
PCA CASE No. 2021-26

PERMANENT COURT OF ARBITRATION

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

- vs -

THE GOVERNMENT OF CANADA

Respondent

TRANSCRIPT OF ARBITRATION PROCEEDINGS
Held at the offices of Arbitration Place
333 Bay Street, Suite 900, Toronto, Ontario
on Friday, February 9, 2024, at 9:01 a.m.

VOLUME 5
FURTHER REVISED TRANSCRIPT
CONDENSED TRANSCRIPT WITH INDEX

TRIBUNAL:

Wendy Miles KC (Presiding Arbitrator)
Prof. John Gotanda
Rt. Hon. Beverley McLachlin

PERMANENT COURT OF ARBITRATION REGISTRY

José Luis Aragón Cardiel
Stefan Schäferling
Helen Griffin

COURT REPORTER:

Lisa Lamberti

Arbitration Place © 2024
900-333 Bay Street Toronto, ON M5H 2R2

APPEARANCES FOR CLAIMANT

John Terry, Counsel
Emily Sherkey, Counsel
Alexandra Shelley, Counsel
Julie Lowenstein, Counsel
Natasha Williams, Counsel
Shoshana Israel, Clerk
Nicole Wannop, Clerk
Torys LLP

Party Representative
David Mars

Fact Witnesses
Nancy Baines
Michael Killeavy

Expert Witnesses
Edward Tobis
Chris Milburn
Pierre-Antoine Tetard

APPEARANCES FOR RESPONDENT

Rodney Neufeld, Senior Counsel
Heather Squires, Senior Counsel and
Deputy Director

E. Alexandra Dosman, Counsel

Yu Cai Tian, Counsel

Kayla McMullen, Paralegal

Darian Bakelaar, Paralegal

Christine Ayoub, Paralegal

Global Affairs Canada, Trade Law Bureau

Party Representative

Rahim Punjani, Counsel

Ministry of the Attorney General, Government of
Ontario

Expert Witness

Dr. Jérôme Guillet

Fact Witnesses

Andrew Teliszewsky

Michael Lyle

Trial Graphic Expert

Ryan Knecht

Core Legal Concepts

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

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

1 as it stood in the real world. For example,
 2 Windstream's costs that we also discussed.
 3 So starting, first, with the
 4 fair and equitable treatment claim.
 5 The FET claim, of course,
 6 deals with the fairness of Ontario's conduct post
 7 the Windstream 2016 award.
 8 The Tribunal, of course,
 9 awarded Windstream damages resulting from
 10 Ontario's failure to address the legal and
 11 contractual limbo in which it had put Windstream.
 12 But it also found, as we know,
 13 that the FIT contract was still in force, which
 14 was consistent with Canada's submissions to the
 15 Tribunal that the project was frozen until the
 16 science was done.
 17 And the Tribunal found that
 18 there was additional value in the FIT contract
 19 that could be created if the parties renegotiated
 20 and restructured.
 21 So there was that conditional
 22 language that we discussed.
 23 We say Ontario breached the
 24 fair and equitable treatment, post award, by
 25 continuing the contractual and legal limbo; and

1 failing to take steps to implement the commitment
 2 that had been made to Windstream.
 3 And, reiterated by Canada in
 4 the submissions when it said the project was
 5 frozen, to freeze a project from the effects of
 6 the moratorium, all of which resulted in
 7 February 2020 in the termination of the FIT
 8 contract.
 9 Now, for the law on fair and
 10 equitable treatment.
 11 We are relying, actually, on
 12 the same determination that this Tribunal made and
 13 that, in our submission, Tribunals have reached
 14 consensus on, although recognizing there is no
 15 stare decisis among these Tribunals, that the
 16 standard from Waste Management is the one that
 17 applies.
 18 And that is that:
 19 "The minimum standard of
 20 treatment of fair and
 21 equitable
 22 treatment --"[as read]
 23 And this is quoting from Waste
 24 Management:
 25 "-- is infringed by

1 conduct attributable to
 2 the state and harmful to
 3 the Claimant if the
 4 conduct is arbitrary,
 5 grossly unfair, unjust or
 6 idiosyncratic, is
 7 discriminatory and
 8 exposes the Claimant to
 9 sectional or racial
 10 prejudice, or involves a
 11 lack of due process
 12 leading to an outcome
 13 which offends judicial
 14 propriety."[as read]
 15 And they also say in that
 16 statement:
 17 "In applying this
 18 standard, it is relevant
 19 that the treatment is in
 20 breach of representations
 21 made by the host state
 22 which were reasonably
 23 relied on by the
 24 Claimant."[as read]
 25 And Waste Management and other

1 cases have rejected the egregious standard that
 2 Canada and other states often argue for and the
 3 Waste Management standard should be adopted, in
 4 our submission.
 5 And the Tribunal, you will
 6 recall, used some colourful language. The
 7 previous Tribunal, in describing, with respect to
 8 fair and equitable treatment, that the proof of
 9 the pudding is in the eating.
 10 And that's at paragraphs 31
 11 and 36 of the award.
 12 The judgment of what is fair
 13 and equitable cannot be reached in the abstract.
 14 It must depend on the facts of the particular
 15 case.
 16 "In other words, just as
 17 the proof of the pudding
 18 is in the eating and not
 19 in its description, the
 20 ultimate test of
 21 correctness of
 22 interpretation is not in
 23 the description, in other
 24 words, but in its
 25 application on the

1 facts."[as read]
 2 So it's a fact-specific
 3 assessment as to whether there's unfairness.
 4 We say, in this case,
 5 Ontario's conduct was arbitrary and unfair and
 6 breached the FET standard.
 7 And Ms. Sherkey will be going
 8 through this in more detail. But, our argument is
 9 that, despite the promise to freeze, the
 10 representations made before the Windstream I
 11 Tribunal and the Tribunal's finding of legal and
 12 contractual limbo, Ontario then took no steps to
 13 resolve the situation it created.
 14 It made the deliberate
 15 decision -- and you recall the evidence of
 16 Mr. Teliszewsky on this.
 17 Made the deliberate decision
 18 not to act. And we say that led to the
 19 termination of the FIT contract and it's provided
 20 no legitimate rationale for its failure to do so,
 21 as well as the failure to carry out the research
 22 that it stated it was going to do.
 23 In terms of some of these --
 24 this conduct, one, Ontario never clarified the
 25 situation after the award. It maintained the FIT

1 contract and Windstream's 6 million line of
 2 credit. Of course that's the IESO that was
 3 maintaining the line of credit.
 4 It never, Ontario never
 5 amended the regulations with respect to offshore
 6 wind, and we rely there on the evidence of Sarah
 7 Powell, which Ms. Sherkey will take you to, that
 8 you still -- offshore wind facilities are still
 9 eligible for REA under Ontario's legal framework,
 10 and that you can still, in terms of the
 11 application for grid access that we also heard
 12 about, you can still go on the website and see the
 13 fact they are the applicant for grid access.
 14 So they have maintained that
 15 situation.
 16 Second, Ontario decided, we
 17 say reflexively and immediately, that it would not
 18 act to remedy the legal and contractual limbo post
 19 award.
 20 It did so -- and this is,
 21 again, the evidence of Mr. Teliszewsky -- without
 22 any meetings or discussions about its commitment
 23 to Windstream or if the circumstances warranted
 24 its involvement. It also stopped doing any
 25 research in respect of the moratorium.

1 And you recall
 2 Mr. Teliszewsky's evidence that he was not aware
 3 of the commitment that had been made to
 4 Windstream.
 5 Third, we say this is unlike
 6 many other times the Ontario government decided to
 7 get involved and direct the IESO in respect of
 8 other proponents, FIT contracts and PPAs. And you
 9 will recall the evidence of Michael Lyle on that.
 10 It had been done more than 100 times in the
 11 TransCanada case.
 12 And, fourth, the IESO
 13 exercised the termination right relying on delay
 14 and conduct by the Ontario government as part of
 15 its reasons, including the lack of direction from
 16 Ontario.
 17 So we rely on those facts, and
 18 Ms. Sherkey will be going into more detail, to
 19 make out our argument about unfair and inequitable
 20 treatment in this case.
 21 And the loss, we say, is a
 22 loss of the opportunity for Windstream to create
 23 additional value in the FIT contract by
 24 reactivating the project.
 25 And you'll see that slide we

1 showed in our opening, which I think, I believe
 2 Ms. Sherkey will come to again, that this was not
 3 an obligation to create new value. It was an
 4 existing project. An existing project would have
 5 been unlocked or created simply by Canada
 6 fulfilling its promises to Windstream.
 7 And that Canada claims Ontario
 8 had no obligation to renegotiate the contract. It
 9 was just an option.
 10 But we say Ontario had an
 11 obligation which arises from fair and equitable
 12 treatment. They had that international
 13 obligation, that NAFTA obligation to treat
 14 Windstream fairly. And that's what gets you to
 15 the obligation, we say, to unblock the contract
 16 and allow Windstream to create value.
 17 The damages for the FET
 18 violation here, as we say, we submit that the
 19 damages are to make the Claimant whole with the
 20 valuation date of 2020. And, again, we are in the
 21 but-for world with the comparables.
 22 I don't want to speak --
 23 Ms. Sherkey will speak more about the but-for
 24 assessment.
 25 The one point I would make,

1 though, is my friends have pointed out, a number
 2 of times in their submissions to some of their
 3 questioning, have made the argument that, even if
 4 the moratorium was lifted, there is still the
 5 problem of the AOR status.
 6 And the way that this was
 7 dealt with by the previous Tribunal, in our
 8 submission, certainly the way it was argued,
 9 was that the AOR and the issues that happened
 10 around that were all part and parcel of the fact
 11 that the Ontario government, after originally
 12 setting up the regulatory framework to go ahead
 13 with offshore wind, started to make it more and
 14 more ambiguous and then get us in this state of
 15 legal and contractual limbo.
 16 So you heard the evidence
 17 originally that there were applications closer to
 18 shore and then Ontario brought in the 5 kilometre
 19 setback. And all that was part of the set of
 20 issues that led to Ontario eventually putting in
 21 the moratorium.
 22 So, in our submission, it's a
 23 reasonable assumption for the experts to make that
 24 the AOR issue would be resolved together with the
 25 moratorium in the but-for world.

1 The loss claim, in this
 2 context, is the difference between the project
 3 value at 2020 and the project value at 2016.
 4 We acknowledge that the amount
 5 of work that could be done in the project has been
 6 limited, we say, because, you know, of the
 7 blockages that have occurred from, as a result of
 8 Ontario's actions.
 9 But, nevertheless, we have
 10 reliable 2020 valuations for projects of a similar
 11 stage from Windstream's experts. And we submit
 12 that the evidence of Dr. Guillet, while relied on,
 13 of course, in the first Tribunal, is unreliable
 14 and should not be -- and that the preference, in
 15 our case, the Tribunal should prefer the evidence
 16 of Secretariat.
 17 Might I just get a time. I
 18 think I have got five minutes left.
 19 MR. ARAGÓN CARDIEL: Five
 20 minutes left, yes.
 21 MR. TERRY: Okay. Thank you.
 22 That's the fair and equitable
 23 treatment claim, and I have tried to clarify as
 24 clearly as possible.
 25 The expropriation claim,

1 again, in many respects, can be expressed more
 2 simply.
 3 Windstream's contract, the
 4 Tribunal found the FIT contract was still in
 5 force. That contract was taken completely, not
 6 just substantially, but completely in 2020.
 7 Windstream was substantially deprived of the value
 8 of the investment and it is entitled to be
 9 compensated for that loss.
 10 And there's a two-step test
 11 for expropriation: One, has there been a taking,
 12 i.e. has the investor been substantially deprived
 13 of the value of the investment; if so, was it
 14 taken lawfully or otherwise excused by the police
 15 powers doctrine?
 16 And that's the test that's
 17 being -- in our submission, has been broadly used
 18 and accepted by NAFTA Tribunals.
 19 We have talked about how the
 20 FIT contract is an investment capable of
 21 expropriation.
 22 And you will recall that, in
 23 our submission, number one, it fits the
 24 definitions in interest arising from commitment of
 25 capital, real estate or other property, tangible

1 or intangible. And the evidence from Sarah Powell
 2 is that it constitutes intangible personal
 3 property.
 4 And, therefore, we say there's
 5 a vested interest.
 6 We rely on the sole effects
 7 approach that's been adopted by Tribunals with
 8 respect to the expropriation test. And that, of
 9 course, if you look at the severity of the
 10 economic impact, that's a decisive criteria
 11 for deciding whether or not there's been
 12 expropriation.
 13 With respect to the Annex 14B
 14 of the CUSMA, which Canada suggests should be
 15 applied, which includes the investment-backed
 16 expectations and other, and other provisions,
 17 we will deal with that in more detail.
 18 Essentially, we think -- and
 19 the Tribunal, of course, made a decision on this
 20 issue without reference to the CUSMA example.
 21 They use other examples. And rejected that
 22 argument.
 23 We say, for that and other
 24 reasons, that that particular test should not be
 25 used by this Tribunal.

1 But we also say that, even if
 2 it is applied, we do have investment-backed
 3 expectations. And, I mean, you heard the evidence
 4 of Nancy Baines and you have seen the witness
 5 statements of others. And that the government's
 6 action, in this case, did have an expropriatory
 7 character directed particularly at Windstream.
 8 We also say this doesn't fall
 9 within the police powers exemption and I can
 10 elaborate on that more in our submissions.
 11 In terms of the damages that
 12 arise from the substantial deprivation, the
 13 question is -- and we all know what the
 14 Tribunal said in Windstream I about the FIT
 15 contract having no value.
 16 In expropriation, since we are
 17 not in the but-for world, the question is what
 18 additional value is added to it.
 19 And we have the information of
 20 costs that was in Secretariat's report with
 21 respect to the project-related costs which, in our
 22 submission, should be included as value of the
 23 project with respect to expropriation.
 24 And so, in this case, we are
 25 not relying on any sort of obligation on the

1 government in contrast to the FET argument to
 2 unblock value.
 3 And unless -- my time is done
 4 and so, right on time, so I will sit down and
 5 leave you in the good hands of Ms. Sherkey.
 6 PRESIDING ARBITRATOR MILES:
 7 Thank you. Thanks very much, Mr. Terry.
 8 MS. SHERKEY: Good morning.
 9 Oh, sorry, I didn't have a big enough coffee.
 10 PRESIDING ARBITRATOR MILES: I
 11 was two sips down in mine.
 12 Mr. Neufeld.
 13 CLOSING ARGUMENT BY MR. NEUFELD:
 14 MR. NEUFELD: So, on Monday,
 15 the Claimant and Canada gave opening statements
 16 that started from two very different starting
 17 points.
 18 For Canada, the start is
 19 September 30th, 2016, when the parties were issued
 20 the Windstream I award. The award provided
 21 finality to the dispute.
 22 For this Tribunal, and because
 23 it's faced with a new claim, the award also
 24 provides your clean slate from which you must
 25 proceed. It is the basis from which you must

1 assess the Respondent's behaviour and whether it
 2 amounts to a breach of Article 1105 or 1110.
 3 Because, by the time the award
 4 was released, the Windstream I award, the
 5 continuing contractual and regulatory limbo had
 6 ceased to exist.
 7 As the Windstream I Tribunal
 8 held, the failure of the Government of Ontario to
 9 take necessary measures within a reasonable period
 10 of time after the moratorium to bring clarity to
 11 the regulatory uncertainty constituted the
 12 wrongful act.
 13 The reasonable period of time
 14 has long since passed. And we know this because,
 15 as of May 4th, 2012, the Project was at a point it
 16 could no longer be developed.
 17 And, on September 30th, 2016,
 18 the FIT Contract had no value.
 19 It's for this reason that the
 20 Tribunal ordered Canada to make the Claimant whole
 21 through a payment of \$25 million in damages and
 22 \$3 million in costs, and Canada did that in
 23 March 2017.
 24 The only part of the
 25 Claimant's investment that was not part of the

1 damages order was its \$6 million letter of credit,
 2 which I will come back to.
 3 For the Claimant, the starting
 4 point is February 11th, 2011.
 5 At this point in time, the
 6 Claimant's Project had been in force majeure for
 7 over two months because it had no site access to
 8 do wind testing or permitting work.
 9 This is a day, of course,
 10 Ontario adopted the moratorium on offshore wind
 11 and Chris Benedetti, the Claimant's government
 12 relations advisor, asks whether its Project was
 13 frozen.
 14 The Claimant argues the yes
 15 that followed that constituted a promise, which
 16 continues as part of a continuing breach scenario.
 17 As counsel for Claimants said
 18 in its opening statement, the Claimant always
 19 emphasized there was a promise to freeze.
 20 And you heard it emphasize it
 21 again this morning. The Claimant's reliance on
 22 the so-called promise to freeze, is just another
 23 attempt to reopen, relitigate its past complaint.
 24 It argued, in Windstream I,
 25 that -- and, here, I am quoting from its own

1 submission.
 2 A direct -- as a direct
 3 consequence of the moratorium and the Respondent's
 4 failure to effectively freeze the Project as
 5 promised, its investments in the Project and the
 6 FIT Contract are now substantially worthless.
 7 That argument was specifically
 8 considered by the Tribunal at paragraph 239 of its
 9 award.
 10 And although the award did not
 11 find a breach on the basis of that promise or use
 12 the word "freeze", it did agree with the Claimant
 13 that it was no longer able to finance and develop
 14 its Project as of May 4th, 2012.
 15 As you heard again this
 16 morning from Mr. Terry, the Claimant relies on
 17 arguments that Canada made in Windstream I. And
 18 it's particular to our Windstream I
 19 counter-memorial where we laid out the arguments
 20 on how it was frozen.
 21 Now, Canada submitted to the
 22 Windstream I Tribunal, it says, until the
 23 moratorium was done. That's when the Project was
 24 supposed to be frozen.
 25 But it purposefully, the

1 Claimant purposefully overlooks how those
 2 arguments evolved afterwards.
 3 Canada's rejoinder memorial
 4 makes clear that the Ontario government informed
 5 the Claimant that, in order to freeze the
 6 contract, it would need to secure contract
 7 amendments from the OPA.
 8 And if you need to, have a
 9 look at paragraphs 117 to 121 of Canada's
 10 rejoinder in Windstream I which provides Canada's
 11 take on those negotiations. They failed to
 12 produce results because the Claimant asked for the
 13 moon.
 14 The award found, at
 15 paragraph 379, as the negotiations between the OPA
 16 and Windstream failed to produce results, by
 17 May 2012, the Project had reached a point at which
 18 it was no longer financeable and could not be
 19 developed.
 20 The Windstream Tribunal did
 21 not find that there was a promise to freeze.
 22 Now, in Windstream II, the
 23 Claimant maintains that the core, the core of its
 24 case now remains the promise to freeze the Project
 25 from the effects of the moratorium.

1 Claimant's counsel's choice of
 2 words is informative. That the promise remains
 3 the core of its case. It indicates that the core
 4 that was Windstream I is the core that is
 5 Windstream II.
 6 Its words provide support to
 7 Canada's argument that the essential or the
 8 essence of its complaint has, in fact, not changed
 9 since 2013. And that it's, therefore, barred
 10 under res judicata as well as falling outside the
 11 time limit.
 12 It's the Claimant's failure to
 13 satisfy these threshold matters that Canada has
 14 always viewed as the proper way of deciding this
 15 dispute. After all, the burden is on the Claimant
 16 to bring a claim that does more than just conjure
 17 up past complaints.
 18 It has an obligation to set
 19 out a claim on a factual basis that is coherent
 20 and logically ties a post award measure to the
 21 damages it seeks. It has resoundingly failed.
 22 But, even if Canada's
 23 admissibility and jurisdictional arguments fail,
 24 since the Windstream Tribunal did not find that
 25 there was a promise to freeze and there has not

1 been a promise after the award, no liability can
 2 flow.
 3 Now let's return to the
 4 security deposit that I mentioned.
 5 On this, the Tribunal deducted
 6 it from the damages Canada was ordered to pay
 7 because it was still available -- those were the
 8 words of the Tribunal -- it was still available to
 9 the Claimant and could either be used as part of a
 10 reactivated contract or be returned to it.
 11 Now, reactivating the FIT
 12 Contract was not seen as an obligation by the
 13 Windstream I Tribunal, or as the only path to
 14 avoid a future breach of the NAFTA, but rather, as
 15 an option available to the IESO and WWIS if they
 16 so chose.
 17 Another option was terminating
 18 the FIT Contract in accordance with the applicable
 19 law.
 20 Once again, though, the
 21 Claimant sees things totally differently.
 22 For it, renegotiation was an
 23 obligation. It used the word "unblock" in its
 24 openings and I heard it again this morning. A
 25 suitably vague word to arrive at the result that

1 it wants.
 2 The Claimant needs, after all,
 3 not just to unblock a contract problem. It has to
 4 change the terms of that contract. It has to lift
 5 the moratorium. It needs an approval framework
 6 that works for it so that it can get its
 7 permitting done. And it needs site access, which
 8 we heard again this morning was a reasonable
 9 assumption to make.
 10 We are not here for
 11 assumptions. All of those assumptions was exactly
 12 what it made when it signed back the FIT Contract.
 13 This would all get done. And here we are again.
 14 For the Claimant, the FIT
 15 Contract still had additional value that could be
 16 added to a conditional investment that would have
 17 existed if the government and Windstream had
 18 worked together to achieve that.
 19 There is no dispute, however,
 20 that the parties never did create new value. As
 21 Mr. Terry said in the opening statement, the
 22 parties have not reactivated the FIT Contract to
 23 create new value.
 24 Nor did the Claimant succeed
 25 in trying to sell or partner, find a partner for

1 its worthless FIT Contract.
 2 The Windstream I Tribunal may
 3 have found that the security deposit remained
 4 available to the Claimant but you may not be too
 5 surprised to hear that that's not how the Claimant
 6 sees it.
 7 In its view, Ontario's holding
 8 of the security was meaningful.
 9 Note the fact that counsel
 10 said Ontario's holding of the security. Whereas
 11 the security deposit is actually held by the bank
 12 and can be drawn upon by the IESO. Ontario never
 13 held the security deposit.
 14 But the blending of the IESO
 15 and Ontario is a theme that ran through the
 16 Claimant's opening statements.
 17 You'll find, in the
 18 transcript, that the Claimant regularly refers to
 19 Ontario or to the government when the actor it
 20 should be referring to is, in fact, the IESO.
 21 You have a few examples there
 22 in the slide.
 23 In 2010, that's when the FIT
 24 Contract is first entered into by the government.
 25 The government never entered

1 into a FIT contract.
 2 And it was speaking to the
 3 government about adding a year to the FIT
 4 Contract.
 5 The government never returned
 6 the \$6 million letter of credit.
 7 It wasn't the government's to
 8 return in the first place. It was the IESO's.
 9 If the government had worked
 10 with Windstream to reactivate and renegotiate the
 11 contract.
 12 So this is all part of the
 13 messages that the Claimant would like for you to
 14 receive sort of uncritically.
 15 And, Madam President, given
 16 the Claimant's efforts to conflate Ontario and the
 17 IESO, you will be forgiven when you asked
 18 Mr. Killeavy whether planning was a government
 19 issue. You will recall Mr. Killeavy's response.
 20 He said it's an Ontario ratepayer issue.
 21 The government acts on behalf
 22 of the interest of Ontarians. The IESO acts in
 23 the best interest of the ratepayers of Ontario.
 24 Language is important.
 25 The FIT Contract is not an

1 Ontario contract. It is an IESO contract and it
 2 contains the requirement to post the security.
 3 During our opening statements,
 4 there was some head scratching about where the
 5 amount of that security deposit is stipulated in
 6 the contract. Well, it's in Exhibit A.
 7 Which provides that the
 8 applicant shall pay a security in the amount of
 9 \$20 per kilowatt hour.
 10 Since the Claimant has applied
 11 for a 300 megawatt Project, the security it had to
 12 put up was \$6 million.
 13 And there was further head
 14 scratching around why the IESO just didn't return
 15 it.
 16 Well, the answer to this
 17 question lies in the applicable FIT Contract
 18 termination provision.
 19 There are numerous provisions
 20 in the contract that allow for termination and, in
 21 some cases, the return of the security deposit.
 22 But only one was applicable in this instance.
 23 Projects that have yet to
 24 receive notice to proceed, NTP, may be
 25 unilaterally terminated by the IESO pursuant to

1 Section 2.4A, in which case, the IESO would have
 2 to pay the Project's preconstruction costs.
 3 However, even if the IESO had
 4 wanted to proceed this way, which would have cost
 5 1.1 million to terminate the WIS Project, it was
 6 prevented from doing so. Because following a
 7 direction from the energy minister of August 2nd,
 8 2011, obliging the OPA to waive its pre
 9 termination rates for FIT 1 projects upon the
 10 request of any supplier, the Claimant had made
 11 such a request.
 12 Section 9.1(g) and 10.1(h)
 13 also provide termination rights. But, again, they
 14 aren't applicable in the situation.
 15 In 10.1(h), it's dealing with
 16 projects that have reached commercial operation.
 17 And 9.1(j) doesn't apply to
 18 force majeure at all which, of course, we know
 19 this contract was in.
 20 So the applicable termination
 21 provision was Section 10.1(g), and it would arise
 22 on May 4th, 2017.
 23 Of course, the decision to
 24 terminate the Claimant's FIT Contract did not
 25 occur on that date or for some time after. But

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

1 Ms. Dosman will deal with
 2 Questions 5 and 4.
 3 And, Mr. Tian, Question Number
 4 2.
 5 And then I will come back for
 6 the very first question on res judicata.
 7 And would it be a problem if
 8 we sat to do that and answered the questions? You
 9 don't mind; okay.
 10 PRESIDING ARBITRATOR MILES:
 11 Not a problem at all. Wherever you are
 12 comfortable.
 13 MR. NEUFELD: How was I for
 14 time?
 15 MR. ARAGÓN CARDIEL:
 16 15 minutes and a half.
 17 PRESIDING ARBITRATOR MILES:
 18 30 seconds. It wasn't my fault.
 19 Ms. Sherkey, we are going to
 20 break at 10:30. Will that be okay with you?
 21 CLOSING ARGUMENT BY MS. SHERKEY:
 22 MS. SHERKEY: Yes.
 23 Just a few housekeeping
 24 matters.
 25 The answers are going to be --

1 your questions are going to be answered through
 2 the submissions. I will deal with 1 to 3 and,
 3 Mr. Terry, 4 to 6. But they will kind of come up
 4 organically in the right topics.
 5 Obviously, we have a lot of
 6 slides here. We are not going to get through each
 7 one individually, so we are going to stay nimble,
 8 address your questions, spend more time on some
 9 and move more quickly through others.
 10 And so the first -- we are
 11 going to start with the two threshold issues and
 12 then I am going to take you through FET. And then
 13 Mr. Terry will take you through expropriation
 14 damages and damages encompasses loss and
 15 causation.
 16 So let's jump right into the
 17 threshold issues and into Canada's argument that
 18 the claims are time-barred.
 19 And I am going to jump right
 20 away into your Question 2 in addressing this.
 21 And so, if we start at Slide
 22 5, I have set out the language here of the
 23 relevant provisions.
 24 And what we are going to spend
 25 some time talking about is -- the test is not

1 controversial but what does it mean to first
 2 acquire knowledge of the alleged breach and that
 3 an investor knowledge that it has incurred loss.
 4 And we say those are the very
 5 key words: Knowledge of the alleged breach and
 6 knowledge that the investor has incurred loss.
 7 And the cases have answered
 8 this for us. So that's where we are going to
 9 start. What have the cases said on the meaning of
 10 those words, which is going to address the part of
 11 your question about the law.
 12 To what extent, if at all, can
 13 elements of the knowledge of the alleged breach
 14 predate the three-year time period.
 15 And so I have set out, on
 16 Slide 8, the parties agree on the applicable test.
 17 So we have set it out here.
 18 We are going to go through the
 19 legal principles and then apply Steps 2 and 3
 20 because we agree on Step 1.
 21 If we turn over the page. We
 22 start with this test.
 23 What do you have to know to
 24 have knowledge of the breach?
 25 My friends, in their opening,

1 used the word:
 2 "Knowledge that an
 3 alleged breach may
 4 happen."[as read]
 5 That is not the test.
 6 The case law is clear. We
 7 have put a little quote from Mobil on the side
 8 here.
 9 It is not enough to suspect
 10 something will happen. Knowledge entails more
 11 than suspicion or concern. It requires a degree
 12 of certainty.
 13 And I have excerpted from
 14 Infinito which dealt with this issue in quite a
 15 lot of detail and it wasn't the NAFTA. It was
 16 the Canada-Costa Rica treaty. But the same
 17 language of limitations is found in that treaty.
 18 And where I started to
 19 highlight:
 20 "The Tribunal notes that
 21 the knowledge -- it's the
 22 knowledge of the alleged
 23 breach and not knowledge
 24 of the facts that make up
 25 the alleged breach. In

1 other words, the
 2 limitations period only
 3 starts to run once the
 4 breach (as a legal
 5 notion) has occurred.
 6 While a breach will
 7 necessarily have been
 8 caused by facts, as
 9 discussed below, the
 10 moment at which a breach
 11 occurs will depend on
 12 when a fact or group of
 13 facts is capable of
 14 triggering a violation of
 15 international law."[as
 16 read]
 17 And then it goes on to say
 18 that, with respect to loss or damage, that must
 19 flow from the alleged breach.
 20 So it doesn't always postdate
 21 it. It can coincide.
 22 What they don't say, but what
 23 logically flows from that, is that the loss cannot
 24 predate the breach.
 25 And so I stop there and

1 emphasize this. We are going to look at a few
 2 cases that facts can predate the breach. That
 3 makes sense. Something has to happen to give rise
 4 to a breach.
 5 And there's also cases where
 6 breaches themselves straddle both sides of the
 7 cutoff date. This is not one of those cases, as I
 8 will explain. But that actually happens as well.
 9 And so just looking at this
 10 point that you can have knowledge of the facts, if
 11 you turn over the page, we have highlighted a
 12 couple of examples of cases.
 13 So Glamis Gold, the Claimant
 14 cited earlier events -- the challenged measure was
 15 a 2001 denial of its permit.
 16 And the Claimant cited earlier
 17 events in its notice of arbitration, even calling
 18 them offending measures.
 19 So the Respondent said those
 20 responding, those offending measures are out of
 21 time. But the Tribunal said, no, those were
 22 factual predicates to the claim. They weren't
 23 what was actually alleged to breach.
 24 And so what the Tribunal sets
 25 out in the excerpt I have here, is they explain:

1 "It is necessary that any
 2 action be preceded by
 3 other steps, but such
 4 factual predicates are
 5 not per se the legal
 6 basis for the claim. The
 7 basis of the claim is to
 8 be determined with
 9 reference to the
 10 submissions of the
 11 Claimant."[as read]
 12 That's how you determine the
 13 alleged breach.
 14 PRESIDING ARBITRATOR MILES:
 15 Ms. Sherkey, I don't have a question. Everything
 16 you are saying is very, very, very helpful. Can
 17 you just say it a little bit slower, for me. Not
 18 for Lisa. I just want to keep up. Thank you.
 19 MS. SHERKEY: Of course.
 20 So the key here is how you
 21 determine the basis of the claim. You do it by
 22 reference to the submission of the Claimant.
 23 And does something form a
 24 factual predicate, we say the promise to freeze,
 25 for example, is the factual predicate. And I

1 will get into this more when we apply this. You
 2 can have pre-existing facts but the question is
 3 what's the breach.
 4 And a very useful example, in
 5 my submission, is over on the next page in Eli
 6 Lilly.
 7 And, in this case, this had to
 8 do with an invalidation of the Claimant's patents
 9 by the Canadian courts.
 10 Just a little background to
 11 the facts.
 12 This case questioned the
 13 validity of what's called the promise utility
 14 doctrine where patents can be invalidated on the
 15 basis that they didn't fulfil the promise they set
 16 out to the public.
 17 And so, in 2010 and 2011, Eli
 18 Lilly claims its patents were invalidated and it
 19 commenced this arbitration.
 20 Canada argued, in that case,
 21 this is out of time. Yes, you brought the claim
 22 in time from when the Supreme Court of Canada
 23 denied you leave to appeal to the Court's
 24 invalidation of those patents.
 25 But what you're really

1 challenging is the judicial treatment of the
 2 promise utility doctrine.
 3 The Claimant said that this
 4 promise doctrine, which was used to invalidate its
 5 patents, was a dramatic change in a Canadian
 6 patent law.
 7 And the Respondent said you
 8 are looking at judicial decisions from 2002 up to
 9 2008, to constitute whether or not that was a
 10 dramatic change. So you're looking at events that
 11 predate the limitation period. You can't do that.
 12 And, in fact, one of the
 13 Claimant's prior patents was invalidated in 2008
 14 on this promise utility doctrine.
 15 So, when the Tribunal went to
 16 this, it said we have to find the alleged breach.
 17 And they did it, like in Glamis Gold, by reference
 18 to the Claimant's submissions. And they said the
 19 Claimant is challenging the invalidation of the
 20 patents. It's doing it by reference to the
 21 application of the promise utility doctrine. But
 22 what the actual breach is, is the invalidation of
 23 its patents.
 24 And so it disagreed with the
 25 Respondent's attempt to, as the Tribunal said,

1 recharacterize the Claimant's case into something
 2 else.
 3 And the Claimant could not
 4 have the requisite knowledge that it would lose
 5 the patents until it happened.
 6 And they noted there was an
 7 increased risk. There might have been knowledge
 8 of an increased risk or an increased likelihood
 9 that this would happen -- and that's set out at
 10 paragraph 169 -- because its prior patent was
 11 invalidated on this basis.
 12 But investors are not required
 13 to bring claims for possible future breaches on
 14 the basis of potential and, therefore, necessarily
 15 hypothetical losses to their investments or the
 16 increased risks of such losses.
 17 So you do not impute knowledge
 18 of a future breach or loss. The loss has to have
 19 happened.
 20 And so, in this case, it was
 21 actually when the Supreme Court of Canada denied
 22 leave to appeal that the invalidation happened.
 23 Of course many facts were
 24 known then. The lower courts had already
 25 invalidated the patent. That had happened.

1 Potential loss had happened. They had been
 2 invalidated.
 3 But while the appeal process
 4 was underway, the alleged breach had not, as a
 5 legal notion, had not formed.
 6 And then the Tribunal goes on
 7 to say, of course, we can consider earlier events
 8 that provide factual background to a timely claim.
 9 And, if we go over the next
 10 page, my friend relies on Bilcon and Rusoro as
 11 saying, well, the proper approach is that you
 12 break everything down, measure by measure, when
 13 you're trying to determine an alleged breach.
 14 We say that's not the test and
 15 that's not consistent with the holdings in those
 16 cases.
 17 I am going to highlight what
 18 Infinito found on the proper test and then I am
 19 going to take you into Rusoro.
 20 So what Infinito stated was
 21 that there is a two-step test here.
 22 First, you have to identify
 23 when a given act or omission was performed or
 24 completed.
 25 So not when it started. When

1 it was performed or completed.
 2 And then the second step was
 3 to assess when the Claimant knew of that
 4 completion. And then the loss caused thereby.
 5 And how do you do that
 6 analysis? You do it for each of the standards
 7 allegedly breached.
 8 So you don't break it out
 9 measure by measure. You break it out breach by
 10 breach. And the Tribunal then goes on to say when
 11 was there knowledge of the alleged expropriation?
 12 When was there knowledge of the alleged FET claim?
 13 So that's how you break it
 14 out.
 15 And, when they did that
 16 analysis, they go into the expropriation analysis.
 17 When they go into knowledge of
 18 expropriation, they don't break it down measure by
 19 measure. They look at what's the element of
 20 expropriation claim.
 21 And the same with FET. They
 22 said what's FET. What's being claimed?
 23 And, for example, in Infinito,
 24 they were saying, well, the FET claim is really
 25 two things: Your ability to operate this gold mine

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

3 And then they assess when they
4 gain knowledge.

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

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

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

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

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

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

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

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

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

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

20 "In the specific
21 circumstances of this
22 case, we are going to
23 break down the alleged
24 composite claim into
25 individual breaches." [as

1 read]
2 Not individual measures.
3 Individual breaches.

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

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

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

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

21 So, if we flip over to Slide
22 15, this deals with the other part of your
23 question: What is the knowledge of the alleged
24 breach in this case? When did the breach occur?
25 Not may occur. Not likely occur. When did it

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

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

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

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

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

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

1 But there was no breach until
 2 there was a termination.
 3 Dealing with a few allegations
 4 my friends make about the timing, my friends have
 5 said, okay, but in 2017, you knew the termination
 6 right arose. And it was a real and tangible
 7 likelihood that the IESO would exercise its
 8 termination right. So you knew that.
 9 And, if you look over on the
 10 next slide, we say that's suspicion, not
 11 knowledge. Particularly on the facts as you have
 12 them. Slide 16.
 13 So the next slide, the
 14 transcript of Mr. Lyle is confidential.
 15 PRESIDING ARBITRATOR MILES:
 16 Alonso, are you here with us today?
 17 MR. HAUSER: I am, Madam
 18 President. I can confirm we are in confidential
 19 mode right now.
 20 --- CONFIDENTIAL TRANSCRIPT COMMENCES AT 9:52 a.m.
 21 PRESIDING ARBITRATOR MILES:
 22 Thank you very much and welcome back.
 23 MR. HAUSER: Thank you.
 24 MS. SHERKEY: The point here
 25 is just Windstream asked to be told that it should

1 have known, in 2017, it was likely, is not the
 2 test. But it asked the IESO directly, are you
 3 going to terminate what happens on May 4th? It
 4 was told no decision. February, no decision.
 5 November, no decision.
 6 And we heard from Mr. Lyle
 7 that the IESO didn't make a decision until between
 8 February 16th and 20th. We have excerpted his
 9 testimony here.
 10 So, like in Eli Lilly,
 11 Windstream cannot be deemed to know of something
 12 before it happens. The IESO did not know what it
 13 was going to do.
 14 And that's reiterated by
 15 Mr. Lyle on the next page where he says:
 16 "The IESO undertakes a
 17 fact-specific exercise.
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED] [as read]
 21 And I asked him:
 22 "It's not automatic that
 23 you will exercise that
 24 termination right." [as
 25 read]

1 And he says:
 2 "That's correct. We want
 3 to make a thoughtful and
 4 reasonable decision." [as
 5 read]
 6 So the point is simple that
 7 you can't impute that knowledge to Windstream that
 8 the IESO would have exercised the termination
 9 right. All it knew was it was a possibility.
 10 Now, the other point my
 11 friends make --
 12 CO-ARBITRATOR MCLACHLIN: Are
 13 we out of.
 14 MS. SHERKEY: We can come out
 15 of confidential mode.
 16 --- CONFIDENTIAL TRANSCRIPT ENDS AT 9:53 a.m.
 17 MR. HAUSER: Out of
 18 confidential. Thank you.
 19 PRESIDING ARBITRATOR MILES:
 20 Thank you.
 21 MS. SHERKEY: It says the
 22 measures challenged here were all known before
 23 Windstream I. They are the continued application.
 24 Windstream knew the moratorium was applied to it.
 25 It knew that research wasn't going ahead. And it

1 knew that, up to that date, Ontario hadn't
 2 directed the IESO.
 3 Yes, those were facts that
 4 were known. But that's not the test.
 5 The measures all postdate the
 6 award in terms of what happened after 2016 when
 7 Windstream approached the government when it asked
 8 the government what it was doing. We have gone
 9 through those facts. And they then resulted in
 10 the termination of the FIT contract.
 11 So I am not going to repeat
 12 myself on what we say the alleged breach is.
 13 But we say Canada is
 14 conflating here knowledge of pre-existing facts
 15 with the conduct actually alleged to amount with
 16 the breach. There is no treaty breach divorced
 17 from the termination of the FIT contract.
 18 And the point I just want to
 19 conclude on, for limitations, is the circularity
 20 of my friend's position.
 21 If we go to the next slide.
 22 If Canada's position was
 23 accepted, there was never a path to this claim.
 24 There was never a time this claim could have been
 25 brought. And I break this down into more detail

1 over the next two slides.
 2 But the point, the gist is, we
 3 were premature in Windstream I. But we are now
 4 too late, at any point after that, for the
 5 termination.
 6 So there just could never be a
 7 claim on the termination of the FIT contract.
 8 And, if you just look over on
 9 the next slide, we break this down into timelines.
 10 Windstream I, too premature.
 11 Canada argued there was no expropriation because
 12 the moratorium was temporary.
 13 The Tribunal, as we know,
 14 found the FIT contract was in force and finding no
 15 expropriation.
 16 So what should Windstream have
 17 done? Brought a claim immediately after in 2016?
 18 Under Canada's theory, it's
 19 both too early and too late. We are premature
 20 because we are in the same place as we were in
 21 Windstream I, the same finding. FIT contract is
 22 in force so you have no expropriation.
 23 But we are also too late
 24 because Canada's arguments that we have had
 25 knowledge of facts since 2011 equally applies

1 then.
 2 Same with when you go to 2017.
 3 We are both too early and too
 4 late.
 5 And then when we bring the
 6 claim in time for what happens in 2018, when
 7 Windstream is advised of the termination right,
 8 now it's too late.
 9 So those are all my
 10 submissions on limitation period.
 11 So I will now -- sorry, I have
 12 one more slide on limitation period. If this was
 13 your question, I am happy to take your question.
 14 And this is not anything that
 15 complicated.
 16 If we go to the next slide.
 17 When did we have knowledge of
 18 the loss?
 19 It had to flow from the
 20 termination. The test is whether loss or damage
 21 has been incurred. Per Infinito, loss must flow
 22 from the breach.
 23 Here, the loss only happened
 24 once the FIT contract was actually taken. It was
 25 only possible before that. It was possible the

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

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

1 the parties can renegotiate and trigger --
 2 renegotiate the FIT contract to create value.
 3 And so they acknowledge the
 4 existence of the FIT contract and there was a
 5 finding of FET for creating the limbo and the FIT
 6 contract still exists.
 7 PRESIDING ARBITRATOR MILES:
 8 So the finding of FET for creating the limbo, with
 9 what consequences? What consequences of finding
 10 limbo gave rise to damages in the first award?
 11 MS. SHERKEY: Well, that
 12 was -- sorry, I just want to make sure I
 13 understand your question on consequences.
 14 They value the project as at
 15 that time, including their finding that the FIT
 16 contract was not -- did not have value at that
 17 time, and recognized that the FIT contract can be
 18 renegotiated.
 19 So the FIT contract is still
 20 in place, still existing. And that is, I would
 21 say, still tied to their FET finding because it's
 22 the basis of how they valued the FET breach.
 23 CO-ARBITRATOR MCLACHLIN: What
 24 was the \$25 million for? It was for breach of
 25 fair and equitable.

1 And the question in my mind is
 2 did that put the Claimant whole for a breach of
 3 that obligation under the trade agreement at that
 4 time? Nothing to do with FIT. Nothing to do with
 5 expropriation. FIT remained. No argument about
 6 that.
 7 But the Tribunal found a
 8 breach and it found 25 million, if you take off
 9 the 6. And was that to make the Claimant whole at
 10 that time for that breach of the trade agreement
 11 standard of fair dealing?
 12 MS. SHERKEY: Yes. For that
 13 breach, for the damages up to that time, and then
 14 of course recognizing that there was still a valid
 15 existing FIT contract that, if renegotiated, would
 16 create further value.
 17 And what happened afterwards,
 18 whether Windstream's entitled to that value, and
 19 we will come to this in res judicata, are fresh
 20 issues for you not considered.
 21 But we would say that's also
 22 tied to the limitation period because now, going
 23 forward, you still have an existing FIT contract.
 24 You have this statement that the FIT contract can
 25 be renegotiated to create value.

1 Windstream tries -- and we
 2 will talk about this in FET -- to get engagement
 3 from the government to clarify the situation that
 4 continues.
 5 And until the termination of
 6 the FIT contract happens, there hasn't been a
 7 breach of FET in this second world, this post-2016
 8 world. This question of whether there was an
 9 obligation under the government, under
 10 international law to renegotiate the treaty --
 11 renegotiate the contract to create value, and
 12 whether that value was taken to Windstream is all
 13 post-2016 elements.
 14 PRESIDING ARBITRATOR MILES:
 15 Why did the FIT have no value?
 16 MS. SHERKEY: As found at the
 17 time that the Tribunal found it, it said it was
 18 unfinanceable as of May 2012.
 19 PRESIDING ARBITRATOR MILES:
 20 Why?
 21 MS. SHERKEY: Because of the
 22 contractual and legal limbo created by the
 23 government. The project, at that point of time,
 24 was no longer able to be developed within the
 25 timelines left of the FIT contract.

1 If the FIT contract was
 2 redeveloped -- or renegotiated, that state of
 3 affairs would change.
 4 That's where the creation of
 5 value would be and we say unlocked. You
 6 renegotiate the contract and now you have a
 7 financeable valuable project beyond what was
 8 awarded by the Tribunal in the first instance.
 9 CO-ARBITRATOR GOTANDA: I
 10 guess where we are struggling is the obligation to
 11 renegotiate the FIT contract might not necessarily
 12 be tied to the termination of it.
 13 The termination concludes,
 14 ultimately, your damage there -- put aside the
 15 expropriation claim.
 16 The expropriation claim, one
 17 could make the argument and, given the first
 18 Tribunal's ruling, it seems like that's -- you
 19 don't have the expropriation claim, until it's --
 20 it's not ripe until that happens.
 21 But it's -- we need you to tie
 22 it tighter together for the FET claim.
 23 Because one could make the
 24 argument that the claim arises as soon as post --
 25 let's say, you know, Windstream I, they refuse to

1 negotiate. And what if they said, at that point,
 2 and we are never negotiating with you?
 3 Doesn't your claim arise
 4 instantly sort of then? You may not know the
 5 extent of your damage. I get that. But help us
 6 understand that.
 7 That's where, I think, where
 8 we are struggling with on that.
 9 MS. SHERKEY: Thank you,
 10 Professor Gotanda.
 11 I think there's a factual and
 12 legal element to answering that.
 13 The first is, on the factual
 14 side, the failure to clarify the situation, post
 15 award. And the Claimant immediately reaches out.
 16 We will talk about this in FET.
 17 The Claimant immediately
 18 reaches out to the government. We want to meet.
 19 We want to meet. We want to meet. And the
 20 government says no, go to the IESO.
 21 They don't say, no, you have
 22 been fully compensated. No, we will never meet
 23 with you. No, this contract will never be
 24 amended. They say go deal with the IESO.
 25 We say that's problematic but

1 no one is proceeding on the basis that this
 2 project can't proceed. That's no one's
 3 understanding. That's never clarified.
 4 And so Windstream goes to deal
 5 with the IESO. Certainly, the government does not
 6 involve itself. That's a huge basis of this
 7 claim.
 8 But the IESO's also saying
 9 it's not going to exercise its termination rights.
 10 And, until it does, they have
 11 the Ontario action. They may see results there in
 12 the injunction. They haven't actually lost that
 13 creation of value, that ability to renegotiate
 14 until the IESO makes its decision to terminate.
 15 So they know it's possible.
 16 They know the factual predicates the government is
 17 refusing to involve itself. It doesn't clarify
 18 the situation. But it's refusing to involve
 19 itself.
 20 But, until the FIT contract is
 21 terminated, the actual failure to renegotiate and
 22 the actual loss of that value has not happened
 23 yet.
 24 CO-ARBITRATOR MCLACHLIN:
 25 Well, I think part of the question was you don't

1 have to have the quantification of the loss. If
 2 there was enough for the -- for a reasonable
 3 person in their position to conclude that the
 4 government was not going to negotiate, the loss
 5 was clear. It hadn't, perhaps, been quantified in
 6 terms of exactly how much they would lose.
 7 But they knew that they could
 8 not go forward and that they would lose their
 9 investment.
 10 So this gets us into that area
 11 where how, how precise does the knowledge of the
 12 loss have to be?
 13 I think that's what's
 14 bothering me about your answer to my friend's
 15 question.
 16 MS. SHERKEY: But they also
 17 don't know what the IESO is going to do, which we
 18 have heard is a multifactorial exercise.
 19 The IESO is telling them we
 20 haven't made a decision. We know, on the facts,
 21 five and 6 out of times, this right had
 22 previously come up. The IESO didn't exercise it.
 23 Windstream was providing a lot of information to
 24 the IESO to inform its decision.
 25 So it knew it was a

1 possibility that the IESO was going to exercise
 2 it.
 3 But, until the IESO actually
 4 did, the loss of the additional value was just a
 5 likely -- maybe not even likely. A possible
 6 outcome. One could argue how likely it is on the
 7 facts but we -- Windstream asked the IESO
 8 directly, are you going to terminate? And they
 9 said we don't know.
 10 And so, at that point, they
 11 continued to ask the government to intervene.
 12 CO-ARBITRATOR MCLACHLIN: I
 13 don't think that answers the question. You go
 14 back to termination.
 15 But that's fine. I think we
 16 have the point. And there may be questions about
 17 exactly when the cause of action arose. That's
 18 all I was trying to get across.
 19 And it may not -- you could
 20 mount a case that it doesn't require actual
 21 termination. That's all. And I wanted to give
 22 you an opportunity to respond to that, not whether
 23 the termination, when it occurred or whatever.
 24 CO-ARBITRATOR GOTANDA: There
 25 were two questions, not slightly unrelated.

1 The focus, though, is not on
 2 the IESO; is it? It's on Ontario.
 3 MS. SHERKEY: Yeah, it's on
 4 Ontario.
 5 CO-ARBITRATOR GOTANDA: Right.
 6 So the fact that the IESO may
 7 have said something is not what we focus on for
 8 whether or not there's a breach of it.
 9 MS. SHERKEY: But, in my
 10 submission, it goes to the knowledge, construct
 11 over actual, that Windstream should have had in
 12 terms of the alleged breach and loss.
 13 Because the alleged breach is
 14 the failure to renegotiate, the failure to
 15 implement the commitments made that result in the
 16 failure to renegotiate when they say the Ontario
 17 government had an obligation.
 18 And that only forms once the
 19 FIT contract is terminated. Because, at that
 20 point, other outcomes could still happen. They
 21 had the Ontario application to enjoin that result.
 22 They could still meet and have settlement
 23 discussions with the IESO. They don't know what
 24 that result is going to be.
 25 So the IESO's actions are

1 relevant in terms of understanding what knowledge
 2 should have happened, although the breach lies
 3 with the Ontario government.
 4 CO-ARBITRATOR GOTANDA: Right.
 5 But that's where I want you to help us connect the
 6 dots a bit more.
 7 Because it's the Ontario
 8 government that says, under the facts, we are not
 9 talking to you. Probably the lawyers probably
 10 told them. In fact, the lawyers did tell them.
 11 Don't talk to them. Probably afraid of getting
 12 sued.
 13 So if they're not at all going
 14 to take any steps, you know, at that point, their
 15 actions, it seems like -- and help me understand
 16 this -- are concluded at that point.
 17 What the IESO does is, they
 18 can do whatever they want.
 19 But your focus, really, is on
 20 Ontario; isn't it, for the FIT claim?
 21 Help us just connect that a
 22 little closer to try to understand how that works
 23 for purposes of this.
 24 MS. SHERKEY: Yeah. And I
 25 think it goes to the question of when did the

1 breach crystallize.
 2 Is the act of saying no --
 3 right, when did it, as a legal notion, become an
 4 international wrong.
 5 In 2016, December 2016, they
 6 get a letter saying go to the IESO.
 7 What happens if you bring a
 8 claim at that point in time?
 9 In my submission, you face a
 10 prematurity argument because you have a contract
 11 that's still existing, they would say you should
 12 have gone to the IESO and had those negotiations.
 13 You didn't know what the result would be.
 14 And so there would be a whole
 15 load of elements of things they didn't know.
 16 They needed to continue
 17 through the course with the IESO and, ultimately,
 18 get to a termination decision before those actions
 19 of the Ontario government actually had a
 20 consequence or a result on the Claimant's
 21 investment.
 22 CO-ARBITRATOR GOTANDA: And
 23 here's the second part of that question, which is
 24 related to what you just said now.
 25 NAFTA may not be perfect and

1 the problem is it may allow you to bring one claim
 2 but perhaps another and you just may be stuck with
 3 that.
 4 Is there anything that we have
 5 from the parties in the drafting that seems to
 6 help answer sort of this question?
 7 Because it seems like, the
 8 language here seems ambiguously to have a
 9 requirement and to have this cutoff. And with the
 10 understanding that, for every wrong, there may not
 11 be a remedy in the end. But that's just how the,
 12 you know, the parties to the treaty drafted it.
 13 MS. SHERKEY: I think, on
 14 limitation period, there is always a remedy but
 15 you have to act on it in time. I don't think
 16 there is a reading of that where you say there
 17 might just never have been a claim for you.
 18 The knowledge has to arise at
 19 some point and then you have three years to bring
 20 it.
 21 So I think that's the key
 22 question, as opposed to a possible outcome,
 23 whether fair or unfair, that there might just not
 24 be a remedy. As it relates to limitation period,
 25 I would say there always is.

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

1 this case, it's terminated. But maybe the FET
 2 claim just arose earlier.
 3 MS. SHERKEY: I see --
 4 CO-ARBITRATOR GOTANDA: And
 5 there's this gap and that's just the language of
 6 the statute just is that way.
 7 But maybe it's not and so
 8 that's the question for you.
 9 MS. SHERKEY: I understand
 10 your point.
 11 CO-ARBITRATOR GOTANDA: Right.
 12 MS. SHERKEY: I think it's an
 13 interesting academic question, actually, very much
 14 so. And very much one that would depend on the
 15 facts.
 16 I think the answer lies here
 17 looking into the facts.
 18 We would just say that gap
 19 doesn't exist and maybe that unfairness helps --
 20 that would result underlies the interpretation
 21 that that's not the right interpretation or result
 22 because it's imputing knowledge to the Claimant,
 23 we say, before they know that it has incurred a
 24 loss. It's imputing that they should have brought
 25 a claim because something might happen at that

1 stage.
 2 But we say, until the
 3 termination happened, the actual loss alleged, the
 4 failure to renegotiate and the loss of that
 5 creation of value was -- it would be imputing the
 6 possibility of something to them, as opposed to
 7 knowledge, as we have seen in the test.
 8 PRESIDING ARBITRATOR MILES:
 9 In response to my earlier questions, you said the
 10 Tribunal found the FIT had no value when it became
 11 unfinanceable as of May 2012.
 12 And you said the Tribunal
 13 further found that that was because of the -- I am
 14 adding words here -- you said it was because of
 15 the contractual and legal limbo created by the
 16 government.
 17 The Tribunal found that the
 18 contractual and legal limbo was the breach of FET.
 19 MS. SHERKEY: Yes.
 20 PRESIDING ARBITRATOR MILES:
 21 Or the contractual legal limbo created by the
 22 government was the breach of FET.
 23 And the Tribunal found that,
 24 at that point, the project could no longer be
 25 developed within the timelines of the FIT

1 contract. Yes?
 2 MS. SHERKEY: Yes.
 3 PRESIDING ARBITRATOR MILES:
 4 And, on your Slide 20 in your box, the grey box,
 5 2013 to 2016, you say Windstream argued that the
 6 FIT contract -- that the FIT contract was de facto
 7 taken.
 8 You -- and you have put taken
 9 there for the purpose of expropriation. And I
 10 understand your argument well on expropriation.
 11 I think, like my
 12 co-arbitrators, I am still struggling with your
 13 argument on FET.
 14 So you also argued that the
 15 FIT contract was de facto gone because it had no
 16 value because it was unfinanceable from May 2012.
 17 MS. SHERKEY: Yes.
 18 PRESIDING ARBITRATOR MILES:
 19 And the Tribunal agreed with you on that. That
 20 the value in the FIT was eliminated by the conduct
 21 leading to the contractual and legal limbo.
 22 MS. SHERKEY: Yes.
 23 PRESIDING ARBITRATOR MILES:
 24 Yes. Okay. So we agree so far.
 25 So if your FET -- if your fair

1 and equitable treatment cause of action in the
 2 first arbitration was predicated on the de facto
 3 destruction of value in the FIT contract, and the
 4 Tribunal agreed with you that there had been de
 5 facto or actual destruction of the value in the
 6 FIT contract because of the conduct creating the
 7 legal and contractual limbo; yes?
 8 MS. SHERKEY: Yes.
 9 PRESIDING ARBITRATOR MILES:
 10 Then don't you have -- coming back to Slide 5 --
 11 knowledge of the alleged breach, fair and
 12 equitable treatment, and knowledge of the loss,
 13 including the loss arising out of the de facto
 14 destruction of the FIT contract.
 15 MS. SHERKEY: No. And I think
 16 the key here is the finding on the damage awarded
 17 at paragraph -- it's either 483 or 485.
 18 PRESIDING ARBITRATOR MILES:
 19 Yeah.
 20 MS. SHERKEY: Where they say
 21 we are valuing the breach flowing from 1105. It's
 22 damage to the investment, not full value, but it
 23 remains open on the parties to renegotiate.
 24 PRESIDING ARBITRATOR MILES:
 25 So you put an awful lot of weight on the use of

1 the word "damage" there, as distinct from loss of
 2 value.
 3 But what did the Tribunal do
 4 to ascertain the value of the whole investment for
 5 the purpose of compensating loss in Windstream I?
 6 MS. SHERKEY: Yes. And they
 7 determined the value of the project using the 2009
 8 to 2013 comparables with the 2016 valuation.
 9 PRESIDING ARBITRATOR MILES:
 10 In a but-for world.
 11 MS. SHERKEY: In a but-for
 12 world.
 13 PRESIDING ARBITRATOR MILES:
 14 And did that but-for world include the FIT
 15 contract sans destruction of value?
 16 MS. SHERKEY: Yes. And then
 17 recognizing that it remains another matter that
 18 the FIT contract can be renegotiated to create
 19 value --
 20 PRESIDING ARBITRATOR MILES:
 21 Right. Leave that aside.
 22 The unrenegotiated and
 23 unreactivated FIT contract, in a but-for world,
 24 was that, in your submission, attributed value by
 25 the Tribunal in Windstream I?

1 MS. SHERKEY: If I can have a
 2 moment, Mr. Terry was dealing with value so I just
 3 want to make sure I am not stepping on his toes.
 4 PRESIDING ARBITRATOR MILES:
 5 And, to be fair, I am not clear in my mind whether
 6 this is an 1116, 1117 issue or res judicata issue.
 7 Or both. And we will flush that out during the
 8 day. Or neither.
 9 MS. SHERKEY: And I think, I
 10 would love to have an answer that satisfies every
 11 one of your concerns, and I think we are going to
 12 circle in that, I think -- the key, it does fall
 13 on to that line, the additional value that could
 14 be created with the renegotiation.
 15 We say that's something the
 16 Tribunal recognized was beyond what was awarded
 17 and that was where the parties were to go forward
 18 from and we say Windstream was deprived.
 19 That's a whole new, both for
 20 res judicata and limitations, a whole new series
 21 of conduct. A whole new series of knowledge.
 22 And so everything you are
 23 saying as to what they found there, yes.
 24 But then the question here
 25 turns on the renegotiation to create that

1 additional value not awarded and when knowledge of
 2 that loss, that claim arose.
 3 PRESIDING ARBITRATOR MILES:
 4 Okay. You understand the challenge that you face
 5 for fair and equitable treatment if one of the
 6 facts that you reach back on is the existence of
 7 the FIT. And the value of the FIT. And the
 8 impact of the conduct causing legal and
 9 contractual limbo in respect of the FIT.
 10 If they are facts you're
 11 relying on as necessary facts for a reactivated,
 12 renegotiated contract will be worth X because the
 13 original FIT contract was worth X, then you're
 14 going back into territory that the Tribunal has
 15 dealt with.
 16 MS. SHERKEY: And maybe that's
 17 best dealt with in context when we talk about the
 18 FET breach and then Mr. Terry is going to take you
 19 through the loss that flows from that.
 20 So it might be that that
 21 conversation comes up better in context tied back
 22 to what we have been discussing this morning.
 23 PRESIDING ARBITRATOR MILES:
 24 Is it an 1116, 1117 issue, though? I think it must
 25 be. I mean, I have been thinking about it in res

1 judicata previously.
2 But, if you had all of the
3 knowledge of the alleged breach and the damage and
4 loss, then you do enter into 1116, 1117 territory
5 on FET, potentially.
6 MS. SHERKEY: If you did.
7 PRESIDING ARBITRATOR MILES:
8 Yes.
9 MS. SHERKEY: But you have my
10 submissions on why they don't.
11 PRESIDING ARBITRATOR MILES: I
12 understand. Okay. All right. Very good.
13 That was really, really
14 helpful. Thank you very much.
15 Did you have -- what were you
16 going to do next?
17 MS. SHERKEY: Res judicata.
18 PRESIDING ARBITRATOR MILES:
19 Should we make a start. Let's go.
20 MS. SHERKEY: Sure.
21 I think we talked through
22 some -- there is a lot of overlapping issues here.
23 And do you mind if I take off
24 my blazer. I run very hot these days.
25 So we are going to start with

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

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

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

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

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

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

1 officials confirmed that the project was not
 2 terminated, and that it would go forward once the
 3 studies have been completed. That's the
 4 Tribunal's finding.
 5 And then it pastes excerpts
 6 from the transcript.
 7 So it's not a so-called
 8 promise. It's a factual finding the Tribunal made
 9 that what was said on the call -- I have a
 10 printout of the transcript here; it's C-484 -- in
 11 fact happened.
 12 And there are multiple
 13 statements in here, not just the one line from
 14 Mr. -- the one excerpt from Mr. Benedetti,
 15 Mr. Neufeld mentioned.
 16 But a statement by
 17 Mr. Mitchell:
 18 "We acknowledge your
 19 project is unique and
 20 that it has a FIT
 21 contract and so, to that
 22 end, Perry is here. We
 23 have asked the OPA sit
 24 down with you and
 25 negotiate a number of

1 pieces, including the
 2 force majeure provisions.
 3 We are going to attempt
 4 to create a solution that
 5 will be acceptable to you
 6 so that is NRG's
 7 position."[as read]
 8 Andrew Mitchell again:
 9 "There is really no way
 10 to proceed at this point.
 11 But, with respect to your
 12 FIT contract, we are
 13 going to work with the
 14 OPA to make provisions to
 15 ensure that there is a
 16 solution that is
 17 acceptable."[as read]
 18 Ian Baines:
 19 "What I am hearing very
 20 clearly is that the
 21 project has been
 22 terminated.
 23 Perry Checcini.
 24 No, you're not hearing
 25 that."[as read]

1 PRESIDING ARBITRATOR MILES:
 2 You are in res judicata now, right.
 3 So, in terms of issue
 4 estoppel, do you accept that, if the Tribunal made
 5 a finding as to the veracity or intent or effect
 6 of certain statements, conversations, facts that
 7 relate to this period that, if there is a fact in
 8 issue as to what was said or what was meant by
 9 what was said or what was the effect of what was
 10 said --
 11 MS. SHERKEY: Yeah.
 12 PRESIDING ARBITRATOR MILES:
 13 -- that we are bound by that determination of
 14 that fact in issue for this period.
 15 MS. SHERKEY: Yes.
 16 PRESIDING ARBITRATOR MILES:
 17 So we take the facts as that Tribunal found them.
 18 MS. SHERKEY: As that Tribunal
 19 found them.
 20 Now, the question is, and this
 21 is what goes. Does that fact exist. It's found
 22 by the Tribunal. It's not a so-called fact. It's
 23 a fact.
 24 It would be, if we are now
 25 saying if Canada was saying it didn't happen, if

1 we were trying to take opposite results, that's
 2 issue estoppel.
 3 That's not the issue here.
 4 The issue here is whether that
 5 fact is a factual predicate that is allowed to
 6 form the basis of a new claim and we say yes.
 7 It was a fact that was before
 8 the Windstream I Tribunal. It found a breach of
 9 FET on the facts before it.
 10 But whether those facts, as a
 11 factual event, then form part of what gives rise
 12 to a new treaty breach, a new obligation, is not
 13 exhausted. It's just a separate question.
 14 And think, for example, of a
 15 gold mine. You may have a representation to
 16 induce a project.
 17 We will move you through the
 18 process speedily and you will go through our
 19 regulatory process, something to that effect, as
 20 we have seen in other cases.
 21 And there is a first claim on
 22 delay. The project is not terminated but there
 23 were delays in getting your EA approvals. The
 24 Tribunal finds that fact happened. Yeah, there
 25 were delays. You suffered damages. Here you go.

1 And then, later, the gold mine
 2 is nationalized and they weren't allowed through
 3 the regulatory process.
 4 That second claim is going to
 5 be based on the same fact, the same
 6 representation. But it's a new question of a new
 7 breach.
 8 So facts can overlap. We say
 9 they are not exhausted.
 10 CO-ARBITRATOR GOTANDA: That's
 11 not a preclusion issue.
 12 The preclusion issue is the
 13 fact that the conversation occurred, as opposed
 14 to, right.
 15 MS. SHERKEY: Yeah.
 16 CO-ARBITRATOR GOTANDA: Yeah.
 17 Okay.
 18 MS. SHERKEY: We say it
 19 occurred. The Tribunal found it occurred.
 20 CO-ARBITRATOR GOTANDA: Right.
 21 Right.
 22 MS. SHERKEY: So the question
 23 is what role, if anything, does that background
 24 fact have on finding a breach here in this
 25 instance. That's a merits issue for you to

1 determine.
2 CO-ARBITRATOR GOTANDA: Right.
3 Not a res judicata --
4 MS. SHERKEY: Not a res
5 judicata issue.
6 CO-ARBITRATOR GOTANDA: Yeah.
7 MS. SHERKEY: So we say this
8 is quite simple.
9 PRESIDING ARBITRATOR MILES: I
10 did say we would stop at 10:30 but I would quite
11 like you to keep going to 10:45 if you're okay.
12 MS. SHERKEY: I actually think
13 I am going to be less than five minutes.
14 PRESIDING ARBITRATOR MILES:
15 Okay. We can take the break when you're done.
16 But you won't get through res
17 judicata.
18 MS. SHERKEY: I don't plan to
19 be long on cause of action estoppel.
20 PRESIDING ARBITRATOR MILES:
21 Let's see how you go. If you can get through by
22 quarter to, then we will clean them up. Thanks.
23 MS. SHERKEY: Sure.
24 PRESIDING ARBITRATOR MILES:
25 Thanks.

1 MS. SHERKEY: So, issue Number
2 4, Canada argues that we are challenging the
3 measures about the failure to lift the moratorium
4 and the moratorium's application to the project.
5 And, again, we -- of course,
6 we have to focus on what the Tribunal found.
7 The finding that is res
8 judicata. The decision to impose the moratorium
9 was not wrongful. It didn't breach the NAFTA.
10 Absolutely. That finding is res judicata.
11 We are not alleging here, in
12 any way, that the moratorium is wrongful. It's
13 not even alleged to breach, itself, the NAFTA.
14 The question is whether its
15 continued application, the failure to conduct
16 research, led to the circumstances that created
17 the conditions to terminate the contract that led
18 to the termination right arising and being
19 exercised. That's a separate issue.
20 Similarly, the Tribunal also
21 said, in finding a breach of FET, that the failure
22 to take the necessary steps or measures within a
23 reasonable period of time after imposing the
24 moratorium to bring clarity to the regulatory
25 uncertainty surrounding the status and development

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

1 methodology is the comparables?
2 MS. SHERKEY: Yes.
3 PRESIDING ARBITRATOR MILES:
4 Okay.
5 And the DCF as a reality
6 check.
7 MS. SHERKEY: Yes.
8 PRESIDING ARBITRATOR MILES:
9 Okay.
10 CO-ARBITRATOR GOTANDA: So
11 here's an issue, though, I do want you to address.
12 And that is Canada seems to be
13 arguing that Dr. Guillet's evidence, that the
14 Tribunal found that -- they basically say that it
15 was comprehensive -- the most comprehensive
16 evidence relating to comparable transactions
17 methodology and that it included undisclosed
18 confidential information that it did not see fit
19 to exclude.
20 Is the finding of the Tribunal
21 that it can -- that we are bound by undisclosed
22 confidential information, is that collateral
23 estoppel? And why?
24 MS. SHERKEY: No, I have a
25 response and then I will look at Mr. Terry to see

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

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

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

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

1 PRESIDING ARBITRATOR MILES:
 2 Yeah, you said hindsight and confidential.
 3 So ex post, ex-ante approach
 4 to valuation methodology and the valuation date
 5 and how to treat that; that is built into the
 6 methodology standards.
 7 MS. SHERKEY: Yes.
 8 PRESIDING ARBITRATOR MILES: I
 9 am not aware of anything on confidentiality, so I
 10 will proceed on that basis unless told otherwise.
 11 MS. SHERKEY: Yes, I
 12 apologize. I might be right but I leave it to my
 13 colleagues to confirm that.
 14 PRESIDING ARBITRATOR MILES:
 15 And there may be a nuance in there, if you're
 16 looking at market comparables, what you can take
 17 into account and confidentiality may be implicit
 18 somewhere in there, but you'd have to show me
 19 that.
 20 MS. SHERKEY: We will come
 21 back to that.
 22 PRESIDING ARBITRATOR MILES:
 23 Did you want to say anything else quickly about
 24 res judicata?
 25 MS. SHERKEY: It's just cause

1 of action estoppel, which I think, unless the
 2 Tribunal will have lots of questions on it, I
 3 can -- I have a few slides but I think I can cut
 4 through it pretty quickly.
 5 PRESIDING ARBITRATOR MILES:
 6 Why don't you just do that. And then we have a
 7 clean break so good.
 8 MS. SHERKEY: Parties don't
 9 disagree on the principles. That was one of your
 10 questions. Agreed on principles. Principle on
 11 page 38, again, agreed.
 12 It's what the Tribunal
 13 determined that matters, not what was alleged.
 14 We've got to focus on what was definitively
 15 settled.
 16 And so, here, essentially, if
 17 we go to Slide 39, the question is -- and the
 18 parties agree -- does the prior claim concern the
 19 same claims based on the same factual and legal
 20 bases? Do the facts and circumstances arise from
 21 a single event and give rise to a right of relief?
 22 We say no. You have my point.
 23 This is a case about Ontario's responsibility for
 24 the termination of the FIT contract. That is not
 25 what was before the Tribunal.

1 Really, we think -- I
 2 understand the points of issue estoppel. We have
 3 talked about that and how it gives rise.
 4 That's really where this
 5 discussion takes place, we say, as it relates to
 6 the causes of action. They are just distinct.
 7 Particularly, based on what the Tribunal found.
 8 And, if you look at what my
 9 friend's arguments are, on paragraph 40, in my
 10 friend's opening, they didn't talk about what the
 11 Tribunal found. They talked about what Windstream
 12 argued and we heard let's just simply compare what
 13 was argued in Windstream I with Windstream II.
 14 And they had these fancy charts of the complaints
 15 in the two proceedings.
 16 And we say this just isn't the
 17 right consideration. The question is what was
 18 found by the Tribunal. And you have my point on
 19 why the determination is different than what was
 20 ultimately found.
 21 My friend, in opening, at
 22 Slide 41, asked the question, what would the
 23 Tribunal say. And he said the Tribunal would say
 24 it's already decided these issues.
 25 Respectfully, that's just not

1 a hypothetical that we can answer. It's now the
 2 question before you.
 3 We also heard from my
 4 colleagues, in opening at Slide 42, that this case
 5 isn't about the termination of FIT contract. They
 6 say we are not challenging the IESO's exercise of
 7 discretion but we are using the termination as a
 8 hook to fish out all the old claims.
 9 And so the termination of the
 10 FIT contract isn't the cause of action here.
 11 And we -- that's just not our
 12 claim. And, again, you are to look at what our
 13 claim is, our submissions, as the -- we saw the
 14 case law on limitations that said that.
 15 And the issue here is whether
 16 is Ontario is responsible for the termination.
 17 The fact that we are not challenging the IESO's
 18 contractual exercise isn't the question.
 19 Just clarifying one point that
 20 came up in opening.
 21 Ms. Miles, it arose -- Madam
 22 President, it arose out of a question you had in
 23 opening about Canada doing what it is alleging we
 24 did. It was successful in expropriation in
 25 arguing that the contract wasn't de facto

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

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

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

13 This assertion misrepresents
14 the current status of the project.

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

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

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

1 MS. SHERKEY: Expropriation,
2 subheading temporary measure.

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

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

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

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

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

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

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

6 "It's clear from the
7 reasons that the parties
8 distinctively put in
9 issue ANDAs
10 generally."[as read]

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

15 So that's the key finding
16 there.

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

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

24 So those are the submissions
25 on the two threshold issues.

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

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

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

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

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

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

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

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

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

1 the nature -- 20.3(j), as Ms. Shelley reminds me,
2 is the nature and sources of information upon
3 which valuers rely must be disclosed.
4 Section 105, para 30.7,
5 sufficient info on transactions should be
6 available to allow the valuer to develop a
7 reasonable understanding of the comparable asset
8 and assess the valuation metrics comparable
9 evidence.

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

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

16 MS. SHERKEY: Yes.

17 PRESIDING ARBITRATOR MILES:
18 So not for DCF, necessarily?

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

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

1 MS. SHERKEY: Paragraph 30.7
2 is comparables.

3 PRESIDING ARBITRATOR MILES:
4 That's excellent.

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

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

12 MS. SHERKEY: Ms. Shelley is
13 looking.

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

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

19 MS. SHERKEY: Okay. So
20 45 minutes, which means I will need to be a bit
21 nimble on FET to ensure that Mr. Terry has time to
22 speak to you about expro and damages.

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

25 If you could sort out, perhaps

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

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

9 MS. SHERKEY: We will look at
10 that.

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

15 All right, okay. Off you go.

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

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

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

1 itself, relied on it in its materials.

2 So the breach of FET.

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

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

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

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

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

25 But we can talk about the

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

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

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

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

19 And we have set out four
20 categories.

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

25 So the first is the lack of

1 clarification.

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

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

8 And one of the key points is
9 it immediately, if we go to the next slide, Slide
10 62, it immediately and clearly communicates this
11 to Ontario. It sends letters asking to meet. It
12 sets out its position that there is next steps for
13 the project.

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

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

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

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

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

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

15 We have seen many examples of
16 terminations in this record.

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

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

1 directives to terminate other contracts.

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

9 PRESIDING ARBITRATOR MILES:
10 Is there any factual evidence on the record,
11 documentary or testimony, or that Windstream asked
12 for the \$6 million back or took any steps to try
13 to renegotiate early termination to get the
14 \$6 million back?

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

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

25 And if the government was

1 saying there is no path, if the government was
 2 saying you have been fully compensated, don't
 3 incur project costs, don't take any steps here
 4 because you have no project, we say it was for
 5 them to clarify that situation.
 6 PRESIDING ARBITRATOR MILES:
 7 And when you say the opposite, that's right, isn't
 8 it, on the facts, insofar as Windstream went to
 9 court to stop the IESO giving their \$6 million
 10 back.
 11 MS. SHERKEY: Yes, yes.
 12 PRESIDING ARBITRATOR MILES:
 13 So they took affirmative positive steps --
 14 MS. SHERKEY: Yes.
 15 PRESIDING ARBITRATOR MILES:
 16 -- not to get their money back.
 17 MS. SHERKEY: Yes. Well, took
 18 affirmative steps to preserve their project and
 19 the additional value, they say, should have been
 20 created, which ties --
 21 PRESIDING ARBITRATOR MILES:
 22 And the consequence of that.
 23 MS. SHERKEY: And the
 24 consequence of that ties up the 6 million.
 25 Assuming the IESO would

1 exercise its rights, right away, and it could have
 2 gone on indefinitely.
 3 We don't know that
 4 hypothetical, if the IESO application was brought
 5 when the right would have been exercised.
 6 They didn't have to exercise
 7 it. They just had the option to exercise it.
 8 PRESIDING ARBITRATOR MILES:
 9 But Windstream knew, at the time it brought its
 10 injunction proceedings, that termination was
 11 imminent. That's why it brought the injunction
 12 proceedings.
 13 MS. SHERKEY: The right was
 14 imminent but they didn't know if a decision would
 15 be made or not.
 16 PRESIDING ARBITRATOR MILES:
 17 Okay.
 18 And Canada never -- sorry,
 19 IESO never defended those injunction proceedings
 20 on the basis of but we are not going to terminate,
 21 don't worry?
 22 MS. SHERKEY: No. They first
 23 said it was premature. We haven't exercised it.
 24 And then, when the parties reached the adjournment
 25 agreement for it to make that decision, that's

1 when it was brought back on, with the decision
 2 having been made.
 3 But, up until that point, the
 4 argument was you're premature.
 5 PRESIDING ARBITRATOR MILES:
 6 Okay. Thanks.
 7 And so, as Mr. Terry touched
 8 on, at Slide 64, the regulatory framework.
 9 So the IESO contract is in
 10 force. Windstream never hears back from the
 11 Ontario clarifying the situation. The \$6 million
 12 is held on to. The regulatory framework continues
 13 to envisage offshore wind, as the Windstream I
 14 Tribunal found. That continued after the award.
 15 That continues to this day.
 16 There have been other
 17 amendments to the REA, but not to offshore wind.
 18 And another point is that, in
 19 addition to retaining the \$6 million security,
 20 Windstream's other applications, its AOR
 21 applications, are still pending. Nothing's been
 22 returned. Nothing's been cancelled.
 23 Over on the next slide, 65.
 24 Then, in addition, there's the
 25 public statements we went through in opening that

1 are set out in Ms. Baines' witness statement.
 2 Ontario states research is being finalized. When
 3 asked if the project could be built, the
 4 government says yes.
 5 So these all lead to the
 6 expectations, the understanding, as Windstream
 7 tries to move the project forward in this period,
 8 to the extent it could.
 9 And then, what we have
 10 learned, in this arbitration, is that MEI has
 11 decided immediately, when it received the
 12 Windstream award, nothing further was required of
 13 it. It was not going to meet with Windstream. It
 14 was not going to take any steps.
 15 And what we learned from
 16 Mr. Teliszewsky is there were no discussions
 17 before they made this decision. MEI wasn't
 18 meeting and said, hey, Windstream is trying to
 19 meet with us. Should we meet with them? Is a
 20 renegotiation of the contract something we should
 21 do? They have given directives in other cases.
 22 We saw the TransCanada example. There is the
 23 greenfield itself. There is a whole list of them
 24 in our evidence where they have clearly gotten
 25 involved in other contractual matters where they

1 felt it was appropriate but they didn't have any
 2 such discussions in this case.
 3 I have highlighted his
 4 evidence here on that point.
 5 And, in fact, the commitment
 6 that was made, on February 11th, at the
 7 teleconference call, if we search over the page,
 8 as the chief of staff, he had no knowledge of
 9 this.
 10 So there certainly weren't any
 11 discussions of whether there was an obligation on
 12 the government or what role that commitment has on
 13 this going forward. The chief of staff wasn't
 14 even aware of it.
 15 And they not only decide, at
 16 MEI, that there is not going to be any dealings
 17 with Windstream. But, if you flip over the next
 18 page, they also communicate to all branches of the
 19 Ontario government; Premier's office, MNR, MOE, we
 20 see them all copied on this email.
 21 We strongly suggest no
 22 political government representatives engage in
 23 dialogue with Windstream or their
 24 consultants/lobbyists at this time.
 25 Then we have Ontario stopping

1 to do research.
 2 Research was the entire stated
 3 rationale of the moratorium. It -- Canada's
 4 position in Windstream I was that the moratorium
 5 was temporary. You saw the statement I just took
 6 you to that Ontario stated, after the award, when
 7 asked questions about the Windstream I award that
 8 was finalizing research.
 9 Now, in this arbitration, we
 10 hear further confirmation that, in fact, this
 11 research isn't happening. There's no need to do
 12 it. And we say there's no credible basis for
 13 this.
 14 And, again, this is all part
 15 of the circumstances that lead to the termination.
 16 But when Canada, in this
 17 arbitration, says there's no need to do this
 18 research -- and they talk about, as well, in that
 19 paragraph where they say that, Ontario's energy
 20 needs in September 2016. There's no evidence
 21 before you on that.
 22 There is no witness statement.
 23 There's nothing in this record that tells you why
 24 they stopped doing research. We just have the
 25 assertion that they have.

1 We asked for documents to be
 2 produced on this. We don't have them. And, in
 3 fact, we have a document produced from a freedom
 4 of information request that says, given the new
 5 government's message on wind power, this is the
 6 Ford government who came in in June 2018. I don't
 7 think it's about doing more studies anymore.
 8 So whatever rationale once
 9 existed for the moratorium seems to have been
 10 replaced by others.
 11 And, ultimately, what this FET
 12 claim really comes down to is this failure to
 13 direct. Ontario's decision to not involve itself
 14 when we say it had made commitments to do so, that
 15 there was further value to be awarded and the
 16 government took no actions without any meaningful
 17 discussions.
 18 Now, Canada's response on this
 19 is there was no need to direct.
 20 Again, highlighting, in
 21 September 2016, Ontario was moving away from
 22 long-term energies. And, again, that's not the
 23 evidence before you as to was that was a
 24 motivation for the government.
 25 Mr. Teliszewski said that

1 Ontario decided, after it received the award,
 2 there was nothing further required of it and they
 3 didn't have further meetings or discussions about
 4 it beyond informational updates.
 5 So the evidence is not that
 6 the energy needs had any bearing on the decision.
 7 Second, Canada says it's
 8 completely normal practice to refer parties to the
 9 IESO. That's what Ontario does and so it was
 10 completely reasonable here. The IESO is the
 11 contractual counterparties.
 12 And we say there are two
 13 issues with this.
 14 The first issue is over on the
 15 next page. This puts Windstream into a cycle of
 16 -- between MEI and IESO. These were not
 17 contractual issues with a contract. These were
 18 political issues that the IESO could not resolve.
 19 The IESO did not make the
 20 commitments to Windstream. The IESO had no
 21 ability to talk about the moratorium, when it
 22 would be lifted, what its impact is. That was not
 23 the IESO's purview.
 24 So the Ministry was sending
 25 Windstream to a party who could not address these

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19 So this leads to the breach.

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

25 This was, we say, unblocking

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

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

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

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

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

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

1 obligations and its duties to perform its
 2 obligations in good faith.
 3 The final point I will make on
 4 FET is a direct answer to your questions, which is
 5 you had asked, if you accept the limitation
 6 argument on some of the measures, but not all of
 7 them, what impacts does that have to your FET
 8 case?
 9 Essentially, the FET case is
 10 B. That's the real heart of the issue.
 11 So, if you remove A, we say
 12 there's no impact. It's still a background fact.
 13 Factually, the termination right arose because the
 14 contract remained in force majeure, the moratorium
 15 continued to apply. But the breach, the heart of
 16 everything is on Ontario's decision to take no
 17 steps to ensure the FIT contract was renegotiated.
 18 So I hope that addresses your
 19 question.
 20 And those -- those are the
 21 submissions on FET.
 22 PRESIDING ARBITRATOR MILES:
 23 Very good. Thank you very much.
 24 CLOSING ARGUMENT BY MR. TERRY (cont'd):
 25 MR. TERRY: So I will be

1 covering expro and damages and I will skip ahead
 2 on expro to Slide 96.
 3 And, the part I am skipping, I
 4 already discussed in my opening, it's the sole
 5 effects point and also the vested rights point.
 6 So this gets to the question
 7 of the application of CUSMA and the tests set out
 8 in Annex 14B of CUSMA.
 9 And we have five arguments
 10 here.
 11 First of all, we say this was
 12 actually -- this is res judicata from the previous
 13 Tribunal. Or issue estoppel from the previous
 14 Tribunal.
 15 The argument was made not with
 16 CUSMA but with other similar provisions in other
 17 treaties, customary law and, for other reasons,
 18 that the Tribunal should apply this test. The
 19 Tribunal did not apply that test. They applied
 20 the sole effects doctrine instead.
 21 So we would argue that that
 22 issue is already dealt with by the previous
 23 Tribunal.
 24 And we have got, on the next
 25 slide, Slide 97, we show the arguments that were

1 made in Canada's counter-memorial with respect to
 2 that issue.
 3 The second reason, on Slide
 4 98, is, just to be very clear, the CUSMA --
 5 certainly with respect to claims being brought
 6 under CUSMA -- and, for example, there can be
 7 claims brought between the US and Mexico under
 8 CUSMA -- it's very clear that this test is applied
 9 through the treaties. And we have set that out on
 10 this slide.
 11 But, here, we are dealing with
 12 a legacy claim under the NAFTA.
 13 So you look to Annex 14C of
 14 the CUSMA and there's nothing there that indicates
 15 at all that the provisions that are set out in
 16 14B, Annex 14B are applicable to legacy claims
 17 such as claims between Canada -- or from the US
 18 investor in Canada.
 19 So, again, as we say here, if
 20 the state parties had wanted to make it
 21 applicable, they could have in drafting, in
 22 agreeing on language in the CUSMA in Annex 14C.
 23 Third, the next slide, Slide
 24 99, we say that Canada's not put forward evidence
 25 of state practice or opinio juris to establish

1 that Annex 14B reflects the contents of customary
 2 international law and we set out, briefly, that
 3 customary international law, of course, requires
 4 state practice of opinio juris. State practice
 5 must be widespread and consistent and we just
 6 don't have that evidence from Canada.
 7 The fourth reason, just on the
 8 next page, just looks to the jurisprudence on the
 9 sole effects and emphasizes, from this
 10 jurisprudence, that the intent, i.e. the character
 11 of the measure itself, whether it's intended to be
 12 expropriatory, is secondary and the focus is on
 13 what the effects, the economic effects on the
 14 investment are.
 15 And that's, again, consistent,
 16 we say, that the test that's set out in the CUSMA
 17 should not be applicable in this case.
 18 And then, finally, the fifth
 19 reason, on Slide 101, is that there's no broad
 20 public purpose exemption to expropriation in the
 21 jurisprudence. And, effectively, that's what
 22 Canada's trying to do, we would say, in trying to
 23 apply CUSMA to this case, is bring in the broad
 24 public purpose doctrine.
 25 And, again, we have set that

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

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

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

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

1 hard on it and the difference is, with the fair
 2 and equitable treatment, in that context, as we
 3 say, and you have heard the argument that the
 4 value that was identified by the Tribunal, the
 5 additional value that could be created, we say
 6 there was an obligation to work to create that.
 7 In the context of an
 8 expropriation, the question is, at the date of
 9 breach, what was -- what was the value that was
 10 expropriated, that particular time.
 11 So we are in, as I say, we are
 12 in the real world as opposed to the but-for world
 13 there. And if we -- in the expropriation context,
 14 at least as we have analyzed it to this point in
 15 time, we can't make out an actual obligation in
 16 that context on the Ontario government to have
 17 worked with us to create that breach.
 18 That's, as I say, that is,
 19 candidly, where we, as far as we have been able to
 20 go in terms of the expro argument, in this case,
 21 and that's why we are relying on sunk costs.
 22 PRESIDING ARBITRATOR MILES:
 23 So I will try on how I think I understand it but I
 24 could be wrong.
 25 In the International

1 Valuations Standards, there is three primary
 2 different methodologies for valuing.
 3 There's investment costs, so
 4 what you spent. So if you lose a house, what did
 5 you pay for the house.
 6 Then there is market
 7 comparables.
 8 And then there is discounted
 9 cash flow -- or there is income assessment which
 10 is discounted cash flow is the program that we use
 11 to get an income assessment.
 12 I was just looking back to
 13 Secretariat to see if they had actually modelled
 14 the investment costs approach at all.
 15 They certainly focused on the
 16 information and a lot of the cross-examination was
 17 on the information that would comprise an
 18 investment cost methodology.
 19 And we know that the first
 20 Tribunal used what it called sunk costs as a
 21 reality check, in inverted commas. So we have all
 22 of that.
 23 But the question -- and
 24 perhaps it doesn't matter. And perhaps Canada
 25 won't object to it.

1 But I had not read those
 2 Secretariat reports as putting forward a valuation
 3 on the basis of an investment costs methodology.
 4 Maybe they did, but I am just.
 5 MR. TERRY: I think it is fair
 6 to say that, in putting forward that information,
 7 they weren't doing that on an investment cost
 8 methodology. But they did calculate the
 9 information.
 10 And you heard, in
 11 cross-examination, what they did with respect to
 12 it. So the information is in evidence in that
 13 respect.
 14 PRESIDING ARBITRATOR MILES:
 15 Okay.
 16 And the reality is we, other
 17 than to test the, perhaps the accounting approach,
 18 the legitimacy of the accounting approach of
 19 treating particular invoices or costs incurred or
 20 costs pending or contingent costs treatment, it's
 21 not -- we don't really need a valuer to say what
 22 was spent. It's not like running a complex
 23 discounted cash flow, anyway.
 24 I see, from their report, that
 25 they do have income approach and market approach.

1 They don't have a section setting out the primary
 2 report on the sunk costs approach to
 3 expropriation.
 4 Mr. Neufeld, are you going
 5 to -- I am not asking you to and I am hoping you
 6 won't.
 7 But if this is a change in the
 8 way that -- if you understand this to be a change
 9 in the way the Claimant is putting their case, are
 10 you going to raise any objection to -- oh,
 11 Ms. Squires.
 12 Are you going to raise any
 13 objection to that?
 14 And, before you do, I just say
 15 I am comfortable that we have all the underlying
 16 information for this. I just don't think it's
 17 what the valuers have done.
 18 MS. SQUIRES: I think it's
 19 fine. I think we are comfortable in responding to
 20 it as well.
 21 PRESIDING ARBITRATOR MILES:
 22 Okay. That's perfect.
 23 Thank you. And thank you for
 24 being very, very clear about that. That's
 25 unbelievably helpful and, frankly, makes a lot

1 more sense. So thank you.
 2 MR. TERRY: Yeah. And just in
 3 case there's any confusion, because, of course,
 4 what we have, in 2020, from an expropriation
 5 perspective, is still an unfinanceable project.
 6 Whereas, in the FET context, we have, if there's
 7 an FET breach, an obligation to work together so
 8 we can have the but-for world.
 9 And perhaps you are going to
 10 tell me I am running very short on time.
 11 PRESIDING ARBITRATOR MILES:
 12 He is like Dr. Death, isn't he.
 13 José Luis has just said five
 14 minutes left.
 15 And I didn't advertise it
 16 yesterday but we do have a little bit of wiggle
 17 room and this has been unbelievably helpful. So
 18 press on.
 19 Do you have roughly a feel,
 20 without rushing?
 21 MR. TERRY: I could probably
 22 do everything very comfortably in about
 23 15 minutes. I might be able to do it a little
 24 shorter than that.
 25 PRESIDING ARBITRATOR MILES:

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

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

1 investment-backed expectation with respect to
 2 determining whether or not expropriation's
 3 occurred in this case, we have listed here some of
 4 the examples in the evidence that would support
 5 investment-backed -- reasonable investment-backed
 6 expectations.
 7 CO-ARBITRATOR GOTANDA: And
 8 here is the question on reasonable
 9 investment-backed expectations.
 10 So doesn't it go to the actual
 11 investment itself, as opposed to some of these,
 12 after the award, they promise the research would
 13 be finalized.
 14 In terms of what I understand
 15 reasonable investment-backed expectations, maybe
 16 you can tell me what your understanding is.
 17 But my understanding, for a
 18 reasonable investment-backed expectation, is
 19 making the investment. It was reasonable because
 20 it relied on X, Y or Z.
 21 Post the award, when they
 22 don't -- the government stated that it would be
 23 finalized, is that part of a reasonable
 24 investment-backed expectation at that period of
 25 time? Are you following my question?

1 MR. TERRY: I am and I don't
 2 think, I don't think my understanding of
 3 investment-backed expectations is different than
 4 what you're describing there.
 5 In terms of -- our argument
 6 here is that they are making an additional
 7 investment -- and we have talked about the
 8 project-related costs being incurred over that
 9 period -- in reliance on what they're -- what
 10 representations they are hearing from the
 11 government, both, you know, direct -- and I won't
 12 go over the evidence Ms. Sherkey has gone over.
 13 But statements being made or the lack of any
 14 statements saying you're done.
 15 And so they are relying on
 16 that to continue to carry out their work related
 17 to the project.
 18 That's how I would
 19 characterize it in this particular circumstance.
 20 CO-ARBITRATOR GOTANDA: Thank
 21 you.
 22 MR. TERRY: And the next
 23 slide, Slide 110, the character of the measure was
 24 expropriatory.
 25 In case, again, the Tribunal

1 is concerned about that issue, our argument is
 2 that these measures were expropriatory in nature.
 3 They weren't sort of general regulatory measures.
 4 It was a particular issue that related,
 5 specifically, to Windstream and how it was being
 6 treated here and when -- and, in the discussion of
 7 the expropriatory measures, again, our argument
 8 would be that you don't have to get here but it's
 9 a distinct situation where we don't have to
 10 establish that, in this particular case, that --
 11 it would be to the extent that you apply the CUSMA
 12 definition here, we would say the steps that the
 13 government took, in this respect, focusing
 14 specifically on Windstream and specifically not
 15 complying with the commitment, would be what the
 16 drafters of 14B would have in mind as being
 17 specific action taken with respect to specific
 18 investor as opposed to general regulatory action
 19 that have a public purpose.
 20 PRESIDING ARBITRATOR MILES:
 21 So the Tribunal in Windstream I -- granted, not
 22 looking at CUSMA.
 23 But the Tribunal in Windstream
 24 I found there wasn't expropriation because there
 25 hadn't been a full taking.

1 MR. TERRY: Yes.
 2 PRESIDING ARBITRATOR MILES:
 3 Remind me. Did it make any affirmative findings
 4 as to the other necessary elements of the cause of
 5 action of expropriation?
 6 Would it have been an
 7 expropriation but for the not an entire
 8 undertaking or did they not do that analysis?
 9 MR. TERRY: My friends can
 10 correct me if I have it wrong.
 11 But, essentially, they did set
 12 out a test, the sole effects test, and then they
 13 went on and made the determinations that we have
 14 gone over in detail in the paragraphs with respect
 15 to prematurity, you know, and with respect to the
 16 substantial deprivation point. And --
 17 PRESIDING ARBITRATOR MILES:
 18 They sort of went to end game. They went from,
 19 here is the test. You failed at the last hurdle.
 20 But did they actually make a decision on the first
 21 hurdles?
 22 MR. TERRY: They didn't --
 23 first of all, they didn't make any
 24 determination -- they didn't go through, say, the
 25 aspects of expropriation as to whether it was for

1 a public purpose and all those matters.
 2 They didn't make a particular
 3 determination on whether police powers applied or
 4 not. If that's what you're getting at.
 5 PRESIDING ARBITRATOR MILES:
 6 It was because I was wondering if there was any
 7 collateral estoppel, any issues that we were
 8 estopped on that, on the way up to no taking. But
 9 it -- I don't think, I don't think there is, but.
 10 MR. TERRY: I don't think so
 11 either. If my friends have a different view, we
 12 can reply later this afternoon on it.
 13 PRESIDING ARBITRATOR MILES:
 14 Just one other, just trying to understand these
 15 investment-backed expectations.
 16 Would you say the investment
 17 that backs the expectation are the costs incurred
 18 for 1 to 7 on page 106 of your slides, and then
 19 the expectation that arose out of that investment
 20 are the expectations on Slide 109?
 21 MR. TERRY: I would agree in
 22 general. I just want to be careful not to -- for
 23 example, in terms of all the costs that we claim,
 24 based on the Secretariat report, would be part of
 25 the costs that we would say would relate to the

1 work they did.
 2 Now, you have heard some of
 3 costs, the interest on the letter of credit and
 4 those sort of matters, I am not sure if they fit
 5 squarely within these examples so I just would
 6 make that caveat.
 7 I think on a brief examination
 8 of 109, I think you are correct with that as well
 9 but, if I could reserve to come back in case there
 10 is anything else that I find.
 11 PRESIDING ARBITRATOR MILES:
 12 Thank you.
 13 MR. TERRY: So if we could
 14 move now to damages.
 15 We do have one Slide also on
 16 112, but this is just -- people will be familiar
 17 with this, these provisions.
 18 These are the familiar
 19 provisions in Article 1110 about unlawfulness and
 20 we have the argument there as to why the
 21 expropriation is unlawful in this case.
 22 Of course, just the very fact
 23 that compensation is not paid is, on its own,
 24 enough to make it unlawful.
 25 If we can go, then, to damages

1 and start at Slide 116.
 2 Just very briefly here.
 3 This is jurisprudence on the
 4 test about making reasonable assumptions in the
 5 but-for world.
 6 I won't go over this. This is
 7 well known jurisprudence.
 8 And, on Slide 117, similar
 9 jurisprudence. To estimate damages, the Tribunal
 10 is required to make reasonable assumptions to
 11 assess the appropriate but-for scenario.
 12 This entails conjecture as to
 13 how the parties would have evolved but-for the
 14 actual behaviour of the parties.
 15 But that flexibility,
 16 reasonability, understanding that it requires --
 17 entails conjecture is accepted in the
 18 jurisprudence when valuers, such as Secretariat,
 19 go about determining their valuation in the
 20 but-for world.
 21 And, sorry, that's at Slide
 22 117, the next slide over.
 23 PRESIDING ARBITRATOR MILES:
 24 Let me ask my question.
 25 You might be answering it and

1 I might be jumping ahead.
 2 But I understand that the
 3 but-for process, which we primarily use when we
 4 are applying DCF or market comparables, is to put
 5 you in the position had the breach not occurred,
 6 or make you whole.
 7 And that is the quantification
 8 exercise, so what's the differential between the
 9 actual world and the but-for world.
 10 That's the damages folks' job.
 11 MR. TERRY: Yes.
 12 PRESIDING ARBITRATOR MILES:
 13 The legal job is did the alleged breach cause that
 14 loss that the damages experts have valued.
 15 And so the existence of a
 16 but-for and a differential is not the answer to
 17 causation; right? There's a step you need to
 18 establish, as a matter of law, in the middle.
 19 MR. TERRY: Correct.
 20 PRESIDING ARBITRATOR MILES:
 21 And that's what you are going to do.
 22 MR. TERRY: Yeah, I will speak
 23 to that now.
 24 PRESIDING ARBITRATOR MILES:
 25 Okay. Great.

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

1 connection. We are talking about the connection
 2 here.
 3 MR. TERRY: Yes. So that's
 4 the breach.
 5 And the connection is that,
 6 that particular breach, because the IESO was not
 7 directed by Ontario -- and Ms. Sherkey went
 8 through all the ways in which the IESO can be
 9 directed, both formal and informal, to take those
 10 steps to renegotiate the contract. The contract
 11 was then terminated because, of course, it had
 12 come to the expiry date.
 13 PRESIDING ARBITRATOR MILES: I
 14 think it's just made sense to me now.
 15 So Canada, you say, breach of
 16 FET, Canada's omitting to intervene, so it's a
 17 negative act, Canada's omission in intervening is
 18 a breach. We need to decide whether or not that's
 19 a breach.
 20 If we decide there is a
 21 breach, your causation is, but-for their failure
 22 to intervene, the IESO would have done something
 23 different?
 24 MR. TERRY: Yes. And,
 25 specifically, the omission was the omission to

1 direct the IESO to uphold the commitment.
 2 So we say, in that causation,
 3 it's very direct. The IESO is being told to do
 4 something by the government.
 5 PRESIDING ARBITRATOR MILES:
 6 Mr. Neufeld, just when your team gets to it. It
 7 would be interesting to understand, as at now, in
 8 closing, if that's in dispute, if we were to find
 9 that the failure of Canada to intervene and direct
 10 the IESO were a breach of FET, is causation, at
 11 that point, in issue?
 12 Ms. Squires, I should be
 13 talking to you.
 14 I know, in your opening, you
 15 spent an awful lot of time on Biwater Gauff and
 16 you were, going to their point, there can't be
 17 causation if there is no loss. I don't think
 18 that's a universal view on all awards and
 19 certainly not in the dissent in that award.
 20 But, leaving aside that
 21 argument which we will need to consider because
 22 you've pleaded very eloquently on that. But, for
 23 that, is that causation actually in dispute.
 24 And, sorry, my penny is
 25 dropping a bit late on this point.

1 Perhaps that is why you
 2 focused so much on Biwater Gauff. Because that
 3 point really can't be disputed. It doesn't mean
 4 their FET claim, necessarily, succeeds or gets
 5 close to succeeding, there's still the breach
 6 needs to establish.
 7 But, in that causation, had
 8 the government intervened, would the IESO have
 9 done what the government directed it to do.
 10 MR. TERRY: Yes. That's --
 11 yeah. That's exactly right. That's the causation
 12 link.
 13 So perhaps I will turn to the
 14 next slides which gets, as you say, to the
 15 experts' job of the but-for world. They are
 16 instructed to assume.
 17 So there are some issues
 18 raised which we are just responding to in the
 19 but-for context and explaining why -- well,
 20 explaining the support for these and for the
 21 counterfactual and the but-for world.
 22 First, the IESO would not have
 23 had the ability to terminate the FIT contract.
 24 And, again, if Ontario had upheld its commitments
 25 to Windstream, it would have directed the IESO to

1 renegotiate or amend the FIT contract.
 2 Secondly, the moratorium would
 3 have been lifted and we note that the -- a
 4 moratorium, just by its definition, is temporary
 5 but it was always certainly advertised by Ontario,
 6 at the time, as being temporary. And, you know,
 7 there's lots of evidence in the record in both
 8 proceedings on that.
 9 The stated premise of the
 10 rationale was that it was temporary measure while
 11 the government conducted scientific research, as
 12 you have heard about.
 13 And this was also canvassed
 14 before Windstream I. So applying reasonable
 15 assumptions in but-for, by definition, this
 16 measure cannot last and must be lifted.
 17 Then, if we go to the next
 18 slide, we had issues that were raised about
 19 technical feasibility and whether or not the
 20 project would have been able to achieve commercial
 21 operation. This summarizes some of the relevant
 22 evidence here.
 23 There were questions, by the
 24 way -- it's important to emphasize here that, at
 25 the previous hearing, Canada put forward its own

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. TERRY: Sure.

7 CO-ARBITRATOR MCLACHLIN:
8 Thank you.

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

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

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

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

1 my colleague who was pulling this case, Natasha
 2 Williams, I don't know if you heard from
 3 yesterday.
 4 MS. SHERKEY: I just did a
 5 quick look at itlaw and I only see the directions
 6 on quantum and I don't see a decision yet.
 7 PRESIDING ARBITRATOR MILES:
 8 Yes, I don't think the decision is out yet.
 9 CO-ARBITRATOR GOTANDA: There
 10 are cases -- and correct me if I am wrong on
 11 this -- in the record that don't have comparables
 12 that don't have an FIT contract.
 13 MR. TERRY: Yes, there are
 14 certainly examples of those, yes.
 15 CO-ARBITRATOR GOTANDA: Yes.
 16 PRESIDING ARBITRATOR MILES:
 17 Just coming back to Justice McLachlin's question
 18 which I think puts the finger on the button.
 19 So first on the -- as I
 20 understand the parties' quantum experts,
 21 Dr. Guillet says, in an early stage development,
 22 tariff price is irrelevant. He is pretty clear
 23 about that.
 24 He says that it's -- the only
 25 two factors are the price paid on the sale of an

1 the entirely different but-for purposes.
 2 The but-for on causation, the
 3 legal question, but-for the omission, there would
 4 have been a reactivated renegotiated contract, is
 5 your FET case.
 6 And then what the experts say
 7 is, in their but-for world, here is what that
 8 reactivated and renegotiated contract would have
 9 been worth, in a but-for world, less the real
 10 world.
 11 So they also use but-for but
 12 not in the legal sense.
 13 Then they -- what they do is
 14 they back that. They take Secretariat, certainly
 15 on both -- well, on their DCF, for sure. They
 16 value the entire project. And then they discount
 17 it in different ways, either using the IRR with
 18 the structured transaction approach or they
 19 discount it with the haircut, with the
 20 55-60 percent haircut.
 21 And that's where they take
 22 whole lifetime value of this project back to what
 23 you're actually saying you lost here, which is not
 24 a whole contract but a reactivated and
 25 renegotiated contract.

1 early stage development, and the wind capacity.
 2 So he gets his multiplier of
 3 .6 using those two factors. So those are the only
 4 variables in his equation.
 5 So tariff price would not come
 6 in. Secretariat disagree with that. And this is
 7 the discussion about the New York lease cases is
 8 much higher tariff price because they are attached
 9 to those leases and they're outliers that
 10 Dr. Guillet chooses to exclude.
 11 So we have that information so
 12 Claimant says tariff price affects market
 13 comparables valuation. Respondent expert says it
 14 doesn't. Everybody accepts tariff price has to
 15 impact a DCF because it's one of the main inputs
 16 into a DCF.
 17 So I think, unless someone
 18 corrects me in the course of today, there's -- the
 19 data we need is clear on that.
 20 What I wanted to come to,
 21 relatedly, is the next step.
 22 If the breach is the omission
 23 in intervening. And the loss is the loss of a
 24 renegotiated, reactivated FIT. You would say --
 25 and this is where we get to the overlapping but

1 So wouldn't you say that, in
 2 the way they have modelled the quantum with the
 3 discounting optionality of either IRR or if we
 4 accepted the IRR were high enough or the haircut,
 5 that that accounts for impact that we may
 6 otherwise call break in the chain of causation.
 7 So you might have had a
 8 renegotiated contract but you were never going to
 9 get to full project, that you have already
 10 accounted for that risk if you might not get that.
 11 To put it another way, insofar
 12 as all a renegotiated reactivated contract gives
 13 you is a chance to run this project, that
 14 discounting for that probability of succeeding in
 15 that chance is already in your damages model, you
 16 would say?
 17 MR. TERRY: Yeah. And I
 18 think, I mean, there is one thing also, of course,
 19 it's important to clarify here.
 20 If you look at what the
 21 commitment that was made by the government to
 22 Windstream was to keep the project whole, so to
 23 allow it to proceed once the moratorium was done,
 24 the science had been done.
 25 So, yes, we do say they should

1 have directed the IESO to renegotiate and
 2 reactivate the contract.
 3 But our case, I mean, at its
 4 highest, in this respect, is that keep whole means
 5 maintain the same tariff price, maintain the same
 6 contractual provisions.
 7 Now, if you understand what I
 8 am saying there.
 9 So, you know, that is,
 10 essentially, I think the starting point for the
 11 Secretariat model.
 12 Certainly, it's the
 13 proposition that Justice McLachlin has put forward
 14 that, instead of the government making it whole,
 15 that what might happen instead, in the but-for
 16 world, is a renegotiated contract and some change
 17 in the tariff price or other provisions in the
 18 contract is certainly, you know, it's certainly
 19 within the realm of what could occur.
 20 Secretariat has done its
 21 discounting and its analysis on the basis of the
 22 project had been kept whole.
 23 I think they have described,
 24 in their report and in their evidence, the very
 25 sensitivity analysis they have done in response to

1 certain issues that have been raised.
 2 But, and I look at my
 3 colleagues and experts in the back to confirm that
 4 I am not misstating anything here.
 5 But Secretariat has not, has
 6 not done an analysis that tries to, for example,
 7 to look at the various ways in which a contract
 8 might be negotiated and the various sensitivities
 9 that arise on that.
 10 And that's, that's, I guess,
 11 where I point to some of the case law, if the
 12 Tribunal wants to have more work done in that
 13 particular area that you can use in terms of your
 14 deliberations, there are precedents for doing
 15 that.
 16 CO-ARBITRATOR MCLACHLIN:
 17 Thank you.
 18 PRESIDING ARBITRATOR MILES: I
 19 think what I was just trying to get to was because
 20 of the discounting, whichever approach you take,
 21 the evidentiary burden is not quite so high that
 22 the Claimant need show there would never be any
 23 regulatory impediment ever on this project. There
 24 would never ever be a technical issue or a
 25 construction issue on this project.

1 That's all the risk that's
 2 built in in that haircut or in their IRR. The
 3 reason why an investor would expect a much higher
 4 IRR much earlier in the project is because all
 5 that uncertainty is still out there.
 6 And unless there were, you
 7 know, a complete guillotine drop of, you know, you
 8 just can't build windmills this big or this small,
 9 then that risk is what you say you factored in.
 10 And the question for us, if we
 11 ever were to get there, is have you factored in
 12 enough risk. But that's not a causation point.
 13 That's a valuation point.
 14 MR. TERRY: Exactly, yes. I
 15 would agree.
 16 I was on Slide 119 and I don't
 17 need to spend a lot of time on this one.
 18 But if I could stay on Slide
 19 119, briefly.
 20 Is just that we do have the
 21 evidence about technical feasibility that comes
 22 from the experts, Wood and Two Dogs, that the
 23 principal who is at Wood is now at Two Dogs.
 24 That's why you see it's a different company name
 25 in the reference to Two Dogs.

1 And just, you heard yesterday
 2 from Dr. Guillet he would not describe himself as
 3 a technical expert. And so there's no technical
 4 expert that's been brought in to rebut or respond
 5 to what Wood and Two Dogs say.
 6 And, and we have also the
 7 evidence, the regulatory evidence, again, from
 8 Sarah Powell who testified in the last proceeding
 9 and provided witness statement in this proceeding,
 10 about the permitting requirements here and her
 11 conclusion that it was commercially reasonable for
 12 a developer with a FIT contract to assume it would
 13 obtain AOR status in due course.
 14 With respect to the AOR status
 15 also, go to Slide 120.
 16 And I referred to this in
 17 opening so I will be brief here.
 18 But we included some further
 19 references here and some excerpts from the
 20 Tribunal's decision just to make the point that
 21 the site release issues and the AOR release
 22 issues, in our submission and my submissions, it
 23 was considered this way by the Windstream
 24 Tribunal, were really part and parcel of the
 25 moratorium and the ambiguity and the lack of

1 clarity in the law that the Tribunal was dealing
 2 with there.
 3 So it's reasonable, in our
 4 submission, for the experts to assume that, in
 5 addition to the moratorium being lifted, if it
 6 were to be lifted, then the AOR site release
 7 issues would also be clarified by the government
 8 and the project would be able to proceed.
 9 Now if I can move now to Slide
 10 122. And I will be brief. We have included some
 11 transcript references.
 12 First of all, with respect to
 13 Secretariat properly applying valuation standards,
 14 you heard this evidence from them.
 15 The one point I would add here
 16 is that -- and, President Miles, I think you had
 17 raised a question about the CBV provisions.
 18 There is, in paragraph 3.6 of
 19 the first Secretariat report, they say that their
 20 valuation was proposed to be a level of
 21 comprehensive valuation report under the CBV and
 22 it's generally consistent with International
 23 Valuations Standards.
 24 So I just give you that
 25 reference.

1 So we have Secretariat, in our
 2 submission, properly applying valuation standards,
 3 choosing an appropriate period for comparables,
 4 making, we would say, that the proper
 5 determinations about hindsight and valuation
 6 analysis that you can't be using hindsight, which,
 7 we would say, is well established by law and by
 8 valuation principle.
 9 And then, on the next slide,
 10 their assumption and contingent consideration must
 11 be included in a fair market value assessment. We
 12 obviously had a lot of discussion on that.
 13 And then, for market approach,
 14 you have to select appropriate -- or you have to
 15 select comparable transactions.
 16 And then multiple valuation
 17 methods and reasonability checks should be
 18 considered.
 19 So very much consistent with
 20 damage valuation principles.
 21 In the next set of slides, we
 22 set out why, in our submission, Dr. Guillet did
 23 not apply valuation standards. And he said he
 24 didn't apply any valuation standards. He admitted
 25 using hindsight.

1 He didn't provide a rationale
 2 for his period of time for comparable
 3 transactions, other than saying that he just chose
 4 all -- he says -- I asked was that a particular
 5 date that he had chosen:
 6 "That's the earliest
 7 transaction for which I
 8 had information."[as
 9 read]
 10 And my understanding from him
 11 was he just provided all the transactions he was
 12 aware of and put them in his tables.
 13 He -- as we, on Slide 125, he
 14 did not include contingent consideration even when
 15 it was included in PwC auditor's report that we
 16 reviewed.
 17 His early stage table includes
 18 transactions that are not comparable and that's,
 19 we would say, is a floating wind turbine
 20 transactions.
 21 And then, on the next page --
 22 and I don't have to belabour this. There were
 23 various issues during his cross-examination which
 24 came up with respect to stages of development and
 25 certain inconsistencies, I would submit.

1 On the next page, Slide 127,
 2 he made errors in his calculations, all of which,
 3 it's important to note, they all understated his
 4 valuations.
 5 And he did not check
 6 confidential data for errors and we will see
 7 the -- you can see, on the right side:
 8 "Did you go back and
 9 check your confidential
 10 information to see
 11 whether you made similar
 12 errors?"[as read]
 13 I asked that question after
 14 the point with Secretariat.
 15 And he said:
 16 "I don't believe I did,
 17 no.
 18 "QUESTION: And how
 19 exactly can we or the
 20 experts validate?
 21 "I guess you can't."[as
 22 read]
 23 Just, in response, Professor
 24 Gotanda, to the questions you had raised with
 25 Ms. Sherkey about responding to Canada's point

1 about res judicata with respect to the Tribunal's
 2 use of confidential transactions.
 3 The three confidential
 4 transactions which the Tribunal relied on for
 5 their earlier -- for, in the first report, were
 6 from 2009, 2011 and -- well, there were two from
 7 2011 and two from 2009.
 8 And my -- our submission is
 9 that those are -- because they are so early with
 10 respect to the exercise you engage in here in
 11 2020, they should be excluded just on the basis of
 12 not being in the comparable range.
 13 I believe my friends from
 14 Canada -- I saw one of their slides and they seem
 15 to be circling a set of comparables that were
 16 later than that. And I am not sure, I don't know
 17 whether Ms. Squires wants to enlighten -- let us
 18 know now or come to it later, but I am not sure
 19 Canada is even relying on those particular
 20 comparables from Dr. Guillet now.
 21 But, in any event, I would say
 22 there is a basis for you to exclude them and not
 23 rely on them just on the basis of comparables
 24 principles.
 25 As you know, they were -- in

1 addition to those three, there were ten others in
 2 the early stage report and five in the late stage
 3 report, and none of those were considered by
 4 Dr. Guillet previously.
 5 CO-ARBITRATOR MCLACHLIN: Can
 6 I ask you this.
 7 Did the Windstream I panel
 8 consider confidential comparables?
 9 MR. TERRY: Sorry, that was
 10 what I meant to be addressing right there.
 11 And I apologize if it's
 12 getting late in the submissions. Yeah, those are
 13 the ones I was discussing.
 14 CO-ARBITRATOR MCLACHLIN: That
 15 is what you are discussing.
 16 MR. TERRY: Sorry, I apologize
 17 if I was unclear there.
 18 Those are the three
 19 confidential comparables, 2009 and two from 2011.
 20 CO-ARBITRATOR MCLACHLIN:
 21 Okay.
 22 CO-ARBITRATOR GOTANDA: I
 23 wonder if you wanted to elaborate any more on
 24 Canada's assertion that we are bound by, under
 25 preclusion principles, on using undisclosed

1 confidential information.
 2 They do note here, though,
 3 that, despite that, you said you are severely
 4 prejudiced by it.
 5 So do you have anything to add
 6 to that.
 7 MR. TERRY: I acknowledge, I
 8 think as discussed before, that I am not sure
 9 there's international, you know, investment case
 10 law or international jurisprudence on the point.
 11 There may be domestic law jurisprudence.
 12 But, just aside from that
 13 point, you, as Tribunal members, are dealing with
 14 a different valuation date, a different set of
 15 comparables, first of all. And making your own
 16 determination, as CND expert, as to whether or not
 17 you want to rely on this confidential information.
 18 All those, in my submission,
 19 are factors that, again, subject to looking at
 20 whether there's jurisprudence and what the
 21 jurisprudence says, since this came up recently.
 22 But those are factors that
 23 would, in my submission, mitigate against applying
 24 a strict set of res judicata principles to those
 25 preclusion effect to those -- the determination

1 made by the previous Tribunal.
 2 The other thing I would that's
 3 important in this context is there was no -- in
 4 this particular hearing, there were some obvious
 5 mathematical errors that we went through that
 6 were -- that I was able to cross-examine
 7 Dr. Guillet on.
 8 And, as part of that, I was
 9 able to find out whether he went back and checked
 10 his confidential information. That was not
 11 information that we -- you know, there were no
 12 errors at that time. Those questions didn't arise
 13 in the first, in the first hearing.
 14 So there's additional
 15 information that's available to you in making that
 16 determination that wasn't available to the
 17 Tribunal, previously.
 18 As I said, we were happy over
 19 the break or subsequently to see if there is
 20 actually case law that's addressed here.
 21 Because I must admit that I
 22 don't have expertise in that particular area, in
 23 the international context, as to what would arise
 24 when the same witness is being -- has had a
 25 particular determination made about their evidence

1 in this sort of context.
 2 The key point I would focus
 3 on, though, is that those three confidential data
 4 points that were relied on by the previous
 5 Tribunal, there is another basis for excluding
 6 them here completely. So I don't think you have
 7 to deal with that particular issue.
 8 And --
 9 CO-ARBITRATOR GOTANDA: I am
 10 not so sure. Because, if I understand what Canada
 11 is saying, is it's broader. It's what they are
 12 saying is the approach. Not just the particular
 13 cases, but the approach itself, we are bound by
 14 that.
 15 And I could be over reading
 16 that and they certainly will have a chance. But I
 17 wanted to give you a chance to respond to that and
 18 tell us what your view is on the approach of using
 19 undisclosed confidential information.
 20 And whether we are bound by
 21 that, as a matter of preclusion, and then should
 22 there be an exception, is there an exception to
 23 any of the preclusion rules sort of apply in your
 24 argument here?
 25 MR. TERRY: You heard earlier

1 about in terms of whether Tribunal members should
 2 accept this sort of information and you heard what
 3 the standards were with respect to that issue,
 4 that information that Ms. Sherkey put forward.
 5 I mean another factor to
 6 consider, in this particular case, is that the
 7 acceptance of the confidential information, I
 8 would submit, is bound up in the Tribunal's
 9 assessment that there were reliability of the
 10 expert overall.
 11 There may be circumstances
 12 where a Tribunal decides it will not accept
 13 confidential information because it can't be
 14 tested and, for all the reasons set out in the
 15 standard, there may be circumstances in which the
 16 Tribunal decides that it's going to accept the
 17 confidential information and it's very hard to
 18 separate, to separate their determination on that,
 19 as a matter of principle, from their determination
 20 as to the matter of impression from the witness.
 21 And, in my submission, it's --
 22 you have the full ability to reach a different
 23 conclusion than the Tribunal with respect to the
 24 reliability of Dr. Guillet's evidence.
 25 You have seen him dealing with

1 a different set of transactions in a different
 2 context.
 3 And I guess I can't say it
 4 more clearly than, as a Tribunal, you're able to
 5 make your own determinations with respect to how
 6 much you want to rely on the evidence of a
 7 particular expert and you're not bound by the
 8 Tribunal making a determination.
 9 CO-ARBITRATOR GOTANDA: I will
 10 put it and you can decide if you -- do you believe
 11 that the Tribunal, relying on an undisclosed
 12 confidential information in the previous case,
 13 from your view, violated -- not from our view, we
 14 have not opined on anything -- violated your due
 15 process rights so fundamentally that a subsequent
 16 Tribunal shouldn't rely upon it?
 17 That's the issue, or one of
 18 the issues.
 19 MR. TERRY: We certainly made
 20 that argument before the previous Tribunal. The
 21 Tribunal did not agree with us. I think we would
 22 maintain the position that we had then. That we
 23 think our position is a better position.
 24 But I just want to make clear,
 25 because I know it's come up a couple times here,

1 we are not suggesting that, somehow, the previous
 2 Tribunal's decision should be revisited in any
 3 respect.
 4 CO-ARBITRATOR GOTANDA: No.
 5 And our job is not to say they made a mistake or
 6 correct any mistakes or not follow them because of
 7 mistakes.
 8 But, yet, there's certain
 9 principles that flow from an argument that we want
 10 to be very careful about with respect to due
 11 process claims.
 12 MR. TERRY: Then if we could
 13 move on, we get to the losses.
 14 And if I could go to Slide
 15 130.
 16 So this is Secretariat's
 17 evidence, just summarizing it. And I think we all
 18 understand the but-for counterfactual they were
 19 using and we are focusing on comparable
 20 transactions here.
 21 We haven't put DCF in here
 22 but, as you heard, DCF is a check rather than the
 23 primary valuation method we are putting forward.
 24 And this is the ten
 25 comparables were in their main report and you saw

1 that they focused on four, in particular, in their
 2 presentation.
 3 And those, of course, set out
 4 a range and we have discussed, I think, already
 5 the basis in which the experts came up with those
 6 ranges.
 7 Now, if we go to the next
 8 page, Slide 131.
 9 All right. We are not moving
 10 on the slide but -- sorry, this is a confidential
 11 slide because it includes information with respect
 12 to Mr. Lyle.
 13 PRESIDING ARBITRATOR MILES:
 14 Do you want to talk about it?
 15 MR. TERRY: Yes.
 16 PRESIDING ARBITRATOR MILES:
 17 Okay.
 18 Alonso, can we please go into
 19 confidential.
 20 --- CONFIDENTIAL TRANSCRIPT COMMENCES AT 12:38
 21 p.m.
 22 MR. HAUSER: Confidential
 23 mode, Madam President.
 24 PRESIDING ARBITRATOR MILES:
 25 Thank you very much.

1 MR. TERRY: Just briefly,
 2 these are other -- we call them other indicators
 3 of loss here. But evidence the that, in our
 4 submission, can also be taken in account by the
 5 Tribunal that came out during the evidence over
 6 the last several days.
 7 First of all, you will recall,
 8 in Dr. Guillet's report, Table 5 of his second
 9 report, when he applied the corrected numbers,
 10 corrected from his first report, there was a slide
 11 there that had the weighted average of his early
 12 stage transactions, in the pre-2015 period versus
 13 the 2015 to 2020 period, and that showed 3.7 times
 14 increase in the weighted average.
 15 So and I recognize, in that
 16 slide, that he also had a project by project
 17 comparable, not with the weighted GW average. I
 18 think that was a different increase, from I think
 19 0.6 to 0.7. So more significant increase in his
 20 weighted average.
 21 So you can see the number you
 22 get from that.
 23 This is also the evidence
 24 that's confidential from Michael Lyle, refers to
 25 the Ontario settlements paid out.

1 You will recall that, when he
 2 was examined, he stated that there were reports of
 3 231 million being paid to the various non-wind,
 4 primarily solar projects that are being cancelled,
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 And, again, we are just
 16 describing this as indicators of loss.
 17 Then we also have the third
 18 bullet. You will recall that Secretariat had
 19 evidence with respect to a check where they look
 20 at the costs incurred, apply a multiple to that.
 21 In the LEM transaction, they
 22 found that there was a multiple of 9.4 times costs
 23 incurred.
 24 So, again, if you apply that
 25 to the context of costs incurred in our case, the

1 number is 260.38 million.
 2 And then there's also -- the
 3 number was, you will recall you asked, I think,
 4 Madam President, Secretariat to do an alternative
 5 calculation using -- or one of the Tribunal
 6 members did, using a 20 percent IRR. They did
 7 that and they came up with 147.3 million.
 8 PRESIDING ARBITRATOR MILES: I
 9 was just wondering why you squared the factor at
 10 the same point but it's a footnote. It threw me.
 11 MR. TERRY: And then we set
 12 out below, again, the evidence from the
 13 Secretariat with respect to applying a 20 percent
 14 IRR.
 15 So, again, optionality here,
 16 as the Tribunal considers the damages evidence and
 17 what to apply.
 18 On the next slide, there is a
 19 question the Tribunal had with respect to the
 20 appreciation of value between 2016 --
 21 We can come out of
 22 confidential.
 23 PRESIDING ARBITRATOR MILES:
 24 Alonso, let us out, please.
 25 --- CONFIDENTIAL TRANSCRIPT ENDS AT 12:42 p.m.

1 MR. HAUSER: We are back.
 2 PRESIDING ARBITRATOR MILES:
 3 Thank you very much.
 4 MR. TERRY: The approach
 5 that's taken by the experts with respect to the
 6 appreciation of value, the difference in value
 7 between the two, as you know, is set out in the
 8 slide.
 9 Fair market value of the
 10 project, calculated as of February 18th, 2020,
 11 less the NAFTA 1 award, less the return of the
 12 letter of credit, provides the differential
 13 between the project value in 2016 and in 2020.
 14 And that's how they calculate
 15 their damages in the market approach, and we set
 16 out the income approach below.
 17 And then, finally, the last
 18 slide, starting at page 134, Slide 134, and I --
 19 we have got three slides here, 134, 135 and 136
 20 that were prepared, I think late last night in
 21 response to the Tribunal's question about the
 22 difference between sunk costs being calculated
 23 from the date of the award, September 27th, 2016,
 24 the first day of the award, and the June 15th,
 25 2015, date which the day up to which Deloitte

1 calculated costs.
 2 I should say the Slide 135, I
 3 have been informed by my colleagues who were
 4 preparing this, can just be removed. It was an
 5 earlier version of a slide.
 6 And I might turn -- I might
 7 have to turn to my colleague Ms. Shelley who
 8 prepared this.
 9 But the first slide sets out
 10 the loss suffered by the Claimant, the sunk costs,
 11 as set out in the Secretariat report. And you'll
 12 probably recall seeing this particular summary of
 13 costs incurred.
 14 And the second slide, the
 15 slide at 136, identifies, more particularly, the
 16 different types of costs here. This is an effort
 17 to determine which ones occurred after the date of
 18 the award versus the date between when Deloitte
 19 did their work and when the award occurred.
 20 You can see that, for many of
 21 them, there is precise information that allows the
 22 numbers to be confirmed. These are the numbers in
 23 the right-hand column.
 24 There are others, for example,
 25 if you look to the column, the third from the

1 right, you will see that there are costs,
 2 capitalized costs, management fees, and also the
 3 interest paid, which have been prorated in the
 4 slide to come up with the new calculation of costs
 5 which would lower the amount from 9.48 to
 6 6.17 million.
 7 CO-ARBITRATOR GOTANDA: I have
 8 a question regarding that, that just dawned on me.
 9 And it comes from your causation, I think, your
 10 point.
 11 If these are -- do you have a
 12 causation problem with respect to the cost claimed
 13 for the interest earned and interest paid?
 14 Because, if I understand --
 15 and here is where you are going to have to help
 16 me.
 17 If I understand your argument
 18 on the expropriation, you're just looking at this
 19 period and I am going back to what were the things
 20 that, in the reasonable investment-backed
 21 expectations, you're required to keep the letter
 22 of credit going. You couldn't just -- you weren't
 23 induced to, in other words, create a new letter of
 24 credit, post Windstream I. If you didn't keep it
 25 up, you would have lost it, actually.

1 MR. TERRY: Correct.
 2 CO-ARBITRATOR GOTANDA: I get
 3 that. I think that's the kind of argument but I
 4 am not sure how it works on the causation
 5 argument. Because it didn't cause the loss
 6 post -- their actions didn't cause the loss, post
 7 of Windstream I.
 8 Are you following me with this
 9 argument?
 10 MR. TERRY: I mean I am not
 11 sure that I am but, I mean, our submission on this
 12 is that these are project-related costs that have
 13 to be incurred.
 14 CO-ARBITRATOR GOTANDA:
 15 Absolutely. And, actually, everyone agrees with
 16 that. Both experts agree this is a
 17 project-related cost.
 18 MR. TERRY: Right.
 19 CO-ARBITRATOR GOTANDA: But it
 20 can be a project-related cost but not caused by
 21 the expropriation in that period.
 22 You following me on that?
 23 MR. TERRY: My submission is
 24 that once -- when the expropriation occurs, the
 25 question is what's the value of the investment at

1 the time the expropriation occurs.
 2 And, to do that, it's
 3 appropriate to look back at what the sunk -- has
 4 there been additional value created? Because, of
 5 course, the Tribunal said, in 2016, you know, the
 6 FIT contract has no value, it's not financeable.
 7 So, therefore, has there been additional value
 8 created?
 9 The value that is being -- the
 10 value of the project, as of 2020, includes the
 11 various sunk costs that were required to, for
 12 example, maintain a contract, maintain the letter
 13 of credit, do everything to both advance the
 14 project, to the extent Windstream was able to,
 15 despite the government's, you know, omissions, we
 16 would say, and also to protect the project.
 17 So that's our primary
 18 submission on that with respect to that point.
 19 CO-ARBITRATOR GOTANDA: Right.
 20 And I am going to push back a little and here is
 21 where you have to help me because I am going to
 22 anticipate Canada's argument.
 23 And Canada's argument would
 24 be, post Windstream I, you have to give us a
 25 reasonable time to terminate this letter of credit

1 and so it's not -- again, it's back to the
 2 causation and is this a loss caused directly by
 3 the acts of Canada versus this would have been --
 4 you would have incurred it anyway, post Windstream
 5 I. That should have been, to some extent,
 6 compensated by the previous Tribunal.
 7 I am probably reading way more
 8 into what they would argue. I am not sure.
 9 But you see the argument. I
 10 am trying to anticipate the argument so I
 11 understand, then, your position on that.
 12 MR. TERRY: I think our
 13 submission is, is just simple. That, when you
 14 come to make the valuation in 2020, you have to
 15 value the value of the project at that particular
 16 time and that includes the project costs.
 17 Now, in terms of anticipating
 18 what would happen earlier on, Ms. Sherkey dealt
 19 with that.
 20 All through this period, we
 21 have got the evidence that Canada, first of all,
 22 is working with the government to try and -- right
 23 up to the end, Canada is trying to meet with the
 24 government, trying to deal -- Canada signals,
 25 earlier on, they suggest they should keep -- to

1 Windstream that they should keep going with this,
 2 with the efforts and incurring the costs they are
 3 describing.
 4 We have the evidence, in
 5 particular, I believe it was of Michael Lyle, in
 6 terms of the termination decision not being made
 7 until very late.
 8 So, all through that period,
 9 Windstream was working on the basis that it made
 10 sense for it, from an investment perspective, to
 11 continue to incur these costs both to move the
 12 project forward, to protect the investment.
 13 So that's -- I am not sure,
 14 again, Professor, if I am responding to your
 15 argument.
 16 CO-ARBITRATOR GOTANDA: I
 17 think I got it. Yeah. Yeah.
 18 MR. TERRY: The only general
 19 argument I also make is, of course, our submission
 20 is that you don't need to apply the reasonable
 21 investment-backed -- investment expectation.
 22 CO-ARBITRATOR GOTANDA: Yes, I
 23 get that. Okay.
 24 Okay. I would be interested
 25 to see what Canada's argument, if any, might be on

1 that. Thank you.
 2 MR. TERRY: And the, finally,
 3 last slide is just the one that references these
 4 two cases.
 5 If the Tribunal would like a
 6 further breakdown of post NAFTA costs in any way,
 7 they have been done pro rata here.
 8 But, if you want more
 9 particular information or if there are other
 10 damages issues that arise, we have examples of
 11 previous Tribunals that have found, if they don't
 12 have sufficient evidence, they have asked for more
 13 information.
 14 Unless further questions,
 15 thanks for your patience. We are done.
 16 MS. SHERKEY: If I could have
 17 an indulgence of 20 seconds.
 18 Madam President, you had asked
 19 a question about some references and I just have
 20 an answer for you.
 21 Which was, in limitations
 22 period, I had raised the point that Canada had
 23 argued the moratorium was temporary. You said
 24 that was in the context of expropriation. Do you
 25 have examples where they raised a similar argument

1 in FET.
 2 And I will just refer you to
 3 paragraphs 24, 445 and 555 -- 455.
 4 PRESIDING ARBITRATOR MILES:
 5 Of what?
 6 MS. SHERKEY: Of the
 7 counter-memorial of Canada and Windstream I.
 8 PRESIDING ARBITRATOR MILES:
 9 Thank you.
 10 It says, in the transcript,
 11 555 to 455?
 12 MS. SHERKEY: I misspoke. It
 13 should be 455, not 555.
 14 So 24, 445, and 455.
 15 PRESIDING ARBITRATOR MILES: I
 16 see. Just 455. Okay.
 17 Perfect. Thank you.
 18 So I am not here to make
 19 myself popular so I will have us back, please, at
 20 1:20. Okay. It's like the nod my teenage son
 21 gives me. You are the boss but I am not happy
 22 about it.
 23 We are going to come back at
 24 1:20 because this is useful, unbelievably useful
 25 and valuable and I want to give you time as early

1 as possible in the day while we are fresh and it
 2 will continue to be useful and valuable.
 3 We took about three and a half
 4 hours this morning. We were only supposed to use
 5 two and a half hours this morning.
 6 It may be that we absolutely
 7 don't need that sort of time because just the way
 8 the questions flow.
 9 But you will absolutely get
 10 your two hours. Whether you need a third is -- we
 11 will see. You may not.
 12 And then the 15 minutes each
 13 at the end for the end game.
 14 All right. See you back here
 15 at twenty past, please.
 16 --- Upon luncheon recess at 12:55 p.m.
 17 --- Upon resuming at 1:32 p.m.
 18 CLOSING ARGUMENT BY MS. SQUIRES:
 19 MS. SQUIRES: Good afternoon.
 20 So, as Mr. Neufeld mentioned
 21 this morning, we have structured our presentation
 22 to give you our closing remarks this afternoon in
 23 response to the six questions that were posed.
 24 So we don't have any other
 25 kind of formal presentation. We were just going

1 to answer the six questions. But I think it will
 2 take us a bit of time to work through them.
 3 And, as you can tell by the
 4 fact that I am up here, we are going in reverse.
 5 So we are going to start with the causation
 6 question the Tribunal had.
 7 So the Tribunal asked what is
 8 the loss that has arisen since the first Award and
 9 what breach caused that loss.
 10 What I plan to do, over the
 11 next little bit, is walk the Tribunal through the
 12 various breaches at issue here, what the proper
 13 but-for scenario would be for each breach and,
 14 finally, what specific loss would arise out of
 15 that.
 16 So three steps for each
 17 breach.
 18 So I want to turn first to
 19 Article 1105.
 20 CO-ARBITRATOR MCLACHLIN:
 21 Where are you in your --
 22 MS. SQUIRES: We are turning
 23 to the first slide now.
 24 CO-ARBITRATOR MCLACHLIN: Oh,
 25 okay. Sorry.

1 MS. SQUIRES: It's because
 2 it's an excerpt from the Claimant so it's the
 3 Claimant's page 94.
 4 So, in this arbitration, as
 5 you can see here on the slide, the Claimant argues
 6 that there was no legitimate rationale for
 7 Ontario's refusal to do anything to make good on
 8 its promises to Windstream and to continue the
 9 very conduct found to be in breach of the NAFTA.
 10 It argued that, by continuing
 11 the course of conduct already found to breach
 12 Article 1105, Ontario failed to meet its
 13 international obligations.
 14 So, the starting point of this
 15 breach, then, is the breach as it was found by the
 16 Windstream I Tribunal.
 17 The Windstream I Tribunal
 18 found that, following the imposition of the
 19 moratorium, additional and more detailed
 20 regulations governing offshore wind were never
 21 developed.
 22 The government let the OPA
 23 conduct the negotiations with Windstream even if
 24 the decision on the moratorium had been taken by
 25 the government and not the OPA. And, without

1 providing any direction to the OPA for the
 2 negotiations, although it had authority to do so.
 3 As a result, the negotiations
 4 between the OPA and Windstream failed to produce
 5 results. By May of 2012, the Project had reached
 6 a point at which it was no longer financeable.
 7 For those reasons, the
 8 Tribunal found that the government's conduct
 9 vis-à-vis Windstream, during the period following
 10 the imposition of the moratorium, was a breach of
 11 a minimum standard of treatment as it appears in
 12 Article 1105.
 13 The Claimant now argues that
 14 the continued application of that breach, such
 15 that the IESO was in a position where they could
 16 and did terminate the FIT Contract, is a new
 17 breach in this arbitration.
 18 Assuming the Tribunal agrees,
 19 what counterfactual world would apply here so we
 20 can isolate the losses arising out of that breach,
 21 specifically.
 22 The remainder of paragraph 370
 23 on the Award provides some helpful guidance on
 24 what Ontario could have done to prevent an Article
 25 1105 breach from happening. And, in doing so, it

1 provides us an appropriate counterfactual world.
 2 So we can see here on the
 3 slide that the Tribunal noted that the government
 4 could have done two things.
 5 It could have prevented a
 6 breach of 1105 by either promptly completing the
 7 required scientific research and establishing the
 8 appropriate regulatory framework for offshore wind
 9 and reactivating Windstream's FIT contract.
 10 Or, by amending the relevant
 11 regulations so as to exclude offshore wind
 12 altogether as a source of renewable energy, and
 13 terminating Windstream's FIT contract in
 14 accordance with the applicable law.
 15 So I am going to deal with the
 16 second scenario there first. And we are going to
 17 walk through two different but-fors using the
 18 Tribunal's wording as the basis.
 19 So, in the scenario, instead
 20 of a breach found by the Windstream I Tribunal
 21 continuing --
 22 CO-ARBITRATOR MCLACHLIN: May
 23 I just say you are going awfully fast and I am
 24 struggling to keep up. Perhaps just a little more
 25 slowly.

1 MS. SQUIRES: No problem. No
 2 problem.
 3 So, in this scenario, instead
 4 of the breach found by the Windstream I Tribunal
 5 continuing, Ontario's regulations are amended to
 6 exclude offshore wind and, instead of the FIT
 7 Contract being terminated on February 18th, 2020,
 8 it is terminated instead on May 4th, 2017, when
 9 the IESO Section 10.1(g) termination rights first
 10 arose.
 11 So what loss would arise out
 12 of that.
 13 And I think two questions come
 14 up here.
 15 The first goes to a question
 16 that Professor Gotanda asked.
 17 So you can see on the slide
 18 here that, in our view, the loss that arises here
 19 would be the cost to the Claimant to maintain its
 20 letter of credit for an extra two years and nine
 21 months.
 22 This morning, Professor
 23 Gotanda asked about Windstream maintaining the
 24 second letter of credit and how that pertains to
 25 the issue of causation.

1 And if we were to turn back
 2 the Exhibit C-2082, we can see that the bank of
 3 credit -- the letter of credit from the Bank of
 4 Montreal was taken out after May 4th, 2017. So
 5 after both parties had a right to terminate the
 6 FIT Contract.
 7 So, in this scenario,
 8 Windstream could have terminated the FIT Contract
 9 instead of taking out a second letter of credit
 10 and, as such, would not have incurred any interest
 11 costs.
 12 Even leaving that aside,
 13 though, when we look at the loss that would arise
 14 out of that, I do want to take just a brief side
 15 track to discuss quantum.
 16 And what the scenario would
 17 lead us to with respect to quantum.
 18 And we are going to keep the
 19 same Exhibit C-2082 up because it is the only
 20 exhibit we have that demonstrates the interest
 21 paid on the letter of credit.
 22 You can see on the slide there
 23 that we will highlight for you, interest payments,
 24 which, as we have corrected on the record, were
 25 actually a fee and not interest at all.

1 So Windstream made these
 2 fees -- made -- paid these fees with respect to
 3 its first \$6 million letter of credit and these
 4 fees were paid on May 8th, 2017.
 5 So just four -- and you can
 6 see on this slide as well, the principal amounts
 7 that the individuals put forward behind that
 8 letter of credit.
 9 So just four days after the
 10 termination right arose, you can see here that the
 11 principal was paid. And we see that, just below
 12 that, the return of that original letter of credit
 13 money. And we can see that that came back to
 14 Windstream on July 5th, 2017.
 15 On June 26th, 2017, the new
 16 letter of credit was deposited at the Bank of
 17 Montreal.
 18 So the Claimant then sends the
 19 money to Bank of Montreal, along with \$120,000
 20 fee, to secure the new line of credit.
 21 And, eventually, we see that,
 22 on March 26th, 2020, that money comes back from
 23 the Bank of Montreal to the Claimant as
 24 \$6.162 million, so they get their \$6 million
 25 letter of credit back. They also get their fee

1 back.
 2 There are no interest payments
 3 on this ledger between May 8th, 2017, and the date
 4 of the valuation date.
 5 The Claimant has not
 6 demonstrated that it has incurred any loss by
 7 maintaining the letter of credit from May 2017 to
 8 the termination date.
 9 PRESIDING ARBITRATOR MILES:
 10 For this purpose, are you distinguishing interest
 11 from fees?
 12 MS. SQUIRES: I think I am
 13 confusing myself. No -- yes. For the Bank of
 14 Montreal, it would be interest. In the previous
 15 letter of credit, it would have been a fee.
 16 That's correct.
 17 PRESIDING ARBITRATOR MILES:
 18 So are you saying there was no interest and no
 19 fees incurred after the date of the Award?
 20 MS. SQUIRES: There is no
 21 evidence on the record that there were interest or
 22 fees incurred after the date of the Award.
 23 PRESIDING ARBITRATOR MILES:
 24 Interest or fees; that's your submission?
 25 MS. SQUIRES: Correct.

1 PRESIDING ARBITRATOR MILES:
 2 Okay.
 3 MS. SQUIRES: So now on to the
 4 other but-for scenario that the Tribunal could
 5 apply with respect to a breach of 1105 and going
 6 back to the Tribunal's words.
 7 In this scenario, what could
 8 have prevented the 1105 breach was Ontario
 9 promptly completing the required scientific
 10 research and establishing the appropriate
 11 regulatory framework for offshore wind and
 12 Windstream's FIT Contract is reactivated.
 13 Now, unlike the previous
 14 option we just talked about, this scenario
 15 requires two assumptions. And these are the types
 16 of assumptions the Claimant would ask you to form,
 17 says you are required to make.
 18 The first is that, by using
 19 the words "completing the required scientific
 20 research and establishing the appropriate
 21 regulatory framework", this necessarily leads to a
 22 lifting of the moratorium.
 23 And, second, that a
 24 reactivation of Windstream's FIT contract means
 25 that the term -- at minimum, the termination right

1 which made the Claimant's Project worthless, as of
 2 May 2017, is not in play.
 3 And the reasons these
 4 assumptions must be made is that, if not, the
 5 counterfactual world reverts back to the real
 6 world, moratorium in place, termination rights in
 7 place.
 8 So what loss arises out of
 9 that scenario?
 10 CO-ARBITRATOR MCLACHLIN: I
 11 need to digest that. Thank you.
 12 MS. SQUIRES: Good. Okay.
 13 So we have included them on
 14 the slides as well for later on, but.
 15 So, unlike in the previous
 16 scenario, here, we would be looking at much the
 17 same world as was evaluated in the Windstream I
 18 arbitration. Except for, this time, the Tribunal
 19 is left to determine the value of the Project as
 20 it existed on the valuation date here,
 21 February 18th, 2020.
 22 The loss that would arise in
 23 this situation is the delta or appreciation, if
 24 there is any, in the fair market value between the
 25 Project, as it was valued in Windstream I, and the

1 fair market value as it was -- as it was on the
 2 valuation date.
 3 This would compensate the
 4 Claimant for the incremental increase in the value
 5 of the Project due to any market changes that
 6 occurred between the Windstream I Award and the
 7 valuation date. That was when the loss -- that
 8 was lost when the FIT Contract was terminated.
 9 Now, Article 1110 -- and I
 10 have to admit this has changed a little bit, given
 11 what we heard this morning that the valuation
 12 model has now changed for them to be sunk costs
 13 only. So I am still going to provide the proper
 14 but-for and I will also respond to what the
 15 Claimant raised this morning.
 16 So, in order to define the
 17 breach of Article 1110, we have used the
 18 Claimant's words in the Secretariat report at the
 19 paragraph 1.9, where they define the alleged
 20 breaches.
 21 And recall that the
 22 Secretariat report has indicated that they have
 23 valued an expropriation claim.
 24 The counterfactual world in
 25 this breach reverses the termination of the FIT

1 contract. It would ensure that Windstream's FIT
 2 contract was "deferred, frozen, or on hold until
 3 the moratorium was lifted".
 4 It would also assume that, on
 5 the valuation day, the moratorium is lifted and
 6 the Project can move ahead with an amended FIT
 7 Contract so that the 10.1(g) termination rights
 8 are no longer active.
 9 The loss, in this scenario, is
 10 the same as would arise in the 1105 scenario I
 11 just discussed.
 12 The difference though, now,
 13 according to the Claimant, is that they wish to
 14 value their expropriation claim on the basis of
 15 sunk costs.
 16 And a loss that arises in this
 17 scenario, as you can see on the slide, is the fair
 18 market value of the investment as it existed on
 19 the valuation date here, less the fair market
 20 value of the investment as it existed on the date
 21 of the Windstream I Award.
 22 Now the Claimant is relying on
 23 sunk costs to say this equals value.
 24 Article 1110 requires that
 25 compensation be paid for the fair market value for

1 the Project, but they have not demonstrated that
 2 costs and value are the same.
 3 And the best example of this I
 4 can put forward at the moment is I asked the
 5 Claimant's experts whether they had valued two
 6 studies that they encapsulate in their sunk costs.
 7 And I asked whether they had valued those two
 8 studies as to what you could sell them for at the
 9 marketplace. Their answer was no.
 10 If this -- so, therefore, they
 11 have not shown that costs translate directly into
 12 value.
 13 And I would note that, if this
 14 is the fair market value of the Project, as the
 15 Claimants allege, that when you deduct the fair
 16 market value as it existed in Windstream I, the
 17 Claimant gets nothing because that is a negative
 18 value.
 19 There's also been numerous
 20 questions with respect --
 21 CO-ARBITRATOR GOTANDA: I am
 22 not following that.
 23 PRESIDING ARBITRATOR MILES:
 24 No.
 25 MS. SQUIRES: It's a bit of an

1 artificial exercise.
 2 So they are saying that, as of
 3 February 18th, 2020, the value of their Project
 4 was their sunk costs which is about 6 million
 5 right now.
 6 In order to determine loss on
 7 the but-for world, you would subtract the fair
 8 market value as it existed in February 18th, 2020,
 9 from the previous fair market value.
 10 PRESIDING ARBITRATOR MILES:
 11 That's not what they are doing.
 12 They are applying a different
 13 method -- as of this morning --
 14 MS. SQUIRES: Oh, I know.
 15 Yes, yes.
 16 PRESIDING ARBITRATOR MILES:
 17 They are applying a different methodology.
 18 MS. SQUIRES: Yeah.
 19 PRESIDING ARBITRATOR MILES:
 20 And they are treating sunk costs as costs. Not as
 21 value. As costs.
 22 MS. SQUIRES: Yes.
 23 PRESIDING ARBITRATOR MILES:
 24 Because that is a valid International Valuations
 25 Standards methodology.

1 That is the case that's been
 2 put this morning. Could you answer that case.
 3 MS. SQUIRES: Yes, that's
 4 exactly where I am headed to next.
 5 So, in the course of the
 6 cross-examinations of the witness of the experts
 7 from Secretariat, Canada raised numerous questions
 8 with respect to sunk costs.
 9 And the Claimant drew our
 10 attention this morning to the International
 11 Valuations Standards and mentioned Article 20.3
 12 about the nature and sources of information which
 13 values rely on and that they must be disclosed.
 14 The Tribunal may recall that,
 15 on numerous instances, the Claimant's expert told
 16 us that they were relying on calls they had with
 17 Mr. Mars, emails from Mr. Mars, invoices that they
 18 had seen, none of which are on the record.
 19 They have also not told us how
 20 they arrived at ensuring there was no double
 21 compensation being counted here with respect to
 22 the interaction of Schedule C -- Schedule 3 and
 23 Exhibit C-2020.
 24 With respect to the management
 25 fees that they rely on.

1 They relied on a post Notice
 2 of Intent invoice from a company that we do not
 3 know where it belongs in this chain, called
 4 Kinetic Blueprint, that involves fees paid in
 5 2015.
 6 On their accounting fees, they
 7 provided no invoices whatsoever. I don't think we
 8 dispute that they use an accountant, but we cannot
 9 tell which accounting fees they paid went to
 10 development costs and which went to other costs.
 11 CO-ARBITRATOR GOTANDA: To be
 12 fair though, if I remember correctly, and you can
 13 correct me if I am wrong, I recall that the
 14 Claimant's experts, Secretariat, saying that they
 15 were relying on documents but they basically have
 16 been audited.
 17 MS. SQUIRES: So the financial
 18 statements they relied on for the incomplete
 19 Project value which led to their capital costs
 20 were unaudited financial statements.
 21 CO-ARBITRATOR GOTANDA: Oh,
 22 okay.
 23 MS. SQUIRES: And those are on
 24 the record from 2015 to 2019. All WWIS financial
 25 statements are unaudited.

1 CO-ARBITRATOR GOTANDA: Can I
 2 take you back to the -- and maybe have your answer
 3 to the letter of credit that the -- and the
 4 interest paid which I just heard your response
 5 there.
 6 Their response, as I
 7 understand it, is that this was a legitimate cost
 8 because, post Windstream I, given what the
 9 Tribunal said, plus the fact that the -- I guess
 10 it was IESO said we are still considering what to
 11 do.
 12 So they were left in the catch
 13 22; weren't they?
 14 They needed to maintain a
 15 letter of credit so they didn't -- and the
 16 argument is, if I understand it correctly, is that
 17 Ontario never stepped in and said we are not going
 18 forward with this.
 19 So, therefore, they went ahead
 20 and incurred this and other costs and they
 21 wouldn't have done so but for the government
 22 taking some action to say, no, we are not, not
 23 going forward. And, therefore, these are what
 24 they are claiming is their legitimate sort of
 25 expenses in the end.

1 MS. SQUIRES: That's right.
 2 So that is the claim that they
 3 are making. That they continued to maintain the
 4 letter of credit, to spend this money, because they
 5 had a goal of continuing to develop the Project.
 6 And, in response to that, I
 7 would draw the -- I am trying to get the exhibit
 8 number for you. But I would draw the Tribunal --
 9 sorry, it's not a problem with the exhibit number.
 10 It's a problem with me being able to read
 11 handwriting.
 12 I am going to draw the
 13 Tribunal's attention to Exhibit R-795.
 14 That's a letter from Ms. Dolly
 15 Goyette at the Ministry of Energy to the Claimant
 16 in response to the numerous letters -- no -- yes,
 17 is that the right one? In response to the
 18 numerous -- the Ortech project description report,
 19 all the documents, the three documents the
 20 Claimant said it submitted in their "REA
 21 submission".
 22 You can see, in this document,
 23 which is dated August 25th, 2017, that the
 24 Ministry of Energy told them that, if they wanted
 25 to proceed with any further studies or work on the

1 Project, it was at their own risk.
 2 CO-ARBITRATOR GOTANDA: But
 3 not the letter of credit; right? Isn't the letter
 4 of credit something different?
 5 In other words, if they don't
 6 establish that project, maintain it, the Project
 7 is done.
 8 So the fact that we have IESO
 9 saying we haven't decided yet, is not unreasonable
 10 given they just got the Award. They have to read
 11 it.
 12 And then Ontario not going
 13 anything. Sitting in the Claimant's shoes, what
 14 they did, it seems like one could make the
 15 argument, wouldn't it, that they were acting
 16 reasonably and maintaining the letter of credit
 17 because they were, technically, it seems like, in
 18 this catch 22 situation, that they had to do that.
 19 Otherwise, there would be no Project.
 20 MS. SQUIRES: Yes, right. I
 21 guess there is two points I would make to that.
 22 And, you are right, it does come down a little bit
 23 to what was reasonable in those circumstances.
 24 I would say, first, there is a
 25 duty of mitigation on the Claimant and whether or

1 not that would apply here.
 2 But, most importantly, the
 3 Windstream I Award money, as we saw in 2082, was
 4 used to pay down all of the expenses.
 5 So there were no costs because
 6 the Windstream I Tribunal's money was used to pay
 7 for those costs.
 8 CO-ARBITRATOR GOTANDA: Yeah.
 9 But they wanted -- they desperately wanted this
 10 Project to go forward.
 11 And given that there was this
 12 language from what the Tribunal said that, if you
 13 get together with the other side, you could create
 14 sort of value.
 15 And then you have the IESO not
 16 saying we are not terminating yet, you know, the
 17 contract -- we are still trying to figure out
 18 whether or not -- what to do. And then you have
 19 Ontario not telling them anything or giving any
 20 direction.
 21 So it's not unreasonable for
 22 them or maybe they were -- it was the appropriate
 23 course of action to maintain at least the letter
 24 of credit.
 25 Putting aside further studies

1 are at your own risk. But, the letter of credit,
 2 if they didn't maintain that, aren't they out at
 3 that point?
 4 MS. SQUIRES: Yes. So the
 5 letter of credit did have to be maintained to keep
 6 the FIT contract. That is correct.
 7 I think it does come down to,
 8 like you say, a test of what was reasonable to do
 9 in those circumstances.
 10 But, ultimately, the letter of
 11 credit, we don't have any evidence of interest
 12 being paid on that letter of credit, cost to the
 13 Claimant for having proceeded in that way. And I
 14 think there's a very much an evidentiary question
 15 that would need to be addressed there as well.
 16 CO-ARBITRATOR GOTANDA: Okay.
 17 That may be. But, thank you.
 18 MS. SQUIRES: I am with you.
 19 CO-ARBITRATOR GOTANDA: Yeah.
 20 Thank you.
 21 MS. SQUIRES: So that brings
 22 me to Question 5 and that's the question on loss.
 23 So this is ultimately how we
 24 would determine what is the quantum of loss I just
 25 described.

1 And the Tribunal has asked us
 2 on what basis is each party claiming appreciation,
 3 or lack of, between the date of the first Award
 4 and the valuation date.
 5 And, in addition to that, on
 6 what date was the Claimant made whole by the first
 7 Award.
 8 So I am going to start with a
 9 question of what date was the Claimant made whole.
 10 In the Windstream I Award, at
 11 paragraph 484, we can see that the Tribunal held
 12 that, in their view, the proper date of
 13 quantification of the damages to the investment
 14 was the date of the Award.
 15 In their view, it was on that
 16 date that damages to the Claimant's investment
 17 crystallized. And, because of that, we say that
 18 the Claimant was made whole as of the date of the
 19 award.
 20 Now, assuming we are starting
 21 from zero or the position where the Claimant was
 22 made whole by the Windstream I Award, the Tribunal
 23 has asked us how we would determine any
 24 appreciation value that has accrued to the
 25 investment.

1 The Claimant argues that
2 changes in the offshore wind market globally, but
3 especially in the United States, since the
4 Windstream I Award means that the Claimant's
5 investment would have a higher fair market value,
6 as of the date of the termination, than it did in
7 September 2016 when the Windstream I Award came
8 out.

9 In fact, we have heard from
10 Secretariat that the Claimant believes these
11 market increases have led to its Project going
12 from a fair market value of \$31 million to
13 \$300 million in under four years.

14 Now this sounds illogical and
15 that's because it is.

16 When a correct basis for
17 determining appreciation is applied, the
18 Claimant's Project did not change in value over
19 the relevant period.

20 So let's look at why.

21 In the first Windstream
22 arbitration, the Tribunal held that the fair
23 market value of the Claimant's investment but for
24 the breach was \$31 million.

25 In coming to that finding,

1 they relied on a comparable transactions
2 methodology, as we know. And derived a fair
3 market value out of transactions that took place
4 between 2009 and 2013 that were at a similar stage
5 of development, as defined by Dr. Guillet.

6 It is that value that must be
7 deducted from what the Tribunal considers the
8 proper method to value the Project as it exists in
9 February 18th, 2020.

10 Canada maintains that, given
11 the Project has not changed at all since
12 February 11th, 2011, and thus, remains an early
13 stage project, the doctrine of res judicata
14 applies to bar this Tribunal from applying a DCF.

15 And my colleague Mr. Neufeld
16 will speak to that shortly when he outlines all of
17 the issues that fall within that area.

18 But this means that what we
19 have on the table, then, and especially after this
20 morning -- as it does not appear anymore that the
21 Claimant is relying on its DCF as its primary
22 valuation methodology -- is two market comparables
23 analysis for the Tribunal to choose from: That of
24 Dr. Guillet and that of Secretariat.

25 I am going to explain to you

1 why the one -- the valuation from Dr. Guillet
2 should be preferred.

3 The Claimant's market
4 comparables analysis arrives at a Project
5 valuation of \$300 million but that is because
6 their market comparables approach is based on a
7 flawed premise.

8 The Claimant's experts have
9 been instructed to assume, among other things,
10 that the Claimant was farther along in the site
11 control process than it was; that it would have
12 received all environmental permits; and that its
13 conditional grid connection would have become
14 guaranteed; and, importantly, that it would have
15 been built within the five year timeline of the
16 FIT Contract while relying on a FIT contract
17 interpretation that has already been rejected by
18 Ontario courts.

19 These types of assumptions
20 should not be imported into a market comparables
21 analysis. It brings with it the same level of
22 impermissible speculation that makes the DCF
23 inappropriate here as well.

24 PRESIDING ARBITRATOR MILES:
25 When you say further along in the project than it

1 was, according to what project development
2 timeline or stages or whose?

3 MS. SQUIRES: So, here, I am
4 talking about, if we look at the four factors that
5 lead to fully permitted.

6 PRESIDING ARBITRATOR MILES: I
7 understand.

8 So whose timeline are you
9 relying on here?

10 MS. SQUIRES: I don't know if
11 it matters, at the end of the day. As we
12 mentioned, it's a spectrum.

13 PRESIDING ARBITRATOR MILES:
14 Yeah. Okay. And Mr. Neufeld will come back to it
15 because this goes to the heart of the issue
16 estoppel on this point.

17 If we are relying on
18 Dr. Guillet's development timeline schedule, and
19 if the Tribunal took a decision in the first Award
20 even to apply the market approach because of
21 Dr. Guillet's evidence, expert opinion on his
22 timelines, and Dr. Guillet has told us, in these
23 proceedings, maybe he has, maybe he hasn't. This
24 is for us to think about. That, actually, they
25 are different now. I have changed my mind.

1
2 Or not I have changed my mind.
3 Let's be fair. The market's changed.
4 And you said nothing has
5 changed since the date of the Award for valuation
6 purposes. The valuation date has changed.
7 You accept that; don't you?
8 MS. SQUIRES: Yes. I mean,
9 nothing has changed with respect to project
10 development since that time.
11 PRESIDING ARBITRATOR MILES:
12 Right.
13 So the valuation date has
14 changed.
15 And, because of that change in
16 valuation date, we have different ex-ante
17 information available to us than what the Tribunal
18 had in 2016.
19 And, indeed, Dr. Guillet has
20 different ex-ante -- and a little bit of ex post.
21 But different ex-ante information available to him
22 than what he had when he gave his opinion to that
23 Tribunal upon which it based its decision.
24 This is the point on your
25 Slide 72 that comes to the point Professor Gotanda

1 has raised on res judicata.
2 But it's also a loss point as
3 well.
4 If, for some reason, we did
5 not accept Dr. Guillet's fairly binary judgment
6 that valuation date does not change the multiplier
7 and the market approach, and we looked to what the
8 correct multiplier is as at today's valuation
9 date.
10 Do you accept that that
11 multiplier could have changed because what we
12 know, at today's valuation date, is different to
13 what the Tribunal knew at the previous valuation
14 date?
15 MS. SQUIRES: So I accept that
16 the multiplier could have changed based on the
17 market.
18 I think everybody agrees that
19 the Project has not itself moved along since the
20 time it entered force majeure.
21 Our position would be, and
22 consistent with the testimony of Dr. Guillet in
23 the first and second arbitrations that, because of
24 the Project's specific characteristics, it remains
25 at the very beginning of the early stage

1 development and that part of his diagram of stages
2 of development has not changed.
3 PRESIDING ARBITRATOR MILES:
4 Okay. That's your submission.
5 Because he spent a lot of time
6 with this whole new stage of mid stage
7 development.
8 MS. SQUIRES: Yes.
9 PRESIDING ARBITRATOR MILES:
10 Which didn't exist in his earlier opinion.
11 And the four elements of fully
12 permitted, I think it's his evidence that they too
13 are not linear.
14 MS. SQUIRES: Um-hmm.
15 PRESIDING ARBITRATOR MILES:
16 That you weight those four factors in different
17 ways in a combination of three and almost one,
18 might be a very different state of certainty,
19 because that's what we are looking for, than two
20 other definite factors and two others quite close.
21 So they are not -- they don't
22 work sequentially in that -- in an absolute way.
23 And I think he was very helpful on that and I
24 found him very candid that he has more information
25 now.

1 So the facts haven't changed
2 but the effect of the combination of facts and
3 factors on how you value a development stage
4 project, wherever it sits within that three parts
5 of development, that might have changed.
6 MS. SQUIRES: I do agree that
7 the phases have developed over time. As you say,
8 with Dr. Guillet's analysis, he has moved from a
9 certain number of phases to five phases now and
10 that has changed over time. I agree.
11 Fundamentally, at the end of
12 the day, though, you have to place the Project, as
13 it exists here, on that continuum.
14 And what we have is a Project
15 that did not have access to its site and, in fact,
16 as designed in this arbitration, it's on grid
17 cells that were not even part of the application
18 to which it alleges it had priority status.
19 It has made assumptions to get
20 it further along in the development stage.
21 The most obvious of that is
22 that site release would have been granted. It has
23 to make those assumptions because it knows that,
24 if it didn't, it's an early stage development
25 project.

1 There is a reason why the
2 Secretariat report has almost two pages of
3 assumptions.
4 And that's because they need
5 this Tribunal to go back to a world where
6 everything was perfect. We can get this built on
7 time. We can do it faster than anyone else in the
8 world. We can do it cheaper. We can renegotiate
9 our turbine sales agreements.
10 All these things, they need to
11 have them. They have assumed them all away for
12 the purposes of their market comparables, just as
13 they did for their discounted cash flow in the
14 first arbitration.
15 PRESIDING ARBITRATOR MILES:
16 Well, that's not quite right; is it? They took a
17 60 percent haircut on their discounted cash flow
18 in their first valuation. And they put a
19 15 percent IRR on their structured transaction
20 model. Both of those things do the opposite of
21 assuming away risk.
22 MS. SQUIRES: I think it
23 assumes some risk away.
24 PRESIDING ARBITRATOR MILES:
25 60 percent.

1 MS. SQUIRES: Sure,
2 60 percent.
3 I think if you look back to
4 the discounted cash flow model that Canada put
5 forward in the Windstream I arbitration, when
6 proper risk, when proper discount rates are
7 applied, it actually discounts the Project back to
8 zero so --
9 PRESIDING ARBITRATOR MILES:
10 Well, I won't get you to define proper in that
11 context.
12 MS. SQUIRES: Yes. I think
13 that's a subjective analysis, I think.
14 I do want to -- before passing
15 things over to my colleague, Ms. Dosman, I do want
16 to take a couple minutes to address the comments
17 with respect to the Claimant and the contents of
18 Dr. Guillet's report and the confidential -- his
19 reliance on confidential information.
20 PRESIDING ARBITRATOR MILES:
21 Just before you do that, I just have a question
22 following on from my earlier question.
23 At paragraph 475 of the
24 earlier Award, I just want to understand, are
25 you -- you have been very clear, as you have been

1 throughout the arbitration, that you're relying on
2 paragraph 475 for the finding, including, as I
3 understand it, issue estoppel that the Claimant
4 did not have site control.
5 You have been less clear about
6 whether or not we are precluded from the
7 Tribunal's finding that the Claimant did have a
8 grid connection.
9 Can you just be clear as to
10 what your position is on that.
11 MS. SQUIRES: Yeah. So I, I
12 think this is a bit of a complicated factual
13 issue.
14 PRESIDING ARBITRATOR MILES:
15 So this -- so just so I understand.
16 Grid connection is a bit of a
17 complicated issue but site control is not a bit of
18 a complicated issue, in your submission.
19 MS. SQUIRES: No, no. I would
20 say they are both complicated issues because the
21 way it's been pled.
22 PRESIDING ARBITRATOR MILES:
23 Okay. Okay.
24 MS. SQUIRES: So a couple of
25 factual backgrounds to the grid assessment.

1 The --
2 PRESIDING ARBITRATOR MILES:
3 We don't have to go through the evidence and
4 submissions again because we have got all the
5 arguments on that.
6 I think what I am just really
7 trying to understand -- and I think the answer
8 sounds like it's a yes.
9 Are you maintaining your
10 position that, either because it doesn't really
11 mean grid connection, that we are not bound by
12 that finding although we are bound by the site
13 control finding?
14 MS. SQUIRES: Yeah. So --
15 PRESIDING ARBITRATOR MILES:
16 Basically, how we get there, you have pleaded
17 fully.
18 MS. SQUIRES: Exactly.
19 PRESIDING ARBITRATOR MILES:
20 But you are saying we can -- you are asking us to
21 assume there was no grid connection or to find
22 that there was no grid connection?
23 MS. SQUIRES: I guess it would
24 depend on a finding of whether the Tribunal there
25 meant grid connection as it's defined for the

1 purpose of valuation. And I believe Mr. Tetard
2 raised the same questions himself when he read the
3 Award.

4 PRESIDING ARBITRATOR MILES:
5 Right.

6 And to which then, you would
7 think, to be logically consistent, it would also
8 raise the question as to what the Tribunal meant
9 by site control.

10 MS. SQUIRES: I think, in the
11 Award, there is very little discussion on grid
12 connection. There is quite a bit of discussion on
13 site control. They have walked through the site
14 control process. They have a very good
15 appreciation of what they are talking about there.

16 Paragraph 107 of the Award
17 walks through all three steps in the process. It
18 situates the Claimant in that process. We do not
19 have that grid control so it's a bit harder to
20 say.

21 PRESIDING ARBITRATOR MILES:
22 Okay. I have your position. It does feel rather
23 like you want to have your cake and eat it but I
24 understand that that is your position. That's all
25 right. I like cake too.

1 But Mr. Neufeld will come to
2 res judicata so you will come back around on this.
3 MS. SQUIRES: Perhaps he has
4 no sweet tooth. We will see.

5 So the last point I want to
6 make, before Ms. Dosman steps up here, is just a
7 couple notes on Dr. Guillet's evidence and the
8 confidential information that he does rely on,
9 because it has, very clearly, become an issue.

10 As the Claimant has mentioned,
11 as the Tribunal is aware, this issue was discussed
12 before the Windstream I Tribunal submissions were
13 made and, in the end, the Tribunal decided, based
14 on the IBA Rules on the Taking of Evidence and the
15 UNCITRAL Rules, Article 27.3, that the question of
16 Dr. Guillet's reliance on confidential information
17 went to the weight of that testimony.

18 When, in speaking about the
19 res judicata effect of that this morning,
20 Mr. Terry spoke about the fact that new things
21 have come to light here. That, in the Windstream
22 I arbitration, he did not ask about the underlying
23 data and he did not know that there was any
24 correction.

25 MR. TERRY: Sorry, that's not

1 correct.

2 PRESIDING ARBITRATOR MILES: I
3 didn't hear that either. I didn't hear that
4 that's what he said.

5 Were you suggesting Mr. Terry
6 didn't ask in cross-examination; was that what you
7 were trying to say because he didn't say?

8 MS. SQUIRES: Sorry. In the
9 Windstream I hearing, he mentioned that he did not
10 ask about corrections to the report so did not
11 know to then.

12 PRESIDING ARBITRATOR MILES: I
13 did not hear Mr. Terry say that this morning.

14 Mr. Terry, do you want to
15 clarify what you said?

16 MR. TERRY: What I certainly
17 said -- what I believe I said, and certainly
18 intended to say, was that, this time, there was a
19 new avenue opened up because we had evidence of
20 errors and that that, therefore, caused me to ask
21 him questions about it and that we didn't have
22 evidence of errors the first time.

23 I certainly recall asking him
24 questions, in cross-examination, about the
25 confidential nature but not that.

1 MS. SQUIRES: Okay.

2 I am going to -- okay.

3 So, in the first Windstream I
4 arbitration, there was no evidence of errors on
5 the part of Dr. Guillet.

6 In the cross-examination of
7 Dr. Guillet in the Windstream I arbitration, at
8 page 185, my friend Mr. Terry -- and that's
9 Exhibit C-2466 -- asked Dr. Guillet about the
10 North Sea offshore wind project.

11 In response, Dr. Guillet said:

12 "Maybe, well, North Sea.

13 Sorry, North Sea one is
14 not on the list. But,
15 yes, it should be." [as
16 read]

17 There were errors made in
18 Dr. Guillet's report in the Windstream I
19 arbitration and they were questioned.

20 Second, if there are concerns
21 about Dr. Guillet's use of the numbers dating back
22 to 2008 -- oh, yes?

23 CO-ARBITRATOR GOTANDA: I
24 understand that. And I understand entirely that
25 the Tribunal would give weight, can assess weight

1 to testimony.
 2 It's a different thing, isn't
 3 it, to allow evidence in when the other side can't
 4 test it at all? That, I think, is the complaint
 5 of the Claimants.
 6 So it doesn't go to the
 7 Tribunal's weight of his testimony because -- and
 8 that -- and I am not even sure that, for our
 9 purposes, we can revisit that. But that's a
 10 different issue than allowing something in when
 11 you don't have the opportunity to test.
 12 MS. SQUIRES: I agree.
 13 And you are correct in that
 14 the evidence is useful when it can be tested.
 15 PRESIDING ARBITRATOR MILES:
 16 This comes at the footnote of the Award at
 17 paragraph 497. Footnote 1041 of the earlier
 18 Award.
 19 In relying on Dr. Guillet's
 20 evidence, the Tribunal keeps in mind that some
 21 third party confidential evidence underlying the
 22 Green Giraffe report was not made available to the
 23 Claimant. They refer back to paragraph 63 and 66
 24 which is the document production exercise.
 25 At paragraph 67 is where the

1 Tribunal says we are not going to order production
 2 of the underlying information but the fact that it
 3 is not provided will go to the weight that we
 4 attribute to that evidence.
 5 CO-ARBITRATOR GOTANDA: Right.
 6 PRESIDING ARBITRATOR MILES:
 7 Did we do that?
 8 CO-ARBITRATOR GOTANDA: No.
 9 No.
 10 PRESIDING ARBITRATOR MILES:
 11 Remind me, Mr. Terry, did you request this data in
 12 these proceedings?
 13 MR. TERRY: I don't believe so
 14 but I will check with the team.
 15 PRESIDING ARBITRATOR MILES: I
 16 am glad you need to check too.
 17 MR. TERRY: No. So you did
 18 not make a similar order.
 19 PRESIDING ARBITRATOR MILES:
 20 Because we were not asked to.
 21 MR. TERRY: Yes, yes.
 22 Correct. Correct. I didn't mean to suggest
 23 anything otherwise.
 24 MS. SQUIRES: I will note on
 25 that point, however, the Claimant has made quite a

1 few inferences or perhaps direct statements in its
 2 reply rejoinder that we should not be relying on
 3 Dr. Guillet's evidence because it's not readily
 4 available. Canada responded to that in the
 5 rejoinder memorial by drawing out the
 6 correspondence from Windstream I. So the
 7 opportunity was certainly there.
 8 Despite all that, I am going
 9 to give you some comfort.
 10 If you decide no weight should
 11 be given to certain parts of Dr. Guillet's
 12 evidence -- and, to be clear, because Mr. Terry
 13 mentioned this morning, it is not our position
 14 that you should go to this as your first
 15 valuation. We are still of the view that the 23
 16 projects are relevant.
 17 That being said, I am going to
 18 triage the data by two different points.
 19 If we were first to focus only
 20 on projects which are valued based on transactions
 21 that go from 2016 to 2020, in doing so, we would
 22 arrive at a multiple of 0.056 million euros per
 23 megawatt.
 24 For the Project, that
 25 translates into 16.8 million euros.

1 You'll recall the Windstream I
 2 Tribunal valued the Project at 21 million euros
 3 per megawatt.
 4 If we were then to reduce
 5 those Projects to take out ones that Dr. Guillet
 6 has either provided no information for or has only
 7 provided some information for, we would be down to
 8 three projects.
 9 Those projects would give us
 10 an implied multiple of 0.07. That number may
 11 sound very familiar.
 12 That is precisely the number
 13 the Windstream I Tribunal used to value the
 14 Project. That will get you at a value of 21
 15 million euros per megawatt. Exactly the same.
 16 So before I yield the floor --
 17 no.
 18 PRESIDING ARBITRATOR MILES:
 19 Ms. Squires, you are not going through any adding
 20 back in what would now -- if we were to take the
 21 finding in the earlier Tribunal that, by
 22 definition, having one of the four factors means
 23 the Project is early stage development.
 24 Therefore, any project that does not have one of
 25 the four factors is early stage development by

1 definition.
 2 Does that not mean we also
 3 have to -- we can take out all the non-disclosed.
 4 But don't we also have to put
 5 in the four or five projects from Dr. Guillet's
 6 reports in these proceedings from what he calls a
 7 late stage development chart but, actually, he
 8 accepted, on cross, did not have one of the four
 9 features?
 10 And, if we did that, excluding
 11 the 1.35 outlier, which is the Welsh one, doesn't
 12 that take us to -- I did the maths. That was .15
 13 or 115 -- .15 I think it was.
 14 But, to be consistent --
 15 right. So the exercise you have done here --
 16 MS. SQUIRES: I follow you.
 17 PRESIDING ARBITRATOR MILES:
 18 -- is ignoring the late-stage projects that
 19 actually, by Dr. Guillet's own definition, didn't
 20 have one of the four features of fully permitting.
 21 MS. SQUIRES: So I believe the
 22 response to that is you cannot place equal weight
 23 on all four and all four of the factors that go
 24 into full permitting.
 25 And the reason of that is, in

1 certain scenarios, one comes first and, in certain
 2 scenarios, one comes last.
 3 PRESIDING ARBITRATOR MILES:
 4 Sure.
 5 But isn't that resolved by the
 6 fact that there is a range, there is a range of
 7 values for each of those phases and that range
 8 takes that into account?
 9 You might have a FIT contract
 10 and nothing else. But an FIT contract is, to use
 11 another judge's phrase, a thing written water. If
 12 there's absolutely no land, no property, no right
 13 to build anything. You just have a contract say
 14 in the never, never. You got to build something
 15 that's unbuildable. You would get this tariff
 16 that may be worth nothing.
 17 But that's why we have a
 18 range. That's why we have .001 -- have I got too
 19 many zeroes?
 20 MS. SQUIRES: .01 is the
 21 beginning.
 22 PRESIDING ARBITRATOR MILES:
 23 .01 to 1 in that early stage development. That's
 24 precisely why.
 25 Because the four factors are

1 not binary -- are not linear. That's what I keep
 2 saying. That's, I think, what Dr. Guillet --
 3 that's what I learned from Dr. Guillet.
 4 MS. SQUIRES: I am with you on
 5 the early stage is 0.01 to 0.1. The Secretariat
 6 report --
 7 PRESIDING ARBITRATOR MILES:
 8 Well, and that was what the earlier Tribunal said.
 9 It was based on what information was given to
 10 them. We have been given different information.
 11 The Tribunal concluded if you
 12 don't have one of four factors, by definition,
 13 you're early stage development.
 14 The Tribunal concluded,
 15 because of the market comparables Dr. Guillet gave
 16 them, and they checked against Mr. Low and others
 17 the Deloitte market comparable, they concluded
 18 that market comparables are projects that didn't
 19 have one of those four factors, were, by
 20 definition, early stage. And the market
 21 comparable multiplier taking those early stage
 22 projects gave a variable, gave a range from .01 to
 23 .1.
 24 If we were to do exactly the
 25 same exercise that the Tribunal did on our own

1 data, wouldn't we need to treat early stage
 2 development as all projects that do not have, for
 3 final, one of those four features, take all of
 4 those projects, which includes, after
 5 cross-examination, we know a number of projects in
 6 Dr. Guillet's second table on late stage
 7 development, and then take the range, the range
 8 that that gives us.
 9 What we do in that range and
 10 whether or not we would consider this Project to
 11 be at the mean or the average, which is what the
 12 Tribunal did earlier, that's a separate question.
 13 We might say it belongs right at the early, early
 14 end of that range but doesn't the range change?
 15 MS. SQUIRES: So perhaps just
 16 a point of clarification, if you don't mind.
 17 The outside range would be the
 18 Secretariat number? Is that the outside range?
 19 CO-ARBITRATOR MCLACHLIN: No.
 20 MS. SQUIRES: I am trying to
 21 figure out what range we are working with.
 22 PRESIDING ARBITRATOR MILES: I
 23 don't know. The mean I got was .15 so I can't
 24 remember what the range was. I think the range
 25 went up to .32. Because I took out the outlier.

1 Actually, I think it got to
2 .24 which was the amended item on the second chart
3 which Dr. Guillet accepted was amended. I took
4 out two outliers. I took out .32 of the first --
5 and, at this point, we are probably getting into
6 such made up numbers, none of it made sense.
7 MS. SQUIRES: That's okay.
8 PRESIDING ARBITRATOR MILES:
9 But maybe that's the point; right.
10 But, on this chart, I did not
11 include .28, for the reasons Secretariat said, off
12 this chart and I think neither have you.
13 And, on the late stage
14 development chart, I excluded 1.35 or 1.3
15 something because it just seemed like such an
16 outlier.
17 But took all of the other
18 items that Mr. Terry had highlighted. I think you
19 were in the room when we did it. I just added
20 those up and divided them by 12. So eight from
21 here and four from the other chart.
22 And that was how to get the
23 mean. I can't remember what the highest number
24 was. But I think it's about .24. So that would
25 give you the range. The range would be .01 to

1 .24.
2 MS. SQUIRES: Right.
3 PRESIDING ARBITRATOR MILES:
4 And, yes, that's different. That would match up,
5 that would enter into the late stage development,
6 even financial close of what Dr. Guillet said
7 eight years ago. But we have a different
8 valuation date so we have different information.
9 MS. SQUIRES: Just give me one
10 second.
11 I agree with you. If you were
12 to combine them in that way to create a range that
13 goes from both experts' view as to what would
14 constitute an early stage, then we would be
15 looking there and would try to place the Project
16 in that, using the market comparables.
17 I would note that
18 Secretariat's multiple of the Project, on the
19 projects that they use, when they have their full
20 list of ten, that gives them a valuation of the
21 Project of 1.01, which is quite at the higher in
22 even the range we are talking about there.
23 So.
24 PRESIDING ARBITRATOR MILES: I
25 just checked. Yes, it would.

1 The highest in the range taken
2 from Mr. Terry's cross-examination yesterday was
3 .32. Because I omitted, as I said, the Welsh
4 project that was 1.33.
5 So, including Seagreen 1, LEM,
6 Ørsted, Saint-Brieuc, those four -- no, it's the
7 late stage development chart. And then doing
8 exactly what you did here, yeah.
9 MS. SQUIRES: Yeah, yeah.
10 Unless there are further
11 questions.
12 CO-ARBITRATOR GOTANDA: So,
13 just for clarification, I am a little confused.
14 Are you abandoning, then, the
15 claim in Slide 72 that it's collateral estoppel as
16 to including undisclosed confidential information?
17 MS. SQUIRES: Mr. Neufeld is
18 shaking -- I don't believe so.
19 And Mr. Neufeld is shaking his
20 head no at me because he would like to address
21 this when he stands up to discuss the points on
22 estoppel.
23 CO-ARBITRATOR GOTANDA: Okay.
24 MS. SQUIRES: I am estopped
25 from talking about estoppel, it seems.

1 PRESIDING ARBITRATOR MILES:
2 Very good.
3 MS. SQUIRES: Thank you very
4 much.
5 PRESIDING ARBITRATOR MILES:
6 Thank you. We are going to be dreaming these
7 numbers all weekend.
8 MS. SQUIRES: We have been
9 doing it for eight years.
10 CLOSING ARGUMENT BY MS. DOSMAN:
11 MS. DOSMAN: Good afternoon.
12 Hello again.
13 I think I will be relatively
14 brief, although famous last words.
15 In Question 4, the Tribunal
16 asked for more clarity on the Claimant's position
17 with respect to CUSMA Annex 14B. And, in
18 particular, whether it must look at
19 investment-backed expectations as an element of
20 the test.
21 We believe Canada's position
22 on that is clear, set out in rejoinder at
23 paragraphs 145 to 147, counter-memorial at 151.
24 PRESIDING ARBITRATOR MILES:
25 And, to be fair, if it helps, your position was

1 clearer to us than the Claimant's position prior
 2 to this morning.
 3 MS. DOSMAN: Okay. Excellent.
 4 To the extent the Tribunal is
 5 minded to do more reading on this topic, we have
 6 included a few references on Slides 28 through 31.
 7 PRESIDING ARBITRATOR MILES:
 8 And those are the cases that get you to
 9 investment-backed expectations without CUSMA Annex
 10 14B.
 11 MS. DOSMAN: Correct.
 12 PRESIDING ARBITRATOR MILES:
 13 Perfect. That's really helpful to have those.
 14 Thank you.
 15 MS. DOSMAN: Love. Love that.
 16 Okay. We can move, then, to
 17 Question 3.
 18 PRESIDING ARBITRATOR MILES: I
 19 am sorry. Just what's your position on what the
 20 Tribunal did with that in the earlier Award?
 21 MS. DOSMAN: You said it.
 22 They went straight to end game. They didn't do
 23 the full test.
 24 PRESIDING ARBITRATOR MILES:
 25 Got it. Okay. Thanks.

1 So we are not precluded one
 2 way or the other.
 3 MS. DOSMAN: Correct.
 4 PRESIDING ARBITRATOR MILES:
 5 Okay. Thanks.
 6 MS. DOSMAN: I think I get the
 7 record for quickest question.
 8 Question 3, the Tribunal asked
 9 us, accepting Canada's case that certain measures
 10 fall outside the three year limitation period, so
 11 if we take those elements out, what would the
 12 minimum standard of treatment basis be arising out
 13 of the remaining elements.
 14 If you'll permit, I would like
 15 to make just one preliminary remark on --
 16 responsive remark to Ms. Sherkey's submissions on
 17 the standard to be applied under Article 1105(1).
 18 And it's really just a note of
 19 caution. Again, I did address the standard, in
 20 Canada's view, in our written pleadings and in our
 21 opening submissions.
 22 And I won't return to that now
 23 but I would like to call up the case to which
 24 Ms. Sherkey took us, Lemire. It's CL-188.
 25 And I flag this because of the

1 need to be precise and careful about which cases
 2 we refer to in discussing the minimum standard of
 3 treatment.
 4 As you know, we do have the
 5 note of interpretation that clarifies that, in the
 6 case of the NAFTA, fair and equitable treatment
 7 does not require anything more than that which is
 8 required by the minimum standard of treatment
 9 under customary international law.
 10 And cases like Lemire involve
 11 very different treaty language in which, for
 12 example, here, this is the US-Ukraine BIT.
 13 I am not going back to the BIT
 14 itself, just the Award.
 15 At paragraph 256, they quote
 16 the relevant provision as including commitment
 17 that neither party shall, in any way, impair, by
 18 arbitrary or discriminatory measures, blah, blah,
 19 blah, investment.
 20 So you have, in that treaty,
 21 an independent obligation with respect to
 22 "arbitrary indiscriminatory measures" and we don't
 23 have that in NAFTA.
 24 So, for references to our
 25 submissions on the scope of the standard, I

1 addressed it yesterday at Slides 151 to --
 2 yesterday -- ah, Monday. Slides 151 to 156. And
 3 the references to our written pleadings at
 4 paragraphs 202 to 203 of the counter-memorial and
 5 103 to 106 of the rejoinder.
 6 So just sort of a note of
 7 caution on the standard.
 8 PRESIDING ARBITRATOR MILES: I
 9 think it was the gross that I was interested in.
 10 Just the -- and, yes, you are right. It was
 11 Lemire, paragraph 262, at Slide 60, the Claimant
 12 was relying on.
 13 MS. DOSMAN: Yes.
 14 PRESIDING ARBITRATOR MILES:
 15 Arbitrariness has been founded on other bases.
 16 I thought, it doesn't say it
 17 on the slide, but I thought that was the
 18 Claimant's answer to -- it is on the slide.
 19 Prohibits arbitrary and grossly unfair conduct.
 20 Does grossly unfair get in the
 21 interpretation though?
 22 MS. DOSMAN: Get in, sorry?
 23 PRESIDING ARBITRATOR MILES:
 24 Sorry, that's my Kiwi accent.
 25 Get into the interpretation

1 note.
 2 MS. DOSMAN: Interpretation
 3 note. Does it get into the minimum standard of
 4 treatment.
 5 So Canada's submission is that
 6 egregious conduct is required.
 7 That's also reflected in the
 8 Waste Management standard in the sense of them
 9 using language such as manifestly, arbitrary and
 10 that conduct must offend sense of judicial
 11 propriety.
 12 So we say it's more than
 13 something that's simply arbitrary.
 14 PRESIDING ARBITRATOR MILES:
 15 Okay.
 16 MS. DOSMAN: It must be really
 17 quite severe.
 18 PRESIDING ARBITRATOR MILES:
 19 But you are happy with Waste Management because --
 20 MS. DOSMAN: We have cited to
 21 it, yes.
 22 PRESIDING ARBITRATOR MILES:
 23 -- I got from the Claimant this morning. They
 24 were happy with Waste Management --
 25 MS. DOSMAN: There are some

1 elements in there that we don't necessarily agree
 2 with, with respect to the relevance of -- they
 3 make a reference to legitimate expectations which
 4 we think are potentially relevant but not always
 5 relevant.
 6 So it's not a whole hearted
 7 endorsement but we are happy with the level --
 8 with the acuteness of the language that the Waste
 9 Management Tribunal uses.
 10 PRESIDING ARBITRATOR MILES:
 11 That's a very careful government answer.
 12 For future reference, I don't
 13 understand the Claimant to be putting their case
 14 on legitimate expectations here.
 15 MS. DOSMAN: No, no, no.
 16 PRESIDING ARBITRATOR MILES:
 17 So, in terms of the Waste Management definition
 18 that's relevant for our proceedings, the parties
 19 are at one on that.
 20 MS. DOSMAN: With the emphasis
 21 on manifestly arbitrary --
 22 PRESIDING ARBITRATOR MILES:
 23 The bits that are good for you. You are in line.
 24 MS. DOSMAN: You can tell it's
 25 Friday.

1 So, to move on to your
 2 question then, and you will not be shocked by my
 3 answer which is that what is left, if we are
 4 looking at the period solely within the critical
 5 date of December 22nd, 2017, forward, is a simple
 6 exercise of a contractual right.
 7 So the breach of Article 1105(1)
 8 was fully remedied by the Award.
 9 There was no new breaching
 10 measure or activity that arose afterwards. I
 11 believe I heard this morning that the termination
 12 itself by the IESO is not being challenged as an
 13 independent breach.
 14 And that's essentially what
 15 took place during that under three-year period.
 16 So just brief recall. The
 17 IESO communicated its intention to terminate on
 18 February 20th, 2018.
 19 And, as a result, WWIS
 20 reactivated its domestic application seeking to
 21 challenge the termination decision domestically.
 22 That was on April 20th, 2018.
 23 And then, one year and nine
 24 months later, so January 15th, 2020, is when WWIS
 25 filed its notice of abandonment of that domestic

1 application.
 2 And then this arbitration was
 3 commenced one week after that.
 4 So we have a somewhat
 5 protracted but otherwise fairly -- you know, it
 6 was a contractual termination that was a right for
 7 the IESO to exercise.
 8 PRESIDING ARBITRATOR MILES:
 9 Okay.
 10 MS. DOSMAN: And I will just
 11 warn you, the slides are a bit out of order. So,
 12 if you come back to them later, you can use your
 13 judgment, but.
 14 Any other merits-related to
 15 which I can give a careful answer?
 16 PRESIDING ARBITRATOR MILES:
 17 No, I think that's all clear. Thank you.
 18 MS. DOSMAN: Oh, sorry. I had
 19 made a note to myself and, since I was ending on
 20 facts, it is sort of a segue.
 21 Professor Gotanda, you had
 22 asked about the reasonableness of entering into
 23 the letter of -- the second letter of credit, so
 24 post the date at which termination could be
 25 exercised.

1 And this sort of flows from my
2 friend's comment that they aren't challenging the
3 specific IESO decision. So we really have to look
4 to Ontario here.

5 And, in my submission, Ontario
6 was very clear with the Claimant that it was not
7 interested in speaking to it.

8 So I think you can -- I agree
9 there is another step to -- from we are not going
10 to talk to, to we are not going to do anything to
11 renegotiate your contract. But at least that.

12 For example, Andrew
13 Teliszewsky, in paragraph 27 of his witness
14 statement, refers to a conversation with a
15 representative of the Claimant. And that was in
16 October or November 2016. And he said he was very
17 clear you have to talk to the IESO. The IESO is
18 the contractual counterparty.

19 The same message was repeated
20 in writing in two letters from the Ministry of
21 Energy to David Mars. The first being
22 December 6th, 2016, which is Exhibit C-2471,
23 Exhibit 3, and the second being February 21st,
24 2017, C-2076.

25 So I guess I would just -- I

1 think that could maybe play into the mix of what
2 they could expect.

3 CO-ARBITRATOR GOTANDA: But
4 that -- saying I refuse to speak to you is not the
5 same as telling them this is not going forward and
6 we are not going to direct IESO to do anything.

7 They never said that, did
8 they, before they established the second letter of
9 credit?

10 MS. DOSMAN: So, yeah, and
11 this is why I acknowledge there is another step to
12 get to that definitive of a statement.

13 But I do submit that they said
14 speak to the IESO because they are the ones who
15 are the contractual counterparty to you in this
16 case.

17 CO-ARBITRATOR GOTANDA: That
18 almost makes your position worse; doesn't it?

19 MS. DOSMAN: Does it? How so?

20 CO-ARBITRATOR GOTANDA:
21 Because --

22 MS. DOSMAN: Am I fired from
23 the Government of Canada?

24 CO-ARBITRATOR GOTANDA:
25 Because the argument, then, would be the IESO said

1 we are still thinking about it.

2 MS. DOSMAN: No, but the IESO
3 is okay to still be thinking about it because
4 that's not --

5 CO-ARBITRATOR GOTANDA: That's
6 fine. They know, then, at that point.

7 MS. DOSMAN: But that itself
8 is not a breach, from what I heard.

9 CO-ARBITRATOR GOTANDA: That
10 is true.

11 MS. DOSMAN: Yeah.

12 CO-ARBITRATOR GOTANDA: But
13 what we are trying to determine, though, is were
14 they reasonable in that circumstance. That period
15 of time, was it reasonable for them to take out
16 that second letter of credit.

17 And by them -- by the
18 affirmative act -- two affirmative acts; one is we
19 are not talking to you; and the second is you have
20 to go talk to the IESO. And then the IESO says we
21 are not -- we haven't made a decision yet.

22 And the fact that they didn't,
23 at that point, say -- Ontario say, no, or direct
24 the IESO not to do anything or direct them to, you
25 know, to tell them don't do this.

1 It's reasonable, wouldn't it,
2 under the circumstances for them to establish the
3 letter of credit -- that's not saying there's a
4 breach.

5 MS. DOSMAN: No, no, no, no.
6 Yeah --

7 CO-ARBITRATOR GOTANDA: All I
8 am focussing on here is whether the act of
9 establishing the letter of credit, under that
10 circumstance, was something that was, that was
11 almost necessary. They would have been in a catch
12 22 had they not.

13 And, given that entire
14 circumstance, including that affirmative
15 direction, what do you think? Don't you think it
16 was reasonable for them?

17 MS. DOSMAN: I don't know.

18 They had just been through litigation that found a
19 breach and that was remedied.

20 CO-ARBITRATOR GOTANDA: But
21 the Tribunal told them you can get together with
22 the other side and, therefore, we will then -- you
23 can create value.

24 So I am trying to think of
25 what the counter -- your counter argument -- and I

1 will let you say it -- would be that their
2 position, they shouldn't have done it.
3 MS. DOSMAN: So I guess the
4 context for that decision to refinance -- you
5 know, to put in a second letter of credit, is that
6 there had been this long litigation, a breach was
7 found. Ontario viewed the matter as resolved.

8 So Ontario, at that point, was
9 seeing this as a contractual matter. Sure.

10 As the Windstream I Tribunal
11 recognized, contractual counterparties can get
12 together and change their minds. That's fine.

13 But Ontario -- and I do take
14 my friend's case to be very much that of Ontario,
15 rather than, you know -- the Ontario's decisions
16 or omissions are at issue here.

17 That their line was that they
18 did not give any indication that there would be
19 movement, that they would take an affirmative
20 action so as to interfere with that contractual
21 relationship.

22 Instead, the message was go
23 back to your contract. Go back to your contract.
24 I see a furrowed brow.

25 PRESIDING ARBITRATOR MILES:

1 That's my wrinkles. That's all.

2 Paragraph 483, the Tribunal
3 didn't say IESO. The Tribunal said three times in
4 that sentence.

5 On the other hand, the
6 Tribunal does not consider it appropriate or
7 necessary to make any further adjustments although
8 the FIT contract could have been reactivated and
9 renegotiated by the Parties.

10 MS. DOSMAN: Yes, to the
11 contract.

12 PRESIDING ARBITRATOR MILES:
13 Well, no. It's capital P. It's a defined term in
14 the Award --

15 MS. DOSMAN: Okay. Okay.
16 That's not how I --

17 PRESIDING ARBITRATOR MILES:
18 -- the Parties.

19 Well, it's a capital P.

20 MS. DOSMAN: I accept that.

21 Yeah.

22 PRESIDING ARBITRATOR MILES:
23 So I think "Parties" is defined in the contract --
24 or memo. Let's have a look.

25 MS. DOSMAN: I am sure it is.

1 PRESIDING ARBITRATOR MILES:
2 Of course it's not.

3 MR. NEUFELD: No, this is
4 another problem.

5 PRESIDING ARBITRATOR MILES: I
6 see. So it's not actually.

7 So it would take a word search
8 to see how proper noun parties is used in the
9 Award. But then they say it's another matter that
10 the Parties -- again, capital P -- can create such
11 value.

12 It doesn't, it doesn't -- so
13 would you say that paragraph 438 could be read or,
14 in your submissions, should be read that that
15 proper noun, Parties, is the Parties to the
16 contract.

17 MS. DOSMAN: I would prefer to
18 do a word search to make sure but I have always
19 understood that.

20 PRESIDING ARBITRATOR MILES:
21 That's your --

22 MS. DOSMAN: Yeah, that has
23 been my understanding.

24 But, you know, if it is
25 capital P Ontario, doesn't that strengthen the

1 idea that -- doesn't Ontario's message that we are
2 not going to speak to you undermine the
3 reasonableness --

4 PRESIDING ARBITRATOR MILES:
5 Well, I am not sure.

6 I think what both parties have
7 sought to do today is separate out IESO had the
8 contracting obligation. They had to dot the I and
9 cross the Ps and sign -- cross the Ts and sign the
10 piece of paper in the contract themselves.

11 But the IESO could have been
12 directed on what to contract, how to contract,
13 whether or not to renegotiate, reactivate, what to
14 put in the terms of that contract, at all times by
15 Ontario.

16 So Ontario had the control
17 over the contract, although the operationalization
18 of that control was IESO.

19 So, if I have understood that
20 correctly as being the parties' positions, what
21 that means, I think, for the question you posed --
22 and I am not sure why I am answering your
23 questions, but here we are -- is, is that, for
24 Ontario to communicate to Claimant qua contracting
25 party, it's saying no, no, no. You deal with your

1 contract with your contracting counterparty. But
 2 that's not the same as saying and we are going to
 3 have nothing to do with it.
 4 MS. DOSMAN: Absolutely, yeah.
 5 PRESIDING ARBITRATOR MILES:
 6 We are not going to talk to IESO. We are not
 7 going to give any directions. We out of this
 8 game.
 9 They are just saying you do
 10 your contract negotiations between A and B. We
 11 are C. What C and B do, that's behind our
 12 curtain.
 13 MS. DOSMAN: Fair enough. I
 14 think I acknowledged there was another step to
 15 take.
 16 PRESIDING ARBITRATOR MILES:
 17 That was the step --
 18 MS. DOSMAN: The
 19 communications would be part of the context.
 20 I also just think, on
 21 attribution, I can feel my colleague Mr. Neufeld's
 22 brain exploding because I don't believe it's
 23 Canada's position that the two were one and the
 24 same for the purposes of the contract, so.
 25 PRESIDING ARBITRATOR MILES: I

1 don't think that's what I said.
 2 MS. DOSMAN: Okay. Good.
 3 Good. I misunderstood.
 4 PRESIDING ARBITRATOR MILES: I
 5 think I was trying to reflect both parties'
 6 positions as the absolute opposite. But I don't
 7 understand you to be saying that Ontario is
 8 claiming it had no directive.
 9 MS. DOSMAN: Power, ability,
 10 theoretically.
 11 PRESIDING ARBITRATOR MILES:
 12 Yeah. Over what the -- that it couldn't direct
 13 what the IESO did. In fact, we have got, I think,
 14 excerpted examples of other contract examples
 15 where it did direct.
 16 MS. DOSMAN: I believe that's
 17 in our pleadings as well, an option not an
 18 obligation.
 19 PRESIDING ARBITRATOR MILES: I
 20 don't believe there is an attribution argument
 21 made in these proceedings.
 22 MS. DOSMAN: Good. I am not
 23 fired then.
 24 I will leave you now.
 25 CLOSING ARGUMENT BY MR. TIAN:

1 MR. TIAN: Madam President,
 2 members of the Tribunal, good afternoon.
 3 To answer the Tribunal's
 4 second question on time limitation, I will first
 5 address the legal issue on whether components of
 6 an alleged composite measure can be individually
 7 analyzed for time-bar purposes.
 8 Then, I will present facts
 9 related to the Claimant's knowledge of the alleged
 10 breach and loss.
 11 As a preliminary matter,
 12 Articles 1116(2) and 1117(2) not only cover actual
 13 knowledge but constructive knowledge as well.
 14 Therefore, when my friend
 15 submitted, this morning, "you cannot impute
 16 knowledge of a future breach or loss", this
 17 ignores the clear language of the treaty
 18 provisions.
 19 If a reasonable and prudent
 20 investor ought to have known the alleged breach or
 21 loss, then of course that knowledge can be imputed
 22 to the Claimant because he cannot willfully abstain
 23 from the inquiry in order to avoid actual
 24 knowledge.
 25 The time-bar requirements for

1 a series of associated actions, such as those
 2 challenges in this case, mandates the Tribunal to
 3 only analyze the measures falling within the
 4 limitation period.
 5 The Spence tribunal correctly
 6 held that a series of associated actions may be
 7 divided up into those that meet the time-bar
 8 requirement and others justiciable, and those that
 9 do not meet the time-bar requirement and, thus,
 10 not justiciable.
 11 Therefore, to the extent that
 12 the components of a series of measures took place
 13 prior to the critical date and the Claimant knew
 14 them, they could not form part of the basis of the
 15 cause of action.
 16 Of course this does not
 17 prevent the Tribunal from considering background
 18 facts that predates the critical date.
 19 However, as the Glamis Gold
 20 tribunal held and the parties appear to agree on
 21 this, such factual predicates are not per se the
 22 legal basis for the claim.
 23 In this specific case, what
 24 are the background facts?
 25 Failure to do the studies is

1 not presented as a background fact.
 2 Continued application of the
 3 moratorium is not presented as a ground fact.
 4 Nor is a failure to direct the
 5 IESO, not to terminate or to freeze the FIT
 6 Contract.
 7 These are the measures that
 8 the Claimant challenges. Even it's the essence of
 9 its claim. They are not background facts.
 10 PRESIDING ARBITRATOR MILES:
 11 But, just be absolutely clear, and you have said
 12 it.
 13 If we were to consider they
 14 are background facts in the way being put by the
 15 Claimant, you would accept that they are within
 16 the time-bar?
 17 MR. TIAN: If they are indeed
 18 background facts, that means they would be outside
 19 of the limitation period and the Tribunal's basis
 20 for consideration of a breach would be informed by
 21 the measures within the limitation period,
 22 informed by those background information.
 23 So this, in other words, the
 24 background fact cannot be the basis of any breach.
 25 PRESIDING ARBITRATOR MILES:

1 Oh, I am sorry. I thought you had said Glamis
 2 Gold does not preclude background facts that form
 3 part of the breach. And then I thought you were
 4 distinguishing measures which I still don't really
 5 follow.
 6 But -- and I was asking you if
 7 we found these were background facts that were
 8 part of the breach, are we not precluded? I am
 9 confused.
 10 I am sorry, what do you say
 11 Glamis Gold says?
 12 MR. TIAN: It says the
 13 background facts are not per se the legal basis
 14 for the claim.
 15 And, as we understand it, it
 16 refers to when they are background facts. That
 17 would not be part of a legal basis. Therefore,
 18 the Tribunal would only look at the legal basis of
 19 a cause of action that are not those background
 20 facts.
 21 PRESIDING ARBITRATOR MILES:
 22 If the Tribunal finds that background facts are
 23 part of the cause of action but that the cause of
 24 action, as a whole, arises within the limitation
 25 period, in your submission, can we include those

1 background facts that arose more than three years
 2 ago; yes or no?
 3 MR. TIAN: Yes. Because the
 4 premise of the question is the cause of action
 5 arose within the limitation period.
 6 PRESIDING ARBITRATOR MILES:
 7 Yeah. Good. Okay. That's what I thought you
 8 meant the first time. Then you sent me off in
 9 three different directions like a pinball.
 10 Okay. Maybe it was me.
 11 MR. TIAN: Sorry about that.
 12 And there is an obvious
 13 disconnect in the Claimant's submissions when it
 14 says it is not challenging pre-cut-off date
 15 measures.
 16 Because all of the Ontario's
 17 measures and the last one from the IESO are
 18 precisely pre-cut-off date measures.
 19 CO-ARBITRATOR GOTANDA: So I
 20 am a little -- I just want to -- and this is my
 21 confusion on this probably.
 22 So the statute requires -- the
 23 Article 1116 requires knowledge of the alleged
 24 breach and knowledge that the investor has
 25 incurred loss or damage.

1 So, if you have facts leading
 2 to knowledge of the alleged breach, does that
 3 alone start the clock running that you have to be
 4 within -- in other words, the limitation -- the
 5 three-year limitation period for that; or does the
 6 fact that you also need the investor has incurred
 7 loss or damage?
 8 MR. TIAN: The legal test is
 9 you need both.
 10 So both the knowledge of loss
 11 and the knowledge of the alleged breach.
 12 CO-ARBITRATOR GOTANDA: Right.
 13 MR. TIAN: I think that's the
 14 distinction I am trying to make between background
 15 facts and measures.
 16 CO-ARBITRATOR GOTANDA: Right.
 17 MR. TIAN: Measures could be
 18 challenged independently as a cause of action.
 19 Whereas background facts, in Canada's submissions,
 20 cannot.
 21 CO-ARBITRATOR GOTANDA: I see.
 22 I think I got it.
 23 CO-ARBITRATOR MCLACHLIN:
 24 Background facts are just what you build your
 25 claim on or foundation.

1 But the real question is when
2 did the breach, when did these facts combine with
3 other things to constitute a breach.

4 MR. TIAN: Precisely.

5 The Claimant has tried to
6 label Canada's arguments as circular, that it is
7 too early to challenge the termination as an
8 expropriation claim in Windstream I and too late
9 now.

10 However, this ignores the
11 essence of its claim that is not the termination
12 itself. But, rather, the circumstances that
13 Ontario created leading to the termination of the
14 FIT contract.

15 It cannot argue, on one hand,
16 for liability that Canada -- rather, Ontario's
17 measures breached the minimum standard of
18 treatment and expropriated its investment, and
19 then, on the other hand, that they are not looking
20 for the same measures for time-bar purposes.

21 CO-ARBITRATOR GOTANDA: And
22 that's where I get a little confused.

23 Because expropriation, at
24 least the way I read the Windstream I Award, is
25 that cause of action doesn't arise until there's a

1 termination of the contract.

2 Am I misreading it or is that
3 incorrect?

4 MR. TIAN: The cause of
5 action, in case of expropriation, is somewhat
6 linked with the loss or damage, for that respect.

7 And it is our standpoint that
8 the knowledge of loss for the expropriation claim
9 arose at least on May 2012 when the Claimant had
10 knowledge that its Project could not move forward
11 in a way that respects the FIT contract's
12 timeline.

13 CO-ARBITRATOR GOTANDA: But
14 then how does that square with the Tribunal's
15 decision saying, essentially, that your claim is,
16 essentially, not ripe here because the contract is
17 still in force and it hasn't been, hasn't been
18 terminated. Hasn't been taken, in other words.

19 If you can't bring the claim
20 until they actually take the property, that's a
21 different question as to whether or not you have
22 incurred damage.

23 In other words, they haven't
24 actually incurred -- the word I think that the
25 Claimants are focusing on is they haven't incurred

1 the loss or damage.

2 You may know that -- you think
3 that there might be loss or damage but you
4 actually haven't incurred it, and I think that's
5 what the Court was saying. The Tribunal was
6 saying -- the earlier Tribunal was saying. It
7 just wasn't incurred yet.

8 And so, therefore, until that
9 time where the contract is actually terminated,
10 it's not incurred.

11 MR. TIAN: Canada understands
12 the first Tribunal's Award not to mean that an
13 expropriation would arise when the contract is
14 terminated.

15 In fact, the Tribunal did not
16 opine on that question. The Tribunal only opined
17 that, back then, there was no expropriation. And
18 it is up to this Tribunal to decide whether there
19 is a viable claim of expropriation after the
20 contract has been terminated in 2018 and effective
21 in 2020.

22 So it wasn't the question that
23 was specifically on the mind of the first
24 Tribunal.

25 CO-ARBITRATOR MCLACHLIN:

1 Where are you on your slides?

2 MR. TIAN: This one.

3 CO-ARBITRATOR MCLACHLIN:
4 Okay, I will go back there. Thank you.

5 MR. TIAN: The essence of the
6 Claimant's complaint -- that is Ontario's
7 measures -- and the background fact -- that is any
8 promise that was made in 2011 -- to the extent it
9 is relevant at all or predate the critical date,
10 the starting point of the limitation period
11 analysis is the essence of the cause of action.

12 At paragraph 206 of the reply,
13 the Claimant attempts to portray its cause of
14 action as the composite measure arising from the
15 sixth individual measures. Yet, it makes no
16 submission as to how the six individual measures
17 amount to a composite measure.

18 Nor does it make any
19 submission on the effect of a composite breach on
20 time-bar requirements.

21 The Tribunal must reject the
22 Claimant's unsubstantiated attempt to amalgam all
23 the challenge measures which means the Tribunal is
24 to analyze each measure individually.

25 And, even if the six measures

1 were to amount to a composite measure, the proper
 2 approach remains to analyze them individually for
 3 time-bar purposes.
 4 When faced with a composite
 5 breach claim, the Rusoro Mining tribunal stated
 6 that the better approach of finding time-bar,
 7 consistent in breaking down each alleged composite
 8 claim into individual breaches, each referring to
 9 a certain government measure and to apply the
 10 time-bar to each of such breaches separately.
 11 The Bilcon --
 12 PRESIDING ARBITRATOR MILES:
 13 Just semantically, a measure may, in total, be the
 14 basis of a breach. But, on the other hand, a
 15 measure may not be the entirety of the breach.
 16 Just, it's simple logic. A
 17 measure could be all that you're required to have
 18 a breach or a measure could be an element of a
 19 breach, depending on what the measure is and
 20 depending on how you're using the word measure.
 21 Again, whether you're using it as a thing, as a
 22 proper noun, or just a description like an
 23 element.
 24 MR. TIAN: Yes.
 25 PRESIDING ARBITRATOR MILES:

1 Right. So I think I understand your position more
 2 clearly now.
 3 But insofar as the Claimant's
 4 alleging a measure qua breach, your position is,
 5 if that measure qua breach occurred more than
 6 three years before the notice of intention itself;
 7 right?
 8 MR. TIAN: Yes.
 9 PRESIDING ARBITRATOR MILES:
 10 If, on the other hand, we decide that it's not the
 11 way the Claimant is treating -- is using the word
 12 "measure" in the context of its -- we consider
 13 it's using some of the elements as background
 14 facts that give rise to a breach that did occur
 15 within the three years, then you would accept that
 16 Glamis Gold says that that is part of the
 17 background facts and we can use those background
 18 facts that are older than three years?
 19 MR. TIAN: To inform the
 20 actual alleged breach.
 21 PRESIDING ARBITRATOR MILES:
 22 Well, right. But they be a necessary element of
 23 the actual breach. It's not just to inform.
 24 There could be four of the five required elements,
 25 all except loss predate.

1 But, if the loss didn't occur
 2 until within the three-year period, then all of
 3 your elements of breach don't arise and you don't
 4 enter 1116/1117 territory until that loss arises;
 5 correct? It's not just to inform.
 6 MR. TIAN: In Glamis, it is to
 7 inform.
 8 CO-ARBITRATOR MCLACHLIN: May
 9 I come in.
 10 Taking you back to Glamis
 11 Gold, three lines from the bottom, starting at
 12 four:
 13 "You may cite to earlier
 14 events as background
 15 facts."[as read]
 16 In quotes.
 17 That would be to inform.
 18 "Or factual
 19 predicates."[as read]
 20 End quotes.
 21 Factual predicates. That
 22 connotes that it's going to become an element of a
 23 breach that may arise later.
 24 So it could be an element.
 25 It's a little more, I think, with respect, and

1 this is a question, actually, for you.
 2 But isn't it a little more
 3 than simply to inform.
 4 You could have elements of a
 5 breach that had not constituted a breach before
 6 the limitation period because they weren't added
 7 to other things.
 8 When you add something else
 9 after the period starts to run and, click, it all
 10 comes together and you have that magic thing
 11 called a breach. And, at that point, you can't
 12 describe that breach without going back to cite
 13 Glamis Gold again, the factual predicates.
 14 So it seems, to me, it's
 15 pretty clear.
 16 The question is whether your
 17 breach came after but you can certainly consider
 18 elements of the breach that came.
 19 MR. TIAN: You can consider
 20 elements of the breach that are part of the
 21 background facts.
 22 CO-ARBITRATOR MCLACHLIN:
 23 Thank you.
 24 PRESIDING ARBITRATOR MILES:
 25 Okay. I think we are clear on that.

1 MR. TIAN: If I may just add
 2 to that.
 3 When you rely on it for a
 4 breach, that does not mean it would necessarily
 5 reset the time-bar to zero.
 6 CO-ARBITRATOR MCLACHLIN: I
 7 don't understand that.
 8 MR. TIAN: It means that it
 9 does not necessarily put the three-year period at
 10 the beginning of the very first background facts.
 11 CO-ARBITRATOR MCLACHLIN: The
 12 beginning is when you have your cause of action.
 13 MR. TIAN: Yes.
 14 CO-ARBITRATOR MCLACHLIN:
 15 That's the critical question; right?
 16 MR. TIAN: Yes.
 17 CO-ARBITRATOR MCLACHLIN: We
 18 agree on that. Thank you.
 19 MR. TIAN: And the Bilcon
 20 tribunal similarly echoed, in finding that it's
 21 possible and appropriate, as the tribunals in
 22 Feldman, Mondev and Grand River, to separate a
 23 series of events into distinct components; some
 24 time-barred and some still eligible for
 25 consideration on the merits.

1 And, therefore, looking at the
 2 six measures individually, the Claimant still
 3 acquired knowledge of five of them before the
 4 critical date.
 5 For knowledge of the alleged
 6 breach, the question becomes when did the Claimant
 7 first acquire actual or constructive knowledge of
 8 individual challenged measures and whether that is
 9 before the critical date.
 10 Measure A, the Claimant
 11 challenges Ontario's failure to conduct further
 12 studies.
 13 The Claimant was well aware
 14 that Ontario did not plan to conduct any further
 15 studies to lift the moratorium at the time of the
 16 Windstream I.
 17 CO-ARBITRATOR MCLACHLIN: I
 18 have to question you on this because it's just not
 19 sitting -- I am not understanding why you would go
 20 back to test each of the individual measures if we
 21 have agreed that the critical thing is when the
 22 cause of action arises and you can look at
 23 components that arise before then.
 24 So why would we then be
 25 testing each of the elements? It seems to me the

1 test goes to when the cause of action arises.
 2 So if, at some point here, a
 3 cause of action arises, then we apply the
 4 limitation period, but not before.
 5 MR. TIAN: As Canada has
 6 understand the essence of the Claimant's case, the
 7 cause of action remains with Ontario's measures.
 8 Therefore, we are going to look at Ontario's
 9 measures to determine when the cause of action
 10 arose.
 11 PRESIDING ARBITRATOR MILES:
 12 This does feel very similar to your opening. You
 13 have taken us through those dates.
 14 I don't think it's in disputes
 15 what dates A, B, C, D occurred. It's E and F and
 16 failure to amend after the Award that postdate and
 17 that fall within the three-year period.
 18 So you don't need to go
 19 through all these dates again. You have already
 20 done that.
 21 You can see what we are still
 22 grappling with is a point -- well, the issue for
 23 us -- and it may be that you have made your
 24 submissions and it's for us to decide which is
 25 probably right.

1 The question for us is when do
 2 we find the cause of action to have arisen and for
 3 the Claimant to have knowledge, possibly
 4 constructive knowledge of the cause of action and
 5 the loss arising out of that cause of action, and
 6 whether they are background fact or measures. The
 7 date is not in dispute. We know what dates they
 8 were. So we know what we have to do, as a matter
 9 of law, to claw back things that predate three
 10 years of the notice of intention.
 11 So you don't need to go back
 12 through your opening submissions again on that.
 13 MR. TIAN: So just one point
 14 on that.
 15 Our position is that measure
 16 F, the very last one, is also time-barred.
 17 CO-ARBITRATOR MCLACHLIN: Yes,
 18 that's your position.
 19 MR. TIAN: Along with the four
 20 other Ontario measures.
 21 PRESIDING ARBITRATOR MILES:
 22 And that goes to the point that you made in
 23 opening on continuing breach which I think was
 24 Rusoro you relied on for that. I may be wrong.
 25 That might have been continuing breach.

1 But that was your point on
 2 continuing breach. If you start doing something
 3 that's a breach, you keep doing that same
 4 breaching thing, your time starts to run from the
 5 date you start doing it?
 6 MR. TIAN: That is correct,
 7 from a legal standpoint. But, on the facts of
 8 this case, we have actual -- we have evidence as
 9 to the Claimant's actual knowledge of the measure
 10 F.
 11 PRESIDING ARBITRATOR MILES:
 12 Right. But measure F is a continuing breach.
 13 MR. TIAN: It's a continuing
 14 measure.
 15 PRESIDING ARBITRATOR MILES:
 16 Okay. Okay. All right.
 17 MR. TIAN: Therefore, looking
 18 at the -- all the time-barred measures, the
 19 Claimant's cause of action clearly arose before
 20 the critical date, and that informs its knowledge
 21 of the alleged breach.
 22 Turning to the Claimant's
 23 knowledge of its loss or damage.
 24 It points to the termination
 25 of the contract by the IESO in 2018 as its first

1 acquisition of knowledge but that's not the
 2 essence of the Claimant's damage case.
 3 The essence of its damage
 4 case, is its inability to develop the Project
 5 and to receive steady revenue provided by the FIT
 6 Contract.
 7 PRESIDING ARBITRATOR MILES:
 8 So, Mr. Tian, I was trying to help you along.
 9 You dealt with all of this in
 10 your opening. We understand your position on when
 11 you submit the individual knowledge of the
 12 individual measures slash elements/components
 13 arose. We have got that. You don't need to do
 14 that again.
 15 MR. TIAN: Yeah, I am going
 16 with loss.
 17 CO-ARBITRATOR MCLACHLIN: That
 18 would be Slide 58 then.
 19 PRESIDING ARBITRATOR MILES:
 20 Oh, sorry. Right. Good. Slide 58.
 21 MR. TIAN: And the Claimant
 22 knew of that inability to develop its Project in
 23 May 2012 when it could not develop the Project in
 24 time to meet the requirements of the FIT Contract.
 25 And the Claimant's counsel

1 acknowledged this morning that that's the moment
 2 where the consequences of Ontario's actions
 3 materialized. It was back then that the Project
 4 cannot be developed in time. It is no longer
 5 financeable back then.
 6 And that inability to develop
 7 the Project, as of May 2012, marks the Claimant's
 8 first acquisition of the knowledge of the damage
 9 that it now seeks to recover in this arbitration.
 10 Namely, the steady revenue
 11 provided by the FIT Contract.
 12 Simply put, the Project was
 13 unbuildable as of May 2012 and any further income
 14 that would have derived from that FIT contract was
 15 irretrievably lost.
 16 CO-ARBITRATOR MCLACHLIN: I
 17 just want to understand this.
 18 You did have a moratorium and
 19 you did have a force majeure which would kind of
 20 put things on hold. And you did have, as the
 21 first Tribunal found, I think, everybody was on
 22 the footing that it might go forward eventually.
 23 So why, I am having trouble
 24 understanding the 2012 date. That may be my
 25 problem. But perhaps you could address my

1 concerns and tell me where I am confused.
 2 MR. TIAN: The -- as of
 3 May 2012, the Claimant knew the Project could not
 4 be developed in time to meet the timeline of the
 5 FIT Contract.
 6 And it would be the FIT
 7 Contract that would grant it the revenue that it
 8 seeks to recover.
 9 CO-ARBITRATOR MCLACHLIN:
 10 Well, what do you say about the force majeure?
 11 What was the impact?
 12 MR. TIAN: I am sorry, I --
 13 CO-ARBITRATOR MCLACHLIN: If
 14 they had been -- maybe I am wrong. But they said
 15 we can't perform on time because of your
 16 moratorium, so now the reason they gave notice of
 17 force majeure, which was accepted, was that they
 18 wanted to put everything on hold.
 19 Implication being that this
 20 will eventually be developed. We will get more
 21 time.
 22 What do you say about that?
 23 MR. TIAN: That's -- whether
 24 there is any such promise and whether that promise
 25 could be reasonably relied upon, is another

1 question.
 2 But the facts is that they
 3 were told by Ontario that there's no direction to
 4 be made and they were told by the OPA back then
 5 that the OPA is not prepared to renegotiate the
 6 contract.
 7 CO-ARBITRATOR MCLACHLIN: So
 8 the moratorium was actually a termination, on your
 9 point of view, effective termination. They could
 10 never revive the thing?
 11 MR. TIAN: Well, the May 2012
 12 was the point where the Claimant had knowledge of
 13 its loss, absent further unconfirmed potential
 14 renegotiation.
 15 CO-ARBITRATOR MCLACHLIN:
 16 Okay. I have your submission.
 17 CO-ARBITRATOR GOTANDA: Just a
 18 quick question on 59.
 19 Do you equate cause with
 20 incurred?
 21 MR. TIAN: The language of the
 22 treaty is incurred.
 23 CO-ARBITRATOR GOTANDA: Right.
 24 MR. TIAN: And it is when the
 25 Claimant would have knowledge that it has suffered

1 loss.
 2 CO-ARBITRATOR GOTANDA: No,
 3 no, that's not what the treaty says; right. It's
 4 knowledge that the investor has incurred damage or
 5 loss.
 6 MR. TIAN: So it has knowledge
 7 that it has suffered loss. And that is when it
 8 has knowledge where loss has been caused to it.
 9 CO-ARBITRATOR GOTANDA: I am
 10 not sure if cause is the same as incurred but you
 11 say it is; right? That's your position?
 12 MR. TIAN: Whether there is
 13 loss that has been caused by a breach, that's a
 14 question for damages.
 15 All the Claimant needs to have
 16 known, for purposes of limitation period, is
 17 whether it has suffered loss.
 18 CO-ARBITRATOR GOTANDA: An
 19 actual loss? Or --
 20 MR. TIAN: A loss that the
 21 extent or quantification may be unclear but it has
 22 to have knowledge that it would have suffered an
 23 actual loss.
 24 CO-ARBITRATOR GOTANDA: Yeah,
 25 some actual loss.

1 MR. TIAN: Yeah.
 2 CO-ARBITRATOR GOTANDA: You
 3 may not know the actual amount but you actually
 4 have to have suffered a loss.
 5 MR. TIAN: Yes.
 6 CO-ARBITRATOR GOTANDA: An
 7 actual incurred damage or loss.
 8 Okay. Thank you.
 9 MR. TIAN: The Claimant claims
 10 to have spent money to further developing its
 11 project after the Windstream I Award.
 12 However, none of this cost
 13 arises within the limitation period. Only the CSR
 14 studies may have occurred after the critical date.
 15 Yet, the Claimant provides no proof of it ever
 16 being paid.
 17 My colleague Ms. Squires just
 18 demonstrated that there is no loss in terms of
 19 fees. The Claimant maintains -- for the Claimant
 20 to maintain the 6 million letter of credit.
 21 In any event, the Claimants
 22 knew abundantly well, when it signed the FIT
 23 Contract, on August 2010, that the letter of
 24 credit constitutes a condition. It knew with
 25 certainty the terms, the amount, and the

1 conditions of return.
 2 And when it chose to keep it
 3 after May 2012, it had knowledge that it could
 4 only be returned upon the termination of the FIT
 5 Contract, or otherwise, in accordance with its
 6 terms.
 7 I will close my arguments with
 8 one final point.
 9 The NAFTA parties intended for
 10 1116(2) and 1117(2) to be a strict limitation
 11 period. This is consistent with the very purpose
 12 of limitation period provisions which provides
 13 legal certainty and predictability, a point that
 14 all three NAFTA parties have noted in this case.
 15 It should definitely not be easily set aside.
 16 Thank you.
 17 PRESIDING ARBITRATOR MILES:
 18 Just before you go, Mr. Tian.
 19 You heard this morning
 20 Ms. Sherkey's characterization that, in the
 21 earlier Award, the Tribunal found that there was
 22 additional value in the FIT Contract that could be
 23 created if the parties renegotiated and
 24 restructured their contract.
 25 And she said the value that

1 would have been created but for Ontario's acts or
2 omissions after the first Award is the loss that
3 the Claimant is seeking in these proceedings in
4 respect of its FET claim.

5 That loss they can't have
6 known about in 2011; can they?

7 MR. TIAN: That's a
8 hypothetical loss because value has not been
9 created. The parties have not renegotiated.

10 PRESIDING ARBITRATOR MILES:

11 Well, Mr. Tian, every single commercial or
12 arbitration damages case is on the basis of a
13 hypothetical loss. That is what the but-for is.
14 It's always hypothetical.

15 So the Claimant's claim is
16 that the loss that they suffered but-for Ontario's
17 breach. Yes hypothetical. It always is.

18 That that value could only
19 have been created after the Award because --
20 perhaps because, in part, given the background
21 fact, maybe, of the Tribunal's finding that there
22 was additional value that could be created if the
23 parties renegotiated.

24 So if we take that background
25 fact, that additional value that would have been

1 created but for Ontario's breach in Claimant's
2 case can't have been known in 2011; can it?

3 MR. TIAN: That would have
4 been the exact same loss that it knew in
5 February -- in May 2012.

6 Because the value that is to
7 be created, in the Claimant's view, from the
8 renegotiation of the FIT Contract and, eventually,
9 the lifting of the moratorium is the value that is
10 to be derived from the FIT Contract. If the
11 steady revenue for a period of 20 years.

12 PRESIDING ARBITRATOR MILES:

13 The Claimant's case that you're needing to answer
14 is, in fact, that the Tribunal -- the Claimant
15 argued, in the first proceeding, that they had de
16 facto termination. We have lost the FIT.

17 They lost on that. The
18 Tribunal said no, you have not lost the FIT. You
19 have still got it. So there has been no taking.
20 There has been no expropriation because you still
21 have that asset. It's still yours.

22 Then, upon that finding, the
23 Tribunal then made the comment, which the Claimant
24 construes as a finding that there was additional
25 value that could be created if the parties

1 renegotiated and restructured.

2 How could they have known that
3 in 2011 or 2012?

4 MR. TIAN: Because it's the
5 same loss that they had thought they lost in
6 May 2012. We are talking about the same --
7 quantum wise, we are talking about the same
8 amount.

9 PRESIDING ARBITRATOR MILES:
10 Okay. All right.

11 MR. TIAN: Thank you.

12 PRESIDING ARBITRATOR MILES:

13 Can we take a brief break? Who is the boss?
14 Ms. Squires, you're in the chief seat.
15 Mr. Neufeld is reaching for his mic.

16 MR. NEUFELD: You are
17 wondering how long I have?

18 PRESIDING ARBITRATOR MILES:
19 Yeah.

20 MR. NEUFELD: How long would
21 you like me to have?

22 PRESIDING ARBITRATOR MILES:

23 Is it just you?

24 MR. NEUFELD: It's just me and
25 it's just the estoppel question, so I think more

1 depends on how interested you are in the estoppel
2 questions.

3 PRESIDING ARBITRATOR MILES:
4 Very.

5 MR. NEUFELD: I think, you
6 know, I have a few things I need to say but I
7 suspect that you will -- you will want to engage
8 on other points.

9 PRESIDING ARBITRATOR MILES:
10 All right. So shall we -- it's 3:23. Shall we
11 come back at 25 to, please. So shortish break and
12 then we will see how you go.

13 I was reflecting in the lunch
14 break and not just to release us all early on a
15 Friday afternoon. But I don't want you all to
16 give 15-minute closings for the sake of giving
17 15-minute closings.

18 And I am actually finding
19 myself thinking -- and we designed it this way so
20 I don't want to take it away and I am not taking
21 it away. But, if you don't want to use it, you
22 are free to release it.

23 MR. TERRY: On our side, we
24 were thinking just a couple of reply points,
25 perhaps, and using it that way.

1 MR. NEUFELD: Exactly the same
 2 point I was going to make.
 3 PRESIDING ARBITRATOR MILES:
 4 Okay. Excellent.
 5 All right. So let's come back
 6 at 25 to for Mr. Neufeld. Thanks.
 7 --- Upon recess at 3:24 p.m.
 8 --- Upon resuming at 3:39 p.m.
 9 PRESIDING ARBITRATOR MILES:
 10 Okay, here we are.
 11 CLOSING ARGUMENT BY MR. NEUFELD (Cont'd):
 12 MR. NEUFELD: Hello again.
 13 Okay. I am going to start,
 14 actually, just by flashing up the FIT Contract
 15 provision for force majeure, as there has been
 16 some questions around it, and I would like for
 17 everybody to walk away from this hearing with an
 18 understanding of what is in the FIT Contract and
 19 what force majeure means in these instances.
 20 We are getting caught up on
 21 who the parties are and, of course, in this case,
 22 the parties are WWIS and the IESO.
 23 Force majeure, you can see, at
 24 10.3, for the purpose of this agreement, the term
 25 force majeure means:

1 "Any act and cause or
 2 condition that prevents a
 3 party from performing its
 4 obligations (other than
 5 payment obligations)
 6 hereunder, that is beyond
 7 the affected party's
 8 reasonable control and
 9 shall include."[as read]
 10 I need the next paragraph
 11 because I don't have it in front of me. There it
 12 is.
 13 So:
 14 "Any inability to obtain
 15 or to secure the renewal
 16 or amendment of any
 17 permit, certificate,
 18 license, approval."[as
 19 read]
 20 I pause on this because those
 21 permits are all coming from Ontario, of course,
 22 and that's where the delay is. We understand
 23 that.
 24 The reason they are in force
 25 majeure and the reason being so granted the

1 request for force majeure is because, originally,
 2 they couldn't get access to their site. It was a
 3 government measure, government being a third party
 4 to this contract, that caused them not to get
 5 access to their site.
 6 So the five-year time
 7 limitation to bring a project into MCO can be
 8 paused in a situation like this but that doesn't
 9 change the term of your contract. Your five-year
 10 term will be pushed out from once that force
 11 majeure event is remedied.
 12 I hope that's all crystal
 13 clear.
 14 Okay. Now back to script.
 15 Actually, not really
 16 because -- well, it is but. Yeah, let's show up
 17 the first slide of the regular slides there, Ryan,
 18 that I was going to go to.
 19 You have seen already -- it
 20 seems to me you flipped through them, you have
 21 been referring to them already, what my project
 22 was last night and what I worked up into the late
 23 hours doing. I just want to walk you through the
 24 format first and then we can take up issues.
 25 What the slide does is brings

1 you through the three-part test which the Claimant
 2 and Canada agree on in terms of how to -- how we
 3 know something is issue estoppel.
 4 And what you see in the top
 5 row decided by the Tribunal are quotes from the
 6 Tribunal. We did not take those words and twist
 7 them in any way, shape or form. So you can rest
 8 assured that those are quotations.
 9 Then what I did is dug out
 10 where it was and by whom it was put in issue and
 11 why its resolution was necessary for you to have
 12 an understanding of why the Tribunal is estopped
 13 from reopening the issue.
 14 Now the bottom part is the fun
 15 little part that you asked us to focus on what is
 16 not covered.
 17 So that's sort of my little
 18 flourish, our little flourish on what the Tribunal
 19 sort of didn't do or, you know, what doesn't bind
 20 you effectively.
 21 Now, before we get into this
 22 particular slide -- well, actually, no. Let's
 23 cover this slide first.
 24 So the issue -- what was put
 25 in issue -- and it's, of course, it's difficult to

1 compartmentalize these things and that's why, in
 2 this case, I think it applies to three different
 3 issues: It applies to the timing of the breach; it
 4 applies to when the project becomes
 5 non-financeable; it applies to the alleged promise
 6 to freeze.

7 And, you know, the argument
 8 that the Claimant raised in Windstream I was that,
 9 as a result of the moratorium and the government's
 10 refusal to insulate the Claimant against its
 11 consequences, the project had become substantially
 12 worthless and not financeable. We have all seen
 13 that. We have dealt with that already.

14 The Claimant also argued that
 15 the failure to carry out the promises to ensure
 16 that Windstream's project was frozen and not
 17 cancelled following the moratorium, which it could
 18 have done by changing contractual deadlines,
 19 amounted to a breach. And Ontario had
 20 definitively refused to fulfil its promise to
 21 ensure that the project was frozen and not
 22 cancelled.

23 So that issue was definitely
 24 before the Windstream I Tribunal. There is no
 25 doubt about that.

1 Now, the findings of the
 2 Tribunal are before you. I don't need to read
 3 them out. We have referred to them so often in
 4 the last few days.

5 What, you know, I can add as
 6 our sort of interpretation beyond what the
 7 Tribunal has said is that the Tribunal did not
 8 determine that the breach continued beyond a
 9 reasonable period of time. I have stressed that a
 10 few times now.

11 Definitely not beyond the date
 12 of the Award.

13 The Tribunal also, we
 14 recognize, didn't use the word "freeze" or
 15 "frozen".

16 Just that the FIT Contract had
 17 not been amended and the Project was no longer
 18 financeable due to the force majeure termination
 19 right.

20 PRESIDING ARBITRATOR MILES:
 21 Just so we are precise.

22 The Tribunal did use the word
 23 "freeze" seven times and "frozen" 12 times but you
 24 would say only in summarizing the parties'
 25 respective positions, not in its reasoning and

1 analysis --

2 MR. NEUFELD: Disposition.
 3 PRESIDING ARBITRATOR MILES:
 4 Or just not in its disposition. Not in its reason
 5 or analysis.

6 MR. NEUFELD: No -- yes,
 7 because you'll find, from these slides, that I
 8 will dig out factual findings. I dug out findings
 9 of -- because, you know, an issue estoppel. We
 10 are worried about issues of facts as well as
 11 issues of law. And those findings are, you know,
 12 are equally barred from being reopened.

13 Now I'd like to come to the
 14 Claimant's Slide 78 that they showed this morning.

15 You will recall, in my
 16 opening, I really stressed the change in the story
 17 throughout the Windstream I pleadings. As we
 18 know, things evolve. Our cases evolve as we go
 19 along. And that's certainly what happened in
 20 Windstream I.

21 So my point to you when I
 22 opened today was that, throughout all of its
 23 arguments, it cites to our counter-memorial. And
 24 I had a little heart jump when I saw, oh, there is
 25 a hearing here. That's not the counter-memorial.

1 What does that say? And this is a lesson in let's
 2 make sure we have all the words before us.

3 So, Ryan, if you could pull up
 4 the transcript from that day. And I think it's
 5 worthwhile providing all the context, so we will
 6 go to page 202. There, they are citing only
 7 page 203 and 204.

8 This goes to your very
 9 question, President Miles, about the temporary
 10 nature and the argument that Canada was making
 11 about the temporary nature of the
 12 non-expropriation, I will call it that way.

13 Which is what I turn to on
 14 page 202.

15 And then I say that the OPA
 16 was willing to preserve its opportunity to pursue
 17 a contract. This was made clear in the conference
 18 call which we heard again this week:

19 "The OPA didn't want the
 20 Claimant's project to
 21 fail because of the
 22 government's lack of
 23 readiness to approve it.
 24 It was prepared to wait
 25 five years for the

1 approval framework to be
 2 finalized as long as the
 3 Claimant was also
 4 prepared to wait."[as
 5 read]
 6 And then a little bit further
 7 along:
 8 "But instead of
 9 negotiating a solution
 10 around these provisions,
 11 the --"[as read]
 12 I said that:
 13 "The Claimant insisted on
 14 contract amendments that
 15 would not have just
 16 frozen the contract but
 17 would have rewritten
 18 it."[as read]
 19 This was my comment about
 20 asking for the moon earlier today.
 21 And, in response, the OPA
 22 reminded the Claimant that it wasn't in a position
 23 to grant the unreasonable requests.
 24 Now, here we come to the
 25 kicker.

1 So what the Claimant cites, on
 2 the next page, is:
 3 "From the government's
 4 point of view, nothing
 5 prevents the Claimant
 6 from going through the
 7 Crown land site release
 8 process and applying for
 9 an REA once the policy
 10 framework is finally in
 11 place."[as read]
 12 That's what they rely on.
 13 The next sentence after that,
 14 I said:
 15 "However, as the Claimant
 16 has indicated, it's no
 17 longer in a position to
 18 secure financing, which
 19 makes moving forward
 20 impossible."[as read]
 21 We had moved on.
 22 The promise was aired and
 23 understood by the time we got to the Tribunal and
 24 the Tribunal understood it too, which is why it
 25 makes a finding that the project is no longer

1 financeable as of May 12th -- May 4th, 2012.
 2 Okay. Let's keep going
 3 through the issues, then.
 4 The next issue is something
 5 that -- so there are, by my count, five instances
 6 where the Claimant has asked for an extension --
 7 either waiver of its termination rights or
 8 extension of the MCO. And three of these happen
 9 in the Windstream I period and then a couple more
 10 happen after.
 11 And, in each instance, the
 12 response was the same.
 13 But the Tribunal also
 14 recognized that these were facts that the Tribunal
 15 put into its factual findings. Not in the
 16 contentious part where it said the Claimant has
 17 argued this and the Respondent has argued this.
 18 These are the Tribunal's factual determinations
 19 that it makes here.
 20 Of course the same statements
 21 came from the IESO after the Award at the
 22 January 15th meeting, January 15th, 2017; and came
 23 from the IESO's letter from Michael Killeavy to
 24 Nancy Baines on February 9th, that they are not
 25 willing to extend the MCO. They are not

1 willing to waive their termination right. That
 2 was made abundantly clear to the Claimant on those
 3 dates.
 4 The third topic I threw in is
 5 one that we can probably skip. It's a horse
 6 that's been beaten to death. It's in our
 7 pleadings.
 8 I suppose the only flourish
 9 here at the bottom is the Tribunal didn't find
 10 that lifting the moratorium was necessary in order
 11 for there not to have been a breach of 1105. I
 12 hope that's clear.
 13 And then we come to
 14 expropriation, which you had discussed with
 15 Ms. Dosman earlier.
 16 Here, too, I think we are
 17 clear. Yeah, we are abundantly clear. I don't
 18 think we need to -- because you had already said,
 19 well, they just jumped to the chase and that is
 20 definitely -- that's definitely our view which is
 21 sort of laid out at the bottom there minus the
 22 typo.
 23 While the -- and I think the
 24 Claimant actually agrees with this position too,
 25 so there's no dispute here.

1 I am pausing because I see you
 2 are still reading so I will wait. I will wait a
 3 little bit.
 4 PRESIDING ARBITRATOR MILES:
 5 That's helpful.
 6 You drafted that last night?
 7 MR. NEUFELD: Yeah.
 8 PRESIDING ARBITRATOR MILES:
 9 Good anticipation. Thank you.
 10 MR. NEUFELD: It's amazing
 11 what comes at 2 o'clock in the morning.
 12 Okay. The next slide is on
 13 the subject of delegated governmental authority
 14 and I understand you don't see this as an issue in
 15 the dispute.
 16 I am happy to move on if you
 17 don't want to hear anything about it. I do
 18 stress, again, that the importance of the
 19 difference between the actors in this case, the
 20 IESO and Ontario.
 21 If you need further indication
 22 -- and, you know, I was planning on coming back to
 23 this in my closing remarks but why don't I just
 24 throw it out here now.
 25 To Professor Gotanda's

1 question about the security and wasn't it
 2 reasonable and they -- you know, who is holding
 3 that security and is it acting with delegated
 4 governmental authority is a key determination in
 5 that factor, in that situation. And the Claimant
 6 hasn't even begun to unravel that ball of wax.
 7 It could have, it could have
 8 pointed to these findings of the Windstream I
 9 Tribunal. It probably didn't want to because the
 10 Tribunal's pretty clear saying that the
 11 directions -- when acting pursuant to a direction,
 12 we know that's delegated, but you can't look at
 13 these things in abstracto. You have to look at
 14 them in concreto.
 15 And it's absolutely essential,
 16 as we know, to look at the very act being
 17 undertaken to know whether it is an act carried
 18 out with delegated governmental authority.
 19 You can also look to the Mesa
 20 tribunal decision where they look, again, at the
 21 OPA and what it's doing. And, interestingly,
 22 there, sure, they find there is delegations of
 23 governmental authority but it's with respect to
 24 the impugned measures in that case.
 25 There is no finding in

1 Windstream I or in Mesa that a decision under the
 2 contract is a delegation of power. There's no,
 3 there's no finding a decision to terminate a FIT
 4 contract is a delegation of governmental
 5 authority.
 6 The next topic I threw in was
 7 on regulatory uncertainty and scientific research.
 8 The Claimant sort of hammered
 9 on this one in its opening and I think we pretty
 10 much left it alone because our message to you has
 11 been consistent, let's start from the Award and go
 12 forward.
 13 Well, here is what the Award
 14 says.
 15 First of all, Canada put at
 16 issue the matter that the Claimant knew that its
 17 project required regulatory change in order to
 18 proceed and it accepted these risks when it
 19 invested in Ontario and it signed back that FIT
 20 Contract.
 21 The regulatory framework for
 22 offshore wind projects remained undeveloped. That
 23 was Canada's argument in Windstream I.
 24 The Tribunal finds, in its
 25 disposition on 1105, plus 1110 as well, but it's a

1 necessary finding, is what I am saying, that,
 2 while the regulatory framework continued to
 3 envisage the development of offshore winds,
 4 additional and more detailed regulations governing
 5 offshore wind, specifically, were never developed.
 6 And it's on this one that I
 7 would like to make sure that we are keeping our
 8 estoppel issues straight.
 9 Again, you'll recall, in the
 10 opening, President Miles, you asked me, well,
 11 didn't the Tribunal accept your argument that the
 12 FIT Contract was still in force, and that's why it
 13 wasn't expropriated.
 14 And I said, well, I don't
 15 remember arguing it that way which the Claimant
 16 took issue with again this morning. Saying that
 17 we had.
 18 But look, again, at their
 19 Slide 43 and what's being put in issue.
 20 Is it the fact that the FIT
 21 Contract remains in place? Or did it have to do
 22 with the scientific research and the deferral,
 23 what we call the deferral at the time the
 24 moratorium being presented as a temporary,
 25 temporary measure.

1 Again, I think the easy way to
 2 keep this straight is just simply to go back to
 3 the Tribunal's words. What did the Tribunal say.
 4 The other problem -- and I
 5 guess this is a point I am coming to -- is that we
 6 find nits in these awards. You are going to find
 7 problems. You are going to find the things that
 8 you scream at when you read it for the first time.
 9 You say they don't understand. Why didn't they
 10 get this. You know, it's frustrating.
 11 We are not here to open up
 12 those things. We are not here to second guess.
 13 That's not the point. Let's move forward.
 14 That's how you have finality
 15 and that's how you have certainty and that's how,
 16 you know, the legal world operates.
 17 All right. The next topic was
 18 Project is an early stage project and the DCF is
 19 not available now.
 20 Again, I would say this is a
 21 horse well beaten. If you want to discuss it
 22 further, I am more than happy to.
 23 But this was clearly the
 24 foundation of the Tribunal's decision on damages.
 25 Oh, we do. Yes.

1 CO-ARBITRATOR GOTANDA: What
 2 do you make, though, out of your expert's opinion
 3 has evolved on what is early stage development?
 4 MR. NEUFELD: Let's do that
 5 when I come to the slide on -- if that's okay by
 6 you. Or we can flip to it right now, if you like,
 7 on -- let's go to Dr. Guillet's slide. So it's,
 8 you know what -- it's the last one, Ryan.
 9 And if I only have four more
 10 before that, that's boding well for an early
 11 afternoon, so that's good too.
 12 So we have laid out in
 13 Slide -- is it 72, the --
 14 CO-ARBITRATOR GOTANDA: Oh,
 15 no, no. 72 raises a whole different -- no, no.
 16 72, no. 72, we will get to that.
 17 MR. NEUFELD: Okay.
 18 CO-ARBITRATOR GOTANDA: What I
 19 guess the question here is -- and I think the
 20 answer -- I will tell you what I think the answer
 21 is and you can tell me if I am wrong.
 22 The fact that your expert's
 23 view has changed on this is just too bad.
 24 If the Tribunal found it's an
 25 early stage project, as they defined it, under

1 your reading of collateral estoppel, the fact that
 2 his view may change, he changes his mind entirely,
 3 it doesn't matter.
 4 MR. NEUFELD: I do not
 5 disagree.
 6 I -- now that you have met our
 7 expert, you know that he is stubborn enough that
 8 even if we told him he wasn't allowed to change
 9 his mind, he would have already changed his mind.
 10 But that's just --
 11 CO-ARBITRATOR GOTANDA: But he
 12 has -- I guess here is the question I have,
 13 though.
 14 Because he changes his mind
 15 and not entirely, to be fair to him. His thinking
 16 has evolved because there are just more
 17 transactions that he now is able to develop a more
 18 refined sort of view, so to speak, of this.
 19 So one could make the argument
 20 here, couldn't you, that where the Tribunal says,
 21 yes, this is an early stage project, but could one
 22 say, if that was critical for the, say, valuation
 23 at that point in time, versus if they are looking
 24 to value it differently or even on a different
 25 claim, I think the answer is no.

1 But does that change your
 2 view?
 3 MR. NEUFELD: Well, there was
 4 a nasty little caveat there, "on a different
 5 claim", I am just going to ignore, I think.
 6 CO-ARBITRATOR GOTANDA: Okay.
 7 MR. NEUFELD: Because I go
 8 back to the first statement you made and you are
 9 stuck with it. We are stuck with it. That's the
 10 world we live in.
 11 I do not disagree with that.
 12 The fact that it gives me some
 13 comfort is the fact that early stage has not
 14 changed. I mean -- and this is -- we are talking
 15 about a project here that did not even do its wind
 16 testing. Right. It is the -- in my mind, it has
 17 always been of the earliest stages.
 18 I know they have done a lot of
 19 expert work. I am not diminishing all the expert
 20 work they have done. But that was all in
 21 litigation. It was all before the Windstream I
 22 Tribunal. And then it was packaged up and
 23 presented as go forward.
 24 And, again, I don't mean to
 25 diminish their experts. I don't mean to diminish

1 them for doing it. You know, valid, valuable
2 work. Sure. But not in this context. Right and
3 so --
4 CO-ARBITRATOR GOTANDA: So
5 then you would live with the categories -- the
6 Tribunal lays it out in almost absolute terms and
7 Dr. Guillet says now, not quite right. My
8 thinking has evolved. And there's a spectrum
9 more.
10 But we are stuck, aren't we,
11 with those absolute. And so, if it doesn't fall
12 in late stage, as was raised earlier, then it has
13 to be then considered earlier stage or can you
14 somehow say know that's a little different at this
15 point.
16 MR. NEUFELD: No. I think
17 it's an early stage project. That's the one thing
18 that's abundantly clear from all this.
19 CO-ARBITRATOR GOTANDA: Okay.
20 Consistent.
21 MR. NEUFELD: Yeah, at least
22 that right. And that's why I said I try to give
23 you comfort on that point.
24 CO-ARBITRATOR GOTANDA: And we
25 will get to 72.

1 MR. NEUFELD: Okay.
2 PRESIDING ARBITRATOR MILES:
3 If I understood what you meant there, even if
4 the -- even if the elements of the stage is
5 changed, where this sits in early stage remains
6 the same. If anything, it's the line between
7 early and late might have become unclear.
8 MR. NEUFELD: Precisely.
9 PRESIDING ARBITRATOR MILES:
10 But this one is so far down the line, in your
11 submission, that it doesn't make any difference.
12 MR. NEUFELD: Precisely.
13 Exactly.
14 PRESIDING ARBITRATOR MILES:
15 It will make a difference to the calculation of a
16 multiplier on the base of a mean, though; won't
17 it?
18 MR. NEUFELD: Sure. Sure.
19 PRESIDING ARBITRATOR MILES:
20 Or median.
21 MR. NEUFELD: Sure. Sure.
22 That's what the damages boss
23 knows all about. Do you want me to get her back
24 up for you?
25 PRESIDING ARBITRATOR MILES:

1 And let you escape the numbers.
2 Just we have interrupted, can
3 we come back to 66. I was looking at that
4 paragraph 380 in its entirety. And thank you for
5 pointing us to that. That is indeed the
6 attribution paragraph and it's very interesting.
7 In my head, I was trying to
8 figure out what it would mean for your collateral
9 estoppel argument if it were the case that this
10 Tribunal concludes that the failure of the Ontario
11 government to take necessary measures, including,
12 when necessary, by way of directing the OPA within
13 a reasonable period of time after the Award to --
14 what's the characterization? To.
15 MR. NEUFELD: Bring clarity;
16 is that? Are you looking for those words?
17 PRESIDING ARBITRATOR MILES:
18 No, I am looking at the Claimant's
19 characterization for construction.
20 MR. NEUFELD: Unblock.
21 PRESIDING ARBITRATOR MILES:
22 To create, I suppose, additional value in the FIT
23 contract, as a consequence of renegotiating and
24 restructuring. Right.
25 If we were to find that

1 constitutes a breach of 1105, so just substituting
2 the not acting in a reasonable amount of time in
3 directing after moratorium.
4 But, instead, it's not, not
5 directing -- I don't know if it needs a reasonable
6 amount of time or not. But not directing after
7 the Award in relation to the creating value by
8 restructuring.
9 If we read on, then, in 380,
10 it was, indeed, the government that could have
11 made that direction as a consequence of the Award.
12 So it cannot be said that the
13 resulting regulatory and contractual limbo was a
14 result of the Claimant's own failure to negotiate.
15 The regulatory limbo Claimant
16 found itself in would follow the, rather than
17 imposition of moratorium, the omission which was a
18 result of the omission of the government and as --
19 Government of Ontario and, as such, is
20 attributable to the Respondent, Canada.
21 So, so the Tribunal,
22 therefore, need not consider whether the conduct
23 of the OPA during the relevant period, a source
24 that would be considered to be attributable to the
25 Respondent.

1 Just take that leap with me.
 2 MR. NEUFELD: Um-hmm, um-hmm.
 3 PRESIDING ARBITRATOR MILES:
 4 If we were to find that breach, as I now
 5 understand it to be characterized on FET under
 6 1105, it would be the same; wouldn't it? It's
 7 still the direction of Ontario or the omission of
 8 a direction.
 9 MR. NEUFELD: Yeah.
 10 PRESIDING ARBITRATOR MILES:
 11 To the IESO.
 12 So the fact that the IESO went
 13 ahead and terminated or refused to negotiate,
 14 doesn't matter if we find that the Government of
 15 Ontario breached NAFTA by not.
 16 MR. NEUFELD: Directing.
 17 PRESIDING ARBITRATOR MILES:
 18 Directing to create that additional value, I think
 19 is the instruction.
 20 MR. NEUFELD: I don't
 21 disagree. Um-hmm, um-hmm.
 22 PRESIDING ARBITRATOR MILES:
 23 Okay. That's helpful. Thank you.
 24 MR. NEUFELD: All right. We
 25 were at, oh yeah, the DCF. That one we have dealt

1 with now. The FIT Contract has no value. You
 2 have seen that in our pleadings. And that's
 3 probably the clearest statement of all from the
 4 Tribunal.
 5 Likewise, the security
 6 deposit, that one, you have seen before.
 7 Site access, this one has come
 8 up now the last couple of days.
 9 So what was put at issue here
 10 was the Claimant argued that the Ministry of
 11 Natural Resources would grant -- it's a bit like
 12 its argument now.
 13 It would grant WWIS's Crown
 14 land application, its AOR status in a timely
 15 manner. It's all based on an assumption, on a
 16 hypothetical. And it relied on that commitment
 17 and that's why it invested in --
 18 PRESIDING ARBITRATOR MILES:
 19 Just in the box before in 69 -- sorry, two boxes
 20 before, Slide 69, the Tribunal did not find the
 21 FIT Contract would change in value between market
 22 forces.
 23 Equally, it didn't find that
 24 it would not change in value. And it didn't find
 25 anything about that. It just said, as at the date

1 of the Award, it has no value.
 2 MR. NEUFELD: Right. Sure.
 3 PRESIDING ARBITRATOR MILES:
 4 And it said value could be created in
 5 renegotiation, reactivation as to the question
 6 could value be created in any other way --
 7 MR. NEUFELD: Yeah. No
 8 disagreement.
 9 PRESIDING ARBITRATOR MILES:
 10 No. Okay.
 11 MR. NEUFELD: Okay. So back
 12 to the site access.
 13 Here, the Tribunal notes that,
 14 while the Claimant did have a FIT Contract and
 15 grid connection, it did not yet have site control,
 16 of course.
 17 And I think we are all
 18 understood on that. But it raises the 3 o'clock
 19 in the morning miss that I didn't put grid access
 20 in here and there's an answer other than
 21 sleepiness and I should have put it in.
 22 But it is not having my cake
 23 and eat -- actually, there is another saying that
 24 I really like. It's having your -- having sold
 25 your cow but wanting to --

1 CO-ARBITRATOR MCLACHLIN: Get
 2 the meat.
 3 MR. NEUFELD: Yeah. Have you
 4 heard that one before, Justice McLachlin?
 5 CO-ARBITRATOR MCLACHLIN: I
 6 come from the west.
 7 PRESIDING ARBITRATOR MILES:
 8 We are both farm girls, so.
 9 MR. NEUFELD: So the grid
 10 access point is also referenced in 475, as I just
 11 read out.
 12 The question, I guess, for you
 13 is do you read it in connection with -- is context
 14 for 475 also paragraph 140 of the Award?
 15 If I were in a treaty right
 16 now, I would certainly argue it was.
 17 We are not in a treaty and,
 18 hey, you know what, I am going to argue that it is
 19 too.
 20 Paragraph 140 of the Award is,
 21 again, the factual determination that the Tribunal
 22 makes and, as Ms. Squires said this morning, they
 23 touched on this ever so slightly, as compared to
 24 AOR and site release, which I already walked
 25 through. But, grid connection, they didn't nearly

1 as much.
 2 But they do find, at
 3 paragraph 140, that, on November 8th, 2010, WWIS
 4 received a notification of conditional approval
 5 for connection.
 6 So do you read 475, grid
 7 connection, in connection with paragraph 140's
 8 conditional approval for connection, because
 9 that's the grid connection that they are talking
 10 about? And I would argue that that is a proper
 11 reading.
 12 Now back to our nits in
 13 awards.
 14 Is that grid connection or
 15 isn't it? And we are stuck with the Award that we
 16 have.
 17 PRESIDING ARBITRATOR MILES:
 18 And grid connection is used interchangeably with
 19 grid access, as I said earlier in the week, in the
 20 Tribunal's reasoning. And this is not unconnected
 21 to Professor Gotanda's question earlier on the
 22 stages of development.
 23 MR. NEUFELD: Right.
 24 PRESIDING ARBITRATOR MILES:
 25 As defined by Dr. Guillet because the Tribunal

1 took those definitions.
 2 MR. NEUFELD: Yeah.
 3 PRESIDING ARBITRATOR MILES:
 4 And treated grid connection on the basis as it
 5 understood him to opine on that.
 6 MR. NEUFELD: Yeah.
 7 PRESIDING ARBITRATOR MILES:
 8 And it seems like, with many of the four factors
 9 for fully permitted, if, indeed, fully permitted
 10 itself, this is a spectrum.
 11 MR. NEUFELD: Right. Right.
 12 And given that's all the Award
 13 says, that's probably all I can say on that as
 14 well.
 15 The last point is the one
 16 Professor Gotanda's been waiting for on
 17 Dr. Guillet's confidential information.
 18 But, I mean, I think we see
 19 where we are going now. We are stuck with what we
 20 have.
 21 CO-ARBITRATOR GOTANDA: Well,
 22 are we? Because -- and here is the push back and
 23 tell me how you think this is wrong.
 24 Collateral estoppel, you
 25 actually have to decide the issue.

1 MR. NEUFELD: Um-hmm.
 2 CO-ARBITRATOR GOTANDA: Right.
 3 And, here, I am looking at 475
 4 and 477 and there is no explicit sort of finding
 5 to this as opposed to on the DCF and early stage.
 6 You know, there, you have, in the -- it's very
 7 clear. Explicitly clear by the language.
 8 Here, you're almost doing it
 9 by implication, from what I see. As opposed to
 10 the Tribunal making a specific finding that it's
 11 to be used.
 12 So I am wondering if this is a
 13 little bit of a stretch.
 14 Also, too, I think we are
 15 limited by the Award itself. In other words, the
 16 fact that the Claimant may have argued something,
 17 if it's not actually in the Award right in that
 18 spot, it doesn't matter for purposes of collateral
 19 estoppel.
 20 Doesn't it actually have to be
 21 in the Award itself?
 22 MR. NEUFELD: It has to be
 23 decided by the Tribunal so.
 24 CO-ARBITRATOR GOTANDA: Right.
 25 But we can't look to the transcripts as to what

1 the parties argued because we don't know what the
 2 Tribunal actually took into account.
 3 In other words, we have to
 4 look to the four corners of the Award and not go
 5 outside of that.
 6 MR. NEUFELD: But one of those
 7 -- you know, R-0951 is the Tribunal decision.
 8 CO-ARBITRATOR GOTANDA: I am
 9 looking at 49.
 10 MR. NEUFELD: Sure. Sure.
 11 That's just what the parties put in issue. I
 12 agree 100 percent.
 13 But 951 is the Tribunal
 14 decision and the Award is a Tribunal decision.
 15 CO-ARBITRATOR GOTANDA: Right.
 16 And then we go back to the
 17 Award at 475 and 477 and, there, the Tribunal
 18 doesn't actually explicitly make that finding; do
 19 they?
 20 MR. NEUFELD: They use the
 21 word "accepted".
 22 CO-ARBITRATOR GOTANDA:
 23 Accepted, though, is not the same as an explicit
 24 finding; that that's something that we are bound
 25 to follow.

1 MR. NEUFELD: I am not sure I
 2 agree on that.
 3 It's very hard not to read the
 4 word "I have accepted this" as not a commitment.
 5 If you were entering an oral
 6 contract and you say I accept that.
 7 CO-ARBITRATOR MCLACHLIN: But
 8 it's conditioned. Maybe it doesn't make any
 9 difference:
 10 "Accepted the evidence of
 11 Dr. Guillet as the most
 12 comprehensive evidence
 13 relating to comparable
 14 transactions,
 15 methodology."[as read]
 16 Which included undisclosed
 17 confidential.
 18 Anyway, it's a what did they
 19 accept question.
 20 MR. NEUFELD: Um-hmm.
 21 CO-ARBITRATOR MCLACHLIN: They
 22 said it was the most comprehensive. That is what
 23 I take from that.
 24 MR. NEUFELD: Um-hmm.
 25 CO-ARBITRATOR GOTANDA: And

1 then they go on to say, though -- and it takes
 2 this evidence as the starting point of the
 3 analysis. That's different; isn't it, for, then
 4 it is the ultimate --
 5 MR. NEUFELD: Well, is the
 6 Tribunal, in that instance, referring to we are
 7 going to take that as a starting point to
 8 determine what the whole pie is to take off the 6
 9 million, you know --
 10 CO-ARBITRATOR GOTANDA: Well,
 11 but it's not clear, is it, at that point. And
 12 it's got to be clear, I think, in order to apply.
 13 MR. NEUFELD: A clear
 14 determination.
 15 CO-ARBITRATOR GOTANDA: Right.
 16 MR. NEUFELD: I mean, I see
 17 where the questions are coming from and I, I mean,
 18 my position is that acceptance is a determination
 19 but.
 20 I think -- I don't think
 21 anything more can be said. Again, we have the
 22 Tribunal's words and that's what we have.
 23 PRESIDING ARBITRATOR MILES:
 24 It may be, if we get to it, that that change in
 25 valuation date unravels all of this anyway.

1 Because once you change -- unusually --
 2 unexpectedly, for me -- perhaps not for valuers --
 3 that change in valuation date does, here, seem to
 4 reopen the basis for the reasoning as to the
 5 appropriate methodology to use in early stage
 6 development because change of valuation date gives
 7 you a lot more information.
 8 MR. NEUFELD: Um-hmm, um-hmm.
 9 PRESIDING ARBITRATOR MILES:
 10 And, once you have more information, we have data
 11 before us that -- without even going into the
 12 confidential, we have more non-confidential data
 13 available to us.
 14 MR. NEUFELD: Right. Right.
 15 PRESIDING ARBITRATOR MILES:
 16 So, you know, we may not -- this may be a moot
 17 point but it is, nevertheless, an interesting
 18 point that, if a collateral issue is decided on
 19 the basis of a procedure that subsequent
 20 information tells you that basis is not legitimate
 21 -- and that's not what we are suggesting here.
 22 But, hypothetically, if that
 23 were the case, are you bound by that issue
 24 estoppel in international law.
 25 MR. NEUFELD: On that point, I

1 haven't heard the argument from my friends at the
 2 other table that it's -- there's new information
 3 and there's a reason here. I haven't -- I haven't
 4 been presented with a case either.
 5 PRESIDING ARBITRATOR MILES:
 6 To be fair, the new information was the
 7 mathematical errors that were apparent on the face
 8 of the additional confidential information, one
 9 can't find mathematical errors if one doesn't have
 10 the variables that you would need to conclude a
 11 mathematical error because they are confidential.
 12 So finding on the face
 13 mathematical errors in the additional information
 14 that we have because of the change of date in
 15 valuation.
 16 MR. NEUFELD: I should have
 17 been more precise with my words.
 18 I haven't heard invocation of
 19 a specific exception in order to unravel or not
 20 use this finding, is what I am trying to say.
 21 PRESIDING ARBITRATOR MILES:
 22 Right. You go ahead. We were going to say the
 23 same thing.
 24 CO-ARBITRATOR GOTANDA: To be
 25 fair, though, you didn't raise this until today.

1 MR. NEUFELD: It's in our
 2 pleadings.
 3 PRESIDING ARBITRATOR MILES:
 4 Slide 72, the findings --
 5 MR. NEUFELD: No, I am
 6 responding to your question on estoppel for sure.
 7 Sure, sure, sure.
 8 PRESIDING ARBITRATOR MILES:
 9 Right. Right.
 10 So that we are estopped from
 11 deciding that we can't use Dr. Guillet's
 12 confidential information or we can't use the
 13 Tribunal's conclusion using Dr. Guillet's
 14 information, that's new.
 15 MR. NEUFELD: Right. No
 16 disagreement.
 17 PRESIDING ARBITRATOR MILES:
 18 And, if there's subsequent information that makes
 19 it illegitimate for us to rely on Dr. Guillet's
 20 confidential information -- I am not suggesting
 21 there is but if, hypothetically, there were, then
 22 that's a new argument.
 23 MR. NEUFELD: Right.
 24 PRESIDING ARBITRATOR MILES:
 25 All right, sir.

1 MR. NEUFELD: Well, that's it.
 2 Those are my estoppel points. I will sit down.
 3 PRESIDING ARBITRATOR MILES:
 4 Thank you. Thank you very much.
 5 Mr. Terry, did you have any --
 6 or Ms. Sherkey or Ms. Shelley. Anybody.
 7 MR. TERRY: Each of us have a
 8 couple of points. I think Ms. Sherkey will go
 9 first.
 10 PRESIDING ARBITRATOR MILES:
 11 Okay.
 12 REPLY CLOSING ARGUMENT BY MS. SHERKEY:
 13 MS. SHERKEY: Just picking up
 14 where we ended on that confidential point. I
 15 don't have too much to add, but to say Mr. Neufeld
 16 said I haven't heard my friend that they are
 17 raising an exception.
 18 I think, to be clear, our
 19 primary submission is issue estoppel doesn't
 20 apply. It was a finding that the Tribunal accepts
 21 the evidence before it. We accept the evidence of
 22 Mr. Guillet so that's not a binding principle upon
 23 you.
 24 PRESIDING ARBITRATOR MILES:
 25 Got that.

1 If it does apply.
 2 MS. SHERKEY: If it does
 3 apply, there could be a question, then, of the
 4 role of the fact that this is new evidence, the
 5 issue of the mistakes within that evidence that's
 6 before you.
 7 But we haven't had an
 8 opportunity to explore the cases. We don't think
 9 that's very well developed in international law.
 10 And whether there are exceptions to the
 11 application of res judicata in those circumstances
 12 is a brand new issue raised today and now before
 13 you.
 14 And then we note your point
 15 that it could be moot.
 16 So I have five targeted reply
 17 points.
 18 If we could pull up C-2474,
 19 Exhibit 3.
 20 Apparently, there are Zoom
 21 issues to get the document up. So Canada's
 22 counsel is going to helpfully put it up for us.
 23 PRESIDING ARBITRATOR MILES:
 24 Do you need to do this for all five points?
 25 MS. SHERKEY: No. I was going

1 to say I could move on but if they have it.
 2 PRESIDING ARBITRATOR MILES:
 3 Is this the Superior Court of Justice? What page?
 4 MS. SHERKEY: It's Exhibit 3.
 5 It's the August 25th letter from the Ministry of
 6 Natural Resources to Windstream that Ms. Squires
 7 took you to. And the point is quite short and
 8 simple for how long it will take to get it.
 9 PRESIDING ARBITRATOR MILES:
 10 Do you have a page number for the exhibit?
 11 MS. SHERKEY: R-795 is another
 12 version of it that might be simpler.
 13 Oh, there it is.
 14 If we scroll to the second
 15 page and zoom in.
 16 Ms. Squires took you to the
 17 top paragraph of this where it was the letter back
 18 to the project description report Windstream filed
 19 in February.
 20 MNR responds to this and
 21 Windstream had provided a bunch of studies and
 22 said:
 23 "In your letter, you also
 24 described the studies you
 25 have carried out to date.

1 The Ministry has not
 2 published any final
 3 guidelines or policies
 4 specific to offshore
 5 wind."[as read]
 6 And it goes on to say so any
 7 studies you carry out are entirely at your own
 8 risk.
 9 The point is not don't proceed
 10 with the project. Don't take out a letter of
 11 credit. Don't do anything here because you have
 12 no project.
 13 This was a specific letter
 14 that said, if you do studies and submit them to us
 15 as part of the REA, we can't guarantee that they
 16 will be accepted.
 17 So that's point one.
 18 Point two.
 19 You heard from Mr. Neufeld
 20 about the letter of credit and he said that we,
 21 the Claimants, haven't made submission on
 22 delegated governmental authority. And that's
 23 important because it's the IESO that holds on to
 24 the letter of credit, not the Ontario government.
 25 And I just want to emphasize

1 what the points are with the letter of credit
 2 because, in my submission, that misses the point.
 3 It is not an issue of delegated governmental
 4 authority. It's no one said the IESO has breached
 5 the NAFTA by holding on to it.
 6 The point about the letter of
 7 credit being held is twofold.
 8 First, it comes up in
 9 Windstream's expectations about the ability of the
 10 project to proceed, the messages it was getting
 11 from the government and what we say it was the
 12 shared understanding that there was a contract and
 13 a path forward, potentially, for the project.
 14 And, if the government's view
 15 was there was no such path, it should have
 16 returned the letter of credit. The IESO, directed
 17 by the government, we don't know. It's a
 18 hypothetical because it didn't happen. But the
 19 point is that informed Windstream's expectations.
 20 As well as the second part,
 21 that's why it was also an expense incurred. And
 22 Mr. Terry's going to speak to you more about the
 23 timing of the expenses so I will leave it at that.
 24 But delegated governmental
 25 authority has no role.

1 Ms. Dosman gave a note of
 2 caution on what authorities to look at in
 3 interpreting the FET standard. And she raised
 4 that in response to the fact that I had taken you
 5 to Lemire which sets out here is what
 6 arbitrariness means.
 7 And I just want the be clear.
 8 The FET standard -- we didn't
 9 go through this -- but Article 1105 sets out FETs
 10 protected under the MST. We are all agreed
 11 there's Waste Management.
 12 Waste Management says you
 13 can't have conduct that's arbitrary, grossly
 14 unfair.
 15 So what does arbitrary mean?
 16 That's what we are interpreting. We are not now
 17 back at the language of Article 1105 saying you
 18 can't look at these other authorities.
 19 There was a question of how
 20 parties was used in the award and I just want to
 21 take you to a few paragraphs of the award.
 22 If we can pull up -- I don't
 23 know who has control.
 24 PRESIDING ARBITRATOR MILES: I
 25 have word searched the award myself, and perhaps

1 Professor Gotanda and Justice McLachlin want you
 2 to do this, but it's used consistently as parties
 3 to the arbitration throughout the award. I can
 4 see that from word search.
 5 MS. SHERKEY: Yes.
 6 And what I will also point
 7 out, at paragraph 387, is there's a use of lower
 8 case parties when talking about a different power
 9 purchase agreement. Parties to that power
 10 purchase agreement was used with a lower case P.
 11 PRESIDING ARBITRATOR MILES: I
 12 only saw a lower case P in quotes. Was that in
 13 quotes?
 14 MS. SHERKEY: No.
 15 PRESIDING ARBITRATOR MILES:
 16 Oh, okay.
 17 That's another power purchase
 18 agreement so it doesn't help you either way; does
 19 it?
 20 MS. SHERKEY: The point being
 21 that, when they weren't talking about parties to
 22 the arbitration, they used lower case.
 23 PRESIDING ARBITRATOR MILES:
 24 Also, when they weren't talking about parties to
 25 the OPA and this -- this IT, they use a lower

1 case, so it cuts both ways.
 2 MS. SHERKEY: I think when you
 3 see -- my submission would be you see that capital
 4 P used consistently through the parties to the
 5 arbitration, and then this is a lower case P when
 6 talking about different parties.
 7 PRESIDING ARBITRATOR MILES:
 8 That would be persuasive if that was referring to
 9 the parties to our FIT. It's not.
 10 MS. SHERKEY: Yes.
 11 PRESIDING ARBITRATOR MILES:
 12 Right. Okay.
 13 MS. SHERKEY: Lastly, Mr. Tian
 14 said, whether there is a loss that has been caused
 15 by a breach, that's a question for damages.
 16 All the Claimant needs to have
 17 known, for purposes of limitation period, is
 18 whether it has suffered a loss.
 19 So he distinguishes between
 20 knowledge of suffering a loss for limitations and
 21 whether there has been loss caused by a breach.
 22 And I would submit that's not
 23 right.
 24 I'll refer you back to Slide 9
 25 where we included the quote from Infinito that

1 says loss or damage must flow from the alleged
 2 breach. They are tied together.
 3 And those are my reply points
 4 and it will be Mr. Terry now.
 5 PRESIDING ARBITRATOR MILES:
 6 Can I just follow you up on one point that I think
 7 definitely was you.
 8 The International Valuation
 9 Standards, at C-2278, you took us to two
 10 paragraphs. I had written them down as 30.7 and
 11 20.3(j). The 20.3(j) must be wrong.
 12 On the 30.7, to start, you
 13 said one was general and one applied only to
 14 comparables, market comparables methodology.
 15 The 30.7 is clearly comparable
 16 transactions which must mean the 20.3.
 17 MS. SHERKEY: Ms. Shelley is
 18 pulling up the reference to get that paragraph.
 19 PRESIDING ARBITRATOR MILES:
 20 My 20.3 only goes to (e) so I am not sure what the
 21 (j) is but it was also the market approach.
 22 MS. SHERKEY: I think it might
 23 be in a different section. There are two 20.3s.
 24 If it makes sense, Mr. Terry
 25 could start while we just get that precise

1 pinpoint for you.
 2 PRESIDING ARBITRATOR MILES:
 3 Yeah. If you could get me the right reference.
 4 If you could give me a page number to the
 5 standards.
 6 MS. SHERKEY: Sure.
 7 PRESIDING ARBITRATOR MILES:
 8 The proper page number for the document, the
 9 numbers on the bottom, then at least I can look at
 10 the right thing.
 11 Because they did look to me --
 12 and, Ms. Shelley, you can confirm -- they did look
 13 to me that they both dealt with market
 14 comparables, which probably doesn't matter at this
 15 point but still.
 16 Mr. Terry.
 17 REPLY CLOSING ARGUMENT BY MR. TERRY:
 18 MR. TERRY: This is really
 19 just a point of clarification on interest paid on
 20 the letter of credit. And some of the submissions
 21 that Ms. Squires is making on that.
 22 And, first of all, if we could
 23 bring up, again, or you go to Slide 136 of our
 24 slides from this morning and if I could -- if I
 25 could have the "interest paid" line highlighted,

1 please. About ten lines down, sorry.
 2 So you see this is -- there is
 3 a line in the revised sunk costs that prorates the
 4 various costs.
 5 And you'll see, if you look in
 6 the third column, that the interest cost that's
 7 been counted here runs from June 1st, 2015, to
 8 May 8th, 2017. And there's no further interest
 9 being counted after that date, May 8th, 2017.
 10 And then there's a pro rata
 11 calculation that's made to reduce the interest of
 12 3.962 million, in the last column, to just
 13 1.249 million.
 14 So that's all that's being
 15 claimed in terms of interest payments on the
 16 letter of credit in that chart.
 17 And, in terms of where the
 18 3.9 million comes from, there is, if I could bring
 19 up, please, or you could turn to page 45 of the
 20 presentation that Secretariat made.
 21 And we won't have to, this
 22 time of day, go through this in too much detail.
 23 But you will see the reference to, at the bottom,
 24 to Exhibit C-282 -- sorry, C-2082. My apologies.
 25 I will just wait for Madam

1 President to get hold of the report. At page 45.
 2 This is the exhibit that was
 3 used to do these calculations.
 4 And you will see, if you look
 5 at the top, they calculate the total interest
 6 paid, and then they subtract the interest paid
 7 amount in the Deloitte report, and that's how they
 8 come up with the 3.9 million for that period, as
 9 we saw on the Slide 136 of our slides this
 10 morning. Going from the time that the Deloitte
 11 report finishes its calculation June 1st, 2015, to
 12 May 8th, 2017.
 13 And this is also, if you want
 14 to -- the reference and detail to see all this is
 15 in Secretariat's first report, Schedule 3, note 8.
 16 And that includes a reference, also, it's based on
 17 Exhibit C-2082.
 18 So that's where the interest
 19 is in the letter of credit.
 20 Now, we did hear about
 21 interest after that amount that was accruing to
 22 the investors. And you may recall, if you look at
 23 Mr. Tobis' testimony -- we don't have to bring it
 24 up or maybe it is up. Okay.
 25 This is his testimony from day

1 3, I believe. It's page 287 -- or 271, sorry.
 2 Since May of 2017, in
 3 Secretariat's calculations, they haven't included
 4 any of the continuing accruing interest.
 5 And he says:
 6 "In our case, we are
 7 including only the fees
 8 that were paid,
 9 technically, since
 10 May 2017."[as read]
 11 Sorry.
 12 "Since May 2017, they are
 13 still accruing more fees
 14 on this amount. We just
 15 haven't included those as
 16 well as we were trying to
 17 be reasonable in
 18 preparing the
 19 schedule."[as read]
 20 So those are accruing fees.
 21 They have not been included.
 22 So I just wanted to point that
 23 out just so the evidence is very clear for you
 24 with respect to the letter of credit of interest.
 25 And that, unless there are any

1 questions, that completes our submissions for the
 2 day.
 3 PRESIDING ARBITRATOR MILES:
 4 Thank you.
 5 MS. SHELLEY: Madam President,
 6 if I could just assist with the reference for you.
 7 Under the general standards,
 8 which is IVS 101, the same document, so C-2278, it
 9 is 20.3(j) and you will find that on page 11 of
 10 the document. Or it's page 16 if you're in the
 11 PDF. But page 11 of the printed document.
 12 PRESIDING ARBITRATOR MILES:
 13 We could have a discussion, if we wanted, about
 14 nature and sources. But not all the data. I see
 15 what you mean.
 16 Okay. Got it. Thank you for
 17 that.
 18 MS. SHELLEY: Thank you.
 19 PRESIDING ARBITRATOR MILES:
 20 Mr. Neufeld.
 21 MR. NEUFELD: Again, I had
 22 some points but I am not sure that we need to hear
 23 them. I think we can probably call it a day and I
 24 can use my time to thank the Tribunal for very
 25 diligently reading all the materials. We felt

1 that personally. And, you never know. We have
 2 dealt with other Tribunals. You are always left
 3 questioning, right, what's understood and what
 4 isn't. And the questions, I can say, are both
 5 super helpful to know that you are engaged and
 6 have understood and traumatizing all at the same
 7 time.
 8 So thanks for that.
 9 Thank you, Lisa and
 10 Mr. Aragón. It's been less arduous than the first
 11 two-week hearing that we went through in this,
 12 although arduous nonetheless.
 13 So just shout out to the
 14 absolute fabulous team that we rely on in Ottawa.
 15 And a cordial thanks to the
 16 Claimant's counsel.
 17 And, in fact, I really enjoyed
 18 meeting many of the Claimant's witnesses and I
 19 remember we had some really good chats. In fact,
 20 Mr. Baines offered for my son to get in touch
 21 about engineering at Queens. It's very touching.
 22 Thank you very much.
 23 MR. TERRY: If I may, if you
 24 don't mind, I would like to make a similar thanks.
 25 It's been a very, very

1 interesting week. I think all counsel really
 2 appreciated the attention that the Tribunal's
 3 given to this issue.
 4 The challenging questions, the
 5 very thoughtful questions. And I think it's
 6 helped all of us, on this side as well, sort out
 7 these issues as we have gone through this.
 8 And, similarly, I would like
 9 to thank José and Lisa very much for all the
 10 efforts through the long days.
 11 I also appreciate the cordial
 12 nature all the way through in this proceeding. We
 13 have had very cordial relations with Canada and,
 14 of course, thanks for everyone else involved. Of
 15 course for our team.
 16 And the only thing I would, as
 17 a little footnote, which might be worth mentioning
 18 is one other thing that happened that, for now, is
 19 probably res judicata from the first hearing, is
 20 that is counsel on our side and counsel on
 21 Canada's side that ended up meeting each other for
 22 the first time that are now married and they have
 23 a young child.
 24 MS. SQUIRES: Not me, no.
 25 PRESIDING ARBITRATOR MILES:

1 Okay. Because you have had a child, there have
 2 been lots of Windstream babies.
 3 Okay. Well, thank you all so
 4 much. We are honoured to be given this
 5 responsibility. It is a particularly tricky case
 6 because of the earlier proceedings and the earlier
 7 award.
 8 It's important; right. It's
 9 really important for states, in an energy
 10 transition, for this to be considered very
 11 carefully.
 12 It's really important for
 13 investors and developers in an energy transition.
 14 It's important for all of us, including all those
 15 babies, that we do everything we can and within
 16 our capacity and expertise to get this energy
 17 transition right.
 18 So we appreciate your patience
 19 with us. We care deeply about these issues.
 20 We huge respect to every
 21 single one of the advocates. It's been --
 22 Mr. Tian, I understand that you're two years out
 23 of law school. I mean, wow.
 24 MR. TIAN: First year call.
 25 PRESIDING ARBITRATOR MILES:

1 They never let me up on a first year call.
 2 So extremely well done.
 3 But wonderful to see the
 4 diversity. Really, really respect that.
 5 But just the today, in
 6 particular, the level with which you engaged with
 7 our questions, I would guess that none of you has
 8 had much more than a couple hours sleep. So but
 9 it showed in terms of the preparedness and focus.
 10 So all the questions I had
 11 yesterday are much, much clearer, to be honest,
 12 are much, much clearer in my mind. So well done,
 13 whatever the outcome. The teams were
 14 extraordinary.
 15 And admiration, also, to the
 16 representatives of the government and
 17 representatives of Windstream for getting along so
 18 well when this has been such a long process for
 19 all of you.
 20 José Luis, you are my hero.
 21 You know that.
 22 And, Lisa, thank you.
 23 And you can image how I feel
 24 the privilege of having these two wings so it's
 25 been a delightful week for me, personally, as

1 well. So thanks.
 2 I did want to say one little
 3 thing.
 4 If we felt we got to it and we
 5 needed anything on the law on the Slide 72 point,
 6 I would like us to be able to ask, give the
 7 parties an opportunity to send us law on that. At
 8 this stage, we don't feel we need it.
 9 But, if we were to reach a
 10 point in the drafting, so we won't close the
 11 proceeding but, otherwise, not anticipating any
 12 written submissions or anything additional.
 13 Okay, so thank you.
 14 --- Whereupon matter adjourned at 4:42 p.m.
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