

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

4 -between-

5 TENNANT ENERGY, LLC

6 (the "Claimant")

7 -and-

8 GOVERNMENT OF CANADA

9 (the "Respondent", and together with the Claimant,
10 the "Parties")

11 PCA CASE NO. 2018-54

12 _____
13 FIRST PROCEDURAL HEARING
14 _____

15
16 The Arbitral Tribunal:

17 Mr. Cavinder Bull SC (Presiding Arbitrator)

18 Mr. R. Doak Bishop

19 Sir Daniel Bethlehem QC

20 Registry Permanent Court of Arbitration

21 17 June 2019

22 Washington, D.C.

A P P E A R A N C E S

COUNSEL FOR THE CLAIMANT, TENNANT ENERGY, LLC:

Mr. Barry Appleton, Esquire
Appleton & Associates
International Lawyers, LP
77 Bloor Street West, Suite 1800
Toronto, ON, M5S 1M2 Canada
Tel.: +416 966 8800 Fax: +416 966 8801
E-mails:bappleton@appletonlaw.com
TennantClaimant@appletonlaw.com

-- and --

Mr. Edward Mullins, Esquire
Reed Smith, LLP
1001 Brickell Bay Drive, 9th Floor
Miami, FL 33131
Tel.: +305 747 0200 Fax: +305 747 0299
E-mail:Emullins@reedsmith.com

COUNSEL FOR RESPONDENT, THE GOVERNMENT OF CANADA:

Ms. Lori Di Pierdomenico, Senior Counsel
Ms. Susanna Kam, Counsel
Ms. Maria Cristina Harris, Counsel
Ms. Darian Bakelaar, Paralegal

1 Mr. Benjamin Tait, Paralegal Trade
2 Law Bureau (JLT)
3 Global Affairs Canada
4 125 Sussex Drive
5 Ottawa, ON, K1A 0G2 Canada
6 E-mails:Lori.DiPierdomenico@international.gc.ca
7 Susanna.Kam@international.gc.ca
8 MariaCristina.Harris@international.gc.ca
9 Darian.Bakelaar@international.gc.ca
10 Benjamin.Tait@international.gc.ca

11 RESPONDENT'S REPRESENTATIVES, MINISTRY OF ENERGY,
12 NORTHERN DEVELOPMENT AND MINES, GOVERNMENT OF
13 ONTARIO:

14 Ms. Jennifer Kacaba, Senior Counsel
15 RESPONDENT'S REPRESENTATIVES, MINISTRY OF THE
16 ATTORNEY GENERAL, GOVERNMENT OF ONTARIO:

17 Ms. Saroja Kuruganty, Counsel

18 ATTENDING REMOTELY VIA VIDEOCONFERENCE:

19 Ms. Harkamal Multani, Counsel
20 Mr. William Coutts, Senior Project Advisor
21 Ms. Aida Setrakian, Counsel
22 Mr. Andrew Christie, Counsel

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Mr. Miran Ternamian, Senior Policy Advisor

Ms. Reena Goyal, Counsel

1 P R O C E E D I N G S

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3 ARBITRATOR BULL: Okay. Let me call
4 proceedings to order. This is PCA Case No.
5 2018-54, Tennant Energy, LLC and Government of
6 Canada. My name is Cavinder Bull. I'm the
7 presiding arbitrator. Joining us by video, my
8 colleagues, Mr. Doak Bishop and Sir Daniel
9 Bethlehem. And I think parties can see both of
10 them on the screens. To my left is the tribunal
11 secretary, Ms. Christel Tham.

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

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

22 MR. PENNIE: Good morning.

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

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

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

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

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

14 And then for the Respondent,
15 please.

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

1 would also like the benefit of seeing them.

2 So I'll start with our legal team.

3 I have Maria Cristina Harris here to my right and
4 Ms. Susanna Kam. Our two paralegals at the Trade
5 Law Bureau are Darian Bakelaar, as well as
6 Mr. Ben Tait. I have as well Ms. Saroja
7 Kuruganty, she's counsel with the Ministry of the
8 Attorney General, and to her side is Ms. Jennifer
9 Kacaba, also counsel -- senior counsel.

10 ARBITRATOR BULL: All right.

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

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

21 MS. DI PIERDOMENICO: Yes.

22 I do believe that --

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

3 Do you know that?

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

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

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

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

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

20 MR. APPLETON: Yes.

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

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

3 MS. DI PIERDOMENICO: Yes.

4 ARBITRATOR BULL: Could I --

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

11 ARBITRATOR BULL: Thank you.

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

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

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

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

1 then allow everybody to see --

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

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

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

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

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

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

22 Otherwise, I would like to start

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

8 So with that said, Agenda Item No.
9 1 comes up first. And each party will have five
10 minutes to brief -- to briefly speak to their
11 case. And I think it would be appropriate to ask
12 the Claimant to go first and then for the
13 Respondent to come on after that.

14 So over to you, Claimants.

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

18 ARBITRATOR BULL: Yes.

19 MR. APPLETON: Yes.

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

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

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

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

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

1 deadline under the NAFTA, and we're told it's
2 temporal, would be June the 1st, 2014, and that
3 the first date that you could possibly know
4 information that would lead to this case, and
5 it's pleaded by the Investor in this case, would
6 be on June the 4th, 2017, with the bulk of the
7 information coming in January of 2015 -- excuse
8 me, that was June of 2014, June the 4th, and with
9 the bulk of the information coming from a release
10 from the PCA in January of 2015 and April of
11 2015.

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

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

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

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

10 ARBITRATOR BULL: Thank you,
11 Mr. Appleton.

12 Open to the Respondent.

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

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

22 But with that being said, we wanted

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

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

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

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

1 Toronto, Ontario to be the most suitable legal
2 seat.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 ARBITRATOR BULL: Thank you.

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

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

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

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

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

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

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

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

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

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

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

22 And we just heard this morning that

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

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

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

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

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

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

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

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

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

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

22 If it turns out, you know all

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

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

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

22 I just tried an international

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

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

16 ARBITRATOR BULL: Thank you,
17 Mr. Mullins.

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

20 Over to you.

21 MS. HARRIS: Thank you.

22 So just a question. I'm assuming

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

5 ARBITRATOR BULL: Yes, that's right.

6 MS. HARRIS: Okay. Thank you.

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

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

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

1 three of the factors set out in paragraphs 29 and
2 30 of the UNCITRAL trial notes on organizing
3 arbitral proceedings, which Canada has referred
4 in its written submissions and that are at Tab 9.

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

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

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

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

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

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

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

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

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

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

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

1 jurisdiction.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 If Toronto is chosen as the seat of

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

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

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

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

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

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

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

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

22 ARBITRATOR BULL: Thank you,

1 Ms. Harris.

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

4 ARBITRATOR BULL: Yes, you have five
5 minutes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 ARBITRATOR BULL: Thank you
15 Mr. Mullins.

16 Response from the Respondent,
17 Ms. Harris.

18 MS. HARRIS: Thank you.

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

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

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

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

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

22 And to answer the issue of where

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

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

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

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

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

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

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

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

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

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

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

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

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

6 So that concludes our reply.

7 ARBITRATOR BULL: Thank you,
8 Ms. Harris.

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

15 ARBITRATOR BULL: Mr. Appleton, just
16 very briefly.

17 MR. APPLETON: Very briefly.

18 ARBITRATOR BULL: Go ahead.

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

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

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

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

1 For this and for other tribunals, too.

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

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

7 ARBITRATOR BULL: Yes, certainly. Go
8 ahead.

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

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

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

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

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

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

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

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

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

22 ARBITRATOR BETHLEHEM: Thank you,

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

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

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

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

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

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

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

19 Thank you, Mr. President.

20 ARBITRATOR BULL: The Respondent,
21 please.

22 MS. HARRIS: Yes. Thank you,

1 Arbitrator Bethlehem, for your questions.

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

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

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

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

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

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

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

8 MS. KAM: It did, in the interim.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 ARBITRATOR BULL: Certainly.

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

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

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

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

5 And I'm addressing this to the
6 Respondent.

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

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

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

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

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

7 ARBITRATOR BULL: Thank you,
8 Ms. Harris.

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

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

14 ARBITRATOR BULL: Please go ahead.

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

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

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

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

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

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

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

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

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

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

1 that's all right.

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

8 ARBITRATOR BETHLEHEM: It was a --

9 MR. MULLINS: Sorry?

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

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

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

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

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

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

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

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

8 ARBITRATOR BULL: Thank you for that.

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

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

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

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

15 ARBITRATOR BULL: Right. Thank you.

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

22 I know that the Claimant's position

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

8 MR. MULLINS: Sure.

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

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

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

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

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

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

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

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

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

17 ARBITRATOR BULL: Thank you.

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

22 We should then move on to Agenda

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

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

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

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

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

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

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

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

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

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

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

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

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

1 merely recommendations. They are not binding
2 interpretations.

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

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

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

22 So it is not a binding statement.

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

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

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

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

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

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

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

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

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

11 And then we were astonished to find
12 that when we wrote to at Canada about that
13 information, that we found that none of that
14 information was made available to the public,
15 despite Canada claiming that this is binding and
16 that they have to make it available to the
17 public, none of that information was made
18 available to the public, none of that information
19 that was declassified and is not confidential
20 that be would relevant in this arbitration and to
21 the public was made public.

22 And, instead, I received a letter,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 So since we know this is now an

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

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

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

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

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

10 ARBITRATOR BULL: Thank you,
11 Mr. Appleton.

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

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

18 MS. DI PIERDOMENICO: Thank you.

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

21 MS. DI PIERDOMENICO: I appreciate
22 that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 public access to this arbitration.

2 Just briefly to respond to the
3 Claimant's arguments that it cost them an extra
4 \$500,000 in the Mesa arbitration, I will just
5 explain that these costs go back -- were a result
6 of the Claimant's actions of going outside of the
7 NAFTA arbitration to seek documents from U.S.
8 courts without the supervision of the tribunal.
9 And in doing so, they did not ensure that the
10 confidentiality orders in those domestic
11 proceedings accorded with the confidentiality
12 orders of the tribunal. And so the tribunal had
13 asked them to go back to those courts to confirm
14 that the tribunal had the authority to govern the
15 confidentiality of those documents, and that's
16 why they were required to engage in additional
17 U.S. court proceedings.

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

22 Regarding its concerns that the

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

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

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

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

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

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

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

17 The next issue that I will address
18 concerns amicus participation.

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

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

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

10 ARBITRATOR BULL: Sure.

11 Ms. Kam.

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

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

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

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

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

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

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

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

1 the current language was mistakenly made in
2 reference to the 2010 UNCITRAL rules as Article
3 17 in the 1976 UNCITRAL arbitration rules, which
4 apply in this arbitration, only refers to the
5 language of the proceedings. If that's the case,
6 then this error could easily be corrected if you
7 refer to Article 15 of the 1976 arbitration
8 rules, which is the equivalent provision.

9 On the issue of access to
10 documents, Canada's position is that amicus
11 should only be permitted access to public
12 information. This approach is reflected in
13 Canada's proposed language at paragraphs 40 and
14 41 of the draft CO at Tab 2 of your binder.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 ARBITRATOR BULL: Thank you, Ms. Kam.

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

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

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

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

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

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

22 And we are saying we should be

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

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

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

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

1 received, is that there was, I believe, a Footnote
2 10 that made reference to that one particular
3 letter?

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

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

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

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

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

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

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

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

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

16 MS. THAM: I did not prepare that.

17 MR. APPLETON: I see.

18 MS. THAM: I've never seen that.

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

22 MS. THAM: I did not prepare that

1 document.

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

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

7 MR. APPLETON: Yes.

8 ARBITRATOR BULL: That might be
9 helpful.

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

12 ARBITRATOR BULL: Right.

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

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

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

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

9 MR. APPLETON: Yes.

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

12 MR. APPLETON: Yes, I am.

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

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

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

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

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

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

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

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

22 MR. APPLETON: That may not be. So

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

3 ARBITRATOR BULL: Of course.

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

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

10 MR. APPLETON: Well, the --

11 ARBITRATOR BULL: So regardless,
12 we --

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

19 ARBITRATOR BULL: Right.

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

22 ARBITRATOR BULL: So why don't we do

1 this --

2 MR. APPLETON: And immediately.

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

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

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

19 MR. APPLETON: I see.

20 ARBITRATOR BULL: -- having to stop
21 midway.

22 MR. APPLETON: Excellent.

1 ARBITRATOR BULL: So let's take a
2 15-minute break now --

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

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

12 MS. DI PIERDOMENICO: Yes.

13 ARBITRATOR BULL: You want more
14 clarity from --

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

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

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

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

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

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

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

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

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

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

16 MS. DI PIERDOMENICO: Okay. Thank
17 you.

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

1 about how the rest of this morning will go.

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

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

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

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

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

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

17 MR. MULLINS: Yeah.

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

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

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

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

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

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

21 MR. APPLETON: Now is fine.

22 ARBITRATOR BULL: Okay.

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

4 Would you like that at the end?

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

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

15 ARBITRATOR BULL: Right.

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

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

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

1 take more than six minutes.

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

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

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

19 MR. MULLINS: Sure.

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

1 deal with the questions that Sir Daniel had.

2 Would that be suitable for

3 Respondent?

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

6 ARBITRATOR BULL: Thank you.

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

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

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

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

1 the UNCITRAL arbitration rules. Article 18 of
2 the arbitration rules deal with the statement of
3 claim. The statement of claim says in Article
4 18, Sub 2, that the claimant made an annex to the
5 statement of claim all documents he deems
6 relevant or may add a reference to the documents
7 or other evidence he will submit.

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

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

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

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

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

22 Canada now comes to us and suggests

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

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

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

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

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

16 We wrote to them on February 11th,
17 2019, gave them that opportunity and they still
18 have taken no steps. And so we think it's a
19 little bit -- it is just a little too cute today
20 for Canada to say, "We don't know about this. We
21 know nothing about it. We can't deal with it."

22 The Government of Ontario is

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

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

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

22 The statement of defense, which is

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

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

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

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

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

22 For example, it is not appropriate

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

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

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

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

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

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

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

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

3 I do finally point out that when we
4 deal with this issue of amicus, we have to --
5 remember, this is the separate from the issue of
6 1128 issues and 1129, the non-disputing parties.
7 And I understand that we'll have an opportunity
8 to talk about that, so I'm not addressing that.
9 And that we actually have a process that we've
10 suggested that would actually be very consistent
11 to be able to deal with that issue, following
12 this specific terms of what's in that. So I'm
13 not going to reference that now, I'm going to
14 save that now that we're on the same agenda.

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

20 ARBITRATOR BULL: Thank you,
21 Mr. Appleton.

22 And then Mr. Mullins.

1 MR. MULLINS: Sure. Thank you.

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

7 MR. APPLETON: You may have lost Sir
8 Daniel.

9 MR. MULLINS: I did lose him.

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

13 And we may have also lost
14 Arbitrator Bishop.

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

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

21 MR. MULLINS: Okay.

22 MR. APPLETON: Sir Daniel, if you

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

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

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

7 MR. APPLETON: Okay.

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

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

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

18 MR. APPLETON: Okay. Can he hear?

19 MS. THAM: He cannot hear.

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

1 MS. THAM: Yes.

2 MR. APPLETON: Is that possible?

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

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

7 (Off the record. Trying to establish
8 reconnection.)

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

11 ARBITRATOR BULL: And you can hear us
12 now?

13 ARBITRATOR BISHOP: Yes, I can.

14 ARBITRATOR BULL: Thank you.

15 So, Mr. Mullins, you may proceed.

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

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

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

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

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

18 ARBITRATOR BULL: Thank you.

19 Then Respondents have an
20 opportunity to reply.

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

1 the NOA, as well as the amicus submissions.

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

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

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

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

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

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

22 On the second issue of amicus

1 submissions, Canada's position is that the NAFTA
2 FTC note is sufficient. And there's no need to
3 reinvent the wheel. To the extent the Claimant
4 is arguing about giving sufficient notice to
5 civil society groups, those civil society groups
6 would have had that NAFTA FTC statement since
7 2003 and understood those procedures.

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

16 ARBITRATOR BULL: Thank you.

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

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

1 jurisdiction and liability award.

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

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

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

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

21 Perhaps Mr. Bishop first.

22 ARBITRATOR BISHOP: Yes, thank you.

1 I have a question for the Claimants.

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

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

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

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

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

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

1 what those ones were.

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

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

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

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

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

22 Did I answer your question

1 Arbitrator Bishop or did I miss what you want?

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

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

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

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

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

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

7 And in the 2001 FTC notes, we have
8 not simply the reference in the chapeau to a
9 clarification and reaffirmation of a meeting of
10 certain of its provisions, provisions of Chapter
11 Eleven, but we do have this specific reference to
12 1137, paragraph 4, and paragraph 1(a), and 1137,
13 paragraph 4 obviously deals with a publication of
14 the award, but there is nothing else, as I read,
15 in Chapter Eleven that deals with publication.

16 So insofar as there may be an issue
17 of clarification of the scope of 1137, paragraph
18 4, I suppose it might be said that that's --
19 there was some uncertainty because of 1137,
20 paragraph 4 about transparency with respect to
21 other provisions. But then we also have in
22 paragraph 1(c) of the FTC notes a reference to

1 Articles 2102 and Articles 2105.

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

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

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

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

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

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

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

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

6 Thank you very much.

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

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

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

21 Would be that fair to say?

22 ARBITRATOR BETHLEHEM: I'm content

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

2 MR. APPLETON: Right.

3 ARBITRATOR BETHLEHEM: -- rather than
4 have --

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

16 ARBITRATOR BETHLEHEM: Mr. Appleton -
17 -

18 MR. APPLETON: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 In fact, the most significant rule
6 in Canada is called the PEPIDA. The PEPIDA
7 excludes the Government of Canada from its
8 operation. It only covers -- so it covers -- it
9 covers the investments in this case called Skyway
10 127, which is in Canada, as a private commercial
11 entity. It actually covers my law firm in
12 Canada, but it does not cover entities that are
13 outside of that, and that's why it's a bit of an
14 issue. The Government has its own approach.

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

1 information and other things.

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

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

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

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

14 MR. APPLETON: Oh, yes.

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

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

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

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

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

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

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

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

11 ARBITRATOR BETHLEHEM: Thank you very
12 much.

13 ARBITRATOR BULL: And the Respondent,
14 please.

15 MS. KAM: Thank you, Mr. President.
16 And thank you, Sir Daniel, for your
17 questions.

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

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

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

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

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

1 sharing that information.

2 On the issue of --

3 MR. APPLETON: I --

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

6 MR. APPLETON: No problem.

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

22 ARBITRATOR BULL: Thank you.

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

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

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

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

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

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

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

19 ARBITRATOR BULL: Does the Respondent
20 want to reply?

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

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

6 ARBITRATOR BULL: Thank you.

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

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

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

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

20 ARBITRATOR BULL: Thank you.

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

1 order.

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

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

12 First, Canada's view -- in Canada's
13 view, the Claimant's proposal at paragraph
14 1(b)(vi) of the confidentiality order, which is
15 available at Tab 2 of your materials, that that
16 proposal must be rejected.

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

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

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

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

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

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

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

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

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

1 other courts and tribunals as the Claimant would
2 like.

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

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

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

22 Second, the tribunal is asked to

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

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

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

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

22 Moreover, it is important that all

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

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

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

22 On a related point, the parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 We're happy to answer any
15 questions.

16 ARBITRATOR BULL: Thank you.

17 Claimants, please.

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

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

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

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

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

22 And then to find out that Canada

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 other items, they're elements of union law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 ARBITRATOR BULL: Thank you,
4 Mr. Appleton.

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

7 MS. DI PIERDOMENICO: Thank you.

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

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

1 that apply equally to both parties.

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

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

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

22 Moreover, we have set out that

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

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

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

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

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

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

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

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

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

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

22 And that concludes my remarks.

1 ARBITRATOR BULL: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 connection to an Access of Information request.

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

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

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

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

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

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

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

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

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

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

1 compressed timelines.

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

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

20 We have nothing further on this
21 unless you have questions.

22 ARBITRATOR BULL: Thank you.

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

4 Perhaps Mr. Bishop first, any
5 questions?

6 ARBITRATOR BISHOP: Yes, I have one
7 question.

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

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

1 the tribunal.

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

11 ARBITRATOR BISHOP: Thank you.

12 ARBITRATOR BULL: Sir Daniel, any
13 questions from you?

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

1 confidentiality order made by a court or tribunal."

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

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

22 For example, a tribunal award that

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

6 Thank you.

7 MS. DI PIERDOMENICO: Okay. Thank
8 you.

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. MULLINS: Sure. What I was --
15 what I understood his concern to be was if there's
16 something else, for example an award, it's one
17 thing to say, "Well, you know, we'll do it -- our
18 confidentiality order now, and then you need to go
19 and tell the court that you're going to do have a
20 1782," and so they've got to comply with your
21 order.

22 So I think Sir Daniel's concern is

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

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

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

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

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

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

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

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

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

7 I was so hoping that this might be
8 an opportunity where the parties might be able to
9 agree upon a bilateral preservation order.

10 That's a very common order to have. As the
11 Tribunal is aware, we've given those for a long
12 time and we have not had an answer, so if that
13 was the case, we could have a situation where it
14 would not be necessary and that would reduce the
15 number of interim measures motions that would
16 have to be brought to this Tribunal.

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

20 ARBITRATOR BULL: Thank you.

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

1 MS. DI PIERDOMENICO: Thank you.

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

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

15 ARBITRATOR BULL: Thank you.

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

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

21 ARBITRATOR BULL: Sure.

22 MS. DI PIERDOMENICO: -- just in

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

6 ARBITRATOR BULL: Yes.

7 MS. DI PIERDOMENICO: And that's it.

8 ARBITRATOR BULL: Thank you.

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

22 ARBITRATOR BULL: All right. Thank

1 you.

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

5 But, Mr. Bishop, any questions?

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

8 ARBITRATOR BULL: And, Sir Daniel?

9 ARBITRATOR BETHLEHEM: Nothing from
10 me.

11 ARBITRATOR BULL: Thank you.

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

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

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

3 ARBITRATOR BULL: On the interim
4 measures?

5 MS. DI PIERDOMENICO: Yes, exactly.

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

11 MS. DI PIERDOMENICO: Thank you.

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

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

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

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

5 ARBITRATOR BULL: All right. Thank
6 you for that.

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

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

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

15 MR. APPLETON: We did, but --

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

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

19 ARBITRATOR BULL: If I may.

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

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

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

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

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

18 ARBITRATOR BULL: I'm grateful.

19 MR. APPLETON: So the issue here is
20 with respect to the wording of Procedural Order
21 11.1. And the concern that we have is that 11.1 of
22 the procedural order is not in accord with the

1 provisions that are in NAFTA Articles 1128 and
2 1129. And that this is going to be the cause of
3 some concern. And we've adverted to this several
4 times today in other contexts, but we think it's
5 quite important to address specifically.

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

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

18 1128 says, "On written notice to
19 the disputing parties" -- that means to Canada in
20 this case, not -- or actually no, that would also
21 include us, disputing parties, small "P," so
22 it's -- a party with a capital "P" is the

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

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

14 So, first of all, Procedural Order
15 11.1 doesn't limit what the purpose and the
16 extent of what may -- what the submissions are.
17 Now, to the extent that I read submission to the
18 Tribunal within the meaning of Article 1128, I'm
19 not sure that that also means it may attend
20 hearings within the meaning of Article 1128. We
21 think that that's -- could be fixed or, in fact,
22 doesn't need to be there because Article 1128

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

3 Our bigger concern is about 1129.
4 1129.1 says, "A Party" -- capital P -- "shall be
5 entitled to receive from the disputing party" --
6 in this case Canada -- "at the cost of the
7 requesting party a copy of the evidence that's
8 been tendered and the written argument of
9 disputing parties."

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

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

22 So that means that the

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

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

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

1 they no longer have to follow confidentiality.

2 And we find that very problematic.

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

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

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

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

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

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

14 So that's our submission with respect
15 to this issue.

16 ARBITRATOR BULL: Mr. Appleton, just
17 so that I understand what you're saying, you would
18 be content if 11.1 was removed, because then 1128
19 and 1129 would just apply because they apply?

20 MR. APPLETON: Correct.

21 ARBITRATOR BULL: I see.

22 MR. APPLETON: They apply, therefore,

1 you don't need to go there.

2 ARBITRATOR BULL: I understand what
3 you're saying. Thank you.

4 And now for the Respondent, please.

5 MS. KAM: Thank you, Mr. President.
6 So I will try to be brief, this is the last issue
7 on today's agenda.

8 But Canada's view is that paragraph
9 11.1 in Procedural Order 1 does not go beyond the
10 scope of Article 1128 and 1129. Regarding access
11 to documents, we disagree that it goes beyond the
12 scope of 1129.

13 Paragraph 11.1 provides that Mexico
14 and the United States shall be entitled to
15 receive a copy of confidential versions of
16 evidence and submissions. And this is consistent
17 with Article 1129, which permits the
18 non-disputing parties to obtain confidential
19 information, subject to the condition in
20 paragraph 2 that it shall treat the information
21 as if it were a disputing party.

22 We agree that the authority for

1 non-disputing parties being required to have the
2 same access to evidence and written submissions
3 as if it were the Respondent party is found in
4 the NAFTA. Given that -- it is clear from
5 Article 1129(2), it's unnecessary to repeat this
6 language in the CO, which only binds the
7 disputing parties in this arbitration as proposed
8 by the Claimant in the draft CO.

9 Regarding the non-disputing NAFTA
10 parties' attendance at future hearings,
11 Article -- paragraph 11.1 of Procedural Order 1
12 provides that the governments of Mexico and the
13 United States may attend hearings and make
14 submissions to the tribunal within the meaning of
15 Article 1128. Similar language is in paragraph
16 49 of the draft CO clarifying that the NAFTA
17 non-disputing parties can be present in the
18 hearing room including with portions of the
19 hearing held in camera.

20 In our view, NAFTA Article 1128
21 recognizes that the non-disputing NAFTA parties
22 may make submissions to the tribunal on a

1 question of the interpretation of the agreement.
2 It does not specify how they may make that --
3 those submissions. And it follows that they
4 should be permitted to attend hearings in person.

5 And I would note that
6 representatives of Mexico and the United States
7 have routinely attended hearings in Canada's past
8 NAFTA Chapter Eleven cases, including most
9 recently in Bilcon, Mesa, Eli Lilly, Lone Pine,
10 and Mercer.

11 From an institutional perspective,
12 I would also like to emphasize that the
13 attendance of non-disputing parties is important
14 to enable them to obtain evidence provided at
15 hearings and upon notice make oral submissions to
16 the tribunal on the question -- on questions of
17 the agreement.

18 To the extent that the Claimant
19 argues that there is a need to impose scheduling
20 requirements on the non-disputing parties, we
21 would also note that the procedural calendar and
22 Procedure Order 1, which we understand the

1 Tribunal to have confirmed already, already
2 clearly establishes deadlines for their
3 submissions. And this provides sufficient
4 advance notice and procedural fairness to both
5 disputing parties.

6 And so with that, we confirm that
7 our view is that the current language of
8 paragraph 11.1 of draft PO 1 is in accordance
9 with Articles 1128 and 1129. And should the
10 Tribunal wish to contact the governments of the
11 United States and Mexico for their views directly
12 as the non-disputing parties in this dispute, we
13 provided the PCA with their contact information.

14 ARBITRATOR BULL: Thank you.

15 For the Claimants, any response you
16 wish to make?

17 MR. APPLETON: None.

18 ARBITRATOR BULL: And I should just
19 check, the Respondent. Obviously would have none.

20 MS. KAM: Nothing to respond to.

21 ARBITRATOR BULL: Thank you.

22 Good. Would my co-arbitrators have

1 any questions on this issue, Mr. Bishop first?

2 ARBITRATOR BISHOP: No, no questions.

3 ARBITRATOR BULL: Thank you.

4 And Sir Daniel?

5 ARBITRATOR BETHLEHEM: Nothing from

6 me.

7 ARBITRATOR BULL: Thank you.

8 That takes us to the end of the
9 agenda, but as I mentioned at the beginning of
10 today's session, I did want to ask everyone to
11 spend a bit of time looking at the draft
12 procedural calendar, that's attached to draft PO
13 No. 1. And in particular this isn't a process
14 where we want to hear any submissions about
15 changing the timelines. Forgive me for being so
16 direct. But there is an issue of when our first
17 hearing might be after today and whether some
18 attempts should be made to figure out some dates
19 on which we might aim towards.

20 MR. APPLETON: Mr. President, I need
21 a moment. I prepared something, I need to find it
22 in the materials.

1 ARBITRATOR BULL: Sure.

2 It relates to what I'm raising?

3 MR. APPLETON: Yes, entirely on what
4 you raised.

5 MR. MULLINS: We filled out --

6 MR. APPLETON: I've got the dates, I
7 organized that.

8 ARBITRATOR BULL: Thank you.

9 MR. APPLETON: But I'm afraid I can't
10 help you with that if I don't find it.

11 ARBITRATOR BULL: While Mr. Appleton
12 is looking for that material, my attention is
13 focused on the first page of the draft procedural
14 calendar. And there is an item that reads,
15 "Hearing on issue of -- issues of
16 bifurcation/preliminary motions." And the date
17 is -- there's no information in the date column
18 because we haven't discussed that. So that is what
19 I thought we might spend a few minutes on.

20 By my calculations, the response by
21 disputing parties to submissions and questions of
22 law from the non-disputing party related to the

1 interpretation of the treaty on bifurcation,
2 which is the item just before the hearing, would
3 come in at 2nd December 2019.

4 MR. APPLETON: I'm sorry. Could you
5 just help me with that again?

6 ARBITRATOR BULL: Sure. I'm on the
7 first page.

8 MR. APPLETON: Yes.

9 ARBITRATOR BULL: And the first table
10 on the first page, the third last item, you'll see
11 "response by disputing parties," and so on.

12 MR. APPLETON: Yes. And the date you
13 have for that?

14 ARBITRATOR BULL: The date I have is
15 2nd December 2019.

16 MR. APPLETON: Yes, that's the date
17 we have as well.

18 ARBITRATOR BULL: Great.

19 So we have been -- the next item
20 would be the hearing itself. And I'm wondering
21 whether the parties have some -- any views about
22 when the hearing should take place and whether we

1 might profitably spend a few minutes setting
2 aside dates so that the process can move forward
3 smoothly.

4 I would imagine that we would need
5 at least a couple of weeks to digest the material
6 that comes in on the 2nd of December, which
7 brings us perilously close to Christmas and then
8 to the New Year. And I wonder whether the
9 parties think that a January hearing would be
10 appropriate. I'm just raising that for
11 discussion.

12 MR. APPLETON: We would think that
13 late --

14 MS. THAM: Sir, the Claimant, if you
15 could please use the mic. Thank you.

16 MR. APPLETON: Sure.

17 A late January hearing would be
18 good. With respect to that, we do point out that
19 if you come to this way, there will be snow. And
20 that I would ask that you not do it on a Monday,
21 which currently we have a number of dates on
22 Mondays, as I'm unavailable on the Mondays in

1 that month.

2 ARBITRATOR BULL: I see.

3 MR. APPLETON: I'm teaching in New
4 York, unless you'd like to do this in New York.
5 But I would not like to raise that. That is not a
6 formal proposal here, please.

7 ARBITRATOR BULL: And what does the
8 Respondent think about this issue?

9 MS. DI PIERDOMENICO: This may be one
10 of the issues on which myself and Mr. Appleton
11 might agree, but we are also thinking end of
12 January.

13 ARBITRATOR BULL: Okay. From a quick
14 check amongst the tribunal members this morning,
15 there appears to be some availability in the later
16 part of January. Let me just make sure -- if I'm
17 not wrong, the dates were 13th through -- let me
18 make sure.

19 Sir Daniel, you had sent me those
20 dates and I'm just trying to look for your email
21 again. Was it 13th through the end of the month?

22 ARBITRATOR BETHLEHEM: I'm happy to

1 confirm that I would have availability in the
2 periods 13th to the 31st. Mr. Appleton had
3 suggested that he wouldn't like Mondays, I would --
4 I would, as I have said, suggest not Fridays, but
5 there may be a question as to how long the parties
6 think would be required for a hearing.

7 MR. APPLETON: We have no information
8 because we still don't even have a statement of
9 defense.

10 ARBITRATOR BULL: All right. And,
11 Mr. Bishop, you're available in January as well,
12 correct?

13 ARBITRATOR BISHOP: I believe so. I
14 don't have my calendar in front of me, but I
15 believe I'm generally available in January.

16 ARBITRATOR BULL: Okay. So we'll
17 come back to the issue of how many days we might
18 have to set aside.

19 MR. MULLINS: I think it's going to
20 depend on the number of motions that are filed. I
21 think we're probably safer to reserve a day and a
22 half or two days just in case, you know, given how

1 long it's taking to get through this agenda, if we
2 have to deal with substantive motions, it might
3 take a little while.

4 ARBITRATOR BULL: Right. So what
5 does Respondent think about number of days?

6 I know it's early in terms of
7 making a precise estimate, but it is prudent for
8 us to set aside a certain number of days.

9 MS. DI PIERDOMENICO: Well, this is
10 what we're measuring here, do we err on the side of
11 prudence and, you know, we are thinking one should
12 be sufficient, but should we try to maybe ensure
13 that two days availability until we have a better
14 picture of what's ahead of us?

15 ARBITRATOR BULL: Right. And okay,
16 so that's helpful. I think one or two days seems
17 to be both parties' thoughts to being on the safer
18 side. And we're talking about the period 13th
19 January to the end of the month, with the
20 preference on the Claimant's side to avoid Mondays.

21 Can I take it, though, that within
22 those parameters, parties will make themselves

1 available for a hearing in January?

2 Okay. Then -- I see heads nodding
3 and I'm grateful for that. So perhaps what we
4 can do is -- just mindful that Mr. Bishop doesn't
5 have his diary in front of him, I'm just
6 wondering shall we --

7 MS. DI PIERDOMENICO: Mr. President,
8 I do have one caveat.

9 ARBITRATOR BULL: Yes, please.

10 MS. DI PIERDOMENICO: Sometimes we,
11 on this side, are subject to negotiations that
12 can't be moved and things like that, provided that
13 we try to the best of our abilities to move things
14 around, I just wanted to ensure that you'll take
15 that into account when setting the date a little
16 bit closer. Some times these things are out of our
17 hands, and so -- in other words, don't be annoyed
18 if Canada comes back with, we may not be able, you
19 know, from the 13th to the 14th, and perhaps maybe
20 a little bit. But that window, I think, we will
21 endeavor to ensure we keep it as clear as possible.

22 MR. APPLETON: Mr. President, we did

1 ask that everyone come with their schedules for
2 today.

3 MS. DI PIERDOMENICO: Mr. Appleton,
4 these things aren't determined months in advance,
5 sometimes -- sometimes they're --

6 MR. APPLETON: But I'm afraid that we
7 do need to determine them and that this Tribunal
8 should be able to set a date just like any other
9 tribunal. And that's the way that this works. And
10 you have a massive legal team here.

11 MS. DI PIERDOMENICO: Okay. It's --

12 ARBITRATOR BULL: Could I have the
13 floor for a minute?

14 Ms. Di Pierdomenico, would it help
15 to give Canada some time to check -- I don't mean
16 a few minutes or hours, I mean a couple of days
17 to check on this, or is this something -- or are
18 you saying that this is something you might not
19 know until closer to the date?

20 MS. DI PIERDOMENICO: That is what I
21 was thinking, it was something that we might not
22 know until closer to the dates. Sometimes these

1 negotiation schedules come out a little bit later,
2 but I don't mean to make an issue out of it, it was
3 just something that I thought I would mention to
4 the President as a potential issue.

5 ARBITRATOR BULL: Okay. I understand
6 that better now.

7 Then my preference would be to try
8 and fix a two-day hearing now and for us all to
9 work towards that. And since we -- we have that
10 date of the 13th mentioned by Sir Daniel, and
11 Mondays not being available, I wonder whether
12 we -- and I'm asking everyone, parties as well as
13 my co-arbitrators, whether we might set the
14 hearing for the 14th and 15th of January 2020.

15 Where the hearing will be we will,
16 of course, let you know that in due course, but
17 it would be prudent to set aside those dates.

18 MR. APPLETON: I do point out that
19 the hearing does not need to take place at the
20 place of arbitration, it could be any venue. And I
21 would be delighted if you did it next day, we could
22 go to Singapore, but I could not make it to

1 Singapore on 14th if I have to teach on the 13th,
2 but, otherwise, I would put it to Canada, we would
3 be delighted to go there.

4 ARBITRATOR BULL: Let's assume it's
5 either Toronto or Miami or Washington, D.C. Adding
6 Singapore to the mix now, I think may be more
7 confusing to everyone than is necessary.

8 Mr. Bishop, you needed to check
9 your diary. I'm not sure whether we -- if that's
10 possible today?

11 ARBITRATOR BISHOP: Yes, if you'll
12 give me two minutes I'll run around to my office
13 and check.

14 ARBITRATOR BULL: Thank you very
15 much. Sorry to trouble you this way.

16 And, Sir Daniel, I assume 14th and
17 15th would work for you?

18 ARBITRATOR BETHLEHEM: The 14th and
19 15th will be fine for me. Thank you very much.

20 ARBITRATOR BULL: Thank you.

21 I assume Canada will be fine with
22 that?

1 MS. DI PIERDOMENICO: Yes, that
2 should be fine.

3 ARBITRATOR BULL: Yes.

4 And Claimant has already said
5 that's fine. Good. Let's just wait for
6 Mr. Bishop. And we will hopefully fix these
7 dates.

8 While we're waiting for Mr. Bishop,
9 can I ask the parties for your comments on this;
10 I had thought that it would not profitable to try
11 and fix other dates because bifurcation would
12 determine one procedure or not. So I was not
13 going to suggest that we fix other hearing dates,
14 but if you have a different view about that, I'm
15 happy to hear you.

16 MR. APPLETON: I'm interested if the
17 Tribunal has a view of how long they may think it
18 may take them to determine this question so we
19 could then roughly flesh some dates out.

20 Of course, it's difficult because
21 we don't have the material, we don't have the
22 statement of defense, we don't have the motions,

1 so I appreciate that, but we're making you have a
2 little bit of our problem as we try to deal with
3 this.

4 But I'm certain that this is going
5 to be a two-day hearing based on the number of
6 motions that are going to be heard. So it would
7 seem to me that it would have to take some time
8 for the Tribunal to form a view.

9 ARBITRATOR BULL: Any comments from
10 the Respondent?

11 ARBITRATOR BISHOP: Mr. President,
12 those dates work for me.

13 ARBITRATOR BULL: Oh, that's
14 excellent. Thank you very much for checking.

15 MS. DI PIERDOMENICO: Just a point of
16 clarification based on what Mr. Appleton said. We
17 were under the assumption this was a hearing on our
18 request for bifurcation and not on interim measures
19 or additional things. And so that clarification
20 would be helpful.

21 ARBITRATOR BULL: Well, I had
22 understood it as -- to be a hearing on the issue of

1 bifurcation as well as preliminary motions. So the
2 interim measures, applications, if they are made,
3 would be -- would be dealt with on those two days
4 as well.

5 MR. MULLINS: We understood that to
6 include motions that -- for example, you said you
7 wanted security for cost, that that all be heard at
8 the same time. That's my understanding. That's
9 why I said two days because I thought those were
10 all included. Not that I'm rushing that motion be
11 heard.

12 MR. APPLETON: It would be very
13 inefficient to have another hearing.

14 ARBITRATOR BETHLEHEM: Mr. President,
15 may I just raise a point?

16 And that is this, I think we
17 need -- we as the tribunal, we need to wait and
18 see what the issues of interim relief are. I
19 mean, there are certain legal criteria that arise
20 with respect to a request for interim relief,
21 including urgency and the like. And that may not
22 be appropriate for a bifurcation hearing.

1 And it may also be that the
2 Tribunal takes a view, once we see the
3 applications of interim relief, that we conclude
4 that these can be dealt with on the papers. So
5 shouldn't we, perhaps -- perhaps this is a
6 question for the parties, treat the 14th and the
7 15th as proceedings relating to the bifurcation
8 request, and we will deal with interim relief
9 when we get those applications. Or perhaps this
10 is a matter simply for the Tribunal to deliberate
11 on privately.

12 MR. MULLINS: If I could respond to
13 that on behalf of the Claimant.

14 ARBITRATOR BULL: Sure.

15 MR. MULLINS: In addition to
16 bifurcation, there's very serious motions that are
17 being sought here. I think if you're asking for
18 security of cost, they're asking for, you know,
19 issues about, whatever, those motions, we're going
20 to want to be heard certainly. And we have -- it
21 takes a lot of people to schedule around for that.

22 I think if there's an urgent

1 motion, then that's obviously a different
2 category, but I think if there's a motion that
3 we're talking about, that, you know, we should
4 schedule that hearing, and it should all be
5 addressed, and we should anticipate that we'll,
6 you know, be briefing on that, there will be
7 motion, response, reply, whatever. And that we
8 have a chance to hear it.

9 But I am concerned, depending on
10 the kind of the nature that they're talking
11 about, that we would like to be heard on these
12 motions and have a chance -- I think this is --
13 this hearing, for example, has been very helpful
14 to us because we haven't been able to answer
15 questions that the tribunal has had very
16 efficiently. And so I think we would probably
17 want to be able to do that, have a hearing on the
18 kind of motions that are being sought, and even
19 motions on our side as well, that we've asked
20 for.

21 ARBITRATOR BULL: Any comments from
22 the Respondent?

1 ARBITRATOR BISHOP: May I add
2 something, Mr. President?

3 MS. DI PIERDOMENICO: I think given
4 that I've read this schedule initially, I had not
5 expected that we would need a hearing for these
6 types of motions. I mean, we were expecting only a
7 hearing for the request for bifurcation having
8 settled the question of motions through paper
9 exchanges.

10 ARBITRATOR BULL: Right. Why don't
11 we do this; I think we should set aside those two
12 days for a hearing. Once we need to use that time
13 for, I think the Tribunal can decide when we have
14 seen the papers and if -- there may well be some
15 things that can be dealt with on the papers and
16 they may well be -- it may well be that the
17 Tribunal feels that it needs to hear from parties
18 on all the motions, but at least we'll have these
19 two days set aside.

20 And the Tribunal will decide what
21 is a sensible use of that time. And what's most
22 important is that we take it as fixed that those

1 two days will be reserved for hearing in January.

2 Good.

3 Then unless there are other
4 comments or questions from my co-arbitrators, I
5 was going to close the proceedings, but I should
6 check with them first whether there's anything
7 else they would like to raise.

8 Mr. Bishop?

9 ARBITRATOR BISHOP: I just have one
10 question. The idea of having a motion -- excuse
11 me, I'm getting an echo in here.

12 The idea of having the hearing on
13 the bifurcation motion in January, I wonder if
14 that isn't too long away. Isn't there a
15 possibility that we can get to a point where we
16 can have a hearing on the bifurcation earlier
17 than January so that we can move the case
18 forward?

19 ARBITRATOR BULL: So if we were to
20 consider earlier than January, I guess that would
21 be December, and as mentioned the last submission
22 comes in on the 2nd of December 2019, I think

1 parties would need a week or two to look at the
2 material and be ready for a hearing, so we would
3 probably be looking at from 16th December onwards.
4 And I'm not sure what parties think about that.

5 MR. APPLETON: Mr. President, you
6 might be able to trim some time around the
7 Respondent's -- the non-disputing parties'
8 submissions.

9 As I see it right now, the last key
10 pleading from the disputing parties is on October
11 the 16th. That would be Claimant's comments on
12 Respondent's request. I worked out the dates.

13 ARBITRATOR BULL: I'm with you.

14 MR. APPLETON: And so it would seem
15 to me that if the non-disputing parties were to
16 make their submissions perhaps a little bit quicker
17 and then we didn't give an entire month to respond
18 to the submissions, that that would actually give
19 us more time to be able to hold something before
20 the end of the year. And so what we might do is
21 move the non-disputing parties' submissions from
22 October 16th to the -- up by one week and then put

1 the responses in in the middle of November.

2 ARBITRATOR BULL: Sorry. I've lost
3 you there.

4 MR. APPLETON: Okay. Let's just go
5 back.

6 ARBITRATOR BULL: So the 16th of
7 October would be --

8 MR. APPLETON: 16th of October would
9 be the Claimant's comments.

10 ARBITRATOR BULL: Yes.

11 MR. APPLETON: Then I would suggest
12 that maybe the 23rd would be the non-disputing
13 parties' submissions. They're mostly going to be
14 foreign but in advance anyway.

15 ARBITRATOR BULL: Sorry. So 23rd of
16 October?

17 MR. APPLETON: Yes.

18 And then we could have the response
19 by the disputing parties in the middle of
20 November then. Well, let's say three weeks at
21 the most. Okay. Now, all of a sudden we're in
22 the middle of November.

1 ARBITRATOR BULL: Sir, if we could go
2 a little slower.

3 MR. APPLETON: Sure. I'm sorry.

4 ARBITRATOR BULL: So non-disputing
5 parties' submissions, you're suggesting would come
6 in on the 23rd of October.

7 MR. APPLETON: Yes.

8 ARBITRATOR BULL: And then the
9 response by disputing parties to that would come in
10 not 75 days --

11 MR. APPLETON: Right. We would do
12 November 14th, I think.

13 ARBITRATOR BULL: Let me just see
14 that, November 14th.

15 MR. APPLETON: To make it easier for
16 me, actually, if we could do the 15th. I try not
17 to do things on the Monday because I'm not in my
18 office, I'm teaching in New York.

19 MS. DI PIERDOMENICO: Just before we
20 get too deep into this, there is a logic behind
21 this procedural calendar and the logic as proposed
22 and as -- what we assumed had been agreed long

1 before this day, is that the non-disputing --
2 capital "P" -- parties would have time to respond
3 to these submissions adequately, and by trimming
4 back the calendar in the way that Mr. Appleton
5 suggests gives them a week. And as a state party,
6 you need more than a week in terms of getting the
7 approvals necessary and so forth.

8 And so these proposals were done by
9 Canada with that logic in mind, and I just wanted
10 to interject before changes were made without
11 having made that consideration in terms of the
12 reason why we proposed these dates to begin with.

13 MR. APPLETON: Then why don't we trim
14 back some time before then, and then the -- I'm
15 happy to make the parties wear more of this
16 problem. If Canada would like the non-disputing
17 parties to have more time, then Canada and the
18 investor will need to have less. We can do that.

19 ARBITRATOR BETHLEHEM: Mr. President,
20 may I also just interject before we get buried in
21 trying to coordinate diaries?

22 Certainly I was working off the

1 proposed schedule that we have in front of us,
2 it's going to be very difficult for me to find
3 time after the 18th of November until the January
4 dates. And I so fear that we may be, you know,
5 dancing around here on the head of a pin of not
6 much benefit.

7 I understand Mr. Bishop's
8 inclination to move this on, and I think that's
9 the Tribunal's inclination, but I think it's very
10 difficult to try and do this while we're all
11 trying to coordinate diaries in real time.

12 ARBITRATOR BULL: Well, thank you for
13 raising that, because if you're not available
14 during that period, Sir Daniel, then that makes it,
15 I think, rather difficult. Let alone the points
16 that have been raised about reshuffling these
17 dates.

18 Mr. Bishop, any thoughts?

19 ARBITRATOR BISHOP: No. I have
20 nothing further.

21 ARBITRATOR BULL: Sir Daniel,
22 anything else you wanted to raise before we close

1 today's session?

2 ARBITRATOR BETHLEHEM: Nothing
3 further from me.

4 ARBITRATOR BULL: And from the
5 Claimants, anything you wanted to raise?

6 MR. APPLETON: Yes, Mr. President,
7 we're just looking for a little bit of
8 understanding about the process for the
9 distribution of materials. This is -- at 6.7, and
10 6.8, it was -- we've had to look at this again
11 because of the discussion the other day about the
12 prehearing briefs. And if you recall originally we
13 were told the prehearing briefs were to be -- were
14 to follow these processes, the prehearing briefs
15 were two pages long, and then I'm glad that what we
16 did is we just dealt with them electronically.

17 The issue here is that I wonder if
18 the tribunal could assist us with two things.
19 First of all, in North America, we don't have A5
20 paper and so one of the requirements is A5. I'm
21 trying to understand if that really is necessary
22 or if we can take the standard size and cut that

1 in half rather than the A5, because otherwise it
2 makes it exceedingly difficult.

3 The second thing is whether it
4 would be possible if submissions are of a certain
5 size to basically not have to send them -- we're
6 not sure how long -- if I sent something next day
7 to Singapore, it cost -- just for an envelope
8 like this over a thousand dollars. If I send a
9 USB, the same cost.

10 When I look at this, we're looking
11 at -- but if I send it for a longer period of
12 time, in other words, the delivery will take a
13 number of days, it's much less. I'm trying to
14 understand -- because there's no standard imposed
15 here, we're trying to understand what it is that
16 the expectation is or if we have another way to
17 work around this.

18 And I don't want to spend a lot of
19 time here, but I think what we've done in other
20 cases is that we've had the PCA take care of
21 locally printing materials in each spot, that
22 saves the very extensive transportation cost, and

1 also is much more carbon neutral and
2 environmentally friendly, yet, at the same time
3 ensures the Tribunal gets their many bundles in
4 exactly the way they like it.

5 And so if that would actually work,
6 I think that might be something that might be
7 better. On the other hand, if the Tribunal
8 definitely wants to have the USB keys, and these
9 other things, then we can't get out of this, we
10 just need to figure out how much time. But it
11 just isn't quite clear enough here. And if you
12 could help us, we would be happy to help you.

13 ARBITRATOR BULL: Thank you for those
14 comments. The Tribunal will have a quick word
15 about this and then we'll, if necessary, provide
16 more clarity on the issue. I understand, the point
17 is really to make things efficient, and that's fine
18 with -- I'm sure that's fine for the tribunal.

19 Any other comments from the
20 Claimant?

21 MR. MULLINS: None other than we
22 thank everybody for their time. It's been very

1 helpful.

2 ARBITRATOR BULL: Thank you.

3 And then does the Respondent have
4 anything to raise?

5 MS. DI PIERDOMENICO: Just two small
6 points. The first one having the PCA organize
7 things for -- maybe we are more of the control
8 freak side of things, but we would be -- I think we
9 would like to prepare our own documents; however,
10 we do take Mr. Appleton's point about the burden
11 that this particular provision imposes. And we
12 would be happy to provide you with our thoughts on
13 this once we've had that opportunity to consider it
14 a bit more.

15 As well on our event schedule here,
16 we've done the math as well, but we're just a
17 little bit different than perhaps how we
18 calculate numbers in North America, but it would
19 be helpful maybe if we revise the schedules and
20 recirculate it so that everybody is working with
21 the same dates. I don't take issue with your
22 math, it's probably my math if I'm honest, but --

1 ARBITRATOR BULL: If we are off, we
2 are not far off.

3 MS. DI PIERDOMENICO: No, just by a
4 couple of --

5 MR. APPLETON: My math is exactly the
6 same.

7 MS. DI PIERDOMENICO: Yeah, it's --
8 like I said, it's probably me.

9 MR. APPLETON: So our math is
10 identical to the President's.

11 MS. DI PIERDOMENICO: But it would be
12 perhaps --

13 MR. APPLETON: That's usually very
14 universal.

15 MS. DI PIERDOMENICO: I take full
16 ownership, I'm not going to lie.

17 ARBITRATOR BULL: No, it's a good
18 idea just to double check so that we're all on the
19 same page. And I think that would be fine. If
20 there is an issue, you can raise that to the
21 tribunal subsequently.

22 MS. DI PIERDOMENICO: Okay.

1 ARBITRATOR BULL: If there's nothing
2 else, then thank you everyone for your assistance
3 today, your submissions. The Tribunal will
4 consider everything that's been said and written to
5 us on these issues and we'll come back to the
6 parties as soon as possible.

7 MR. APPLETON: Just to assist us, the
8 dates in the procedural order speak to when the
9 procedural order is issued, so for the parties
10 right now, should they -- could we set the date for
11 the filing of these interim motions -- you might be
12 considering other issues, in other words -- or do
13 you want us to wait until you make -- until
14 Procedural Order 1 is issued before we start
15 deciding when we file these interim measure motions
16 and other matters?

17 ARBITRATOR BULL: Right.

18 MR. APPLETON: I think it would be
19 very helpful to us if we could -- I think they're
20 independent of your motion.

21 ARBITRATOR BULL: So parties should
22 assume that the procedural calendar is in place

1 because we've already indicated that to the
2 parties. And the procedural calendar starts not
3 with the issuance of the procedural order, but with
4 the holding of the procedure -- first procedural
5 meeting --

6 MR. APPLETON: Okay.

7 ARBITRATOR BULL: -- being today. So
8 15 days from now the Respondent's statement of
9 defense is due. And we will, of course, endeavor
10 to issue PO No. 1 promptly. But I think that few
11 issues that are still outstanding on PO No. 1
12 should not prevent parties from being able to treat
13 the procedural calendar in the draft PO No. 1 as
14 operational.

15 MR. APPLETON: Actually, that raises
16 a point. There's something that's inconsistent in
17 the procedural order about the statement of
18 defense, and I just was hoping that we could get
19 some clarity.

20 My understanding is that the
21 statement of defense that's being sought is a
22 statement of defense as set out in Article 18 of

1 the UNCITRAL rules, but some other words were put
2 in to the statement of defense calendar. And the
3 calendar says Article 18(2) says that there
4 should be the statement of the facts supporting
5 the claim that points to the issue and the relief
6 remedy sought, but the tribunal said that Canada
7 was directed to file a statement of defense which
8 is limited to and setting forth all its
9 jurisdictional objections.

10 Now, my understanding of this is
11 because the statement of defense requires that
12 you file all your jurisdictional objections,
13 that's what you mean. But do you mean that
14 you're expecting a different type of statement of
15 defense and that there might be another statement
16 of defense filed, or are you meaning that the
17 statement of defense is set out in the UNCITRAL
18 rules is simply what you're expecting?

19 In other words, the Article 18
20 ordinary, regular statement of the defense?

21 ARBITRATOR BULL: Let me ask first
22 how Canada understands the obligation just so that

1 we --

2 MS. DI PIERDOMENICO: Canada
3 understood the Tribunal's direction to be limited
4 to jurisdictional grounds.

5 ARBITRATOR BULL: And that's what the
6 wording indicates, Mr. Appleton.

7 MR. APPLETON: So I'm trying to
8 understand, does the Tribunal have a view as to
9 when it wants the rest of the statement of defense,
10 because it's not canvassed here?

11 And that would be a normal part of
12 the UNCITRAL rules to be able to be issued. I've
13 never heard of a partial statement of defense, so
14 I'm trying to understand what it is that this
15 means so we can clarify and keep it on the record
16 here.

17 ARBITRATOR BULL: All right. Let
18 me -- I just want to make sure that the whole
19 tribunal is on the same page here. And perhaps
20 what we might do is have a quick word and then let
21 parties know if there's any change in the wording
22 that is necessary.

1 MR. APPLETON: Yes, the words of the
2 UNCITRAL are quite clear to the extent that that's
3 helpful to you, but we would -- it would help us
4 very much.

5 MR. MULLINS: And just to add on
6 that, if we're going to be doing preliminary
7 motions, I think it would be helpful to know all --
8 their total defense and not just a partial defense.

9 ARBITRATOR BULL: I assure you, I
10 understand the point.

11 MR. MULLINS: Thank you.

12 ARBITRATOR BULL: Okay. Then thank
13 you, everybody. And the hearing is adjourned.

14 (Whereupon, at 1:28 p.m., the First
15 Procedure Hearing in the above-entitled
16 arbitration was concluded.)

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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.



FELICIA A. NEWLAND, CSR

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