PCA Case No. 2021-26

IN THE MATTER OF AN ARBITRATION UNDER ANNEX 14-C OF THE CANADA-UNITED STATES-MEXICO AGREEMENT ("CUSMA"), CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA"), AND THE 2013 UNCITRAL ARBITRATION RULES

- between -

WINDSTREAM ENERGY LLC

(the "Claimant")

- and -

THE GOVERNMENT OF CANADA

(the "Respondent", and together with the Claimant, the "disputing parties")

PROCEDURAL ORDER NO. 6

Decision on Respondent's Motion for Costs Undertaking

The Arbitral Tribunal

Ms Wendy Miles KC (Presiding Arbitrator)
Prof. John Gotanda
Rt. Hon. Beverly McLachlin

Administering Authority

Permanent Court of Arbitration

Tribunal Secretary

Mr José Luis Aragón Cardiel

17 January 2024

This Procedural Order No. 6 is in response to the Respondent's Motion for Costs Undertaking in the arbitration between Windstream Energy LLC (the "**Claimant**") and the Government of Canada (the "**Respondent**") under Annex 14-C of the Canada-United States-Mexico Agreement, Chapter 11 of the North American Free Trade Agreement ("**NAFTA**") and the 2013 UNCITRAL Arbitration Rules (the "**UNCITRAL Rules**").

I. PROCEDURAL HISTORY

1. On 29 November 2023, the Respondent submitted its Motion for Costs Undertaking (the "**Motion for Costs Undertaking**") together with factual exhibits R-952 to R-962 and legal authorities RL-228 to RL-259.

2. On 14 December 2023, the Claimant submitted its Response to the Motion for Costs Undertaking ("**Response to Motion for Costs Undertaking**") together with factual exhibits C-2841 to C-2856 and legal authorities CL-218 to CL-241.

II. THE RESPONDENT'S MOTION FOR A COSTS UNDERTAKING

3. In its Motion for Costs Undertaking, the Respondent requested interim measures in the form of an order:

> … that the Claimant deliver a financial undertaking that ensures Canada may recover an eventual costs award against the Claimant. The undertaking would take the form of an enforceable contract between Canada and one or more of the persons or the entity funding the Claimant's claim, the members and principal investors in Windstream Energy LLC [the "**Undertaking**"].[1]

4. The Respondent further requested that the Tribunal:

   (a) "*invite the disputing parties to confer in attempt to agree on the terms of the undertaking*";[2] and

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1 Motion for Costs Undertaking, para. 1.

2 Motion for Costs Undertaking, para. 44.

(b) if they were unable to so agree, "*permit submission of their different proposals with a short explanation of positions*" and then "*decide the final terms of the undertaking for execution*".[3]

5. The Motion for Costs Undertaking was commenced in response to the Claimant's alleged practice of returning profits to its members ("*high-net worth individuals*"), and drawing on those members' funds on an as needed basis to fund its claim against the Respondent.[4] It submitted that the Undertaking would prevent the Claimant, its members and shareholders from gaining significantly from an award in the Claimant's favour whilst avoiding direct responsibility for an award in favour of the Respondent.[5] The Respondent referred to the Claimant's lack of assets and pointed out that an Undertaking was less onerous and more effective in safeguarding the integrity of the arbitration than security for costs.[6]

1. Tribunal Authority to Order Undertaking

6. The Respondent submitted that the Tribunal has powers to order interim measures pursuant to Article 26 of the UNCITRAL Rules and NAFTA Article 1134, as affirmed by Section 20.2 of Procedural Order No. 1.[7] In its view, NAFTA Article 1134 does not modify Article 26 of the UNCITRAL Rules in respect of the type of measure requested, which means Article 26 of the UNCITRAL Rules is the governing provision.[8]

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3 Motion for Costs Undertaking, para. 44.

4 Motion for Costs Undertaking, para. 2; Memorial, para. 63.

5 Motion for Costs Undertaking, para. 2.

6 Motion for Costs Undertaking, para. 3.

7 Motion for Costs Undertaking, paras 5-6, 11; David D Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edition, Oxford University Press, 2012) ("***Caron and Caplan***"), p. 518 (**RL-228**); *Merck Sharp & Dohme (I.A.) LLC v. Republic of Ecuador*, PCA Case No. 2012-10 ("***Merck v. Ecuador***"), First Decision on Interim Measures, 7 March 2016, para. 65 (**RL-233**); *Manuel Garcia Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08 ("***Garcia Armas***"), Procedural Order No. 9 – Decision on Provisional Measures, 20 June 2018, para. 201 (**RL-234**).

8 Motion for Costs Undertaking, paras 9-10; Meg N. Kinnear, Andrea K. Bjorklund, and John F.G. Hannaford, *Investment Disputes under NAFTA – An Annotated Guite to NAFTA Chapter 11* (Kluwer Law International, 2006), p. 1134-4 (**RL-232**).

7. The Respondent referred in particular to the following Article 26 provisions:

(a) Article 26(1) , which states that "*[t]he arbitral tribunal may, at the request of a party, grant interim measures*";[9]

(b) Article 26(2), which defines interim measures broadly as "*any temporary measure*" issued by the tribunal before the final award (except as modified by NAFTA Article 1134 in respect of attachment orders and enjoinder, neither of which is engaged in this case);[10]

(c) Article 26(2)(b), which establishes in particular that a tribunal may order an interim measure to "*[t]ake action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm or (ii) prejudice the arbitral process itself*";[11] and

(d) Article 26(3), which sets out the conditions to be met for an interim measure.[12]

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9 Motion for Costs Undertaking, para. 7.

10 Motion for Costs Undertaking, para. 8; Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International, 2018) ("***Paulsson and Petrochilos***"), p. 226 (**RL-229**).

11 Motion for Costs Undertaking, para. 11; Article 26(2)(b) of the UNCITRAL Rules (emphasis added by the Respondent).

12 Motion for Costs Undertaking, para. 8.

8. According to the Respondent, Article 26(2) is not limited to certain interim measures and does not exclude others.[13] Consequently, the Respondent asserted that ordering the Claimant to deliver the Undertaking is within the Tribunal's discretionary powers.[14]

9. The Respondent proceeded to set out the conditions required by Article 26(3), as summarised below.[15]

2. Article 26(3) of the UNCITRAL Rules

10. The Respondent set out Article 26(3) of the UNCITRAL Rules as follows:

> (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.[16]

11. The Respondent submitted on the basis of commentary and earlier arbitral awards that Article 26(3) "*has been found to contain four conditions for interim measures*", as follow:

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13 Motion for Costs Undertaking, paras 11-12; *Caron and Caplan*, p. 518 (**RL-229**); *Paulsson and Petrochilos*, pp. 223-224 (**RL-229**); *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54 ("***Tennant v. Canada***"), Procedural Order No. 4, 27 February 2020, paras 16, 166 (**RL-236**); *Sergei Viktorovich Pugachev v. Russian Federation, ad hoc*, UNCITRAL ("***Pugachev***"), Interim Award, 7 July 2017 (**RL-237**); *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 ("***Quiborax***"), Decision on Provisional Measures, 26 February 2010, para. 117 (**RL-238**); *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 ("***Biwater Gauff***"), Procedural Order No. 1, 31 March 2006, para. 71 (**RL-239**); *RSM Production Corporation v. Saint Lucia*, ICSID Case No ARB/12/10 ("***RSM v. Saint Lucia***"), Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, para. 86 (**RL-240**); *RSM v. Saint Lucia*, Decision on Annulment, 29 April 2019, paras 183-201 (**RL-241**); *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2 ("***Lighthouse***"), Procedural Order No. 2, 13 February 2016, para. 56 (**RL-242**).

14 Motion for Costs Undertaking, para. 12.

15 Motion for Costs Undertaking, paras 15-36.

16 Motion for Costs Undertaking, para. 13.

(a) necessary to prevent substantial harm;

(b) urgent;

(c) proportionate; and

(d) subject to the applicant's reasonable possibility of success on the merits.[17]

12. First as to whether or not the interim measure is necessary, the Respondent made the following points:

(a) it will suffice for the Respondent to prove that the order is necessary to prevent substantial prejudice that is likely, as opposed to actual prejudice;[18]

(b) the possibility of monetary compensation does not automatically eliminate the need for interim measures;[19]

(c) costs of defending investor-state claims are significant;[20]

(d) denial of Respondent's right to recover legal costs would constitute substantial harm, which would not be adequately reparable by an award of damages;[21] and

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17 Motion for Costs Undertaking, para. 14; *Garcia Armas*, Procedural Order No. 9 – Decision on Provisional Measures, 20 June 2018, para. 191 (**RL-234**); *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia, ad hoc*, UNCITRAL ("***Paushok***"), Order on Interim Measures, 2 September 2008, para. 212 (**RL-243**).

18 Motion for Costs Undertaking, para. 15.

19 Motion for Costs Undertaking, para. 15; *Paulsson and Petrochilos*, p. 221; *Paushok*, Order on Interim Measures, 2 September 2008, para. 45 (**RL-243**); *Behring International Inc. v. Islamic Republic Iranian Air Force, Iran Aircraft Industries and The Government of Iran*, Iran United States Claims Tribunal Case No. 382, Interim and Interlocutory Award, 21 June 1985 (**RL-245**); *Aegean Sea Continental Shelf Case (Greece v. Turkey)*, Interim Protection order of 11 September 1976, Separate Opinion of President Jiménez de Aréchaga, I.C.J. Reports 1976, p. 3, at pp. 16-17 (**RL-246**).

20 By way of example, the Respondent refers to its legal costs of CAD 8,261,052.35 in *Windstream I* (Motion for Costs Undertaking, para. 16).

21 Motion for Costs Undertaking, para. 16; *Lighthouse*, Procedural Order No. 2, 13 February 2016, para. 57 (**RL-242**); *RSM v. Saint Lucia*, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, paras 72-73 (**RL-240**).

(e) therefore, the Undertaking is necessary to protect the integrity of the arbitral process.[22]

13. The Respondent raised four evidential points in support of its concern that it was likely to lose its right to recover legal costs, as follow:

(a) the Claimant has not provided any evidence to suggest that it has sufficient funds to pay its legal costs in the event of an adverse award, despite repeated requests;[23]

(b) evidence as to the Claimant's financial situation suggests that it did not retain monies received pursuant to the *Windstream I* Award, using the vast majority to pay its bills and returning its members' capital with interest and made equity payments to shareholders;[24]

(c) contrary to the Claimant's contentions,[25] the Claimant's members act as third-party funders, providing capital on an as-needed basis to fund the Claimant's claim, while being shielded from liability to pay an adverse costs award under the Windstream Energy Limited Liability Company Agreement, leaving the Respondent unable to enforce a cost award against them should the Claimant refuse to pay;[26] and

(d) the Claimant refused the Respondent's request for a binding and enforceable undertaking from the Claimant's members requiring them to pay any costs award in the Respondent's favour.[27]

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22 Motion for Costs Undertaking, para. 16; *Garcia Armas*, Procedural Order No. 9 – Decision on Provisional Measures, 20 June 2018, para. 201 (**RL-234**); *OOO Manolium-Processing v. Republic of Belarus*, PCA Case No. 2018-06, Decision on Claimant's Interim Measures Request, 7 December 2018 (**RL-247**).

23 Motion for Costs Undertaking, paras 18-21.

24 Motion for Costs Undertaking, paras 22-24.

25 Letter from Emily Sherkey (Torys LLP) to Rodney Neufeld (Government of Canada), 15 September 2023, p. 2 (**R-953**).

26 Motion for Costs Undertaking, paras 25-27.

27 Motion for Costs Undertaking, para. 28.

14. As a consequence, the Respondent submitted that it is left with no other option but to seek an order from the Tribunal.

15. The Respondent referred to two recent cases involving states that were unable to enforce cost orders against unsuccessful claimants backed by wealthy investors,[28] as well as commentary reflecting other states' similar experiences.[29]

16. Second, as to urgency, the Respondent submitted that urgency was found to exist where a question could not await the outcome of the award on the merits.[30] According to the Respondent, if the Tribunal were to wait until it issued its award in this arbitration before protecting the Respondent's right to recover legal costs (if applicable), it would be too late to prevent the Claimant from refusing or being unable to pay.[31] The Respondent argued that it has made every effort to resolve the matter of its right to costs recovery, as early as possible and without involving the Tribunal, and therefore there is no basis for the Claimant to argue lack of urgency due to delay by the Respondent.[32]

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28 Motion for Costs Undertaking, paras 40-41; *Tennant v. Canada*, Final Award, 25 October 2022, paras 476(e) and(f) (**CL-197**); *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17 ("***Mesa Power v. Canada***"), Canada's Submission on Costs, 3 March 2015, para. 4 and Annexes I and II (**RL-256**).

29 Motion for Costs Undertaking, para. 42; UNCITRAL Working Group III, 36th Session 29 October – 2 November 2018, Note by the Secretariat on Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration, UN Doc A/CN.9/WG.III/WP.153, para. 33 (**RL-257**); ICSID, Proposals for Amendment of the ICSID Rules – Synopsis, ICSID Secretariat Volume 1, 2 August 2018, para. 51 (**RL-258**); ICSID, Proposals for Amendment of the ICSID Rules, November 2021, p. 53, Rule 53 ("Security for Costs) (**RL-259**).

30 Motion for Costs Undertaking, para. 29; *Paulsson and Petrochilos*, p. 219 (**RL-229**); *Burlington Resources Inc. et al. v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, 29 June 2009, para. 73 (**RL-248**); *Biwater Gauff*, Procedural Order No. 1, 31 March 2006, para. 76 (**RL-239**).

31 Motion for Costs Undertaking, para. 30; *Paulsson and Petrochilos*, p. 222 (**RL-229**); *Abaclat et al. v. Republic of Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 11, 27 June 2012, para. 20 (**RL-249**); *Quiborax*, Decision on Provisional Measures, 26 February 2010, para. 153 (**RL-238**).

32 Motion for Costs Undertaking, para. 31.

17. Third, as to proportionality, the Respondent submitted that the Undertaking is proportionate based on the "*balance of hardships*" or proportionality test contained in Article 26(3) of the UNCITRAL Rules,[33] because:

    (a) the potential harm caused to the Respondent (*i.e.*, loss of its right to compensation for its legal costs should the Claimant fail to pay) outweighs any hardship on the side of the Claimant associated with the Undertaking;[34]

    (b) unlike a payment of security for costs, the Undertaking requires no financial outlay by the Claimant or its members at this stage;[35] and

    (c) the interim measure does not interfere with the Claimant's access to justice as it only affects the Claimant's and its members' finances if and when the Tribunal were to render an adverse costs award.[36]

18. Fourth, as to reasonable possibility of success on the merits,[37] the Respondent submitted that the standard applicable to the Tribunal's assessment of the Respondent's underlying defence/s requires that:

    (a) a tribunal may assume the facts alleged by the applicant for the interim measure as proven to determine if it could prevail;[38] and

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33 Motion for Costs Undertaking, para. 32; *Paushok*, Order on Interim Measures, 2 September 2008, paras 61, 79 (**RL-243**); *Eugene Kazmin v. Republic of Latvia*, ICSID Case No. ARB/17/5, Procedural Order No. 6 – Decision on the Respondent's Application for Security for Costs, 13 April 2020, para. 61 (**RL-250**).

34 Motion for Costs Undertaking, paras 32-34.

35 Motion for Costs Undertaking, para. 33.

36 Motion for Costs Undertaking, para. 33.

37 Motion for Costs Undertaking, paras 35-36.

38 Motion for Costs Undertaking, para. 35; *Paushok*, Order on Interim Measures, 2 September 2008, para 55 (**RL-243**).

(b) claims must not be, on their face, frivolous or manifestly outside the tribunal's competence.[39]

19. On the basis of that standard, the Respondent submitted that its numerous credible bases for the Tribunal to dismiss the claim for want of jurisdiction, grounds of inadmissibility or absence of merit are sufficient to show that the Respondent has a reasonable possibility of success.[40] Consequently, it submitted, it meets the requirements for an interim measure under Article 26(3)(b) of the UNCITRAL Rules.

20. The Respondent proceeded to set out its argument as to why the Undertaking is an appropriate measure "*to* ***hold the Claimant accountable*** *and* ***avoid growing prejudice*** *to the arbitral process*"[41] It submitted that:

(a) the Claimant's failure to produce any financial information and its refusal to seek undertakings from "*the persons or entities funding its claim*", leaves the Respondent with no choice;[42]

(b) if the Claimant is unable to pay an adverse costs order "***or if it returns any funds it has post-litigation to its members***", the Respondent would be left with no ability to recover its costs;[43]

(c) the Claimant's representation that there is no evidence that it would not pay an adverse costs order "*is insufficient*";[44]

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39 Motion for Costs Undertaking, para. 35; *Pugachev*, Interim Award, 7 July 2017, para. 310 (**RL-237**); *Garcia Armas*, Procedural Order No. 9 – Decision on Provisional Measures, 20 June 2018, para. 202 (**RL-234**).

40 Motion for Costs Undertaking, para. 36.

41 Motion for Costs Undertaking, paras 37-42 (emphasis added).

42 Motion for Costs Undertaking, para. 37.

43 Motion for Costs Undertaking, para. 37 (emphasis added).

44 Motion for Costs Undertaking, para. 37.

(d) an enforceable undertaking between the Respondent and "*one or more members [of the Claimant] is the appropriate remedy*";[45]

(e) it accepted that although such an order "*would be directed to the Claimant*", it "*may nevertheless affect third parties, such as the members and other shareholders who stand to gain from an award to the Claimant*";[46]

(f) however, "*a tribunal does have the power to order a party in the arbitration to take steps which involve third parties*";[47]

(g) in *Sukyas v. Romania*, two identically constituted under the UNCITRAL Rules ordered an undertaking similar to the one requested by the Respondent (*i.e.*, against counsel funding the arbitration);[48] and

(h) two recent NAFTA cases, *Tennant Energy LLC v. Canada* and *Mesa Power LLC v. Canada*, illustrate the substantial harm that the Respondent could suffer if the relief were not granted.[49]

III. THE CLAIMANT'S POSITION

21. The Claimant submitted that the Respondent's Motion for Costs Undertaking must be dismissed because "*the Tribunal has no jurisdiction to order an undertaking to be imposed against non-parties to this arbitration*",[50] and in any event, it has failed to

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45 Motion for Costs Undertaking, para. 38.

46 Motion for Costs Undertaking, para. 38; UNCITRAL, Report of the Working Group on Arbitration and Conciliation on the Work of its 32nd Session, UN Doc A/CN.9/468, p. 13, para. 64 (**RL-253**); *Caron and Caplan*, p. 517 (**RL-228**).

47 Motion for Costs Undertaking, para. 38; *Paulsson and Petrochilos*, p. 229 (**RL-229**) citing to *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal*, ICSID Case No. ARB/08/20, Decision on the Application for Provisional Measures, 9 December 2009, para. 52 (**RL-254**).

48 Motion for Costs Undertaking, para. 39; *Jak Sukyas v. Romania*, PCA Case No. 2020-53/2020-54 ("***Sukyas***"), Procedural Order No. 2, 30 January 2022 (**RL-255**).

49 Motion for Costs Undertaking, paras 40-41; *Tennant v. Canada*, Final Award, 25 October 2022, para. 476(e) and (f) (**CL-197**), and *Mesa Power v. Canada*, Canada's Submission on Costs, 3 March 2015, ¶ 4 and Annexes I and II (pp. 19-21) (**RL-256**).

50 Response to Motion for Costs Undertaking, para 7.

establish the exceptional circumstances required to obtain security for costs, let alone the higher threshold necessary for a measure affecting third parties to the arbitration.[51]

1. Tribunal Jurisdiction Over Relief Against Third Parties

22. According to the Claimant, an order that it "*negotiate a contractual undertaking with Canada and cause one or more of its members … to enter into it*", constitutes an extraordinary request for relief that must be dismissed for jurisdictional reasons because it requires relief against a third party.[52] In this regard, it submitted as follows:

(a) it is well-established as stated in commentary and earlier awards that tribunals do not have jurisdiction over third parties to an arbitration;[53]

(b) this is reflected in the requirement under Article 26(2) of the UNCITRAL Rules that an interim measure must be directed at "*a party*";[54]

(c) there is no authority to support the Respondent's position in this regard;[55]

(d) the Respondent sought to rely on earlier awards that accepted tribunal power under Article 26(2) of the UNCITRAL Rules to order the Claimant to negotiate an undertaking "*to be provided by the persons or the entity funding its claim*",[56] but

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51 Response to Motion for Costs Undertaking, paras 1-7.

52 Response to Motion for Costs Undertaking, paras 52-65.

53 Response to Motion for Costs Undertaking, paras 54, 56; *Paulsson and Petrochilos*, p. 228 (**RL-229**); Gary Born, *International Commercial Arbitration* (3rd ed., Kluwer Law International, 2021), p. 2626 (**CL-241**); *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador II*, PCA Case No. 2009-23, Third Interim Award on Jurisdiction and Admissibility, 27 February 2012, para. 4.64.

54 Response to Motion for Costs Undertaking, para. 55 (**CL-184**); *Atlantic Richfield Company v. Islamic Republic of Iran, the National Iranian Oil Company, Lavan Petroleum Company*, Iran United States Claims Tribunal Case No. 396, Interim Award, 18 April 1985, para. 11 (**CL-219**).

55 Response to Motion for Costs Undertaking, paras 57-60.

56 Motion for Costs Undertaking, paras 11-12.

these merely restate that tribunals have wide discretion to issue interim orders under Article 26(2) of the UNCITRAL Rules;[57]

(e) the Motion for Costs Undertaking "*clearly [amounts to] a request for an order that will be binding upon non-parties*", even if the Claimant were ordered to procure it;[58]

(f) none of the authorities relied upon by the Respondent illustrates that it is permissible for the order to be "*directed to the Claimant*" and still "*affect third Parties*":

i. the commentary by Paulsson and Petriochilos refers to examples of orders for a party to direct a third party to do something in the ordinary course of business, such as a bank releasing funds;[59]

ii. *Millicom v. Senegal* ordered the respondent to suspend domestic proceedings and invited it to send a joint suspension application to the local court with the claimant (*i.e.*, both parties to the proceedings);[60] and

iii. *Sukyas v. Romania* involved the claimant itself notifying the respondent and tribunal that a third-party law firm funder would be responsible for paying any adverse costs order, without being ordered to do so.[61]

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57 Response to Motion for Costs Undertaking, para. 58; Caron and Caplan, p. 518 (RL-228); *Merck v. Ecuador*, First Decision on Interim Matters, 7 March 2016, para. 65 (**RL-233**); *Garcia Armas*, Procedural Order No. 9 – Decision on Provisional Measures, 20 June 2018, para. 201 (**RL-234**).

58 Response to Motion for Costs Undertaking, para. 59.

59 Response to Motion for Costs Undertaking, para. 60a); *Paulsson and Petrochilos*, p. 229 (**RL-229**).

60 Response to Motion for Costs Undertaking, para. 60b); *Millicom International Operations B.V. and Sentel GSM SA v. The Republic of Senegal* (ICSID Case No. ARB/08/20) Decision on the Application for Provisional Measures, 9 December 2009, paras 2, 36, 52 (**RL-254**).

61 Response to Motion for Costs Undertaking, para. 60b); *Sukyas*, Procedural Order No. 2, 30 January 2022, paras 178-180 (**RL-255**).

23. According to the Claimant, the current Motion for Costs Undertaking also requires the Tribunal to pierce the corporate veil, going "*further than an order for security for costs against a claimant, as it seeks to establish a precedent for the granting of a personal undertaking from a claimant's shareholder, owner and/or funder*".[62]

2. "*Exceptional Circumstances*" Threshold

24. In the event that the Tribunal were to find it has jurisdiction, the Claimant accepted in principle that the Tribunal "*has power to order security for costs*" pursuant to Article 26 of the UNCITRAL Rules, based on the four factors therein.[63] However, it submitted that the standard is "*very high*" and the Respondent must show "*extreme and exceptional circumstances*" in order to obtain such an order.[64]

25. The Claimant submitted that tribunals in earlier decisions proceeded on the basis that parties have an obligation to comply with costs awards,[65] and that, absent evidence to the contrary, it must be presumed that a party will act in good faith.[66] In particular, it referred to:

(a) examples provided by the *Tennant* tribunal of what could constitute exceptional circumstances, including:

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62 Response to Motion for Costs Undertaking, para. 61.

63 Response to Motion for Costs Undertaking, paras 10-11; *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 172 (**RL-236**).

64 Response to Motion for Costs Undertaking, para. 12; *South American Silver Limited v. The Plurinational State of Bolivia*, PCA Case No. 2013-15 ("***South American Silver***"), Procedural Order No. 10 (Security for Costs), 11 January 2016, paras 59, 61 (**RL-252**); *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 173 (**RL-236)**; *EuroGas Inc. and Belmont Resources v. Slovak Republic*, ICSID Case No. ARB/14/14 ("***EuroGas***"), Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures), 23 June 2015, para. 121 (**CL-233**); *Commerce Group Corp. and San Sebastian Gold Mines, Inc. v. Republic of El Salvador*, ICSID Case No. ARB/09/17 ("***Commerce Group***"), Decision on El Salvador's Application for Security of Costs (Annulment Proceeding), 20 September 2012, paras 44-45 (**CL-221**).

65 Response to Motion for Costs Undertaking, para. 12; *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 182 (**RL-236)**.

66 Response to Motion for Costs Undertaking, para. 12; *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 182 (**RL-236)**.

i. a claimant's track record of non-payment of cost awards in prior proceedings;

ii. a claimant's improper behaviour in the proceedings at issue;

iii. evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; and

iv. other evidence of a claimant's bad faith or improper behaviour;[67]

(b) it being "*well-established*" that a respondent "*must do more than show a claimant lacks financial assets of that there is a lack of financial information to show sufficient assets*", citing to various tribunal decisions in support:[68]

i. *Lighthouse v. Timor-Leste*, that "*even if it were assumed that the Claimants have insufficient assets, this would not be enough in and of itself*";[69]

ii. *Ipek v. Turkey*, that the claimant's insufficient funds "*was insufficient to justify an order for security for costs*";[70]

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67 Response to Motion for Costs Undertaking, para. 13; *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 174 (**RL-236)**; *The Estate of Julio Miguel Orlandini-Agreda and Compañia Minera Orlandini Ltda. v. The Plurinational State of Bolivia*, PCA Case No. 2018-39 ("***Orlandini***"), Decision on the Respondent's Applications for Termination, Trifurcation and Security for Costs, 9 July 2019, para. 143 (**CL-237**).

68 Response to Motion for Costs Undertaking, para. 14; *Lighthouse*, Procedural Order No. 2, 13 February 2016, paras 58, 61 (**RL-242**); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8 ("***Libananco***"), Decision on Preliminary Issues, 23 June 2008, paras 58-59 (**CL-227**); *RSM Production Corporation et al. v. Grenada*, ICSID Case No. ARB/10/6 ("***RSM v. Grenada***"), Decision on Respondent's Application for Security for Costs, 24 October 2010, paras. 5.19-5.21 (**CL-233**); *Ipek v. Republic of Turkey*, ICSID Case No. ARB/18/18 ("***Ipek***"), Procedural Order No. 5, 19 September 2019, para. 10 (**CL-225**); *South American Silver*, Procedural Order No. 10 (Security for Costs), 11 January 2016, paras 61-63 (**RL-252**); *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 178 (**RL-236)**; *Orlandini*, Decision on the Respondent's Applications for Termination, Trifurcation and Security for Costs, 9 July 2019, paras 144, 146 (**CL-237**).

69 Response to Motion for Costs Undertaking, para. 14; *Lighthouse*, Procedural Order No. 2, 13 February 2016, paras 58, 61 (**RL-242**).

70 Response to Motion for Costs Undertaking, para. 14; *Ipek*, Procedural Order No. 5, 19 September 2019, para. 10 (**CL-225**).

iii. *Libananco v. Turkey*, that the tribunal "*did not find it convincing*" that the claimant "*is a shell company without assets of its own*";[71] and

iv. *RSM v. Saint Lucia*, that "*more should be required than a simple showing of the likely inability of a claimant to pay a possible costs award*";[72]

(c) tribunals having required, in addition to insufficient funds, some broader financial difficulties or distress;[73]

(d) the existence of a third-party funder alone also not sufficing to justify an order for security for costs;[74] and

(e) tribunals being reluctant to pierce the corporate veil to examine the source of a party's funds, noting that in *Lao Holdings v. Laos*, the Claimant argued that, without additional evidence that a party would refuse to comply with an adverse cost award, it is immaterial whether the resources come from its own assets or from those of its owners, because payment of the arbitration deposits indicates sufficient resources to pay a costs award.[75]

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71 Response to Motion for Costs Undertaking, para. 14; *Libananco*, paras 58-59 (**CL-227**).

72 Response to Motion for Costs Undertaking, para. 14; *RSM*, paras. 5.19-5.21 (**CL-233**).

73 Response to Motion for Costs Undertaking, para. 15; *Commerce Group*, Decision on El Salvador's Application for Security of Costs (Annulment Proceeding), 20 September 2012, para. 48 (**CL-221**); *EuroGas*, Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures), 23 June 2015, para. 123 (**CL-223**).

74 Response to Motion for Costs Undertaking, para. 16; *EuroGas*, Procedural Order No. 3 (Decision on the Parties' Request for Provisional Measures), 23 June 2015, para. 123 (**CL-223**); *South American Silver*, Procedural Order No. 10 (Security for Costs), 11 January 2016, para. 77 (**RL-252**); *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 179 (**RL-236)**.

75 Response to Motion for Costs Undertaking, para. 17; *Lao Holdings N.V. v. Lao People's Democratic Republic (II)*, ICSID Case No. ARB(AF)/16/2 ("***Lao Holdings v. Laos***"), Procedural Order No. 6 (Decision on Respondent's Application for Security for Costs of 29 June 2018, 26 July 2018, para. 40 (**CL-226**).

26. Having made its preliminary submissions as to the "*exceptional circumstances*" threshold for interim measures in the form of security for costs, the Claimant proceeded to set out its position as to each of the four factors under Article 26(3) of the UNCITRAL Rules.[76]

27. First, as to necessity, the Claimant submitted that the Respondent had failed to submit any evidence that it would suffer irreparable substantial harm.[77] It disputed that the Respondent's legal costs in *Windstream I* were a suitable comparator for any legal costs harm, given that are were significantly fewer expert reports and fact witnesses to be examined in the current proceedings, which is scheduled for a maximum five-day hearing, as compared to a two-week hearing in *Windstream I*.[78]

28. It submitted that there is no evidence of bad faith or improper behaviour on the Claimant's part that contradicts the presumption that it will act in good faith.[79] It pointed out that the Claimant promptly paid all required deposits and arbitration costs in this proceeding and also the costs award in the amount of CAD 750,000 which the Ontario Superior Court of Justice ordered the Claimant to pay to the IESO (*i.e.*, the Independent Electricity System Operator) after WWIS (*i.e.*, Windstream Wolfe Island Shoals Inc.) discontinued its Application in the Ontario courts in August 2020.[80] It submitted that it was the Respondent that failed to make payment of the awarded damages and costs on time in *Windstream I*.[81]

29. As to the four evidential points raised by the Respondent, the Claimant submitted that none established substantial irreparable harm to meet the threshold of exceptional circumstances.[82] In particular:

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76 Response to Motion for Costs Undertaking, paras 18-51.

77 Response to Motion for Costs Undertaking, paras 20-45.

78 Response to Motion for Costs Undertaking, paras 21-24.

79 Response to Motion for Costs Undertaking, paras 25-45.

80 Response to Motion for Costs Undertaking, para. 26; Endorsement of Hainey J., 27 August 2020 (**C-2856**).

81 Response to Motion for Costs Undertaking, para. 27.

82 Response to Motion for Costs Undertaking, paras 29-45.

(a) the Claimant denied it failed to comply with its production obligations concerning available financial statements and other information,[83] submitting further that:

i. it "*produced all available financial information in its power, possession or control, including financial statements for the entities that have them, tax documents, and balance sheets for the years 2016-2021*";[84]

ii. contrary to the Respondent's assertions, it is not required have formal financial statements;[85]

iii. "*there is no requirement in investment arbitration that a claimant must demonstrate solvency*";[86] and

iv. the Respondent seeks to reverse the burden to demonstrate likelihood of irreparable harm,[87] an effort previously rejected in *Tennant v. Canada*;[88]

(b) a showing of insufficient assets,[89] without more, does not justify the extraordinary relief of security for costs and the Respondent is unable to cite a single case in support of its position otherwise;[90]

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83 Response to Motion for Costs Undertaking, paras 30-36; see above para. 13(a).

84 Response to Motion for Costs Undertaking, para. 31.

85 Response to Motion for Costs Undertaking, paras 32-33.

86 Response to Motion for Costs Undertaking, para. 35; *Lighthouse*, Procedural Order No. 2, 13 February 2016, para. 60 (**RL-242**).

87 Response to Motion for Costs Undertaking, para. 35.

88 Response to Motion for Costs Undertaking, para. 36; *Tennant v. Canada*, Procedural Order No. 4, 27 February 2020, para. 178 (**RL-236)**.

89 See above, para. 13(b).

90 Response to Motion for Costs Undertaking, paras 37-38.

(c) third-party funding by investors,[91] (which the Claimant denies is third-party funding),[92] would not itself justify an order for security for costs;[93]

(d) the source of its funds is immaterial,[94] maintaining that the Respondent fails to address the authorities against or cite any case in support;[95] and

(e) the Claimant's refusal to have its owners sign a personal contractual undertaking,[96] is irrelevant as they have no obligation voluntarily to do so and their refusal cannot be used as a ground to support the Respondent's Motion for Costs Undertaking.[97]

30. Second, as to urgency,[98] the Claimant submitted that the requisite urgency simply does not exist because:

(a) the Respondent has been aware of its structure and the nature of its financial documents since *Windstream I*, as confirmed in documents received on 31 May 2023 through document production;[99]

(b) the Respondent raised no question of requiring an Undertaking in *Windstream I* and nothing has changed in the relevant circumstances since;[100]

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91 See above, para. 13(c).

92 Response to Motion for Costs Undertaking, para. 40.

93 Response to Motion for Costs Undertaking, paras 42-43; *South American Silver*, Procedural Order No. 10 (Security for Costs), 11 January 2016, paras 18-20, 33, 64-69, 76-77, 81 (**RL-252**).

94 Response to Motion for Costs Undertaking, paras 40-41; *Lao Holdings v. Laos*, Procedural Order No. 6 (Decision on Respondent's Application for Security for Costs of 29 June 2018, 26 July 2018, para. 40 (**CL-226**); see also e.g., *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 29 April 1999, paras 105, 109 (**CL-239**); *RENERGY S.A.R.L. v. Kingdom of Spain*, ICSID Case No. ARB/14/18, Award, 6 May 2022, paras 578-581 (**CL-202**).

95 Response to Motion for Costs Undertaking, para. 43.

96 See above, para. 13(d).

97 Response to Motion for Costs Undertaking, para. 45.

98 Response to Motion for Costs Undertaking, paras 46-50.

99 Response to Motion for Costs Undertaking, paras 47-48.

100 Response to Motion for Costs Undertaking, para. 47.

(c) it responded to the Respondent's request for a personal undertaking against the Claimant's owners on 15 September 2023,[101] noting that there was "*no basis to find that this order is urgent*";[102] and

(d) the Respondent provided no explanation for its delay in bringing its Motion for Costs Undertaking less than two months before the hearing.[103]

31. Third, as to proportionality, the Claimant denied that the proposed Undertaking would be proportionate given that it would affect third parties and that the Respondent has produced no evidence that it will suffer any irreparable harm.[104]

32. Fourth, as to reasonable prospect of success, the Claimant submitted that it is premature for the Tribunal to decide whether or not there is a reasonable prospect that the Respondent will succeed on the merits at this stage of the arbitration, as there is also an equally reasonable prospect that the Claimant will do so.[105]

33. In summary, the Claimant submitted that the Respondent has failed to demonstrate its entitlement to the relief requested. As the relief sought would go, "*further than an order for security for costs against a claimant*", the Respondent "*must not only meet the test for security for costs (which it does not), but it must also meet a higher burden to access the extraordinary and unprecedented form of relief it is seeking in this motion.*"[106] In other instances where tribunals were asked to pierce the corporate veil, they required a showing

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101 Response to Motion for Costs Undertaking, para. 49; Letter from Emily Sherkey (Torys LLP) to Rodney Neufeld (Government of Canada), 15 September 2023 (**R-953**).

102 Response to Motion for Costs Undertaking, para. 50.

103 Response to Motion for Costs Undertaking, para. 50.

104 Response to Motion for Costs Undertaking, para. 51.

105 Response to Motion for Costs Undertaking, para. 19.

106 Response to Motion for Costs Undertaking, para. 61

of fraudulent activity.[107] In this case, there is no evidence of fraudulent activity or any other exceptional circumstances justifying the requested relief.[108]

IV. ANALYSIS

34. The Tribunal has carefully and fully considered the disputing parties' written submissions and evidence in deciding the Respondent's Motion for Costs Undertaking.

1. Jurisdiction to Grant Interim Measures

35. Both disputing parties agree that the Tribunal has authority to grant interim measures in accordance with Article 26 of the UNCITRAL Rules and NAFTA Article 1134.

36. Article 26 of the UNCITRAL Rules provides as follows (where relevant):

> ***Interim measures***
>
> *Article 26*
>
> 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:
>
> …
>
> (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;
>
> …

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107 Response to Motion for Costs Undertaking, para. 62; e.g., *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, para 358 (**CL-21**); *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v. Czech Republic*, PCA Case No. 2016-12, Interim Award on Jurisdiction, 25 April 2018, paras 518-524, 546-549 (CL-240); *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, paras 53-56 (**CL-238**).

108 Response to Motion for Costs Undertaking, paras 63-64.

> 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.
>
> …

37. NAFTA Article 1134 provides as follows:

> **Interim measures of protection**
>
> 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.

38. Neither disputing party has suggested that NAFTA Article 1134 modifies the Tribunal's powers pursuant to the UNCITRAL Rules Article 26 in the context of the current Motion for Costs Undertaking and measure sought. Accordingly, each disputing party put its case on the basis of Article 26(2) of the UNCITRAL Rules, which broadly describes interim measures as "*any temporary measure*" ordered by the tribunal before the final award, and Article 26(3) as establishing the conditions of factors relevant to interim measures.

39. Whilst Article 26(2) confers upon this Tribunal the necessary power to grant interim measures against a party to the proceedings, the Claimant has challenged the Tribunal's specific jurisdiction to "*order the Claimant to negotiate a contractual undertaking with Canada and cause one or more of its members, the third-party funders of this claim, to enter into it*", on the basis this is an "*order against non-parties to this arbitration*".[109]

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[109] Response to Motion for Costs Undertaking, paras. 52, 55.

40. The Respondent characterised its application for interim measures as a Motion for Costs Undertaking. It seeks by way of relief that the Claimant negotiate a costs undertaking and cause one or more of its members to enter into it. Although the order is *per se* against the Claimant, its effect is to require the Claimant to procure an affirmative undertaking by one or more of its members, none of whom is a party to these proceedings.

41. In its summary of the disputing parties' positions (as set out above), the Tribunal set out the Claimant's position on jurisdiction ahead of its substantive response, and in its analysis the Tribunal first determines its jurisdiction in response to the Claimant's challenge. The Tribunal notes that the Claimant itself raised jurisdiction only as a secondary argument and in a manner that appeared to be interrelated to its proportionality arguments.

42. Nonetheless, to the extent that it is required to determine its own jurisdiction in respect of the Motion for Costs Undertaking, the Tribunal finds that it has jurisdiction to grant an interim measure in the form of a costs undertaking against the Claimant. This is because the Tribunal has *prima facie* jurisdiction in the arbitration, subject to determining the extant jurisdictional challenges brought by the Respondent in its final award. Accordingly, it has jurisdiction to conduct the arbitration up until that award, in accordance with the UNCITRAL Rules. Those rules expressly confer power to grant interim measures against a party. The Respondent is requesting an order against the Claimant; its members are not parties to the proceedings and the Tribunal is not (directly) asked to make order against them. Nor could it do so; its jurisdiction is limited to disputes between the disputing parties.

43. Therefore, the Tribunal rejects the Claimant's jurisdictional challenge as to its jurisdiction to grant interim measures orders against the Claimant. As to the effect of any interim measures granted, including any direct or indirect effect in respect of non-parties, that is a question for consideration in the context of the factors contained in Article 26(3) and the Tribunal's decision as a whole.

2. Applicable Legal Standard

44. Article 26(3) sets out the conditions or factors that the Tribunal is required to take into account in considering interim relief, but it does not prescribe a legal standard of review or requirements to be met. According to the Claimant, interim relief in the form of security for costs specifically requires "*exceptional circumstances*".

45. No additional threshold "*exceptional circumstances*" requirement exists under UNCITRAL Rules, Article 26 or NAFTA, Article 1134. Instead, the Claimant has extracted such a 'requirement' from decisions on security for costs by previous tribunals. The Tribunal does not consider that it is necessary for it to consider those earlier tribunal decisions or make a finding as to whether or not, as the Claimant contends, "*exceptional circumstances*" are a necessary and independent prerequisite for security for costs in this case, for the following two reasons.

46. First, the Respondent is not seeking payment by way of security for costs. Instead, it seeks a financial undertaking to be negotiated by the Claimant and to include as a party one or more members of the Claimant, which "*ensures* [the Respondent] *may recover an eventual costs award against the Claimant*", in the form of "*an enforceable contract*". A contractual undertaking by a party to make payment upon the occurrence of an event is, as the Respondent argues, potentially less onerous or prejudicial than an order for upfront payment.

47. Second, and in any event, the Tribunal is not persuaded that interim measures in the form of security for costs, or indeed a costs undertaking, is sufficiently unique to give rise to an additional "*exceptional circumstances*" threshold over and above the conditions or factors already enumerated at Article 26(3). The Tribunal is already required to weigh potential prejudice caused to the Claimant in granting the measure against potential prejudice to the Respondent in not doing so. It is implicit in that balancing exercise that a more onerous measure would require a correspondingly higher risk to the applicant if not granted. However, that would be taken into account in the Tribunal's assessment of proportionality pursuant to Article 26(3).

48. Nevertheless, both disputing parties do accept, and the Tribunal affirms, that interim measures are an extraordinary measure that will not be granted lightly.

3. Application of the Legal Standard

49. In order to examine whether or not appropriate circumstances are present for the specific interim measures sought in this case, the Tribunal considers each of the four conditions or factors set out at Article 26(3) of the UNCITRAL Rules below.

50. The Tribunal considers these conditions or factors against the type of interim measures as described at Article 26(2)(b), relied on by the Respondent, to require "*action that would prevent, … , (i) current or imminent harm or (ii) prejudice to the arbitral process itself*".

a. Necessary to prevent substantial harm

51. In considering whether or not the requested Undertaking is necessary to prevent substantial harm that is not adequately reparable by an award of damages, the Tribunal must consider first the nature and degree of alleged harm, and then consider whether or not the requested interim measure is necessary to protect from that harm.

52. The Respondent characterises the substantial harm in this case as being the loss of its right to recover legal costs. It does not suggest that a particular event triggered its Motion for Costs Undertaking on 29 November 2023; instead it sets out various factors broadly evidencing the Claimant's impecuniosity from at least 2020. Any risk that the Claimant will be unable to pay any costs award has existed for some years, yet the Respondent has proceeded without seeking any costs undertaking from the Tribunal (or its predecessor tribunal in *Windstream I*).

53. The Tribunal considers the timing of the Motion for Costs Undertaking to be material not only to the factors of urgency and proportionality (as discussed below), but also to the question whether or not the measure is necessary to prevent a harm occurring. As to that timing, the Tribunal accepts that the Respondent invited the Claimant to provide a costs undertaking on 23 September 2023, shortly before its Motion for Costs Undertaking, but this remains a relatively late stage in these proceedings.

54. The difficulty that the Respondent faces, in respect of an interim measure to protect its right to recover legal costs, is that on its own case it has already suffered that loss. The primarily legal costs in these proceedings, and therefore harm, would have been incurred in the course of the Respondent submitting its: (i) written Request for Bifurcation and Memorial on Jurisdiction of 12 May 2022; (ii) written Counter-Memorial and accompanying fact and expert evidence in December 2022; and (iii) third written submission, its Rejoinder, on 30 October 2023. The Motion for Costs Undertaking was submitted only after that on 29 November 2023.

55. The Claimant has failed to provide any evidence as to the occurrence of a subsequent event or events or the existence of subsequent conduct that gave rise to the risk of substantial harm that did not already exist. For example, if there were an imminent and pending threat that the Claimant would dissipate assets prior to the final award, that would influence the Tribunal's view. Instead, the Respondent is at this late stage in the proceedings, asking the Tribunal to grant it a retroactive right to underwrite its previously incurred costs, which (in practical terms) it never had previously in these proceedings.

56. A further factor as to timing in considering whether or not the Undertaking at this time is necessary, is the relatively modest yet to be incurred costs. From the date of the Motion for Costs Undertaking to the date of an award, these may include:

    (a) the two-month period from the beginning of December 2023 to end of January 2024 (less the holiday period) to prepare for the imminent hearing;

    (b) attendance at the now four-day hearing commencing 5 February 2023; and

    (c) any additional costs arising out of post-hearing steps.

57. In the overall context of international investor-state arbitration proceedings, and in these particular proceedings commenced three years prior, involving a lengthy procedural schedule, document production requests, and significant expert evidence, the remaining procedural steps likely will add moderate additional cost to the disputing parties overall.

58. Accordingly, the Tribunal is unpersuaded that the Respondent has provided the Tribunal with sufficient evidence that its additional unprotected costs position from 29 November 2023 is a sufficiently substantial harm to warrant the measure it seeks. The Tribunal notes in that regard that the Respondent has not put in any information regarding its legal costs in this arbitration at all; instead it has simply referred to its total legal costs in the earlier *Windstream I* arbitration proceedings.

59. In reaching this view, the Tribunal takes into account the substantially reduced hearing schedule (from two weeks to four days) and the reduction of expert evidence to be traversed at the hearing largely to financial and quantum issues. This efficiency will result in considerable cost saving by both disputing parties and marks a considerable difference from *Windstream I.*

60. As the Tribunal has not accepted the Respondent's position that the interim measure is necessary to protect it from substantial harm, strictly speaking it is not required to consider the additional conditions under Article 26(3). However, it does so below for the sake of completeness.

b. Urgency

61. As to urgency, this is interrelated with the question whether or not the measure is necessary. Urgency requires that the Tribunal must impose measures in the interim pending the final award in order to protect the Respondent from suffering harm or risk of harm. For the reasons set out above, the Tribunal does not consider this to be the case here.

62. In effect, were the Tribunal to grant the requested measure, it would significantly improve the Respondent's existing position by retroactively granting additional protection in respect of costs previously incurred. Those costs are already subject, if and as appropriate, to costs allocation in the ordinary course in the final award. None of the evidential points identified by the Respondent is sufficient to satisfy the Tribunal that the Respondent would not be able to enforce a costs award at that time.

63. Again, were there an additional intervening event that materially increased the Respondent's risk of non-recovery, that may go towards establishing urgency. However, the Respondent has not adduced satisfactory evidence to that effect in support of its Motion for Costs Undertaking.

64. Instead, the Claimant's additional representations as to its ongoing good faith conduct of these arbitration proceedings, as set out in its response to the Motion for Costs Undertaking, should offer the Respondent additional reassurance regarding its ability to recover.

c. Proportionality

65. As to the Tribunal's consideration of "*balance of hardships*" or proportionality, the current or imminent harm to the Respondent is its alleged inability to recover legal costs. In this regard, the Tribunal makes three observations.

66. Regarding hardship to the Respondent, the Undertaking would not prevent the accrual of unprotected legal costs; that has already occurred. Instead, it would retroactively relieve the Respondent from the hardship of a pre-existing risk. It would potentially substantially enhance its current position a few months prior to the hearing. This would occur at a stage in the proceedings when the additional cost to be incurred should be relatively moderate in the scheme of the overall arbitration costs. This modest additional cost has been diminished even further because the disputing parties have agreed substantially to reduce the scope of the oral hearing.

67. Regarding hardship to the Claimant, the risk of prejudice is considerable. In the event that the interim measure were granted and the Claimant failed to procure the Undertaking, including because non-party members of the Claimant were unwilling or unable to provide it and the Claimant has no control over those individuals or entities, the Respondent would almost certainly seek to interrupt or even suspend the proceedings. This would cause significant hardship in the months immediately leading up to the hearing, causing substantial hardship to the Claimant. The Respondent has provided no assurance to the Tribunal or to the Claimant that this risk does not exist.

68. Accordingly, in the Tribunal's view, even if the Undertaking were both necessary and urgent, it would not be a proportionate measure at this time. The Undertaking as sought would risk preventing the Claimant from continuing its claim. Given the timing of the Motion for Costs Undertaking, it is belated and potentially oppressive, risking the Claimant being unjustly shut out of the arbitration at an extremely late stage.

69. It is in this context, rather than in relation to jurisdiction, that the Respondent's attempt to obtain relief that would force the Claimant to procure a contractual outcome from a third party, becomes critical. That interim measure as requested is potentially arduous and pecuniary vis-à-vis the Claimant. It would require the Claimant to "*deliver a financial undertaking that ensures Canada may recover an eventual costs award against the Claimant*", in the form of "*an enforceable contract between Canada and one or more of the persons or the entity funding the Claimant's claim, the members and principal investors in Windstream*".[110] Thus, the Claimant would be required:

(a) ***to deliver*** a ***binding and enforceable contract*** to which it itself is not party;

(b) to "***ensure***", despite not being a party to that contract, that the Respondent is able to recover any costs under it; and

(c) to ***procure the entry into that contract of individuals or entities that are not party*** to these proceedings or otherwise directly subject to the jurisdiction or powers of this Tribunal.

70. The Claimant's failure to deliver such instrument, which the interim measure demands ***ensures*** the Respondent's right to recover costs, risks interruption to or suspension of these arbitral proceedings. The Respondent has provided no undertaking that this would not be the case and the Tribunal does not consider that this approach or consequence is appropriate or proportionate in the circumstances.

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110 Motion for Costs Undertaking, para. 1.

d. Prima Facie *Case*

71. As to the final condition or factor, the Tribunal accepts that the Respondent has a *prima facie* defence to the claims, both as a matter of jurisdiction and/or substantively. That does not mean the Claimant does not also have a *prima facie* case in respect of its own claims; the two are not mutually exclusive.

72. In the course of submissions, the Claimant raised concerns as to the existence of a *prima facie* case, including as to jurisdiction. However, not least because of the potentially overlapping nature of the proceedings in *Windstream I*, the Tribunal is satisfied that there is sufficient evidence of a *prima facie* defence on the part of the Respondent. It may be that in the course of the proceedings the Respondent will be unable to establish on substantive grounds that there is no jurisdiction, and this decision does not preclude that.

V. DECISION

73. Based on the above analysis, the Tribunal decides as follows:

(a) The Respondent's Motion for Costs Undertaking is refused; and

(b) Costs are reserved.

Dated: 17 January 2024

Place of Arbitration: Toronto

Ms Wendy Miles KC

(Presiding Arbitrator)

On behalf of the Tribunal