

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

-between-

**TENNANT ENERGY, LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)**

PROCEDURAL ORDER NO. 4

The Arbitral Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. R. Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms. Christel Y. Tham

27 February 2020

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I. INTRODUCTION

1. The present Order is made in an arbitration between Tennant Energy, LLC (the “**Claimant**”) and the Government of Canada (“**Canada**” or the “**Respondent**”), pursuant to Chapter 11 of the North American Free Trade Agreement (“**NAFTA**”) and the Arbitration Rules of the United Nations Commission on International Trade Law, as adopted in 1976 (the “**UNCITRAL Rules**”).
2. The dispute between the Parties concerns the Respondent’s alleged breaches under Chapter 11, Section A of the NAFTA through the application of the 2011 Feed-in Tariff Program (the “**FIT Program**”) in respect of the Claimant’s alleged investment in Skyway 127 Wind Energy Inc. (“**Skyway 127**”), an enterprise incorporated in Ontario, Canada.
3. At issue in this Order are the following applications:
 - (a) The Claimant’s Request for Interim Measures, dated 16 August 2019 (the “**Request for Interim Measures**”), in which it requested that the Tribunal order (i) the disputing parties to preserve, index, protect, and scan documentation in their possession, custody, or control that is relevant to the dispute; and (ii) the Respondent to produce within 30 days the non-confidential documents on record in the *Windstream Energy LLC v. Government of Canada* case in their entirety to the Claimant, along with an index;
 - (b) The Respondent’s Request for Bifurcation, submitted on 23 September 2019 (the “**Request for Bifurcation**”) to address in a preliminary procedure the Respondent’s NAFTA Article 1116(2) time-bar jurisdictional objection; and
 - (c) The Respondent’s Motion for Security for Costs, and in the same submission, its Motion for the Disclosure of Third-Party Funding, dated 16 August 2019 (the “**Motion for Security for Costs**” and “**Motion for the Disclosure of Third Party Funding**”), in which it requested the Tribunal to order the Claimant to (i) issue security for costs in the amount of 6,934,001.95 CAD, by depositing the security into an escrow account arranged by the Permanent Court of Arbitration (the “**PCA**”) within 90 days of the order, or the arbitral proceedings will be discontinued; and (ii) disclose the existence of any third-party funding agreement that the Claimant has entered into to finance its claim in this arbitration, the name(s) and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that Claimant may achieve in this arbitration, or pay an adverse costs order against the Claimant.

II. RELEVANT PROCEDURAL HISTORY¹

4. On 24 June 2019, the Tribunal issued Procedural Order No. 1 (“**PO 1**”) which, *inter alia*, provided that these proceedings shall be governed by the UNCITRAL Rules, except as modified by the provisions of Chapter 11, Section B of the NAFTA, and set out the procedural calendar in its Annex 1. The procedural calendar provided for an “Initial Phase”, comprising of (i) the Parties’ submissions on bifurcation and any preliminary

¹ Given its nature, this Order will contain only recitals of the factual background and procedural history needed to resolve the issues arising in respect of various applications. These matters will be addressed in more detail in the Final Award, as appropriate, in light of the future pleadings of the Parties, which will follow in due course.

motions; (ii) the non-disputing Parties' submissions on questions of law related to the interpretation of the NAFTA on bifurcation; (iii) the Parties' responses to the non-disputing Parties' submissions; (iv) a hearing on the issues of bifurcation and preliminary motions, which would take place from 14 to 15 January 2020 (the "**Hearing**"); and (v) the Tribunal's decision on bifurcation and any preliminary motions. In addition, the procedural calendar set forth two subsequent alternative timetables applicable (i) should the proceedings not be bifurcated; or (ii) should the proceedings be bifurcated.

5. On 16 August 2019, the Respondent submitted its Motion for Security for Costs and Disclosure of Third-Party Funding ("**Motion for Security for Costs**"), accompanied by exhibits R-001 to R-013 and legal authorities RLA-001 to RLA-051.
6. On the same date, the Claimant submitted its **Request for Interim Measures**, accompanied by legal authorities CLA-001 to CLA-052.
7. On 23 September 2019, the Claimant submitted its Response to Canada's Motion for Security for Costs and Disclosure of Funding ("**Response to the Motion for Security for Costs**"), accompanied by legal authorities CLA-001 to CLA-070.
8. On the same date, the Respondent submitted its **Request for Bifurcation** and, in a separate filing, its Response to the Claimant's Request for Interim Measures ("**Response to the Request for Interim Measures**"), accompanied by exhibits R-001 to R-023 and legal authorities RLA-001 to RLA-088.
9. On 23 October 2019, the Claimant submitted its Response to the Request for Bifurcation ("**Response to the Request for Bifurcation**"), accompanied by exhibits C-001 to C-017 and legal authorities CLA-001 to CLA-071.
10. On 1 November 2019, the United States ("**U.S.**") submitted a letter to the Tribunal noting *inter alia* that it did not intend to make any submissions in connection with the request for bifurcation, but may wish to do so in connection with the Parties' preliminary motions. The U.S. proposed to inform the Tribunal and the Parties whether it will make such submissions by 27 November 2019, and file any such submissions by 6 December 2019. The U.S. also reserved its right to make oral submissions during the Hearing, pursuant to Article 1128 of the NAFTA.
11. On 2 November 2019, the Claimant wrote to the Tribunal (i) objecting to the U.S.' proposed procedural schedule and maintaining that any non-disputing Party submissions should be provided no later than 6 November 2019; and (ii) objecting to the U.S.' participation at the upcoming Hearing.
12. On 3 November 2019, the Tribunal invited the Respondent to comment on the U.S.' and the Claimant's correspondence of 1 and 2 November 2019, respectively, by 4 November 2019.
13. On 4 November 2019, Mexico submitted a letter to the Tribunal informing that it did not intend to make a submission on bifurcation, expressing its intention to attend the January 2020 hearing and reserving its right to make any oral submissions then, and joining the U.S. in its proposal to inform the Tribunal and the Parties whether it will make submissions on the Parties' preliminary motions by 27 November 2019, and file any such submissions by 6 December 2019.
14. On the same day, the Respondent wrote to the Tribunal arguing *inter alia* that (i) under the NAFTA, the non-disputing Parties have a right to make submissions on questions of

interpretation of the NAFTA and that their proposed timetable is reasonable; and (ii) the non-disputing Parties have a right under the NAFTA to attend hearings and make oral submissions.

15. On 5 November 2019, in reaction to the 4 November 2019 letter from Mexico, the Claimant wrote to the Tribunal requesting that it (i) set a new date, which shall be no later than 8 November 2019, for the filing of all remaining non-disputing Party submissions; and (ii) reaffirm its prior decision as reflected in Procedural Order No. 1 that the non-disputing Parties should not be allowed to attend the Hearing.
16. On 11 November 2019, the Tribunal wrote to the Parties and non-disputing Parties directing *inter alia* that (i) the non-disputing Parties inform the Tribunal by 13 November 2019 whether they will be making any submissions on the Parties' preliminary motions, and file any such submissions by 27 November 2019; (ii) the Parties file their responses, if any, to any non-disputing Party submissions, by 27 December 2019; and (iii) the non-disputing Parties shall be allowed to attend the Hearing, and make any oral submissions to the extent that they have given timely notice to the Parties in writing.
17. On 13 November 2019, the U.S. and Mexico informed the Tribunal that they expect to make submissions on questions of interpretation of the NAFTA in connection with the Parties' preliminary motions.
18. On 18 November 2019, the Respondent submitted a revised version of RLA-006, and sought the Tribunal's guidance on the agenda and time allocation for the Hearing.
19. On 20 November 2019, the Tribunal *inter alia* informed the Parties that it wished to hear oral submissions on the Respondent's request for bifurcation and all the Parties' preliminary motions during the Hearing, and requested the Parties to confer and jointly propose a draft hearing schedule by 6 December 2019.
20. On 27 November 2019, the U.S. and Mexico submitted their respective submissions on questions of interpretation of the NAFTA, pursuant to Article 1128 of the Treaty (the "**U.S.' Article 1128 Submission**" and "**Mexico's Article 1128 Submission**").
21. On 6 December 2019, the Parties submitted their respective proposed hearing schedules for the Hearing, as well as their comments with respect to the various disputed aspects.
22. On 27 December 2019, the Parties submitted their respective responses to the non-disputing Parties' submissions of 27 November 2019 (the "**Claimant's Response to the non-Disputing Parties' Submissions**" and "**Respondent's Response to the non-Disputing Parties' Submissions**").
23. On 28 December 2019, the Tribunal circulated to the Parties a final schedule for the Hearing.
24. On 3 January 2020, the Tribunal invited the non-disputing Parties to clarify by 7 January 2020 whether they intend to make any oral submissions at the Hearing and, if so, whether they have notified this in a timely manner to the Disputing Parties.
25. On 7 January 2020, the non-disputing Parties respectively informed the Tribunal and the Parties that the U.S., but not Mexico, intends to make oral submissions at the Hearing.
26. On 8 January 2020, the Tribunal circulated the final schedule and list of attendees for the Hearing.

27. The Hearing took place from 14 to 15 January 2020 at the World Bank Main Complex Building, Building C, 1225 Connecticut Avenue N.W., Washington, D.C. 20036. Non-confidential portions of the Hearing were broadcast live to a separate conference room at the hearing venue accessible to the public.
28. On 4 February 2020, the Respondent requested leave from the Tribunal to submit the 27 January 2020 Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim in the *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35) case ("**Dirk Herzig v. Turkmenistan**") into the record, "and to allow the disputing parties, should the Tribunal wish, to make brief, concise written submissions on the relevance of the decision" to the Respondent's Motion for Security for Costs. The Respondent justified its request on the basis that the decision, which is directly relevant, had only been released that day and the Respondent thus could not have introduced it into the record any earlier.
29. On the same day, the Claimant objected to the Respondent's request, alleging that the "additional costs arising from Canada's requests, when coupled with the delay arising from the due process obligations owed to the disputing parties, are disproportionately high" and that in any event, the decision the Respondent seeks to introduce is irrelevant because "the test for ICSID Convention interim measures provisions differ from the terms of Art 26 of the 1976 UNCITRAL Arbitration Rules and the governing provisions in NAFTA Article 1134."
30. On 5 February 2020, the Respondent clarified that the decision that it sought to submit into the record could be found on IA Reporter, a publicly available website.
31. On 10 February 2020, the Tribunal granted the Respondent's 4 February 2020 request and invited the Parties to file submissions on the Decision in *Dirk Herzig v. Turkmenistan*.
32. On 17 February 2020, the Respondent submitted the Decision in *Dirk Herzig v. Turkmenistan* into the record, together with a written submission.
33. On 24 February 2020, the Claimant filed its written submission on the Decision in *Dirk Herzig v. Turkmenistan*.

III. SUMMARY OF THE PARTIES' ARGUMENTS

34. In this section, the Tribunal will review the Parties' and the non-disputing Parties' positions and arguments in respect of the applications before the Tribunal. Naturally, this section is not meant to serve as an exhaustive review of the Parties' and the non-disputing Parties' submissions on the applications at issue, but a summary of the arguments that are relevant to the Tribunal's analysis and findings. Regardless, the Tribunal has carefully considered all of the submissions made by the Parties and the non-disputing Parties, whether in writing or made orally during the Hearing.

A. CLAIMANT'S REQUEST FOR INTERIM MEASURES

35. In its Request for Interim Measures, the Claimant requests that the Tribunal (i) order the Parties to preserve and protect documentation in their possession, custody, or control that is relevant to the dispute (the "**Protected Documents**"), including in particular documents "relevant to the Investor, the Investment, and the award electrical power transmission access or contracts under the Ontario [FIT Program] and/or any related policies or

measures”;² and (ii) order the Respondent to produce non-confidential documentation on record in *Windstream Energy v. Canada* (the “**Windstream Documents**”).³ The Claimant also requests the Tribunal to order the reimbursement of its reasonable legal and other costs incurred in connection with its request for interim measures.⁴

36. The Respondent submits that the Tribunal should reject the Claimant’s request and reserves its right to claim the costs incurred in responding thereto.⁵

1. The Claimant’s Position

37. The Claimant submits its request for interim measures in the context of what it considers to be a systemic lack of transparency in Ontario’s administration of the FIT Program, perpetuated by, among other things, the suppression and destruction of relevant evidence. The Claimant asserts that this suppressed evidence, which only became publicly available through the release of information in the *Mesa Power v. Canada* and *Windstream v. Canada* arbitration proceedings, reveals the extent of Ontario’s unlawful conduct which resulted in the breaches of NAFTA the Claimant alleges in these proceedings. Moreover, the Claimant contends that information that is “relevant to [its] case and may reveal further unlawful behavior that harmed its investment” continues to be withheld, and its repeated requests to the Respondent to take steps to collect and preserve evidence related to the dispute were either ignored or rejected.
38. For these reasons, the Claimant considers the relief sought to be “necessary to preserve the *status quo*, ensure the availability of information necessary for [it] to make its claim fully and fairly, and enable [it] and [the Tribunal] to proceed without an asymmetry of relevant information relative to Canada.”⁶
39. The Claimant contends that NAFTA Article 1134 and Article 26 of the UNCITRAL Rules both provide that the Tribunal has the authority to order interim measures.⁷ Article 1134 of the NAFTA expressly provides that, in exercising such authority, the Tribunal may grant an “order to preserve evidence in the possession or control of a disputing party.”⁸ Similarly, the Claimant notes that the non-exhaustive list of categories of interim measures under Article 26(2) of the UNCITRAL Rules encompasses the relief it seeks.⁹ Accordingly, the Claimant argues that the Tribunal has the power to grant both of its requested interim measures.¹⁰
40. In addition, the Claimant submits that it is entitled to the interim measures requested because it has satisfied all the relevant criteria under the relevant rules,¹¹ namely “(a) a risk of serious or irreparable harm; (b) urgency; (c) no prejudgment of the merits of a case; and

² Request for Interim Measures, ¶ 2(a), FN 3.

³ Request for Interim Measures, ¶¶ 2, 36, referring to *Windstream Energy LLC v. Canada*, PCA Case 2013-22 (“*Windstream Energy v. Canada*”).

⁴ Request for Interim Measures, ¶ 37.

⁵ Response to the Request for Interim Measures, ¶¶ 3, 38-39.

⁶ Request for Interim Measures, ¶ 12.

⁷ Request for Interim Measures, ¶¶ 13, 16.

⁸ Request for Interim Measures, ¶ 13, quoting Article 1134 of the NAFTA.

⁹ Request for Interim Measures, ¶ 17, referring to *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 (“*Biwater Gauff v. Tanzania*”), Procedural Order No. 1, 31 March 2006, ¶ 84 (CLA-45).

¹⁰ Request for Interim Measures, ¶ 17.

¹¹ Request for Interim Measures, ¶ 28.

(d) a *prima facie* case on the merits”.¹² In this regard, the Claimant notes that “in determining whether to grant interim measures, most tribunals also balance the harm the Investor is likely to suffer in the absence of interim measures against the harm likely to result to the respondent if the measures are granted”.¹³

41. First, the Claimant alleges that it will suffer a risk of serious and imminent harm if the Tribunal fails to grant the interim relief requested. In particular, the Claimant considers that “[t]here is a material risk that relevant Documents will be lost or destroyed given past patterns of conduct by the Ontario Government.”¹⁴ The Claimant also contends that “[w]ithout the *Windstream* documents in particular, neither the Investor nor the Tribunal will benefit from the information already available to Canada and one of the arbitrators from their participation [in that case].”¹⁵
42. Second, the Claimant submits that its request is urgent because, as in *Biwater Gauff v. Tanzania*, the requested documents must be preserved before the proceedings progress any further, in order to enable each Party to properly plead their case.¹⁶ The Claimant further claims that the urgency of its request is “further pronounced” with respect to the *Windstream* Documents because if it is not granted, only the Respondent and one arbitrator on the Tribunal will have access to this relevant information when considering the Parties’ motions and upcoming pleadings.¹⁷
43. The Claimant similarly rejects the Respondent’s claim that its request for the *Windstream* Documents is not urgent and can simply be made during the document production phase. In the Claimant’s view, given the *Windstream* Documents’ “obvious and potential relevance and materiality to the issues in dispute”,¹⁸ it is important that the Claimant and the entire Tribunal have access to this information as soon as possible, and “there is no additional burden in asking Canada to provide it at this time.”¹⁹
44. With respect to the third and fourth criteria, the Claimant contends that it “has demonstrated a strong *prima facie* case on the merits, [and] granting the relief requested would by no means prejudice the merits of the case.”²⁰ In addition, according to the Claimant, “the evidence in question is likely to be relevant to the substantive jurisdictional and merits issues that the Tribunal must decide,” and accordingly, “refusing to grant the relief requested would effectively prejudice those issues by the Tribunal choosing to leave itself in the position of adjudicating them without all relevant facts.”²¹
45. Finally, the Claimant argues that the harm it will suffer if its request is not granted “outweighs any potential burden on Canada by complying with the orders requested.”²²

¹² Request for Interim Measures, ¶ 20, referring to Gary Born, *International Commercial Arbitration* (2014), 2468 (CLA-44).

¹³ Request for Interim Measures, ¶ 20, referring to Gary Born, *International Commercial Arbitration* (2014), 2468 (CLA-44).

¹⁴ Request for Interim Measures, ¶ 29; Hearing Transcript, Day 1, 83:6-20.

¹⁵ Request for Interim Measures, ¶ 29(b).

¹⁶ Request for Interim Measures, ¶ 31, citing *Biwater Gauff v. Tanzania*, ¶ 86 (CLA-45).

¹⁷ Request for Interim Measures, ¶ 31; Hearing Transcript, Day 1, 82:12-16.

¹⁸ Request for Interim Measures, ¶ 32.

¹⁹ Request for Interim Measures, ¶ 31, referring to Transcript of the First Procedural Hearing, 129:7-17; *Biwater Gauff v. Tanzania*, ¶ 86 (CLA-45).

²⁰ Request for Interim Measures, ¶ 33, citing *Paushok v. Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶ 55 (CLA-46).

²¹ Request for Interim Measures, ¶ 33, referring to *Biwater Gauff v. Tanzania*, ¶ 86 (CLA-45).

²² Request for Interim Measures, ¶ 34.

With respect to the *Windstream* Documents in particular, the Claimant notes that they are “already organized, indexed, and within Canada’s possession” and “the FTC Notes of interpretation bind it to have already made [those] Documents public already.”²³ It further points out that “producing the requested Documents now could reduce the need for either disputing party to seek to engage in costly third-party discovery requests in U.S. courts.”²⁴

2. The Respondent’s Position

46. The Respondent largely agrees with the Claimant that in order to determine whether interim measures are necessary pursuant to Article 26(1) of the UNCITRAL Rules the Tribunal must consider whether “(i) *prima facie*, there is a reasonable possibility that the disputing party advancing the motion would prevail in the case; (ii) the disputing party would likely suffer harm not adequately reparable by an award of damages without the order; (iii) the disputing party’s potential harm without the order substantially outweighs the harm that the other disputing party would likely incur from the order; and (iv) the condition of urgency is met.”²⁵ The Respondent contends that since the Claimant has failed to meet its burden of satisfying each of these elements the Tribunal should decline both of the Claimant’s requests.²⁶
47. With respect to the Claimant’s requested order for Canada to preserve, index, protect, and scan documents, first, the Respondent submits that the Claimant has failed to satisfy its burden to prove, *prima facie*, that it has a reasonable possibility of prevailing in this case. In this respect, the Respondent reiterates that the Claimant’s claims are time-barred under Article 1116(2) of the NAFTA, and that any information that may be obtained during this arbitration is not necessary to rule on the time-bar issue.²⁷
48. Second, the Respondent argues that the Claimant “has failed to demonstrate it will suffer any harm if the tribunal refuses to grant an order for the preservation and protection of documents.”²⁸ The Respondent submits that it “has already put in place robust procedures to preserve and protect documents that may be relevant to this dispute”, and which “effectively render Tennant’s request unnecessary.”²⁹ For example, the Respondent explains, the Archives and Recordkeeping Act in force since September 2007, and Ontario’s Corporate Policy on Recordkeeping of July 2011 and March 2015 (“**Recordkeeping Policy 2015**”), all have as one of their main objectives the management and preservation of public records.³⁰ In particular, Ontario’s Corporate Policy on Recordkeeping of 2015, *inter alia*, expressly prohibits ministries from destroying records in their possession that may be subject to a legal proceeding until they are notified that the matter has been concluded.³¹

²³ Request for Interim Measures, ¶ 34.

²⁴ Request for Interim Measures, ¶ 35.

²⁵ Motion for Security for Costs, ¶¶ 14-16; Response to the Request for Interim Measures, ¶ 2.

²⁶ Response to the Request for Interim Measures, ¶ 3.

²⁷ Statement of Defence, ¶ 46; Request for Bifurcation, ¶¶ 1, 10-22; Response to the Request for Interim Measures, ¶ 6, *referring to* Article 1116(2) of the NAFTA; Hearing Transcript, Day 1, 96:6-11.

²⁸ Response to the Request for Interim Measures, ¶ 15.

²⁹ Response to the Request for Interim Measures, ¶¶ 7-8; Hearing Transcript, Day 1, 96:12-97:23.

³⁰ Response to the Request for Interim Measures, ¶¶ 8-10, *referring to* Archives and Recordkeeping Act, 2006, S.O. 2006, c. 34, Sched. A (**R-015**); Government of Ontario, Minister of Government Services, Corporate Policy on Recordkeeping, 25 July 2011 (**R-016**); Government of Ontario, Ministry of Government and Consumer Services, Corporate Policy on Recordkeeping, March 2015 (**R-017**).

³¹ Response to the Request for Interim Measures, ¶ 10, *referring to* Ontario Corporate Policy on Recordkeeping 2015, ¶ 28 (**R-017**).

49. In relation to the records managed by the Independent Electricity System Operator (“**IESO**”), the entity that was merged with the Ontario Power Authority (“**OPA**”),³² the Respondent alleges that pursuant to domestic freedom of information legislation, this entity has a legal obligation to preserve records.³³ In confidential submissions, the Respondent detailed the steps that had been taken to preserve records.
50. An order for the preservation of documents, in the Respondent’s view, is therefore unnecessary in this case.³⁴
51. Third, the Respondent maintains that it would be unduly burdensome to index and scan the Protected Documents at this stage given the breadth of the Claimant’s request and the fact that its Request for Bifurcation is still pending.³⁵
52. Fourth, the Respondent alleges that the Claimant has failed to demonstrate urgent circumstances justifying its request, since its allegations in support of such urgency relate to past events occurring long before the filing of its Notice of Intent.³⁶ In this regard, the Respondent contends that since there is no evidence of destruction of documents relevant to this dispute, the urgency requirement has not been met.³⁷
53. Regarding the Claimant’s request for an order for the production of the *Windstream* Documents, the Respondent submits that, first, “the Claimant has failed to satisfy its burden of demonstrating a *prima facie* ‘reasonable case’ in its underlying claim,” reiterating the arguments it put forward in relation to the Claimant’s request for the preservation of the Protected Documents.³⁸
54. Second, the Respondent contends that “there is no risk of harm if the Tribunal denies the Claimant’s request for production of the *Windstream* Documents at this stage of the arbitration.”³⁹ This is because the *Windstream* Documents are not relevant to the Respondent’s time-bar objection, and the Claimant has not provided any reason justifying a departure from the timelines and procedures for document production set out in Procedural Order No. 1. These importantly include, the Respondent contends, procedures that assist with determining the relevance and materiality of the *Windstream* Documents, and narrowing the scope of documents to be produced in this proceeding, in accordance with the International Bar Association (“**IBA**”) Rules on the Taking of Evidence in International Arbitration.⁴⁰ In the Respondent’s view, the Claimant has not provided any basis for it to circumvent the requirement to justify the relevance and materiality of its document requests, and acceding to the Claimant’s request would accordingly be “procedurally

³² Response to the Request for Interim Measures, ¶ 8. *See also* Statement of Defence, ¶¶ 5-11.

³³ Response to the Request for Interim Measures, ¶ 11, *referring to* Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c F.31, s. 10.1 (**R-018**).

³⁴ Response to the Request for Interim Measures, ¶¶ 14-15, *citing Nova Group Investments B.V. v. Romania*, ICSID Case No. ARB/16/19, Procedural Order No. 7, Decision on Claimant’s Request for Provisional Measures, 29 March 2017, ¶ 243.

³⁵ Response to the Request for Interim Measures, ¶ 17; Hearing Transcript, Day 1, 97:24-98:5.

³⁶ Response to the Request for Interim Measures, ¶ 18, *referring to* Request for Interim Measures, ¶¶ 6-8; Hearing Transcript, Day 1, 98:14-99:3.

³⁷ Response to the Request for Interim Measures, ¶ 20.

³⁸ Motion for Security for Costs, ¶ 25; Response to the Request for Interim Measures, ¶ 23; Hearing Transcript, Day 1, 99:9-11.

³⁹ Response to the Request for Interim Measures, ¶¶ 24-33; Hearing Transcript, Day 1, 99:12-101:3.

⁴⁰ Response to the Request for Interim Measures, ¶¶ 26-33.

unfair” and “lead to the Claimant unilaterally benefitting from an early production of documents.”⁴¹

55. Third, in the Respondent’s view, it would be unduly burdensome for it to produce the *Windstream* Documents at this stage of the arbitration, “particularly since [they] are not relevant to Canada’s time bar objection, and because the Claimant has not proven the relevance and materiality of the documents requested to its claim.”⁴²
56. Fourth, the Respondent argues that “[t]here are no urgent circumstances requiring the Tribunal to order Canada to produce the *Windstream* Documents.” In this respect, the Respondent maintains that the Claimant “provides no evidence that any relevant and material documents are necessary in order for the Tribunal to rule on Canada’s jurisdictional objection on time bar, nor has it provided any evidence that such documents have been or will be suppressed or destroyed during the course of this arbitration.”⁴³

3. The Tribunal’s Analysis and Decision

57. The Claimant is seeking (i) an order that the Respondent produce the *Windstream* Documents at this stage of the arbitration; and (ii) an order that the Parties preserve, index and protect the Protected Documents. It is undisputed that the Tribunal has authority to grant the interim measures sought pursuant to Article 1134 of the NAFTA and Article 26(1) of the UNCITRAL Rules.⁴⁴
58. Article 26(1) of the UNCITRAL Rules provides *inter alia* that the Tribunal may make any interim measures it deems “necessary” in respect of the subject-matter of the dispute. While Article 26(1) does not make explicit the criteria which the Tribunal should apply in determining whether an interim measure is “necessary”, the Tribunal notes that the Parties largely agree that the requesting party would be required to show that there is, amongst others, a risk of serious or irreparable harm and that the condition of urgency is met.⁴⁵
59. Turning to the Claimant’s request that the Respondent produce the *Windstream* Documents at this stage of the arbitration, the Tribunal is not persuaded that it is necessary for the Tribunal to order an early production of these documents, which would require the Tribunal to depart from the timelines and procedures for document production set out in PO 1. In the Tribunal’s view, the Claimant’s request that the *Windstream* Documents be produced is in essence a discovery request which may be made at the document production stage.
60. In particular, the Tribunal fails to see any risk of serious or irreparable harm to the Claimant if the *Windstream* Documents are not produced now. The Claimant has not provided any reason for the *Windstream* Documents to be treated differently from any other document requests which would require proof of the various requirements for document production in accordance with the IBA Rules on the Taking of Evidence in International Arbitration, including relevance and materiality.

⁴¹ Response to the Request for Interim Measures, ¶ 33.

⁴² Response to the Request for Interim Measures, ¶ 35, *referring to* Request for Bifurcation, ¶¶ 26-28; Statement of Defence, ¶ 27.

⁴³ Response to the Request for Interim Measures, ¶ 36; Hearing Transcript, Day 1, 101:21-24.

⁴⁴ Request for Interim Measures, ¶ 13-14; Response to the Request for Interim Measures, ¶ 2.

⁴⁵ Request for Interim Measures, ¶ 20; Response to the Request for Interim Measures, ¶ 2.

61. In this regard, the Claimant has made no attempt to argue that the *Windstream* Documents are relevant and material with reference to its pleaded claims.⁴⁶ Instead, the thrust of the Claimant's argument was that the documents have to be produced urgently because, without them in the Claimant's possession, only the Respondent and one of the three arbitrators will have knowledge of them.⁴⁷ It is unclear to the Tribunal how that would result in serious or irreparable harm to the Claimant if the *Windstream* Documents, assuming they are relevant and material, are produced only at the discovery stage.
62. The Tribunal is also unable to agree with the Claimant that there are urgent circumstances requiring the Tribunal to order the Respondent to produce the *Windstream* Documents now.
63. The Respondent has stated at the Hearing that it has in its possession electronic copies of the *Windstream* Documents.⁴⁸ Further, the *Windstream* Documents which the Claimant is now seeking are documents that were produced and are on the record of the *Windstream* arbitration. The Claimant does not dispute that these documents are securely held by PCA in its archives.⁴⁹ In other words, it is clear that there are presently two available sources of the *Windstream* Documents, namely the Respondent's internal records and the PCA's archives.
64. In the event that the Tribunal were to conclude at a later stage that *Windstream* Documents are to be produced in this arbitration, and for whatever reason the *Windstream* Documents held by the Respondent are lost, there is nothing which prevents the Claimant from requesting access to the *Windstream* Documents stored in the PCA's archives. In this regard, the Tribunal notes that the Respondent has unambiguously waived any objections to the PCA producing the *Windstream* Documents if that were the case.⁵⁰ The Tribunal is therefore not satisfied that the requirement of urgency is met.
65. As for the Claimant's request that the Tribunal orders that the Parties preserve, index and protect the Protected Documents, the Tribunal is similarly not persuaded that such an order is necessary at this stage.
66. The Respondent has explained⁵¹ that it has put in place procedures to preserve and protect documents that may be relevant to the dispute.
67. Having been informed, in confidential session, of the steps that the Respondent has put in place to protect and preserve the Protected Documents, the Tribunal is satisfied that these steps are sufficient. It is also unclear to the Tribunal what further steps the Respondent could take to preserve and protect the Protected Documents. Consequently, the Tribunal is not convinced that there is a risk of serious or irreparable harm or that the condition of urgency is met.
68. The Tribunal further notes that both Parties have stated unambiguously that it is important for Parties to take active steps to preserve evidence relevant to this case. The Tribunal expects the Parties to continue to be mindful of the need to ensure that relevant evidence is preserved and remains available.

⁴⁶ Request for Interim Measures, ¶¶ 29(a), 32; Hearing Transcript, Day 1, 89:24-90:19.

⁴⁷ Request for Interim Measures, ¶ 31; Hearing Transcript, Day 1, 82:12-23, 85:23-86:2, 87:8-17.

⁴⁸ Hearing Transcript, Day 1, 109:8-9.

⁴⁹ Hearing Transcript, Day 1, 86:20-87:2.

⁵⁰ Hearing Transcript, Day 1, 120:6-121:4.

⁵¹ Response to the Request for Interim Measures, ¶ 8 to 15.

69. For the reasons set out above, the Claimant’s request for interim measures is dismissed.

B. RESPONDENT’S REQUEST FOR BIFURCATION

1. The Respondent’s Position

70. The Respondent requests that, for reasons of fairness and procedural efficiency, the Tribunal should bifurcate the proceedings and address as a preliminary question its jurisdictional objection concerning Article 1116(2) of the NAFTA.⁵² Under this objection, the Respondent submits the Claimant’s claims are time-barred because it knew, or should have known, about the alleged loss or damage more than three years before it submitted its claim to arbitration (*i.e.*, before 1 June 2014).⁵³ The Respondent does not propose that the Tribunal address its other jurisdictional objections in a preliminary phase because they may be more closely intertwined with the merits of the dispute.⁵⁴
71. The Respondent submits that Article 21(4) of the UNCITRAL Rules grants the Tribunal the discretion to bifurcate the proceedings and at the same time “creates a clear presumption in favour of bifurcating jurisdictional questions.”⁵⁵ Not only have NAFTA Chapter 11 tribunals “frequently decided questions of jurisdiction as a preliminary matter”, the Respondent also points out that such “questions of jurisdiction” often include time-bar issues.⁵⁶ In deciding whether or not to bifurcate the proceedings into a separate jurisdictional phase, the Respondent asserts that tribunals have been guided by the principles of fairness and efficiency⁵⁷ and have considered whether the jurisdictional objection(s) at stake (i) are *prima facie* serious and substantial; (ii) can be examined without prejudging or entering the merits; and (iii) if successful, could dispose of all or an essential part of the claims.⁵⁸

⁵² Request for Bifurcation, ¶¶ 1, 29; Hearing Transcript, Day 1, 128:13-19.

⁵³ Statement of Defence, ¶¶ 28-39; Hearing Transcript, Day 1, 128:20-130:8.

⁵⁴ Request for Bifurcation, ¶ 5.

⁵⁵ Request for Bifurcation, ¶¶ 6, 8, citing *Resolute Forest Products Inc. v. Government of Canada*, PCA Case No. 2016-13 (“*Resolute v. Canada*”), Procedural Order No. 4 - Decision on Bifurcation, 18 November 2016, ¶ 4.3 (RLA-052); *Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17 (“*Mesa Power v. Canada*”), Procedural Order No. 2, 18 January 2013, ¶ 16 (RLA-053); *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL (“*Glamis Gold v. Unites States*”), Procedural Order No. 2 (Revised), 31 May 2005, ¶¶ 9, 12(b) (RLA-054); *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile*, UNCITRAL (“*Pey Casado v. Chile II*”), Decision on Respondent’s Request for Bifurcation, 27 June 2018, ¶¶ 100-101 (RLA-055); *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India*, PCA Case No. 2016-07, Procedural Order No. 4 - Decision on the Respondent Application for Bifurcation, 19 April 2017, ¶ 70 (RLA-056). See also Hearing Transcript, Day 1, 131:20-132:7.

⁵⁶ Request for Bifurcation, ¶ 7, referring to *Resolute v. Canada*, ¶ 4.6 (RLA-052).

⁵⁷ Request for Bifurcation, ¶¶ 7-8, referring to *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2 (“*Lighthouse v. Timor-Leste*”), Procedural Order No. 3 – Decision on Bifurcation and Related Requests, 8 July 2016, ¶ 19 (RLA-059); *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezele v. Hungary*, ICSID Case No. ARB/12/3, Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 38 (RLA-071); *Glamis Gold v. United States*, ¶ 11 (RLA-054).

⁵⁸ Request for Bifurcation, ¶ 9, referring to *Resolute v. Canada*, ¶ 4.3 (RLA-052); *Philip Morris Asia Limited v. Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014, ¶ 10 (RLA-060); *Global Telecom Holding S.A.E. v. Government of Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 2 – Decision on

72. The Respondent affirms that bifurcation is appropriate in this arbitration as its Request for Bifurcation satisfies the mentioned three criteria. With respect to the first criterion, the Respondent submits that in examining whether it has been met, a tribunal is “only required to be satisfied that the objections are not frivolous or vexatious.”⁵⁹ In this regard, the Respondent asserts that its objection is serious as “it goes to the very basis of the Tribunal’s authority to hear [the Claimant’s claims].”⁶⁰ According to the Respondent, the limitation period enshrined in Article 1116(2) has been strictly applied by NAFTA Chapter 11 tribunals, and expressly recognized as “an integral aspect of the NAFTA Parties’ consent to arbitration.”⁶¹ Since the Claimant did not submit its claim within the required three-year period, the Respondent has not consented to arbitration this claim.⁶²
73. The Respondent submits that the jurisdictional objection in question is also substantial.⁶³ In this respect, the Respondent maintains that its objection applies to all of the “four categories of wrongful actions” challenged by the Claimant under Article 1105 of the NAFTA,⁶⁴ namely the Respondent’s (i) unfair manipulation of the award of access to the electricity transmission grid; (ii) unfair manipulation of the dissemination of program information under the FIT Program; (iii) unfair manipulation of the awarding of Contracts under the FIT Program; and (iv) improper destruction of necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.⁶⁵
74. According to the Respondent, the evidence already existing on the record demonstrates that these actions all took place more than three years before the Claimant filed its Notice of Arbitration (*i.e.*, before 1 June 2014), and based on publicly available information the Claimant knew, or should have known, about these alleged breaches before 1 June 2014.⁶⁶ For this reason, the Respondent submits that no further briefing on the part of the Claimant is necessary for the Tribunal to determine whether or not to bifurcate the proceedings.⁶⁷
75. As evidence that the Claimant knew or should have known about the first three categories of alleged wrongful actions, the Respondent points to *inter alia* the notice of arbitration submitted by Mesa Power Group, LLC (“**Mesa Power**”) against Canada on 4 October 2011, which “included nearly identical allegations to [the first three categories of alleged “wrongful actions”] put forward by the Claimant.”⁶⁸ In the Respondent’s view, if Mesa Power “had sufficient knowledge to make these allegations in 2011 based on information

Respondent’s Request for Bifurcation, 14 December 2017, ¶ 100 (**RLA-075**); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Procedural Order No. 2 – Decision on Bifurcation, 28 June 2018, ¶ 49 (**RLA-061**); and *Bay View Group LLC and the Spalena Company LLC v. Republic of Rwanda*, ICSID Case No. ARB/18/21, Procedural Order No. 2 on Bifurcation, 28 June 2019, ¶¶ 9, 36 (**RLA-076**). *See also* Hearing Transcript, Day 1, 132:8-133:8.

⁵⁹ Request for Bifurcation, ¶ 11, *citing Resolute v. Canada*, ¶ 4.4 (**RLA-052**); Hearing Transcript, Day 1, 133:10-20.

⁶⁰ Request for Bifurcation, ¶ 12.

⁶¹ Request for Bifurcation, ¶¶ 12-14, *citing Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 63 (**RLA-081**).

⁶² Request for Bifurcation, ¶ 13, *referring to Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, 7 August 2002, ¶ 120 (**RLA-002**); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware v. Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, ¶ 229 (**RLA-003**).

⁶³ Request for Bifurcation, ¶ 15.

⁶⁴ Request for Bifurcation, ¶ 16, *referring to* Notice of Arbitration, ¶¶ 90-91.

⁶⁵ Notice of Arbitration, ¶¶ 90-91.

⁶⁶ Request for Bifurcation, ¶¶ 15, 22. *See also* Hearing Transcript, Day 1, 135:16-141:19.

⁶⁷ Hearing Transcript, Day 1, 204:25-205:6.

⁶⁸ Request for Bifurcation, ¶¶ 17-18; Hearing Transcript, Day 1, 143:24-144:3.

that was publicly available at the time, there is no reason why Tennant could not have done the same given the nearly identical nature” of its claims.⁶⁹

76. Specifically with respect to the Claimant’s knowledge of the alleged loss or damage giving rise to its claims, the Respondent maintains that at the latest, the Claimant knew, or should have known, of said loss or damage by 12 June 2013, the date on which the Ontario Minister of Energy directed the OPA to “not procure any additional MW under the FIT Program for Large FIT projects,” such as the one proposed in Skyway 127’s application.⁷⁰ This date, the Respondent emphasizes, is far beyond the limitation period provided under the NAFTA.
77. Turning to the second criterion, the Respondent submits that the Tribunal should grant its request for bifurcation because it will not be required to prejudge or enter into the merits of the case to decide on the time-bar objection.⁷¹ According to the Respondent, the facts applicable to the time-bar objection do not substantially overlap with those relevant to the merits because the Tribunal “needs only determine the dates on which the Claimant first had, or should have had knowledge of the measures alleged to violation NAFTA Chapter Eleven and the resulting loss or damages.”⁷² Moreover, the Respondent contends “the evidentiary inquiry required to rule on Canada’s time bar objection is limited”⁷³ because its objection may be sufficiently demonstrated on the basis of the facts alleged in the Notice of Arbitration and public information.⁷⁴
78. In addition, the Respondent notes that while the *Mesa Power* tribunal reversed its decision to bifurcate proceedings because it subsequently found one of the jurisdictional objections to be extremely intertwined with merits, that case is entirely different because the objection at issue pertained to the timelines of the claims pursuant the so-called “cooling-off period” under Article 1120(1) of the NAFTA, and not the time-bar under Article 1116(2).⁷⁵
79. Finally, in relation to the third criterion, the Respondent submits that if the Tribunal upholds its objection under Article 1116(2) of the NAFTA, “it would dispose of [the Claimant’s] claim in its entirety”⁷⁶ and “result in substantial savings in time and costs for both [Parties].”⁷⁷ In this regard, the Respondent disputes the Claimant’s claim that it will need to seek the production of documents from the Respondent to substantiate its position with respect to the time-bar objection, especially since the salient issue here is the Claimant’s own knowledge regarding its claims, and the point in time that it gained, or should have gained, such knowledge.⁷⁸

2. The Claimant’s Position

80. The Claimant agrees that Article 21(4) of the UNCITRAL Rules allows for the consideration of jurisdictional questions as a preliminary question, but emphasizes that the

⁶⁹ Request for Bifurcation, ¶ 19; Hearing Transcript, Day 1, 141:20-143:7.

⁷⁰ Request for Bifurcation, ¶ 21 referring to Statement of Defence, ¶ 19.

⁷¹ Request for Bifurcation, ¶¶ 23-25, referring to *Pey Casado v. Chile II*, ¶ 106 (RLA-055); *Resolute v. Canada*, ¶ 4.9 (RLA-052); *Lighthouse v. Timor-Leste*, ¶ 25 (RLA-059).

⁷² Request for Bifurcation, ¶ 24.

⁷³ Request for Bifurcation, ¶ 24.

⁷⁴ Request for Bifurcation, ¶ 25.

⁷⁵ Hearing Transcript, Day 1, 154:4-155:8.

⁷⁶ Request for Bifurcation, ¶ 27; Hearing Transcript, Day 1, 157:21-159:4.

⁷⁷ Request for Bifurcation, ¶ 27.

⁷⁸ Hearing Transcript, Day 1, 205:24-206:1.

Tribunal has the discretion not to do so when “is unlikely to bring about increased efficiency in the proceedings.”⁷⁹ Since none of the three criteria that would support bifurcating proceedings have been satisfied in this case,⁸⁰ including that it should bring about increased efficiency, the Claimant submits that the Respondent’s request should be rejected.⁸¹

81. First, the Claimant submits that the Respondent’s time-bar objection is frivolous.⁸² Relying on the decision on bifurcation in *Glamis Gold v. United States*, the Claimant asserts that in considering the Respondent’s Request for Bifurcation the Tribunal “should take [the Claimant’s] claim as alleged.”⁸³ In this case, the Claimant points out, it has clearly explained in its Notice of Arbitration that it only obtained knowledge of the Respondent’s alleged breaches less than three years before it submitted its Notice of Arbitration on 1 June 2017.⁸⁴
82. In particular, the Claimant explains that nearly all of the facts on which its claims are based are derived from the submissions and other case-related documents in the *Mesa Power v. Canada* and *Windstream Energy v. Canada* cases, which were only publicly disclosed after 1 June 2014.⁸⁵ This includes, for the example, (i) the claims in *Mesa Power v. Canada* on 4 June 2014; (ii) the terms of the Green Energy Investment Agreement (“GEIA”), which were disclosed as a part of the proceedings in *Mesa Power v. Canada* between 4 June 2014 and 30 April 2015; (iii) the transcript of the hearing in *Mesa Power v. Canada* on 30 April 2015; and (iv) the award in *Windstream Energy v. Canada* on 6 December 2016.⁸⁶
83. According to the Claimant, it only found out about the “wrongful actions” it alleges the Respondent undertook after the hearing transcripts and the post-hearing briefs in *Mesa Power v. Canada* were published in December 2014.⁸⁷ Through testimony that was provided by one of the witnesses in the *Mesa Power v. Canada* case, for example, the Claimant claims that it found out for the first time that preferential treatment and protection was given to International Power Canada, a Canadian company, which resulted in the Claimant’s loss of a multi-million dollar FIT contract.⁸⁸ In this regard, the Claimant clarifies that it was not simply the loss of the FIT Contract that forms the basis of its claims, but the reasons for this loss, which was only revealed later through the disclosure of the above-mentioned documents.⁸⁹ Similarly, the Claimant points out that the Respondent’s alleged destruction of material evidence only came to light as a result of certain relevant documents published in 2015 within the context of the *Mesa Power v. Canada* and *Windstream Energy v. Canada* cases.⁹⁰

⁷⁹ Response to the Request for Bifurcation, ¶¶ 1-2, referring to *Glamis Gold v. Unites States*, ¶ 12(c) (RLA-054); *Resolute v. Canada*, ¶ 4.3, (RLA-052).

⁸⁰ Response to the Request for Bifurcation, ¶ 3, referring to *Glamis Gold v. Unites States*, ¶ 12(c) (RLA-054); *Resolute v. Canada*, ¶ 4.3, (RLA-052). See Request for Bifurcation, ¶ 9.

⁸¹ Response to the Request for Bifurcation, ¶ 4.

⁸² Response to the Request for Bifurcation, ¶¶ 6, 18.

⁸³ Response to the Request for Bifurcation, ¶ 5, referring to *Glamis Gold v. Unites States*, ¶ 12(a) (RLA-054); Hearing Transcript, Day 1, 170:25-171:3.

⁸⁴ Response to the Request for Bifurcation, ¶¶ 5-18.

⁸⁵ Response to the Request for Bifurcation, ¶ 9; Hearing Transcript, Day 1, 178:7-12.

⁸⁶ Response to the Request for Bifurcation, ¶ 7, referring to Notice of Arbitration, ¶ 117. See also Hearing Transcript, Day 1, 178:1-12.

⁸⁷ Response to the Request for Bifurcation, ¶¶ 12-15, referring to *Mesa Power Group v. Canada*, Claimant’s Post-Hearing Brief, 18 December 2014, ¶ 1 (C-017).

⁸⁸ Hearing Transcript, Day 1, 166:10-167:17.

⁸⁹ Hearing Transcript, Day 1, 180:9-11.

⁹⁰ Response to the Request for Bifurcation, ¶ 16.

84. The Claimant also disputes the Respondent's claim that because *Mesa Power* had sufficient knowledge to bring its claim and file its Notice of Arbitration in 2011, the Claimant should similarly have had the knowledge to file its current claim then. According to the Claimant, while the two cases arise out of the same factual matrix, namely Ontario's FIT Program, the claims in both cases, and the alleged wrongful conduct, are entirely different.⁹¹ Indeed, the Claimant notes, the critical facts that form the basis of its claims cannot be found in *Mesa Power's* Notice of Arbitration because they were not public at the time, and were only disclosed later in the arbitration, through witness testimony and documents that were submitted by Canada.⁹²
85. Second, the Claimant submits that granting the Respondent's request for bifurcation would not materially reduce the time and costs of these proceedings.⁹³ In this respect, the Claimant reiterates that because Respondent's time-bar objection lacks merit, regardless of whether the Tribunal addresses it as a preliminary question, "there will be a merits hearing of some scope in this case."⁹⁴ Similarly, if the Respondent's time-bar objection is upheld only with respect to part of the claims, there will still be a need to undertake a merits phase. In addition, the Claimant noted that should the Tribunal decide to bifurcate the proceedings, the initial phase would not be significantly shorter since the Claimant intends to both seek document production and submit witness testimony for purposes of the time-bar issue.⁹⁵ For these reasons, the Claimant submits that bifurcating the proceedings would in fact unnecessarily increase the costs and duration of proceedings.⁹⁶
86. Finally, in the Claimant's view, the Respondent's time-bar objection is closely intertwined with the merits of the case and will require the Tribunal to delve inappropriately into merits issues.⁹⁷ The Claimant points out that all of its claims relate to "surreptitious actions taken by government officials outside the public purview" and, as such, the questions of if and when these actions occurred and were disclosed to the public would have to be dealt with both in determining the Respondent's time-bar objection and the Claimant's claims.⁹⁸ Furthermore, the Claimant underscores that the tribunal in *Mesa Power v. Canada*, decided to reverse its decision to bifurcate proceedings because it considered that one of the jurisdictional objections which pertained to the timelines of the claims pursuant the so-called "cooling-off period" under Article 1120(1) of the NAFTA could not be decided "without substantially engaging in the facts of the dispute."⁹⁹ As in *Mesa Power v. Canada*, the Claimant considers that addressing the question of when the Claimant first knew or should have known about the alleged breaches and corresponding losses and damages requires delving into the merits of the Claimant's claims, thereby making it inappropriate for the Tribunal to consider the Respondent's time-bar objection as a preliminary question.¹⁰⁰

⁹¹ Hearing Transcript, Day 1, 209:21-210:13.

⁹² Hearing Transcript, Day 1, 209:21-210:13.

⁹³ Response to the Request for Bifurcation, ¶¶ 19-25.

⁹⁴ Response to the Request for Bifurcation, ¶ 20.

⁹⁵ Hearing Transcript, Day 1, 187:3-18, 200:23-201:16.

⁹⁶ Response to the Request for Bifurcation, ¶¶ 21-25.

⁹⁷ Response to the Request for Bifurcation, ¶¶ 26-34.

⁹⁸ Response to the Request for Bifurcation, ¶¶ 28-29.

⁹⁹ Response to the Request for Bifurcation, ¶¶ 30-34, quoting *Mesa Power v. Canada*, Procedural Order No. 3, ¶¶ 73, 76 (CLA-001). See also Hearing Transcript, Day 1, 211:9-20.

¹⁰⁰ Response to the Request for Bifurcation, ¶ 34; Hearing Transcript, Day 1, 198:3-199:23.

3. The Tribunal's Analysis and Decision

87. In the exercise of its discretion to bifurcate, the Tribunal is guided by three relevant considerations. These considerations are (i) whether the jurisdictional objection is frivolous; (ii) whether the objection, if successful, would materially reduce the time and costs of the proceeding; and (iii) whether the objection concerns issues intertwined with the merits of the arbitration.¹⁰¹
88. Having considered the Parties' submissions on this issue, the Tribunal has decided to dismiss the Respondent's request for bifurcation on the ground that it is premature.
89. The Tribunal has been directed to paragraph 91 of the Claimant's Notice of Arbitration dated 1 June 2017 ("NOA").¹⁰² Paragraph 91 of the NOA refers to "four categories of wrongful actions" purportedly committed by the Respondent, namely (i) the unfair manipulation of the award of access to the electricity transmission grid; (ii) the unfair manipulation of the dissemination of the FIT Program information; (iii) the unfair manipulation of the awarding of the FIT Program Contracts; and (iv) the improper destruction of necessary and material evidence by senior officials in the Government of Ontario. However, the NOA simply does not contain sufficient particulars of each category of wrongdoing which would allow the Tribunal to take a view, one way or another, on whether the Tribunal can determine the Respondent's jurisdictional objection without entering into the merits.
90. The Respondent has requested that the Tribunal bifurcate the proceedings to consider the Respondent's jurisdictional objection that the Claimant allegedly failed to meet the conditions precedent for submitting a claim to arbitration pursuant to Article 1116(2) of the NAFTA. According to the Respondent, the NOA was filed more than three years after the Claimant first acquired, or should have acquired, knowledge of the alleged breach and knowledge that it incurred loss or damage as a result of that breach and as such, the claim is time-barred.¹⁰³
91. Before the Tribunal can make an assessment of whether to bifurcate the proceedings, the Tribunal will need to know what evidence it will likely have to consider in determining the Respondent's jurisdictional objection and whether the Tribunal will be substantially engaging in the facts of the dispute when considering that evidence. However, until the Tribunal is informed of the specific breach in question which the Respondent now contends is time-barred, the Tribunal does not know what evidence will likely be adduced or the evidence it will likely have to consider in assessing *when* the Claimant acquired, or should have acquired, knowledge of that breach. Consequently, the Tribunal is unable to decide at this stage whether an inquiry into the Respondent's jurisdictional objection will be best conducted with the merits phase when the Tribunal will have the benefit of the entire record or whether the jurisdictional objection should be heard as a preliminary issue. The Tribunal needs to see the Claimant's claims in more detail before it can decide whether the proceedings can be bifurcated. The Tribunal cannot decide whether to bifurcate the proceedings or not if there is no specificity to the claims. For these reasons, the Respondent's request for bifurcation is premature.

¹⁰¹ *Glamis Gold v. United States*, ¶ 12(c) (RLA-054).

¹⁰² Request for Bifurcation, ¶ 16.

¹⁰³ Request for Bifurcation, ¶ 1.

92. Having dismissed the Respondent's request for bifurcation, the Parties are to proceed with the procedural timetable set out in PO 1 for the scenario where the proceedings are *not* bifurcated.
93. However, given the Tribunal's finding that the Respondent's request for bifurcation is premature, the Tribunal makes the following modifications to the procedural timetable:
- (a) The Claimant is to set out in full its detailed pleading on the issue of jurisdiction in its Memorial and specifically on the issue of time-bar which has been raised by the Respondent. In accordance with the procedural timetable set out in PO 1, this Memorial is due to be filed 90 days from the date of this Procedural Order (*i.e.* **Wednesday, 27 May 2020**).
 - (b) Should the Respondent wish to pursue bifurcation of the proceedings after having had sight of the Claimant's Memorial, the Respondent is to file its detailed objections on jurisdiction and a request for bifurcation within 45 days from the date of the Claimant's Memorial (*i.e.* **Monday, 13 July 2020**).
 - (c) If the Respondent files a request for bifurcation in accordance with (b) above, the Claimant is to file its response to the Respondent's request for bifurcation within 21 days from the date of that request (*i.e.* **Monday, 3 August 2020**).
 - (d) After receiving the above submissions, the Tribunal will decide **on the papers without a hearing** on whether the proceedings should be bifurcated. In this regard, the Tribunal notes that it has had the benefit of extensive arguments by Parties on the issue of bifurcation and the oral arguments made at the Hearing in particular have been of assistance to the Tribunal. In the interests of expediency and to save time and costs for all Parties, the Tribunal is confident that it can address a second bifurcation request without a further hearing.
 - (e) The Tribunal will issue the relevant procedural directions after it has come to a decision on the Respondent's second bifurcation request, including any adjustments to the procedural timetable where necessary.
 - (f) Should the Respondent choose *not* to pursue bifurcation of the proceedings after having had sight of the Claimant's Memorial, the timelines will continue to run in accordance with the procedural timetable set out in PO 1.

C. RESPONDENT'S MOTION FOR DISCLOSURE OF THIRD-PARTY FUNDING

94. The Respondent has submitted a motion requesting that the Tribunal order the Claimant to "[d]isclose the existence of any third-party funding agreement that [the Claimant] entered to finance its claim in this arbitration, the name(s) and details of the third-party funder(s), and the nature of the arrangements concluded with the third-party funder(s), including whether and to what extent it/they will share in any successes that [the Claimant] may achieve in this arbitration, or pay an adverse costs order against [the Claimant]."¹⁰⁴

¹⁰⁴ Motion for Security for Costs, ¶ 46(b).

95. The Claimant requests that the Tribunal reject the Respondent's motion and order the Respondent to reimburse the costs the Claimant has incurred in connection with its response to the motion.¹⁰⁵

1. The Respondent's Position

96. The Respondent submits that, in accordance with relevant investment treaty case law, "it is necessary to order Tennant to disclose the existence and terms of any third-party funding agreement it entered into to finance its claim in this arbitration."¹⁰⁶ Referring to the cases of *García Armas v. Venezuela* and *Muhammet Çap v. Turkmenistan*, the Respondent points out that the tribunals in those cases ordered the claimants to reveal the nature of their third-party funding arrangement, based on, *inter alia*, the tribunal's duty to protect the integrity of the arbitral proceedings,¹⁰⁷ the principle of transparency,¹⁰⁸ and the relevance of such information in evaluating requests for security for costs.¹⁰⁹ In the present case, the Respondent submits, the same reasons apply to justify an order for disclosure of such information, in addition to the need to identify potential conflicts of interest.
97. In particular, the Respondent argues that the existence of a third-party funding agreement between the Claimant and a funder, which the Claimant has effectively admitted exists,¹¹⁰ "would increase the chances that Tennant cannot comply with an adverse costs order."¹¹¹ This would especially be the case if the funder is not bound to pay an adverse costs order, and even if it is bound to do so, third-party funders are not parties to the arbitration, and investment tribunals cannot order a third-party funder to pay an Adverse Costs Order that is made against the Claimant.¹¹² This therefore creates the risk of a situation where a cost order is rendered ineffective and the Respondent State is effectively forced to pay the bill, which undermines the equality of the parties and the integrity of the arbitration.¹¹³
98. The Respondent further argues that the disclosure of certain key terms in the funding arrangement, to the extent that they may exist, is especially relevant for evaluating requests for security for costs.¹¹⁴ These terms include those which reflect (i) a funder's level of interest in the Award; (ii) whether a funder paid the Claimant's arbitration fees; (iii) whether a funder has the responsibility to pay an adverse costs order; and (iv) a funder's termination rights.¹¹⁵

¹⁰⁵ Response to the Motion for Security for Costs, ¶¶ 65-66.

¹⁰⁶ Motion for Security for Costs, ¶ 41.

¹⁰⁷ Motion for Security for Costs, ¶ 41, referring to *Muhammet Çap and Sehil İnşaat Endüstri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6 ("*Muhammet Çap v. Turkmenistan*"), Procedural Order No. 3, 12 June 2015, ¶ 9 (RLA-044); *Manuel García Armas et al. v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08 ("*García Armas v. Venezuela*"), Procedural Order No. 9, Decision on Provisional Measures, 20 June 2018, ¶ 250 (revised RLA-006).

¹⁰⁸ Hearing Transcript, Day 1, 21:18-21.

¹⁰⁹ Motion for Security for Costs, ¶ 41, referring to *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, ¶ 86 (RLA-019); Hearing Transcript, Day 1, 23:20-27:2.

¹¹⁰ Hearing Transcript, Day 1, 18:24-25.

¹¹¹ Motion for Security for Costs, ¶ 42.

¹¹² Hearing Transcript, Day 1, 18:8-11.

¹¹³ Hearing Transcript, Day 1, 18:20-23, 22:9-12.

¹¹⁴ Hearing Transcript, Day 1, 23:20-24:1.

¹¹⁵ Hearing Transcript, Day 1, 25:1-30:16, ICCA-Queen Mary Taskforce, *Report on Third-Party Funding*, Chapter 4, ¶ A.1, April 2018 (CLA-065).

99. Finally, the Respondent maintains that it is “necessary for Tennant to reveal the existence of any third-party funding agreement to address potential conflicts of interest arising in this arbitration”, as required under Article 4.6 of the Terms of Appointment and Article 9 of the UNCITRAL Rules, and in accordance with the IBA Guidelines on Conflict of Interest in International Arbitration, 2014.¹¹⁶

2. The Claimant’s Position

100. The Claimant submits that the Tribunal should reject the Respondent’s motion for third-party funding disclosure because the source of its funding “is irrelevant to the issues in dispute.”¹¹⁷
101. In relation to the Respondent’s concerns regarding possible conflicts of interest, the Claimant asserts that, at the Tribunal’s request, it would be willing to disclose the identity of any funder exclusively to the Tribunal in order that it may “determine whether any conflict of interest exists and, if necessary, make any necessary disclosures to the parties.”¹¹⁸ The Claimant maintains that it is not, however, willing to disclose this information to the Respondent. In the Claimant’s view, the Respondent’s true motive for requesting this information is not to identify potential conflicts of interest but rather “to know the financial condition of the funder itself so they know what they can go after.”¹¹⁹
102. In addition, the Claimant submits that the Respondent’s concern regarding the level of financial interest a potential funder might have in the outcome of this proceeding is unwarranted because any such interest would not alter the fact that the Claimant “is the party at interest in this proceeding and has demonstrated that it is the owner of the investment that Canada treated unlawfully.”¹²⁰
103. The Claimant also considers Respondent’s request to disclose the terms of any third-party funding agreement to be unwarranted. In the Claimant’s view, such agreements are confidential and often contain proprietary information, and accordingly, their disclosure may be required only in “exceptional circumstances, where the precise terms of that agreement are relevant.”¹²¹ However, such exceptional circumstances are absent in this case, and therefore the terms of any third-party funding agreement should remain confidential.¹²²

3. The Tribunal’s Analysis and Decision

104. The Tribunal considers that it has the authority to order the disclosure requested if doing so would preserve the integrity of the arbitral process. The Claimant does not appear to dispute this.

¹¹⁶ Motion for Security for Costs, ¶¶ 43-44; Hearing Transcript, Day 1, 22:18-23:3.

¹¹⁷ Response to the Motion for Security for Costs, ¶ 59.

¹¹⁸ Response to the Motion for Security for Costs, ¶ 60, *referring to* ICCA-Queen Mary Taskforce, *Report on Third-Party Funding*, Chapter 4, ¶ A.1, April 2018 (CLA-065); Hearing Transcript, Day 1, 38:11-39:8.

¹¹⁹ Hearing Transcript, Day 1, 38:15-21.

¹²⁰ Response to the Motion for Security for Costs, ¶ 61; Hearing Transcript, Day 1, 46:4-10.

¹²¹ Response to the Motion for Security for Costs, ¶ 62; Hearing Transcript, Day 1, 40:14-41:5, 42:7-23.

¹²² Response to the Motion for Security for Costs, ¶ 63, *referring to* *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case No. 2013-15 (“*South American Silver v. Bolivia*”), Procedural Order No. 10, 11 January 2016, ¶¶ 79-81 (RLA-013).

105. The Claimant has also stated that it is willing to disclose the identity of any third-party funder to the Tribunal to address any concerns about a conflict of interest.¹²³
106. Having considered the Parties' submissions on this issue, the Tribunal has decided that the Claimant should make the following disclosures to the Tribunal and the Respondent by **Thursday, 12 March 2020**:
- (a) the identity of any third-party funder;
 - (b) any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the Claimant in this arbitration. Any such terms should be quoted in full in the Claimant's disclosure; and
 - (c) where no such terms set out at (b) above exist, the Claimant is to inform the Tribunal and the Respondent of that fact.
107. Where any of the following changes are made to the third-party funding arrangement in the course of this arbitration, the Claimant is to notify the Tribunal and the Respondent of the same within two weeks from the date of change:
- (a) any change to the identity of the third-party funder, including termination of the third-party funding arrangement; or
 - (b) any change to the terms relating to the payment of adverse costs orders against the Claimant in this arbitration.
108. Any such disclosures by the Claimant to the Tribunal and the Respondent as set out at paragraphs 106 and 107 above shall be designated "Confidential Information" in accordance with the Confidentiality Order dated 24 June 2019. For the avoidance of doubt, these disclosures need not be made available to the general public.
109. The Tribunal's decision is based on the following factors. First, the existence of third-party funding agreements can be relevant to the Tribunal's assessment of applications for security for costs.¹²⁴ The Tribunal notes that the Claimant has not denied that there is a third-party funder for its claims in this arbitration. It would have been easy for the Claimant to do so if there was no such funder.
110. Secondly, and in any event, the Tribunal considers that transparency as to the existence of a third-party funder is important to determine whether any conflict of interest exists.
111. Having ordered that the Claimant make the disclosures as set out at paragraphs 106 and 107 above, the Tribunal now turns to consider the Respondent's motion for security for costs.

D. RESPONDENT'S MOTION FOR SECURITY FOR COSTS

112. The Respondent has submitted a motion requesting that the Tribunal order the Claimant to issue security for costs in the amount of 6,934,001.95 CAD, by depositing the security into

¹²³ Response to the Motion for Security for Costs, ¶ 60; Hearing Transcript, Day 1, 49:14-17.

¹²⁴ See e.g., *García Armas v. Venezuela* (revised **RLA-006**).

an escrow account arranged by the PCA within 90 days of the order, or the arbitral proceedings will be discontinued.¹²⁵

113. In the alternative, the Respondent requests that the Tribunal order the Claimant to issue “(i) security for costs for the procedural and jurisdictional phase of the proceedings, at this stage [(i.e. 1,477,098.91 CAD)]; and (ii) security for costs for the remaining phases of the arbitration (5,456,903.04 CAD) at a later date in its decision on the request for bifurcation or its decision on jurisdiction, should the arbitration proceed to merits and damages.”¹²⁶
114. The Claimant requests that the Tribunal reject the Respondent’s motion for security for costs and order the Respondent to reimburse the Claimant the costs incurred in connection with the Claimant’s response to the said motion.¹²⁷

1. Preliminary Matters

(a) *The Tribunal’s Authority to Order Security for Costs*

115. The Parties disagree as to whether the Tribunal has the authority to issue an order for security for cost under the NAFTA and the UNCITRAL Rules.¹²⁸

i. The Respondent’s Position

116. The Respondent asserts that the Tribunal possesses such authority under Article 26(1) of the UNCITRAL Rules.¹²⁹ According to the Respondent, Article 26(1), the purpose of which is to protect the integrity of the arbitral proceedings, “grants the Tribunal a wide measure of discretion to order interim measures, including security for costs”.¹³⁰ In addition, in the Respondent’s view, the amendments to the 2010 UNCITRAL Arbitration Rules “do not detract in any way from the authority granted by the 1976 Rules to order Security for Costs” because they “simply make explicit powers that were implicit” under Article 26(1) of the 1976 UNCITRAL Arbitration Rules.¹³¹
117. In support of its position, the Respondent also points out that many tribunals have affirmed their authority to order security for costs, including under the 2010 UNCITRAL Arbitration Rules and the ICSID Convention.¹³² These tribunals have exercised their authority to order security for costs for various reasons, including (i) the failure of claimants to prove their solvency and the existence of a third-party funding agreement which did not cover the payment of an adverse award on costs, as in the *García Armas v. Venezuela* case;¹³³ and (ii)

¹²⁵ Motion for Security for Costs, ¶ 46.

¹²⁶ Motion for Security for Costs, ¶ 40.

¹²⁷ Response to the Motion for Security for Costs, ¶¶ 65-66.

¹²⁸ Motion for Security for Costs, ¶¶ 10-13; Response to the Motion for Security for Costs, ¶¶ 3-23.

¹²⁹ Motion for Security for Costs, ¶¶ 10-13; Hearing Transcript, Day 2, 228:12-229:15.

¹³⁰ Motion for Security for Costs, ¶¶ 10-13, *referring to* Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules* (2006), ¶ 206 (**RLA-008**); *García Armas v. Venezuela*, ¶ 187 (revised **RLA-006**); David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Second Edition (Oxford University Press, 2012), pp. 517-518 (**RLA-10**); *Islamic Republic of Iran and United States of America*, 1983 Tribunal Rules, Decision No. DEC 116-A15(IV)/A24-FT, 18 May 1993 (**RLA-11**).

¹³¹ Hearing Transcript, Day 2, 231:3-12.

¹³² Motion for Security for Costs, ¶ 10; Hearing Transcript, Day 2, 229:13-25.

¹³³ Motion for Security for Costs, ¶ 11, *referring to* *García Armas v. Venezuela*, ¶¶ 193, 194, 224, 226, 231, 250, and 261 (revised **RLA-006**).

the claimant's impecuniosity and record of non-compliance with costs orders, and the existence of a third-party funding agreement, as in the *RSM v. Saint Lucia* case governed by the ICSID Convention.¹³⁴

118. The Respondent adds that *Invesmart v. Czech Republic* is the only public case in which a tribunal has addressed a security for costs application solely under the UNCITRAL Rules. In that case, the Respondent stresses that while the tribunal found that it did not have the power to order security for costs under the UNCITRAL Rules, "there are no public details from the Procedural Order in that case explaining why the Tribunal thought that it lacked [such authority]".¹³⁵
119. Furthermore, the Respondent argues that the Tribunal may exercise its authority under Article 26(1) of the UNCITRAL Rules because it is not modified by Article 1134 of the NAFTA in relation to this motion. In this respect, the Respondent maintains that none of the provisions of Section B, including Article 1134 of the NAFTA, modify the Tribunal's authority under Article 26(1) of the UNCITRAL Rules.¹³⁶
120. In any event, the Respondent submits that Article 1134 of the NAFTA authorises tribunals to order interim measures to preserve and protect both existing and contingent rights, such as a favourable costs order.¹³⁷ In support of this interpretation, the Respondent points out that Article 1134 includes, as examples of interim measures, orders to preserve evidence, which can be made to protect contingent rights on the future production of evidence.¹³⁸
121. Moreover, the Respondent contends that "the basic rules of treaty interpretation require the Tribunal to take into account the unanimous agreement of the NAFTA Parties on the proper interpretation of Article 1134", namely that NAFTA tribunals have authority to order security for costs, subject to applicable arbitration rules, and "to accord the NAFTA Parties' interpretation considerable weight because it is consistent with the relevant context."¹³⁹
122. Specifically, the Respondent contends that "[w]here the NAFTA Parties express concordant views on how to interpret NAFTA, they create subsequent agreement and subsequent practice within the meaning of VCLT Article 31.3."¹⁴⁰ For this reason, NAFTA tribunals have accorded considerable weight to the concordant views of NAFTA Parties, expressed through their submissions to investor-State tribunals, including non-disputing Party submissions.¹⁴¹

¹³⁴ Motion for Security for Costs, ¶ 11, referring to *RSM v. Saint Lucia*, ¶ 86 (RLA-019).

¹³⁵ Hearing Transcript, Day 2, 230:17-21.

¹³⁶ Motion for Security for Costs, ¶¶ 12-13.

¹³⁷ Hearing Transcript, Day 2, 231:17-25.

¹³⁸ Hearing Transcript, Day 2, 232:2-7.

¹³⁹ Respondent's Response to the non-Disputing Parties' Submissions, ¶¶ 2, 8. See also Hearing Transcript, Day 2, 233:9-234:8.

¹⁴⁰ Respondent's Response to the non-Disputing Parties' Submissions, ¶¶ 5-6.

¹⁴¹ Respondent's Response to the non-Disputing Parties' Submissions, ¶ 5, referring to *Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, 28 January 2008, ¶¶ 181-189 (RLA-063); *Bayview Irrigation District et al. v. United Mexican States*, ICSID Case No. ARB (AF)/05/1, Award, 19 June 2007, ¶¶ 100, 106-107 (RLA-065); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, Award on Damages, 10 January 2019, ¶ 378 (RLA-100).

ii. *The Claimant's Position*

123. In contrast, the Claimant submits that neither the NAFTA nor the UNCITRAL Rules authorize the Tribunal to order security for costs.¹⁴²
124. According to the Claimant, an order for security for costs “is not an interim measure envisaged by the drafters of NAFTA Article 1134”,¹⁴³ which limits the interim measures a tribunal may order to those that preserve a right or ensure the Tribunal’s jurisdiction is made fully effective. This is because, the Claimant argues, “no party has a right to a costs award”,¹⁴⁴ and the issue of security for costs has no bearing on the Tribunal’s jurisdiction.¹⁴⁵
125. Moreover, the Claimant submits that the Tribunal “should be very cautious in accepting” the Respondent’s argument that it should give considerable weight to the fact that all three NAFTA Parties agree that Article 1134 authorizes tribunals to order security for costs.¹⁴⁶ In this regard, the Claimant notes that the “overwhelming number of NAFTA Tribunals” have “exercised judicial restraint in not confirming that the various Article 1128 Submissions, taken together with the positions of the responding Party in the same or other dispute, constitute a subsequent practice.”¹⁴⁷
126. In the Claimant’s view, subsequent practice is only one of several elements to be considered under Article 31 of the Vienna Convention on the Law of Treaties, and should not be outweighed nor taken in isolation from other sources of treaty interpretation.¹⁴⁸ Moreover, commentators have argued that the written pleadings of states in investor-state disputes are not, and should not be, sufficient to “establish concordant, common, and consistent subsequent practice supporting new content of treaty law”¹⁴⁹ because it would, among other things, be contrary to the “principle of independence and impartiality of justice, which includes the principle that no one can be judge of its own cause.”¹⁵⁰

¹⁴² Response to the Motion for Security for Costs, ¶¶ 3-23.

¹⁴³ Response to the Motion for Security for Costs, ¶¶ 3-9.

¹⁴⁴ Response to the Motion for Security for Costs, ¶ 7, referring to 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); *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); and *Eskosol SPA in liquidazione v. Italy*, ICSID Case No. ARB/15/50 (“*Eskosol v. Italy*”), Decision on Respondent’s Request for Provisional Measures, 12 April 2017, ¶¶ 33-35 (RLA-041). See also Hearing Transcript, Day 2, 284:4-285:9.

¹⁴⁵ Response to the Motion for Security for Costs, ¶ 8, referring to *Eskosol v. Italy*, Decision on Respondent’s Request for Provisional Measures, 12 April 2017, ¶¶ 33-35 (RLA-041); Claimant’s Response to the non-Disputing Parties’ Submissions, ¶¶ 9-11.

¹⁴⁶ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 35.

¹⁴⁷ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 36, referring to Patrick Dumberry, *The Fair and Equitable Treatment Standard* (Wolters Kluwer, 2013), Chapter II, Part I: “The Meaning of Article 1105”, pp. 82-83 (CLA-093).

¹⁴⁸ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 37.

¹⁴⁹ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 42, citing to Martins Paparinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (Oxford: Oxford University Press, 2013), pp.144-145 (CLA-097).

¹⁵⁰ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 45, citing to Gabrielle Kaufmann-Kohler, “Interpretive Powers of the Free trade Commission and the Rule of Law” *Fifteen Years of NAFTA Chapter 11 Arbitration*. (2011) JurisNet, at 175 (CLA-098). See also Hearing Transcript, Day 2, 278:11-279:17.

127. In any event, the Claimant disputes the Respondent's suggestion that an order to preserve evidence, which is an interim measure expressly included in the scope of Article 1134, protects a contingent right to the disclosure of evidence, and that therefore Article 1134 must be interpreted to authorize a tribunal to issue interim measures that protect both existing and contingent rights. In the Claimant's view, "an order to preserve evidence in the possession or control of a disputing party", as referenced in Article 1134, protects "immediate and definite" rights by protecting the integrity of the arbitration process and prevent the aggravation of the dispute.¹⁵¹ The right to request the production of documents, the Claimant argues, is also confirmed in Article 24(3) of the UNCITRAL Rules, and corroborated by Article 26 which authorizes the Tribunal to order interim measures for document production.¹⁵²
128. In light of the above, the Claimant considers that the NAFTA Parties' reading of Article 1134 would be tantamount to an amendment to the provision, which can only be done under NAFTA Article 2202(2) and approved in accordance with the "applicable legal procedures of each Party",¹⁵³ and not simply through subsequent practice or agreement.¹⁵⁴
129. The Claimant further submits that the UNCITRAL Rules do not empower the Tribunal to order security for costs because there is no provision therein which explicitly addresses such an interim measure.¹⁵⁵ In the Claimant's view, the Tribunal's authority under Article 26(1) does not encompass measures that are not related to the subject-matter of the dispute, including orders for security for costs, which are procedural in nature.¹⁵⁶ Indeed, the Claimant considers that Article 26(2), which authorizes a tribunal to order security for the costs of interim measures, supports the position that Article 26(1) only authorizes tribunals to grant interim measures that have as an object concrete rights or property in dispute "and not a hypothetical final cost award."¹⁵⁷
130. The Claimant adds that the amendments made to Article 26(1) by the 2010 UNCITRAL Rules support the interpretation that security for costs may not be granted under the 1976 version of the rules.¹⁵⁸ The Claimant underlines that 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" and to include new language specifically authorizing interim measures to "[p]rovide a means of preserving assets out of which a subsequent award may be satisfied."¹⁵⁹
131. The Claimant also disputes the Respondent's reliance on decisions by ICSID tribunals, given that the relevant provisions of the ICSID Convention do not contain the limitation in Article 26 of the UNCITRAL Rules that interim measures must be "in relation to the

¹⁵¹ Claimant's Response to the non-Disputing Parties' Submissions, ¶ 49.

¹⁵² Claimant's Response to the non-Disputing Parties' Submissions, ¶ 48.

¹⁵³ Claimant's Response to the non-Disputing Parties' Submissions, ¶¶ 38-40.

¹⁵⁴ Hearing Transcript, Day 2, 279:18-25.

¹⁵⁵ Response to the Motion for Security for Costs, ¶ 11.

¹⁵⁶ Response to the Motion for Security for Costs, ¶¶ 8, 13, *referring to* Court of Appeal for Ontario, *Inforica Inc. v. CGI Info. Sys & Mgt Consultants Inc.*, [2009] ONCA 642, (CLA-054); Claimant's Response to the non-Disputing Parties' Submissions, ¶¶ 20-21; Hearing Transcript, Day 2, 285:12-21.

¹⁵⁷ Response to the Motion for Security for Costs, ¶ 14; Claimant's Response to the non-Disputing Parties' Submissions, ¶ 22.

¹⁵⁸ Response to the Motion for Security for Costs, ¶¶ 16-18, *referring to* 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).

¹⁵⁹ Response to the Motion for Security for Costs, ¶ 16. *See also* Hearing Transcript, Day 2, 291:16-292:22.

subject-matter of the dispute.”¹⁶⁰ Moreover, the Claimant argues that the decisions by the tribunals in *Paushok v. Mongolia* and *South American Silver v. Bolivia* are not relevant precedents, as the former did not address its power to award security for costs and the latter was governed by the 2010 UNCITRAL Rules.¹⁶¹ Additionally, according to the Claimant, the *García Armas v. Venezuela* case is “inapposite” because in that case, the parties did not contest the tribunal’s authority to order interim measures and the application was made both under the UNCITRAL Rules and the ICSID Additional Facility Rules.¹⁶²

(b) Applicable Legal Standard

132. The Parties’ positions differ as to the applicable legal standard for granting security for costs.
133. The Respondent submits that the applicable legal standard was articulated by the tribunal in *García Armas v. Venezuela*, which was governed by the UNCITRAL Rules.¹⁶³ The test, which was drawn from Article 26(3) of the 2010 UNCITRAL Rules and which the tribunal considered to reflect the international consensus, comprised the following elements (i) whether there is, *prima facie*, a reasonable prospect that the Tribunal will issue an award in favour of the Respondent, including its costs of legal representation; (ii) whether harm not adequately reparable by an award of damages may be caused if the measure is not ordered; (iii) whether such harm would substantially outweigh the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and (iv) whether the measure requested is of such urgency that it cannot be postponed until the issuance of the award.¹⁶⁴
134. The Respondent also does not consider it necessary to demonstrate that the applicant has submitted its request under “exceptional circumstances.”¹⁶⁵ While some tribunals have held that an order for security for costs is appropriate only in “exceptional circumstances,” the Respondent argues that there is no basis under Article 26(1) to assert that this is a necessary requirement not least because in contrast to Article 29 of the UNCITRAL Rules, Article 26(1) does not refer to exceptional circumstances.¹⁶⁶ Moreover, the Respondent points out, Article 1134 of the NAFTA does not refer to “exceptional circumstances” and that no tribunal conducting its proceedings under the NAFTA has applied the discussed requirement.¹⁶⁷ The Respondent adds that the Tribunal should reject the “exceptional circumstances” standard because it would expose the Respondent to an asymmetrical risk that an adverse costs order against the Claimant would remain unpaid, and lead to unequal treatment of the disputing Parties in violation of Article 15(1) of the UNCITRAL Rules.¹⁶⁸
135. The Claimant, by contrast, contends that a security for cost order may be only obtained in “exceptional circumstances”,¹⁶⁹ because “of the fundamentally significant and disruptive

¹⁶⁰ Response to the Motion for Security for Costs, ¶ 20 referring to Articles 47 and 39 of the ICSID Convention.

¹⁶¹ Response to the Motion for Security for Costs, ¶¶ 21-23.

¹⁶² Response to the Motion for Security for Costs, ¶ 22 referring to *García Armas v. Venezuela*, ¶ 186 (revised **RLA-006**).

¹⁶³ Motion for Security for Costs, ¶¶ 16-19.

¹⁶⁴ Motion for Security for Costs, ¶ 16, referring to *García Armas v. Venezuela*, ¶ 191 (revised **RLA-006**); Hearing Transcript, Day 2, 236:8-20.

¹⁶⁵ Motion for Security for Costs, ¶¶ 20-23.

¹⁶⁶ Motion for Security for Costs, ¶ 21; Hearing Transcript, Day 2, 237:4-15.

¹⁶⁷ Motion for Security for Costs, ¶ 22.

¹⁶⁸ Hearing Transcript, Day 2, 237:16-238:1.

¹⁶⁹ Response to the Motion for Security for Costs, ¶¶ 24-25.

impact that occurs upon the Claimant.”¹⁷⁰ The Claimant argues that even the tribunals in *García Armas v. Venezuela* and *RSM v. Saint Lucia* – the only two tribunals that have ordered security for costs – relied on the “exceptional circumstances” standard to justify their decision.¹⁷¹

2. The Respondent’s Request for Security for Costs

(a) The Respondent’s Position

136. The Respondent affirms that its Request for Security for Costs satisfies the applicable legal standard.¹⁷² In relation to the first limb of the *García Armas v. Venezuela* test, the Respondent submits that it has a *prima facie* reasonable possibility of prevailing in this case.¹⁷³ On jurisdiction, the Respondent maintains that the Claimant’s claim is manifestly time-barred, reiterating its arguments of its objection under Article 1116(2) of the NAFTA.¹⁷⁴ Furthermore, the Respondent contends that the Claimant’s “allegations regarding spoliation of documents do not even relate to the Claimant or its project, as required by NAFTA Article 1101(1).”¹⁷⁵ With respect to the merits, the Respondent submits that since the tribunal in *Mesa Power v. Canada* has already dismissed claims that are “substantially no different” from the Claimant’s claim, the Claimant’s claims should be deemed frivolous.¹⁷⁶
137. Concerning the second limb of the test, the Respondent submits that it could suffer harm not adequately reparable by a costs order if security for costs is not provided.¹⁷⁷ The Respondent submits that the Claimant’s “corporate history leading up to the present indicates that it is impecunious and has been unsuccessful in many previous business ventures.”¹⁷⁸ The Respondent notes that based on its “diligent investigation” and “extensive research”, “[i]t seems” that the Claimant “no longer operates”, “has no website[, no] publicly identifiable business establishment[, no] apparent source of revenues from any business activities [and] [n]o public information indicates that it holds financial assets.”¹⁷⁹ In addition, the Respondent points out that the Claimant appears to have a third-party

¹⁷⁰ Hearing Transcript, Day 2, 286:16-287:1.

¹⁷¹ Response to the Motion for Security for Costs, ¶ 26, referring to *García Armas v. Venezuela*, ¶¶ 250-251 (revised **RLA-006**); *RSM v. Saint Lucia*, ¶¶ 52, 75 (**RLA-019**); Hearing Transcript, Day 2, 294:1-295:1.

¹⁷² Motion for Security for Costs, ¶ 24; Hearing Transcript, Day 2, 285:22-289:4.

¹⁷³ Motion for Security for Costs, ¶¶ 25-27.

¹⁷⁴ Motion for Security for Costs, ¶ 26, referring to Statement of Defence, ¶¶ 2, 28-39; Hearing Transcript, Day 2, 243:22-245:2.

¹⁷⁵ Motion for Security for Costs, ¶ 26.

¹⁷⁶ Motion for Security for Costs, ¶ 27. The Respondent underlines that the wording in the notice of arbitration in *Mesa Power v. Canada* and the one in this case overlaps significantly (Motion for Security for Costs, ¶ 27, Annex III).

¹⁷⁷ Motion for Security for Costs, ¶¶ 28-31.

¹⁷⁸ Motion for Security for Costs, ¶ 30, referring to Tennant Consulting, LLC, Limited Liability Company Articles of Organization, 10 September 2001 (**R-008**); Wine Destinations, LLC, Limited Liability Company Restated Articles of Organization, 5 March 2002 (**R-009**); Tennant Travel Services, LLC, Limited Liability Company Restated Articles of Organization, 27 November 2002 (**R-010**); Tennant Energy, LLC, Amendment to Articles of Organization of a Limited Liability Company, 20 April 2015, (**R-011**).

¹⁷⁹ Motion for Security for Costs, ¶ 30; Hearing Transcript, Day 2, 248:6-13.

funder “which this Tribunal has no jurisdiction to compel payment of an Adverse Costs Order and who may have no responsibility to pay one.”¹⁸⁰

138. Under these circumstances, the Respondent considers that it has established a reasonable basis to find that the Claimant is impecunious, and that accordingly, the burden is now on the Claimant to “produce evidence sufficient to prove it can pay an adverse costs order.”¹⁸¹ Yet, the Respondent observes that beyond stating that it has “limited assets beyond the Arbitration,” the Claimant has thus far not provided any evidence to prove that it has the capability to pay an adverse costs order.¹⁸²
139. Accordingly, because the Claimant has failed to meet this burden, the Tribunal must order it to issue security for costs.¹⁸³ Otherwise, the Respondent argues, it would be left in the same position as in *Mesa Power v. Canada*, where despite having been awarded part of its costs in the final award, Canada is still “spending significant funds trying to enforce [this order], without any alternative options.”¹⁸⁴
140. Regarding the third limb of the test, the Respondent alleges that the harm it will suffer substantially outweighs the harm the Claimant would suffer if the motion were granted.¹⁸⁵ In its view, the harm that the Claimant will suffer is temporary, as such an order would not undermine the Claimant’s access to justice, and the Claimant would be able to recover its full security if the Tribunal issues a costs order in its favour, and especially if the Claimant had a third-party funder that could post security for costs on its behalf.¹⁸⁶ In contrast, the Respondent “could suffer permanent harm by losing potentially millions of dollars from an unpaid costs order in its favour.”¹⁸⁷
141. Regarding the fourth limb of the test, the Respondent submits that its “ongoing expenditures to defend itself in investment arbitration are sufficient to meet the condition of urgency.”¹⁸⁸
142. Finally, the Respondent asserts that the requested amounts for security for costs, namely (i) 6,934,001.95 CAD for the entire proceedings; or, in the alternative, (ii) 1,477,098.91 CAD for the jurisdictional phase and, if necessary, 5,456,903.04 CAD for the remaining part of the proceedings, are reasonable.¹⁸⁹ The Respondent submits that the calculation of the requested amounts was based on the costs it incurred in *Mesa Power v. Canada*, adjusted in respect of the jurisdictional phase in light of the additional procedural steps envisioned in the procedural calendar of this arbitration.¹⁹⁰ According to the Respondent, this calculation is reasonable, as it has asserted before, the Claimant’s claims “virtually replicates” *Mesa Power*’s claims.¹⁹¹

¹⁸⁰ Hearing Transcript, Day 2, 226:23-227:1, 248:2-6.

¹⁸¹ Motion for Security for Costs, ¶ 31, referring to *García Armas v. Venezuela*, ¶¶ 7, 224, 226, 250 (revised **RLA-006**).

¹⁸² Hearing Transcript, Day 2, 257:19-258:10.

¹⁸³ Motion for Security for Costs, ¶ 31, referring to *García Armas v. Venezuela*, ¶¶ 197-199 (revised **RLA-006**).

¹⁸⁴ Motion for Security for Costs, ¶ 29; Hearing Transcript, Day 2, 227:2-8.

¹⁸⁵ Motion for Security for Costs, ¶¶ 32-34.

¹⁸⁶ Hearing Transcript, Day 2, 266:21-267:24.

¹⁸⁷ Motion for Security for Costs, ¶ 34; Hearing Transcript, Day 2, 265:4-10.

¹⁸⁸ Motion for Security for Costs, ¶ 35. See also Hearing Transcript, Day 2, 268:14-269:2.

¹⁸⁹ Motion for Security for Costs, ¶¶ 37-40; Hearing Transcript, Day 2, 270:10-271:5.

¹⁹⁰ Motion for Security for Costs, ¶¶ 38-39, Annexes I and II, referring to *Mesa Power v. Canada*, Canada’s Submission on Costs, 3 March 2015, ¶ 4 (**R-007**); Hearing Transcript, Day 2, 271:6-9.

¹⁹¹ Motion for Security for Costs, ¶ 38.

(b) *The Claimant's Position*

143. The Claimant asserts that even assuming *arguendo* that the Tribunal has the authority to issue an order for security for costs, the “exceptional circumstances” required for rendering such order do not exist in this case.¹⁹²
144. First, the Claimant submits that the Respondent has not met its burden of proving that it has *prima facie* a reasonable possibility of prevailing in this case.¹⁹³ In this respect, the Claimant alleges that its claim is not manifestly time-barred, reiterating its argument in response to the Respondent’s *ratione temporis* jurisdictional objection.¹⁹⁴ In addition, the Claimant alleges that its Motion for Interim Measures evidences that it does not have access to all the relevant documents in relation to the challenged conduct.¹⁹⁵
145. Addressing the Respondent’s assertion that the Claimant’s claim are frivolous due to their similarity with the claims in *Mesa Power*, the Claimant contends that the Respondent fails to recognize that the tribunal in that case considered it to be a “legitimate dispute” and that one of the members of that tribunal issued a dissenting opinion characterizing Canada’s conduct as “grotesque”.¹⁹⁶ Further, the Claimant notes, the Respondent fails to mention that measures related to the application of the FIT Program were found in breach of the NAFTA by the tribunal in *Windstream Energy v. Canada*.¹⁹⁷
146. The Claimant maintains that other tribunals, including the ones in *García Armas v. Venezuela*, *South American Silver v. Bolivia* and *Orlandini v. Bolivia*, have considered that when evaluating a request for security for costs, tribunals should avoid prejudging on the merits of the dispute.¹⁹⁸ Moreover, the Claimant emphasises that the tribunal in *Maffezini v. Spain* determined that upholding a request for security for costs on the basis that a respondent will hypothetically obtain a favourable costs order, entails prejudging on the merits of the dispute.¹⁹⁹ Relying on the foregoing, the Claimant states that at this stage of the proceedings, where jurisdictional and merits issues are still disputed and where the Claimant “continues to await information related to these disputed jurisdictional and merits issues,” “assessing the likelihood of the respondent state’s success would be premature.”²⁰⁰
147. Second, the Claimant submits that “the potential harm Canada invokes, [...] is hypothetical and, in any event, reparable through the courts of enforcement.”²⁰¹ Regarding Canada’s

¹⁹² Response to the Motion for Security for Costs, ¶¶ 31-57; Hearing Transcript, Day 2, 294:22-295:4.

¹⁹³ Response to the Motion for Security for Costs, ¶¶ 31-42.

¹⁹⁴ Response to the Motion for Security for Costs, ¶¶ 32, 33.

¹⁹⁵ Response to the Motion for Security for Costs, ¶ 33.

¹⁹⁶ Response to the Motion for Security for Costs, ¶ 35, referring to *Mesa Power v. Canada*, Award, 24 March 2016, ¶ 704 (RLA-001), Dissenting Opinion of Judge Charles N. Brower, ¶¶ 4, 23, (CLA-055). See also Hearing Transcript, Day 2, 300:17-301:1.

¹⁹⁷ Response to the Motion for Security for Costs, ¶ 35. See also Hearing Transcript, Day 2, 300:17-301:1.

¹⁹⁸ Response to the Motion for Security for Costs, ¶¶ 37-39, referring to *García Armas v. Venezuela*, ¶ 191 (revised RLA-006); *South American Silver v. Bolivia*, ¶ 55 (RLA-013); *Orlandini v. The Plurinational State of Bolivia*, PCA Case No. 2018-39 (“*Orlandini v. Bolivia*”), Decision on the Respondent’s Motion for Security for Costs for Termination, Trifurcation, and Security for Costs, 9 July 2019, ¶ 142 (RLA-034).

¹⁹⁹ Response to the Motion for Security for Costs, ¶ 40, referring to *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).

²⁰⁰ Response to the Motion for Security for Costs, ¶ 42.

²⁰¹ Response to the Motion for Security for Costs, ¶ 44.

inability to enforce the cost order in *Mesa Power v. Canada*, the Claimant contends that it is irrelevant because Canada “never took any steps to enforce that award”.²⁰²

148. Concerning the relevance of a claimant’s solvency in determining whether an order for security for costs is appropriate, the Claimant argues that several tribunals, including those in *Burimi v. Albania* and *RSM v. Saint Lucia*, have held that mere financial difficulties or lack of assets on the part of a claimant do not constitute a sufficient basis for an order for security for costs.²⁰³ Any decision contrary to this view, according to the Claimant, “would frustrate investor’s access to justice.”²⁰⁴
149. Referring to statements by the tribunals in *EuroGas v. Slovak Republic* and *Orlandini v. Bolivia*, the Claimant alleges that orders for security for costs should be warranted only in exceptional circumstances, such as when a claimant has a record of non-payment of costs awards or there is evidence showing a claimant’s bad faith or improper behaviour in the proceedings at stake.²⁰⁵ In the present case, the Claimant submits that the Respondent “has been unable to identify any exceptional circumstances of the kind found by previous tribunals as justification for an order for security for costs.”²⁰⁶
150. Referring to various ICSID tribunals that have considered requests for security for costs, the Claimant points out that they have held that there was insufficient risk to grant such requests even where the claimant lacked assets.²⁰⁷ Similarly, as in this case, where the claimant lacked a history of defaulting on its financial obligations, tribunals have found that there was no real risk to justify an award for security for costs, or requirement for the claimant to demonstrate its solvency.
151. Third, the Claimant submits that, contrary to the Respondent’s assertion, the harm the Respondent may suffer would not outweigh the Claimant’s harm in the event that the Tribunal ordered security for costs.²⁰⁸ The Claimant argues *inter alia* that the amount requested by the Respondent is “speculative and grossly excessive,” because it assumes that the Respondent will be awarded 100% of its costs when in *Mesa Power v. Canada*, the case the Respondent uses as a basis to calculate the amount it requests, the tribunal awarded Canada only 30% of its costs.²⁰⁹ On the other hand, the Claimant contends that harm it will suffer if it is required to issue security for costs is tangible and may even “hinder it from being able to proceed with the arbitration” as it has limited assets that are unconnected to this dispute.²¹⁰

²⁰² Response to the Motion for Security for Costs, ¶¶ 45, 52.

²⁰³ Response to the Motion for Security for Costs, ¶¶ 47-48, referring to *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); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (“*RSM et al. v. Grenada*”), ICSID Case No. ARB/10/6, Decision on Security for Costs, 14 October 2010, ¶¶ 5.19 (RLA-018).

²⁰⁴ Response to the Motion for Security for Costs, ¶ 49.

²⁰⁵ Response to the Motion for Security for Costs, ¶¶ 50-51, referring to *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14 (“*EuroGas v. Slovak Republic*”), Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, 23 June 2015, ¶ 122 (CLA-067); *Orlandini v. Bolivia*, ¶¶ 143-144 (RLA-034).

²⁰⁶ Response to the Motion for Security for Costs, ¶ 52.

²⁰⁷ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶¶ 57, 59, 61.

²⁰⁸ Response to the Motion for Security for Costs, ¶¶ 54-55.

²⁰⁹ Response to the Motion for Security for Costs, ¶ 54(c); Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 60(c).

²¹⁰ Response to the Motion for Security for Costs, ¶ 54(b); Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 60.

152. Finally, the Claimant argues that the Respondent has failed to demonstrate that its motion for security for costs is of an urgent character.²¹¹ The Claimant disagrees with the Respondent's position that its ongoing costs related to these proceedings justify the urgency of its request.²¹² In the Claimant's view, given that the Respondent's counsel are government employees with a fixed salary, the Respondent's costs of legal representation are not related to this claim and will still be borne in any event.²¹³

3. Non-Disputing Parties' Submissions

153. Both the U.S. and Mexico made submissions on the interpretation of Article 1134 of the NAFTA, and in particular on the question whether the tribunals' authority thereunder to grant interim measures of protection includes the authority to grant orders for security for costs. The following sub-sections summarize each of the non-disputing Parties' arguments in this respect.

(a) *The United States' Submission*

154. The U.S. submits that an order for security for costs "may constitute 'an interim measure of protection to preserve the rights of a disputing party'" under Article 1134 of the NAFTA, and that such an order is not barred by the second sentence of that Article.²¹⁴

155. According to the US, Article 1134 "makes no distinction between interim measures that protect contingent rights and measures that protect existing rights."²¹⁵ The phrase "rights of a disputing party" is not qualified in any way,²¹⁶ and the express example of an interim measure provided in Article 1134—an order to preserve evidence in the possession or control of a disputing party—preserves a right to disclosure of evidence that is contingent on the tribunal's authority to order such disclosure, and its determination that such an order is appropriate.²¹⁷

156. While no tribunal appears to have ruled on requests for security for costs under NAFTA Article 1134, the U.S. also points out that several tribunals have found that similar language under Article 47 of the ICSID Convention allows for provisional measures that preserve contingent rights, including orders granting a party security for its costs.²¹⁸

157. Thus, the U.S. submits that a tribunal constituted under Chapter 11 of the NAFTA may issue an order for security for costs under Article 1134 in appropriate circumstances and, if so, authorized by the applicable arbitration rules.²¹⁹

158. Furthermore, the U.S. contends that when the three NAFTA Parties demonstrate an agreement on the proper interpretation of a provision, as they have done with respect to

²¹¹ Response to the Motion for Security for Costs, ¶¶ 56-57.

²¹² Response to the Motion for Security for Costs, ¶¶ 56-57.

²¹³ Response to the Motion for Security for Costs, ¶¶ 56-57.

²¹⁴ U.S.' Article 1128 Submission, ¶ 7.

²¹⁵ U.S.' Article 1128 Submission, ¶ 5.

²¹⁶ U.S.' Article 1128 Submission, ¶ 5.

²¹⁷ U.S.' Article 1128 Submission, ¶ 4.

²¹⁸ U.S.' Article 1128 Submission, ¶ 6, citing *RSM et al. v. Grenada*, ¶¶ 5.6, 5.8 (RLA-018).

²¹⁹ U.S.' Article 1128 Submission, ¶ 7.

Article 1134 in this case, the Tribunal must take this into account, in accordance with the principles on subsequent agreement and practice as outlined in Article 31 of the VCLT.²²⁰

(b) The United Mexican States' Submission

159. Mexico submits that “[i]n general, NAFTA Article 1134 provides a margin of discretion for a Tribunal to order an interim measure of protection ‘to preserve the rights of a disputing party’ which allows the possibility for a Tribunal to order security for costs, provided that other relevant requirements contained in the applicable arbitration rules are met.”²²¹
160. This is because, Mexico argues, the first sentence of Article 1134 authorizes various types of interim measures of protection, and therefore does not limit the Tribunal’s authority to order security for costs simply because such an order is not expressly referenced therein.²²² In addition, the two limitations to the power of NAFTA Chapter 11 tribunals to order interim measures of protection, as laid out in the second sentence of Article 1134, also do not cover security for costs.²²³

4. The Tribunal’s Analysis and Decision

161. As a preliminary matter, following the conclusion of the Hearing, but before the making of this Order, the Respondent drew to the Tribunal’s, and the Claimant’s, attention, the publication of the Decision on the Respondent’s Request for Security for Costs and the Claimant’s Request for Security for Claim, dated 27 January 2020, handed down by the ICSID tribunal in the case *Dirk Herzig v. Turkmenistan*.²²⁴ Having afforded the Parties an opportunity to make submissions on this decision, the decision was admitted into the record of these proceedings and has been carefully weighed by the Tribunal for purposes of its present Order.
162. The Tribunal’s authority to order interim measures is governed by Article 26 of the UNCITRAL Rules, which provides as follows:
1. 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 of the dispute, such as ordering their deposit with a third person or the sale of perishable goods.
 2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.
 3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

²²⁰ Hearing Transcript, Day 2, 345:4-8, 346:25-347:9.

²²¹ Mexico’s Article 1128 Submission, ¶ 6.

²²² Mexico’s Article 1128 Submission, ¶ 4.

²²³ Mexico’s Article 1128 Submission, ¶ 5.

²²⁴ *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan*, ICSID Case No. ARB/18/35 (“*Dirk Herzig v. Turkmenistan*”), Decision on the Respondent’s Request for Security for Costs and the Claimant’s Request for Security for Claim, 27 January 2020 (RLA-112).

163. Pursuant to Article 1120(2) of the NAFTA, Article 26 of the UNCITRAL Rules shall govern this arbitration except to the extent modified by Section B of NAFTA Chapter 11, which includes Article 1134.
164. Article 1134 of the NAFTA in turn provides that:
- 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.
165. Having carefully considered the Parties' and the non-disputing Parties' submissions on this issue, the Tribunal is of the view that it has authority to order security for costs in this arbitration.
166. In this regard, the Tribunal notes that the investment tribunals in *Pugachev v Russia*²²⁵ and *García Armas v Venezuela*²²⁶ have both affirmed their authority to order security for costs under Article 26 of the UNCITRAL Rules. Whilst the parties in *Pugachev v Russia* did not contest the issue on the Tribunal's power to grant requests for security for costs, the tribunal in that case nonetheless independently examined whether it has the power to do so. The Tribunal agrees with the tribunal in *Pugachev v Russia* that Article 26 of the UNCITRAL Rules does not set forth a limit on the types of provisional measures that this Tribunal may take. In fact, Article 26(2) expressly provides that UNCITRAL tribunals are entitled to require "security for the costs" of interim measures, which suggests that UNCITRAL tribunals do have power to request a party to provide security for costs. The Tribunal is fortified in its conclusion by the fact that in the context of investment arbitration, several arbitral tribunals have expressly confirmed that arbitral tribunals do have the power to grant requests for security for costs.
167. The Claimant argues that because 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" and included new language specifically authorising interim measures which provide a means of "preserving assets out of which a subsequent award may be satisfied", this suggests that the pre-amendment language does not empower tribunals to order a party to pay security for costs.²²⁷ The Tribunal is unable to agree. It may well be that the amendments, as the Respondent submits, make explicit powers that were implicit in Article 26 of the UNCITRAL Rules. This conclusion is supported by the Report commissioned by the UNCITRAL Secretariat on revisions of the 1976 UNCITRAL Rules, which explained that the amendments are merely "*clarifications* that practice has shown are necessary or at least highly desirable", and that these amendments would "*maintain* the basic structure and *content* of the existing article 26" (emphasis added). The reference to the "subject-matter" in Article 26(1) was also expressly characterised in the report as "facially restrictive phraseology".²²⁸

²²⁵ *Sergei Viktorovich Pugachev v Russia* (UNCITRAL) Interim Award, 7 July 2017 (**RLA-032**).

²²⁶ *García Armas v. Venezuela* (revised **RLA-006**).

²²⁷ Response to the Motion for Security for Costs, ¶¶ 16-18.

²²⁸ Jan Paulsson & Georgios Petrochilos, *Revision of the UNCITRAL Arbitration Rules*, (2006), ¶ 206 (**RLA-008**).

168. The Tribunal is also unable to agree with the Claimant’s argument that NAFTA Article 1134 limits the measures that this Tribunal may order to those that preserve an existing right, with the result that this Tribunal has no power to order security for costs as a party’s “right” to a costs award hinges on the hypothetical.²²⁹ Article 1134 permits the Tribunal to order measures of protection “to preserve the rights of a disputing party”. It does not make any distinction between interim measures that protect contingent rights and measures that protect existing rights. The only types of interim measures that the Article expressly bars a tribunal from ordering are (i) attachment orders, and (ii) orders that enjoin the application of the challenged measure, none of which restricts the Tribunal from ordering security for costs.
169. The Tribunal further notes that many tribunals have confirmed that the hypothetical nature of a costs award is not a bar to ordering provisional measures under Article 47 of the ICSID Convention, which like NAFTA Article 1134, similarly permits a tribunal to recommend provisional measures “to preserve the respective rights of either party”. In any case, it makes no sense to the Tribunal to construe the rights that are being preserved under NAFTA Article 1134 as being limited to “existing” rights. In this regard, the Tribunal agrees with the reasoning in *RSM v. Saint Lucia* that “the hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures”.²³⁰
170. In addition, neither party has addressed the Tribunal on whether it was necessary to establish that the Tribunal had *prima facie* jurisdiction before it could grant security for costs.
171. In the premises, the Tribunal is satisfied that it has the power under Article 26 of the UNCITRAL Rules to order security for costs in this arbitration. The Tribunal now turns to consider the legal standard to grant security for costs.
172. The Tribunal notes that the parties largely agree that the four factors set out in *García Armas v. Venezuela* would apply.²³¹ These factors are:
- (a) *prima facie*, there is a reasonable possibility that the respondent would prevail in the case;
 - (b) the respondent would likely suffer harm not adequately reparable by an award of damages without the order;
 - (c) the respondent’s potential harm without the order substantially outweighs the harm that the claimant would likely incur from the order; and
 - (d) the condition of urgency is met.
173. The disagreement between the Parties, it would appear, is whether a security for cost order may be only obtained in “exceptional circumstances”. The Tribunal agrees with the Claimant that the Respondent would have to show “exceptional circumstances”. In considering requests for security for costs, investment arbitration tribunals have emphasised that this power may only be exercised where there are “exceptional circumstances”. The Respondent has not been able to cite a single case where the standard “exceptional circumstances” was *not* applied. This is not surprising, given that security for

²²⁹ Claimant’s Response to the non-Disputing Parties’ Submissions, ¶ 10.

²³⁰ *RSM v. Saint Lucia*, ¶ 72 (RLA-019).

²³¹ *García Armas v. Venezuela*, ¶ 191 (revised RLA-006).

costs orders raise specific access to justice issues that do not arise with other forms of provisional relief.

174. The Tribunal agrees with the tribunal in *Orlandini v Bolivia*²³² that such exceptional circumstances would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour 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 behaviour.
175. In *RSM v. Saint Lucia* for example, the RSM tribunal took into account that the claimant was impecunious and was funded by a third-party that could presumably not be made responsible for any adverse costs award in reaching its decision to order security. However, the decisive factor for the tribunal to grant the requested security for costs was the fact that the claimant had a proven history of not complying with costs awards rendered against it.²³³
176. Similarly, in *EuroGas v. Slovak Republic*,²³⁴ the tribunal refused to make an order for security for costs as the respondent had failed to establish that the claimants had defaulted on their payment obligations in the proceedings or in other arbitration proceedings. The tribunal made clear in that case that "financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs".
177. For the reasons set out below, the Tribunal is not persuaded that the Respondent has met the burden of proving exceptional circumstances.
178. First, the Respondent has not discharged its initial burden of establishing a reasonable basis that the Claimant is impecunious such that the burden then shifts to the Claimant to produce evidence of its ability to meet a costs award. All that the Respondent has shown is that there is no public information which indicates that the Claimant holds financial assets. It is not the case that there is something which suggests that the Claimant does not hold financial assets. Instead, the Respondent simply lacks evidence about the asset position of the Claimant.²³⁵ That is not sufficient for the Respondent to discharge its initial burden. Given this lack of evidence, the Tribunal is not therefore persuaded of the Respondent's case that it is at risk of serious or irreparable harm.
179. Secondly, the existence of a funding agreement alone has not been found by arbitral tribunals to be sufficient to grant security for costs. As explained by the tribunal in *South American Silver v. Bolivia*,²³⁶ if "the existence of these third-parties alone, without considering other factors, becomes determinative on granting or rejecting a request for security for costs, respondents could request and obtain the security on a systematic basis, increasing the risk of blocking potentially legitimate claims". On this issue, the Tribunal notes the recent decision in *Dirk Herzig v. Turkmenistan*, which turned, *inter alia*, on the

²³² *Orlandini v. Bolivia*, ¶ 143 (RLA-034). See also ICCA-Queen Mary Taskforce, *Report on Third-Party Funding*, p. 174, April 2018 (CLA-065).

²³³ *RSM v. Saint Lucia*, ¶ 86 (RLA-019).

²³⁴ *EuroGas v. Slovak Republic*, ¶ 123 (CLA-067).

²³⁵ Hearing Transcript, Day 2, 248:16-249:19; Motion for Security for Costs, ¶ 30.

²³⁶ *South American Silver v. Bolivia*, ¶ 77 (RLA-013).

issue of “the explicit non-liability of the third-party funder for a costs award adverse to its funded party”.²³⁷

180. In illustrating the “irreparable harm” that the Respondent will suffer without an order for security in the present case, the Respondent points to Mesa’s failure to comply with a \$3 million costs order in *Mesa Power v. Canada*.²³⁸ However, this is irrelevant as the Claimant was not a party in that arbitration, which involved a different party, Mesa. To the extent that the Respondent suggests that the Claimant is controlled by Mesa because the present arbitration is *inter alia* a duplicative claim of that in *Mesa Power v. Canada*,²³⁹ the Tribunal cannot decide one way or another until it has seen the Parties’ pleadings which have yet to be filed. The fact that Mesa has failed to comply with a \$3 million costs order will not advance the Respondent’s case at this stage.
181. The Respondent’s motion for security for costs is therefore dismissed. For the avoidance of the doubt, however, the dismissal does not preclude the Respondent from re-applying for security costs if there is a change in circumstances or if there is new evidence which suggests that the Claimant may not, or may not be able to, comply with an adverse costs order.
182. The Tribunal is mindful of the principle that parties in proceedings like these under NAFTA Chapter 11 and under the UNCITRAL Rules have an obligation to comply with orders and awards, including those relating to costs. The Tribunal has not found anything to indicate that the Claimant will not comply with costs orders and the presumption must be that in the absence of evidence to the contrary, a party will act in good faith.

²³⁷ *Dirk Herzig v. Turkmenistan*, ¶ 57 (RLA-112).

²³⁸ Motion for Security for Costs, ¶ 29.

²³⁹ Hearing Transcript, Day 1, 74:9-14.

IV. DISPOSITIF

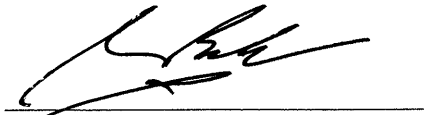
183. On the basis of the foregoing reasons, the Tribunal unanimously decides to:

- (a) REJECT the Claimant's request for interim measures.
- (b) REJECT the Respondent's request for bifurcation as premature, and directs that modifications in accordance with paragraph 93 above be made to the procedural timetable set out at PO 1 for the scenario where the proceedings are *not* bifurcated.
- (c) ORDER the Claimant to make the disclosures set out at paragraphs 106 and 107.
- (d) REJECT the Respondent's motion for security for costs.

184. The issue of costs of the above applications is to be reserved to be decided at a later stage.

Dated: 27 February 2020

Place of Arbitration: Washington, D.C.



Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal