

UNDER THE UNCITRAL ARBITRATION RULES (1976) AND
NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

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In the Matter of Arbitration between: :
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TENNANT ENERGY, LLC, :
:
: Claimant, : PCA Case No.
: 2018-54
and :
:
GOVERNMENT OF CANADA, :
:
: Respondent. :
:
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HEARING ON BIFURCATION AND PRELIMINARY MOTIONS

Tuesday, January 14, 2020

The World Bank Group
1225 Connecticut Avenue, N.W.
C Building
Conference Room 1-450
Washington, D.C.

The hearing in the above-entitled matter
convened at 9:00 a.m. before:

MR. CAVINDER BULL, President of the Tribunal

MR. R. DOAK BISHOP, Co-Arbitrator

SIR DANIEL BETHLEHEM, Co-Arbitrator

ALSO PRESENT:

Secretary to the Tribunal

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C O N T E N T S	
	PAGE
PRELIMINARY MATTERS.....	9
Agenda Item 1: Respondent's Motion for Disclosure of Third-Party Funding	
ARGUMENT BY COUNSEL FOR THE RESPONDENT:	
By Mr. Klaver.....	17
ARGUMENT BY COUNSEL FOR THE CLAIMANT:	
By Mr. Mullins.....	37
By Mr. Appleton.....	50
QUESTIONS FROM THE TRIBUNAL.....	53
Agenda Item 2: Claimant's Request for Interim Measures	
ARGUMENT BY COUNSEL FOR THE CLAIMANT:	
By Mr. Appleton.....	82
ARGUMENT BY COUNSEL FOR THE RESPONDENT:	
By Ms. Dallaire.....	95
ARGUMENT BY COUNSEL FOR THE CLAIMANT:	
By Mr. Appleton.....	116
Agenda Item 3: Respondent's Request for Bifurcation	
ARGUMENT BY COUNSEL FOR THE RESPONDENT	
By Ms. Di Pierdomenico.....	130

ARGUMENT BY COUNSEL FOR THE CLAIMANT

By Mr. Mullins..... 165

ARGUMENT BY COUNSEL FOR THE RESPONDENT

By Ms. Di Pierdomenico..... 204

ARGUMENT BY COUNSEL FOR THE CLAIMANT

By Mr. Mullins..... 211

QUESTIONS FROM THE TRIBUNAL..... 215

CLOSED SESSIONS

Number 1..... 98-99

Number 2..... 112-114

Number 3..... 124-127

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
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19
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PRESIDENT BULL: Okay. Good morning, everyone.
I think we'll call the Hearing in to session.
This is PCA Case Number 2018-54, Tennant Energy,
LLC against the Government of Canada.

My name is Cavinder Bull. I'm the presiding
arbitrator. My co-arbitrators to my left and right are
Mr. Doak Bishop and Sir Daniel Bethlehem. And also in
attendance is the Tribunal Secretary, Ms. Christel Tham.

I wonder if I could get the Claimants to introduce
those here for them.

MR. APPLETON: Good morning. Thank you very much,
Mr. President, and Members of the Tribunal.

I'm Barry Appleton. My colleague, Lillian
De Pena, is joining us, I believe by telephone connection,
in Toronto today. I'm joined here at the Hearing by Edward
Mullins, and we have the Claimants' client representative,
Mr. John Pennie, here. This is the same delegation that we
had at the last hearing, but now we are all in person, so
you can see us in the flesh.

PRESIDENT BULL: Thank you, Mr. Appleton.
And then, if someone could introduce everyone for
Canada.

MS. DI PIERDOMENICO: Sure. My name is Lori
Di Pierdomenico, and I will be speaking on issue Item 3

1 today, Canada's Request for Bifurcation. I also have with
2 me Mr. Mark Klaver, and he will be speaking on Items 1 and
3 4. Ms. Johannie Dallaire will be speaking on the Agenda
4 Item 2, which is the Claimants' Request for Interim
5 Measures. As well joining us, we have Ms. Susanna Kam and
6 María Cristina Harris, whom you might recognize from the
7 last hearing, and we are all counsel at the Trade Law
8 Bureau at Global Affairs Canada.

9 As well, we have Ms. Darian Bakelaar, who is a
10 senior paralegal also at the Trade Law Bureau.

11 We have from the Investment Trade Policy Office of
12 the Government of Canada Ms. Renaude Bender, and she's a
13 Senior Policy Officer.

14 And we also have representatives from the
15 Government of Ontario, Ms. Saroja Kuruganty, she's counsel
16 at the Ministry of Attorney-General, and Ms. Jennifer
17 Kacaba, senior counsel at the Ministry of Energy, Northern
18 Development, and Mines--and I smiled because I know I
19 mispronounced your name. I'm sorry, Jennifer.

20 We also have video conference lines in Ottawa and
21 Toronto, and the Permanent Court of Arbitration has
22 prepared a list. I can either go through the list or ask
23 leave from the Tribunal to refer to the list for those that
24 are present.

25 There is only one person who is not present

1 currently, and it's Ms. Sejal Shah. She will be joining us
2 later on this afternoon. But all others we confirm are
3 present.

4 PRESIDENT BULL: I wonder if I can get the
5 Non-Disputing Parties to introduce themselves for the
6 record.

7 MR. JEDREY: Good morning. My name is Nathaniel
8 Jedrey from the U.S. Department of State, and I'm here with
9 my colleague Margaret Cedric.

10 MR. LÓPEZ: Hello. Good morning. My name is
11 Aristeo López. I represent the Government of México.
12 Thank you.

13 PRESIDENT BULL: Thank you, everyone.

14 We have a number of items, four issues to--or four
15 applications to deal with in the next day and a half, but
16 before we kick off with Agenda Item Number 1, just a few
17 housekeeping matters.

18 There are two confidential documents relating to
19 [REDACTED] issue, and because this Hearing is also
20 being witnessed by members of the public in a separate
21 room, if either Party is going to deal with that issue,
22 then please let the Tribunal know before you do so that the
23 feed to the room where the public is sitting can be closed
24 so that the confidential information can be dealt with.

25 MR. APPLETON: Mr. President, perhaps it may

1 assist the Tribunal that Ms. Di Pierdomenico and myself had
2 a brief conversation about this this morning.

3 I will be talking about those issues. I'll be
4 addressing that matter today, and I will have to--because
5 it's an integral part of one of the motions. However, I
6 believe I can discuss it in such a way that we are not
7 going to need to cut the public off. I believe it is very
8 important that there be transparency and public access.
9 I'm sorry that we actually have this issue, that we could
10 potentially cut the public off here, because I think access
11 to information to the public in this case is particularly
12 important, and so I'm going to do my best to be able to
13 discuss the documents without any disclosure of what's in
14 the documents. And I've asked Ms. Di Pierdomenico to
15 immediately notify us in the event that she believes that
16 she has an objection as to something that's going to take
17 place.

18 In other words, I'd rather not cut the public off
19 on that discussion, if that's possible, and that means more
20 work for me to try to find a way to reference the
21 information in such a manner that we don't have to deal
22 with that. But, if I cross that line inadvertently, I
23 believe that the Government of Canada will immediately
24 bring that to all of our attention, and then we can address
25 it, if that's acceptable in advance.

1 PRESIDENT BULL: Ms. Di Pierdomenico?

2 MS. DI PIERDOMENICO: Thank you. Addressing our
3 side first, we will be referring to the documents, and we
4 will clearly flag when we are ready to go into closed
5 session.

6 In terms of Mr. Appleton's remarks, our preference
7 is that he ensure--that the session is closed immediately
8 once he knows he's referring to the documents, and, you
9 know, putting the onus on us to interrupt him might not
10 only disrupt his own presentation, but also it could lead
11 to unnecessary disclosures.

12 PRESIDENT BULL: Mr. Appleton, I have to say I
13 much prefer that way of proceeding, because if you do stray
14 or if there's a difference of opinion about whether you
15 stray, then we are going to be in a situation where some
16 things may have already been said and then one Party will
17 be unhappy about it.

18 So, of course, you will have to be the judge
19 yourself of what you are going to say. And if it comes to
20 these confidential documents, I think you'll have to let us
21 know whether the feed should be cut.

22 MR. APPLETON: I think perhaps it might be easiest
23 if the Tribunal could give us some leanings. We don't have
24 to have the leanings until we get to Agenda Item 2 today.
25 Perhaps on a break you might consider this with your

1 colleagues and come back to us.

2 It would seem to me that the existence of these
3 documents themselves are not confidential. The content of
4 what is in these documents itself would be confidential,
5 and, therefore, the reference to documents in existence
6 would not. And I would propose that where I would discuss
7 documents that are in existence, that's a fact. That's
8 already been disclosed, and it is already covered in the
9 motions and other things that are with us, and that's not
10 confidential. That would be allowed to be permitted.

11 The actual content of what's in these documents,
12 that may be an issue of what is confidential, and that's
13 where I would draw the line.

14 If the Tribunal wishes me to draw the line
15 somewhere else, I would appreciate having some indication,
16 because I think the public needs to know as much as
17 possible in a case that focuses heavily on despoliation of
18 evidence, of evidence being destroyed, of evidence not
19 being available that is covered by Canadian law and is
20 protected. Right? That's what this case deals with, are
21 materials that under the law of Canada have to be protected
22 and under the law of Ontario have to be protected, but were
23 destroyed, and there were criminal charges and conviction.

24 And so, to the extent that we can't let the public
25 know about that, which--I think the public has a right to

1 know, but to the extent we can't let the public know, I
2 understand that Canada has said they want to suppress,
3 through confidentiality, that particular evidence, that
4 content, through confidentiality.

5 We obviously objected. The Tribunal has ruled.
6 That matter is over. But the existence of such documents,
7 they have not asserted confidentiality over it. They have
8 pleaded it into documents that are on the public site, and
9 that, to me, is where the line would be drawn.

10 But we will follow completely your instructions,
11 and we simply would ask that before we get to Item 2, you
12 give us those instructions. If you're prepared to give
13 those instructions right now, that is all right, too.

14 PRESIDENT BULL: Thank you, Mr. Appleton.

15 Ms. Di Pierdomenico, any other comments?

16 MS. DI PIERDOMENICO: Yes. Just in response to
17 that, I think that the Tribunal's decision on this is
18 clear, and that is the confidentiality is asserted over all
19 of it, and, therefore, I think it's a bright line rule that
20 need not be crossed today unnecessarily.

21 PRESIDENT BULL: Right. Thank you.

22 The issue having been flagged, and since this is
23 coming up after the break, I think we can move on for the
24 moment.

25 The other matter that I wanted to check was with

1 the Non-Disputing Parties, and my understanding is that the
2 Government of México is not intending to make any oral
3 submissions. Is that still the case?

4 MR. LÓPEZ: Yes, that is still the case,
5 Mr. President.

6 PRESIDENT BULL: Thank you.

7 And I understand that the United States would be
8 making oral submissions, and I wondered if there was an
9 indication we could have about which of the applications
10 you would be making those submissions on.

11 MR. JEDREY: Yes, Mr. President. The United
12 States will be making submissions solely on Agenda Item 4,
13 so we won't be making any submissions, any oral
14 submissions, during the course of today.

15 PRESIDENT BULL: Good. Then we are bang-on time,
16 9:15, and we can start with Agenda Item 1, and this is the
17 Respondent's Motion for Disclosure of Third-Party Funding,
18 and, of course, I would invite the Respondent to begin.

19 But just before that, Mr. Bishop wanted to clarify
20 something arising from the submissions.

21 ARBITRATOR BISHOP: Yes. I have a question that
22 perhaps might save some time.

23 I understood from the papers that the Parties may
24 be in agreement on disclosing the identity of the
25 third-party funder as long as it's done in confidence.

1 Did I understand that to be the position of the
2 Claimant?

3 MR. MULLINS: On behalf of the Claimant, if we
4 are--as we put in our papers, if we were so ordered, we
5 would disclose. I think there is an argument to be had
6 that if the Tribunal never knew who the funder was, the
7 issue of a conflict probably doesn't exist because it is
8 almost like, once the cat is out of the bag, you now
9 realize there is a conflict.

10 I recognize, however, on issues of transparency
11 that the line of cases or authorities in the Queen Mary
12 suggested that disclosure should be had, so I guess that's
13 a long-winded way of saying that while we would--if we are
14 so ordered, we would not oppose it, if that makes it easier
15 for the Tribunal.

16 ARBITRATOR BISHOP: Okay.

17 PRESIDENT BULL: So, I believe it's Mr. Klaver who
18 is going to be--have I pronounced that correctly?

19 MR. KLAVER: It is Klaver.

20 PRESIDENT BULL: Klaver. Mr. Klaver.

21 You are speaking for Canada in respect of this
22 motion?

23 MR. KLAVER: Yes.

24 PRESIDENT BULL: Thank you.

25 MR. KLAVER: So, just at the outset, I'd like to

1 thank the Claimant for clarifying that. Our understanding
2 of the Claimants' proposal was that you were willing to
3 disclose the identity of the funder to the Tribunal solely,
4 but not to Canada. So, if you are willing to disclose the
5 identity of the funder to Canada as well, that clears up
6 one of the issues.

7 MR. MULLINS: On behalf of that, I don't believe
8 that, on that issue, that Canada really does need it. We
9 would disclose to the Tribunal, just so we are clear, but I
10 don't understand--and I'm interested to hear your
11 argument--why Canada would have it. But I think you're
12 probably looking for more anyway, so I think it's probably
13 a moot point, and I think it's where the rubber hits the
14 road anyway. So, you're looking for more than just this
15 identity anyway.

16 AGENDA ITEM NUMBER 1: RESPONDENT'S MOTION FOR
17 DISCLOSURE OF THIRD-PARTY FUNDING
18 ARGUMENT BY COUNSEL FOR THE RESPONDENT

19 MR. KLAVER: Thank you.

20 President Bull, Arbitrator Bethlehem, and
21 Arbitrator Bishop, thank you for providing us with the
22 opportunity to address third-party funding in this
23 Arbitration.

24 Third-party funding has emerged fairly recently as
25 a prominent issue in Investor-State arbitration, and while

1 it has the potential upside of bringing access to justice
2 for meritorious claims, it also brings new risks. Now, we
3 will address some of them today, such as the risks of
4 conflict of interest, but at the outset, we wish to outline
5 for the Tribunal the risk that third-party funding can
6 undermine the equality between disputing Parties.

7 Now, third-party funders are not Parties to the
8 Arbitration. Unlike domestic courts, investment Tribunals
9 cannot order a third-party funder to pay an Adverse Costs
10 Order that is made against the Claimant, nor can Respondent
11 States enforce that order against the third-party funder.

12 Now, as you can see from this passage on the
13 slide, this creates the risk of what Arbitrator Jean
14 Kalicki calls "the arbitral hit and run." It arises when a
15 funder stands to gain if the Claimant wins, but would not
16 be liable to meet any award of costs that might be made
17 against the Claimant if it lost. This risk is highest when
18 a funding agreement expressly absolves the funder of
19 responsibility to pay an Adverse Costs Order.

20 By rendering a cost order ineffective and forcing
21 the Respondent State's taxpayers to foot the bill,
22 third-party funding can undermine the equality of the
23 Parties and the integrity of the Arbitration.

24 Now, in this case, Tennant has effectively
25 admitted that a third party is funding the Claim. Canada

1 first inquired into the participation of a funder in its
2 motion for a disclosure of third-party funding and security
3 for costs, and as we've seen, Tennant has indicated that a
4 funder may be involved and it's willing to disclose that
5 information. But Tennant is only willing to disclose it to
6 the Tribunal, it sounds like, and this is unacceptable for
7 the reasons I'll explain today.

8 Canada's motion also inquired into whether a
9 funding agreement absolves a funder of responsibility for
10 paying an Adverse Costs Order against Tennant. Again, the
11 Claimant could have resolved this issue by reassuring the
12 Tribunal that a funder had taken responsibility to pay an
13 Adverse Costs Order. The fact that it did not do so
14 increases our concern that Tennant has, indeed, entered
15 into a third-party funding agreement that allows a funder
16 to avoid paying Canada's costs. In these circumstances,
17 the risk of an "arbitral hit and run" would be very real.

18 As can see on the slide, my objective today is to
19 convey two main points for the Tribunal.

20 First, it is necessary to order Tennant to
21 disclose to both Canada and the Tribunal the identity of a
22 third party that is funding this claim.

23 Second, it is necessary to order Tennant to
24 disclose the terms of the funding arrangement.

25 Now, starting with the identity of the funder,

1 Tennant fails to cite a single Investment Tribunal that
2 limited disclosure to the Tribunal while excluding the
3 Respondent. In contrast, today I will discuss multiple
4 Investment Tribunals that have ordered disclosure of
5 third-party funding to both the Tribunal and the Respondent
6 State.

7 Now, while some of these were decided under the
8 2010 UNCITRAL Rules or the ICSID Rules, they offered
9 reasons that are just as meaningful and relevant to this
10 Tribunal's determination under the 1976 UNCITRAL Rules.

11 Specifically, as listed on the screen, Tribunals
12 have identified at least three reasons to order disclosure
13 of third-party funding in international arbitration.

14 First, for the purposes of transparency; second,
15 to address potential conflicts of interest; and, third, to
16 assess applications for security for costs. Each of these
17 reasons relates to the integrity of the Arbitration, and
18 for all three, it is necessary to order Tennant to disclose
19 the identity of the funder to Canada and the Tribunal.

20 Now, starting with transparency, this an integral
21 principle in international arbitration. Transparency
22 upholds the legitimacy of investment proceedings.

23 The IBA guidelines on conflicts of interest in
24 international arbitration were revised in 2014 partly to
25 address the emergence of third-party funding in

1 international arbitration, and the explanation to General
2 Standard 6(b) states: "Third-party funders may have a
3 direct economic interest in the Award, and, as such, may be
4 considered the equivalent of a party."

5 Disclosure of a funder's identity is necessary for
6 Canada to know: Who is the true party, or the equivalent
7 of a party, that brought this claim against it? To deny
8 Canada this information would undermine the legitimacy of
9 the arbitration, as Canada could be left defending a claim
10 for over \$100 million brought, ultimately, by an
11 unidentified actor.

12 Right now, there are many unknowns about this
13 Claim. For instance, if a third-party funder is from
14 Canada or a non-NAFTA Party, Canada might wish to explore
15 the possibility of a denial of benefits in this case.
16 Disclosure of a funder's identity could help address this
17 possibility.

18 Now, the Muhammet Cap Tribunal paid due regard to
19 the principle of transparency, stating: "The Tribunal
20 considers that transparency as to the existence of a
21 third-party funder is important." That Tribunal ordered
22 disclosure of third-party funding to the Respondent and the
23 Tribunal for a multitude of reasons, including to address
24 conflicts and the Respondent's potential application for
25 security for cost.

1 Now, for its part, Tennant fails to offer a valid
2 reason that the Tribunal should disregard transparency and
3 exclude Canada from learning the funder's identity. If the
4 Claimant considers the funder's identity to be
5 confidential, it may follow the proper procedures in the
6 Confidentiality Order to seek to redact that information.
7 Accordingly, the Claimants' request would break from the
8 jurisprudence for no good reason.

9 Moreover, to exclude Canada from learning of any
10 third-party funding in this Arbitration would undermine the
11 equality of the Parties, which the Tribunal is required to
12 uphold under Article 51 of the 1976 UNCITRAL Rules.

13 In fact, Tennant's Proposal would contravene
14 Article 15(3), which, as you can see, requires that "All
15 documents or information supplied to the Arbitral Tribunal
16 by one Party shall at the same time be communicated by that
17 Party to the other Party."

18 Now, moving to potential conflicts of interest:
19 Article 7(a) of the IBA guidelines states that a Party must
20 inform the Tribunal and other Parties of any direct or
21 indirect relationship between the arbitrator and a
22 third-party funder. The involvement of a third-party
23 funder can create a wide range of potential conflicts in
24 international arbitration. Avoiding such conflicts is
25 imperative to protect the legitimacy of investment

1 proceedings and the validity of arbitral awards. Thus, it
2 is necessary to order Tennant to disclose the identity of
3 the funder to address potential conflicts.

4 Moreover, Canada, the arbitrators, and Tennant
5 each need to make their own assessment of potential
6 conflicts in this case. As Nadia Darwazeh and Adrian Leleu
7 explain, the independence and impartiality of an arbitral
8 tribunal cannot be properly assessed unless the existence
9 of a funder is disclosed to all: The members of an
10 arbitral tribunal, the Parties, and the arbitral
11 institution. It would undermine the integrity of the
12 arbitration to deny Canada the opportunity to assess
13 potential conflicts.

14 Investment Tribunals have acknowledged the
15 legitimacy of these concerns. For instance, in both South
16 American Silver and EuroGas, the Tribunals ordered
17 disclosure of third-party funding, of the identity of the
18 funder, to determine if the Arbitrators had a potential
19 conflict.

20 Now, moving to the third reason to disclose
21 third-party funding on security for costs, the presence of
22 a third-party funder may indicate that a Claimant is
23 impecunious and unable to pay an Adverse Costs Order; thus,
24 the widely held view among tribunals and commentators is
25 that third-party funding may be an important factor in the

1 determination of an application for security for costs.

2 For instance, in García Armas, the Tribunal stated
3 that third-party funding is especially relevant when it
4 comes to evaluating requests for interim measures to
5 provide security for costs.

6 Furthermore, the proposed reforms to the ICSID
7 Rules are instructive on this issue. They do not bind the
8 Tribunal; yet they offer important context for its
9 consideration, as the reforms indicate that ICSID members
10 are incorporating what Tribunals have already ruled.

11 As you can see on the slide, Rule 14 provides--or
12 requires the disclosure of the name of a third-party funder
13 in the Arbitration, and this is provided to the Opposing
14 Party. And Rule 52 states the Tribunal may consider
15 third-party funding as evidence in determining whether to
16 order security for costs.

17 In sum, it is necessary to order Tennant to
18 disclose any third-party funder's identity in this
19 arbitration to both Canada and the Tribunal to address--to
20 uphold transparency, address potential conflicts, and as it
21 relates to the motion for security for costs.

22 Now, for these same reasons, Canada maintains that
23 it is necessary to order the disclosure of any third-party
24 funding agreement. Canada requests disclosure of the full
25 agreement to review it for any provisions that relate to

1 the issues addressed today. However, it is critical to
2 disclose four key terms to the extent that they may exist
3 in a funding arrangement: A funder's level of financial
4 interest in the Award; whether a funder paid Tennant's
5 arbitration fees; whether a funder has responsibility to
6 pay an Adverse Costs Order; and a funder's termination
7 rights.

8 Now, first, if a funder stands to gain a
9 significant portion of a final award in favor of Tennant,
10 it would strongly indicate that Tennant is impecunious and
11 has no capability to pay an Adverse Costs Order. This
12 would corroborate the need for security for costs.

13 Second, if a funder paid Tennant's fees for the
14 Arbitration, this could further inform the assessment of
15 the Claimants' impecuniosity.

16 Third, it is extremely important to order
17 disclosure of any terms indicating that a funder will not
18 pay an Adverse Costs Order against Tennant. In fact, it is
19 widely held across the international arbitration community
20 that security for costs may be justified to protect the
21 integrity of the arbitration and prevent the "arbitral hit
22 and run."

23 Now, in this regard, it is important to consider
24 the ICCA Queen Mary Task Force on third-party funding. The
25 Task Force included leading arbitration experts including

1 Arbitrator Bishop. And the Report states: "A funder who
2 benefits financially if the client wins should not be able
3 to walk away without any responsibility for adverse costs
4 if the client loses."

5 To prevent this outcome, the Report explains:
6 "One important provision in a third-party funding
7 Agreement, which the Tribunals should review, will be the
8 provision about whether the funder has agreed to cover
9 adverse costs, including an order for security for costs.
10 If the Party is impecunious, both the funder and Party
11 should be aware that a funding agreement in which a funder
12 is not obligated to irrevocably pay an award of costs may
13 cause the Tribunal to order security for costs."

14 Furthermore, commentary to the proposed ICSID
15 Rules states: "If the Tribunal determines that the terms
16 of the third-party funding Agreement would be relevant to
17 its decision (for example, whether the funder has
18 undertaken to cover an Adverse Costs Order) it may order
19 disclosure of the relevant information or terms."

20 Now, Tribunals are already moving in this
21 direction. In *García Armas*, the Tribunal noted that in
22 many previous cases, Tribunals inquired as to whether the
23 financing agreement did or did not cover an adverse costs
24 award. And the Tribunal ordered security for costs in
25 large part because the terms of the funding agreement

1 allowed the funder to avoid any responsibility for an
2 adverse costs award.

3 Moreover, in RSM v. Saint Lucia, the Tribunal
4 ordered security for costs partly because the admitted
5 third-party funding further supports the Tribunal's concern
6 that Claimant will not comply with a cost award rendered
7 against it since in the absence of a security or guarantees
8 being offered, it is doubtful whether the third-party will
9 assume responsibility for honoring such an award.

10 Furthermore, two International Commercial
11 Arbitration Decisions offered guidance that, although not
12 binding, may be helpful for this Tribunal. An ICC Tribunal
13 ruled: "The Arbitral Tribunal takes into consideration the
14 fact that the funding agreement rules out any payment of
15 costs awarded to Respondents and concludes that in this
16 case the Agreement changed the circumstances in such a
17 fundamental manner that security for costs is justified."

18 Moreover, in X v. Y & Z, an Arbitral Tribunal
19 ordered security for costs after observing that the
20 Claimants' third-party funding arrangement did not provide
21 for the funder to pay an eventual Adverse Costs Order.

22 These commentaries, reforms, and arbitral
23 decisions all demonstrate that to protect the integrity of
24 this arbitration, it is necessary to order Tennant to
25 disclose any term in the funding agreement indicating that

1 the funder has no responsibility to pay an Adverse Costs
2 Order. Confirmation of this point would further prove a
3 very high risk that Tennant will not pay a costs order in
4 Canada's favor and corroborate the need for security for
5 costs.

6 Now, the fourth element--yes.

7 ARBITRATOR BETHLEHEM: Mr. Klaver, with the
8 President's permission, just before you move on, I have a
9 number of questions. I won't get to them all now, but
10 there is just one here.

11 You identified four key terms that you indicated
12 should be disclosed. I'd be interested to know whether you
13 place a priority on those. You spend most of your time
14 talking about responsibility to pay an Adverse Costs Order.
15 If you could be satisfied on the issue of the Adverse Costs
16 Order, are the other three points as important?

17 I mean, we're here focused simply on the risks of
18 nonpayment of costs, aren't we?

19 MR. KLAVER: Right. Canada's position, I want to
20 be clear, is that the full funding agreement needs to be
21 disclosed. In terms of ranking of the priority, it is
22 extremely important to disclose any term indicating whether
23 the funder will pay an Adverse Costs Order. But that
24 doesn't take away from the importance of other factors like
25 whether the funder stands to gain a significant portion of

1 the Award. If the funder stands to gain a very large
2 amount, that could indicate that the Claim was effectively
3 assigned to someone else and that Tennant was just
4 maintained as a shell for jurisdictional purposes. And
5 that may feed into an analysis of a denial of benefits
6 issue.

7 So, there are multiple issues that may arise from
8 disclosure of the funding agreement. We need to see all of
9 that.

10 ARBITRATOR BETHLEHEM: But the wider issues that
11 you identify, don't they engage other considerations such
12 as whether Tennant is just a fiction, a shell; whereas, the
13 particular issue of whether the Claimant would be able to
14 pay an Adverse Costs Order would be satisfied, wouldn't it
15 be, if you could be satisfied simply on the question of
16 responsibility to pay an Adverse Costs Order?

17 MR. KLAVER: So, Tribunals have--for instance,
18 García Armas, ordered security for costs mainly on two
19 factors, impecuniosity and a third-party funding agreement
20 that absolved the funder of responsibility. The term
21 indicating that the funder has no responsibility would
22 address the second issue, but impecuniosity is also a
23 concern. And the items related to whether a third party
24 paid the arbitration fees could indicate Tennant has no
25 funds. Whether the funder stands to gain a significant

1 portion of the Award, again, could indicate Tennant is
2 impecunious. So, we need more than just that term for a
3 full analysis of the security for costs motion.

4 ARBITRATOR BETHLEHEM: Thank you.

5 MR. KLAVER: Now, the fourth element of the
6 funding agreement that it is necessary to order the
7 claimant to disclose concerns a funder's termination
8 rights.

9 The ICCA Queen Mary Task Force report states:
10 "Another relevant provision in the context of a security
11 for costs application will be the provision in a third
12 party funding agreement about the funder's termination
13 rights. If a third party sustains the Claim but can
14 withdraw funding before the Final Award without any
15 responsibility to pay an Adverse Costs Order, this further
16 supports the need for security for costs."

17 Now, having outlined the four key terms to
18 disclose, I also wish to emphasize a striking similarity
19 between this Claim and the facts in Muhammet Cap. That
20 Tribunal observed that the Claimants had changed their
21 legal counsel. The new counsel was the same counsel for a
22 different Claimant that had failed to pay an Adverse Costs
23 Order to the Respondent in another investment arbitration.
24 The Tribunal ordered disclosure of the full terms of the
25 funding agreement partly because the same counsel was

1 involved in both claims. And the Tribunal concluded in
2 these circumstances: "The Tribunal is sympathetic to
3 Respondent's concern that, if it is successful in the
4 arbitration and the Cost order is made in its favor,
5 Claimants will be unable to meet these costs and the
6 third-party funder will have disappeared as it is not a
7 party to the arbitration."

8 Now, similarly, Tennant's counsel represented
9 Mesa, which you will hear a lot about today and tomorrow.
10 Mesa continues to evade a \$3 million costs order rendered
11 against it in March 2016 in another NAFTA Arbitration
12 against Canada. Consequently, Canada has been forced to
13 expend further resources trying to enforce the Costs order
14 against Mesa. In these circumstances, Canada has a
15 legitimate concern about history repeating itself, such
16 that Canada is forced, once again, to bear the expenses of
17 an unpaid costs order. Disclosure of the funding agreement
18 would shed some light on this risk. Therefore, to uphold
19 transparency, review for potential conflicts, and address
20 Canada's motion for security for costs, it is necessary to
21 order Tennant to disclose to Canada and the Tribunal the
22 identity of any third party that is funding this Claim and
23 the terms of the funding agreement. The only way to
24 preserve the equality of the Parties and uphold the
25 integrity of the Arbitration is with an order for

1 disclosure of third-party funding.

2 Thank you.

3 PRESIDENT BULL: Thank you, Mr. Klaver.

4 Do you have any questions?

5 Please go ahead.

6 ARBITRATOR BETHLEHEM: I have a number of other
7 questions, and do feel free to defer these. I know that
8 you have an opportunity to come back.

9 MR. KLAVER: Sure.

10 ARBITRATOR BETHLEHEM: I presume that Canada
11 accepts that there may be terms in any third-party funding
12 agreement which are commercially in confidence and you
13 would not need to see; is that correct?

14 MR. KLAVER: No. Our position is we need to see
15 the full funding Agreement, and if Tennant seeks to redact
16 information on the basis of confidentiality, it can follow
17 the proper procedure in the Confidentiality Order.

18 ARBITRATOR BETHLEHEM: Right. So, then this goes
19 to the next question, and I anticipate--I don't know your
20 immediate answer, but I would like you to sort of assume
21 the premise.

22 If the Tribunal was not with you on the issue of
23 disclosure of the whole agreement, would it suffice--or, if
24 not, why would it not suffice--for the Tribunal to ask the
25 Claimant to address the questions of whether, for example,

1 there was a restriction on the payment of an Adverse Costs
2 Order? In other words, to get counsel on instructions to
3 say "I can't affirm that there is a commitment to pay an
4 Adverse Costs Order."

5 Would that be--would that not be sufficient?

6 MR. KLAVER: That would plainly not be sufficient.
7 We need to see the terms of the funding agreement itself.
8 We do not want to rely on a representation from counsel.
9 And it is also in line with the jurisprudence to order
10 disclosure of the full funding agreement when there is a
11 security for costs application that the Tribunal needs to
12 resolve. Muhammet Cap, García Armas both ordered full
13 disclosure of the terms of the funding agreement in order
14 to address security for costs.

15 ARBITRATOR BETHLEHEM: I appreciate your point,
16 which is really repeating the submissions that you made,
17 but if the Tribunal was not with you on the issue of the
18 disclosure of the whole funding Agreement, because, for
19 example, we may not be with you on the issue of the third
20 party funder's interest in the Award, a third party
21 funder's payment of arbitration fees or so on, but we were,
22 for example, for sake of this question, with you on the
23 concerns relating to an adverse costs payment, why would it
24 not be sufficient to have the Claimant on the record aver
25 that there is a commitment to pay an adverse costs

1 Claimant, perhaps along with any statement about what
2 termination rights were engaged?

3 MR. KLAVER: I think for the integrity of the
4 Arbitration, Canada needs to be able to review the term
5 itself.

6 ARBITRATOR BETHLEHEM: And I presume, therefore,
7 that your position would be that it is not sufficient for
8 Claimants to disclose any such terms to the Tribunal alone
9 to allow the Tribunal to make an assessment, for example,
10 as to whether there is a commitment to pay an Adverse Costs
11 Order?

12 MR. KLAVER: That would be unacceptable. That
13 would contravene Article 15(3) of the 1976 UNCITRAL Rules
14 which requires disclosure that the Party makes to the
15 Tribunal to the Opposing Party, and it would also be
16 unacceptable because Canada needs to know the information
17 that the Tribunal is basing its Decision on security for
18 costs over.

19 ARBITRATOR BETHLEHEM: Perhaps the last question,
20 or maybe penultimate question: If the terms, the relevant
21 terms of the Agreement were disclosed, does the identity of
22 the third-party funder have an importance of its own, apart
23 from any issue of conflicts of interest?

24 MR. KLAVER: Yes. The identity of the funder is
25 important for Canada to assess the capital adequacy of the

1 funder itself. And the ICCA Queen Mary Task Force
2 indicates that this is a relevant factor for security for
3 costs.

4 ARBITRATOR BETHLEHEM: Okay. Then the last
5 question--truly the last question--we will get later on to
6 the issue of security for costs: Is there a sequencing
7 point here in the way which the Tribunal ought to deal with
8 this? I mean, for example, if the Tribunal was with you on
9 the disclosure of the details of the third-party funder,
10 those details were disclosed, and you were satisfied and
11 the Tribunal was satisfied that there was no adverse costs
12 issue or any other issue associated with the third-party
13 funder, would that have implications for your
14 security--security for costs application?

15 You can defer this to later on if you would like,
16 but there is obviously a linkage.

17 MR. KLAVER: I'm happy to address this now. This
18 is one factor that is relevant for security for costs. If
19 the funding agreement indicates that the funder has
20 responsibility for an Adverse Costs Order, that does not
21 resolve Canada's concerns that the Claimant will not pay an
22 Adverse Costs Order and that the funder has no duty to this
23 Tribunal to pay an Adverse Costs Order. The Tribunal
24 cannot force the funder to pay it. Canada cannot force a
25 private agreement between Tennant and its third-party

1 funder to pay. We cannot force the Respondent to
2 comply--or, I'm sorry, the third-party funder to comply
3 with that private agreement between Tennant and the third
4 party.

5 So, this is a relevant factor for the Application
6 for Security for Costs, but it would not be determinative
7 in leading to the conclusion that security for costs was
8 not necessary. Right now, Canada considers that the
9 information in front of the Tribunal indicates that Tennant
10 is impecunious and has no capability to pay an Adverse
11 Costs Order. So, we will continue to have that concern
12 irrespective of the terms of the Agreement.

13 ARBITRATOR BETHLEHEM: Thank you very much.

14 PRESIDENT BULL: Good. Thank you very much,
15 Mr. Klaver.

16 Now for the Claimants, please.

17 Mr. Mullins.

18 ARGUMENT BY COUNSEL FOR THE CLAIMANT

19 MR. MULLINS: Thank you, Members of the Tribunal.

20 In terms of the issues, what we've heard from
21 Canada is that they want not only answers to the questions
22 raised by the Tribunal, which we also feel are
23 confidential, but everything possible. And the one thing I
24 would point out first is that third-party funding is not
25 this idea of, you know, "hit and run."

1 We are going to talk a lot about the Queen Mary
2 Project as well, and as they point out, the--even
3 Respondents sometimes are now using third-party funding.
4 And the fact that someone is using third-party funding is
5 not a--necessarily a basis that made-up claims or claims
6 that should never be brought. But what I found really
7 interesting of the comments is, "Well, we need to know
8 everything about the Claimant, whether or not they could
9 pay a cost order. We need to know what the funder is. We
10 need to know the finances of the funder."

11 Remember, you're in an international arbitration
12 and Parties are to be treated equally, and it's convenient
13 that Canada, a country, can make these arguments, but think
14 if it's just another Respondent. Do I have the
15 opportunity, obligation, or right to ask for the finances
16 of a Respondent? Do I get to go, before I get my claim, my
17 award, ask who--can you pay the Award? Who owns it? Who
18 is behind it? What kind of property you have? I mean,
19 what's been mortgaged? Of course not.

20 I mean, this idea that you can do this intensive
21 investigation of everybody that may or may not be involved
22 before this Award is contrary to the very concept that we
23 are not going to look at the merits of the Claims until it
24 is fully decided, and Canada seems to think that, you know,
25 we are definitely going to win the Cost Award and,

1 therefore, I need to know all your finances, and certainly
2 that's not the law, that's not what's been recognized in
3 international tribunals and we ask you to reject it.

4 Certainly, the UNCITRAL model Working Group and,
5 of course, the Queen Mary--of course, we will talk more in
6 detail in a moment--have recognized that these arrangements
7 are confidential, and by revealing these terms is the kind
8 of leverage that we don't have. We are not going to be
9 able to find out all the finances of Canada, and this is
10 the kind of leverage that they would like to have.

11 Let's talk about the conflict issue. We do think
12 that the only legitimate issue is the conflict that it
13 turns out that the identity funder is one that, perhaps, a
14 law--members of the Tribunal may have been involved in the
15 past, et cetera, could be revealed. I was interested to
16 know what Canada's interest in the identity, and apparently
17 the only interest was not that they actually used funders
18 themselves, but that, in fact, what they are really saying
19 is that they really want to know the financial condition of
20 the funder itself so they know what they can go after,
21 something we are not entitled to on our end.

22 I recognize, however--we recognize that, on the
23 issue of transparency, that the identity of--given to the
24 name of the funder to the Tribunal would be shared with--to
25 the Party of the other side, but we do think that that

1 should be it. Just as we--and Canada mentioned the South
2 American case, and in that Decision, what was identified
3 was the name of the funder for purposes of conflicts, but
4 then the Respondent, just as the Respondent here, had asked
5 for more, they wanted disclosure of the terms of the
6 financing agreement with the third-party funder and the
7 Tribunal rejected it. And the reason is because you are
8 putting the cart before the horse.

9 At the end of the day, the South American
10 Tribunal--and I believe the Queen Mary Project goes--there
11 is a lot of things in there, but at least, I think, the
12 sense that I get from the Queen Mary Project is that the
13 test of whether or not security of costs is going to be
14 applied should be considered independently of what you
15 would find out from the third-party funder, and it can't be
16 the other way around.

17 And so, we believe, and it will be argued intense
18 tomorrow, that the Tribunal, in fact, lacks the authority
19 to award security costs under--in a NAFTA arbitration.

20 But in any event, the test needs to be met, and it
21 can't be what's fine in the terms of the funder and use
22 that against it. Because just like in the Decision in
23 South American, what should happen is does the test meet
24 for security costs and then you look at the third-party
25 funding issue. We think that's the way it should happen,

1 and we do believe that the third-party funding will
2 fail--I'm sorry, that the security for costs will fail and,
3 therefore, that there is no need begins with our terms of
4 our arrangement with any third-party funder. Again, you
5 can't put the cart before the horse.

6 When we talk about, you know, beyond the identity
7 of the funder, which obviously we held confidential,
8 disclosing the interests of--the financial interests of the
9 funder and the extent of what the financial terms are
10 clearly are proprietary. And, if anything, the existence
11 of a funder, you know, suggests that someone believed in
12 the case independently of just the Claimants. So I don't
13 understand this "hit and run" idea.

14 But if you really think about it, what you are
15 really asking for is the heart of attorney-client
16 privilege. I mean, I'm not entitled to know--look, for
17 example, if the State here, Canada represents itself. As
18 the Tribunal is well aware, often States are represented by
19 Outside Counsel. I'm not entitled to know what the rates
20 are. I'm not entitled to know if there's--you know, what
21 their--is there a flat fee and how much--what's being cost
22 there.

23 And just if--on our side, you're not entitled to
24 know the terms we have with our client. You know, do we
25 have a flat fee, do we have an assessed fee, do we have a

1 contingency. You're not entitled. This is attorney-client
2 information. This is what the Queen Mary Project
3 recognized, that these are confidential terms. You are not
4 allowed to go in behind it in the guise of just trying to
5 find out all the information possible. Again--you know,
6 whether or not the funder would pay adverse costs against
7 an investor. Again, this presupposes Canada is going to
8 win a cost issue, which it should not, and we will talk
9 about that tomorrow.

10 But essentially, all that's going on is that
11 Canada is simply trying to find out the assets of our
12 client prejudgment or pre-award. That's not appropriate.
13 And, in fact, it would essentially be the Tribunal
14 presupposing the--who is a winner, which you are not
15 allowed to do, of course. At this point, you haven't heard
16 the case, and so essentially to allow Canada to do a full
17 disclosure and have to know all the economic terms is
18 essentially is presupposing the case, which is not fair,
19 but also inappropriate.

20 And what's really going on here is that they talk
21 about the access to justice, but what really is going on
22 here is that States such as Canada are trying to eliminate
23 legitimate claims and trying to scare people to not be
24 involved in third-party funding arrangements because the
25 ramifications of having to reveal all of that would be

1 devastating. And also in a situation where a Claimant is
2 basically eliminated, either through expropriation or
3 whatever, all their assets, and they try to get funding,
4 this will be the end of trying to find out what the funding
5 is and try to eliminate claims, and it simply is just
6 inappropriate.

7 Talk a little bit about the Queen Mary Report that
8 both sides have looked at. And, remember, this is a report
9 basically on third-party funding. If you look at, for
10 example, Chapter 5, Finding B2, the Queen Mary found that:
11 "The specific provisions of a funding agreement may be
12 subject to confidentiality obligations between the Parties
13 and may include the information that is subject to a legal
14 privilege. As a consequence, production of such provisions
15 should only be ordered in exceptional circumstances."

16 And I submit that that hasn't happened here. The
17 Queen Mary is recognizing that the provisions of these
18 agreements are confidential and be subject to
19 attorney-client privilege and simply is not necessary. And
20 the identity, as I say, is not a privilege issue for
21 conflicts purposes, but going beyond that, it is completely
22 inappropriate.

23 The Queen Mary Report, also in Chapter 6, said
24 that: "The Application for Security of costs should, in
25 the first instance, be determined on the basis of

1 applicable tests without regard to the existence of any
2 funding arrangement."

3 That is the exact procedure done in the South
4 American case where they looked at the issue of whether or
5 not security costs should be awarded before determining
6 whether or not there's going to be a disclosure of the
7 funding arrangement because the issue should be separated
8 and to meld those together would be inappropriate. And so
9 we suggest, both as the Queen Mary suggested--Project, and
10 both South American, that the process should be--those
11 should be independent, and, in fact, as we believe the
12 security costs would be inappropriate, that should be the
13 end of the analysis.

14 And I--contrary to what we heard today, but some
15 Tribunals--in fact, the Queen Mary said in most of these
16 Tribunals and other circumstances--this is on Page 221 of
17 the Report--says: "The conclusions there are based on
18 analysis of existing sources and reported investment
19 arbitration cases is that the existence of third-party
20 funding is generally irrelevant to either a determination
21 of request for security costs or final allocation of costs
22 at the end of the case."

23 So, contrary to--it is not--it should be a
24 separate issue independent of the issue of the security
25 costs. And so, when you do that, then you ask why you need

1 to have all this information if you look at the four
2 factors beyond the identity that they are asking for.
3 Again, you see that it would go beyond the identity. They
4 are essentially looking for issues that all go to,
5 essentially, the--on the security cost issue, and that
6 should be separated out, in fact.

7 Now, going to Arbitrator Bethlehem's questions,
8 you know, could you answer certain questions. You know, I
9 heard from counsel--and I would say--this is just what the
10 questions are. But, for example, has a claim been
11 assigned? You know, can you answer that? And I heard the
12 counsel, "Well, we can't trust the counsel's
13 representations." That is just disappointing. Obviously,
14 we are able to answer questions under--as officers of the
15 Court, for lack of a better term, and we can answer
16 questions, if necessary.

17 But I will say now, make no mistake, the Claimant
18 here is Tennant. It is not some other entity. Tennant is
19 the Claimant and, in fact, certainly they are entitled to
20 do what they need to do to address the issues of standing,
21 et cetera, but at the end of the day, those questions can
22 be answered without revealing confidential terms.

23 ARBITRATOR BETHLEHEM: Mr. Mullins, may I just--

24 MR. MULLINS: If I read your question.

25 ARBITRATOR BETHLEHEM: We will pick up on this.

1 Just to be very specific on what you've just said,
2 are you saying here to us that you, Counsel for Tennant,
3 would be able to and in a position to respond to questions
4 from the Tribunal on specific issues such as whether there
5 was a responsibility of a third-party funder to pay an
6 Adverse Costs Order; and, second, were you able to answer
7 those questions, for example, by indicating that there was
8 a commitment to pay an Adverse Costs Order, I'd be
9 interested to know whether you think that that would be
10 sufficient. I'd be interested to know whether you think
11 that would be sufficient to satisfy the Respondent's
12 concerns.

13 MR. MULLINS: I appreciate that. Certainly we can
14 answer questions. But that's--our view is that does then
15 cross the line into issues, as I just argued, that the
16 Tribunal should not do.

17 As the Queen Mary Project recognizes, as the South
18 American Project recognizes, whether or not there's going
19 to be award of security costs is independent of the terms
20 of the Funding Agreement, and so we think those issues are
21 confidential, and so we don't believe that it would be
22 appropriate for the Tribunal to ask those questions and to
23 require us to answer it.

24 I mean, the devil in the details. You can simply
25 ask enough questions where you would basically get the

1 whole funding agreement anyway, which is not appropriate
2 either.

3 What I was really headed to is representations to
4 be made as to the identity of the stakeholder, and the
5 stakeholder is Tennant, and that we could affirm that the
6 Claim has not been assigned. And those are to--would, I
7 think, solve one issue that Canada pointed out, which is
8 that we want to make sure that there is jurisdiction here
9 in terms of who is the Claimant.

10 But, again, we would, with all due respect to the
11 Tribunal and your question, believe that, again, based on
12 what the Queen Mary points are and the South American
13 decisions, and what a lot of these Tribunals have said is
14 that the security costs issue has to be separate from the
15 funding agreement.

16 And, again, I really emphasize, just turning
17 around--I mean, again, we look at this as an international
18 arbitration, and we are here in Investor-State arbitration,
19 but, again, we are generating principles, and people look
20 at these Decisions. I am not entitled to know against a
21 Respondent--obviously, it's convenient it's Canada, but
22 let's say it is some other Respondent, I'm not entitled to
23 know, well, is your Shareholder going to pay for this?
24 What kind of assets do you have? We are just not allowed
25 to know that. That is not consistent with how these things

1 work. You don't win before you won.

2 And at the end of the day, we are concerned about
3 access to justice, but it goes both ways because, just like
4 a Respondent will say, "Look, you're not entitled to know
5 that stuff, you haven't won yet," why are they allowed to
6 turn it around against the Claimant and say, "You know, by
7 the way, we win, we may get a Security Costs Award and,
8 therefore, we are entitled to it."

9 I don't believe that that goes fair. It's not the
10 way it should be done, and that's why we think--and we'll
11 talk about this tomorrow--but even if the Tribunal has
12 authority for security costs, that's why it is exceptional
13 circumstances, in the first instance, because these things
14 were not equal. It is not fair. We don't do it to
15 Respondents. We're not entitled to security costs for
16 them. How come we don't get a bond from them? How come
17 we're not allowed--because it is Canada, right. But how
18 come we are not allowed--no one is saying that we are
19 allowed to have them post, you know, to protect our
20 ultimate award.

21 So, in any event, that is how we believe that the
22 issues should be separated, and that you should not meld
23 the issues.

24 And just to close out of some of the things that
25 were raised, this is not Mesa. My current firm was not

1 counsel of record of Mesa, and there are a number of
2 lawyers that are different, but I will just point out, it
3 is simply not fair to look at one client and then say,
4 "Well, the other client is going to do another thing."
5 That's not how this works.

6 And I will point out that, in fact, Canada has not
7 even tried to collect the Award in Mesa for three years,
8 and all of a sudden counsel for Canada contacted us
9 recently, right before this Hearing, and said, "Oh, by the
10 way, when are you going to pay this Award?" I thought the
11 timing was very convenient.

12 And I will say, but it's--I think it's
13 inappropriate to say, well, one behavior by one entity is
14 going to fly over to another entity which is completely
15 different companies, and I think it's an inappropriate
16 argument.

17 I'm sorry, I'm just looking at my notes to make
18 sure I've covered some of the points of Canada in my
19 presentation.

20 I guess, unless the Tribunal has any closing, I
21 don't believe that there is any basis whatsoever for Canada
22 to know anything other than the identity, and, again, even
23 the identity, I think, is not necessary for them because I
24 don't think they are using third-party funding. I think if
25 all they are doing is trying to figure out the assets of

1 funder, I think it is kind of inappropriate for the reasons
2 I said before. But I recognize, in the interest of
3 transparency, that if information is given to the Tribunal,
4 that they will want to share it also with the Claimant.

5 I do feel that it was very telling, in closing, to
6 Arbitrator Bethlehem's questions, what if the Tribunal got
7 the information to this and Canada says, "No, we can't have
8 that because we need to know everything you're
9 getting"--and, again, it goes to the--back to we don't
10 believe this kind of invasive information should be given
11 at all and certainly, apparently, they don't agree that it
12 only be given to the Tribunal.

13 And so, in sum, we feel that the only thing that
14 should be revealed here in confidence would be the identity
15 of a funder, and that's it. And for the reasons we've
16 cited.

17 We will turn it over to one comment by my
18 colleague.

19 ARBITRATOR BISHOP: Before you do, when you
20 say "in confidence," you mean to the Tribunal and to Canada
21 in confidence; is that correct?

22 MR. MULLINS: Correct. In other words, not to the
23 public. That was really where I was headed, yeah.

24 MR. APPLETON: Thank you, Mr. Mullins.

25 I simply want to raise one issue that was raised

1 for the very first time in Mr. Klaver's discussion today,
2 and it's about Denial of Benefits, Article 1113 of the
3 NAFTA. And the Tribunal might not be familiar with the
4 terms of Denial of Benefit and how that works, but it's a
5 process by which the Government of Canada could seek to
6 have the benefits of the NAFTA removed from the Claimant in
7 this case, from Tennant Energy, only in the circumstances
8 that it did not own or control the investment.

9 Now, the situation that I've heard today is
10 outrageous. The suggestion that, for example, if I had a
11 mortgage or I owed my brother \$50 in a promissory note that
12 somehow that would mean I no longer owned my house or owned
13 the company is completely and utterly abusive. It is prone
14 to abuse. It is a process of delay, distract, and deny,
15 and this Tribunal has been very careful to set up very
16 clear time frames to make sure this case can proceed.

17 But the Government of Canada continues to throw
18 out different things to delay, distract, and deny from
19 what's here. The suggestion that any type of financing
20 arrangement here could mean in some way that Tennant Energy
21 does not own this Claim, that Tennant Energy doesn't own
22 that company, it didn't make the investment that was
23 involved here, is totally and utterly without any basis in
24 fact and completely and utterly outrageous, and I want to
25 flag this to the Tribunal because you may be now called in,

1 based on what we've heard today, for yet another emergency
2 process if Canada wishes to do this.

3 We cannot prevent this process from taking place.
4 We can merely come to you on an emergency basis to have you
5 review the legitimacy.

6 First, I'm shocked when I heard this today, and I
7 merely had to take a moment to identify that this is, in
8 itself, capricious and abusive. It cannot have any basis
9 here, and this Tribunal needs to know that we may be called
10 back to deal with this, and that this is very, very
11 unusual, inappropriate, and grossly unequal. And, yet
12 again, we see the situation where Canada is trying to abuse
13 its position. Canada is a party to a \$1 trillion trade
14 agreement. It has massive resources. We filed some
15 information about this in our response in the 1128s. They
16 get tremendous benefits from the NAFTA and, yet, now they
17 want to say that somehow this is unfair and that there
18 needs to be some issues here. And, yet--so that is one
19 issue for security. We will talk about that tomorrow.

20 But now to somehow say that they should be denying
21 the benefits and they need to look at a financing agreement
22 to see whether or not the Claimant actually owns its case,
23 this is really beyond the pale. I simply needed to flag
24 this because this is it completely new. We had never heard
25 this before and I really think it's objectionable. We are

1 going to let Mr. Klaver to be able to respond to that
2 because Canada has something to answer here.

3 QUESTIONS FROM THE TRIBUNAL

4 PRESIDENT BULL: Mr. Mullins, I have a couple of
5 questions, if you could help me.

6 MR. MULLINS: Sure.

7 PRESIDENT BULL: You said a number of times that
8 it's unfair because you can't--because Claimant cannot ask
9 Canada for a bond or security. And I was just wondering:
10 Can you help me? Isn't that just a reflection of the fact
11 that it is Respondents in any arbitration that can ask for
12 security for costs and Claimants can't unless there's a
13 Counterclaim? Usually, the position--as I understand it
14 and I could be wrong--

15 MR. MULLINS: Right.

16 PRESIDENT BULL: The position, as I understand it,
17 is the Claimant makes its own decision about whether or not
18 this is a claim worth bringing, and if it decides to take
19 the risk that the Respondent is worth pursuing in
20 arbitration, then it takes that risk.

21 But the Respondent doesn't have that choice. The
22 Respondent is brought into it by the Claimant. And in the
23 situation where there's no Counterclaim, the law on
24 security for costs, as I understand it, simply says that
25 Respondents can make that application. They might not

1 succeed, but they can make the Application and Claimants
2 can't.

3 So, I wonder if you could help me out with that.

4 MR. MULLINS: Sure. And I try--sometimes I get a
5 little academic in my arguments.

6 I think where I was headed is our fundamental
7 point is that the issue of disclosure of these arrangements
8 should be independent of the security costs issue, and
9 that, I think, based on the test--and we'll be talking
10 about this in detail, and I don't want to presuppose our
11 arguments, but that's the ramifications and the ability of
12 it and the unfairness of allowing one party to get into the
13 finances and the economic relationship in another, I
14 believe, is why this test is so strong for security costs
15 in exceptional circumstances because of the nature of that.

16 What I was really trying to argue--and I guess it
17 wasn't artful enough and I'll try to do better--is if you
18 take those as a given--I believe that's the law and I think
19 that's what the Queen Mary Project is--whether or not
20 you're going to award security or costs or not should be
21 independent of the disclosure of the Funding Agreement
22 which I think is what the South American case says, what
23 the Queen Mary suggests, they should be independent
24 decisions, then what we're really then hearing and we
25 recognize that you'll get the identity for conflicts

1 purposes, which we recognize is a legitimate point, then
2 what we're really doing, then, is having--if you take those
3 parts out, right, then what you're really doing is having
4 an investigation by one party who has a claim, here for
5 costs, on the finances of the other. That's where I'm
6 headed.

7 And that's--that doesn't necessarily happen. In
8 other words, put the idea of the security costs out for an
9 issue. I'm not entitled to know the financial relations of
10 a respondent just because I brought a claim. And that's
11 what I think is what's inappropriate, and that's why I
12 think it's inappropriate to go beyond the identity of the
13 funder and that you should also keep the issue of security
14 costs separate from the identity of the funding arrangement
15 because I'm not entitled--the Parties are not simply
16 entitled to look at the finances of the other simply
17 because you have a claim against them. Because that's
18 really all they're really saying. Because if you take the
19 security--should--the security costs should be separated
20 out, so now it's just a matter of "I want to know the
21 financial information of the Claimant," if that makes
22 sense.

23 PRESIDENT BULL: Thank you, Mr. Mullins.

24 MR. MULLINS: I don't know if it did. That's
25 where I was really headed.

1 PRESIDENT BULL: I will think about that answer.
2 Thank you.

3 A follow-on question--and you mentioned this,
4 again, about--I think the phrase earlier used was "cart
5 before the horse." There are a number of Investment Treaty
6 cases where Tribunals have decided that it was relevant to
7 them in those circumstances to know whether there was
8 funding and what the terms of funding were.

9 So, if that is correct, if it is relevant to a
10 security for costs applications, then shouldn't we know the
11 terms before deciding the security for costs?

12 I know that there are other issues involved here,
13 but the horse before the cart, or the other way around, if
14 this was one of the relevant considerations for security
15 for costs, shouldn't we decide whether or not we need to
16 see this relevant information before making the Decision on
17 security for costs?

18 MR. MULLINS: I will say our position is--in this
19 situation is no because we don't think you have authority
20 to do it anyway. And I recognize you may disagree with us.

21 PRESIDENT BULL: Yeah, I understand that's your
22 position. But that's an issue of jurisdiction.

23 MR. MULLINS: Correct.

24 PRESIDENT BULL: But jurisdiction aside, if any
25 Tribunal was coming to decide security for costs, wouldn't

1 they want to have before them the material that could be
2 relevant so that they could make the best decision
3 possible?

4 MR. MULLINS: Again, there is contrary authority,
5 and I recognize there is other Tribunals, but I think, for
6 example, in the Smith Case--our position is that--I note
7 the Queen Mary Project says a lot of things, that a lot of
8 it is--especially on the Investor-State, the basis of,
9 "Look, there is a lot of stuff going on here, and we're not
10 making up any rules," is the way I read it.

11 But I believe, based on what they said, if you
12 look at their Decision--well, the rule that came out is
13 that those decisions should be independent, because I do
14 think it's a slippery slope if you--and I don't agree with
15 the Tribunals where they used it because, I think, it's,
16 again, a slippery slope is to--well, you know, at the end
17 of the day, is that should be an exceptional circumstance.

18 And I also believe that, as the Queen Mary Project
19 says, the existence of third-party funding cannot
20 necessarily mean that these are "weak claims" or, you know,
21 people don't have assets because people are using them in
22 different situations and even respondents are using them.

23 So, I appreciate the issue of relevance, but,
24 again, I go back to the point that just because something
25 may be interesting does not mean it's an appropriate way to

1 handle it. And I do feel the way that should be separated
2 out is that the security costs issue should be separate
3 from any arrangements of the funding because of the danger
4 of revealing confidential, privileged information.

5 Again, I do separate that issue from can you
6 directly ask--have this Claimant assigned, which I think
7 the counsel can answer those kinds of questions. But I do
8 feel fundamentally it is important for Tribunals to
9 separate those issues because I think that the standard is
10 so high for the security costs it should be separate, and
11 once you start opening the door to all these terms, it
12 really puts the Claimant at a disadvantage, again, which
13 we're not allowed to have against them.

14 And I recognize you see it as a difference, but I
15 do think it's not different in a lot of ways because we are
16 not allowed to go into how the Respondents are financing,
17 again, in a regular case. And that's why the standard is
18 so high for security of costs, I believe--is one of the
19 reasons. It's exceptional circumstances because it's an
20 odd thing.

21 PRESIDENT BULL: Just one other question for the
22 moment. You had a comment earlier about how an order for
23 disclosure of the terms of the third-party funding would
24 scare people away from third-party funding and would be
25 devastating to have to disclose third-party funding.

1 You seem to suggest--here I'm seeking your
2 clarification--that it would be devastating to the
3 third-party funders? Is that what you meant?

4 MR. MULLINS: Well, I did, but, ultimately, we're
5 talking about the Claimants. I mean, I do believe that
6 a--that third-party funding is an ability for Claimants to
7 bring very strong legitimate claims.

8 PRESIDENT BULL: But why would the disclosure of
9 an agreement--

10 MR. MULLINS: Because it's confidential and
11 privileged, as the Queen Mary Project said.

12 PRESIDENT BULL: I see.

13 MR. MULLINS: At the end of the day, these are
14 confidential agreements. Again, we don't expect or allow
15 the Parties to identify and reveal the attorney-client
16 privilege or the arrangements of their counsel.

17 For example, if a counsel has something like a
18 tenancy, you're not allowed to know that.

19 PRESIDENT BULL: Why would attorney-client
20 privilege come in vis-à-vis the agreement with the funder?

21 MR. MULLINS: It is confidential.

22 PRESIDENT BULL: I understand your point about
23 confidentiality. But you also say its attorney-client
24 privilege. Maybe you mean--it may be that you mean that
25 it's analogous to, but I need your clarification on that.

1 MR. MULLINS: Well, I'm using "attorney-client
2 privilege" broadly. I'm including the work product
3 doctrine. In other words, these communications that you
4 have are privileged; it is just work product doctrine.

5 PRESIDENT BULL: The Agreement is work product?

6 MR. MULLINS: Yes. Yes. Well, no.

7 PRESIDENT BULL: After it's signed?

8 MR. MULLINS: The relations are confidential. But
9 what ends up happening is that you are opening the door to
10 communications as well between the funder and the Parties.
11 In other words, you can't simply open the door to this.
12 Once you open it up and say, well, I need to know--let's
13 say--I'm just making something up here. This is saying,
14 hey, hypothetically. "You must give quarterly reports."
15 Well, I want the reports. You disclosed it. I mean, where
16 is the limit?

17 Again, I don't see it as any--I get that there is
18 not attorney-client relationship with the funder, but they
19 are critically part of the relationship, and it's work
20 product and then the terms are confidential. And it's, to
21 me, for the same policy reasons, and we could argue whether
22 or not it's the same policy reasons for confidentiality and
23 the privilege and work product, it's not fair or
24 appropriate to say "By the way, funders, if you fund
25 these"--because your decision could be followed, right, and

1 if you said "You've got to turn these over in
2 Investor-State," because, you know, States are so much
3 unprotected than other people and they need to have
4 everything about the funders because they are so special,
5 funders will say, "Well, I'm not going to do this anymore."

6 And the ramifications of that is nobody is going
7 to--the funders are not going to fund legitimate claims and
8 the ramification of that is that somebody, for example,
9 could expropriate somebody's entire land, and the only way
10 they can sue against a State that acted horribly was to
11 fund it through a third-party funder and the funder said,
12 "You know, I really can't do it because the Decision in the
13 Tennant Case was once you get funded, they get to you know
14 everything about it."

15 The ramifications, the policy reasons of what
16 could happen here today and what we should be protecting is
17 the ability of Parties to be able to talk freely and
18 independently with "their funder" and with their Parties,
19 and just like I'm not entitled to know, care what Canada's
20 talking--I don't get to talk to--what they are saying to
21 their clients. I don't get to know that, but it's the same
22 policy reasons, and you have to look at that because
23 there's ramifications beyond today as to what could happen
24 to future claims.

25 PRESIDENT BULL: I understand what you are saying,

1 Mr. Mullins. Thank you.

2 Do you have any questions?

3 ARBITRATOR BETHLEHEM: I just have one question,
4 and it may very well be that this is something to be
5 deferred to the security for costs segment.

6 We've heard--it is in Canada's Written Submission
7 and we heard a little bit of this in passing from
8 Mr. Klaver and, Mr. Appleton, this may be a question that
9 is directed at you--the suggestion that the identity of
10 counsel or the co-identity of counsel in this case and in
11 the Mesa Case is somehow relevant. And I'd like to know
12 your views and, ultimately, Canada's views on why the
13 coincidence of counsel in the case now before us and in,
14 for example, Mesa or any other case, why that may be
15 relevant or whether it is irrelevant.

16 MR. APPLETON: Sir Daniel, I think we will talk
17 about this now because I think it will be helpful across
18 the board.

19 Canada has made a lot of hay out of the fact that
20 there are some counsel in this case who are counsel for
21 Mesa Power. They had not made hay out of the fact that
22 there is an arbitrator on this panel who was an arbitrator
23 in Windstream and, therefore, another one. There are two
24 cases that are relevant here, Mesa Power and Windstream,
25 and there is information, as we are going to talk about in

1 the second item today, that are relevant with respect to
2 both cases that are relevant in this case.

3 The Tennant Case is different. But one of the
4 important things, first of all, is in my law practice, I'm
5 the only lawyer who was on the Mesa Case. Every single
6 other lawyer in my practice was not on Mesa. Every single
7 other lawyer in my practice has no information or knowledge
8 in any way, shape, or form with respect to that case, the
9 operation of that case. A large amount of the information
10 in this case was restricted or confidential, subject to
11 orders--not only of a Tribunal, but four different orders
12 relevant from different courts of the United States with
13 respect to the production of information.

14 That information is known to Mesa. That
15 information is not known to Tennant.

16 In this case, much of the information, as we are
17 going to see, arose from Mesa Power or from Windstream and
18 was not known to the public. The Government of Ontario and
19 the Government of Canada knew information, they knew it in
20 advance, they never disclosed it. They fundamentally knew
21 of wrongfulness and wrongdoing but never did the public
22 know. Never did proponents like Tennant Energy, following
23 a process to go along, they didn't know that local
24 champions, local companies, were getting special treatment,
25 special benefits not given to others. That only came out

1 in the Hearing. That only came out in the release of
2 information in the Post-Hearing Briefs in 2015 and '16.

3 So, there's a very significant difference between
4 these cases.

5 To somehow say the information that I--because I
6 was counsel to Mesa Power, cannot say to Tennant Energy, "I
7 have an ethical obligation. I am bound by court orders. I
8 am bound by information from that, I can't give them that
9 information. I can't share that information, that is
10 restricted and locked inside, just like when I worked
11 for--I worked for the Government of Ontario for three years
12 as a civil servant and I was bound by their Official
13 Secrets Act. There is information from that time I may not
14 disclose. There are members here that may give advice to
15 the Cabinet. They may not disclose. It doesn't mean they
16 don't know it; it means they can't disclose it.

17 So, we are bound in that way.

18 So, the fact that there may be some common
19 elements here, that's correct, means that we have
20 professional obligations, responsibilities, to protect and
21 contain that information, not the other way around.

22 That is why when we talk about the second issue we
23 are going to seek production of certain materials so
24 everybody can have the same information that is permitted
25 at the same time for exactly that reason. And that's the

1 same thing here.

2 So--and by the way, I just simply have to mention
3 that I found it very disappointing that the Government of
4 Canada today would raise an issue that they are now trying
5 to collect from Mesa Power now that T. Boone Pickens, the
6 proponent of Mesa Power, has died, that they left
7 everything until the time that Mr. Pickens--who was a very
8 fine, upstanding person, well-known in the area of energy,
9 was dead, to then try to be able to start enforcing. And I
10 just thought that, as a former counsel there and someone
11 who worked very closely with Mr. Pickens, who was an
12 exceptionally upstanding and fine man and extremely
13 generous, I thought that was really beyond the pale, and I
14 thought that was very unfortunate.

15 ARBITRATOR BISHOP: Did Mr. Pickens own Mesa
16 Power?

17 MR. APPLETON: Yeah. Mr. Pickens, through a
18 variety of well-positioned companies, was the ultimate
19 beneficiary of Mesa Power, yes.

20 ARBITRATOR BISHOP: Thank you.

21 ARBITRATOR BETHLEHEM: Mr. Appleton, thank you for
22 your response, and that additional detail is helpful. But
23 I'd like to just sort of tease it out a little bit further.

24 I mean, may it be relevant, for example, if--and
25 this is the hypothetical in the same spirit that

1 Mr. Mullins was suggesting a hypothetical--if it was
2 apparent that a third-party funding, in fact, was arranged
3 by Tennant's counsel, by you, who is also counsel to Mesa,
4 and that in the course of arranging that third-party
5 funding with the same third-party funder you said, "Well,
6 let's have the same third-party funding arrangement as we
7 had in Mesa."

8 So, I'm trying to establish whether there is
9 something of substance that may be relevant flowing from
10 the fact that you were counsel in both and there is
11 evidently an issue relating to Adverse Costs Order in the
12 case of Mesa.

13 MR. APPLETON: Sir Daniel, it's a little tricky
14 because I'm no longer counsel for Mesa Power. And
15 Mr. Pickens is deceased, who would be the person I would
16 normally get my instructions from. But to make--to end
17 this inquiry and make this easier, I'm going to go out on a
18 limb and I'm going to tell you that there was no
19 third-party funder at all in Mesa Power.

20 So, to the extent that that is relevant to your
21 consideration, there was no third party. Mesa Power
22 brought its claim and that was not an issue, isn't
23 relevant, wasn't there. So, to the extent that that
24 satisfies that inquiry, and I'm hoping I haven't gone too
25 far, but I thought that in the interest of trying to just

1 try to answer these things off.

2 ARBITRATOR BETHLEHEM: Thank you.

3 ARBITRATOR BISHOP: Well, I was left a little
4 unclear by Mr. Mullins' answer about your position on
5 whether the Agreement with the funder, whether that is
6 privileged or not.

7 MR. MULLINS: I do believe that the funding
8 agreement should be considered privileged and part of work
9 product, correct.

10 ARBITRATOR BISHOP: So, the privilege that applies
11 is work product?

12 MR. MULLINS: I do believe that the relationship
13 with a funder and with the client is either considered part
14 of work product or attorney-client privileged, because of
15 the need to be fully vested and to be able to talk
16 confidentially to the funder. I think that's the better
17 view, yes.

18 ARBITRATOR BISHOP: Is there any authority for
19 that?

20 MR. MULLINS: If you give us an opportunity, we
21 could brief the issue, if you like.

22 ARBITRATOR BISHOP: Thank you.

23 ARBITRATOR BETHLEHEM: I'm going to return to this
24 as well. I don't know whether briefing the issue--this is
25 a matter for the President or for the Tribunal to decide,

1 but you'll have opportunities to come back in response, you
2 may like to think about it further.

3 I'd also like to know whether there is any
4 authority for this because it seems as if this is extending
5 the notion of privilege quite dramatically. I mean, if
6 it's going to be a funder, why isn't there going to be all
7 sorts of other people? Privilege is usually narrowly
8 confined. So, I'd also like to hear more about that,
9 please.

10 MR. MULLINS: Sure.

11 PRESIDENT BULL: Right. Then both Parties are
12 entitled to a response, and there have been a number of
13 questions from Tribunal as well, and you may want to deal
14 with them together.

15 Mr. Klaver.

16 ARGUMENT BY COUNSEL FOR THE RESPONDENT

17 MR. KLAVER: Thank you.

18 I will aim to avoid repeating Canada's arguments.
19 So, in regard to the Claimants' argument that third-party
20 funding is not relevant to security for costs, I will point
21 the Tribunal to Canada's main submission. We clearly
22 disagree with this, and I'm happy to answer any further
23 questions on that point.

24 Regarding the South American Silver Case that the
25 Claimant repeatedly referred to, that case is

1 distinguishable. The Tribunal found that the Claimants had
2 provided financial documents. The Claimant's parent
3 company was operational, and so Bolivia was simply
4 speculating that the Claimant may in the future face
5 financial difficulties.

6 We have a much different circumstance with
7 Tennant. It is not operational. It provided no financial
8 documents. There is no indication that it has the
9 capability or willingness to pay an Adverse Costs Order.
10 So, in these circumstances, Canada maintains that the
11 security for costs is necessary and so is the disclosure of
12 third-party funding.

13 Now, in regard to the Claimant's suggestion that
14 an exceptional circumstances standard is required to order
15 disclosure of third-party funding, this is also not
16 correct. The South American Silver Tribunal applied that
17 standard solely to the Application for Security for costs.
18 On disclosure of third-party funding, it is simply a
19 relevance test that the Tribunal applied.

20 With regard to the issue of privilege, the Queen
21 Mary Task Force Report states that even this information
22 can be disclosed in exceptional circumstances.

23 Now, on privilege, I think it is very important to
24 emphasize this is not an issue that is presently facing the
25 Tribunal. The correct approach is for the Tribunal to

1 order disclosure of the funding agreement. Tennant can
2 then apply to redact the information for privilege. Canada
3 will then have an opportunity to respond and challenge
4 those designations as we see fit, and then the Tribunal can
5 resolve the issue of privilege.

6 That said, just in response to Arbitrator Bishop's
7 questions, we are not aware of a situation where a Tribunal
8 permitted redactions of the funding agreement on the basis
9 of privilege. In terms of the funding identity, the Queen
10 Mary Task Force Report states that the funder's identity is
11 not privileged.

12 Now, moving to the issue of denial of benefits, I
13 will just address this briefly. The fact is that there are
14 uncertainties that we need disclosure of the funding
15 agreement to resolve. Denial of benefits relates to
16 whether or not a Canadian funder or a funder from a
17 non-Party owns or controls Tennant, and Tennant has no
18 substantial business activities.

19 If the funding agreement reveals that the funder
20 has a substantial portion of the Award, that could indicate
21 the Claim was assigned, and Tennant is simply a shell
22 maintained for jurisdictional purposes and that the funder
23 does control Tennant. So, we would need this information,
24 the disclosure of the funder's identity, to resolve that
25 issue.

1 ARBITRATOR BISHOP: Doesn't the denial of benefits
2 issue, though, go to whether Tennant was an operating
3 company at the time of the investment as opposed to today?

4 MR. KLAVER: It relates to whether it is
5 operational now as well.

6 ARBITRATOR BISHOP: Okay.

7 MR. KLAVER: Now, Canada also needs disclosure of
8 the funder's identity because it is possible, we don't
9 know, but the same entity that was funding Mesa Power's
10 claim that was related to Mesa Power may be funding
11 Tennant's claim.

12 Now, Counsel Appleton discussed T. Boone Pickens,
13 and, of course, we are very sad for his loss. He was the
14 founder or sole member of Mesa Power, and his estate--he or
15 his estate may be funding this Claim. Cole Robertson, the
16 VP of finance for Mesa Power Group, may also be involved.
17 So, this could actually create issues of res judicata.

18 Now, we simply need--because if it's the same
19 Party bringing the same claim, we need to know this
20 information.

21 The fact is that there are uncertainties, and
22 disclosure of the funder's identity can help resolve that.

23 ARBITRATOR BETHLEHEM: Mr. Klaver, just to go back
24 to your 1113 point, it seems to me that, in fact, you are
25 setting up a general proposition that the identity and

1 detail of third-party funders must always be disclosed
2 because there is always going to be uncertainty.

3 So, it is moving away from the rather stricter
4 test that you seem to have established about whether it's
5 necessary because now you simply seem to be saying, by
6 reference to 1113, that there's always going to be some
7 uncertainty as to whether the Investor of a non-Party owns
8 or controls the enterprise and, therefore, as a matter of
9 course, as a matter of general proposition, third-party
10 funders need to be disclosed.

11 Am I understanding you correctly?

12 MR. KLAVER: I appreciate your point. We are
13 focused on the circumstances of this case. Tennant appears
14 to be impecunious and have no business operations in the
15 United States whatsoever. So, in this case, it is
16 important to disclose the funder's identity for a number of
17 reasons, and one of them is the possibility of a potential
18 denial of benefits issue.

19 I don't want to speak for other potential cases.
20 We are in this case and these circumstances. It is
21 important to disclose this information.

22 ARBITRATOR BETHLEHEM: Although you are setting
23 out a very broad brush argument here.

24 MR. KLAVER: Well, I wouldn't go that far.
25 Tennant is nonoperational. It has no website. It has no

1 business. It has no revenues. It seems to exist solely on
2 paper. This is a pretty exceptional circumstance.

3 ARBITRATOR BETHLEHEM: Thank you.

4 ARBITRATOR BISHOP: I don't understand your res
5 judicata argument. How would res judicata come into play
6 here?

7 MR. KLAVER: So, res judicata arises if it's the
8 same party bringing the same claim.

9 ARBITRATOR BISHOP: You mean Tennant and Mesa?

10 MR. KLAVER: That's right. And so, in regard to
11 the same claim, we will discuss at length the overlaps and
12 duplications between these Claims.

13 ARBITRATOR BISHOP: But you're suggesting--I mean,
14 you seem to be suggesting that there could be res judicata
15 because they have--because of funders involved. I'm not
16 following your argument.

17 MR. KLAVER: Sure. Happy to explain.

18 Our concern here is that Tennant is merely an
19 empty shell and that the real Party of interest is the
20 third-party funder who may stand to gain the entirety or a
21 very large portion of the Award.

22 Now, if that Party also funded and was involved in
23 Mesa's claim, then you have the same Party bringing this
24 case. The IBA Guidelines state that the third-party funder
25 is effectively a Party, and so we would have a potential

1 issue of effectively the same Party bringing the same
2 claim, and that would raise issues of res judicata. I
3 wanted to clarify--

4 ARBITRATOR BISHOP: That's taking the statement
5 that it's equivalent to a Party to virtually a new level.
6 I think that's a remarkable argument. And if you had the
7 same funder in two different cases--and let's say both the
8 underlying Parties were bankrupt Parties and that's why
9 they had to have a funder, you seem to be suggesting that
10 because the funder might get a large part of the recovery,
11 that that would make the two cases equivalent?

12 That there would be res judicata between them?

13 MR. KLAVER: I don't want to speak for other
14 cases, but this is an exceptional case because the claims
15 are virtually identical. And the fact is that Tennant
16 appears to exist merely on paper, and so if it really is
17 the funder for Mesa's claim that is seeking another kick at
18 the can, that raises potential res judicata issues.

19 To be clear, we're not making this a submission at
20 this point on res judicata. This is one further reason why
21 it is necessary to resolve the issue facing the Tribunal
22 today to disclose third-party funding. Of course, we've
23 raised a multitude of other reasons why it is necessary to
24 order disclosure of third-party funding.

25 PRESIDENT BULL: But is that relevant to the

1 security for costs Application?

2 MR. KLAVER: The issue of--

3 PRESIDENT BULL: The res judicata argument,
4 assuming that it is valid.

5 MR. KLAVER: It is relevant. We have grave
6 concerns about a repeat of Mesa cost--or, I'm sorry, of
7 Mesa Power in this claim. We've got a duplicative claim
8 brought by Mr. Appleton, the same counsel. I understand
9 there are other counsel, but Mr. Appleton is the same
10 counsel.

11 And in that claim in Mesa Power, the Tribunal
12 ordered a \$3 million cost order in Canada's favor partly
13 because the Claimant had created a large number of
14 procedural difficulties. Now, we are concerned about a
15 repetition in this case because Mesa never paid the Adverse
16 Costs Order.

17 And I'm about to explain the steps Canada has
18 taken to enforce that, but this is why this information is
19 relevant.

20 There are an extraordinary number of overlaps in
21 these cases, and we don't want our taxpayers to be faced
22 with another \$3 million or substantial cost order going
23 unpaid, forcing Canada to spend more money trying to
24 enforce it.

25 Does that answer your question? Okay.

1 Now, the Claimant also suggested that Canada
2 hadn't taken steps to enforce Mesa. This is completely
3 misguided. Since the Tribunal awarded Canada's costs in
4 Mesa in 2016, Canada then began enforcement proceedings in
5 the District of Columbia courts in 2017. On June 15, 2017,
6 a U.S. domestic court confirmed that the Mesa Costs Order
7 is enforceable.

8 Subsequently, in August 2017, Canada sent demand
9 letters to Mesa's legal counsel regarding payment of the
10 Award. As a result of Mesa's continued noncompliance,
11 during 2018, Canada hired an asset search firm to research
12 Mesa's financial situation in an effort to enforce the
13 Award, and, as recently as 2019, in November, Canada served
14 Mesa's legal counsel with document requests and
15 interrogatories related to Mesa's financial condition and
16 corporate structure in an effort to enforce the Award.

17 So, Canada is actively seeking to enforce the
18 Award, and this is costing our taxpayers funds, so we want
19 to avoid a repetition of that.

20 Now, that's the conclusion of my response. Happy
21 to answer any further questions.

22 PRESIDENT BULL: Thank you, Mr. Klaver.

23 For the Claimants, your brief response.

24 ARGUMENT BY COUNSEL FOR THE CLAIMANT

25 MR. MULLINS: Sure. First, just so we can talk

1 about it later, but if you want--I don't know if it would
2 really be necessary because I think everybody recognizes
3 confidentiality between the funder and the--whoever hires
4 the funder, but I will point out the following.

5 This is from the Queen Mary Report, on
6 Page 117(b) (2): "The specific provisions of a funding
7 agreement may be subject to confidentiality obligations as
8 between the Parties and may include information that is
9 subject to a legal privilege. As a consequence, production
10 of such provisions should only be ordered in exceptional
11 circumstances."

12 So, in response to Canada's point that at least
13 the Queen Mary Project said that the funding agreement in
14 fact not only has confidentiality, but also has privilege
15 issues, because remember when--

16 PRESIDENT BULL: I'm sorry to interrupt,
17 Mr. Mullins.

18 MR. MULLINS: Go ahead. Sure.

19 PRESIDENT BULL: I thought what you read said that
20 it may contain privileged issue material.

21 MR. MULLINS: Correct.

22 PRESIDENT BULL: So, wouldn't that suggest that,
23 by its nature itself, it is not necessarily privileged? It
24 might have some privileged information, but, by its nature,
25 it is not.

1 MR. MULLINS: Right. But the rest of it is
2 confidential. In other words--well, where I was headed is
3 that what happens in these arrangements is that
4 information--in order to get funding, information has to be
5 conveyed. And then they get into whole conflicts issue,
6 and the Queen Mary Project goes into what privileged issues
7 should apply.

8 Again, in the United States we are much more
9 protective over privilege and confidentiality and these
10 things than perhaps in other countries, but just that--but
11 if you look at these arrangements, I believe, as I said
12 before, that the policy reasons for confidentiality, and to
13 allow these claims to go forward, it would be really
14 inappropriate and devastating to the ability of Claimants
15 to have access to justice if the result is going to be that
16 these kind of arrangements are going to be identified
17 irrespective of the issues that you need to worry about.

18 You are worried about conflict. Then we can
19 identify the funder and make sure nobody on the panel's
20 firm is using a funder. And if they are, they disclose it,
21 and then people have to decide: What are you going to do
22 about that? That's it. That should be it.

23 If it's a matter--what was really interesting is a
24 matter of who the Claimant is. Well, they are going to
25 find out who the Claimant is. It is going to be--you know,

1 there's going to be Witness Statements, et cetera. They
2 are going to find out who the Claimant is. I can tell you
3 right now that Tennant is not Mesa. That Tennant is not
4 involved with Mr. Pickens' company. I'll say that now.

5 That is what they--they'll do their investigation
6 and ask for documents, will do--I could tell you that. The
7 notion is really silly to suggest that they are the same
8 Company. The idea that there is res judicata or collateral
9 estoppel between two separate entities is absurd.

10 But, having said that, all I'm getting at is just
11 because--and I point to Lisa Nieuwveld's article,
12 "Third-Party Funding in International Arbitration," in
13 Second Edition, 2017, they say on Page 260-261: "In most
14 cases, the Tribunal will only order the disclosure of the
15 identity of the third-party funder, rarely a Tribunal will
16 order disclosure of the funding arrangement, i.e., when the
17 funding arrangement was in dispute."

18 I do believe that the majority of the
19 Opinions--and I do think these other cases are outliers and
20 can be distinguished, but I think at least in Queen Mary's
21 position--and these treatises are suggesting that these
22 disclosures should be limited to the identity. And then if
23 there are specific questions as to whether or not it's
24 assignment, those answers can be answered by counsel of
25 record, you know, taking counsel's statement for their

1 word.

2 But, what we're really--our concern is, again, the
3 access to justice. There's this idea that anybody, you
4 know, might, who use a third-party funder, is acting
5 inappropriate--and these are these "hit and run"
6 arbitrations.

7 What is really disturbing is, in a situation
8 where, as here, where the Project failed because Canada
9 didn't do its obligations under the NAFTA and secretly gave
10 special deals, including to a domestic corporation, and
11 then ultimately says, oh--then when they have somebody who
12 believes in their claim that says, "I need to know all your
13 details so I can figure them out," and if you can't do
14 that, then you need to withdraw your claim.

15 That is not access to justice. That is
16 inappropriate policy, and that's not what NAFTA was for--or
17 any of these investment treaties. And it's completely
18 inappropriate.

19 I do think that the--it should be identity of the
20 funder will be done confidential, won't be disclosed to the
21 public, and that if there are specific legitimate questions
22 that need to be answered, it is determined whether or not
23 there is assignment which would affect the ability for
24 people to go forward, understandable, that could be
25 answered, but they don't need all of the provisions. That

1 is not the position taken by the Queen Mary Project. That
2 is not the position taken by these other Tribunals, and we
3 do think it's inappropriate.

4 PRESIDENT BULL: Thank you very much.

5 Then, we are grateful to all counsel for their
6 submissions on the first issue.

7 Let's take a 15-minute break and return here to
8 deal with Agenda Item Number 2. Thank you.

9 (Brief recess.)

10 PRESIDENT BULL: Right. Let's go back on the
11 record.

12 We are now scheduled to deal with Agenda Item 2.

13 Just before we launch into that, the Tribunal has
14 had a short discussion, and the direction on the issue that
15 was raised at the beginning of today about the confidential
16 documents is this: We would like to draw the line a little
17 further out than the Claimant would like, just to be safe.
18 So, when either Party is going to deal with the issue that
19 concerns those two documents, the two confidential
20 documents to do with [REDACTED], then please flag
21 that and we will go into closed session.

22 After the Hearing, a transcript obviously will be
23 produced, and Parties will have an opportunity to designate
24 things as confidential. So, if the discussion or parts of
25 the discussion do not turn out to be confidential, then the

1 transcript of those portions will be made available to the
2 public at that stage, and the Tribunal feels that that
3 would be an appropriate middle ground, balancing all the
4 concerns. So, we will proceed in that fashion.

5 That said, Agenda Item 2 is Claimant's Request for
6 Interim Measures, so the Claimant has 10 minutes first to
7 make the Application.

8 AGENDA ITEM 2: CLAIMANT'S REQUEST FOR

9 INTERIM MEASURES

10 ARGUMENT BY COUNSEL FOR THE CLAIMANT

11 MR. APPLETON: Thank you very, very much,
12 Mr. President, Members of the Tribunal. I don't think
13 we'll even need all the time we have.

14 There are two matters that are before the Tribunal
15 on this part of the Agenda. The first is a request from
16 the Investor that Canada and the Investor--so a bilateral
17 order; Canada and the Investor--preserve and protect
18 documents in their possession. That's the first part.

19 The second part is an order that Canada produce
20 nonconfidential documents on the record in the Windstream
21 Energy arbitration. Originally, we had sought to have both
22 the Mesa Power and the Windstream arbitration materials,
23 but, in fact, before Mr. Pickens passed away, he gave his
24 permission that nonconfidential information that could be
25 passed along--from that case could be passed along. So, we

1 no longer needed to have permission with respect to the
2 Mesa Power case. We only needed to have information with
3 respect to the Windstream Case, cases that both involved
4 Canada. Canada has documents in their possession that are
5 available and that should be available to the Tribunal and
6 to the Investor in this case.

7 We note that, on the Windstream Case--we will just
8 deal with the second one first, I think, though--on the
9 Windstream case, that one of the arbitrators here was an
10 arbitrator in that case, but the other arbitrators were
11 not, so they are not familiar with those documents. We
12 certainly, the Claimant in this case and counsel, were not
13 involved, and we certainly don't have documents in that
14 case. Those are documents that would be maintained by
15 Canada, they would be available by Canada, and should be
16 very easy to be able--to produce so that everyone would
17 have the same materials. That's the idea with respect to
18 that second matter.

19 We don't think that it was very difficult. We
20 thought it should have been easy to be done. We don't know
21 why they didn't actually simply just agree. They didn't.
22 That's why we're here.

23 The second issue is--sorry, the first issue is to
24 seek a bilateral order to preserve and protect the record.
25 Now, normally Parties agree, generally. They want to

1 protect and preserve. In this case, it was particularly
2 important because there are at least six examples of this
3 record or records relating to gas and energy policy in
4 Ontario being destroyed. There are orders from the
5 legislature of Ontario. There was a criminal investigation
6 done by the Ontario Provincial Police. There were criminal
7 charges that were laid, and there were documents that were
8 destroyed. So, again, in the context of such widespread
9 despoliation--in fact, there is a civil suit on
10 despoliation of evidence and malfeasance in Trillium Power.
11 So, in that context, we were very concerned that we wanted
12 to ensure that documents would be protected, that there was
13 an absolute and positive affirmative agreement that that
14 would happen, and that they would be produced. And we were
15 astonished when it didn't happen.

16 The Investor wrote to the Government of Canada,
17 Deputy Attorney-General, Minister of Justice of Canada, on
18 June 1, 2017, and requested that type of protection. We
19 didn't get an answer. We have asked a variety of times--I
20 believe there are five of them that are outlined--including
21 before this Tribunal at that last procedural hearing. It
22 is only recently that we received an answer. I'm not going
23 to discuss the nature of the answer in light of your
24 ruling. You know what I'm talking about, but in light of
25 the ruling--I think this part of process needs to be

1 publicly available, but I need the green light on, because
2 I think the public needs to know that there are documents
3 that could be relevant. There are documents about policy
4 issues and inappropriate actions done by the Government of
5 Ontario, and that's what this case is about. This case is
6 about an attempt by the Government of Ontario to suppress,
7 to hide inappropriate actions and activities by their
8 officials that favored certain companies, certain local
9 companies that were politically connected to the
10 Government, and to ensure that that type of behavior is not
11 seen.

12 That is the reason to--fundamentally, to make this
13 information to be muzzled, to keep it suppressed. And we
14 do not believe--we believe the public have a right to know.
15 We think the public should, in an Investor-State case, have
16 an obligation. The Government has an obligation. They say
17 they believe in transparency, but when we ask them, they
18 are not transparent.

19 This is a very good example. And that's exactly
20 the case. We have agreed that we would preserve all the
21 documents, that we would have those. Canada won't agree.
22 We don't know why. We believe in that context in the light
23 of the criminal convictions for despoliation of
24 evidence--this is just not a suspicion. This is a criminal
25 standard. The Chief of Staff to the Premier of Ontario,

1 convicted; failures to comply with legislative subpoenas
2 for the production of evidence in 2014.

3 And, in fact, one of the key issues here, the
4 actual terms of the Green Energy Investment Agreement, that
5 document that we often call the GEIA, that document only
6 was produced after a U.S. court produced the document
7 through what's called a 1782, and not because of an
8 agreement from the Government of Ontario, even though it
9 related to what looked like a \$19 billion sole source,
10 nonpublic procurement. 19 billion. That's a huge number.
11 Just to give a context to what we're talking about and the
12 reasons why this information needs to be produced.

13 So, we simply say what's good for the goose is
14 good for the gander. Both sides should have the same
15 order. Both sides should have agreed. They won't. They
16 should. We would like you to help us with that. So, we
17 have that record.

18 On the other issue, we think that the Windstream
19 materials should be produced so everyone has access. It
20 may not be anything special. It just should be--everyone
21 should have it so we are treated equally and fairly.

22 Those are our submissions.

23 ARBITRATOR BETHLEHEM: Mr. Appleton, may I just
24 ask a point of clarification?

25 MR. APPLETON: Yeah, of course.

1 ARBITRATOR BETHLEHEM: The Windstream documents
2 that you are addressing are the Windstream documents that
3 were produced and are on the record of that arbitration; is
4 that correct?

5 MR. APPLETON: Yes, that are not confidential. We
6 don't know what is confidential. We are not seeking any
7 confidential materials.

8 ARBITRATOR BETHLEHEM: Right. Is it not the case
9 that those documents are securely held by the Permanent
10 Court of Arbitration and that if, as a matter of
11 extraordinary hypothesis, something were to happen to those
12 documents in Canada's archives, that they are available in
13 substitute form, if you like, in the record of the
14 Permanent Court of Arbitration?

15 MR. APPLETON: Sir Daniel, let me answer your
16 question and then give the context.

17 So, of course, the answer is yes. We would assume
18 that. We don't know what agreement they may have had about
19 destruction, so--but let's assume they are within the
20 records of the Permanent Court of Arbitration, and they are
21 probably all available electronically and easily
22 producible, in any event.

23 The question isn't: Are those documents safe?
24 The questions are: Why should those documents not be
25 produced now to make it easier for the Tribunal and

1 everyone here to share the same information so that we can
2 actually have more focused pleadings at an early stage?

3 So, the question there is not about their
4 protection. It is simply that they should be shared, and
5 the real particular reason is because we think that a
6 situation that--where one Member of the Tribunal has that
7 knowledge and the others don't, it should simply just flow
8 out so that everyone has it. I don't believe there is
9 anything wrong with that knowledge. I just think it is
10 better if everybody has it. That's all. And that's why we
11 seek it now. Not for any other reason, but that--that's
12 why we are asking for that information.

13 ARBITRATOR BETHLEHEM: But I'm really going to the
14 detail of your request. The headline request is to
15 produce, but you talk about preserve, index, protect, and
16 scan, and I'm trying to understand why index and scan, you
17 know, in circumstances in which you've just said these
18 documents are safe and secure and all the rest of it. So,
19 it's going to the detail of that.

20 And the second issue is if, as you say, it's all
21 about fairness, why shouldn't everyone have those documents
22 now? I mean, Canada will get to this in its submissions
23 because this is addressed in its written response. Why
24 partial disclosure document production at this stage?

25 MR. APPLETON: I'll answer each question for you,

1 and in order.

2 So, the first bit was, it didn't occur to us the
3 PCA might have those documents when we wrote this request,
4 and we did not know the terms of the order as to whether
5 they were electronic or not. So, to the extent that they
6 were electronic, then that would be not a problem to comply
7 with whatsoever; but if they were not, we think that to
8 facilitate the exchange of the materials, it should be
9 electronic in that way. So, that's that answer.

10 And then with respect to your second question, I
11 think the real--the most important issue here was simply
12 because of the asymmetry of information with the Tribunal.
13 That's what makes this a little different from the other
14 situation, because now all we are talking about is the
15 Windstream documents, and because one Member of the
16 Tribunal has knowledge about that, looking at the program
17 that is here, that's why we are looking in that way.

18 And so--I mean, we simply don't understand why--if
19 the PCA has them electronically, if Canada has them
20 electronically, why they just wouldn't turn it over. I
21 mean, it is not very difficult or onerous. It is not
22 anything that would be particularly problematic.

23 Canada's answer is we should go through their
24 access to information process, which is a costly and
25 lengthy process, where they have all types of delays from

1 material that they have. They have full access to it and
2 we don't.

3 So, here we're talking about Windstream, where
4 they have all the material and all the knowledge, and we
5 have none or very limited amounts, and there's an asymmetry
6 in the Tribunal. We think that makes a special
7 circumstance that is different from something else, and
8 that's why we have suggested in that way.

9 ARBITRATOR BETHLEHEM: Thank you.

10 PRESIDENT BULL: So, you'd like disclosure of the
11 Windstream documents now, rather than wait for them--wait
12 until document production and asking for them then? I've
13 understood you correctly; right?

14 MR. APPLETON: Yes.

15 PRESIDENT BULL: If you had to wait for document
16 production, you'd have to show relevance, but your
17 application now does not seem to be dealing with that
18 issue.

19 MR. APPLETON: Well, we presume that the Tribunal
20 would not require that relevance because they are both
21 cases dealing with the Ontario Feed-in Tariff about the
22 Government of Ontario's conduct with respect to the Feed-in
23 Tariff and with respect to wind power. So, we simply
24 assume that, given the extraordinary similarity, Canada has
25 presumed, as you've seen at great end, about the similarity

1 between the Mesa Power case and the Tennant case, but they
2 constantly ignore the similarity of the Windstream case,
3 and that's exactly why.

4 Now, we just thought that that--we have not
5 submitted anything with respect to the Mesa Power case
6 either. Neither have they on that. It seemed to me that
7 it would be natural that the two cases arising out of the
8 consideration of the very same regulatory measure would be
9 there.

10 PRESIDENT BULL: So, your position is that the
11 documents would be relevant for that reason?

12 MR. APPLETON: Yes. They would be relevant and
13 there's virtually no burden because they are totally and
14 utterly--

15 PRESIDENT BULL: I'm not concerned with burden.
16 I'm just concerned with relevance.

17 MR. APPLETON: Yes, that's why.

18 PRESIDENT BULL: Okay. Thank you.

19 ARBITRATOR BISHOP: Are the claims in Windstream
20 and the claims in this case the same?

21 MR. APPLETON: We believe the claims in Tennant
22 Energy are different from everybody's claims. They are
23 sui generis, but there are similarities with respect to the
24 factual underpinnings of the Ontario Feed-in Tariff program
25 and its administration that are very relevant and very

1 material. That's why.

2 This is really about inappropriate conduct with
3 respect to the administration of the program, and that's
4 why we are seeking that information.

5 ARBITRATOR BISHOP: So, it's not--it doesn't have
6 to do with relevance between the claims, between the cases.
7 It is simply the fact that that case involved the same
8 general FIT program.

9 MR. APPLETON: Well, there are specific provisions
10 of the FIT program. They all deal with FIT contracts,
11 transmission access, access to the grid. It is not a small
12 layer of overlap. It's a very significant layer of
13 overlap. And simply--in the Windstream case, you are
14 dealing with offshore winds, and in the Tennant Case you
15 are dealing with wind on land.

16 But it's wind is wind and FIT is FIT, and this is
17 a question with respect to the Ontario Feed-in Tariff
18 and--about transmission access, and the transmission access
19 is critical to this case, because you cannot have a FIT
20 Contract without transmission access. And when the process
21 of the transmission access is done in a predatory manner,
22 which is what we've now been able to discover arising out
23 of the Mesa Power documents--and we'll talk about that when
24 we get to bifurcation. When we see that a predatory
25 manner, not known to anybody until the evidence that came

1 out from Mesa Power, when that was done by the Korean
2 Consortium, or where you have a situation where officials
3 were actually gaming the system to help local champions who
4 were politically connected at the direct cost of Tennant
5 Energy--it was next in line to be able to get the Contract;
6 they were the people that were knocked out, directly
7 because of that--that is a very specific situation.

8 So, yes, it comes from the same schema, it comes
9 from the same approach, it comes from the same access to
10 transmission. All of that is covered in both cases, and we
11 would like to be able to see how that was considered and
12 what materials were put in because they might be different,
13 and that's what we are seeking to find.

14 ARBITRATOR BISHOP: And the documents you are
15 requesting are documents produced by Canada in that case;
16 correct?

17 MR. APPLETON: It would be the nonconfidential
18 documents produced by both sides. Whatever is
19 nonconfidential, we would be seeking, but we are most
20 interested, of course, in Canada's documents. Absolutely.

21 ARBITRATOR BISHOP: Okay. Thank you.

22 ARBITRATOR BETHLEHEM: You said in your
23 submissions, Mr. Appleton, that before T. Boone Pickens
24 died, that he gave permission for the Mesa documents to be
25 used. I don't quite know what that means. Perhaps you can

1 elaborate. But I'd like to know whether this means, in
2 effect, that you have got an archive of Mesa documents
3 which are now available to Tennant and, if so, whether that
4 is an archive of documents that corresponds to the archive
5 of documents that Canada would have, and, if not, whether
6 you are implicitly making an offer to disclose all of those
7 documents to Canada as part of the--as it were, the
8 reciprocal disclosure of Windstream and Mesa documents.

9 MR. APPLETON: So, Mr. Tennant said that all the
10 public documents that were available in Mesa could be made
11 available to anybody that contacted us with respect to the
12 issues under the Ontario FIT Program.

13 So, it would seem to me that it's likely that
14 those are the same documents as Canada, but we would have
15 no difficulty identifying and synchronizing, so to speak,
16 the materials, and we would have no problem. They haven't
17 sought them, but if they would like to have them, for sure
18 we would have no problem setting that together.

19 So, Sir Daniel, I think you are absolutely right
20 with respect to that.

21 Now, Mr. Pickens did not say "Please take away all
22 my attorney-client privilege communications," and I'm not
23 in a position to do that. But to the extent that he said
24 that the public materials would be
25 available--"nonconfidential" was his term--that's what we

1 would make available. That's why we didn't seek those.

2 ARBITRATOR BETHLEHEM: Thank you.

3 PRESIDENT BULL: Thank you, Mr. Appleton.

4 Now, we will hear from Canada.

5 ARGUMENT BY COUNSEL FOR THE RESPONDENT

6 MS. DALLAIRE: President Bull, Arbitrator
7 Bethlehem, Arbitrator Bishop, I will explain why the
8 Claimant's Request for Interim Measures are both
9 unreasonable and unnecessary.

10 First, Canada has already put in place procedures
11 to ensure the preservation and protection of documents, and
12 there is no evidence that Canada is not complying with
13 them.

14 Second, the Claimant's request to obtain the
15 Windstream documents is nothing more than an attempt--

16 (Interruption.)

17 MS. DALLAIRE: I think we are all ready to go, to
18 continue.

19 So, as explained, the first request, we don't
20 think it is necessary because Canada has already put in
21 place procedures to ensure the preservation and protection
22 of documents in this arbitration.

23 And, second, the Claimant's request to obtain the
24 Windstream document is nothing more than an attempt to
25 circumvent the rules, procedures, and timeline established

1 by this Tribunal. It amounts to an additional and
2 unilateral document production phase which Canada strongly
3 opposes.

4 So, my presentation will follow a different
5 structure. I will first apply the legal test because there
6 is a legal test to meet before a Tribunal can decide to
7 order interim measures.

8 So, the applicable rule is Article 26, and both
9 Parties agree on this. This is Article 26(1) of the
10 UNCITRAL Rules. As explained in Canada's response, to
11 determine whether interim measures are necessary, Tribunals
12 like those in Nova Group and García Armas have applied a
13 four-part test. I will briefly summarize the test.

14 In this Arbitration, the Claimant has to
15 demonstrate that, first, it has a reasonable possibility of
16 prevailing in this case.

17 Second, that it will likely suffer harm not
18 adequately reparable without the Order.

19 Third, that on the balance of convenience, the--it
20 will suffer greater harm than Canada without the Order.

21 And, fourth, that the condition of urgency is met.

22 Canada's position is that the Claimant has not met
23 any element of the four-part test.

24 So, first, regarding the Claimant's first request,
25 the Claimant has not established that this Tribunal has

1 MS. DALLAIRE: Thank you.

2 So, more importantly in this Arbitration, Canada
3 has also produced [REDACTED] put in place by the
4 Government of Ontario and IESO. They are, respectively,
5 Exhibits R-021 and R-022. [REDACTED] confirm
6 that the relevant Ontario Ministry and IESO have to
7 preserve documents relevant to this arbitration. They were
8 put in place promptly after receiving the Claimant's Notice
9 of Intent in March 2017.

10 Similarly, the Tribunal in Nova Group refused to
11 grant an order for the preservation of documents concluding
12 that "Romania's express representations to preserve
13 documents was sufficient."

14 Canada has already undertaken to preserve and
15 protect documents and, as such, there is no risk of serious
16 harm to the Claimant if its request is denied.

17 Third, it is completely unnecessary and would be
18 overly burdensome for Canada to index and scan all the
19 protected documents as contemplated in the Claimant's
20 motion in Footnote 3. The Claimant's request is drafted in
21 an unreasonable manner which would require Canada to
22 retrieve, review, index, and scan potentially millions of
23 documents.

24 We can now go back to the public session.

25 (Beginning Open Session.)

1 OPEN SESSION

2 MS. DALLAIRE: The Claimant's request--as I
3 already said before, Canada has already taken steps to
4 preserve documents and the additional steps to index and
5 scan documents serve no purpose. These are steps that
6 normally take place during the document production phase,
7 which will occur at a later stage.

8 Fourth, there is absolutely no urgency here. The
9 Claimant is relying on unsupported allegations that
10 documents relevant to its claim were destroyed. These
11 unsupported allegations do not establish the imminent
12 ongoing destruction of documents in this arbitration. As
13 such, there is no urgency to grant the Claimant's request.

14 In RDC v. Guatemala, the Tribunal refused to grant
15 interim measures because there was no evidence of ongoing
16 or imminent destruction of documents. The Tribunal
17 explained it was not sufficient for the Claimant to rely on
18 the destruction of documents by a previous government to be
19 granted an interim order.

20 Similarly, there is no evidence to indicate that
21 the current Government of Ontario or IESO are not complying
22 with their legal obligation on recordkeeping.

23 In sum, Canada asks that the Tribunal dismiss the
24 Claimant's first request to preserve, protect, index, and
25 scan all documents relevant to this dispute.

1 Canada is also opposing the Claimant's request to
2 order the production of all nonconfidential Windstream
3 documents. First, as explained, the Claimant has not met
4 its burden of establishing that this Tribunal has
5 jurisdiction to hear its claim.

6 Second, the Claimant has not demonstrated that it
7 will suffer any harm if the Tribunal denied its request.

8 Procedural Order Number 1 already sets out
9 timelines and procedures for document production in this
10 Arbitration. Document production will only take place if
11 the case proceeds on merits and damages. The Claimant was
12 given a fair and full opportunity to make proposals and to
13 comment on the Procedural Calendar. It did not raise any
14 issues on the timing of document production during the
15 procedural phase. The Claimant also failed to give
16 satisfactory reason as to why the Tribunal should depart
17 from the Procedural Calendar. As such, its request to
18 obtain the Windstream documents is untimely and should be
19 denied.

20 In addition, the Claimant would not have an
21 automatic right to obtain the Windstream documents through
22 document production.

23 Procedural Order Number 1 sets out a specific and
24 detailed process for document production. The Claimant
25 first has to request specific and narrow category of

1 documents. It also has to demonstrate the relevance and
2 materiality of each document request it makes. The
3 Procedural Order, then, gives Canada an opportunity to
4 object. And considering the irrelevance of the Claimant's
5 request, we absolutely want the opportunity to object to
6 such request. And then the Claimant has the right to
7 respond to this objection.

8 The Claimant's request does not follow any of
9 these steps. The Claimant does not demonstrate that these
10 documents are relevant and material to its Claim. A mere
11 assertion that the Windstream documents are relevant is
12 meaningless. It is not sufficient to establish how they
13 are relevant to the Claimant's Claim.

14 As you have mentioned earlier, the Claimant was
15 not--did not explain in its Request for Interim Measures
16 how the documents were relevant to its case. Now
17 Mr. Appleton has brought a new reason as to why the
18 documents are relevant to his claim. He said that "FIT is
19 FIT" and "Wind is wind." Of course, we don't think that
20 these new allegations meet the standard of having to
21 demonstrate the relevance and materiality of document
22 request.

23 Further, it is worth mentioning that the Biwater
24 Gauff Case where the Tribunal had to decide if it could
25 order the production of documents as part of an interim

1 order. The Tribunal concluded that document production is
2 not typically considered within the ambit of interim
3 measures except in exceptional circumstances. This is
4 because ordering the preservation of documents is usually
5 sufficient to protect the Party's right.

6 Third, on the balance of convenience, the Tribunal
7 should refuse to grant the Claimant's request. Canada
8 seeks to bifurcate the proceedings to have its
9 jurisdictional objection heard. If Canada is successful on
10 its objection, Tennant's claim would be dismissed in its
11 entirety and document production would not occur at all.

12 As such, Canada should not be required to go
13 through an extra round of document production to retrieve,
14 review, organize, and index thousands of documents.

15 Fourth, the Claimant has not proven that there is
16 any urgency to grant its request. The Windstream documents
17 are not necessary at this stage of the arbitration before
18 the currently scheduled document production phase.

19 To conclude, the Claimant's Request for Interim
20 Measures do not meet the legal test under Article 26(1) of
21 the UNCITRAL Rules. An order for the preservation of
22 documents is unnecessary because Canada already has
23 procedures in place to ensure the preservation and
24 protection of documents.

25 Further, it is unreasonable for the Claimant to

1 circumvent the rules and procedures in place to obtain the
2 Windstream document at this stage of the Arbitration.
3 Canada, therefore, asks the Tribunal to dismiss the
4 Claimant's to Request for Interim Measures.

5 I would be happy to answer any questions that
6 Members of the Tribunal may have.

7 ARBITRATOR BISHOP: Yes. I have a question. You
8 argue that there's no jurisdiction for us to order the
9 production of the Windstream documents. Remind me what the
10 basis of that is.

11 MS. DALLAIRE: So, we are saying--and you'll be
12 hearing from my colleague here, Lori, that we are asking
13 the Tribunal to bifurcate the proceedings because we
14 believe that the Claim is time-barred.

15 ARBITRATOR BISHOP: Yes. And so the time-bar
16 issue is the jurisdictional objection. And you say because
17 you have that pending, that we have no authority to order
18 the Windstream documents to be produced?

19 MS. DALLAIRE: Right.

20 So, the first requirement is that a Claimant has
21 to demonstrate that it has a reasonable possibility of
22 prevailing on the merits of the case. Of course, we are
23 saying that there is no chances that the Claimant will
24 prevail in this case because the Tribunal doesn't even have
25 jurisdiction to hear its Claim.

1 ARBITRATOR BISHOP: Thank you.

2 PRESIDENT BULL: But that requires you to be able
3 to say that there is no chance at all that Canada would
4 lose the jurisdictional argument. I mean, the first
5 element of the test is just reasonable possibility of
6 success. It is not really intended to predict with
7 certainty who is going to win the case. So, if I
8 understand it, Canada's position is that the position is so
9 clear on jurisdiction that it would make it impossible for
10 them to clear that first hurdle? Is that your submission?

11 MS. DALLAIRE: So, we are saying, of course, that
12 we agree that the Tribunal has to determine its own
13 competence, and we understand that it's for the Tribunal to
14 decide whether it has jurisdiction or not.

15 What we are saying is, of course, we have a strong
16 objection here to make on jurisdiction because we believe
17 that the Claim that the Claimant is bringing forward is
18 time-barred and it's because every event happened before
19 the June 1, 2014, critical date.

20 But, just to add to that point, in Biwater Gauff,
21 the Tribunal stated that objections to jurisdiction may be
22 a relevant factor to consider when exercising its
23 discretion to order interim measures, and on the first
24 test, so the first part of the test, so the chance is that
25 a Claimant will prevail on the Merits of the case.

1 ARBITRATOR BETHLEHEM: I have two brief questions.
2 I think it's clear, subject to anything that you
3 may say or anything that Mr. Appleton wishes to revisit or,
4 indeed, hearing from the Tribunal Secretary, I think it's
5 clear that the Windstream documents are held in an archive
6 by the Permanent Court of Arbitration.

7 Would Canada here, in these proceedings, now waive
8 any objection that you may have to accessing the PCA
9 archive of these documents if, for some inadvertent or
10 other reason, it is established that there is a destruction
11 of the documents that are held in Canada's archives?

12 MS. DALLAIRE: So, again, our point is that the
13 Windstream documents are not relevant, especially at this
14 stage of the Arbitration.

15 ARBITRATOR BETHLEHEM: I understand the point.
16 I'm just asking a really simple question, whether you would
17 waive any objection to accessing those documents were we to
18 decide at some future stage that the documents were
19 relevant and should be disclosed, but for some reason the
20 documents held in your archive had been destroyed.

21 MS. DALLAIRE: I'm going to get back to you on
22 that point. I think we need further direction on that
23 specific point on whether or not the Claimant should access
24 the PCA records. I'm going to make sure to have a complete
25 response during my Rejoinder, time for my Rejoinder.

1 ARBITRATOR BETHLEHEM: That's very helpful, and
2 I'm certainly very happy for you to defer the answer. Let
3 me just clarify the thought behind the question and, of
4 course, it's a hypothetical thought.

5 I take it from the Claimant's submissions that
6 they are concerned that, for whatever speculative reason,
7 that the documents held by Canada may be lost, may be
8 destroyed for some reason, and they want to be sure to have
9 access to those documents.

10 Were the Tribunal to conclude that the documents
11 may be relevant but that disclosure would properly come at
12 an appropriate time in a document production phase, the
13 Tribunal may wish to be satisfied that those documents are
14 safe.

15 Now, one way to be satisfied that the documents
16 are safe is that they are held in the archive of the
17 Permanent Court of Arbitration, but we would want to be
18 absolutely sure in those circumstances that Canada would
19 not stand up at some future stage and say "I'm sorry, we do
20 not give our permission. That was another proceeding."
21 So, that's the nub of the question.

22 The second question that I have is that I
23 appreciate entirely the points of principle that Canada is
24 making about jurisdiction, urgency, and all the rest of it.
25 I'd like to know, though, as regards the Claimant's first

1 request, that is an order directed to both Parties to
2 preserve and protect documentation in their possession,
3 custody or control that are relevant to the dispute.

4 I'd like to know, as a practical matter, whether
5 you object to that?

6 MS. DALLAIRE: So, do we--so, I might maybe
7 respond to your second question first. So, is the question
8 whether we do not agree that it's important to preserve and
9 protect documents relevant to this arbitration?

10 ARBITRATOR BETHLEHEM: No. I understand that you
11 do agree because you've already said that you've taken
12 steps. So, I'm taking that as a given. And I'm taking as
13 a given, so you don't need to repeat them, your arguments
14 of principle that we do not have jurisdiction. There is no
15 urgency in that the interim measures elements have not been
16 met. So, I accept the arguments--I acknowledge the
17 arguments that you've made.

18 I'd like to know, though, whether you have some
19 other grand objection to an order from the Tribunal,
20 because this is not reflected in Procedural Order No. 1,
21 that is addressed to both Parties, which is motherhood and
22 apple pie in arbitration: That both Parties should--should
23 preserve and protect documents in their possession, custody
24 or control that are relevant to the dispute.

25 MS. DALLAIRE: So, yes, now that I understand your

1 question correctly, we do oppose such an order from the
2 Tribunal because we believe, and many awards have stated
3 the same thing, that interim measures should not be granted
4 lightly. This is--we have a specific test to meet in order
5 to get interim measures.

6 I think both Parties agree that it's important to
7 preserve and protect documents, and if any--if a party is
8 not able to meet the test to receive--to be granted an
9 interim order, then we believe that it is not necessary for
10 this Tribunal to order such a request.

11 ARBITRATOR BETHLEHEM: Ms. Dallaire, I understand
12 the point that you're making. In essence, perhaps I
13 invited you to do so, but you're repeating your argument
14 about interim measures.

15 Let's take as a hypothetical that the Tribunal
16 decided of its own motion that we wanted to issue
17 Procedural Order No. 4, which just had one line, which said
18 that: "In view of uncertainty and the fact that this was
19 not covered in Procedural Order No. 1, we hereby order that
20 both Parties take the necessary steps to preserve and
21 protect documentation in their possession, custody, and
22 control."

23 So, I'm trying to establish whether you are
24 objecting to the point of principle in relation to interim
25 measures because you want to preserve the interim measures

1 principle or whether you are objecting for some other
2 reason to an order--motherhood and apple pie order,
3 relating to the preservation of documents?

4 MS. DALLAIRE: So, as I said previously, we agree
5 that it is important to preserve and protect documents for
6 both Parties. I think it's in line with the general duty
7 of Parties to be acting in good faith in the context of an
8 arbitration. Many Tribunals have said so. The Nova Group
9 Tribunal has said so. I can refer you to a specific
10 paragraph.

11 I think to your point, we don't have a strong
12 objection for this Tribunal to order to both Parties to
13 protect and preserve documents, but we believe that it's
14 unnecessary, and there's no uncertain here because we have
15 made specific undertakings that we are protecting and
16 preserving documents here.

17 So, in principle, we don't object, we just think
18 that it's not necessary in that the Claimant has not met
19 the four-part test.

20 ARBITRATOR BETHLEHEM: Thank you very much.

21 ARBITRATOR BISHOP: I have a couple of questions.

22 Do the Windstream documents that have been
23 requested, do they--have they already been pulled together
24 in an electronic file and do they exist, as such, as an
25 electronic file right now?

1 MS. DALLAIRE: Yes, they do exist. We have
2 electronic copies of the Windstream documents, and it's
3 not--so, we are not saying that it would be overly
4 burdensome for Canada to produce the Windstream documents.
5 I think our main point is that the documents are not
6 relevant to this Arbitration.

7 I don't need to remind you, Mr. Bishop, because
8 you were on this Tribunal, but the Windstream document was
9 about offshore wind development, and it was also--and I
10 could maybe talk about this a bit more because I didn't
11 have time to address that in my presentation.

12 So, as I was saying, Windstream is about the
13 development of offshore wind development. And Windstream
14 applied for a FIT Contract. It's true, during the same
15 launch period, but Windstream was awarded a FIT Contract,
16 unlike Tennant, and also the main--so, Windstream was
17 mostly about the Decision of the Ontario Government to
18 defer the development--the offshore wind project for a
19 period of time. And also, there was no--unlike what
20 Mr. Appleton said, there was no questions of transmission,
21 grids or--the main issue with Windstream was the regulatory
22 approvals for the offshore wind development projects. So,
23 we don't think it is relevant to this current Arbitration.

24 ARBITRATOR BISHOP: So, your main argument there
25 is relevance and not that there is some specific harm to

1 Canada or burden?

2 MS. DALLAIRE: So, it is, we are not saying that
3 it would be too burdensome.

4 What we are saying is that, yes, the Claimant has
5 not demonstrated they are relevant, and also we have
6 specific procedure in place to account for document
7 production in this Arbitration. Both Parties were
8 consulting on this Procedural Calendar that accounts for
9 document production, and we are just saying that at this
10 stage, when the Tribunal has to deal with the time bar
11 objection raised by Canada, it is not necessary at this
12 stage when we are talking about the Claimant's knowledge to
13 obtain the Windstream documents.

14 ARBITRATOR BISHOP: Okay. The other question I
15 have goes to the first matter raised, the Request for a
16 Bilateral Order to Preserve Documents generally. If we
17 were to make such an order, what would Canada do beyond
18 what it has already done to preserve documents?

19 MS. DALLAIRE: That's a good question. We believe
20 that we've done everything that is in our power to preserve
21 and protect documents. This is something that is very
22 important for Canada, and I think we have shown--and maybe
23 we could go in closed session so that I can talk about it a
24 bit more.

25 (Beginning Closed Session.)

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CLOSED SESSION

MS. DALLAIRE: Sorry, there is some kind of delay.
Thank you.

So, we have produced [REDACTED],
which is standard practice for us to make sure that
documents are preserved. We are in agreement with the
Claimant that it is important to have documents relevant to
this Claim protected because, of course, Parties are
entitled to see these documents.

So, honestly, because we have both, you know,
recordkeeping policies and laws on the specific topic of
having to preserve and protect documents, and also [REDACTED]
[REDACTED], honestly, I think we've done everything
to demonstrate that, yes, we are preserving documents.
This is an issue very important to us. And this is an
issue that we take seriously.

And also, [REDACTED], which are
Exhibits R-021 and R-022, are very broad and make sure that
relevant Ministry and IESO protect the documents relevant
to this arbitration.

ARBITRATOR BISHOP: So, is there anything else
that could be done to preserve the documents beyond [REDACTED]
[REDACTED] that you've already sent and the
laws in place?

MS. DALLAIRE: I don't--I don't think so. And

1 also I can maybe get back to you. I believe that we are
2 doing everything that is in our power to preserve and
3 protect documents.

4 And, also, I would just like to flag that in past
5 Awards, Tribunals like Nova Group have agreed that simple
6 express representation by a State--so, without any
7 demonstration that they have [REDACTED] in place--is
8 usually sufficient to--for Tribunals to say that an interim
9 order is not necessary because the Respondent State or
10 another disputing Party are preserving and protecting
11 documents.

12 So, I think the threshold is not really high here,
13 and we've done a lot to demonstrate that we are preserving
14 documents and also protecting them.

15 ARBITRATOR BISHOP: I take that point.
16 Mr. Appleton has pointed to certain examples that have
17 occurred in the past, criminal convictions and such, which
18 are set out, I think, in the Notice of Arbitration.

19 Could you address that issue specifically and tell
20 us what has been done since then to ensure that won't
21 reoccur?

22 MS. DALLAIRE: So, that's another really good
23 question. Maybe I can refer to our Statement of Defence
24 where we talk about these allegations that the Claimant
25 makes.

1 Of course we believe that these allegations are
2 unsupported here. They are in relation to two gas plants
3 that were canceled in 2010 and 2011, and I think that
4 Claimant is trying to refer to the Report by the Privacy
5 Commissioner of Ontario, which you can find at R-003, where
6 she talks about specifically the two gas plants that were
7 canceled and the investigation that followed.

8 So, we don't have any evidence in this Arbitration
9 that the destruction of documents were relevant to the
10 onshore wind development, which is what this claim is
11 about. And so, I think the Claimant is only pointing to
12 vague allegation which do not relate to this case, and
13 so--and you also have a follow-up for the Report which is
14 R-004.

15 ARBITRATOR BISHOP: Thank you.

16 SECRETARY THAM: Can we open the session?

17 MS. DALLAIRE: Sorry. Yes, we can.

18 (Beginning Open Session.)

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OPEN SESSION

PRESIDENT BULL: Thank you very much for your submissions.

Then we will hear in Reply from the Claimants. You have five minutes.

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. APPLETON: Thank you, Mr. President. Just a couple of quick points.

First of all, Ms. Dallaire has not brought to your attention your authority, which is in the NAFTA Article 1134, even though that was a very significant part of all of these motions. I do not know why she completely and utterly omitted any reference to the Tribunal's authority for interim measures.

The Article 1134, just to remind you--I know that you are following this quite closely for discussions. It says: "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction."

It's very clear. You clearly have this authority, you clearly have this ability, and this is exactly the situation we need to deal with it. I was rather surprised

1 that Ms. Dallaire continues to call the situation
2 unsupported allegations when you go so far as to actually
3 have criminal convictions.

4 All of the energy policy emails are gone. And now
5 to say, "Well, we can't prove what's gone and, therefore,
6 it is unsupported because we don't know what was wiped"--we
7 know that there were hundreds of thousands of emails that
8 were gone, but we don't know what they are because they are
9 gone and, therefore, that means its unsupported? That's
10 ridiculous.

11 The laws that were in place to protect against
12 that were in place before. Canada says, "Well, we have
13 laws; therefore, there can be no destruction, there can be
14 no risk." But those laws were there. If people won't
15 follow those laws, that's the problem. That's what makes
16 this different.

17 They cite the case of Nova Group, which is not a
18 NAFTA case, but in Nova Group there's not a situation where
19 there's proof of destruction and violation. You not only
20 have the violation in terms of the destruction of the
21 documents, but there was a subpoena to order their
22 production and then, in light of that, the destruction.

23 And I could give you some suggestions of things
24 that could be done and things that could be checked to
25 ensure by Canada that Ontario was compliant, but that is

1 not what we've heard. We've heard that this is just
2 unsupported.

3 Then I'm rather alarmed to hear a suggestion now
4 that we have no right to Windstream, that the Windstream
5 documents shouldn't--so, now we know that we are going to
6 have a fight about that. That's why Canada won't give you
7 its permission for the PCA to turn it over.

8 The fact of the matter is there should be no
9 objection. Canada says that they believe in transparency
10 in all their cases. This information should be available
11 to the public, but yet when they are asked, we don't get an
12 answer because their conduct shows us that they don't walk
13 the walk, they just talk the talk. They say they believe
14 in transparency, but they don't do it.

15 ARBITRATOR BETHLEHEM: If Canada were to give
16 permission, would that satisfy you?

17 MR. APPLETON: I think that would make it a lot
18 easier, and I think--and I don't understand why they
19 wouldn't. I mean, Canada has said, "We have an obligation
20 to preserve and protect the record," they admitted it
21 today, and that there is no burden. Yet they won't agree
22 to a bilateral order to do that. I'm just completely
23 shocked. I don't understand why. They say one thing and
24 then do another.

25 Yes, they have an obligation, an international

1 obligation to do it. And I just don't know why they
2 wouldn't agree. And it is remarkable to have to ask you to
3 make this Order that they should do because it is their
4 ongoing international obligation.

5 I had one last point.

6 Yes. Ms. Dallaire has now indicated that,
7 fundamentally, that the issues in Windstream are now
8 irrelevant. That is Canada's position, and I find
9 that--she said--she denied that "FIT is FIT" and "wind is
10 wind." I don't know why she thinks wind is different if
11 it's on the water or if it's on the land. I'm quite
12 interested in that. I spend a lot of time looking at wind
13 issues, so I can't wait to hear that one.

14 But the fact of the matter is we are talking about
15 transmission access, a very valuable, important commodity,
16 which is regulated by governmental permit and permission,
17 covered by the NAFTA, covered by the Treaty, and the
18 process that goes with it. That's why we need to see how
19 that was done. We don't understand why that would be
20 problematic, especially since they agree that there is no
21 burden to deal with it. It could be produced, and it's
22 special because of the existence of destruction.

23 That's what makes all of this different. You have
24 the authority to keep your--the integrity of the process.
25 That's what we are asking about--1134, in light of the

1 admission, in light of the confirmation by criminal courts
2 of what went on, and that's what we are seeking. So, it's
3 very specific.

4 I believe that's all that we have on this. We
5 thank you very much for your time to consider this matter
6 because we think that it's important to ensure that we have
7 a record and that things are produced, because of the
8 questions of the conduct of senior government members at
9 issue in this case.

10 Thank you.

11 PRESIDENT BULL: Thank you, Mr. Appleton.

12 And Canada has five minutes for Rejoinder.

13 REJOINDER COMMENTS BY COUNSEL FOR RESPONDENT

14 MS. DALLAIRE: So, I will be very brief, just a
15 couple of points that Mr. Appleton has raised.

16 Concerning Article 1134 of the NAFTA, we agree.
17 We're not saying that this Tribunal doesn't have the
18 authority to grant Interim Measures and to order the
19 preservation of documents. That is not what we are saying.
20 We are applying a test and we are saying that the test,
21 which, by the way, the Claimant was also applying in its
22 own motion, is not met here. There are certain conditions
23 to meet, and they are not met.

24 Also, about the questions on new policies and
25 procedures since the criminal investigation, I think it was

1 a question that was raised by you, Mr. Bishop, and I maybe
2 forgot to respond to that specific part of the question.

3 So, there are now new policies in place and
4 procedures in place to ensure the preservation and
5 protection of documents following the Report which I
6 referred you to earlier, so R-003, and I can also refer you
7 namely to the corporate recordkeeping policies, which
8 is--of 2011 and 2015, and I believe that they are
9 Exhibit R-017. And I will probably have to get back to
10 you--oh, and R-016. So, R-016 and R-017.

11 Also, regarding the question on the PCA--so,
12 again, we don't want to sound like we are opposing any
13 production of documents here. That is not the case. We
14 are simply saying that there are procedures in place, but
15 we could agree for the PCA to produce documents.

16 But, again, I think we--the test here to meet is
17 that the document needs to be relevant and material, and
18 also on the point of like the destruction of records
19 by--not the destruction, but that the records could maybe
20 be destroyed inadvertently by Canada, we can confirm that
21 we have those documents and we are preserving them in the
22 context of this Arbitration.

23 ARBITRATOR BETHLEHEM: Ms. Dallaire, I suppose
24 what I'm looking to you for, if Canada wishes to make this
25 statement, is something that is clear, unambiguous, on the

1 record, that says: "If an issue arises in the future,
2 Canada will not object to accessing the PCA records."

3 Can you give that declaration? Can you make that
4 statement?

5 MS. DALLAIRE: Yes, we are willing to state that.
6 It is just that, again, we believe that there--

7 ARBITRATOR BETHLEHEM: I understand the point of
8 principle. I'm just--I don't want us to be in a position,
9 if that were to be, we haven't deliberated, but if we were
10 to come to a point in the future where relevance had been
11 established and it was then found that inadvertently some
12 documents had been disclosed, we don't want to be in a
13 position where Canada then says, "Well, we reserved our
14 right not to give permission."

15 So, if you are going to, this is the time to make
16 the point--clear, unequivocal, unambiguous--that you will
17 waive any objection that may arise in due course.

18 MS. DALLAIRE: So, I can right now say and confirm
19 that we would not--we would waive, and we would not object
20 to the PCA producing those documents, following all of
21 these steps that you've just mentioned.

22 ARBITRATOR BETHLEHEM: Thank you very much.

23 ARBITRATOR BISHOP: I'm sorry. You would waive
24 any objection you might have to the PCA producing the
25 documents?

1 MS. DALLAIRE: So, I'm going to rephrase that.

2 ARBITRATOR BISHOP: In that instance that was
3 referred to; is that correct?

4 MS. DALLAIRE: So, we would waive our right and we
5 would not object to the PCA producing documents. I'm sorry
6 about the confusion.

7 ARBITRATOR BETHLEHEM: I have one more question
8 but it would require us to go into a closed session.

9 (Beginning Closed Session.)

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CLOSED SESSION

ARBITRATOR BETHLEHEM: I don't know whether it is relevant, so I just want to probe in case it is, and I appreciate that there is a whole procedure for dealing with these things.

I'd like to know, just in a nutshell, why the elements that are marked as confidential are marked as confidential. I would have thought that a [REDACTED] would be a straightforward issue and that it may assist for the fact of a [REDACTED] to be in the public domain.

So, why have you decided that these aspects are confidential, [REDACTED] aspects?

MS. DALLAIRE: So, we believe that it is because they are--the solicitor client privilege applies here and that's the reason. [REDACTED]--and I can confirm this later--were drafted by lawyers, and we just believe that they are subject to SCP privilege, and that's why we want to make them confidential.

ARBITRATOR BETHLEHEM: Okay. Thank you.

PRESIDENT BULL: Sorry, just on that last point.

So, your concern is that because you believe that they are privileged, that releasing them would then jeopardize other communications. Is that the thinking?

MS. DALLAIRE: So, I can always get back to you on this. Of course, [REDACTED] are not--do not

1 pertain to the Government of Canada. They are--they were
2 drafted by the Government of Ontario, so I would have to
3 check with them first before I can make any assertion here.
4 And also they are subject to privileged designation under
5 domestic law, so I think I'm going to need some further
6 directions on this before I can fully respond to your
7 question.

8 PRESIDENT BULL: Sure. Thank you.

9 MR. APPLETON: Mr. President, just arising from
10 your question, I simply want to note that what's
11 particularly--so, if Mr. Dallaire is going to get back to
12 us, she might want to make sure that she gets back as well
13 on that there was waiver in this case, Canada admitted that
14 there was waiver of the solicitor-client privilege in this
15 situation, that the act--but they have sought here--that's
16 why it was very perplexing, is that another institutional
17 privilege arises that is not subject to waiver, and that
18 was arising out of a piece of legislation, the--which is
19 called FIPPA, and that, but--and we wrote back to the
20 Tribunal and said, "Well, the FIPPA would only apply if you
21 sought it under FIPPA," and you overruled that.

22 You said, no, because we said that since this was
23 waived, and, therefore, there is no litigation privilege
24 here that is permitted, that, therefore, this would have to
25 be produced. That's why we wanted it in the record. And

1 we were told by Canada, no, the Ontario institutional law
2 would apply. And we said, but it only applies if you apply
3 through FIPPA, because that was the process. And we were
4 overturned on that.

5 So, we understand, but we just found that to be
6 very unusual given the fact that, if you waive--and
7 Canada's position was, there is no waiver of the
8 institutional privilege. There is only a waiver of the
9 actual litigation privilege, and the fact that they made
10 this public is irrelevant and, therefore, that waiver
11 doesn't apply. They call that common-law waiver, but that
12 the institutional privilege applied because in the Order it
13 was permitted.

14 And we think that was not the intention of the
15 Order, and we cautioned the Tribunal about the nature of
16 those types of orders when it was being made, that we
17 didn't understand how broad that would be, and we thought
18 that was very problematic because it would be unbalanced
19 between the Parties. And I simply flagged that, because
20 when Ms. Dallaire reports back to you, she might want to
21 reference the institutional issue versus the waiver that
22 they admit took place about the solicitor-client privilege
23 in general.

24 PRESIDENT BULL: You don't have to, but if you
25 wish to respond to anything Mr. Appleton has said, you have

1 the opportunity.

2 MS. DALLAIRE: I trust that the--this Tribunal is
3 familiar with its own Decisions. So, I don't think there
4 is anything more to say on this. I think there is a clear
5 ruling, and there is no further submission from Canada on
6 this.

7 PRESIDENT BULL: Thank you.

8 Good. Then Tribunal thanks counsel for their
9 submissions on Agenda Item Number 2.

10 SECRETARY THAM: Can we go to open?

11 PRESIDENT BULL: Yes, we can go to open session.

12 (Beginning Open Session.)

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OPEN SESSION

PRESIDENT BULL: So, that concludes the submissions for Agenda Item Number 2, and we--I thank everyone for your help. We are on time. And that is much appreciated. We will break for lunch now, and as stated in the timetable, we will reconvene at 1:45. Thank you.

(Whereupon, at 12:15 p.m., the Hearing was adjourned until 1:45 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT BULL: Let's resume proceedings.

We're back on the record.

Before we turn to Agenda Item 3, the Tribunal has deliberated on Agenda Item 1, the issue of disclosure of third-party funding, and the Tribunal is not going to make an order right now, but the Tribunal does have a view about the order it is minded to make, and we want to inform the Parties of our inclination.

The Tribunal is minded to order that the name of the third-party funder be disclosed to the Tribunal and to Canada and that information be kept confidential; in other words, without the need to disclose that name to the public.

The Tribunal is also minded to order disclosure of any terms in the third-party funding agreement relating to payment of adverse cost orders and termination of the agreement. If there are no such terms in the agreement, then counsel for the Claimant can merely make that representation to the Tribunal and to Canada. That would suffice.

Then the Tribunal is also minded to order that, if there were subsequently changes to the third funding--third-party funding agreement related to those clauses, changes relating to those two clauses about

1 termination and adverse cost orders, that the Claimant
2 would inform the Tribunal and Canada when those changes
3 occurred.

4 So, that's the Tribunal's inclination at the
5 moment.

6 However, the Tribunal is of the view that it may
7 benefit from hearing the full arguments on security for
8 costs before making a final decision about the Order
9 itself, but we wanted to inform both Parties about our
10 inclination so that that may assist both Parties in
11 fine-tuning your submissions for tomorrow.

12 So, that's for both Parties' information at the
13 moment.

14 And that is it, we can turn to Agenda Item 3,
15 which is Respondent's Request for Bifurcation.

16 It being the Respondent's Request,
17 Ms. Di Pierdomenico, you have the floor.

18 AGENDA ITEM 3: RESPONDENT'S REQUEST FOR BIFURCATION

19 ARGUMENT BY COUNSEL FOR THE RESPONDENT

20 MS. DI PIERDOMENICO: Thank you, President Bull,
21 Arbitrator Bethlehem, Arbitrator Bishop.

22 I will present Canada's remarks concerning its
23 request for bifurcated preliminary phase.

24 As the Tribunal is aware, Canada's objection of
25 this Tribunal to hear the case is with the Claimant's

1 failure to bring its claims in a timely manner. When
2 Claimant filed its Notice of Arbitration on June 1, 2017,
3 more than three years had passed since the Claimant knew or
4 should have known about the breaches of NAFTA that it
5 alleges, as well as the loss that it has suffered as a
6 result. Tennant's inexplicable delay in bringing its terms
7 within three years means its claim is time-barred and, as
8 such, Canada has not consented to this Arbitration.

9 The issue before the Tribunal today is to decide
10 when it would like to hear Canada's objection to the
11 Tribunal's jurisdiction. Canada requests that the Tribunal
12 rule on this issue in a preliminary phase.

13 The Tribunal should be guided by efficiency and
14 fairness when deciding whether it should bifurcate these
15 proceedings into a preliminary jurisdictional phase.

16 This case represents the epitome of when a
17 Tribunal should bifurcate. Canada's objection is simple,
18 it is discrete, and it is ripe for preliminary
19 determination.

20 To determine whether a case is time-barred under
21 NAFTA, the Tribunal need only to count back three years
22 from the date of filing from the Notice of Arbitration.
23 This determines the critical date for your purposes. Since
24 the Claimant filed its Notice of Arbitration on June 1,
25 2017, the critical date is June 1, 2014. This is the date

1 that I want you to keep in mind throughout our discussion
2 today.

3 No claim may proceed, under NAFTA Chapter Eleven,
4 where the Claimant knew or should have known of the alleged
5 breach of the NAFTA and any resultant damage before the
6 critical date, June 1, 2014.

7 Another key piece of evidence that--key piece of
8 information, excuse me, that I want you to keep in mind is
9 the Claimant alleges four categories of wrongful actions in
10 Paragraph 91 of its Notice of Arbitration, which you see
11 here on the slide. They are detailed in subparagraphs (a)
12 through (d) here.

13 To summarize briefly, the Claimant complains of
14 the regulation and administration of the Ontario Feed-in
15 Tariff program, which I'll refer to as the FIT Program.
16 Specifically, these claims are that, (a), Ontario unfairly
17 manipulated the award of access to the Electricity
18 Transmission Grid, resulting in unfair treatment to the
19 investment; (b), Ontario unfairly manipulated the
20 dissemination of program information under the FIT Program;
21 (c) Ontario unfairly manipulated the awarding of Contracts
22 under the FIT Program; and finally, (d), senior officials
23 improperly destroyed necessary and material evidence of
24 their internationally unlawful actions in an attempt to
25 avoid liability for their wrongfulness.

1 In this case, it is clear that all of these
2 alleged categories of wrongful actions by Ontario and the
3 independent electricity system operator--or IESO, as I will
4 refer to them going forward--and any losses that it felt as
5 a result were either known or should have been known to the
6 Claimant well before June 1, 2014. This is what we are
7 asking the Tribunal to decide in a preliminary
8 Jurisdictional Phase.

9 So, my presentation today is structured as
10 follows: First, I will set out the applicable law on
11 bifurcation; and, second, I will apply the law to the facts
12 in order to demonstrate why these proceedings should be
13 bifurcated. These facts, substantiated in contemporaneous
14 public documents and publications, were all available to
15 the Claimant before June 1, 2014. The Claim is, therefore,
16 time-barred from proceeding under NAFTA.

17 By the end of my presentation, you will see that
18 this case engages the exact circumstances warranting a
19 preliminary proceeding. It would allow a Tribunal to
20 decide its jurisdiction over a matter before it engages
21 into an inquiry into the Merits which ultimately proves to
22 be unnecessary.

23 ARBITRATOR BISHOP: Could I ask one preliminary
24 question?

25 Under Article 1116(2), which is the section you're

1 going under, who has the burden of proof with respect to
2 proving when the Investor first acquired or should have
3 first acquired knowledge of the breach and the loss of
4 damage?

5 MS. DI PIERDOMENICO: It is the Claimant that has
6 the burden to establish its claim meets the jurisdictional
7 requirement of NAFTA, one being it meets the requirements
8 of the time bar.

9 ARBITRATOR BISHOP: Is there any authority on
10 that?

11 MS. DI PIERDOMENICO: The authority that I would
12 point to would be Grand River. Unfortunately, I don't have
13 anything--a specific paragraph that I can point to.

14 There may be others, but I think in terms of the
15 purposes today, we are only trying to establish bifurcation
16 and not so much the law on the time bar. But I'm happy to
17 pull that authority and get it to you in soonest order.

18 ARBITRATOR BISHOP: Thank you.

19 MS. DI PIERDOMENICO: No problem.

20 So, turning to the applicable law, Article 21(4)
21 of the UNCITRAL Rules, it provides that, "In general, the
22 Arbitral Tribunal should rule on a plea concerning its
23 jurisdiction as a preliminary question."

24 The language of Article 21(4) establishes a
25 presumption that challenges to a Tribunal's jurisdiction

1 should be treated as a preliminary question when it is
2 appropriate to do so. Additionally, established NAFTA
3 Tribunal practice is to normally address the application of
4 the time bar in a preliminary phase. Citing to NAFTA
5 jurisprudence, the Resolute Tribunal in its Decision on
6 Bifurcation found as a matter of NAFTA practice time bar
7 issues are normally decided as a preliminary question, as
8 preliminary questions, excuse me.

9 The Tribunal's inquiry when deciding whether or
10 not to bifurcate proceedings under Article 21.4 of the
11 UNCITRAL Rules is a limited one. The Tribunal need only
12 consider the three-part test crystallized in the
13 jurisprudence and set out very recently in the Resolute and
14 Philip Morris cases to determine whether bifurcation is
15 fair and would result in procedural efficiencies.

16 First, whether the objection is prima facie
17 serious and substantial. In this case, Canada's objection
18 is prima facie serious and substantial because it goes to
19 the very basis of the Tribunal's authority to hear this
20 claim. Canada has not consented to this Arbitration.
21 Accordingly, the Tribunal does not have jurisdiction to
22 hear the Claim.

23 Second, whether the time-bar objection can be
24 examined without prejudging or entering the Merits. In
25 this case, it is patently clear that an examination of what

1 the Claimant knew or should have known can be done without
2 prejudging or entering the Merits. Moreover, Canada can
3 establish the Claim as time-barred exclusively through
4 contemporaneous publicly available information, avoiding
5 discovery-related costs.

6 And, third, whether the objection, if successful,
7 could dispose of all or essentially part of the claims.
8 Here, Canada's time-bar objection is--if it's successful,
9 it will dispose of all of Tennant's claims.

10 So, let's apply the three-part test on bifurcation
11 to the relevant facts. In applying the first element of
12 the test, the Tribunal must evaluate if Canada's objection
13 is prima facie serious and substantial. The inquiry at
14 this stage, as I mentioned before, is a limited one. As
15 described by the Resolute Tribunal, the determination of
16 the first part of the test should not entail a preview of
17 the jurisdictional arguments themselves; rather, at this
18 stage, the Tribunal is only required to be satisfied that
19 the objections are not frivolous or vexatious, brought in
20 good faith, and cannot be excluded on a prima facie basis.

21 As well, *ratione temporis* objections to
22 jurisdiction have specifically been found to be prima facie
23 serious and substantial. In *Pey Casado v. Chile*, the
24 Tribunal determined that an objection that the subject
25 matter of the Compliant fell outside the temporal scope of

1 the Treaty went to the very basis of Tribunal's power to
2 award the relief sought by the Claimants. As such, the
3 objection was prima facie serious and substantial.

4 Like Pey Casado, the application of the NAFTA time
5 bar to this case goes to the very basis of the Tribunal's
6 power to hear this case.

7 The consent of State Parties to arbitrate Foreign
8 Investor claims under NAFTA is not unconditional. NAFTA
9 Article 1116(2) clearly establishes a three-year time
10 limitation for the filing of claims under NAFTA Chapter
11 Eleven. Specifically, NAFTA Article 1116(2) provides that:
12 "An Investor may not make a claim if more than three years
13 have elapsed from the date on which the Investor first
14 acquired, or should have first acquired, knowledge of the
15 alleged breach and knowledge that the Investor has incurred
16 loss or damage."

17 The time limitation commences from the time either
18 acknowledge or constructive knowledge of the alleged breach
19 and any resultant loss or damage is first acquired. In
20 accordance with the Agreement, NAFTA's time bar has been
21 strictly applied by Tribunals. A delay in submitting a
22 claim within the required three-year period is an absolute
23 bar to an Investor's Claim proceeding.

24 This is why the Tribunal in Grand River decided to
25 bifurcate the time limitation issue for trial as a

1 preliminary issue, stating: "Since Articles 1116(2) and
2 1117(2) introduced a clear and rigid limitation defense,
3 not subject to any suspension, prolongation, or other
4 qualification, the Tribunal decided to bifurcate the time
5 limitation issue for trial as a preliminary issue."

6 Again, the time limitation is a clear and rigid
7 limitation defense. There is no possibility for the
8 Claimant to suspend, prolong, or otherwise qualify the
9 three-year time limitation to bringing its claim. To be
10 clear, the Tribunal does not need to conclude, nor do we
11 ask the Tribunal to conclude, if this case is likely to be
12 time-barred. Recall, the Tribunal's inquiry is a limited
13 one at this stage. In its decision on whether to
14 bifurcate, Canada only asks the Tribunal to determine
15 whether Canada has a reasonable case on its face.

16 For this task, it is necessary for me to summarize
17 some of the most basic and relevant facts to this case to
18 demonstrate that Canada's jurisdictional objection engages
19 the essence of a serious and substantial question.

20 Now, I'm laying out these facts because they are
21 important to the legal test of bifurcation.

22 So, you may wish to keep your slide on the four
23 allegations of breaches. I believe it is Slide Number 3 in
24 your materials--that is Paragraph 91 of the Notice of
25 Arbitration--as I will be referring to these four

1 allegations throughout my review of the basic facts which
2 are relevant.

3 Now, let's move through some of this information.

4 So, let's rewind by 11 years. On October 1, 2009,
5 the FIT Program was launched. At the time, it was
6 administered by the Ontario Power Authority, which I refer
7 to going forward as the OPA. This was the predecessor to
8 the IESO. The Claimant, through its alleged investment,
9 Skyway 127, submitted an application to the OPA for a FIT
10 Contract on November 24, 2009, and this is according to the
11 Claimant's Notice of Arbitration.

12 Separately from the FIT Program, on January 21,
13 2010, the Government of Ontario entered into the Green
14 Energy Investment Agreement, referred to as the GEIA on the
15 slide. The Agreement was with a consortium comprised of
16 Samsung, C&T Corporation, and the Korea Power Electric
17 Corporation, which I'll refer to as the Korean Consortium
18 going forward.

19 This Agreement with the Korean Consortium was
20 publicly announced by The Premier of Ontario that same day.
21 The Government of Ontario issued news releases about it.
22 In fact, the Claimant acknowledges this was public
23 information at the time.

24 The amended and restated agreement with the Korean
25 Consortium was published on the Ministry of Energy's

1 website on July 29, 2011. This Agreement is extensively
2 cited in the Claimant's Notice of Arbitration.

3 Additionally, the Minister of Energy issued
4 several directions to the OPA on September 30, 2009,
5 April 1, 2010, and September 17, 2010. These directions
6 required the OPA to, among other things, reserve a certain
7 amount of transmission capacity for the Korean Consortium
8 so that it would have priority access to the grid.

9 These directions, like all of the Minister of
10 Energy's directions and directives to the OPA and IESO,
11 were posted on the OPA and IESO's website as of the date
12 they were issued. The timing of the announcement of the
13 Korean Consortium's agreement with Ontario, the publication
14 of the amended Agreement, along with these accompanying
15 Minister's directions on reserving capacity for the Korean
16 Consortium, contain the information relevant to Claimant's
17 Claim (c) of Paragraph 91 of the Claimant's Notice of
18 Arbitration, that Ontario unfairly manipulated the awarding
19 of contracts under the FIT Program. Two of these
20 directions are cited in the Claimant's Notice of
21 Arbitration.

22 Now, while all of this information was available
23 and circulating in the Korean Consortium agreement with
24 Ontario and its priority access to the grid, there was an
25 important development under the FIT Program. In

1 April 2010, the first round of FIT Contract offers were
2 made by the OPA. However, the Claimant's Skyway 127
3 proposal did not receive a FIT Contract during this first
4 contract round--this first round of FIT Contract offer,
5 excuse me.

6 And then came the changes to the FIT. These
7 changes were detailed in a June 3, 2011, Minister of Energy
8 direction to the OPA regarding required changes to the FIT
9 Program rules, which was published on the OPA and IESO's
10 websites on that date, and these changes form the basis of
11 Claimant's Claim (b) of Paragraph 91 of the Notice of
12 Arbitration, that Ontario unfairly manipulated the
13 dissemination of program information under the FIT Program.

14 But very soon after these changes were made to the
15 FIT Program, on July 4, 2011, FIT Contract offers were made
16 for the Bruce-Milton Transmission area and were publicly
17 announced, and Skyway 127 was, again, not offered a FIT
18 Contract at the time.

19 Soon thereafter, on December 5, 2011, the Office
20 of the Auditor General of Ontario made public its Annual
21 Report. The Report provides key details on the Korean
22 Consortium's agreement with Ontario. It explains how the
23 priority access to Ontario's transmission system for the
24 Consortium had impacted the transmission availability for
25 other renewable energy projects. The Auditor General's

1 2011 Report further describes how the limited capacity
2 available on Ontario's transmission and distribution
3 systems impacted the Award of FIT Contracts and noted that
4 more than 3,000 FIT Program applications could not be
5 accommodated to the existing power grid given the
6 higher-than-anticipated number of renewable energy projects
7 awaiting connection to the grid.

8 These findings by the Auditor General in 2011 are
9 at the heart of the Claimant's allegations concerning the
10 unfair manipulation in awarding access to the electricity
11 grid, unfair manipulation in the dissemination of FIT
12 Program information, and unfair manipulation in the award
13 of FIT Contracts, or Claims (a), (b), and (c) of
14 Paragraph 91 of the Claimant's Notice of Arbitration.

15 The Annual Report is actually cited in the
16 Claimant's Notice of Arbitration as well.

17 Now, let's consider the Claimant's fourth
18 allegation, (d), in Paragraph 91 of its Notice of
19 Arbitration. This fourth allegation concerns the document
20 destruction involving Ontario senior officials.

21 This issue came to light in 2011 in a matter
22 involving cancellation of two gas power plant contracts in
23 2010 and 2011. Throughout the years 2011 to 2013, this
24 matter was highly publicized in the press, debated in the
25 Ontario Legislative Assembly, and was the subject of a

1 special investigative report by the Information and Privacy
2 Commissioner of Ontario. This investigative Report, titled
3 "Deleting Accountability: Records Management Practices of
4 Political Staff," was tabled in the Ontario Legislative
5 Assembly on June 5, 2013.

6 Thus, the Claimant's unsubstantiated fourth
7 allegation concerning the destruction of documents is based
8 on highly publicized events that were well known throughout
9 2011 to 2013.

10 Finally, on June 12, 2013, in a publicly posted
11 direction, the Minister of Energy directed the OPA to not
12 procure any additional large FIT projects. As Skyway 127
13 proposal was, with respect, to a large project, this
14 direction effectively eliminated any further consideration
15 of the Claimant as a FIT candidate as of June 12, 2013.

16 The facts and publicly available documents that
17 I've just referred to are just some of the basic facts that
18 the Claimant knew or should have known before the critical
19 date of June 1, 2014. And this is really just a minor
20 sampling of such facts. It can hardly be said, as the
21 Claimant attempts to do, that Ontario's acts are
22 surreptitious and outside the public's purview.

23 Now, I understand that I just walked you through a
24 timeline and set out a lot of information with quite a lot
25 of dates attached, so I thought it might be useful to

1 summarize this information for you in another format that
2 you can take away with you.

3 The chart on the screen or in your packages sets
4 out the four so-called "categories" of wrongful actions of
5 Paragraph 91 of the Claimant's Notice of Arbitration in
6 red. Alongside each of the allegations I provide the
7 information underlying all of these claims--underlying each
8 of these claims, excuse me, and the dates when this
9 information was made public or was otherwise available to
10 the Claimant.

11 You will also see at the bottom the dates the
12 Claimant alleges impacts on its investment. This is the
13 row in blue. I always get confused between rows and
14 columns, but that's a row.

15 So, again, you will see all of the information was
16 available to the Claimant before the critical date. In
17 fact, the Claimant does not make a single reference in its
18 Notice of Arbitration to an act or measure alleged to be in
19 breach of NAFTA in relation to its Skyway proposal that
20 takes place after June 1, 2014.

21 In its attempt to state the timeliness of its
22 claim, the Claimant boldly asserts that it did not know of
23 any of these alleged categories of wrongful acts until
24 documents were disclosed in more timely actions brought by
25 other NAFTA Claimants. One of those Claimants, Mesa Power

1 Group, brought its claim on October 4, 2011, just about
2 six years before the Claimant initiated its nearly
3 identical claim.

4 In light of the Mesa Claim, the Tribunal need not
5 conjecture nor guess when a reasonable Investor knew or
6 should have known to bring its NAFTA challenge in relation
7 to the FIT Program. Mesa brought its virtually identical
8 claim on the basis of exactly the same information that was
9 available to the Claimant.

10 And when we speak of virtually identical claims,
11 we are not only talking substantively similar. We are
12 actually speaking of identical paragraphs in Tennant's
13 Notice of Arbitration that appear to be copied from the
14 Mesa Notice of Arbitration. And these slides simply--I
15 believe there is five of them--show exactly that.

16 In the left column, we have the paragraphs in the
17 Mesa Notice of Arbitration, and the column on the right
18 shows the exact same paragraph in the Tennant Notice of
19 Arbitration.

20 Moreover, these virtually identical claims in the
21 Mesa Case were made public before the critical date.
22 Mesa's intention to initiate its Claim was posted on the
23 Government of Canada's website on August 3, 2011. Its
24 Notice of Arbitration was posted on the same website on
25 May 15--by May 15, 2013. Therefore, the Claimant cannot

1 hide behind the argument it makes in response to Canada's
2 request for bifurcation that all of its claims are based
3 upon facts that would not be known by anyone in the
4 Investor's position before June 4, 2014. This is simply
5 not credible when the Claimant references documents and
6 information as supports for its claim in its Notice of
7 Arbitration which were made public before the critical
8 date.

9 The Claimant may also not be permitted to reset
10 the NAFTA's time bar simply because it was able to point to
11 a new fact that was discovered in the course of Mesa's
12 timely brought case. It is normal for new facts to be
13 uncovered throughout the course of a fully arbitrated
14 claim; however, a new fact that is discovered in the
15 context of another case does not extend the application of
16 NAFTA's strict time bar for other potential Claimants. The
17 test under 1116(2) is when a Claimant first acquires
18 knowledge of its claims that result in damages.

19 ARBITRATOR BETHLEHEM: May I ask you there, what
20 about if the new fact gives rise to an independently
21 actionable claim?

22 MS. DI PIERDOMENICO: That is for the Tribunal to
23 consider in looking at the new facts that the Claimant
24 alleges.

25 However, the underlying claims here are virtually

1 the same. They are alleging unfair treatment by the
2 Claimant's investment. Mesa made the exact same
3 allegation, and therefore, we believe that we are far from
4 that nexus in this case.

5 ARBITRATOR BETHLEHEM: I suspect that one of the
6 issues that we are going to have to grapple with--I mean,
7 the Claimant has made the point that these issues are
8 inextricably bound up with the Merits, and in many of these
9 time-barred cases, they are very highly fact-specific.

10 There are also questions that arise about a series
11 of actions, continuing breaches, where there is an alleged
12 continuing illegality. Now, you seem to be addressing this
13 issue in a very, as it were, definite, specific sort of
14 example, where we've got the "should have known" occurring
15 before the time bar. But in many of these cases, it seems
16 as if the "should have known" morphs into some X before,
17 some X after, continuing series of conduct.

18 Are you going to be coming on to address this? Is
19 this an issue as you perceive it to be in this case?

20 MS. DI PIERDOMENICO: In terms of whether or not I
21 intended on addressing continuing breach today, no, I
22 hadn't, because that is more substantive to the time bar.
23 This is something that I think the Tribunal would consider
24 in its analysis the facts.

25 But just looking at the plain language of

1 Article 1116, it is not a test for continuing breach. It
2 is a test of when the Claimant first knew or should have
3 known. So, there is a moment in time that you will be able
4 to identify and be able to apply the time bar in that
5 precise nature.

6 So, I'm sure that the Claimant is going to come up
7 here and obfuscate and allege so many different claims and
8 facts that were never known to it beforehand. However, I
9 think you have to take the Notice of Arbitration as it is
10 alleged by the Claimant, as we have done--we took it very
11 seriously, and we looked at these Claims, and we believe
12 that the time bar is clearly applied here in a manner that
13 excludes the Claim from proceeding under NAFTA.

14 ARBITRATOR BETHLEHEM: I certainly understand your
15 argument. I mean, one of the things that you are going to
16 have to satisfy us on, given that you are asking us to
17 decide to bifurcate at this particular point in time, is
18 that we will be capable of engaging with your time bar
19 point in grand isolation of anything else that may arise.
20 I mean, you are asking us to bifurcate before we have even
21 seen the Memorial of the Claimant, which is not completely
22 unique, but it is quite unusual.

23 MS. DI PIERDOMENICO: Let me just unpack that a
24 little bit.

25 While it might be unusual, as I have mentioned

1 before, it is normal NAFTA practice to bifurcate on the
2 time bar, and that these assessments on what the Claimant
3 knew or should have known at a particular point in time can
4 be done in isolation. I had intended on addressing it a
5 little bit later on in my presentation, but the idea is
6 quite simple: All we are looking at is information that is
7 on the public record and what the Claimant knew and going
8 back to the Claim as alleged.

9 Now, I tried to walk you through that in my chart
10 and in my fancy slide show, but the exercise for the
11 Tribunal is quite clear distinct from the Merits. Now,
12 what they are alleging in terms of the Merits of the case
13 is in Article 1105, which is the minimum standard of
14 treatment, which can be a quite grandiose-type analysis on
15 the Merits. Here, we are not looking at that. All we are
16 looking at is the Claim as alleged and whether or not the
17 Claimant knew or should have known of its claim before the
18 critical date. And, if so, then it's excluded.

19 We have brought to you an example of how a
20 Tribunal would approach this analysis, and I can either
21 continue on and jump that...or I can jump to that, but
22 Tribunals are not overly stressed in terms of analyzing
23 actual versus constructive knowledge. If you can establish
24 this outside of the Merits, then you should be able to
25 proceed to a bifurcated claim, and we believe we have a

1 strong case for that, given the public record that we have.
2 And there's a lot more information out there. We just need
3 the chance to bring it to you.

4 ARBITRATOR BETHLEHEM: Thank you.

5 ARBITRATOR BISHOP: Could I ask a question?

6 In terms of the standard, you're relying upon the
7 language "should have first acquired." Is that you're not
8 presenting evidence. I realize we're not at that stage,
9 but, I mean, you don't have evidence of when the Claimant
10 actually first acquired knowledge, do you?

11 MS. DI PIERDOMENICO: Well, the Claimant in its
12 response to our Request for Bifurcation alluded to its
13 actual acquisition of the knowledge after the Mesa
14 documents were published.

15 ARBITRATOR BISHOP: Right.

16 MS. DI PIERDOMENICO: So, we have to give that to
17 the Claimant, because perhaps that's the case. But the
18 test is not irresponsible Investors operating in Canada.
19 The test is diligent, responsible Investors, and that's why
20 we have a test that includes constructive knowledge.

21 ARBITRATOR BISHOP: Okay. But--

22 MS. DI PIERDOMENICO: In my view, there is so much
23 evidence out there, there are so much documents out there,
24 that it is clear that there is a case for actual knowledge
25 to be made. But, you know, they only know their own minds,

1 and so we move on to the constructive knowledge aspect in
2 establishing what a diligent and reasonable Investor would
3 know in the same circumstances.

4 ARBITRATOR BISHOP: Okay. The second question I
5 have is what is it that they had to have knowledge of? As
6 I read 1116, it is knowledge of the alleged breach and the
7 loss or damage. But knowledge of alleged breach seems to
8 be something other than knowledge of a particular event,
9 but it seems to include, if I'm understanding you correctly
10 and please correct me if not, that it seems to include that
11 you have knowledge that there was an actual breach or at
12 least an alleged breach of the Treaty.

13 Is that correct or wrong?

14 MS. DI PIERDOMENICO: That's right. I mean,
15 basically, when would the Investor have been triggered.
16 When would the Investor start to think about when its
17 claims were formed. It doesn't need to have a full
18 accounting of its claim. Obviously, that would dispel the
19 need for any sort of discovery process.

20 ARBITRATOR BISHOP: Okay.

21 MS. DI PIERDOMENICO: We're not saying that's what
22 the investor needs to establish under the NAFTA time bar,
23 but we do have a sense here of the information that was out
24 there and the Claims as alleged, in addition to two other
25 NAFTA Claimants under the FIT Program that have brought

1 their claims to bar in a timely way, and we think that
2 there's quite a bit out there that we need you to see.

3 ARBITRATOR BISHOP: Thank you.

4 ARBITRATOR BETHLEHEM: I'm sorry, just to check,
5 so you are--I mean, you cited Grand River to us on a number
6 of occasions. You are content to stand on that test. I'm
7 just looking at some of what Grand River says:

8 "Constructive knowledge of a fact is imputed to a person
9 if, by the exercise of reasonable care or due diligence,
10 they would have known, either from knowing something that
11 ought to be put to the person to further inquiry or from
12 willfully abstaining from inquiry."

13 So, it's a due diligence dimension that you are
14 suggesting that the Claimants, on the basis of all of this
15 public information, should have undertaken?

16 MS. DI PIERDOMENICO: That's right. I mean, we
17 are talking about procurement contracts in renewable
18 energy. This is not an area of the law that is
19 unregulated. I mean, this is a highly regulated area in
20 which there were specific rules, rules that were cited to
21 in the Notice of Arbitration, cited to extensively.

22 How is it they know the FIT Contract Rules, and
23 yet none the directives, the specific directives, that
24 pertain to the FIT Program? This is not credible when it
25 makes that sort of statement, that it's saying that it

1 would not have known of any sort of results from these
2 changes that might have affected its investment.

3 So, I guess if that concludes the questions, I'll
4 just proceed with them.

5 So, I have a conclusory sentence that says: "In
6 light of all these considerations," but I don't remember
7 what the considerations were that I presented to you. I'm
8 sure they were amazing.

9 But ultimately, it's the first part of the test in
10 that Canada's objection goes to the very basis of the
11 Tribunal to hear the Claim, and, therefore, in light of all
12 these considerations, it follows that Canada's
13 jurisdictional objection meets that first requirement.

14 So, the second element of the test on bifurcation
15 is whether Canada's objection can be examined without
16 prejudging or entering the Merits.

17 In its determination on whether to bifurcate on
18 the time bar, the Tribunal in Resolute found that the
19 limited evidentiary inquiry to decide the time-bar
20 objection in that case would not involve the Tribunal
21 prejudging or entering the merits of claim.

22 So, let's look at what it did. It found that the
23 date of the alleged breaches, the Nova Scotia Measures, are
24 uncontested. Rather, the Tribunal's inquiry will turn on
25 the question of when the Claimant first knew or ought to

1 have known that it incurred loss or damage.

2 Just like in Resolute, the dates of the alleged
3 events to constitute the breach are uncontested. So, the
4 factual inquiry required for this Tribunal to rule on
5 Canada's time-bar objection in this case will also be
6 limited.

7 The only issue for the Tribunal is to determine
8 when the Claimant knew or ought to have known of the four
9 breaches and its resultant loss. Therefore, a
10 determination of whether the Claimant's claim is
11 time-barred is a discrete inquiry that does not require the
12 Tribunal to enter or prejudge the Merits.

13 As stated by the Resolute Tribunal, it's the
14 bifurcated hearing that "would give the disputing parties
15 the opportunity to put evidence on the Record as to what
16 the Claimant knew or ought to have known and when and allow
17 the Tribunal to decide the jurisdictional objection on the
18 basis of that evidence. Such a limited inquiry would not
19 involve the Tribunal prejudging or entering the Merits."

20 Unlike what the Claimant asserts in its response
21 to Canada's request to bifurcation, the Tribunal will not
22 have to determine, first, if and when the four categories
23 of claims it alleges occurred and, second, if and when they
24 were disclosed to the public. This misstates the
25 Tribunal's task for reasons that I hope you understand now.

1 Moreover, taking the Claim as it is alleged by the
2 Claimant does not require the Tribunal to simply take the
3 Claimant's word for it when--on when it learned from the
4 alleged breaches and its resultant loss. Such an
5 interpretation would ignore the express terms of the
6 applicable law which provides that there are two
7 possibilities that may satisfy the knowledge test under
8 116(2), which is either actual knowledge or constructive
9 knowledge, whichever is earlier.

10 So, past NAFTA Tribunals assessed both the actual
11 and constructive knowledge, so what I alluded to earlier
12 with Arbitrator Bethlehem, in assessing both the actual and
13 constructive knowledge of both Claimant in ascertaining
14 whether the three-year time limitation is met.

15 So, for example, in Grand River, I set out the
16 example here for you. The Tribunal bifurcated the
17 proceedings solely to decide the Respondent's time-bar
18 objection. While the Tribunal could not establish actual
19 knowledge before the critical date in that case, the
20 Tribunal assessed the Claimant's constructive knowledge.
21 The slide sets out part of the Decision that shows the
22 Tribunal determined that there was enough information
23 available to the Claimant to establish constructive
24 knowledge to both the measure and loss as a result of the
25 Measure.

1 Ultimately, the Grand River Tribunal dismissed the
2 time-barred claims pursuant to NAFTA Articles 1116(2) and
3 1117(2) on the basis of a finding of a constructive
4 knowledge alone.

5 In this case, as we have seen, the record is
6 replete with contemporaneous, publicly available
7 information that serves as the foundation for the
8 allegations that is set out in the Claimant's Notice of
9 Arbitration.

10 If this does not demonstrate actual knowledge, it
11 must be indicative of constructive knowledge.

12 For example, we have referred to the relevant
13 dates of claim, as alleged by the Claimant, which situates
14 the Claimant's claim in a time period ending well before
15 the critical date. We have referred to some of the
16 contemporaneous public sources of information detailing the
17 events and issues raised in Claimant's Claims and we
18 further refer to another investor that brought its FIT
19 Program-related claim in a timely manner.

20 Moreover, just as in Grand River, no discovery or
21 witness testimony will be required to enable this Tribunal
22 to make a determination on Canada's jurisdictional
23 objection. The facts necessary to make its Decision are
24 all part of the public record.

25 ARBITRATOR BETHLEHEM: Ms. Di Pierdomenico, before

1 you get on to your next slide and the third point, may I
2 ask you--this is--you may wish to wait until the Claimant
3 has set out its store, but they've already addressed this
4 in their written pleadings.

5 They draw to our attention the situation as arose
6 in Mesa Power where the Tribunal, having bifurcated and
7 then went back on its bifurcation because it seemed to
8 occur to the Tribunal that they could not address the
9 issues without engaging in the Merits, it would, I think,
10 be helpful to us if you could address that issue, either
11 now or in Reply, and I would certainly find it
12 helpful--and, perhaps, my apologies, because I could have
13 perhaps identified this for myself on the basis of the Mesa
14 public record. I don't know. But it would be useful to
15 know what pleadings there were in Mesa at the point at
16 which the Tribunal decided to bifurcate.

17 Was there, for example, a Memorial or were there
18 only pleadings on the time-bar issue? Mesa Power seems to
19 be all over this case, except it is not all over this case
20 on the time-bar issue, and we'd like to know why.

21 MS. DI PIERDOMENICO: Just one minute.

22 Forgive me, Arbitrator Bethlehem, but the time-bar
23 objection that Canada made was not actually the time bar
24 under 1116(2), is my understanding. It was the six-month
25 cooling-down period, and this is quite different than

1 needing to--entangling the facts to the merits of the
2 Claim. The considerations were quite different there.

3 I think Canada is very strong--I shouldn't say
4 Canada.

5 All of the NAFTA Parties are quite strong on the
6 prerequisites for bringing a claim, and one of them is the
7 cooling-down period because that would enable the Parties
8 to hopefully, you know, get into a room, discuss, and
9 settle. So, it's quite different in that case.

10 ARBITRATOR BETHLEHEM: That's helpful. And the
11 Claimant does, in its citation, talk about the case turning
12 on 1120(1) rather than 1116(2).

13 But it would be helpful, I think, to understand a
14 little bit more, you may tell us that it's not relevant,
15 but about the risks of a Tribunal having to sort of reverse
16 itself because it doesn't have enough information once the
17 pleadings, the truncated pleadings if you like, have been
18 put before it.

19 MS. DI PIERDOMENICO: I mean, it is not
20 unprecedented. Tribunals will see that, you know, a party
21 will establish a prima facie case which is a quite limited
22 review of what the facts are that we presented. As long as
23 it's a serious and substantial question, the Tribunal
24 should bifurcate and then give the Party the opportunity to
25 prove its case or to establish its case.

1 If the Tribunal is dissatisfied, it is more than
2 welcome to rearrange the proceedings as it sees fit. In
3 fact, this is what was done in Resolute, the most recent
4 time bar consideration in a bifurcated phase. The Tribunal
5 bifurcated with the idea that, perhaps, procedural
6 efficiencies could be gained, determined at the end of the
7 day it was too entwined with the Merits of claim, and moved
8 on.

9 However, we think that we will establish our case
10 in a bifurcated--in a bifurcated phase and, you know, we
11 will leave it to the Tribunal for its own considerations
12 under the time bar at that time.

13 ARBITRATOR BETHLEHEM: One last point. You can
14 choose when to address it.

15 In your estimation, why would it is not be
16 appropriate, for example, to require the submission of a
17 Memorial and then if Canada wishes to raise objections to
18 jurisdiction, including time bar, and make a Request for
19 Bifurcation at that stage, why would that not be
20 appropriate?

21 Why are you urging something, as it were, even
22 more antecedent on us?

23 MS. DI PIERDOMENICO: It's for simple reasons of
24 fairness. We have not agreed to bifurcate this Claim
25 because it is outside of the time limitation period. There

1 are some--there's a clear and rigid requirement here for
2 Claimants to meet to bring a NAFTA claim, and all we are
3 asking of any Claimant is to meet that requirement. It is
4 not--it is not unconditional to arbitrate under NAFTA.
5 Canadian, and indeed, all NAFTA Party consent--I don't mean
6 to speak for you--but Canadian and all NAFTA Party consent
7 has certain conditions that each Claimant must meet and,
8 therefore, it is unfair to require Canada to engage in a
9 full expense of a fully arbitrated process when it never
10 consented to arbitrate in the first place.

11 ARBITRATOR BETHLEHEM: Thank you.

12 MS. DI PIERDOMENICO: Okay, so, basically, what I
13 was getting to is exactly that, that there will be no need
14 for a complicated analysis that would be required to engage
15 the Merits of this case, which is an 1105 claim, the
16 minimum standard of treatment.

17 So, assessing actual and constructive knowledge of
18 the Claimant's alleged breaches and resultant loss will
19 require no inquiry or prejudgment of the Merits of this
20 case, and, as such, it follows that Canada met the second
21 element of the test on bifurcation because of that.

22 So, the third part of the test on bifurcation asks
23 the question: If Canada's objection were successful, could
24 it dispose of all or an essential part of the claims? Now,
25 if the case was compelling for Canada under the first two

1 elements of this test, our case knocks it of the ballpark
2 for this final element because the application of the test
3 on time bar will dispense with each and every one of the
4 Claimant's four allegations concerning the regulation and
5 administration of the FIT Program.

6 If the Tribunal upholds Canada's time-bar
7 objection, the Claim would be disposed of in its entirety.
8 None of the claims remain. There would be no discovery on
9 document production and no Memorials, Witness Statements,
10 Expert Reports, or Hearing on the Merits. There would be
11 no complicated damages assessment either.

12 The Claimant is convinced that it would be
13 entitled to at least limited discovery in a bifurcated
14 Jurisdictional Phase. That is incorrect. And it is an
15 issue that has already been decided by the Tribunal, which
16 was done during the Procedural Phase, Procedural Order
17 No. 1. It clearly provides that, should the proceedings be
18 bifurcated, there will be no document production phase.

19 But unsurprisingly, as it has consistently done,
20 the Claimant is seeking to rewrite the already established
21 procedures, and such an approach undermines the Tribunal's
22 Procedural Order, creates uncertainty in the arbitral
23 process, and also results in additional and unnecessary
24 costs for the Parties and procedural delay.

25 Canada's objection does not require more than what

1 is already set out in the Procedural Calendar. And if
2 Canada's time-bar objection is successful, these
3 proceedings will have to be terminated, achieving
4 substantial savings and time and costs in the millions for
5 both Canada and the Claimant.

6 As we stated in our Request for Bifurcation, a
7 review of the costs incurred by Canada and Mesa Arbitration
8 provide a pretty good basis for what Canada and the
9 Claimant's costs would be in this Arbitration.

10 So, here on the slide, that's the actual paragraph
11 lifted from our Request for Bifurcation, and it includes
12 Expert and legal fees, arbitration costs relating to the
13 Tribunal's time and expenses and hearing costs incurred.
14 And this is over several years to conclude the arbitral
15 process.

16 To defend itself in the Mesa Case, Canada was
17 required to expend nearly CAD 7 million over some
18 four years, and the majority of the sum was incurred
19 arguing the Merits and damages. Mesa's costs were even
20 higher at USD 9.3 million.

21 So, there is no question that, if Canada's
22 challenge to the Tribunal's jurisdiction were granted, it
23 would avoid both disputing Parties incurring many millions
24 of dollars in costs, and moreover, the Claimant will not
25 suffer any prejudice if the proceedings were bifurcated

1 because eventually--if they were not, eventually it would
2 have to defend our jurisdictional claim to begin with.

3 So, since Canada's objection would dispense of the
4 Claimant's entire claim, it would result in this procedural
5 efficiency and it follows that Canada meets the third
6 element of the test.

7 So, to conclude, a NAFTA State Party's consent to
8 arbitrate under NAFTA Chapter 11 is not unconditional.
9 NAFTA Article 1116(2) imposes a strict three-year time
10 limitation. The wording of the provision is clear and
11 rigid. It is not subject to suspension, prolongation, or
12 other qualification. Canada has not consented to arbitrate
13 any case that is not submitted within NAFTA's three-year
14 time limitation period. This Tribunal, therefore, lacks
15 jurisdiction to hear this claim. Full stop.

16 Now, at this stage, the Tribunal need only
17 determine whether or not to hear Canada's objection to its
18 jurisdiction in a preliminary bifurcated phase, and as
19 demonstrated in Canada's submission, this is exactly the
20 type of preliminary objection that warrants bifurcation
21 pursuant to the UNCITRAL Rules, and this is for reasons of
22 both fairness and efficiency.

23 Canada's jurisdictional objection is both serious
24 and substantial because it goes to the very basis of the
25 Tribunal's power to hear the Claim and it cannot be

1 excluded on a prima facie basis. Canada's jurisdictional
2 objection does not require prejudging or entering the
3 Merits. The only consideration for the Tribunal is whether
4 the Claimant knew or should have known of the breaches it
5 alleges and resultant damages. This issue is ripe,
6 succinct, and discrete.

7 As we have explained, there is sufficient
8 information in the facts as alleged by the Claimant in its
9 Notice of Arbitration and the public record to establish
10 what the Claimant knew or should have known about each and
11 every one of the claims it alleges and losses well in
12 advance of the critical date of June 1, 2014.

13 And if Mesa knew to bring a nearly identical claim
14 in a timely way, so too should the Claimant in this case.

15 And, finally, Canada's jurisdictional objection
16 will dispose of Tennant's entire claim.

17 So, that concludes my remarks on bifurcation.

18 ARBITRATOR BISHOP: I have a question. There's a
19 time-bar issue such as Article 1116(2). Is that a
20 jurisdictional question, or is it an admissibility
21 question?

22 MS. DI PIERDOMENICO: It's long been settled that
23 the time-bar issue under 1116(2) is an issue of
24 jurisdiction, the Tribunal's jurisdiction. As it is set
25 out in Article 1122(1), I believe, there are requirements

1 that the Tribunal must look at in order for a Claimant to
2 bring a claim, and, you know, there are several cases that
3 I've looked to the issue of jurisdiction and admissibility,
4 the most recently one being Resolute as well as Philip
5 Morris. In the NAFTA--if you want to stick to the NAFTA
6 context, we totally can: Apotex as well as Grand River.
7 Each considered this to be an issue of jurisdiction.

8 ARBITRATOR BISHOP: Thank you.

9 MS. DI PIERDOMENICO: The time bars.

10 ARBITRATOR BISHOP: Thank you.

11 PRESIDENT BULL: Thank you very much for your
12 submissions, and the Claimant now has 45 minutes to make
13 its Response.

14 ARGUMENT BY COUNSEL FOR THE CLAIMANT

15 MR. MULLINS: Thank you. If we can get the time
16 started once my PowerPoint is on.

17 (Comments off microphone.)

18 MR. MULLINS: Thank you. I'll be handling this
19 argument.

20 And the first thing I would point out, I think,
21 just sort of a principle I think was kind of in--buried in
22 the counsel's remark is, look, if one or two NAFTA parties
23 were able to sue, everybody should be able to sue, but
24 that's not true. Because as the--coming from the questions
25 of the Panel, specifically Sir Daniel, this Claim, this

1 Arbitral Claim is premised on systematic withholding
2 information regarding this FIT Program.

3 The Claim was--certainly, as counsel showed up,
4 there are factual similarities in the notice because it was
5 the same FIT Program. We're not denying that. But the
6 difference is that revealed in that proceeding were
7 independent, separate violations of the NAFTA that, in
8 fact, this Claimant and other Claimants could sue.

9 But all those facts, that we'll show you in a
10 moment, came out after the critical date. Independently,
11 they are all a basis for a claim. And I'll say this now
12 and I'll say it at the end: If you find even one of them
13 with sufficient to go forward, then we've wasted our time
14 by bifurcation; correct? It's been a waste of time. So, I
15 don't think there's only one. I think there is multiple,
16 but I just say, if any of them become actionable or timely
17 under the standards, then we've simply wasted our time.

18 And Ms. Dallaire this morning--I hope I pronounced
19 your name correctly--said this morning that there is no
20 way, that it would be impossible for us to possibly show
21 that our Claims were timely, and she is simply wrong. It
22 is very critical that the information that is premised on
23 these Claims are timely and that bifurcation would be
24 simply a waste of the resources of the Panel and of the
25 Parties.

1 Next slide. Thank you.

2 The good news is I think we agree on the test.
3 So, at least we'll have a big argument about the law
4 because I think on this one, unlike the last argument we
5 had, there were some differences, but I think generally the
6 standards are the same. We all agree this is a
7 three-factor test.

8 The way I look at it, though--and I think from the
9 Panel's questions, we may not agree on how to describe
10 it--but you have to meet all three, and then what ends up
11 happening is it becomes sort of a sliding scale. So, we
12 certainly--well, it's easy to say, "Well, yes, I could
13 ultimately win on a jurisdictional objection. You know, I
14 think I have a substantial argument." But the challenge is
15 that: Is it really going to reduce the costs if you can't
16 show it's impossible, that there is no way that the
17 Claimant can show that its Claims were timely? Is it
18 really not going to be intertwined with the Merits?

19 And I think what's really critical here is
20 that--in response to Arbitrator Bishop's question--there is
21 no allegation, no claim here; that we knew that, for
22 example, that special circumstances would be given to the
23 IPC company, which was a Canadian company that was given
24 special conditions. Obviously, we didn't know that, and
25 so, then, we get into a question of should you have known,

1 and that is where it gets really difficult, and it gets
2 intertwined with the Merits.

3 This is not the case, as Sir Daniel was asking, is
4 it usual in these kind of cases to go forward, raise the
5 jurisdictional at the end, have the benefit of briefings of
6 both Parties. This is not the case to bifurcate because we
7 do believe at the end it's going to cost more resources and
8 more time for both Parties.

9 Next slide.

10 As I said, this is not Mesa Power. If you look at
11 the allegations of Mesa Power, we are not suing here--for
12 example, in Tennant--simply because a special deal on its
13 face was given to the Korean Consortium. We recognize that
14 that was out there, that it was a Korean Consortium. What
15 this case is about is an issue of surreptitiously hiding
16 the wrongful acts of--that Canada did, that not only
17 Tennant knew or did not know or should have--could not have
18 known, but any investor could not have known until after
19 the information was released after your June 1, 2014. The
20 information of Windstream came as well, so--oh, I'm sorry.

21 ARBITRATOR BISHOP: What information is it that
22 was hidden?

23 MR. MULLINS: Sure.

24 ARBITRATOR BISHOP: What's the key information
25 that you say was hidden?

1 MR. MULLINS: Sure. It is later in my slides.

2 But, no, I will just give you an example. There's a--

3 ARBITRATOR BISHOP: That's fine.

4 MR. MULLINS: No, no, no. It's fine. Let me--I
5 was going to go through some of that, but specifically
6 just, for example, the issue with the IPC--let's get to my
7 notes for a second.

8 (Comments off microphone.)

9 MR. MULLINS: International Power Canada, for
10 example, and that's just--this is just one obvious example.
11 Ms. Lo testified at the hearing that she was a high-level
12 official and testified at the hearing. This literally came
13 up during cross-examination that I took of Ms. Lo. We had
14 no idea--you are not going to find any of this in any of
15 the claims submitted by Mesa. It turned out--

16 ARBITRATOR BISHOP: Is this her testimony in the
17 Mesa Case?

18 MR. MULLINS: It is, yes. Which did not become
19 public until--yeah, her testimony did not become public
20 until January 9, 2015, in our Post-Hearing Brief where we
21 describe this. And then also there was some of her
22 testimony as well. But, in any event, what she testified,
23 that Ontario had a B club, meaning that wanted to protect
24 the--basically wanted to protect IPC--I call it "IPC"--from
25 the Korean Consortium set aside. So, if you're familiar

1 with the case, what essentially happened was that Korean
2 Consortium was provided basically a preference to go in and
3 take what it needed to satisfy its GEIA, and other
4 Applicants, including Tennant, were essentially in bid for
5 the rest of the remaining of the proceedings.

6 What happened was she testified in the hearing
7 that they did a test run, and it turned out the IPC was not
8 going to win, and then they changed it. Okay. That is
9 specific protection to a Canadian company, and, in fact,
10 this Canadian company, the President was a Past President
11 of the governing Ontario Provincial Liberal Party, and
12 essentially this was a party--this guy was big up in the
13 political party. And they said: "Look, we've got to redo
14 this," and they redid it. The result of redoing it is that
15 Tennant fell apart--fell out of the ranking in terms of
16 winning.

17 (Comments off microphone.)

18 MR. MULLINS: And actually it was the next one in
19 line. It won. Had that Decision not been made, they would
20 have got a multi-million-dollar contract.

21 That's not only issue, but certainly you will see
22 nothing in their PowerPoint that mentions anything about
23 that when they compare the Notice of Arbitration in Mesa
24 and the Notice of Arbitration of Tennant. You're not going
25 to see anything about that because obviously Mesa did not

1 know about that. No one knew about that until she revealed
2 it in the cross-examination, and ultimately we think it's a
3 separate issue.

4 You haven't asked a question, but I'll answer one
5 you might ask: Well, how did the Mesa Power Panel deal
6 with it? And they didn't. Whatever it is, they just
7 didn't address it. In fairness to them, we did not have a
8 chance to go into it. I will tell you it's going to be a
9 big issue in this Arbitration because it is "but for." Had
10 they not done that, we would have won--or our client would
11 have won its contract, rather.

12 ARBITRATOR BISHOP: Just to give me a quick
13 overview of the timeline on Mesa, when was the Mesa Notice
14 of Arbitration first published?

15 MR. MULLINS: The documents were published
16 three days after the critical date, which is also on a
17 Power slide.

18 ARBITRATOR BISHOP: So, the notice of--sorry.

19 MR. APPLETON: Filed, not published.

20 MR. MULLINS: I thought he was asking--

21 MR. APPLETON: He asked when they were published.

22 MR. MULLINS: Yeah. Right.

23 MR. APPLETON: It's not when they were published.
24 It's when they were filed.

25 MR. MULLINS: No. You know what? Actually, go to

1 that slide. Because I think that answers your question.
2 Maybe it doesn't, but I think it answers your question.

3 Just go up and we will go back to that. Go to the
4 timeline issue, and we can go back.

5 ARBITRATOR BISHOP: I apologize if I am out of
6 order. I don't mean to.

7 MR. MULLINS: I think that you are asking when the
8 documents of Mesa Power were published on June 4, 2014, if
9 that's what you are asking.

10 ARBITRATOR BISHOP: Yeah. Is it--does that
11 include--when you say the "Mesa Power documents," does that
12 include the Notice of Arbitration?

13 MR. MULLINS: We'd have to look.

14 ARBITRATOR BISHOP: Okay.

15 MR. MULLINS: We'd have to look.

16 ARBITRATOR BISHOP: Fair enough. Just one other
17 question in that regard: When did you become counsel for
18 Tennant?

19 MR. MULLINS: When did we become counsel for
20 Tennant?

21 MR. APPLETON: We'd have to look. We can look at
22 that too.

23 ARBITRATOR BISHOP: I'm not looking for a specific
24 date. Was it after or before the critical date?

25 MR. MULLINS: I'm confident it was after June 1,

1 2014, if that helps you. I'm confident of that. Okay.

2 (Comments off microphone.)

3 MR. MULLINS: Okay. Thank you. Sorry.

4 As I said, again, there's a similarity obviously
5 between--it was the same FIT Program, but a--Skyway was a
6 successor. Tennant is actually a successor to GE. This
7 was a project that was with GE, General Electric Company,
8 an American company, and GE does things on the up and up.
9 I have been privileged to represent them in the past, a
10 great client. They don't expect that when they lose a
11 project that there is some sneaky thing going back. They
12 didn't assume that when they announced that: "Gosh, you
13 didn't make the ranking, that the real reason you didn't
14 make the ranking was not because there's a fair process,"
15 but we need to protect the IPC. That's what they didn't
16 know. That's a separate breach, and there is no way they
17 could have known that.

18 Next page.

19 You're going the wrong way.

20 (Comments off microphone.)

21 MR. MULLINS: And, again, this is just the
22 statute, I think we all agree, but I did want to talk about
23 this a little bit, about the burden of jurisdiction.

24 Our belief, Arbitrator Bishop, is that we've met
25 our burden to establish jurisdiction. In other words, our

1 Claim under the Glamis Gold is that the Tribunal should
2 take our Claim as alleged. We've established jurisdiction,
3 in other words, the events that we are talking about became
4 public. That's what we are relying on. We think we've
5 established jurisdiction. We think, then, the burden is on
6 Canada to establish its challenge. I don't think it's
7 appropriate that we got to say at the ultimate we've got to
8 prove a negative; right? Because the answer to your
9 question was, is there any evidence or any claim that we
10 do--IPC, for example--obviously, we couldn't have; right?
11 So, the Claim has got to be: Should you have known?

12 We don't think--I think in this situation,
13 ultimately that becomes Canada's challenge. We can't prove
14 a negative of what we should not have known; right? We
15 showed that we did not know these things. We showed that
16 this stuff we are relying on became public afterwards. We
17 believe we've established our jurisdiction. It becomes a
18 burden on the Respondent to make their Claim on challenge,
19 challenge that jurisdiction that we should have known
20 earlier.

21 ARBITRATOR BISHOP: So, as to Article 1116 itself,
22 is it your position that establishing the matters that are
23 the subject of Article 1116 are the burden of Canada in the
24 first instance?

25 MR. MULLINS: No. I'll try it again. I think

1 ultimately the Claimant has the burden to showing
2 jurisdiction. I think we've done that. I think then, if,
3 for example--for example, we would have had to have a
4 claim--which we did--that said, okay, these are the--here
5 is the timeline. These are when we learned these things,
6 and, therefore, we could not have known earlier, but that's
7 all we need to do. In other words, our claim, on its face,
8 shows that we have jurisdiction.

9 And in answer to your question, it doesn't show,
10 on its face, that we knew it earlier. In other words,
11 there is nothing in the Claim that says, Oh, by the way, I
12 found out about this thing back in 2000 or something. It
13 doesn't say that; right? It says these are what we are
14 relying on. This is the timeline, therefore, we met our
15 burden.

16 I think at that point, then the challenge is on
17 Canada to say--after we've made our prima facie evidence of
18 jurisdiction, the burden becomes on Canada to say, okay,
19 now thank you very much, but you know what? You should
20 have known earlier and you should have known earlier, and,
21 therefore, I think then the burden becomes on Canada at
22 that point after the prima facie standard is met. And
23 essentially I think we all agree that they are not claiming
24 that we clearly knew beforehand.

25 And I think, then, reality is that when I go back

1 to this idea that when we want to see if it's intertwined
2 with the Merits and are we trying to save time, I do
3 believe going to back to what Ms. Dallaire had said earlier
4 is they really needed to show it is impossible for us to
5 win, because when you look at the first factor, okay, is it
6 substantially--they have a substantial defense, nor is it
7 frivolous, but then beyond that, is it intertwined with the
8 Merits, and is it going to waste time?

9 And I go back to the point that is if you believe
10 that there's a good question that any of these claims would
11 survive a bifurcation--I think all of them would. But, if
12 any of them do, then we've wasted our time because we now
13 have gone through all this, and then we're going to have to
14 do it again. It would make much more sense to try the
15 whole case at one time.

16 Go ahead. Next slide.

17 ARBITRATOR BETHLEHEM: Mr. Mullins?

18 MR. MULLINS: Sure.

19 ARBITRATOR BETHLEHEM: Mr. Mullins, just a quick
20 question which goes back to your slide with the timeline
21 where you say publishes Mesa Power documents.

22 MR. MULLINS: Yeah, we will skip that. Go ahead.

23 ARBITRATOR BETHLEHEM: It's just a simple
24 question. I'd like to know what you mean by the "Mesa
25 Power documents." The Procedural Orders in Mesa Power, as

1 I look at the PCA website, must have been published on or
2 about the date of their issue. The Award obviously came a
3 little bit later, but what is it that you're referring to
4 when you talk about the Mesa Power documents? You
5 reference specifically the Hearing Transcript on April 30,
6 but are there other documents?

7 MR. MULLINS: No. The Transcript actually came
8 later. Our Post-Hearing Brief was published in January 9,
9 2015. The Award was on March 24, 2016. We can get you
10 details as to exactly--

11 MR. APPLETON: Might I offer some assistance?

12 MR. MULLINS: Go ahead.

13 MR. APPLETON: Sir Daniel, perhaps I can offer
14 some assistance.

15 This was a case where there were tremendous
16 amounts of issues with respect to redaction of confidential
17 information and many, many motions being brought with
18 respect to that. There were countless motions, and this
19 caused delay, very significant delay in the publication of
20 all types of documents. And, as a result, on June 4,
21 that's when the bulk of the documents in this case had
22 finished a very extensive declassification and dispute
23 process in relation to that.

24 And that is why--the bulk of the information in
25 this case that would have normally been produced earlier

1 did not come out by the PCA and through the normal process
2 until that date. That's why I was so careful. Before, we
3 were trying to reduce the number of confidential documents
4 in the process with it. It became very contentious and
5 required a tremendous amount of the engagement of the
6 Tribunal and with a tremendous amount of paperwork back and
7 forth. And so that's why on June 4, the orders of
8 which--the orders were out but not the substantive
9 materials underlying the case, and that's the case. So,
10 that's why I remember that date, in particular, because it
11 took us a very long time to be able to get everything
12 agreed across the board to be able to deal with that.

13 Now, we can go back, if you'd like, to find some
14 more on that, but that's basically my recollection as to
15 why and when that occurred.

16 ARBITRATOR BETHLEHEM: Well, I mean, it's
17 obviously a matter for you and a matter for Canada as to
18 whether any of this is relevant. I mean, it is not
19 necessarily clear from the PCA website when things were
20 actually sort of posted and made public. There are lots of
21 documents, Written Submissions, that have a date prior to
22 the 1st of June, and I presume were put on the website
23 beforehand. I mean, Investor's Memorial Public Version is
24 dated 20th of November 2013.

25 So, insofar as either for you or for Canada, the

1 issue of when documents were made public by the PCA, then I
2 think it, obviously, is going to be important for you to
3 sort of tie it with a degree of precision. I mean, we have
4 the ability, obviously, to do our own research as a PCA
5 Tribunal, but this is a matter that you should be
6 addressing us on. I mean, I was really focused on the
7 generality of the statement "PCA publishes Mesa Power
8 documents." It doesn't necessarily tell us anything.

9 MR. APPLETON: Sir Daniel, I would be happy to
10 come back. I believe that the dates come from an email
11 communication from the Secretary of that PCA Tribunal at
12 that time, and I believe that might assist in this regard,
13 and I'm sure that we could find it. I don't know if we can
14 find it by tomorrow, but I'm sure that we could find it
15 fairly quickly with respect to that. But it was an unusual
16 situation because of the extensive amount of dispute, and
17 that's why we've done everything we can in this case to try
18 to minimize those types of issues because we are worried
19 that we could see that again. And it was very intensive in
20 terms of the needs of the Tribunal.

21 ARBITRATOR BETHLEHEM: And just as a last question
22 which you may wish to think about: I mean, is it your case
23 that, either from on the 4th of June or some suitable date
24 thereafter, that the Claimant in this case, Tennant, was
25 subject to a kind of due diligence inquiry obligation which

1 ultimately would have put them on notice?

2 Because we all seem to be focused on June 1 being
3 the critical date, and then you are drawing your line very
4 strategically beyond that, June 4, this is when the
5 documents were published; April 30, when the Hearing
6 Transcript was published.

7 At what point would a claimant be expected to be
8 sort of on notice simply because documents had been put in
9 the public domain?

10 MR. MULLINS: Sure. The answer clearly is, no, I
11 don't believe--clearly, for example, the IPC issue was not
12 available on June 4, 2014, because the actual Award was not
13 issued until 2016 and the Post-Hearing Briefs was--the
14 first time I believe it became public was not until
15 January 9, 2015.

16 Well, I think I'm--I thought about this before the
17 argument. We were trying to be as reasonable as possible,
18 and now I realize I just put myself in a situation--because
19 you are asking questions I probably would ask if I were
20 you.

21 I think it's going to be on an issue-by-issue
22 basis. I could very comfortably tell you that everything
23 we are suing on was well after, frankly, between June 4,
24 2014. Our point was that's the first time the Mesa
25 documents became public. I will tell you that the critical

1 events are going to be the April 30, 2015, date when the
2 Power Transcript becomes public, and our Post-Hearing Brief
3 on January 9, 2015. I think that's where you are going to
4 find the critical events that we believe are separate
5 breaches in event.

6 But what we were trying to show the Tribunal, just
7 for purposes of this Hearing, whether or not you're going
8 to want to decide to--is it clear that--the point is that
9 even the Mesa Power documents--generally, the
10 pleadings--were not fully public until after the
11 confidentiality was done, until after June 4.

12 The reality is it's going to be even much later
13 when it became public, just things such as the IPC. The
14 other thing, what we haven't talked about--it is also
15 critical--is that it turned out that the Korean Consortium
16 had essentially picked off the low-hanging fruit. And so
17 what Canada essentially had set up was a process of ranking
18 based on various criteria. What the Korean Consortium did
19 was go to this low-hanging fruit and use them to comply
20 with their obligations.

21 And this is what Judge Brower said in his
22 concurrence: "This could only be characterized as
23 grotesque. As it actually happened, the Korean Consortium
24 was thereby enabled to acquire low-ranked FIT applicants in
25 order to fill its allotted 500 megawatts thereby

1 clearly--jumping clear losers in the FIT Program over
2 higher-ranked but ultimately unsuccessful FIT applicants
3 due to the reduced available megawattage."

4 This predatory behavior was not revealed until the
5 Tribunal issued its Award in March 24, 2016, or arguably,
6 if you read our Post-Hearing Brief, on January 9, 2015, but
7 his finding was not available until 2016. So, these kinds
8 of things, we believe, are separate violations. That was
9 not in. We didn't know. The Mesa--so, the Mesa team did
10 not know what--how--all we knew was that there was this
11 GEIA. And we are not claiming, on its face, that was the
12 claim here.

13 What we're saying is, worse than that, the fact
14 that the Head of GEIA recognized that issue. But right
15 now, in terms of the Claim, it's this predatory behavior of
16 taking "clear losers"--in the terms of Judge Brower--and
17 basically putting them up ahead, in addition to the fact
18 that Skyway lost because it cut a special deal with a
19 Canadian company.

20 None of this you'll find in the Mesa Notice of
21 Arbitration. It could not have been there because no one
22 knew publicly. Only Canada knew. They kept it secret.
23 And for them now to say: "Well, you should have known that
24 we were going to act badly. Once you lost, we just assumed
25 that it was all these violations is not obviously the

1 test." Okay. Obviously, Skyway knew they didn't get a
2 contract. It is in their chronology. Skyway doesn't.
3 Tennant doesn't get its contract, doesn't get its bid, but
4 Tennant did not know why. They didn't know there was a
5 special deal with IPC. They didn't know that Korean
6 Consortium was moving people ahead of time. It could not
7 have known that at the time because this was all secret.

8 And that goes to my next point. It's not just
9 knowledge of loss, but the reason for loss. It's not just
10 you know you lost. It is you know how you lost. If
11 Canada's secretly manipulating the system and doing a
12 secret, then how can you say conclusively that it would be
13 impossible for us to--should have known that, you know
14 what? We lost. It must be that they are giving special
15 deals to local companies. It is simply not the test and
16 simply not accurate and simply be a waste of time to
17 bifurcate.

18 Canada's point is that it hid its wrongful
19 behavior from the public in bid proponents, and Tennant did
20 not know that this stuff was happening, and it is only when
21 Tennant knew or should have known--and, again, there is no
22 way they could know through this. And we talk about some
23 of these other things that we could not know. We talked
24 about the predatory behavior of the Korean Consortium. We
25 talked about the special deal, the IPC, a couple other

1 things that came out from the Hearing. And, again, all
2 this came out publicly after the critical date. We found
3 out that Canada allowed the Korean Consortium to breach the
4 GEIA. So, it wasn't just that there was this GEIA, that
5 Korean Consortium didn't give them anywhere near what it
6 was required to do, was allowed to breach it, and then they
7 were allowed to engage this predatory behavior of taking
8 the low-hanging fruit. All of this became public
9 afterwards.

10 Again, we found courts that NextEra had won. But
11 we didn't know that NextEra was lobbying and getting
12 special deals. Again, it's not so much that the events
13 happened. You can't assume an investor is supposed to know
14 that wrongful behavior is happening, that's not right.

15 Again, this is just what we talked about on the
16 PowerPoint, on the timeline. Again, the claims were posted
17 in 2014.

18 Go ahead.

19 MR. APPLETON: And it says what?

20 MR. MULLINS: On June 4, 2014.

21 MR. APPLETON: And it says where we've cited it?

22 MR. MULLINS: Yeah. Yeah, it has the location on
23 our filings.

24 The next slide.

25 I want to talk a little bit about this. Counsel

1 said, well, the GEIA, the amended GEIA was on the website,
2 the actual GEIA itself, the original deal that was
3 breached, and they allowed to breach and all that, that
4 wasn't made public until sometime between June 4 and
5 April 30, 2015. We tried to pin that date down as much as
6 possible. We do know it was after the June 1 timeline, but
7 it was made public. Again, all that was after the June 1
8 time period, the actual GEIA itself. We know that because
9 we had to go to court to get it. And so, this was not
10 something that was well-known. The amended one they made
11 public; this one, they kept secret.

12 Again, I think this is the critical part. This
13 is, I think, a critical date because I do think when we get
14 to the discussion on jurisdiction at the Final Hearing,
15 when you go through the Memorials and stuff, you're going
16 to find that the critical events were made public by the
17 revelation of a transcript and/or the Post-Hearing Brief on
18 January 9, 2015.

19 Again, I talked about the NextEra getting access.
20 I talked about the IPC event. And, again, this stuff did
21 not become public. It was not in the Mesa Notice of
22 Arbitration because simply people did not know.

23 The Windstream Award, there were findings about
24 destruction of documents. Again, all that was after the
25 critical date. Counsel said, well, it was public that we

1 were showing documents. This was the actual program
2 itself, the FIT Program. We think it's different, but,
3 again, this is all, again, afterwards.

4 So, not, again, to belabor the point. But,
5 again--

6 (Comments off microphone.)

7 MR. MULLINS: Tennant, this case is not Mesa
8 Power. Again, as I've said, you'll find all this stuff
9 that we've talked about, these critical breaches were not
10 in the Mesa Notice of Arbitration. It could not have been
11 because they were not public.

12 (Comments off microphone.)

13 MR. MULLINS: Okay. Perfect. Yeah, so just
14 answer--well into the slide. What was made public on
15 June 4, 2014, was a public version of our Memorial, the
16 Mesa Memorial. The public version of the Witness Statement
17 of Cole Robertson, who was a principal witness for Mesa on
18 April 24, 2014. That was made public on that June 4 date
19 and then the public version of the Expert Reports.

20 Go ahead.

21 ARBITRATOR BETHLEHEM: So, I'm here looking again
22 at the PCA website as you are talking, Memorial of the
23 Investor.

24 MR. MULLINS: Yes.

25 ARBITRATOR BETHLEHEM: And in the big red block on

1 the top of it, says "public version, May 15, 2014."

2 MR. MULLINS: That's when we submitted it, but we
3 have an email that's from the Secretary, asking our--to be
4 uploaded to the Web site. And we can provide this for the
5 record, but they uploaded it on June 4, 2014.

6 ARBITRATOR BETHLEHEM: Right. As I say, I don't
7 know how much weight we need to give--and both sides will
8 address us on this, to the date of publication by the PCA
9 for purposes of putting some other Party on notice, and it
10 would be helpful if you address that. But, as you do so,
11 if things turn on particular dates, then I think we need to
12 have the proof of those dates.

13 MR. MULLINS: Sure. I will tell you that this
14 investor, obviously until things become public, could not
15 be reasonably expected to know a Memorial unless it's made
16 public. It didn't become public 'til June 4. I will tell
17 you, again, things like the IPC, things like what we found
18 out about GE--the Korean Consortium being allowed to
19 basically breach the GEIA, these things were not in that
20 first Memorial. Because we didn't know--all that came
21 later.

22 So, it may ultimately be a moot point, but I do--I
23 will confirm that we have established that our Memorial was
24 not made public, wasn't posted until June 4, and that fact
25 will then, whatever is in there, somebody could argue,

1 well, you should have known, based on what's in this
2 Memorial. But I will tell you for purposes of here, it may
3 be a moot point, because of the critical stuff I'm talking
4 about came later after the hearing, anyway. It was not in
5 that Memorial.

6 ARBITRATOR BETHLEHEM: Then, it's obviously then
7 going to be important to go back to Mr. Bishop's sort of
8 question as to when you were instructed by Tennant. You
9 suggested that it was going to be after the first of June.
10 We appreciate that there will be a sort of firewall in your
11 minds in the knowledge that you have for Mesa and the
12 discussions that you would have had with Tennant, but
13 insofar as you may have been instructed on behalf of
14 Tennant before the first of June, that may be relevant.

15 MR. MULLINS: Yes, I--actually, by counsel who was
16 actually hired first, was retained on June 1, 2015. A year
17 after the critical date.

18 ARBITRATOR BISHOP: I'm sorry, say that again?

19 MR. MULLINS: June 1, 2015, which is a year after
20 the critical date.

21 ARBITRATOR BISHOP: And what is that date?

22 MR. MULLINS: That's the--I'm sorry. That's the
23 date that Mr. Appleton was hired by Tennant. He was hired
24 first and then we came in second.

25 MR. APPLETON: I'm sorry. Let me answer

1 Arbitrator Bishop's question. That was the first date we
2 were contacted by the Company. It's not the first date we
3 were retained. And it was, for the record, June 1, 2015,
4 and it was actually Mr. Pennie here who actually had a note
5 with the dates here, who provided it to us in this
6 instance, so we can give you an accurate and specific
7 answer. Thank Mr. Pennie, actually. I'm glad he is paying
8 attention.

9 (Comments off microphone.)

10 MR. MULLINS: So, again, that's our presentation
11 on the first factor. But, as I said at the beginning of my
12 presentation, I do think that all this is sort of
13 intertwined, because if it turns out that these issues are
14 intertwined, it is not going to be efficient, then even if
15 you really think, Canada, that you got a great argument and
16 you're going to be able to show that every single thing we
17 are complaining about should have been known prior, even
18 though you kept it secret.

19 It's--you know, not going to be--it's going to be
20 intertwined. It's going to increase the Costs. We don't
21 think you are going to be able to show that and we think
22 that bifurcation is a waste of time. And counsel talked
23 about the purpose of this is efficiency. What is efficient
24 is not to bifurcate. Now, this matter has been pending
25 three years, and what Canada really wants is add another

1 three years on this.

2 And the one thing we also point out, she says,
3 well, the Procedural Order doesn't allow us to have
4 discovery. Well, what the Procedural Order actually said
5 is the pattern, that in the bifurcation model that the
6 Tribunal pointed out, if we bifurcate doesn't really
7 recognize a--exchange of discovery, but 5.2, Procedural
8 Order 1, says that any stage of proceedings--and we can
9 seek further directions from the Tribunal regarding
10 procedural steps relating to and/or in addition to those
11 set out in the Procedural--calendar.

12 We interpret that to mean that, if, in fact, we
13 believe--and I think it would be appropriate for us to do
14 some discovery, if this was a bifurcated, that we would
15 want so. And I do believe that if we'd asked for it,
16 Canada would too. But I also think that it would be a
17 waste of time to bifurcate, in any event.

18 But--I also want to point out the delay here. And
19 I know you--the Tribunal worked very hard and tried to come
20 up with a schedule that makes sense, but by my math,
21 without bifurcation, we're looking at 470 days to have a
22 hearing if we don't bifurcate. And that is 470 days from
23 the date that you decide we're not to bifurcate. Now,
24 that's based on the Procedural Order you gave up. That is
25 the math I came up was that--by the time you got through

1 everything, from assuming--let's say you ruled today.
2 470 days from today. Did I do something wrong?

3 PRESIDENT BULL: Right. No, Mr. Mullins. I just
4 wanted to go back a step before the math.

5 MR. MULLINS: Okay.

6 PRESIDENT BULL: You were saying that, if this
7 matter was bifurcated, Claimant would want to seek document
8 production?

9 MR. MULLINS: Yes.

10 PRESIDENT BULL: What would you seek document
11 production about? I'm not asking for a comprehensive list.

12 MR. MULLINS: No. No, I--yeah. Well, sure. But
13 I think we're--we would be entitled to show the efforts
14 that Canada did to keep these things secret. And so, I
15 mean, if the dance is going to be--

16 PRESIDENT BULL: I understand.

17 MR. MULLINS: You know, you should have known,
18 well, you know, let's talk about what you did with IPC and
19 what you talked about. I mean, obviously, that gets to my
20 second point. This is all intertwined with the Merits, but
21 that's what we would do. I would think on their side they
22 would want to know what you knew, when and whatever, but
23 maybe they wouldn't.

24 Going back to the math, I will say that we
25 calculated without bifurcation, if you ruled today we're

1 not having bifurcation, at a minimum the Hearing would be a
2 year and 33 months from now. That's not, of course, time
3 for you to commit an award. I mean, that takes time. So,
4 it is quite a bit of time.

5 Again, I'm not saying that the Tribunal is doing
6 anything inappropriate, but my math, if we have bifurcation
7 from today, 709 days, not including time for your Decision
8 on bifurcation.

9 Well, so, if, for example, if we go through and we
10 have the bifurcation hearing, you're going to have time to
11 rule on jurisdiction. That is going to take time. And
12 your Procedural Order then--so, the 709 days does not even
13 calculate the time you would need to do your Decision. So,
14 it's going to be more than 709 days. It's going to be
15 whatever time it takes you to come under jurisdiction
16 which, I assume, that you would spend a lot of time on.
17 So, it's going to be 800 or something, or whatever, or 750,
18 or something like that.

19 ARBITRATOR BETHLEHEM: Mr. Mullins, isn't this,
20 you know, you reading the tea leaves and then we're going
21 to get a different reading of the tea leaves from the other
22 side because they'll say, "Mr. Mullins came up with
23 700, 800 days. Well, in fact, if you bifurcate now and the
24 Tribunal is with us, then the whole thing will be over and
25 done and dusted sort of pretty quickly." So, I'm just sort

1 of wondering what the dueling numbers of days is--is where
2 that is going to get us.

3 But my question to you is that we are--we have in
4 Procedural Order Number 1 two scenarios after this initial
5 phase. The first one is should the proceedings not be
6 bifurcated, which is obviously what you are angling for,
7 and then Scenario 2 is should the proceedings be
8 bifurcated, which is what Canada is angling for.

9 Now, there is an intermediate sort of position, or
10 there may be an intermediate position, which would require,
11 obviously, the Tribunal to vary these calendars where we
12 order that the Claimant produces a Memorial on the Merits,
13 which would allow you to fully plead out your case, set out
14 all the factual issues, all the Witness evidence and
15 everything, and then provide an opportunity in fairly short
16 order because the Respondent knows its case here, for the
17 Respondent to come back within a month or within two months
18 and put forward its time-barred jurisdictional objection
19 and then to renew its Application for Bifurcation at that
20 stage.

21 And, I mean, is that something that you would
22 think has advantage? And if not, why not?

23 MR. MULLINS: I don't think this case warrants
24 bifurcation no matter when it's ordered. So, I do think
25 it--I mean, certainly--and I appreciate the effort. I do

1 think what will end up happening, it would even make the
2 709 days even longer. I won't go for the math but what you
3 are really suggesting is we are going to do our whole
4 Memorial and then they are going to have a separate
5 briefing on bifurcation and then we're going to have to
6 respond to that. So, it is even going to further delay.

7 I'm not saying we should rush to do the
8 bifurcation. I don't believe their claim that this is time
9 barred is going to get any better today, you know, or after
10 a Memorial, and I don't--I think it would just be even more
11 time and more delay. Again, I'm--this is my position based
12 on the material that they are never going to be able to
13 show you that we should have known about every single one
14 of these things we're complaining about. They may have
15 some arguments in some, but I don't think they are going to
16 be able to knock out the entire claim.

17 And what is going to happen is, even if you
18 believe it's just the IPC or it's, you know, and/or just
19 the fact that they lobbied with NextEra or the fact that,
20 you know, GEIA, that they were allowed to breach and they
21 engaged in predatory conduct, if any of all of these
22 things, you know, survive, we've wasted years. And that's
23 why I was showing you the math.

24 I'm not trying to be flippant about it. It's
25 really to show the delay, and I'm concerned by even the

1 suggestion you're making will increase the days even
2 further. I don't believe they are ever going to meet it.
3 So, I--like, obviously, I'm biased and I think I'm going to
4 win. I just don't think they are going to be able to do
5 that.

6 And so, this is so intertwined with the Merits,
7 which is my last point, which is the factor three, that
8 it's not even close. Certainly, about all these programs,
9 what they were doing, what they were hiding is all going to
10 be decided the Merits. And so, when we get into a
11 jurisdictional about this IPC, we are going to end up
12 redoing this twice.

13 But, Mr. Bull, did you have a question? Because
14 you looked like you were looking at me with that expression
15 on your face.

16 PRESIDENT BULL: No, I was listening to you.

17 MR. MULLINS: Oh. Well, good.

18 PRESIDENT BULL: But I did wonder about just a
19 follow-on from Sir Daniel's question.

20 At the moment, your Notice of Arbitration is not
21 as detailed as what your Memorial would be. Your Memorial
22 would then set out what are the specifics that go
23 beyond--that fill out the four categories of wrongful
24 actions. When you fill those out with details, might it
25 not be more apparent, then, or more helpful to the Tribunal

1 in deciding when an investor could have or should have had
2 that information to be able to bring those actions?

3 For example, you talk about matters that came up
4 during cross-examination. That sort of evidence would,
5 perhaps, be mentioned in your Memorial. And then it would
6 be clearer, would it not, for the Tribunal, whether or not
7 things fall on one side or the other of the critical date?

8 That, to me--just sort of hearing Sir Daniel's
9 suggestion, that might be something that you might want to
10 address because, at the moment, those--I think not all
11 those details are in your papers. And that's not--no
12 criticism, because the Notice of Arbitration is not the
13 time for all those details.

14 MR. MULLINS: Sir, I certainly--if the question is
15 was Canada's request premature? Yes. Certainly, this was
16 completely premature. And the question then is should
17 Canada be allowed--could you just simply deny this without
18 prejudice or something and say, "Look, you can revisit this
19 after the Memorial or you can show us this," I would say
20 that, you know, we're trying to save costs. I would be
21 making these same arguments, I feel pretty comfortable.

22 But, I mean, obviously, the Tribunal is going to
23 feel, you know, am I going to take a bird in the hand? I
24 think, yes, you deny it now, and come back, I'm going to be
25 making the same arguments. But at the end of the day, I do

1 think, certainly, if the question is was Canada's request
2 premature? Yes, it was. And--but, I think--by the very
3 nature of your question, it speaks of--once you get our
4 Memorial and we detail all this out, we say this is what we
5 learned, you know, this is it. We found this from the
6 Tribunal--you know, we put it in our Memorial. Sue Lo
7 testified, IPC, et cetera. It came public on this day.

8 Are we really going to be valued to having a
9 separate hearing, another one of these, where we talk about
10 bifurcating again and have a separate bifurcation hearing?
11 The answer is no. We are telling you what--how this is
12 going to play out. We believe that we have won on terms
13 that there is clearly jurisdiction here, but I recognize
14 that--you know, I'm just arguing and you have a chance to,
15 you know, test me. I get it.

16 But was this premature? Certainly.

17 So, the last factor--the last factor, is this
18 intertwined with the Merits? And I actually kind of argued
19 this already in my response to the Chair's question. We
20 certainly believe that you would not be able to adjudicate
21 our--the jurisdictional objections that Canada has without
22 knowing if and when things occurred, if and when they were
23 disclosed to the public, and certainly that's what's going
24 to be happening on the Merits, because the whole case is
25 about whether or not things were done secretly and,

1 therefore, were not disclosed and, therefore, that was the
2 real reason why Tennant lost and not sort of some fair
3 reasons and they just lost because in an open, even-ended,
4 even playing field, they deserved to lose. They lost
5 because someone thought it was a good idea, the Government
6 of Canada thought it was a good idea to put one of their
7 local companies ahead of the line. Canada thought it was a
8 good idea to allow Korean Consortia to take losers and put
9 them ahead of the line. Canada thought it was a good idea
10 to allow the Korean Consortium to reach its GEIA and to the
11 detriment of all the legitimate companies that wanted this
12 fabulous great program, this FIT Program, that had
13 guaranteed money and was going to make them a lot of money.
14 All this is done--was done in secret, and, in fact, what we
15 talked about in the Merits.

16 And I want to point out something that I thought
17 was pretty unique from conversations earlier today. This
18 case was so simple, and jurisdiction was so clear. Why is
19 Canada asking for \$7 million in fees, same amount of money
20 that it claims it used to defend Mesa? And it must be they
21 assume they are going to lose jurisdiction; right? If it
22 was so simple and so clear, why are they asking for all the
23 amount of money that it took them to fight the Mesa Case on
24 the Merits?

25 And it must be because they know they are not

1 going to win. They know that bifurcation is going to waste
2 the time, and what they are trying to do is increase the
3 costs on our side. They are just trying to make this as
4 long and labored as possible so that they win, just like
5 they basically violated the Treaty in how they operated
6 this program. They are trying to make it difficult for us
7 to get our day in court and to have adjudication on the
8 Merits.

9 And the last slide, I believe it was Sir Daniel
10 that stole my thunder on this. So, he had asked--well, you
11 know, "Why wouldn't you do what they did in Mesa Power? I
12 think that Mesa Power got it right." And there's a cost.
13 I mean, if you start down the road, we are going to
14 bifurcate, then you decide, well, it was a bad idea, that
15 just costs more money. And so, ultimately the Panel found
16 that it had jurisdiction. They ruled on the Merits. I
17 recognize we didn't prevail, but that--they did find they
18 had jurisdiction.

19 But I also recognize, you know, this is going to
20 be a tough case. This is not so clear. Canada lost
21 Windstream, and they had a very strong concurrence from
22 Mr. Brower about what he found. "The Government of Ontario
23 acted arbitrarily, grossly unfairly, unjustly,
24 idiosyncratically, discriminated against the FIT Applicants
25 in the favor of the Korean Consortium, and acted with a

1 complete lack of transparency and candor." And that's in
2 the Mesa Award that came out afterwards.

3 And certainly, if you are an investor that found
4 that out based on information that only came out in a
5 hearing, are you supposed to just walk away and not bring
6 your claim? Are you supposed to find out, well, maybe I
7 was ripped off because you acted arbitrarily, un--grossly
8 unfairly, unjustly, idiosyncratically and discriminated?

9 And the issue is going to be what violations that
10 were available to the public, but clearly the kind of stuff
11 that specifically what he was talking about was the Korean
12 Consortium, you know, acting predatorily. That didn't come
13 out until all this became public and, therefore, our claims
14 are timely.

15 Unless the Tribunal has any questions, I will--oh,
16 you have question.

17 ARBITRATOR BETHLEHEM: Yes. Yes. It's just a
18 clarification on the point you say I stole your thunder.

19 MR. MULLINS: I thought you were agreeing. But
20 maybe--

21 ARBITRATOR BETHLEHEM: Well, when I put the
22 question to the Respondent, Ms. Di Pierdomenico's response
23 was, well, that's rather different because that was an 1120
24 issue.

25 Now, you skated over that.

1 MR. MULLINS: I did.

2 ARBITRATOR BETHLEHEM: 1120 is not 1116. So, why
3 is that relevant?

4 MR. MULLINS: Because I think the same result is
5 going to happen. And I think--

6 ARBITRATOR BETHLEHEM: It's not an issue of the
7 results, because you're making an argument here about the
8 time bar and bifurcation under 1120. Why is this--the six
9 months having to elapse before the Claim, why is that
10 relevant to the three-year time bar?

11 MR. APPLETON: Sir Daniel, if I might, the
12 fundamental question that had to be addressed by the Mesa
13 Tribunal and that will have to be addressed here, I
14 believe, as well, is that the questions--the
15 interrelationships are so intertwined between the Merits
16 and the jurisdictional questions that they could not be
17 addressed simply.

18 Our friends on the other side have said you don't
19 have to look here. This is so clear. It is impossible.
20 There is no way. But of course we've seen from the
21 discussion this afternoon that it is not clear and it's
22 very complicated. But that was, in fact, what happened in
23 Mesa.

24 In Mesa, at the beginning, the Tribunal said,
25 "This must be clear." Then, once they saw--and in that

1 case, it was the reception of Article 1782 evidence,
2 evidence that came in from local courts in the United
3 States compelling discovery from third parties that had
4 documents that Canada would not produce or had not had or
5 may have been destroyed, and those documents that were
6 produced by the recipients in the United States came in and
7 they demonstrated that there were very significant
8 questions to be determined. And once that came in, the
9 Mesa Tribunal said, "We are going to reconsider what we
10 did."

11 Clearly--this is what they wrote in their Award:
12 "Clearly, these are significant issues and they need to be
13 considered in the context of the Merits."

14 So, to go back directly to your question, it isn't
15 because of which provision, whether it's 1120 or 1116.
16 It's the interrelationship with the complexity of the
17 matrix between the facts and the law that need to be
18 considered. That is the question. That is really--is it
19 efficient and is it appropriate to have a separate phase,
20 or are you just going to really move the Merits up into the
21 jurisdictional discussion and then have to do it again in
22 Merits.

23 And I believe what Mr. Mullins has been telling
24 you is that we would have to be there anyways. It would be
25 grossly inefficient to do that, very costly. There is an

1 asymmetry in this case between the resources of Tennant
2 Energy and the Government of Canada, a G8 power. They have
3 tremendous resources. Tennant Energy's main focus,
4 Skyway 127, was destroyed by their conduct.

5 And so, the longer the hearings, the more
6 hearings, this threat that there is now going to be a
7 denial of benefit, Article 1113 approach, and all the other
8 things are made for a war of attrition. It's like a siege
9 to try to make it so that Tennant Energy will not be able
10 to afford to have its day, to have its case heard. This a
11 significant access to justice issue, and fundamentally,
12 that was the reason why, in Mesa Power, they said, "This
13 complex matter has to be done in terms of the Merits," and
14 that's why they changed.

15 Unusual. That's why they changed their position,
16 and that's exactly the same reason that we submit here is
17 why you shouldn't go there in the first place, because we
18 now know this.

19 ARBITRATOR BETHLEHEM: Thank you.

20 PRESIDENT BULL: Right. Let's take a 15-minute
21 break, and then we can--

22 ARBITRATOR BISHOP: Sorry. One question. Do
23 you--whenever the time-bar issue is addressed on its own
24 Merits, do you anticipate that there will be witnesses on
25 this issue?

1 MR. MULLINS: Well, certainly, I do believe--I
2 mean, obviously, there's the obvious, that people could not
3 have known things were kept secret. So, I mean, I think
4 that part of it is just going to be on the record. But,
5 yes, I mean, I think that you would have to put something
6 on--you know, something with testimony, of people say, you
7 know, I did not know this--these facts.

8 So, I do think we have evidentiary--look, we
9 have--again, this goes back to the opportunity to put on
10 our case. We also talk about discovery. I do think there
11 would be a discovery phase in all this because we have to
12 have a chance to put on our case. So, I think throwing it
13 out on jurisdiction without having an opportunity to do
14 that, would not be--without being able to have an
15 opportunity to provide ability to put on our case.

16 PRESIDENT BULL: Right.

17 Then we will take the 15-minute break now and
18 return at 3:50 for Replies and Rejoinders. Thank you.

19 (Brief recess.)

20 PRESIDENT BULL: Okay. Thank you, everyone, in
21 returning. We are back on the record.

22 And next we should hear from Canada in reply to
23 what we've heard from Claimant.

24 ARGUMENT BY COUNSEL FOR THE RESPONDENT

25 MS. DI PIERDOMENICO: Thank you.

1 There was a lot said by Mr. Mullins talking about
2 how this is just a huge waste of time, but I ask the
3 question: For who? If Canada is successful on
4 jurisdiction, the true waste of time is having to engage in
5 full arbitral process when it hasn't agreed to jurisdiction
6 of the Tribunal in the first place. And, therefore, I
7 don't think this is particularly persuasive to us when we
8 are telling you that we have not agreed to jurisdiction--we
9 haven't consented to jurisdiction in this case, and we
10 shouldn't be forced to arbitrate a claim that will
11 ultimately fail on the Merits, in any event.

12 But even so, Mr. Mullins said even if one claim,
13 if one claim gets through, then you still have to engage in
14 the entire review of case. Be that as it may, it
15 substantially narrows of items for consideration for the
16 Tribunal which meets the test for bifurcation. The test
17 isn't complete elimination of the Claim. It is a
18 substantial narrowing of the issues at bar, and, therefore,
19 this claim is still a claim in which the Tribunal should
20 consider seriously bifurcation because it still continues
21 to meet the test for bifurcation in that regard.

22 Sir Bethlehem's question on why don't we just make
23 this submission after the Memorial--I believe it was from
24 Sir Bethlehem--that may be something that the Tribunal
25 could consider; however, it still engages the expense of

1 having to undergo an entire process over which Canada
2 hasn't agreed to arbitrate in the first place. And,
3 therefore, the procedure remains efficient if we bifurcate
4 on jurisdictional grounds alone. In any event, the facts
5 that are required to determine whether or not the case is
6 time-barred have nothing to do with the merits of the
7 claim. So, why consider the jurisdictional grounds that we
8 have brought to you for consideration after the Memorial
9 when we can consider them in a bifurcated preliminary phase
10 on their own?

11 ARBITRATOR BETHLEHEM: The costs in those
12 circumstances, in terms of the monetary costs, are going to
13 be for the Claimant. I mean, there would be some further
14 delay, but are you saying that there would be costs for
15 Canada? In circumstances in which we might opt for that
16 sort of middle route, Claimant files its Memorial, you then
17 file an Objection to Jurisdiction and apply for
18 bifurcation. At that stage, were we to grant bifurcation
19 at that stage, what would be the costs as it were to
20 Canada?

21 MS. DI PIERDOMENICO: Well, the costs--in terms of
22 engaging in a full arbitral process, the costs would be
23 exactly same if we even--sorry, let me take a step back.

24 In order to submit a Memorial, you would have to
25 engage in witness and expert testimony. You would have to

1 engage in the costly analysis for damages, you would have
2 to, as well, engage in document production which, again,
3 can be costly from a time perspective.

4 ARBITRATOR BETHLEHEM: I mean, the scenario that I
5 put to the other side was--and this has been applied in a
6 number of arbitrations--Claimant files its Memorial, for
7 example. And this would be the normal, for example, in
8 other interstate proceedings. Claimant files its Memorial,
9 the other side then has an opportunity, shortened
10 opportunity to make an Objection to Jurisdiction. At that
11 point, at the point of the Objection to Jurisdiction, there
12 is then a process to decide on the preliminary measures or
13 the bifurcation.

14 If the bifurcation is unsuccessful or if the
15 Request for Bifurcation is refused, then there would be a
16 Counter-Memorial and then you would have the disclosure
17 process. So, on this postulate, the costs of producing the
18 witness statements and whatever would be the Claimants'.
19 They would not be Canada's. You would come back and make
20 your Objection to Jurisdiction at a later stage. It goes
21 to the point of prematurity that Mr. Mullins was keen to
22 adopt his "bird in the hand."

23 MS. DI PIERDOMENICO: Our position is that the
24 evidence that we need already to bifurcate is on the
25 record, and, therefore, even having us to engage in this

1 later, more-detailed Memorial submission, from our
2 perspective, is still one that would incur additional costs
3 that we do not think would happen if the Claimants
4 bifurcated and we are ultimately successful.

5 ARBITRATOR BETHLEHEM: Thank you.

6 MS. DI PIERDOMENICO: In terms of the test for the
7 time bar, it is important to note that the test is what the
8 Investor knew when the Investor first knew of the breach
9 and first knew of damages.

10 We have already pointed to how two other Claimants
11 knew enough to bring their FIT Program-related Claims in
12 2011 and 2012, and we have still not heard a satisfactory
13 explanation as to why Tennant could not have done the same.

14 Claimants that lack simple due diligence and of a
15 reasonable standard of care in terms of just willful
16 blindness for the public record and all the information
17 that might be out there should not be rewarded. And this
18 is exactly what the Claimant is asking you to do by
19 resetting the time bar based on two other diligent
20 Investor's claims that were brought in a timely way.

21 Moreover, it is still not clear to me why does the
22 Claimant need discovery to establish its own knowledge?
23 This is something the Claimant should inherently know.
24 Importantly, new facts that are exposed during the course
25 of a full arbitral process of another investor also does

1 not reset the time bar.

2 Now, I just want to tease out a little bit what
3 they said on their side. As expected, we knew that they
4 were going to try and point to some additional facts in
5 order to prove that they had no idea of their allegation
6 until after the Mesa-Windstream Cases. When they are
7 talking about the Korean Consortium and how this
8 low-hanging fruit was not exposed until after Mesa made
9 allegations and brought its claim to bar is simply not
10 credible. The Mesa Notice of Arbitration was posted on the
11 Government of Canada's website in 2013, before the critical
12 date. And in that Notice of Arbitration, you have the
13 allegation coming from Mesa that the Government of Ontario
14 was favoring the Korean Consortium.

15 I'm paraphrasing now because I'm trying to answer
16 the questions in the time. But you have this simple
17 allegation of unfair treatment. There is no difference
18 here because they expose some sort of low-hanging fruit
19 conspiracy. The same thing with the IPC and the Susan Lo
20 testimony. There is no difference just because they
21 discovered another investment within which they could
22 compare this unfair treatment. All they found out was that
23 the Government of Ontario was allegedly favoring another
24 investment. How is this a new claim? It is not.

25 And if Mesa knew to bring its claim in 2011, so

1 too should have Tennant.

2 And, finally, I just want to put to rest this
3 whole idea because they made such hay out of the original
4 Contract being secret, the GEIA. The original GEIA, which
5 I was unable to refer to before because it is still not on
6 the record, but this is exactly the type of evidence that I
7 would like to bring to you in a jurisdictional phase, was
8 actually published on August 3, 2011, on the website.
9 Therefore, all this conspiracy and conspiratorial theories
10 that they are bringing to you simply did not exist.

11 And, finally, Mr. Mullins says Mesa Power got it
12 right. We agree because they brought their claim in a
13 timely way.

14 So, if we could just take a giant step back from
15 the facts and everything that we just discussed in terms of
16 who brought what, when, where, the question before the
17 Tribunal today is whether or not to bifurcate. We have
18 laid out the clear test that you have to consider. The
19 first part of the test is whether or not Canada has a
20 serious and substantial objection. We believe we met that
21 part of the test. We also know that, if Canada were
22 successful, we would limit this entire Claim and that the
23 consideration before the Tribunal is not entangled in the
24 merits. All do you have figure out is when the Claimant
25 knew of its Claims and that this happened before the

1 critical date.

2 Canada has explained already that the information
3 that you need is already on the public record, and we would
4 just like the opportunity to bring it to the Tribunal for
5 your further consideration. In a preliminary phase, of
6 course.

7 I think that concludes my remarks.

8 PRESIDENT BULL: Thank you very much for that.

9 And Rejoinder from the Claimant, please.

10 ARGUMENT BY COUNSEL FOR THE CLAIMANT

11 MR. MULLINS: Thank you, again, so much to the
12 Tribunal for letting us bring these issues and be able a
13 chance to argue this.

14 First, you know, at the end of the day, the one
15 part that I clearly take issue with from what I just heard
16 is that, well, if one piece survives, then this was not a
17 waste of time because we narrow the issues. Well this is
18 not a case where, if you narrow down to what the issues
19 that, you know, presumably that some of our Claim might be
20 time-barred or not--I don't think any of it is--if they
21 even did that--this is the same FIT Program, and that
22 statement alone shows you why this is a bad idea.

23 And I appreciate, Sir Daniel, taking my words
24 "bird in the hand," but I don't think--I do think it is
25 premature, but I also don't think it's going to be a good

1 idea later. Certainly we can put in our Memorial details
2 about when things became public, more clarity, and that can
3 be done, but I think they're going to be in the same
4 situation and they are not ever going to be able to show
5 that all our Claims are time-barred. And I do think it
6 will be a waste of time and a waste of resources, and as
7 just talking about this middle ground, thinking the cost to
8 us.

9 They clearly should not do it now. And after we
10 do our Memorial, then they tried to raise it again after we
11 have already done our Memorial and all that work. But,
12 again, so I don't think the answer is ever going to
13 be--that the answer is going to be that we should have a
14 separate Hearing on Bifurcation and also extremely
15 concerned about time--the time it will take to do it in the
16 interim ground that is going to make it even more
17 time-consuming.

18 And, again, Counsel says, well, this is an issue
19 of due diligence. Two other Applicants knew that there
20 were issues and why didn't Tennant know? Because
21 Tennant--again, no due diligence would show you that they
22 were going to cut a secret deal on the IPC. I didn't hear
23 any response to that. Any evidence or showing that that
24 was somewhere in this Notice of Arbitration. It wasn't
25 there. They mentioned, well, yes, Korean Consortium was in

1 the Notice of Arbitration and Mesa.

2 What was not in there is the predatory conduct by
3 Korean Consortium. What was not in there that Korean
4 Consortium, after blocking the transmission access and then
5 blocking the ability for applicants to get contracts, then
6 went to low-hanging fruit after--in the context of the
7 special deal that they got and the fact that a special
8 circumstance was given to IPC. None of that possibly could
9 have been found through due diligence because it was not
10 public. It had all been kept secret.

11 And so, again, I do think that it's--that it's not
12 just a general: "Hey, you lost, you know. Somebody
13 thought there was unfair treatment. You should have
14 known." The standard is should you know about the actual
15 breaches and the cause of loss, and the things were kept
16 secret are not something that you would be able to
17 take--you just assume that somebody should know and just
18 guess. That's not how people react, and I don't think it's
19 a fair standard.

20 Not to belabor it--we can brief this later, but
21 the GEIA that was amended was not made public. But the
22 actual GEIA with the terms that were problematic was not
23 made public until much later. We actually had to get that
24 through a court order, but we could obviously brief that
25 later. I don't think it's a strong issue.

1 I think it is pretty obvious now, based on the
2 arguments, that this is all intertwined. It is going to be
3 complicated, that bifurcation is not going to save us any
4 time. This is not the kind of proceeding that you should
5 do it.

6 When I say "Mesa Power got it right," what I mean
7 is that the Panel--and what I was trying to say is it is
8 not so much the same statutory or same provision of the
9 Treaty. What I was trying to say is that there's a
10 situation where a Panel decided that you should bifurcate
11 and then found that it was so intertwined. That's
12 where--the situation we're concerned about because I think
13 that the same thing would happen here. If we go down the
14 road of bifurcation, then we spend time doing that, and
15 then the Panel changes its mind. It causes more costs to
16 us and more delay, and more costs, frankly, on both sides
17 if the situation was reversed.

18 What we don't want is a situation where we didn't
19 get a chance to put on our case because we were prematurely
20 stopped because we are not allowed discovery and some kind
21 of heightened or quick bifurcation, relatively quick
22 bifurcation. It's still going to take a year. But, in any
23 event, we just don't think it's appropriate. We want
24 discovery on these issues before we are told that we
25 haven't been able to put on our case. So, we are going to

1 want to be able to do that.

2 So all those reasons, we think that bifurcation
3 should be denied now. Certainly we think it's premature.
4 We hope that the Panel would not invite Respondent to renew
5 their efforts later. That should just be denied. They
6 haven't chose to bring it now, and it should just be
7 denied. But, again, the Tribunal has control of the
8 schedule and how they want to write their Orders, but
9 hopefully this will be denied now and we will go through
10 the Merits and use the non-bifurcation Procedural Order
11 model that was attached to Procedural Order 1.

12 Thank you. Unless you have any questions, I think
13 this is the end of my comments.

14 QUESTIONS FROM THE TRIBUNAL

15 ARBITRATOR BETHLEHEM: Just a small hypothetical
16 question to both sides. I'm looking at Procedural Order 1
17 and the schedule should proceedings be bifurcated. Now,
18 I'd like you to take this on a speculative hypothesis and
19 not necessarily if the Tribunal was with the Respondent now
20 and decides to bifurcate at this stage, but if at some
21 point now, some other halfway-house approach, the Tribunal
22 were to conclude that it would be appropriate to bifurcate,
23 we've got in the Procedural Order two rounds of Written
24 Submissions on Bifurcation: Respondent's Memorial on
25 Jurisdiction, Claimant's Counterclaim on Jurisdiction, then

1 Respondent's Reply, Memorial on Jurisdiction, and then
2 Claimant's Rejoinder Memorial on Jurisdiction. It is just
3 a brief question.

4 The Respondent is saying that these issues are
5 sort of straightforward. It is common in other proceedings
6 to have one round of written pleadings on a jurisdictional
7 objection and to defer the Reply round to the oral phase.
8 That would, of course, shorten the process by three months.
9 I would just be interested to know from each Party on that
10 sort of hypothetical whether that bifurcation were to be
11 ordered now or to be ordered later. Would you still think
12 that two rounds of Written Pleadings would be appropriate?

13 And, perhaps, that goes, first of all, to Canada.
14 Should I repeat the question?

15 MS. DI PIERDOMENICO: I apologize. I thought you
16 were directing it--

17 ARBITRATOR BETHLEHEM: No. I was directing it
18 first to you. I thought--you're making the Application.

19 MS. DI PIERDOMENICO: Yes. Well, in this regard,
20 we would like the opportunity to respond because if we were
21 the first one to write our objection, we would only have
22 the few dates provided for and the Claims provided for in
23 the Notice of Arbitration at this point--

24 ARBITRATOR BETHLEHEM: No. You are mistaking my
25 question.

1 MS. DI PIERDOMENICO: Oh.

2 ARBITRATOR BETHLEHEM: If we were to decide to
3 bifurcate on the basis of a Memorial on Jurisdiction and
4 then the other side had a Counterclaim on Jurisdiction, do
5 you think it would be necessary to have a second round of
6 Written Pleadings, or could the Reply Phase be folded into
7 the oral hearing?

8 MS. DI PIERDOMENICO: Sir Bethlehem, I apologize,
9 but maybe I'm misunderstanding the process. Even if you
10 were to fold it into the final Memorials, we would still
11 need that opportunity to respond to whatever it is that
12 they are responding to from--sorry, that they are bringing
13 up for the first time in their response to our objection on
14 jurisdiction.

15 ARBITRATOR BETHLEHEM: In writing. You would want
16 an opportunity to respond in writing?

17 MS. DI PIERDOMENICO: Yes. Yes.

18 ARBITRATOR BETHLEHEM: Okay. Thank you.

19 MR. MULLINS: And we would want a Rejoinder as
20 well. And also there is--I think the United States and
21 México have an opportunity to Rule 28, and we got to
22 respond to that as well.

23 ARBITRATOR BETHLEHEM: Sure. I was really just
24 trying to get to the views of the Parties on whether those
25 plus-45 days, plus-45 days could be done away with if we

1 concluded that bifurcation at some point was appropriate,
2 but this one of the rare points on which you agree.

3 MR. MULLINS: Yeah.

4 PRESIDENT BULL: So the Tribunal thanks counsel
5 for both Parties for the Submissions, not just this
6 afternoon but for today. We have reached the end of our
7 timetable for today, and we will resume at 9:30 a.m.
8 tomorrow to deal with the Motion for Security for Costs.

9 MR. MULLINS: Can I just ask one clarification on
10 something you said at the beginning of the afternoon
11 session?

12 PRESIDENT BULL: Yes.

13 MR. MULLINS: When you said your preliminary
14 ruling, I recognize that it's not final, but your thoughts,
15 if you will. I am just going to pull them up. The one
16 thing you talked about was termination. Just so I
17 understood that, and I want to make sure I don't
18 misunderstand what you are saying.

19 PRESIDENT BULL: Yes.

20 MR. MULLINS: You wanted to know whether or not a
21 funder, if there's a funder, would have the ability to
22 terminate these proceedings. In other words, to tell the
23 Claimant: "You must stop."

24 Is that what you're talking about?

25 PRESIDENT BULL: No, termination of the Funding

1 Agreement. So, if there is a funder and there's a funding
2 arrangement, there will be a contract, and that contract
3 has a clause that deals with adverse costs orders. We
4 would want to--we are inclined to order that that clause be
5 disclosed, and we would also be inclined to order that
6 there be disclosure of any clause that entitles the funder
7 to terminate the Contract with Tennant.

8 So, if there's a clause that says the funder can
9 terminate this Contract on seven days' notice, the Tribunal
10 would be--is inclined to find that relevant to our Analysis
11 of Security for Costs. So, for example, if the funder
12 was--if there was a clause that provided that the funder
13 would pay for adverse costs orders but there was a
14 provision, a separate provision that says he can terminate
15 this agreement on seven days' notice without any cause,
16 then that would affect the efficacy of the adverse order
17 clause.

18 MR. MULLINS: I see.

19 PRESIDENT BULL: So that's why termination
20 is--that is one of the ways in which termination may be
21 relevant to us. Termination of the Agreement; not
22 termination of the arbitration.

23 MR. APPLETON: Sorry, I just want to make sure I
24 understand.

25 So, it's not in respect to the issues raised by

1 Canada about control saying that we want to know if a
2 funder is actually controlling an arbitration because I
3 thought that's what--it's my fault. I misunderstood what
4 you were saying. I thought it was in relation to that
5 issue, not in relation to now what I understand to be the
6 issue of provision of under what circumstances would, if
7 there was an agreement, would funding end. Just to make
8 sure I understand correctly.

9 PRESIDENT BULL: Yes.

10 MR. APPLETON: Okay.

11 (Interruption.)

12 MR. MULLINS: I said, that was our
13 misunderstanding. That's why we were asking for
14 clarification. Thank you.

15 PRESIDENT BULL: I'm glad you did.

16 MR. MULLINS: I am too.

17 PRESIDENT BULL: If there is nothing else, then we
18 are adjourned for today. Thank you.

19 (Whereupon, at 4:19 p.m., the Hearing was
20 adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.


Dawn K. Larson