IN THE MATTER OF AN ARBITRATION UNDER THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW AND THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

MOTION FOR SECURITY FOR COSTS AND DISCLOSURE OF THIRD-PARTY FUNDING

August 16, 2019

Trade Law Bureau
Government of Canada
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
K1A 0G2
CANADA

TABLE OF CONTENTS

I. OVERVIEW

1. In accordance with Article 16.3 of Procedural Order No. 1 ("PO1") and Article 26.1 of the 1976 UNCITRAL Arbitration Rules (the "1976 UNCITRAL Rules"), Canada respectfully requests the Tribunal to order Tennant Energy, LLC ("Tennant" or the "Claimant") to issue security for costs in the amount of 6,934,001.95 CAD.[1]

2. Tennant appears to be an impecunious entity with no active business operations, revenues, or financial assets. Tennant has brought a frivolous claim that is time-barred and that virtually replicates another claim, involving the same legal counsel, which Canada successfully defended itself against after years of litigation, and in which Canada expended substantial personnel resources and millions of dollars. In this motion Canada sets out the applicable legal standard for the Tribunal to order security for costs under Article 26.1 of the 1976 UNCITRAL Rules, and explains why it is necessary for the Tribunal to order Tennant to issue security for costs in order to protect the integrity of these arbitral proceedings and Canada's right to recover a costs order in its favour.

3. Separately, Canada respectfully requests an order from the Tribunal directing Tennant to disclose the existence of any third-party funding agreement that Tennant entered into in order to finance its claim in this arbitration. The details of this disclosure should include the name(s) of any such third-party funder(s) and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent they will share in any potential damages awarded, or pay an adverse costs order rendered against Tennant.

II. THE TRIBUNAL HAS AUTHORITY TO ORDER SECURITY FOR COSTS

A. Applicable Rules

4. The rules governing this motion are set out in PO1, the 1976 UNCITRAL Rules and the NAFTA.

5. Article 16.3 of PO1 states:

[1] Further details on the calculation of this amount, which is based on the costs incurred by Canada in *Mesa Power Group LLC v. Government of Canada*, are provided in Annexes I and II. *See also*, **R-007**, *Mesa Power Group, LLC v. Canada* (UNCITRAL) Canada's Submission on Costs, 3 March 2015 ("*Mesa – Canada's Costs Submission*"), ¶ 4.

> [t]he Tribunal shall be free to decide any issue by way of an order, a partial or interim Award, or a final Award, as it may deem appropriate.

6. Article 2.1 of PO1 states:

> [t]he procedure in this arbitration shall be governed by the 1976 UNCITRAL Arbitration Rules ("UNCITRAL Rules") except as modified by the provisions of Section B of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") (per Article 1120(2) of the NAFTA).

7. Article 26.1 of the 1976 UNCITRAL Rules states:

> [a]t the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

8. Article 1120(2) of NAFTA states:

> [t]he applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

9. Article 1134 of NAFTA states:

> [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. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

1. The Tribunal has Authority to Order Security for Costs under Article 26.1 of the 1976 UNCITRAL Rules

10. The purpose of interim measures under Article 26.1 of the 1976 UNCITRAL Rules is to protect the integrity of the arbitral proceedings, covering both substantive and procedural rights.[2]

[2] **RLA-006**, *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, (UNCITRAL) Procedural Order No. 9 Decision on Provisional Measures, 20 June 2018 [Spanish, with attached translated excerpts in English] ("*García Armas – Decision on Provisional Measures*"), ¶ 201. *See also* **RLA-007**, *Igor Boyko v. Ukraine* (UNCITRAL) Procedural Order No. 3 on Claimant Application for Emergency Relief, 3 December 2017 ("*Boyko – Procedural Order No. 3*"), ¶ 2.3 in which the tribunal stated: "[i]nterim measures under Article 26 of the UNCITRAL Rules

While Article 26.1 refers to the "subject-matter" of the dispute, authorities commenting on the 1976 UNCITRAL Rules have interpreted Article 26.1 as having a broader focus.[3] In fact, Article 26.1 grants the Tribunal a wide measure of discretion to order interim measures,[4] including security for costs.[5] Many investment tribunals have affirmed their authority to order security for costs,[6] including under Article 26.1 of the 1976 UNCITRAL Rules, Article 26 of the 2010 UNCITRAL Arbitration Rules (the "2010 UNCITRAL Rules"),[7] Article 47 of the International

---

preserve the rights of the parties in the subject matter of the dispute which includes their rights as to the integrity of the agreed arbitral process." (Emphasis added.)

[3] The report commissioned by the UNCITRAL Secretariat on revisions of the 1976 UNCITRAL Rules characterized the reference to the "subject-matter" in Article 26.1 as merely "facially restrictive phraseology", explaining that Article 26.1 has a broader focus: **RLA-008**, Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, (2006), ¶ 206; *see also* **RLA-010**, David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Second Edition (Oxford University Press, 2012) ("*Caron & Caplan*"), pp. 517-518. *See also* **RLA-011**, *Islamic Republic of Iran and United States of America* (1983 Tribunal Rules) Decision No. DEC 116-A15(IV)/A24-FT, 18 May 1993; **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 201.

[4] *See, e.g.*, **RLA-012**, *Merck Sharpe & Dohme (I.A.) LLC v. Republic of Ecuador* (UNCITRAL) First Decision on Interim Measures, 7 March 2016 ("*Dohme – Decision on Interim Measures*"), ¶ 65: ("as the Rule [Article 26 of the UNCITRAL Rules] formulates it, the judgment whether interim measures are necessary, and if so which particular measures are appropriate, is remitted to the Tribunal itself, in the exercise of the wide measure of discretion assigned to it.") (Emphasis added). *See also*, **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 187.

[5] *See, e.g.*, **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 187.

[6] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 187; **RLA-013**, *South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016 ("*South American Silver – Procedural Order No. 10*"), ¶ 52. Note that the wording of Article 26.1 of the 1976 UNCITRAL Rules leaves wider discretion to the Tribunal in the awarding of interim measures than under Article 47 of the ICSID Arbitration Rules: **RLA-014**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia* (UNCITRAL) Order on Interim Measures, 2 September 2008 ("*Paushok – Order on Interim Measures*"), ¶ 36. *See also*, e.g., **RLA-015**, *Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8) Decision on Preliminary Issues, 23 June 2008, ¶ 57; **RLA-016**, *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/7) Procedural Order No. 2, 28 October 1999, ¶¶ 8-9; **RLA-017**, *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. El Salvador* (ICSID Case No. ARB/09/17) Decision on El Salvador's Application for Security for Costs, 20 September 2012 ("*Commerce Group – Decision on Application for Security for Costs*"), ¶ 45; **RLA-018**, *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg & RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6) Decision on Respondent's Application for Security for Costs, 14 October 2010, ¶ 5.16; and **RLA-019**, *RSM Production Corp. v. Saint Lucia* (ICSID Case No. ARB/12/10) Decision on Saint Lucia's Request for Security for Costs, 13 August 2014 ("*RSM – Decision on Saint Lucia's Request for Security for Costs*"), ¶ 54.

[7] The relevant paragraphs of Article 26 of the 2010 UNCITRAL Rules state:

> 1. The arbitral tribunal may, at the request of a party, grant interim measures.
> 2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:
>
> (a) Maintain or restore the status quo pending determination of the dispute;
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice to the arbitral process itself;
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

Centre for Settlement of Investment Disputes ("ICSID") Convention,[8] and Article 39 of the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules").[9] As the UNCITRAL Working Group III on Investor-State Dispute Settlement ("ISDS") Reform[10] recently affirmed: "[a]rbitral tribunals have the power to order security for costs, either pursuant to arbitration laws and/or rules explicitly providing for such power, or general provisions on interim measures."[11]

11. Tribunals have exercised their authority to order security for costs, for various reasons. For instance, in *García Armas* the tribunal ordered the claimants to issue security for costs under Article 26.1 of the 1976 UNCITRAL Rules because the claimants failed to prove that they were solvent, and their third-party funding agreement indicated the funder would not pay an adverse

---

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

[8] Article 47 of the ICSID Convention states:

> [e]xcept as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

[9] Article 39.1 of the ICSID Arbitration Rules states:

> [a]t any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.

[10] UNCITRAL Working Groups are intergovernmental groups which undertake the development of the topics on UNCITRAL's work programme. The membership of the working groups currently includes all member States of UNCITRAL, see: **RLA-020**, A Guide to UNCITRAL, Basic facts about the United Nations Commission on International Trade Law (United Nations, Vienna 2013), available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf. For more information on UNCITRAL Working Group III: ISDS Reform, see: https://uncitral.un.org/en/working_groups/3/investor-state.

[11] **RLA-021**, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, Note by the Secretariat on Possible reform of investor-State dispute settlement (ISDS), Third-party funding ("UNCITRAL Note on Third-Party Funding"), ¶ 32, available at: https://undocs.org/en/A/CN.9/WG.III/WP.157.

costs award rendered against the claimants.[12] Moreover, in *RSM*, the tribunal ordered security for costs under the ICSID Arbitration Rules because the claimant was impecunious, had a third-party funding agreement, and had a history of non-compliance with cost orders.[13] In April 2019, an ICSID annulment committee upheld the *RSM* tribunal's decision to order security for costs.[14] The committee stated that the ICSID Convention "imposes no limitation on the nature of the rights to be preserved and thus does not exclude rights that may be contingent. Thus, the fact that costs have yet to be ordered does not preclude an order for security of those costs."[15]

2. NAFTA Article 1134 Does Not Modify Article 26.1 of the 1976 UNCITRAL Rules in Relation to this Motion

12. Article 26.1 of the 1976 UNCITRAL Rules governs this arbitration except as modified by Section B of NAFTA Chapter Eleven, which includes Article 1134. Article 1134 authorizes a tribunal to order various interim measures "to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective".[16] Two features of Article 1134 modify Article 26.1 of the 1976 UNCITRAL Rules: the prohibition on (i) attachment orders, and (ii) orders that enjoin the application of the challenged measure.[17] Neither modification restricts a tribunal from ordering security for costs.

13. Thus in considering this motion, it is appropriate for the Tribunal to apply Article 26.1 of the 1976 UNCITRAL Rules as is, because NAFTA Article 1134 does not modify the Tribunal's authority to order security for costs under Article 26.1.

---

[12] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶¶ 193, 194, 224, 226, 231, 250, and 261. In this case, security was granted in the amount of 1,500,000 USD.

[13] **RLA-019**, *RSM – Decision on Saint Lucia's Request for Security for Costs*, ¶ 86. Security was granted in the amount of 750,000 USD.

[14] **RLA-022**, *RSM Production Corp. v. Saint Lucia* (ICSID Case No. ARB/12/10) Decision on Annulment, 29 April 2019 ("*RSM – Decision on Annulment*"), ¶¶ 181-182. The annulment committee did overturn part of the *RSM* tribunal's decision – specifically, the tribunal's decision to dismiss the case "with prejudice" due to the claimant's failure to issue security for costs: *See* ¶¶ 183-201.

[15] **RLA-022**, *RSM – Decision on Annulment*, ¶ 179.

[16] *See also*, **RLA-023**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006) ("*Kinnear et al.*"), p. 4-1134: ("[t]he wording of Article 1134 and the two categories it lists ('including' an order to preserve evidence or protect a tribunal's jurisdiction) suggest that various interim orders are available under Chapter 11 and that tribunals are not limited to the two categories noted in the article.") (Emphasis added.)

[17] **RLA-023**, *Kinnear et al.*, p. 4-1134.

B. The Legal Standard to Order Security for Costs under Article 26.1 of the 1976 UNCITRAL Rules

14. Article 26.1 of the 1976 UNCITRAL Rules does not specify the criteria that a tribunal should apply in exercising its discretion to determine if an interim measure is "necessary".[18] However, Article 26.3 of the 2010 UNCITRAL Rules provides greater detail on the conditions to grant an interim measure, in order to guide a tribunal in its decision.[19] Specifically Article 26.3 of the 2010 UNCITRAL Rules states:

> 3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:
>
> > (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
> >
> > (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.[20]

15. The *García Armas* tribunal, in an arbitration governed by the 1976 UNCITRAL Rules, observed that international consensus exists on these conditions, as reflected by the practice of investment tribunals – including tribunals operating under the 1976 UNCITRAL Rules – and by Article 17 A of the UNCITRAL Model Law 2006.[21] Moreover, authorities commenting on the

---

[18] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 187.

[19] **RLA-010**, *Caron & Caplan*, pp. 513, 515, 517. See also, **RLA-024**, UNCITRAL website excerpt, "UNCITRAL Arbitration Rules", stating that the 2010 UNCITRAL Rules "include more detailed provisions on interim measures": https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration.

[20] **RLA-025**, UNCITRAL Arbitration Rules (as revised in 2010), Article 26.3.

[21] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 189, *citing* **RLA-014**, *Paushok – Order on Interim Measures*, ¶ 45; **RLA-012**, *Dohme – Decision on Interim Measures*, ¶ 69; **RLA-026**, *Merck Sharpe & Dohme (I.A.) Corporation v. The Republic of Ecuador* (UNCITRAL) Second Decision on Interim Measures, 6 September 2016, ¶ 35; **RLA-027**, *EnCana Corporation v. Republic of Ecuador* (LCIA Case No. UN3481) Interim Award - Request for Interim Measures of Protection, 31 January 2004 ("*EnCana Corp – Interim Award*"), ¶ 13; **RLA-028**, Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (Wolters Kluwer, 2018), p. 221, ¶ 15: ("[t]he only condition for the grant of interim measures imposed under article 26(1) of the 1976 Rules was that an arbitral tribunal may issue measures it deems 'necessary'. That was interpreted to import a number of requirements, namely the urgency of the tribunal's intervention, connected with a serious risk of substantial harm occurring unless the tribunal intervenes, and a weighing of the relative hardship that will be caused to one side or the other by the

UNCITRAL Rules observe that while Article 26.1 of the 1976 UNCITRAL Rules does not expressly enumerate the conditions in Article 26.3 of the 2010 UNCITRAL Rules, "the conditions likely were similar in practice under the 1976 Rules, and the articulation of these conditions in the 2010 Rules will likely influence the manner in which tribunals exercise their discretion under the 1976 Rules in the future."[22]

16. For this reason, the *García Armas* tribunal drew from Article 26.3 of the 2010 UNCITRAL Rules as textual support to determine the applicable test to order security for costs under Article 26.1 of the 1976 UNCITRAL Rules.[23] Specifically, the tribunal considered four factors to determine whether to order security for costs:[24]

i. *prima facie*, there is a reasonable possibility that the respondent would prevail in the case;[25]

ii. the respondent would likely suffer harm not adequately reparable by an award of damages without the order;

iii. the respondent's potential harm without the order substantially outweighs the harm that the claimant would likely incur from the order; and

iv. the condition of urgency is met.[26]

---

tribunal's decision. The relevant requirements are now spelt out in article 26(3)(a) of the 2010 Rules."). *See* **RLA-009**, UNCITRAL Model Law on International Commercial Arbitration (2006), Article 17 A.

[22] **RLA-010**, *Caron & Caplan*, p. 520, *citing* **RLA-027**, *EnCana Corp – Interim Award*, ¶ 13; **RLA-030**, *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (UNCITRAL) Second Interim Award on Interim Measures, 16 February 2012, ¶ 2.

[23] The tribunal reasoned as follows: "[w]hile the 2010 UNCITRAL Rules are not applicable to the present arbitration, the Tribunal, in full use of its discretion, considers that the requirements contained therein reflect international practice independent of the applicable rules" (**RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 189 [as translated]).

[24] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 191.

[25] A tribunal's *prima facie* determination regarding a respondent's reasonable possibility of success does not affect the discretion of the arbitral tribunal in making any subsequent determination: **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 207. Thus Canada submits this motion without prejudice to Canada's position that the Tribunal lacks jurisdiction over Tennant's claim in this arbitration.

[26] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 191. While the tribunal in *Garcia Armas* added that the case involved exceptional circumstances, this standard is separable from and not an element of, the four-part test that the tribunal applied: **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 251. Nevertheless, even if this Tribunal were to apply an "exceptional circumstances" standard, it would have sufficient grounds to order Tennant to issue security for costs, for the reasons explained in Section III of this motion.

17. The application of general principles of treaty interpretation supports the criteria set down by the *García Armas* tribunal.[27] The ordinary meaning of "necessary", as used in the Article, implies that without the order, the moving party would likely suffer harm not adequately reparable by an award of damages.[28] Moreover, Article 26.1 uses the term "necessary" in the context of potentially urgent circumstances, including "the conservation of the goods forming the subject-matter in dispute".

18. The object and purpose of the 1976 UNCITRAL Rules lends further support to those factors considered by the *García Armas* tribunal under Article 26.1 given its fundamental objective is to ensure that the disputing parties are treated with equality.[29] For example, it may be necessary for a tribunal to order an interim measure where, without such an order, the potential harms to the parties would be unequal, such that the respondent's likely harm without the order substantially outweighs the harm that the claimant would incur from the order.

19. Thus the four-part test enumerated by the *García Armas* tribunal is an appropriate legal standard for the Tribunal to apply in determining whether to order security for costs under Article 26.1 of the 1976 UNCITRAL Rules.

C. "Exceptional Circumstances" is Not the Applicable Standard under the 1976 UNCITRAL Rules or NAFTA Chapter Eleven

20. Some investment tribunals have found that an order for security for costs is appropriate only in "exceptional circumstances." However, they provide no compelling reason as to why these words should be read into Article 26.1 of the 1976 UNCITRAL Rules (nor 2010

[27] NAFTA Article 1131(1); **RLA-031**, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 23 May 1969, Article 31.

[28] **RLA-032**, *Sergei Viktorovich Pugachev v. Russia* (UNCITRAL) Interim Award, 7 July 2017, ¶ 238; **RLA-033**, *Dawood Rawat v. Republic of Mauritius* (UNCITRAL) Order Regarding Claimant's and Respondent's Requests for Interim Measures, 11 January 2017, ¶ 45.

[29] For instance, Article 15.1 of the 1976 UNCITRAL Rules states: "[s]ubject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case." (Emphasis added.)

UNCITRAL Rules Article 26.3, ICSID Convention Article 47, and ICSID Arbitration Rule 39) in determining whether to order security for costs.[30]

21. Article 26.1 of the 1976 UNCITRAL Rules does not refer to "exceptional circumstances". Rather, it provides that "the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute".[31] Thus an "exceptional circumstances" standard for security for costs bears no relation to the plain and ordinary meaning of the words of Article 26.1. Unlike Article 26.1, Article 29 of the 1976 UNCITRAL Rules refers explicitly to "exceptional circumstances" – in relation to a tribunal's authority to reopen the hearings before making the award.[32] The absence of the phrase "exceptional circumstances" in Article 26.1, in the context of the use of this phrase in Article 29, demonstrates that it was never intended as an applicable criterion in a motion under Article 26.1.[33] It would therefore be inappropriate to apply it to Canada's request for security for costs in this case.

22. Moreover, NAFTA Article 1134 does not refer to "exceptional circumstances"; and no NAFTA Chapter Eleven tribunal has held that Article 1134 requires "exceptional circumstances" to order interim measures.[34] Thus, this Tribunal should not follow cases that adopted an

[30] *See, e.g.*, **RLA-013**, *South American Silver – Procedural Order No. 10*, ¶ 68; **RLA-017**, *Commerce Group – Decision on Application for Security for Costs*, ¶ 44; **RLA-034**, *The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v. The Plurinational State of Bolivia* (UNCITRAL) Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, ¶ 148.

[31] 1976 UNCITRAL Rules Article 26.1. (Emphasis added).

[32] 1976 UNCITRAL Rules Article 29.2 states: "[t]he arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made."

[33] Article 26.5 of the 2010 UNCITRAL Rules also uses the term "exceptional circumstances", in relation to a tribunal's authority to modify, suspend, or terminate an interim measure it has granted. But the 2010 UNCITRAL Rules do not require "exceptional circumstances" to order an interim measure.

[34] Few NAFTA Chapter Eleven awards have applied Article 1134; and none have addressed the relationship between Article 1134 and Article 26.1 of the 1976 UNCITRAL Rules. In fact, no NAFTA Chapter Eleven tribunal has considered an application for security for costs by a respondent State. *See* **RLA-023**, *Kinnear et al.*, p. 1134-7. Only three NAFTA Chapter Eleven tribunals have considered requests for interim measures under Article 1134: **RLA-035**, *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1) Interim Decision on Confidentiality, 27 October 1997 ("*Metalclad – Interim Decision*"); **RLA-036**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award on Harmac Motion, 24 February 2000; and **RLA-037**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Procedural Order No. 2, 3 May 2000. In *Pope & Talbot*, the tribunal did not address the relevant provisions of the 1976 UNCITRAL Arbitration Rules in discussing NAFTA Article 1134. The applicable arbitration rules in *Metalclad* and *Feldman* were the ICSID Arbitration (Additional Facility) Rules. Yet the *Metalclad* tribunal set out the basic test for provisional measures under Article 1134: "[i]n

"exceptional circumstances" limitation in determining whether to order security for costs, as the applicable rules in this arbitration do not support such an interpretation.

23. Recent proposed reforms at international arbitral institutions show that security for costs orders are recognized as a necessary mechanism to hold unsuccessful claimants accountable for unpaid costs orders.[35] Numerous States have expressed dissatisfaction with the direction that some tribunals have taken in requiring exceptional circumstances for security for costs; States have also voiced concerns that after defending against an unsuccessful, frivolous, or bad faith claim, they may be unable to recover on a favourable costs order.[36] In this regard, States have highlighted that claimants might use shell companies to submit investment claims to avoid paying costs, or corporate entities may be impecunious, through no fault of the State, and may be unable to pay an adverse costs order against them.[37] To address these concerns, UNCITRAL and ICSID are engaged in ongoing deliberations to adopt new rules specifically on security for costs.[38] These proposed reforms serve as additional reasons as to why, in applying the Tribunal's wide discretion under Article 26.1 of the 1976 UNCITRAL Rules, it would be inappropriate to read in an "exceptional circumstances" standard on this motion.

---

order to succeed in a request for provisional measures an applicant party must demonstrate that the measures are urgently required in order to protect its rights from an injury that cannot be made good by the subsequent payment of damages". **RLA-035**, *Metalclad – Interim Decision*, ¶ 8. As explained in this motion below, the appropriate legal standard to apply Article 26.1 of the 1976 UNCITRAL Rules includes these requirements of urgency and avoiding harm not adequately reparable by an award of damages.

[35] **RLA-038**, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Vienna, 29 October - 2 November 2018, Note by the Secretariat on Possible reform of investor-State dispute settlement (ISDS) - cost and duration ("UNCITRAL Note on Cost and Duration"), available at: http://undocs.org/en/A/CN.9/WG.III/WP.153. *See also*, **RLA-039**, *Proposals for Amendment of the ICSID Rules – Synopsis*, ICSID Secretariat Volume 1, 2 August 2018, ¶ 51, available at: https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf; **RLA-040**, *Proposals for Amendment of the ICSID Rules - Consolidated Draft Rules*, ICSID Secretariat Volume 2, 2 August 2018 ("ICSID Draft Rules"), p. 48, Rule 51 ("Security for Costs"), available at: https://icsid.worldbank.org/en/Documents/Amendments_Vol_Two.pdf.

[36] **RLA-038**, UNCITRAL Note on Cost and Duration, ¶ 33, where the ongoing UNCITRAL Working Group III on ISDS Reform identified as an area of concern the risk that successful respondent States may be unable to recover on a favourable costs order.

[37] **RLA-038**, UNCITRAL Note on Cost and Duration, ¶¶ 53, 56, and 68.

[38] **RLA-038**, UNCITRAL Note on Cost and Duration; **RLA-040**, ICSID Draft Rules.

III. IT IS NECESSARY TO ORDER SECURITY FOR COSTS IN THIS CASE

24. To protect the integrity of these arbitral proceedings and Canada's right to recover a costs order in its favour, it is necessary to order Tennant to issue security for costs. The facts in this arbitration satisfy each element of the four-part test laid out by the *García Armas* tribunal to grant the interim measure.

A. Canada has a Reasonable Possibility of Prevailing in this Case

25. The disputing party advancing a motion for an interim measure must have a *prima facie* "reasonable case" in its underlying claims.[39] Those claims must not be frivolous or obviously outside the tribunal's competence.[40] If the disputing party seeking security for costs has a reasonable possibility of prevailing in the case based on one (or more) of its claims, and of receiving a favourable costs order, it satisfies the first condition for security for costs.[41]

26. Canada has a *prima facie* reasonable possibility of prevailing in both its jurisdictional objections and merits defense in this arbitration. As explained in its Statement of Defence, Canada has not consented to the Tribunal's jurisdiction over this arbitration because Tennant's claim is time-barred.[42] NAFTA Article 1116(2) sets a strict three-year limitation period to file a claim.[43] In *Mesa Power Group LLC*, another claimant ("Mesa") brought investment proceedings against Canada on October 4, 2011 regarding the same measures that Tennant challenges.[44] Despite making virtually the same claims as Mesa, Tennant did not file its Notice of Arbitration ("NOA") until June 1, 2017. A prudent claimant would or should have known about the breach and loss well before June 1, 2014. Thus Tennant's claim is manifestly time-barred. Moreover, Tennant's allegations regarding spoliation of documents do not even relate to the Claimant or its project, as required by NAFTA Article 1101(1).

---

[39] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 202.

[40] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 202, *quoting* **RLA-014**, *Paushok – Order on Interim Measures*, ¶ 55.

[41] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 191.

[42] Canada's Statement of Defence, 2 July 2019, ¶¶ 2, 28-39.

[43] NAFTA Article 1116(2) states: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

[44] **R-005**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Notice of Arbitration, 4 October 2011.

27. On the merits, Tennant's allegations of fact and law are substantively no different from many of Mesa's claims. Mesa and Tennant alleged that the same measures contravened NAFTA Article 1105.[45] The wording of the two claimants' NOAs even overlaps substantially – as Canada demonstrates in Annex III to this motion. In fact, the lead counsel for Tennant represented Mesa. Perhaps the only notable difference between the two arbitrations is the name of the claimant. Canada successfully defended itself against the allegations made in *Mesa Power Group LLC*. The tribunal found that the impugned measures did not contravene NAFTA Article 1105. This Tribunal has no new substantive issues to decide. Tennant's attempt to challenge measures that another investment tribunal has already found to be consistent with NAFTA demonstrates that its claim is frivolous. Given Canada's reasonable jurisdictional objections and the frivolous nature of Tennant's claim, there are also sufficient grounds for the Tribunal to make a *prima facie* determination that there is a reasonable possibility that Canada may receive a favourable costs order in the arbitration.[46] Thus, Canada has a reasonable possibility of success in this arbitration due to the strength of its jurisdictional objections and merits defenses.

B. Canada Could Suffer Harm Not Adequately Reparable by a Costs Order without Security for Costs

28. When a claimant fails to pay an adverse costs order, a tribunal cannot adequately repair the respondent's loss with another costs order. Thus a claimant's solvency and ability to pay an adverse costs order are of utmost importance in determining whether an order for security for costs is necessary.[47]

29. As an illustration of the irreparable harm that Canada will suffer without an order for security, in *Mesa Power Group LLC* Canada spent 825,000 CAD in arbitration costs, 4,225,547.67 CAD in legal representation costs and 1,883,454.28 CAD on disbursements to

[45] **R-006**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Memorial of the Investor, 20 November 2013, ¶ 17; Part Four: The Law Applied to the Facts, IV. International Law Standard of Treatment (pp. 177-205).

[46] It is not premature for this Tribunal to make a *prima facie* determination that Canada has a reasonable case that it may receive a favourable costs order in the arbitration because Canada has *prima facie* reasonable jurisdictional objections and merits defences.

[47] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶¶ 197-198, 224, 226.

successfully defend the claim.[48] The *Mesa Power Group LLC* tribunal ordered Mesa to pay 2,948,701 CAD of Canada's costs.[49] Yet Mesa has not complied with the tribunal's order. Canada is in ongoing litigation in U.S. courts, spending significant funds trying to enforce the costs order against Mesa, without any alternative options.

30. Without an order for security for costs from Tennant, Canada would likely suffer harm that is not adequately reparable by an award of damages because it may be unable to recover a costs order in its favour. Tennant's corporate history leading up to the present indicates that it is impecunious and has been unsuccessful in many previous business ventures. The entity changed names and business endeavours several times. It was originally incorporated in 2001 under the name "Tennant Consulting, LLC".[50] On March 5, 2002, James Tennant filed Restated Articles of Organization and renamed the entity "Wine Destinations, LLC".[51] On November 27, 2002, he filed Restated Articles of Organization, under the name "Tennant Travel Services, LLC".[52] On April 20, 2015, he filed an Amendment to Articles of Organization for a new name, "Tennant Energy, LLC".[53] It appears that, having failed to sustain operations in various business ventures, including in Ontario's renewable energy sector, the entity no longer operates. It has no website or publicly identifiable business establishment. Tennant has no apparent source of revenues from any business activities. No public information indicates that it holds financial assets. Without active business operations, revenues, or financial assets, Tennant appears impecunious and incapable of paying an adverse costs order in Canada's favour.

---

[48] **R-007**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Submission on Costs, 3 March 2015, ¶ 4 and Annexes I and II (pp. 19-21).

[49] Specifically, the tribunal ordered Mesa to pay 100% of the arbitration costs (1,116,000 CAD) and 30% of Canada's costs (1,832,701 CAD): **RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶¶ 706(vi) and (vii).

[50] The Claimant was incorporated in in California in 2001 under "Tennant Consulting, LLC" (200125610024). **R-008**, Tennant Consulting, LLC, Limited Liability Company Articles of Organization (Sep. 10, 2001).

[51] **R-009**, Wine Destinations, LLC, Limited Liability Company Restated Articles of Organization (Mar. 5, 2002).

[52] **R-010**, Tennant Travel Services, LLC, Limited Liability Company Restated Articles of Organization (Nov. 27, 2002).

[53] **R-011**, Tennant Energy, LLC, Amendment to Articles of Organization of a Limited Liability Company (Apr. 20, 2015).

31. To determine whether the claimants in *García Armas* could pay an adverse costs order, the tribunal shifted some of the burden onto the claimants by ordering them to produce evidence of their assets, including information on the jurisdiction the assets were subject to in order to ascertain if they could be seized to satisfy a costs award.[54] The claimants' failure to provide enough evidence on these matters led the tribunal to determine that the respondent would suffer harm not adequately reparable by an award of damages without security for costs.[55] Having established a reasonable basis to find that Tennant is impecunious, Canada maintains that in response to this motion Tennant must produce evidence sufficient to prove it can pay an adverse costs order.[56] Tennant controls the details and evidence of its financial condition. If Tennant cannot prove that it is capable of paying an adverse costs order, then it is necessary for the Tribunal to order Tennant to issue security for costs.[57]

C. The Harm to Canada Substantially Outweighs Tennant's Harm

32. To assess the proportionality of an interim measure, the *Sergei Paushok* tribunal stated that a tribunal must "weigh the balance of inconvenience in the imposition of interim measures upon the parties."[58] In *García Armas*, the tribunal balanced the facts and held that the respondent would suffer substantially greater harm without security for costs than the claimants would incur from the order, as the order would not preclude the claimants' pursuit of the claim or access to justice.[59]

33. Similarly, the balance of inconvenience strongly favours Canada in this case. An order for security for costs does not undermine Tennant's access to justice, since it does not affect Tennant's ability to proceed with its claim. Canada recognizes the importance of access to justice, and that security for costs is not designed to create an additional "fee" to access investor-

[54] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 7.

[55] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶¶ 224, 226, and 250.

[56] Relevant factors may include whether the Claimant has taken out an insurance policy to cover an adverse costs award. *See, for instance*: **RLA-041**, *Eskosol S.p.A. v. Italian Republic* (ICSID Case No. ARB/15/50) Procedural Order No. 3, 12 April 2017, ¶ 37.

[57] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 197-199.

[58] **RLA-014**, *Paushok – Order on Interim Measures*, ¶ 79.

[59] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶¶ 231-237.

State arbitration. Canada does not seek to use the measure to undermine any of Tennant's rights to bring a claim. Rather, Canada has legitimate concerns about Tennant's capacity to pay an adverse costs order, and, along with the fact that Tennant brings a frivolous claim, Canada aims to protect its right to a costs order in its favour if the Tribunal so rules.

34. Furthermore, almost all of the projected harm to Tennant from issuing security for costs is temporary: Tennant will recoup its full security if the Tribunal does not order costs in Canada's favour. In contrast, without an order for security for costs, Canada could suffer permanent harm by losing potentially millions of dollars from an unpaid costs order in its favour.[60] Canada's ongoing litigation against Mesa to recover almost 3,000,000 CAD verifies the substantial harm it could suffer without security for costs. The integrity of these arbitral proceedings depends on protecting Canada's right to recover a costs order in its favour.

D. The Circumstances are Urgent

35. A respondent's ongoing expenditures to defend itself in investment arbitration are sufficient to meet the condition of urgency.[61] Canada continues to expend substantial personnel and public financial resources for its legal representation and the costs of this arbitration. An order for security for costs cannot wait until the Tribunal issues the final award without running the risk that Canada would suffer harm not adequately reparable by an award of costs.[62]

36. In sum, it is necessary to order Tennant to issue security for costs, because the circumstances in this case satisfy the four-part test under Article 26.1 of the 1976 UNCITRAL Rules laid down by the *García Armas* tribunal.

IV. THE AMOUNT OF SECURITY FOR COSTS REQUESTED IS REASONABLE

37. To protect the integrity of these arbitral proceedings and Canada's right to recover a costs order, it is necessary for the Tribunal to order Tennant to issue 6,934,001.95 CAD in security for costs for this arbitration. This amount includes estimates of the fees and expenses of the

[60] As noted above in ¶ 29, Mesa has failed to pay a costs order in Canada's favour of almost $3 million.

[61] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 241.

[62] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 241.

Tribunal, as well as reasonable costs for Canada's legal representation and assistance, as summarized in Annex I to this motion.

38. The amount of 6,934,001.95 CAD is based on the actual costs incurred by Canada in *Mesa Power Group LLC*.[63] As explained above, Tennant's claim virtually replicates Mesa's claim, regarding the same measures alleged to be in breach of NAFTA and same counsel, which Canada has already successfully defended.[64] Under the circumstances, the costs incurred by Canada in *Mesa Power Group LLC* provide the most reasonable basis for estimating Canada's costs in this arbitration. Moreover, this amount is commensurate with the average reported costs for respondent States in international investment arbitration.[65]

39. Canada estimates that 1,477,098.91 CAD of the total amount requested in security for costs reflects Canada's costs in the procedural and jurisdictional phase of the arbitration. As summarized in Annex II of this motion, this amount includes estimates of the fees and expenses of the Tribunal, as well as costs for Canada's legal representation and assistance, should the Tribunal decide to bifurcate the proceedings. The amount of 1,477,098.91 CAD is reasonable as it is based on the legal representation and assistance costs incurred by Canada for the procedural and jurisdictional phase in *Mesa Power Group LLC*.[66] Notably, Canada's jurisdictional objection regarding the submission of the claim to arbitration in *Mesa Power Group LLC* only involved one round of written submissions from the disputing parties and a teleconference with the

[63] **R-007**, *Mesa – Canada's Costs Submission*, ¶ 4 and Annexes I and II.

[64] See above, ¶¶ 26-27.

[65] In 2017, Allan & Overy LLP reported in its updated study that the average respondent costs in international treaty arbitration were 4,855,000 USD (approximately 6,360,535 CAD, as of the average exchange rate of July 2019). **RLA-042**, Allen & Overy, *Investment Treaty Arbitration : cost, duration and size of claims all show steady increase*, 14 December 2017, available at: http://www.allenovery.com/publications/en-gb/Pages/Investment-Treaty-Arbitration-cost-duration-and-size-of-claims-all-show-steady-increase.aspx. In 2016, Vannin Capital reported that the average respondent party costs in ICSD arbitrations concluded between FY 2011 and 2015 was 4,954,461.27 USD (approximately 6,490,839 CAD as of the average exchange rate of July 2019). **RLA-043**, Kluwer Arbitration Blog, Jeffrey P. Commission (Vannin Capital), *How Much does an ICSID Arbitration Cost? A Snapshot of the Last Five Years*, 26 February 2016, available at: http://arbitrationblog.kluwerarbitration.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/.

[66] Additionally, Canada bases its estimate of arbitration costs for this arbitration on the initial deposit ordered by the Tribunal in ¶ 10.1 of the Terms of Appointment.

Tribunal.[67] In contrast, the Procedural Calendar in PO1 of this arbitration provides for a hearing on issues of bifurcation / preliminary motions, two rounds of written pleadings on jurisdiction and a hearing on jurisdiction.[68] Accordingly, as explained in further detail in Annex II, Canada's estimate of costs in the procedural and jurisdictional phase of this arbitration has been adjusted to account for Canada's costs for the additional hearings and written submissions provided for in the Procedural Calendar of PO1. This amount is also commensurate with the security for costs ordered by the tribunal for the jurisdictional phase in *García Armas*.[69]

40. At this stage of the arbitration, Canada requests the Tribunal to order Tennant to issue security for costs for the entire proceeding, since the issue of bifurcation has yet to be determined by the Tribunal. In the alternative, Canada requests that the Tribunal order Tennant to issue: (i) security for costs for the procedural and jurisdictional phase of the proceedings, at this stage; and (ii) security for costs for the remaining phases of the arbitration (5,456,903.04 CAD) at a later date in its decision on the request for bifurcation or its decision on jurisdiction, should the arbitration proceed to merits and damages.

IV. DISCLOSURE OF THIRD-PARTY FUNDING

A. Tennant Must Disclose Any Third-Party Funding Agreement

41. In addition to ordering security for costs, it is necessary to order Tennant to disclose the existence and terms of any third-party funding agreement it entered into to finance its claim in this arbitration. In *Muhammet Çap*, the tribunal stated that it could order the disclosure of a third-party funding agreement to protect the integrity of the arbitral process.[70] The use of third-party funding may indicate, among other things, that a claimant has insufficient funds of its own and

[67] **R-012**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Objection to Jurisdiction, 3 December 2012; **R-013**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Investor's Answer on Canada's Preliminary Objections on Jurisdiction, 19 February 2013; **RLA-001**, *Mesa – Award*, ¶¶ 70-80.

[68] Procedural Order No. 1, Annex I Procedural Calendar, pp. 15-17.

[69] The tribunal in *García Armas* ordered security for costs in an amount of 1,500,000 USD (approximately 1,965,150 CAD, as of the average exchange rate of July 2019) and reserved its right to modify such order if so required. **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶¶ 261-262.

[70] **RLA-044**, *Muhammet Çap and Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6) Procedural Order No. 3, 12 June 2015 ("*Muhammet Cap – Procedural Order No. 3*"), ¶ 9.

cannot pay a costs order in favour of the respondent.[71] The *García Armas* tribunal stated that many sources "have recognized the fact that the existence of financing agreements can be relevant to investment arbitrations in general, and especially when it comes to evaluating requests for interim measures to provide security for costs."[72] The tribunals in both *Muhammet Çap* and *García Armas* ordered the claimants in their respective cases to reveal the nature of their third-party funding agreements, including whether the third-party funder would pay an adverse costs order rendered against the claimants.[73] In its majority decision ordering the claimant to post security for costs, the *RSM* tribunal was also considered the possibility that the third-party funder would not pay a costs order rendered against the claimant.[74]

42. If Tennant has entered into a third-party funding agreement to finance all or part of its claim in this arbitration, it is necessary to disclose the existence of the third-party funding agreement, the name(s) and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any success that Tennant may achieve in this arbitration, or pay an adverse costs order against Tennant. A third-party funding agreement which stipulates that the funder

[71] **RLA-021**, UNCITRAL Note on Third-Party Funding, ¶ 31.

[72] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶¶ 196, citing multiple sources: **RLA-045**, Bernardo Cremades Sanz-Pastor and Antonias Dimolitsa, *Third-Party Funding in International Arbitration* (ICC Dossier, 2013), pp. 104, 111; **RLA-046**, Lisa Bench Nieuwveld and Victoria Shannon Sahani, *Third-Party Funding in International Arbitration*, 2nd edition (Kluwer Law International, 2017), p. 264; **RLA-047**, *Muhammet Çap & Sehil In_aat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan* (ICSID Case No. ARB/12/6) Decision on Objections to Jurisdiction by the Respondent, 13 February 2015, ¶ 285; **RLA-048**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14) Award, 18 August 2017, ¶ 108; **RLA-049**, Gary Born, *International Commercial Arbitration*, 2nd edition (Kluwer Law International, 2014) p. 2496; **RLA-050**, J. E. Kalicki, *Security for Costs in International Arbitration*, Transnational Dispute Management, Vol. 3, issue 5 (2006); **RLA-019**, *RSM – Decision on Saint Lucia's Request for Security for Costs*, ¶¶ 83-87; **RLA-013**, *South American Silver – Procedural Order No. 10* ¶ 78. Moreover, the Working Paper on the Proposed Amendments prepared by the ICSID Secretariat on the reform of the ICSID Arbitration Rules provides: "the existence of [third-party funding] coupled with other relevant circumstances may form part of the relevant factual circumstances considered by a Tribunal in ordering security for costs. This will be a fact-based determination in each case." (**RLA-051**, *Proposals for Amendment of the ICSID Rules – Working Paper*, ICSID Secretariat Volume 3, 2 August 2018, ¶ 267).

[73] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 250. **RLA-044**, *Muhammet Çap – Procedural Order No. 3*, ¶ 13.

[74] **RLA-019**, *RSM – Decision on Saint Lucia's Request for Security for Costs*, ¶ 86, where the tribunal stated that the claimant: "is funded by an unknown third party which, as the Tribunal sees reason to believe, might not warrant compliance with a possible costs award rendered in favor of respondent". In an assenting decision, Arbitrator Gavan Griffith also proposed that when a claim is funded by a third party, the burden should shift to the claimant to show why security for costs should not be ordered: **RLA-019**, *RSM – Decision on Saint Lucia's Request for Security for Cost*, Assenting Reasons of Gavan Griffith, ¶¶ 10 to 16.

will not pay an adverse costs order against the Claimant, as in *García Armas*, would increase the chances that Tennant cannot comply with an adverse costs order.[75]

B. Addressing Potential Conflicts of Interest

43. It is also necessary for Tennant to reveal the existence of any third-party agreement to address potential conflicts of interest arising in this arbitration.[76] Article 4.6 of the Terms of Appointment states:

> [e]ach member of the Tribunal confirms that he is, and shall remain, impartial and independent of the Parties. Each of the members of the Tribunal confirms that he has disclosed, to the best of his knowledge, all circumstances likely to give rise to justifiable doubts as to his impartiality or independence and that he will promptly disclose any such circumstances that may arise in the future.[77]

44. Article 9 of the 1976 UNCITRAL Rules requires each Arbitrator to disclose any circumstances likely to give rise to justifiable doubts about his or her impartiality or independence.[78] An arbitrator's impartiality is closely connected to whether he or she has a relationship with a third-party funder involved in an arbitration.[79] The *IBA Guidelines on Conflict of Interest in International Arbitration, 2014*, which offer guidance on conflicts of interest in international arbitration, state: "[t]hird-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be

---

[75] **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 197 and fn 372.

[76] **RLA-021**, UNCITRAL Note on Third-Party Funding, ¶ 17 observes: "[t]he question of conflicts of interest between arbitrators and third-party funders was one of the first issues that attracted attention in light of its potential impact on the enforceability of arbitral awards and, more generally, on the integrity of the arbitral process and the legitimacy of international arbitration." The *Muhammet Çap* tribunal noted: "the importance of ensuring the integrity of the proceedings and to determine whether any of the arbitrators are affected by the existence of a third-party funder." **RLA-044**, *Muhammet Cap – Procedural Order No. 3*, ¶ 9.

[77] Terms of Appointment, Article 4.6.

[78] Article 9 of the 1976 UNCITRAL Rules states:

> [a] prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

[79] **RLA-021**, UNCITRAL Note on Third-Party Funding, ¶ 20.

the equivalent of the party."[80] If one of the Arbitrators – or the law firm or chambers with which he works – has a relationship in other proceedings with a third-party funding Tennant's claim, then Tennant and the Arbitrator must disclose that relationship in this arbitration.[81] Thus, Tennant's disclosure of the existence of any third-party agreement, including the identity of any third-party funder, is a necessary pre-condition for the Arbitrators to be able to meet their requirements to disclose any circumstances likely to give rise to justifiable doubts about the Arbitrators' respective impartiality or independence under Article 9 of the 1976 UNCITRAL Rules.

45. In the absence of the Claimant's disclosure of such information at this time, Canada reserves its right to supplement this motion should Tennant reveal the existence of any third-party funding agreement financing its claim.

V. ORDER REQUESTED

46. Tennant appears to be an impecunious entity with no active business operations, revenues, or financial assets. It has brought a frivolous claim that is time-barred and virtually replicates one which Canada has already successfully defended after years of litigation, and in which Canada expended substantial personnel resources and millions of dollars, the costs of which it has been unable to recover. To protect Canada's right to recover a costs order in its favour and the integrity of these arbitral proceedings, Canada respectfully requests the Tribunal to order Tennant to:

[80] **RLA-029**, International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 October 2014, "Explanation to General Standard 6" subparagraph (b). General Standard 6 states: "(b) If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party."

[81] For instance, General Standard 7(a) of the *IBA Guidelines* requires a party to inform the tribunal and other parties of any relationship, direct or indirect, between the arbitrator and the party or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.[81] Moreover, General Standard 7(d) states: "[a]n arbitrator is under a duty to make reasonable enquiries to identify any conflict of interest, as well as any facts or circumstances that may reasonably give rise to doubts as to his or her impartiality or independence." (**RLA-029**, International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, 23 October 2014, General Standard 7).

a) Issue security for costs in the amount of 6,934,001.95 CAD, by depositing the security into an escrow account arranged by the Permanent Court of Arbitration within 90 days of the order, or the arbitral proceedings will be discontinued; and

b) Disclose the existence of any third-party funding agreement that Tennant entered to finance its claim in this arbitration, the name(s) and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Tennant may achieve in this arbitration, or pay an adverse costs order against Tennant.

August 16, 2019

Respectfully submitted on behalf of the Government of Canada,

Heather Squires
Lori Di Pierdomenico
Annie Ouellet
Susanna Kam
Mark Klaver
Johannie Dallaire
Maria Cristina Harris

ANNEX I

Total Costs Claimed in *Mesa v. Canada*[82]

Category of Cost	Amount (CAD)
Arbitration Costs	825,000
Legal Representation	4,225,547.67
Disbursements (Experts, Travel, Printing, etc.)	1,883,454.28
TOTAL:	**6,934.001.95**

[82] **R-007**, *Mesa – Canada's Costs Submission*, ¶ 4 and Annexes I and II.

ANNEX II

Summary of Costs Claimed for Procedural and Jurisdiction Phase

Category of Cost	Amount (CAD)
Arbitration Costs	**200,896.00**[83]
Legal Representation	705, 702.91[84]
	+ 500,000.00[85]
	= **1,205,702.91**
Disbursements (Experts, Travel, Printing, etc.)[86]	**70,500.00**
TOTAL:	**1,477,098.91**

[83] Initial deposit of 150,000 USD (see Terms of Appointment, ¶ 10.1), converted to Canadian dollars on the date paid.

[84] This amount reflects the legal representation costs incurred by Canada in the procedural and jurisdiction phase in *Mesa Power Group LLC* (i.e., Fiscal Years 2011-2012 and 2012-2013). **R-007**, *Mesa – Canada's Costs Submission*, Annex I.

[85] This amount includes an estimate of the additional legal representation costs incurred by Canada to prepare two rounds of written pleadings in the jurisdictional phase, and to prepare for the hearing on issues of bifurcation / preliminary motions and the hearing on jurisdiction, as provided for in the Procedural Calendar in PO1.

[86] This amount includes travel costs for Canada's legal team for three in-person hearings (Procedural Meeting of June 17, 2019, Hearing on Canada's Request for Bifurcation of January 14-15, 2020, and a Hearing on Jurisdiction); trial technology and graphics consultants' fees, additional meeting rooms at a hotel for Canada's preparation, and printing and courier costs for providing hard copies of materials to the Tribunal in accordance with PO1.

ANNEX III

Mesa Power Group, LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 4 October 2011	**Tennant Energy LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 1 June 2017**
¶ 10: "Ontario's government launched the Feed-In Tariff Program ("FIT Program") in 2009"	¶ 22: "Ontario's government launched its Feed-In Tariff Program ("FIT Program") in 2009"
¶ 11: "The Bruce to Milton Transmission project was a key element to enable power production in the Bruce Region under the FIT Program. This project was designed to allow the OPA to offer contracts under the FIT Program in the region from Bruce County to Milton, Ontario. The process was to offer 1,200 MW of renewable energy contracts with this region of the province of Ontario."	¶ 26: "The Bruce to Milton Transmission Project was a key element to enable power production in the Bruce Region under the FIT Program. This project was designed to allow the OPA to offer contracts under the FIT Program in the region from Bruce County to Milton, Ontario. The process was to offer 1,200 MW of renewable energy contracts with this region of the province of Ontario."
¶ 12: "Through long-term fixed price contracts with the OPA, the Ontario FIT Program guaranteed electrical grid access to renewable energy producers. The renewable energy producers in the FIT Program would receive a set price for renewable energy, and a guaranteed contract for the energy they produce. As a green energy supplier, Mesa Power needed to enter into contractual relations with the OPA to have the opportunity to conduct business with the local distribution companies and the transmission asset owners with whom electricity generators benefiting from the FIT Program need to work with in order to connect to the network."	¶ 23: "Through long-term fixed price contracts with the OPA, the Ontario FIT Program guaranteed electrical grid access to renewable energy producers. As a green energy supplier, Tennant Energy needed to enter into contractual relations with the OPA to have the opportunity to conduct business with the local distribution companies and the transmission asset owners with whom electricity generators benefiting from the FIT Program need to work with to connect to the network."
¶ 13: "…A successful applicant under the FIT Program would receive a Power Purchase Agreement (PPA) from the OPA, that guaranteed a set purchase price over a twenty year period (the "FIT Contract"). This guaranteed purchase price was based on 13.5 cents per kilowatt hour plus escalators."	¶ 25: "A successful applicant under the FIT Program would receive a Power Purchase Agreement (PPA) from the OPA, which guaranteed a set purchase price over a twenty year period (the "FIT Contract"). This guaranteed purchase price was based on 13.5 cents per kilowatt hour plus escalators.
¶ 16: "A proponent would only be offered a FIT Contract if there is sufficient transmission capacity available to connect the project. To determine whether the necessary connection resources were available to the applicant, the OPA provided tools designed to identify connection availability. Provided that the project was not exempt from the OPA's project capacity allocation, then all proposed projects were to be assessed within sixty	¶ 27: "A proponent would only be offered a FIT Contract if there is sufficient transmission capacity available to connect the project. To determine whether the necessary connection resources were available to the applicant, the OPA provided tools designed to identify connection availability. Provided that the project was not exempt from the OPA's project capacity allocation, then all proposed projects were to be assessed within sixty days of a

Mesa Power Group, LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 4 October 2011	**Tennant Energy LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 1 June 2017**
days of a complete application."	complete application."
¶ 18: "On December 21, 2010, the OPA issued its first-round priority ranking, and indicated that priority ranking was based on the acceleration-shovel readiness criteria."	¶ 29: "On December 21, 2010, the OPA issued its first-round priority ranking, and indicated that priority ranking was based on the acceleration - shovel-readiness criteria."
¶ 22: "On January 21, 2010, two Korean-controlled companies, Samsung C &T Corporation and Korea Electric Power Corporation, signed a $7 billion green energy investment agreement with Ontario's Premier and with Ontario's Minister of Energy (The Agreement is known as the *Green Energy Investment Agreement*). The existence of the agreement was public, but its terms and conditions were kept secret. The hidden agreement granted Samsung C&T and Korea Electric Power Corporation significantly better access to renewable energy transmission and generation than to other energy providers in the province of Ontario including other companies participating in the FIT Program."	¶ 30: "On January 21, 2010, two Korean-controlled companies, Samsung C&T Corporation and Korea Electric Power Corporation, signed a $7 billion green energy investment agreement with Ontario's Premier and with Ontario's Minister of Energy (The Agreement is known as the *Green Energy Investment Agreement*). […] The existence of the agreement was public, but its terms and conditions were kept secret. The secret agreement granted Samsung C&T and Korea Electric Power Corporation significantly better access to renewable energy transmission and generation than to other energy providers in the province of Ontario including other companies participating in the FIT Program."
¶ 24: "To satisfy Phase I of the Green Energy Investment Agreement, the Ontario Ministry of Energy directed the OPA on September 30, 2009 to hold in reserve 240 MW of transmission capacity in Haldimand County, Ontario and a total 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities with respect to proponents that signed province-wide framework agreements. As a result of the Green Energy Investment Agreement, the Korean Consortium received a guaranteed right of first refusal on transmission access in these transmission zones in the Province of Ontario."	¶ 39: "To satisfy Phase I of the Green Energy Investment Agreement, the Ontario Ministry of Energy directed the OPA on September 30, 2009 to hold in reserve 240 MW of transmission capacity in Haldimand County, Ontario and a total 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities with respect to proponents that signed province-wide framework agreements. Because of the Green Energy Investment Agreement, the Korean Consortium received a guaranteed right of the first refusal on transmission access in these transmission zones in the Province of Ontario."
¶ 25: "Pattern Energy Group LLC ("Pattern Energy") is an independent, fully integrated energy company that develops, constructs, owns and operates renewable energy and transmissions assets in the United States, Canada and Latin America. On April 18, 2011, Pattern Energy joined the Korean Consortium to acquire wind projects in Ontario. Pattern Energy joined into the benefits of the Green Energy Investment Agreement, by	¶ 56: "Pattern Energy Group LLC. ("Pattern Energy") is an independent, fully-integrated energy company that develops, constructs, owns and operates renewable energy and transmissions assets in the United States, Canada and Latin America. On April 18, 2011, Pattern Energy joined the Korean Consortium to acquire wind projects in Ontario. Pattern Energy joined into the benefits of the Green Energy Investment Agreement, by

Mesa Power Group, LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 4 October 2011	**Tennant Energy LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 1 June 2017**
jointly acquiring land from two wind development projects in the Regional Municipality of Chatham-Kent."	jointly acquiring land from two wind development projects in the Regional Municipality of Chatham-Kent."
¶ 26: "A few days later, on April 26, 2011, Pattern Energy partnered with Samsung Renewable Energy to acquire wind power projects in Ontario. Samsung noted that this successfully 'secured dedicated transmission capacity for these initial projects.'"	¶ 57: "A few days later, on April 26, 2011, Pattern Energy collaborated with Samsung Renewable Energy to acquire wind power projects in Ontario. Samsung noted that this successfully 'secured dedicated transmission capacity for these initial projects.'"
¶ 28: "On Friday, June 3, 2011, the OPA issued, without any prior notice, a new set of rules for awarding FIT Program contracts based on a directive it received from the Ontario Minister of Energy. The new rules made four fundamental changes: a. The Ontario Power Authority was directed to award 750 MW of FIT Program contracts in the Bruce Region transmission zone, and 300 MW in the West of London Region transmission zone; b. Each project was now to be provided the opportunity to change its interconnect point during a five day period commencing Monday, June 6, 2011; c. Projects in the Bruce or West of London Regions could change and select an interconnect point outside their own region, and could build long transmission lines outside of their own regions and into neighbouring regions; and d. Instead of evaluating projects on the previously published priority rankings for the region, the projects were now to be evaluated on a provincial wide ranking."	¶ 58: "On Friday, June 3, 2011, the OPA, without any prior notice, and contrary to its established practice, issued a new set of rules for awarding FIT Program contracts based on a directive it received from the Ontario Minister of Energy. The new rules made four fundamental changes: a. The Ontario Power Authority was directed to award 750 MW of FIT Program contracts in the Bruce Region transmission zone, and 300 MW in the West of London Region transmission zone; b. Each project was now to be provided the opportunity to change its interconnect point during a five-day period commencing Monday, June 6, 2011; c. Projects in the Bruce or West of London Regions could change and select an interconnect point outside their region, and could build long transmission lines outside of their regions and into neighboring regions; and d. Instead of evaluating projects on the previously published priority rankings for the region, the projects were now to be evaluated on a provincial-wide ranking."
¶ 33: "On July 4, 2011 the Investor consequently lost their priority ranking and were not offered FIT Program contracts, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects."	¶ 60: "On July 4, 2011 Skyway consequently was not offered a FIT Program Contract, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects."
¶ 36: "On August 2, 2011, the OPA announced that it would modify the termination provisions of the	¶ 69: "On August 2, 2011, the OPA announced that it would modify the termination provisions of the

Mesa Power Group, LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 4 October 2011	**Tennant Energy LLC v. Government of Canada (UNCITRAL) Notice of Arbitration, 1 June 2017**
FIT Program to ensure that any contract awarded could not be terminated under the existing four month termination provisions in the FIT Program."	FIT Program to ensure that any contract awarded could not be terminated under the existing four-month termination provisions in the FIT Program."
¶ 37: "On August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to Samsung C&T and its Consortium Partners. The Minister gave a one-year extension to the Consortium."	¶ 70: "On August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to Samsung C&T and its Consortium Partners. 50 The Minister gave a one-year extension to the Consortium."
¶ 49: "Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with Mesa Power's property rights and the conduct and operations of its investments. These measures were taken without any consultation or notice to Mesa Power or its investments."	¶ 61: "Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with Tennant Energy's property rights and the conduct and operations of its investments. These measures were taken without any consultation or notice to the Investor or its investments."
¶ 50: "The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better-treated companies and were taken in the context of an Ontario provincial general election to be held on October 6, 2011."	¶ 62: "The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better-treated companies and were taken in the context of an Ontario provincial general election to be held on October 6, 2011."