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

PCA CASE NO 2018-54

BETWEEN

Tennant Energy, LLC

INVESTOR

AND

Government of Canada

RESPONDENT

Investor's Request for Interim Measures

16 AUGUST 2019

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

ReedSmith

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I. INTRODUCTION

1. This Request for Interim Measures (the ***Request***) is submitted on behalf of Tennant Energy, LLC (the ***Investor***) in accordance with Article 1134 of the NAFTA and Article 26 of the applicable 1976 UNCITRAL Arbitration Rules (the ***UNCITRAL Rules***) to ensure that Canada[1] preserves, protects, and produces certain evidence relevant to this dispute.

2. Specifically, the Investor asks that the Tribunal:

   (a) order Canada and the Investor to preserve and protect documentation (***Documents***)[2] in their possession, custody, or control that is relevant to the dispute (the ***Protected Documents***);[3] and

   (b) order Canada to produce[4] non-confidential Documents on record in *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (the ***Windstream Documents***).[5]

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[1] The term "Canada" for the purposes of this Motion includes the Government of Canada, the Province of Ontario, and any of their agencies, agents, instrumentalities or state enterprise. All requests are for documents in the possession or control of all of the respective branches, ministries, agencies, agents, affiliates, and enterprises and persons and entities under the control of the Respondent.

[2] For the purposes of this Motion, the term "Document" shall mean any writing, email, recording or photograph including, but not limited to, electronic documents, which are in your actual or constructive possession, custody, care or control, which pertain directly or indirectly, in whole or in part, either to any of the subjects listed below or to any other matter relevant to the issues in this arbitration, or which are themselves listed below as specific documents, including but not limited to: correspondence, e-mails, memoranda, agendas, facsimiles, drafts, notes, messages, diaries, minutes, books, reports, work papers, charts, ledgers, invoices, computer printouts, microfilms, videotapes or tape recordings, or any record in any electronic format or other medium.

[3] The "Protected Documents" sought in this Motion include, but are not limited to documents in the possession, custody, care, or control of the Respondent relating to the dispute, in particular documents relevant to the Investor, the Investment, and the award of electrical power transmission access or contracts under the Ontario Feed-In Tariff (***FIT***) Program and/or any related policies or measures.

[4] All documents produced by the Respondent should be exchanged in electronic format, along with an index, with the producing party retaining copies of the original document, which will be produced if required for inspection at the request of the party requesting the document.

[5] The "*Windstream* Documents" include all non-confidential documents (or non-confidential versions of documents) in the possession, custody or control of the disputing parties in the *Windstream Energy LLC v. Canada* NAFTA Arbitration, (PCA Case 2013-22) including, but not limited to, pleadings, exhibits, legal authorities, correspondence, indexes, hearing materials, presentations, and demonstrative aids.

If the relief sought by the Investor is not granted, the ability of the Investor to advance its claim and the Tribunal's role to decide this dispute will be compromised.

II. THE BASIS FOR THE INVESTOR'S REQUESTS

3. This case concerns the Canadian Province of Ontario's denial of electricity transmission access and a twenty-year fixed-price renewable energy contract to the Investor's investment, the Skyway 127 Wind Energy Inc. (***Skyway 127***) wind farm project. The contract was sought under Ontario's renewable energy Feed-In Tariff Program (the ***FIT Program***) which was operated by the Ontario Power Authority under direction of the Ontario Minister of Energy and his ministry

4. In particular, as set out in the Notice of Arbitration (the ***NoA***), the Ontario Ministry of Energy directed the Ontario Power Authority to implement the FIT program to encourage the production of renewable energy in Ontario. The Ontario Power Authority accepted Skyway 127's application to produce 100 MW of wind power in the Bruce Transmission Zone during the FIT Program's launch period in November 2009. Despite receiving a ranking relative to other producers that entitled it to produce and sell to Ontario the full 100 MW envisaged in its application, Skyway 127 never received a FIT contract.

5. Ontario prevented Skyway 127 from receiving a FIT contract through a series of measures, including conferring preferential treatment to ensure contracts were awarded to NextEra and International Power Canada (***IPC***).

6. Ontario's administration of the FIT Program lacked transparency. The extent of Ontario's conduct – which included inside preferential access to information in advance of rule changes, preferential regulatory access to obtain FIT contracts, protection to politically connected local investors, and special access to governmental officials – only became public knowledge through the release of information from two NAFTA proceedings: *Mesa Power Group v. Canada* (PCA Case No. 2012-17) (***Mesa***) in June 2014 and April 2015 and *Windstream* in December 2016.

7. The lack of transparency is systemic, as it has since come to light that members of the Ontario government actively suppressed key information about the GEIA and the FIT Program, as well as other energy projects in Ontario. This includes:

(a) only releasing the terms of the GEIA after an order by a U.S. court that an American company produce its copy;

(b) a pending claim by Trillium Wind against the Ontario government for malfeasance in public office (including the spoliation of evidence) related to Trillium's FIT project;

(c) a criminal investigation launched by the Ontario Provincial Police against members of the Ontario government in May 2014 about the destruction of documents related to the FIT Program;

(d) criminal charges against senior Ontario government officials in the office of the Premier of Ontario in relation to the destruction of documents about another large energy project in Ontario;

(e) a preliminary ruling in September 2012 by the Ontario legislature declaring the Minister of Energy in contempt for refusing to disclose documents relating to the cancellation of a gas plant; and

(f) in 2013, the Chief of Staff and the Deputy Chief of Staff to the Premier of Ontario were charged with breach of trust, mischief about data, and misuse of a computer system about the alleged destruction of documents relating to the cancellation of two gas plants (the Chief of Staff was subsequently criminally convicted).

8. The Ontario government's lack of transparency, including its pattern of suppressing and destroying relevant evidence in the context of energy disputes, is central to this dispute: it has resulted in direct breaches of the NAFTA, and information continues to be withheld

(some of which was destroyed) that is relevant to the Investor's case and may reveal further unlawful behavior that harmed its investment.

9. The Investor accordingly has asked Canada on several occasions to take steps to collect and preserve evidence related to this dispute, including non-confidential information on record in the *Windstream* case. The occasions on which these requests were made includes:

(a) a letter to the Deputy Attorney General of Canada on 1 June 2017;

(b) an email to the PCA referencing this request on 11 February 2019;

(c) an email to Canada on 20 February 2019;

(d) an email to Canada 26 February 2019; and

(e) the Procedural Hearing held in Washington DC on 17 June 2019.

Canada either has ignored or refused these requests.

10. The Investor is entitled to interim relief in these circumstances is clear, as explained in the remainder of this Request.

(a) *First*, the Investor's right to seek the preservation of relevant evidence is set out in the NAFTA, and there is no reason for Canada to refuse such a request, which is in any event imposes reciprocal duties on both disputing parties. Nor is there any reason for Canada to refuse production of non-confidential Documents from the *Windstream* case, which Canada's own position on its NAFTA obligations requires it to have made public already.

(b) *Second*, the imminent risk of substantial harm to the Investor if Canada does not preserve and protect the information requested is clear: Canada will be permitted to conceal or be allowed to destroy information relevant to the Investor's claims, including evidence that may further engage Canada's liability under the NAFTA; and Canada thereby will be enabled to proceed with an asymmetry of relevant information relative to the Investor. Indeed, concerning the *Windstream*

Documents, at least one of the members of the Tribunal already has been exposed to this relevant material, as has the Canadian legal team.

11. As a result, the interim measures that the Investor seeks fall within the core of those granted by international tribunals.

12. The preservation order sought by the Investor would apply bilaterally – to both disputing parties – and would preserve the evidential record from the risk of despoliation. The Investor seeks nothing more than an order of preservation, protection, and production of relevant Documents, as well as an order to produce Documents that should have already been made public. This relief is necessary to preserve the *status quo*, ensure the availability of information necessary for the Investor to make its claim fully and fairly, and enable the Investor and all of the members of the Tribunal to proceed without an asymmetry of relevant information relative to Canada.

III. THE INVESTOR IS ENTITLED TO THE INTERIM MEASURES REQUESTED

A. THE TRIBUNAL HAS JURISDICTION TO ORDER INTERIM MEASURES

13. Article 1134 of the NAFTA, entitled "Interim Measures of Protection" provides:

> *A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.*

This Tribunal therefore has jurisdiction to grant interim measures, including specific measures ordering a party to preserve evidence in its possession, custody, or control.

14. Pursuant to Article 1120 of the NAFTA, the Parties agreed to arbitrate this NAFTA dispute under the UNCITRAL Arbitration Rules (as amended by the Treaty). UNCITRAL Article 26 also entitles the Tribunal to grant interim measures:

> *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 in 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

15. As noted by Professor Gary Born, Article 26 of the UNCITRAL Rules:

> *is properly understood as granting arbitrators broad powers to order provisional measures which they deem necessary, imposing only the relatively modest limitation that such measures be 'in respect of the subject matter of the dispute.'*
>
> *As with Article 17 of the UNCITRAL Model Law, this limitation should not be interpreted to restrict a tribunal to orders for the preservation, detention, or inspection of disputed goods or property. Rather, the UNCITRAL Rules are correctly understood as granting a tribunal the authority to issue any measures against a party that it deems necessary for protective or conservatory purposes, provided only that these measures have some connection to the contract, contractual or legal rights, property, requested relief, or other issues in dispute.*[6]

16. Therefore, pursuant to Article 26 of the UNCITRAL Rules, the Tribunal has the power to grant interim measures to, *inter alia*, order a party to take action or refrain from taking action that is likely to cause current or imminent harm to the other party, as well as to prevent a party from aggravating the dispute or frustrating the Tribunal's power to order relief.

17. Here, the Investor seeks:

    (a) an order that Canada preserve, index, and protect the Protected Documents; and

    (b) an order that Canada produces the *Windstream* Documents.

Both fall squarely within the interim measures envisaged in Article 1134 of the NAFTA, as well as the non-exhaustive list of categories of interim measures under Article 26(2) of the UNCITRAL Arbitration Rules.[7] The Tribunal, therefore, has the power to grant them.

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[6] **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2441.

[7] *See* **CLA-45**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶84 (describing the preservation of evidence as "one of the most common forms of interim relief.").

B. THE INVESTOR SATISFIES THE APPLICABLE CRITERIA FOR GRANTING THE REQUESTED INTERIM MEASURES

1. The criteria for granting interim measures

18. Article 1134 of the NAFTA provides that interim measures may be granted "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." (Emphasis added.)

19. Article 26(1), by contrast, does not set forth any explicit standards for the grant of interim measures, providing only that a tribunal may issue interim measures if it deems them to be "necessary in respect of the subject-matter of the dispute."

20. In international arbitration practice, there are four principal requirements that an applicant must satisfy to be granted the interim measures requested:

    (a) a risk of serious or irreparable harm;

    (b) urgency;

    (c) no prejudgment of the merits of a case; and

    (d) a *prima facie* case on the merits.[8]

    In addition, 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.[9]

21. First, the requirement of serious or irreparable harm does not require the requesting party to show that the harm would be literally "irreparable" in the absence of interim measures,

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[8] *See* **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2468 (further stating that, "[c]onsidered more closely, … most arbitral tribunals also look to the nature of the provisional measures that are requested, and the relative injury to be suffered by each party, in deciding whether to grant such measures").

[9] *See* **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2468 ("[M]ost arbitral tribunals also look to the nature of the provisional measures that are requested, and the relative injury to be suffered by each party, in deciding whether to grant such measures.").

and the mere availability of damages does not defeat a request for interim measures under the international standard.[10] Rather, a showing of "serious," "substantial," or "grave" harm satisfies this standard and "accords with arbitral practice."[11] Regarding the requisite showing of harm, Professor Born writes:

> *Obviously, it is difficult (and not infrequently impossible) to demonstrate truly "irreparable" harm that cannot be compensated by money damages in a final award; a literal "irreparable harm" requirement would limit provisional measures principally to cases where one party was effectively insolvent or where enforcement of a final award would be impossible. In reality, however, most decisions which state that damage must be "irreparable" do not appear to apply this formula, but instead, require that there be a material risk of serious damage to the [Investor].*[12]

22. Second, tribunals require the requesting party to make a showing of urgency, which is closely related to the requirement of serious or substantial harm.[13] Professor Born describes the "urgency" requirement as follows:

> *As with the requirement of "irreparable" harm, the "urgency" requirement is not interpreted literally or mechanically. Tribunals typically do not delay granting provisional measures until dire consequences are only days away, but rather take a realistic commercial view of the likelihood that serious damage will occur prior to*

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[10] *See* **CLA-46**, *Paushok v. Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶68 ("[T]he possibility of monetary compensation does not necessarily eliminate the possible need for interim measures. The Tribunal relies on the opinion of the Iran-U.S. Claims Tribunal in the *Behring* case to the effect that, in international law, the concept of 'irreparable prejudice' does not necessarily require that the injury complained of be not remediable by an award of damages."); **CLA-47**, *Behring Int'l, Inc. v. Islamic Republic Iranian Air Force* (UNCITRAL), Interim and Interlocutory Award, Award No. ITM/ITL 52-382-3, 21 June 1985, 8 Iran-U.S. Cl. Trib. Rep. 128 (1985) ("[T]he concept of irreparable prejudice in international law arguably is broader than the Anglo-American law concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages … the former does not so require.").

[11] **CLA-48**, Georgios Petrochilos, *Interim Measures Under the Revised UNCITRAL Arbitration Rules*, 28 ASA BULLETIN 878 (2010), 883. *See also* **CLA-49**, David D. Caron, Lee M. Caplan and Matti Pellonpää, THE UNCITRAL ARBITRATION RULES: A COMMENTARY (2006), 537 ("If one must characterize the degree of harm, the terms 'grave' or 'substantive' might be more appropriate than 'irreparable.' … Although the term 'irreparable' is utilized, as has been done by the Iran-US Claims Tribunal, one should keep in mind that a literal interpretation has not been adopted."); **CLA-50**, Klaus Peter Berger, INTERNATIONAL ECONOMIC ARBITRATION (1993), 336 ("To preserve the legitimate rights of the requesting party, the measures must be 'necessary'. This requirement is satisfied if the delay in the adjudication of the main claim caused by the arbitral proceedings would lead to a 'substantial' (but not necessarily 'irreparable' as known in common law doctrine) prejudice for the requesting party.").

[12] **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2471.

[13] **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2474; **CLA-46**, *Paushok v. Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶¶45, 57–62 (describing the standard as "imminent danger of serious prejudice").

the end of the arbitral proceedings. As one award explained, "[a] measure is urgent where action prejudicial to the rights of either party is likely to be taken before such final decision is taken."[14]

…

Where failure to issue provisional measures would raise a risk of impairing a material right, "the safest course at [an] early stage of the proceedings is to ensure that no adverse step is taken to the same."[15]

23. Similarly, Professor Francisco Orrego Vicuña writes:

[The] question [of urgency] is more one of fact than of legal considerations and the flexibility noted allows tribunals to assign particular weight to the circumstances of the case. The increasing reliance of tribunals on ordering the parties not to adopt measures that might aggravate the dispute has been a useful tool to handle the question of urgency of specific measures and has allowed the tribunal to constantly monitor the situation between the parties. Good faith in the conduct of the parties and assurances in respect of not adopting measures that might aggravate the dispute have been important considerations tribunals take into account in assessing whether there is an urgent need to adopt provisional measures….[16]

24. Third, arbitral tribunals require that the requested interim measures avoid any prejudgment of the merits of a case. Professor Born explains this requirement as follows:

Properly analyzed, the 'no prejudgment' requirement stands for the fairly basic, but nonetheless important, propositions that (a) a grant of provisional measures may not preclude the tribunal from ultimately deciding the arbitration in any particular manner after the parties have presented their cases (e.g., provisional measures should not make it more difficult to render a decision in favor of one party or the other); (b) provisional measures have no res judicata or similar preclusive effect with regard to a decision on the merits; (c) a tribunal must take care to ensure that it does not, in considering and deciding an application for provisional measures, even partially close its mind to one party's submissions or deny one party an opportunity to be heard in subsequent proceedings; and (d) the same relief that is

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[14] **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2476 (quoting **CLA-52**, *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Procedural Order No. 3, 18 January 2005, ¶8).

[15] **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2476 n. 282 (quoting **CLA-45**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶86).)

[16] **CLA-51**, Francisco Orrego Vicuña, *The Evolving Nature of Provisional Measures*, in M. Á. Fernández-Ballesteros and David Arias (eds.), LIBER AMERICORUM BERNARDO CREMADES 939 (2010), 949–50.

sought as final relief may ordinarily be issued on a provisional basis, subject to later revision (although it may also be issued as partial final relief prior to a final award).

As noted above, the 'no prejudgment' requirement does not mean that a tribunal may not consider and decide upon the likely prospects of a claim (e.g., whether the claimant has presented a prima facie case? which party preliminarily appears more likely to prevail?). Rather, a tribunal is entirely free to take such matters into account, provided that the arbitrators do not in any way close their minds to the parties' subsequent submissions nor accord the provisional measures decision any preclusive effect.[17]

25. Fourth, the applicant must demonstrate a *prima facie* case on the merits. In describing this criterion, the tribunal in *Paushok v. Mongolia* stated:

[T]he Tribunal need not go beyond whether a reasonable case has been made which, if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of Claimants. Essentially, the Tribunal needs to decide only that the claims are not, on their face, frivolous or obviously outside the competence of the Tribunal. To do otherwise would require the Tribunal to proceed to a determination of the facts and, in practice, to a hearing on the merits of the case, a lengthy and complicated process which would defeat the very purpose of interim measures.[18]

26. Lastly, most tribunals require the Investor to show that the harm it will suffer absent interim measures outweighs the harm that is likely to result to the respondent if the measures are granted. In essence, this requirement calls for the Tribunal to determine

the extent to which it is just or fair that the burden or risk of loss during the arbitral proceedings fall on one party or another (including considerations such as whether one party is seeking to alter the status quo to its advantage during the arbitral proceeding), the likelihood of success of each party on the merits of its case, and the relative hardship of each of the parties if provisional measures are or are not granted.

…

For example, where the claimant, asserting a prima facie *credible claim, appears likely to suffer serious (but not irreparable) injury as a consequence of steps threatened by the respondent to alter the existing* status quo, *provisional measures are likely; that is particularly true where the respondent's actions appear designed to make ultimate enforcement of the award more difficult … and/or the respondent*

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[17] **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2477-2478.

[18] **CLA-46**, *Paushok v. Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶55.

> *does not appear likely to suffer material harm from a grant of provisional measures. Conversely, where a respondent is merely pursuing business in the ordinary course, its contemplated actions appear unaffected by litigation considerations and it will suffer demonstrable damage from the requested provisional measures, tribunals are more likely to require a showing of truly "irreparable" harm by the claimant.*[19]

2. The Investor is entitled to interim measures in the circumstances

27. As explained above, in international arbitration practice, a party requesting interim measures usually must demonstrate:

(a) a risk of "serious" or "substantial" harm;

(b) urgency;

(c) no prejudgment of the merits of a case; and

(d) a *prima facie* case on the merits.

28. The applicant also typically must show that the harm it is likely to suffer in the absence of interim measures outweighs any harm to the respondent likely to result if the measures are granted. All of these elements are present here.

29. *First*, as described above, failure to grant the interim relief requested risks serious and imminent harm to the Investor. Among other things:

(a) The Protected Documents and the *Windstream* Documents are necessary to protect the Investor's right to have its claims fully and fairly considered and decided by the Tribunal, as those Documents are relevant to Canada's conduct with respect to the FIT Program (and thus the Investor's claims);

[19] **CLA-44**, Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2496 (stating that the 2006 revisions to Article 17 of the UNCITRAL Model Law — which contains identical language as that in Article 6(3)(a) of the UNCITRAL Rules — adopted this approach). *See also* **CLA-46**, *Paushok v. Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶79 ("Under proportionality, the Tribunal is called upon to weigh the balance of inconvenience in the imposition of interim measures upon the parties.").

(b) Without 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 the *Windstream* arbitration; and

(c) There is a material risk that relevant Documents will be lost or destroyed given past patterns of conduct by the Ontario Government (and its Premier's Office and Ministry of Energy in particular) with respect to evidence relevant to this case and other energy disputes.

30. In similar circumstances, the tribunal in *Biwater Gauff v. Tanzania* found that the preservation of evidence that might be relevant to an investor's ability to bring its claim was reasonable. Although it found (as is the case here) that the precise nature of the events at issue and their legal significance were matters for determination later in the proceedings, the tribunal in *Biwater* found that it is "likely that the investigation of the merits will require consideration of evidence that is currently in Tanzania, and beyond BGT's possession, custody or control."[20] Accordingly, as the Investor asks this Tribunal to decide, the tribunal in *Biwater* concluded that "[u]ntil a view can be taken as to the relevance and materiality of such evidence, the safest course at this early stage of the proceedings is to ensure that no adverse step is taken in relation to the same."[21]

31. *Second*, the need to preserve, protect, and produce this evidence urgently is met in this case. As in *Biwater*, the Investor requires the Protected Documents and the Windstream Documents "because there is a need for such evidence to be preserved before the proceedings progress any further (e.g., to enable each party properly to plead their respective cases)."[22] The urgency is further pronounced concerning the *Windstream* Documents, because, without them in the Investor's possession, only Canada and one of

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[20] **CLA-45**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶85.

[21] **CLA-45**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶86.

[22] **CLA-45**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶86.

the three arbitrators will have knowledge of them while considering the Parties' motions and upcoming pleadings, including during the Tribunal's deliberations on jurisdiction.

32. Canada alleges that the request for the *Windstream* Documents is not urgent because it is a "request for document discovery" that should be requested during the discovery stage of the arbitration.[23] As in *Biwater*, however, the *Windstream* Documents are of "obvious potential relevance and materiality to the issues in the dispute."[24] The *Windstream* case dealt with the same lack of transparency in the FIT program, among other issues relevant to the issues in this dispute, and the Investor (like Canada) should have access to (and be able to rely on) the *Windstream* Documents when preparing its submissions at all stages in this arbitration. It is therefore important that the Investor and all members of the 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.

33. *Third*, the Investor has demonstrated a strong *prima facie* case on the merits, although granting the relief requested would by no means prejudge the merits of the case. To recall the words of the tribunal in *Paushok*, "the Tribunal needs to decide only that the claims are not, on their face, frivolous or obviously outside the competence of the Tribunal,"[25] not decide the substantive matters of jurisdiction and the merits before it. As in *Biwater*, the evidence in question is likely to be relevant to the substantive jurisdictional and merits issues that the Tribunal must decide (i.e., with respect to timing of the knowledge of certain key facts on jurisdiction and with respect to liability on the merits); accordingly, refusing to grant the relief requested would effectively prejudge those issues by the Tribunal choosing to leave itself in the position of adjudicating them without all relevant facts (a

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[23] *See Tennant Energy, LLC v. Canada*, First Procedural Hearing Transcript, Page 129:7-17.

[24] **CLA-45**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 1, 31 March 2006, ¶104.

[25] **CLA-46**, *Paushok v. Mongolia* (UNCITRAL), Order on Interim Measures, 2 September 2008, ¶55.

decision the Tribunal could only make if it were confident of the outcome on those issues regardless of the content of the Documents in question).

34. *Finally*, the harm to the Investor of not granting the measures outweighs any potential burden on Canada by complying with the orders requested. Canada has no reason not to preserve and protect relevant evidence – indeed, any reluctance to do so would be unethical, and itself warrant suspicion. Nor would it be burdensome on Canada to produce the non-confidential Documents from the *Windstream* arbitration. Those Documents are already organized, indexed, and within Canada's possession. On Canada's own case, the FTC Notes of Interpretation bind it to have made the *Windstream* Documents public already.[26]

35. Moreover, 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.

IV. INTERIM MEASURES REQUESTED

36. Based on the preceding, the Investor respectfully requests that the Tribunal:

(a) ORDER the disputing parties to preserve, index, protect, and scan the Protected Documents; and

(b) ORDER Canada to produce the *Windstream* Documents in their entirety to the Investor, along with an index, within 30 days.

37. The Investor further requests that the Tribunal order the reimbursement of the Investor's reasonable legal and other costs incurred in connection with this Request.

[26] *See Tennant Energy, LLC v. Canada*, First Procedural Hearing Transcript, Pages 16:18 – 17:8, 117:21 – 118:7, 119:10-21.

Respectfully submitted on behalf of the Investor on the 16th day of August, 2019.

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