
15 partner at Deloitte who leads the valuation  
16 practice in the greater Toronto area, and Richard  
17 and I have worked together for about 25 years at  
18 the various firms that we have both worked at.

19 Q. What type of qualifications  
20 does Mr. Taylor have?

21 A. Mr. Taylor's qualifications  
22 are virtually identical to mine, chartered  
23 accountant, chartered business valuator.

24 Q. Now further to the Tribunal's  
25 direction, can you confirm that your working file

1 has been brought with you to the arbitration?

2 A. Yes.

3 Q. Great. Let's talk a little  
4 bit about your qualifications and your curriculum  
5 vitae, which is in appendix D to your first report.  
6 You can look at, if you like. I am sure you  
7 probably know.

8 You are an executive advisor in  
9 the Deloitte financial advisory group, and before  
10 that you were a partner at Deloitte. Is that  
11 correct?

12 A. That's correct. And my  
13 principal function is I lead the dispute practice  
14 in the Greater Toronto Area.

15 Q. And the CV says that you have  
16 worked since 1978 fairly exclusively in the damages  
17 valuation area; is that correct?

18 A. Yes. That has been my  
19 practice since 1978, over 35 years.

20 Q. Is it safe to say that you  
21 have been engaged in a wide variety of damages and  
22 business valuation matters over the course of that  
23 time?

24 A. Very much so.

25 Q. Could you tell us the number

1 of dispute resolution matters in which you have  
2 given testimony about damages and valuation?

3 A. I haven't kept exact track,  
4 but it would be in excess of 60 times.

5 Q. You're a chartered accountant  
6 with more than 40 years of experience?

7 A. That's correct. I'm a  
8 chartered accountant.

9 Q. Could you give me an example,  
10 then, of a relevant dispute that you may have  
11 participated in where you gave testimony about  
12 damages and valuation?

13 A. One that comes to mind I will  
14 refer to as the Pearson airport case, the airport  
15 that you transited to come into Toronto. And it  
16 was over a 57-year contract for a consortium to  
17 lease terminals 1 and 2 at the airport.

18 The contract was terminated by the  
19 government, and there was extensive litigation over  
20 the value of that contract.

21 Q. What was the general quantum  
22 in dispute?

23 A. It was approximately \$600  
24 million.

25 Q. Often airports are the basis

1 of disputes, as the members of the Panel know. And  
2 if not, sometimes we all feel like they should be.  
3 --- Laughter.

4 MR. BROWER: Could I ask, is that  
5 the Lockheed case, if you can say?

6 THE WITNESS: No, it was not.

7 BY MR. APPLETON:

8 Q. Mr. Low, I see that you are a  
9 chartered business valuator.

10 A. Yes.

11 Q. Can you tell us what this  
12 designation is?

13 A. A chartered business valuator  
14 is a designation awarded by the Canadian Institute  
15 of Chartered Business Valuators. It is an  
16 organization of people who are dedicated to the  
17 field of business valuation and damages, and they  
18 provide education leading to an examination,  
19 qualification process, and continuing education,  
20 publications and discipline of members.

21 Q. When I read your CV, just for  
22 my own interest, I saw that you have sat on the  
23 final examination committee for the Canadian  
24 Institute of Chartered Business Valuators. Can you  
25 just tell us what that means?



1                   A.    The final examination  
2   committee is -- I was appointed, effectively by  
3   your peers, to assist in the process of reviewing  
4   the examinations as have been written by candidates  
5   who are trying to get the designation of chartered  
6   business valuator, as well as the other information  
7   that they have to put forward in order to qualify  
8   in being awarded the CPV designation.

9                   Q.    And who is this Canadian  
10   Institute of Chartered Business Valuators?

11                  A.    It started back in the early  
12   '70s with a number of people who were devoted to  
13   that field, and it has grown.  It is a fairly  
14   substantial organization, was underneath the  
15   chartered accountant organization for a while, but  
16   it is now independent of that.

17                  In addition, currently I sit on  
18   the publications committee of the CICBV peer  
19   reviewing articles in the journal that is produced,  
20   and I sit on the discipline committee.

21                  Q.    So when I see on your CV it  
22   says CBV, that means chartered business valuator?

23                  A.    That's correct.

24                  Q.    And when I see it says CA,  
25   what does that mean?

1           A.   Chartered accountant.

2           Q.   I see.  Now, you have served  
3 as an arbitrator in commercial disputes, as well?

4           A.   I have, only a few times, and  
5 they have all related to a question of damages.

6           Q.   All right.  So as you have  
7 heard and as the president has explained to other  
8 experts as they come in, the Tribunal has permitted  
9 experts to give a presentation -- and we're always  
10 careful when we talk to experts, it is limited up  
11 to 20 minutes -- setting out the conclusions in  
12 their reports, their methodologies, and to explain  
13 the divergences between the experts.

14                   In this case, that other expert of  
15 course would be Mr. Goncalves, who I expect that we  
16 will hear from later today, who has filed a number  
17 of reports.

18                   Could you, please -- actually, do  
19 you have a presentation?

20           A.   Yes, I do.

21           Q.   I understand that the  
22 presentation is in the binders -- and someone will  
23 tell me at what tab -- at tab C.  And we will also  
24 hand out a copy to make it easier for the members  
25 of the Tribunal and for Canada.  Once we do that,

1 we will start your 20 minutes, okay?

2 --- Binder distributed

3 BY MR. APPLETON:

4 Q. All right. Could we put that  
5 up somewhere? All right. So your 20 minutes can  
6 begin now. Let's hear your presentation, sir.

7 A. Thank you. If I could have  
8 the next slide, please? We've prepared a report --  
9 two reports with respect to economic losses that  
10 are assumed to have occurred as a result of  
11 breaches of NAFTA, NAFTA Articles 1102, 1103, 1105  
12 and 1106.

13 The basic approach that we have  
14 used in all of these articles in determining the  
15 economic loss is the discounted cash flow approach,  
16 and we deemed that to be the most appropriate  
17 approach in this instance for the following  
18 reasons: That the revenues can be forecast with a  
19 relatively high degree of confidence.

20 There are wind studies, and we  
21 have taken a conservative approach or the typical  
22 approach to how to apply those. And the FIT  
23 contract, 20 years, with a designated price, with a  
24 partial inflation protector to allow that to be  
25 predictable.

1                   The majority of the capital costs  
2                   would have been contractual, and we refer there to  
3                   the MTSA, which is for the turbines, one of the  
4                   principal capital costs to be incurred, and the  
5                   EPC, or the balance of plant construction costs,  
6                   have been estimated by an independent consultant,  
7                   Mortenson.

8                   The operating costs are expected  
9                   to be relatively stable, and in fact BRG has agreed  
10                  or Mr. Goncalves has agreed with those operating  
11                  cost estimates.

12                  And there isn't any novel  
13                  technology. It is not something new. It is really  
14                  quite predictable. And, in fact, Mr. Goncalves  
15                  basically adopts the same discounted cash flow  
16                  approach and, indeed, the majority of the data that  
17                  we have used, other than a few factors that I will  
18                  discuss later in the presentation.

19                  As a result, we believe that the  
20                  discounted cash flow approach can be estimated in a  
21                  reliable manner with a relatively high degree of  
22                  confidence; that is, it is not speculative in this  
23                  instance.

24                  Next slide. Thanks. This  
25                  discounted cash flow approach obviously was adopted

1 by us. Mr. Goncalves has applied the same  
2 discounted cash flow approach as Deloitte with, as  
3 I said, a few variables being different, and I will  
4 discuss those momentarily.

5 In addition, the OPA as, at least  
6 in this dispute, an independent body and before the  
7 FIT program was enacted, applied a discounted cash  
8 flow approach in establishing the FIT pricing.

9 And, indeed, we heard the other day from  
10 Mr. Jennings that the OPA price or the FIT price  
11 was set and it was set using this discounted cash  
12 flow approach in order that the applicants could  
13 recover their costs and be entitled to a  
14 commercially-reasonable rate of return.

15 And so, again, the discounted cash  
16 flow approach, I think, is quite reasonable and  
17 appropriate in this instance.

18 We have approached the NAFTA  
19 Articles 1102 or the economic losses related to  
20 Articles 1102, 1103, 1105 and 1106 having regard to  
21 the benefits of the amended GEIA and that these  
22 should be reflected in the economic losses.

23 This principally takes the form in  
24 1103 of the Most Favoured Nation-type of analysis  
25 and that the best treatment awarded should be

1 compensated to Mesa in this instance. So we have  
2 looked at the treatment provided to the Korean  
3 Consortium under the amended GEIA.

4 So principally what does this  
5 include? In our opinion, it includes priority  
6 access to the four -- I apologize, I have a little  
7 bronchitis -- priority access to four projects that  
8 Mesa had totalling 565 megawatts reduced risk to  
9 development for a couple of reasons, but largely  
10 due to the government assistance in the regulatory  
11 process, in that there was a group set up to assist  
12 the Korean Consortium with that process and that  
13 should have been available then to Mesa, as well.  
14 And the priority access, in addition, reduced the  
15 risk to development.

16 We then heard discussion of the  
17 economic development adder, and this has to do with  
18 the likeness. And according to the evidence of  
19 Mr. Seabron Adamson, really it equates what was in  
20 the GEIA to the domestic content requirements and  
21 that it was an ability to point to a manufacturer  
22 and say, Here's our partner.

23 The economic development adder is  
24 a payment, in addition, that would be received over  
25 the 20-year life of the project. So it's been

1 present valued on the discounted cash flow basis,  
2 as well.

3 In addition, we have looked at the  
4 10 percent capacity expansion that GEIA provided  
5 for, plus or minus 10 percent, as the better  
6 treatment. We have determined the value of the  
7 plus 10 percent capacity expansion. And as  
8 indicated by Susan Lo in her evidence the other  
9 day, the Korean Consortium, in fact, did use more  
10 than 500 kilowatts in their first two phases.

11 The last point I would like to  
12 make is that we have used the timing under the  
13 amended GEIA to push back the timing that would  
14 have been in the Mesa projects, in that we think  
15 they would have been ready earlier, but we have  
16 moved these back in time to accord with the timing  
17 in the amended GEIA.

18 With respect to NAFTA Article 1106  
19 related to domestic content, as you can see under  
20 the 1.6xle turbine the words "base case", all of  
21 the damages that we have determined in our  
22 calculations for 1102, 1103 and 1105 were based on  
23 the use of the 1.6xle turbine, and Mesa had to make  
24 a decision early on believing that contracts were  
25 going to be awarded, and in August of 2010 were

1 told that the 2.5xls would not be available to  
2 qualify for domestic content until 2012.

3 So the decision was made. The  
4 planning started to be undertaken, the development  
5 undertaken with respect to use of the 1.6xle.

6 Why are they different? The  
7 2.5xle, while costing more, generates more power.  
8 It is a more efficient turbine. The effect -- and  
9 we have quantified this separately -- of the  
10 application of the 2.5 turbines into these projects  
11 versus the 1.6 results in a loss, due to the  
12 domestic content rule and having to qualify, of  
13 \$106 to \$115 million.

14 On the next slide, we have  
15 indicated in this circle -- the circle is  
16 equivalent to the entire \$106 to \$115 million loss.  
17 And what we have tried to demonstrate here is that  
18 indeed it is the revenue loss, the efficiency of  
19 the 2.5 turbine relative to the wind studies and  
20 the FIT rate, that is generating most of the loss.

21 There would have been more revenue  
22 in these four projects had they proceeded with the  
23 2.5xl turbine.

24 The next largest component is the  
25 operating cost. And simply stated, a number of the



1 operating costs are determined on a per-turbine  
2 basis. The 2.5xl process involves fewer turbines.  
3 They are more expensive, but they involve fewer  
4 turbines, and, therefore, the operating costs, when  
5 determined on a per-turbine basis, would be lower,  
6 and that accounts for approximately 25 percent of  
7 the losses, as well.

8                   Lastly, we have looked at the  
9 capital costs of using the 2.5 turbines versus 1.6.  
10 And over the four projects, while each 2.5 turbine  
11 is more expensive than a 1.6 because they use fewer  
12 of them, they virtually nil out the greater  
13 per-turbine cost offset by fewer turbines, and, in  
14 fact, there's a slight cost advantage to the use of  
15 the 2.5s versus the 1.6s.

16                   That's the domestic content loss.  
17 In summary, then, our total economic losses that we  
18 have determined from our reply report are \$704 to  
19 \$768 million. All of these have been determined on  
20 this discounted cash flow basis and effectively are  
21 lost profits that have resulted from Mesa not being  
22 treated in the same fashion as the Korean  
23 Consortium.

24                   The base case is separately  
25 identified from -- other than the risk advantage,

1 is built into the base case. The economic  
2 development adder, as you can see here, and the  
3 capacity expansion are quantified separately. And,  
4 in fact, in our report -- reports, you can see that  
5 we've separately identified these categories for  
6 each of the four projects, and then there is a very  
7 small economic development adder that would be  
8 applicable to the capacity expansion.

9 The sum of all of those is \$358 to  
10 \$406 million. To that, we have added NAFTA 1106,  
11 the domestic content damages, for \$106 to \$115  
12 million, and I commented on the previous slides how  
13 that was determined.

14 So the total damages, on a lost  
15 profit basis, are \$464 to \$521 million. In the  
16 base case, we have deducted the entire cost of  
17 acquiring the turbines, including the amount that  
18 was put on deposit with GE. So that has already  
19 been deducted in coming to these lost profits that  
20 I have already talked about.

21 So we have added back here the  
22 General Electric deposit that was forfeited, and  
23 the basis for doing that is that our approach is  
24 that all four projects would have proceeded. All  
25 four projects would have required 347 turbines to

1 be used. The MTSA deposit and the MTSA itself  
2 related to 333 turbines and, accordingly, the  
3 deposit would have been applied to the purchase of  
4 all of those turbines and would not have been lost,  
5 and, accordingly, we have added \$157 million to the  
6 damages as a sunk cost.

7           The other sunk costs relate to  
8 professional fees, acquisition costs of the  
9 properties, land rent while properties were being  
10 held and developed, and project development costs  
11 such as the wind studies and other things as Mesa  
12 was preparing these properties for development.  
13 And that amount is \$8 million, and there is a table  
14 in our first report, schedule 1B, that provides an  
15 analysis of that by category and by property.

16           So the out-of-pocket costs are  
17 approximately \$165 million for a total claim under  
18 NAFTA Articles 1102, 1103, 1105, and including  
19 1106, of \$629 to \$686 million.

20           To that, we have added interest  
21 from the date of the claim to November 1, 2014, the  
22 end of this hearing, in the amount of \$75 to \$82  
23 million. That was based on the prime rate of  
24 interest in Canada and was compounded annually.

25           That results in the total claim of

1       \$704 to \$768 million.

2                       I would now like to touch on the  
3 principal differences between Mr. Goncalves'  
4 conclusions and my own. As indicated, our approach  
5 applies the benefits and the treatment accorded to  
6 the Korean Consortium to the discounted cash flow  
7 approach.

8                       Mr. Goncalves's approach to the  
9 economic loss does not consider the application of  
10 NAFTA or, in fact, the articles that have been  
11 breached.

12                      So on the left-hand side of this  
13 schedule, you can see a comment labelled "Deloitte"  
14 on the right-hand side, BRG or Mr. Goncalves.

15                      As I have talked about, our  
16 economic losses are consistent with the NAFTA MFN,  
17 Most Favoured Nation, benefits or approach  
18 affording to Mesa the best treatment provided under  
19 Article 1103.

20                      With respect to Mr. Goncalves's  
21 approach, in spite of indicating in his reports  
22 that he was instructed to assume that there were  
23 breaches of these NAFTA provisions, his economic  
24 losses, to use his words, "have been determined  
25 independent of NAFTA".

1                   So what's the impact of that  
2           between the two reports? In my report, the four  
3           projects have been included and they reflect the  
4           benefits from the amended GEIA, the better  
5           treatment. In addition, the GE deposit would not  
6           have been lost.

7                   Under Mr. Goncalves's approach, he  
8           has included only two projects, being TTD and  
9           Arran, and he has included no benefits of the  
10          amended GEIA. He has not accorded Mesa the  
11          benefits of the better treatment pursuant to, for  
12          instance, Article 1103. And, in addition, he has  
13          excluded from his conclusions all of the GE  
14          deposit.

15                   The difference in this  
16          methodological approach of according the treatment  
17          under Article 1103 or 1102 versus Mr. Goncalves's  
18          approach is a reduction from my conclusions of \$500  
19          million solely attributable to this difference.  
20          And I believe that the difference -- the approach  
21          taken by Mr. Goncalves is wrong.

22                   So the midpoint of my range from  
23          the previous analysis was \$658 million. The \$500  
24          million reduction, which indeed I have taken from  
25          Mr. Goncalves's report, is \$500 million, leaving

1       \$158 million left.

2                       The next largest difference  
3 between us is the cost of equity that was used in  
4 determining the weighted average cost of capital  
5 that has then been applied in the discounted cash  
6 flow approach over 20 years.

7                       The cost of equity component that  
8 went into my conclusion was 11-1/2 percent to  
9 12-1/2 percent. You might recall that you have  
10 heard this before. The OPA, in setting the FIT  
11 price, the recovery of costs and the commercial  
12 rate of return appropriate to investors in the FIT  
13 program, was determined as 11 percent.

14                      Mr. Goncalves's rate of return on  
15 equity is 20 percent to 21-1/2 percent. I suggest  
16 that is not even in the ballpark of reasonable.

17                      The difference, again, as  
18 quantified in his own report, is equal to \$120  
19 million. As I indicated before, he had reduced our  
20 claim, by virtue of the methodological difference,  
21 by \$500 million. This further \$120 million would  
22 reduce the damages to \$38 million.

23                      There's other minor differences to  
24 other issues that he has that account for  
25 approximately half of the 38, and he is left with

1     \$19 million of losses that he believes is  
2     appropriate.

3                     The two large items are this  
4     methodological difference of not applying the  
5     better treatment and the discount rate. They  
6     account for the vast majority of the differences  
7     between us.

8                     That's the end of the summary.

9                     MR. APPLETON: Thank you. We  
10    appreciate -- we know that I can commiserate with  
11    personally, trust me.

12                    MR. BROWER: You make quite a  
13    team.

14                    MR. APPLETON: Apparently it is  
15    what we require of all our experts now.

16                    BY MR. APPLETON:

17                    Q.    Something that we have been  
18    very lucky with through the course of this hearing  
19    has been that experts and witnesses generally  
20    haven't relied on a lot of technical words, but you  
21    did rely on one word I just want you to clarify.

22                    At the beginning of your summary,  
23    you talked about EPC, and I assume that you meant  
24    engineering, procurement and construction costs.

25                    A.    Yes.

1                   Q.    I just want to make sure we  
2    have a clear record for it.

3                   Now, Mr. Low, thank you very much.  
4    Could you, please, advise the Tribunal if you have  
5    any observations to make in response to the  
6    comments arising since your last expert report was  
7    filed?

8                   A.    Yes.  There are three items  
9    that I would like to address orally, and they deal  
10   with the calculation of the weighted average cost  
11   of capital at September 17, 2010.  They deal with a  
12   change to the determination of damages under  
13   Article 1105, and a reference that we made in our  
14   report to a certain rate of return that I would  
15   like to clarify.

16                   So with respect to the calculation  
17   of the weighted average cost of capital, in our  
18   reply report we did adopt a valuation date of  
19   September 17, 2010.  We had, in our first report,  
20   used a valuation date in January 2010.  And when we  
21   did our calculation of the weighted average cost of  
22   capital, in our reply report we did not go through  
23   the mechanics of adjusting that weighted average  
24   cost of capital calculation.

25                   Mr. Goncalves, in his second



1 report, pointed out that we had not done that, and  
2 it was his view that the components of that  
3 calculation had changed sufficiently that our  
4 calculation was in error.

5 In that regard, I have updated  
6 that calculation to September 17th, put in the  
7 appropriate factors, some very similar to what he  
8 had done. Some are slightly different by virtue of  
9 either sources or however we have determined the  
10 data, but I have redone that calculation using a  
11 September 17th input date.

12 The effect of that is that the  
13 cost of equity increased slightly, and the weighted  
14 average cost of capital increased even less,  
15 because the interest component was still fixed and  
16 maintained the same. The effect of that was  
17 to -- I'm sorry, reduce the damages slightly.

18 With respect to 1105, my first  
19 report and the reply report included the benefits  
20 of the GEIA in the Article 1105 damages. And I had  
21 spoken with counsel before and as we were producing  
22 those reports, and, with the belief that the  
23 fairness was a fairly egregious breach in this  
24 instance, had concluded with counsel that the  
25 benefits of the GEIA should be included in 1105.

1                   Subsequent to the second BRG or  
2                   Mr. Goncalves' report, again sitting with counsel,  
3                   it was determined that the benefits of the GEIA  
4                   should not be included in the 1105 damages. And,  
5                   accordingly, I went through a process of  
6                   eliminating those.

7                   And a couple of them are very easy  
8                   to see, in that we simply take the economic  
9                   development adder, which in our schedules is  
10                  separately quantified, and the capacity expansion  
11                  quantification out of the calculations.

12                  However, removing the GEIA  
13                  benefits also removes the government assistance  
14                  benefit that reduced the risk to the project. And,  
15                  accordingly, I would have increased the rate of  
16                  return required on the equity component in the cost  
17                  of capital to reflect that the government  
18                  assistance would no longer be available.

19                  And I then had to look at the four  
20                  projects separately, and the first two, TTD and  
21                  Arran, are slightly more advanced than are  
22                  Summerhill and North Bruce and I would have added a  
23                  further incremental increase to the cost of  
24                  capital.

25                  The effect of all of those is a

1 fairly significant reduction to the amount that I  
2 had quantified under 1105 to remove the benefits of  
3 the GEIA from that component of the articles that  
4 we have calculated.

5           The third item that I would like  
6 to refer was pointed out by Mr. Goncalves in his  
7 reply report, and we had referred, when talking  
8 about our conclusion with respect to the weighted  
9 average cost of capital, to the OPA 11 percent and  
10 to a Scotiabank article that included a pre-tax  
11 unlevered cost of equity amount.

12           Our reference to that cost of  
13 equity was not correct. It should not have been  
14 there. It wasn't relevant to the conclusion.

15           However, there is an important  
16 distinction I would like to make. All of the Bank  
17 of Nova Scotia rates cited in that presentation  
18 represented what is called an internal rate of  
19 return. By definition, an internal rate of return  
20 is the return that results in the net present value  
21 of the future cash flows being forced to zero, such  
22 that there is no value.

23           So it indicates what the total  
24 return on the project is, but it's not  
25 necessarily -- and, frankly, is not -- the

1 commercial rate of return on investment. It is  
2 simply -- which is the risk of the projects. It  
3 is: What is the return having regard to all of the  
4 circumstances?

5 But it forces the conclusion to  
6 zero. So Mr. Goncalves in his second report states  
7 that, from the same document, the after-tax levered  
8 internal rate of return of approximately 23 or 24  
9 percent is the relevant proxy for the cost of  
10 equity, and because his return of 20 to 21-1/2 is  
11 lower, slightly lower, than that, he believes that  
12 that demonstrates his cost of equity is  
13 conservative.

14 Effectively, though, by being  
15 close to an after-tax internal rate of return, his  
16 calculation is close to forcing the conclusion to  
17 zero. He has not applied a commercial return on  
18 investment. He has applied an IRR or close to an  
19 IRR that forces the conclusion to zero.

20 I think this demonstrates that  
21 Mr. Goncalves didn't understand what that IRR was,  
22 didn't understand the valuation and financial or  
23 damages theory that go along with applying costs of  
24 equity to a damages claim. Those are my comments.

25 Q. Thank you. Thank you very

1 much, Mr. Low. One last question. Are your  
2 corrections to your expert report to the benefit of  
3 Mesa Power or to the benefit of the Government of  
4 Canada?

5 A. The last item with respect to  
6 the rate of return has no impact on my  
7 calculations.

8 The discount rate change to the  
9 proper calculation at September 17, 2010 and the  
10 1105 removal of the benefits of the GEIA are both  
11 to, if you wish, the benefit of Canada. They would  
12 both reduce the damages under, for instance,  
13 Article 1105 that I believe are appropriate for  
14 Mesa to claim.

15 MR. MULLINS: Mr. Low, just for  
16 the record, because I am looking at the transcript  
17 and I don't know if you are accurately quoted, but  
18 you never said anything about the original date you  
19 used for the weighted cost of capital, because I  
20 think the transcript is telling January 2010. Was  
21 that accurate?

22 THE WITNESS: Yes. I think it was  
23 January 21, 2010.

24 MR. MULLINS: Okay, thank you.

25 THE WITNESS: What was in the

1 first report.

2 MR. MULLINS: Okay, thank you.

3 BY MR. APPLETON:

4 Q. All right. So just to come  
5 back to the answer before we got there, so  
6 just -- I am going to just restate my question so  
7 we're very clear.

8 To the extent that there is a  
9 change caused by your calculations here, those  
10 changes, to the extent there is any, would be to  
11 the benefit of Canada?

12 A. That's correct.

13 MR. APPLETON: Thank you very  
14 much. It is Canada's witness.

15 --- (Off record discussion)

16 THE CHAIR: So, we will proceed to  
17 the cross-examination. Is Canada ready? All  
18 right.

19 MR. APPLETON: Mr. Low, would you  
20 like this wireless microphone?

21 THE WITNESS: I think I am okay.

22 MR. APPLETON: It is coming  
23 through.

24 CROSS-EXAMINATION BY MR. WATCHMAKER AT 9:45 A.M.:

25 Q. Good morning, Mr. Low,

1 members. My name is Raahool Watchmaker. I will be  
2 asking you some questions today about your damages  
3 assessment. I understand you have bronchitis, so  
4 if you do need a break, do let me know.

5 A. Thank you.

6 Q. Now, I want to make sure  
7 you've got your materials before you. You've got  
8 our binder. You've got your reports. Do you also  
9 have the reports of Mr. Goncalves with you?

10 A. I do.

11 Q. Now, Mr. Low, you have been  
12 here all week, so you know how this goes. Counsel  
13 prefers a "yes" or "no" answer, but feel free to  
14 give whatever context you need after that.

15 We are both here to help the  
16 Tribunal in their deliberations. So it is  
17 important for the record, when they are looking at  
18 it in the future, to have a clear response to the  
19 questions.

20 A. I will endeavour.

21 Q. Now, obviously we will be  
22 dealing with some confidential information and if  
23 we do get into confidential information, I will  
24 make clear that the feed be cut, and then we will  
25 proceed once we have that confirmation, okay?

1                   Now, your introduction, your  
2                   summary, was quite helpful and I am hoping that it  
3                   might actually cut out a lot of initial questions  
4                   that I have. But why don't we start by confirming  
5                   your instructions with respect to your reports?

6                   Now, I understand that you were  
7                   asked to prepare an expert's report quantifying the  
8                   estimated economic losses suffered by the claimant  
9                   as a result of the alleged actions of the  
10                  Government of Canada; is that right?

11                  A. That's correct.

12                  Q. Okay. And so really that's  
13                  the fundamental purpose of your report, to quantify  
14                  the economic losses, if any, suffered by the  
15                  claimant as a result of the allegations?

16                  A. Correct.

17                  Q. Okay. Now, as I understand  
18                  it you, in appendix B of your report -- maybe you  
19                  could turn there. This is your original report,  
20                  and I believe it is on page 53.

21                  A. Yes.

22                  Q. I think the members are  
23                  struggling to get there. I believe there is a lot  
24                  of charts before the page numbering starts up  
25                  again.



1                   A.    If I could assist, it is  
2    about six pages from the back.

3                   Q.    There you go.  Thanks.  So  
4    this appendix is your restrictions, major  
5    assumptions, qualifications, limitations.

6                   A.    Yes.

7                   Q.    And if we focus on the third  
8    paragraph, you say here that your report has been  
9    based on information, documents and explanations  
10   that have been provided to you; right?

11                  A.    That's correct.

12                  Q.    And I expect in this respect  
13   you mean information, documents and explanations  
14   provided to you by your client, the claimant;  
15   right?

16                  A.    They are the documents that  
17   have been made available in this process.

18                  Q.    Right.  Okay.  And a little  
19   further down in the paragraph, you say the validity  
20   of your conclusions rely on the integrity of such  
21   information.

22                  A.    That's correct.

23                  Q.    So you're essentially saying  
24   your conclusions are based on the assumption that  
25   the information, documents and explanations that

1 you have been provided are accurate and true;  
2 correct?

3 A. That's correct.

4 Q. In the last sentence of this  
5 paragraph you say you are not under any obligation  
6 or agreement to investigate the accuracy of any  
7 third party information, nor have you performed any  
8 investigative procedures to independently verify  
9 the accuracy of any third party information. Do  
10 you see that?

11 A. I see that. That's largely  
12 related to the independent research that we do on  
13 comparable companies, and as such. While we  
14 haven't audited, for instance, Mesa's information  
15 or the documents that have been provided, the third  
16 parties really meant not from the parties in this  
17 matter, but independent materials that we have  
18 obtained.

19 Q. So just so I understand your  
20 testimony, your testimony is that the claimant,  
21 your client, would be a third party to your report;  
22 is that right?

23 A. No. That's not how I  
24 interpret this and the way these are written.

25 The third parties are people

1 external to this process, meaning -- so the  
2 claimant and the respondent, the Government of  
3 Canada and Mesa, are parties to this. Third  
4 parties are people outside of that process.

5 Q. So then we can assume that  
6 you have performed investigative procedures to  
7 independently verify the accuracy of the  
8 information, documents and explanations of the  
9 claimant?

10 A. Most of the documents I have  
11 taken as, on their face, being reliable. I  
12 haven't -- to use an accountant's term, I haven't  
13 audited information here.

14 So, for instance, if I have two  
15 documents that are at variance, then I would look  
16 at that and try to assess that. But we haven't  
17 done an audit of all of the documents that are  
18 here. So we have relied on the documents largely  
19 as they have been presented to us.

20 Q. Okay. And we're not just  
21 talking about documents; right? We're talking  
22 about information and explanations, as well, and  
23 your answer is the same?

24 A. That's correct.

25 Q. Okay. Now I would like to

1 turn to page 3 of your report. It is actually the  
2 covering letter. Now, at the top of this page, it  
3 says "confidential", but I don't believe there is  
4 any confidential information. I believe it has  
5 actually been declared to be a public document.

6 It's page 3.

7 A. I think that's the case,  
8 but -- yes.

9 Q. And this is similar to the  
10 chart that you put up on the screen earlier, and I  
11 just want to confirm a few things about the  
12 subcategories and categories that you had up on the  
13 screen earlier.

14 So your base case scenario, you  
15 say that it's based on the assumption -- this is  
16 at -- sorry to jump around here, but you say this  
17 at page 23 of your report. You say that it's based  
18 on the assumption that Mesa would have obtained FIT  
19 contracts for the projects and would have developed  
20 the wind farms in accordance with the DCRs and  
21 operated the projects to the intent of their FIT  
22 contracts.

23 That's at paragraph 4.1(a)(i) of  
24 your report. Does that sound correct?

25 A. Yes, it does.

1                   Q.    And I think you explained  
2    earlier that you have included three separate  
3    categories under your base case, economic  
4    development adder, the capacity expansion and the  
5    economic development adder applicable to the  
6    capacity expansion, and these are all alleged  
7    incremental losses that derive from the GEIA;  
8    correct?

9                   A.    That's correct.

10                  Q.    These are all future losses;  
11    correct?

12                  A.    All of these losses are  
13    future losses.

14                  Q.    Okay.

15                  A.    Effectively, if you want to  
16    think about it this way, under our reply report  
17    these projects would be coming in to their COD  
18    start of true operation and providing power this  
19    year.  So even today the cash flows are still in  
20    the future.

21                  Q.    That's true of the 1106  
22    allegation there, as well; right?

23                  A.    Yes.

24                  Q.    Now, in your opening  
25    presentation, then, I just want to confirm, while

1 we're on the topic of Article 1106, you put up a  
2 pie chart?

3 A. Yes.

4 Q. Just to be clear, none of the  
5 losses in that pie chart represented losses that  
6 have already been suffered. Those are all future  
7 losses; correct?

8 A. Those losses are all future  
9 losses, yes.

10 Q. Okay. And so you also have a  
11 line item here for past costs incurred. So that is  
12 essentially just sunk costs; correct?

13 A. Those are sunk costs. They  
14 are, as I indicated, professional fees, rents on  
15 the lands and development costs.

16 To the extent there are  
17 development costs in there, we believe that there  
18 are amounts that could be attributed to NAFTA 1106,  
19 in that Mesa, because of the domestic content  
20 requirement, was using consultants and others who  
21 were more expensive than they believed they could  
22 have used in other circumstances, but we have not  
23 quantified that amount.

24 Q. Okay. So to be clear, you're  
25 saying that there could be sunk costs attributable

1 to an Article 1106 violation, but you haven't  
2 calculated what those are or separated them out.  
3 They are not represented here on this chart;  
4 correct?

5 A. We have not separated them  
6 out. We believe they exist, but haven't quantified  
7 them.

8 Q. So am I correct in saying the  
9 vast majority of these sunk costs are really the  
10 turbine deposit?

11 A. I was talking solely about  
12 the \$8,100,000.

13 Q. Okay.

14 A. The GE deposit is a different  
15 question.

16 Q. But it is also a sunk cost?

17 A. It is a sunk cost, but it is  
18 effectively not part of 1106.

19 Q. Just let me confirm that you  
20 have claimant's reply memorial.

21 A. I don't have that in these  
22 documents.

23 Q. We will provide it to you.

24 A. Thank you.

25 Q. Can you turn to paragraph

1 886, please?

2 A. I have it.

3 Q. Okay. So here the claimant

4 says:

5 "Under the 'but-for' test,  
6 once a violation has been  
7 established, the remedial  
8 objective of an international  
9 tribunal is to place the  
10 injured investor in its  
11 investment in a position they  
12 would have been in, but for  
13 the illegal conduct."

14 It goes on to quote the S.D. Myers  
15 tribunal, which said:

16 "Compensation should undo the  
17 material harm inflicted by a  
18 breach of an international  
19 obligation."

20 Do you see that?

21 A. Yes, I do.

22 Q. From an valuation  
23 perspective, I assume you agree with the claimant  
24 on such an approach?

25 A. This issue is, to use an



1 expression, the elephant in the room between  
2 Mr. Goncalves and myself.

3 The issue here -- if I was to  
4 express this, the "but-for" test under Article 1103  
5 is not to put the investor into the -- back into  
6 the position of what it had, but the 1103 test is  
7 to provide the better treatment.

8 And so I disagree with this  
9 analysis. Effectively, this "but-for" test is  
10 where I am now with respect to Article 1105, but I  
11 don't believe that it is the appropriate analysis  
12 or method for determining the losses under Articles  
13 1102 or 1103 that provide for the better treatment,  
14 is how I interpret those articles.

15 Q. So that I understand, I think  
16 you said you disagree with the claimant's approach  
17 to the "but-for" test stated here?

18 A. I don't think this is the  
19 claimant's -- this is your analysis of what the  
20 "but-for" should be. This is not my analysis of  
21 what the "but-for" should be.

22 Q. This is the claimant's reply  
23 brief; correct?

24 A. Oh, sorry, investors. Well,  
25 sorry.

1                   As I said, the "but-for" test in  
2     the case of 1102 and 1103 is, I think, to put them  
3     in the place that should have been provided with  
4     the better treatment. So it is not exactly the way  
5     these words are, but can be interpreted, in any  
6     event.

7                   Q.    Mr. Low, are you a lawyer?

8                   A.    No, I'm not. I'm a damages  
9     person.

10                  Q.    Are you purporting to  
11     interpret Article 1103 of NAFTA?

12                  THE CHAIR: Well, you have -- I'm  
13     sorry, but you asked the question about this  
14     paragraph. I think we understood the valuation  
15     expert's understanding that under 1102 and 1103, it  
16     is not just a matter of undoing the harm, but it is  
17     placing the investor in the position in which it  
18     would be had it been granted better treatment, and  
19     for 1105 it is undoing the harm. Is this a correct  
20     restatement of what you said?

21                  THE WITNESS: That is a correct  
22     statement. Thank you.

23                  THE CHAIR: Thank you.

24                  BY MR. WATCHMAKER:

25                  Q.    That better treatment, as I

1 think you summarized this morning, is the GEIA  
2 treatment; right?

3 A. That's correct.

4 Q. And just to summarize the  
5 elements of that, that is the priority access to  
6 the transmission grid, facilitation services by the  
7 government, the economic development adder, and the  
8 capacity expansion option; is that right?

9 A. That's correct.

10 Q. Okay. And, again, to be  
11 clear, that assumption essentially supports your  
12 entire base case, which supports your damages  
13 valuation for Articles 1102, 1103, 1105 and 1106;  
14 correct?

15 A. That's correct, until the  
16 description I have given of the change to 1105, but  
17 in my reply report, yes.

18 Q. So then, in essence, to  
19 correct the harm to the claimant as a result of  
20 Canada's alleged discriminatory treatment, under  
21 your valuation base case you provide the  
22 discriminatory treatment to the claimant?

23 A. I provide my analysis of what  
24 the better treatment was and that should have been  
25 provided to Mesa, yes.

1                   Q.    So you're extending the  
2 wrongful conduct to the claimant; correct?

3                   A.    I'm not claiming that it is  
4 wrongful.  I'm claiming it was a breach of NAFTA.

5                   And if there is a breach of NAFTA,  
6 which is what I have been told to assume, then from  
7 a damages perspective, I believe that leads to a  
8 quantification of the better treatment.

9                   Q.    Would you agree with me that  
10 under the FIT program, no FIT applicant received  
11 GEIA-like treatment, did they?

12                  A.    That's correct.

13                  Q.    Okay.  But in your "but-for"  
14 counter-factual world, you're extending that  
15 treatment to the claimant and no other FIT  
16 applicant; is that right?

17                  A.    I am extending it to the  
18 claimant on the basis that 1103 provides for the  
19 better treatment and, therefore, I have quantified  
20 it.  It doesn't accrue to all other FIT claimants  
21 or FIT applicants.

22                  Q.    Would you agree with me that  
23 there are real and physical transmission capacity  
24 constraints in any electricity system, Mr. Low?

25                  A.    That's my understanding.

1                   Q.    So by definition, it would be  
2 impossible to provide priority transmission access  
3 to all FIT applicants; correct?

4                   A.    I think that's a fair  
5 statement. It would not be possible to do that.  
6 I'm not suggesting that it should be done. I'm  
7 simply suggesting that there is compensation due to  
8 Mesa for the better treatment provided to the  
9 Korean Consortium.

10                  Q.    So you're saying that your  
11 economic analysis is focussed only on Mesa's  
12 conditions?

13                  A.    My economic analysis is  
14 actually focussed on the Korean Consortium  
15 conditions as being the better treatment.

16                  Q.    But in your "but-for"  
17 counter-factual, you're not concerned at all with  
18 how other FIT applicants might be treated in that  
19 counter-factual world; correct?

20                  A.    That's correct. I don't  
21 think that's the analysis that's appropriate.

22                  Q.    So you think that it is  
23 probable that if GEIA-like treatment is found to be  
24 a violation of NAFTA, that the Government of  
25 Ontario would extend that violating treatment to

1 the claimant, but to no other FIT applicant?

2 A. If other FIT applicants had  
3 qualified under NAFTA and raised this as a breach,  
4 I presume they would be entitled to it, as well.

5 I am not aware that others have  
6 come forward, so this is solely applicable to Mesa  
7 at this point, to my knowledge.

8 Q. Would you accept that if the  
9 GEIA is not a breach of NAFTA, that you would have  
10 to go back and do a significant amount of  
11 revisions?

12 A. Ask the question again,  
13 please.

14 Q. Would you accept that if we  
15 assume that the GEIA is not found to be a violation  
16 of NAFTA by this Tribunal, that you would have to  
17 do a lot of revisions to your reports?

18 A. There would be revisions  
19 required. Basically, I have talked about that  
20 already this morning, in that the amendments to  
21 1105 to remove the benefits of the GEIA largely  
22 reflect that issue of not reflecting the benefits  
23 of the GEIA.

24 And other than the discount rate  
25 amendment, the removal of the other benefits is

1 really quite similar.

2 Q. Would it not impact your  
3 inclusion of damages related to Summerhill and  
4 North Bruce?

5 A. Not necessarily, no.

6 The management of Mesa believed at  
7 the time that with the -- in 2010, with the belief  
8 that there was requirements for additional power in  
9 Ontario, that they would have been able to  
10 develop -- excuse me, develop all four. And  
11 effectively in quantifying the values that we have,  
12 the other alternative is that, as Mesa did with  
13 other projects, it could have sold these projects  
14 and realized the value at the valuation dates, and,  
15 therefore, realized effectively what's happened  
16 here before people -- before circumstances changed,  
17 power use declined and other circumstances such  
18 that we now find ourselves in.

19 Q. The Summerhill and North  
20 Bruce projects, they were ranked extremely low in  
21 the provincial rankings, weren't they?

22 A. They were ranked low, yes.

23 Q. Have you done any analysis to  
24 determine whether there was enough transmission  
25 capacity available in the Bruce region to actually

1 allow for those two projects to achieve FIT  
2 contracts, even excluding the Korean Consortium,  
3 set aside? Have you done any of that analysis?

4 A. I have looked at that, and at  
5 the valuation dates there was not sufficient  
6 capacity. But by 2018, there was a view that there  
7 was going to be sufficient capacity in the Ontario  
8 market, and there was a prospect that Summerhill  
9 and North Bruce would have been developed.

10 Q. What was the view that there  
11 would have been enough capacity based on?

12 A. I believe that we have heard  
13 that the expectation was that there would be an  
14 additional 10,700 megawatts of power required from  
15 renewable resources by 2018.

16 Q. You're talking about the LTEP  
17 cap or target of renewable energy generation in  
18 Ontario?

19 A. I believe that's where the  
20 number came from, and I think it was -- I think it  
21 was Mr. Jennings that gave some evidence with  
22 respect to that.

23 Q. Have you assessed how much of  
24 that generation capacity has already been  
25 committed?



1                   A.    No.  No, I haven't.

2                   Q.    So you don't know, do you,  
3    how much generation capacity is actually available  
4    in the Bruce and whether or not the Summerhill and  
5    North Bruce projects could actually obtain  
6    contracts, given that capacity, do you?

7                   A.    Given where we are and the  
8    Bruce-to-Milton line coming into play, once that  
9    has been used, which it has, there was not  
10   sufficient capacity at that time.

11                  Q.    Okay.

12                  A.    If I could add, again, the  
13   way we have done our schedules of breaking out  
14   components and projects, should the Tribunal  
15   determine that for some reason there are only two  
16   projects going to be awarded, it is possible to get  
17   to those numbers with the analyses that are in our  
18   reports.

19                  Q.    Now, you do understand that  
20   damages have not been bifurcated in this case;  
21   correct?

22                  A.    I do understand that.

23                  Q.    So the Tribunal has to make  
24   its decision on jurisdiction, merits and damages at  
25   the same time; right?

1                   A.    That's my understanding.

2                   Q.    Your base case is based on  
3   the assumption that the GEIA is a violation of  
4   NAFTA; correct?

5                   A.    That's correct.

6                   Q.    So you've already --

7                   A.    For 1102, 1103 and 1106 and,  
8   in the reports, 1105 amended as I talked about this  
9   morning.

10                  Q.    Now, if the GEIA is not found  
11   to be a violation of NAFTA, you would also, I  
12   believe you said, need to adjust for the GEIA-based  
13   assumption, the facilitation services under the  
14   agreement would have a significant impact on  
15   completion and project risk, as well; correct?

16                  A.    It would have --

17                  MR. APPLETON:  Excuse me, sorry,  
18   Mr. Low.  Stop.  I have been listening very  
19   carefully to Mr. Watchmaker.  He has asked the  
20   witness to make a legal assumption he didn't say.  
21   He gave him an answer to the question about whether  
22   or not the GEIA violated the NAFTA, and he said  
23   that it's the government's conduct that violates  
24   the NAFTA rather than the GEIA itself.

25                  But Mr. Watchmaker has summarized

1 his comment and put it back into that question. I  
2 believe that is improper. I am sure Mr. Watchmaker  
3 could rephrase it to make it a proper question.

4 THE CHAIR: I have some issue with  
5 the way this question was worded, as well. It  
6 seems to me that what Mr. Low has done is assumed  
7 that not giving treatment according to GEIA was a  
8 breach of NAFTA.

9 It doesn't say anything about  
10 whether the GEIA in and of itself is a breach, or  
11 do I misunderstand something?

12 MR. APPLETON: In fact, I believe  
13 he testified exactly directly on that question that  
14 the GEIA itself was known as a legal agreement, but  
15 it was the effect. So he has been asked that. He  
16 has answered that question. He has given his  
17 testimony, and I am afraid Mr. Watchmaker, I'm sure  
18 inadvertently, has misconstrued the answer in the  
19 question, and I don't think that is fair to ask any  
20 witness.

21 THE CHAIR: In any event, we will  
22 not rely on Mr. Low's testimony for these legal  
23 issues. It goes without saying. So maybe you  
24 could rephrase the question, because I'm unclear  
25 where we exactly stand now.

1 BY MR. WATCHMAKER:

2 Q. Sure. So my question is,  
3 simply: Assuming that there is no breach as a  
4 result of GEIA, you would have to update your work,  
5 as you have said you have already done with respect  
6 to 1105, specifically with respect to completion  
7 and project risk; correct?

8 A. That's correct. I have  
9 indicated this morning that removing the impact of  
10 the GEIA or the better treatment from 1105 would  
11 result in an increase in the discount rate cost of  
12 equity to reflect the lack of some of the benefits  
13 of government facilitation, and that that would  
14 have the impact of reducing the damages.

15 THE CHAIR: That is clear, and you  
16 have well explained it before and you have said  
17 also in what respect it would reduce.

18 What impact would it have on the  
19 1102 and the 1103 claim?

20 THE WITNESS: Assuming that the  
21 GEIA was not a breach of 1102 and 1103?

22 THE CHAIR: The fact of not giving  
23 the same treatment, yes.

24 THE WITNESS: If one removed the  
25 treatment from 1102 and 1103, then you'd be in the

1 same order of magnitude as 1105 at that point,  
2 which is what I spoke about this morning.

3                   Although I haven't provided the  
4 quantum of it, it is lower than what is in my  
5 reports as they are stated here. And one would  
6 have to assess whether at that point -- in my view,  
7 they still had the opportunity for four projects  
8 and/or could have sold all four projects, but the  
9 analysis could be done on the basis of two  
10 projects.

11                   BY MR. WATCHMAKER:

12                   Q. Well, I would like to come  
13 back to that point. Is that actually correct,  
14 Mr. Low? The violations of Article 1102 and 1103  
15 deal with national treatment and MFN treatment,  
16 discrimination; correct?

17                   A. Yes.

18                   Q. So if there is no  
19 discriminatory treatment under the GEIA, there  
20 wouldn't be an 1102 or an 1103 damages valuation,  
21 would there?

22                   A. There, I think, is still a  
23 breach of 1102 and 1103. If one removes the GEIA,  
24 because under 1102 it would still have the Canadian  
25 subsidies of the Korean Consortium, but removing

1 the GEIA entirely, then I think you are left with  
2 the other factors of either treatment that was  
3 provided to Boulevard as a subsidiary of  
4 NextEra -- so I think there still can be applicable  
5 breaches of those, but they don't provide you with  
6 the benefits of the GEIA.

7 So it effectively becomes similar  
8 to what I have called, if you will, my revised  
9 1105.

10 Q. But Boulevard --

11 MR. APPLETON: Excuse me. It is  
12 the same type of issue, again. Now it is lightly  
13 different. Mr. Watchmaker has asked this witness,  
14 who is not a lawyer, about discrimination, which we  
15 do not believe is a part of Article 1102 or 1103.  
16 We have submissions to deal with that and we made  
17 submissions on that.

18 So I want to put it on the record  
19 formally. So I do not believe it is  
20 appropriate -- you can comment, but please just let  
21 me get it out there -- that it's not appropriate to  
22 make a damages expert give testimony about legal  
23 findings of international law obligations,  
24 especially when they are, at best, contentious and,  
25 in our view, completely wrong.

1                   THE CHAIR: I understand. I don't  
2 think it depends on whether they are wrong or not.

3                   There's part of the submission --  
4 what I would like to understand is in terms of  
5 valuation and not in terms of law. If I look at  
6 the computations for losses due to 1102 and 1103,  
7 and I remove the fact of better treatment not  
8 having been granted, what remains in your  
9 computation?

10                   I don't know whether I should go  
11 to page 7 of your -- that's the summary. There's a  
12 table there of your second report or there's the  
13 same table I think further down. Let me see if I  
14 find it.

15                   THE WITNESS: If I might, Madam  
16 Chair --

17                   THE CHAIR: Can you answer my  
18 question just conceptually?

19                   THE WITNESS: Certainly.  
20 Conceptually, if I could turn you to the reply  
21 valuation report, so that is the one dated April  
22 29, 2014.

23                   THE CHAIR: Yes, yes.

24                   THE WITNESS: And if you go to the  
25 page preceding the appendices, so right at the

1 back, this provides more detail.

2 THE CHAIR: Yes.

3 THE WITNESS: Rather than the  
4 summary.

5 THE CHAIR: I understand that this  
6 provides detail and, in particular, allows to see  
7 what is claimed per project, and that is, I think,  
8 what you referred to before when you said if you  
9 want to take only two projects, you can deduct.

10 But that does not give me an  
11 answer to my question, unless I misunderstand  
12 something, and my question is: If you remove the  
13 component of better treatment, in terms of  
14 valuation, from the claimed breaches of 1102 and  
15 1103, what remains on the account of these  
16 provisions?

17 I understand your position on  
18 1105.

19 THE WITNESS: Okay, okay. The  
20 answer on the face is, in first place, quite  
21 simple, in that you would take the numbers for the  
22 economic development adder on this page and the  
23 capacity expansion and the EDA applicable to the  
24 capacity expansion and simply remove them.

25 THE CHAIR: Yes.



1                   THE WITNESS:  So at that point,  
2   you would be left with the base case of \$301 to  
3   \$343 million.

4                   However, those numbers are  
5   somewhat high, because, as I indicated, I would  
6   have to change the cost of equity to remove the  
7   benefit of the government assistance, and that has  
8   an impact.  It would lower these damages, not by an  
9   enormous amount, but we're not talking amounts.

10                  So it would have the impact of  
11   reducing the \$301 to \$343 million to reflect the  
12   benefit of the assistance under the GEIA.

13                  The balance, the past costs, the  
14   GE contract penalties which are referred to here,  
15   would remain consistent.

16                  In addition, NAFTA 1106 is added  
17   into that top schedule, and, what one would have to  
18   do, the details of 1106 are at the bottom.  And,  
19   again, you would have to take only the base case,  
20   being the \$96 to \$104 million, instead of the total  
21   that is there.  And that also would be somewhat  
22   reduced by the change to the discount rate.

23                  THE CHAIR:  Thank you.

24                  MR. LANDAU:  Just to follow up on  
25   that, I am just wondering -- I am not asking you

1 any question of law, but just whether you can  
2 articulate what it is you would actually be -- what  
3 you are valuing at that point in terms of the  
4 breach.

5 If you take out of the equation  
6 the GEIA and the alleged preferential treatment,  
7 what is it that is on your table that you're  
8 valuing at that point under Articles 1102 and 1103?

9 THE WITNESS: 1102 and 1103, or at  
10 that point 1105, would I think all be similar, in  
11 that they are the value of the projects as they  
12 would have existed under the FIT program.

13 MR. APPLETON: Excuse me. I'm not  
14 sure whether it started from Mr. Landau or if it  
15 came from Mr. Low. 102 is another obligation; I  
16 think you mean 1102 or 1105.

17 THE WITNESS: 1102, 1105.

18 MR. APPLETON: Just to make sure  
19 we completely understand.

20 THE WITNESS: My apologies.

21 THE CHAIR: But I understand your  
22 answer to be what you would then value is the fact  
23 of not having been granted a FIT contract. Is that  
24 the answer?

25 THE WITNESS: That's correct.

1 MR. LANDAU: That's fine, thank  
2 you.

3 THE CHAIR: Thank you.

4 BY MR. WATCHMAKER:

5 Q. Why don't we move on? I  
6 would like to take a look at the treatment of one  
7 of the sunk costs alleged by the claimant. You  
8 have included the entire forfeited \$153 million GE  
9 turbine deposit as a sunk cost; correct?

10 A. That's correct.

11 Q. Now, I think we will need to  
12 go into confidential session at this point. So  
13 could the public feed be cut off?

14 --- Upon resuming confidential session at  
15 10:22 a.m. under separate cover

16 --- Upon resuming public session at 10:26 a.m.

17 BY MR. WATCHMAKER:

18 Q. Can you turn to tab 12 of  
19 your binder, the big white binder there?

20 A. This one?

21 Q. Yes. This is Exhibit BRG 86.  
22 Are you there?

23 A. I think so. A news article?

24 Q. Yes. This is an article  
25 dated July 7th, 2009.



1                   have been ordered from GE and  
2                   will be delivered in the  
3                   first quarter of 2011, and  
4                   Pickens does not have any  
5                   place to put them."

6                   Do you see that?

7                   A.    I can read that, yes.

8                   Q.    There is no mention of  
9                   Ontario here; correct?

10                  A.    There is not.  I believe the  
11                  due diligence process had commenced, but they had  
12                  not yet purchased the TTD project.

13                  Q.    Did you investigate --

14                  A.    -- in July.

15                  Q.    Okay.  Did you investigate  
16                  the claimant's involvement in trying to place  
17                  turbines at any of these sites?

18                  A.    I'm not sure exactly which of  
19                  these sites are being referred to or what happened  
20                  to the four states that are referenced here.

21                  I am familiar with some of the  
22                  projects that preceded either coincident or after  
23                  the Ontario projects.

24                  Q.    So you wouldn't know if the  
25                  claimant succeeded in bringing any of these

1 projects into commercial operation; correct?

2 A. If you're talking about these  
3 references to smaller wind projects in Wisconsin,  
4 Oklahoma, Kansas and possibly Texas, it is my  
5 understanding that Mesa has developed and sold  
6 projects, but has not built out a project that  
7 would include any of these four.

8 Q. But you apportioned none of  
9 the GE deposit to any of these projects; correct?

10 A. No, I've not.

11 Q. Mr. Robertson also mentions a  
12 number of projects Mesa was involved in, and at  
13 paragraph 13 of his reply witness statement -- I am  
14 not sure if you've got it there, but he refers to  
15 projects in Minnesota, Michigan and Missouri.

16 Do you recall that? It is  
17 actually up on the screen.

18 A. Yes, I'm familiar with  
19 those -- or somewhat familiar with those projects  
20 and what the circumstances were.

21 Q. Okay. And you will recall  
22 from the other day Mr. Robertson noted there was no  
23 geographic limitation in their agreement; correct?

24 A. I believe it was intended as  
25 North America.

1                   Q.    So that we're clear, you  
2 haven't allocated any amount of the GE deposit to  
3 any of these projects either, have you?

4                   A.    I have not.  Again, I think  
5 this is a fairly simple concept, in that assuming  
6 these four projects had proceeded in Ontario, the  
7 turbines would have been ordered.  They would have  
8 been used.  The GE deposit would not have been  
9 forfeit, and it's really quite that simple,  
10 that --

11                  Q.    Sorry, finish, please.

12                  A.    The assumption is that under  
13 1102 and 1103 and the benefits of the GEIA, the  
14 four projects would have proceeded.  Had they  
15 proceeded, these deposits would not have been lost.

16                  I mean, it really is that simple a  
17 concept.

18                  Q.    Okay.  But isn't it also the  
19 case that if any of these other projects had  
20 succeeded, the MTSA could have supplied turbines to  
21 those projects, as well?

22                  A.    That's correct.  And my  
23 understanding is that Mesa, particularly once July  
24 4th, 2011 came along, did its best to try to use  
25 turbines or allocate turbines to other projects,

1 and various circumstances resulted in their  
2 inability -- once these projects appeared to be  
3 terminated or not going to proceed, they attempted  
4 to mitigate their damages, but were unsuccessful.

5 Q. But in the period of time  
6 we're talking about right now, that article I  
7 showed you and Mr. Robertson's testimony, we're  
8 talking about a period of time prior to the FIT  
9 program's denial of the contracts to the claimant,  
10 are we not?

11 A. I can't much speak to the  
12 ones that came before. I'm not familiar  
13 necessarily with the states that were mentioned and  
14 the specific projects that were there.

15 Again, my view is simply that  
16 under the approach to damages economic losses that  
17 I have taken, that the GE deposit would not have  
18 been forfeit and that Mesa tried to mitigate that  
19 damage, which they are obligated to do by  
20 attempting to develop other projects, and for  
21 various reasons was not successful in doing that.

22 Q. Okay. Maybe we can go back  
23 in confidential session.

24 --- Upon resuming confidential session at

25 10:32 a.m. under separate cover



1 --- Upon resuming public session at 10:33 a.m.

2 BY MR. WATCHMAKER:

3 Q. So, again, this is a press  
4 report dated April 21st, 2010. This is about four  
5 months after the signing of the MTSA; correct?

6 A. Yes.

7 Q. The first paragraph, it says:  
8 "All necessary approvals have  
9 been obtained for the Goodhue  
10 wind project in Minnesota."

11 Do you see that?

12 A. Yes.

13 Q. This article reports the  
14 Minnesota Public Utilities Commission had given  
15 American Wind Alliance, including Mesa Power,  
16 approval of the project's purchase power agreement.

17 Do you see that?

18 A. Yes, I can see that.

19 Q. There is also reference to  
20 Mesa using GE turbines. Do you see that reference?

21 A. I see that, yes.

22 Q. Had Mesa's Ontario projects  
23 received all necessary approvals, Mr. Low?

24 A. They had not, no.

25 Q. Had Mesa's Ontario projects

1 received power purchase agreements?

2 A. No.

3 Q. My understanding is that Mesa  
4 eventually sold this project to a third party. Is  
5 that your understanding?

6 A. That's my understanding.

7 Q. And subsequent to that sale,  
8 the project actually failed to come into  
9 operation. Do you recall that?

10 A. Yes. It's my understanding  
11 that there were environmental or bird issues, I  
12 think, some form of problems with eagles --

13 Q. So you don't --

14 A. -- that prevented the project  
15 from proceeding.

16 Q. But you don't apportion any  
17 amount of the forfeiture of the GE turbine deposit  
18 to this project that had all necessary approvals  
19 and an approved power purchase agreement, do you,  
20 Mr. Low?

21 A. No. Again, I don't on the  
22 basis that that being factual, because it appears  
23 to have been and I think you have stated it fairly,  
24 the basis of the economic losses that we have  
25 quantified here is that the four projects would

1 have proceeded.

2 Those turbines would have been  
3 used in Ontario, and, accordingly, the deposit  
4 would not have been forfeited.

5 Q. Well, again, some of the  
6 turbines could have been used on this project;  
7 correct?

8 A. If that project had  
9 proceeded, yes.

10 Q. If we can go back into  
11 confidential session for a few minutes.

12 --- Upon resuming confidential session at  
13 10:36 a.m. under separate cover

14 --- Upon resuming public session at 10:45 a.m.

15 MR. WATCHMAKER: Madam Chair, I am  
16 in your hands as to whether or not to take a break  
17 or continue.

18 THE CHAIR: If you have now closed  
19 this topic.

20 MR. WATCHMAKER: I have closed  
21 this topic, yes.

22 THE CHAIR: Fine. It may be a  
23 good time for a break. I am sure your voice will  
24 appreciate a break. And you know, because I have  
25 been telling this to every witness and expert, they

1 should not speak during the break to anyone during  
2 your testimony.

3 THE WITNESS: Absolutely.

4 THE CHAIR: Let's take 15 minutes  
5 and resume at 11:00 or 11:05? 11:05. Good.

6 MR. WATCHMAKER: It seems  
7 inevitable.

8 --- Recess at 10:46 a.m.

9 --- Upon resuming at 11:10 a.m.

10 THE CHAIR: Apologies. We are a  
11 little late, but we're ready now. So  
12 Mr. Watchmaker can start if Mr. Low is ready, as  
13 well.

14 THE WITNESS: I am.

15 THE CHAIR: Fine.

16 BY MR. WATCHMAKER:

17 Q. The court reporter has given  
18 me a mic, so I don't mean to shock everyone if my  
19 voice is now louder, but apparently I was dropping  
20 off earlier in the day.

21 Mr. Low, earlier you said that you  
22 had included the projected value of the claimant's  
23 ability to use the GE 2.5-megawatt turbine into  
24 your Article 1106 future loss valuation; is that  
25 right?

1                   A.    That's correct.

2                   Q.    And am I correct in my  
3 understanding that you use August 7th, I believe it  
4 is 2010, as your valuation date?

5                   A.    I think is August 5.

6                   Q.    August 5, sorry.  Have you  
7 seen any invoices from the claimant, as of that  
8 date, showing any payments made?

9                   A.    Absolutely not.  They hadn't  
10 ordered any, nor taken delivery of any turbines, so  
11 there were no invoices at this point.  There were  
12 only contracts.

13                   Q.    Okay.  And you've essentially  
14 assumed that those turbines were available for use  
15 and assumed that they were available at the prices  
16 that I believe Mr. Robertson and management  
17 provided to you; is that correct?

18                   A.    I believe they were  
19 available, but the pricing of the 2.5 turbines is  
20 based on a representation from Mr. Robertson in  
21 both the representation letter he gave me and his  
22 witness statements with respect to what he had  
23 determined with GE the pricing of the 2.5 would  
24 have been.

25                   Q.    Okay.  But besides that

1 management letter and Mr. Robertson's testimony,  
2 there is no documentary evidence in the record  
3 confirming they were available for those prices;  
4 correct?

5 A. There are no documents in the  
6 record with respect to the 2.5 pricing.

7 Q. Okay. Could we turn to  
8 paragraph 4.4.1(b) of your first report, please?

9 A. Yes.

10 Q. Here you say that the US  
11 Export-Import Bank prepared a letter of intent  
12 indicating that they were interested in financing  
13 the claimant's projects; correct?

14 A. Yes, there was a letter.

15 Q. Okay. I would like to go  
16 into confidential session.

17 --- Upon resuming confidential session at

18 11:14 a.m. under separate cover

19 --- Upon resuming public session

20 BY MR. WATCHMAKER:

21 Q. Now, Mr. Low, I understand  
22 from your direct examination this morning you have  
23 updated your discount rate to reflect changes to  
24 your Article 1102, 1103 and 1105 and dates of  
25 breach; correct?

1 A. That's correct.

2 Q. So you now use for all of  
3 these claims the date of September 17th, 2010?

4 A. Yes.

5 Q. This is the date that the  
6 Minister of Energy directed the OPA to set aside  
7 500 megawatts of transmission capacity in the Bruce  
8 region for the Korean Consortium; right?

9 A. That's correct.

10 Q. And you selected this date as  
11 your date of breach because the set-aside is  
12 alleged to be a violation of those articles of  
13 NAFTA; right?

14 A. In part, the selection of the  
15 breach date is that of counsel, rather than my  
16 particular selection of the date.

17 Q. Right.

18 A. But that is the basis of it.

19 Q. Okay. So from a valuation  
20 perspective, can you please explain what  
21 quantifiable losses were actually caused to the  
22 claimant on September 17th?

23 A. The reservation of -- excuse  
24 me -- transmission capacity on September 17th had  
25 an effect on the prospects for obtaining FIT

1 contracts by the Mesa projects, by virtue of that  
2 reservation. It reduced the available capacity in  
3 the Bruce region.

4 Q. So I think you said it  
5 reduced the prospects that they would obtain  
6 contracts; is that right?

7 A. That's correct. It's the  
8 first indication in a series of things that occur,  
9 that there will be an effect -- as I understand it,  
10 this being part of a legal point, there will be an  
11 impact on Mesa, and that was the first date that it  
12 was known.

13 Q. Okay. But the  
14 Bruce-to-Milton transmission line didn't even  
15 receive final approval until May 10th, 2011, isn't  
16 that right?

17 A. That's correct.

18 Q. And, Mr. Low, the  
19 Bruce-to-Milton allocation didn't happen until June  
20 3rd of 2011; is that correct?

21 A. That's also correct.

22 Q. So the denial of actual  
23 contracts didn't happen until that time; correct?

24 A. That's correct.

25 Q. July 4th?



1                   A.    I believe that's the date.  
2    However, from September 17th, 2010 on, that was  
3    foreseeable.

4                   Q.    Foreseeable.  But my question  
5    was:  What quantifiable losses were actually caused  
6    as of that date?

7                   A.    As of that date, from a value  
8    perspective, the expectation for FIT contracts on  
9    the part of Mesa had to have been significantly  
10   diminished because of the reservation of capacity  
11   in the Bruce.

12                   So in a value sense, it's  
13   determinative at that date that there was an impact  
14   on the prospects for these projects, and,  
15   accordingly, a decrease in the expected value of  
16   those projects.

17                   Q.    And it's your testimony that  
18   the decrease in value is the entire valuation that  
19   you have conducted based on September 17th being  
20   the valuation date?

21                   A.    Effectively that ends up  
22   being the result.  There are subsequent events that  
23   happen that crystallize it, but to my  
24   understanding, September 17th is the first date  
25   that Mesa became aware, and that's the reason that

1 the date is selected, and the infringement on its  
2 value occurs on that date.

3 Q. You say that the infringement  
4 on its value occurs on that date, but I am still  
5 not quite understanding what specific losses.  
6 Could you enumerate some of the specific losses  
7 that occurred on that date?

8 A. Sure. It's on that date that  
9 Mesa becomes aware of an impact on its projects  
10 specifically, and it's on that date -- and I am  
11 treading into legal ground here -- that it becomes  
12 aware of a breach of Article 1103.

13 Article 1103, as I understand it,  
14 then entitles Mesa to the better treatment accorded  
15 the Korean Consortium, and, accordingly, then the  
16 value on that date, had Mesa been accorded that  
17 better treatment, is reflected in the economic loss  
18 conclusions that I have determined.

19 Q. But on September 17th, you  
20 will agree with me there was still a possibility  
21 that the claimant would have received FIT  
22 contracts; correct?

23 A. I think at that point, as I  
24 understand the availability of transmission  
25 capacity, that was significantly affected.

1                   However, I'm not sure that that's  
2 really the relevant point. I think the relevant  
3 point, as I understand it, is that that is the  
4 first date on which Mesa became aware of the impact  
5 of the breach of 1103, and that it was at that  
6 point entitled to the benefits -- the better  
7 treatment under 1103; and the better treatment,  
8 therefore, gets you into all of the issues that  
9 we've talked about of the four projects, the  
10 government assistance, transmission access, and  
11 that becomes the damage.

12                   Q. Okay. Well, you used an  
13 interesting word earlier on and I think it  
14 is -- and I don't think it's a term of art. But  
15 you said "crystallize".

16                   I think it is probably important  
17 from a valuation perspective. When did losses  
18 crystallize? And I would suggest to you, did  
19 losses not crystallize when they failed to get  
20 contracts?

21                   A. I'm going to try to answer  
22 your question strictly from a damages perspective,  
23 and I will try to avoid the law.

24                   Q. Yes.

25                   A. And I think I am treading

1 fairly close here. So my understanding of Article  
2 1103, for example, is that it entitles the  
3 claimant, if it is found to have been in breach, to  
4 the benefits under the GEIA, the better treatment  
5 afforded the Korean Consortium, and the first date  
6 on which that became apparent to Mesa was September  
7 17th, 2010.

8                   And that then crystallizes the  
9 damages pursuant to 1103. The fact that it may  
10 have taken subsequent events to determine that it  
11 impacted all four, we know, for example, at July  
12 4th, 2011 they weren't awarded any contracts.

13                   Let me make a hypothesis, that if  
14 on July 4th, TTD and Arran had been provided  
15 contracts under the FIT program, then I still think  
16 there would have been a loss under 1103 for the  
17 other two projects due to the better treatment to  
18 the Korean Consortium, but part of the loss would  
19 have been mitigated by virtue of Mesa receiving the  
20 contracts.

21                   So they didn't receive the  
22 contracts, so the loss is the entire piece.

23                   THE CHAIR: Can I ask just one  
24 follow-up question? Sorry for the interruption.

25                   Your answer was focussing on the

1 better treatment. You say that in September 17th,  
2 2010, it became obvious that the better  
3 treatment -- that they were entitled to the better  
4 treatment and that is how you justify this  
5 valuation date.

6 Now, let's assume we do not adopt  
7 the idea of the better treatment and simply adopt a  
8 view that what matters is the fact that they have  
9 not been awarded FIT contracts. How would then  
10 your answer be to the question of: What loss  
11 occurred on September 17th, 2010?

12 THE WITNESS: I think, on that  
13 basis, the loss at September 17, 2010 would be the  
14 loss of the four projects without the benefits of  
15 the GEIA.

16 So it would become -- if there is  
17 no breach of 1103 by virtue of the better treatment  
18 to the Korean Consortium, then you would be back  
19 into the loss of the projects without the benefits  
20 of the GEIA.

21 THE CHAIR: I understand that, but  
22 September 17, 2010 Mesa would not know whether it  
23 will be awarded the contracts, or not.

24 THE WITNESS: I think if you look  
25 at -- and there's some charts in the -- I believe

1 it is the first report of Mr. Goncalves. And it  
2 shows the rankings of the projects and puts Mesa  
3 out at eight, nine, and then the high 30s for the  
4 other two.

5 The September announcement, at a  
6 minimum, cuts off the award that may have been  
7 possible for the other two, and then it takes a  
8 continuing action of the change point window,  
9 access point change, and that in combination  
10 results in the fact that TTD and Arran are not  
11 awarded contracts, as well.

12 THE CHAIR: Yes.

13 THE WITNESS: But I think the  
14 starting point is still September 2010.

15 THE CHAIR: Thank you.

16 BY MR. WATCHMAKER:

17 Q. Okay. Now, you have also  
18 changed your Article 1105 valuation date; correct?

19 A. That's a complicated  
20 question. There was -- I'm not sure where I should  
21 be going with this, because it's been the subject  
22 of debate for the last three or four days, in that  
23 it was -- the date of 1105 was December 21, 2010.  
24 We had wanted to change it to September 17, 2010,  
25 had proposed that.

1                   That was among the things that  
2                   were initially rejected, and I think in the last  
3                   round of what I was allowed to speak to, that  
4                   change of valuation date to September 2010 was not  
5                   included. There was only the calculation of  
6                   discount rate.

7                   THE CHAIR: No. But unless I am  
8                   mistaken, the valuation date issue that we debated  
9                   over the last few days related to 1106, and it was  
10                  the question of whether that could be moved from  
11                  September to August. And if I am wrong, of course  
12                  counsel will correct me.

13                  THE WITNESS: The 1106 date was a  
14                  move from August 5th to July. It was moving --

15                  THE CHAIR: Then it was confirmed  
16                  that it was August 5th.

17                  THE WITNESS: Yes. So we did not  
18                  change 1106. Although it is not in evidence,  
19                  because it was withdrawn, the so-called "correction  
20                  letter" was also going to change 1105 from December  
21                  2010 to September 17th, 2010.

22                  THE CHAIR: Right.

23                  THE WITNESS: And I think as this  
24                  progressed during the hearing, that was one of the  
25                  items that kind of fell off the table.

1                   THE CHAIR: It was not revived in  
2 your last letter?

3                   THE WITNESS: Right.

4                   THE CHAIR: Yes, that's clear.

5                   MR. WATCHMAKER: My apologies, I  
6 think I misspoke.

7                   BY MR. WATCHMAKER:

8                   Q. You have adjusted your  
9 discount rate?

10                  A. We have.

11                  Q. Okay.

12                  A. To reflect the actual  
13 calculation at September. The valuation date  
14 didn't change. It's the calculation of the  
15 weighted average cost of capital components that  
16 changed.

17                  Q. You have also removed the  
18 economic development adder and the capacity  
19 expansion option?

20                  A. Two different questions. One  
21 is the calculation of the weighted average cost of  
22 capital, that affects 1102 and 1103, and 1106 as it  
23 relates to 1102 and 1103.

24                  The second question relates to my  
25 suggestion that 1105 should not include the



1 benefits of the GEIA, and so the change in the  
2 discount rate is then to reflect a difference,  
3 rather than the calculation, if you will.

4 Q. If I recall the numbers in  
5 the chart, they were still quite high. You're  
6 continuing to include the Summerhill and North  
7 Bruce projects under that claim; correct?

8 A. That's correct.

9 Q. And on what basis --

10 A. On a higher risk -- excuse  
11 me, a higher risk of attaining those, we suggested  
12 there should be an incremental risk, first of all,  
13 to the overall cap rate -- sorry, capitalization  
14 rate or discount rate, cost of equity, to reflect  
15 the removal of the benefits of the GEIA, and then a  
16 further increase to the risk reflecting the state  
17 of those projects when there's no benefit of the  
18 GEIA, that you could absolutely move them forward.

19 Q. Okay. Well, we've already  
20 talked about how much capacity might be available  
21 in the Bruce, so I don't intend on going back on  
22 that.

23 I've just got a few more  
24 questions. Could you please turn to page 22 of  
25 your original report? This page has confidential

1 information on it, but I want to look at a  
2 non-confidential paragraph. It is paragraph  
3 4.1(a)(3). I don't know if there is a public  
4 version we could use?

5 It is at page 22 of the original  
6 report. You see here -- Mr. Low, are you there?

7 A. I believe I am, yes.

8 Q. So you say here:

9 "The additional 10 percent of  
10 capacity is considered to be  
11 an incremental loss that has  
12 been quantified based on the  
13 assumption that the claimant  
14 would have the ability to  
15 increase the capacity of its  
16 projects by 10 percent that  
17 was offered to the Korean  
18 Consortium as part of the  
19 GEIA."

20 Do you see that?

21 A. Yes.

22 Q. Now, I would like to actually  
23 look at the GEIA provision dealing with this, and I  
24 don't think it is in your bundle, but it is Exhibit  
25 C-322. I would like to look at section 3.4

1 specifically.

2 A. In this binder?

3 Q. I don't think it is in that  
4 white binder. Maybe we could try to find that. It  
5 is section 3.4 and it is claimant's Exhibit C-322.  
6 So it is section 3.4.

7 So the first part of this  
8 provision says:

9 "The Korean Consortium may  
10 adjust the Targeted  
11 Generation Capacity for each  
12 phase of the Project,  
13 specified in Articles 3.1 and  
14 3.2, within the range of plus  
15 or minus 10 percent."

16 Do you see that?

17 A. I do.

18 Q. And then the phrase at the  
19 end of this provision limits its scope by adding  
20 "subject to Targeted Generation Capacity of 2,500  
21 megawatts overall for the project."

22 Do you see that, Mr. Low?

23 A. Yes, I do.

24 Q. So would you agree with me  
25 that this provision deals with a 10 percent

1 adjustment to the generation capacity of a phase of  
2 the entire Korean Consortium's project, but that  
3 the generation capacity of the entire project is  
4 capped to the consortium's overall total of 2,500  
5 megawatts?

6 A. I would agree that that is  
7 how that reads, yes.

8 Q. And that means your  
9 additional damages for this capacity expansion  
10 option, that's not really appropriate, is it,  
11 Mr. Low?

12 A. No. I believe it is  
13 appropriate, and there's a combination of things  
14 that have to be taken into account to consider  
15 that.

16 One is that the Mesa projects  
17 effectively could be considered a phase. They are  
18 pretty close to being a 500-megawatt phase. They  
19 have 565 in combination.

20 Mesa has indicated that if it had  
21 known that this type of arrangement was possible,  
22 that they would have been prepared to undertake the  
23 kind of obligation that was in the GEIA, at least  
24 as interpreted by us with the manufacturing  
25 commitment being point to a supplier, and would

1 have been prepared to undertake 2,000 or 2,500  
2 megawatts.

3                   So within that context, these  
4 projects would have been a phase of that entire  
5 commitment, if the -- if Mesa had been aware of the  
6 opportunity of this better treatment.

7                   Q. I would like to stay on a  
8 valuation perspective, though.

9                   The provision says that the entire  
10 project is capped to the consortium's overall total  
11 2,500 megawatts. Now, wouldn't you agree that that  
12 means that they cannot generate -- pardon the  
13 pun -- any additional revenues for their project  
14 overall?

15                   A. That's correct. What they  
16 can do is advance the revenues and the  
17 profitability of the project by moving capacity  
18 from later projects that won't be ready for several  
19 years to projects that are currently available and  
20 ready.

21                   And, effectively, that's what  
22 we've done in our calculation, in that relative to  
23 the Korean Consortium projects, it would appear  
24 that TTD and Arran, at least, if not all four, were  
25 certainly advanced further than where the Korean

1 Consortium was.

2                               Therefore, this advancement would  
3 be attributable to this phase or these four  
4 projects.

5                               Q. But, sir, even if we were to  
6 treat the claimant's projects the way you're  
7 suggesting, okay, wouldn't they be capped at their  
8 total nameplate capacity? There's no additional  
9 10 percent to the nameplate capacity that the  
10 Korean Consortium gets here, is there?

11                              A. No. But the piece that I  
12 think you're missing is that one could have  
13 attempted to determine what the balance of the  
14 benefit or better treatment under the GEIA was of,  
15 say, okay, Mesa could develop 2,000 or 2,500  
16 megawatts of power. So the difference between the  
17 565 megawatts with the 10 percent adder would  
18 simply have come out of that residual.

19                              But we didn't do that, because  
20 there's simply not enough factual basis on which to  
21 determine effectively all of the benefit that  
22 accrued to the Korean Consortium under this  
23 agreement.

24                              So there's a very significant  
25 piece of future value that could have accrued to

1 Mesa that we haven't dealt with at all. Therefore,  
2 I still think is appropriate to advance this 10  
3 percent into what effectively could have been the  
4 first phase and, as we heard from Susan Lo, was  
5 effectively done by the Mesa -- or the Korean  
6 Consortium.

7 Q. So if I understand your  
8 testimony, it's that if the claimant was afforded  
9 this capacity expansion, you are treating all of  
10 the claimant's four projects as a single phase, and  
11 you're increasing the generation capacity of that  
12 single phase by 10 percent and calculating the  
13 value of that future revenue; is that right?

14 A. That's correct.

15 Q. Okay.

16 A. And subsequent phases, if  
17 Mesa had been permitted, the benefits, the total  
18 benefits of this agreement would have been reduced,  
19 and we haven't dealt with that second piece at all.

20 MR. WATCHMAKER: Madam Chair,  
21 Members, those are my questions.

22 THE CHAIR: Yes. Thank you.

23 --- Cross-examination concludes at 11:46 p.m.

24 THE CHAIR: Any re-direct  
25 questions? Mr. Appleton, do you need a few

1 minutes?

2 MR. APPLETON: I think just a  
3 couple of minutes. Do you want to take a mini  
4 break?

5 THE CHAIR: No, preferably not,  
6 but you can take a few minutes, because if  
7 everybody leaves, then it is going to be much  
8 longer.

9 MR. APPLETON: I will hook  
10 everything up. Sorry, Mr. Low, we just have to  
11 hook up to the microphone. You can hear me?

12 RE-EXAMINATION BY MR. APPLETON 11:50 A.M.:

13 Q. All right. Mr. Low, thank  
14 you. We have a few questions for you, but I thank  
15 the Tribunal for providing us with a short minute  
16 to get organized. I have been able to reduce the  
17 re-direct questions as a result.

18 Now, I am going to ask you to just  
19 recall some of the testimony. It was a full  
20 morning. Mr. Watchmaker asked you a lot of  
21 questions and we have a lot of information here.

22 First of all, he had asked you a  
23 question at the very beginning about some of the  
24 standard practices that you might do. He took you  
25 through some letters and asked you about whether



1 you had gone back to sort of audit or check certain  
2 information.

3                   Would you traditionally do an  
4 audit in calculating lost profits within the  
5 60-plus testimonies that you provided as a damages  
6 expert?

7                   A. I cannot recall one  
8 circumstance where -- in any of my actual  
9 testifying cases, where I undertook an audit of the  
10 information provided.

11                  Q. So what you did in this case  
12 would have been the standard practice?

13                  A. Absolutely.

14                  Q. I see. Now, Mr. Watchmaker  
15 asked you about Article 1106 damages. Do you  
16 remember he was asking you about some of the slides  
17 you talked about today, the pie chart?

18                  A. Yes.

19                  Q. Now, in your answer to him,  
20 you said that the Article 1106 damages were all  
21 future losses.

22                  Now, I would like you to look at  
23 your report, section 4.1. Is this the first report  
24 or second report? Second report. That's what I  
25 thought. Your second report.

1 Do you see that in front of you?

2 I don't know what tab that is, sir, in the binders.

3 A. I have my copy of the report.

4 Q. Tab B. Tab B. So I am going  
5 to ask that they put section 4.1 up of the report,  
6 because I am a little confused, for a minute.

7 Do you have the portion I want to  
8 focus on? So can we just put it up?

9 So if you look here in 4.1, you  
10 can see near the bottom, it says:

11 "We note that prior to the  
12 time Mesa Power would have  
13 obtained FIT contracts, it  
14 incurred higher costs due to  
15 the domestic content  
16 requirements."

17 And so I am just confused, and  
18 perhaps the Tribunal would be. Was there incurred  
19 damage, as you have said here in your second report  
20 with respect to 1106, or were all of the damages  
21 future-related?

22 A. I believe I tried to make  
23 this clear in my evidence, but there are incurred  
24 higher costs at the dates of the breach that relate  
25 to the past costs incurred, in that it is believed

1 that those costs were higher by virtue -- in order  
2 to get the local domestic content up, that, for  
3 example, Canadian consultants were used rather  
4 than perhaps people that Mesa had dealt with before  
5 where they believe the prices would have been  
6 lower.

7                   So in our analysis of the past  
8 costs at schedule 1B of our first report, there is  
9 an indication of a number of consulting costs,  
10 pre-development costs, in the order of I think  
11 \$5 million. And some portion of that represents an  
12 increased cost incurred.

13                   What we have quantified in Article  
14 1106 are the future damages that would result from  
15 actually finishing out the construction of the  
16 project. But there are past costs incurred that  
17 are the result of the domestic content requirement.

18                   Q. So these incurred costs are  
19 because of the requirement to have to obtain local  
20 content that would require that you change what you  
21 were doing. Is that what you're saying, or did I  
22 misunderstand?

23                   A. Yes. The domestic content  
24 requirement had to be met and you could meet it in  
25 a number of ways.

1                   It wasn't necessarily that the  
2 turbine, for instance, had to be 100 percent local  
3 content. It didn't. But in aggregate, you had to  
4 build up to meet the domestic content requirement.

5                   Since, for example, the  
6 turbine -- so 1.6, even though it was proposed to  
7 meet the domestic content requirements, there were  
8 still other costs that had to be supplemented for  
9 Mesa to attain the entire domestic content  
10 requirement.

11                   So having local consultants, local  
12 people installing the towers, et cetera, you would  
13 build up, and part of that was in the past costs.

14                   Q. The reason, Mr. Low, might be  
15 because there is a cap on what you are allowed to  
16 quantify within the domestic content by component  
17 category?

18                   A. By component, that's correct.

19                   Q. So, therefore, you would have  
20 to make it up in other areas. You can't just get  
21 it in one?

22                   A. That's correct.

23                   Q. I understand, okay. Now I  
24 get this.

25                   Now, you were asked by

1 Mr. Watchmaker that if the FIT program had been  
2 launched -- sorry, if the FIT program had not been  
3 launched, would the General Electric deposit have  
4 been lost? And I believe that you said that if  
5 things had played out the way they had, it would  
6 have been lost. That's my recollection.

7 I have a couple of questions  
8 arising from that. Is it true that Mesa was in the  
9 FIT program between November 2009, when they  
10 applied, to July 4, 2011, which is at least a  
11 20-month period?

12 A. At least, yes.

13 Q. Yes. And wasn't it important  
14 to the FIT program that the applicant could  
15 demonstrate they had an equipment supply contract?

16 A. That was a requirement, yes.

17 Q. Then wouldn't it be  
18 reasonable for Mesa to allocate the turbines under  
19 the MTSA to the Mesa FIT project during this time  
20 period?

21 A. That is certainly my view,  
22 yes.

23 Q. So do you think it is really  
24 possible to determine what the effect would have  
25 been if there had been no FIT program?

1                   A.    It's a very extreme  
2   hypothetical.  I mean, it takes it out of the  
3   entire context of this hearing, frankly.

4                   Q.    Okay.  Mr. Watchmaker also  
5   asked you a series of questions about a letter from  
6   the Ex-Im Bank.  Do you remember that?

7                   A.    Yes.

8                   Q.    Did you rely on the Ex-Im  
9   Bank letter to set your debt rate?

10                  A.    No, we did not.

11                  Q.    Did you rely solely on the  
12   Ex-Im Bank letter to determine the interest rate on  
13   debt in your report?

14                  A.    No.  The --

15                  Q.    Sorry.

16                  A.    What we did was we had  
17   reference to the Ex-Im Bank letter.  It was  
18   available.

19                                We had information through our own  
20   practice in Toronto of what reasonable interest  
21   rates were for project finance at the time, and  
22   these are referred to in my report.

23                                And the actual rate that we  
24   adopted for, if you will, the Ex-Im Bank portion  
25   was, frankly, considerably in excess of what was

1 quoted in the Ex-Im Bank letter. And in  
2 combination with the project finance piece and the  
3 term piece of the financing, we ended up for an  
4 aggregate interest rate of 5.38 percent.

5 And there is evidence in the  
6 market at the time, through reference to quotes of  
7 participants in the wind market and actual  
8 transactions that occurred, that suggest that that  
9 5.38 percent was absolutely reasonable in the  
10 context of what was happening in the marketplace at  
11 the time.

12 And those are referenced in our  
13 report.

14 Q. Do you know where?

15 MR. LANDAU: This is your  
16 paragraph 4.4.1.

17 MR. APPLETON: Thank you,  
18 Mr. Landau. Of the second report?

19 MR. LANDAU: First.

20 THE WITNESS: The first report.

21 BY MR. APPLETON:

22 Q. First.

23 A. Thank you. So  
24 specifically -- thank you for pointing the place.  
25 Specifically, the Ex-Im Bank letter suggested the

1 3.66 percent interest rate. What we effectively  
2 used was 4.75 percent, and then the balance of the  
3 required financing based on a term limit, seven.

4 In the following paragraph, you  
5 can see that we have had reference to a  
6 transaction -- this is February 2013 -- which is  
7 about the time that Mesa would have had to raise  
8 financing under the term of the projects pursuant  
9 to the GEIA, that the rate for -- \$450 million  
10 raise by Brookfield Renewable Energy Partners on a  
11 Canadian wind farm project was 5.13 percent.

12 And as I indicated, our average  
13 was 5.38 percent. Accordingly, the market would  
14 suggest that that was -- our conclusion was  
15 reasonable of what the interest rate should be.  
16 But it did not rely on the rates in the Ex-Im Bank.  
17 We put it into a Canadian context in what we  
18 believed was available in the market.

19 Q. Okay. Now, Mr. Low, are you  
20 prepared, right now, to discuss with the Tribunal  
21 what the quantum of damages would be if the losses  
22 were limited only to the failure to obtain each of  
23 the four projects? Don't answer. I am going to  
24 ask the Chair whether I can proceed to ask those  
25 questions.



1 A. Could you just --

2 THE CHAIR: I was reading.

3 MR. APPLETON: Sorry. I am happy  
4 to rephrase.

5 THE CHAIR: Can you please repeat?

6 MR. APPLETON: Yes. I was asking  
7 Mr. Low if he was prepared right now to discuss  
8 with the Tribunal what the quantum of damages would  
9 be if the losses were limited only to the failure  
10 to obtain each of the four projects.

11 MR. BROWER: Take out the GEIA.

12 THE CHAIR: That means taking out  
13 the better treatment aspect, what we discussed  
14 before in conceptual terms.

15 MR. APPLETON: It was your  
16 question.

17 THE CHAIR: Yes. Is there an  
18 objection with asking the question?

19 MR. SPELLISCY: Well, I guess I am  
20 a little confused, because I think if you were to  
21 do so, if you were to do so, he would essentially  
22 be giving the calculations that he arrived at for  
23 his 1105 valuation, which the ruling was we can  
24 discuss this conceptually, but that we were not  
25 going to get into calculations.

1                   It seems to me now, if I am  
2     understanding what he is being asked to do right  
3     now -- I might not be, but if I am, he's  
4     essentially providing the calculation that the  
5     Tribunal said he shouldn't provide.

6                   THE CHAIR: Yes. I have asked  
7     myself whether I should ask the question of a range  
8     of reduction, and then I refrained from doing so.

9                   Obviously we cannot go into the  
10    actual calculations, but it would be useful to the  
11    Tribunal to have the range. Obviously we cannot  
12    award damages on oral testimony about a range  
13    without having gone into the calculations, and if  
14    we were to reach this point, we would have to get  
15    more input from Mr. Low, but then of course also  
16    from Canada's expert.

17                   Having said that, is it acceptable  
18    that the expert answers what the range of reduction  
19    will be?

20                   MR. SPELLISCY: I think as long as  
21    there is no ability to put similar questions about  
22    what he's about to say to Mr. Goncalves, who will  
23    not have had the ability to assess the  
24    calculations, then that would be fine.

25                   THE CHAIR: Thank you.

1 MR. APPLETON: What do you think?

2 MR. MULLINS: Madam Chair, we're  
3 fine with that. I do think, based on what the  
4 Chair has just, we would like to revisit the  
5 procedures going forward.

6 We could have Mr. Low continue to  
7 testify, but I think we do have comments now based  
8 on the ruling from the Tribunal.

9 THE CHAIR: Which ruling?

10 MR. MULLINS: We can do this in  
11 front of Mr. Low or do this on break, but if the  
12 Chair is saying that we are -- if the Chair is  
13 simply said they cannot award damages based on the  
14 testimony of Mr. Low, then I think it would be best  
15 at this point to have a later hearing to allow the  
16 Tribunal to have the full testimony. We're  
17 prepared now to --

18 THE CHAIR: Yes. What I was  
19 saying is if we reach this issue. I'm not saying  
20 we will dismiss the damage claim because we don't  
21 have the calculations.

22 I'm just saying that if we reach  
23 this issue, which I do not know right now -- I am  
24 just making assumptions, but then -- and we would  
25 not follow Mr. Low's calculation as it is now in

1 his reports and we would rather go with the oral  
2 testimony, then we need substantiation for that.  
3 And you would certainly get a chance in providing  
4 this, if it is needed, as would Canada be in a  
5 position to respond. And if that requires a  
6 hearing, then so be it.

7 MR. MULLINS: And that's fine to  
8 the Tribunal. I had raised earlier that I am  
9 concerned about how that might be communicated.

10 THE CHAIR: You have raised --

11 MR. MULLINS: And I would have  
12 thought it would be more practical. You may come  
13 to an internal decision amongst yourselves about  
14 where you are headed, but once you communicate that  
15 to us, and then now there could be an argument,  
16 well, is this a ruling or a final award or award  
17 that could be confirmed or sought?

18 And I thought what might be more  
19 practical -- again, because I want to be most  
20 efficient as possible and respectful of the time of  
21 the Tribunal - that as long as there is an  
22 outstanding issue and you have internal  
23 discussions, it might be more efficient at this  
24 point to let you have all of the evidence before  
25 you, and then you can decide where you are going to

1 go.

2 But if you start saying, Look, I  
3 don't need to go that now because I'm not going to  
4 reach that issue, then there will be an argument if  
5 that is a ruling or not.

6 I think given what the Tribunal  
7 said, and I fully respect what you're saying, it  
8 might be best at this point, with all of the  
9 testimony from the experts, to have that latter  
10 hearing to support all the evidence you need, and  
11 then can you take that evidence and decide what you  
12 want to do and how any award is to be given.

13 I respect efficiency, but I am  
14 also concerned that any interim rulings might cause  
15 more inefficiency as we will end up fighting in  
16 some court somewhere about what the effect of that  
17 is. That is my thought.

18 THE CHAIR: Would you like to  
19 react now or later?

20 MR. SPELLISCY: I guess on a  
21 couple of points. I am not sure what the concern  
22 is here. We are under the UNCITRAL arbitration  
23 rules here, which provide for partial awards.  
24 Partial awards are not an issue if the Tribunal  
25 needs to have a separate hearing. I don't know

1 what the exact concern is being raised.

2 My bigger concern is one of, Why  
3 are we here now, because if we're now talking about  
4 we're going to need a separate hearing and we're  
5 bifurcating, this was our whole point weeks ago,  
6 that if you wanted to do this, you should have  
7 bifurcated weeks ago?

8 I fully subscribe to what the  
9 Chair has said, which is you can come to your  
10 deliberations, and if -- which is what we wrote in  
11 our letter. If necessary, we can schedule another  
12 hearing, but I would object to scheduling that  
13 hearing and spending that time and resources having  
14 another hearing before we're at that point. I just  
15 don't think that it is a good use of time.

16 THE CHAIR: I think the Tribunal  
17 has heard you all discuss this. There was no  
18 indication of a partial award.

19 I mean, when I go into  
20 deliberations, there may be issues that come up on  
21 this topic, but not on others. The Tribunal could  
22 at any time go back to the parties and say, I'm  
23 missing information for this point. I did not  
24 realize before it was really relevant for my  
25 deliberation, and, therefore, please provide it in

1 one way or another.

2 That was more the idea. But I  
3 think what we should do now is simply continue with  
4 this examination, because we still have another  
5 witness to hear today, and then at some point the  
6 Tribunal will have a discussion during a break and  
7 come back.

8 MR. MULLINS: I appreciate that.  
9 I appreciate it sounds like if the communications  
10 are more, 'we need more information on the  
11 following topics', that might be a different issue  
12 than an award.

13 I appreciate the education on  
14 that.

15 THE CHAIR: I'm sorry if I was not  
16 clear.

17 MR. MULLINS: No. I may have  
18 over-complicated the issue. I have dealt with this  
19 before and I am trying to avoid the problem.

20 THE CHAIR: No, I understand where  
21 you are. That was not what I had in mind,  
22 absolutely.

23 MR. MULLINS: Sorry for the  
24 interruption.

25 MR. APPLETON: That's why we were

1 seeking procedural guidance to know where to go.  
2 So I am unclear as to what we have decided, if we  
3 decided anything. That is my ---

4 THE CHAIR: We have not decided  
5 anything. The Tribunal has just given an  
6 indication that if we were to reach this issue in  
7 our deliberations, like other issues that we may  
8 reach and that we require more information from the  
9 parties, we would require it, certainly.

10 Having said that, I thought that  
11 it would be acceptable that Mr. Low gives a range  
12 of what the reduction is. It's a range and it's  
13 not more than that.

14 MR. APPLETON: Okay, great.

15 THE CHAIR: I think that is -- it  
16 was accepted, yes.

17 MR. APPLETON: Excellent. Okay.

18 Well then --

19 THE CHAIR: So, Mr. Low, can you  
20 give us a range?

21 THE WITNESS: Removing the impact  
22 of the GEIA from 1105 would be approximately a  
23 \$125 million reduction to my previous conclusion,  
24 which was \$657 million before interest. So the  
25 amount is approximately \$530 million on a



1 non-GEIA-included basis.

2 If I could ask Mr. Appleton for a  
3 point of clarification, you asked a question about  
4 each project, I think, but I am not sure you want  
5 to go there or if the total is sufficient.

6 THE CHAIR: I think for the time  
7 being, the total is sufficient.

8 BY MR. APPLETON:

9 Q. So I think what would be best  
10 here would be to ask the Tribunal. If they want  
11 more information, they should ask you, rather than  
12 us, because we're really in their hands in any  
13 event. And now that we have the procedural  
14 guidance, I think we can turn it back over. Thank  
15 you.

16 THE CHAIR: That means you have no  
17 further re-direct questions?

18 MR. APPLETON: I only had that  
19 procedural question to get some procedural  
20 understanding from the Tribunal, which is not part,  
21 in essence, of my re-direct. And now that that is  
22 resolved, we're finished. Thank you.

23 --- Re-Examination concludes at 12:11 p.m.

24 THE CHAIR: Do my colleagues have  
25 questions for Mr. Low?

1 QUESTIONS BY THE TRIBUNAL AT 12:11 P.M.:

2 MR. BROWER: I will begin just by  
3 observing you apparently have sat as arbitrator and  
4 it is much better, isn't it?

5 --- Laughter.

6 THE WITNESS: It's an easier task.

7 --- Laughter.

8 THE WITNESS: On a damages  
9 perspective, only. I think the law is a little  
10 more complex.

11 MR. BROWER: You testified earlier  
12 in your testimony this morning that you have  
13 calculated damages which are assumed to have been  
14 incurred or assumed to have occurred.

15 Now, that embraces to me two  
16 things. One, you have made it clear that you're  
17 proceeding on the assumption, which is part of your  
18 instructions, that there has been a breach of these  
19 various articles of NAFTA which have been referred  
20 to. That is one; right?

21 THE WITNESS: Yes.

22 MR. BROWER: But you are also  
23 assuming that these four contracts would have  
24 succeeded?

25 THE WITNESS: That's correct.

1                   MR. BROWER: So you have not been  
2 asked to do any analysis of whether the alleged  
3 breach in each case would, in fact, have caused  
4 damages. You have calculated what the damages  
5 would be had losses been caused by the breaches,  
6 and your take-off point for that is the FIT  
7 contracts for which applications have been made  
8 would in all four cases have been won.

9                   THE WITNESS: If I might, I think  
10 I would express it a little differently. Under  
11 Articles 1102 and 1103 --

12                   MR. BROWER: Right.

13                   THE WITNESS: -- the assumption  
14 that has been made is that there is a breach of  
15 those NAFTA articles.

16                   MR. BROWER: Right.

17                   THE WITNESS: From a damages  
18 perspective, once that assumption is made and if  
19 the Tribunal found that were to be the case, then I  
20 think the damages result from that breach and  
21 attributable to that on the basis of the better  
22 treatment to the Korean Consortium.

23                   And I think it's been reasonably  
24 demonstrated through the evidence of the various  
25 parties, whether put forward by Canada or Mesa,

1 that the Korean Consortium has been able to put  
2 forward a number of projects that were low-ranked,  
3 whether they picked them off in the market because  
4 people were about to forego them anyway or  
5 whatever, how they've done it, they have managed  
6 from virtually a cold start of having no projects  
7 of being able to develop at least the first two  
8 phases of 1,000-some-plus megawatts of power.

9 Had Mesa been provided with that  
10 better treatment, I don't think there's any  
11 question that these four projects would have been  
12 developed under that kind of circumstance.

13 The circumstance -- if I leave  
14 that for a minute, because my own view from a  
15 damages perspective is I think that's fairly  
16 definitive.

17 The second question is for 1105  
18 and particularly as I have amended my views of how  
19 that should be interpreted. And there could be  
20 some question of whether two or four projects  
21 should go forward and something for the Tribunal to  
22 consider.

23 Again, I think under 1105, to me  
24 there is virtually no doubt that at least two were  
25 going to be put forward and succeed. And I think

1       there is a good probability that all four could  
2       have proceeded. And we've taken that probability  
3       factor into account in the discount rate by  
4       increasing the discount rate for the last two  
5       projects.

6                        But the last comment I would like  
7       to make, as far as trying to explain the  
8       probability, if you will, of the projects  
9       proceeding is inherently built into the discount  
10      rate that we've selected.

11                      So whether it be the OPA sitting  
12      back at the beginning of this whole process and  
13      saying somebody coming into this and developing a  
14      project should be entitled to an 11 percent rate of  
15      return, some projects are going to go forward, some  
16      projects aren't. But they are saying that's the  
17      reasonable rate of return to be earned on those  
18      projects, and therefore they set the price or they  
19      believe they set the price to try to drive that  
20      kind of rate of return.

21                      So the prospect of whether any of  
22      these projects goes forward is considered in the  
23      rate of return that we've chosen.

24                      So that's a very long answer to a  
25      question, but I think there's various levels. It

1 depends on which article you're in, and I think  
2 that the prospect of the projects going forward is  
3 affected by which article, but is compensated for  
4 in the discount rate.

5 MR. BROWER: Well, then I  
6 understand you to be saying you actually have done  
7 two things. One is to calculate the damages,  
8 assuming damages have resulted, have been caused by  
9 the breaches.

10 But you are also dealing with the  
11 issue of whether or not -- and, if so, the extent  
12 to which -- there is a causal connection between  
13 the breach and the experiencing of damages. You  
14 have used the word "probability" with respect to  
15 two versus four, and you have taken the view that,  
16 on your analysis, it is certain -- under some of  
17 those articles it was inevitable, it was  
18 unavoidable -- that the breach caused the damages  
19 that you are calculating.

20 THE WITNESS: I think, sir, that  
21 under Article 1102 and 1103, the better treatment  
22 afforded the Korean Consortium indicates that these  
23 projects would have gone forward.

24 They've demonstrated that it could  
25 be done and would be done pursuant to the treatment

1 that they were provided.

2                   However, when I said that the  
3 prospect of them proceeding is, in part, dealt with  
4 in the discount rate, we still applied that  
5 discount rate.

6                   So it's not a virtual certainty.  
7 An 11 percent cost of capital has relatively a fair  
8 amount of risk built into it. It's not a  
9 certainty, but we think that the contingencies are  
10 fully taken into account in that discount rate.

11                   MR. BROWER: But these projects  
12 were still competing with other projects which were  
13 not covered by GEIA and were not brought up by  
14 GEIA. So there's a competition factor there.

15                   THE WITNESS: There is a  
16 competition, unless you are under the better  
17 treatment accorded the GEIA.

18                   The GEIA projects did not have to  
19 compete with the FIT projects. 1105, sir, I  
20 absolutely agree with you, it is a different  
21 circumstance. 1102 and 1103, I think, are -- have  
22 a different thought process behind them of awarding  
23 the better treatment, rather than assessing the  
24 projects within the FIT program.

25                   The better treatment under the

1 GEIA is outside of the FIT program.

2 MR. BROWER: But wouldn't every  
3 other project, at least in this Bruce area where  
4 the applications were made, be entitled to be  
5 considered on the same basis, that they also get  
6 the better treatment? So you are just on a  
7 different plane of competition.

8 THE WITNESS: I think I'm heading  
9 towards legal territory there.

10 MR. BROWER: Okay.

11 THE WITNESS: But I don't think  
12 that's the case. I don't think the analysis is  
13 that the same treatment is afforded everybody who  
14 was in the FIT program.

15 I think the treatment is that  
16 pursuant -- if there's a breach of 1103 under the  
17 NAFTA --

18 MR. BROWER: Right.

19 THE WITNESS: -- then the  
20 compensation for that breach is the treatment. And  
21 it doesn't extend to everybody should get that  
22 treatment. It is particular to this claimant and  
23 the nature of the damages that arise from that  
24 breach.

25 1105, I would agree with you, is



1 different, in that --

2 MR. BROWER: Right.

3 THE WITNESS: -- Mesa is still in  
4 the competitive FIT pool under 1105.

5 MR. BROWER: Okay. Now, with  
6 respect to two-and-a-half, whatever it is, MW, kW,  
7 and the --

8 THE WITNESS: 2.5x1 versus 1.6x1e.

9 MR. BROWER: 1.6.

10 THE WITNESS: It is easier just to  
11 use the numbers.

12 MR. BROWER: Okay. So the point  
13 you made is that the 2.5s were not available with  
14 sufficient local content?

15 THE WITNESS: In 2011.

16 MR. BROWER: At the time that  
17 acquisition need --

18 THE WITNESS: At the time Mesa  
19 believed they had to commit to the projects.

20 MR. BROWER: Right.

21 THE WITNESS: The one factor that  
22 I think has to be remembered is that -- and it's a  
23 bit of an anomaly here because of the moving  
24 valuation dates and construction timetables.

25 If, in actual fact, Mesa was

1 accorded the GEIA and fell into the GEIA timetable,  
2 the 2.5s would have been available with the  
3 domestic content requirement, and the 1106 claim  
4 really would then become part of the base case.  
5 It's not that it falls off the table. It just  
6 changes character.

7 MR. BROWER: Right.

8 THE WITNESS: And would be part of  
9 the base case, in that rather than the base case  
10 being built off the 1.6 with the lower efficiency,  
11 lower revenues, we would have built the base case  
12 off the 2.5s.

13 But given the timing of the  
14 breaches, we believe that the 1106 claim stood on  
15 its own at that point in time.

16 MR. BROWER: And the GEIA timing  
17 you just referred to is the timing under the  
18 amended and restated agreement?

19 THE WITNESS: That's correct.

20 MR. BROWER: The delayed date.

21 THE WITNESS: Yes, sir.

22 MR. BROWER: But going back to the  
23 situation as it was at the time turbines were  
24 ordered or required, did any company other than GE,  
25 do you know, offer at that time 2.5x1 that would

1 have had sufficient Ontario content?

2 THE WITNESS: Not that I am aware  
3 of.

4 MR. BROWER: All right.

5 THE WITNESS: There are projects  
6 that have used a Siemens 2.3. So my understanding  
7 is they are different, but they have some  
8 similarities. But that has happened post-2012.

9 MR. BROWER: Right.

10 THE WITNESS: Which is when the  
11 2.5s were supposed to be available with the  
12 domestic content requirement.

13 MR. BROWER: But is it your  
14 understanding that Mesa was bound to make its  
15 acquisitions from GE rather than from any other  
16 source, had such a source been available, for 2.5x1  
17 with the required amount of Ontario content, either  
18 because they were contractually bound not to deal  
19 with anyone else or because effectively they were  
20 prevented by the fact that they had invested  
21 150-some million in the contract with GE?

22 THE WITNESS: I believe those two  
23 things go together. The MTSA has an exclusivity  
24 provision in it.

25 MR. BROWER: Right, yes.

1                   THE WITNESS: But there was an  
2 investment of \$150-odd million that Mesa was trying  
3 to use in addition.

4                   MR. BROWER: So they were locked  
5 two ways?

6                   THE WITNESS: They were locked two  
7 ways.

8                   MR. BROWER: Can you explain to me  
9 why there would have been a revenue increase? I  
10 understand the cost situation, but why would there  
11 be a revenue increase if 2.5xls were used rather  
12 than the 1.6?

13                   THE WITNESS: Yes. I can try to  
14 explain that. The wind studies that were prepared  
15 had both analyses for the 2.5 and the 1.6 turbines.

16                   The wind analyses with the  
17 characteristics of the wind in that area indicated  
18 that the 2.5s were more efficient, that on the  
19 basis of the amount of power that they would drive  
20 per hour per day, because of the wind, was greater  
21 than what could be derived from a 1.6. And it is  
22 simply that increment of efficiency and power that  
23 drives the incremental revenue.

24                   I can get into some numbers and  
25 stuff, but, conceptually, that's what it is. It is

1 the nature of the specifics of the site, the wind  
2 characteristics as was determined in these wind  
3 studies, that indicated that there was a benefit to  
4 use the 2.5s.

5 They were more efficient, without  
6 being significantly different in capital cost.

7 MR. BROWER: Well, the next  
8 question may explain my total ignorance of  
9 electrical engineering and power supply. But if  
10 there is a limited transmission line and there is a  
11 limit on the amount of megawatts that the system  
12 will accept, how can you increase your output? How  
13 will it be accepted?

14 I mean, there is not sort of an  
15 endless capacity to absorb, as I understand it.

16 THE WITNESS: No. And that's  
17 correct. I'm not an electrical energy expert.

18 MR. BROWER: Welcome to the club.

19 --- Laughter.

20 MR. BROWER: There's a lot of us  
21 here.

22 THE WITNESS: Let me explain it  
23 this way in the context of wind.

24 Wind is not like, say, hydro power  
25 where you have a relatively constant stream of

1 water that flows by a dam, absent rain storms or  
2 whatever.

3 MR. BROWER: Right, yes.

4 THE WITNESS: The wind is going to  
5 vary. It's going to go up and down. These,  
6 therefore, have variability in them anyway.

7 The revenue projections that we  
8 have used are based on the 50 percent probabilities  
9 in the wind studies. So there's a 50 percent  
10 probability the wind will be higher; a 50 percent  
11 probability the wind will be lower. That's the  
12 standard methodology that's used.

13 So to the degree that the turbine  
14 can be more efficient, it's going to generate  
15 somewhat more power, but it will still fall within  
16 the range of what has been contracted, that  
17 the -- that variability will absorb that  
18 difference.

19 And we're talking about -- because  
20 it varies by which of the projects, but the maximum  
21 variance is 8 percent, and I think one of them  
22 could be as low as 1-1/2 or 2 percent different.

23 So it is relatively minor in the  
24 scheme of how much incremental power is driven, but  
25 because there are no extra costs, the revenue

1 virtually falls to the bottom line. There's no  
2 incremental cost. It is simply that the turbine is  
3 turning and generating power.

4 MR. BROWER: Well, it sounds to me  
5 like you really mean greater net revenue, because  
6 the emphasis is on the costs being lowered because  
7 of whatever the characteristics are of the 2.5xl,  
8 not that there is a lot more money coming in.

9 THE WITNESS: It actually is that  
10 there is more money coming in. The incremental  
11 power that you can sell virtually has no costs  
12 against it, because all of your costs are already  
13 fixed. The maintenance per turbine is already  
14 fixed.

15 So if you can increase the revenue  
16 that, call it, 5 percent increase in revenue,  
17 rather than being diluted by cost down to the  
18 bottom line, is literally going to go to -- that  
19 5 percent revenue increase is going to go right  
20 into your income.

21 MR. BROWER: That I understand,  
22 but you're putting out more power than what you  
23 have been permitted contractually.

24 THE WITNESS: It is actually not  
25 more than what you have been permitted. It still

1 falls within the required capacity. It is just  
2 they do it more efficiently, such that you will get  
3 more power within that scope of when the wind is  
4 blowing.

5 MR. BROWER: Well, I think I have  
6 done as well as I can on that.

7 --- Laughter.

8 THE WITNESS: I think I have, too.

9 THE CHAIR: Do you have anything?

10 MR. LANDAU: There is only one  
11 issue I want to go back to, and that is on your  
12 choice of valuation dates.

13 It may be that the answer to this  
14 is, in the scheme of things, what's driving this is  
15 the instruction you have been given by counsel as  
16 to what valuation date to use. If that is the  
17 case, then that's fine and that's the position, and  
18 it becomes simply a legal issue to debate.

19 But what I wanted to ask you is,  
20 if that is not the case, if in fact there is an  
21 economic analysis you have done that has driven you  
22 to the choice of valuation date, what is the  
23 significance in economic terms -- from your  
24 perspective, valuation terms, what's the  
25 significance about the date that a party becomes



1 aware of something?

2 I mean, the easiest way is to look  
3 in your chart. I'm looking, for example, in your  
4 second report, paragraph 7.11, where you summarize  
5 dates of breach. And granted this has gone through  
6 other developments since, but here you articulate  
7 your reasoning.

8 So if you look under 1102, on this  
9 day Mesa Power became aware of the better treatment  
10 and 1103 is consistent; you say consistent with  
11 that. 1105, to an extent, is also along similar  
12 lines, because it's about when something perhaps  
13 becomes available.

14 But can you explain to me, from  
15 your valuation perspective, why the date of  
16 becoming aware, which might be a fortuitous event,  
17 is serving it in terms of incurring of loss?

18 THE WITNESS: Two responses, sir.  
19 The selection of the date of breach is a legal  
20 issue.

21 MR. LANDAU: Right.

22 THE WITNESS: From a value -- this  
23 is largely a valuation exercise. From a  
24 value-cum-damages perspective, the day that  
25 something happens has an impact on the future

1 prospect. It may not be the entire impact because,  
2 as I said, you effectively had to wait until there  
3 were no contracts awarded to know whether the  
4 impact was only on two or on four of the projects.

5 But the effect on value can happen  
6 when you find something out, even if the impact is  
7 going to be in the future.

8 So let me take a different  
9 example. If you are operating a manufacturing  
10 company that produces paper bags for the grocery  
11 industry, the day -- and you're in the City of  
12 Toronto somewhere. The day the City of Toronto  
13 says, You know what, we don't want -- actually, I  
14 should probably go the other way, because it has  
15 come back again.

16 You're manufacturing plastic bags  
17 for the grocery industry. The City of Toronto  
18 says, We're either going to charge you for every  
19 plastic bag that's going into the -- effectively  
20 that's going into the landfill, or we're going back  
21 to paper.

22 The day that is announced, it has  
23 changed the value of that business. So I see that  
24 kind of impact happening here.

25 But the circumstance under NAFTA

1 1102 and 1103 I think is different, because it is  
2 not that "but-for" scenario that's been talked  
3 about. It's an award of better treatment, and that  
4 is why I think it links to when you have a  
5 knowledge of when that better treatment is.

6 But that's where I begin to get  
7 into the legal side of it.

8 MR. LANDAU: Right, right.

9 THE WITNESS: I think.

10 MR. LANDAU: In which case I won't  
11 ask you any more questions.

12 --- Laughter.

13 MR. BROWER: You can still belong  
14 to the club.

15 --- Laughter.

16 THE CHAIR: May I ask you to go to  
17 your first report, paragraph 4.18?

18 THE WITNESS: Certainly.

19 CHAIR: Page 28.

20 THE WITNESS: I have it.

21 THE CHAIR: That is where you have  
22 set out the assumptions on which you have  
23 established your valuation.

24 I was asking myself: What happens  
25 if one assumption fails in the Tribunal's judgment?

1 And you will correct me if I misunderstand the  
2 assumptions, but it seemed to me that assumption  
3 (A) to (C) must all -- (A) to (D), sorry, must all  
4 be cumulatively met for there to be a loss.

5 Now I am speaking in economic  
6 terms, at least I am trying.

7 THE WITNESS: Yes.

8 THE CHAIR: And I am not looking  
9 at the legal aspects.

10 THE WITNESS: I understand.

11 THE CHAIR: By contrast,  
12 assumption (E) if it is not met as set out there,  
13 would simply reduce the loss; is that correct?

14 THE WITNESS: With respect to (E),  
15 the time line would impact the loss depending  
16 whether you advance it or delay it.

17 THE CHAIR: So that's a question  
18 of amount?

19 THE WITNESS: Yes, that's correct.  
20 So with respect to the other assumptions here, we  
21 have effectively tried to put -- I think I have  
22 tried to put Mesa into the position that it would  
23 have been had it been provided the better treatment  
24 under the GEIA. And I think it has been proven  
25 out.

1                   So (A), the projects would have  
2                   obtained a FIT contract. Well, they would have  
3                   obtained a GEIA contract that looks like a FIT  
4                   contract, but we've stated would have obtained a  
5                   FIT contract.

6                   I think it's fair to say that the  
7                   Korean Consortium has been able to do that, and so  
8                   we're simply saying that we had four projects that  
9                   look like, feel like, may have been better than  
10                  some of the Korean Consortium projects and should  
11                  be accorded, then, the same benefit of the GEIA,  
12                  the better treatment.

13                  With respect to the next one, all  
14                  environmental and associated approvals are  
15                  received, this is a two-step one.

16                  Number 1, at the time that this  
17                  was occurring, there was nothing known by Mesa that  
18                  would have suggested they were going to have any  
19                  difficulties in this area of approvals. TTD was  
20                  well advanced in this process, and the others are  
21                  not that far away. They are not located where  
22                  there are native issues, as some of the other  
23                  projects have had issues. And the government was  
24                  required to assist with this process.

25                  So, again, while it is stated as

1 an assumption, I think it falls within the context  
2 of what the benefits of the GEIA were.

3 The fact of financing, that is a  
4 risk that financing can be secured. Given what we  
5 know from our research was happening in the  
6 industry -- and that's the paragraph that  
7 Mr. Landau referred to before -- where there is  
8 interest in funding these projects, we're past the  
9 recession. People do have money. They are looking  
10 for what are effectively infrastructure projects to  
11 finance.

12 So I don't think obtaining the  
13 financing is a particular issue. And that Mesa had  
14 the financial capacity is more of a factual  
15 question, and I think Mr. Pickens indicated that he  
16 had the money. Not all of us can write  
17 \$150 million cheques to GE, so...

18 But the second thing I want to say  
19 about all four of those is, while we indicated here  
20 they are assumed, they are all part of the "risk"  
21 of getting a contract, whether it be GEIA or FIT,  
22 and are all part of the risk rate that we assumed  
23 was reasonable here.

24 So I will go back to the --

25 THE CHAIR: So my question was

1 relatively simple. If one assumption fails, does  
2 it mean there are no damages, or now are you  
3 telling me something different by saying there is a  
4 risk incorporated in the discount rate?

5 THE WITNESS: There is a risk  
6 incorporated in the discount rate that deals with  
7 each and every one of these, because each and every  
8 one of these would have been built into the risks  
9 that the OPA looked at when they said -- because  
10 when they are looking at this, they know that not  
11 everybody who starts into this process is going to  
12 come out the far end.

13 So they are saying, We think that  
14 the commercial rate of return for getting into this  
15 venture, starting through it and getting to the  
16 end, is an 11 percent rate of return. And that  
17 effectively takes each and every one of these into  
18 account.

19 So I don't think it is as simple  
20 as saying, What if one of these fails? I think  
21 they are all reasonable in the context of the GEIA  
22 and the benefits, but I also think they are all  
23 encompassed in the rate of return, anyway.

24 THE CHAIR: Thank you. Then --

25 MR. LANDAU: Sorry, can I just ask

1 one follow-up?

2 THE CHAIR: Yes, of course.

3 MR. LANDAU: Why do you say that  
4 all of these are covered by the OPA 11 percent? Is  
5 that to say that the OPA itself was building in the  
6 possibility that proponents might not have  
7 sufficient financial capacity themselves? Do you  
8 think the OPA was looking at that?

9 THE WITNESS: I wasn't part of the  
10 process, so...

11 MR. LANDAU: You're asserting that  
12 this is an important point for your analysis,  
13 because you're asserting the 11 percent OPA, in a  
14 sense, that discount factor, for you, is  
15 encapsulating these assumptions. So it is your  
16 analysis.

17 THE WITNESS: Yes, it is an  
18 important factor, I will agree with you.

19 I think it is effectively an arm's  
20 length benchmark here independent of the parties,  
21 and that was done in advance of any of this  
22 actually happening.

23 When I look at what went into  
24 it -- and they have various factors. So the amount  
25 of financing that they believed might be



1 appropriate, there are a number of factors that go  
2 into their determination.

3 The risk -- the return on  
4 investment that I think that they put forward had  
5 to encompass the fact that there were risks of  
6 undertaking these projects, that -- let me take it  
7 to an extreme.

8 Somebody who gets through the  
9 process and has an up-and-running facility, wind  
10 project, that wind project becomes worth an  
11 incredible -- relatively incredible amount of  
12 money, because the risks are then all behind them.  
13 The risk, once you are up and running, of operating  
14 that facility is no longer 11 percent.

15 It's probably down around 7 or  
16 8 percent, like a utility rate of return, at that  
17 point, because that is really what it is.

18 So I think the 11 percent  
19 encompasses the risk of getting to that stage.

20 MR. BROWER: But it doesn't get  
21 you to that stage. The whole point is that that is  
22 the reward for someone who has taken all of the  
23 risks and succeeded, but it is no guarantee to  
24 anyone that they are going to get the contract.

25 I understand it is built into the

1 rate, but, as a matter of causation, did the breach  
2 cause this person not to win that FIT contract?

3 That's a fundamental issue.

4 THE WITNESS: I agree that's a  
5 fundamental issue, particularly if you're in -- I  
6 apologize -- particularly if you're in 1105.

7 Under 1102 and 1103, I think it is  
8 not the same issue, because awarding the same  
9 treatment I believe is far different than but for  
10 these acts these would have been -- these would  
11 have proceeded.

12 And so you almost need two  
13 different mind sets to think about these, because I  
14 think they are very different circumstances.

15 MR. BROWER: Okay, I understand.  
16 I understand that. I mean, that's a basic issue,  
17 frankly, whether the failure, if that were the  
18 case, of Canada to accord, let's say, Most Favoured  
19 Nation treatment means that the resulting -- that  
20 you have to progress from there to say, Ah-hah, the  
21 fact they should have been treated -- that they  
22 shouldn't have been -- that they shouldn't have had  
23 to contend with the GEIA agreement pre-empting a  
24 substantial amount of the available capacity that  
25 was in the FIT program necessarily, I think that is

1 a legal issue as to whether the result is that the  
2 damage to that unsuccessful applicant has to be  
3 calculated on the basis that you have to sort of  
4 assume causation, because if Canada had not  
5 breached the agreement in that regard, they would  
6 have had guaranteed access. I mean, that's  
7 something that we have to think about.

8 THE WITNESS: If I might comment,  
9 and I will try to stay away from the legal  
10 interpretation.

11 MR. BROWER: That's what you're  
12 here for.

13 --- Laughter.

14 THE WITNESS: Under 1105, I  
15 believe you're absolutely correct that that  
16 causation issue is much more directly linked.

17 Under 1103, from a damages  
18 perspective, as I read it, Canada's obligation is  
19 to provide the better treatment, period.

20 And, therefore, I think you can  
21 look at the Korean Consortium and what it did and  
22 say, then, Mesa should be accorded those same  
23 benefits in treatment. And, therefore, it was  
24 guaranteed access; subject to meeting the  
25 qualifiers of bringing jobs, it was guaranteed

1 access to the transmission system.

2 And that -- so that's where I  
3 think these 1102 and 1103 become very different  
4 than 1105 and...

5 MR. BROWER: In this respect,  
6 you're operating on the basis of your own expertise  
7 and not on the basis of instructions from counsel  
8 to make that assumption?

9 THE WITNESS: With respect to that  
10 view of how to interpret from a damage perspective  
11 1103 --

12 MR. BROWER: Yes.

13 THE WITNESS: -- that is my view.

14 MR. BROWER: Right, thank you.

15 Okay.

16 THE CHAIR: Can you then turn,  
17 please, to your second report, page 6, where you  
18 have the summary, and page 7?

19 I must say -- and you will forgive  
20 me if I missed something during your examination or  
21 in your reports -- I am not entirely clear how you  
22 compute the amount of losses for under Article  
23 1106.

24 If I look at paragraph 1.3 on page  
25 6, close to the bottom it says: Consistent with

1 your initial report, the losses related to Article  
2 1106 are included in the losses for Articles 1102,  
3 1103, 1104, 1105 and are not additive thereto.

4 Then I turn to the next page, and  
5 then I see that on the first top-half I have the  
6 damages for 02, 03, 04, 05, and then I have a line  
7 that says NAFTA 1106 with an amount.

8 THE WITNESS: Yes.

9 THE CHAIR: And it says below, and  
10 I believe, if I understand, that below is a  
11 breakdown for the amount on this line above, but  
12 you have added it to the damages in 02, 03, 04, 05.

13 THE WITNESS: Yes. Let me explain  
14 that. I believed that the benefit of the 2.5  
15 versus the 1.6, is the domestic content rule,  
16 should be included in the damages for 1102 or 1103  
17 or 1105, but we wanted to separately quantify the  
18 amount, which was determined on the basis of the  
19 difference between the 2.5s and the 1.6 and what  
20 happens.

21 So the bottom part of this page  
22 that says NAFTA 1106 and below are the net  
23 differences from using a 2.5 versus a 1.6.

24 And what we were trying to  
25 communicate is we've included it in the upper

1 portion. We think it is appropriate to be inside  
2 NAFTA 1102, 1103 and 1105, and, therefore, we would  
3 not want the Tribunal to take the total for 1102,  
4 3, 4 and 5 of, give or take, \$650 million, and then  
5 add 1106 to it again.

6 We were trying to be clear, and I  
7 guess weren't very, that we didn't want additive  
8 things. We've already included it up above, but  
9 here's the detail of how it was determined.

10 THE CHAIR: So what you're saying  
11 is if there was a breach of 1106, we should take  
12 into account the loss that you have established for  
13 1106?

14 MR. BROWER: You just said "1106"  
15 twice.

16 THE CHAIR: Sorry, I misspoke.

17 If there is a breach under 1102,  
18 then we should consider the amount that you have  
19 established for 1106 as part of the loss for 1102?

20 THE WITNESS: That is correct.  
21 That is how I have dealt with this, yes.

22 THE CHAIR: Yes, yes. So it was  
23 the additive that was misleading in my reading, but  
24 it is clear now. Thank you.

25 THE WITNESS: Thank you.

1                   THE CHAIR: I have no other  
2 questions. No follow-up questions? So that means  
3 we can adjourn now for lunch, and that ends your  
4 examination, Mr. Low. Thank you very much.

5                   THE WITNESS: Thank you.

6                   THE CHAIR: Should we start again  
7 at two o'clock with Mr. Goncalves? Yes. Good.

8 --- Luncheon recess at 12:56 p.m.

9 --- Upon resuming at 2:05 p.m.

10                  THE CHAIR: Everyone ready?  
11 Mr. Goncalves, you're ready?

12                  THE WITNESS: Yes.

13                  THE CHAIR: So can you please  
14 confirm to us that you're Christopher Goncalves.

15                  THE WITNESS: I am.

16                  THE CHAIR: You're director at  
17 Berkeley Research Group's energy practice in  
18 Washington, D.C.?

19                  THE WITNESS: That's correct.

20                  THE CHAIR: You have provided two  
21 expert reports, the first one dated February 28th  
22 and the second one June 24, 2014.

23                  THE WITNESS: June 27th, correct.

24                  THE CHAIR: June 27, yes. I  
25 misread my notes. Absolutely. You are here as an

1 expert witness. As an expert witness, you are  
2 under a duty to make only such statements in  
3 accordance with your sincere belief. Can you  
4 please confirm that this is your intention?

5 THE WITNESS: Yes, of course.

6 AFFIRMED: CHRISTOPHER GONCALVES

7 THE CHAIR: Thank you. So we will  
8 first proceed with direct examination,  
9 Mr. Watchmaker.

10 EXAMINATION IN-CHIEF BY MR. WATCHMAKER AT 2:06

11 P.M.:

12 Q. Good afternoon, Members.  
13 Mr. Goncalves, my name is Raahool Watchmaker,  
14 counsel for Canada. I only have a few questions  
15 for you in direct examination.

16 Could you please summarize for the  
17 Tribunal your qualifications?

18 A. Well, I lead the energy  
19 practice at BRG. I have been in the energy and  
20 financial industries for approximately 25 years.

21 I began my career as a banker in  
22 corporate finance at a large global bank, where I  
23 initially learned valuation and financial analysis.

24 I have been advising energy  
25 companies, governments, state entities, banks on



1 project finance, due diligence, and other entities  
2 in the energy sector ever since, including a  
3 variety of what I call business advisory,  
4 development advisory, transactional advisory,  
5 strategic advisory regarding energy projects,  
6 values, prices, commercial terms and conditions, as  
7 well as more recently, over the last ten years or  
8 so, providing expert testimony in dispute  
9 resolution proceedings.

10 Q. Okay. And I understand you  
11 have prepared a summary of your expert testimony in  
12 this matter for the Tribunal?

13 A. That's correct.

14 Q. Would you like to present  
15 that summary, please?

16 A. Sure. Copies are coming.

17 --- Copies of expert report distributed

18 A. So this is a summary of the  
19 analysis that I provided, focussing particularly on  
20 the second report, of course, because it is the  
21 most current, but really for both reports  
22 throughout the arbitration. Next slide.

23 There are four sections to the  
24 presentation: First, just a quick overview of how  
25 we view our responsibilities in this matter;

1 second, a summary of our approach; third, a summary  
2 of our analysis of causation; and, finally, a  
3 summary of the analysis of quantum.

4 With respect to responsibilities,  
5 next slide, we were asked -- focussing first on  
6 instructions, we were asked to provide an  
7 independent analysis of the alleged causes of harm  
8 and applicable damages to Mesa Power.

9 In doing that, we were asked to  
10 assume that the alleged violations were in fact  
11 inconsistent with Canada's treaty obligations. And  
12 in relation to that, we were asked to provide  
13 independent analysis of the damages evaluation  
14 prepared by Mr. Low and Richard Taylor from  
15 Deloitte.

16 Next slide. Our view of our  
17 responsibilities in providing this work are that we  
18 act with independence, be as transparent as  
19 possible, strive for accuracy wherever possible,  
20 and be realistic.

21 I won't read every bullet on the  
22 slide, but it is there in front of you.

23 Next slide. With respect to our  
24 approach -- and this is a section I think is very  
25 important given what Mr. Low described as the

1 elephant in the room. I thought it was a very apt  
2 characterization.

3 We have taken very different  
4 approaches in our approach to damages, quantum on  
5 this matter. So I just wanted to highlight how we  
6 see that in the flow of analysis and process that  
7 we go through.

8 We both assume from the outset,  
9 under liability, that the NAFTA was breached, and  
10 that the various allegations are correct and that  
11 Canada is liable.

12 With respect to causation, as far  
13 as we can tell, there is really no apparent  
14 analysis in the Deloitte report. A lot of the  
15 statements regarding causation that we see in the  
16 reports talk about the breach, and then they say,  
17 as a result, the damages due are the following.  
18 But the causation seems to be limited to that  
19 statement about "as a result".

20 So in Deloitte's counter factual,  
21 they assume that all of the Mesa projects get FIT  
22 contracts because of the KC treatment, of course,  
23 with the GEIA terms and benefits embedded.

24 I should quickly qualify I am not  
25 referring here to the statements Mr. Low made

1 regarding 1105. I am referring to what was stated  
2 in his reports before, so I have not updated this  
3 to reflect the new statements, although I did hear  
4 them.

5                   Then with respect to damages, I  
6 think they all get the GEIA terms and assumptions  
7 about access to the grid, about the risk embedded  
8 in the DCF calculations -- that's the discount  
9 rate -- the cost of equity, as we heard earlier  
10 today, for all of the valuations.

11                   So those assumptions, in our view,  
12 are pervasive throughout the Deloitte analysis.  
13 Looking at the bottom, assuming liability, as well,  
14 we then look at causation case by case, and we look  
15 at the cause of harm. We focus on the GEIA, the  
16 connection change and domestic content, and we  
17 conclude that the GEIA and/or the connection change  
18 caused TTD and Arran, only, to lose transmission  
19 access and FIT contracts, but the domestic content  
20 had no impact.

21                   With respect to our counter  
22 factual to establish the harm created but for the  
23 violations, we then look for the most probable  
24 scenario of the Mesa projects as they would have  
25 existed without the GEIA terms in the market.

1                   So we're not ascribing to the Mesa  
2 projects the GEIA terms, but trying to put them  
3 back in the position they would have been in, but  
4 for the breach. We interpret the GEIA to be the  
5 breach, not the source of damages. And that's the  
6 summary there.

7                   Next slide. Why did we do this?  
8 By conflating the cause of harm and liability, we  
9 were concerned that Deloitte wasn't providing  
10 enough information to the Tribunal to make  
11 decisions. So we sought, instead of an  
12 all-or-nothing approach with respect to the GEIA,  
13 what I would call an à la carte approach, where  
14 even if the GEIA is not a breach, you could ascribe  
15 damages for the other alleged violations. And,  
16 also, even if the GEIA is considered a breach, the  
17 damages don't incorrectly include the terms of the  
18 GEIA in the calculation of damages. They are truly  
19 based on a "but-for" scenario that is designed to  
20 put Mesa back in the situation it would have been  
21 if there had been no breach.

22                   Next slide. This is just a quick  
23 summary. This comes from our first report. You  
24 can find it there, but it is just intended to be  
25 helpful to the Tribunal about how we organize our

1 delivery. I don't talk a lot about NAFTA articles.  
2 This will map the NAFTA articles and the way  
3 Deloitte does it to the way we do it.

4 I refer mostly to the breaches  
5 themselves, GEIA, the connection change point  
6 window and domestic content in my analysis.

7 But we do understand the Tribunal  
8 needs to get back to the NAFTA articles, so we  
9 provided this as a reference tool.

10 Next slide. Okay. With respect  
11 to causation, next slide, I have brought in here a  
12 series of charts from the attachment to our first  
13 report where we sort of lay out how we look at the  
14 problem and determine the harm caused to Mesa.

15 So the first point gives you the  
16 provincial rankings. I have heard in the hearings  
17 there's been some confusion about this, whether the  
18 rankings were provincial or were at the regional  
19 level.

20 Here we give you the provincial  
21 rankings the way they were actually performed, and  
22 then I am going to switch in the next  
23 slide -- sorry, go back, please. What I wanted to  
24 emphasize here is this TTD and Arran were number 91  
25 and 96, I believe, and North Bruce and Summerhill

1 were 318 through 322 or thereabouts. There were  
2 four projects associated with those.

3 And now I will look at it in the  
4 Bruce so we can understand what Mesa has alleged  
5 about being ranked number 8 and 9, and so forth.

6 Next slide. Okay. This is the  
7 Bruce region application of the provincial  
8 rankings. So at the bottom, I keep the provincial  
9 rankings numbered as they were at the provincial  
10 level, but take out all the projects that weren't  
11 in the Bruce region.

12 So you can see on the left you see  
13 the orange projects are the west of London. The  
14 blue projects were FIT-contracted capacity. You  
15 have some other projects there, and then you have  
16 TTD and Arran showing up down the chain a little  
17 bit, and then Summerhill and North Bruce.

18 You see in the actual scenario,  
19 with only 750 megawatts of transmission, none of  
20 the projects obviously got FIT contracts.

21 Next slide. Turning to the GEIA  
22 counterfactual, we then take away the breach,  
23 which is the 500-megawatt allocation of  
24 transmission capacity to the Korean Consortium. So  
25 you now have, at that dotted brown bar, a

1 1,250-megawatt available transmission capacity.

2 And as you can see, TTD and Arran make the cut and  
3 get FIT contracts in that scenario, but Summerhill  
4 and north Bruce did not.

5                   Next slide. In the next scenario,  
6 for the connection point change window, we don't  
7 adjust the transmission capacity, because we're not  
8 assuming that breach, but we do remove the west of  
9 London projects that came in and, as we've heard,  
10 allegedly bumped out TTD and Arran and the Mesa  
11 projects.

12                   So what happens there, when you  
13 remove the connection change projects, is that TTD  
14 and Arran fall down below the 750-megawatt  
15 available capacity and get contracts, but  
16 Summerhill and North Bruce do not.

17                   Next slide. Finally, we've then  
18 combined both of those breaches, the GEIA breach  
19 and the connection point change window, so that you  
20 have the additional transmission capacity, as well  
21 as the removal of the west of London projects, so  
22 you now have 1,250 of transmission.

23                   And in that scenario, as well, TTD  
24 and Arran both get FIT contracts, but it is not  
25 quite enough to get contracts for Summerhill and



1 North Bruce, which are still well above the cut.

2                   Next slide. With respect to  
3 domestic content and the use of the allegedly more  
4 efficient turbines, we simply couldn't get  
5 comfortable that those damages were not  
6 speculative. We did a fair amount of independent  
7 research and evaluation on this, and what we found  
8 is there were a bunch of assumptions built into the  
9 assumption of damages.

10                   Those were that the turbines were  
11 economically less efficient, that the turbines were  
12 available at economically beneficial prices, that  
13 the turbines were not compliant with domestic  
14 content -- sorry, the larger turbines were not  
15 compliant with domestic content.

16                   And, therefore, Deloitte concludes  
17 the economic impact should be factored into the  
18 base analysis, which includes the GEIA terms and  
19 benefits.

20                   In our analysis, counter factual  
21 removal of the domestic content requirements  
22 does not confer FIT contracts without other  
23 violations.

24                   So standing alone, it doesn't  
25 matter if you have these domestic content

1 requirements on their own, because there is no FIT  
2 contracts. That's the actual scenario that I  
3 showed earlier.

4 But if you assume other breaches,  
5 as well, and then compound with the alleged  
6 domestic content violation, we had some other  
7 concerns about whether there was actually, in the  
8 real world, any caused harm, harm caused. And  
9 those were because the smaller turbines may have  
10 been more efficient economically, and more  
11 appropriate for the local wind regime.

12 This gets fairly technical. I am  
13 sure we can talk about it. The larger turbines, in  
14 our research, may not have been available at  
15 beneficial prices. We haven't seen any evidence  
16 that they were. And the larger turbines may have  
17 actually complied with domestic content. Again, we  
18 talked about that somewhat in with the fact  
19 witnesses.

20 So those were the kinds of  
21 information we reviewed. As a result, we conclude  
22 there was no harm caused and the damages would be  
23 speculative.

24 Next slide. With respect to the  
25 GE deposit, just to summarize, this is a chart that

1 comes from our second report, I believe it is. But  
2 the bottom line -- and I won't go through it,  
3 because this is something that's been talked about  
4 at great length in terms of the history of the MTSA  
5 and its various amendments. All this does is put  
6 this on a chronology, map it against some of the  
7 various projects we have been talking about in the  
8 Mesa portfolio, and look at the impacts.

9 But the bottom line is that we  
10 didn't find that the Mesa MTSA -- sorry, that the  
11 Ontario breaches caused Mesa to sign the original  
12 MTSA to incur the turbine deposit or to forfeit the  
13 deposit. So we couldn't establish in our minds a  
14 direct causal link between that alleged harm and  
15 the breaches in Ontario.

16 Next slide. Finally, turning to  
17 quantum, there's been a lot of discussion of  
18 valuation dates. I won't repeat the Deloitte  
19 assumptions. Those have been summarized very well  
20 by Mr. Low in the prior session.

21 Just a few comments on those.  
22 Regarding Articles 1102 and 1103 and the September  
23 17th date, our view was that publicly reserving  
24 transmission for the Korean Consortium in  
25 accordance with the terms of the GEIA caused no

1 immediate or direct harm to Mesa.

2                   And as you see, in our assumption  
3 we assumed July 4th, the date that the FIT  
4 contracts were not awarded, is the date the harm  
5 was actually crystallized and became apparent to  
6 Mesa.

7                   For Article 1105, the December 21  
8 date -- and I think there was some discussion about  
9 that and which day should be appropriate, but,  
10 anyway, the lower ranking did not result, in our  
11 view, in the loss of a FIT contract, and, as a  
12 result, no harm was caused.

13                   It was the beginning, perhaps, of  
14 the harm, but the harm was actually crystallized on  
15 July 4th, in our view.

16                   Then finally, with 1106, as I've  
17 said, we were unclear there was actually any harm  
18 caused at all, so certainly not on August 5th,  
19 2010, because there was no harm, in our view, or at  
20 least the harm would be speculative to conclude.

21                   Next slide. There's been a lot of  
22 discussion of the cost of capital in an effort to  
23 be helpful and sort of put the major components of  
24 this down on paper. We have mapped ours against  
25 Deloitte's and provided some comments on the

1 differentials.

2                   There are differences both in the  
3 cost of equity and the cost of debt. That's a  
4 little more complicated than I can summarize in an  
5 introduction, but I would only say that it does  
6 come from my experience working with development  
7 projects that are in the early stages of  
8 development or the middle stages of development,  
9 and valuing development projects that had been  
10 bought and sold between developers, that I assume  
11 that a higher discount rate, and particularly a  
12 higher cost of equity, is appropriate at this stage  
13 of development.

14                   Again, I'm not assuming, in my  
15 calculations, any benefit from the terms of the  
16 GEIA. So the lower-risk profile that Mr. Low  
17 referred to, the various facilitation benefits and  
18 so forth, don't factor into my calculation here at  
19 all.

20                   And I do believe these are  
21 reasonable figures in light of where the Mesa  
22 projects would have actually have been on July 4th,  
23 2011 had they received FIT contracts.

24                   This, I should emphasize, is only  
25 focussed on TTD and Arran, of course, because we

1 don't value Summerhill and North Bruce for the  
2 reasons discussed.

3                   And next slide, last slide. This  
4 is a summary from our second report of the  
5 differences between us and Deloitte in the final  
6 results. There are a lot of footnotes -- we can  
7 talk about those -- simply to clarify some of the  
8 points.

9                   But the main points I would draw  
10 your attention to are -- and I should also say this  
11 table does not include any sort of interest  
12 damages. We understand that's a matter of dispute,  
13 and we're not calculating those at this time.

14                   Deloitte's number was on the order  
15 of \$657 million for all damages. As Mr. Low said  
16 correctly earlier, the difference between us on the  
17 matters of causation is about \$500 million, so that  
18 is the MOE substantial difference. So our damages  
19 without the causation problems would be about \$156  
20 million.

21                   The discount rate accounts for  
22 about \$120 million of damages. The GE turbine  
23 treatment -- this is not the turbine agreement  
24 itself and the causation issues, but some things  
25 about how the payments work under the turbine

1 agreement -- was about 12 million, and the  
2 valuation date it was about \$42 million.

3                   These are not additive, because  
4 we're running each of these individually through  
5 the pro forma, through the project models, to  
6 determine damages. So it doesn't lend itself to a  
7 strict calculation on the right-hand column.

8                   And I will leave it there for now.  
9 We can go into the details in the rest of the time.  
10 Thanks very much.

11                   Q. Thank you, for that summary,  
12 Mr. Goncalves. Do you have any corrections to make  
13 to your report at this time?

14                   A. I do. There are two that I  
15 would like to make to my second report. First, on  
16 page 12, paragraph 40(b) we mistakenly  
17 wrote -- this is something of a typographical  
18 error -- the economic development adder of 0.27  
19 percent. That is obviously incorrect. It should  
20 read 0.27 cents per kilowatt-hour. So that is a  
21 correction we wanted to make.

22                   And the next one regards what  
23 Mr. Low discussed earlier at paragraph 154(e). We  
24 referred to -- in an effort to correct something  
25 Deloitte had done in its reply report previously,

1 we referred incorrectly to the pre-tax unlevered  
2 cost of equity, but the words "cost of equity" in  
3 the second and third lines of that paragraph, and  
4 actually the second, third and fourth -- no just  
5 the second and third, should be changed to IRR.  
6 He's correct the reference is to IRR.

7 I would also like to note that  
8 this is -- I think the error arose -- it was our  
9 mistake, that the error arose, because he referred  
10 at paragraph 7.4(e) and 7.6 of his report to the  
11 Scotiabank numbers and called it the return on  
12 equity, and we picked it up and incorrectly  
13 switched to cost of equity, because that is, after  
14 all, what we're discussing, and didn't look  
15 carefully back to the fact that it references an  
16 IRR.

17 I heard his comments earlier  
18 today. I will be happy to address them. He's  
19 correct an IRR is different than a cost of equity,  
20 and I don't have any issue with those comments.

21 Q. Okay. Do you have any  
22 specific responses to make as a result of Mr. Low's  
23 testimony this morning?

24 A. Well, there's a number of  
25 things that I would like to address, but I



1 think -- how much time do I have?

2 Q. Well, you can -- we've got  
3 time, but we do have to get to cross-examination.

4 A. Let me just maybe -- there's  
5 a lot of detail in this discussion. So let me  
6 maybe just focus on what I think are major points  
7 and those would be -- I think I've addressed  
8 causation adequately in my summary, so I won't  
9 repeat that, but I do think that is the biggest  
10 difference and a very, very important distinction.

11 I think with respect to the  
12 discount rate, which is the second-biggest issue in  
13 terms of differences between us in quantum, I know  
14 that we're different kinds of experts, and I don't  
15 have the credentials he has as a CPA, but what I  
16 have is a lot of experience in the trenches or in  
17 the field, if you will, dealing with developers and  
18 business people on valuing assets, arranging  
19 transactions, doing due diligence for banks  
20 regarding transactions.

21 So these issues are familiar as an  
22 energy expert. And what I would say is that an 11  
23 percent cost of capital, at this stage of a project  
24 where I think the Mesa projects would actually have  
25 been on July 4th, 2011, is far too low.

1                   And the reason is because  
2       developers who buy projects at that stage of  
3       development or value projects or evaluate returns  
4       at that stage of a project are looking at all of  
5       the risks that are ahead of them for permitting,  
6       financing, construction, to get to the point of  
7       operations, and that's really -- I have written a  
8       fair amount about that.

9                   I have provided some background in  
10      my reports on that. But that's really the core of  
11      the issue between us on the discount rate.

12                  I also have several more technical  
13      issues with the proxy group he selects to calculate  
14      his cost of equity. His statements that Mesa Power  
15      would have been less risky than that proxy group, I  
16      view it as exactly the opposite. I think Mesa  
17      Power would have been more risky than the proxy  
18      group he selects for a variety of reasons.

19                  Those have to do with the  
20      geography of the other parties being largely in  
21      Europe, the regulatory environments and the  
22      benefits they enjoyed, the debt-to-equity ratios on  
23      their balance sheets which were better than 80/20.  
24      Cost of equity of course also reflects somewhat the  
25      leverage in the project. At 80/20 for the Mesa

1 projects, the leverage is quite high, at least  
2 compared to the proxy group.

3                   It is also high compared to -- he  
4 cited the OPA analysis. It is high compared to the  
5 70/30 debt-equity ratio assumed in the OPA  
6 analysis. Additionally he focusses on their cost  
7 of equity, but doesn't take into account their cost  
8 of debt, which was 7 percent higher than ours and  
9 far higher than his. He doesn't look at their  
10 WACC, which would have been higher still than his.

11                   And, finally, on the OPA analysis,  
12 he doesn't -- I heard what he said about that it  
13 would have taken into account all of this  
14 development risk, but I fully disagree. That was  
15 essentially the equivalent of a regulated rate of  
16 return for an operating project to determine the  
17 price that they would get from the FIT contract  
18 escalated for inflation over a period of time.

19                   And that presumes that the project  
20 is in operation. It would be applicable from the  
21 first date of operation through the end,  
22 presumably, or until regulatory change.

23                   Whereas when you're valuing a  
24 project two or three years before operation, at  
25 least a couple of years before operation, there's

1 several risks ahead that the equity investor needs  
2 to take into account. And I have tried, in the  
3 analysis we did, to capture those kinds of risks,  
4 the fact that the equity was only 20 percent of the  
5 capital structure, therefore having greater risk  
6 than on a 70/30 or 60/40 capital structure, and I  
7 think this is the other main area of difference  
8 between us.

9 Q. Okay, Mr. Goncalves, I just  
10 have two things mostly for the record. You  
11 mentioned the word "WACC". Can you just for the  
12 court reporter spell out that acronym?

13 A. It is simply a reference to  
14 the weighted average cost of capital.

15 Q. Okay. And I think I saw the  
16 Members struggling a little to write, so I would  
17 remind you to slow down a little bit.

18 A. I will do my best.

19 Q. With that, I will present  
20 this witness for cross-examination, Madam Chair.

21 THE CHAIR: Thank you. Can I give  
22 the floor to Mr. Appleton?

23 CROSS-EXAMINATION BY MR. APPLETON AT 2:32 P.M.:

24 Q. Okay. Let me check the  
25 technology before we go. You see the challenges we

1 have? We're on? Can you hear me? Yes? No? Can  
2 you hear me now? Yes. Excellent.

3 Well, good afternoon,  
4 Mr. Goncalves. You know that we don't have a lot  
5 of time today, so let's just get started. There  
6 should be a binder in front of you that we have  
7 provided.

8 Let's talk a little bit about  
9 qualifications. With respect to this claim for  
10 Canada, it's fair to say you're the only damages  
11 expert witness?

12 A. That's correct.

13 Q. Yes. And you're just a  
14 damage witness, sir; right? You didn't go beyond  
15 the area of damages in your report?

16 A. I frequently serve as both  
17 damages and/or industry expert. Certainly in some  
18 of my analysis on causation and discount rate,  
19 there is an element of my industry expertise coming  
20 through, but I am functioning here as a damages  
21 expert, yes.

22 Q. Right. For this report  
23 you're a damages expert, not something else;  
24 correct?

25 A. Correct.

1 Q. Right. Now, your full CV is  
2 attached to your report; correct?

3 A. Correct, mm-hm.

4 Q. So I am going to run through  
5 a few points?

6 A. Sure.

7 Q. You have a BA in  
8 international relations and a master's from the  
9 School of Advanced International Studies at Johns  
10 Hopkins; correct?

11 A. Mm-hm.

12 Q. You mentioned you were a  
13 different kind of expert from Mr. Low; right?

14 A. Correct.

15 Q. Right. You don't have a  
16 degree in business?

17 A. No. I have a degree in  
18 international economics.

19 Q. I like the School of Advanced  
20 International Studies. Many people at the American  
21 Society of International Law go there. We train  
22 many great diplomats there. It is a wonderful  
23 program, but your degree is not in business, as I  
24 said.

25 Are you recognized as a member of

1 any organization that certifies business valuator?

2 A. No, no certification in that  
3 regard.

4 Q. Do you have any articles in  
5 economics journals?

6 A. I've written for several  
7 publications. I wouldn't call them economic  
8 journals. I have an article coming out in the  
9 Energy Bar Association.

10 Q. I understand, but my question  
11 was about economic journals?

12 A. No.

13 Q. Are you a qualified  
14 accountant?

15 A. No.

16 Q. Do you have an accounting  
17 degree?

18 A. No.

19 Q. Do you have a law degree?

20 A. No. On those last two  
21 questions, let me add although there's no degree, I  
22 was trained in all of these matters at an  
23 investment bank as a part of the training program  
24 for financial association.

25 Q. So I see that the training

1 program gave you training in law?

2 A. No. I didn't say that.

3 Q. You said the last two. I  
4 will check that.

5 A. Okay, sorry.

6 Q. I asked you about law, sir,  
7 and accounting.

8 A. I was trained in accounting,  
9 analytical accounting, corporate finance, financial  
10 analysis. We had various modules in our training  
11 program that included professors coming in from  
12 what Harvard, Chicago, Rice, and various  
13 universities to train the bankers on the job.

14 Q. How does that answer my  
15 question if you have an accounting degree? Did  
16 they give you a degree?

17 A. I was simply adding  
18 information to answer your question.

19 Q. I can see that, but you  
20 didn't answer my question.

21 A. I answered your question. I  
22 do not have an accounting degree.

23 Q. Thank you.

24 MR. SPELLISCY: Just to interject,  
25 and this can come out of my time, he did answer the



1 question. It is clear. It says "no" in the  
2 transcript. I think Mr. Appleton needs to respect  
3 the right of the witness to give some context and  
4 some qualifications since he is asking about  
5 qualifications.

6 MR. APPLETON: That is completely  
7 improper. The question was quite direct. He was  
8 capable of answering it.

9 MR. APPLETON: Do you have -- are  
10 you a lawyer? Do you have an accounting degree?  
11 And he told us that he went to --

12 THE CHAIR: I don't think we need  
13 to belabour this. We understand what your  
14 background is.

15 BY MR. APPLETON:

16 Q. Okay. So you haven't been  
17 recognized by any professional body that certifies  
18 damage valuers and business valuers; correct?

19 A. Correct.

20 Q. In how many hearings have you  
21 testified where you personally have calculated lost  
22 profits?

23 A. A couple.

24 Q. Would you tell us?

25 A. I haven't counted them, but I

1 have been involved in six different hearings, and I  
2 think there were two where there were damages.

3 Q. But I didn't ask about  
4 whether there were damages. I asked where you  
5 personally calculated them, sir.

6 A. There were actually others  
7 where I calculated damages, but I wasn't involved  
8 in giving the testimony.

9 Q. Yes?

10 A. So does that answer your  
11 question?

12 Q. No, my question was quite  
13 specific. How many hearings have you testified in  
14 in which you have personally calculated the lost  
15 profits?

16 A. Two.

17 Q. Two. Do you normally do  
18 damage valuations, sir?

19 A. It is a part of what I do in  
20 both commercial and investment disputes.

21 Q. Okay. I will try this again.  
22 Do you normally do damages valuations?

23 A. What do you mean by  
24 "normally"?

25 Q. For example, we heard from

1 Mr. Low that he's done -- I can't remember -- 60  
2 was the number? There were 60 disputes.

3 A. I heard that, yes. I've  
4 worked with many individuals like Mr. Low in my  
5 career, and I am aware there are people who do it a  
6 lot more than I do. As I stated, it is something I  
7 have done more recently in addition to the other  
8 things I do in my profession.

9 Q. Okay. Let's talk about your  
10 experience in the energy sector. It is set out in  
11 your CV; correct?

12 A. Absolutely.

13 Q. Is this a complete listing?

14 A. I am sure there is a few  
15 things missing, but it has several of the -- it  
16 certainly has a complete listing of my employment  
17 history, and it must also have a relatively  
18 complete history of projects I have worked on.

19 I'm always aware that there are  
20 some that I forget to put in there, but they should  
21 be mostly be in there.

22 Q. Before you were engaged by  
23 Canada on this Mesa claim, did you have any  
24 specific experience with wind power or the FIT  
25 program?

1                   A.    The FIT program, no.  With  
2    respect to wind, and I think this actually might be  
3    one that is not in my CV, but I was an advisor to a  
4    California wind company years ago in their efforts  
5    to set up a joint venture in eastern Europe, in the  
6    early days after the wall came down, and there was  
7    a lot of change in the eastern European market.

8                    So I attended several trade  
9    conferences with them.  I helped them negotiate the  
10   terms of a joint venture with the east European  
11   company for the manufacture of wind turbines and  
12   development of boutique wind farms in and around  
13   central and eastern Europe.

14                  Q.    Did they have a feed-in  
15    tariff program?

16                  A.    They didn't at that time, no.

17                  Q.    Which country were you  
18    involved in, sir?

19                  A.    That was Germany.

20                  Q.    In Germany?

21                  A.    Sorry, Germany had a feed-in  
22    tariff program.  The markets they were aiming at in  
23    eastern Europe did not.

24                  Q.    It's very important that you  
25    listen carefully to my question so we get a very

1 clean transcript.

2 A. Sure.

3 Q. All right. You agree with me  
4 about that?

5 A. Sorry, agree with what?

6 Q. You agree it is important?

7 A. Please restate so I know what  
8 I'm agreeing with.

9 Q. You would agree with me it  
10 would be important to have a clean transcript?

11 A. Yes, I agree with you.

12 Q. We wouldn't want people to  
13 misunderstand us, what we're both talking about.

14 A. I agree.

15 Q. Are you an expert on  
16 regulatory systems in Canada?

17 A. No, I'm not.

18 Q. Are you an expert about  
19 regulatory systems in Ontario?

20 A. No.

21 Q. Okay. Now, sir, you had a  
22 section in both of your reports about disclosure.  
23 Do you remember this?

24 A. Vaguely, yes.

25 Q. Okay. So have you made all

1 of the disclosures to the Tribunal in the  
2 disclosure section, sir?

3 A. As far as I know.

4 Q. Isn't it true, sir, that  
5 you're acting as a valuation expert in another  
6 NAFTA case for Canada?

7 A. Yes, that's correct.

8 Q. And did you disclose that in  
9 your report, sir?

10 A. No.

11 Q. You did disclose this on your  
12 website, didn't you?

13 A. I don't think so.

14 Q. We can take you to it if  
15 you --

16 A. It's possible.

17 Q. Wouldn't you think it would  
18 be relevant to disclose to the Tribunal if you have  
19 repeated engagements from the same party?

20 A. It didn't cross my mind,  
21 honestly.

22 Q. But you said in your  
23 disclosure statement, sir, the first time that you  
24 had no relationship prior to this with the  
25 Government of Canada.

1                   A.    Well, this is the first one.

2    I think -- let's go, please, to the statement.

3                   Q.    Sure.  Let's look at your  
4    first report.  That's fine.  Your first report, and  
5    let's look at the disclosure section.  It's right  
6    at the front.  It's your report.  I am sure you can  
7    find it.  Then we will go to exactly the same  
8    section in the second report.

9                   A.    Yes.  So what this says is  
10   that:

11                         "I confirm I am not aware of  
12                         any issue that would  
13                         constitute a conflict of  
14                         interest or detract from my  
15                         providing a wholly  
16                         independent opinion in  
17                         relation to this matter.  
18                         Additional disclaimers or  
19                         disclosures are provided in  
20                         attachment 2."

21                         Which is where?

22                   Q.    Okay.  Perhaps you might look  
23    at the section below that, sir, on page 15, which  
24    is started disclosure of interests.  You see the  
25    numbers 3, 4. 5.  Number 3 you see it says that you

1 confirm you're not aware of any issue causing a  
2 conflict. You see that?

3 A. Right, correct.

4 Q. Number 4, what you didn't  
5 read out, you can confirm --

6 A. Sorry, where are you looking?  
7 I see 5, 6, and 7.

8 Q. You do not see 3, 4, 5 and 6?

9

10 A. Those are very different  
11 paragraphs. Sir, are we talking about the same  
12 report?

13 Q. Perhaps I am looking at the  
14 second report. Let me just -- I'll take it back.  
15 So the attachments to the February 28th report.  
16 That's the first report, or is that the second  
17 report? Let's just look. That's the first report  
18 in the attachments.

19 I'm sorry, I find your numbering  
20 system quite confusing, sir, just so you  
21 understand, because you have three reports. You  
22 put various things in various sections.

23 It is called "disclosures", and  
24 the first page is called "attachments", and it  
25 should be in tab B of the binder. Why don't we



1 just go to the binder?

2 A. Page 15; correct?

3 Q. Yes, sir.

4 A. Yes.

5 Q. It says here, number 4, that

6 "he", and I assume "he" is you, sir:

7 "... can confirm he has not  
8 previously been instructed or  
9 retained by either the  
10 claimant or respondent."

11 A. Correct.

12 Q. And, in addition, he has not  
13 had previous engagement by Appleton & Associates?

14 A. Correct.

15 Q. And you have not been  
16 instructed by any member of the arbitration  
17 tribunal, including Professor Gabrielle  
18 Kaufmann-Kohler, The Honourable Charles M. Brower,  
19 or Toby Landau, Q.C., but you have appeared before  
20 Judge Brower before?

21 A. That's correct.

22 Q. You have made that disclosure  
23 because you thought it was important that everyone  
24 that sees your report understand your relationship;  
25 correct?

1                   A.    This is standard feature of  
2   our reports, yes.

3                   Q.    So let's turn, then, if you  
4   don't recall what you said in your second report.  
5   We will go to your second report.  And in the same  
6   section, in the same type of report -- so I believe  
7   it will be at tab -- I imagine it would be at tab E  
8   in the section called "Disclosures".

9                   It might be in the first one.  
10   Sorry, I thought we were going to just get some  
11   agreement on this.  There is a section on  
12   disclosures.  It is actually in your second report.  
13   It is in the -- which is at tab D.  It is on page 2  
14   under the title "Disclaimer and Disclosure", and  
15   this is June 27th of 2014.

16                  A.    You're talking about 1.3 on  
17   page 2 of my second report?

18                  Q.    Yes.  We'll make sure the  
19   Tribunal members can get there, sir.  So let's give  
20   them a moment.

21                  THE CHAIR:  Second report?

22                  MR. APPLETON:  Page 2.  It is tab  
23   D of the binder.  Tab D, page 2, 1.3, disclaimers  
24   and disclosure.

25                  MR. BROWER:  There is 1.1.

1                   MR. APPLETON: No, 1.3 at the  
2 bottom of the page, disclaimers and disclosure. We  
3 will wait for Judge Brower to get there and I will  
4 be turning to 1.3. You can read that while we're  
5 waiting. You're there, Judge Brower?

6                   MR. BROWER: I've got it.

7                   BY MR. APPLETON:

8                   Q. So here, can you show me  
9 where you disclosed this new engagement with the  
10 Government of Canada?

11                  A. Of course it's not there.

12                  Q. Did you not think that would  
13 be important, or would you like -- or were you not  
14 engaged at that time?

15                  A. You know, I don't recall the  
16 date of engagement. It is possible that between  
17 the first report and the second report we became  
18 engaged on the second matter.

19                         It is probably an oversight not to  
20 have put it in there, in hindsight, that there was  
21 something that had come up. I would have been more  
22 than happy to disclose it, and I do not view it as  
23 a conflict of interest.

24                  Q. Okay. So the answer is you  
25 didn't disclose it, and we know you put on your

1 website the following information, and I can take  
2 you there if you don't believe me, but it says:

3 Confidential matter:

4 "Lead damages and industry  
5 expert for two investment  
6 disputes regarding wind power  
7 investment projects in North  
8 America. Each of the  
9 UNCITRAL disputes was argued  
10 under Chapter Eleven of the  
11 investment provisions of the  
12 North American Free Trade  
13 Agreement and concerned  
14 allegations regarding fair  
15 and equitable treatment  
16 amongst other matters under  
17 the treaty."

18 So you thought it was important  
19 enough to go on the website?

20 A. I think that might show up on  
21 a CV.

22 Q. Does it show up on your CV  
23 here, sir?

24 A. Well, there is a timing  
25 issue; right?

1 Q. But --

2 A. This was submitted at the  
3 very beginning, before --

4 Q. We will move along. We all  
5 know why we're here.

6 Now, Mr. Goncalves, let's look at  
7 the foundation of your report, sir. You have  
8 stated in paragraph 3 of your second report that  
9 you were asked to assume that the alleged  
10 violations were in fact inconsistent with Canada's  
11 treaty obligations; correct?

12 A. Which paragraph? That's  
13 correct, though.

14 Q. All right. So, in fact,  
15 actually before we go there, I think we should  
16 probably turn to your instructions. Are you in the  
17 second report?

18 A. I am.

19 Q. So let's look at section 1.1  
20 in the second report.

21 A. Yes.

22 Q. This sets out all of your  
23 instructions in this matter, sir?

24 A. Say again?

25 Q. I'm sorry. It's going to be

1 hard to hear. Does this set out all of your  
2 instructions in this matter, sir?

3 A. That's correct, yes.

4 Q. Now, but in your engagement  
5 letter, sir, you were instructed differently,  
6 weren't you?

7 A. I don't recall that.

8 Q. Did you look at your  
9 engagement letter before you came today?

10 A. No, I didn't.

11 Q. I see. Well, we'll go show  
12 you and maybe that will refresh your memory.

13 Now, you just told us you're the  
14 lead damage witness; correct?

15 A. Sorry.

16 Q. You told us you were the lead  
17 damage witness?

18 A. Yes.

19 Q. You told us you didn't go  
20 beyond damages in your report?

21 A. No, I didn't say it exactly  
22 that way, but...

23 Q. Did you go beyond --

24 A. I said I'm the lead damages  
25 expert.

1                   Q.    Did you go beyond the area of  
2    damages in your report?

3                   A.    I stated earlier that I have  
4    industry expertise and that that informed my view  
5    of damages, damage assumptions and causation, and  
6    so forth.  Is that going beyond damages?  I think  
7    it is part and parcel of estimating damages.

8                   Q.    The reason I ask, sir, is  
9    that your website says you're an industry expert in  
10   this dispute.  That's what raises this question.  
11   It says you're damages and industry expert.

12                  A.    I just said the same thing.

13                  Q.    I see.  Well, that's not  
14   exactly what you said.  Now, doesn't your original  
15   engagement letter also engage you as a damages and  
16   industry expert?

17                  A.    I don't recall, as I said,  
18   but it would make sense that it does.

19                  Q.    Can we go into confidential  
20   mode for a moment, please?  I am going to put  
21   something on the screen.  There are two versions of  
22   the engagement letter.  One is confidential and one  
23   is not.

24   --- Upon resuming confidential session at 2:50 p.m.  
25         under separate cover now deemed public

1 BY MR. APPLETON:

2 Q. Can we pull up the  
3 confidential version of the engagement letter? It  
4 is in the binder, I believe at tab G. Let me make  
5 sure I am right. Yes. And, actually, if you can  
6 just look at page 1. You can look at it, too, sir,  
7 page 1 in the binder in front of you.

8 A. In the binder?

9 Q. Yes, in the binder at tab G.  
10 And if we look at the bottom of the page, it says  
11 that you have been compensated up to \$1 million for  
12 this engagement. Do you see that, sir?

13 A. Yes.

14 Q. I am going to go back to the  
15 public so the public can hear, and we're going to  
16 turn to tab H. So tell me when we can go public?

17 Q. Now we're going to go back to  
18 tab H, which has some of that material that has  
19 been removed.

20 Now, sir, weren't you required to  
21 provide alternative views as part of your  
22 engagement?

23 A. What are you referring to?

24 Q. Well, we can look directly,  
25 actually. I need to pull up the next book here.



1                   If we look at -- I believe it is  
2                   on page 7. Here, page 7. If we look at that, it  
3                   says -- you can pull it up on the screen, if you  
4                   like:

5                   "The contractor must also  
6                   present an alternative view,  
7                   if any, and must present a  
8                   written final report with its  
9                   findings which is to be  
10                  included in Canada's counter  
11                  memorial and rejoinder as an  
12                  expert report."

13                  And your report was put into both  
14                  the rejoinder report and in the counter memorial,  
15                  wasn't it, sir?

16                  A.    Correct.  Yes.

17                  Q.    Do you see that?

18                  A.    I see, yes.  I am reading the  
19                  language there.

20                  Q.    Is this not the document that  
21                  instructs you?

22                  A.    Yes.

23                  Q.    Canada provided it as it was  
24                  required to here, sir.

25                  A.    Say again?

1 Q. Canada was required to  
2 provide it here. That's why we have it.

3 A. I understand.

4 Q. Yes. It also says:  
5 "The contractor will also be  
6 required to advise on and  
7 will provide expertise on the  
8 regulatory side of the  
9 Ontario power market."

10 Correct?

11 A. Correct.

12 Q. What you told us is you had  
13 no expertise in that; right?

14 A. I did.

15 Q. Yes. And it says -- oh, this  
16 is very interesting. Just while we're here, it has  
17 a little note at the bottom of that paragraph:

18 "Please note that if this  
19 case were appealed, called a  
20 set aside proceeding under  
21 NAFTA, then this would likely  
22 take place in an Ontario  
23 court on very narrow grounds  
24 for which our expert witness  
25 would not be required to

1 appear."

2 That's a legal matter. You don't  
3 have to comment on that. I just found that  
4 surprising. Let's go to part (5) below,  
5 "Tasks/technical specifications".

6 Can we look at (b) here? It says  
7 that your job here, (a) says you are to provide an  
8 expert report.

9 A. Where are we?

10 Q. Let's go to (a)?

11 A. Sorry, (a) where?

12 Q. Five; at 5.1(a).

13 A. 5.1(a)?

14 Q. Do you see it?

A. Yes.

15 Q. It says that these are your  
16 technical specifications for this report. You are  
17 to prepare an expert report commenting on the  
18 claimant's expert reports and addressing the  
19 conclusions and presenting an alternative view, if  
20 any, of the damages valuation. Do you see that?

21 A. I do.

22 Q. And then it says in (b)

23 "Advise Canada and provide  
24 expert evidence on

25 Ontario's regulatory

1                   system with respect  
2                   respect to electricity and  
3                   the FIT program."

4                   A.    Yes.  I need to comment on  
5                   this.  I believe at the time we were -- when we  
6                   signed this contract, we were discussing a  
7                   subcontract with an Ontario expert who was going to  
8                   be a part of our team on this.

9                   And that changed along the course  
10                  of the engagement, but that's --

11                  Q.    So did you receive other  
12                  instructions, sir, that we haven't seen?

13                  A.    Did I what?

14                  Q.    Other instructions that haven't  
15                  been produced?

16                  A.    Not that -- subsequent to  
17                  this?

18                  Q.    Yes.

19                  A.    There were discussions along  
20                  the way about the work and the scope, just like  
21                  with any client at any time.  But I'm just  
22                  referring back to when we set this up, we were  
23                  talking about engaging a subcontractor in Ontario.

24                  Q.    I understand.  I'm just  
25                  trying to understand the nature of what you have

1       been engaged to do so the Tribunal understands; right?

2                     A.    That's fair.

3                     Q.    Of course it's fair.  It is  
4       absolutely essential that we disclose this  
5       information.  So the question here is:  You didn't  
6       disclose this information that is in this  
7       engagement letter in your report?  We see that,  
8       correct?  Can you show me where you talk about  
9       those points, the requirement --

10                    A.    No.  We summarized the --

11                    Q.    You didn't say alternative  
12       views, did you?

13                    A.    We were asked to provide an  alternative view of  
14       damages from the view that  
15       Deloitte prepared as independent experts in the  
16       matter.

17                    Q.    And you were paid up to a  
18       certain sum to do that, weren't you?

19                    A.    Sorry?

20                    Q.    You were paid up to a certain  
21       sum to do that alternative view, weren't you?

22                    A.    Well, if you read the  
23       contract closely, we were paid on a time-and  
24       materials basis for the work we did, just like with  
25       every other client.

1                   Q.    I am trying not to refer to  
2    the confidential information is what I'm saying.

3                   A.    I see.

4                   Q.    So let's talk about your  
5    alternative view.  Let's turn to that.

6                   A.    Absolutely.

7                   Q.    Okay.  So let's go and look  
8    at paragraph 42 of your second report.

9                   A.    Sorry, I didn't hear your  
10   paragraph.

11                  Q.    Actually, let's look at  
12   paragraph 3.  Paragraph 3 says that you were asked  
13   to assume that the alleged violations were in fact  inconsistent with  
14   Canada's treaty obligations.

15   Does that sound about right to you, sir?

16                  A.    Yes.  Correct.

17                  Q.    And then at paragraph 42, if  
18   you go down to 42, it says:

19                                "We were asked to assume that  
20                                the treatment of the KC and  
21                                Mesa Power breached Canada's  
22                                MFN'S obligation under the  
23                                NAFTA."

24                  A.    Mm-hm.  Yes.

25                  Q.    Okay.  Now despite this -

1 let's turn to paragraph 28. Is this the first  
2 report or second? Let's check 28 of this report to  
3 see if it says, "Our analysis of the cause and  
4 quantum". Is that this report or the other?  
5 Sorry, I find it a little confusing.

6 A. That's correct.

7 Q. Same report. So it says:  
8 "Our analysis of the cause  
9 and quantum of damages is  
10 independent of NAFTA and  
11 based on standard practices  
12 for assessing damages in  
13 international arbitrations."

14 Do you see that, sir?

15 A. Yes.

16 Q. All right. How do you make  
17 an expert report on damages in a NAFTA case that is  
18 independent of NAFTA?

19 A. Can you repeat that, please?

20 Q. How do you make an expert  
21 report on damages in a NAFTA case that is  
22 independent of NAFTA?

23 A. It's very simple.

24 Q. Hmm.

25 A. Simply put, I look at this

1 and I have understood from my client, and from  
2 everybody in this room virtually, that the alleged  
3 breaches of NAFTA or the alleged violations  
4 constitute breaches of NAFTA.

5                   That's an assumption that we make.  
6 And based on that assumption, we set about trying  
7 to determine a counter factual to put the investor,  
8 Mesa Power, back in the situation it would have  
9 been in but for those violations, not to give it  
10 the terms and conditions in the violations, but to  
11 put it back in the condition it would have been,  
12 but for the violations. That is the core  
13 difference here.

14                   Q. I understand what the core  
15 differences are.

16                   A. And that is my view of the  
17 appropriate counter factual for determining damages  
18 based on experience in an international  
19 arbitration.

20                   Q. And you prepared your damage  
21 report on what you said were standard practices.  
22 Yes?

23                   A. Yes.

24                   Q. And these are based on  
25 standard practices in the NAFTA claims?

                  A. No. I said in international arbitration.



1                   Q.    But this is a NAFTA claim.  
2    This is international law arbitration, but it is a  
3    NAFTA claim?

4                   A.    I understand that.

5                   Q.    So your understanding of  
6    standard practice in a NAFTA case is to do a  
7    damages analysis --

8                   A.    Right.

9                   Q.    Let me finish the question,  
10   and then I will wait and listen to your answer.

11                  A.    I'm listening.

12                  Q.    So your understanding of  
13   standard practices in a NAFTA case is to do a  
14   damages analysis independent of the NAFTA; is that  
15   correct?

16                  A.    That doesn't sound right.

17                  Q.    It doesn't, I agree.

18                  A.    I am not sure I understood it  
19   fully.

20                  MR. SPELLISCY:  Would  
21   counsel -- counsel should let the witness finish  
22   his answer.

23                  MR. APPLETON:  I thought the  
24   witness was finished, but -- and I have asked the  
25   question.  I have got an answer.  I think we can

1 move along on this.

2 MR. SPELLISCY: I'm sorry, you  
3 didn't get an answer. He started his answer.

4 THE CHAIR: I think we got back to  
5 the question of what the damage compensation should  
6 do, whether it should give better terms or give the  
7 terms of better treatment or whether it should undo  
8 the harm.

9 And I understand when you say  
10 "independent of NAFTA" you are having in mind the  
11 idea of the objective of undoing the harm. Is that what  
12 you were saying?

13 THE WITNESS: That's correct.

14 THE CHAIR: So then we can move  
15 on.

16 THE WITNESS: Possibly --

17 MR. APPLETON: But I need to  
18 understand what he's doing with this, because it is  
19 a very significant assumption and divergence  
20 between the parties.

21 THE CHAIR: Fine.

22 BY MR. APPLETON:

23 Q. So, for example, you made no  
24 effort to determine what the most favourable  
25 treatment under NAFTA Article 1103 is in this case, did you?

1                   A.    Not for purposes of  
2    calculating damages.

3                   Q.    And if we were to assume for  
4    the purpose of damages that Mesa was entitled to  
5    this most favourable treatment, then your results  
6    would have to be different, wouldn't they?

7                   A.    If you were to assume that  
8    the proper approach to calculating damages for the  
9    breach was to give Mesa the terms embedded in  
10   NAFTA, then I would have to recalculate damages, yes.

11                  Q.    Yes.  You can't deny that  
12   Mr. Low's analysis of MFN damages is correct, in  
13   the event that the Tribunal determines the MFN  
14   treatment required the same benefits to be given to  
15   the claimant as those given to the Korean  
16   Consortium; correct?

17                  A.    For those NAFTA  
18   articles -- we heard a lot of discussion today  
19   about 1102, 1103, 1105, et cetera.  For those NAFTA  
20   articles that convey the MFN treatment, if the  
21   Tribunal concludes that the proper remedy is to  
22   give the benefit of the KC terms to Mesa Power,  
23   then the conceptual approach that Mr. Low takes is  
24   the appropriate one for that calculation.

25                  But I wouldn't go so far as to say

1 it's correct because, as we've discussed many times  
2 and you see in my report, we have identified  
3 several significant technical quantitative  
4 differences between our reports, including  
5 principally the discount rate. So I wouldn't go so  
6 far as to say the actual numbers are correct, if  
7 you see the distinction.

8 Q. But the conceptual approach  
9 would have to be different. That's what you have just told us?

10 A. I have.

11 Q. Yes. Now, at paragraph 42 of  
12 your second report, where we just were before, you  
13 say you were asked by Canada to assume that the  
14 treatment of the Korean Consortium and Mesa Power  
15 breached Canada's MFN obligations under NAFTA;  
16 correct?

17 A. Yes.

18 Q. But then you say at paragraph  
19 43 that this interpretation is not relevant from a  
20 damages perspective?

21 A. Correct.

22 Q. Now, I just asked you if you  
23 looked at NAFTA Article 1103, and you said "not for  
24 the purpose of calculation of damages". So why did  
25 you look at NAFTA Article 1103?

1                   A.    Well, we wanted to understand  
2    the general provisions, and of course when you  
3    read -- part of my scope was to respond to the  
4    report of Mr. Low, and his report is organized, and  
5    so forth, around the NAFTA articles.  So I wanted  
6    to understand what it says.

7                    But I didn't spend any time trying  
8    to interpret it, and I think I can help you with the  
9    prior question by simply saying we were not  
10   asked to assume at any point that -- a legal  
11   interpretation.

12                   We were not asked by counsel at  
13   any point to assume that a legal interpretation of  
14   NAFTA requires that the GEIA terms, or the terms  
15   for MFN, should be ascribed to Mesa Power.

16                   It is our view, from common  
17   practice, that the "but-for" scenario for Mesa  
18   Power is to be back in the position it most  
19   probably would have enjoyed but for the breach.

20                   Q.    But you heard from Mr. Low,  
21   in his professional opinion, that that is not  
22   correct, from his --

23                   A.    I understand his perspective,  
24   yes.

25                   Q.    Yes.  All right.  And you'd

1 agree with me the treaty obligation in NAFTA  
2 Article 1103 says that Mesa, as an American  
3 investor in Canada, is entitled to treatment  
4 equivalent to the best treatment provided to a  
5 non-NAFTA party investor like a Korean --

6 MR. SPELLISCY: That's a legal  
7 question.

8 THE WITNESS: I can't say. That is  
9 really between you and counsel.

10 MR. SPELLISCY: It is obviously a  
11 legal question that this witness is not able to  
12 answer.

13 MR. APPLETON: Let's parse it,  
14 because he actually makes determinations about  
15 issues that are just like this in his report.

16 THE CHAIR: We understand that the  
17 expert said his instructions did not include an  
18 assumption that Mesa would be given the better  
19 terms of the Korean Consortium. So he has not  
20 addressed this, and if I am -- if I am not right,  
21 you will correct me.

22 MR. APPLETON: I believe he said,  
23 We weren't asked to assume. So, therefore, it is  
24 his judgment, he says, based on standard practice.  
25 I am trying to ask him what the nature of the

1 standard practice is, and so that's what I am  
2 trying to understand.

3 BY MR. APPLETON:

4 Q. And so you haven't disclosed  
5 any basis for your standard practice in your  
6 report, have you?

7 A. No. I've stated it based on  
8 experience.

9 Q. I see. All right.  
10 Now, you agree with me that Samsung started to receive  
11 treatment from Ontario, as pleaded by Mesa, under  
12 the GEIA when it was signed in January of 2010, at  
13 least by that point.

14 A. Depending on what you mean by  
15 started to achieve -- sorry, started to receive  
16 treatment, I don't actually have a working  
17 knowledge of when they started to receive the  
18 benefits of the GEIA, but from the point it was  
19 signed, they had access to benefits.

20 Q. You have been here all week,  
21 I believe?

22 A. I have, yes.

23 Q. You have seen that there were  
24 various directives, including a directive in  
25 September of 2009 --

26 A. Correct.

1                   Q.    -- before this was signed?  
2    They gave certain priority access.  You saw that  
3    there was an MOU?

4                   A.    Mm-hm.  I am familiar with  
5    this.

6                   Q.    I am trying to stay away from  
7    the controversial issues.  In any event, by the  
8    time the GEIA is signed, it would be fair to say  
9    Samsung started to receive some treatment in  
10   Ontario?

11                  MR. SPELLISCY:  I don't think that  
12   was a question for an expert witness.  It is a  
13   question for a fact witness or it appears to be a  
14   submission by counsel, but...

15                  MR. APPLETON:  No, Mr. Spelliscy,  
16   the witness has said that he has industry  
17   expertise, and his engagement talks about industry  
18   expertise and he says he went beyond this.  So I  
19   believe it is fair for him to answer that question.

20                  MR. SPELLISCY:  I think I will ask  
21   the Tribunal here.  Industry expertise is not the  
22   same as saying he knows when Samsung started to  
23   receive treatment, which is a question of  
24   fact.  This is not a fact witness.

25                  MR. APPLETON:  Well...



1 THE CHAIR: What was the question?

2 BY MR. APPLETON:

3 Q. Would you agree with me that  
4 Samsung started to receive treatment from Ontario,  
5 as pleaded by Mesa, under the GEIA when it was  
6 signed in January 2010?

7 A. And I said in response I  
8 believe they had access to the benefits as soon as  
9 the agreement was entered. When they actually  
10 started to receive those, I just couldn't say.

11 Q. Okay, fine. Have you seen  
12 the Toronto Star article?

13 A. I recall that.

14 Q. Would that give you the  
15 information to answer this?

16 A. I don't know. Let's look.

17 Q. Okay. How about the press  
18 backgrounder? You saw that?

19 A. I recall that.

20 Q. That was January 21, 2010.  
21 Would that give you enough information to be able  
22 to answer that question?

23 A. It might. Let's look at it.

24 Q. If you like. We can pull it  
25 up.

1 A. Sure.

2 Q. I will pull that in a moment.

3 Let's go through, because it is not in the binder  
4 and I don't want to break the binder flow.

5 THE CHAIR: Yes, absolutely, it is  
6 quite the binder flow. I know that you are acutely  
7 aware of the time that passes.

8 MR. APPLETON: I am quite aware.

9 THE CHAIR: Fine.

10 MR. BROWER: That's why he's  
11 talking twice as fast as normal.

12 MR. APPLETON: Thank you, Judge  
13 Brower, for noticing.

14 --- Laughter

15 BY MR. APPLETON:

16 Q. Assuming that...

17 You told us that you're relying on  
18 experience for only using a "but-for" MFN  
19 calculation, but didn't you just say you had no  
20 NAFTA experience, Mr. Goncalves?

21 A. I did.

22 Q. Yes. Okay. So how can the  
23 assumption that MFN applies and has been breached  
24 be consistent, then, with what you say in paragraph  
25 12? We can look at paragraph 12. You say:

1                   "Mesa would not have had  
2                   access to the GEIA items for  
3                   any of its projects, but for  
4                   the violations."

5                   A.    I say this assumption  
6                   presents -- sorry, we have to refer to what we're  
7                   talking about.  I think this is an assumption  
8                   Deloitte makes that they get the benefits.

9                   This assumption presents an  
10                  inaccurate counter factual scenario for damages  
11                  analysis, because Mesa Power would not have had  
12                  access to the GEIA terms, but for the violations.  
13                  There is no realistic or probable counter factual  
14                  scenario in which that would have occurred, as  
15                  detailed in section 3.2.

16                  Q.    But you told us that --

17                  A.    That is my view.

18                  Q.    You told us if Mesa was  
19                  entitled to the better treatment under MFN, then --

20                  A.    Oh, and I will comment on  
21                  that.

22                  Q.    Why don't you let me finish  
23                  my question?

24                  A.    Please.

25                  Q.    Then we would be happy to

1 hear your comments, okay.

2 So you told us that if Mesa was  
3 entitled to the better treatment under the MFN  
4 obligation, then wouldn't Mesa have had access to  
5 treatment equivalent to that under the GEIA?

6 A. No.

7 Q. I see.

8 A. I think -- I understand that  
9 the fact that Mesa didn't have access to the better  
10 treatment is a breach of NAFTA. That's my  
11 understanding from counsel.

12 Based on that, I take a standard  
13 approach to damages to put -- as I've said many  
14 times, put Mesa back in the realistic probable  
15 scenario it would have enjoyed but for that breach.

16 Q. I see. So --

17 A. That's the bottom line.

18 Q. So under your theory, then,  
19 Mr. Goncalves, Canada can violate its MFN  
20 obligations to those who did not receive the MFN  
21 treatment to which they were entitled, and yet they  
22 are not damaged under your theory?

23 A. Say that again?

24 Q. Under your theory, Canada can  
25 violate its MFN obligations which is owed to

1 investors and investments and those who did not  
2 receive the most favourable treatments to which  
3 they were entitled are not damaged?

4 A. I didn't say that. If they  
5 didn't receive treatment that counsel or the  
6 Tribunal determines they should have had, in my  
7 view, Canada would have breached NAFTA and,  
8 therefore, damages would be due.

9 Q. So do you think MFN is for to  
10 put the person back, but putting them back means  
11 not giving them the most favourable treatment at  
12 all; right?

13 A. Putting them back in the  
14 scenario they would have had had there been no harm  
15 caused.

16 Q. But they were required to  
17 have the most favourable treatment. That is what  
18 the treaty required that they have. That's what  
19 they were supposed to do. So just to make sure we  
20 understand.

21 You say you put them back to  
22 breach. You don't put them back to where they were  
23 entitled to be. Is that what you're telling us?

24 A. It sounds like I need to be a  
25 lawyer to answer that question.

1                   MR. SPELLISCY: I am going to say  
2 the question of where they are entitled to be by  
3 the MFN clause is a purely legal question.

4                   Mr. Goncalves has explained again  
5 and again what he did, and I don't know. Maybe  
6 counsel isn't concerned about his time, but we're  
7 going over the same ground again and again and again.

8                   MR. APPLETON: Mr. Spelliscy, this  
9 is the essential question that leads to \$500  
10 million of damage.

11                  MR. MULLINS: I would ask counsel  
12 to quit trying to coach his witness while we're  
13 trying to ask questions.

14                  MR. SPELLISCY: I am pretty sure I  
15 can object. When it is a legal question the  
16 witness is not entitled to answer, counsel. So  
17 this can come out of my time. I have about seven  
18 hours, I think.

19                  So the reality is that we're  
20 trying to push through this. We're trying to get  
21 this done and we're spending time again and again  
22 coming back to legal questions that this witness  
23 has said he did not address.

24                  Counsel is testifying into the  
25 record as to what he thinks the MFN clause means.

1       That is not a question for Mr. Goncalves. He has  
2 explained what he has done. Counsel can spend the  
3 time as he wants, but every time he asks a legal  
4 question I am going to speak up.

5                   MR. APPLETON: Mr. Spelliscy has  
6 confused that the expert has given his view as to  
7 what the damages result is on the MFN clause, and  
8 to this expert, he says that you don't get the most  
9 favourable treatment; you get the least favourable  
10 treatment.

11                   And that is the fundamental  
12 difference between these reports, and I believe it  
13 is appropriate that this expert answer the question  
14 so that the Tribunal understands the basis upon  
15 which he has come to this fundamental conclusion  
16 upon which everything else sits. That is the  
17 question.

18                   THE CHAIR: Was this a conclusion  
19 of yours, Mr. Goncalves, or was this an  
20 instruction?

21                   THE WITNESS: I would like to  
22 clarify exactly how this discussion occurred  
23 between me and counsel for Canada.

24                   THE CHAIR: Yes.

25                   THE WITNESS: I looked at this

1 case independently, both before and after we were  
2 retained on this second matter, because I always  
3 look at everything independently, and it does not  
4 matter that I was retained on another matter for  
5 Canada, because it doesn't change my view.

6 THE CHAIR: That's a different  
7 issue. Let's put that aside.

8 THE WITNESS: But I wanted to say  
9 it.

10 With respect to this specific  
11 issue, I looked at this scenario. I developed a  
12 view, based on my experience with UNCITRAL  
13 proceedings and other international arbitrations  
14 under ICC, about how to look at the proper counter  
15 factual and seek to put Mesa back in the realistic  
16 position they would have been in but for the  
17 breach.

18 I discussed it with Canada,  
19 counsel for Canada, and I said: Is there anything  
20 about NAFTA that I am missing that I need to  
21 know? Because this is my first NAFTA case. My  
22 other experiences are in different types of  
23 matters.

24 And they said, No, you don't need  
25 to assume anything different about NAFTA than other



1 cases.

2 So that was an instruction, but it  
3 was also my theory to begin with, that they  
4 verified with the legal instruction.

5 THE CHAIR: So you applied as a  
6 standard for your valuation the rule that you  
7 should place the party that is harmed back into the  
8 position in which it would be had the breach not  
9 occurred?

10 THE WITNESS: Correct.

11 THE CHAIR: That is what you did,  
12 and you did not attach weight to the type of  
13 breach, whether it was 1105 or 1102 or 1103 or  
14 1106?

15 THE WITNESS: Exactly correct. My  
16 approach is the same for all of the alleged  
17 breaches.

18 THE CHAIR: Fine. I think that is  
19 clear, and the rest is legal and we will have to  
20 assess it.

21 BY MR. APPLETON:

22 Q. So just to confirm, then, so  
23 when you say that your approach is independent of  
24 NAFTA, as you answered President Kaufmann-Kohler's  
25 question, you have told us you provided no support

1 for this in your report other than your statements;  
2 is that correct?

3 A. Say that again?

4 Q. You provided no other support  
5 in your report other than your statements?

6 A. For that assumption, correct.

7 Q. Yes. Can you refer me to any  
8 generally accepted accounting principle that tells  
9 us not to follow the terms of the treaty?

10 A. No, I wasn't referring to  
11 generally accepted accounting principles.

12 Q. I can see that. Can you  
13 refer me to any text that tells us where to ignore  
14 the terms of a governing contract or the treaty in  
15 the calculation of damages?

16 A. Not sitting here today.

17 Q. And you have told us you were  
18 not instructed by your client to take this  
19 position?

20 A. My view of the appropriate  
21 way to calculate damages was confirmed by the  
22 client based on their interpretation.

23 Q. So this was just your  
24 decision?

25 A. Sorry?

1 Q. This was just your decision?

2 A. It was my view, and I checked  
3 it with counsel to make sure that it was not at  
4 odds with what NAFTA requires. So I did ask the  
5 question, to be clear.

6 I did ask the question: Is there  
7 anything different about this treaty or NAFTA that  
8 would require me or cause me to calculate damages  
9 differently than I'm accustomed to in other matters  
10 that are not under NAFTA? And the answer was, No,  
11 there's not.

12 Q. So if the Tribunal comes to a  
13 different conclusion, then the calculations in your  
14 report would have to be wrong, wouldn't they, sir?

15 A. With respect to 1102 and  
16 1103, as I have said before, the conceptual  
17 approach would need to be changed.

18 With respect to 1105, I have heard  
19 a lot of discussion here this week about what it  
20 does and doesn't require. I will leave that alone  
21 because, again, there is a lot of complex legal  
22 interpretation involved there.

23 So I would say there would be some  
24 parts of the conceptual approach that would need to  
25 be changed if you draw a different conclusion -- if

1 the Tribunal were to draw a different conclusion  
2 than I was instructed, and some parts that I think,  
3 from what I heard this week, would stand.

4 THE CHAIR: Just to clarify this,  
5 does that mean that what relates to damages arising  
6 out of breaches of 1102 and 1103 would have to be  
7 changed conceptually if we were to go along with  
8 the idea that better treatment must be accorded?  
9 However, the part of the damage computation for  
10 damages arising out of 1105 would stand according  
11 to -- in your approach? Is that what you're  
12 saying, or is it something different?

13 THE WITNESS: I think so. But as  
14 I indicated, I think I would need to think through  
15 a little bit more and receive a little more clear  
16 legal instruction than I have been able to divine  
17 from the discussions this week to answer you  
18 clearly.

19 THE CHAIR: Fine.

20 MR. APPLETON: We're done with  
21 this witness.

22 THE CHAIR: Oh, you're done with  
23 this witness?

24 MR. APPLETON: We're done. We  
25 have nothing further now.

1 THE CHAIR: Fine. Any re-direct  
2 questions on Canada's side?

3 MR. SPELLISCY: No.

4 THE CHAIR: No? Do my  
5 co-arbitrators have questions?

6 QUESTIONS BY THE TRIBUNAL 3:20 P.M.:

7 MR. BROWER: My first question is  
8 totally irrelevant to these proceedings, but since  
9 you have -- as was pointed out on page 15 of the  
10 attachments to your first report under disclosure  
11 of interests, it is on the attachments, which is  
12 tab B in my book here. See page 15? You were  
13 taken to it before, disclosure of interest, and  
14 down in (6) at the very bottom, it says you have  
15 appeared before me previously. Can you refresh my  
16 recollection as to which case it was?

17 --- Laughter.

18 MR. BROWER: Sorry about that.

19 THE WITNESS: As I recall, you  
20 were on the Tribunal for El Paso v. Macae I correct  
21 on that.

22 MR. BROWER: No. El Paso versus?

23 THE WITNESS: Petro Brass.

24 MR. BROWER: Well, I am happy for  
25 the credit, but I did not sit on that.

1                   THE WITNESS: Then I am mistaken,  
2 but I was trying to remember where it was. If I am  
3 wrong I apologize, but I think -- I thought it was  
4 that one.

5                   MR. BROWER: Maybe you dreamed it.  
6 --- Laughter.

7                   MR. BROWER: Okay, good. Well,  
8 that relieves me of any embarrassment on my part.  
9 --- Laughter.

10                  THE WITNESS: The embarrassment is  
11 entirely mine.

12                  MR. BROWER: If I could take you  
13 now to, where are we, tab D in the binder in front  
14 of you, which is your second expert report.

15                  Now I am looking at the  
16 confidential copy, but I don't think what I am  
17 looking at is confidential.

18                  MR. APPLETON: Which tab?

19                  MR. BROWER: "D". It's the second  
20 expert report, confidential version.

21                  MR. APPLETON: If I can assist  
22 you, Judge Brower, the version, if it is marked  
23 confidential, this would be Canada's designation.  
24 That is on the cover page. Then they want the page  
25 with confidential information. So if the page

1 doesn't have "confidential" marked on it, I believe  
2 that page might not be confidential.

3 MR. BROWER: It does not.

4 MR. APPLETON: Would that be  
5 right, Mr. Spelliscy?

6 MR. SPELLISCY: That is consistent  
7 with the Tribunal's procedural order. So if it  
8 doesn't have the word "confidential" on the top and  
9 there is no gray boxes in it, then there is nothing  
10 confidential on that page.

11 MR. BROWER: Well, if you can  
12 follow me in the binder on the same document, you  
13 can confirm for me that "confidential" is not on  
14 the page, Mr. Spelliscy?

15 MR. SPELLISCY: Sorry, I missed  
16 the page number. Did you give it?

17 MR. BROWER: Sorry?

18 MR. SPELLISCY: I missed the page  
19 number that we're looking at.

20 MR. BROWER: That's because I  
21 didn't give it yet. Page 2. This is tab D, second  
22 expert report, confidential version.

23 MR. SPELLISCY: Anything on page 2  
24 is fine.

25 MR. BROWER: Okay, thank you.

1 Now, I am looking at paragraph 3. Are you there  
2 with me, Mr. Goncalves?

3 THE WITNESS: Yes.

4 MR. BROWER: Before the A, B, C,  
5 the next previous sentence reads as follows:

6 "The focus of our analysis  
7 was and remains to analyze  
8 the cause and quantum of harm  
9 to Mesa Power, if any, that  
10 resulted from the alleged  
11 violations."

12 Then you continue with:

13 "We focussed on analyzing  
14 (a) whether Mesa Power was  
15 harmed."

16 Which considering the foregoing  
17 seems to embrace both cause or principally cause,  
18 because (b), which follows, refers to the way in  
19 which Mesa Power was harmed.

20 There is one other page in this  
21 which is not marked "confidential" in mine. This  
22 is page 9. We're okay?

23 THE WITNESS: Yes.

24 MR. BROWER: Okay. Paragraph 28,  
25 right at the beginning, you write:



1                   "Our analysis of the cause  
2                   and quantum of damages is  
3                   independent of NAFTA..."

4                   Et cetera, et cetera, et cetera.

5                   So I deduce from this that you have dealt not just  
6                   with quantum of damages, but also the issue of  
7                   causation as between the assumed breach leading to  
8                   damages.

9                   THE WITNESS: That's correct.

10                  MR. BROWER: Right, okay. Now,  
11                  let's take your initial presentation that was on  
12                  the screen and turn to slide 12. Are you there?  
13                  It is slide 12.

14                  THE WITNESS: I am.

15                  MR. BROWER: I understood your  
16                  testimony to be, but please confirm or disaffirm  
17                  it, that if the GEIA was found to be a breach of  
18                  NAFTA, then you conclude that Arran and TTD would  
19                  have won their contracts?

20                  THE WITNESS: Correct.

21                  MR. BROWER: Okay.

22                  THE WITNESS: That's right.

23                  MR. BROWER: So that takes care of  
24                  causation, as it were, with respect to those two?

25                  THE WITNESS: Mm-hm.

1                   MR. BROWER: But you exclude any  
2 causation with respect to North Bruce and  
3 Summerhill?

4                   THE WITNESS: That's correct. I  
5 hope it is clear that that brown dotted line is the  
6 available transmission -

7                   MR. BROWER: Right.

8                   THE WITNESS: You got it.

9                   MR. BROWER: Yes.

10                  THE CHAIR: Just to clarify on  
11 this, I understand this to say: If the  
12 transmission capacity reservation for the GEIA is a  
13 breach, because that -- it's not the contract it  
14 was the consortium such that is at issue here in  
15 your analysis.

16                  Here it is only the transmission  
17 capacity, or do I miss something? What are you  
18 doing here?

19                  THE WITNESS: I wouldn't say that  
20 only the transmission capacity access was a breach.  
21 I would say that all of the treatment was a breach.

22                  If you find that all of that  
23 treatment was a breach, then what happened to  
24 Mesa --

25                  THE CHAIR: No. My question is a

1 different one.

2 THE WITNESS: I'm sorry.

3 THE CHAIR: Do you here discuss  
4 the reservation of capacity for the Korean  
5 Consortium?

6 THE WITNESS: Yes, yes.

7 THE CHAIR: That is the only issue  
8 that is dealt with here on this slide.

9 THE WITNESS: Correct. That's the  
10 only thing I think would have impacted Mesa --

11 THE CHAIR: Absolutely, yes.

12 THE WITNESS: -- is the lack of  
13 access to transmission capacity, and I hope that it  
14 is clear -- I know I was moving fast when I  
15 introduced this -- that the difference between the  
16 prior slide, 11, the actual scenario where you have  
17 750 megawatts of available transmission and this  
18 one on slide 12 is the additional 500 megawatts of  
19 capacity.

20 So you lift the available capacity  
21 back to the total by removing the Korean  
22 Consortium's 500 megawatts, and when you  
23 make -- when you lift that available capacity, TTD  
24 and Arran would have gotten FIT contracts.

25 MR. BROWER: Okay. So as --

1 THE WITNESS: Is that clear?

2 MR. BROWER: Your testimony  
3 basically is, as an expert appearing on behalf of  
4 Canada in this case, you have no doubt but that if  
5 GEIA were found to be a breach, we may proceed on  
6 the basis that Arran and TTD were home free; they  
7 got their contracts?

8 THE WITNESS: Or in other words  
9 that they were harmed, yes.

10 MR. BROWER: Yes, okay. Let's go  
11 to the next one, slide 13. Now, this is an  
12 interesting addition, as well, because confirm or  
13 disaffirm my understanding from this chart and your  
14 testimony that if the only breach were the  
15 connection point change window -- let me pause  
16 there, because what do you mean by connection point  
17 change window?

18 THE WITNESS: That's a very good  
19 question. This was -- this relates to the  
20 allegation that there should have been no  
21 connection point change. There was a lot of  
22 discussion in the last few days about the timing of  
23 the change, and so forth. But I think the  
24 allegation -- and I have to confess here I am now a  
25 little confused what the actual allegation is.

1                   The way I understood it before --

2                   THE CHAIR:  Whatever the  
3                   allegation is, what we must understand is what you  
4                   did on this chart, so explain that to us and don't  
5                   worry about the allegation.

6                   THE WITNESS:  Okay.  What I  
7                   assumed is that the breach would be or was the  
8                   implementation or the fact of the connection point  
9                   change that was implemented.

10                  And based on that, what happened  
11                  in fact is that several projects from the west of  
12                  London region were allowed to change their  
13                  connection point into the Bruce.

14                  So if I can clarify the impact by  
15                  going back to, again, slide 11, the actual  
16                  scenario, what really happened before the counter  
17                  factuals, if you focus on the orange bars, the west  
18                  of London projects far off to the left.

19                  MR. BROWER:  Mm-hm.

20                  THE WITNESS:  Those projects are  
21                  the ones that changed into the region.

22                  MR. BROWER:  All right.

23                  THE WITNESS:  And there are some  
24                  other impacts that are a little technical about  
25                  smaller-sized projects that got allowed to connect

1 because they fit, but that is not a major point.

2                   Going back to slide 13, I have  
3 removed those. So that if the connection point  
4 change had not been implemented, if it had not  
5 happened, then those projects wouldn't be in the  
6 Bruce. The transmission capacity would still be  
7 750, because I'm not making the GEIA adjustment  
8 here.

9                   MR. BROWER: Right.

10                   THE WITNESS: And TTD and Arran  
11 also in this scenario would have gotten FIT  
12 contracts. They would have been harmed.

13                   MR. BROWER: So --

14                   THE WITNESS: But not Summerhill  
15 and North Bruce, of course.

16                   MR. BROWER: But your slide 13  
17 assumes also that the GEIA agreement was a breach?

18                   THE WITNESS: No.

19                   MR. BROWER: Because that's how  
20 you get to 750.

21                   THE WITNESS: This was in  
22 isolation.

23                   MR. BROWER: Isolation.

24                   THE WITNESS: That assumption  
25 comes up on the next slide, slide 14, the

1 combination.

2 MR. BROWER: Okay. So if the  
3 only -- let me make it clear here. The allegation  
4 of the claimant, as I understand it, with respect  
5 to the connection point change window is twofold:  
6 One, that the opportunity to change your connection  
7 point was announced pursuant to a direction of the  
8 Ministry on a Friday to be available Monday through  
9 Friday of the following week to apply for a change.  
10 That's one aspect of it, and the other is that that  
11 kind of change should not have been permitted at  
12 all.

13 So if the connection point change  
14 window on either of those bases or both of those  
15 bases were found to be in breach of the treaty,  
16 then, again, as a matter of causation, you say  
17 Arran and TTD were home free. They would have  
18 gotten their contracts?

19 THE WITNESS: I wouldn't say it  
20 just that way, and there is a reason. I'm glad you  
21 brought that up, because that is what I was  
22 referring to earlier that I've become a bit  
23 confused about this week, is if you assume that the  
24 implementation of the connection point change or  
25 the fact that it occurred is the breach, then I

1       come to this conclusion, because you remove the  
2       west of London projects.

3                       MR. BROWER: Right.

4                       THE WITNESS: There was a lot of  
5       discussion this week about the timing and the way  
6       in which it was implemented and the fact that it  
7       was at the last minute and it wasn't adequately  
8       transparent, and so forth.

9                       MR. BROWER: Right.

10                      THE WITNESS: From my perspective,  
11       if you allowed more time with more notice, but you  
12       say that the connection point change was actually  
13       appropriate, then you could have had more projects  
14       coming into the region from other regions, and  
15       almost certainly if even one more project came or  
16       maybe two, TTD and Arran would not have had -- in  
17       fact, even without more projects coming, we  
18       conclude they would not have had contracts.

19                      So I think the only breach that  
20       would lead me to this conclusion is the one that  
21       the change point connection should not have  
22       happened at all.

23                      MR. BROWER: I see, okay, okay.

24       That is very clear. Okay. So it is two up and two  
25       down. I got it.



1 THE WITNESS: Okay.

2 MR. BROWER: Those are my  
3 questions.

4 THE WITNESS: Thank you.

5 THE CHAIR: Mr. Goncalves, can I  
6 go back to your last slide, which is also a figure  
7 that I noticed in your report, figure 11 on page 51  
8 of your second report, which of course you know  
9 better than I.

10 I would like to make sure that I  
11 understand exactly what you have done and how this  
12 does not add up and why not, because you start with  
13 Deloitte's total damage figure -- I take the column  
14 on the right now, the total one.

15 And then you factor in what you  
16 call inaccurate causation, so you take out what  
17 you -- part of the loss that you considered not  
18 caused by the breach; is that correct?

19 THE WITNESS: Yes.

20 THE CHAIR: That gives you a  
21 figure of 156. And then you have a number of other  
22 elements that you have then limited to TTD and  
23 Arran, because you do not consider the two other  
24 projects. And there you have looked at the  
25 discount rate, that you think they have too -- Mesa

1 has too low a discount rate and you want to use a  
2 higher one. It was of course a net present value  
3 that would be lower, lower by 120 million; is that  
4 right?

5 THE WITNESS: Correct.

6 THE CHAIR: Then you have looked  
7 at GE turbine treatment, which is not the same  
8 thing like deposit, I understand?

9 THE WITNESS: That's correct.

10 THE CHAIR: That's a different  
11 issue. And that gives 12 million. Then you have  
12 the issue of the valuation date. That gives you  
13 minus 42, and then you end up with 19. And somehow  
14 I don't understand how these different deductions,  
15 what their relationship is, because obviously they  
16 cannot be added up.

17 THE WITNESS: Yes. That's an  
18 excellent question. I did try to address this in  
19 paragraph... I guess it was in the other report  
20 that I did that, but at any rate --

21 THE CHAIR: 174 and following  
22 maybe?

23 THE WITNESS: Here we go. It's  
24 footnote 157 at the bottom of page 51.

25 MR. BROWER: Which report?

1                   THE WITNESS:  Second report, page  
2     51, footnote 157.  And I do understand that this is  
3     a point of confusion.  What we've done with the  
4     model is analyze each item in isolation, but there  
5     are some overlapping or compounding effects when  
6     you combine them, so that you can't simply extract  them out and add them  
7     up perfectly.

8                   For example, I address this on the  
9     PowerPoint presentation in footnotes 3 and 4, where  
10    I indicated that there is effectively some amount  
11    of overlap, for example, with the valuation date.  
12    You're not only changing the date in terms of the  
13    amount -- or the time at which you set the net  
14    present value to when you are discounting, but you  
15    are also updating several features of the discount  
16    rate to be appropriate for that date and time.

17                   So there is a different cost of  
18    equity and, in particular, a different cost of  
19    debt.  Well, that would seem to overlap the issue  
20    of the discount rate.

21                   THE CHAIR:  So that means --

22                   THE WITNESS:  There are some  
23    features that are in common and some that are  
24    different.

25                   THE CHAIR:  So that means if we

1       were to consider that you are right on the  
2       valuation dates, but that you are wrong on the  
3       discount rate, then we could not simply deduct \$42  
4       million, because that would mean that we're taking  
5       something away under the heading of discount rate  
6       because of the overlap?

7                       THE WITNESS:  I think that is  
8       correct.  There may be -- I have to think it  
9       through a bit.  There may be a solution within some  
10      of the other tables in our report, 53, 54.  We have  
11      taken even further breakdowns of these components.

12                      But simply put, I think the only  
13      clean way to come up with a proper result, once the  
14      theory of damages is -- or the conclusions  
15      regarding breach and damages -- breaches is decided  
16      is to put it all into the model and come up with a  
17      result.

18                      THE CHAIR:  I don't have the  
19      model.

20      --- Laughter.

21                      THE WITNESS:  I understand that.  
22      Sometimes that happens in these arbitrations.  
23      Sometimes it doesn't.  But, yes, the answer to your  
24      question is, yes, there would be some elements of  
25      overlap there.

1 MR. BROWER: Don't throw the Bible  
2 away. You never know what may be....

3 THE WITNESS: I have seen it  
4 happen before.

5 THE CHAIR: We might, if needed,  
6 ask both parties' experts to work on whatever  
7 models they have and come up with answers to  
8 specific questions that we would have --

9 THE WITNESS: I understand.

10 THE CHAIR: -- because otherwise  
11 it could be difficult to handle on our part.

12 Any further questions for Mr.  
13 Goncalves?

14 MR. BROWER: That's it.

15 THE CHAIR: No? Then this ends  
16 your examination. Thank you very much.

17 THE WITNESS: Thank you.

18 --- Whereupon examination adjourns at 3:40 p.m.

19 PROCEDURAL MATTERS:

20 CHAIR: So now we have a number of  
21 procedural points that we would like to address for  
22 trying to be efficient so you can have time to  
23 prepare for tomorrow, and in that sense the  
24 Tribunal has a number of suggestions that they  
25 would like to make so it channels the debate, and

1 then you can comment on them.

2 I will try and make all of them  
3 together, and then you can come back on the  
4 different points.

5 We have provided earlier on that  
6 there would be post-hearing briefs. In terms of  
7 purpose and content of the post-hearing briefs, the  
8 Tribunal would expect your commenting on the  
9 evidence gathered this week and putting it into  
10 context with your case that as it has been pleaded.

11 Of course, we do not  
12 expect -- it's not only that we do not expect. We  
13 do not wish you to repeat what you have already  
14 explained in the briefs before. That is not the  
15 exercise.

16 However, what would be helpful for  
17 us is really to have a discussion of: This is what  
18 we find in the transcript and this confirms or  
19 rebuts, refutes, something that I find in this  
20 document or that the other side has argued and I  
21 have argued.

22 MR. LANDAU: Just one little  
23 footnote, if I may, to what you have just said.  
24 With the reference to the word "discussion", I  
25 think the -- I hope I am speaking for all Members

1 of the Tribunal is that there is a kind of plea for  
2 less narrative and just kind of bullet points and  
3 make it sort of just -- it can be -- it can be  
4 scaled right back, because we have already a huge  
5 amount of useful, we have a lot of narrative in all  
6 of the rounds of submission and pages and pages,  
7 and it kills trees and trees, and in the end it  
8 would be much easier for us, if possible, to scale  
9 it back in terms of pros.

10 MR. BROWER: I want to put it, if  
11 possible, even more strongly.

12 --- Laughter.

13 MR. BROWER: I personally avoid  
14 reference to the word "brief" and I refer to them  
15 as post-hearing submissions.

16 The whole point of this is this is  
17 the time for you at the end of the hearing, so all  
18 of the evidence is in, to list -- I call it  
19 list -- or more like a bill of particulars, what  
20 are the factual points that you wish to accept, and  
21 then why.

22 And the "why" is witness statement  
23 first or second of Mr. X, or whoever, paragraph  
24 such and such, okay, transcript, day, page,  
25 witness, lines such and such, document.

1                   It is a road map. It needs to be  
2                   on basically the factual issues. And as we will  
3                   come to I think in a moment, this is particularly  
4                   key in connecting the dots on causation, getting  
5                   from the claimed breach to damages.

6                   Just don't tell us any stories.  
7                   We have heard all of the stories, I think, or at  
8                   least we've heard all of the stories we're going to  
9                   hear by the time we receive those post-hearing  
10                  submissions.

11                  What we need is the road map, and  
12                  that has two advantages for you, and that is it  
13                  ensures that we don't miss anything. If you  
14                  connect all of the dots for us and give us the road  
15                  map, then we know we've got what we need and you  
16                  are protected against the possibility that we might  
17                  overlook something in this vast record.

18                  Also, without making any promises  
19                  as to the timing of a result, let me put it that  
20                  way, or a first result, it certainly facilitates  
21                  putting together whatever it is that we have to put  
22                  together.

23                  So please err on the side of not  
24                  narrating anything. Just give us your case on the  
25                  facts. It may be necessary to an extent on the



1 law, too, but to the extent that's done, it has to  
2 be the same way. Okay, is that clear?

3 THE CHAIR: I am not sure it is  
4 that clear. If I were counsel, I would be a little  
5 bit disturbed --

6 --- Laughter.

7 THE CHAIR: -- by the different  
8 indications they got. Let me just kind of  
9 summarize, and, in the end, you're in control of  
10 your cases and you know what is effective at this  
11 stage of the hearing.

12 I think it is important that you  
13 know that what we want here is a discussion of the  
14 evidence. Obviously you can do it in short form,  
15 but then we need to understand what you mean.

16 And what I think it is not  
17 needed -- and I think it is important, because if  
18 you have now gotten the impression that you have to  
19 repeat everything that was already in your previous  
20 submissions, then that is not what we expect. It  
21 would be huge work to have to assemble everything  
22 again, and it would be quite duplicative.

23 Of course we will look at what you  
24 have submitted earlier when we make our order. Is  
25 it clear like this? I have other points, but maybe

1 I carry on, unless you have something specific on  
2 this.

3 MR. SPELLISCY: You can carry on.  
4 I can ask my questions at the end.

5 THE CHAIR: Good. We start of one  
6 simultaneous submission. For the time limit, we're  
7 very much in your hands. You may wish to have a  
8 short consultation among counsel.

9 You understand that we value  
10 something that is concise and effective, but we do  
11 not think that we should put a page limit. I don't  
12 think we would expect something more than 100  
13 pages, but that gives you a range. There is no  
14 obligation to write 99 pages.

15 --- Laughter

16 MR. MULLINS: You may want to  
17 consult with your colleagues.

18 --- Laughter.

19 THE CHAIR: But it gives you an  
20 indication of what we have in mind. There is one  
21 specific issue that Judge Brower just touched on  
22 where we would like a little more -- would  
23 appreciate the parties specifically addressing,  
24 which is really it is causation.

25 We have spoken about causation a

1 lot and we understand a number of things, but it  
2 would help us to have a specific description of the  
3 causation change from each alleged breach to each  
4 claimed loss so that we have a clear understanding  
5 of the flow of events and what the result of these  
6 events are.

7                   We have also thought whether we  
8 have other specific issues, but we think we have  
9 covered the ground well, and this is the only point  
10 right now that we think of. You can of course  
11 address it tomorrow, but we can also address it in  
12 your post-hearing briefs.

13                   There are two procedural aspects  
14 that are outstanding at this stage. One is the  
15 claimant's 1105 damage valuation, and the second  
16 one is the respondent's subsidy defence that we  
17 have said we would address at the end of the  
18 hearing.

19                   The Tribunal's suggestion is to  
20 handle this in the following fashion. If in our  
21 deliberations we come across -- we think that this  
22 is relevant to the outcome of the case, then we  
23 would come -- and it applies to the two aspects.  
24 We would revert to the parties and ask specific  
25 questions, and then we will take it from there.

1                   If you think that requires a  
2 hearing, then it requires a hearing, but we will  
3 see, depending on what it is. It may also be that  
4 in the deliberations, as I mentioned earlier, we  
5 may come across other points where we thought now  
6 that it was clear and when we work closer we  
7 realize that one or the other issue needs more  
8 input from the parties, but that would be only  
9 limited input on specific questions.

10                   With respect to further  
11 proceedings, once we have -- we need to agree on  
12 the time limits for the post-hearing briefs. At  
13 some point we also need to have a corrected  
14 transcript, and you would have to agree on  
15 transcript corrections.

16                   There is another point -- then  
17 also we would like to have, after the post-hearing  
18 brief, cost submissions, and you may wish to agree  
19 among yourself about what level of detail. Is it  
20 just a statement of the costs incurred or is it a  
21 discussion of what should be considered, what  
22 should not be considered?

23                   Another point that we will have to  
24 deal with is the release of the recording of the  
25 hearing on the PCA website. It seems to us, but

1 obviously we can hear the parties about this, it  
2 seems to us the reason for the closed-circuit was  
3 that there could still have been an issue of  
4 subsidy defence and witnesses being heard.

5                   And if that is still the case,  
6 then I think the release should take place at the  
7 moment when the Tribunal has said that this is not  
8 relevant, or it is relevant and it has been dealt  
9 with.

10                   So that would be the Tribunal's  
11 suggestion, subject to your views, of course.

12                   So in terms of further procedures,  
13 then we would go into -- once we have done all of  
14 this, we would go into deliberation and handle this  
15 as we -- as I mentioned before, we would hope to  
16 get to a final award, but I cannot say that there  
17 will not be other issues that may come up in the  
18 course of the deliberation on which we would revert  
19 to you.

20                   That's it in terms -- I may have a  
21 few things for tomorrow, but for beyond tomorrow,  
22 that is all what the Tribunal had in mind of  
23 putting forward to you. I don't know whether you  
24 want a short recess to discuss these points. Some  
25 points may also have to be discussed among counsel

1 on both sides, and you may have common views on  
2 certain things.

3 Should we take --

4 MR. BROWER: I would like to speak  
5 to a couple of issues that I feel they should cover  
6 tomorrow more precisely.

7 THE CHAIR: You can do so,  
8 absolutely.

9 MR. BROWER: Issues that at least  
10 I would and I think probably all of us would  
11 appreciate being addressed tomorrow and in the  
12 post-hearing non-brief, I would be interested to  
13 see some persuasive authority to the effect that  
14 where the MFN provision of NAFTA is breached, the  
15 measure of damages suffered, if and when suffered,  
16 is frankly along the lines of what Mr. Low has  
17 presented as opposed to what Mr. Goncalves has  
18 presented. This is not a position that I have had  
19 the experience of having presented to me before.

20 Similarly, the question before us,  
21 I think, is how it can be that a foreign investor,  
22 a national of a NAFTA treaty party investing in  
23 another treaty party, can take advantage of that  
24 foreign investor status, but through in this case a  
25 Canadian subsidy also claim non-national treatment,

1       which is what I have understood the position to be  
2       on the part of the claimant.

3                       I think that's it, but I might  
4       point out that there hypothetically could be -- in  
5       putting together the chain of causation, it could  
6       be that more than one breach is required to get  
7       there. What I'm wondering about is do you need  
8       just, for example, a breach of MFN to get through  
9       causation to damage, or would you need in addition  
10      a breach of 105 -- 1105, I'm sorry. That's what  
11      has tickled my fancy, in particular.

12                      THE CHAIR: Fine. Should we take  
13      a ten-minute break now for you to consider the  
14      different points, or do you want to react right  
15      away?

16                      MR. MULLINS: We might -- unless  
17      the Panel really feels they want to talk today, we  
18      could use this time to talk to our opposing counsel  
19      and maybe talk in the morning before we start  
20      arguments, or however.

21                      I think some of this sounds like  
22      we might want to come up with a brief schedule. We  
23      might want to think that through, and timing and  
24      that kind of thing. That may take more than ten  
25      minutes, and I would hate to have you sit around

1 and wait for us, but whatever works for the Panel.

2 THE CHAIR: Absolutely. That is a  
3 possibility. I don't think there was anything  
4 difficult in here. Let me just then say how I see  
5 it tomorrow.

6 We have on both sides reserved  
7 three hours maximum for closing. You can reserve  
8 time out of the three hours for rebuttal,  
9 sur-rebuttal.

10 We should, if at all possible, end  
11 by five o'clock, which, if we simply stick to the  
12 schedule, should not be a problem. I must confess  
13 that I have changed my flight.

14 MR. MULLINS: Then I withdraw my  
15 suggestion.

16 --- Laughter.

17 THE CHAIR: But we can do it  
18 tomorrow morning, but then maybe we start a little  
19 earlier tomorrow morning or have a shorter break.

20 MR. MULLINS: We can use the time  
21 left now. We still have time left in the day.

22 MR. APPLETON: But I do think it  
23 would be helpful for the disputing parties if you  
24 might give us some very general ballpark as to what  
25 you were looking for with respect to timing,



1 because we know that you're very busy Tribunal.

2 THE CHAIR: About the post-hearing  
3 briefs?

4 MR. BROWER: Is that what you  
5 mean?

6 MR. APPLETON: Yes. Not for  
7 tomorrow. Tomorrow we roughly can figure out -- we  
8 roughly know the order of who goes first and who  
9 goes second, so that part we know. It's about for  
10 us to talk to each other effectively, are you  
11 thinking about post-hearing briefs within two  
12 weeks, two months, two years? Let's hope it is not  
13 two years. But, you know --

14 THE CHAIR: Two days.

15 MR. APPLETON: That's what I'm  
16 trying to figure out. We need a transcript to be  
17 certified and come together...

18 THE CHAIR: It all depends also on  
19 your other matters and how your team is available.  
20 I would say something like four weeks, six weeks,  
21 something along these lines would seem reasonable  
22 to me, but...

23 MR. APPLETON: So, for example,  
24 because those deadlines start to hit into the  
25 holidays.

1 THE CHAIR: Yes.

2 MR. APPLETON: And many of the  
3 staff, perhaps on both sides, certainly for our  
4 side, have had no holidays, as they have been doing  
5 this through. So they all have these pent-up  
6 holidays coming in. That is what we're trying to  
7 figure out.

8 We will talk with Canada and see  
9 what we can do in the next few minutes, and then we  
10 will come back.

11 MR. SPELLISCY: Just to be clear,  
12 I deny staff holidays all the time.

13 MR. LANDAU: It's on record.

14 --- Laughter.

15 THE CHAIR: Right. Would you like  
16 to take a few minutes now? You can also think  
17 about a time limit for submissions on costs, but  
18 that can be logically, like, two weeks after the  
19 post-hearing briefs, because obviously you have to  
20 gather the costs of the post-hearing briefs and  
21 whether you want just statements of costs, or  
22 whether you want an opportunity to comment on your  
23 opponent's statement.

24 MR. SPELLISCY: And what detail.

25 THE CHAIR: And in what detail in

1 terms of entitlement to costs.

2 MR. APPLETON: Does the Tribunal  
3 have any views of any form to guide us here?

4 THE CHAIR: I would say what we  
5 certainly need is a statement of costs. You can  
6 give some explanations. Was it about  
7 entitlement? You may have arguments about: This  
8 was caused by the other party, and therefore they  
9 should bear the costs, and so on.

10 Then I would give a short time  
11 limit, like two weeks after that, if there is any  
12 wish to comment on the opponent's submission, for  
13 instance, to say this cost is too high, or without  
14 an obligation to file a reply. Does that make  
15 sense? Good.

16 MR. APPLETON: Excellent. Thank  
17 you.

18 MR. BROWER: So we will wait  
19 around?

20 --- Recess at 4:01 p.m.

21 --- Upon resuming at 4:28 p.m.

22 THE CHAIR: Fine. I see you are  
23 ready to resume. Should I first -- could I give  
24 the floor to the claimant? Mr. Mullins.

25 MR. MULLINS: Thank you. Members

1 of the Tribunal, you'll be happy to know that  
2 counsel have been able to come up with a  
3 recommendation for a schedule, and so we propose  
4 the following: December 18th, 2014 for post  
5 hearing submissions, not briefs. We  
6 then -- simultaneous, as requested by the Tribunal.

7 And then for cost submissions, we  
8 are proposing to follow simultaneously on February  
9 3rd, 2015 with also an agreement internally by  
10 January 15th to agree on format, so there is no  
11 surprises and we can kind of agree what each side  
12 is doing, and then try to work as possible to match  
13 what each side is doing so there is no fights.

14 Then once we file the submissions  
15 on February 3rd, both sides will respond to those  
16 submissions on February 26th.

17 THE CHAIR: 26th?

18 MR. MULLINS: Yes, yes, Madam  
19 Chair.

20 And just obviously beyond the  
21 holidays, counsel have travels and other briefs and  
22 stuff. So hopefully these dates will work out for  
23 the Panel, and they worked out with the schedules  
24 of counsel.

25 THE CHAIR: Is this an agreed

1 proposal?

2 MR. SPELLISCY: Yes. Of course,  
3 yes.

4 THE CHAIR: Yes. That's  
5 wonderful. Should we have a date for an agreed  
6 corrected transcript, or you would not want to go  
7 through this? I don't need it. As long as you can  
8 work with the transcript as it is, it is fine, and  
9 if there are any issues that come up, we could also  
10 take it from there.

11 MR. APPLETON: The transcript  
12 that's being produced -- and I will put it on the  
13 record now how wonderful the team with Teresa and  
14 Lisa have been, really wonderful transcripts. They  
15 certify them themselves based against the oral  
16 hearing. And they have been doing that, I believe,  
17 the next day or -- really like almost overnight.  
18 We're getting them first thing in the morning.

19 So the real issue is about  
20 confidentiality between the restricted or the  
21 confidential. So that is the only issue. And we  
22 had one issue that we identified amongst counsel  
23 where there was a document that was marked as being  
24 "confidential", but actually had been declassified,  
25 so that will have to be marked appropriately so it

1 will form part of the public transcript, rather  
2 than the private part.

3 But with that one exception, we  
4 think it would be relatively easy. We had not  
5 discussed not having to worry about the transcript.  
6 Personally I'm very much in favour of that. That  
7 would speed everything up. So I am very interested  
8 in what Mr. Spelliscy has to say about that.

9 THE CHAIR: So are we.

10 MR. SPELLISCY: I am not sure what  
11 the question was to me.

12 THE CHAIR: No. The question was:  
13 Can we simply live with the transcript as it  
14 is? And if there is a major issue that you  
15 discover as you work on it, you could raise it, but  
16 that would not be expected. Then we have the other  
17 issue, which is: What is the public version and  
18 what is the confidential version? And that needs  
19 to be sorted out somehow, some time, but it is not  
20 that urgent, unless there is something that escapes  
21 me.

22 MR. SPELLISCY: We're perfectly  
23 fine working with the certified versions that they  
24 have produced, the final versions.

25 THE CHAIR: All right. And how do

1 you want to go about the public-confidential  
2 version? I mean, you have been going  
3 through -- you have gone through this exercise  
4 before, so...

5 MR. APPLETON: Well, some  
6 exercises have been less successful than others.

7 THE CHAIR: So let's try to copy  
8 the successful ones.

9 MR. APPLETON: We haven't had one  
10 yet, but we're hoping.

11 It would seem to us that -- why  
12 don't we give the parties maybe two weeks, after we  
13 get all of the certified versions back, to be able  
14 to look at that just to see if there is anything.  
15 That would be the time to notify with respect to if  
16 something that is 'off' with respect to  
17 confidential and restricted.

18 Otherwise, I think there is  
19 no -- nothing that will prevent the Tribunal from  
20 being able to deal with things. You have the  
21 restricted version and, as far as I can tell, it is  
22 completely complete, as I have looked at those  
23 already.

24 And perhaps we're on the way to  
25 get what Judge Brower wants with everybody with

1 point-forms and as short as possible.

2 MR. BROWER: I'm not the only one.

3 --- Laughter.

4 THE CHAIR: It shouldn't be  
5 difficult, because each time something confidential  
6 was raised, it was said. So you can do a search of  
7 "confidential" and you should be able to locate all  
8 the passages that are relevant.

9 Two weeks for that? Is that fine?

10 MR. APPLETON: It would be two  
11 weeks from the receipt.

12 THE CHAIR: From receipt.

13 MR. APPLETON: Because it might  
14 take a few days, especially they have been going  
15 non-stop. But, yes, two weeks from the receipt of  
16 the final.

17 THE CHAIR: Fine. Good. Is there  
18 anything further that you -- yes. The Tribunal had  
19 some thought about receiving USB keys. I don't  
20 know whether that has been discussed among the  
21 parties.

22 There is, in those that we have  
23 received before the hearing on both sides, a few  
24 things missing. So it would be nice to have a  
25 complete one, plus it would be good that we have



1 the expert presentations, because now we only have  
2 them in hard copy, the opening and closing  
3 presentations, and possibly the indices of the  
4 witness expert bundles, because in case we need to  
5 go back to a tab number and I do not have the  
6 exhibit number, having the indices electronically  
7 would make it more efficient to look for.

8 MR. APPLETON: Counsel discussed  
9 part of your request already. We had agreed on a  
10 process by which anything that was introduced here  
11 at the hearing, which are demonstrative slides and  
12 presentations, would be given the next number for  
13 each side, "C" or "R", and it would be done  
14 chronologically.

15 So the opening slides would be the  
16 next number. For example, Mr. Goncalves's  
17 presentation today would be the next one for  
18 Canada, and if Canada has slides in closing, that  
19 would be the next one.

20 We would identify, though, we  
21 would like sort permission from the Tribunal if  
22 there are items that are missing. Maybe the  
23 Tribunal has already advised the parties and I  
24 don't know about it, or --

25 THE CHAIR: No, we have not. We

1 have not.

2 MR. APPLETON: If you advise us,  
3 we will work on that to get that done. So I think  
4 that that shouldn't be all that difficult.

5 With respect, though, to your last  
6 request about the indices, it's a little bit more  
7 tricky. We have already had some problems with  
8 this, so that's why I'm asking or identifying.

9 With respect to the experts that  
10 we have produced, all of their documents are  
11 identified, because we have forced all of them to  
12 put into a common record with us.

13 So, in other words, none of the  
14 witnesses have separate exhibits. We have already  
15 scheduled them into a number, and I believe that  
16 they always have an index in the reports of the  
17 documents, as well; right? I don't think there is  
18 one that does not.

19 With respect to Canada, though,  
20 for example, BRG, they have their own numbering  
21 system, and there are other witnesses that didn't  
22 do a schedule. They sometimes referred to a  
23 website in some of their things and it is a general  
24 website. It doesn't have anything else.

25 So I am not sure how you want to

1 handle that, and I am not sure it is necessary at  
2 this time.

3 THE CHAIR: I wouldn't want  
4 anything to be done other than simply receiving  
5 these sheets that we have in front of the witness  
6 binder that lists what is in the tabs, because in  
7 case on the transcript it only says "tab 10" and  
8 not the exhibit number, which sometimes happens, or  
9 in our notes we have only tab 10, it will help us.  
10 I mean, we can also do it on the paper, but it  
11 would be nice to have it electronically.

12 MR. APPLETON: Okay.

13 THE CHAIR: It is nothing but just  
14 these sheets that we have in the front of each  
15 witness bundle.

16 MR. APPLETON: Okay. Well, then  
17 that does raise one other issue. It is very minor.

18 Both sides had put in the  
19 engagement letters for witnesses in the witness  
20 bundles, but they weren't formally a part of the  
21 record. They were produced by order and exchanged,  
22 but they didn't have a number.

23 So we will need to -- anything  
24 that was put in the bundle, I believe for both  
25 sides, are the only document that was not already

1 on the record other than the presentations that  
2 were in some of the witness bundles. They would  
3 need to be scheduled, as well.

4 THE CHAIR: Yes. I mean, we have  
5 the engagement letters, because we received them.  
6 Even if they had no number, we received them and we  
7 looked at them.

8 MR. APPLETON: Yes.

9 THE CHAIR: So I don't think it is  
10 necessary to complicate matters with this. If we  
11 have what you have in here on both sides, then that  
12 is -- that will be fine.

13 MR. MULLINS: Madam Chair, did you  
14 need the indices just for the experts or for the  
15 witnesses, as well?

16 MR. LANDAU: All of them.

17 MR. MULLINS: It sounded like this  
18 was the issue.

19 THE CHAIR: Witnesses is probably  
20 more important.

21 MR. LANDAU: Yes.

22 MR. MULLINS: Yes.

23 MR. APPLETON: So just to confirm,  
24 each bundle that was put up, because it would have  
25 been referred to in the transcript, because we

1 didn't know if you wanted that, we always would  
2 give you the other number, to Mr. Mullins's  
3 chagrin. So you will get that, and I am sure  
4 Canada can do that easily, no problem.

5 THE CHAIR: Yes, I suppose. Fine.  
6 Is there anything else that we would need to agree  
7 on now?

8 MR. SPELLISCY: I had two  
9 questions that I would like on the post-hearing  
10 submissions, non-briefs.

11 For these, I assume it goes  
12 without saying that the evidentiary record is  
13 closed, so no new exhibits are to be cited?

14 THE CHAIR: Thank you for  
15 mentioning. Yes, it was implied. No new exhibits,  
16 unless the Tribunal requests something specific,  
17 but, otherwise, the record would be closed, yes.

18 MR. SPELLISCY: And my other  
19 question, because Judge Brower had talked about the  
20 roadmap with the facts. Is the Tribunal looking  
21 for submissions on issues of law, as well, in these  
22 post-hearing submissions, or do you want them to be  
23 evidentiary submissions?

24 THE CHAIR: Yes. We have  
25 discussed this and I would not wish to exclude that

1     you want to discuss some aspects of the law, in the  
2     sense that -- if I now think about causation,  
3     causation is a legal issue, but it is also factual.

4                     And we have heard evidence about  
5     causation here, so you may wish to say, Well, on  
6     the basis of what we heard about that, that is the  
7     legal consequence of this.

8                     So I would say that it is in your  
9     judgment how much law you want to include. There  
10    may be other issues where there are legal  
11    consequences from the evidence that was taken this  
12    week. Does that answer the question?

13                    MR. SPELLISCY: Yes, I understand.

14                    THE CHAIR: Are there any other  
15    points that we would need to raise before we close  
16    for the day? No.

17                    MR. BROWER: Do we meet at 8:30?

18                    THE CHAIR: No. We meet at 9:00  
19    and we start. Yes, that will be fine. Good. So I  
20    am not wishing you a good evening, because that  
21    would be...

22                    MR. APPLETON: Just think  
23    about -- we talked about tomorrow, because we will  
24    have a lot of surprises. The idea would be we  
25    start at 9:00. I assume since there are three

1 hours, maybe there would be some time reserved for  
2 rebuttal, but it is probably still too long for the  
3 transcript to go without a break.

4 So I assume that you would like at  
5 some point --

6 THE CHAIR: In the middle of the  
7 three hours, approximately, I would say we would  
8 have a break. That would lead us to about 12:30.  
9 Then we would have an hour lunch, and then we would  
10 carry on until five o'clock with a break again.

11 MR. APPLETON: Three hours.

12 THE CHAIR: Three hours gets us to  
13 4:30, plus the break would give about five o'clock.  
14 Is that...

15 MR. APPLETON: I am just worried  
16 about the time. I think it should be workable, but  
17 imagine, for example -- because let's say, for  
18 example, that we were to use two hours and 45  
19 minutes, so we would finish -- and we start right  
20 at 9:00, so we finish before 12:00.

21 Would you have Canada start then,  
22 or no? You would want to take the break, I  
23 imagine.

24 THE CHAIR: It would be more  
25 logical to have the break, but then we could have

1 an earlier lunch. That would make sense.

2 Maybe the lesson to be drawn from  
3 this is that we need to tell the Arbitration Place  
4 to be ready a little earlier so that we have more  
5 flexibility.

6 MR. APPLETON: Yes. That was my  
7 point.

8 THE CHAIR: Nothing  
9 further? Fine. Then have, all, a good evening.  
10 It will be a busy evening, but we are almost there.  
11 --- Whereupon the hearing adjourned at 4:43 p.m.,  
12 to be resumed on Friday, October 31, 2014 at  
13 9:00 a.m.

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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