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

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

RESPONSE TO CLAIMANT'S REQUEST FOR INTERIM MEASURES

September 23, 2019

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I. INTRODUCTION

1. The Claimant's Request for Interim Measures, dated August 16, 2019,[1] fails to meet the legal standard under Article 26.1 of the 1976 UNCITRAL Arbitration Rules (the "1976 UNCITRAL Rules") and must be dismissed. It is not necessary for the Tribunal: (a) to order the disputing parties "to preserve, index, protect, and scan" documents in their possession, custody, or control that are relevant to this dispute (the "Protected Documents"); or (b) to order Canada to produce non-confidential documents on record in *Windstream v. Canada* (the "*Windstream* Documents") at this stage of the arbitration.

2. As explained in Canada's Motion for Security for Costs and Disclosure of Third Party Funding, dated August 16, 2019 ("Canada's Motion"), the rules governing a motion for interim measures in this arbitration are set out in Procedural Order No. 1 ("PO1"), the 1976 UNCITRAL Rules, and the NAFTA.[2] Pursuant to Article 26.1 of the 1976 UNCITRAL Rules, the Tribunal has the authority to order interim measures if it deems them "necessary" in respect of the subject-matter of the dispute.[3] As explained in Canada's Motion, the purpose of interim measures under Article 26.1 is to protect the integrity of the arbitral proceedings, covering both substantive and procedural rights.[4] In determining if an interim measure is "necessary" under Article 26.1 of the 1976 UNCITRAL Rules, it is appropriate for the Tribunal to 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.[5]

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[1] Claimant's Request for Interim Measures, August 16, 2019 ("Claimant's Request").

[2] Canada's Motion for Security for Costs and Disclosure of Third-Party Funding, August 16, 2019 ("Canada's Motion"), ¶¶ 4-9.

[3] Article 26.1; Canada's Motion, ¶ 10.

[4] Canada's Motion, ¶ 10.

[5] Canada's Motion, ¶¶ 14-16. The Claimant's Request sets out a different test, which requires the following criteria to be met: "(a) a risk of serious or irreparable harm; (b) urgency; (c) no prejudgment of the merits of a case; and (d) a

3. For the Tribunal to grant the Claimant's request for interim measures under Article 26.1 of the 1976 UNCITRAL Rules, the Claimant bears the burden of satisfying each element of the four-part test. As explained below, the Claimant's failure to do so means the interim measures it requests are not necessary to protect the integrity of the arbitral proceedings. Accordingly, the Tribunal should decline to grant the interim measures requested by the Claimant.

II. IT IS NOT NECESSARY FOR THE TRIBUNAL TO ORDER CANADA TO PRESERVE, INDEX, PROTECT, AND SCAN DOCUMENTS

4. The Claimant fails to prove that an order for Canada to "preserve, index, protect, and scan documents" is necessary under Article 26.1 of the 1976 UNCITRAL Rules. First, the Claimant has not established, *prima facie*, that it has a reasonable possibility of prevailing in this case. Second, it is not necessary for the Tribunal to order Canada to preserve documents because Canada already has put robust procedures in place to preserve and protect documents that may be relevant to this dispute. Third, it would be unduly burdensome to require Canada to index and scan documents at this stage. Fourth, the Claimant has failed to demonstrate urgent circumstances justifying its request.

A. The Claimant Does Not Have a Reasonable Possibility of Prevailing in this Case

5. In order for the disputing party requesting an interim measure to prove, *prima facie*, that there is a reasonable possibility that it will prevail on the merits of the case, its claim must not be frivolous or obviously outside the tribunal's competence.[6] Moreover, in deciding whether to exercise its discretion to order an interim measure, the tribunal in *Biwater Gauff v. Tanzania* observed that objections to jurisdiction may be a relevant factor to consider.[7]

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prima facie case on the merits." Additionally, the Claimant states that "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." See Claimant's Request for Interim Measures, ¶ 20. As explained below, regardless of which test is applied, the Claimant fails to satisfy the legal standard under Article 26.1 of the 1976 UNCITRAL Rules.

[6] Canada's Motion, ¶ 25. *See also* Claimant's Request, ¶ 33.

[7] **CLA-045**, *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Procedural Order No. 1, 31 March 2006 ("*Biwater Gauff – Procedural Order No. 1*"), ¶ 70.

6. In this case, Canada has not consented to the Tribunal's jurisdiction to hear the claim put forward by the Claimant, which is time-barred.[8] Canada bears the burden of proving its jurisdictional objection on time bar, not the Claimant. Pursuant to NAFTA Article 1116(2), Canada must prove that the Claimant filed its Notice of Arbitration ("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 as a result of that breach.[9] Information obtained by the Claimant during the course of this arbitration is not relevant to establishing the Claimant's knowledge of the alleged breach and loss or damage more than three years prior to the filing of its NOA. Thus, it is not necessary to "preserve, index, protect, and scan documents" in order to rule on the issue of time bar. In the absence of any supporting evidence and considering Canada's jurisdictional objections, the Claimant has failed to establish, *prima facie*, that it has a reasonable possibility of prevailing in this case.

B. The Claimant Would Not Incur Any Harm if the Request is Denied

7. The Claimant makes the spurious assertion that without an order from the Tribunal directing Canada to preserve and protect documents, 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."[10] This allegation is extremely inappropriate and entirely groundless. Canada embraces its general duty to act in good faith in these, and all, international arbitral proceedings. The Tribunal should not countenance the Claimant's reckless and unfounded attempts to cast doubt on that commitment.

8. Moreover, the Claimant's allegation ignores the fact that Canada has already put in place robust procedures to preserve and protect documents that may be relevant to this dispute. The recordkeeping policies of the Government of Ontario and the Independent Electricity System Operator ("IESO"), the entity that was merged with the former Ontario Power Authority ("OPA"),

[8] Canada's Statement of Defence, 2 July 2019, ¶ 46; Canada's Request for Bifurcation, 23 September 2019, ¶¶ 1 and 10-22.

[9] NAFTA Article 1116(2) provides that "[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage." *See* Canada's Statement of Defence, ¶¶ 29-30.

[10] Claimant's Request, ¶ 10(b).

effectively render Tennant's request unnecessary. A key piece of provincial legislation in Ontario, the *Archives and Recordkeeping Act*[11] ("ARA"), came into force in September 2007. The purpose of the ARA is, in part, to ensure that the public records of Ontario are managed, kept, and preserved in a useable form for the benefit of present and future generations; to foster government accountability and transparency; and to support effective government administration by promoting and facilitating good recordkeeping by public bodies.[12] The ARA generally prohibits the destruction of public records, subject to certain exceptions.[13]

9. In implementing the ARA, the Government of Ontario imposed government-wide policies in respect of recordkeeping requirements. They include the Corporate Policy on Recordkeeping, of July 2011[14] and the subsequent Corporate Policy on Recordkeeping, of March 2015[15] ("Recordkeeping Policy 2015"), which came into force in January 2016. Recognizing the importance of document retention in times of governmental transition, the Government of Ontario sought to improve its recordkeeping policy by ensuring that reasonable measures are implemented to more effectively preserve records that are maintained or controlled by public institutions in Ontario.[16] The purpose of the Government of Ontario's Recordkeeping Policy 2015 is to define and establish requirements for managing public records, including requirements for the creation and management of authentic, reliable, enduring, and useable business records in support of business functions and activities.[17]

10. Among the various mandatory requirements imposed by the Recordkeeping Policy 2015, the Government of Ontario requires that every program must "ensure that the integrity, reliability and retrievability of business records for ongoing legal, fiscal or other business purposes is preserved

[11] **R-015**, *Archives and Recordkeeping Act, 2006*, S.O. 2006, c. 34, Sched. A ("*ARA*").

[12] **R-015**, *ARA*, ss. 1(a) and (b).

[13] **R-015**, *ARA*, s. 15(1).

[14] **R-016**, Government of Ontario, Minister of Government Services, *Corporate Policy on Recordkeeping* (Jul. 25, 2011).

[15] **R-017**, Government of Ontario, Ministry of Government and Consumer Services, *Corporate Policy on Recordkeeping* (Mar. 2015) ("Ontario Corporate Policy on Recordkeeping 2015").

[16] **R-017**, Ontario Corporate Policy on Recordkeeping 2015.

[17] **R-017**, Ontario Corporate Policy on Recordkeeping 2015, ¶ 1.

throughout their lifecycle".[18] Additionally, the Recordkeeping Policy 2015 explicitly states that any public record in the possession of a ministry may be subject to legal proceedings; and in response to requests arising from such proceedings, ministries must preserve and produce all relevant records in accordance with the applicable rules and procedures.[19] Any relevant public records must not be transferred, altered, or otherwise destroyed until the ministry has been notified that the matter is concluded.[20]

11. Moreover, the IESO is designated as an "institution" under domestic freedom of information legislation and has a legal obligation to preserve records in accordance with the requirements contained therein.[21] The IESO's Memorandum of Understanding with Ontario, as represented by the Minister of Energy (now the Minister of Energy, Northern Development and Mines) (the "MOU"), sets out certain expectations with respect to records management.[22] The IESO has a number of policies and procedures in place that govern and define the requirements for managing its records. IESO employees are required to comply with all applicable laws, regulations, and IESO policies in the performance of their duties.[23]

12. Furthermore, [redacted]

[18] **R-017**, Ontario Corporate Policy on Recordkeeping 2015, ¶ 8.

[19] **R-017**, Ontario Corporate Policy on Recordkeeping 2015, ¶ 28.

[20] **R-017**, Ontario Corporate Policy on Recordkeeping 2015, ¶ 28.

[21] Section 10.1 of Ontario's *Freedom of Information and Protection of Privacy Act* states: "[e]very head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution." (**R-018**, *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c F.31, s. 10.1).

[22] Section 13.3.1 states: "[t]he CEO is responsible for ensuring that there is a system in place for the creation, collection, maintenance and disposal of records in accordance with corporate policies, guidelines and best practices." (**R-019**, *Memorandum of Understanding Between Her Majesty the Queen in Right of the Province of Ontario as Represented by the Minister of Energy and Independent Electricity System Operator*, 2016 (signed May 2017), s. 13.3.1).

[23] **R-020**, Independent Electricity System Operator, Code of Conduct (last revised February 2019), p. 2.

[24] **R-021**, [redacted] **R-022**, [redacted]

[redacted]

13. [redacted] The Government of Ontario and IESO's robust procedures sufficiently and appropriately serve to preserve and protect documents that may be relevant to this dispute.

14. An order for the preservation of documents would also be inconsistent with the approach taken by other investor-State tribunals. For example, in response to an interim request for an order to preserve documents, the tribunal in *Nova Group Investments* explained that a tribunal should require only the *minimum steps necessary* to preserve the right of a disputing party:

> [i]f the particular measure sought by an applicant is broader than required under Article 47 to preserve the right in question, that portion of the measure will be

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[redacted]

[25] **R-021**, [redacted] p. 1.

[26] [redacted]" (**R-021**, [redacted]

[27] **R-021**, [redacted] p. 2.

[28] **R-022**, [redacted]

[29] **R-022** [redacted] p. 1.

> neither necessary nor urgent, and almost by definition will impose burdens of the other party that are disproportionate to the claimed need. For this reason, tribunals should be mindful to grant provisional relief that is as narrow as can be fashioned to preserve the rights in question. This is inherent to the Tribunal's initial observation that tribunals should recommend only the *minimum steps necessary* to meet the objectives set out in the [ICSID] Convention.[30]

Because Romania had undertaken to preserve all relevant documents to the dispute, the tribunal concluded that it "saw no need for a provisional measures recommendation specifically targeted at Romania."[31]

15. Equally, the document retention policies [redacted] put in place by the Government of Ontario and IESO demonstrate that Canada has preserved and protected all relevant documents in this case. Accordingly, there is no need for the Tribunal to order Canada to preserve, index, protect, and scan documents. 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.

C. It Would Be Unduly Burdensome for Canada to Index and Scan All Documents

16. In addition to its request for preservation and protection of documents, the Claimant requests that Canada be ordered to index and scan "Protected Documents," which it broadly defines as:

> [t]he "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.[32]

17. If the Tribunal were to grant the Claimant's request, Canada would be required to devote significant time and resources to retrieve, review, index and scan potentially millions of documents, including documents that are not relevant or material to the present dispute. In view of Canada's Request for Bifurcation, dated September 23, 2019 ("Canada's Request for Bifurcation") and jurisdictional objection on time bar, it would be unduly burdensome to require Canada to begin

[30] **RLA-084**, *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 ("*Nova Group – Procedural Order No. 7*"), ¶ 243.

[31] **RLA-084**, *Nova Group – Procedural Order No. 7*, ¶ 363.

[32] Claimant's Request, fn 3.

undertaking steps for document production at this stage of the arbitration. Requiring Canada to take additional steps to index and scan documents within a 30-day timeframe is also unreasonable given the breadth of the Claimant's request. Accordingly, the balance of convenience favours the rejection of the Claimant's broad request to index and scan "Protected Documents."

D. The Circumstances Are Not Urgent

18. In its Request for Interim Measures, the Claimant attempts to show that the circumstances are urgent but it does so based on unsupported allegations.[33] These allegations relate to past events, occurring between 2012 and 2014,[34] long before the filing of the Claimant's NOI.

19. As stated by the tribunal in *Railroad Development Corporation*, it is not sufficient for a disputing party to rely on vague allegations of destruction of documents that occurred in the past to obtain an order for the preservation of documents.[35] In that case, given the absence of any evidence put forward by the claimant demonstrating the ongoing destruction of documents by the Guatemalan government or the imminent destruction of relevant documents, the tribunal refused to order the preservation of documents.[36] The tribunal explained that the claimant had failed to establish any urgency to the provisional measures it sought.[37]

20. The same reasoning applies here. There is a general presumption in every case that the disputing parties are acting in good faith in respect of their document preservation and production

[33] Claimant's Request, ¶¶ 6-8. Canada disputes the factual accuracy of the allegations in the Claimant's Request and reserves its right to respond to these allegations, if necessary, at an appropriate stage of the arbitration. However, given that these allegations relate to past events, which are not sufficient to satisfy the urgency criteria in obtaining an order for the preservation of documents, it is not necessary for the Tribunal to determine whether the facts alleged by the Claimant have been sufficiently proven in order to rule on the Claimant's Request for Interim Measures.

[34] Claimant's Request, ¶ 7.

[35] **RLA-085**, *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Provisional Measures, 15 October 2008 ("*Railroad Development – Decision on Provisional Measures*"), ¶ 35: ("To prove the need and urgency of the provisional measures, the Claimant relies on destruction or loss of documentation during the 2004 and 2008 changes of administration in Guatemala and the frequent changes in high positions in the administration of President Colom. As evidence, the Claimant has presented mainly news reports which refer to document destruction in 2004. As regards the change of government in 2008, the evidence presented refers to the disorder found in government offices when the new administration took over. No evidence has been presented that during the course of 2008 documents have been destroyed or lost by the current government of Guatemala or the destruction of relevant documents is imminent because of the existence of this arbitration. (Emphasis added).")

[36] **RLA-085**, *Railroad Development – Decision on Provisional Measures*, ¶ 35.

[37] **RLA-085**, *Railroad Development – Decision on Provisional Measures*, ¶ 36.

obligations.[38] The Claimant bears the burden of proving otherwise and it has failed to do so. There is no evidence of destruction of documents relevant to this dispute. Further, the Claimant's allegations are unfounded when considered in light of the Government of Ontario's Recordkeeping Policy 2015 and the IESO's document retention policies, as described above.[39]

21. In sum, the Claimant's request that the Tribunal order Canada to preserve, index, protect, and scan documents fails to meet the legal standard under Article 26.1 of the 1976 UNCITRAL Rules. The Claimant has not demonstrated that it will incur any harm if the request is denied or that the circumstances are urgent, such that the granting of its request is necessary to protect the integrity of the arbitral proceedings, particularly given the steps taken by the Government of Ontario and IESO to preserve relevant documents. It is also unduly burdensome to require Canada to index and scan "Protected Documents" as it has not yet been determined whether the disputing parties will even be required to undergo document production in this arbitration.

III. IT IS NOT NECESSARY FOR THE TRIBUNAL TO ORDER THE PRODUCTION OF THE WINDSTREAM DOCUMENTS AT THIS STAGE OF THE ARBITRATION

22. The Claimant also fails to demonstrate that its request for the Tribunal to order Canada to produce the *Windstream* Documents satisfies the legal standard under Article 26.1 of the 1976 UNCITRAL Rules. It is not necessary for the Tribunal to order the production of the *Windstream* Documents to protect the integrity of the arbitral proceedings at this stage of the arbitration. The Claimant's request for the production of *Windstream* Documents is nothing more than an attempt to circumvent the procedures established by the Tribunal in PO1. For these reasons, the Claimant's request must be denied.

[38] *See e.g.*, **RLA-086**, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB (AF)/00/1) Procedural Order No. 3, 4 October 2001, ¶ 4: ("The appropriate assumption in every case is that, both parties having proceeded to international arbitration in good faith, neither would withhold documents for its own benefit and that good faith will render any practical problems of document production susceptible of prompt resolution without undue hardship or expense on either party.")

[39] **R-017**, Ontario Corporate Policy on Recordkeeping 2015. *See above*, ¶¶ 10 and 11.

A. The Claimant Does Not Have a Reasonable Possibility of Prevailing in this Case

23. For the reasons set out in Section II(A), the Claimant has failed to satisfy its burden of demonstrating a *prima facie* "reasonable case" in its underlying claim.[40] In view of Canada's Request for Bifurcation and jurisdictional objection on time bar, it is not necessary for the Tribunal to order the production of the *Windstream* Documents.

B. The Claimant Would Not Incur Any Harm if the Request is Denied

24. The Claimant provides no support for its statement that the *Windstream* Documents are necessary to protect its right to have its claim heard by the Tribunal.[41] In PO1, the Tribunal has clearly set out the timelines and procedures for document production in this arbitration.[42] The Claimant's failure to provide any reason why the Tribunal should depart from PO1 demonstrates that its request for the production of the *Windstream* Documents is nothing more than an attempt to circumvent those rules and procedures, and to reopen a debate on procedural matters that has already been decided by the Tribunal.

25. As cautioned by the tribunal in *Biwater Gauff*, the production of documents "is a more controversial issue when framed as an application for provisional measures."[43] This is because "[a]ctual production is not usually considered within the ambit of such interim relief, partly because preservation is usually sufficient to protect the rights in question, and partly because actual production is catered for by other rules."[44] Accordingly, there is a danger that an interim measure for document production might be deployed to circumvent other procedures, such as a detailed mechanism for the exchange of document requests.[45]

[40] Canada's Motion, ¶ 25.

[41] Claimant's Request, ¶¶ 29(a) and (b).

[42] Procedural Order No. 1, Section 7 (Document Production), and Annex I: Procedural Calendar.

[43] **CLA-045**, *Biwater Gauff – Procedural Order No. 1*, ¶ 100.

[44] **CLA-045**, *Biwater Gauff – Procedural Order No. 1*, ¶ 100.

[45] **CLA-045**, *Biwater Gauff – Procedural Order No. 1*, ¶ 101.

26. As explained above,[46] there is no harm to the Claimant if Canada does not produce the *Windstream* Documents at this stage of the arbitration because the documents are not relevant to Canada's time bar objection. As explained in Canada's Request for Bifurcation, if Canada succeeds in its jurisdictional objection, the Claimant's case would be dismissed in its entirety and there would be no need for the Tribunal to consider the merits and damages of the claim or for the disputing parties to engage in document production.[47] Moreover, even if the case were to proceed to the merits and damages phase, the Procedural Calendar in PO1 sets out a schedule for document production to occur after the filing of the Claimant's Memorial and Canada's Counter-Memorial. At that stage, the Claimant would have the opportunity to submit document requests. Moreover, issues concerning the relevance and materiality of the *Windstream* Documents can be more appropriately dealt with under the "Redfern Schedule" procedure set out in Section 7 of PO1.

27. The Claimant also provides no reason for its proposed departure from the "Redfern Schedule" procedures in Section 7 of PO1. Contrary to the Claimant's assertion, it is not "entitled" to the production of the *Windstream* Documents.[48] Consistent with Article 3 of the *IBA Rules on the Taking of Evidence in International Arbitration* (the "IBA Rules"),[49] Article 7.2 of PO1 stipulates the information that shall be identified in each disputing party's request for document production:

[46] *See above*, ¶ 7.

[47] Canada's Request for Bifurcation, 23 September 2019, ¶¶ 3, 27.

[48] Claimant's Request, Part III ("The Investor is Entitled to the Interim Measures Requested").

[49] The relevant paragraph of **RLA-087**, International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 29 May 2010 ("*IBA Rules*"), Article 3 states:

> 3. A Request to Produce shall contain:
>
> (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
>
> (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
>
> (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.

> [e]ach Party's request for production shall identify: a description of each requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist; a statement as to how the documents requested are relevant to the case and material to its outcome; and a statement that the documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such documents, and a statement of the reasons why the requesting Party assumes the documents requested are in the possession, custody or control of the other Party. The request for production shall take the form of a Redfern Schedule, as attached at Annex II (Redfern Schedule). For the purposes of this order, the term "relevance" encompasses both the term "relevance" and "materiality".

28. The Claimant's request for "all non-confidential documents (or non-confidential versions of documents)" in *Windstream* does not conform to the requirement in Article 7.2 of PO1 to identify a narrow or specific category of documents. In this regard, the Claimant's definition of the "*Windstream* Documents" is exceedingly broad and open-ended:

> [t]he "*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.[50]

29. The Claimant's request also raises issues concerning the relevance and materiality of the requested documents to this arbitration. Article 7.4.6 of PO1 provides that the Tribunal may refer to the IBA Rules for the purpose of ruling on disputed document requests. In relevant part, Article 3(7) of the IBA Rules provides that:

> [t]he Arbitral Tribunal may order the Party to whom such Request is addressed to produce any requested Document in its possession, custody or control as to which the Arbitral Tribunal determines that (i) the issues that the requesting Party wishes to prove are relevant to the case and material to its outcome; (ii) none of

[50] Claimant's Request, fn 5. Notably, the Claimant's broad request is for documents "in the possession, custody or control of the disputing parties" However, Windstream Energy LLC is not a disputing party and cannot be compelled to produce documents in this arbitration.

> the reasons for objection set forth in Article 9.2 applies; and (iii) the requirements of Article 3.3 have been satisfied.[51]

Accordingly, the Tribunal may only order documents relating to issues that are "relevant to the case and material to its outcome" to be produced in this arbitration.

30. The Claimant argues that the *Windstream* Documents are relevant and material because "the *Windstream* case dealt with the same lack of transparency in the FIT Program, among other issues relevant to the issues in this dispute."[52] However, this statement is inaccurate and, in any event, far too general to establish the relevance and materiality of the broad category of documents requested. Unlike Tennant's claim, the measures at issue in *Windstream* concerned the Government of Ontario's February 2011 decision to defer offshore wind development,[53] which is not related to the Claimant's allegations in respect of it not being granted an onshore wind FIT Contract. Given that the *Windstream* case involved different facts and measures alleged to be in breach of NAFTA, the Claimant's statement is not sufficient to support a broad request for all non-confidential documents in the possession, custody, or control of the disputing parties in the *Windstream* arbitration.

31. In *Biwater Gauff*, the tribunal's comment that the documents requested were "of obvious relevance and materiality to issues in dispute" only pertained to the claimant's requests for bank statements and written statements of account relating to the claimant's own investment, which comprised of "a specifically identified, narrow category of documents."[54] Conversely, the tribunal

[51] **RLA-087**, IBA Rules, Article 3(7) (emphasis added).

[52] Claimant's Request, ¶ 32.

[53] **RLA-088**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ¶ 5: ("The dispute between the Parties arises out of an offshore wind electricity generation project in the Wolfe Island Shoals area in Ontario, Canada (the "Project" or the "WWIS Project"). The Project was undertaken following Ontario's enactment of the Green Energy and Green Economy Act of 2009 ("GEGEA") and the subsequent promulgation of additional rules and regulations, creating a Feed-in-Tariff ("FIT") program (the "FIT Program") for the development of renewable energy projects, including onshore and offshore wind. According to the Claimant, following the award of a Feed-in-Tariff Contract (the "FIT Contract") to the Claimant, the Government of Ontario (also referred to as the "Government" or "Ontario") delayed the approval of the required permits and authorizations, including those allowing access to Crown land, and eventually, on 11 February 2011, imposed a moratorium on the development of offshore wind that frustrated the Claimant's attempts to develop the Project.")

[54] **CLA-045**, *Biwater Gauff – Procedural Order No. 1*, ¶ 104.

declined the claimant's other requests for "broad categories" of documents on the basis that the relevance and materiality of such documents were still a matter of debate.[55]

32. There is no reason to depart from the Redfern Schedule procedures set out in Section 7 of PO1, including the procedures for disputed document requests, as there would be no harm to the Claimant by maintaining this process. Even if the Tribunal were to consider granting the Claimant's request for the *Windstream* Documents at this stage, Canada objects to it on the basis that the Claimant has failed to identify a narrow and specific category of requested documents and to establish the relevance and materiality of the requested documents.

33. In sum, 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. The Claimant has provided no reason justifying a departure from the timelines and procedures for document production set out in PO1. The Claimant's proposal would be procedurally unfair, as it would result in the Claimant circumventing the requirement to justify the relevance and materiality of its document requests. It would also lead to the Claimant unilaterally benefitting from an early production of documents, which is unnecessary at this stage of the arbitration and not envisioned in the Procedural Calendar established by the Tribunal.

C. It Would Be Unduly Burdensome on Canada to Produce Documents at this Stage of the Arbitration

34. In the absence of any risk of harm to the Claimant, the balance of convenience does not favour the Claimant's request. Canada is seeking to bifurcate the proceedings to have its jurisdictional objection on time bar heard prior to proceeding to the merits and damages phase of this arbitration.[56] Given that the *Windstream* Documents are not relevant to Canada's jurisdictional objection on time bar, an order for the early production of such documents would be prejudicial to Canada, as it would assume that the case will proceed further to the merits and damages phase. However, if Canada prevails on its time bar objection, Tennant's claim would be dismissed in its

[55] **CLA-045**, *Biwater Gauff – Procedural Order No. 1*, ¶ 107.

[56] Canada's Request for Bifurcation, 23 September 2019, ¶¶ 1-5.

entirety, and the Tribunal would not need to consider the merits or damages.[57] In these circumstances, the disputing parties would not be required to undergo any document production.

35. Conversely, if the Tribunal granted the Claimant's request for Canada to produce the *Windstream* Documents, Canada would be required to devote unnecessary time and resources to retrieve, review, and organize thousands of documents, as well as create an index, as requested by the Claimant. Requiring Canada to undergo an additional round of document production in this arbitration is unduly burdensome, particularly since such documents 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.[58]

D. The Circumstances Are Not Urgent

36. There are no urgent circumstances requiring the Tribunal to order Canada to produce the *Windstream* Documents. 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. As explained above, mere allegations of past events of destruction or loss of documentation do not constitute evidence of the need and urgency for an interim measure.[59] There is also no harm to the Claimant by maintaining the existing Procedural Calendar set out by the Tribunal in PO1, which provides for document production to occur at a later stage of the arbitration, if the claim proceeds to the merits and damages phase. Consequently, the Claimant has failed to meet its burden of proving that the circumstances are urgent in order to justify the granting of its request for the production of the *Windstream* Documents.

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[57] Canada's Request for Bifurcation, 23 September 2019, ¶¶ 26-28; Canada's Statement of Defence, ¶ 27.

[58] Furthermore, the public availability of documents does not "entitle" the Claimant to obtain document production through the arbitral process. Many documents falling within the Claimant's broad definition of "*Windstream* Documents," such as the written submissions, procedural documents and hearing transcripts and video are accessible online (see e.g. the Permanent Court of Arbitration's website: https://pca-cpa.org/en/cases/36/). As Canada has previously explained, the *Windstream* Documents may also be subject to disclosure under Canada's domestic laws. The Claimant has provided no explanation as to why it has not availed itself of the procedures available under domestic law to obtain access to such documents. Its decision not to use such procedures does not make it "necessary" for Canada to produce these documents in this arbitration. (*See e.g.*, **R-023**, E-mail from Lori Di Pierdomenico to Barry Appleton et al. (Feb. 27, 2019).

[59] *See above*, Section II.B, "The Claimant Would Not Incur Any Harm if the Request is Denied".

IV. CONCLUSION

37. Based on the foregoing, the Claimant's Request for Interim Measures fails to satisfy the legal standard under Article 26.1 of the 1976 UNCITRAL Rules and must be dismissed in its entirety. As detailed above, Canada has already put in place robust measures to preserve and protect documents that may be relevant to this dispute. In the absence of any evidence of ongoing or future destruction of such documents, Canada must be presumed to be acting in good faith. Thus, it is not necessary for the Tribunal to order Canada to preserve, index, protect, and scan documents in this arbitration and that request must be denied.

38. Furthermore, the Claimant's request for the production of *Windstream* Documents is nothing more than an attempt to circumvent the rules, procedures, and timelines established by the Tribunal in PO1, in particular those related to document production. In view of Canada's Request for Bifurcation, there is also no risk of harm to the Claimant if this request is denied as the *Windstream* Documents are not relevant to Canada's jurisdictional objection on time bar. Consequently, the Claimant's request for the production of the *Windstream* Documents must be denied.

39. Canada reserves its right to claim its costs to respond to the Claimant's Request for Interim Measures.

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Respectfully submitted on behalf of the
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