IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

PCA CASE NO 2018-54

BETWEEN

Tennant Energy LLC

INVESTOR

AND

Government of Canada

RESPONDENT

Response to Canada's Motion for Security for Costs and Disclosure of Funding

23 SEPTEMBER 2019

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

ReedSmith

Table of Contents

Investor's Response on the Motion for Security for Costs

1. In accordance with the Tribunal's directions in Procedural Order No. 1, Tennant Energy LLC ("Tennant" or the "Investor") submits its response to the Government of Canada's ("Canada" or the "Respondent")'s Motion for Security for Costs and for Disclosure of Third-Party Funding of 16 August 2019 (the "Application").

2. The Respondent's Application is without merit and should be dismissed.

I. NEITHER THE GOVERNING TREATY NOR THE GOVERNING RULES AUTHORIZE THE TRIBUNAL TO ORDER SECURITY FOR COSTS.

A. THE NAFTA DOES NOT EMPOWER THE TRIBUNAL TO ORDER SECURITY FOR COSTS.

3. As with any issue in relation to an investment tribunal's authority, an inquiry into whether the Tribunal has the power to order a party to pay security for costs must begin first and foremost with the text of the applicable treaty—in this case, the North American Free Trade Agreement ("NAFTA").[1]

4. Indeed, as Canada observes, "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***."[2] In other words, regardless of what the applicable rules provide in relation to security for costs, Canada needs to show that such a remedy is available under and consistent with NAFTA Article 1134. Yet, Canada has not made any attempt at such a showing.[3]

5. NAFTA Article 1134 provides:

> *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*

---

[1] NAFTA Article 1131, **CLA-042** ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

[2] Motion for Security for Costs, ¶ 12.

[3] Motion for Security for Costs, ¶ 13.

a recommendation.[4]

6. Notably, Article 1134 of NAFTA limits the measures that a tribunal may order to those that:

   a. preserve a right; or

   b. ensure the Tribunal's jurisdiction is made fully effective.

7. Turning to the first of these two categories, no party has a right to a costs award—a fact numerous tribunals have confirmed.[5] Rather, it is in the discretion of the Tribunal to award costs after it has deliberated and decided on the merits at issue and the evidence presented during the proceedings. Deciding that a right to a costs award exists at this nascent stage of the proceeding would hinge on several "hypothetical situations," the outcome of which the Tribunal does not know (including the final result of the proceedings and the Tribunal's ultimate decision on costs).[6] As the tribunal in *Maffezini v. Spain* noted, "[a] determination at this time which may cast a shadow on a party's ability to present its case is not acceptable."[7]

8. Moreover, whether the Investor posts security for costs has no bearing on the Tribunal's jurisdiction. The Tribunal still would maintain its power to decide the issues in dispute whether security for costs is ordered. The Tribunal is not charged with overseeing the parties' collection efforts or addressing their collection risk. Otherwise, it also would be appropriate for tribunals to ask states to post security for any amounts claimed to ensure that they are readily available for investors to collect in the event of an award.[8]

---

4 NAFTA Article 1134, **CLA-042**.

5 *See* footnote [21]. *See also Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Decision on Provisional Measures,¶¶ 21-23, 26-27, **CLA-053** ("the Respondent has only a mere expectation, not a right with respect to an eventual award of costs"); *Eskosol SPA in liquidazioine v Italy* (ICSID Case No ARB/15/50), Decision on Respondent's Request for Provisional Measures, 12 April 2017, ¶¶ 33-35, **RLA-041**.

6 *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, ¶¶ 16-18, **RLA-016**.

7 *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, ¶¶ 21, **RLA-016**.

8 *Eskosol SPA in liquidazioine v Italy* (ICSID Case No ARB/15/50), Decision on Respondent's Request for Provisional Measures, 12 April 2017, ¶ 35, **RLA-041** (remarking that "there is something analytically curious about the notion that an ICSID tribunal, while not empowered to protect a claimant's ability to collect on a possible merits award, nonetheless should intervene to protect a State's asserted "right" to collect on a possible costs award.").

9. Accordingly, an order to pay security for costs is not an interim measure envisaged by the drafters of NAFTA Article 1134 and correspondingly the state parties to the NAFTA. Indeed, no NAFTA tribunal ever even has considered a security for costs request,[9] much less granted one.

B. THE 1976 UNCITRAL RULES DO NOT EMPOWER THE TRIBUNAL TO ORDER A PARTY TO PAY SECURITY FOR COSTS.

10. Article 1120(1) of the NAFTA allows investors a choice of arbitration rules under which they can elect to bring their claims: the rules governing disputes brought before the International Centre for Settlement of Investment Disputes ("ICSID") pursuant to the terms of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), the Additional Facility Rules of the ICSID, or the UNCITRAL Arbitration Rules. In this case, the Investor chose to bring its claims under the 1976 UNCITRAL Arbitration Rules[10]—so it is those rules that govern this arbitration, and no other.

11. There is no provision in the 1976 UNCITRAL Arbitration Rules explicitly addressing security for costs. Nevertheless, Canada relies on Article 26(1) of the UNCITRAL Rules, which provides as follows:

> *At 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.*

12. In other words, Article 26(1) circumscribes the Tribunal's power to award interim relief to measures that are both (a) "necessary" and (b) "in respect of the subject-matter of the dispute." Accordingly, interim measures that are not related to "the subject-matter of the dispute" may not be awarded.

13. Security for costs requested here is not related to the subject-matter of this dispute—that is, whether Canada breached its obligations under NAFTA Chapter 11. Rather, security for costs requested relates to the Tribunal's power to apportion the costs of the arbitration between the parties in its final award. This is procedural in character.[11] It

---

9 Canada acknowledges this lack of precedent for the relief it seeks. *See* Motion, footnote 34.

10 Notice of Arbitration, p. 1.

11 Indeed, Canada's own courts have affirmed the procedural character of a security for costs order. *See Inforica Inc. v. CGI Info. Sys & Mgt Consultants Inc.*, [2009] ONCA 642 (Ontario Ct. App.), **CLA-054** (refusing arbitral

follows, therefore, that Article 26(1) of the 1976 UNCITRAL Rules does not empower tribunals to order payment of security for costs.[12]

14. Article 26(2) further confirms that security for costs was not envisaged among the interim measures that may be taken under Article 26(1). Article 26(2) provides that the Tribunal may "require security for the costs of such [interim] measures."[13] This indicates that the object of such measures is to preserve actual, concrete rights or property in dispute—and not a hypothetical final cost award, the existence and amount of which are yet to be determined. The example Article 26(1) provides of an appropriate interim measure, *i.e.*, "the conservation of goods forming the subject-matter of the dispute," supports this interpretation.[14]

15. Canada relies on the availability of security for costs under other arbitral rules as the basis for its assertion that such a measure is available here.[15] However, the Tribunal is bound to apply the 1976 UNCITRAL Arbitration Rules—and those rules alone.

16. Canada's reliance on the 2010 UNCITRAL Rules is misplaced; that those rules were modified only supports Tennant's position.[16] Recognizing that Article 26 of the 1976 UNCITRAL Rules, being "narrowly worded,"[17] raised numerous "difficult issues,"[18] the drafters of the 2010 UNCITRAL Rules revised Article 26 to remove the requirement that interim measures be "in relation to the subject-matter of the dispute." They also included new language specifically authorizing interim measures to "[p]rovide a means of preserving assets out of which a subsequent award may be

---

review of a security for costs order based on its procedural character); *see also RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs (Dissenting Opinion of Judge Edward Nottingham), 13 August 2014, ¶ 64, **RLA-019** (describing the interest protected by security for costs as "a *procedural* right not directly related to the subject matter of the dispute" (emphasis in the original)).

12 N. Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11(3) Am. Rev. Int'l Arb. 307, 344 (2000) **CLA-060** ("while the UNCITRAL Rules are sweeping in their authorization of interim measures deemed necessary in respect of the subject matter of the dispute, such preliminary steps would not seem to include the purely procedural security for costs order.").

13 Article 26(2), *United Nations Commission on International Trade Law (UNCITRAL)*, General Assembly Resolution 31/98, 1976, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf, **CLA-070.**

14 Article 26(1), *United Nations Commission on International Trade Law (UNCITRAL)*, General Assembly Resolution 31/98, 1976, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf, **CLA-070.**

15 Motion for Security for Costs, ¶ 10.

16 Motion for Security for Costs, ¶ 10, footnote 7.

17 J. Paulsson and G. Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, p. 9, **RLA-008**.

18 J. Paulsson and G. Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, ¶ 203, **RLA-008**.

satisfied."[19] Those new provisions only apply to arbitrations governed by the 2010 UNCITRAL Rules. The 2010 UNCITRAL Rules have no bearing on arbitrations, like this one, that are governed by the 1976 UNCITRAL Rules.

17. In fact, when UNCITRAL Working Group II revised Article 17 of the 1985 UNCITRAL Model Law, which was identical to Article 26 of the 1976 UNCITRAL Rules, it acknowledged that the provision had been revised specifically to allow tribunals to grant security for costs:

> *A proposal was made that paragraph (2)(c) should be amended expressly to refer to security for costs through an addition of the words "or securing funds" after the word "assets." Opposition was expressed to that proposal as it could connote that the corresponding provision in the UNCITRAL Arbitration Model Law was insufficient to provide for security for costs. The Working Group agreed that security for costs was encompassed by the words "preserving assets out of which a subsequent award may be satisfied."*[20]

18. The implication is that the pre-amendment language, which governs here, does not empower tribunals to order a party to pay security for costs.[21]

19. Canada's reliance on ICSID provisions on interim measures likewise is misguided.[22] A tribunal's power under the ICSID Convention and the ICSID Arbitration Rules to order payment of security for costs does not imply an equivalent power under Article 26 of the 1976 UNCITRAL Rules.

20. Article 47 of the ICSID Convention[23] and Article 39 of the ICSID Rules[24] provide that

---

19 Motion for Security for Costs, ¶ 10, footnote 7.

20 Report of Working Group II (Arbitration and Conciliation), U.N. Commission on International Trade Law (UNCITRAL), 47th Sess., at U.N. Doc. A/CN.9/641 (2007), ¶ 48, **CLA-069**.

21 *Cf.* C. Kee, *International Arbitration and Security for Costs – A Brief Report on Two Developments*, 17 Am. Rev. Int'l Arb. 273, 276 (2006), **CLA-066** (noting that Article 17 of the 1985 UNCITRAL Model Law was amended, because it did not grant tribunals the authority to grant security for costs).

22 Motion for Security for Costs, ¶ 10, footnotes 8 and 9. It is also notable that the UNCITRAL Working Group III document that Canada relies on to affirm tribunals' power to order security for costs cites to another document prepared by the Working Group that relies on the 2010 UNCITRAL Rules for that proposition. *See* Motion for Security for Costs, ¶ 10, footnote 11 (citing 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, ¶ 32, **RLA-021** (citing back to ¶ 33-37 of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Vienna, 29 October – 2 November 2018, **RLA-038**)). Unsurprisingly, neither the 1976 UNCITRAL Rules nor NAFTA is relied upon by the UNCITRAL Working Group III as a source for that power.

23 Motion for Security for Costs, ¶ 10, footnote 8.

24 Motion for Security for Costs, ¶ 10, footnote 9.

a tribunal may "recommend provisional measures which should be taken to preserve the respective rights of either party." Some tribunals have concluded that security for costs is not available in an ICSID arbitration because the expectation of a future costs award is too hypothetical to be considered a "right".[25] Setting that aside, Article 47 of the ICSID Convention does not contain the limitation in Article 26 of the 1976 UNCITRAL Rules that interim measures must be "in relation to the subject-matter of the dispute." Thus, any ICSID case law suggesting that a tribunal can order the payment of security for costs is simply inapplicable.

21. With this in mind, it is not surprising that Canada can cite only three cases for its proposition that the 1976 UNCITRAL Rules enable the Tribunal to order security for costs, *i.e.*, *Paushok v. Mongolia*, *South American Silver v. Bolivia*, and *García Armas v. Venezuela* [26]—or that all three are inapposite to the question here.

22. Canada neglects to mention that the *Paushok* tribunal did not address its power to award security for costs or that the 2010 UNCITRAL Rules, which are not applicable here, governed in *South American Silver*. Likewise, Canada fails to state two key facts about *García Armas*:

---

[25] *See*, e.g., *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 8 October 1999, ¶¶ 12-27, **RLA-016** ("we are unable to see what present rights are intended to be preserved"). *See also Lao Holdings N.V. v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Procedural Order No. 6, 26 June 2018, ¶¶ 34-35, **CLA-056**.; *Eskosol S.p.A. v. Italian Republic* (ICSID Case No. ARB/15/50), Procedural Order No. 3, 13 April 2017, footnote 51, **RLA-041** (citing *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10); Decision on Saint Lucia's Request for Security for Costs (Dissenting Opinion of Judge Edward Nottingham), 13 August 2014, ¶ 1, **RLA-019** (disagreeing with the majority that a security for costs order "is encompassed within the class of 'provisional measures' which may 'be taken to preserve the rights' of Respondent"); *Grynberg et al v. Grenada* (ICSID Case No. ARB/10/6), Decision on Security for Costs, 14 October 2010, footnote 9, (dissenting opinion) **RLA-018** ("the use of the words 'preserve' and 'preserved' in Article 47 and Rule 39 presupposes that the right to be preserved exists. Because Respondent has no existing right to an ultimate award of costs, the Tribunal is thus without jurisdiction"); L.E. Peterson, "In New Ruling, BIT Tribunal Holds That Alleged Right to Future Costs-Recovery is Not a Right Capable of Grounding an Interim 'Security for Costs' Request," Investment Arbitration Reporter, 26 September 2016, **CLA-059**, (reporting on unpublished decision in Valla Verde Sociedad Financieras S.L. v. Venezuela (ICSID Case No. ARB/12/18), Procedural Order No. 8, 21 September 2016, reportedly disavowing the tribunal's power to order provisional measures "to protect a right that as of yet does not exist").

[26] *See* Motion for Security for Costs, footnote 6 (citing *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, (UNCITRAL) Procedural Order No. 9 Decision on Provisional Measures, 20 June 2018, **RLA-006**, ¶ 187; *South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016, ¶ 52, **RLA-013**; and *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia* (UNCITRAL) Order on Interim Measures, 2 September 2008, ¶ 36, **RLA-014**).

a. As detailed in a paragraph artfully omitted from Canada's English translation of the case, the parties in *García Armas* did not contest the tribunal's authority to order interim measures;[27] and

b. the *García Armas* tribunal considered the application for security for costs under ***both*** the UNCITRAL Arbitration Rules ***and*** the ICSID Additional Facility Rules.[28]

23. The truth of the matter is that the one publicly available case in which parties disputed a tribunal's power to grant security for costs under the 1976 UNCITRAL Rules is *Invesmart v. Czech Republic*. In that case, the respondent state sought security for its costs from a funded claimant, who objected to the request. The tribunal rejected that request, affirming "that it did not have authority to make the order sought in the Respondent's application."[29]

II. EVEN IF AVAILABLE, SECURITY FOR COSTS IS UNWARRANTED.

A. SECURITY FOR COSTS IS ONLY WARRANTED IN EXCEPTIONAL CIRCUMSTANCES.

24. To obtain an order for security for costs, Canada has acknowledged that it must, at a minimum, establish that:

a. It has a reasonable possibility of prevailing in the case;

b. it would suffer irreparable harm if security for costs is not granted;

c. the harm it will suffer if security for costs is not granted substantially outweighs the harm such an order would entail for the Investor; and

d. its request must be granted as a matter of urgency.[30]

---

27 *Manuel García Armas v.Venezuela*, Procedural Order No. 9 Decision on Provisional Measures, ¶ 186, **RLA-006** (noting that "the parties accept that the Tribunal is empowered, in accordance with the applicable rules, to issue a cost guarantee as a provisional measure").

28 *Manuel García Armas v. Venezuela*, Procedural Order No. 9 Decision on Provisional Measures, ¶ 186, **RLA-006** (noting that "the parties accept that the Tribunal is empowered, in accordance with the applicable rules, to issue a cost guarantee as a provisional measure").

29 *Invesmart B.V. v. Czech Republic* (UNCITRAL), Award, 26 June 2009, ¶¶ 23-25, **CLA-057**.

30 Motion for Security for Costs, ¶ 16.

25. Due to these strict requirements, requests for security for costs in investment treaty arbitration, even when that form of interim measure is available pursuant to the governing rules, are almost always rejected. In fact, tribunals invariably note that an order to pay security for costs is granted only in exceptional circumstances—including in the very cases Canada uses to support its Application.

26. For instance, Canada does not mention it, but the tribunal in *García Armas*, *i.e.*, the primary case on which Canada relies for its request, recognized the "high threshold" for ordering the payment of security for costs and only granted the respondent's request in that case on account of circumstances it found to be "exceptional."[31] Likewise, the tribunal in *RSM v. Saint Lucia*, the only other tribunal to grant security for costs, also relied on "exceptional circumstances" to justify its decision[32]—a fact Canada artfully ignores.

27. Having failed to note the "exceptional circumstances" under which tribunals have granted security for costs, it is not at all surprising that Canada does not acknowledge, let alone address, the plethora of cases in which tribunals have rejected requests for security for costs because the requisite "exceptional circumstances" were not found.[33]

---

[31] *Manuel García Armas v. Venezuela*, Procedural Order No. 9, Decision on Provisional Measures, ¶¶ 250-251, **RLA-006**.

[32] *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs (Dissenting Opinion of Judge Edward Nottingham), 13 August 2014, ¶¶ 52, 75, **RLA-019**.

[33] *See, e.g., Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, ¶ 57, **RLA-015** ("[o]nly in the most extreme cases [should] the possibility of granting security for costs…be entertained at all."); *South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016, ¶¶ 59, 68, **RLA-013** (noting "agreement that the standard to grant the measures is very strict, given that it shall be granted only in case of extreme and exceptional circumstances"); *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶ 75, **RLA-019** (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Decision on Provisional Measures, 6 April 2007, ¶ 32, **CLA-058**); *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24-, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005, ¶ 38, **CLA-061**; *Saipem S.p.A. v. People 's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 175, **CLA-062**; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, 17 August 2007, ¶ 59, **CLA-063***; Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Motion for Security for Costs for Security for Costs. 14 October 2010, ¶ 5.17, **RLA-018**; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador's Motion for Security for Costs for Security for Costs, 20 September 2012, ¶ 44, **RLA-017**; *Burimi S.R.L. and Eagle Games SH. A. v. Republic of Albania* (ICSID Case

28. Lacking case law supporting its position, Canada relies on an argument based in part on the fact that the term, "exceptional circumstances," does not appear in Article 26 of the 1976 UNCITRAL Rules or NAFTA Article 1134.[34] However, this does not help; instead, it only highlights the fact, discussed in the last section, that neither Article 26, nor NAFTA Article 1134, contains language authorizing a grant of security for costs.

29. Canada also cites recent draft reform proposals pushed by states before UNCITRAL and ICSID as proof that exceptional circumstances should not be required.[35] Those unenacted proposals have no bearing on this arbitration. Moreover, being inherently one-sided, they may never be enacted. Of course, treaty-violating states would welcome a new requirement that investor claimants must pay security for costs up front—knowing that such large, upfront payments may deter those claimants from bringing potentially meritorious claims. However, denying investors, who often are bereft of funds because of the very actions of those states, access to justice will greatly impair the efficacy of the investor-state dispute settlement system.

30. Ultimately, in this case, Canada has a very specific reason for wanting to lower the bar for security for costs requests: As shown below, it knows that the "exceptional circumstances" that all other tribunals have required to grant such a request are simply not present here.

B. THE REQUIREMENTS FOR SECURITY FOR COSTS ARE NOT MET

1. AWARDING SECURITY FOR COSTS WOULD ENTAIL PREJUDGING MATTERS IN DISPUTE

31. As Canada has stated, to justify an order for security of costs, it must show that there is a reasonable possibility that it will receive a favourable result in this dispute.[36] It has not met that burden.

32. Canada's first reason for believing that it will prevail in this case is based upon a belief that the Tribunal lacks jurisdiction, because the claimant in *Mesa Power Group LLC v. Canada* brought similar claims against Canada in October 2011, and thus in Canada's view, the Investor must have known about its claims more than three years before June 1, 2017, *i.e.*, the date on which it filed its Notice of Arbitration.[37]

No. ARB/11/18), Procedural Order No. 2, 3 May 2012, ¶ 34, **CLA-064**).

34 Motion for Security for Costs, ¶¶ 21-22.

35 Motion for Security for Costs, ¶ 23.

36 Motion for Security for Costs, ¶ 25.

37 Motion for Security for Costs, ¶ 26.

33. However, the Investor did not have knowledge of the conduct giving rise to its claims until it became public after the release of information from *Mesa Power* on June 2014 and April 2015 and *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) in December 2016. Moreover, the Investor still lacks complete knowledge of the relevant state conduct, because the Canadian government has actively suppressed key information relating to the Feed-In Tariff ("FIT") Program and other energy projects in Ontario.[38] In fact, the Investor currently has pending requests to Canada to produce documents related to the *Windstream* proceedings and preserve relevant documents that are at risk of being destroyed.[39] These documents could lead to amended claims.

34. Furthermore, even if Canada's jurisdictional arguments somehow had such undebatable merit, they still would not constitute grounds for an order of security for costs. If its jurisdictional arguments are indeed as straightforward and compelling as it claims, Canada could bring them immediately and have this arbitration dismissed without any significant costs being incurred. Any costs Canada expends because of its delay in bringing those arguments are its own fault and not that of the Investor.

35. As for the merits of the Investor's case, Canada alleges that the Investor's claims are "frivolous," because they are supposedly similar to the claims brought in *Mesa Power* that were rejected by the majority of a NAFTA tribunal.[40] However, Canada fails to mention that the *Mesa Power* tribunal itself considered that case to be a "legitimate dispute"[41] and that Judge Charles Brower took the extraordinary step of writing a strenuous dissent to the tribunal's award to express his opinion that Canada had breached its NAFTA obligations calling Canada's behaviour "grotesque."[42] Setting aside the fact that there are distinctions between *Mesa Power* and the Investor's claim and that the Investor plans to submit new evidence in support of its claims, to the extent the two cases share common background facts, the remarks by the *Mesa Power* tribunal alone undermine Canada's assertion that the Investor's case is frivolous.

36. Furthermore, the success of the claimant in *Windstream Energy v. Canada* also underscores the underlying strength of the claim here. The *Windstream Energy* NAFTA claim required a consideration of the same Ontario FIT program at issue in

---

38 Notice of Arbitration, 16 August 2019, ¶¶ 113-123.

39 Investor's Request for Interim Measures, 16 August 2019.

40 Motion for Security for Costs, ¶ 27.

41 *Mesa Power Group v. Canada* (PCA Case No. 2012-17) Award, ¶ 704, **RLA-001**.

42 *Mesa Power Group v. Canada* (PCA Case No. 2012-17), Dissenting Opinion of Judge Charlie N. Brower, ¶¶ 4, 23, **CLA-055**; *see also* Albert Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in Mahnoush H Arsanjani and others (eds), *Looking to the Future* (Martinus Nijhoff 2011), ¶¶ 823-27, **CLA-068** (discussing the dearth of dissents in investment arbitration).

this arbitration. Canada fails to mention that it was found to have violated its NAFTA obligations in that claim.

37. Finally, and most importantly, Canada's Application fails to mention a crucial point—specifically, that tribunals will not grant requests for security for costs if it requires them to prejudge the issues in dispute. Indeed, in its discussion of *Garcia Armas*, Canada neglects to mention that the tribunal in that case, in laying out the "reasonable possibility of success" standard, emphasized that tribunals should not put themselves in a position where they are prejudging disputes:

> *[T]he Tribunal will analyze whether . . . there is prima facie a reasonable possibility that a favorable ruling will be issued to Venezuela that includes its representation costs . . . .* ***In doing so, the Tribunal will also analyze whether the determination about the Guarantee can be made without prejudging the dispute.***[43]

38. The *Garcia Armas* tribunal is not alone on this point. In *South American Silver v. Bolivia*, the tribunal refused to award security for costs based on jurisdictional issues that were in dispute and set to be briefed in pending submissions "because so doing would imply pre-judging Bolivia's jurisdictional objections."[44] Similarly, the tribunal in *Lao Holdings v. Laos* refused to take a position on Laos' assertion that the investor's claims were wholly without legal basis on the merits, because it "consider[ed] it premature to assess the validity of any legal claim asserted at this stage."[45]

39. Like those tribunals and others, the tribunal in *Orlandini v. Bolivia* also emphasized the inappropriateness of prejudging if the respondent would ultimately prevail and be allocated costs in the final award:

> *The Tribunal is reluctant to opine, at this stage of the proceedings, on whether there is a reasonable prospect of an award of costs in favor or against either Party. To the extent that there is a reasonable prospect of an award of costs against the Claimants, there is also a reasonable prospect of an award of costs against the Respondent. Any pronouncement by the Tribunal on the matter at this stage would be premature. Therefore, the Tribunal cannot issue a ruling on the Respondent's application for*

---

43 *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, Procedural Order No. 9, ¶ 191, **RLA-006** (emphasis added).

44 *South American Silver v. Bolivia*, Procedural Order No. 10, ¶ 55, **RLA-013**.

45 *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/16/2 and ADHOC/17/1), Decision on Respondent's Motion for Security for Costs for Security for Costs, 26 July 2018, ¶ 38, **CLA-056**.

security for costs on the basis of whether it is reasonable, or not, to expect that there would be an award of costs against the Claimants.[46]

40. The tribunal in *Maffezini* also expressed concerns about the prejudgment that an order of security for costs would entail. Its on-point analysis of this issue merits a full quotation:

> *The Respondent alleges that it may be difficult or impossible for it to obtain reimbursement of its legal costs and expenses, if the Claimant does not prevail and if the Tribunal orders the payment of additional costs and expenses to be paid by the Claimant.*
>
> *This claim contains several hypothetical situations.*
>
> *One, whether the Respondent will prevail and two, whether the Tribunal will deem the Claimant's case to be of such nature as to require it to pay the Respondent the costs and expenses it will incur.*
>
> *Obviously, at this point in the proceedings the Tribunal is unable to answer either of these two questions. These must remain, at least for the time being, as hypothetical issues concerning future events. While hypothetical issues are stimulating and academically challenging, they are beyond the ken of an arbitral tribunal determining real issues of fact and law.*
>
> *Respondent alleges that the Claimant's claim is totally without merit, forcing the Respondent to spend unnecessary money on the costs and expenses incurred in defending against the Claimant's claim.*
>
> *Expectations of success or failure in an arbitration or judicial case are conjectures. Until this Arbitral Tribunal hands down an award, no one can state with any certainty what its outcome will be. The meritoriousness of the Claimant's case will be decided by the Tribunal based on the law and the evidence presented to it.*
>
> *A determination at this time which may cast a shadow on either party's ability to present its case is not acceptable. It would be improper for the Tribunal to pre-judge the Claimant's case by recommending provisional measures of this nature.*[47]

41. Put simply, tribunals must be extremely careful not to prejudge the merits of the dispute before memorials, direct evidence and documents are presented, and cross-

---

[46] *Orlandini v. The Plurinational State of Bolivia* (PCA Case No. 2018-39) Decision on the Respondent's Motion for Security for Costs for Termination, Trifurcation, and Security for Costs, 9 July 2019, ¶ 142, **RLA-034**.

[47] *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, ¶¶ 15-21, **RLA-016**.

examination is conducted at a final hearing—but that is exactly what Canada asks the Tribunal to do by basing its security for costs request on the proposition that it will prevail on its jurisdictional objections and merits defenses.[48]

42. In summary, in circumstances, like here, where there is a dispute between the parties as to when the investor had knowledge of the objectionable conduct at issue, the legality of the respondent state's measures (including actions to suppress information) is disputed, and the investor continues to await information related to these disputed jurisdictional and merits issues, assessing the likelihood of the respondent state's success would be premature. Awarding security for costs would risk prejudging disputed propositions of fact and law before the Tribunal has the opportunity to review the arguments and evidence the parties are scheduled to present in scheduled submissions. On this basis alone, Canada's request can, and indeed should, be dismissed.

2. SECURITY FOR COSTS IS NOT NECESSARY TO AVOID IRREPARABLE HARM

43. Canada acknowledges that it also must demonstrate that irreparable harm will result for a security for costs order to be necessary. Yet. its own words suggest that it cannot meet this burden. Instead, Canada claims that it will "***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."[49]

44. By definition, the mere possibility that a party "may" not be able to recover a hypothetical award of costs in its favor does not amount to irreparable harm. Otherwise, security for costs would be granted in every proceeding contrary to the extraordinary nature of that relief. As the *Maffezini* tribunal observed in the passage quoted above, ordering costs simply because the respondent "may" prevail prejudges the merits of the case, including a decision on the allocation of costs that should be made only with the full procedural details and final outcome of a case in mind.[50] Put simply, the potential harm Canada invokes, *i.e.*, the prospect of an unpaid costs award, is hypothetical and, in any event, reparable through the courts of enforcement.

45. Tellingly, in the *Mesa Power* arbitration, while Canada successfully confirmed its award against Mesa Power, it never took any steps to enforce that award. Thus, Canada complains that the Investor may not pay a costs award—but it does not have a

---

48 Motion for Security for Costs, ¶¶ 26-27.

49 Motion for Security for Costs, ¶ 30 (emphasis added).

50 *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, ¶¶ 15-21, **RLA-016**.

track record of attempting to enforce those awards. Thus, it is not risk of nonpayment that truly concerns Canada; it is the ability to impose roadblocks to prevent investor claims that question its conduct.

46. Canada nonetheless argues that "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."[51] That statement, which relies on the minority view in *García Armas*, is inconsistent with the decisions of numerous investment treaty tribunals.

47. For instance, the tribunal in *Burmi v. Albania* held that mere financial difficulties are not sufficient to justify an order for security for costs, noting that it "would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed."[52] That same logic applies here, as there is nothing in NAFTA Article 1134 requiring an investor to demonstrate a certain amount of assets, let alone pay such an amount, in order to be able to bring a claim.

48. The tribunal in *RSM v. Grenada* was of a similar mindset, emphasizing that an investor's access to justice should not depend on a showing of sufficient financial resources:

> *In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order. First, as was pointed out in Libananco, it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment vehicle, with few assets, that was created or adapted specially for the purpose of the investment. Second, as was noted by the Casado Tribunal, it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award.*[53]

49. As these and other tribunals have explained, the existence of a special purpose vehicle with insufficient assets to pay a potential costs award does not suffice for security for costs. Indeed, if a state were able to demand security for costs anytime there was a risk that a potential costs award would not be paid, it would frustrate investor's access to justice. States could, as Canada did here, undermine the economic value of an investment by blocking its ability to generate cash flow and then demand that the less liquid investor post multi-million-dollar securities when those actions are tested on the

---

51 Motion for Security for Costs, ¶ 28.

52 *Burimi S.R.L. and Eagle Games SH.A v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, 3 May 2012, ¶ 41, **CLA-064**.

53 *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Security for Costs, 14 October 2010, ¶¶ 5.19, **RLA-018**.

ground that the investor lacks assets. This would enable states to benefit from their own wrongdoing.

50. With this in mind, tribunals have held that some further element rendering the situation truly exceptional is needed to award security for costs, such as a serial litigant with a history of unpaid costs awards. As the tribunal in *EuroGas v. Slovak Republic* explained:

> *[T]he underlying facts in [the RSM v. St. Lucia] arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of not complying with cost orders. As underlined by the arbitral tribunal, these circumstances were considered cumulatively.*[54]

51. The tribunal in *Orlandi v. Bolivia* went further, providing a series of examples of exceptional circumstances that might give grounds for an order of security for costs:

> *The Tribunal believes that such factors would include: (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behavior in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behavior.*[55]

52. In this case, Canada asserts that the Investor lacks assets, but it has been unable to identify any exceptional circumstances of the kind found by previous tribunals as justification for an order for security for costs. Canada's experience in the *Mesa Power* case is irrelevant, since the Investor was not a party in that arbitration. Indeed, were the Tribunal to punish the Investor for the faults of another, unrelated claimant in a separate case, just because it hired the same counsel, it would be a miscarriage of justice.

---

[54] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Requests for Provisional Measures, 23 June 2015, ¶ 122, **CLA-067**. *See also South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016, ¶¶ 59-61, ¶ 68, **RLA-013**.

[55] *Orlandini v. The Plurinational State of Bolivia* (PCA Case No. 2018-39) Decision on the Respondent's Motion for Security for Costs for Termination, Trifurcation, and Security for Costs, 9 July 2019, ¶¶ 143-144, **RLA-034**. *See* also *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Requests for Provisional Measures, 23 June 2015, ¶ 123, **CLA-067** ("financial difficulties and third-party funding—which has become common practice—do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs"); *Lao Holdings N.V. and Sanum Investments Limited v. Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/16/2 and ADHOC/17/1), Decision on Respondent's Motion for Security for Costs for Security for Costs, 26 July 2018, ¶¶ 40-41, **CLA-056**.

53. Likewise, Canada's allegation that the Investor has failed in previous business ventures, based solely on corporate name changes, does not reflect any bad faith on the Investor's part. To the extent that this is relevant at all, he company during its previous unsuccessful business venture had different management. Here, there is no history of the Investor being a serial litigant, defying court and tribunal orders, or failing to pay adverse costs awards. Put simply, the exceptional circumstances that tribunals have deemed necessary to grant security for costs do not exist.

3. THE SPECULATIVE RISK OF AN UNPAID COSTS AWARD DOES NOT SUBSTANTIALLY OUTWEIGH THE CERTAIN HARM OF SECURITY FOR COSTS

54. The certain harm to the Investor of granting Canada's request far outweighs the hypothetical cost that Canada "may" suffer if its request is not granted:

a. *First*, Canada's alleged harm rests on a hypothetical, *i.e.*, that the Investor will not pay an eventual adverse costs award, which itself rests on other hypotheticals, *e.g.*, that Canada will succeed on the merits, receive a favorable costs award, and the Investor will be unwilling or unable to pay that award. The Tribunal cannot give weight to this potential harm without prejudging the merits of the case. Nor has the Investor—which has paid its share of the costs in this arbitration and is not accused of any procedural misconduct or bad faith actions here or elsewhere—given the Tribunal any reason to believe that it intends to frustrate an adverse costs award.

b. *Second*, the harm that the Investor will suffer if it must pay security for costs is tangible. As it has limited assets that are unconnected to this litigation, requiring it to post security for costs would block its access to justice and hinder it from being able to proceed with the arbitration. Even if the Investor could convince a third party to post the required security, that avenue of relief would come at a cost that the Investor could not recover, *i.e.*, a decreased financial interest in any amounts awarded by the Tribunal. In circumstances like this one, where Canada's actions are responsible for the Investor's financial position, such a result would be unfair and prejudicial.

c. *Third*, the C$6.9 million Canada requests for security for costs is speculative and grossly excessive. As noted above, it would be prejudicial for the Tribunal to assume that Canada will receive any costs at all, much less 100% of its anticipated costs in arbitration. In *Mesa Power*, the case on which Canada relies for its estimate, the Tribunal awarded Canada only 30% of its costs, *i.e.*, C$1.8

million.[56] Canada seeks almost three times that in an arbitration it claims is frivolous. Indeed, if this case is as similar to *Mesa Power* as Canada claims, then there is no reason why it should need to spend even the same amount on it as it did on *Mesa Power*, as most of the work would be duplicative.

55. In summary, the harm of granting Canada's request is real, immediate, and permanent. It would either bar Investor from being able to bring to its claim or substantially increase the costs of continuing with its claim. At the same time, the harm that Canada alleges it will suffer if its request is not granted is hypothetical and exaggerated. Clearly, the former outweighs the latter.

4. CANADA HAS NOT DEMONSTRATED URGENCY

56. Finally, Canada has failed to demonstrate urgency, the last requirement that it asserts is needed to obtain an order for security for costs. Canada cites its ongoing costs of defending its position,[57] but these costs must be borne whether or not security for costs is required. Indeed, even if this case were discontinued, Canada's counsel—all of whom are government employees on a fixed salary—still would need to be paid.

57. Hence, the bulk of the costs of Canada's defense has nothing to do with this claim. In any event, a speculative risk, by definition, cannot give rise to the urgency needed for interim measures,[58] and the Tribunal could order security for costs at any point if the situation changes assuming it had power to do so (which it does not) and that all of the other factors are met (which they likely will not be, just as they are not met now).

III. THE INVESTOR SHOULD NOT BE ORDERED TO DISCLOSE THE EXISTENCE OF ANY THIRD-PARTY FUNDING AGREEMENT

58. Canada asks the Tribunal to order the Investor to disclose the existence of any funding agreement, the identity of any funder, and the details of any funding agreement. Canada's reasons for this request are that it allegedly needs to determine:

a. whether there is any conflict of interest between a funder and a member of the Tribunal;

b. the interest a funder might have in the outcome of the proceedings; and

---

56 Motion for Security for Costs, footnote 49.

57 Motion for Security for Costs, ¶ 35.

58 *Manuel García Armas v. Venezuela*, Procedural Order No. 9 Decision on Provisional Measures, ¶¶ 238-241, **RLA-006**.

c. whether a funder will pay a hypothetical adverse costs order against the Investor.[59]

59. The source of the Investor's funding is irrelevant to the issues in dispute.

60. To address Canada's concerns about a conflict of interest, the Investor is willing to disclose the identity of any funder to the Tribunal, if so ordered.[60] That transparency disclosure, if ordered, would enable the Tribunal to determine whether any conflict of interest exists and, if necessary, make any necessary disclosures to the parties.

61. Canada's concern about the level of financial interest a potential funder might have in the outcome of this proceeding is unwarranted. Tennant is the party at interest in this proceeding and has demonstrated that it is the owner of the investment that Canada treated unlawfully. The level of interest a funder might have in the outcome of the proceeding does not alter that fact.

62. Canada's request that the Tribunal order the Investor to disclose the terms of any funding agreement is likewise unwarranted. Funding agreements are confidential agreements between claimants and third parties that often contain proprietary information. Correspondingly, they need be disclosed only in exceptional circumstances, where the precise terms of that agreement are relevant.

63. *South American Silver Ltd v. Bolivia* is illustrative on this point. In that case, the tribunal dealt with a request to have the claimant disclose both the identity of its funder and the terms of the funding agreement.[61] The tribunal decided that the identity of the third-party funder should be disclosed for the purposes of transparency, but it refused to order the disclosure of the funding agreement's terms.[62] Rather, it stated that a tribunal should not mandate the disclosure of a funding agreement if the "exceptional circumstances" that might justify an order for security of costs do not clearly exist.[63] Otherwise, the terms of the agreement between the claimant and the funder should remain confidential.

---

59 Motion for Security for Costs, ¶¶ 42-43.

60 In this regard, it is notable that the disclosure recommendation in the *ICCA-Queen Mary Task Force on Third-Party Funding* does not extend to the opposing party in the arbitration. *See* Report of the *ICCA-Queen Mary Taskforce on Third-Party Funding*, Chapter 4, ¶ A.1, (April 2018), **CLA-065** (recommending disclosure of the identity of the funder to "the arbitrators and the arbitral institution or appointing authority (if any)").

61 *South American Silver v. Bolivia*, Procedural Order No. 10, **RLA-013**.

62 *South American Silver v. Bolivia*, Procedural Order No. 10, ¶ 79-80, **RLA-013**.

63 *South American Silver v. Bolivia*, Procedural Order No. 10, ¶ 81, **RLA-013**.

64. As explained above in great detail, the exceptional circumstances necessary for an order for security for costs do not exist in this case. Therefore, it is irrelevant whether a funder would assume responsibility for a costs award against the Investor.[64]

IV. PRAYER FOR RELIEF

65. On the basis of the foregoing, Tennant respectfully requests that the Tribunal:

    a. REJECT Canada's request to order the Investor to post security for costs;

    b. REJECT Canada's request that the Investor disclose its funding arrangements in this arbitration.

66. The Investor further requests that the Tribunal order the reimbursement of Tennant's reasonable legal and other costs incurred in connection with responding to the Application.

Respectfully submitted on behalf of the Investor, on September 23, 2019.

Barry Appleton

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

Edward M. Mullins
Ben Love

ReedSmith

[64] *South American Silver v. Bolivia*, Procedural Order No. 10, ¶¶ 80-81, **RLA-013**.