IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES, 1976

-between-

TENNANT ENERGY, LLC

(the “Claimant”)

-and-

GOVERNMENT OF CANADA

(the “Respondent”, and together with the Claimant, the “Parties”)

PCA CASE NO. 2018-54

FIRST PROCEDURAL HEARING

The Arbitral Tribunal:

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. R. Doak Bishop

Sir Daniel Bethlehem QC

Registry Permanent Court of Arbitration

17 June 2019

Washington, D.C.

A P P E A R A N C E S

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P R O C E E D I N G S

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ARBITRATOR BULL: Okay. Let me call proceedings to order. This is PCA Case No. 2018-54, Tennant Energy, LLC and Government of Canada. My name is Cavinder Bull. I'm the presiding arbitrator. Joining us by video, my colleagues, Mr. Doak Bishop and Sir Daniel Bethlehem. And I think parties can see both of them on the screens. To my left is the tribunal secretary, Ms. Christel Tham.

And I wonder if I might get someone from the Claimant's side to introduce those present for the Claimant, please.

MR. APPLETON: The first test of the day. Very good. Good morning. And I'd like to thank you, Mr. President, and also to the other members of the Tribunal. I'm Barry Appleton. Joining me on behalf of the Claimant this morning, that is Tennant Energy, LLC, first is our client representative, Mr. John Pennie.

MR. PENNIE: Good morning.

MR. APPLETON: Then I have Ben Love beside me. And on the other side is Mr. Ed Mullins, and I believe on the telephone we have Lillian De Pena in our offices in Toronto.

I don't know that she's there, I believe she's been muted, but I'm going to assume that we've connected to her.

MS. THAM: Yes. I believe we have connected to her.

MR. APPLETON: Well, then we won't wait. I'm sure she's there.

ARBITRATOR BULL: Thank you very much, Mr. Appleton.

And then for the Respondent, please.

MS. DI PIERDOMENICO: Thank you. Just a small housekeeping matter as well. I am hoping that we could also have the benefit of being able to see the arbitrators. It would be quite difficult for us to speak to the screen, I think. But my name is Lori Di Pierdomenico. I apologize. I hate to start with a technical matter, but I

would also like the benefit of seeing them.

So I'll start with our legal team. I have Maria Cristina Harris here to my right and Ms. Susanna Kam. Our two paralegals at the Trade Law Bureau are Darian Bakelaar, as well as Mr. Ben Tait. I have as well Ms. Saroja Kuruganty, she's counsel with the Ministry of the Attorney General, and to her side is Ms. Jennifer Kacaba, also counsel -- senior counsel.

ARBITRATOR BULL: All right.

MS. DI PIERDOMENICO: And so we, as well, have two open lines for Canada; one going to Ottawa and one, I think, to Toronto. And we can walk through the list of introductions or I can just refer you -- I believe it's in the sleeve of your binders -- those that will be joining. It's quite a cast of characters. I'm happy to walk through it or we can refer to the list.

ARBITRATOR BULL: Well, if it's as written on the list, then that's fine.

MS. DI PIERDOMENICO: Yes.

I do believe that --

MR. APPLETON: Excuse me. Is everyone on the list in that room?

Do you know that?

MS. DI PIERDOMENICO: There is one person who's -- well, there's two people who's not there. One is absent due to sickness and the other one will be late, both representatives of the Government of Canada.

MR. MULLINS: I think he just means for the record if we just know who's --

MS. DI PIERDOMENICO: No, that's -- that's fair. I had assumed everyone would be here this morning, but those are the two absences that I've been made aware of.

MR. APPLETON: Do you know who they are so we can make a note of it?

MS. DI PIERDOMENICO: Yes. We have Ms. Julie Boisvert, representative for the Government of Canada, she will be late.

MR. APPLETON: Yes.

MS. DI PIERDOMENICO: And Ms. Renaude Bender will not make it today.

MR. APPLETON: But, otherwise, we can just assume that everyone on the list is there?

MS. DI PIERDOMENICO: Yes.

ARBITRATOR BULL: Could I --

MS. DI PIERDOMENICO: To the extent that I'm made aware throughout the day that people have not made it, I will be sure to update everyone, but for now, those are the people that have indicated that they cannot make it or will be late.

ARBITRATOR BULL: Thank you.

I have a question. Do I -- is your surname Pierdomenico or is it with the "Di" at the beginning?

MS. DI PIERDOMENICO: It's with a "Di" at the beginning, yes.

ARBITRATOR BULL: I just want to make sure I try and address you in the appropriate manner. Thank you.

MR. MULLINS: I was wondering, is it possible that we could get that screen up here? Is that technically impossible? Because that would

then allow everybody to see --

MS. THAM: Would you like the video conference also to be --

MR. MULLINS: Well, that way then Canada could see the -- I think they'll --

MS. DI PIERDOMENICO: Well, it's now operational.

MR. MULLINS: Got it. I'm sorry. It's fine.

ARBITRATOR BULL: Thank you for the introductions. And one thing that I wanted to say before we dive into the schedule that we've set out for our work today, is that at the end of that schedule, I expect that we should spend a few minutes looking at the procedure schedule that's attached to the draft procedural order number one.

And also in particular, perhaps to look a little ahead to possible hearing dates that we might have to set aside. And if we can make some progress on that at the end of the day, I think that would be useful.

Otherwise, I would like to start

straight away with Agenda Item No. 1. I would like to encourage parties right off from the start that the Tribunal is quite serious about all that it does, and we're starting with the timings that we've given the parties because we like to be efficient with the use of our time and the use of your time.

So with that said, Agenda Item No. 1 comes up first. And each party will have five minutes to brief -- to briefly speak to their case. And I think it would be appropriate to ask the Claimant to go first and then for the Respondent to come on after that.

So over to you, Claimants.

MR. APPLETON: We'll just wait for the noise to stop. I think this is appropriate. I might be able to begin.

ARBITRATOR BULL: Yes.

MR. APPLETON: Yes.

Thank you very much, Mr. President. We're going to just very briefly want to address two key points with respect to this matter. The

first is that the Investor, Tennant Energy, brought its claim two years ago, June 1st, 2017, and that Claimants in international arbitration generally would like to have a situation where their cases are heard in an expeditious fashion.

We have no interest in delay. We don't seek delay. We seek a fair process which requires certain steps to be taken, of course, but it's taken a very long time to have this matter put onto the process. And we wanted to make note of that. My client is here and he reminds me of that frequently. And I want to make sure that we're very clear about that.

Second of all, as you're aware, there is an issue that is going to come up and it's going to be briefed with respect to potential issue of jurisdiction.

We believe that at the outset, that we simply cannot understand or comprehend how there could be temporal jurisdictional issues given the fact that the claim was bought on June the 1st, 2017, that means that a three-year

deadline under the NAFTA, and we're told it's temporal, would be June the 1st, 2014, and that the first date that you could possibly know information that would lead to this case, and it's pleaded by the Investor in this case, would be on June the 4th, 2017, with the bulk of the information coming in January of 2015 -- excuse me, that was June of 2014, June the 4th, and with the bulk of the information coming from a release from the PCA in January of 2015 and April of 2015.

So without any question, there are clearly issues that are in this case that are focused entirely on matters that arise within three years. But we cannot see how it would be reasonable to be able to presume that there would be a temporal defect of jurisdiction.

Now we will see when we get the statement of defense, so we'll understand what that is, there will be pleadings, and we can go there, but we wanted to make sure that the Tribunal was aware of our concerns about dilatory

and delaying tactics and we believe that there are others that are already in the works here that would take the process here outside of the efficient expeditious process the international arbitration provides.

So with that, we're happy to cede the floor to our friends from the Government of Canada. We wanted to make sure that this wasn't missed in the process of today's hearing.

ARBITRATOR BULL: Thank you, Mr. Appleton.

Open to the Respondent.

MS. DI PIERDOMENICO: Thank you, Mr. Chairman.

I'd like to thank Mr. Appleton for his preliminary comments on the substance of the time bar; however, we are here today because we're not talking about substantive issues, but rather, we're here for a procedural meeting and to adopt a procedural order and a confidentiality order.

But with that being said, we wanted

to stress that in our view, the biggest procedural issue that this Tribunal has to address is the bifurcation of the proceedings to hold a separate jurisdictional phase to consider Canada's jurisdictional objections in this dispute, including the time bar.

This case is manifestly time barred, in our view, and for this reason, it should be dismissed in its entirety.

Keeping that in mind, and in order to allow the parties to resolve the remaining issues efficiently, Canada intends to limit its presentations to the items on the agenda, which are specifically circumscribed by the Tribunal in its email of May 28th, 2019.

I will now briefly summarize Canada's position on those issues. Let me turn to the second agenda item, the legal seat of arbitration. As my colleague, Ms. Maria Cristina Harris, will explain during her presentation, on the seat of arbitration, based on the applicable law and the facts of this case, we consider

Toronto, Ontario to be the most suitable legal seat.

We are of the view that the Claimant's potential request to obtain third-party evidence in the United States should not outweigh Canada's equal concern that it may also require support of the local courts in this arbitration.

Case law on the proximity of evidence criteria has almost always looked to the location of the measure of the majority of the potential witnesses.

My colleague, Ms. Susanna Kam, will explain the issues concerning the third item agenda, which is the transparency provision, which is in some ways related to confidentiality in these proceedings.

First, Canada's proposal on transparency is based on the principles of transparency in the NAFTA Free Trade Commissions' July 31st, 2001 binding notes of interpretation. It is also consistent with Canada's domestic legal

obligations to provide Canada with public access to any document under its control subject to protection of confidential information.

Second, it is Canada's view that non-disputing NAFTA parties must have access to documents filed in these proceedings and that they are entitled to observe the disputing parties' submission on NAFTA as they are pled at a hearing.

Finally on the topic of transparency, we request that the Claimant provide Canada and the Tribunal with all documents upon which it relies in its notice of arbitration. It is a fundamental issue of fairness that Canada access documents upon which the Claimant relies to allege its case. Moreover, the Claimant's failure to produce these documents has already led to delays in the publication of the notice of arbitration.

With respect to the fourth agenda item, I will explain that Canada intends a robust confidentiality order that ensures transparency, protection of confidential information, and that does not result in unreasonable and unwarranted

delays to this arbitration process. These proceedings must have only one set of confidentiality rules over which this Tribunal has full oversight.

Canada's proposed confidentiality order ensures that all documents introduced by a party are redacted by the same standard. This is not oppressive, as claimed by the Claimant, but standard practice.

The European Union General Data Protection Regulation has no place in a confidentiality order governing NAFTA Chapter Eleven proceedings.

And, finally, the Tribunal has requested any parties' submissions on procedure related to interim measures. Canada is satisfied with the process that is set out for interim measures for these proceedings and we do not seek any changes to the procedural calendar in this regard.

This summarizes our position on the agenda items today. Thank you.

ARBITRATOR BULL: Thank you.

Then let's move into Agenda Item No. 2, which is the seat of the arbitration. And on this issue, I was going to invite the Claimants to speak first and then the Respondents.

MR. MULLINS: Good morning. I'll be taking this for the Claimant, this issue.

I think through some agreement on the law, just in terms of the application of it here, Article 1130 requires a seat to be in either Canada, U.S. or Mexico. And no one is arguing we should be going to Mexico. So the issue is should we have these hearings in Canada or here in the United States where we're having this hearing.

And I've reviewed the Canadian submissions. And if you believe them, essentially any time that they're brought in a NAFTA arbitration, they seem to believe that the seat should be in Canada. That seems to be like a standard, you know, simple rule there, but that

the government should be -- try the arbitration where they're being charged the violations of the treaty. That can't be the case, that certainly is not fair, it's not consistent with neutrality. And it's not true here.

If the Panel wishes to maintain neutrality, the best place would be to not place the hearing -- the final hearings where the challenged government is located and is based.

And if we look at the UNCITRAL trial notes, and Canada has asked us, it's -- if we look at the law, and it's very interesting, there's again consistency.

Canada concedes, in fact, that the law of the United States and in Canada is similar, and actually almost very clear, a protection of the confirmation of the vacatur procedures of award. But there's a significant difference.

And one of the things that they look at is the court intervention in the course of arbitral proceedings. That is a critical part

of the issue. And, in fact, Counsel just mentioned that she's concerned about having the ability of court intervention. And so while we both agree that the protection of the award in NAFTA, where both parties of the New York Convention, et cetera, is fine, but the real difference, the major difference between the Canadian UNCITRAL Model and the Federal Arbitration Act is the ability of the party to seek vacatur or even confirmation of an interim award.

And we think that this is a critical point here, so when we talk about a case-by-case analysis, we do think in this particular case, it suggests that the arbitration hearing should not be held in Canada. And so the significance difference is pursuant to the UNCITRAL Model Law that Canada has adopted, the Court can, and should, enforce the interim awards. The Federal Arbitration Act has no such provision.

And we just heard this morning that

Canada is vehement, and assuming that they prevail on this of having the jurisdictional phase. If it turns out, which we believe will happen, that they fail on that, and the Court -- and the Tribunal finds jurisdiction, that will then allow Canada to go to court in Canada to seek to vacate that ruling.

And then what happens? We're in a situation where while we're trying to go forward in this arbitration, they're in court trying to vacate the award. And what would happen if then the -- Canada then goes beyond that and says, "Well, I want you to stay this arbitration in court while we seek to vacate the ruling on jurisdiction"?

I'm not trying to presuppose that we're going to prevail on any particular issue, I'm just saying that we don't have these problems in the United States on the Federal Arbitration Act.

And given that -- there's clearly, you know, an agenda of trying to have, you know,

these bifurcations of different issues, and Canada has talked about other interim relief that it will seek, we don't think that the kind of segmented procedures that are set forth in the interim -- in the UNCITRAL Model Law in Canada makes sense here. And for that major reason, we do think that the -- that the location of the hearing should be in the United States.

But in addition, as we also noted in our brief, we also have a serious concern about the collection of evidence. Just like in the Mesa arbitration award -- or order, rather, it was the Panel there decided that the most appropriate place to have the hearing would be in the United States because of the access to evidence there.

As we pointed out, one of the major issues in our case is that Canada, in implementing this FIT program, gave special attention to an international power company, a company in Canada, which is now owned by a foreign company Engie Energy, which has offices

all over the United States, we feel that both due to 28 USC 1782, and the FAA, that we will need to seek evidence and testimony there.

In addition, one of the main competitors of our client in this program was a company called NextEra based in South Florida, they kept track of all of the issues that were going on in this bid program, and we think will be needing evidence there, just as like we had to take evidence in the Mesa program.

You know, for this part, they talk about the evidence and the witnesses in Canada. Our assumption is that they also work for Canada and that they can bring these people here. If there's somebody else that they think they're going to take evidence of, I haven't seen it in their briefings and would be interested to know that. So at this point, we believe that they're capable, as they were here today, to bring everyone in to have a hearing here in the United States.

If it turns out, you know all

things are equal, and they say that law is the same, why would we do it in the United States or in Canada, if we say there's going to be evidence and maybe third parties in both places, what's the most fair and neutral place to do it?

It's where the challenged government resides or is it in another country? And then the UPS and the Merrill Panels decided the fair thing, the neutral thing, would be to not have the investor go back to the country where it feels that it's been wronged to have the arbitration there. Separating the reviewing court from the jurisdiction from the -- under review preserves neutrality, we think is important.

We certainly were able to all get here to D.C. without a problem. And there's -- certainly law here is -- it protects the rights of both parties. Miami we also suggest is another location, one of the top international arbitration centers.

I just tried an international

arbitration in a new center we have there in Miami, and it worked out fine. The hotel rates, the flights are all available in the United States. Everybody was able to get here pretty easily. And you don't have the goods and services tax that's available -- or that's required in Canada. We suggest that the best location for this hearing to be in the United States.

If there's any other -- the only thing that I'd like -- if there's a chance to rebut, I still don't know where the evidence would be outside because I haven't heard that. So if there's a chance -- I'll have a chance to rebut, but I'll reserve that if I could.

ARBITRATOR BULL: Thank you, Mr. Mullins.

Let me then invite Ms. Harris, is it, who's going to speak to this issue?

Over to you.

MS. HARRIS: Thank you.

So just a question. I'm assuming

then, right now I can present on the seat of arbitration, Canada's position, and then we'll have an opportunity to reply in a separate time to --

ARBITRATOR BULL: Yes, that's right.

MS. HARRIS: Okay. Thank you.

So good morning, Members of the Tribunal. So I will be speaking on the seat of arbitration.

As you are aware from Canada's written submissions, which you have in front of you, at Tabs 5, 6, and 8 of your material, Canada's position is that the facts of this case and applicable law weigh heavily in favor of Toronto as the most appropriate legal seat or place of arbitration and not Miami, Florida or other U.S. locations that the Claimant points to, as being convenient, such as Washington, D.C. or Houston, Texas.

In support of Canada's arguments that Toronto, Ontario is the most appropriate legal seat for this arbitration, I will focus on

three of the factors set out in paragraphs 29 and 30 of the UNCITRAL trial notes on organizing arbitral proceedings, which Canada has referred in its written submissions and that are at Tab 9.

First, I will speak about the suitability of the arbitration law at the place of arbitration, Factor A of paragraph 29, to explain why the law on arbitral procedure in Canada is suitable and provides a well-developed and modern legal framework for the conduct of international arbitrations.

Second, I will discuss the law jurisprudence and practices at the place of arbitration, Factor B of paragraph 29, to demonstrate that Canadian courts are highly deferential to specialize NAFTA Chapter Eleven tribunals and are limited by a set of narrow grounds when reviewing awards issued by them.

Third, I will touch on the location of the subject matter in dispute and proximity of evidence, Factor C of paragraph 30, to emphasize that the facts of this case are undeniably

centered in Ontario and that overwhelmingly relevant witnesses, documents and experts will be located in or close to Toronto.

First, the law in arbitral procedure in Canada is suitable. Both Ontario and Canada at the federal level are jurisdictions that have adopted the UNCITRAL Model Law on international commercial arbitration.

Specifically the Federal Commercial Arbitration Act and the Ontario International Commercial Arbitration Act have incorporated the Model Law. Both are at Tabs 10 and 11 of your materials. As such, the law in arbitral proceedings is consistent with international legal standards.

On the contrary, although some U.S. states, including Florida, have adopted statutes based on the UNCITRAL Model Law on a state level, the Federal Arbitration Act has not and is, indeed, quite different.

This is not to say that U.S. law on arbitral proceedings is unsuitable, but rather

that it may provide less certainty. Whether state or federal law would apply to this arbitration is unclear.

Additionally, having a legal seat may provide uncertainty as to venue. Canada experienced this firsthand in the Mesa Chapter Eleven NAFTA arbitration, a case very similar to this one. In Mesa, even though Miami, Florida was chosen as the legal seat, when the Claimant petitioned to vacate the arbitration award, it did not go to the federal district courts of the Eleventh Circuit, which Miami is in, but rather chose to file the petition at the district court for the District of Columbia.

As such, even though it was the claimant in Mesa that pushed for the legal seat to be in Miami, it then resorted to what it believed was a more favorable U.S. jurisdiction for its vacatur petition. Therefore, even if Miami was to be chosen as the seat, there is no guarantee that subsequent proceedings related to this arbitration will remain in that

jurisdiction.

This type of uncertainty should be avoided, and having the legal seat in Toronto would mean that the applicable law was both clear and in line with international legal standards.

This brings me to my second point. Because federal and Ontario law are based on the Model Law, courts in both jurisdictions will apply the narrow and specific grounds set out in Article 34(2) when reviewing an application to set aside an award.

Article 34(2) is set out on page 16 of Tab 11 of your materials. In this regard, there is no uncertainty as to which grounds are applicable when awards are reviewed, whether at the federal or provincial level.

To return to Canada's experience in Mesa's vacatur petition, one of the preliminary issues that was discussed by the court was the controlling choice of law; specifically whether the precedent of the Eleventh Circuit or the D.C. Circuit applied.

This was relevant, because under Eleventh Circuit precedent, the grounds for vacating an award in Section 10 of the Federal Arbitration Act, did not apply to a foreign arbitral award, nor was the additional ground of manifest disregard of the law available. Under DC Circuit precedent, this was not the case.

Although, the court noted that it did not need to actually decide the issue, because under either circuit's law, the vacatur petition would fail, it devoted almost four pages of a 22-page decision to this question.

Such a situation would be avoided if the legal seat was Toronto, because the grounds for set-aside in Ontario and federally are identical and based on the Model Law. Whether there may exist an additional ground for set-aside is not the question.

The record shows the Canadian courts have vast experience in reviewing NAFTA Chapter Eleven awards. They acknowledge the narrow grounds provided by the Model Law on which

an award can be set aside, and they exercise restraint and are cautious not to interfere with the decisions of specialized NAFTA tribunals.

To speak to my third point, the location of the evidence and the subject matter in dispute should be a decisive factor in choosing Toronto as the legal seat. Several NAFTA Chapter Eleven tribunals have held that the location of the subject matter is the place where the challenge measure was taken.

In this matter, the only measures being challenged are those of the Government of Ontario, and as such, Toronto, as the capital of the province, is the jurisdiction with the most significant connection to the subject matter of this dispute.

As the location of the Government of Ontario, the relevant government departments, witnesses, documents, and experts will overwhelmingly be located in or close to Toronto.

On the contrary, the Claimant's position that Miami, Florida should be chosen as

the seat of arbitration is based merely on an assertion that it may need to obtain evidence from third parties located in the U.S., and that judicial assistance in the U.S. will be necessary to obtain this evidence. However, choosing a seat of arbitration in Canada does not foreclose the Claimant's ability to resort to U.S. law to obtain third-party evidence in the U.S.

Section 1782 of Title 28 of the United States Code referred to by the Claimant, and referenced at Tab 12, provides that a district court where a person resides may order the person to give evidence in a foreign or international tribunal or upon the application of any interested person.

If a U.S. seat of arbitration were to be chosen, Canada, on the other hand, does not have analogous legislation that would allow a tribunal seated in the United States to directly obtain the assistance of Canadian courts in gathering evidence located in Canada.

If Toronto is chosen as the seat of

arbitration, the Claimant, and even Canada, could have recourse to Section 1782 to obtain any relevant third-party evidence in the U.S. if it indeed exists. And because Toronto is the jurisdiction where most of the evidence is located, both the Claimant and Canada, and this Tribunal, would more easily be able to seek the assistance of Ontario courts in obtaining evidence should the need arise.

The reality of the matter is that the measures being challenged were adopted years ago and it may very well be that Canada is no longer in control of evidence that may be relevant to the challenged measures. Choosing Toronto would not prejudice the Claimant.

As a final point, it is Canada's position that if the Claimant does seek to obtain evidence from third parties, rules of procedural fairness require that it must do so under the supervision and by order of the Tribunal. This is in accordance with Article 3(9) of the IBA rules on the taking of evidence at Tab 13, and ensures that

the parties are treated with equality. Indeed this is a requirement that Canada would also be subject to.

So to conclude, although Canada is by no means saying that U.S. arbitration law is not suitable and that U.S. courts are not deferential. If this Tribunal has to choose between Miami, Florida and Toronto, Ontario, Toronto should be the logical choice.

In our view, Canada's arbitration law is slightly more suitable because it provides certainty as to the applicable law. The grounds for set-aside before Ontario federal courts are clear and there is no uncertainty as to the application of additional grounds for set-aside.

To tip the balance, Toronto is the jurisdiction most closely connected to the facts of this dispute.

Subject to any questions the Tribunal may have, that's Canada's position on the seat of arbitration.

ARBITRATOR BULL: Thank you,

Ms. Harris.

MR. MULLINS: Can I get a short rebuttal? Is that --

ARBITRATOR BULL: Yes, you have five minutes.

MR. MULLINS: Oh, I have plenty of time. Don't tell a lawyer you have more time.

I'm quite surprised by the arguments by Canada that -- I'm hearing that, you know -- well, they started out saying how much better Canada's arbitration law is better than the U.S., and then this conception, well, it's only slightly better. That's not what was briefed.

What Canada told us on page 8 of their briefings is that, "NAFTA tribunals" -- this is page 8, "NAFTA tribunals have regularly selected jurisdictions in Canada or United States as appropriate place of arbitration as well when assessing the suitability of the arbitration law between Canada and the United States, the tribunals have usually considered both to be

equally suitable in terms of the law on arbitral procedure enforcement."

And I -- not just my patriotic thing of defending my country, but the law in the United States is just as suitable, just as great, and it protects arbitration awards. I can point to plenty of cases where international arbitration awards -- treaty awards have been confirmed in the United States.

What was not addressed, which I raised, was the specter where -- where Canadian law actually is not as good as U.S. law, because under Canadian law, there could be disruption of this Tribunal with the ability of Canada, or our client, to go to court to try to confirm or vacate interim awards, which is not permitted under the FAA. And we think the uncertainty is on the Canadian side and not on the U.S. side.

Their talk about what happened in Mesa, what was not talked about Mesa is that yes, we did seek to vacate the award and Canada won. There was no harm to them. We went to the D.C.

Circuit. The law was different, but at the end of the day, manifest disregard is not a very, very strong element. I think it's a bogeyman that people are scared of, that frankly is not very frightening. It doesn't work. It didn't work in Mesa, and I don't suspect it'll work -- it just doesn't.

And at the end of the day, the -- there's no disruption between state and federal preemption of -- state and federal law, the federal law preempts the state law. And so the Federal Arbitration Act under the treaty would -- would govern the confirmation of any award or the vacatur of any award.

And this idea, well, there was some confusion about D.C. or the Eleventh Circuit law, that was a confusion brought in by Canada, Mesa. That no one really argued that was an issue. In fact, my wife and I wrote an article about that. The laws in the circuits can be different. You don't go to a circuit -- what they were trying to argue is, if I go to the D.C. Circuit, I should

be applying Eleventh Circuit law. It was frankly a pretty frivolous argument, and it was not -- not right. And that's not really the issue.

The other thing I challenged Canada in our arguments was to tell us where the third-party evidence was in Canada that we were -- you know, that they were going to use. I still haven't heard any. I keep on hearing about that there's going to be -- the witnesses in Canada, presumably, all work for the government, experts. They can go anywhere. Right? I don't suspect we're going to put a hearing just because of the experts.

What we are concerned about, we've already been told, "Well, the documents are probably already gone." This is a concern that we have, this is a government that's already been investigated, criminal charges, for destruction of documents. And we are -- we are very concerned that the documents are not going to be there. And we may have to go to third parties in order to get emails and other documents that are

pertaining to the Canadian Government, for example, companies like IPC, to prove our case. All of which, of course, was why the Mesa tribunal chose the United States as the appropriate place to go.

So that's our position. I don't -- I haven't heard any reason why we cannot have hearings in places, for example, like D.C., where we're all here today. Everybody was able to get here. Presumably the flights are available here. And the law in the United States is not as protected as Canada, but, in fact, even more protected.

ARBITRATOR BULL: Thank you Mr. Mullins.

Response from the Respondent, Ms. Harris.

MS. HARRIS: Thank you.

So just to begin with, Canada is again not saying that U.S. law is not suitable or that the courts are not deferential. We agree that U.S. courts are deferential to arbitration

awards. Canada's point is that in the U.S., there can be uncertainty and, perhaps, less predictability than there is in Canada.

Sure, in Mesa, Canada won, but we still had to -- we -- Canada had to argue in a jurisdiction that was not actually the legal seat of arbitration and it still had to argue what the applicable law was.

I think it's fair to say that in a -- in a petition or in a vacatur proceeding, that Canada would argue that the applicable law should be what the law of the seat of arbitration was.

And so in Canada, for set-aside proceedings, we would not have to argue what is the applicable precedent. Both Federal Court of Canada, Ontario courts follow Article 34(2) of the Model Law when reviewing awards. And they have even -- the Federal Court of Canada has referred to the decisions by the Ontario Superior Court to recognize the standard of review.

And to answer the issue of where

the third-party evidence is or that Canada has not asserted that we -- who we might seek evidence from, it's our position that at this point in the proceedings it's still very early on to know if Canada would need to seek third-party evidence from anyone located in Canada that is not under Canada's control.

I don't -- I don't think we can say that any relevant witnesses are employed by the Government of Canada or the Government of Ontario. This happened many years ago. And as these proceedings continue, we may then realize that there are relevant witnesses that are not in Canada's control.

So we don't believe that the decision on the legal seat of arbitration should be based on the Claimant's assertion that it may need to seek third-party evidence.

The Mesa, respectfully, in our view, although the Mesa tribunal got it correct on the merits, we don't believe that their decision on the place of arbitration was correct,

the Claimant in those proceedings was still -- was able to seek third-party evidence and obtain that third-party evidence through Section 1782 proceedings. And so there's -- there is no prejudice to the Claimant if Canada is chosen or Toronto, Ontario is chosen as the legal seat in terms of being able to seek that third-party evidence.

And, finally, in terms -- just to respond to the Claimant's assertions that Canada will not be neutral, that it -- if we really truly wanted a neutral location, it would neither be -- it would not be in the U.S. or in Canada.

And so Canada has been in front of Canadian courts several times. There is nothing to show that Canadian courts would not be neutral. They don't favor the Government of Canada when there are proceedings involving the Government of Canada.

And just as an example, in the Bilcon case, the most recent set-aside application that was brought by Canada before the

federal courts, Canada did not win on that application. So there is -- neutrality should not weigh against Canada being chosen -- or Toronto as a legal seat.

And just to touch on the Claimant's point that if a legal seat is chosen in Canada, the arbitrators' fees would be subject to GST. This is irrelevant. First, it's irrelevant to choosing a legal seat of arbitration.

And just to respond to a little further on that. Claimant's counsel has brought this up in several proceedings against Canada, including Bilcon, including Merrill & Ring. And in the Merrill & Ring case, Canada consulted with the Canada revenue agency. And we -- the response that was received was that the arbitrators' fees, that the supply of arbitration services by the arbitrators was not subject to GST.

That case was similar. It was an ICSID administered arbitration. And in that -- and if it's an -- like a PCA-administered

arbitration, essentially the supply of services is rendered to the PCA. The PCA is ultimately responsible for making sure that the arbitrators are paid their fees, and so this would not be subject to GST in Canada.

So that concludes our reply.

ARBITRATOR BULL: Thank you, Ms. Harris.

MR. APPLETON: Mr. President, I'm afraid that something new came up, I'd like to address it specifically. I was the counsel in Merrill & Ring. And I'd like to address that point that Ms. Harris has just raised with respect to the GST and the VAT issue, because that --

ARBITRATOR BULL: Mr. Appleton, just very briefly.

MR. APPLETON: Very briefly.

ARBITRATOR BULL: Go ahead.

MR. APPLETON: And I think it's very important. We could ask for a written confirmation from the tax authorities. We've never received that. We have nothing that would actually confirm.

And when one deals with taxation issues, you have to have something. There's a process called an interpretation bulletin, another process that would do a letter. We've received nothing that would confirm this. Under the reading of the Act, it would appear that the HST is exigible. It would have to be collected. And without having a formal document to be able to confirm that, every arbitrator is at risk with respect to that.

And it's very common in many jurisdictions for arbitrators to have to remit VAT, with respect to the work they do in that jurisdiction.

Now, we would be delighted if Canada would provide that letter. And if they have that letter now, we would really like it, so that we can see for sure, because that would be fabulous. We don't think it's determinative of this issue. But given the fact that it's been raised now by Ms. Harris, with new information that's just coming now, we would like to see that, because I think that would be very helpful.

For this and for other tribunals, too.

ARBITRATOR BULL: And, Ms. Harris, anything you want to add on that?

MS. DI PIERDOMENICO: If it's okay, I'd like to jump in since I was also counsel on the Merrill & Ring. And I find it --

ARBITRATOR BULL: Yes, certainly. Go ahead.

MS. DI PIERDOMENICO: Thank you, Mr. President.

I don't recall, Mr. Appleton, if we forwarded to you the letter at the time, but I was the one that actually wrote the letter to the CRA asking the question. And the CRA did respond that, you know, based on the fact pattern in that case, that there was no GST, which is very similar to the fact pattern in this case, in terms of the relevant points that they looked to in terms of determining whether or not GST was payable.

This was very important to Arbitrator Rowley, as you know. And that's why

we went back to the CRA and we got that paper. If we didn't forward it to you at the time, I'm sure we can easily flip you a copy. Subject to confidentiality, I don't know what would apply, but I'll let you know if there's an issue, but I don't see any right now.

MR. APPLETON: We're happy to take your undertaking on that. And then maybe we can let this proceeding go on.

ARBITRATOR BULL: Thank you. Thank you to both parties for submissions on this.

I should ask now my co-arbitrators whether they have questions on the issue of the seat of the arbitration. And, perhaps, if I can invite Mr. Bishop first, whether he has any questions.

ARBITRATOR BISHOP: Thank you, Mr. President. No, I have no questions on this issue. Thank you.

ARBITRATOR BULL: And Sir Daniel, any questions you might have for the parties?

ARBITRATOR BETHLEHEM: Thank you,

Mr. President. Yes, I do have a number of very brief questions.

I've heard the submission by both parties. I'd just like to ask Canada to either elaborate on a number of points that I think emerged after its reply statement in which I wasn't entirely clear about.

The first one is I heard what Canada had to say about Toronto being the preferable seat. If the Tribunal were not to be persuaded that Miami was the appropriate seat, but, nonetheless, was also not persuaded that Toronto was the appropriate seat, is Canada's strength of view about Miami also applied to Washington, D.C., or do you take a more nuanced view about D.C.?

The second point is I would be grateful to hear just a little bit more on the issue of the suggestion that the Canadian courts would entertain a vacation of an interim award.

A third, very briefly, and I understood this to be from Ms. Harris, a

throw-away point, but nonetheless, it was quite a striking throw-away point, when Canada said neither Canada nor the United States would be truly neutral. And I was wondering where that led Canada. Are you suggesting by that implication that the seat should be in Mexico?

And the final question, which I ask simply for reason of completeness, and it's really to both parties, I assume what the answer may be, but I'd like clarification. In the event that during the tenure of these proceedings, that NAFTA ceases to apply as a treaty and is superseded by the USMCA, is that likely to have any effect, any appreciable effect, that one might speculate about on the question of review or the way in which the courts in either the United States or Canada may treat a NAFTA proceeding?

Thank you, Mr. President.

ARBITRATOR BULL: The Respondent, please.

MS. HARRIS: Yes. Thank you,

Arbitrator Bethlehem, for your questions.

So to respond to the first question, if Canada would take a more nuanced view of Washington, D.C. We remain -- it would still be our position that any -- that any U.S. seat -- that Canada would still be preferable over a U.S. seat -- any U.S. seat, for the reasons that were stated, especially the location of the subject matter in dispute, the location of the evidence, and because even though, yes, courts are deferential in the U.S., yes, the Federal Arbitration Act is suitable, there is always the question of the application of state law, the application of federal law, and then the difference between precedence between the circuits. So it's still our position that Toronto would -- or that Toronto would be preferable to a U.S. seat.

About the point on neutrality, I mean, it -- the NAFTA does provide that the location, the seat of arbitration, will be in one of the NAFTA parties, but past tribunals have

noted that -- I think it was -- past trials have noted that the only neutral place would be not in the country of the claimant and not in the country of the respondent, if we really truly wanted to achieve complete neutrality. But Canada's main point is that Canada, even if a seat was chosen in Canada, it would -- it is still neutral. And that's -- so that shouldn't play against choosing Canada as the legal seat.

To respond to the question about reviewing a decision on jurisdiction under Canadian law, this is also something that the Claimant had not brought up previously in its submissions, but a court, as long as an interim award is final, yes, the Model Law does provide that an interim award can be reviewed by a court -- or enforced by a court. But perhaps on the break, we can endeavor to give you a more fulsome response on this or if one of my colleagues would like to respond right now.

MS. KAM: If I may, Mr. President, in the Bilcon matter there was a review of the

jurisdiction and liability award. And because that award was final, the Canadian courts did undertake a set-aside review of that award, even though it was not the final damages award or the final award in that case.

ARBITRATOR BULL: And did the arbitration proceed in the meanwhile?

MS. KAM: It did, in the interim.

ARBITRATOR BULL: So your understanding of the law in Canada, is it the case that it is up to the tribunal to decide whether or not the proceedings should continue?

MS. KAM: It was the tribunal's decision to determine whether the arbitration would continue, but in terms of the set-aside of the award, so long as the award is final and not subject to further review by the tribunal itself, it is -- it can be reviewed by a Canadian court.

MR. APPLETON: Mr. President, I'm afraid that we -- there's something missing. So I had an aunt who used to make cookies, she didn't want anyone else to make the cookies, so she left

an ingredient missing. We have an ingredient missing. Canada has regularly gone to the court and asked them to issue a stay. That is separate from the decision of the tribunal whether or not a stay should take place.

The concern here is that you can appear on an interim matter, on an interim award, seek a stay in the place of arbitration and then the tribunal finds itself in a situation where essence they have an anti-suit and they have an injunction, they have a prohibition in the place of arbitration from proceeding. So they no longer effectively have the opportunity to determine what the right course should be.

If, in fact, the Tribunal is seated elsewhere, then the Tribunal has that opportunity to be able to make that determination. That is the concern about an interim award.

And so what's happened is in some circumstances the Canadian courts have said, no, we're not going to issue that, and other times, it was always brought by Canada.

Canada, as a party to the judicial action, has sought to have a stay, not asking the Tribunal for its determination first, but going to the court and have them order a stay. And that is what's problematic. We believe the decision should be made by the Tribunal. The Tribunal is in the best position to make that decision, in our view. And that's the concern.

ARBITRATOR BULL: Right. But, Mr. Appleton, do you have material to assist us about how often and on what principles that Canadian courts have granted such an application?

I hear your submission, you're saying that Canada has asked for a stay in certain cases. I don't know how often they do this and in what circumstances, but I hear your assertion. I'm wondering what the position of the Canadian courts has been to such applications.

MR. APPLETON: The Canadian courts will have to rule on that depending by the argument raised by parties. Generally -- now, one has to

remember that they're not very many NAFTA cases. Canada only goes to court in Canada when the place of arbitration is in Canada and when Canada loses. And when that happens, they go to court. And in those circumstances, we've had situations where Canada's argued, in some cases they've gone to their court and said that losing is, in fact, a breach of public policy. And the Canadian courts have basically laughed them out.

And that was rather astonishing to anybody who believes in arbitration. And that was such a serious matter that for many years international tribunals were very weary of holding an international commercial arbitration involving Canada in Canada.

Now, the Canadian courts have expressed slightly better views, which I've very pleased about as someone who practices in Canada, but the fact of the matter is, should it be permitted to have a situation where on an interim measure that -- an interim award that a decision could go to a Canadian court and the Canadian court

could make the decision to stay the process when the tribunal might decide not to stay the process. That creates a conflict.

There should be a natural confluence between the rule of national courts and the rule of arbitration. That's what we seek to find. Not to have a conflict. And I'm very concerned about the ability to have a conflict. And that is the concern.

And by the way, we put this in our prehearing brief, so Canada was well aware this would be an issue to be discussed today. I'm surprised that they weren't prepared to discuss it.

And, you know, I mean, to the extent that we are, we're certainly prepared to -- if you want further briefing, we can do further briefing, if you think that would be helpful. I'm hoping that you don't need this to make your decision.

ARBITRATOR BETHLEHEM: Mr. President, may I just come back with a follow-on question on this, please?

ARBITRATOR BULL: Certainly.

ARBITRATOR BETHLEHEM: Certainly, I would be grateful if perhaps during one of the brief breaks that no doubt you will share your -- in the course of the proceedings, as Ms. Harris suggested, Canada might reflect a little bit further on this and come back on the point. But I'd also like to hear from Canada and from -- from the Claimants very briefly as to whether the position, in fact, is any different in the United States.

I had understood that, in fact, the D.C. courts also entertained set-aside proceedings in respect of interim awards. And I have in mind, in fact, a proceeding in which I was involved, and that was the Spence, that later became the Berkowitz case against Costa Rica, in which there was a challenge proceeding before the D.C. Courts at an interim stage.

So, as I understand it, the position doesn't seem to be terribly different in Canada or the United States, but I would be very grateful for some clarification.

ARBITRATOR BULL: Any response immediately or would you like to take Sir Daniel's suggestion about thinking about this over the break?

And I'm addressing this to the Respondent.

MS. HARRIS: Yes. We will take Sir Daniel's suggestion and get back to you further on this. But just to -- just to make a point that the Claimant's prehearing submission stated that there was more favorable U.S. arbitration law concerning the timing of vacatur actions.

This is a very general statement which Canada did not really know what was meant from this and so that is why we didn't expect this to be brought up in this amount of detail.

But to be able to also just answer Sir Daniel's final question on whether this NAFTA Chapter Eleven arbitration would be affected by the coming into force of the Canada-US-Mexico agreement, the CUSMA, it would -- it would not. It would -- the investment chapter of the new

agreement has a legacy period and it -- and it's -- it does state arbitrations -- disputes that have already been commenced would not be affected.

MR. APPLETON: I need to address Sir Daniel's question.

ARBITRATOR BULL: Thank you, Ms. Harris.

And Claimant will need to also respond to that last question, please.

MR. APPLETON: I'm going to address Sir Daniel's question four and then I'll allow Mr. Mullins to address the other part.

ARBITRATOR BULL: Please go ahead.

MR. APPLETON: With respect to the question, Sir Daniel, it's an open issue actually. It's a little bit more complicated than Ms. Harris has explained.

I recently had the opportunity to give a discussion on this in New York. The USMCA has provisions that talk about a transitional period, however, the issue with respect to the

treaty is that there are provisions in Canadian law, particularly the Federal Act, Ms. Harris made reference, if you recall, to two acts in Canada. And that's because jurisdiction with respect to arbitration enforcement is handled by provinces generally. But the Government of Canada also put a Federal Act, and the Federal Act which allows jurisdiction at the federal court for enforcement, specifically deals with the NAFTA.

Now, that Federal Act is going to have to be amended. We don't know what that amendment will look like. But the amendment to that would tell us whether or not there's going to be a legacy period with respect to USMCA decisions or whether it's going to only deal with the new issue.

Of course, as you know, Canada will no longer have investor states, so we don't know what's going to be the amendments to the international -- the Commercial Arbitration Act, the one that goes to the federal court. And so

we're going to need to see that. And that process, to my knowledge, hasn't been done.

Now, if Canada has that legislation or if it's already been presented, we would be -- and I'm sure the team here has been very involved in this so they would probably know. And so -- but that would be really the question to know about, is what will happen to the references in the existing Canadian legislation, which could be gone. And that would be the issue, not the issue about is there a transition.

That would apply to new cases being brought, not to the process to enforce a case that's already underway. Of course, we would hope that that wouldn't be a problem.

Now, the Ontario Act, which is based on the Model Law as well, would appear to apply, but that's a separate approach, but it doesn't give explicit reference to NAFTA as the Federal Act does.

Now, I'm going to turn it over to Mr. Mullins to just address that other matter if

that's all right.

MR. MULLINS: Just briefly, and I -- I didn't catch Mr. Sir Daniel, if that award -- the interim award that was issued in your case was a jurisdictional issue or was it a separate award on preliminary relief or something like that. I think the difference --

ARBITRATOR BETHLEHEM: It was a --

MR. MULLINS: Sorry?

ARBITRATOR BETHLEHEM: It was a challenge brought by a jurisdictional award, interim award.

MR. MULLINS: And there was a finding of jurisdiction and it was challenged in court or was it the other way around?

ARBITRATOR BETHLEHEM: There was a finding rejecting aspects of jurisdiction and following aspects of jurisdiction.

MR. MULLINS: Right. I think the difference in the United States and Canada is the nature of interim award. If the Panel finds jurisdiction, that's the kind of -- that is not the

type of interim final award that would be subject to confirmation of vacatur in the United States, is my understanding of the law. And obviously people could make arguments.

But the model of U.S. Arbitration Law is to have a final award. And at least the ICDR and the ICC all try to have one final award. And I -- what I don't think would have happen is if this Tribunal finds jurisdiction, that you would find in the U.S. that somebody could run to court and say, "I want to vacate your preliminary finding of jurisdiction."

That's simply not done. We certainly could, you know, provide some authority. I think that's the difference here. And I -- and also, I think the difference is that the Tribunal has much more control over there by indicating that it's not a final award in your language, in any ruling you make on jurisdiction, such that it would not be -- it would be considered an award and it would not subject to either vacatur or confirmation.

But that's just the nature of arbitration. Our model is to have the whole thing go through and it would be one final award, so there's not this constant going to court fighting over -- simply what happened to Bilcon, I don't believe would happen in the United States.

ARBITRATOR BULL: Thank you for that.

I had a question for Claimants. We heard Ms. Harris for the Respondent refer to Section 1782 of the U.S. statute, and the submission has been made that there is an avenue in U.S. law for evidence to be sought to be adduced in a foreign tribunal. And I wondered what Claimant's response is to that.

MR. MULLINS: Sure. So 28 USC 1782 has been interpreted almost uniformly that it does apply to investor-state arbitrations. There's been some debate whether or not it applies to international commercial arbitrations. There's a split of authority on that. I believe for investor state it does apply.

I think our bigger concern is that if we don't have the arbitration seated in the United States, we wouldn't be able to use the FAA Section 7, which allows you to take deposition and discovery in aid of a federal arbitration. And so that would be -- that's a separation section. That would be only be for arbitrations that are actually based in the United States.

And you could either do that if it's in the district where it is or the -- the federal rules would allow you to, for example, have somebody from video conference and you could do that in their district and then take the evidence that way.

ARBITRATOR BULL: Right. Thank you.

I had one other question for the Claimant. In your briefing, you focused very much on Miami as the preferred seat, but today orally there has been reference to Washington, D.C. as well. And I wonder if you could just take a moment and speak to this.

I know that the Claimant's position

is that the venue -- sorry, the seat should be in the United States, I understand that, but in terms of the actual jurisdiction, whether it's Miami or Washington, D.C., or elsewhere, how does the Claimant see that? Is it Miami or bust or are there other options? I'd like some clarity on that, please.

MR. MULLINS: Sure.

In our briefing we suggested the United States. We said Miami or D.C. If you look at -- I think it's the last paragraph of our briefing, it says Miami, Florida or some other convenient location, such as D.C. or, you know, Houston, Texas. I -- I don't want to read too much in it, but we're here, and it seems to be working pretty well. So Washington, D.C. seems like a natural choice.

And actually obviously it has arbitrations here. And this is a national location for many NAFTA arbitrations. In terms of why we suggested Miami, NextEra is in the Southern District of Florida, and so to the

extent that we will need evidence there, I think it's sort of -- one of the factors that the Mesa tribunal looked at.

In addition -- and you know, I live in Miami, I will say it's one of the cheaper places to do international arbitration. The facility that we used two weeks ago is free, if you use the court reporter, it's pretty amazing, Veritext actually, a wonderful program. So it's a -- we have -- we simply have a lot of hotel rooms and a lot of available, a lot flights.

And we suggested Miami because we have year-around great weather and it's, frankly, the cheapest of the major international arbitration centers. I believe Miami is the cheapest. We've done studies on this at the Miami International Arbitration Society, which I'm a board member.

But this is not a Chamber of Commerce sale for my wonderful city. We certainly think that D.C. is also an appropriate selection as well. We were just looking at where

the evidence, at least NextEra was, the fact that it's, frankly, more economical than other places such as New York or Toronto.

ARBITRATOR BULL: Now, in terms of obtaining evidence from third parties, am I right that there would be no substantive difference whether it was in Florida or some other city in the U.S., like Washington, D.C.?

MR. MULLINS: Yes and no. To the extent that the -- to the extent that NextEra becomes a major factor, it would be more convenient for it to be in Miami, but generally we would be using FAA Section 7 and/or 28 USC 1782, for purposes of getting that evidence in. It wouldn't probably make much of a practical difference between Miami and D.C.

ARBITRATOR BULL: Thank you.

Unless there are other questions from my fellow arbitrators, I think that's all very helpful on the issue of the seat. And the Tribunal will reflect on what has been said.

We should then move on to Agenda

Item No. 3, which is on transparency. And, again, I wondered if the Claimant might begin first, followed by the Respondent, and then the usual replies.

MR. APPLETON: Thank you very much, Mr. President. With respect to the issue of transparency, there are a number of items on the agenda today that actually have some interrelationship. And this is the first time that we're going to have this interrelationship.

Transparency, amicus, the issues with respect to the Free Trade Commission and to the rule of Non-disputing parties, are all going to interconnect in a variety of ways.

I'm going to try to stay as focused as I can on this particular issue, but please give me a little bit of latitude as we enter into this. By the time we get finished, you'll understand where we're at at each spot.

With respect to the issue here, if you look at Procedural Order 13.1, I believe that the issue here is with respect to what

constitutes what should be made public. I believe that's really the issue on transparency.

Normally when we talk about transparency, we're very interested in the process with respect to access of the public, the issue about amicus, third-party rights. And we have a separate topic for that, and we will get to that. And we're very interested and concerned about the -- having a proper opportunity for the public to have their say, and we're worried about whether or not the current process is robust enough to deal with that.

But here, our situation is a little bit different. Here, we're talking about what is it that should be made public. And so, first of all, we're -- this is going to be our first introduction to the Free Trade Commission interpretation.

Now, what's important about the Free Trade Commission interpretation is to look at Article 1130 of the -- I'm sorry, 1131 of the NAFTA. 1131 of the NAFTA permits a Free Trade

Commission. Those are the minsters of the NAFTA parties to be able to interpret a provision of NAFTA. That's exactly what it says.

So if they interpret a provision of the NAFTA, then the ministers are able to make some modification. If they don't interpret a provision of the NAFTA, they may not. That's reserved to congress and to parliaments. It's a matter of legality and fundamental rule of law.

So the issue is, if the Free Trade Commission makes a statement, we have to look to what provision is being interpreted. To the extent that it actually interprets a provision, that would be something that could be binding by the terms of the NAFTA. But if they don't, it's not.

So, for example, there's a 2003 Free Trade Commission interpretation, or documents, statements, that we're going to look at today as well, and it talks about amicus and other things. And there's nothing in the NAFTA that deals with this and, therefore, those are

merely recommendations. They are not binding interpretations.

The fact that something is said by the Free Trade Commission does not make it binding, it has to meet the requirements of the NAFTA to be binding.

Now, the 2001 Free Trade Commission statement has provisions that tribunals have ruled are binding, because they deal with specific and explicit interpretations of the NAFTA. They may be in relation to Articles 1110 on expropriation, and 1105, with respect to fair and equitable treatment. That's another issue, I'm not going to make a statement on that generally other than to say that that's an argument and that's for another day.

However, with respect to this issue of submissions, there is nothing in the NAFTA that's being interpreted and, therefore, this is merely a recommendation, this is merely a statement of general principles.

So it is not a binding statement.

So every time Canada tell us that it's binding, I'm afraid that we object. There are provisions that could be binding, and we can talk about those specifically, but the statement itself, ipso facto, a statement is not binding simply because it's stated by the Free Trade Commission.

It must meet the fundamental principles of legality, which have been accepted and passed by parliaments and congress before it has that special power, otherwise, there is a democratic deficit here. There is something that has not gone through the proper process and the public has not been properly consulted. And we must, as a tribunal, in the process be very careful to follow the process that's been laid out by the treaty and not to exceed that jurisdiction.

So the issue here is fundamentally do these provisions which do not interpret a provision of the NAFTA and, at best, may try to interpret a provision of the UNCITRAL rules, which they have no authority whatsoever to

interpret, do they bind? And the answer, of course, is no, they can't by definition.

So then the issue then is, well, what's the best thing to do here? What's the best process? And that's where we have to look at that issue, which we will talk about later, about GDPR and other bits of data privacy.

So whether we're going to talk about a specific regime of data privacy or a general regime of data privacy, the rule requires now that we think carefully about the use of personal data and privacy. And so the issue here is there needs to be a process set by the Tribunal to make sure that personal data is going to be protected in some way. That's just the nature of a globalized world that runs on data now.

And so we are very concerned that the wording that is proposed creates a situation where there's either tremendous burden -- and we're going to talk about the burden and the issues that go with it considerably in this

hearing today -- or where's there's a situation where material that does not need to be made public is, in fact, made public.

Now, in particular, we want to raise the following situation: That in the situation of Mesa Power, the claimant was required to engage in tremendous amounts of declassification, of going through information and removing it, redacting it, so there would be a position so it could be made public.

And then we were astonished to find that when we wrote to at Canada about that information, that we found that none of that information was made available to the public, despite Canada claiming that this is binding and that they have to make it available to the public, none of that information was made available to the public, none of that information that was declassified and is not confidential that be would relevant in this arbitration and to the public was made public.

And, instead, I received a letter,

a very polite one, from counsel for Canada saying, "Feel free to go through our Domestic Freedom of Information process," which has extensive delays in the process and has been criticized by Canada's own information privacy commissioner for the process, particularly from that done by Global Affairs Canada, the entity which is represented here today.

So we do not believe that that is consistent with what is in the guidelines by the Free Trade Commission. If they were to be binding, they're not being followed. We also don't see that the burden that's there is worthwhile, as we've already disclosed, there's more than $500,000 worth of costs imposed upon the claimant in that case to be able to declassify and go through the compliance process in that.

It's in the confidentiality order, it's one of our major concerns about the terms of this confidentiality order, they are disproportionate and they impose tremendous

burden. And, yet, we were astonished to find that as a result, after all of that burden, none of that information was made public. And I was merely invited to be able to apply to obtain it by a domestic process.

So in our view, the terms should be carefully considered and inconsistent -- and to be done consistently with the principles of data minimization and purpose. We need to think about what the real need for that data is.

And so it would seem to us that if we were to have memorials without the supporting materials that would meet the public interest, and that the Tribunal should also ensure that transcripts, which have been redacted to deal with personal data, just like they would be redacted to deal with confidential business data, would be taken care of.

And that, furthermore, the same thing would happen with witness statements and expert statements. And if we had that, we would be consistent. In other words, we are proposing

throughout the day today a way to navigate and be consistent with these obligations that still allow for tremendous public access.

But at the end of the day, if Canada really believed that this information needed to be available to the public, then we would have seen it. And we asked for that information from Windstream and from Mesa Power and we were not provided any of it.

And the reason, of course, is because there's been tremendous despoliation in this case, criminally convicted despoliation of evidence by the Government of Ontario, the Premier of Ontario resigns, the chief of staff was sent to jail. These are extraordinary situations.

Magnetometers were brought in and all of the documents, which were subject at that time to legislatively subpoena had been destroyed. This is not a minor matter, this is a very serious matter. And that is what causes the need to seek as evidence from the third parties.

And, similarly, with respect to where that evidence has already been produced, where that evidence would be relevant, we would like to know what that is. And we think that could reduce a number of the issues later in the interim measures. Again, we've invited Canada to assist with that and they have not, that's their choice, but that's what we need to settle today.

So our view is that we should be thinking about purpose limitation, that the purpose limitation here should be, as we've proposed, which is memorials without supporting materials orders and awards generated during the course of this arbitration. We believe that would meet best practices.

And, furthermore, we're just alerting the Tribunal at this point that we do need to be careful about the use of personal data and confidential business data in the orders and awards that are made, specifically to prevent that in the future.

So since we know this is now an

issue, we're just flagging that. And our view is that there's a way around this, there's a way to follow this, but that that's -- it's like complaining about the weather. When I first went to Cambridge to do my work, I complained about the weather. That was foolish.

Sir Daniel, I'm sure you remember when you were at Cambridge, that the weather was sometimes had left something to be desired. It was not always the best, there were sometimes places that were better. There's no point complaining about it, we might as well just move along and try to find the best way to get this.

And so our suggestion is, this is the first opportunity today where there is a process that could very easily accommodate that concern. And to the argument that this is binding, I put it to Canada, show us specifically and expressly where there is a specific provision, because when I look at this, and I have the Free Trade Commission document with me, there is no provision. It just says subject to

the application of Article 1137(4), which doesn't say anything there. So, in fact, there is no provision for this particular issue.

Now, that's not to say that we should not attempt to do everything we can to have transparency, and we're very much in favor of that, it's just to be able to do it in a way that allows the Arbitration Tribunal to proceed and not to be undone as a result of these issues.

ARBITRATOR BULL: Thank you, Mr. Appleton.

MS. DI PIERDOMENICO: Mr. Chairman, I would just like to flag that Mr. Appleton went over his time and if it's okay with you, we would also like to have that reserved time.

ARBITRATOR BULL: Yes. The Tribunal has noted that --

MS. DI PIERDOMENICO: Thank you.

ARBITRATOR BULL: -- and you'll be accorded equal treatment in that respect.

MS. DI PIERDOMENICO: I appreciate that.

ARBITRATOR BULL: And if I'm not wrong, Ms. Kam is going to address you on this.

MS. KAM: Thank you, Mr. Chairman. Good morning and welcome to the -- members of the Tribunal.

Canada's submissions on transparency will focus on three main issues. First I will explain why Canada's proposal for all documents to be made publicly available promotes greater transparency in this arbitration.

Second, I didn't hear the Claimant address this, but we would like to respond to its comments on amicus participation and explain why a separate procedural order on transparency and third-party rights is unnecessary.

And, third, Canada requests that the Claimant be ordered to provide all documents cited in its NOA. And, secondly, provide information on the third-party who produces documents it has relied upon which may contain confidential information.

So the first issue concerns the language in Paragraph 13.1 of Procedural Order 1. Canada proposes to make all filings to the Tribunal, hearing transcripts, orders, and awards to be made available to the public subject to the redaction of confidential information.

We had understood the Claimant to oppose making hearing transcripts publicly available, but I believe in the Claimant's previous remarks, it appears that they are willing to make hearing transcripts subject to the redaction of confidential information public.

But, moreover, they take issue with making -- with limiting the public availability of filings to memorials without supporting material, such as witness statements, expert reports and exhibits. However, I would note that in NAFTA Article 102(1), the NAFTA parties had made a commitment to transparency as an objective of this agreement.

Canada's proposed language is also consistent with the NAFTA Free Trade Commission's

binding notes of interpretation. And I don't want to spend too much time on this, because I understand the Claimant's counsel has made this argument in numerous other NAFTA arbitrations and it has been rejected. But the NAFTA FTC note is titled, "Notes of interpretation of certain Chapter Eleven provisions."

We view this as binding. Just because there's no specific article referred to in the access to documents section of that note, it clearly states that nothing in Chapter Eleven prohibits the parties from providing public access to documents submitted to or issued by a Chapter Eleven tribunal. And so we view this statement as being binding on this Tribunal.

More generally, I would note that the lack of transparency in ISDS has been a major criticism affecting public perception of this system. As such, Canada has consistently advocated for increasing transparency in investor-state arbitration and striving to ensure that documents submitted to or by a tribunal have

been made -- will be made publicly available and that confidential information is adequately protected. This not only promotes transparency, but it contributes to the legitimacy of this arbitration.

The exact same language that Canada is proposing in 13.1 has been adopted by other NAFTA tribunals. For example, if you -- you can find this language in paragraph 22.1 of the Mesa procedural order, which is at Tab 18 of your binder, and in paragraph 18.1 of the Windstream procedural order which is at Tab 19 of your binder.

In contrast, we view the Claimant's proposal as limiting publicly -- the public availability of submissions as unduly limiting public access to this arbitration. In our view, they have not provided any justifiable reasons to depart from the principle of transparency. And its argument that it would be burdensome and inefficient to make supporting documents publicly available does not outweigh the benefit of making

public access to this arbitration.

Just briefly to respond to the Claimant's arguments that it cost them an extra $500,000 in the Mesa arbitration, I will just explain that these costs go back -- were a result of the Claimant's actions of going outside of the NAFTA arbitration to seek documents from U.S. courts without the supervision of the tribunal. And in doing so, they did not ensure that the confidentiality orders in those domestic proceedings accorded with the confidentiality orders of the tribunal. And so the tribunal had asked them to go back to those courts to confirm that the tribunal had the authority to govern the confidentiality of those documents, and that's why they were required to engage in additional U.S. court proceedings.

I would also note that the Claimant itself has benefited from the public availability of documents and hearing transcripts in the Mesa arbitration, which it has cited to in its NOA.

Regarding its concerns that the

exhibits have not been made publicly available, I would note that had the Claimant brought its claim in a timely manner, it may have well been able to request these documents directly from the tribunal. However, having waited so long to bring its claim, these arbitrations are now over and those tribunals are now functus, but as the Claimant has noted, it can still access these documents publicly through Canada's domestic procedures.

Furthermore, in our view, the designation process is intended to ensure the protection of both disputing parties information. And so that in this regard, making these documents publicly available would avoid any prejudice or harm resulting from disclosure.

We also don't see why issues of privacy -- data privacy should prevent the disputing parties from making public versions of documents publicly available.

Not only does Canada disagree with the application of the GDPR to this arbitration

in general, we also disagree with the -- that the application of it should justify limiting transparency.

In fact, the Claimant's arguments are contradicted by the practice of the EU itself, which at Article 8.36 of the Canada EU Comprehensive Economic Trade Agreement, has committed alongside Canada to require all written submissions, transcripts, expert reports, and witness statements, including exhibits, to be made publicly available in ISDS cases.

So in accordance with the principle of transparency, Canada's view is that the Tribunal should reject the Claimant's attempt to limit transparency and public access to documents and accept Canada's proposed language in 13.1.

The next issue that I will address concerns amicus participation.

MR. APPLETON: Excuse me, Mr. President, would this not be covered under the other, that is Item 3.3.2 on their agenda called amicus participation?

ARBITRATOR BULL: No, the issue of amicus participation did come up under the transparency. And I'll let the Respondents address it at this time. It won't prejudice the Claimant. If you feel it's most appropriate for you to deal with it later, that's fine as well.

MR. APPLETON: Very good. Yes, that's our view. We just want to make sure that we handle each item in each spot. Thank you.

ARBITRATOR BULL: Sure.

Ms. Kam.

MS. KAM: I'm happy to address this later if the Chair prefers.

ARBITRATOR BULL: I think if you're prepared to deal with it now, I certainly have no problems hearing the submissions from you now and from Claimants later.

MS. KAM: Okay. Thank you, Mr. President.

So both disputing parties had addressed this issue in their prior written submissions on Procedural Order 1. Just to note,

Canada had understood from the Tribunal's May 28th, email, which is at Tab 7 of your binder, that aside from the issue of the seat of arbitration and transparency, all other issues in PO 1 had been decided and are not to be re-litigated at this procedural meeting.

If the Tribunal seeks to reopen this issue, Canada maintains its position that the NAFTA statement on non-disputing party participation, which is at Tab 30 of your binder, should be taken into account.

As explained in Canada's March 14th letter, which is at Tab 6, the statement by all three NAFTA parties establishes important principles and recommendations and promotes greater transparency and predictability with respect to the procedures for considering applications for leave to file an amicus brief.

If you're going to review this paragraph in the PO, we also request confirmation for the Tribunal on whether the reference to Article 17 of the UNCITRAL arbitration rules in

the current language was mistakenly made in reference to the 2010 UNCITRAL rules as Article 17 in the 1976 UNCITRAL arbitration rules, which apply in this arbitration, only refers to the language of the proceedings. If that's the case, then this error could easily be corrected if you refer to Article 15 of the 1976 arbitration rules, which is the equivalent provision.

On the issue of access to documents, Canada's position is that amicus should only be permitted access to public information. This approach is reflected in Canada's proposed language at paragraphs 40 and 41 of the draft CO at Tab 2 of your binder.

Specifically, these paragraphs limit disclosure of confidential and restricted access information to certain persons in the arbitration, not including third parties.

In our view, this approach is sufficient to address concerns regarding confidentiality and data privacy, and it is, therefore, unnecessary and insufficient to

develop a separate procedural order on transparency and third-party rights, which could only lead to further delays in this proceeding.

The last issue concerns the Claimant's NOA. And Canada is requesting all documents cited in that submission. To date the Claimant has only provided Exhibits 1 and 2, and has refused to provide the remainder of its supporting documents.

The Claimant should be required to provide copies of all documents it relies on in the NOA in order to complete the arbitration record. This is not only an issue of transparency, but of procedural fairness.

This principle is reflected in paragraph 82 of draft PO1, which requires the disputing parties to submit with their memorials and written submissions all evidence and authorities on which they intend to rely upon in support of their factual and legal arguments.

Without being able to confirm the specific evidence the Claimant relies upon,

neither Canada, nor this Tribunal, is in a position to evaluate or respond to it.

The absence of a complete arbitration record is already prejudicing Canada in its preparation of the statement of defense, which is due a mere 15 days after this meeting. It has also given rise to issues concerning the redaction of the NOA. This issue stems entirely from the Claimant's January 30th letter, which is at Tab 22 of your binder, identifying a letter cited at Footnote 10 of the NOA, that potentially contains confidential information.

As stated by the Claimant in the letter, the letter at issue emanates from the Ontario Power Authority, but, quote, if Canada makes that letter public, than no redaction is necessary, end quote.

The Claimant's January 30th letter goes on to state that the document was produced to it by a third party. But as you know, there's been no document production in this arbitration. And the fact that documents were produced to the

Claimant which may contain Canada's confidential information gives rise to some concern.

Accordingly, we request additional information on: One, the identity of the third party that produced the document to the Claimant in order to determinates its source; two, the basis upon which the third party produced the document in order to help us understand how it's been handled; and, three, we require additional information on whether any confidential information of third parties has been identified.

We understand that the Claimant now purports that the reason for the redaction is due to its inability to obtain permission for the publication of personal data; however, without being able to see the document or additional information on how it was obtained, we have no way of verifying whether such redaction is appropriate or if Canada could agree to the removal of the redaction.

So just to conclude, the Claimant should be required to submit all supporting

documents it relies upon in its NOA and to provide additional information on the third party that produced the information to it, which may contain confidential information. Thank you.

ARBITRATOR BULL: Thank you, Ms. Kam.

And the Claimant has five minutes to respond as it sees fit.

MR. APPLETON: Mr. President, since there are other items on the agenda, we prefer to deal with those in those items rather than to address them all separately here. I'm happy to fill the five minutes that you are giving me, but it is not necessary. Each of the items require some discussion and they should be in the specific areas that we're in.

I think the only thing that we would address in this item, which is the item that we talked about in our presentation, is fundamentally that the Free Trade Commission statements has to be read against the powers of the Free Trade Commission. That is set specifically in the NAFTA that -- and so,

therefore, you must interpret a provision for that to be there. And that is how that works, otherwise, you're acting unlawfully. You must follow the process set under the treaty. Canada's suggestion exceeds the jurisdictional capacity that's available.

The other thing that I wish to raise simply is the reference to the NAFTA. NAFTA Article 102 talks about principles of the NAFTA. They include principles such as national treatment, they include principles of most favored nation treatments, and the third principle is transparency.

And there is a chapter in the NAFTA on transparency. And that chapter on transparency is very clear, and it does not say anything that Canada says here that this means. So while we think the principle of transparency is important, it does not say or support what Canada says other than there being a general principle of transparency.

And we are saying we should be

transparent. And we've set a very good way to be transparent, we're just saying we should be mindful of other interests that need to be taken into account, and the way to be able to deal with that is in that way.

Now, there are other conventions, they don't apply right now, the MERS convention for example, that could deal with that. Canada is a part of that convention, United States is not. It is not applicable in this case, but there are other ways that we could deal with that. But that's not the way that the framers of the NAFTA decided to deal with that issue.

And that's all we have to say on that topic.

ARBITRATOR BULL: Mr. Appleton, do you -- and if you don't, that's fine, but do you wish to address the issue of -- that has been raised about the documents that are referred to in the filing that has been made and not being attached to documents, in particular the way which this arose in the submissions that the Tribunal

received, is that there was, I believe, a Footnote 10 that made reference to that one particular letter?

And there was an exchange between parties about whether or not that footnote would have to be redacted from the version of the notice of arbitration that would be made publicly available. And at the moment, if memory serves me, that has been left out of the version that has been put up on the PCA's website.

But I think that is one of the items that has been addressed by Ms. Kam. And if you -- if you have something more to say about that that's not in your -- in your written submissions, I did want to flag to you that that does not seem to me at least to come under any other item on the agenda.

But, again, if you -- if you're resting on what's your written submissions, that's fine. The Tribunal has read that.

MR. APPLETON: Mr. President, I would just bring to your attention, that Item 3.3.1 on

the written agenda, which is entitled, "Redaction of the notice of arbitration," am I not reading the same agenda as you?

Because I have 3.3.1 as a separate item, and I've prepared a specific submission with respect to that. I also have a 3.3.2 on amicus participation.

ARBITRATOR BULL: Okay. I'm -- you and I certainly are looking at different documents.

MR. APPLETON: Is it possible that perhaps, Ms. Tham might come over and see what I'm looking at, because it's on the letterhead of the Permanent Court of Arbitration?

And that's what I'm using as the basis --

MS. THAM: I did not prepare that.

MR. APPLETON: I see.

MS. THAM: I've never seen that.

MR. APPLETON: Well, then, I don't know where this came from other than it's wonderful and in my binder.

MS. THAM: I did not prepare that

document.

MR. APPLETON: I see. Well, then, what I'm going to suggest --

ARBITRATOR BULL: Perhaps, Mr. Appleton, before you make your suggestion, I'll let you know what I'm looking at.

MR. APPLETON: Yes.

ARBITRATOR BULL: That might be helpful.

MR. APPLETON: Yes, that was my suggestion is --

ARBITRATOR BULL: Right.

MR. APPLETON: -- that maybe we could synchronize.

ARBITRATOR BULL: I'm quite sure of this, the emails from the secretariate prior to the hearing enclosed a notional schedule, and it lists Agenda Items 1 through 6. We are now at Item 3 on transparency. After the coffee break we'll be dealing with Item 4, which is confidentiality order. And then Item 5, we are going to deal with interim measures, but just on procedure. And then

Item 6 is attendance non-disputing parties at future hearings.

And I earlier had thought that perhaps you might want what to deal -- might have wanted to deal with amicus issues under Agenda Item No. 6, as I said, I'm content with that. But you may want to recalibrate. I think you've just been handed --

MR. APPLETON: Yes.

ARBITRATOR BULL: -- a copy of what I'm looking at.

MR. APPLETON: Yes, I am.

Mr. President, I would like to address this, I had planned to address these, I just thought they were on other items of the agenda, which is why I did that intervention with Ms. Kam when she was speaking, because I thought she was off the agenda. And, in fact, based on my agenda she was, but based on your agenda, apparently she's not.

If you would give me the opportunity to address both issues, as we had

planned to do, that I think that would probably be best.

ARBITRATOR BULL: And what are both issues that you are referring to?

MR. APPLETON: The issues that I have would be the issue of the redaction and the issue of amicus participation. If you're telling me that amicus is to be dealt with here, then, for sure I have to deal with it at this time or forever hold my peace.

ARBITRATOR BULL: Well, I think you do need to be given the opportunity to deal with both of those. It's -- let me ask you this, Mr. Appleton, do you wish to deal with it now -- we are looking at --

MR. APPLETON: I'm happy to deal with it now.

ARBITRATOR BULL: Okay. Then why don't we do that and -- why don't you take five minutes to deal with that. I think that may be an appropriate amount of time.

MR. APPLETON: That may not be. So

it's very important that we have the opportunity to have our case heard effectively.

ARBITRATOR BULL: Of course.

MR. APPLETON: I'm sorry about the misunderstanding with respect to the agenda.

ARBITRATOR BULL: Yes. And just so that the record is clear, I mean, the agenda was sent to all parties. And I think there was clarity on that part. So --

MR. APPLETON: Well, the --

ARBITRATOR BULL: So regardless, we --

MR. APPLETON: Mr. President, I can't tell you where that came from. I do have a document with the letterhead of the PCA, and that's why I'm so confused about this. But I think we could easily address the issues, I just don't know if I can do it in five minutes.

ARBITRATOR BULL: Right.

MR. APPLETON: But I'm happy to address both.

ARBITRATOR BULL: So why don't we do

this --

MR. APPLETON: And immediately.

ARBITRATOR BULL: Why don't we do this. Let's take the coffee break that's scheduled from five minutes from now anyway, let's take that break. Why don't you have a moment and see what the timings are and how they would fit with the schedule, and then when we come back, we can have an idea of how this will proceed.

MR. APPLETON: Mr. President, I'm prepared to go without that unless you really want coffee.

ARBITRATOR BULL: Well, I don't drink coffee, but I think it's only fair to the transcribers, as well as everyone else, that we have -- keep to our break. And if you're going to take more than five minutes, starting now would put you at a disadvantage --

MR. APPLETON: I see.

ARBITRATOR BULL: -- having to stop midway.

MR. APPLETON: Excellent.

ARBITRATOR BULL: So let's take a 15-minute break now --

MS. DI PIERDOMENICO: Mr. President, before we break, there is the question of Arbitrator Bethlehem, who has asked Canada some questions, and I would just like to know what those questions are that he would like to dispatch over the break. And, I'm sorry, I know you really want to go on break but --

ARBITRATOR BULL: No, it's fine. Let's sort this out first.

MS. DI PIERDOMENICO: Yes.

ARBITRATOR BULL: You want more clarity from --

MS. DI PIERDOMENICO: Arbitrator Bethlehem, if every question that you had asked before -- you had sort of a list of questions for us to deal with and then you said you would appreciate that Canada retire over break and consider some of the questions, but I just wanted to make sure that we have answered them fully for you or that if you still have some issues that you

would like us to cover over the break, what are they now?

ARBITRATOR BETHLEHEM: Ms. Di Pierdomenico, thanks very much for that. I think you had answered all four of my questions. And are you getting feedback there?

MS. DI PIERDOMENICO: Yes, it's a bit difficult to hear you here as well. One second please.

ARBITRATOR BETHLEHEM: Okay. Can anyone -- can you hear me now better?

MS. DI PIERDOMENICO: We can hear you perfectly now.

ARBITRATOR BETHLEHEM: Thank you. In fact, I had asked all of my questions, but in response to one of my questions, I think Ms. Harris had said that you would like to take a moment to reflect. And I was simply suggesting that you take a moment to reflect over the coffee break.

But in particular, I think the question that remains outstanding is the issue of the Canadian courts entertaining challenges to

interim awards. And I added to that question, if being seated in the United States any different, and I gave you the example which I'm scratching my memory for, of the Spence Berkowitz case, that's a CAFTA case, that's I think it currently on the ICSID website as Berkowitz against Costa Rica, a CAFTA case, in which there was a challenge before the D.C. courts to an interim award.

So that's the only question that remains outstanding. But you have given, I can put it this way, an interim answer, so I'm not pressing you to give any answer, I was simply responding to Ms. Harris' suggestion that you might like to reflect further on that point.

MS. DI PIERDOMENICO: Okay. Thank you.

ARBITRATOR BULL: So why don't we take a 15-minute break. And if both parties would sort of have some thought about what additional items you might have to deal with. And we will start in 15 minutes time with a quick discussion

about how the rest of this morning will go.

And then we are adjourned for 15 minutes. Thank you.

(Recess from 10:45 a.m. to 11:09 a.m.)

ARBITRATOR BULL: Since everyone is back in the room, let's come back on the record.

Mr. Appleton, you've had a chance to think about how we might progress. Do you have a suggestion?

MR. MULLINS: I do have answers to Sir Daniel's questions about the law, if you want to do that now or I can wait.

ARBITRATOR BULL: I'd like to know how we're going to proceed, so I know there are questions outstanding -- some answers to Sir Daniel Bethlehem's questions --

MR. MULLINS: Yeah.

ARBITRATOR BULL: But there were also two issues that were mentioned, amicus and redactions, mentioned by Mr. Appleton about which he thought that there were separate agenda items for these later on, and I just want to know whether

he wants to address that now or whether that fits with -- I's would like to now the plan, please.

MR. APPLETON: I'm ready to address them whenever you are ready. And our only question is when would you like us to address the answers to Sir Daniel's question. We can do that before we start this section or we can do it after. It's whatever you would like.

ARBITRATOR BULL: I'd like to know -- okay. I'm looking at the agenda that was sent to all parties before the hearing. And we are on Item No. 3, transparency. Item No. 4 is confidentiality order, 5 is interim measures, and 6 is attendance of non-disputing parties.

Knowing that that is the agenda that I am working off, would you -- when would you like to deal with amicus?

Would you like to deal with them now or would you like to deal with them in Agenda Item 6? And, please, would you make the choice.

MR. APPLETON: Now is fine.

ARBITRATOR BULL: Okay.

MR. APPLETON: But I still have the question of when would you like Mr. Mullins to respond to the other questions.

Would you like that at the end?

ARBITRATOR BULL: Yes. If I can deal with these one at a time. So amicus, you'll deal with that now. Secondly, the issue of redactions, which you mentioned, would you like to deal with that now or would you like to deal with that under confidentiality order or some other item?

MR. APPLETON: Mr. President, I would propose to deal first with the issue of the redaction, then I'd like to deal with the issue of amicus.

ARBITRATOR BULL: Right.

MR. APPLETON: And I propose to deal with both of those now if you'll allow me to do so.

ARBITRATOR BULL: Yes. I think that would be useful. How long do you think you might need for that, just for my planning purposes?

MR. APPLETON: I believe that they would be relatively short. I cannot image it would

take more than six minutes.

ARBITRATOR BULL: Thank you. And why don't we do that. I appreciate that your preparation seem to have been on a slightly different basis, but we want to make sure that the Claimant has its opportunity to say what it needs to say.

And by equal measure, the Respondent can have an opportunity to reply to whatever submissions with equal time being granted. If the Respondent needs some think to think about what has been said, of course, we can try and accommodate that within reason.

And then perhaps what we'll do is let's deal with those two issues first and then at the end of that, if you could -- if Mr. Mullins wants to deal with some of Sir Daniel Bethlehem's questions, he can do that.

MR. MULLINS: Sure.

ARBITRATOR BULL: And then I'll hand it over to the Respondent, who can deal with a response to what Claimants have said, as well as

deal with the questions that Sir Daniel had.

Would that be suitable for Respondent?

MS. DI PIERDOMENICO: Yes, that will be fine.

ARBITRATOR BULL: Thank you.

And after that, I will then, of course, invite my co-arbitrators to ask any further questions on what has been already submitted by the parties.

So, Mr. Appleton, if you could start us off, please.

MR. APPLETON: Thank you very much, Mr. President. And I just want to point out -- I have ten minutes to address this issue. There are a few bits of -- actually, ten minutes to address each of the two issues. I will address them both in six. So I will be a little bit quick with where I go.

The first issue is with respect to the redaction of the notice of arbitration. I think it would be helpful if we were to look at

the UNCITRAL arbitration rules. Article 18 of the arbitration rules deal with the statement of claim. The statement of claim says in Article 18, Sub 2, that the claimant made an annex to the statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

The rule says specifically that you may add a reference to the documents or other evidence he will submit. That is not Canada's first time having an UNCITRAL claim. Canada knows -- they know that they're not entitled to these documents at this time, they know that there needs to be a reference to them, they are fully compliant with the UNCITRAL arbitration rules. This is merely, yet, another attempt to try to justify delay and a failure to produce a statement of defense, which is absolutely necessary in this case.

Second of all, the investor, who is very committed to the principle of transparency, because they want the public to know the

outrageous behavior that is taking place in the Government of Ontario with respect to the Green Energy Program, and the tremendous waste of taxpayer money that's going on here and the gross unfairness.

So the investor has taken a 32-page document and declassified everything but one four-word statement. The four-word statement was with respect to a document upon which that had contained personal information that they could not get permission to be able to address.

Canada controls the Ontario Power Authority, the OPA. It is a controlled enterprise, state enterprise. It is directed under law by the state, it must follow the instructions under the Ontario Energy Act of the Government of Ontario. It doesn't have an option that they might comply, it is controlled. Other tribunals have made clear that it is controlled when we look at issues of state of responsibility.

Canada now comes to us and suggests

that they can't get the information that they don't know from an entity that they control. We said to them, if you take this letter that's from a controlled entity, it's from a person at the Ontario Power Authority to a third party, and if you declassified this, then it could be public and then we would be fine, we would meet the requirement and we could make that public. That we actually see there is no problem with the public having redaction of these four words.

We also think that it is a tremendous and disproportionate waste of this Tribunal's time and resources. And as we will talk about when we get to the confidentiality order, we see the order proposed by Canada as a recipe for more and more and more of this, wasting the Tribunal's time on things that are irrelevant.

We see that all of the goals of transparency, all the best practices that are engaged here are followed here. In fact, we disclosed all types of evidence. Canada still

hasn't disclosed a confidential information from the Windstream case or -- sorry, the nonconfidential information from the Windstream case or the Mesa case, which is all available to them, in which the public, under their basis, should be entitled to, yet, they are focusing on this. We think this is just a waist of time and does not -- is not worthy of the focus and the attention of this Tribunal.

But for any event, the fact is personal data needs to be respected, we need to follow that process, we have tried to deal with it with the other items that are here. And Canada could have made this problem go away easily and a long time ago.

We wrote to them on February 11th, 2019, gave them that opportunity and they still have taken no steps. And so we think it's a little bit -- it is just a little too cute today for Canada to say, "We don't know about this. We know nothing about it. We can't deal with it."

The Government of Ontario is

represented in this room and has people on the feed. The Government of Canada is responsible internationally for these actions under the NAFTA, and because of the operation of international law, there is no question they could have done this and they didn't.

Now, turning to -- and unless you have a question on this, I'd like to turn to the other issues, but if you do.

So I believe that answers the two questions, both with respect to redactions and with respect to production. The production issue that was raised by Canada is just untimely. We've had asked Canada, and we would be happy to produce other documents in relation to this if they'll produce the documents that we've sought, which are the nonconfidential information from the Windstream tribunal and from the Mesa Power case. But apparently what's good for the goose is not good for the gander. They're demanding this and claim that they must have it to respond.

The statement of defense, which is

in the UNCITRAL rules is not contingent on the production of that material for the reference. And, by the way, Canada probably has all of these key documents in any event in their own files. So I think it's just a little bit grand on their part.

With respect to the issue of -- unless you have questions.

ARBITRATOR BULL: No, you can proceed Mr. Appleton.

MR. APPLETON: With respect to the issue of amicus. Canada's position basically is look at what the 2003 Free Trade Commission statement was on amicus. And while that's a very helpful process, it's just the beginning of that process.

And our view is that there should be a separate order dealing with amicus, that that order needs to be made public by the PCA, and that there are better practices that need to be followed than those that are Canada's.

For example, it is not appropriate

to post on a PCA website with 30 days' notice a process for people to go through the amicus qualification and submission process. There's just not enough time, it's not reasonable.

And for the beginning of the process, we should be given 90 days. And we should be posting onto the PCA website a long time in advance the process so that civil society groups that are interested are going to be able to have the time, so they can have proper notice.

Furthermore, we need to have a process that fairly does not impede the operation of the process here, but gives everybody time to be able to review. And we have to make sure there are provisions in there that deal with issues about independence of the parties that are seeking to submit amicus briefs, that need to be independent, they need to be limited in the scope, they need to be issues with that. And that's our view is how it should be best handled.

There -- we were involved in doing the very first order, which was in the UPS case,

there was another order in Methanex. This was around the same time as these FTC statements came out.

We think the world has moved in a better way, in a stronger way. And we think that they're easily accommodated, the PCA accommodates them regularly. But the proposals as set out in the FTC statement are not efficient for the Tribunal, and they're not good enough for civil society. And if we are concerned and we actually take seriously the issues of civil society that know about this process, then Canada should be doing more.

Canada should be taking proactive steps that enhance what's here, not just going back to something that is almost 17 years old. And that's where we call them out. And that's the reason why we said we want to raise this, because we think there would be a small, separate order would be appropriate here that could meet best practices and could deal with this. And so that's our concern with respect to that. It's

getting a better practice that's more consistent in that matter.

I do finally point out that when we deal with this issue of amicus, we have to -- remember, this is the separate from the issue of 1128 issues and 1129, the non-disputing parties. And I understand that we'll have an opportunity to talk about that, so I'm not addressing that. And that we actually have a process that we've suggested that would actually be very consistent to be able to deal with that issue, following this specific terms of what's in that. So I'm not going to reference that now, I'm going to save that now that we're on the same agenda.

So I believe that -- let me just check with my co-counsel. I think I've hit all the issues. So thank you for the opportunity and thank you for letting us get back into the agenda properly.

ARBITRATOR BULL: Thank you, Mr. Appleton.

And then Mr. Mullins.

MR. MULLINS: Sure. Thank you.

So responding to Sir Daniel's question about the Berkowitz case. He'll be delighted to know that -- that his opinion was set -- was fine because the court threw out the petition in the cases 288 F.Supp --

MR. APPLETON: You may have lost Sir Daniel.

MR. MULLINS: I did lose him.

MR. APPLETON: I'm sorry. He was so happy to hear this, so why don't we just wait for a minute.

And we may have also lost Arbitrator Bishop.

ARBITRATOR BETHLEHEM: Please don't worry. I'm picking up everything and I'm certainly aware of what the D.C. courts did with respect to that.

MR. APPLETON: Well, then we might have lost Arbitrator Bishop.

MR. MULLINS: Okay.

MR. APPLETON: Sir Daniel, if you

would just wait for a moment while we check to see if Doak is there.

Doak, if you're there, could you say something?

MS. THAM: Arbitrator Bishop has lost his connection --

MR. APPLETON: Okay.

MS. THAM: -- and we are trying to reestablish it now via WebEx link.

MR. APPLETON: Could we find out where -- when he might have lost that?

MS. THAM: So I have been in communication with him and he said that we can proceed because he's fine with that. And he will reestablish the connection as soon as he can. But we're still working on getting the WebEx link set up.

MR. APPLETON: Okay. Can he hear?

MS. THAM: He cannot hear.

MR. APPLETON: No, I think we should wait momentarily if we can get him. Perhaps we can get him by phone.

MS. THAM: Yes.

MR. APPLETON: Is that possible?

MS. THAM: Sure. Let me just reach out to the technician and speak with him.

MR. APPLETON: I actually want to take a minute.

(Off the record. Trying to establish reconnection.)

ARBITRATOR BISHOP: Yes, I apologize, but my video keeps going off, along with the sound.

ARBITRATOR BULL: And you can hear us now?

ARBITRATOR BISHOP: Yes, I can.

ARBITRATOR BULL: Thank you.

So, Mr. Mullins, you may proceed.

MR. MULLINS: Yeah. So during the break we were able to get a hold of the Berkowitz Opinion, which is a lower court decision which they threw out the petition to vacate the interim award on jurisdiction. You can find it at 288 F.Supp 3d 166. It's a January 23rd, 2018 decision from Judge Leon, the circuit here, District of Columbia.

And what the award there was, their award lacked jurisdiction to hear certain claims, had jurisdiction to hear some claims. And the petitioners, which was the claimants, sought to have the award vacated. Costa Rica argued that the court did not have jurisdiction, the district court judge agreed. In so doing, the court says, quote, it is improper for a district court to interfere with an international arbitration proceeding before the tribunal issues a final ruling, citing the D.C. Circuit. It's a cardinal principle of arbitration that arbitration awards are reviewable and enforceable only if they are final, that is they purport to resolve all aspects of dispute being arbitrated. And then it cites an Eleventh Circuit case, which is the circuit that governs Miami.

"FAA allows review of final arbitral awards only, but not of interim or partial rulings." And then it goes on to say, "It's not final unless there's an issue about damages."

And so this goes in the category that people are going to do whatever the people do. I mean, lawyers do things. And so these guys came in there to try to vacate an interim award and jurisdiction, and this district judge quite correctly said, "You can't do that under the FAA."

As I understand from Canada, that's not the law in the Canada. They've admitted that is an issue, that they can then seek to vacate on interim award on jurisdiction. So that is a significant difference. I believe that the Berkowitz case is consistent with the law that I was -- understood. And the cases are all cited in here, it's not a case where it's out there on a limb, it's consistent with U.S. laws, as I understand it.

ARBITRATOR BULL: Thank you.

Then Respondents have an opportunity to reply.

MS. KAM: Thank you, Mr. President, so I will respond to the Claimant's arguments on

the NOA, as well as the amicus submissions.

So first we take issue with its attempts to draw parallels between the issues of the documents in the NOA and its request for documents in the Windstream and Mesa arbitrations.

So on the one hand, our request for documents in the NOA concerns documents that are already in the -- on the record in this arbitration and documents that are being submitted to the Tribunal for its consideration; whereas, their request for documents in the Windstream and Mesa arbitration, those are document requests and documents for documents -- request for document discovery. And we have not gotten to that stage of the proceedings in this arbitration.

To the extent that the Claimant is relying on the document that cites in the NOA, a reference is not sufficient if those documents are not publicly available in order for us to consider that evidence.

And to the extent that they are refusing to provide those documents, our position is simple, that no weight should be given to those documents that are cited because the Tribunal is not in a position to consider them.

Without those documents, as I have noted in my earlier remarks, we're not able to assess the confidentiality of those documents, and so without being able to see them, we can't respond to those requests.

In addition, they made arguments about the Ontario Power Authority. I'm not going to respond to the issues about the relationship about -- between the Government of Canada and the OPA in this procedural meeting, but I would note that it's not relevant to the submission of documents in the record. Where those documents came from does not matter, it's about submitting all of the evidence and legal authorities that you rely upon in your submissions and having that provided to the Tribunal.

On the second issue of amicus

submissions, Canada's position is that the NAFTA FTC note is sufficient. And there's no need to reinvent the wheel. To the extent the Claimant is arguing about giving sufficient notice to civil society groups, those civil society groups would have had that NAFTA FTC statement since 2003 and understood those procedures.

As noted in Canada's March 14th letter commenting on Procedural Order 1, the Claimant's proposal actually does not provide the same level of guidance of the FTC note. And so to the extent that it is relying on the same proposal that it had before, we don't think it's sufficient, and to the extent that it is making a new proposal, we have not seen it.

ARBITRATOR BULL: Thank you.

Did you also want to come back on the questions that Sir Daniel had asked?

MS. KAM: I'll just briefly respond that in the Bilcon case, there's a question about the set-aside of interim awards. And in that case, the Canadian courts did refuse to set aside the

jurisdiction and liability award.

And in that case, Canada had made a request to stay the arbitration proceedings, but it was denied. And the tribunal itself determined that it would move forward. And in that case that is what happened. So there was the set-aside proceedings moving concurrently with the NAFTA arbitration damages phase.

MR. MULLINS: If I could just have five seconds to respond to that. I think the difference is they had the authority to do it in Canada; whereas, in the United States, they did not have authority. And that's the difference, it's the difference between the ruling and the authority.

ARBITRATOR BULL: All right. Thank you both parties for your submissions on transparency.

Can I ask my fellow arbitrators if they have any questions?

Perhaps Mr. Bishop first.

ARBITRATOR BISHOP: Yes, thank you.

I have a question for the Claimants.

The Claimants had referred to other interests that need to be taken into account, and they have -- they've referred to the possible third-party discovery. I'm wondering if they can be specific for us as to what interest concerned them specifically with respect to the transparency and confidentiality?

MR. APPLETON: I'm not sure I understand the question. If I understand your question properly, and stop me if I'm going -- if I'm answering another question.

With respect to confidentiality and transparency with third parties, first of all, once you give information to non-parties to the arbitration, you can't control what they do with that information, therefore, all of the information that has to be given to a non-party, whether it's a non-disputing party not subject to the special provisions in Article 1129 of the NAFTA or any other third party such as an amicus, it has to be nonconfidential.

In other words, confidential information cannot be put out, only non-confidential information because you can't control them, you're not a court, you're an arbitration tribunal, they're not a party to the arbitration, therefore, the process that we need to follow with respect to information that goes to amicus and with respect to the process that deals with transparency has to accommodate and address the interest about the information that's there.

So the way to do that, in our view, is, first of all, to minimize the types of things. In other words, to make sure enough information goes out so that everybody has a very clear understanding of what's going on, that would be submissions, that would be the transcripts, and that be would the orders.

But not to put information that might not be necessary that may take a tremendous burden upon the parties and really don't need to be there. And, in our view, we have identified

what those ones were.

So that's -- so the problem is because we are an arbitration tribunal and not a court, we don't have plenary jurisdiction, we have jurisdiction of those who have agreed to be bound. We have an additional element, which is unusual, in that Article 1129 of the NAFTA specifically says that if information is received by a non-disputing party in the process set out in 1129 -- that's a very specific process -- if you follow that process, then, and only then, do they take the obligations of a NAFTA party with respect to that information.

So in that one particular circumstance, the NAFTA gives you a sense of power. That's Article 1129, 1 and 2. If you follow what's in 1, then all of a sudden 1129.2 deals with that. That's why if you follow that process, you can give confidential information to the non-disputing parties, because they're required to protect it, but if you give it to them outside of the terms of 1129.1, it's exactly

the same as if you were giving confidential information to amicus or anybody else on the streets that would be outside of that. You have no authority to govern them. That's why we raised this in this area, but we'll have an opportunity to discuss this. There's a specific item on the agenda for that.

And the only other point that we would raise is that -- Ms. Kam said that everybody knows since 2003 the process. Well, the fact is you never know what this process is because you don't know when the deadlines are and what the content is going to be unless the tribunal makes the order.

It says there could be this process, it doesn't say that there will be this process. And the fact of the matter is you need dates, you need specific ways, and you need to give enough time so civil society can reasonably put that material in. And that's what we're saying should be done.

Did I answer your question

Arbitrator Bishop or did I miss what you want?

ARBITRATOR BISHOP: That's fine. I'm not -- I don't need to follow up on it. That's sufficient. Thank you.

ARBITRATOR BULL: Can I ask, are there any questions from Sir Daniel?

ARBITRATOR BETHLEHEM: I have -- thank you. I have, I think, two brief questions, but I'd like to -- while we're on the FTC, and while we're on the amicus issue, but I'd like to preface my question on the FTC by setting out what I thought I understood the Claimant to be saying, and the Claimant can correct me if I'm wrong on this, but this is a question also that goes to both parties, these questions go to both parties.

On the FTC claims, I understood the Claimants to be saying that Article 1131, paragraph 2, is what limits the scope of what the FTC can do by reference to an interpretation of a provision.

Now, as I read 1131 -- excuse me, and then the Claimant went on to say that the FTC

note of 2001 did not address a provision. As I read 1131, paragraph 2, it refers to an interpretation by a commission of a provision of this agreement. In other words, of the whole of the NAFTA, it's not focused just on Chapter Eleven.

And in the 2001 FTC notes, we have not simply the reference in the chapeau to a clarification and reaffirmation of a meeting of certain of its provisions, provisions of Chapter Eleven, but we do have this specific reference to 1137, paragraph 4, and paragraph 1(a), and 1137, paragraph 4 obviously deals with a publication of the award, but there is nothing else, as I read, in Chapter Eleven that deals with publication.

So insofar as there may be an issue of clarification of the scope of 1137, paragraph 4, I suppose it might be said that that's -- there was some uncertainty because of 1137, paragraph 4 about transparency with respect to other provisions. But then we also have in paragraph 1(c) of the FTC notes a reference to

Articles 2102 and Articles 2105.

So I suppose the first question to the Claimant is just to invite the Claimant to clarify precisely what it is saying about 1131.2 and the FTC notes.

The second question on the FTC is to draw attention to this savings clause in paragraph 1(c) of the FTC notes and the reference to 2105. And I see that 2105 says inter alia that nothing in this agreement shall be construed to require a party to furnish or allow access to information, the disclosure of which would impede law enforcement or would be contrary to the parties' law protecting personal privacy, and so on.

So I would like to invite both parties to comment on the relevance of this savings clause in respect to personal privacy and whether 2105 and the reference to personal privacy, essentially, becomes an additional element of safeguard to be added to the FTC 2001 notes, paragraph 1(b)(2), where there's a

reference to confidential business information, information otherwise protected from disclosure under domestic law and information which a party must withhold pursuant to relevant arbitral rules.

I apologize if that's a convoluted question, but I imagine that counsel for both parties will understand it.

And then the last question, which I'll just put, and you can answer them as you wish. It goes to the issue of amici amicus briefs. This Tribunal in these proceedings will not be the first tribunal, the first proceedings, to deal with this issue. There have been many other Chapter Eleven proceedings in which there have been a huge volume of amicus briefs.

I recall one simply because it's in the forefront of my mind as I have experience it, the Eli Lilly against Canada case, Procedural Order No. 4 actually addressed that at some length. But I'd like to know from both parties how these issues have been dealt with before, and

to the Claimant, whether the Claimant is proposing to take this Tribunal in a direction which departs from the way in which previous Chapter Eleven tribunals have dealt with the matter.

Thank you very much.

ARBITRATOR BULL: Could we hear from the Claimants first in response to these questions?

MR. APPLETON: Sure. I'll do my best. There are a number of questions that are packed in there.

Let's first talk about the FTC interpretation. Give me a moment here. I want to cover all the pieces in here. So I'm going to assume that we are -- that we all agree that this is not an interpretation, but anything that's relevant here is interpreting Article 1120 Sub 2, which is about publication of awards. To the extent that that's an issue that is in dispute between any of the parties.

Would be that fair to say?

ARBITRATOR BETHLEHEM: I'm content

with that, but I just want to hear your answer --

MR. APPLETON: Right.

ARBITRATOR BETHLEHEM: -- rather than have --

MR. APPLETON: All right. So let's talk about what the meanings of the Articles 2102 and 2105 are. So 2102 is a provision that deals with national security. And, to my knowledge, there's no issue that has arisen yet, nor do I believe there's a likelihood of a national security exception. National security exceptions in the NAFTA are very specific. They deal with access to information dealing with -- related to trafficking arms, ammunition, and implements of war taken in time of war other emergency --

ARBITRATOR BETHLEHEM: Mr. Appleton --

MR. APPLETON: Yes.

ARBITRATOR BETHLEHEM: -- with the leave of the President, may I interrupt you there?

I don't really need to hear anything about 2102. I don't think anybody has

put a national security point on the table. The point that I'm interested in exploring with the parties is whether the reference in 2105 to NAFTA requires the publication or a party to require publication contrary to a parties' laws protecting personal privacy.

I understand -- or at least I thought understood from your submissions that you were saying that there is an insufficiency of law protecting personal property. So it's the application of that provision for which there is a specific savings clause in the FTC notes that I would be grateful to hear your views, please.

MR. APPLETON: Sir Daniel, I don't believe the FTC notes addresses or interprets this issue. My reading of this interpretation, in my view, does not interpret that provision, 2105, at all. However, when we talk about the issue of personal privacy, we've been talking about the application of personal privacy in a different context to this arbitration. And that is not an issue of personal privacy that I believe fits in

within 2105, though it may, I just -- that's not something that we've addressed.

And when we talk about this today, and we may talk about it again, it's in relation to personal privacy as a regulatory matter that affects the operation of this Tribunal.

Since we've posed some questions, we have not received the answers back to those questions, we don't know the extent to which personal privacy is going to be affected, and in particular by the European GDPR. We know that -- that there's going to be a GDPR fact, in our view, we've explained why. We also think there could be other reasons why there's a GDPR effect, that's why we posed the questions. We think there's a way to address that.

But clearly 2105, which adverted to personal privacy only deals with the parties laws, and so it doesn't apply to this personal privacy issue, which is kicking in not because of the parties, the three NAFTA Parties, capital "P" being the United States, Canada, and Mexico.

That's why we don't think that's where that comes in.

Our problem is the inadvertent and essence of fact of a regulatory matter that we think that we should just deal with and be able to get on with so that we can make this work. But, you know, this is a NAFTA case, we understand it's a NAFTA case, we were not anticipating that we would have to deal with those types of issues. I had to learn about this issue than I ever anticipated having to learn. I've had to read tremendous amounts and meet with many people to be able to understand this. Now that I understand it, I see how that matter works.

And so I -- as we'll talk about later today, with respect to the confidentiality order, we think that: A, it does apply; B, we want ways to be able to minimize its operational impediments, we don't want that to be the case.

So do I read 2105 as saying that it informs of the FTC interpretation? I wish it

did, because that would be a very simple answer, but I don't see this as being one of the parties' personal privacy rules. And that's the difficulty.

In fact, the most significant rule in Canada is called the PEPIDA. The PEPIDA excludes the Government of Canada from its operation. It only covers -- so it covers -- it covers the investments in this case called Skyway 127, which is in Canada, as a private commercial entity. It actually covers my law firm in Canada, but it does not cover entities that are outside of that, and that's why it's a bit of an issue. The Government has its own approach.

So I just don't think that answers that question, even though I would like it to. I would like this problem to go away. I think there's a way that we can practically make this go away, and that's what we've been trying to offer. But it's simply a regulatory reality of today that we need to address, just like we would address other issues, like confidential business

information and other things.

And so we would suggest get on with it to be able to deal with it, because at the end of the day, we don't want anything to affect or impede the ability of this process to get underway.

Now, there was another question, and I'm afraid that I need to look -- what was that other question about? It was about --

Sir Daniel, if you could just assist me with the --

ARBITRATOR BETHLEHEM: The question, in short, was whether you are on the amicus issue --

MR. APPLETON: Oh, yes.

ARBITRATOR BETHLEHEM: -- in asking this Tribunal to go down a path which is different from the Chapter Eleven tribunals previously. I understand the contemplation of our draft rules and procedure, Procedural Order No. 1, to be in line with other proceedings.

MR. APPLETON: So the answer here is relatively simple. Canada has suggested that we

follow the 2003 statement. Other tribunals have gone beyond the 2003 statement. To the extent that we're following other procedures, which are better, we would be in favor of that.

I'm not asking for something that's new or different, I'm simply suggesting that 2003 was a long time ago, the world has changed, the process is better, and we should be in accord with those best practices. And that there are issues that were not anticipated in 2003 when we first started this.

We were the first institution to have this process of inviting civil societies to be able to participate and that there are provisions that can be put into this order, which often are, but not always, and that that would make it better.

And that's what I'm suggesting. Our position is that we should follow best practices, not necessarily the oldest practice. And our view is that we're being suggested from Canada to follow the oldest practice, and we

think that the world has moved a little bit. So that best practices would be better.

But if your question is, am I asking you to invent something new to do a new, to do a new fangle dance? No. I'm asking that we follow the usual process with perhaps some better procedural tweaks along the way to ensure that the public effectively is given notice and effectively has an opportunity to be able to engage in this process.

ARBITRATOR BETHLEHEM: Thank you very much.

ARBITRATOR BULL: And the Respondent, please.

MS. KAM: Thank you, Mr. President.

And thank you, Sir Daniel, for your questions.

We would read the FTC notes, and as you have pointed out, as interpreting certain provisions of the NAFTA. This is not only evident in the title of that NAFTA FTC note, but as you noted, under the amicus -- or the access

to documents section, there is reference to specific provisions of the NAFTA.

And so in that sense, when it's interpreting certain provisions of the NAFTA, then according to NAFTA Article 1131(2), this interpretation shall be binding on a tribunal established under Section B of Chapter Eleven.

On the issue of transparency and access to documents, I just want to reemphasize that Canada's submission is that all documents in this arbitration that are made publicly available -- what we're talking about is the public versions of those documents.

Say for the issue of non-disputing parties, which we'll get to under Item 6 of this agenda. And so when we're only making public information publicly available, we don't see any issues concerning data privacy as arising that would address any concerns. Because any treatment of public information outside of the hands of this Tribunal, it's publicly available so we don't see an issue with those third parties

sharing that information.

On the issue of --

MR. APPLETON: I --

MS. KAM: I'd like to finish my remarks, please.

MR. APPLETON: No problem.

MS. KAM: On the issue of Eli Lilly, we would note that the Claimant has not raised any concerns with how amicus submissions were dealt with in that case. And specifically in deciding whether there should be amicus submissions in that case, the tribunal took into account and applied the criteria under the NAFTA FTC statement. And so given that there's no issues concerning with how amicus submissions were treated in that arbitration, I think that is an example of how an NAFTA tribunal has used that NAFTA FTC note to consider amicus participation, and there's no issue concerning what the level of detail or the notice to civil society groups in order to participate. Thank you.

ARBITRATOR BULL: Thank you.

MR. APPLETON: Mr. President, I would like to make one brief comment.

With respect to -- Ms. Kam has just raised an issue, I believe she's either misstated the matter or she's changed the position of the Government of Canada, one or the other, I'm not sure.

Under the confidentiality order that we're going to discuss, Canada has refused to accept that personal privacy information constitutes confidential information. Ms. Kam just said that that type of information would be considered to be confidential. Of course, it doesn't meet the definition of confidential business information, as it's been defined right now, that's why we have to create a separate class to deal with that. That would be consistent, it would make sense, that's why we suggested that. It would be a very simply fix.

But if I understand their position, which is that that is not to be covered by the confidentiality order, then the statement she

just made couldn't be correct. And that would be the -- that would be the problem.

The problem is not to release personal data. That's why they have this principle of data minimization and pseudonymisation -- I'm sorry, that's starts with a "P" -- pseudonymisation, to be able to protect personal information so it doesn't have to go out in that way. And they are very specific and simple ways to deal with that. Anybody who is in Europe is basically responsible for doing that right now anyways.

And so the fact is, is that that, in our view, should be covered. And if that's their position, we're happy to get that. That might bring us closer together, but my understanding is that that was not the position and, therefore, that answer could not be correct.

ARBITRATOR BULL: Does the Respondent want to reply?

MS. KAM: Just briefly to say that we have made our submissions on the EU GDPR. We take

the position that it does not apply and it does not govern this arbitration, but concerning the definition of confidential information, we plan to deal with this issue under the confidentiality order.

ARBITRATOR BULL: Thank you.

So the Tribunal thanks both parties for your submissions and transparency. And I'd like to move us on to the issue of the confidentiality order. And on this, would the Claimants be willing to lead us off, please.

MR. APPLETON: Well, since the order is Canada's, we thought maybe Canada might want to start.

ARBITRATOR BULL: Then I see nodding heads on the Respondent's side, so over to you then.

MS. DI PIERDOMENICO: Sure. I'll happy to kick this one off.

ARBITRATOR BULL: Thank you.

MS. DI PIERDOMENICO: So I will present Canada's comments on the confidentiality

order.

Canada has proposed a confidentiality order to govern these proceedings that ensures robust protection of confidential information in a manner that is consistent with Canada's laws.

In spite of the amount of brackets in the confidentiality order, the Tribunal will be pleased to know there's only really about five to six issues to determine in order to conclude it today.

First, Canada's view -- in Canada's view, the Claimant's proposal at paragraph 1(b)(vi) of the confidentiality order, which is available at Tab 2 of your materials, that that proposal must be rejected.

MR. APPLETON: You're using this document in tab -- and it's your document. Okay.

MS. DI PIERDOMENICO: The proposal seeks to add a category under the definition of confidential information that would automatically designate as confidential information in these

proceedings any information otherwise protected from disclosure that has been obtained under a confidential agreement or a confidentiality order made by a court or a tribunal.

In other words, outside courts and tribunals and third parties to this arbitration could determine what amounts to confidential information in these NAFTA proceedings.

Claimant's counsel seems to be making this proposal based on his experience in the Mesa arbitration. The claimant in that case was required to designate information obtained from its 1782 applications information that was protected by U.S. court order in accordance with the Mesa Chapter Eleven confidentiality order.

Claimant's counsel in Mesa did not want to do this work. And this is likely why it is proposing additional language in this arbitration. However, it is essential that this Tribunal maintains its jurisdiction to decide on all confidentiality matters that arise in these proceedings.

In fact, this was explicitly recognized by the Mesa tribunal. As such, to avoid any conflict between a U.S. court order and the confidentiality order applicable to the Mesa arbitration, the Mesa tribunal asked the claimant to confirm the tribunal had authority to govern the use of 1782 documents in the NAFTA arbitration, which is what Ms. Kam was referring to in her -- in her presentation on the issue, that basically the claimant was the master of its own demise in that case and caused the cost to fall onto it as a result of 1782 applications that were inconsistent with the U.S. court order and the NAFTA confidentiality order.

The U.S. courts further agreed with the Mesa tribunal's determination that the NAFTA tribunal had the authority to govern confidentiality and the documents at issue.

In fact, it is this Tribunal's responsibility to maintain complete jurisdiction over issues of confidentiality in these proceedings and not to abdicate that power to

other courts and tribunals as the Claimant would like.

Canada has concerns that confidential determinations made in these proceedings in which Canada is not a party, for instance, those that could be made by a U.S. court, would conflict with what is considered confidential in these proceedings.

Moreover, Canada objects to third parties establishing rules of confidentiality that govern in these proceedings in which Canada or this Tribunal, would have no part in taking. It is Canada's view that this Tribunal has essential jurisdiction over all matters concerning confidentiality in this arbitration.

The Claimant's proposal would further mean that any confidentiality challenges would have to be decided by the third parties to this arbitration, for example, the U.S. courts. The Claimant's approach is, therefore, inefficient and could result in further delays.

Second, the tribunal is asked to

resolve the issue in the definitions -- to resolve issues in the definitions of written submission and public document.

The definition of written submission is important in this confidentiality order as it lists the disputing parties' documents that are subject to the process of redaction under the confidentiality order.

In Canada's view, a written submission is a brief, memorial, witness statement, exhibit or expert report. Canada considers all filings in this arbitration, including the main pleadings and all supporting document -- all supporting materials to those pleadings must be made available to the public.

The Claimant, however, seeks to exclude all but motions and memorials from its definition of written submission and this is inconsistent with Canada's commitment to transparency in the NAFTA Chapter Eleven proceedings.

Moreover, it is important that all

main pleadings and supporting documents have appropriate designations by the time that the hearings are held, otherwise, there would be uncertainty as to which portions of the hearing are open to the public and which portions of the hearing are held in camera due to confidential information being discussed. This is an already decided issue at paragraph 13.2 of the procedural order, that hearings shall be open to the public.

If these confidentiality designations are not worked out in advance of the hearings, the issue has the potential of derailing the hearing itself. Similarly, this Tribunal is the best place to rule on all issues concerning confidentiality in these proceedings and should do so before it is functus.

If Canada were asked to provide the documents after the conclusion of the arbitration, it would have to deal with confidentiality issues without the benefit of this Tribunal.

On a related point, the parties

further disagree on what is a public document under the confidentiality order. This category of documents can be freely disclosed to the public.

Canada believes that for the purposes of this arbitration, a public document is a written submission, transcript, order or award that contains no restricted access or confidential information and no redactions of this type of information.

The Claimant inexplicably wishes to exclude transcripts, orders, and awards from what constitutes a public document, even though those documents contain no confidential or restricted access information.

The Claimant's position on this issue also appears to contradict its position under 13.1 of the procedural order, which includes in a list of documents that shall be made available up to the public orders and awards. This is the non-contested part of the definition.

Third, Canada's proposals under paragraphs 46, 48, and 50 are meant to recognize the potential application of laws to document requests, document production, and document disclosures.

Paragraph 46 sets out that any request for documents or for the production of documents under the applicable domestic law is governed by that law.

Paragraph 48 ensures that a party may make any disclosures of documents or information as is required by law. The Claimant's proposal under paragraph 48, to specify and say that disclosure is subject to the terms of relevant procedural law is unclear and in any event linked to the GDPR.

Past NAFTA tribunals have acknowledged the rules and importance of domestic disclosure legislation. They have expressly recognized that the rights under such legislation is not qualified by the NAFTA or applicable arbitral rules.

Paragraph 50 ensures that a refusal to disclose information based on a privilege, ground for an exemption or nondisclosure or a "public interest immunity" arising at common law or under national or provincial legislation is not inconsistent with the confidentiality order.

The Claimant's reasons for opposing the inclusion of the expression "public interest immunity" are unclear. However, as a state party to this arbitration, Canada cannot be forced to disclose information where such disclosure could damage the public interest.

In fact, all three paragraphs that I mentioned are standard clauses in Canada's confidentiality orders and NAFTA proceedings. And we have many examples, including the Mesa and Windstream tribunals. These are available at Tabs 28 and 29 of your materials.

Fourth, an important aspect of Canada's proposed confidentiality order is to put in place reasonable timelines for making confidentiality designations and submitting any

disputes to the Tribunal so that they can be resolved quickly.

Restricted access disputes may be submitted no later than three weeks; whereas confidential information designation disputes may be submitted to this Tribunal no later than 35 days. As mentioned in our letter on the CO, these timelines are not only achievable, but necessary. They are also generous by comparison.

This process ensures the individuals involved in the preparation of arguments, such as clients and provincial representatives have access to documents quickly, and that procedural efficiency is maintained.

As regards resolving disputes relating to designations, the Claimant proposes no deadlines for submitting disputed restricted access and confidential information designations to the Tribunal.

Canada has significant interest, as Ms. Kam pointed out, in the transparency of these proceedings and cannot agree to an indefinite

deadline to finalizing designations. Accepting the Claimant's proposal to have -- would have the effect of negating transparency altogether.

Fifth, and finally, in our letter on the GDPR, which is set out at Tab 21, we detail our reasons why it is unnecessary and inappropriate to include provisions concerning the GDPR in the confidentiality order or for the parties to enter into a data protection protocol.

Quite simply, the European Union General Data Protection Regulation has no place in a Northern American Chapter Eleven arbitration's confidentiality order.

We're happy to answer any questions.

ARBITRATOR BULL: Thank you.

Claimants, please.

MR. APPLETON: Thank you very much Mr. Bull. A few submissions on this, as you could imagine.

First, let's try to talk about the terms of the confidentiality agreement that don't

deal with data privacy, then we'll address the issues that do.

With respect to the issues about the confidentiality agreement, we are deeply concerned about the process that is being proposed in this order and that Canada is basically suggesting that we follow a process that didn't work in the past and that we provided specific ways of making a process that would work better.

So to those ends, for example, we have identified there are problems with the periods with the process of redaction in the periods of the redaction. As we have already seen from the issue with respect to the notice of arbitration, we're 99.99 percent that the notice has been made public and Canada wants to fight about four words, which are really meaningless in the big picture of all of this and waste time and resources. That is exactly the situation that we found ourselves in with respect to Mesa.

And then to find out that Canada

takes the position that they have an obligation. They said it again, Ms. Di Pierdomenico said today, "We have this obligation to be able to make all this information public that is nonconfidential." And yet, none of that information that was nonconfidential was made public or made available.

It is exactly the type of fundamental problem, do what we say, not what we do. And we're seeing that again and again and again in this order.

And this Tribunal should not make an order that's ineffective, it should not make an order that treats the parties unduly, and it should deal with the concept of proportionality when we look at things. There should not be burdens put in for things that will never go out. If that information is going to be important, it has to be made public. And if wasn't in important, then they're not obviously following that provision, which is, in fact, what we say is, in fact, the case.

Now, NAFTA Article 1129 -- well, actually we'll deal with that separately.

With respect to the issue here about data privacy. Data privacy is just a fact. We didn't choose to have to deal with data privacy, data privacy chose to deal with all of us. We fundamentally are -- you know, at the end of the day, we expect that the Tribunal will address the issue because it's an issue to be addressed.

And so we have given a process that will follow that, that will allow it to work. And one of the most important issues there is to deal with data minimization. To only make sure the data that needs to be made public is made public and the data that needs to be made available is made available. These are the fundamental principles followed across the world with respect to data privacy.

And so, you know, we think that that would be the simplest, most straightforward way. And so when we looked at the definitions,

we've added data privacy in, because otherwise it wouldn't be there.

We also note that Canada's laws with respect to -- with respect to the protection of information have been considered by other NAFTA tribunals and are very unusual.

Canada has laws that they have attempted to apply, and that tribunals have rejected, that allow any document not to be produced and not even to be disclosed.

Canada, if it applies under the Evidence Act, a clerk -- the most senior official of the government may sign a letter, the letter does not disclose whether the document exists or does not exist, it simply makes it impossible for a court to be able get that information. That is why when we talk about the words that are here, we're so careful about these words, the provisions of Canadian law are unusual, they are unlike other provisions. And other tribunals have ruled that those were violations of fundamental due process and equality to the

parties as respected by NAFTA Article 1115 and Article 15 of the UNCITRAL arbitration rules.

That's why we're so careful. We're careful because we know that Canada has attempted in the past to suppress relevant and material information so the tribunal could not see it. And that is very problematic. It's also very unfair.

And, therefore, we need to have a process that respects the types of privileges and issues that are there but, yet, also ensures that that process is not abused. And that is our concern.

Our concern is not an unfounded concern, because we've had cases where this has been attempted in the past. It is a founded concern, and that's why we bring it to the Tribunal's attention and ask that this Tribunal look at it.

Now, we have provided provisions inside the orders so that would specifically address concerns. And we think if you were to

follow those provisions with respect to personal data, with respect to allowing it to be covered by the definition of confidential information, and to follow the process that we have set out in here that we think we could accommodate pretty well all of the main issues. There would be a need for a small data protocol. That protocol would deal with issues that would address if you had a breach of security, how you would store data and how you would destroy it.

And these are all processes that international arbitration bodies, like ICA, and the IBA are very focused on right now. They are issues that do not exempt this Tribunal because of their connection with the PCA. I wish it did, but it doesn't.

And when we have this provision about material scope, as we've pointed out, material scope is just like the provisions that we had in the NAFTA that say if it's about national security or about criminal law, those powers are outside the scope of the GDPR, but not

other items, they're elements of union law.

We've taken this very seriously because if we didn't have to go here, we wouldn't want to go here. This is not our issue. We're -- we're simply covered by this just like everybody else.

It's like the law governing maximum speeds on the highway or public safety when I go through the airport. It's just a regulatory provision that we all need to deal with. And there's a way to deal with it. And, here, we're trying to work our way through.

When we filed this case in 2017, the GDPR didn't apply. We had no concept that the GDPR was going to apply. And it may very well be that Canada, because of its establishments and operations in Europe may already be covered on its own under the GDPR. Well, perhaps it's not, we don't know, we've asked them some questions that would assist us to be able to get that information.

But given the fact that we have to deal with this in some way, we just say, "Let's get

on with this practically." But what's not practical is to so put our heads in the sand and do an ostrich. Canada just says no. I call that hopium. That is not the approach for a sophisticated international tribunal governing these types of very important issues.

We just need to get on with what we need to do. And in that respect, we have tried to find something that's practical, that's simple, that minimizes what needs to be produced. That's the purpose for dealing with that, to be able to focus the attention. And we do not want to have a process that is going to be prone for abuse.

We'd like to also point out, because Canada has now raised this twice, but once by Ms. Kam, also by Ms. Di Pierdomenico, that the concept and the problems in the Mesa case arose because of some failure on the part of the claimant in Mesa.

The 1782 information that arose in that case came before there was a confidentiality order, before the tribunal was making orders and

dealing with these issues, there was no tribunal. So if -- these things came before there was a process. In this case, once we would have a tribunal, we would have a process that would help regularize and streamline those types of issues.

The big problem that we had in that case were provisions of stipulated orders and other court orders that didn't align. And the tribunal had the choice of modifying the order to deal with how third-party information was going to come in.

And one of the requirements was that you had to know directly that it had been maintained as confidential along the way and that you knew the basis for the confidentiality rather than information that was provided to you that was confidential under the terms of the order.

And, of course, Mesa couldn't do that because they didn't have the information. And Canada again and again and again pushed that issue. But under the terms of the order, the Claimant could not oppose that because we were not allowed to make that information public. We were allowed

to have it ruled against us, but we couldn't actually take steps that would take that confidential information and make it public.

And again and again and again, Canada pushed that to declassify that, to have it redacted, to make it all in. And we thought, okay. Well, it was very unfortunate we did that, we thought it would be for the public good, for the public purpose, for transparency. And then we discover that it's never been made public and that they will not provide it, even though I've heard again and again and again today that this is, according to Canada, the type of information that they say in this case and they say in general should be public and should be available. We just can't understand what they say and what they do, two different stories.

And we're asking the tribunal not to create a dysfunctional order that's going to make the Tribunal have to hear motion after motion after motion, instead to have a process that from the get-go is going to be nice and clean, very easy,

very efficient, because the -- the investor in this case wants to have its case heard effectively and quickly. We don't want to waste effort and time. And that's what we're seeking.

So I think we're going to close on that unless there are specific questions how the Tribunal would like to go through this. We've simply tried to find a practical solution that would try to accommodate what we see are some particular issues here and to try to move this forward.

And that's our approach. Our approach is simply to try to find a way that's going to hit best practices. Many tribunals are starting to think about this. This is now starting because of the excellent work done by ICA. And ICA and the IBA, and the Bar in the UK, have done what they can to try to exempt to themselves.

The data regulators in the UK have made it very clear that they will not exempt arbitrators and persons in arbitration, that that's a problem. And we simply want to find a way to get

around that problem. And that's the process that we have suggested today.

ARBITRATOR BULL: Thank you, Mr. Appleton.

Ms. Di Pierdomenico, you would like to -- you have five minutes to respond, please.

MS. DI PIERDOMENICO: Thank you.

Now, starting right out of the gate on this issue of redactions. Canada's philosophy is quite simple: One arbitration, one set of rules. All we are asking is that we are guided by the exact same set of rules on both sides of table.

If we take on the Claimant's suggestion to allow outside courts to make determinations, they will make those court orders without taking Canada's interest into account. And that is patently obvious with some of the court orders that came out of the court, which is why Canada had to go back to the tribunal again and again and again to enforce the simple rule of one arbitration, one set of confidentiality rules

that apply equally to both parties.

If we want the parties to be treated equally in these proceedings, we have to ensure that the confidentiality rules that apply equally.

On the issue of data privacy and data minimization, the Claimant has basically stated that the only way to protect data privacy in these proceedings is to take the extraordinary step -- and I can't emphasize this enough of -- of incorporating an EU domestic law and have it apply generally in these proceedings.

This is an astounding result for the reasons set out in our paper that we sent, I believe, June 12th. You know, we do not believe that the EU GDPR generally applies in these proceedings for those reasons. This is an arbitration under the Northern American Free Trade Agreement. The rules that apply are the UNCITRAL rules. It is not subject matter that falls generally under EU law.

Moreover, we have set out that

Canada's Acts according to, you know, what we intend on doing in these proceedings would not fall under the territoriality scope provision of that -- of that regulation.

While there might be extra territorial elements to the EU GDPR, and this, I think we can all agree to since it applies to companies processing personal data outside of the EU, regardless of the company's location, you must still perform those necessary acts which are set out in the EU GDPR in order to bring yourself into the scope of the legislation. We're simply not doing that here, so why would we agree to generally applicable rules? It's just -- it's such a bizarre result.

One of the points that the Claimant had fleshed out in his summary of points was that, you know, everybody is subject to rules. If Claimant performed an assault, he would still be subject to the domestic rules of assault. We agree. Everybody has to follow their own rules, but we're -- what we're saying is you don't

incorporate them if one person is subject to domestic laws into a generally applicable agreement. No, you just act yourself accordingly.

It is for each arbitral participant to determine what their liabilities are and to act accordingly. To make this set of rules generally applicable where they otherwise would not apply is not something that we can agree to.

On the issue of the cabinet confidence, Claimants suggest there is an unusual practice in Canada about cabinet confidence -- failure to disclose cabinet confidence. Well, I -- I would just like to say that it is not an unusual practice to not disclose cabinet confidence, that this is a generally recognized practice. And this is not something that goes beyond the IBA rules for the taking the evidence and, therefore, we do not see the point of this asked for by the Claimant.

Now, on the issue of privacy itself, I would just like to say that Canada

takes protection of private information very seriously and that we already have provision in the confidentiality order for those things.

If you look to paragraph 1(b)(iv) of the definition of confidential information, which again is at Tab 2. It says, "Information otherwise protected from disclosure under applicable domestic law of the disputing state party." For us, we would look at the Access to Information Act, which says that, "The head of a government institution shall" -- there is no discretion here -- "shall refuse to disclose any record that contains personal information as defined in Sections 3 -- Section 3 of the Privacy Act."

Personal information under the Privacy Act for Canada is a nine-paragraph definition under the Privacy Act. There is substantial overlap with what is already provided for under the EU GDPR. I just don't understand what the problem is here.

And that concludes my remarks.

ARBITRATOR BULL: Thank you.

Mr. Appleton, you five minute to respond if you wish.

MR. APPLETON: Thank you, Mr. President. We have some very brief remarks.

First on the issue about redaction. Canada completely ignores the fact that the process that would be involved in would be a process where the Tribunal controls. The Tribunal would agree and supervise the process where there would be recourse to going to local courts. As a result of that, Canada would know, Canada would be able to participate.

Furthermore, Canada may on its own bring actions to the local courts because of the widespread destruction of evidence that's taken place in Ontario of the relevant information as well.

So the fact is that's going to be governed by the Tribunal. There's not going to a process that's outside the Tribunal. And outside the knowledge of Canada. That was the case in

Mesa, because when the 1782 material was obtained, there was no tribunal in place. It was a different process and a different time.

So that does not work. The Tribunal will supervise this process and will be involved in it. None of those comments are -- are -- are relevant to the issue that we go on.

With respect to the issue of cabinet confidence. Canada has not told you that the Evidence Act goes far beyond cabinet confidences. Cabinet confidences is not our issue. The Evidence Act applies to anything that the clerk of the Privy Council so wishes to apply to, anything at any time in any way.

And that is why there was a decision of a NAFTA tribunal said that was grossly unfair. A former member of the House of Lords made the -- was the president of that tribunal.

These were not people who didn't know about law, they knew very much about law, and very much about unfair process. And

that's -- that's the problem with this. That's why we raised concerns and that's why we want this Tribunal to know that we can't just follow that.

With respect to the Access of Information Act, well, a government -- head of a government, sure, she makes the decision, but then we have the case of Appleton versus Privy Council. And in Appleton versus Privy Council, the head of the government institution, decided to release very sensitive information about arbitrators in the case. And in this case, there was a question as to whether or not an arbitrator had been acting appropriately and whether there was a basis for conflict in that case.

The government decided -- and that was confidential, that was not allowed to be out. The government decided in an unrelated Access to Information request to act to allow that information to be released because they're allowed under their act, and their courts permitted, any information to be released in

connection to an Access of Information request.

And that -- so I was the nominal plaintiff in that. I tried to protect the information of the Tribunal because I thought it was damaging and I thought it was confidential. And Canada, successfully, was permitted to put all that information out. That's why the Access to Information Act is not enough.

I am personally a testament, I am personally testifying to that from direct access and directly being involved.

Finally we have the issue of data and the GDPR. Whether we like it or not, the Members of this Tribunal are covered by the GDPR. It's not because we want them to be covered, it's because they are. They're covered because of the reasons we've set out. They have joint control, they're joint processors. The GDPR rules are very significant, they definitely have extraterritorial effect, and they have very extensive fines. We don't want anybody to be subject to that.

The reason that we have these provisions are specifically because otherwise the words are only governed by Canadian law rather than the rules of the GDPR. And we don't want there to be a space between the Canadian law and the GDPR. We want to make sure that if we have a process for data protection, we follow it, it's consistent, and that, for example, Canada cannot later release information because they have that power under that case I was just telling you about to release it that would make the Tribunal get into trouble.

That's why we put those provisions in. We don't want there to be a risk that a party to this arbitration -- that's capital "P" Party -- using its own domestic law would be able to circumvent the other rule.

So if the United States gets information subject to the terms of this order -- and that will be something that we're going to talk about -- but if they were to get that, then they would not be able to use their law

separately to declassify that, because that would create some liability back to the Tribunal, which we don't want. That's why we put it in.

All we're looking for is a simple workable system. We're not doing something that's extreme. We're not doing something that's completely out there. We're simply trying to comply with a regulatory reality as practically and as simply as we can and define a confidentiality order that's workable.

The last point here is that the time to redact. We've had situations where we've had thousands -- 2,000 pages to redact in a very short period of time. And it is very, very difficult to be able to do that. That's why we've suggested that the time periods be more flexible to permit time.

This is not to delay the process, this is to allow effectively the time to get this done. We've had to stop work on everything in every other file in our office and get everybody involved to try to meet these artificially

compressed timelines.

Obviously if they're not necessary, that's fine, or if you want a process to go back to the Tribunal, we could do that, but we're trying not to bother the Tribunal on this. What we want is not to have to deal with this at all as much as possible, to have a system up front so that this can be data minimized and pseudonymise, the keywords of the GDPR, but followed by everybody in data privacy, to be able to avoid this.

Because I can't imagine a worse hearing than to sit and go through a thousand pages of data with the tribunal. That would be terrible. And I don't think that we want to do that. And countless, countless motions. We don't want to do that. We want to avoid that. That's why we're asking you to help us find a workable system that just deals with it.

We have nothing further on this unless you have questions.

ARBITRATOR BULL: Thank you.

Could I ask my co-arbitrators whether they have questions on this section of the proceedings today?

Perhaps Mr. Bishop first, any questions?

ARBITRATOR BISHOP: Yes, I have one question.

The Claimant proposes to include in the definition of confidential information that would otherwise be protected under a confidentiality agreement made by a court or a tribunal. And I wonder if the Claimants would give us a concrete example of what they have in mind.

MR. MULLINS: Mr. Bishop, so what happened, for example, in the Mesa situation, we did 1782 discovery and the challenges that the third parties who absolutely had that discovery and are not subject to the jurisdiction of the tribunal, and so what ends up happening is they want to mark their stuff confidential, which is, you know, significant, but it needs to match with

the tribunal.

And what all of this is, in our view, is that Canada does not want the Tribunal to get this information. And that doesn't seem to be fair. But we're entitled to obtain it. And we'll talk about how that will come out, but what we want is to make sure that the confidentiality system, you know, works both -- if it's obtained through a separate proceeding, it's obtained through here.

ARBITRATOR BISHOP: Thank you.

ARBITRATOR BULL: Sir Daniel, any questions from you?

ARBITRATOR BETHLEHEM: I have just one question, which follows up from the question put by Mr. Bishop. And it's really a question that's perhaps best directed to Canada, but obviously both parties can respond. It goes exactly to the same provision in the draft confidentiality order, so b(vi), "Information otherwise protected from disclosure that has been obtained under a confidential agreement or

confidentiality order made by a court or tribunal."

And to Counsel of the Respondent, I understand the submissions that you have made, but I'd like to know how you propose, or whether you propose, that the Tribunal, our tribunal, should regard as confidential information that may be subject to a confidentiality order by a court or tribunal that is made in proceedings that are unrelated to our proceedings?

Now, I understand -- just to unpack that, I understand that your submissions focus on a concern that the Claimant may seek information covered by a confidentiality agreement or a confidentiality order before the tribunal, but what happens in circumstances in which there is information that either party would like to put before this Tribunal, but that it is covered by a confidentiality agreement -- or a confidentiality order from a court or tribunal which is unrelated, but, nonetheless, is in the possession of the party?

For example, a tribunal award that

is made, would that concern be addressed by reformulation of b(vi) that it, for example, addresses a confidentiality order by a court or tribunal in proceedings that are unrelated to the present proceedings?

Thank you.

MS. DI PIERDOMENICO: Okay. Thank you.

Arbitrator Bethlehem, if I understand your question correctly, you're asking what would happen if you have already documents that are protected under a separate court proceedings, what would happen. I think in this case, as long as they were done in accordance with the law of the party, you could take that into account in terms of your own confidentiality designations, but in terms of removing that proposal from the Claimant altogether, what it establishes is that this Tribunal has the authority to determine the confidentiality designations in this proceeding, but that doesn't mean that you would ignore the court order

altogether. What it means is that you would simply take it into account when making your decisions to the extent that a conflict might arise.

As well, on the 1782 issue particularly, there is a simple solution here, and this was done in the Mesa tribunal, in that what was asked of the claimant in that case was to go back to U.S. courts because the confidentiality designations were already made in that case.

In this case we understand that Claimant has not yet made any 1782 applications, although that's yet to be confirmed explicitly by Claimant. What -- the easy solution here would be simply to let the Tribunal know that these -- that those documents are potentially documents that would be introduced in this NAFTA proceedings and that that court should explicitly allow this tribunal to determine the confidential designations in this proceedings.

It's -- it's not onerous. To the

extent that it was onerous in Mesa, those facts do not exist here. In terms of the workload for redactions, I have to admit it's not pleasant redacting documents, however, that is -- that is what we have to do, as lawyers, is redact the materials that could be potentially subject to a confidentiality agreement.

I wish I could help you with your workload, Mr. Appleton, but at the end of the day, this is something that we must do in order to ensure that the documents reflect the confidential designations properly.

And ultimately one set of rules for both parties is a fair and equivalent process. This Tribunal will take into account both of our interests in terms of determining what that set of rules are. And by abdicating that power to third parties outside of this arbitration could be potentially injurious to Canada, which is what we are posing.

MR. MULLINS: The only thing I would respond to that is it's one thing to talk about

prospective discovery that you can try to deal with the Tribunal, but I think --

MS. DI PIERDOMENICO: Excuse me. That question was directed at Canada, and we were not afforded an opportunity to respond when Arbitrator Bishop asked the Claimant a question, and so I would just want to ensure the equality of the parties in these proceedings.

ARBITRATOR BULL: I think Sir Daniel's questions has been addressed -- has been directed at both parties, so you can answer to the question. And if you could do that, I think that would be good.

MR. MULLINS: Sure. What I was -- what I understood his concern to be was if there's something else, for example an award, it's one thing to say, "Well, you know, we'll do it -- our confidentiality order now, and then you need to go and tell the court that you're going to do have a 1782," and so they've got to comply with your order.

So I think Sir Daniel's concern is

what if it's an award, that tribunal's gone. And I think that's the difference, which is that there are certain circumstances that you may have documents that have been declared confidential in other proceedings, awards, documents, that there's not an opportunity to adopt this order. And I think that's -- that's our concern.

MR. APPLETON: In fact, that was the case that Canada alluded to earlier, they said, "Oh, you could have gone back to the tribunal in Mesa and asked them, but they were functus and you can't get that information."

In fact, that's actually not correct, because factually the information wasn't disclosed until well after the tribunal was functus. And so -- but the fact is, is that that situation is a good example, it just happens to not be an applicable example for that answer that they gave.

But if you were to go -- if the tribunal is functus, it cannot give its permission. If that information is in the

possession of Canada and they're relying on it, it should be able to be produced. And it should be able to be produced in a confidential manner. And if there's information that's produced to the investor and the investor wants to make that available, it should be able to be produced in a confidential manner. But that cannot be disclosed to the public, that's the issue. That would be a serious problem.

ARBITRATOR BULL: All right. Thank you. Unless there are other questions from my co-arbitrators, I think we can move on to Agenda Item No. 5, which is on interim measures. And as the Tribunal has emphasized to the parties before the hearing, the discussion today is just limited to the issue of procedure.

All right. And I think both parties have raised issues on this, but if I can ask the Claimant to address us first on this, please.

MR. APPLETON: Mr. President, the issue for us is if, in fact, Canada is prepared to

consent to a bilateral preservation order and/or is prepared to consent to the production of the declassified information, in other words, the public information that hasn't been produced, then there'll be no need for those interim measures at all. And that would save a lot of time and effort.

I was so hoping that this might be an opportunity where the parties might be able to agree upon a bilateral preservation order. That's a very common order to have. As the Tribunal is aware, we've given those for a long time and we have not had an answer, so if that was the case, we could have a situation where it would not be necessary and that would reduce the number of interim measures motions that would have to be brought to this Tribunal.

We understand that Canada still will wish to bring other motions and we'll not address those.

ARBITRATOR BULL: Thank you.

And Respondent, again, on the interim measures issue, please.

MS. DI PIERDOMENICO: Thank you.

For the record, Canada did not ask for interim measures to be added to the agenda today, this was exclusively on behalf of the Claimant on agenda item.

In terms of our comments, we decided to relegate ourselves to the Tribunal's direction which was on the process. Canada is satisfied that the process is a -- is a good one, and we do not seek any changes to the process itself. We don't have any comments in terms of reacting to Mr. Appleton's request here. As the Tribunal has directed the parties, we are only supposed to discuss process today.

ARBITRATOR BULL: Thank you.

With that being the case, I wouldn't imagine either party needs to respond so we can --

MS. DI PIERDOMENICO: Sorry. There was one other issue.

ARBITRATOR BULL: Sure.

MS. DI PIERDOMENICO: -- just in

terms of the types of interim measures, the Tribunal did ask which interim measures the parties would introduce, and we will be asking for security for cost as well as third-party funding information.

ARBITRATOR BULL: Yes.

MS. DI PIERDOMENICO: And that's it.

ARBITRATOR BULL: Thank you.

MR. APPLETON: The Tribunal is aware, because we put it in our prehearing brief, of the interim measures that we'll be seeking. We do stress that the interim measures provisions of the NAFTA, there's a specific provision, Article 1134, it changes, it modifies and restricts what you can do with respect to an interim measure that, otherwise, would be done by Article 1126 of the UNCITRAL arbitration rules of 1976. And that we think the Tribunal needs to take that into account when it considers whether some of the measures that are going to be before it, may even be within its jurisdiction.

ARBITRATOR BULL: All right. Thank

you.

I should just pause to see if either of my co-arbitrators have any questions on interim measures. I do not.

But, Mr. Bishop, any questions?

ARBITRATOR BISHOP: No, I don't have any questions. Thank you.

ARBITRATOR BULL: And, Sir Daniel?

ARBITRATOR BETHLEHEM: Nothing from me.

ARBITRATOR BULL: Thank you.

Then let's move on to Agenda Item No. 6, attendance of non-disputing parties at future hearings. And this --

MS. DI PIERDOMENICO: Mr. President, I'm really sorry for interrupting you, but Canada had a certain expectation in terms of the process that would be followed, and I understand that you would like to maintain the agenda, which is a very viable goal, however, we had expected to be able to respond to Claimant's comments on this issue as well, in terms of as, you know, the ten minutes

versus five minutes and we were not afforded that -- the extra time. I apologize.

ARBITRATOR BULL: On the interim measures?

MS. DI PIERDOMENICO: Yes, exactly.

ARBITRATOR BULL: Well, you're absolutely right, I just did not think that there was anything that you might want to say, but that was presumptuous of me. You, of course, have that right, and the Respondent can proceed.

MS. DI PIERDOMENICO: Thank you.

It is only that the Claimant had made certain statements that we were not able to respond to that Article 1134 restricts the types of interim measures. I would just point out that this is a substantive issue and not something that we were meant to discuss today and --

MR. APPLETON: It's procedural element under the treaty.

MS. DI PIERDOMENICO: It's not a procedural element in terms of what is -- what is permitted and what is not permitted for the

Tribunal to consider. And, therefore, we take issue with your characterization that Article 1134 is something that is -- that limits the Tribunal's power with respect to interim measures. Thank you.

ARBITRATOR BULL: All right. Thank you for that.

And now finally to Agenda item No. 6. And, again, if we can ask the Claimants to address the tribunal first on that.

MR. APPLETON: I need a moment. I believe perhaps the moving party element on this is Canada, perhaps they might want to go first.

MS. KAM: Actually, I believe the Claimant had asked to add this agenda item so --

MR. APPLETON: We did, but --

MS. KAM: -- we're not going to go --

MR. APPLETON: -- you are the people who are opposing it be followed.

ARBITRATOR BULL: If I may.

The way this item arose was really about whether the U.S. would be present here today. And because of correspondence having been

exchanged, the end result was that the Tribunal made it clear that this was a closed session and the United States decided that it would not ask to attend. And that's how the issue resolved itself.

It is, to my memory, correct, that the Claimant asked for it to be added to the agenda before we reached a final landing. It may well be that both parties think that this item does not need to be dealt with, but if it does need to be dealt with, then one of -- one or the other of you needs to raise it.

Is there an issue here that needs ventilation for the Claimants?

MR. APPLETON: Yes. So I would be delighted to speak to it now that I have organized my book.

ARBITRATOR BULL: I'm grateful.

MR. APPLETON: So the issue here is with respect to the wording of Procedural Order 11.1. And the concern that we have is that 11.1 of the procedural order is not in accord with the

provisions that are in NAFTA Articles 1128 and 1129. And that this is going to be the cause of some concern. And we've adverted to this several times today in other contexts, but we think it's quite important to address specifically.

So Procedural Order 11.1 says, "The governments of Mexico and the United States may attend hearings and may make submissions to the tribunal within the meaning of Article 1128 on dates to be determined."

To the extent that the Tribunal means that they may follow Article 1128, this may be fine, but to the extent that this means that the governments of Mexico and the United States may attend all hearings, it may be somewhat beyond what's in 1128. I think it would be useful to look at 1128 and 1129 together.

1128 says, "On written notice to the disputing parties" -- that means to Canada in this case, not -- or actually no, that would also include us, disputing parties, small "P," so it's -- a party with a capital "P" is the

governments, a disputing party with a small "P" are the parties to the arbitration. The non-disputing parties with the capital "P" are the governments of the United States and Mexico. Just so we understand what's being referenced here.

"That on written notice to the disputing parties" -- which did not occur in this situation of the United States -- and their potential attendance at this hearing -- "a party" -- that is a government party -- "may make submissions to a tribunal on the question of interpretation of this agreement."

So, first of all, Procedural Order 11.1 doesn't limit what the purpose and the extent of what may -- what the submissions are. Now, to the extent that I read submission to the Tribunal within the meaning of Article 1128, I'm not sure that that also means it may attend hearings within the meaning of Article 1128. We think that that's -- could be fixed or, in fact, doesn't need to be there because Article 1128

actually answers all of this, and then it would be unnecessary to have this provision.

Our bigger concern is about 1129. 1129.1 says, "A Party" -- capital P -- "shall be entitled to receive from the disputing party" -- in this case Canada -- "at the cost of the requesting party a copy of the evidence that's been tendered and the written argument of disputing parties."

So that's the process by which the non-disputing party is entitled to obtain information in this arbitration. And they are limited to evidence or to written argument, which is basically pretty well everything, and that includes the confidential material.

In order to protect the confidentiality, the drafters of the NAFTA very thoughtfully enclosed Article 1129(2), "A party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing party."

So that means that the

confidentiality order made by this Tribunal governs a disputing party receiving information pursuant to Article 1129(1). And that's your only authority as a tribunal to govern their conduct in receipt of that evidence.

Now, the words that we certainly have in Procedural Order 11.1, which were, I believe, proposed by Canada, is that, "The party shall be entitled to receive a copy of the confidential versions of evidence and submissions referred to in Article 1129."

Well, all 1129 refers to is evidence and submissions, so -- but it doesn't say anything more. But it doesn't say that they're required to follow the confidentiality provisions. And there's no power, in our view, on this Tribunal except through 1129, because they're non-parties so it has to be by way of the treaty, which is something that they've agreed to and consented to, and that they -- since they have not received the evidence pursuant to Article 1129, in the process set out in 1129,

they no longer have to follow confidentiality.

And we find that very problematic. And so either we would suggest that we -- we think judicial economy would tell us there's no reason to have this at all, that this shouldn't be there, or you could follow word for word what's in the NAFTA, in Article 1128 and 1129, that would be alright, but we're worried about the wording right now.

And we're further concerned because we believe that data privacy rights apply here. And we believe that they create liability on the Tribunal. And we don't want there to be any liability on the Tribunal because of this dissemination of information.

And it's needless. It doesn't need -- there doesn't need to be any space between 1129 and what's in your order and, therefore, we would think that would be a useful thing.

Now, Canada should have told you that when they put that in. We think this is

actually an attempt to slightly broaden what was in the treaty, but the fact of the matter is we think it's very important that the Tribunal follow these provisions specifically because it has very limited authority when it comes to governing the acts of non-parties to this arbitration.

And since the non-disputing parties, that is the parties to the treaty, who are not disputing parties, specifically agreed to a process, we think that should be respected and that should be followed. And we would like that to be the situation.

So that's our submission with respect to this issue.

ARBITRATOR BULL: Mr. Appleton, just so that I understand what you're saying, you would be content if 11.1 was removed, because then 1128 and 1129 would just apply because they apply?

MR. APPLETON: Correct.

ARBITRATOR BULL: I see.

MR. APPLETON: They apply, therefore,

you don't need to go there.

ARBITRATOR BULL: I understand what you're saying. Thank you.

And now for the Respondent, please.

MS. KAM: Thank you, Mr. President. So I will try to be brief, this is the last issue on today's agenda.

But Canada's view is that paragraph 11.1 in Procedural Order 1 does not go beyond the scope of Article 1128 and 1129. Regarding access to documents, we disagree that it goes beyond the scope of 1129.

Paragraph 11.1 provides that Mexico and the United States shall be entitled to receive a copy of confidential versions of evidence and submissions. And this is consistent with Article 1129, which permits the non-disputing parties to obtain confidential information, subject to the condition in paragraph 2 that it shall treat the information as if it were a disputing party.

We agree that the authority for

non-disputing parties being required to have the same access to evidence and written submissions as if it were the Respondent party is found in the NAFTA. Given that -- it is clear from Article 1129(2), it's unnecessary to repeat this language in the CO, which only binds the disputing parties in this arbitration as proposed by the Claimant in the draft CO.

Regarding the non-disputing NAFTA parties' attendance at future hearings, Article -- paragraph 11.1 of Procedural Order 1 provides that the governments of Mexico and the United States may attend hearings and make submissions to the tribunal within the meaning of Article 1128. Similar language is in paragraph 49 of the draft CO clarifying that the NAFTA non-disputing parties can be present in the hearing room including with portions of the hearing held in camera.

In our view, NAFTA Article 1128 recognizes that the non-disputing NAFTA parties may make submissions to the tribunal on a

question of the interpretation of the agreement. It does not specify how they may make that -- those submissions. And it follows that they should be permitted to attend hearings in person.

And I would note that representatives of Mexico and the United States have routinely attended hearings in Canada's past NAFTA Chapter Eleven cases, including most recently in Bilcon, Mesa, Eli Lilly, Lone Pine, and Mercer.

From an institutional perspective, I would also like to emphasize that the attendance of non-disputing parties is important to enable them to obtain evidence provided at hearings and upon notice make oral submissions to the tribunal on the question -- on questions of the agreement.

To the extent that the Claimant argues that there is a need to impose scheduling requirements on the non-disputing parties, we would also note that the procedural calendar and Procedure Order 1, which we understand the

Tribunal to have confirmed already, already clearly establishes deadlines for their submissions. And this provides sufficient advance notice and procedural fairness to both disputing parties.

And so with that, we confirm that our view is that the current language of paragraph 11.1 of draft PO 1 is in accordance with Articles 1128 and 1129. And should the Tribunal wish to contact the governments of the United States and Mexico for their views directly as the non-disputing parties in this dispute, we provided the PCA with their contact information.

ARBITRATOR BULL: Thank you.

For the Claimants, any response you wish to make?

MR. APPLETON: None.

ARBITRATOR BULL: And I should just check, the Respondent. Obviously would have none.

MS. KAM: Nothing to respond to.

ARBITRATOR BULL: Thank you.

Good. Would my co-arbitrators have

any questions on this issue, Mr. Bishop first?

ARBITRATOR BISHOP: No, no questions.

ARBITRATOR BULL: Thank you.

And Sir Daniel?

ARBITRATOR BETHLEHEM: Nothing from me.

ARBITRATOR BULL: Thank you.

That takes us to the end of the agenda, but as I mentioned at the beginning of today's session, I did want to ask everyone to spend a bit of time looking at the draft procedural calendar, that's attached to draft PO No. 1. And in particular this isn't a process where we want to hear any submissions about changing the timelines. Forgive me for being so direct. But there is an issue of when our first hearing might be after today and whether some attempts should be made to figure out some dates on which we might aim towards.

MR. APPLETON: Mr. President, I need a moment. I prepared something, I need to find it in the materials.

ARBITRATOR BULL: Sure.

It relates to what I'm raising?

MR. APPLETON: Yes, entirely on what you raised.

MR. MULLINS: We filled out --

MR. APPLETON: I've got the dates, I organized that.

ARBITRATOR BULL: Thank you.

MR. APPLETON: But I'm afraid I can't help you with that if I don't find it.

ARBITRATOR BULL: While Mr. Appleton is looking for that material, my attention is focused on the first page of the draft procedural calendar. And there is an item that reads, "Hearing on issue of -- issues of bifurcation/preliminary motions." And the date is -- there's no information in the date column because we haven't discussed that. So that is what I thought we might spend a few minutes on.

By my calculations, the response by disputing parties to submissions and questions of law from the non-disputing party related to the

interpretation of the treaty on bifurcation, which is the item just before the hearing, would come in at 2nd December 2019.

MR. APPLETON: I'm sorry. Could you just help me with that again?

ARBITRATOR BULL: Sure. I'm on the first page.

MR. APPLETON: Yes.

ARBITRATOR BULL: And the first table on the first page, the third last item, you'll see "response by disputing parties," and so on.

MR. APPLETON: Yes. And the date you have for that?

ARBITRATOR BULL: The date I have is 2nd December 2019.

MR. APPLETON: Yes, that's the date we have as well.

ARBITRATOR BULL: Great.

So we have been -- the next item would be the hearing itself. And I'm wondering whether the parties have some -- any views about when the hearing should take place and whether we

might profitably spend a few minutes setting aside dates so that the process can move forward smoothly.

I would imagine that we would need at least a couple of weeks to digest the material that comes in on the 2nd of December, which brings us perilously close to Christmas and then to the New Year. And I wonder whether the parties think that a January hearing would be appropriate. I'm just raising that for discussion.

MR. APPLETON: We would think that late --

MS. THAM: Sir, the Claimant, if you could please use the mic. Thank you.

MR. APPLETON: Sure.

A late January hearing would be good. With respect to that, we do point out that if you come to this way, there will be snow. And that I would ask that you not do it on a Monday, which currently we have a number of dates on Mondays, as I'm unavailable on the Mondays in

that month.

ARBITRATOR BULL: I see.

MR. APPLETON: I'm teaching in New York, unless you'd like to do this in New York. But I would not like to raise that. That is not a formal proposal here, please.

ARBITRATOR BULL: And what does the Respondent think about this issue?

MS. DI PIERDOMENICO: This may be one of the issues on which myself and Mr. Appleton might agree, but we are also thinking end of January.

ARBITRATOR BULL: Okay. From a quick check amongst the tribunal members this morning, there appears to be some availability in the later part of January. Let me just make sure -- if I'm not wrong, the dates were 13th through -- let me make sure.

Sir Daniel, you had sent me those dates and I'm just trying to look for your email again. Was it 13th through the end of the month?

ARBITRATOR BETHLEHEM: I'm happy to

confirm that I would have availability in the periods 13th to the 31st. Mr. Appleton had suggested that he wouldn't like Mondays, I would -- I would, as I have said, suggest not Fridays, but there may be a question as to how long the parties think would be required for a hearing.

MR. APPLETON: We have no information because we still don't even have a statement of defense.

ARBITRATOR BULL: All right. And, Mr. Bishop, you're available in January as well, correct?

ARBITRATOR BISHOP: I believe so. I don't have my calendar in front of me, but I believe I'm generally available in January.

ARBITRATOR BULL: Okay. So we'll come back to the issue of how many days we might have to set aside.

MR. MULLINS: I think it's going to depend on the number of motions that are filed. I think we're probably safer to reserve a day and a half or two days just in case, you know, given how

long it's taking to get through this agenda, if we have to deal with substantive motions, it might take a little while.

ARBITRATOR BULL: Right. So what does Respondent think about number of days?

I know it's early in terms of making a precise estimate, but it is prudent for us to set aside a certain number of days.

MS. DI PIERDOMENICO: Well, this is what we're measuring here, do we err on the side of prudence and, you know, we are thinking one should be sufficient, but should we try to maybe ensure that two days availability until we have a better picture of what's ahead of us?

ARBITRATOR BULL: Right. And okay, so that's helpful. I think one or two days seems to be both parties' thoughts to being on the safer side. And we're talking about the period 13th January to the end of the month, with the preference on the Claimant's side to avoid Mondays.

Can I take it, though, that within those parameters, parties will make themselves

available for a hearing in January?

Okay. Then -- I see heads nodding and I'm grateful for that. So perhaps what we can do is -- just mindful that Mr. Bishop doesn't have his diary in front of him, I'm just wondering shall we --

MS. DI PIERDOMENICO: Mr. President, I do have one caveat.

ARBITRATOR BULL: Yes, please.

MS. DI PIERDOMENICO: Sometimes we, on this side, are subject to negotiations that can't be moved and things like that, provided that we try to the best of our abilities to move things around, I just wanted to ensure that you'll take that into account when setting the date a little bit closer. Some times these things are out of our hands, and so -- in other words, don't be annoyed if Canada comes back with, we may not be able, you know, from the 13th to the 14th, and perhaps maybe a little bit. But that window, I think, we will endeavor to ensure we keep it as clear as possible.

MR. APPLETON: Mr. President, we did

ask that everyone come with their schedules for today.

MS. DI PIERDOMENICO: Mr. Appleton, these things aren't determined months in advance, sometimes -- sometimes they're --

MR. APPLETON: But I'm afraid that we do need to determine them and that this Tribunal should be able to set a date just like any other tribunal. And that's the way that this works. And you have a massive legal team here.

MS. DI PIERDOMENICO: Okay. It's --

ARBITRATOR BULL: Could I have the floor for a minute?

Ms. Di Pierdomenico, would it help to give Canada some time to check -- I don't mean a few minutes or hours, I mean a couple of days to check on this, or is this something -- or are you saying that this is something you might not know until closer to the date?

MS. DI PIERDOMENICO: That is what I was thinking, it was something that we might not know until closer to the dates. Sometimes these

negotiation schedules come out a little bit later, but I don't mean to make an issue out of it, it was just something that I thought I would mention to the President as a potential issue.

ARBITRATOR BULL: Okay. I understand that better now.

Then my preference would be to try and fix a two-day hearing now and for us all to work towards that. And since we -- we have that date of the 13th mentioned by Sir Daniel, and Mondays not being available, I wonder whether we -- and I'm asking everyone, parties as well as my co-arbitrators, whether we might set the hearing for the 14th and 15th of January 2020.

Where the hearing will be we will, of course, let you know that in due course, but it would be prudent to set aside those dates.

MR. APPLETON: I do point out that the hearing does not need to take place at the place of arbitration, it could be any venue. And I would be delighted if you did it next day, we could go to Singapore, but I could not make it to

Singapore on 14th if I have to teach on the 13th, but, otherwise, I would put it to Canada, we would be delighted to go there.

ARBITRATOR BULL: Let's assume it's either Toronto or Miami or Washington, D.C. Adding Singapore to the mix now, I think may be more confusing to everyone than is necessary.

Mr. Bishop, you needed to check your diary. I'm not sure whether we -- if that's possible today?

ARBITRATOR BISHOP: Yes, if you'll give me two minutes I'll run around to my office and check.

ARBITRATOR BULL: Thank you very much. Sorry to trouble you this way.

And, Sir Daniel, I assume 14th and 15th would work for you?

ARBITRATOR BETHLEHEM: The 14th and 15th will be fine for me. Thank you very much.

ARBITRATOR BULL: Thank you.

I assume Canada will be fine with that?

MS. DI PIERDOMENICO: Yes, that should be fine.

ARBITRATOR BULL: Yes.

And Claimant has already said that's fine. Good. Let's just wait for Mr. Bishop. And we will hopefully fix these dates.

While we're waiting for Mr. Bishop, can I ask the parties for your comments on this; I had thought that it would not profitable to try and fix other dates because bifurcation would determine one procedure or not. So I was not going to suggest that we fix other hearing dates, but if you have a different view about that, I'm happy to hear you.

MR. APPLETON: I'm interested if the Tribunal has a view of how long they may think it may take them to determine this question so we could then roughly flesh some dates out.

Of course, it's difficult because we don't have the material, we don't have the statement of defense, we don't have the motions,

so I appreciate that, but we're making you have a little bit of our problem as we try to deal with this.

But I'm certain that this is going to be a two-day hearing based on the number of motions that are going to be heard. So it would seem to me that it would have to take some time for the Tribunal to form a view.

ARBITRATOR BULL: Any comments from the Respondent?

ARBITRATOR BISHOP: Mr. President, those dates work for me.

ARBITRATOR BULL: Oh, that's excellent. Thank you very much for checking.

MS. DI PIERDOMENICO: Just a point of clarification based on what Mr. Appleton said. We were under the assumption this was a hearing on our request for bifurcation and not on interim measures or additional things. And so that clarification would be helpful.

ARBITRATOR BULL: Well, I had understood it as -- to be a hearing on the issue of

bifurcation as well as preliminary motions. So the interim measures, applications, if they are made, would be -- would be dealt with on those two days as well.

MR. MULLINS: We understood that to include motions that -- for example, you said you wanted security for cost, that that all be heard at the same time. That's my understanding. That's why I said two days because I thought those were all included. Not that I'm rushing that motion be heard.

MR. APPLETON: It would be very inefficient to have another hearing.

ARBITRATOR BETHLEHEM: Mr. President, may I just raise a point?

And that is this, I think we need -- we as the tribunal, we need to wait and see what the issues of interim relief are. I mean, there are certain legal criteria that arise with respect to a request for interim relief, including urgency and the like. And that may not be appropriate for a bifurcation hearing.

And it may also be that the Tribunal takes a view, once we see the applications of interim relief, that we conclude that these can be dealt with on the papers. So shouldn't we, perhaps -- perhaps this is a question for the parties, treat the 14th and the 15th as proceedings relating to the bifurcation request, and we will deal with interim relief when we get those applications. Or perhaps this is a matter simply for the Tribunal to deliberate on privately.

MR. MULLINS: If I could respond to that on behalf of the Claimant.

ARBITRATOR BULL: Sure.

MR. MULLINS: In addition to bifurcation, there's very serious motions that are being sought here. I think if you're asking for security of cost, they're asking for, you know, issues about, whatever, those motions, we're going to want to be heard certainly. And we have -- it takes a lot of people to schedule around for that.

I think if there's an urgent

motion, then that's obviously a different category, but I think if there's a motion that we're talking about, that, you know, we should schedule that hearing, and it should all be addressed, and we should anticipate that we'll, you know, be briefing on that, there will be motion, response, reply, whatever. And that we have a chance to hear it.

But I am concerned, depending on the kind of the nature that they're talking about, that we would like to be heard on these motions and have a chance -- I think this is -- this hearing, for example, has been very helpful to us because we haven't been able to answer questions that the tribunal has had very efficiently. And so I think we would probably want to be able to do that, have a hearing on the kind of motions that are being sought, and even motions on our side as well, that we've asked for.

ARBITRATOR BULL: Any comments from the Respondent?

ARBITRATOR BISHOP: May I add something, Mr. President?

MS. DI PIERDOMENICO: I think given that I've read this schedule initially, I had not expected that we would need a hearing for these types of motions. I mean, we were expecting only a hearing for the request for bifurcation having settled the question of motions through paper exchanges.

ARBITRATOR BULL: Right. Why don't we do this; I think we should set aside those two days for a hearing. Once we need to use that time for, I think the Tribunal can decide when we have seen the papers and if -- there may well be some things that can be dealt with on the papers and they may well be -- it may well be that the Tribunal feels that it needs to hear from parties on all the motions, but at least we'll have these two days set aside.

And the Tribunal will decide what is a sensible use of that time. And what's most important is that we take it as fixed that those

two days will be reserved for hearing in January. Good.

Then unless there are other comments or questions from my co-arbitrators, I was going to close the proceedings, but I should check with them first whether there's anything else they would like to raise.

Mr. Bishop?

ARBITRATOR BISHOP: I just have one question. The idea of having a motion -- excuse me, I'm getting an echo in here.

The idea of having the hearing on the bifurcation motion in January, I wonder if that isn't too long away. Isn't there a possibility that we can get to a point where we can have a hearing on the bifurcation earlier than January so that we can move the case forward?

ARBITRATOR BULL: So if we were to consider earlier than January, I guess that would be December, and as mentioned the last submission comes in on the 2nd of December 2019, I think

parties would need a week or two to look at the material and be ready for a hearing, so we would probably be looking at from 16th December onwards. And I'm not sure what parties think about that.

MR. APPLETON: Mr. President, you might be able to trim some time around the Respondent's -- the non-disputing parties' submissions.

As I see it right now, the last key pleading from the disputing parties is on October the 16th. That would be Claimant's comments on Respondent's request. I worked out the dates.

ARBITRATOR BULL: I'm with you.

MR. APPLETON: And so it would seem to me that if the non-disputing parties were to make their submissions perhaps a little bit quicker and then we didn't give an entire month to respond to the submissions, that that would actually give us more time to be able to hold something before the end of the year. And so what we might do is move the non-disputing parties' submissions from October 16th to the -- up by one week and then put

the responses in in the middle of November.

ARBITRATOR BULL: Sorry. I've lost you there.

MR. APPLETON: Okay. Let's just go back.

ARBITRATOR BULL: So the 16th of October would be --

MR. APPLETON: 16th of October would be the Claimant's comments.

ARBITRATOR BULL: Yes.

MR. APPLETON: Then I would suggest that maybe the 23rd would be the non-disputing parties' submissions. They're mostly going to be foreign but in advance anyway.

ARBITRATOR BULL: Sorry. So 23rd of October?

MR. APPLETON: Yes.

And then we could have the response by the disputing parties in the middle of November then. Well, let's say three weeks at the most. Okay. Now, all of a sudden we're in the middle of November.

ARBITRATOR BULL: Sir, if we could go a little slower.

MR. APPLETON: Sure. I'm sorry.

ARBITRATOR BULL: So non-disputing parties' submissions, you're suggesting would come in on the 23rd of October.

MR. APPLETON: Yes.

ARBITRATOR BULL: And then the response by disputing parties to that would come in not 75 days --

MR. APPLETON: Right. We would do November 14th, I think.

ARBITRATOR BULL: Let me just see that, November 14th.

MR. APPLETON: To make it easier for me, actually, if we could do the 15th. I try not to do things on the Monday because I'm not in my office, I'm teaching in New York.

MS. DI PIERDOMENICO: Just before we get too deep into this, there is a logic behind this procedural calendar and the logic as proposed and as -- what we assumed had been agreed long

before this day, is that the non-disputing -- capital "P" -- parties would have time to respond to these submissions adequately, and by trimming back the calendar in the way that Mr. Appleton suggests gives them a week. And as a state party, you need more than a week in terms of getting the approvals necessary and so forth.

And so these proposals were done by Canada with that logic in mind, and I just wanted to interject before changes were made without having made that consideration in terms of the reason why we proposed these dates to begin with.

MR. APPLETON: Then why don't we trim back some time before then, and then the -- I'm happy to make the parties wear more of this problem. If Canada would like the non-disputing parties to have more time, then Canada and the investor will need to have less. We can do that.

ARBITRATOR BETHLEHEM: Mr. President, may I also just interject before we get buried in trying to coordinate diaries?

Certainly I was working off the

proposed schedule that we have in front of us, it's going to be very difficult for me to find time after the 18th of November until the January dates. And I so fear that we may be, you know, dancing around here on the head of a pin of not much benefit.

I understand Mr. Bishop's inclination to move this on, and I think that's the Tribunal's inclination, but I think it's very difficult to try and do this while we're all trying to coordinate diaries in real time.

ARBITRATOR BULL: Well, thank you for raising that, because if you're not available during that period, Sir Daniel, then that makes it, I think, rather difficult. Let alone the points that have been raised about reshuffling these dates.

Mr. Bishop, any thoughts?

ARBITRATOR BISHOP: No. I have nothing further.

ARBITRATOR BULL: Sir Daniel, anything else you wanted to raise before we close

today's session?

ARBITRATOR BETHLEHEM: Nothing further from me.

ARBITRATOR BULL: And from the Claimants, anything you wanted to raise?

MR. APPLETON: Yes, Mr. President, we're just looking for a little bit of understanding about the process for the distribution of materials. This is -- at 6.7, and 6.8, it was -- we've had to look at this again because of the discussion the other day about the prehearing briefs. And if you recall originally we were told the prehearing briefs were to be -- were to follow these processes, the prehearing briefs were two pages long, and then I'm glad that what we did is we just dealt with them electronically.

The issue here is that I wonder if the tribunal could assist us with two things. First of all, in North America, we don't have A5 paper and so one of the requirements is A5. I'm trying to understand if that really is necessary or if we can take the standard size and cut that

in half rather than the A5, because otherwise it makes it exceedingly difficult.

The second thing is whether it would be possible if submissions are of a certain size to basically not have to send them -- we're not sure how long -- if I sent something next day to Singapore, it cost -- just for an envelope like this over a thousand dollars. If I send a USB, the same cost.

When I look at this, we're looking at -- but if I send it for a longer period of time, in other words, the delivery will take a number of days, it's much less. I'm trying to understand -- because there's no standard imposed here, we're trying to understand what it is that the expectation is or if we have another way to work around this.

And I don't want to spend a lot of time here, but I think what we've done in other cases is that we've had the PCA take care of locally printing materials in each spot, that saves the very extensive transportation cost, and

also is much more carbon neutral and environmentally friendly, yet, at the same time ensures the Tribunal gets their many bundles in exactly the way they like it.

And so if that would actually work, I think that might be something that might be better. On the other hand, if the Tribunal definitely wants to have the USB keys, and these other things, then we can't get out of this, we just need to figure out how much time. But it just isn't quite clear enough here. And if you could help us, we would be happy to help you.

ARBITRATOR BULL: Thank you for those comments. The Tribunal will have a quick word about this and then we'll, if necessary, provide more clarity on the issue. I understand, the point is really to make things efficient, and that's fine with -- I'm sure that's fine for the tribunal.

Any other comments from the Claimant?

MR. MULLINS: None other than we thank everybody for their time. It's been very

helpful.

ARBITRATOR BULL: Thank you.

And then does the Respondent have anything to raise?

MS. DI PIERDOMENICO: Just two small points. The first one having the PCA organize things for -- maybe we are more of the control freak side of things, but we would be -- I think we would like to prepare our own documents; however, we do take Mr. Appleton's point about the burden that this particular provision imposes. And we would be happy to provide you with our thoughts on this once we've had that opportunity to consider it a bit more.

As well on our event schedule here, we've done the math as well, but we're just a little bit different than perhaps how we calculate numbers in North America, but it would be helpful maybe if we revise the schedules and recirculate it so that everybody is working with the same dates. I don't take issue with your math, it's probably my math if I'm honest, but --

ARBITRATOR BULL: If we are off, we are not far off.

MS. DI PIERDOMENICO: No, just by a couple of --

MR. APPLETON: My math is exactly the same.

MS. DI PIERDOMENICO: Yeah, it's -- like I said, it's probably me.

MR. APPLETON: So our math is identical to the President's.

MS. DI PIERDOMENICO: But it would be perhaps --

MR. APPLETON: That's usually very universal.

MS. DI PIERDOMENICO: I take full ownership, I'm not going to lie.

ARBITRATOR BULL: No, it's a good idea just to double check so that we're all on the same page. And I think that would be fine. If there is an issue, you can raise that to the tribunal subsequently.

MS. DI PIERDOMENICO: Okay.

ARBITRATOR BULL: If there's nothing else, then thank you everyone for your assistance today, your submissions. The Tribunal will consider everything that's been said and written to us on these issues and we'll come back to the parties as soon as possible.

MR. APPLETON: Just to assist us, the dates in the procedural order speak to when the procedural order is issued, so for the parties right now, should they -- could we set the date for the filing of these interim motions -- you might be considering other issues, in other words -- or do you want us to wait until you make -- until Procedural Order 1 is issued before we start deciding when we file these interim measure motions and other matters?

ARBITRATOR BULL: Right.

MR. APPLETON: I think it would be very helpful to us if we could -- I think they're independent of your motion.

ARBITRATOR BULL: So parties should assume that the procedural calendar is in place

because we've already indicated that to the parties. And the procedural calendar starts not with the issuance of the procedural order, but with the holding of the procedure -- first procedural meeting --

MR. APPLETON: Okay.

ARBITRATOR BULL: -- being today. So 15 days from now the Respondent's statement of defense is due. And we will, of course, endeavor to issue PO No. 1 promptly. But I think that few issues that are still outstanding on PO No. 1 should not prevent parties from being able to treat the procedural calendar in the draft PO No. 1 as operational.

MR. APPLETON: Actually, that raises a point. There's something that's inconsistent in the procedural order about the statement of defense, and I just was hoping that we could get some clarity.

My understanding is that the statement of defense that's being sought is a statement of defense as set out in Article 18 of

the UNCITRAL rules, but some other words were put in to the statement of defense calendar. And the calendar says Article 18(2) says that there should be the statement of the facts supporting the claim that points to the issue and the relief remedy sought, but the tribunal said that Canada was directed to file a statement of defense which is limited to and setting forth all its jurisdictional objections.

Now, my understanding of this is because the statement of defense requires that you file all your jurisdictional objections, that's what you mean. But do you mean that you're expecting a different type of statement of defense and that there might be another statement of defense filed, or are you meaning that the statement of defense is set out in the UNCITRAL rules is simply what you're expecting?

In other words, the Article 18 ordinary, regular statement of the defense?

ARBITRATOR BULL: Let me ask first how Canada understands the obligation just so that

we --

MS. DI PIERDOMENICO: Canada understood the Tribunal's direction to be limited to jurisdictional grounds.

ARBITRATOR BULL: And that's what the wording indicates, Mr. Appleton.

MR. APPLETON: So I'm trying to understand, does the Tribunal have a view as to when it wants the rest of the statement of defense, because it's not canvassed here?

And that would be a normal part of the UNCITRAL rules to be able to be issued. I've never heard of a partial statement of defense, so I'm trying to understand what it is that this means so we can clarify and keep it on the record here.

ARBITRATOR BULL: All right. Let me -- I just want to make sure that the whole tribunal is on the same page here. And perhaps what we might do is have a quick word and then let parties know if there's any change in the wording that is necessary.

MR. APPLETON: Yes, the words of the UNCITRAL are quite clear to the extent that that's helpful to you, but we would -- it would help us very much.

MR. MULLINS: And just to add on that, if we're going to be doing preliminary motions, I think it would be helpful to know all -- their total defense and not just a partial defense.

ARBITRATOR BULL: I assure you, I understand the point.

MR. MULLINS: Thank you.

ARBITRATOR BULL: Okay. Then thank you, everybody. And the hearing is adjourned.

(Whereupon, at 1:28 p.m., the First Procedure Hearing in the above-entitled arbitration was concluded.)

CERTIFICATE OF NOTARY PUBLIC

I, FELICIA A. NEWLAND, CSR, the officer before whom the foregoing hearing was taken, do hereby certify that the witnesses whose testimony appears in the foregoing hearing was duly sworn by me; that the testimony of said witnesses was taken by me in stenotypy and thereafter reduced to typewriting under my direction; that said hearing is a true record of the testimony given by said witnesses; that I am neither counsel for, related to, nor employed by and of the parties to the action in which this hearing was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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FELICIA A. NEWLAND, CSR

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