

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, 1976

PCA CASE NO 2018-54

BETWEEN

Tennant Energy LLC

AND

INVESTOR

Government of Canada

RESPONDENT

Investor's Response to Canada's
Motion for Bifurcation

23 OCTOBER 2019

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In accordance with the Tribunal’s directions in Procedural Order No. 1, Tennant Energy LLC (“Tennant” or the “Investor”) submits its response to the Government of Canada’s (“Canada” or the “Respondent”) Motion for Bifurcation (the “Motion”) of this arbitration pursuant to Section B of Chapter Eleven of the North American Free Trade Agreement (“NAFTA”).

I. BIFURCATION IS DISCRETIONARY AND JUSTIFIED ONLY WHEN IT WILL INCREASE THE EFFICIENCY OF AN ARBITRATION.

1. Canada observes that Article 21(4) of the 1976 UNCITRAL Arbitration Rules states, “In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”¹ Yet, Canada omits the second sentence of Article 21(4), which provides that “**the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.**”²
2. As many tribunals have observed, this second sentence confirms that tribunals retain the discretion to join jurisdictional issues to the merits, when bifurcation “is unlikely to bring about increased efficiency in the proceedings.”³
3. In exercising that discretion, the tribunal should consider three factors:
 - a. whether a jurisdictional objection is substantial or frivolous;
 - b. whether the objection, if successful, materially would reduce the time and costs of the proceeding (e.g., by disposing of the claims raised); and
 - c. whether the objection concerns issues intertwined with the merits of the arbitration.⁴
4. As shown below, these considerations render Canada’s bifurcation request unwarranted.

¹ Canada’s Request for Bifurcation, 23 September 2019, ¶ 6 (quoting Article 21(4) of the 1976 UNCITRAL Rules).

² Article 21(4), United Nations Commission on International Trade Law (UNCITRAL), General Assembly Resolution 31/98, 1976, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>, **CLA-070**.

³ *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2, 31 May 2005, ¶ 12(c) **RLA-054**. See also *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 4 – Decision on Bifurcation, 18 November 2016, ¶ 4.3, **RLA-052**.

⁴ *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2, 31 May 2005, ¶ 12(c), **RLA-054**; See also *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 4 – Decision on Bifurcation, 18 November 2016, ¶ 4.3, **RLA-052**.

II. NONE OF THE FACTORS THAT A TRIBUNAL SHOULD CONSIDER SUGGESTS THAT BIFURCATION IS WARRANTED HERE.

A. CANADA'S JURISDICTIONAL OBJECTION IS FRIVOLOUS.

5. The *Glamis Gold* NAFTA tribunal noted in its procedural order on bifurcation that “in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunal should take the claim as it is alleged by Claimant.”⁵
6. A review of the Investor’s Notice of Arbitration in this case clearly demonstrates that Canada’s jurisdictional objection is frivolous. Canada alleges that Tennant’s claim is time-barred under NAFTA Article 1116(2), because Tennant supposedly “filed its ... NOA more than three years after it first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it incurred loss or damage because of the alleged breach.” However, the Notice of Arbitration helpfully highlights when the Investor learned of the alleged breaches—and that knowledge of the breaches all occurred less than three years before it submitted delivered its Notice of Arbitration on June 1, 2017.
7. Specifically, in paragraph 117 of the Notice of Arbitration, the Investor explains that it did not, and indeed could not, have knowledge of Ontario’s wrongful actions, until:
 - a. June 4, 2014, when the claims in *Mesa Power Group, LLC v. Canada* were posted by the Permanent Court of Arbitration on its website;⁶
 - b. Sometime between June 4, 2014 and April 30, 2015, when the previously secret complete terms of the Green Energy Investment Agreement (“GEIA”) between Ontario and two Korean companies, Samsung C&T Corporation and Korea Electric Power Corporation, (together, the “Korean Consortium”) were publicly disclosed during the *Mesa Power* arbitration;⁷
 - c. April 30, 2015, when the transcript of the evidentiary hearing in *Mesa Power* was released by the PCA;⁸ and

⁵ *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2, 31 May 2005, ¶ 12(a), **RLA-054**.

⁶ Notice of Arbitration, 1 June 2017, ¶ 117.

⁷ Notice of Arbitration, 1 June 2017, ¶ 117.

⁸ Notice of Arbitration, 1 June 2017, ¶ 117.

- d. December 6, 2016, when the award in *Windstream Energy v. Canada* was posted by the PCA on its website.⁹
8. Indeed, nearly all of the facts in the Notice of Arbitration on which the claims in this NAFTA arbitration are based, come from the briefings exchanged in the *Mesa Power* NAFTA claim, the transcript of the evidentiary hearing in *Mesa Power*, or the GEIA (which, as afore-mentioned, was only publicly disclosed as a result of the *Mesa Power* arbitration).¹⁰
9. This is not surprising. The claims under which Tennant has brought this case relate to facts that came to light only after the public release of information revealed during the evidentiary hearing in *Mesa Power Group, LLC v. Canada* (“*Mesa Power*”).¹¹
10. By way of explanation, in the Notice of Arbitration, the Investor has brought four separate categories of claims:
- a. *Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the Investment;*
 - b. *Ontario unfairly manipulated the dissemination of program information under the FIT Program;*
 - c. *Ontario unfairly manipulated the awarding of Contracts under the FIT Program; and*
 - d. *Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.*¹²
11. As the Notice of Arbitration makes clear, **each** one of those claims is derived from information revealed for the first time at the *Mesa Power* hearing.
12. For example, the Investor’s claims that Ontario manipulated the award of access to the electricity transmission grid are based upon information revealed at the *Mesa Power* hearing and in the post-hearing briefs in relation to International Power Canada (“IPC”), the Korean Consortium, and NextEra Energy (“NextEra”).

⁹ Notice of Arbitration, 1 June 2017, ¶ 117.

¹⁰ Notice of Arbitration, 1 June 2017, ¶¶ 9-10, 16-31.

¹¹ *Mesa Power Group, LLC v. Government of Canada*, Investor’s Post-Hearing Brief, Public Version, 18 December 2014, ¶ 1, C-017.

¹² Notice of Arbitration, 1 June 2017, ¶ 91.

13. Specifically,
- a. As noted in Paragraph 107 of the Notice of Arbitration, the *Mesa Power* hearing revealed that “blatant protection was afforded to [IPC], a Canadian company whose executive leadership at the time was a well-known political backer of the Ontario Liberal government.”¹³
 - b. As noted in Paragraphs 99 through 101 of the Notice of Arbitration, the Investor’s Post-Hearing Brief in *Mesa Power* revealed that “Ontario granted special transmission access privileges to the members of the Korean Consortium despite the fact that the Korean Consortium was non-compliant with the binding terms of the GEIA ... between Ontario and the Korean Consortium in 2011;”¹⁴ and
 - c. As noted in Paragraph 106 of the Notice of Arbitration, the Investor’s Post-Hearing Brief in *Mesa Power* also revealed that NextEra “was given access to high-level government officials and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change.”¹⁵
14. Likewise, the Notice of Arbitration explains that the Investor’s claims that Ontario unfairly manipulated the dissemination of program information under the FIT Program are based upon information revealed in the *Mesa Power* Investor’s Post-Hearing Brief that “Ontario provided selective advance access to information and program decision makers to the Canadian subsidiary of NextEra and subsequently arbitrarily modified the FIT Program rules in a manner that disadvantaged the Investment.”¹⁶
15. The Investor’s claims that Ontario unfairly manipulated the awarding of Contracts under the FIT Program is based upon information about the advantageous treatment of IPC and the Korean Consortium revealed in the *Mesa Power* Investor’s Post-Hearing Brief. Indeed, Paragraph 111 of the Notice of Arbitration outlines the information about IPC that was gleaned from that arbitral submission,¹⁷ and Paragraph 112 of the Notice of Arbitration details what information about the Korean Consortium came from there.¹⁸

¹³ Notice of Arbitration, 1 June 2017, ¶ 107.

¹⁴ Notice of Arbitration, 1 June 2017, ¶¶ 99-101.

¹⁵ Notice of Arbitration, 1 June 2017, ¶ 106.

¹⁶ Notice of Arbitration, 1 June 2017, ¶ 109.

¹⁷ Notice of Arbitration, 1 June 2017, ¶ 111.

¹⁸ Notice of Arbitration, 1 June 2017, ¶ 112.

16. Finally, the Investor's claims about the destruction of evidence directly relates to the fact that evidence of its other claims only came to light because of the *Mesa Power* and *Windstream Energy* arbitrations.¹⁹ As a result, the Investor became aware of the basis for its claims only in 2015—after the documents in *Mesa Power* and *Windstream Energy* began being disclosed.²⁰
17. Prior to then, Tennant had:
 - a. no knowledge of the fact that the Korean Consortium was granted a contract under the FIT Program even though it failed to fulfil its obligations under the GEIA;²¹
 - b. no knowledge of the fact that the Korean Consortium was given more time to complete the transmission availability test, which was mandatory according to the rules of the FIT Program;²²
 - c. no knowledge of the fact that NextEra had preferential contact with high-level government officials that led to rule changes in May 2011, which allowed it to obtain six FIT contracts;²³ and
 - d. no knowledge of the fact that Ontario protected IPC from the adverse effects of the FIT set-aside for the Korean Consortium because of its close connections to the governing political party.²⁴
18. Considering this information contained within the Notice of Arbitration, there is no reasonable basis for Canada to claim that the Investor's claims are time-barred. Canada's jurisdictional objection is frivolous and does not justify the time and expense of bifurcation.

¹⁹ Notice of Arbitration, 1 June 2017, ¶ 117.

²⁰ Notice of Arbitration, 1 June 2017, ¶ 121.

²¹ Notice of Arbitration, 1 June 2017, ¶ 42.

²² Notice of Arbitration, 1 June 2017, ¶ 47.

²³ Notice of Arbitration, 1 June 2017, ¶¶ 76-79.

²⁴ Notice of Arbitration, 1 June 2017, ¶ 81.

B. BIFURCATION WOULD LEAD TO DUPLICATION AND INEFFICIENCY.

19. In addition to the fact that it is clear from the face of the Investor’s pleadings that Canada’s jurisdictional objection is frivolous, bifurcating this arbitration to allow that objection to be adjudicated separately would not materially reduce the time and cost of these proceedings. Instead, it only would multiple them.
20. As the previous section makes clear, at least some, if not all (as the Investor asserts), of the Investor’s claims are based upon facts that would not be known by anyone in the Investor’s position before June 4, 2014—less than three years before the Notice of Arbitration in this case was submitted. Thus, notwithstanding Canada’s brazen and unsupported assertion that “each and every one of the measures is beyond the Tribunal’s jurisdiction,”²⁵ there will be a merits hearing of some scope in this case.
21. Canada has not tried to argue that the partial dismissal of some of the Investor’s claims will result “in a material reduction of the proceedings at the next phase”—because it cannot. If any of the Investor’s claims remain after a jurisdictional hearing (assuming bifurcation were granted and jurisdiction was denied on certain claims), there still will need to be a document production phase on the operation of the FIT Program and a hearing on those claims that remain. There will be no time or cost savings.
22. In fact, bifurcation will lead to unnecessary duplication and thereby increase the duration of this arbitration and consequently its cost. If the Tribunal were to proceed with a separate jurisdictional phase, in addition to a separate hearing on jurisdiction, the Investor presumably would be entitled to at least limited discovery to ensure that the Investor is given a “full opportunity” to present its case, in accordance with Article 15(1) of the 1976 UNCITRAL Arbitration Rules.²⁶
23. By way of example, in its Request for Interim Measures, the Investor already has identified a set of documents, *i.e.*, the non-confidential documents from the *Windstream Energy* arbitration, that “is likely to be relevant to the substantive jurisdictional ... issues that the Tribunal must decide (*i.e.*, with respect to the timing of the knowledge of certain key facts on jurisdiction ...).”²⁷

²⁵ Canada’s Request for Bifurcation, 23 September 2019, ¶ 4.

²⁶ Article 15(1), United Nations Commission on International Trade Law (UNCITRAL), General Assembly Resolution 31/98, 1976, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>, CLA-070.

²⁷ Investor’s Request for Interim Measures, 16 August 2019, ¶ 33.

24. Then, there would need to be a second round of document production and a second hearing on whichever of the Investor’s claims remain after the jurisdictional phase, assuming that the Panel were to find some claims were time-barred (which the Investor disputes). Consequently, as it is apparent from the face of the Notice of Arbitration that most, if not all (as the Investor asserts), of the Investor’s claims will survive Canada’s jurisdictional objection, bifurcation only will lead to the duplication of procedural steps in this arbitration, prolong the period before a final award, and thereby increase its costs exponentially.
25. In its Motion for Security for Costs and Disclosure of Third-Party Funding, Canada bemoaned the fact that it supposedly has “to expend substantial personnel and public financial resources for its legal representation the costs of this arbitration.”²⁸ In light of that expressed concern, the Tribunal should not order bifurcation and force those costs to skyrocket even more.

C. CANADA’S JURISDICTIONAL OBJECTION WILL REQUIRE THE TRIBUNAL TO DELVE INAPPROPRIATELY INTO MERITS ISSUES.

26. In its Request for Bifurcation, Canada acknowledges that bifurcation is inappropriate when a jurisdictional objection is “closely intertwined with the merits of the case.”²⁹ Then, rather than providing a thorough explanation of how the Tribunal can resolve its jurisdictional objection without delving into the merits of this dispute, Canada only blithely states the following without explication:

*[T]he facts applicable to Canada’s jurisdictional questions do not substantially overlap with the facts relevant to the merits of Tennant’s claim. The Tribunal needs only to determine the dates on which the Claimant first had, or should have had, knowledge of the measures alleged to violate NAFTA Chapter Eleven and the resulting loss or damage.*³⁰

27. Nothing can be further from the truth. As mentioned earlier, the Investor has alleged four categories of wrongful actions by Canada:

- a. Ontario unfairly **manipulated** the award of access to the electricity transmission grid, resulting in unfair treatment to the Investment.
- b. Ontario unfairly **manipulated** the dissemination of program information

²⁸ Canada’s Motion for Security for Costs and Disclosure of Third-Party Funding, 16 August 2019, ¶ 35.

²⁹ Canada’s Request for Bifurcation, 23 September 2019, ¶ 23.

³⁰ Canada’s Request for Bifurcation, 23 September 2019, ¶ 24.

under the FIT Program;

- c. Ontario unfairly **manipulated** the awarding of Contracts under the FIT Program; and*
- d. Senior officials improperly **destroyed necessary and material evidence** of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.³¹*

- 28. As highlighted above, three of the four categories relate to government manipulation, and the fourth involves the destruction of evidence. In other words, all four relate to surreptitious actions taken by government officials outside the public purview - the exact same issues that would be examined in a jurisdictional phase.
- 29. Canada's jurisdictional objection relates to timing—specifically, when the Investor knew or should have known about Canada's wrongful actions. Because all of the wrongful actions relate to actions by the Ontario government that were unlawful in part because they were kept secret from the public, the Tribunal will be unable to adjudicate Canada's jurisdictional objection without first determining both
 - a. If, and when, they occurred, and
 - b. If, and when, they were disclosed to the public.

The Tribunal will be forced to resolve whether the Investor has an actionable claim before it can determine when it should have known about that claim.

- 30. It is telling that, in discussing whether its jurisdictional objection will force the Tribunal to prejudge the dispute, Canada does not once mention *Mesa Power*.
- 31. Throughout its Request for Bifurcation, Canada repeatedly tries to compare this dispute with the completely different one in *Mesa Power*, just because they both involve the FIT Program and because the same counsel represented Mesa Power Group, LLC in that arbitration and the Investor in this arbitration³²—but Canada does not bring up *Mesa Power* in its section on whether its jurisdiction objection will force the Tribunal to inappropriately delve into the merits of this dispute.³³ The reason is obvious: Canada wants to ignore what happened in that proceeding.

³¹ Notice of Arbitration, 1 June 2017, ¶ 91 (emphasis added).

³² Canada's Request for Bifurcation, 23 September 2019, ¶¶ 17-19, 28.

³³ Canada's Request for Bifurcation, 23 September 2019, ¶¶ 23-25.

32. In *Mesa Power*, Canada also raised a jurisdictional objection in relation to the timing of the claims brought by a FIT Program Proponent. There, it alleged that the claims violated NAFTA Article 1120(1), because they were brought less than six months after the events giving rise to them occurred.³⁴ As Canada notes in a footnote in its Request for Bifurcation, the tribunal in *Mesa Power* initially decided to bifurcate the proceedings in that arbitration into jurisdictional and merits phases.³⁵
33. What Canada does not disclose, however, is that the *Mesa Power* tribunal subsequently reversed its decision and discontinued bifurcation, once it delved into the jurisdictional objection and realized how closely it was intertwined with the merits of the case. In pertinent part, the tribunal stated:

*Having now had the benefit of the Claimant's Answer on Jurisdiction, it appears to the Tribunal that it may not be possible to rule on the application of Article 1120(1) in the abstract, without substantially engaging in the facts of the dispute. The Tribunal will likely need to establish certain facts and the connections between these facts. Such an inquiry will best be conducted together with the merits phase, when the Tribunal will have the benefit of the entire record, including documents obtained through document production orders and witness evidence. It indeed anticipates at this stage that part of the facts, allegations, evidence, and arguments related to jurisdiction will overlap with the case on the merits.*³⁶

34. Just as in *Mesa Power*, the existence in this case of a substantial overlap between the merits of the Investor's claims and the jurisdictional questions raised by Canada will require that the merits of those claims be considered when the jurisdictional question of when the claims first arose is determined. Accordingly, those two inquiries should be made together—and not via a bifurcated proceeding.

³⁴ *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 8 January 2013, ¶ 5, **CLA-071**; *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 3, 28 March 2013, ¶ 72, **CLA-001**.

³⁵ Canada's Request for Bifurcation, 23 September 2019, ¶ 6 (citing *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 8 January 2013, ¶ 16, **CLA-071**).

³⁶ *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 3, at ¶¶73 and 76, **CLA-001**.

III. CONCLUSION

35. The Investor respectfully urges the Tribunal to follow the normal arbitral practice, keep with the principles of arbitral efficiency and economy, and hold a single hearing on the questions at issue.
36. More specifically,
 - a. Tennant respectfully requests that the Tribunal REJECT Canada's request for Bifurcation, and
 - b. ORDER the reimbursement of Tennant's reasonable legal and other costs incurred in connection with responding to the Motion.

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



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