UNDER THE UNCITRAL ARBITRATION RULES (1976) AND
NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

In the Matter of Arbitration between:	
TENNANT ENERGY, LLC,	
Claimant,	PCA Case No. 2018-54
and	
GOVERNMENT OF CANADA,	
Respondent.	
	Volume 1

HEARING ON BIFURCATION AND PRELIMINARY MOTIONS

Tuesday, January 14, 2020

The World Bank Group
1225 Connecticut Avenue, N.W.
C Building
Conference Room 1-450
Washington, D.C.

The hearing in the above-entitled matter convened at 9:00 a.m. before:

MR. CAVINDER BULL, President of the Tribunal

MR. R. DOAK BISHOP, Co-Arbitrator

SIR DANIEL BETHLEHEM, Co-Arbitrator

ALSO PRESENT:

Secretary to the Tribunal

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APPEARANCES: (Continued)

On behalf of the Respondent:

MS. LORI DI PIERDOMENICO
MS. SUSANNA KAM
MR. MARK KLAVER
MS. JOHANNIE DALLAIRE
MS. MARIA CRISTINA HARRIS
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APPEARANCES: (Continued)

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Party representatives for Independent Electricity System Operator, Legal Services:

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APPEARANCES: (Continued)

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C O N T E N T S

P R O C E E D I N G S

PRESIDENT BULL: Okay. Good morning, everyone.

I think we'll call the Hearing in to session.

This is PCA Case Number 2018-54, Tennant Energy, LLC against the Government of Canada.

My name is Cavinder Bull. I'm the presiding arbitrator. My co-arbitrators to my left and right are Mr. Doak Bishop and Sir Daniel Bethlehem. And also in attendance is the Tribunal Secretary, Ms. Christel Tham.

I wonder if I could get the Claimants to introduce those here for them.

MR. APPLETON: Good morning. Thank you very much, Mr. President, and Members of the Tribunal.

I'm Barry Appleton. My colleague, Lillian De Pena, is joining us, I believe by telephone connection, in Toronto today. I'm joined here at the Hearing by Edward Mullins, and we have the Claimants' client representative, Mr. John Pennie, here. This is the same delegation that we had at the last hearing, but now we are all in person, so you can see us in the flesh.

PRESIDENT BULL: Thank you, Mr. Appleton.

And then, if someone could introduce everyone for Canada.

MS. DI PIERDOMENICO: Sure. My name is Lori Di Pierdomenico, and I will be speaking on issue Item 3

today, Canada's Request for Bifurcation. I also have with me Mr. Mark Klaver, and he will be speaking on Items 1 and 4. Ms. Johannie Dallaire will be speaking on the Agenda Item 2, which is the Claimants' Request for Interim Measures. As well joining us, we have Ms. Susanna Kam and María Cristina Harris, whom you might recognize from the last hearing, and we are all counsel at the Trade Law Bureau at Global Affairs Canada.

As well, we have Ms. Darian Bakelaar, who is a senior paralegal also at the Trade Law Bureau.

We have from the Investment Trade Policy Office of the Government of Canada Ms. Renaude Bender, and she's a Senior Policy Officer.

And we also have representatives from the Government of Ontario, Ms. Saroja Kuruganty, she's counsel at the Ministry of Attorney-General, and Ms. Jennifer Kacaba, senior counsel at the Ministry of Energy, Northern Development, and Mines--and I smiled because I know I mispronounced your name. I'm sorry, Jennifer.

We also have video conference lines in Ottawa and Toronto, and the Permanent Court of Arbitration has prepared a list. I can either go through the list or ask leave from the Tribunal to refer to the list for those that are present.

There is only one person who is not present

currently, and it's Ms. Sejal Shah. She will be joining us later on this afternoon. But all others we confirm are present.

PRESIDENT BULL: I wonder if I can get the Non-Disputing Parties to introduce themselves for the record.

MR. JEDREY: Good morning. My name is Nathaniel Jedrey from the U.S. Department of State, and I'm here with my colleague Margaret Cedric.

MR. LÓPEZ: Hello. Good morning. My name is Aristeo López. I represent the Government of México. Thank you.

PRESIDENT BULL: Thank you, everyone.

We have a number of items, four issues to--or four applications to deal with in the next day and a half, but before we kick off with Agenda Item Number 1, just a few housekeeping matters.

There are two confidential documents relating to [redacted] issue, and because this Hearing is also being witnessed by members of the public in a separate room, if either Party is going to deal with that issue, then please let the Tribunal know before you do so that the feed to the room where the public is sitting can be closed so that the confidential information can be dealt with.

MR. APPLETON: Mr. President, perhaps it may

assist the Tribunal that Ms. Di Pierdomenico and myself had a brief conversation about this this morning.

I will be talking about those issues. I'll be addressing that matter today, and I will have to--because it's an integral part of one of the motions. However, I believe I can discuss it in such a way that we are not going to need to cut the public off. I believe it is very important that there be transparency and public access. I'm sorry that we actually have this issue, that we could potentially cut the public off here, because I think access to information to the public in this case is particularly important, and so I'm going to do my best to be able to discuss the documents without any disclosure of what's in the documents. And I've asked Ms. Di Pierdomenico to immediately notify us in the event that she believes that she has an objection as to something that's going to take place.

In other words, I'd rather not cut the public off on that discussion, if that's possible, and that means more work for me to try to find a way to reference the information in such a manner that we don't have to deal with that. But, if I cross that line inadvertently, I believe that the Government of Canada will immediately bring that to all of our attention, and then we can address it, if that's acceptable in advance.

PRESIDENT BULL: Ms. Di Pierdomenico?

MS. DI PIERDOMENICO: Thank you. Addressing our side first, we will be referring to the documents, and we will clearly flag when we are ready to go into closed session.

In terms of Mr. Appleton's remarks, our preference is that he ensure--that the session is closed immediately once he knows he's referring to the documents, and, you know, putting the onus on us to interrupt him might not only disrupt his own presentation, but also it could lead to unnecessary disclosures.

PRESIDENT BULL: Mr. Appleton, I have to say I much prefer that way of proceeding, because if you do stray or if there's a difference of opinion about whether you stray, then we are going to be in a situation where some things may have already been said and then one Party will be unhappy about it.

So, of course, you will have to be the judge yourself of what you are going to say. And if it comes to these confidential documents, I think you'll have to let us know whether the feed should be cut.

MR. APPLETON: I think perhaps it might be easiest if the Tribunal could give us some leanings. We don't have to have the leanings until we get to Agenda Item 2 today. Perhaps on a break you might consider this with your

colleagues and come back to us.

It would seem to me that the existence of these documents themselves are not confidential. The content of what is in these documents itself would be confidential, and, therefore, the reference to documents in existence would not. And I would propose that where I would discuss documents that are in existence, that's a fact. That's already been disclosed, and it is already covered in the motions and other things that are with us, and that's not confidential. That would be allowed to be permitted.

The actual content of what's in these documents, that may be an issue of what is confidential, and that's where I would draw the line.

If the Tribunal wishes me to draw the line somewhere else, I would appreciate having some indication, because I think the public needs to know as much as possible in a case that focuses heavily on despoliation of evidence, of evidence being destroyed, of evidence not being available that is covered by Canadian law and is protected. Right? That's what this case deals with, are materials that under the law of Canada have to be protected and under the law of Ontario have to be protected, but were destroyed, and there were criminal charges and conviction.

And so, to the extent that we can't let the public know about that, which--I think the public has a right to

know, but to the extent we can't let the public know, I understand that Canada has said they want to suppress, through confidentiality, that particular evidence, that content, through confidentiality.

We obviously objected. The Tribunal has ruled. That matter is over. But the existence of such documents, they have not asserted confidentiality over it. They have pleaded it into documents that are on the public site, and that, to me, is where the line would be drawn.

But we will follow completely your instructions, and we simply would ask that before we get to Item 2, you give us those instructions. If you're prepared to give those instructions right now, that is all right, too.

PRESIDENT BULL: Thank you, Mr. Appleton.

Ms. Di Pierdomenico, any other comments?

MS. DI PIERDOMENICO: Yes. Just in response to that, I think that the Tribunal's decision on this is clear, and that is the confidentiality is asserted over all of it, and, therefore, I think it's a bright line rule that need not be crossed today unnecessarily.

PRESIDENT BULL: Right. Thank you.

The issue having been flagged, and since this is coming up after the break, I think we can move on for the moment.

The other matter that I wanted to check was with

the Non-Disputing Parties, and my understanding is that the Government of México is not intending to make any oral submissions. Is that still the case?

MR. LÓPEZ: Yes, that is still the case, Mr. President.

PRESIDENT BULL: Thank you.

And I understand that the United States would be making oral submissions, and I wondered if there was an indication we could have about which of the applications you would be making those submissions on.

MR. JEDREY: Yes, Mr. President. The United States will be making submissions solely on Agenda Item 4, so we won't be making any submissions, any oral submissions, during the course of today.

PRESIDENT BULL: Good. Then we are bang-on time, 9:15, and we can start with Agenda Item 1, and this is the Respondent's Motion for Disclosure of Third-Party Funding, and, of course, I would invite the Respondent to begin.

But just before that, Mr. Bishop wanted to clarify something arising from the submissions.

ARBITRATOR BISHOP: Yes. I have a question that perhaps might save some time.

I understood from the papers that the Parties may be in agreement on disclosing the identity of the third-party funder as long as it's done in confidence.

Did I understand that to be the position of the Claimant?

MR. MULLINS: On behalf of the Claimant, if we are--as we put in our papers, if we were so ordered, we would disclose. I think there is an argument to be had that if the Tribunal never knew who the funder was, the issue of a conflict probably doesn't exist because it is almost like, once the cat is out of the bag, you now realize there is a conflict.

I recognize, however, on issues of transparency that the line of cases or authorities in the Queen Mary suggested that disclosure should be had, so I guess that's a long-winded way of saying that while we would--if we are so ordered, we would not oppose it, if that makes it easier for the Tribunal.

ARBITRATOR BISHOP: Okay.

PRESIDENT BULL: So, I believe it's Mr. Klaver who is going to be--have I pronounced that correctly?

MR. KLAVER: It is Klaver.

PRESIDENT BULL: Klaver. Mr. Klaver.

You are speaking for Canada in respect of this motion?

MR. KLAVER: Yes.

PRESIDENT BULL: Thank you.

MR. KLAVER: So, just at the outset, I'd like to

thank the Claimant for clarifying that. Our understanding of the Claimants' proposal was that you were willing to disclose the identity of the funder to the Tribunal solely, but not to Canada. So, if you are willing to disclose the identity of the funder to Canada as well, that clears up one of the issues.

MR. MULLINS: On behalf of that, I don't believe that, on that issue, that Canada really does need it. We would disclose to the Tribunal, just so we are clear, but I don't understand--and I'm interested to hear your argument--why Canada would have it. But I think you're probably looking for more anyway, so I think it's probably a moot point, and I think it's where the rubber hits the road anyway. So, you're looking for more than just this identity anyway.

AGENDA ITEM NUMBER 1: RESPONDENT'S MOTION FOR DISCLOSURE OF THIRD-PARTY FUNDING

ARGUMENT BY COUNSEL FOR THE RESPONDENT

MR. KLAVER: Thank you.

President Bull, Arbitrator Bethlehem, and Arbitrator Bishop, thank you for providing us with the opportunity to address third-party funding in this Arbitration.

Third-party funding has emerged fairly recently as a prominent issue in Investor-State arbitration, and while

it has the potential upside of bringing access to justice for meritorious claims, it also brings new risks. Now, we will address some of them today, such as the risks of conflict of interest, but at the outset, we wish to outline for the Tribunal the risk that third-party funding can undermine the equality between disputing Parties.

Now, third-party funders are not Parties to the Arbitration. Unlike domestic courts, investment Tribunals cannot order a third-party funder to pay an Adverse Costs Order that is made against the Claimant, nor can Respondent States enforce that order against the third-party funder.

Now, as you can see from this passage on the slide, this creates the risk of what Arbitrator Jean Kalicki calls "the arbitral hit and run." It arises when a funder stands to gain if the Claimant wins, but would not be liable to meet any award of costs that might be made against the Claimant if it lost. This risk is highest when a funding agreement expressly absolves the funder of responsibility to pay an Adverse Costs Order.

By rendering a cost order ineffective and forcing the Respondent State's taxpayers to foot the bill, third-party funding can undermine the equality of the Parties and the integrity of the Arbitration.

Now, in this case, Tennant has effectively admitted that a third party is funding the Claim. Canada

first inquired into the participation of a funder in its motion for a disclosure of third-party funding and security for costs, and as we've seen, Tennant has indicated that a funder may be involved and it's willing to disclose that information. But Tennant is only willing to disclose it to the Tribunal, it sounds like, and this is unacceptable for the reasons I'll explain today.

Canada's motion also inquired into whether a funding agreement absolves a funder of responsibility for paying an Adverse Costs Order against Tennant. Again, the Claimant could have resolved this issue by reassuring the Tribunal that a funder had taken responsibility to pay an Adverse Costs Order. The fact that it did not do so increases our concern that Tennant has, indeed, entered into a third-party funding agreement that allows a funder to avoid paying Canada's costs. In these circumstances, the risk of an "arbitral hit and run" would be very real.

As can see on the slide, my objective today is to convey two main points for the Tribunal.

First, it is necessary to order Tennant to disclose to both Canada and the Tribunal the identity of a third party that is funding this claim.

Second, it is necessary to order Tennant to disclose the terms of the funding arrangement.

Now, starting with the identity of the funder,

Tennant fails to cite a single Investment Tribunal that limited disclosure to the Tribunal while excluding the Respondent. In contrast, today I will discuss multiple Investment Tribunals that have ordered disclosure of third-party funding to both the Tribunal and the Respondent State.

Now, while some of these were decided under the 2010 UNCITRAL Rules or the ICSID Rules, they offered reasons that are just as meaningful and relevant to this Tribunal's determination under the 1976 UNCITRAL Rules.

Specifically, as listed on the screen, Tribunals have identified at least three reasons to order disclosure of third-party funding in international arbitration.

First, for the purposes of transparency; second, to address potential conflicts of interest; and, third, to assess applications for security for costs. Each of these reasons relates to the integrity of the Arbitration, and for all three, it is necessary to order Tennant to disclose the identity of the funder to Canada and the Tribunal.

Now, starting with transparency, this an integral principle in international arbitration. Transparency upholds the legitimacy of investment proceedings.

The IBA guidelines on conflicts of interest in international arbitration were revised in 2014 partly to address the emergence of third-party funding in

international arbitration, and the explanation to General Standard 6(b) states: "Third-party funders may have a direct economic interest in the Award, and, as such, may be considered the equivalent of a party."

Disclosure of a funder's identity is necessary for Canada to know: Who is the true party, or the equivalent of a party, that brought this claim against it? To deny Canada this information would undermine the legitimacy of the arbitration, as Canada could be left defending a claim for over $100 million brought, ultimately, by an unidentified actor.

Right now, there are many unknowns about this Claim. For instance, if a third-party funder is from Canada or a non-NAFTA Party, Canada might wish to explore the possibility of a denial of benefits in this case. Disclosure of a funder's identity could help address this possibility.

Now, the Muhammet Cap Tribunal paid due regard to the principle of transparency, stating: "The Tribunal considers that transparency as to the existence of a third-party funder is important." That Tribunal ordered disclosure of third-party funding to the Respondent and the Tribunal for a multitude of reasons, including to address conflicts and the Respondent's potential application for security for cost.

Now, for its part, Tennant fails to offer a valid reason that the Tribunal should disregard transparency and exclude Canada from learning the funder's identity. If the Claimant considers the funder's identity to be confidential, it may follow the proper procedures in the Confidentiality Order to seek to redact that information. Accordingly, the Claimants' request would break from the jurisprudence for no good reason.

Moreover, to exclude Canada from learning of any third-party funding in this Arbitration would undermine the equality of the Parties, which the Tribunal is required to uphold under Article 51 of the 1976 UNCITRAL Rules.

In fact, Tennant's Proposal would contravene Article 15(3), which, as you can see, requires that "All documents or information supplied to the Arbitral Tribunal by one Party shall at the same time be communicated by that Party to the other Party."

Now, moving to potential conflicts of interest: Article 7(a) of the IBA guidelines states that a Party must inform the Tribunal and other Parties of any direct or indirect relationship between the arbitrator and a third-party funder. The involvement of a third-party funder can create a wide range of potential conflicts in international arbitration. Avoiding such conflicts is imperative to protect the legitimacy of investment

proceedings and the validity of arbitral awards. Thus, it is necessary to order Tennant to disclose the identity of the funder to address potential conflicts.

Moreover, Canada, the arbitrators, and Tennant each need to make their own assessment of potential conflicts in this case. As Nadia Darwazeh and Adrian Leleu explain, the independence and impartiality of an arbitral tribunal cannot be properly assessed unless the existence of a funder is disclosed to all: The members of an arbitral tribunal, the Parties, and the arbitral institution. It would undermine the integrity of the arbitration to deny Canada the opportunity to assess potential conflicts.

Investment Tribunals have acknowledged the legitimacy of these concerns. For instance, in both South American Silver and EuroGas, the Tribunals ordered disclosure of third-party funding, of the identity of the funder, to determine if the Arbitrators had a potential conflict.

Now, moving to the third reason to disclose third-party funding on security for costs, the presence of a third-party funder may indicate that a Claimant is impecunious and unable to pay an Adverse Costs Order; thus, the widely held view among tribunals and commentators is that third-party funding may be an important factor in the

determination of an application for security for costs.

For instance, in García Armas, the Tribunal stated that third-party funding is especially relevant when it comes to evaluating requests for interim measures to provide security for costs.

Furthermore, the proposed reforms to the ICSID Rules are instructive on this issue. They do not bind the Tribunal; yet they offer important context for its consideration, as the reforms indicate that ICSID members are incorporating what Tribunals have already ruled.

As you can see on the slide, Rule 14 provides--or requires the disclosure of the name of a third-party funder in the Arbitration, and this is provided to the Opposing Party. And Rule 52 states the Tribunal may consider third-party funding as evidence in determining whether to order security for costs.

In sum, it is necessary to order Tennant to disclose any third-party funder's identity in this arbitration to both Canada and the Tribunal to address--to uphold transparency, address potential conflicts, and as it relates to the motion for security for costs.

Now, for these same reasons, Canada maintains that it is necessary to order the disclosure of any third-party funding agreement. Canada requests disclosure of the full agreement to review it for any provisions that relate to

the issues addressed today. However, it is critical to disclose four key terms to the extent that they may exist in a funding arrangement: A funder's level of financial interest in the Award; whether a funder paid Tennant's arbitration fees; whether a funder has responsibility to pay an Adverse Costs Order; and a funder's termination rights.

Now, first, if a funder stands to gain a significant portion of a final award in favor of Tennant, it would strongly indicate that Tennant is impecunious and has no capability to pay an Adverse Costs Order. This would corroborate the need for security for costs.

Second, if a funder paid Tennant's fees for the Arbitration, this could further inform the assessment of the Claimants' impecuniosity.

Third, it is extremely important to order disclosure of any terms indicating that a funder will not pay an Adverse Costs Order against Tennant. In fact, it is widely held across the international arbitration community that security for costs may be justified to protect the integrity of the arbitration and prevent the "arbitral hit and run."

Now, in this regard, it is important to consider the ICCA Queen Mary Task Force on third-party funding. The Task Force included leading arbitration experts including

Arbitrator Bishop. And the Report states: "A funder who benefits financially if the client wins should not be able to walk away without any responsibility for adverse costs if the client loses."

To prevent this outcome, the Report explains: "One important provision in a third-party funding Agreement, which the Tribunals should review, will be the provision about whether the funder has agreed to cover adverse costs, including an order for security for costs. If the Party is impecunious, both the funder and Party should be aware that a funding agreement in which a funder is not obligated to irrevocably pay an award of costs may cause the Tribunal to order security for costs."

Furthermore, commentary to the proposed ICSID Rules states: "If the Tribunal determines that the terms of the third-party funding Agreement would be relevant to its decision (for example, whether the funder has undertaken to cover an Adverse Costs Order) it may order disclosure of the relevant information or terms."

Now, Tribunals are already moving in this direction. In García Armas, the Tribunal noted that in many previous cases, Tribunals inquired as to whether the financing agreement did or did not cover an adverse costs award. And the Tribunal ordered security for costs in large part because the terms of the funding agreement

allowed the funder to avoid any responsibility for an adverse costs award.

Moreover, in RSM v. Saint Lucia, the Tribunal ordered security for costs partly because the admitted third-party funding further supports the Tribunal's concern that Claimant will not comply with a cost award rendered against it since in the absence of a security or guarantees being offered, it is doubtful whether the third-party will assume responsibility for honoring such an award.

Furthermore, two International Commercial Arbitration Decisions offered guidance that, although not binding, may be helpful for this Tribunal. An ICC Tribunal ruled: "The Arbitral Tribunal takes into consideration the fact that the funding agreement rules out any payment of costs awarded to Respondents and concludes that in this case the Agreement changed the circumstances in such a fundamental manner that security for costs is justified."

Moreover, in X v. Y & Z, an Arbitral Tribunal ordered security for costs after observing that the Claimants' third-party funding arrangement did not provide for the funder to pay an eventual Adverse Costs Order.

These commentaries, reforms, and arbitral decisions all demonstrate that to protect the integrity of this arbitration, it is necessary to order Tennant to disclose any term in the funding agreement indicating that

the funder has no responsibility to pay an Adverse Costs Order. Confirmation of this point would further prove a very high risk that Tennant will not pay a costs order in Canada's favor and corroborate the need for security for costs.

Now, the fourth element--yes.

ARBITRATOR BETHLEHEM: Mr. Klaver, with the President's permission, just before you move on, I have a number of questions. I won't get to them all now, but there is just one here.

You identified four key terms that you indicated should be disclosed. I'd be interested to know whether you place a priority on those. You spend most of your time talking about responsibility to pay an Adverse Costs Order. If you could be satisfied on the issue of the Adverse Costs Order, are the other three points as important?

I mean, we're here focused simply on the risks of nonpayment of costs, aren't we?

MR. KLAVER: Right. Canada's position, I want to be clear, is that the full funding agreement needs to be disclosed. In terms of ranking of the priority, it is extremely important to disclose any term indicating whether the funder will pay an Adverse Costs Order. But that doesn't take away from the importance of other factors like whether the funder stands to gain a significant portion of

the Award. If the funder stands to gain a very large amount, that could indicate that the Claim was effectively assigned to someone else and that Tennant was just maintained as a shell for jurisdictional purposes. And that may feed into an analysis of a denial of benefits issue.

So, there are multiple issues that may arise from disclosure of the funding agreement. We need to see all of that.

ARBITRATOR BETHLEHEM: But the wider issues that you identify, don't they engage other considerations such as whether Tennant is just a fiction, a shell; whereas, the particular issue of whether the Claimant would be able to pay an Adverse Costs Order would be satisfied, wouldn't it be, if you could be satisfied simply on the question of responsibility to pay an Adverse Costs Order?

MR. KLAVER: So, Tribunals have--for instance, García Armas, ordered security for costs mainly on two factors, impecuniosity and a third-party funding agreement that absolved the funder of responsibility. The term indicating that the funder has no responsibility would address the second issue, but impecuniosity is also a concern. And the items related to whether a third party paid the arbitration fees could indicate Tennant has no funds. Whether the funder stands to gain a significant

portion of the Award, again, could indicate Tennant is impecunious. So, we need more than just that term for a full analysis of the security for costs motion.

ARBITRATOR BETHLEHEM: Thank you.

MR. KLAVER: Now, the fourth element of the funding agreement that it is necessary to order the claimant to disclose concerns a funder's termination rights.

The ICCA Queen Mary Task Force report states: "Another relevant provision in the context of a security for costs application will be the provision in a third party funding agreement about the funder's termination rights. If a third party sustains the Claim but can withdraw funding before the Final Award without any responsibility to pay an Adverse Costs Order, this further supports the need for security for costs."

Now, having outlined the four key terms to disclose, I also wish to emphasize a striking similarity between this Claim and the facts in Muhammet Cap. That Tribunal observed that the Claimants had changed their legal counsel. The new counsel was the same counsel for a different Claimant that had failed to pay an Adverse Costs Order to the Respondent in another investment arbitration. The Tribunal ordered disclosure of the full terms of the funding agreement partly because the same counsel was

involved in both claims. And the Tribunal concluded in these circumstances: "The Tribunal is sympathetic to Respondent's concern that, if it is successful in the arbitration and the Cost order is made in its favor, Claimants will be unable to meet these costs and the third-party funder will have disappeared as it is not a party to the arbitration."

Now, similarly, Tennant's counsel represented Mesa, which you will hear a lot about today and tomorrow. Mesa continues to evade a $3 million costs order rendered against it in March 2016 in another NAFTA Arbitration against Canada. Consequently, Canada has been forced to expend further resources trying to enforce the Costs order against Mesa. In these circumstances, Canada has a legitimate concern about history repeating itself, such that Canada is forced, once again, to bear the expenses of an unpaid costs order. Disclosure of the funding agreement would shed some light on this risk. Therefore, to uphold transparency, review for potential conflicts, and address Canada's motion for security for costs, it is necessary to order Tennant to disclose to Canada and the Tribunal the identity of any third party that is funding this Claim and the terms of the funding agreement. The only way to preserve the equality of the Parties and uphold the integrity of the Arbitration is with an order for

disclosure of third-party funding.

Thank you.

PRESIDENT BULL: Thank you, Mr. Klaver.

Do you have any questions?

Please go ahead.

ARBITRATOR BETHLEHEM: I have a number of other questions, and do feel free to defer these. I know that you have an opportunity to come back.

MR. KLAVER: Sure.

ARBITRATOR BETHLEHEM: I presume that Canada accepts that there may be terms in any third-party funding agreement which are commercially in confidence and you would not need to see; is that correct?

MR. KLAVER: No. Our position is we need to see the full funding Agreement, and if Tennant seeks to redact information on the basis of confidentiality, it can follow the proper procedure in the Confidentiality Order.

ARBITRATOR BETHLEHEM: Right. So, then this goes to the next question, and I anticipate--I don't know your immediate answer, but I would like you to sort of assume the premise.

If the Tribunal was not with you on the issue of disclosure of the whole agreement, would it suffice--or, if not, why would it not suffice--for the Tribunal to ask the Claimant to address the questions of whether, for example,

there was a restriction on the payment of an Adverse Costs Order? In other words, to get counsel on instructions to say "I can't affirm that there is a commitment to pay an Adverse Costs Order."

Would that be--would that not be sufficient?

MR. KLAVER: That would plainly not be sufficient. We need to see the terms of the funding agreement itself. We do not want to rely on a representation from counsel. And it is also in line with the jurisprudence to order disclosure of the full funding agreement when there is a security for costs application that the Tribunal needs to resolve. Muhammet Cap, García Armas both ordered full disclosure of the terms of the funding agreement in order to address security for costs.

ARBITRATOR BETHLEHEM: I appreciate your point, which is really repeating the submissions that you made, but if the Tribunal was not with you on the issue of the disclosure of the whole funding Agreement, because, for example, we may not be with you on the issue of the third party funder's interest in the Award, a third party funder's payment of arbitration fees or so on, but we were, for example, for sake of this question, with you on the concerns relating to an adverse costs payment, why would it not be sufficient to have the Claimant on the record aver that there is a commitment to pay an adverse costs

Claimant, perhaps along with any statement about what termination rights were engaged?

MR. KLAVER: I think for the integrity of the Arbitration, Canada needs to be able to review the term itself.

ARBITRATOR BETHLEHEM: And I presume, therefore, that your position would be that it is not sufficient for Claimants to disclose any such terms to the Tribunal alone to allow the Tribunal to make an assessment, for example, as to whether there is a commitment to pay an Adverse Costs Order?

MR. KLAVER: That would be unacceptable. That would contravene Article 15(3) of the 1976 UNCITRAL Rules which requires disclosure that the Party makes to the Tribunal to the Opposing Party, and it would also be unacceptable because Canada needs to know the information that the Tribunal is basing its Decision on security for costs over.

ARBITRATOR BETHLEHEM: Perhaps the last question, or maybe penultimate question: If the terms, the relevant terms of the Agreement were disclosed, does the identity of the third-party funder have an importance of its own, apart from any issue of conflicts of interest?

MR. KLAVER: Yes. The identity of the funder is important for Canada to assess the capital adequacy of the

funder itself. And the ICCA Queen Mary Task Force indicates that this is a relevant factor for security for costs.

ARBITRATOR BETHLEHEM: Okay. Then the last question--truly the last question--we will get later on to the issue of security for costs: Is there a sequencing point here in the way which the Tribunal ought to deal with this? I mean, for example, if the Tribunal was with you on the disclosure of the details of the third-party funder, those details were disclosed, and you were satisfied and the Tribunal was satisfied that there was no adverse costs issue or any other issue associated with the third-party funder, would that have implications for your security--security for costs application?

You can defer this to later on if you would like, but there is obviously a linkage.

MR. KLAVER: I'm happy to address this now. This is one factor that is relevant for security for costs. If the funding agreement indicates that the funder has responsibility for an Adverse Costs Order, that does not resolve Canada's concerns that the Claimant will not pay an Adverse Costs Order and that the funder has no duty to this Tribunal to pay an Adverse Costs Order. The Tribunal cannot force the funder to pay it. Canada cannot force a private agreement between Tennant and its third-party

funder to pay. We cannot force the Respondent to comply--or, I'm sorry, the third-party funder to comply with that private agreement between Tennant and the third party.

So, this is a relevant factor for the Application for Security for Costs, but it would not be determinative in leading to the conclusion that security for costs was not necessary. Right now, Canada considers that the information in front of the Tribunal indicates that Tennant is impecunious and has no capability to pay an Adverse Costs Order. So, we will continue to have that concern irrespective of the terms of the Agreement.

ARBITRATOR BETHLEHEM: Thank you very much.

PRESIDENT BULL: Good. Thank you very much, Mr. Klaver.

Now for the Claimants, please.

Mr. Mullins.

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. MULLINS: Thank you, Members of the Tribunal.

In terms of the issues, what we've heard from Canada is that they want not only answers to the questions raised by the Tribunal, which we also feel are confidential, but everything possible. And the one thing I would point out first is that third-party funding is not this idea of, you know, "hit and run."

We are going to talk a lot about the Queen Mary Project as well, and as they point out, the--even Respondents sometimes are now using third-party funding. And the fact that someone is using third-party funding is not a--necessarily a basis that made-up claims or claims that should never be brought. But what I found really interesting of the comments is, "Well, we need to know everything about the Claimant, whether or not they could pay a cost order. We need to know what the funder is. We need to know the finances of the funder."

Remember, you're in an international arbitration and Parties are to be treated equally, and it's convenient that Canada, a country, can make these arguments, but think if it's just another Respondent. Do I have the opportunity, obligation, or right to ask for the finances of a Respondent? Do I get to go, before I get my claim, my award, ask who--can you pay the Award? Who owns it? Who is behind it? What kind of property you have? I mean, what's been mortgaged? Of course not.

I mean, this idea that you can do this intensive investigation of everybody that may or may not be involved before this Award is contrary to the very concept that we are not going to look at the merits of the Claims until it is fully decided, and Canada seems to think that, you know, we are definitely going to win the Cost Award and,

therefore, I need to know all your finances, and certainly that's not the law, that's not what's been recognized in international tribunals and we ask you to reject it.

Certainly, the UNCITRAL model Working Group and, of course, the Queen Mary--of course, we will talk more in detail in a moment--have recognized that these arrangements are confidential, and by revealing these terms is the kind of leverage that we don't have. We are not going to be able to find out all the finances of Canada, and this is the kind of leverage that they would like to have.

Let's talk about the conflict issue. We do think that the only legitimate issue is the conflict that it turns out that the identity funder is one that, perhaps, a law--members of the Tribunal may have been involved in the past, et cetera, could be revealed. I was interested to know what Canada's interest in the identity, and apparently the only interest was not that they actually used funders themselves, but that, in fact, what they are really saying is that they really want to know the financial condition of the funder itself so they know what they can go after, something we are not entitled to on our end.

I recognize, however--we recognize that, on the issue of transparency, that the identity of--given to the name of the funder to the Tribunal would be shared with--to the Party of the other side, but we do think that that

should be it. Just as we--and Canada mentioned the South American case, and in that Decision, what was identified was the name of the funder for purposes of conflicts, but then the Respondent, just as the Respondent here, had asked for more, they wanted disclosure of the terms of the financing agreement with the third-party funder and the Tribunal rejected it. And the reason is because you are putting the cart before the horse.

At the end of the day, the South American Tribunal--and I believe the Queen Mary Project goes--there is a lot of things in there, but at least, I think, the sense that I get from the Queen Mary Project is that the test of whether or not security of costs is going to be applied should be considered independently of what you would find out from the third-party funder, and it can't be the other way around.

And so, we believe, and it will be argued intense tomorrow, that the Tribunal, in fact, lacks the authority to award security costs under--in a NAFTA arbitration.

But in any event, the test needs to be met, and it can't be what's fine in the terms of the funder and use that against it. Because just like in the Decision in South American, what should happen is does the test meet for security costs and then you look at the third-party funding issue. We think that's the way it should happen,

and we do believe that the third-party funding will fail--I'm sorry, that the security for costs will fail and, therefore, that there is no need begins with our terms of our arrangement with any third-party funder. Again, you can't put the cart before the horse.

When we talk about, you know, beyond the identity of the funder, which obviously we held confidential, disclosing the interests of--the financial interests of the funder and the extent of what the financial terms are clearly are proprietary. And, if anything, the existence of a funder, you know, suggests that someone believed in the case independently of just the Claimants. So I don't understand this "hit and run" idea.

But if you really think about it, what you are really asking for is the heart of attorney-client privilege. I mean, I'm not entitled to know--look, for example, if the State here, Canada represents itself. As the Tribunal is well aware, often States are represented by Outside Counsel. I'm not entitled to know what the rates are. I'm not entitled to know if there's--you know, what their--is there a flat fee and how much--what's being cost there.

And just if--on our side, you're not entitled to know the terms we have with our client. You know, do we have a flat fee, do we have an assessed fee, do we have a

contingency. You're not entitled. This is attorney-client information. This is what the Queen Mary Project recognized, that these are confidential terms. You are not allowed to go in behind it in the guise of just trying to find out all the information possible. Again--you know, whether or not the funder would pay adverse costs against an investor. Again, this presupposes Canada is going to win a cost issue, which it should not, and we will talk about that tomorrow.

But essentially, all that's going on is that Canada is simply trying to find out the assets of our client prejudgment or pre-award. That's not appropriate. And, in fact, it would essentially be the Tribunal presupposing the--who is a winner, which you are not allowed to do, of course. At this point, you haven't heard the case, and so essentially to allow Canada to do a full disclosure and have to know all the economic terms is essentially is presupposing the case, which is not fair, but also inappropriate.

And what's really going on here is that they talk about the access to justice, but what really is going on here is that States such as Canada are trying to eliminate legitimate claims and trying to scare people to not be involved in third-party funding arrangements because the ramifications of having to reveal all of that would be

devastating. And also in a situation where a Claimant is basically eliminated, either through expropriation or whatever, all their assets, and they try to get funding, this will be the end of trying to find out what the funding is and try to eliminate claims, and it simply is just inappropriate.

Talk a little bit about the Queen Mary Report that both sides have looked at. And, remember, this is a report basically on third-party funding. If you look at, for example, Chapter 5, Finding B2, the Queen Mary found that: "The specific provisions of a funding agreement may be subject to confidentiality obligations between the Parties and may include the information that is subject to a legal privilege. As a consequence, production of such provisions should only be ordered in exceptional circumstances."

And I submit that that hasn't happened here. The Queen Mary is recognizing that the provisions of these agreements are confidential and be subject to attorney-client privilege and simply is not necessary. And the identity, as I say, is not a privilege issue for conflicts purposes, but going beyond that, it is completely inappropriate.

The Queen Mary Report, also in Chapter 6, said that: "The Application for Security of costs should, in the first instance, be determined on the basis of

applicable tests without regard to the existence of any funding arrangement."

That is the exact procedure done in the South American case where they looked at the issue of whether or not security costs should be awarded before determining whether or not there's going to be a disclosure of the funding arrangement because the issue should be separated and to meld those together would be inappropriate. And so we suggest, both as the Queen Mary suggested--Project, and both South American, that the process should be--those should be independent, and, in fact, as we believe the security costs would be inappropriate, that should be the end of the analysis.

And I--contrary to what we heard today, but some Tribunals--in fact, the Queen Mary said in most of these Tribunals and other circumstances--this is on Page 221 of the Report--says: "The conclusions there are based on analysis of existing sources and reported investment arbitration cases is that the existence of third-party funding is generally irrelevant to either a determination of request for security costs or final allocation of costs at the end of the case."

So, contrary to--it is not--it should be a separate issue independent of the issue of the security costs. And so, when you do that, then you ask why you need

to have all this information if you look at the four factors beyond the identity that they are asking for. Again, you see that it would go beyond the identity. They are essentially looking for issues that all go to, essentially, the--on the security cost issue, and that should be separated out, in fact.

Now, going to Arbitrator Bethlehem's questions, you know, could you answer certain questions. You know, I heard from counsel--and I would say--this is just what the questions are. But, for example, has a claim been assigned? You know, can you answer that? And I heard the counsel, "Well, we can't trust the counsel's representations." That is just disappointing. Obviously, we are able to answer questions under--as officers of the Court, for lack of a better term, and we can answer questions, if necessary.

But I will say now, make no mistake, the Claimant here is Tennant. It is not some other entity. Tennant is the Claimant and, in fact, certainly they are entitled to do what they need to do to address the issues of standing, et cetera, but at the end of the day, those questions can be answered without revealing confidential terms.

ARBITRATOR BETHLEHEM: Mr. Mullins, may I just--

MR. MULLINS: If I read your question.

ARBITRATOR BETHLEHEM: We will pick up on this.

Just to be very specific on what you've just said, are you saying here to us that you, Counsel for Tennant, would be able to and in a position to respond to questions from the Tribunal on specific issues such as whether there was a responsibility of a third-party funder to pay an Adverse Costs Order; and, second, were you able to answer those questions, for example, by indicating that there was a commitment to pay an Adverse Costs Order, I'd be interested to know whether you think that that would be sufficient. I'd be interested to know whether you think that would be sufficient to satisfy the Respondent's concerns.

MR. MULLINS: I appreciate that. Certainly we can answer questions. But that's--our view is that does then cross the line into issues, as I just argued, that the Tribunal should not do.

As the Queen Mary Project recognizes, as the South American Project recognizes, whether or not there's going to be award of security costs is independent of the terms of the Funding Agreement, and so we think those issues are confidential, and so we don't believe that it would be appropriate for the Tribunal to ask those questions and to require us to answer it.

I mean, the devil in the details. You can simply ask enough questions where you would basically get the

whole funding agreement anyway, which is not appropriate either.

What I was really headed to is representations to be made as to the identity of the stakeholder, and the stakeholder is Tennant, and that we could affirm that the Claim has not been assigned. And those are to--would, I think, solve one issue that Canada pointed out, which is that we want to make sure that there is jurisdiction here in terms of who is the Claimant.

But, again, we would, with all due respect to the Tribunal and your question, believe that, again, based on what the Queen Mary points are and the South American decisions, and what a lot of these Tribunals have said is that the security costs issue has to be separate from the funding agreement.

And, again, I really emphasize, just turning around--I mean, again, we look at this as an international arbitration, and we are here in Investor-State arbitration, but, again, we are generating principles, and people look at these Decisions. I am not entitled to know against a Respondent--obviously, it's convenient it's Canada, but let's say it is some other Respondent, I'm not entitled to know, well, is your Shareholder going to pay for this? What kind of assets do you have? We are just not allowed to know that. That is not consistent with how these things

work. You don't win before you won.

And at the end of the day, we are concerned about access to justice, but it goes both ways because, just like a Respondent will say, "Look, you're not entitled to know that stuff, you haven't won yet," why are they allowed to turn it around against the Claimant and say, "You know, by the way, we win, we may get a Security Costs Award and, therefore, we are entitled to it."

I don't believe that that goes fair. It's not the way it should be done, and that's why we think--and we'll talk about this tomorrow--but even if the Tribunal has authority for security costs, that's why it is exceptional circumstances, in the first instance, because these things were not equal. It is not fair. We don't do it to Respondents. We're not entitled to security costs for them. How come we don't get a bond from them? How come we're not allowed--because it is Canada, right. But how come we are not allowed--no one is saying that we are allowed to have them post, you know, to protect our ultimate award.

So, in any event, that is how we believe that the issues should be separated, and that you should not meld the issues.

And just to close out of some of the things that were raised, this is not Mesa. My current firm was not

counsel of record of Mesa, and there are a number of lawyers that are different, but I will just point out, it is simply not fair to look at one client and then say, "Well, the other client is going to do another thing." That's not how this works.

And I will point out that, in fact, Canada has not even tried to collect the Award in Mesa for three years, and all of a sudden counsel for Canada contacted us recently, right before this Hearing, and said, "Oh, by the way, when are you going to pay this Award?" I thought the timing was very convenient.

And I will say, but it's--I think it's inappropriate to say, well, one behavior by one entity is going to fly over to another entity which is completely different companies, and I think it's an inappropriate argument.

I'm sorry, I'm just looking at my notes to make sure I've covered some of the points of Canada in my presentation.

I guess, unless the Tribunal has any closing, I don't believe that there is any basis whatsoever for Canada to know anything other than the identity, and, again, even the identity, I think, is not necessary for them because I don't think they are using third-party funding. I think if all they are doing is trying to figure out the assets of

funder, I think it is kind of inappropriate for the reasons I said before. But I recognize, in the interest of transparency, that if information is given to the Tribunal, that they will want to share it also with the Claimant.

I do feel that it was very telling, in closing, to Arbitrator Bethlehem's questions, what if the Tribunal got the information to this and Canada says, "No, we can't have that because we need to know everything you're getting"--and, again, it goes to the--back to we don't believe this kind of invasive information should be given at all and certainly, apparently, they don't agree that it only be given to the Tribunal.

And so, in sum, we feel that the only thing that should be revealed here in confidence would be the identity of a funder, and that's it. And for the reasons we've cited.

We will turn it over to one comment by my colleague.

ARBITRATOR BISHOP: Before you do, when you say "in confidence," you mean to the Tribunal and to Canada in confidence; is that correct?

MR. MULLINS: Correct. In other words, not to the public. That was really where I was headed, yeah.

MR. APPLETON: Thank you, Mr. Mullins.

I simply want to raise one issue that was raised

for the very first time in Mr. Klaver's discussion today, and it's about Denial of Benefits, Article 1113 of the NAFTA. And the Tribunal might not be familiar with the terms of Denial of Benefit and how that works, but it's a process by which the Government of Canada could seek to have the benefits of the NAFTA removed from the Claimant in this case, from Tennant Energy, only in the circumstances that it did not own or control the investment.

Now, the situation that I've heard today is outrageous. The suggestion that, for example, if I had a mortgage or I owed my brother $50 in a promissory note that somehow that would mean I no longer owned my house or owned the company is completely and utterly abusive. It is prone to abuse. It is a process of delay, distract, and deny, and this Tribunal has been very careful to set up very clear time frames to make sure this case can proceed.

But the Government of Canada continues to throw out different things to delay, distract, and deny from what's here. The suggestion that any type of financing arrangement here could mean in some way that Tennant Energy does not own this Claim, that Tennant Energy doesn't own that company, it didn't make the investment that was involved here, is totally and utterly without any basis in fact and completely and utterly outrageous, and I want to flag this to the Tribunal because you may be now called in,

based on what we've heard today, for yet another emergency process if Canada wishes to do this.

We cannot prevent this process from taking place. We can merely come to you on an emergency basis to have you review the legitimacy.

First, I'm shocked when I heard this today, and I merely had to take a moment to identify that this is, in itself, capricious and abusive. It cannot have any basis here, and this Tribunal needs to know that we may be called back to deal with this, and that this is very, very unusual, inappropriate, and grossly unequal. And, yet again, we see the situation where Canada is trying to abuse its position. Canada is a party to a $1 trillion trade agreement. It has massive resources. We filed some information about this in our response in the 1128s. They get tremendous benefits from the NAFTA and, yet, now they want to say that somehow this is unfair and that there needs to be some issues here. And, yet--so that is one issue for security. We will talk about that tomorrow.

But now to somehow say that they should be denying the benefits and they need to look at a financing agreement to see whether or not the Claimant actually owns its case, this is really beyond the pale. I simply needed to flag this because this is it completely new. We had never heard this before and I really think it's objectionable. We are

going to let Mr. Klaver to be able to respond to that because Canada has something to answer here.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BULL: Mr. Mullins, I have a couple of questions, if you could help me.

MR. MULLINS: Sure.

PRESIDENT BULL: You said a number of times that it's unfair because you can't--because Claimant cannot ask Canada for a bond or security. And I was just wondering: Can you help me? Isn't that just a reflection of the fact that it is Respondents in any arbitration that can ask for security for costs and Claimants can't unless there's a Counterclaim? Usually, the position--as I understand it and I could be wrong--

MR. MULLINS: Right.

PRESIDENT BULL: The position, as I understand it, is the Claimant makes its own decision about whether or not this is a claim worth bringing, and if it decides to take the risk that the Respondent is worth pursuing in arbitration, then it takes that risk.

But the Respondent doesn't have that choice. The Respondent is brought into it by the Claimant. And in the situation where there's no Counterclaim, the law on security for costs, as I understand it, simply says that Respondents can make that application. They might not

succeed, but they can make the Application and Claimants can't.

So, I wonder if you could help me out with that.

MR. MULLINS: Sure. And I try--sometimes I get a little academic in my arguments.

I think where I was headed is our fundamental point is that the issue of disclosure of these arrangements should be independent of the security costs issue, and that, I think, based on the test--and we'll be talking about this in detail, and I don't want to presuppose our arguments, but that's the ramifications and the ability of it and the unfairness of allowing one party to get into the finances and the economic relationship in another, I believe, is why this test is so strong for security costs in exceptional circumstances because of the nature of that.

What I was really trying to argue--and I guess it wasn't artful enough and I'll try to do better--is if you take those as a given--I believe that's the law and I think that's what the Queen Mary Project is--whether or not you're going to award security or costs or not should be independent of the disclosure of the Funding Agreement which I think is what the South American case says, what the Queen Mary suggests, they should be independent decisions, then what we're really then hearing and we recognize that you'll get the identity for conflicts

purposes, which we recognize is a legitimate point, then what we're really doing, then, is having--if you take those parts out, right, then what you're really doing is having an investigation by one party who has a claim, here for costs, on the finances of the other. That's where I'm headed.

And that's--that doesn't necessarily happen. In other words, put the idea of the security costs out for an issue. I'm not entitled to know the financial relations of a respondent just because I brought a claim. And that's what I think is what's inappropriate, and that's why I think it's inappropriate to go beyond the identity of the funder and that you should also keep the issue of security costs separate from the identity of the funding arrangement because I'm not entitled--the Parties are not simply entitled to look at the finances of the other simply because you have a claim against them. Because that's really all they're really saying. Because if you take the security--should--the security costs should be separated out, so now it's just a matter of "I want to know the financial information of the Claimant," if that makes sense.

PRESIDENT BULL: Thank you, Mr. Mullins.

MR. MULLINS: I don't know if it did. That's where I was really headed.

PRESIDENT BULL: I will think about that answer. Thank you.

A follow-on question--and you mentioned this, again, about--I think the phrase earlier used was "cart before the horse." There are a number of Investment Treaty cases where Tribunals have decided that it was relevant to them in those circumstances to know whether there was funding and what the terms of funding were.

So, if that is correct, if it is relevant to a security for costs applications, then shouldn't we know the terms before deciding the security for costs?

I know that there are other issues involved here, but the horse before the cart, or the other way around, if this was one of the relevant considerations for security for costs, shouldn't we decide whether or not we need to see this relevant information before making the Decision on security for costs?

MR. MULLINS: I will say our position is--in this situation is no because we don't think you have authority to do it anyway. And I recognize you may disagree with us.

PRESIDENT BULL: Yeah, I understand that's your position. But that's an issue of jurisdiction.

MR. MULLINS: Correct.

PRESIDENT BULL: But jurisdiction aside, if any Tribunal was coming to decide security for costs, wouldn't

they want to have before them the material that could be relevant so that they could make the best decision possible?

MR. MULLINS: Again, there is contrary authority, and I recognize there is other Tribunals, but I think, for example, in the Smith Case--our position is that--I note the Queen Mary Project says a lot of things, that a lot of it is--especially on the Investor-State, the basis of, "Look, there is a lot of stuff going on here, and we're not making up any rules," is the way I read it.

But I believe, based on what they said, if you look at their Decision--well, the rule that came out is that those decisions should be independent, because I do think it's a slippery slope if you--and I don't agree with the Tribunals where they used it because, I think, it's, again, a slippery slope is to--well, you know, at the end of the day, is that should be an exceptional circumstance.

And I also believe that, as the Queen Mary Project says, the existence of third-party funding cannot necessarily mean that these are "weak claims" or, you know, people don't have assets because people are using them in different situations and even respondents are using them.

So, I appreciate the issue of relevance, but, again, I go back to the point that just because something may be interesting does not mean it's an appropriate way to

handle it. And I do feel the way that should be separated out is that the security costs issue should be separate from any arrangements of the funding because of the danger of revealing confidential, privileged information.

Again, I do separate that issue from can you directly ask--have this Claimant assigned, which I think the counsel can answer those kinds of questions. But I do feel fundamentally it is important for Tribunals to separate those issues because I think that the standard is so high for the security costs it should be separate, and once you start opening the door to all these terms, it really puts the Claimant at a disadvantage, again, which we're not allowed to have against them.

And I recognize you see it as a difference, but I do think it's not different in a lot of ways because we are not allowed to go into how the Respondents are financing, again, in a regular case. And that's why the standard is so high for security of costs, I believe--is one of the reasons. It's exceptional circumstances because it's an odd thing.

PRESIDENT BULL: Just one other question for the moment. You had a comment earlier about how an order for disclosure of the terms of the third-party funding would scare people away from third-party funding and would be devastating to have to disclose third-party funding.

You seem to suggest--here I'm seeking your clarification--that it would be devastating to the third-party funders? Is that what you meant?

MR. MULLINS: Well, I did, but, ultimately, we're talking about the Claimants. I mean, I do believe that a--that third-party funding is an ability for Claimants to bring very strong legitimate claims.

PRESIDENT BULL: But why would the disclosure of an agreement--

MR. MULLINS: Because it's confidential and privileged, as the Queen Mary Project said.

PRESIDENT BULL: I see.

MR. MULLINS: At the end of the day, these are confidential agreements. Again, we don't expect or allow the Parties to identify and reveal the attorney-client privilege or the arrangements of their counsel.

For example, if a counsel has something like a tenancy, you're not allowed to know that.

PRESIDENT BULL: Why would attorney-client privilege come in vis-à-vis the agreement with the funder?

MR. MULLINS: It is confidential.

PRESIDENT BULL: I understand your point about confidentiality. But you also say its attorney-client privilege. Maybe you mean--it may be that you mean that it's analogous to, but I need your clarification on that.

MR. MULLINS: Well, I'm using "attorney-client privilege" broadly. I'm including the work product doctrine. In other words, these communications that you have are privileged; it is just work product doctrine.

PRESIDENT BULL: The Agreement is work product?

MR. MULLINS: Yes. Yes. Well, no.

PRESIDENT BULL: After it's signed?

MR. MULLINS: The relations are confidential. But what ends up happening is that you are opening the door to communications as well between the funder and the Parties. In other words, you can't simply open the door to this. Once you open it up and say, well, I need to know--let's say--I'm just making something up here. This is saying, hey, hypothetically. "You must give quarterly reports." Well, I want the reports. You disclosed it. I mean, where is the limit?

Again, I don't see it as any--I get that there is not attorney-client relationship with the funder, but they are critically part of the relationship, and it's work product and then the terms are confidential. And it's, to me, for the same policy reasons, and we could argue whether or not it's the same policy reasons for confidentiality and the privilege and work product, it's not fair or appropriate to say "By the way, funders, if you fund these"--because your decision could be followed, right, and

if you said "You've got to turn these over in Investor-State," because, you know, States are so much unprotected than other people and they need to have everything about the funders because they are so special, funders will say, "Well, I'm not going to do this anymore."

And the ramifications of that is nobody is going to--the funders are not going to fund legitimate claims and the ramification of that is that somebody, for example, could expropriate somebody's entire land, and the only way they can sue against a State that acted horribly was to fund it through a third-party funder and the funder said, "You know, I really can't do it because the Decision in the Tennant Case was once you get funded, they get to you know everything about it."

The ramifications, the policy reasons of what could happen here today and what we should be protecting is the ability of Parties to be able to talk freely and independently with "their funder" and with their Parties, and just like I'm not entitled to know, care what Canada's talking--I don't get to talk to--what they are saying to their clients. I don't get to know that, but it's the same policy reasons, and you have to look at that because there's ramifications beyond today as to what could happen to future claims.

PRESIDENT BULL: I understand what you are saying,

Mr. Mullins. Thank you.

Do you have any questions?

ARBITRATOR BETHLEHEM: I just have one question, and it may very well be that this is something to be deferred to the security for costs segment.

We've heard--it is in Canada's Written Submission and we heard a little bit of this in passing from Mr. Klaver and, Mr. Appleton, this may be a question that is directed at you--the suggestion that the identity of counsel or the co-identity of counsel in this case and in the Mesa Case is somehow relevant. And I'd like to know your views and, ultimately, Canada's views on why the coincidence of counsel in the case now before us and in, for example, Mesa or any other case, why that may be relevant or whether it is irrelevant.

MR. APPLETON: Sir Daniel, I think we will talk about this now because I think it will be helpful across the board.

Canada has made a lot of hay out of the fact that there are some counsel in this case who are counsel for Mesa Power. They had not made hay out of the fact that there is an arbitrator on this panel who was an arbitrator in Windstream and, therefore, another one. There are two cases that are relevant here, Mesa Power and Windstream, and there is information, as we are going to talk about in

the second item today, that are relevant with respect to both cases that are relevant in this case.

The Tennant Case is different. But one of the important things, first of all, is in my law practice, I'm the only lawyer who was on the Mesa Case. Every single other lawyer in my practice was not on Mesa. Every single other lawyer in my practice has no information or knowledge in any way, shape, or form with respect to that case, the operation of that case. A large amount of the information in this case was restricted or confidential, subject to orders--not only of a Tribunal, but four different orders relevant from different courts of the United States with respect to the production of information.

That information is known to Mesa. That information is not known to Tennant.

In this case, much of the information, as we are going to see, arose from Mesa Power or from Windstream and was not known to the public. The Government of Ontario and the Government of Canada knew information, they knew it in advance, they never disclosed it. They fundamentally knew of wrongfulness and wrongdoing but never did the public know. Never did proponents like Tennant Energy, following a process to go along, they didn't know that local champions, local companies, were getting special treatment, special benefits not given to others. That only came out

in the Hearing. That only came out in the release of information in the Post-Hearing Briefs in 2015 and '16.

So, there's a very significant difference between these cases.

To somehow say the information that I--because I was counsel to Mesa Power, cannot say to Tennant Energy, "I have an ethical obligation. I am bound by court orders. I am bound by information from that, I can't give them that information. I can't share that information, that is restricted and locked inside, just like when I worked for--I worked for the Government of Ontario for three years as a civil servant and I was bound by their Official Secrets Act. There is information from that time I may not disclose. There are members here that may give advice to the Cabinet. They may not disclose. It doesn't mean they don't know it; it means they can't disclose it.

So, we are bound in that way.

So, the fact that there may be some common elements here, that's correct, means that we have professional obligations, responsibilities, to protect and contain that information, not the other way around.

That is why when we talk about the second issue we are going to seek production of certain materials so everybody can have the same information that is permitted at the same time for exactly that reason. And that's the

same thing here.

So--and by the way, I just simply have to mention that I found it very disappointing that the Government of Canada today would raise an issue that they are now trying to collect from Mesa Power now that T. Boone Pickens, the proponent of Mesa Power, has died, that they left everything until the time that Mr. Pickens--who was a very fine, upstanding person, well-known in the area of energy, was dead, to then try to be able to start enforcing. And I just thought that, as a former counsel there and someone who worked very closely with Mr. Pickens, who was an exceptionally upstanding and fine man and extremely generous, I thought that was really beyond the pale, and I thought that was very unfortunate.

ARBITRATOR BISHOP: Did Mr. Pickens own Mesa Power?

MR. APPLETON: Yeah. Mr. Pickens, through a variety of well-positioned companies, was the ultimate beneficiary of Mesa Power, yes.

ARBITRATOR BISHOP: Thank you.

ARBITRATOR BETHLEHEM: Mr. Appleton, thank you for your response, and that additional detail is helpful. But I'd like to just sort of tease it out a little bit further.

I mean, may it be relevant, for example, if--and this is the hypothetical in the same spirit that

Mr. Mullins was suggesting a hypothetical--if it was apparent that a third-party funding, in fact, was arranged by Tennant's counsel, by you, who is also counsel to Mesa, and that in the course of arranging that third-party funding with the same third-party funder you said, "Well, let's have the same third-party funding arrangement as we had in Mesa."

So, I'm trying to establish whether there is something of substance that may be relevant flowing from the fact that you were counsel in both and there is evidently an issue relating to Adverse Costs Order in the case of Mesa.

MR. APPLETON: Sir Daniel, it's a little tricky because I'm no longer counsel for Mesa Power. And Mr. Pickens is deceased, who would be the person I would normally get my instructions from. But to make--to end this inquiry and make this easier, I'm going to go out on a limb and I'm going to tell you that there was no third-party funder at all in Mesa Power.

So, to the extent that that is relevant to your consideration, there was no third party. Mesa Power brought its claim and that was not an issue, isn't relevant, wasn't there. So, to the extent that that satisfies that inquiry, and I'm hoping I haven't gone too far, but I thought that in the interest of trying to just

try to answer these things off.

ARBITRATOR BETHLEHEM: Thank you.

ARBITRATOR BISHOP: Well, I was left a little unclear by Mr. Mullins' answer about your position on whether the Agreement with the funder, whether that is privileged or not.

MR. MULLINS: I do believe that the funding agreement should be considered privileged and part of work product, correct.

ARBITRATOR BISHOP: So, the privilege that applies is work product?

MR. MULLINS: I do believe that the relationship with a funder and with the client is either considered part of work product or attorney-client privileged, because of the need to be fully vested and to be able to talk confidentially to the funder. I think that's the better view, yes.

ARBITRATOR BISHOP: Is there any authority for that?

MR. MULLINS: If you give us an opportunity, we could brief the issue, if you like.

ARBITRATOR BISHOP: Thank you.

ARBITRATOR BETHLEHEM: I'm going to return to this as well. I don't know whether briefing the issue--this is a matter for the President or for the Tribunal to decide,

but you'll have opportunities to come back in response, you may like to think about it further.

I'd also like to know whether there is any authority for this because it seems as if this is extending the notion of privilege quite dramatically. I mean, if it's going to be a funder, why isn't there going to be all sorts of other people? Privilege is usually narrowly confined. So, I'd also like to hear more about that, please.

MR. MULLINS: Sure.

PRESIDENT BULL: Right. Then both Parties are entitled to a response, and there have been a number of questions from Tribunal as well, and you may want to deal with them together.

Mr. Klaver.

ARGUMENT BY COUNSEL FOR THE RESPONDENT

MR. KLAVER: Thank you.

I will aim to avoid repeating Canada's arguments. So, in regard to the Claimants' argument that third-party funding is not relevant to security for costs, I will point the Tribunal to Canada's main submission. We clearly disagree with this, and I'm happy to answer any further questions on that point.

Regarding the South American Silver Case that the Claimant repeatedly referred to, that case is

distinguishable. The Tribunal found that the Claimants had provided financial documents. The Claimant's parent company was operational, and so Bolivia was simply speculating that the Claimant may in the future face financial difficulties.

We have a much different circumstance with Tennant. It is not operational. It provided no financial documents. There is no indication that it has the capability or willingness to pay an Adverse Costs Order. So, in these circumstances, Canada maintains that the security for costs is necessary and so is the disclosure of third-party funding.

Now, in regard to the Claimant's suggestion that an exceptional circumstances standard is required to order disclosure of third-party funding, this is also not correct. The South American Silver Tribunal applied that standard solely to the Application for Security for costs. On disclosure of third-party funding, it is simply a relevance test that the Tribunal applied.

With regard to the issue of privilege, the Queen Mary Task Force Report states that even this information can be disclosed in exceptional circumstances.

Now, on privilege, I think it is very important to emphasize this is not an issue that is presently facing the Tribunal. The correct approach is for the Tribunal to

order disclosure of the funding agreement. Tennant can then apply to redact the information for privilege. Canada will then have an opportunity to respond and challenge those designations as we see fit, and then the Tribunal can resolve the issue of privilege.

That said, just in response to Arbitrator Bishop's questions, we are not aware of a situation where a Tribunal permitted redactions of the funding agreement on the basis of privilege. In terms of the funding identity, the Queen Mary Task Force Report states that the funder's identity is not privileged.

Now, moving to the issue of denial of benefits, I will just address this briefly. The fact is that there are uncertainties that we need disclosure of the funding agreement to resolve. Denial of benefits relates to whether or not a Canadian funder or a funder from a non-Party owns or controls Tennant, and Tennant has no substantial business activities.

If the funding agreement reveals that the funder has a substantial portion of the Award, that could indicate the Claim was assigned, and Tennant is simply a shell maintained for jurisdictional purposes and that the funder does control Tennant. So, we would need this information, the disclosure of the funder's identity, to resolve that issue.

ARBITRATOR BISHOP: Doesn't the denial of benefits issue, though, go to whether Tennant was an operating company at the time of the investment as opposed to today?

MR. KLAVER: It relates to whether it is operational now as well.

ARBITRATOR BISHOP: Okay.

MR. KLAVER: Now, Canada also needs disclosure of the funder's identity because it is possible, we don't know, but the same entity that was funding Mesa Power's claim that was related to Mesa Power may be funding Tennant's claim.

Now, Counsel Appleton discussed T. Boone Pickens, and, of course, we are very sad for his loss. He was the founder or sole member of Mesa Power, and his estate--he or his estate may be funding this Claim. Cole Robertson, the VP of finance for Mesa Power Group, may also be involved. So, this could actually create issues of res judicata.

Now, we simply need--because if it's the same Party bringing the same claim, we need to know this information.

The fact is that there are uncertainties, and disclosure of the funder's identity can help resolve that.

ARBITRATOR BETHLEHEM: Mr. Klaver, just to go back to your 1113 point, it seems to me that, in fact, you are setting up a general proposition that the identity and

detail of third-party funders must always be disclosed because there is always going to be uncertainty.

So, it is moving away from the rather stricter test that you seem to have established about whether it's necessary because now you simply seem to be saying, by reference to 1113, that there's always going to be some uncertainty as to whether the Investor of a non-Party owns or controls the enterprise and, therefore, as a matter of course, as a matter of general proposition, third-party funders need to be disclosed.

Am I understanding you correctly?

MR. KLAVER: I appreciate your point. We are focused on the circumstances of this case. Tennant appears to be impecunious and have no business operations in the United States whatsoever. So, in this case, it is important to disclose the funder's identity for a number of reasons, and one of them is the possibility of a potential denial of benefits issue.

I don't want to speak for other potential cases. We are in this case and these circumstances. It is important to disclose this information.

ARBITRATOR BETHLEHEM: Although you are setting out a very broad brush argument here.

MR. KLAVER: Well, I wouldn't go that far. Tennant is nonoperational. It has no website. It has no

business. It has no revenues. It seems to exist solely on paper. This is a pretty exceptional circumstance.

ARBITRATOR BETHLEHEM: Thank you.

ARBITRATOR BISHOP: I don't understand your res judicata argument. How would res judicata come into play here?

MR. KLAVER: So, res judicata arises if it's the same party bringing the same claim.

ARBITRATOR BISHOP: You mean Tennant and Mesa?

MR. KLAVER: That's right. And so, in regard to the same claim, we will discuss at length the overlaps and duplications between these Claims.

ARBITRATOR BISHOP: But you're suggesting--I mean, you seem to be suggesting that there could be res judicata because they have--because of funders involved. I'm not following your argument.

MR. KLAVER: Sure. Happy to explain.

Our concern here is that Tennant is merely an empty shell and that the real Party of interest is the third-party funder who may stand to gain the entirety or a very large portion of the Award.

Now, if that Party also funded and was involved in Mesa's claim, then you have the same Party bringing this case. The IBA Guidelines state that the third-party funder is effectively a Party, and so we would have a potential

issue of effectively the same Party bringing the same claim, and that would raise issues of res judicata. I wanted to clarify--

ARBITRATOR BISHOP: That's taking the statement that it's equivalent to a Party to virtually a new level. I think that's a remarkable argument. And if you had the same funder in two different cases--and let's say both the underlying Parties were bankrupt Parties and that's why they had to have a funder, you seem to be suggesting that because the funder might get a large part of the recovery, that that would make the two cases equivalent?

That there would be res judicata between them?

MR. KLAVER: I don't want to speak for other cases, but this is an exceptional case because the claims are virtually identical. And the fact is that Tennant appears to exist merely on paper, and so if it really is the funder for Mesa's claim that is seeking another kick at the can, that raises potential res judicata issues.

To be clear, we're not making this a submission at this point on res judicata. This is one further reason why it is necessary to resolve the issue facing the Tribunal today to disclose third-party funding. Of course, we've raised a multitude of other reasons why it is necessary to order disclosure of third-party funding.

PRESIDENT BULL: But is that relevant to the

security for costs Application?

MR. KLAVER: The issue of--

PRESIDENT BULL: The res judicata argument, assuming that it is valid.

MR. KLAVER: It is relevant. We have grave concerns about a repeat of Mesa cost--or, I'm sorry, of Mesa Power in this claim. We've got a duplicative claim brought by Mr. Appleton, the same counsel. I understand there are other counsel, but Mr. Appleton is the same counsel.

And in that claim in Mesa Power, the Tribunal ordered a $3 million cost order in Canada's favor partly because the Claimant had created a large number of procedural difficulties. Now, we are concerned about a repetition in this case because Mesa never paid the Adverse Costs Order.

And I'm about to explain the steps Canada has taken to enforce that, but this is why this information is relevant.

There are an extraordinary number of overlaps in these cases, and we don't want our taxpayers to be faced with another $3 million or substantial cost order going unpaid, forcing Canada to spend more money trying to enforce it.

Does that answer your question? Okay.

Now, the Claimant also suggested that Canada hadn't taken steps to enforce Mesa. This is completely misguided. Since the Tribunal awarded Canada's costs in Mesa in 2016, Canada then began enforcement proceedings in the District of Columbia courts in 2017. On June 15, 2017, a U.S. domestic court confirmed that the Mesa Costs Order is enforceable.

Subsequently, in August 2017, Canada sent demand letters to Mesa's legal counsel regarding payment of the Award. As a result of Mesa's continued noncompliance, during 2018, Canada hired an asset search firm to research Mesa's financial situation in an effort to enforce the Award, and, as recently as 2019, in November, Canada served Mesa's legal counsel with document requests and interrogatories related to Mesa's financial condition and corporate structure in an effort to enforce the Award.

So, Canada is actively seeking to enforce the Award, and this is costing our taxpayers funds, so we want to avoid a repetition of that.

Now, that's the conclusion of my response. Happy to answer any further questions.

PRESIDENT BULL: Thank you, Mr. Klaver.

For the Claimants, your brief response.

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. MULLINS: Sure. First, just so we can talk

about it later, but if you want--I don't know if it would really be necessary because I think everybody recognizes confidentiality between the funder and the--whoever hires the funder, but I will point out the following.

This is from the Queen Mary Report, on Page 117(b)(2): "The specific provisions of a funding agreement may be subject to confidentiality obligations as between the Parties and may include information that is subject to a legal privilege. As a consequence, production of such provisions should only be ordered in exceptional circumstances."

So, in response to Canada's point that at least the Queen Mary Project said that the funding agreement in fact not only has confidentiality, but also has privilege issues, because remember when--

PRESIDENT BULL: I'm sorry to interrupt, Mr. Mullins.

MR. MULLINS: Go ahead. Sure.

PRESIDENT BULL: I thought what you read said that it may contain privileged issue material.

MR. MULLINS: Correct.

PRESIDENT BULL: So, wouldn't that suggest that, by its nature itself, it is not necessarily privileged? It might have some privileged information, but, by its nature, it is not.

MR. MULLINS: Right. But the rest of it is confidential. In other words--well, where I was headed is that what happens in these arrangements is that information--in order to get funding, information has to be conveyed. And then they get into whole conflicts issue, and the Queen Mary Project goes into what privileged issues should apply.

Again, in the United States we are much more protective over privilege and confidentiality and these things than perhaps in other countries, but just that--but if you look at these arrangements, I believe, as I said before, that the policy reasons for confidentiality, and to allow these claims to go forward, it would be really inappropriate and devastating to the ability of Claimants to have access to justice if the result is going to be that these kind of arrangements are going to be identified irrespective of the issues that you need to worry about.

You are worried about conflict. Then we can identify the funder and make sure nobody on the panel's firm is using a funder. And if they are, they disclose it, and then people have to decide: What are you going to do about that? That's it. That should be it.

If it's a matter--what was really interesting is a matter of who the Claimant is. Well, they are going to find out who the Claimant is. It is going to be--you know,

there's going to be Witness Statements, et cetera. They are going to find out who the Claimant is. I can tell you right now that Tennant is not Mesa. That Tennant is not involved with Mr. Pickens' company. I'll say that now.

That is what they--they'll do their investigation and ask for documents, will do--I could tell you that. The notion is really silly to suggest that they are the same Company. The idea that there is res judicata or collateral estoppel between two separate entities is absurd.

But, having said that, all I'm getting at is just because--and I point to Lisa Nieuwveld's article, "Third-Party Funding in International Arbitration," in Second Edition, 2017, they say on Page 260-261: "In most cases, the Tribunal will only order the disclosure of the identity of the third-party funder, rarely a Tribunal will order disclosure of the funding arrangement, i.e., when the funding arrangement was in dispute."

I do believe that the majority of the Opinions--and I do think these other cases are outliers and can be distinguished, but I think at least in Queen Mary's position--and these treatises are suggesting that these disclosures should be limited to the identity. And then if there are specific questions as to whether or not it's assignment, those answers can be answered by counsel of record, you know, taking counsel's statement for their

word.

But, what we're really--our concern is, again, the access to justice. There's this idea that anybody, you know, might, who use a third-party funder, is acting inappropriate--and these are these "hit and run" arbitrations.

What is really disturbing is, in a situation where, as here, where the Project failed because Canada didn't do its obligations under the NAFTA and secretly gave special deals, including to a domestic corporation, and then ultimately says, oh--then when they have somebody who believes in their claim that says, "I need to know all your details so I can figure them out," and if you can't do that, then you need to withdraw your claim.

That is not access to justice. That is inappropriate policy, and that's not what NAFTA was for--or any of these investment treaties. And it's completely inappropriate.

I do think that the--it should be identity of the funder will be done confidential, won't be disclosed to the public, and that if there are specific legitimate questions that need to be answered, it is determined whether or not there is assignment which would affect the ability for people to go forward, understandable, that could be answered, but they don't need all of the provisions. That

is not the position taken by the Queen Mary Project. That is not the position taken by these other Tribunals, and we do think it's inappropriate.

PRESIDENT BULL: Thank you very much.

Then, we are grateful to all counsel for their submissions on the first issue.

Let's take a 15-minute break and return here to deal with Agenda Item Number 2. Thank you.

(Brief recess.)

PRESIDENT BULL: Right. Let's go back on the record.

We are now scheduled to deal with Agenda Item 2.

Just before we launch into that, the Tribunal has had a short discussion, and the direction on the issue that was raised at the beginning of today about the confidential documents is this: We would like to draw the line a little further out than the Claimant would like, just to be safe. So, when either Party is going to deal with the issue that concerns those two documents, the two confidential documents to do with [redacted], then please flag that and we will go into closed session.

After the Hearing, a transcript obviously will be produced, and Parties will have an opportunity to designate things as confidential. So, if the discussion or parts of the discussion do not turn out to be confidential, then the

transcript of those portions will be made available to the public at that stage, and the Tribunal feels that that would be an appropriate middle ground, balancing all the concerns. So, we will proceed in that fashion.

That said, Agenda Item 2 is Claimant's Request for Interim Measures, so the Claimant has 10 minutes first to make the Application.

AGENDA ITEM 2: CLAIMANT'S REQUEST FOR INTERIM MEASURES

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. APPLETON: Thank you very, very much, Mr. President, Members of the Tribunal. I don't think we'll even need all the time we have.

There are two matters that are before the Tribunal on this part of the Agenda. The first is a request from the Investor that Canada and the Investor--so a bilateral order; Canada and the Investor--preserve and protect documents in their possession. That's the first part.

The second part is an order that Canada produce nonconfidential documents on the record in the Windstream Energy arbitration. Originally, we had sought to have both the Mesa Power and the Windstream arbitration materials, but, in fact, before Mr. Pickens passed away, he gave his permission that nonconfidential information that could be passed along--from that case could be passed along. So, we

no longer needed to have permission with respect to the Mesa Power case. We only needed to have information with respect to the Windstream Case, cases that both involved Canada. Canada has documents in their possession that are available and that should be available to the Tribunal and to the Investor in this case.

We note that, on the Windstream Case--we will just deal with the second one first, I think, though--on the Windstream case, that one of the arbitrators here was an arbitrator in that case, but the other arbitrators were not, so they are not familiar with those documents. We certainly, the Claimant in this case and counsel, were not involved, and we certainly don't have documents in that case. Those are documents that would be maintained by Canada, they would be available by Canada, and should be very easy to be able--to produce so that everyone would have the same materials. That's the idea with respect to that second matter.

We don't think that it was very difficult. We thought it should have been easy to be done. We don't know why they didn't actually simply just agree. They didn't. That's why we're here.

The second issue is--sorry, the first issue is to seek a bilateral order to preserve and protect the record. Now, normally Parties agree, generally. They want to

protect and preserve. In this case, it was particularly important because there are at least six examples of this record or records relating to gas and energy policy in Ontario being destroyed. There are orders from the legislature of Ontario. There was a criminal investigation done by the Ontario Provincial Police. There were criminal charges that were laid, and there were documents that were destroyed. So, again, in the context of such widespread despoliation--in fact, there is a civil suit on despoliation of evidence and malfeasance in Trillium Power. So, in that context, we were very concerned that we wanted to ensure that documents would be protected, that there was an absolute and positive affirmative agreement that that would happen, and that they would be produced. And we were astonished when it didn't happen.

The Investor wrote to the Government of Canada, Deputy Attorney-General, Minister of Justice of Canada, on June 1, 2017, and requested that type of protection. We didn't get an answer. We have asked a variety of times--I believe there are five of them that are outlined--including before this Tribunal at that last procedural hearing. It is only recently that we received an answer. I'm not going to discuss the nature of the answer in light of your ruling. You know what I'm talking about, but in light of the ruling--I think this part of process needs to be

publicly available, but I need the green light on, because I think the public needs to know that there are documents that could be relevant. There are documents about policy issues and inappropriate actions done by the Government of Ontario, and that's what this case is about. This case is about an attempt by the Government of Ontario to suppress, to hide inappropriate actions and activities by their officials that favored certain companies, certain local companies that were politically connected to the Government, and to ensure that that type of behavior is not seen.

That is the reason to--fundamentally, to make this information to be muzzled, to keep it suppressed. And we do not believe--we believe the public have a right to know. We think the public should, in an Investor-State case, have an obligation. The Government has an obligation. They say they believe in transparency, but when we ask them, they are not transparent.

This is a very good example. And that's exactly the case. We have agreed that we would preserve all the documents, that we would have those. Canada won't agree. We don't know why. We believe in that context in the light of the criminal convictions for despoliation of evidence--this is just not a suspicion. This is a criminal standard. The Chief of Staff to the Premier of Ontario,

convicted; failures to comply with legislative subpoenas for the production of evidence in 2014.

And, in fact, one of the key issues here, the actual terms of the Green Energy Investment Agreement, that document that we often call the GEIA, that document only was produced after a U.S. court produced the document through what's called a 1782, and not because of an agreement from the Government of Ontario, even though it related to what looked like a $19 billion sole source, nonpublic procurement. 19 billion. That's a huge number. Just to give a context to what we're talking about and the reasons why this information needs to be produced.

So, we simply say what's good for the goose is good for the gander. Both sides should have the same order. Both sides should have agreed. They won't. They should. We would like you to help us with that. So, we have that record.

On the other issue, we think that the Windstream materials should be produced so everyone has access. It may not be anything special. It just should be--everyone should have it so we are treated equally and fairly.

Those are our submissions.

ARBITRATOR BETHLEHEM: Mr. Appleton, may I just ask a point of clarification?

MR. APPLETON: Yeah, of course.

ARBITRATOR BETHLEHEM: The Windstream documents that you are addressing are the Windstream documents that were produced and are on the record of that arbitration; is that correct?

MR. APPLETON: Yes, that are not confidential. We don't know what is confidential. We are not seeking any confidential materials.

ARBITRATOR BETHLEHEM: Right. Is it not the case that those documents are securely held by the Permanent Court of Arbitration and that if, as a matter of extraordinary hypothesis, something were to happen to those documents in Canada's archives, that they are available in substitute form, if you like, in the record of the Permanent Court of Arbitration?

MR. APPLETON: Sir Daniel, let me answer your question and then give the context.

So, of course, the answer is yes. We would assume that. We don't know what agreement they may have had about destruction, so--but let's assume they are within the records of the Permanent Court of Arbitration, and they are probably all available electronically and easily producible, in any event.

The question isn't: Are those documents safe? The questions are: Why should those documents not be produced now to make it easier for the Tribunal and

everyone here to share the same information so that we can actually have more focused pleadings at an early stage?

So, the question there is not about their protection. It is simply that they should be shared, and the real particular reason is because we think that a situation that--where one Member of the Tribunal has that knowledge and the others don't, it should simply just flow out so that everyone has it. I don't believe there is anything wrong with that knowledge. I just think it is better if everybody has it. That's all. And that's why we seek it now. Not for any other reason, but that--that's why we are asking for that information.

ARBITRATOR BETHLEHEM: But I'm really going to the detail of your request. The headline request is to produce, but you talk about preserve, index, protect, and scan, and I'm trying to understand why index and scan, you know, in circumstances in which you've just said these documents are safe and secure and all the rest of it. So, it's going to the detail of that.

And the second issue is if, as you say, it's all about fairness, why shouldn't everyone have those documents now? I mean, Canada will get to this in its submissions because this is addressed in its written response. Why partial disclosure document production at this stage?

MR. APPLETON: I'll answer each question for you,

and in order.

So, the first bit was, it didn't occur to us the PCA might have those documents when we wrote this request, and we did not know the terms of the order as to whether they were electronic or not. So, to the extent that they were electronic, then that would be not a problem to comply with whatsoever; but if they were not, we think that to facilitate the exchange of the materials, it should be electronic in that way. So, that's that answer.

And then with respect to your second question, I think the real--the most important issue here was simply because of the asymmetry of information with the Tribunal. That's what makes this a little different from the other situation, because now all we are talking about is the Windstream documents, and because one Member of the Tribunal has knowledge about that, looking at the program that is here, that's why we are looking in that way.

And so--I mean, we simply don't understand why--if the PCA has them electronically, if Canada has them electronically, why they just wouldn't turn it over. I mean, it is not very difficult or onerous. It is not anything that would be particularly problematic.

Canada's answer is we should go through their access to information process, which is a costly and lengthy process, where they have all types of delays from

material that they have. They have full access to it and we don't.

So, here we're talking about Windstream, where they have all the material and all the knowledge, and we have none or very limited amounts, and there's an asymmetry in the Tribunal. We think that makes a special circumstance that is different from something else, and that's why we have suggested in that way.

ARBITRATOR BETHLEHEM: Thank you.

PRESIDENT BULL: So, you'd like disclosure of the Windstream documents now, rather than wait for them--wait until document production and asking for them then? I've understood you correctly; right?

MR. APPLETON: Yes.

PRESIDENT BULL: If you had to wait for document production, you'd have to show relevance, but your application now does not seem to be dealing with that issue.

MR. APPLETON: Well, we presume that the Tribunal would not require that relevance because they are both cases dealing with the Ontario Feed-in Tariff about the Government of Ontario's conduct with respect to the Feed-in Tariff and with respect to wind power. So, we simply assume that, given the extraordinary similarity, Canada has presumed, as you've seen at great end, about the similarity

between the Mesa Power case and the Tennant case, but they constantly ignore the similarity of the Windstream case, and that's exactly why.

Now, we just thought that that--we have not submitted anything with respect to the Mesa Power case either. Neither have they on that. It seemed to me that it would be natural that the two cases arising out of the consideration of the very same regulatory measure would be there.

PRESIDENT BULL: So, your position is that the documents would be relevant for that reason?

MR. APPLETON: Yes. They would be relevant and there's virtually no burden because they are totally and utterly--

PRESIDENT BULL: I'm not concerned with burden. I'm just concerned with relevance.

MR. APPLETON: Yes, that's why.

PRESIDENT BULL: Okay. Thank you.

ARBITRATOR BISHOP: Are the claims in Windstream and the claims in this case the same?

MR. APPLETON: We believe the claims in Tennant Energy are different from everybody's claims. They are sui generis, but there are similarities with respect to the factual underpinnings of the Ontario Feed-in Tariff program and its administration that are very relevant and very

material. That's why.

This is really about inappropriate conduct with respect to the administration of the program, and that's why we are seeking that information.

ARBITRATOR BISHOP: So, it's not--it doesn't have to do with relevance between the claims, between the cases. It is simply the fact that that case involved the same general FIT program.

MR. APPLETON: Well, there are specific provisions of the FIT program. They all deal with FIT contracts, transmission access, access to the grid. It is not a small layer of overlap. It's a very significant layer of overlap. And simply--in the Windstream case, you are dealing with offshore winds, and in the Tennant Case you are dealing with wind on land.

But it's wind is wind and FIT is FIT, and this is a question with respect to the Ontario Feed-in Tariff and--about transmission access, and the transmission access is critical to this case, because you cannot have a FIT Contract without transmission access. And when the process of the transmission access is done in a predatory manner, which is what we've now been able to discover arising out of the Mesa Power documents--and we'll talk about that when we get to bifurcation. When we see that a predatory manner, not known to anybody until the evidence that came

out from Mesa Power, when that was done by the Korean Consortium, or where you have a situation where officials were actually gaming the system to help local champions who were politically connected at the direct cost of Tennant Energy--it was next in line to be able to get the Contract; they were the people that were knocked out, directly because of that--that is a very specific situation.

So, yes, it comes from the same schema, it comes from the same approach, it comes from the same access to transmission. All of that is covered in both cases, and we would like to be able to see how that was considered and what materials were put in because they might be different, and that's what we are seeking to find.

ARBITRATOR BISHOP: And the documents you are requesting are documents produced by Canada in that case; correct?

MR. APPLETON: It would be the nonconfidential documents produced by both sides. Whatever is nonconfidential, we would be seeking, but we are most interested, of course, in Canada's documents. Absolutely.

ARBITRATOR BISHOP: Okay. Thank you.

ARBITRATOR BETHLEHEM: You said in your submissions, Mr. Appleton, that before T. Boone Pickens died, that he gave permission for the Mesa documents to be used. I don't quite know what that means. Perhaps you can

elaborate. But I'd like to know whether this means, in effect, that you have got an archive of Mesa documents which are now available to Tennant and, if so, whether that is an archive of documents that corresponds to the archive of documents that Canada would have, and, if not, whether you are implicitly making an offer to disclose all of those documents to Canada as part of the--as it were, the reciprocal disclosure of Windstream and Mesa documents.

MR. APPLETON: So, Mr. Tennant said that all the public documents that were available in Mesa could be made available to anybody that contacted us with respect to the issues under the Ontario FIT Program.

So, it would seem to me that it's likely that those are the same documents as Canada, but we would have no difficulty identifying and synchronizing, so to speak, the materials, and we would have no problem. They haven't sought them, but if they would like to have them, for sure we would have no problem setting that together.

So, Sir Daniel, I think you are absolutely right with respect to that.

Now, Mr. Pickens did not say "Please take away all my attorney-client privilege communications," and I'm not in a position to do that. But to the extent that he said that the public materials would be available--"nonconfidential" was his term--that's what we

would make available. That's why we didn't seek those.

ARBITRATOR BETHLEHEM: Thank you.

PRESIDENT BULL: Thank you, Mr. Appleton.

Now, we will hear from Canada.

ARGUMENT BY COUNSEL FOR THE RESPONDENT

MS. DALLAIRE: President Bull, Arbitrator Bethlehem, Arbitrator Bishop, I will explain why the Claimant's Request for Interim Measures are both unreasonable and unnecessary.

First, Canada has already put in place procedures to ensure the preservation and protection of documents, and there is no evidence that Canada is not complying with them.

Second, the Claimant's request to obtain the Windstream documents is nothing more than an attempt--

(Interruption.)

MS. DALLAIRE: I think we are all ready to go, to continue.

So, as explained, the first request, we don't think it is necessary because Canada has already put in place procedures to ensure the preservation and protection of documents in this arbitration.

And, second, the Claimant's request to obtain the Windstream document is nothing more than an attempt to circumvent the rules, procedures, and timeline established

by this Tribunal. It amounts to an additional and unilateral document production phase which Canada strongly opposes.

So, my presentation will follow a different structure. I will first apply the legal test because there is a legal test to meet before a Tribunal can decide to order interim measures.

So, the applicable rule is Article 26, and both Parties agree on this. This is Article 26(1) of the UNCITRAL Rules. As explained in Canada's response, to determine whether interim measures are necessary, Tribunals like those in Nova Group and García Armas have applied a four-part test. I will briefly summarize the test.

In this Arbitration, the Claimant has to demonstrate that, first, it has a reasonable possibility of prevailing in this case.

Second, that it will likely suffer harm not adequately reparable without the Order.

Third, that on the balance of convenience, the--it will suffer greater harm than Canada without the Order.

And, fourth, that the condition of urgency is met.

Canada's position is that the Claimant has not met any element of the four-part test.

So, first, regarding the Claimant's first request, the Claimant has not established that this Tribunal has

jurisdiction to hear its claim. Canada has not consented to the Tribunal's jurisdiction and has raised several strong jurisdictional objections in a Statement of Defence.

Second, the Claimant will not suffer any harm if its request is denied. In its request, the Claimant implies that Canada will be allowed to conceal or destroy information relevant to its claim. This allegation is highly inappropriate and has no legal or factual basis. In general, under domestic law, the Government of Ontario and the Independent Electricity System Operator, or IESO, have to ensure the preservation of documents. I refer the Tribunal specifically to Paragraph 7 to 11 of Canada's Response.

And on that note, just to respond to the Claimant--or to respond to Mr. Appleton, we agree that it's important to preserve and protect documents in this Arbitration. What we are saying is that we assume that both Parties are doing this because it's part of their obligation to act in good faith in arbitrations, and we just are simply saying that an order from the Tribunal is not necessary.

So, I am now about to enter into a confidential part of my presentation.

(Beginning Closed Session.)

CLOSED SESSION

MS. DALLAIRE: Thank you.

So, more importantly in this Arbitration, Canada has also produced [redacted] put in place by the Government of Ontario and IESO. They are, respectively, Exhibits R-021 and R-022. [redacted] confirm that the relevant Ontario Ministry and IESO have to preserve documents relevant to this arbitration. They were put in place promptly after receiving the Claimant's Notice of Intent in March 2017.

Similarly, the Tribunal in Nova Group refused to grant an order for the preservation of documents concluding that "Romania's express representations to preserve documents was sufficient."

Canada has already undertaken to preserve and protect documents and, as such, there is no risk of serious harm to the Claimant if its request is denied.

Third, it is completely unnecessary and would be overly burdensome for Canada to index and scan all the protected documents as contemplated in the Claimant's motion in Footnote 3. The Claimant's request is drafted in an unreasonable manner which would require Canada to retrieve, review, index, and scan potentially millions of documents.

We can now go back to the public session.

(Beginning Open Session.)

OPEN SESSION

MS. DALLAIRE: The Claimant's request--as I already said before, Canada has already taken steps to preserve documents and the additional steps to index and scan documents serve no purpose. These are steps that normally take place during the document production phase, which will occur at a later stage.

Fourth, there is absolutely no urgency here. The Claimant is relying on unsupported allegations that documents relevant to its claim were destroyed. These unsupported allegations do not establish the imminent ongoing destruction of documents in this arbitration. As such, there is no urgency to grant the Claimant's request.

In RDC v. Guatemala, the Tribunal refused to grant interim measures because there was no evidence of ongoing or imminent destruction of documents. The Tribunal explained it was not sufficient for the Claimant to rely on the destruction of documents by a previous government to be granted an interim order.

Similarly, there is no evidence to indicate that the current Government of Ontario or IESO are not complying with their legal obligation on recordkeeping.

In sum, Canada asks that the Tribunal dismiss the Claimant's first request to preserve, protect, index, and scan all documents relevant to this dispute.

Canada is also opposing the Claimant's request to order the production of all nonconfidential Windstream documents. First, as explained, the Claimant has not met its burden of establishing that this Tribunal has jurisdiction to hear its claim.

Second, the Claimant has not demonstrated that it will suffer any harm if the Tribunal denied its request.

Procedural Order Number 1 already sets out timelines and procedures for document production in this Arbitration. Document production will only take place if the case proceeds on merits and damages. The Claimant was given a fair and full opportunity to make proposals and to comment on the Procedural Calendar. It did not raise any issues on the timing of document production during the procedural phase. The Claimant also failed to give satisfactory reason as to why the Tribunal should depart from the Procedural Calendar. As such, its request to obtain the Windstream documents is untimely and should be denied.

In addition, the Claimant would not have an automatic right to obtain the Windstream documents through document production.

Procedural Order Number 1 sets out a specific and detailed process for document production. The Claimant first has to request specific and narrow category of

documents. It also has to demonstrate the relevance and materiality of each document request it makes. The Procedural Order, then, gives Canada an opportunity to object. And considering the irrelevance of the Claimant's request, we absolutely want the opportunity to object to such request. And then the Claimant has the right to respond to this objection.

The Claimant's request does not follow any of these steps. The Claimant does not demonstrate that these documents are relevant and material to its Claim. A mere assertion that the Windstream documents are relevant is meaningless. It is not sufficient to establish how they are relevant to the Claimant's Claim.

As you have mentioned earlier, the Claimant was not--did not explain in its Request for Interim Measures how the documents were relevant to its case. Now Mr. Appleton has brought a new reason as to why the documents are relevant to his claim. He said that "FIT is FIT" and "Wind is wind." Of course, we don't think that these new allegations meet the standard of having to demonstrate the relevance and materiality of document request.

Further, it is worth mentioning that the Biwater Gauff Case where the Tribunal had to decide if it could order the production of documents as part of an interim

order. The Tribunal concluded that document production is not typically considered within the ambit of interim measures except in exceptional circumstances. This is because ordering the preservation of documents is usually sufficient to protect the Party's right.

Third, on the balance of convenience, the Tribunal should refuse to grant the Claimant's request. Canada seeks to bifurcate the proceedings to have its jurisdictional objection heard. If Canada is successful on its objection, Tennant's claim would be dismissed in its entirety and document production would not occur at all.

As such, Canada should not be required to go through an extra round of document production to retrieve, review, organize, and index thousands of documents.

Fourth, the Claimant has not proven that there is any urgency to grant its request. The Windstream documents are not necessary at this stage of the arbitration before the currently scheduled document production phase.

To conclude, the Claimant's Request for Interim Measures do not meet the legal test under Article 26(1) of the UNCITRAL Rules. An order for the preservation of documents is unnecessary because Canada already has procedures in place to ensure the preservation and protection of documents.

Further, it is unreasonable for the Claimant to

circumvent the rules and procedures in place to obtain the Windstream document at this stage of the Arbitration. Canada, therefore, asks the Tribunal to dismiss the Claimant's to Request for Interim Measures.

I would be happy to answer any questions that Members of the Tribunal may have.

ARBITRATOR BISHOP: Yes. I have a question. You argue that there's no jurisdiction for us to order the production of the Windstream documents. Remind me what the basis of that is.

MS. DALLAIRE: So, we are saying--and you'll be hearing from my colleague here, Lori, that we are asking the Tribunal to bifurcate the proceedings because we believe that the Claim is time-barred.

ARBITRATOR BISHOP: Yes. And so the time-bar issue is the jurisdictional objection. And you say because you have that pending, that we have no authority to order the Windstream documents to be produced?

MS. DALLAIRE: Right.

So, the first requirement is that a Claimant has to demonstrate that it has a reasonable possibility of prevailing on the merits of the case. Of course, we are saying that there is no chances that the Claimant will prevail in this case because the Tribunal doesn't even have jurisdiction to hear its Claim.

ARBITRATOR BISHOP: Thank you.

PRESIDENT BULL: But that requires you to be able to say that there is no chance at all that Canada would lose the jurisdictional argument. I mean, the first element of the test is just reasonable possibility of success. It is not really intended to predict with certainty who is going to win the case. So, if I understand it, Canada's position is that the position is so clear on jurisdiction that it would make it impossible for them to clear that first hurdle? Is that your submission?

MS. DALLAIRE: So, we are saying, of course, that we agree that the Tribunal has to determine its own competence, and we understand that it's for the Tribunal to decide whether it has jurisdiction or not.

What we are saying is, of course, we have a strong objection here to make on jurisdiction because we believe that the Claim that the Claimant is bringing forward is time-barred and it's because every event happened before the June 1, 2014, critical date.

But, just to add to that point, in Biwater Gauff, the Tribunal stated that objections to jurisdiction may be a relevant factor to consider when exercising its discretion to order interim measures, and on the first test, so the first part of the test, so the chance is that a Claimant will prevail on the Merits of the case.

ARBITRATOR BETHLEHEM: I have two brief questions.

I think it's clear, subject to anything that you may say or anything that Mr. Appleton wishes to revisit or, indeed, hearing from the Tribunal Secretary, I think it's clear that the Windstream documents are held in an archive by the Permanent Court of Arbitration.

Would Canada here, in these proceedings, now waive any objection that you may have to accessing the PCA archive of these documents if, for some inadvertent or other reason, it is established that there is a destruction of the documents that are held in Canada's archives?

MS. DALLAIRE: So, again, our point is that the Windstream documents are not relevant, especially at this stage of the Arbitration.

ARBITRATOR BETHLEHEM: I understand the point. I'm just asking a really simple question, whether you would waive any objection to accessing those documents were we to decide at some future stage that the documents were relevant and should be disclosed, but for some reason the documents held in your archive had been destroyed.

MS. DALLAIRE: I'm going to get back to you on that point. I think we need further direction on that specific point on whether or not the Claimant should access the PCA records. I'm going to make sure to have a complete response during my Rejoinder, time for my Rejoinder.

ARBITRATOR BETHLEHEM: That's very helpful, and I'm certainly very happy for you to defer the answer. Let me just clarify the thought behind the question and, of course, it's a hypothetical thought.

I take it from the Claimant's submissions that they are concerned that, for whatever speculative reason, that the documents held by Canada may be lost, may be destroyed for some reason, and they want to be sure to have access to those documents.

Were the Tribunal to conclude that the documents may be relevant but that disclosure would properly come at an appropriate time in a document production phase, the Tribunal may wish to be satisfied that those documents are safe.

Now, one way to be satisfied that the documents are safe is that they are held in the archive of the Permanent Court of Arbitration, but we would want to be absolutely sure in those circumstances that Canada would not stand up at some future stage and say "I'm sorry, we do not give our permission. That was another proceeding." So, that's the nub of the question.

The second question that I have is that I appreciate entirely the points of principle that Canada is making about jurisdiction, urgency, and all the rest of it. I'd like to know, though, as regards the Claimant's first

request, that is an order directed to both Parties to preserve and protect documentation in their possession, custody or control that are relevant to the dispute.

I'd like to know, as a practical matter, whether you object to that?

MS. DALLAIRE: So, do we--so, I might maybe respond to your second question first. So, is the question whether we do not agree that it's important to preserve and protect documents relevant to this arbitration?

ARBITRATOR BETHLEHEM: No. I understand that you do agree because you've already said that you've taken steps. So, I'm taking that as a given. And I'm taking as a given, so you don't need to repeat them, your arguments of principle that we do not have jurisdiction. There is no urgency in that the interim measures elements have not been met. So, I accept the arguments--I acknowledge the arguments that you've made.

I'd like to know, though, whether you have some other grand objection to an order from the Tribunal, because this is not reflected in Procedural Order No. 1, that is addressed to both Parties, which is motherhood and apple pie in arbitration: That both Parties should--should preserve and protect documents in their possession, custody or control that are relevant to the dispute.

MS. DALLAIRE: So, yes, now that I understand your

question correctly, we do oppose such an order from the Tribunal because we believe, and many awards have stated the same thing, that interim measures should not be granted lightly. This is--we have a specific test to meet in order to get interim measures.

I think both Parties agree that it's important to preserve and protect documents, and if any--if a party is not able to meet the test to receive--to be granted an interim order, then we believe that it is not necessary for this Tribunal to order such a request.

ARBITRATOR BETHLEHEM: Ms. Dallaire, I understand the point that you're making. In essence, perhaps I invited you to do so, but you're repeating your argument about interim measures.

Let's take as a hypothetical that the Tribunal decided of its own motion that we wanted to issue Procedural Order No. 4, which just had one line, which said that: "In view of uncertainty and the fact that this was not covered in Procedural Order No. 1, we hereby order that both Parties take the necessary steps to preserve and protect documentation in their possession, custody, and control."

So, I'm trying to establish whether you are objecting to the point of principle in relation to interim measures because you want to preserve the interim measures

principle or whether you are objecting for some other reason to an order--motherhood and apple pie order, relating to the preservation of documents?

MS. DALLAIRE: So, as I said previously, we agree that it is important to preserve and protect documents for both Parties. I think it's in line with the general duty of Parties to be acting in good faith in the context of an arbitration. Many Tribunals have said so. The Nova Group Tribunal has said so. I can refer you to a specific paragraph.

I think to your point, we don't have a strong objection for this Tribunal to order to both Parties to protect and preserve documents, but we believe that it's unnecessary, and there's no uncertain here because we have made specific undertakings that we are protecting and preserving documents here.

So, in principle, we don't object, we just think that it's not necessary in that the Claimant has not met the four-part test.

ARBITRATOR BETHLEHEM: Thank you very much.

ARBITRATOR BISHOP: I have a couple of questions.

Do the Windstream documents that have been requested, do they--have they already been pulled together in an electronic file and do they exist, as such, as an electronic file right now?

MS. DALLAIRE: Yes, they do exist. We have electronic copies of the Windstream documents, and it's not--so, we are not saying that it would be overly burdensome for Canada to produce the Windstream documents. I think our main point is that the documents are not relevant to this Arbitration.

I don't need to remind you, Mr. Bishop, because you were on this Tribunal, but the Windstream document was about offshore wind development, and it was also--and I could maybe talk about this a bit more because I didn't have time to address that in my presentation.

So, as I was saying, Windstream is about the development of offshore wind development. And Windstream applied for a FIT Contract. It's true, during the same launch period, but Windstream was awarded a FIT Contract, unlike Tennant, and also the main--so, Windstream was mostly about the Decision of the Ontario Government to defer the development--the offshore wind project for a period of time. And also, there was no--unlike what Mr. Appleton said, there was no questions of transmission, grids or--the main issue with Windstream was the regulatory approvals for the offshore wind development projects. So, we don't think it is relevant to this current Arbitration.

ARBITRATOR BISHOP: So, your main argument there is relevance and not that there is some specific harm to

Canada or burden?

MS. DALLAIRE: So, it is, we are not saying that it would be too burdensome.

What we are saying is that, yes, the Claimant has not demonstrated they are relevant, and also we have specific procedure in place to account for document production in this Arbitration. Both Parties were consulting on this Procedural Calendar that accounts for document production, and we are just saying that at this stage, when the Tribunal has to deal with the time bar objection raised by Canada, it is not necessary at this stage when we are talking about the Claimant's knowledge to obtain the Windstream documents.

ARBITRATOR BISHOP: Okay. The other question I have goes to the first matter raised, the Request for a Bilateral Order to Preserve Documents generally. If we were to make such an order, what would Canada do beyond what it has already done to preserve documents?

MS. DALLAIRE: That's a good question. We believe that we've done everything that is in our power to preserve and protect documents. This is something that is very important for Canada, and I think we have shown--and maybe we could go in closed session so that I can talk about it a bit more.

(Beginning Closed Session.)

CLOSED SESSION

MS. DALLAIRE: Sorry, there is some kind of delay. Thank you.

So, we have produced [redacted], which is standard practice for us to make sure that documents are preserved. We are in agreement with the Claimant that it is important to have documents relevant to this Claim protected because, of course, Parties are entitled to see these documents.

So, honestly, because we have both, you know, recordkeeping policies and laws on the specific topic of having to preserve and protect documents, and also [redacted], honestly, I think we've done everything to demonstrate that, yes, we are preserving documents. This is an issue very important to us. And this is an issue that we take seriously.

And also, [redacted], which are Exhibits R-021 and R-022, are very broad and make sure that relevant Ministry and IESO protect the documents relevant to this arbitration.

ARBITRATOR BISHOP: So, is there anything else that could be done to preserve the documents beyond [redacted] that you've already sent and the laws in place?

MS. DALLAIRE: I don't--I don't think so. And

also I can maybe get back to you. I believe that we are doing everything that is in our power to preserve and protect documents.

And, also, I would just like to flag that in past Awards, Tribunals like Nova Group have agreed that simple express representation by a State--so, without any demonstration that they have [redacted] in place--is usually sufficient to--for Tribunals to say that an interim order is not necessary because the Respondent State or another disputing Party are preserving and protecting documents.

So, I think the threshold is not really high here, and we've done a lot to demonstrate that we are preserving documents and also protecting them.

ARBITRATOR BISHOP: I take that point. Mr. Appleton has pointed to certain examples that have occurred in the past, criminal convictions and such, which are set out, I think, in the Notice of Arbitration.

Could you address that issue specifically and tell us what has been done since then to ensure that won't reoccur?

MS. DALLAIRE: So, that's another really good question. Maybe I can refer to our Statement of Defence where we talk about these allegations that the Claimant makes.

Of course we believe that these allegations are unsupported here. They are in relation to two gas plants that were canceled in 2010 and 2011, and I think that Claimant is trying to refer to the Report by the Privacy Commissioner of Ontario, which you can find at R-003, where she talks about specifically the two gas plants that were canceled and the investigation that followed.

So, we don't have any evidence in this Arbitration that the destruction of documents were relevant to the onshore wind development, which is what this claim is about. And so, I think the Claimant is only pointing to vague allegation which do not relate to this case, and so--and you also have a follow-up for the Report which is R-004.

ARBITRATOR BISHOP: Thank you.

SECRETARY THAM: Can we open the session?

MS. DALLAIRE: Sorry. Yes, we can.

(Beginning Open Session.)

OPEN SESSION

PRESIDENT BULL: Thank you very much for your submissions.

Then we will hear in Reply from the Claimants. You have five minutes.

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. APPLETON: Thank you, Mr. President. Just a couple of quick points.

First of all, Ms. Dallaire has not brought to your attention your authority, which is in the NAFTA Article 1134, even though that was a very significant part of all of these motions. I do not know why she completely and utterly omitted any reference to the Tribunal's authority for interim measures.

The Article 1134, just to remind you--I know that you are following this quite closely for discussions. It says: "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."

It's very clear. You clearly have this authority, you clearly have this ability, and this is exactly the situation we need to deal with it. I was rather surprised

that Ms. Dallaire continues to call the situation unsupported allegations when you go so far as to actually have criminal convictions.

All of the energy policy emails are gone. And now to say, "Well, we can't prove what's gone and, therefore, it is unsupported because we don't know what was wiped"--we know that there were hundreds of thousands of emails that were gone, but we don't know what they are because they are gone and, therefore, that means its unsupported? That's ridiculous.

The laws that were in place to protect against that were in place before. Canada says, "Well, we have laws; therefore, there can be no destruction, there can be no risk." But those laws were there. If people won't follow those laws, that's the problem. That's what makes this different.

They cite the case of Nova Group, which is not a NAFTA case, but in Nova Group there's not a situation where there's proof of destruction and violation. You not only have the violation in terms of the destruction of the documents, but there was a subpoena to order their production and then, in light of that, the destruction.

And I could give you some suggestions of things that could be done and things that could be checked to ensure by Canada that Ontario was compliant, but that is

not what we've heard. We've heard that this is just unsupported.

Then I'm rather alarmed to hear a suggestion now that we have no right to Windstream, that the Windstream documents shouldn't--so, now we know that we are going to have a fight about that. That's why Canada won't give you its permission for the PCA to turn it over.

The fact of the matter is there should be no objection. Canada says that they believe in transparency in all their cases. This information should be available to the public, but yet when they are asked, we don't get an answer because their conduct shows us that they don't walk the walk, they just talk the talk. They say they believe in transparency, but they don't do it.

ARBITRATOR BETHLEHEM: If Canada were to give permission, would that satisfy you?

MR. APPLETON: I think that would make it a lot easier, and I think--and I don't understand why they wouldn't. I mean, Canada has said, "We have an obligation to preserve and protect the record," they admitted it today, and that there is no burden. Yet they won't agree to a bilateral order to do that. I'm just completely shocked. I don't understand why. They say one thing and then do another.

Yes, they have an obligation, an international

obligation to do it. And I just don't know why they wouldn't agree. And it is remarkable to have to ask you to make this Order that they should do because it is their ongoing international obligation.

I had one last point.

Yes. Ms. Dallaire has now indicated that, fundamentally, that the issues in Windstream are now irrelevant. That is Canada's position, and I find that--she said--she denied that "FIT is FIT" and "wind is wind." I don't know why she thinks wind is different if it's on the water or if it's on the land. I'm quite interested in that. I spend a lot of time looking at wind issues, so I can't wait to hear that one.

But the fact of the matter is we are talking about transmission access, a very valuable, important commodity, which is regulated by governmental permit and permission, covered by the NAFTA, covered by the Treaty, and the process that goes with it. That's why we need to see how that was done. We don't understand why that would be problematic, especially since they agree that there is no burden to deal with it. It could be produced, and it's special because of the existence of destruction.

That's what makes all of this different. You have the authority to keep your--the integrity of the process. That's what we are asking about--1134, in light of the

admission, in light of the confirmation by criminal courts of what went on, and that's what we are seeking. So, it's very specific.

I believe that's all that we have on this. We thank you very much for your time to consider this matter because we think that it's important to ensure that we have a record and that things are produced, because of the questions of the conduct of senior government members at issue in this case.

Thank you.

PRESIDENT BULL: Thank you, Mr. Appleton.

And Canada has five minutes for Rejoinder.

REJOINDER COMMENTS BY COUNSEL FOR RESPONDENT

MS. DALLAIRE: So, I will be very brief, just a couple of points that Mr. Appleton has raised.

Concerning Article 1134 of the NAFTA, we agree. We're not saying that this Tribunal doesn't have the authority to grant Interim Measures and to order the preservation of documents. That is not what we are saying. We are applying a test and we are saying that the test, which, by the way, the Claimant was also applying in its own motion, is not met here. There are certain conditions to meet, and they are not met.

Also, about the questions on new policies and procedures since the criminal investigation, I think it was

a question that was raised by you, Mr. Bishop, and I maybe forgot to respond to that specific part of the question.

So, there are now new policies in place and procedures in place to ensure the preservation and protection of documents following the Report which I referred you to earlier, so R-003, and I can also refer you namely to the corporate recordkeeping policies, which is--of 2011 and 2015, and I believe that they are Exhibit R-017. And I will probably have to get back to you--oh, and R-016. So, R-016 and R-017.

Also, regarding the question on the PCA--so, again, we don't want to sound like we are opposing any production of documents here. That is not the case. We are simply saying that there are procedures in place, but we could agree for the PCA to produce documents.

But, again, I think we--the test here to meet is that the document needs to be relevant and material, and also on the point of like the destruction of records by--not the destruction, but that the records could maybe be destroyed inadvertently by Canada, we can confirm that we have those documents and we are preserving them in the context of this Arbitration.

ARBITRATOR BETHLEHEM: Ms. Dallaire, I suppose what I'm looking to you for, if Canada wishes to make this statement, is something that is clear, unambiguous, on the

record, that says: "If an issue arises in the future, Canada will not object to accessing the PCA records."

Can you give that declaration? Can you make that statement?

MS. DALLAIRE: Yes, we are willing to state that. It is just that, again, we believe that there--

ARBITRATOR BETHLEHEM: I understand the point of principle. I'm just--I don't want us to be in a position, if that were to be, we haven't deliberated, but if we were to come to a point in the future where relevance had been established and it was then found that inadvertently some documents had been disclosed, we don't want to be in a position where Canada then says, "Well, we reserved our right not to give permission."

So, if you are going to, this is the time to make the point--clear, unequivocal, unambiguous--that you will waive any objection that may arise in due course.

MS. DALLAIRE: So, I can right now say and confirm that we would not--we would waive, and we would not object to the PCA producing those documents, following all of these steps that you've just mentioned.

ARBITRATOR BETHLEHEM: Thank you very much.

ARBITRATOR BISHOP: I'm sorry. You would waive any objection you might have to the PCA producing the documents?

MS. DALLAIRE: So, I'm going to rephrase that.

ARBITRATOR BISHOP: In that instance that was referred to; is that correct?

MS. DALLAIRE: So, we would waive our right and we would not object to the PCA producing documents. I'm sorry about the confusion.

ARBITRATOR BETHLEHEM: I have one more question but it would require us to go into a closed session.

(Beginning Closed Session.)

CLOSED SESSION

ARBITRATOR BETHLEHEM: I don't know whether it is relevant, so I just want to probe in case it is, and I appreciate that there is a whole procedure for dealing with these things.

I'd like to know, just in a nutshell, why the elements that are marked as confidential are marked as confidential. I would have thought that a [redacted] would be a straightforward issue and that it may assist for the fact of a [redacted] to be in the public domain.

So, why have you decided that these aspects are confidential, [redacted] aspects?

MS. DALLAIRE: So, we believe that it is because they are--the solicitor client privilege applies here and that's the reason. [redacted]--and I can confirm this later--were drafted by lawyers, and we just believe that they are subject to SCP privilege, and that's why we want to make them confidential.

ARBITRATOR BETHLEHEM: Okay. Thank you.

PRESIDENT BULL: Sorry, just on that last point.

So, your concern is that because you believe that they are privileged, that releasing them would then jeopardize other communications. Is that the thinking?

MS. DALLAIRE: So, I can always get back to you on this. Of course, [redacted] are not--do not

pertain to the Government of Canada. They are--they were drafted by the Government of Ontario, so I would have to check with them first before I can make any assertion here. And also they are subject to privileged designation under domestic law, so I think I'm going to need some further directions on this before I can fully respond to your question.

PRESIDENT BULL: Sure. Thank you.

MR. APPLETON: Mr. President, just arising from your question, I simply want to note that what's particularly--so, if Mr. Dallaire is going to get back to us, she might want to make sure that she gets back as well on that there was waiver in this case, Canada admitted that there was waiver of the solicitor-client privilege in this situation, that the act--but they have sought here--that's why it was very perplexing, is that another institutional privilege arises that is not subject to waiver, and that was arising out of a piece of legislation, the--which is called FIPPA, and that, but--and we wrote back to the Tribunal and said, "Well, the FIPPA would only apply if you sought it under FIPPA," and you overruled that.

You said, no, because we said that since this was waived, and, therefore, there is no litigation privilege here that is permitted, that, therefore, this would have to be produced. That's why we wanted it in the record. And

we were told by Canada, no, the Ontario institutional law would apply. And we said, but it only applies if you apply through FIPPA, because that was the process. And we were overturned on that.

So, we understand, but we just found that to be very unusual given the fact that, if you waive--and Canada's position was, there is no waiver of the institutional privilege. There is only a waiver of the actual litigation privilege, and the fact that they made this public is irrelevant and, therefore, that waiver doesn't apply. They call that common-law waiver, but that the institutional privilege applied because in the Order it was permitted.

And we think that was not the intention of the Order, and we cautioned the Tribunal about the nature of those types of orders when it was being made, that we didn't understand how broad that would be, and we thought that was very problematic because it would be unbalanced between the Parties. And I simply flagged that, because when Ms. Dallaire reports back to you, she might want to reference the institutional issue versus the waiver that they admit took place about the solicitor-client privilege in general.

PRESIDENT BULL: You don't have to, but if you wish to respond to anything Mr. Appleton has said, you have

the opportunity.

MS. DALLAIRE: I trust that the--this Tribunal is familiar with its own Decisions. So, I don't think there is anything more to say on this. I think there is a clear ruling, and there is no further submission from Canada on this.

PRESIDENT BULL: Thank you.

Good. Then Tribunal thanks counsel for their submissions on Agenda Item Number 2.

SECRETARY THAM: Can we go to open?

PRESIDENT BULL: Yes, we can go to open session.

(Beginning Open Session.)

OPEN SESSION

PRESIDENT BULL: So, that concludes the submissions for Agenda Item Number 2, and we--I thank everyone for your help. We are on time. And that is much appreciated. We will break for lunch now, and as stated in the timetable, we will reconvene at 1:45. Thank you.

(Whereupon, at 12:15 p.m., the Hearing was adjourned until 1:45 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT BULL: Let's resume proceedings.

We're back on the record.

Before we turn to Agenda Item 3, the Tribunal has deliberated on Agenda Item 1, the issue of disclosure of third-party funding, and the Tribunal is not going to make an order right now, but the Tribunal does have a view about the order it is minded to make, and we want to inform the Parties of our inclination.

The Tribunal is minded to order that the name of the third-party funder be disclosed to the Tribunal and to Canada and that information be kept confidential; in other words, without the need to disclose that name to the public.

The Tribunal is also minded to order disclosure of any terms in the third-party funding agreement relating to payment of adverse cost orders and termination of the agreement. If there are no such terms in the agreement, then counsel for the Claimant can merely make that representation to the Tribunal and to Canada. That would suffice.

Then the Tribunal is also minded to order that, if there were subsequently changes to the third funding--third-party funding agreement related to those clauses, changes relating to those two clauses about

termination and adverse cost orders, that the Claimant would inform the Tribunal and Canada when those changes occurred.

So, that's the Tribunal's inclination at the moment.

However, the Tribunal is of the view that it may benefit from hearing the full arguments on security for costs before making a final decision about the Order itself, but we wanted to inform both Parties about our inclination so that that may assist both Parties in fine-tuning your submissions for tomorrow.

So, that's for both Parties' information at the moment.

And that is it, we can turn to Agenda Item 3, which is Respondent's Request for Bifurcation.

It being the Respondent's Request, Ms. Di Pierdomenico, you have the floor.

AGENDA ITEM 3: RESPONDENT'S REQUEST FOR BIFURCATION

ARGUMENT BY COUNSEL FOR THE RESPONDENT

MS. DI PIERDOMENICO: Thank you, President Bull, Arbitrator Bethlehem, Arbitrator Bishop.

I will present Canada's remarks concerning its request for bifurcated preliminary phase.

As the Tribunal is aware, Canada's objection of this Tribunal to hear the case is with the Claimant's

failure to bring its claims in a timely manner. When Claimant filed its Notice of Arbitration on June 1, 2017, more than three years had passed since the Claimant knew or should have known about the breaches of NAFTA that it alleges, as well as the loss that it has suffered as a result. Tennant's inexplicable delay in bringing its terms within three years means its claim is time-barred and, as such, Canada has not consented to this Arbitration.

The issue before the Tribunal today is to decide when it would like to hear Canada's objection to the Tribunal's jurisdiction. Canada requests that the Tribunal rule on this issue in a preliminary phase.

The Tribunal should be guided by efficiency and fairness when deciding whether it should bifurcate these proceedings into a preliminary jurisdictional phase.

This case represents the epitome of when a Tribunal should bifurcate. Canada's objection is simple, it is discrete, and it is ripe for preliminary determination.

To determine whether a case is time-barred under NAFTA, the Tribunal need only to count back three years from the date of filing from the Notice of Arbitration. This determines the critical date for your purposes. Since the Claimant filed its Notice of Arbitration on June 1, 2017, the critical date is June 1, 2014. This is the date

that I want you to keep in mind throughout our discussion today.

No claim may proceed, under NAFTA Chapter Eleven, where the Claimant knew or should have known of the alleged breach of the NAFTA and any resultant damage before the critical date, June 1, 2014.

Another key piece of evidence that--key piece of information, excuse me, that I want you to keep in mind is the Claimant alleges four categories of wrongful actions in Paragraph 91 of its Notice of Arbitration, which you see here on the slide. They are detailed in subparagraphs (a) through (d) here.

To summarize briefly, the Claimant complains of the regulation and administration of the Ontario Feed-in Tariff program, which I'll refer to as the FIT Program. Specifically, these claims are that, (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 finally, (d), senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.

In this case, it is clear that all of these alleged categories of wrongful actions by Ontario and the independent electricity system operator--or IESO, as I will refer to them going forward--and any losses that it felt as a result were either known or should have been known to the Claimant well before June 1, 2014. This is what we are asking the Tribunal to decide in a preliminary Jurisdictional Phase.

So, my presentation today is structured as follows: First, I will set out the applicable law on bifurcation; and, second, I will apply the law to the facts in order to demonstrate why these proceedings should be bifurcated. These facts, substantiated in contemporaneous public documents and publications, were all available to the Claimant before June 1, 2014. The Claim is, therefore, time-barred from proceeding under NAFTA.

By the end of my presentation, you will see that this case engages the exact circumstances warranting a preliminary proceeding. It would allow a Tribunal to decide its jurisdiction over a matter before it engages into an inquiry into the Merits which ultimately proves to be unnecessary.

ARBITRATOR BISHOP: Could I ask one preliminary question?

Under Article 1116(2), which is the section you're

going under, who has the burden of proof with respect to proving when the Investor first acquired or should have first acquired knowledge of the breach and the loss of damage?

MS. DI PIERDOMENICO: It is the Claimant that has the burden to establish its claim meets the jurisdictional requirement of NAFTA, one being it meets the requirements of the time bar.

ARBITRATOR BISHOP: Is there any authority on that?

MS. DI PIERDOMENICO: The authority that I would point to would be Grand River. Unfortunately, I don't have anything--a specific paragraph that I can point to.

There may be others, but I think in terms of the purposes today, we are only trying to establish bifurcation and not so much the law on the time bar. But I'm happy to pull that authority and get it to you in soonest order.

ARBITRATOR BISHOP: Thank you.

MS. DI PIERDOMENICO: No problem.

So, turning to the applicable law, Article 21(4) of the UNCITRAL Rules, it provides that, "In general, the Arbitral Tribunal should rule on a plea concerning its jurisdiction as a preliminary question."

The language of Article 21(4) establishes a presumption that challenges to a Tribunal's jurisdiction

should be treated as a preliminary question when it is appropriate to do so. Additionally, established NAFTA Tribunal practice is to normally address the application of the time bar in a preliminary phase. Citing to NAFTA jurisprudence, the Resolute Tribunal in its Decision on Bifurcation found as a matter of NAFTA practice time bar issues are normally decided as a preliminary question, as preliminary questions, excuse me.

The Tribunal's inquiry when deciding whether or not to bifurcate proceedings under Article 21.4 of the UNCITRAL Rules is a limited one. The Tribunal need only consider the three-part test crystallized in the jurisprudence and set out very recently in the Resolute and Philip Morris cases to determine whether bifurcation is fair and would result in procedural efficiencies.

First, whether the objection is prima facie serious and substantial. In this case, Canada's objection is prima facie serious and substantial because it goes to the very basis of the Tribunal's authority to hear this claim. Canada has not consented to this Arbitration. Accordingly, the Tribunal does not have jurisdiction to hear the Claim.

Second, whether the time-bar objection can be examined without prejudging or entering the Merits. In this case, it is patently clear that an examination of what

the Claimant knew or should have known can be done without prejudging or entering the Merits. Moreover, Canada can establish the Claim as time-barred exclusively through contemporaneous publicly available information, avoiding discovery-related costs.

And, third, whether the objection, if successful, could dispose of all or essentially part of the claims. Here, Canada's time-bar objection is--if it's successful, it will dispose of all of Tennant's claims.

So, let's apply the three-part test on bifurcation to the relevant facts. In applying the first element of the test, the Tribunal must evaluate if Canada's objection is prima facie serious and substantial. The inquiry at this stage, as I mentioned before, is a limited one. As described by the Resolute Tribunal, the determination of the first part of the test should not entail a preview of the jurisdictional arguments themselves; rather, at this stage, the Tribunal is only required to be satisfied that the objections are not frivolous or vexatious, brought in good faith, and cannot be excluded on a prima facie basis.

As well, ratione temporis objections to jurisdiction have specifically been found to be prima facie serious and substantial. In Pey Casado v. Chile, the Tribunal determined that an objection that the subject matter of the Compliant fell outside the temporal scope of

the Treaty went to the very basis of Tribunal's power to award the relief sought by the Claimants. As such, the objection was prima facie serious and substantial.

Like Pey Casado, the application of the NAFTA time bar to this case goes to the very basis of the Tribunal's power to hear this case.

The consent of State Parties to arbitrate Foreign Investor claims under NAFTA is not unconditional. NAFTA Article 1116(2) clearly establishes a three-year time limitation for the filing of claims under NAFTA Chapter Eleven. Specifically, NAFTA Article 1116(2) provides that: "An 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."

The time limitation commences from the time either acknowledge or constructive knowledge of the alleged breach and any resultant loss or damage is first acquired. In accordance with the Agreement, NAFTA's time bar has been strictly applied by Tribunals. A delay in submitting a claim within the required three-year period is an absolute bar to an Investor's Claim proceeding.

This is why the Tribunal in Grand River decided to bifurcate the time limitation issue for trial as a

preliminary issue, stating: "Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defense, not subject to any suspension, prolongation, or other qualification, the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue."

Again, the time limitation is a clear and rigid limitation defense. There is no possibility for the Claimant to suspend, prolong, or otherwise qualify the three-year time limitation to bringing its claim. To be clear, the Tribunal does not need to conclude, nor do we ask the Tribunal to conclude, if this case is likely to be time-barred. Recall, the Tribunal's inquiry is a limited one at this stage. In its decision on whether to bifurcate, Canada only asks the Tribunal to determine whether Canada has a reasonable case on its face.

For this task, it is necessary for me to summarize some of the most basic and relevant facts to this case to demonstrate that Canada's jurisdictional objection engages the essence of a serious and substantial question.

Now, I'm laying out these facts because they are important to the legal test of bifurcation.

So, you may wish to keep your slide on the four allegations of breaches. I believe it is Slide Number 3 in your materials--that is Paragraph 91 of the Notice of Arbitration--as I will be referring to these four

allegations throughout my review of the basic facts which are relevant.

Now, let's move through some of this information.

So, let's rewind by 11 years. On October 1, 2009, the FIT Program was launched. At the time, it was administered by the Ontario Power Authority, which I refer to going forward as the OPA. This was the predecessor to the IESO. The Claimant, through its alleged investment, Skyway 127, submitted an application to the OPA for a FIT Contract on November 24, 2009, and this is according to the Claimant's Notice of Arbitration.

Separately from the FIT Program, on January 21, 2010, the Government of Ontario entered into the Green Energy Investment Agreement, referred to as the GEIA on the slide. The Agreement was with a consortium comprised of Samsung, C&T Corporation, and the Korea Power Electric Corporation, which I'll refer to as the Korean Consortium going forward.

This Agreement with the Korean Consortium was publicly announced by The Premier of Ontario that same day. The Government of Ontario issued news releases about it. In fact, the Claimant acknowledges this was public information at the time.

The amended and restated agreement with the Korean Consortium was published on the Ministry of Energy's

website on July 29, 2011. This Agreement is extensively cited in the Claimant's Notice of Arbitration.

Additionally, the Minister of Energy issued several directions to the OPA on September 30, 2009, April 1, 2010, and September 17, 2010. These directions required the OPA to, among other things, reserve a certain amount of transmission capacity for the Korean Consortium so that it would have priority access to the grid.

These directions, like all of the Minister of Energy's directions and directives to the OPA and IESO, were posted on the OPA and IESO's website as of the date they were issued. The timing of the announcement of the Korean Consortium's agreement with Ontario, the publication of the amended Agreement, along with these accompanying Minister's directions on reserving capacity for the Korean Consortium, contain the information relevant to Claimant's Claim (c) of Paragraph 91 of the Claimant's Notice of Arbitration, that Ontario unfairly manipulated the awarding of contracts under the FIT Program. Two of these directions are cited in the Claimant's Notice of Arbitration.

Now, while all of this information was available and circulating in the Korean Consortium agreement with Ontario and its priority access to the grid, there was an important development under the FIT Program. In

April 2010, the first round of FIT Contract offers were made by the OPA. However, the Claimant's Skyway 127 proposal did not receive a FIT Contract during this first contract round--this first round of FIT Contract offer, excuse me.

And then came the changes to the FIT. These changes were detailed in a June 3, 2011, Minister of Energy direction to the OPA regarding required changes to the FIT Program rules, which was published on the OPA and IESO's websites on that date, and these changes form the basis of Claimant's Claim (b) of Paragraph 91 of the Notice of Arbitration, that Ontario unfairly manipulated the dissemination of program information under the FIT Program.

But very soon after these changes were made to the FIT Program, on July 4, 2011, FIT Contract offers were made for the Bruce-Milton Transmission area and were publicly announced, and Skyway 127 was, again, not offered a FIT Contract at the time.

Soon thereafter, on December 5, 2011, the Office of the Auditor General of Ontario made public its Annual Report. The Report provides key details on the Korean Consortium's agreement with Ontario. It explains how the priority access to Ontario's transmission system for the Consortium had impacted the transmission availability for other renewable energy projects. The Auditor General's

2011 Report further describes how the limited capacity available on Ontario's transmission and distribution systems impacted the Award of FIT Contracts and noted that more than 3,000 FIT Program applications could not be accommodated to the existing power grid given the higher-than-anticipated number of renewable energy projects awaiting connection to the grid.

These findings by the Auditor General in 2011 are at the heart of the Claimant's allegations concerning the unfair manipulation in awarding access to the electricity grid, unfair manipulation in the dissemination of FIT Program information, and unfair manipulation in the award of FIT Contracts, or Claims (a), (b), and (c) of Paragraph 91 of the Claimant's Notice of Arbitration.

The Annual Report is actually cited in the Claimant's Notice of Arbitration as well.

Now, let's consider the Claimant's fourth allegation, (d), in Paragraph 91 of its Notice of Arbitration. This fourth allegation concerns the document destruction involving Ontario senior officials.

This issue came to light in 2011 in a matter involving cancellation of two gas power plant contracts in 2010 and 2011. Throughout the years 2011 to 2013, this matter was highly publicized in the press, debated in the Ontario Legislative Assembly, and was the subject of a

special investigative report by the Information and Privacy Commissioner of Ontario. This investigative Report, titled "Deleting Accountability: Records Management Practices of Political Staff," was tabled in the Ontario Legislative Assembly on June 5, 2013.

Thus, the Claimant's unsubstantiated fourth allegation concerning the destruction of documents is based on highly publicized events that were well known throughout 2011 to 2013.

Finally, on June 12, 2013, in a publicly posted direction, the Minister of Energy directed the OPA to not procure any additional large FIT projects. As Skyway 127 proposal was, with respect, to a large project, this direction effectively eliminated any further consideration of the Claimant as a FIT candidate as of June 12, 2013.

The facts and publicly available documents that I've just referred to are just some of the basic facts that the Claimant knew or should have known before the critical date of June 1, 2014. And this is really just a minor sampling of such facts. It can hardly be said, as the Claimant attempts to do, that Ontario's acts are surreptitious and outside the public's purview.

Now, I understand that I just walked you through a timeline and set out a lot of information with quite a lot of dates attached, so I thought it might be useful to

summarize this information for you in another format that you can take away with you.

The chart on the screen or in your packages sets out the four so-called "categories" of wrongful actions of Paragraph 91 of the Claimant's Notice of Arbitration in red. Alongside each of the allegations I provide the information underlying all of these claims--underlying each of these claims, excuse me, and the dates when this information was made public or was otherwise available to the Claimant.

You will also see at the bottom the dates the Claimant alleges impacts on its investment. This is the row in blue. I always get confused between rows and columns, but that's a row.

So, again, you will see all of the information was available to the Claimant before the critical date. In fact, the Claimant does not make a single reference in its Notice of Arbitration to an act or measure alleged to be in breach of NAFTA in relation to its Skyway proposal that takes place after June 1, 2014.

In its attempt to state the timeliness of its claim, the Claimant boldly asserts that it did not know of any of these alleged categories of wrongful acts until documents were disclosed in more timely actions brought by other NAFTA Claimants. One of those Claimants, Mesa Power

Group, brought its claim on October 4, 2011, just about six years before the Claimant initiated its nearly identical claim.

In light of the Mesa Claim, the Tribunal need not conjecture nor guess when a reasonable Investor knew or should have known to bring its NAFTA challenge in relation to the FIT Program. Mesa brought its virtually identical claim on the basis of exactly the same information that was available to the Claimant.

And when we speak of virtually identical claims, we are not only talking substantively similar. We are actually speaking of identical paragraphs in Tennant's Notice of Arbitration that appear to be copied from the Mesa Notice of Arbitration. And these slides simply--I believe there is five of them--show exactly that.

In the left column, we have the paragraphs in the Mesa Notice of Arbitration, and the column on the right shows the exact same paragraph in the Tennant Notice of Arbitration.

Moreover, these virtually identical claims in the Mesa Case were made public before the critical date. Mesa's intention to initiate its Claim was posted on the Government of Canada's website on August 3, 2011. Its Notice of Arbitration was posted on the same website on May 15--by May 15, 2013. Therefore, the Claimant cannot

hide behind the argument it makes in response to Canada's request for bifurcation that all of its claims are based upon facts that would not be known by anyone in the Investor's position before June 4, 2014. This is simply not credible when the Claimant references documents and information as supports for its claim in its Notice of Arbitration which were made public before the critical date.

The Claimant may also not be permitted to reset the NAFTA's time bar simply because it was able to point to a new fact that was discovered in the course of Mesa's timely brought case. It is normal for new facts to be uncovered throughout the course of a fully arbitrated claim; however, a new fact that is discovered in the context of another case does not extend the application of NAFTA's strict time bar for other potential Claimants. The test under 1116(2) is when a Claimant first acquires knowledge of its claims that result in damages.

ARBITRATOR BETHLEHEM: May I ask you there, what about if the new fact gives rise to an independently actionable claim?

MS. DI PIERDOMENICO: That is for the Tribunal to consider in looking at the new facts that the Claimant alleges.

However, the underlying claims here are virtually

the same. They are alleging unfair treatment by the Claimant's investment. Mesa made the exact same allegation, and therefore, we believe that we are far from that nexus in this case.

ARBITRATOR BETHLEHEM: I suspect that one of the issues that we are going to have to grapple with--I mean, the Claimant has made the point that these issues are inextricably bound up with the Merits, and in many of these time-barred cases, they are very highly fact-specific.

There are also questions that arise about a series of actions, continuing breaches, where there is an alleged continuing illegality. Now, you seem to be addressing this issue in a very, as it were, definite, specific sort of example, where we've got the "should have known" occurring before the time bar. But in many of these cases, it seems as if the "should have known" morphs into some X before, some X after, continuing series of conduct.

Are you going to be coming on to address this? Is this an issue as you perceive it to be in this case?

MS. DI PIERDOMENICO: In terms of whether or not I intended on addressing continuing breach today, no, I hadn't, because that is more substantive to the time bar. This is something that I think the Tribunal would consider in its analysis the facts.

But just looking at the plain language of

Article 1116, it is not a test for continuing breach. It is a test of when the Claimant first knew or should have known. So, there is a moment in time that you will be able to identify and be able to apply the time bar in that precise nature.

So, I'm sure that the Claimant is going to come up here and obfuscate and allege so many different claims and facts that were never known to it beforehand. However, I think you have to take the Notice of Arbitration as it is alleged by the Claimant, as we have done--we took it very seriously, and we looked at these Claims, and we believe that the time bar is clearly applied here in a manner that excludes the Claim from proceeding under NAFTA.

ARBITRATOR BETHLEHEM: I certainly understand your argument. I mean, one of the things that you are going to have to satisfy us on, given that you are asking us to decide to bifurcate at this particular point in time, is that we will be capable of engaging with your time bar point in grand isolation of anything else that may arise. I mean, you are asking us to bifurcate before we have even seen the Memorial of the Claimant, which is not completely unique, but it is quite unusual.

MS. DI PIERDOMENICO: Let me just unpack that a little bit.

While it might be unusual, as I have mentioned

before, it is normal NAFTA practice to bifurcate on the time bar, and that these assessments on what the Claimant knew or should have known at a particular point in time can be done in isolation. I had intended on addressing it a little bit later on in my presentation, but the idea is quite simple: All we are looking at is information that is on the public record and what the Claimant knew and going back to the Claim as alleged.

Now, I tried to walk you through that in my chart and in my fancy slide show, but the exercise for the Tribunal is quite clear distinct from the Merits. Now, what they are alleging in terms of the Merits of the case is in Article 1105, which is the minimum standard of treatment, which can be a quite grandiose-type analysis on the Merits. Here, we are not looking at that. All we are looking at is the Claim as alleged and whether or not the Claimant knew or should have known of its claim before the critical date. And, if so, then it's excluded.

We have brought to you an example of how a Tribunal would approach this analysis, and I can either continue on and jump that...or I can jump to that, but Tribunals are not overly stressed in terms of analyzing actual versus constructive knowledge. If you can establish this outside of the Merits, then you should be able to proceed to a bifurcated claim, and we believe we have a

strong case for that, given the public record that we have. And there's a lot more information out there. We just need the chance to bring it to you.

ARBITRATOR BETHLEHEM: Thank you.

ARBITRATOR BISHOP: Could I ask a question?

In terms of the standard, you're relying upon the language "should have first acquired." Is that you're not presenting evidence. I realize we're not at that stage, but, I mean, you don't have evidence of when the Claimant actually first acquired knowledge, do you?

MS. DI PIERDOMENICO: Well, the Claimant in its response to our Request for Bifurcation alluded to its actual acquisition of the knowledge after the Mesa documents were published.

ARBITRATOR BISHOP: Right.

MS. DI PIERDOMENICO: So, we have to give that to the Claimant, because perhaps that's the case. But the test is not irresponsible Investors operating in Canada. The test is diligent, responsible Investors, and that's why we have a test that includes constructive knowledge.

ARBITRATOR BISHOP: Okay. But--

MS. DI PIERDOMENICO: In my view, there is so much evidence out there, there are so much documents out there, that it is clear that there is a case for actual knowledge to be made. But, you know, they only know their own minds,

and so we move on to the constructive knowledge aspect in establishing what a diligent and reasonable Investor would know in the same circumstances.

ARBITRATOR BISHOP: Okay. The second question I have is what is it that they had to have knowledge of? As I read 1116, it is knowledge of the alleged breach and the loss or damage. But knowledge of alleged breach seems to be something other than knowledge of a particular event, but it seems to include, if I'm understanding you correctly and please correct me if not, that it seems to include that you have knowledge that there was an actual breach or at least an alleged breach of the Treaty.

Is that correct or wrong?

MS. DI PIERDOMENICO: That's right. I mean, basically, when would the Investor have been triggered. When would the Investor start to think about when its claims were formed. It doesn't need to have a full accounting of its claim. Obviously, that would dispel the need for any sort of discovery process.

ARBITRATOR BISHOP: Okay.

MS. DI PIERDOMENICO: We're not saying that's what the investor needs to establish under the NAFTA time bar, but we do have a sense here of the information that was out there and the Claims as alleged, in addition to two other NAFTA Claimants under the FIT Program that have brought

their claims to bar in a timely way, and we think that there's quite a bit out there that we need you to see.

ARBITRATOR BISHOP: Thank you.

ARBITRATOR BETHLEHEM: I'm sorry, just to check, so you are--I mean, you cited Grand River to us on a number of occasions. You are content to stand on that test. I'm just looking at some of what Grand River says: "Constructive knowledge of a fact is imputed to a person if, by the exercise of reasonable care or due diligence, they would have known, either from knowing something that ought to be put to the person to further inquiry or from willfully abstaining from inquiry."

So, it's a due diligence dimension that you are suggesting that the Claimants, on the basis of all of this public information, should have undertaken?

MS. DI PIERDOMENICO: That's right. I mean, we are talking about procurement contracts in renewable energy. This is not an area of the law that is unregulated. I mean, this is a highly regulated area in which there were specific rules, rules that were cited to in the Notice of Arbitration, cited to extensively.

How is it they know the FIT Contract Rules, and yet none the directives, the specific directives, that pertain to the FIT Program? This is not credible when it makes that sort of statement, that it's saying that it

would not have known of any sort of results from these changes that might have affected its investment.

So, I guess if that concludes the questions, I'll just proceed with them.

So, I have a conclusory sentence that says: "In light of all these considerations," but I don't remember what the considerations were that I presented to you. I'm sure they were amazing.

But ultimately, it's the first part of the test in that Canada's objection goes to the very basis of the Tribunal to hear the Claim, and, therefore, in light of all these considerations, it follows that Canada's jurisdictional objection meets that first requirement.

So, the second element of the test on bifurcation is whether Canada's objection can be examined without prejudging or entering the Merits.

In its determination on whether to bifurcate on the time bar, the Tribunal in Resolute found that the limited evidentiary inquiry to decide the time-bar objection in that case would not involve the Tribunal prejudging or entering the merits of claim.

So, let's look at what it did. It found that the date of the alleged breaches, the Nova Scotia Measures, are uncontested. Rather, the Tribunal's inquiry will turn on the question of when the Claimant first knew or ought to

have known that it incurred loss or damage.

Just like in Resolute, the dates of the alleged events to constitute the breach are uncontested. So, the factual inquiry required for this Tribunal to rule on Canada's time-bar objection in this case will also be limited.

The only issue for the Tribunal is to determine when the Claimant knew or ought to have known of the four breaches and its resultant loss. Therefore, a determination of whether the Claimant's claim is time-barred is a discrete inquiry that does not require the Tribunal to enter or prejudge the Merits.

As stated by the Resolute Tribunal, it's the bifurcated hearing that "would give the disputing parties the opportunity to put evidence on the Record as to what the Claimant knew or ought to have known and when and allow the Tribunal to decide the jurisdictional objection on the basis of that evidence. Such a limited inquiry would not involve the Tribunal prejudging or entering the Merits."

Unlike what the Claimant asserts in its response to Canada's request to bifurcation, the Tribunal will not have to determine, first, if and when the four categories of claims it alleges occurred and, second, if and when they were disclosed to the public. This misstates the Tribunal's task for reasons that I hope you understand now.

Moreover, taking the Claim as it is alleged by the Claimant does not require the Tribunal to simply take the Claimant's word for it when--on when it learned from the alleged breaches and its resultant loss. Such an interpretation would ignore the express terms of the applicable law which provides that there are two possibilities that may satisfy the knowledge test under 116(2), which is either actual knowledge or constructive knowledge, whichever is earlier.

So, past NAFTA Tribunals assessed both the actual and constructive knowledge, so what I alluded to earlier with Arbitrator Bethlehem, in assessing both the actual and constructive knowledge of both Claimant in ascertaining whether the three-year time limitation is met.

So, for example, in Grand River, I set out the example here for you. The Tribunal bifurcated the proceedings solely to decide the Respondent's time-bar objection. While the Tribunal could not establish actual knowledge before the critical date in that case, the Tribunal assessed the Claimant's constructive knowledge. The slide sets out part of the Decision that shows the Tribunal determined that there was enough information available to the Claimant to establish constructive knowledge to both the measure and loss as a result of the Measure.

Ultimately, the Grand River Tribunal dismissed the time-barred claims pursuant to NAFTA Articles 1116(2) and 1117(2) on the basis of a finding of a constructive knowledge alone.

In this case, as we have seen, the record is replete with contemporaneous, publicly available information that serves as the foundation for the allegations that is set out in the Claimant's Notice of Arbitration.

If this does not demonstrate actual knowledge, it must be indicative of constructive knowledge.

For example, we have referred to the relevant dates of claim, as alleged by the Claimant, which situates the Claimant's claim in a time period ending well before the critical date. We have referred to some of the contemporaneous public sources of information detailing the events and issues raised in Claimant's Claims and we further refer to another investor that brought its FIT Program-related claim in a timely manner.

Moreover, just as in Grand River, no discovery or witness testimony will be required to enable this Tribunal to make a determination on Canada's jurisdictional objection. The facts necessary to make its Decision are all part of the public record.

ARBITRATOR BETHLEHEM: Ms. Di Pierdomenico, before

you get on to your next slide and the third point, may I ask you--this is--you may wish to wait until the Claimant has set out its store, but they've already addressed this in their written pleadings.

They draw to our attention the situation as arose in Mesa Power where the Tribunal, having bifurcated and then went back on its bifurcation because it seemed to occur to the Tribunal that they could not address the issues without engaging in the Merits, it would, I think, be helpful to us if you could address that issue, either now or in Reply, and I would certainly find it helpful--and, perhaps, my apologies, because I could have perhaps identified this for myself on the basis of the Mesa public record. I don't know. But it would be useful to know what pleadings there were in Mesa at the point at which the Tribunal decided to bifurcate.

Was there, for example, a Memorial or were there only pleadings on the time-bar issue? Mesa Power seems to be all over this case, except it is not all over this case on the time-bar issue, and we'd like to know why.

MS. DI PIERDOMENICO: Just one minute.

Forgive me, Arbitrator Bethlehem, but the time-bar objection that Canada made was not actually the time bar under 1116(2), is my understanding. It was the six-month cooling-down period, and this is quite different than

needing to--entangling the facts to the merits of the Claim. The considerations were quite different there.

I think Canada is very strong--I shouldn't say Canada.

All of the NAFTA Parties are quite strong on the prerequisites for bringing a claim, and one of them is the cooling-down period because that would enable the Parties to hopefully, you know, get into a room, discuss, and settle. So, it's quite different in that case.

ARBITRATOR BETHLEHEM: That's helpful. And the Claimant does, in its citation, talk about the case turning on 1120(1) rather than 1116(2).

But it would be helpful, I think, to understand a little bit more, you may tell us that it's not relevant, but about the risks of a Tribunal having to sort of reverse itself because it doesn't have enough information once the pleadings, the truncated pleadings if you like, have been put before it.

MS. DI PIERDOMENICO: I mean, it is not unprecedented. Tribunals will see that, you know, a party will establish a prima facie case which is a quite limited review of what the facts are that we presented. As long as it's a serious and substantial question, the Tribunal should bifurcate and then give the Party the opportunity to prove its case or to establish its case.

If the Tribunal is dissatisfied, it is more than welcome to rearrange the proceedings as it sees fit. In fact, this is what was done in Resolute, the most recent time bar consideration in a bifurcated phase. The Tribunal bifurcated with the idea that, perhaps, procedural efficiencies could be gained, determined at the end of the day it was too entwined with the Merits of claim, and moved on.

However, we think that we will establish our case in a bifurcated--in a bifurcated phase and, you know, we will leave it to the Tribunal for its own considerations under the time bar at that time.

ARBITRATOR BETHLEHEM: One last point. You can choose when to address it.

In your estimation, why would it is not be appropriate, for example, to require the submission of a Memorial and then if Canada wishes to raise objections to jurisdiction, including time bar, and make a Request for Bifurcation at that stage, why would that not be appropriate?

Why are you urging something, as it were, even more antecedent on us?

MS. DI PIERDOMENICO: It's for simple reasons of fairness. We have not agreed to bifurcate this Claim because it is outside of the time limitation period. There

are some--there's a clear and rigid requirement here for Claimants to meet to bring a NAFTA claim, and all we are asking of any Claimant is to meet that requirement. It is not--it is not unconditional to arbitrate under NAFTA. Canadian, and indeed, all NAFTA Party consent--I don't mean to speak for you--but Canadian and all NAFTA Party consent has certain conditions that each Claimant must meet and, therefore, it is unfair to require Canada to engage in a full expense of a fully arbitrated process when it never consented to arbitrate in the first place.

ARBITRATOR BETHLEHEM: Thank you.

MS. DI PIERDOMENICO: Okay, so, basically, what I was getting to is exactly that, that there will be no need for a complicated analysis that would be required to engage the Merits of this case, which is an 1105 claim, the minimum standard of treatment.

So, assessing actual and constructive knowledge of the Claimant's alleged breaches and resultant loss will require no inquiry or prejudgment of the Merits of this case, and, as such, it follows that Canada met the second element of the test on bifurcation because of that.

So, the third part of the test on bifurcation asks the question: If Canada's objection were successful, could it dispose of all or an essential part of the claims? Now, if the case was compelling for Canada under the first two

elements of this test, our case knocks it of the ballpark for this final element because the application of the test on time bar will dispense with each and every one of the Claimant's four allegations concerning the regulation and administration of the FIT Program.

If the Tribunal upholds Canada's time-bar objection, the Claim would be disposed of in its entirety. None of the claims remain. There would be no discovery on document production and no Memorials, Witness Statements, Expert Reports, or Hearing on the Merits. There would be no complicated damages assessment either.

The Claimant is convinced that it would be entitled to at least limited discovery in a bifurcated Jurisdictional Phase. That is incorrect. And it is an issue that has already been decided by the Tribunal, which was done during the Procedural Phase, Procedural Order No. 1. It clearly provides that, should the proceedings be bifurcated, there will be no document production phase.

But unsurprisingly, as it has consistently done, the Claimant is seeking to rewrite the already established procedures, and such an approach undermines the Tribunal's Procedural Order, creates uncertainty in the arbitral process, and also results in additional and unnecessary costs for the Parties and procedural delay.

Canada's objection does not require more than what

is already set out in the Procedural Calendar. And if Canada's time-bar objection is successful, these proceedings will have to be terminated, achieving substantial savings and time and costs in the millions for both Canada and the Claimant.

As we stated in our Request for Bifurcation, a review of the costs incurred by Canada and Mesa Arbitration provide a pretty good basis for what Canada and the Claimant's costs would be in this Arbitration.

So, here on the slide, that's the actual paragraph lifted from our Request for Bifurcation, and it includes Expert and legal fees, arbitration costs relating to the Tribunal's time and expenses and hearing costs incurred. And this is over several years to conclude the arbitral process.

To defend itself in the Mesa Case, Canada was required to expend nearly CAD 7 million over some four years, and the majority of the sum was incurred arguing the Merits and damages. Mesa's costs were even higher at USD 9.3 million.

So, there is no question that, if Canada's challenge to the Tribunal's jurisdiction were granted, it would avoid both disputing Parties incurring many millions of dollars in costs, and moreover, the Claimant will not suffer any prejudice if the proceedings were bifurcated

because eventually--if they were not, eventually it would have to defend our jurisdictional claim to begin with.

So, since Canada's objection would dispense of the Claimant's entire claim, it would result in this procedural efficiency and it follows that Canada meets the third element of the test.

So, to conclude, a NAFTA State Party's consent to arbitrate under NAFTA Chapter 11 is not unconditional. NAFTA Article 1116(2) imposes a strict three-year time limitation. The wording of the provision is clear and rigid. It is not subject to suspension, prolongation, or other qualification. Canada has not consented to arbitrate any case that is not submitted within NAFTA's three-year time limitation period. This Tribunal, therefore, lacks jurisdiction to hear this claim. Full stop.

Now, at this stage, the Tribunal need only determine whether or not to hear Canada's objection to its jurisdiction in a preliminary bifurcated phase, and as demonstrated in Canada's submission, this is exactly the type of preliminary objection that warrants bifurcation pursuant to the UNCITRAL Rules, and this is for reasons of both fairness and efficiency.

Canada's jurisdictional objection is both serious and substantial because it goes to the very basis of the Tribunal's power to hear the Claim and it cannot be

excluded on a prima facie basis. Canada's jurisdictional objection does not require prejudging or entering the Merits. The only consideration for the Tribunal is whether the Claimant knew or should have known of the breaches it alleges and resultant damages. This issue is ripe, succinct, and discrete.

As we have explained, there is sufficient information in the facts as alleged by the Claimant in its Notice of Arbitration and the public record to establish what the Claimant knew or should have known about each and every one of the claims it alleges and losses well in advance of the critical date of June 1, 2014.

And if Mesa knew to bring a nearly identical claim in a timely way, so too should the Claimant in this case.

And, finally, Canada's jurisdictional objection will dispose of Tennant's entire claim.

So, that concludes my remarks on bifurcation.

ARBITRATOR BISHOP: I have a question. There's a time-bar issue such as Article 1116(2). Is that a jurisdictional question, or is it an admissibility question?

MS. DI PIERDOMENICO: It's long been settled that the time-bar issue under 1116(2) is an issue of jurisdiction, the Tribunal's jurisdiction. As it is set out in Article 1122(1), I believe, there are requirements

that the Tribunal must look at in order for a Claimant to bring a claim, and, you know, there are several cases that I've looked to the issue of jurisdiction and admissibility, the most recently one being Resolute as well as Philip Morris. In the NAFTA--if you want to stick to the NAFTA context, we totally can: Apotex as well as Grand River. Each considered this to be an issue of jurisdiction.

ARBITRATOR BISHOP: Thank you.

MS. DI PIERDOMENICO: The time bars.

ARBITRATOR BISHOP: Thank you.

PRESIDENT BULL: Thank you very much for your submissions, and the Claimant now has 45 minutes to make its Response.

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. MULLINS: Thank you. If we can get the time started once my PowerPoint is on.

(Comments off microphone.)

MR. MULLINS: Thank you. I'll be handling this argument.

And the first thing I would point out, I think, just sort of a principle I think was kind of in--buried in the counsel's remark is, look, if one or two NAFTA parties were able to sue, everybody should be able to sue, but that's not true. Because as the--coming from the questions of the Panel, specifically Sir Daniel, this Claim, this

Arbitral Claim is premised on systematic withholding information regarding this FIT Program.

The Claim was--certainly, as counsel showed up, there are factual similarities in the notice because it was the same FIT Program. We're not denying that. But the difference is that revealed in that proceeding were independent, separate violations of the NAFTA that, in fact, this Claimant and other Claimants could sue.

But all those facts, that we'll show you in a moment, came out after the critical date. Independently, they are all a basis for a claim. And I'll say this now and I'll say it at the end: If you find even one of them with sufficient to go forward, then we've wasted our time by bifurcation; correct? It's been a waste of time. So, I don't think there's only one. I think there is multiple, but I just say, if any of them become actionable or timely under the standards, then we've simply wasted our time.

And Ms. Dallaire this morning--I hope I pronounced your name correctly--said this morning that there is no way, that it would be impossible for us to possibly show that our Claims were timely, and she is simply wrong. It is very critical that the information that is premised on these Claims are timely and that bifurcation would be simply a waste of the resources of the Panel and of the Parties.

Next slide. Thank you.

The good news is I think we agree on the test. So, at least we'll have a big argument about the law because I think on this one, unlike the last argument we had, there were some differences, but I think generally the standards are the same. We all agree this is a three-factor test.

The way I look at it, though--and I think from the Panel's questions, we may not agree on how to describe it--but you have to meet all three, and then what ends up happening is it becomes sort of a sliding scale. So, we certainly--well, it's easy to say, "Well, yes, I could ultimately win on a jurisdictional objection. You know, I think I have a substantial argument." But the challenge is that: Is it really going to reduce the costs if you can't show it's impossible, that there is no way that the Claimant can show that its Claims were timely? Is it really not going to be intertwined with the Merits?

And I think what's really critical here is that--in response to Arbitrator Bishop's question--there is no allegation, no claim here; that we knew that, for example, that special circumstances would be given to the IPC company, which was a Canadian company that was given special conditions. Obviously, we didn't know that, and so, then, we get into a question of should you have known,

and that is where it gets really difficult, and it gets intertwined with the Merits.

This is not the case, as Sir Daniel was asking, is it usual in these kind of cases to go forward, raise the jurisdictional at the end, have the benefit of briefings of both Parties. This is not the case to bifurcate because we do believe at the end it's going to cost more resources and more time for both Parties.

Next slide.

As I said, this is not Mesa Power. If you look at the allegations of Mesa Power, we are not suing here--for example, in Tennant--simply because a special deal on its face was given to the Korean Consortium. We recognize that that was out there, that it was a Korean Consortium. What this case is about is an issue of surreptitiously hiding the wrongful acts of--that Canada did, that not only Tennant knew or did not know or should have--could not have known, but any investor could not have known until after the information was released after your June 1, 2014. The information of Windstream came as well, so--oh, I'm sorry.

ARBITRATOR BISHOP: What information is it that was hidden?

MR. MULLINS: Sure.

ARBITRATOR BISHOP: What's the key information that you say was hidden?

MR. MULLINS: Sure. It is later in my slides. But, no, I will just give you an example. There's a--

ARBITRATOR BISHOP: That's fine.

MR. MULLINS: No, no, no. It's fine. Let me--I was going to go through some of that, but specifically just, for example, the issue with the IPC--let's get to my notes for a second.

(Comments off microphone.)

MR. MULLINS: International Power Canada, for example, and that's just--this is just one obvious example. Ms. Lo testified at the hearing that she was a high-level official and testified at the hearing. This literally came up during cross-examination that I took of Ms. Lo. We had no idea--you are not going to find any of this in any of the claims submitted by Mesa. It turned out--

ARBITRATOR BISHOP: Is this her testimony in the Mesa Case?

MR. MULLINS: It is, yes. Which did not become public until--yeah, her testimony did not become public until January 9, 2015, in our Post-Hearing Brief where we describe this. And then also there was some of her testimony as well. But, in any event, what she testified, that Ontario had a B club, meaning that wanted to protect the--basically wanted to protect IPC--I call it "IPC"--from the Korean Consortium set aside. So, if you're familiar

with the case, what essentially happened was that Korean Consortium was provided basically a preference to go in and take what it needed to satisfy its GEIA, and other Applicants, including Tennant, were essentially in bid for the rest of the remaining of the proceedings.

What happened was she testified in the hearing that they did a test run, and it turned out the IPC was not going to win, and then they changed it. Okay. That is specific protection to a Canadian company, and, in fact, this Canadian company, the President was a Past President of the governing Ontario Provincial Liberal Party, and essentially this was a party--this guy was big up in the political party. And they said: "Look, we've got to redo this," and they redid it. The result of redoing it is that Tennant fell apart--fell out of the ranking in terms of winning.

(Comments off microphone.)

MR. MULLINS: And actually it was the next one in line. It won. Had that Decision not been made, they would have got a multi-million-dollar contract.

That's not only issue, but certainly you will see nothing in their PowerPoint that mentions anything about that when they compare the Notice of Arbitration in Mesa and the Notice of Arbitration of Tennant. You're not going to see anything about that because obviously Mesa did not

know about that. No one knew about that until she revealed it in the cross-examination, and ultimately we think it's a separate issue.

You haven't asked a question, but I'll answer one you might ask: Well, how did the Mesa Power Panel deal with it? And they didn't. Whatever it is, they just didn't address it. In fairness to them, we did not have a chance to go into it. I will tell you it's going to be a big issue in this Arbitration because it is "but for." Had they not done that, we would have won--or our client would have won its contract, rather.

ARBITRATOR BISHOP: Just to give me a quick overview of the timeline on Mesa, when was the Mesa Notice of Arbitration first published?

MR. MULLINS: The documents were published three days after the critical date, which is also on a Power slide.

ARBITRATOR BISHOP: So, the notice of--sorry.

MR. APPLETON: Filed, not published.

MR. MULLINS: I thought he was asking--

MR. APPLETON: He asked when they were published.

MR. MULLINS: Yeah. Right.

MR. APPLETON: It's not when they were published. It's when they were filed.

MR. MULLINS: No. You know what? Actually, go to

that slide. Because I think that answers your question. Maybe it doesn't, but I think it answers your question.

Just go up and we will go back to that. Go to the timeline issue, and we can go back.

ARBITRATOR BISHOP: I apologize if I am out of order. I don't mean to.

MR. MULLINS: I think that you are asking when the documents of Mesa Power were published on June 4, 2014, if that's what you are asking.

ARBITRATOR BISHOP: Yeah. Is it--does that include--when you say the "Mesa Power documents," does that include the Notice of Arbitration?

MR. MULLINS: We'd have to look.

ARBITRATOR BISHOP: Okay.

MR. MULLINS: We'd have to look.

ARBITRATOR BISHOP: Fair enough. Just one other question in that regard: When did you become counsel for Tennant?

MR. MULLINS: When did we become counsel for Tennant?

MR. APPLETON: We'd have to look. We can look at that too.

ARBITRATOR BISHOP: I'm not looking for a specific date. Was it after or before the critical date?

MR. MULLINS: I'm confident it was after June 1,

2014, if that helps you. I'm confident of that. Okay.

(Comments off microphone.)

MR. MULLINS: Okay. Thank you. Sorry.

As I said, again, there's a similarity obviously between--it was the same FIT Program, but a--Skyway was a successor. Tennant is actually a successor to GE. This was a project that was with GE, General Electric Company, an American company, and GE does things on the up and up. I have been privileged to represent them in the past, a great client. They don't expect that when they lose a project that there is some sneaky thing going back. They didn't assume that when they announced that: "Gosh, you didn't make the ranking, that the real reason you didn't make the ranking was not because there's a fair process," but we need to protect the IPC. That's what they didn't know. That's a separate breach, and there is no way they could have known that.

Next page.

You're going the wrong way.

(Comments off microphone.)

MR. MULLINS: And, again, this is just the statute, I think we all agree, but I did want to talk about this a little bit, about the burden of jurisdiction.

Our belief, Arbitrator Bishop, is that we've met our burden to establish jurisdiction. In other words, our

Claim under the Glamis Gold is that the Tribunal should take our Claim as alleged. We've established jurisdiction, in other words, the events that we are talking about became public. That's what we are relying on. We think we've established jurisdiction. We think, then, the burden is on Canada to establish its challenge. I don't think it's appropriate that we got to say at the ultimate we've got to prove a negative; right? Because the answer to your question was, is there any evidence or any claim that we do--IPC, for example--obviously, we couldn't have; right? So, the Claim has got to be: Should you have known?

We don't think--I think in this situation, ultimately that becomes Canada's challenge. We can't prove a negative of what we should not have known; right? We showed that we did not know these things. We showed that this stuff we are relying on became public afterwards. We believe we've established our jurisdiction. It becomes a burden on the Respondent to make their Claim on challenge, challenge that jurisdiction that we should have known earlier.

ARBITRATOR BISHOP: So, as to Article 1116 itself, is it your position that establishing the matters that are the subject of Article 1116 are the burden of Canada in the first instance?

MR. MULLINS: No. I'll try it again. I think

ultimately the Claimant has the burden to showing jurisdiction. I think we've done that. I think then, if, for example--for example, we would have had to have a claim--which we did--that said, okay, these are the--here is the timeline. These are when we learned these things, and, therefore, we could not have known earlier, but that's all we need to do. In other words, our claim, on its face, shows that we have jurisdiction.

And in answer to your question, it doesn't show, on its face, that we knew it earlier. In other words, there is nothing in the Claim that says, Oh, by the way, I found out about this thing back in 2000 or something. It doesn't say that; right? It says these are what we are relying on. This is the timeline, therefore, we met our burden.

I think at that point, then the challenge is on Canada to say--after we've made our prima facie evidence of jurisdiction, the burden becomes on Canada to say, okay, now thank you very much, but you know what? You should have known earlier and you should have known earlier, and, therefore, I think then the burden becomes on Canada at that point after the prima facie standard is met. And essentially I think we all agree that they are not claiming that we clearly knew beforehand.

And I think, then, reality is that when I go back

to this idea that when we want to see if it's intertwined with the Merits and are we trying to save time, I do believe going to back to what Ms. Dallaire had said earlier is they really needed to show it is impossible for us to win, because when you look at the first factor, okay, is it substantially--they have a substantial defense, nor is it frivolous, but then beyond that, is it intertwined with the Merits, and is it going to waste time?

And I go back to the point that is if you believe that there's a good question that any of these claims would survive a bifurcation--I think all of them would. But, if any of them do, then we've wasted our time because we now have gone through all this, and then we're going to have to do it again. It would make much more sense to try the whole case at one time.

Go ahead. Next slide.

ARBITRATOR BETHLEHEM: Mr. Mullins?

MR. MULLINS: Sure.

ARBITRATOR BETHLEHEM: Mr. Mullins, just a quick question which goes back to your slide with the timeline where you say publishes Mesa Power documents.

MR. MULLINS: Yeah, we will skip that. Go ahead.

ARBITRATOR BETHLEHEM: It's just a simple question. I'd like to know what you mean by the "Mesa Power documents." The Procedural Orders in Mesa Power, as

I look at the PCA website, must have been published on or about the date of their issue. The Award obviously came a little bit later, but what is it that you're referring to when you talk about the Mesa Power documents? You reference specifically the Hearing Transcript on April 30, but are there other documents?

MR. MULLINS: No. The Transcript actually came later. Our Post-Hearing Brief was published in January 9, 2015. The Award was on March 24, 2016. We can get you details as to exactly--

MR. APPLETON: Might I offer some assistance?

MR. MULLINS: Go ahead.

MR. APPLETON: Sir Daniel, perhaps I can offer some assistance.

This was a case where there were tremendous amounts of issues with respect to redaction of confidential information and many, many motions being brought with respect to that. There were countless motions, and this caused delay, very significant delay in the publication of all types of documents. And, as a result, on June 4, that's when the bulk of the documents in this case had finished a very extensive declassification and dispute process in relation to that.

And that is why--the bulk of the information in this case that would have normally been produced earlier

did not come out by the PCA and through the normal process until that date. That's why I was so careful. Before, we were trying to reduce the number of confidential documents in the process with it. It became very contentious and required a tremendous amount of the engagement of the Tribunal and with a tremendous amount of paperwork back and forth. And so that's why on June 4, the orders of which--the orders were out but not the substantive materials underlying the case, and that's the case. So, that's why I remember that date, in particular, because it took us a very long time to be able to get everything agreed across the board to be able to deal with that.

Now, we can go back, if you'd like, to find some more on that, but that's basically my recollection as to why and when that occurred.

ARBITRATOR BETHLEHEM: Well, I mean, it's obviously a matter for you and a matter for Canada as to whether any of this is relevant. I mean, it is not necessarily clear from the PCA website when things were actually sort of posted and made public. There are lots of documents, Written Submissions, that have a date prior to the 1st of June, and I presume were put on the website beforehand. I mean, Investor's Memorial Public Version is dated 20th of November 2013.

So, insofar as either for you or for Canada, the

issue of when documents were made public by the PCA, then I think it, obviously, is going to be important for you to sort of tie it with a degree of precision. I mean, we have the ability, obviously, to do our own research as a PCA Tribunal, but this is a matter that you should be addressing us on. I mean, I was really focused on the generality of the statement "PCA publishes Mesa Power documents." It doesn't necessarily tell us anything.

MR. APPLETON: Sir Daniel, I would be happy to come back. I believe that the dates come from an email communication from the Secretary of that PCA Tribunal at that time, and I believe that might assist in this regard, and I'm sure that we could find it. I don't know if we can find it by tomorrow, but I'm sure that we could find it fairly quickly with respect to that. But it was an unusual situation because of the extensive amount of dispute, and that's why we've done everything we can in this case to try to minimize those types of issues because we are worried that we could see that again. And it was very intensive in terms of the needs of the Tribunal.

ARBITRATOR BETHLEHEM: And just as a last question which you may wish to think about: I mean, is it your case that, either from on the 4th of June or some suitable date thereafter, that the Claimant in this case, Tennant, was subject to a kind of due diligence inquiry obligation which

ultimately would have put them on notice?

Because we all seem to be focused on June 1 being the critical date, and then you are drawing your line very strategically beyond that, June 4, this is when the documents were published; April 30, when the Hearing Transcript was published.

At what point would a claimant be expected to be sort of on notice simply because documents had been put in the public domain?

MR. MULLINS: Sure. The answer clearly is, no, I don't believe--clearly, for example, the IPC issue was not available on June 4, 2014, because the actual Award was not issued until 2016 and the Post-Hearing Briefs was--the first time I believe it became public was not until January 9, 2015.

Well, I think I'm--I thought about this before the argument. We were trying to be as reasonable as possible, and now I realize I just put myself in a situation--because you are asking questions I probably would ask if I were you.

I think it's going to be on an issue-by-issue basis. I could very comfortably tell you that everything we are suing on was well after, frankly, between June 4, 2014. Our point was that's the first time the Mesa documents became public. I will tell you that the critical

events are going to be the April 30, 2015, date when the Power Transcript becomes public, and our Post-Hearing Brief on January 9, 2015. I think that's where you are going to find the critical events that we believe are separate breaches in event.

But what we were trying to show the Tribunal, just for purposes of this Hearing, whether or not you're going to want to decide to--is it clear that--the point is that even the Mesa Power documents--generally, the pleadings--were not fully public until after the confidentiality was done, until after June 4.

The reality is it's going to be even much later when it became public, just things such as the IPC. The other thing, what we haven't talked about--it is also critical--is that it turned out that the Korean Consortium had essentially picked off the low-hanging fruit. And so what Canada essentially had set up was a process of ranking based on various criteria. What the Korean Consortium did was go to this low-hanging fruit and use them to comply with their obligations.

And this is what Judge Brower said in his concurrence: "This could only be characterized as grotesque. As it actually happened, the Korean Consortium was thereby enabled to acquire low-ranked FIT applicants in order to fill its allotted 500 megawatts thereby

clearly--jumping clear losers in the FIT Program over higher-ranked but ultimately unsuccessful FIT applicants due to the reduced available megawattage."

This predatory behavior was not revealed until the Tribunal issued its Award in March 24, 2016, or arguably, if you read our Post-Hearing Brief, on January 9, 2015, but his finding was not available until 2016. So, these kinds of things, we believe, are separate violations. That was not in. We didn't know. The Mesa--so, the Mesa team did not know what--how--all we knew was that there was this GEIA. And we are not claiming, on its face, that was the claim here.

What we're saying is, worse than that, the fact that the Head of GEIA recognized that issue. But right now, in terms of the Claim, it's this predatory behavior of taking "clear losers"--in the terms of Judge Brower--and basically putting them up ahead, in addition to the fact that Skyway lost because it cut a special deal with a Canadian company.

None of this you'll find in the Mesa Notice of Arbitration. It could not have been there because no one knew publicly. Only Canada knew. They kept it secret. And for them now to say: "Well, you should have known that we were going to act badly. Once you lost, we just assumed that it was all these violations is not obviously the

test." Okay. Obviously, Skyway knew they didn't get a contract. It is in their chronology. Skyway doesn't. Tennant doesn't get its contract, doesn't get its bid, but Tennant did not know why. They didn't know there was a special deal with IPC. They didn't know that Korean Consortium was moving people ahead of time. It could not have known that at the time because this was all secret.

And that goes to my next point. It's not just knowledge of loss, but the reason for loss. It's not just you know you lost. It is you know how you lost. If Canada's secretly manipulating the system and doing a secret, then how can you say conclusively that it would be impossible for us to--should have known that, you know what? We lost. It must be that they are giving special deals to local companies. It is simply not the test and simply not accurate and simply be a waste of time to bifurcate.

Canada's point is that it hid its wrongful behavior from the public in bid proponents, and Tennant did not know that this stuff was happening, and it is only when Tennant knew or should have known--and, again, there is no way they could know through this. And we talk about some of these other things that we could not know. We talked about the predatory behavior of the Korean Consortium. We talked about the special deal, the IPC, a couple other

things that came out from the Hearing. And, again, all this came out publicly after the critical date. We found out that Canada allowed the Korean Consortium to breach the GEIA. So, it wasn't just that there was this GEIA, that Korean Consortium didn't give them anywhere near what it was required to do, was allowed to breach it, and then they were allowed to engage this predatory behavior of taking the low-hanging fruit. All of this became public afterwards.

Again, we found courts that NextEra had won. But we didn't know that NextEra was lobbying and getting special deals. Again, it's not so much that the events happened. You can't assume an investor is supposed to know that wrongful behavior is happening, that's not right.

Again, this is just what we talked about on the PowerPoint, on the timeline. Again, the claims were posted in 2014.

Go ahead.

MR. APPLETON: And it says what?

MR. MULLINS: On June 4,2014.

MR. APPLETON: And it says where we've cited it?

MR. MULLINS: Yeah. Yeah, it has the location on our filings.

The next slide.

I want to talk a little bit about this. Counsel

said, well, the GEIA, the amended GEIA was on the website, the actual GEIA itself, the original deal that was breached, and they allowed to breach and all that, that wasn't made public until sometime between June 4 and April 30, 2015. We tried to pin that date down as much as possible. We do know it was after the June 1 timeline, but it was made public. Again, all that was after the June 1 time period, the actual GEIA itself. We know that because we had to go to court to get it. And so, this was not something that was well-known. The amended one they made public; this one, they kept secret.

Again, I think this is the critical part. This is, I think, a critical date because I do think when we get to the discussion on jurisdiction at the Final Hearing, when you go through the Memorials and stuff, you're going to find that the critical events were made public by the revelation of a transcript and/or the Post-Hearing Brief on January 9, 2015.

Again, I talked about the NextEra getting access. I talked about the IPC event. And, again, this stuff did not become public. It was not in the Mesa Notice of Arbitration because simply people did not know.

The Windstream Award, there were findings about destruction of documents. Again, all that was after the critical date. Counsel said, well, it was public that we

were showing documents. This was the actual program itself, the FIT Program. We think it's different, but, again, this is all, again, afterwards.

So, not, again, to belabor the point. But, again--

(Comments off microphone.)

MR. MULLINS: Tennant, this case is not Mesa Power. Again, as I've said, you'll find all this stuff that we've talked about, these critical breaches were not in the Mesa Notice of Arbitration. It could not have been because they were not public.

(Comments off microphone.)

MR. MULLINS: Okay. Perfect. Yeah, so just answer--well into the slide. What was made public on June 4, 2014, was a public version of our Memorial, the Mesa Memorial. The public version of the Witness Statement of Cole Robertson, who was a principal witness for Mesa on April 24, 2014. That was made public on that June 4 date and then the public version of the Expert Reports.

Go ahead.

ARBITRATOR BETHLEHEM: So, I'm here looking again at the PCA website as you are talking, Memorial of the Investor.

MR. MULLINS: Yes.

ARBITRATOR BETHLEHEM: And in the big red block on

the top of it, says "public version, May 15, 2014."

MR. MULLINS: That's when we submitted it, but we have an email that's from the Secretary, asking our--to be uploaded to the Web site. And we can provide this for the record, but they uploaded it on June 4, 2014.

ARBITRATOR BETHLEHEM: Right. As I say, I don't know how much weight we need to give--and both sides will address us on this, to the date of publication by the PCA for purposes of putting some other Party on notice, and it would be helpful if you address that. But, as you do so, if things turn on particular dates, then I think we need to have the proof of those dates.

MR. MULLINS: Sure. I will tell you that this investor, obviously until things become public, could not be reasonably expected to know a Memorial unless it's made public. It didn't become public 'til June 4. I will tell you, again, things like the IPC, things like what we found out about GE--the Korean Consortium being allowed to basically breach the GEIA, these things were not in that first Memorial. Because we didn't know--all that came later.

So, it may ultimately be a moot point, but I do--I will confirm that we have established that our Memorial was not made public, wasn't posted until June 4, and that fact will then, whatever is in there, somebody could argue,

well, you should have known, based on what's in this Memorial. But I will tell you for purposes of here, it may be a moot point, because of the critical stuff I'm talking about came later after the hearing, anyway. It was not in that Memorial.

ARBITRATOR BETHLEHEM: Then, it's obviously then going to be important to go back to Mr. Bishop's sort of question as to when you were instructed by Tennant. You suggested that it was going to be after the first of June. We appreciate that there will be a sort of firewall in your minds in the knowledge that you have for Mesa and the discussions that you would have had with Tennant, but insofar as you may have been instructed on behalf of Tennant before the first of June, that may be relevant.

MR. MULLINS: Yes, I--actually, by counsel who was actually hired first, was retained on June 1, 2015. A year after the critical date.

ARBITRATOR BISHOP: I'm sorry, say that again?

MR. MULLINS: June 1, 2015, which is a year after the critical date.

ARBITRATOR BISHOP: And what is that date?

MR. MULLINS: That's the--I'm sorry. That's the date that Mr. Appleton was hired by Tennant. He was hired first and then we came in second.

MR. APPLETON: I'm sorry. Let me answer

Arbitrator Bishop's question. That was the first date we were contacted by the Company. It's not the first date we were retained. And it was, for the record, June 1, 2015, and it was actually Mr. Pennie here who actually had a note with the dates here, who provided it to us in this instance, so we can give you an accurate and specific answer. Thank Mr. Pennie, actually. I'm glad he is paying attention.

(Comments off microphone.)

MR. MULLINS: So, again, that's our presentation on the first factor. But, as I said at the beginning of my presentation, I do think that all this is sort of intertwined, because if it turns out that these issues are intertwined, it is not going to be efficient, then even if you really think, Canada, that you got a great argument and you're going to be able to show that every single thing we are complaining about should have been known prior, even though you kept it secret.

It's--you know, not going to be--it's going to be intertwined. It's going to increase the Costs. We don't think you are going to be able to show that and we think that bifurcation is a waste of time. And counsel talked about the purpose of this is efficiency. What is efficient is not to bifurcate. Now, this matter has been pending three years, and what Canada really wants is add another

three years on this.

And the one thing we also point out, she says, well, the Procedural Order doesn't allow us to have discovery. Well, what the Procedural Order actually said is the pattern, that in the bifurcation model that the Tribunal pointed out, if we bifurcate doesn't really recognize a--exchange of discovery, but 5.2, Procedural Order 1, says that any stage of proceedings--and we can seek further directions from the Tribunal regarding procedural steps relating to and/or in addition to those set out in the Procedural--calendar.

We interpret that to mean that, if, in fact, we believe--and I think it would be appropriate for us to do some discovery, if this was a bifurcated, that we would want so. And I do believe that if we'd asked for it, Canada would too. But I also think that it would be a waste of time to bifurcate, in any event.

But--I also want to point out the delay here. And I know you--the Tribunal worked very hard and tried to come up with a schedule that makes sense, but by my math, without bifurcation, we're looking at 470 days to have a hearing if we don't bifurcate. And that is 470 days from the date that you decide we're not to bifurcate. Now, that's based on the Procedural Order you gave up. That is the math I came up was that--by the time you got through

everything, from assuming--let's say you ruled today. 470 days from today. Did I do something wrong?

PRESIDENT BULL: Right. No, Mr. Mullins. I just wanted to go back a step before the math.

MR. MULLINS: Okay.

PRESIDENT BULL: You were saying that, if this matter was bifurcated, Claimant would want to seek document production?

MR. MULLINS: Yes.

PRESIDENT BULL: What would you seek document production about? I'm not asking for a comprehensive list.

MR. MULLINS: No. No, I--yeah. Well, sure. But I think we're--we would be entitled to show the efforts that Canada did to keep these things secret. And so, I mean, if the dance is going to be--

PRESIDENT BULL: I understand.

MR. MULLINS: You know, you should have known, well, you know, let's talk about what you did with IPC and what you talked about. I mean, obviously, that gets to my second point. This is all intertwined with the Merits, but that's what we would do. I would think on their side they would want to know what you knew, when and whatever, but maybe they wouldn't.

Going back to the math, I will say that we calculated without bifurcation, if you ruled today we're

not having bifurcation, at a minimum the Hearing would be a year and 33 months from now. That's not, of course, time for you to commit an award. I mean, that takes time. So, it is quite a bit of time.

Again, I'm not saying that the Tribunal is doing anything inappropriate, but my math, if we have bifurcation from today, 709 days, not including time for your Decision on bifurcation.

Well, so, if, for example, if we go through and we have the bifurcation hearing, you're going to have time to rule on jurisdiction. That is going to take time. And your Procedural Order then--so, the 709 days does not even calculate the time you would need to do your Decision. So, it's going to be more than 709 days. It's going to be whatever time it takes you to come under jurisdiction which, I assume, that you would spend a lot of time on. So, it's going to be 800 or something, or whatever, or 750, or something like that.

ARBITRATOR BETHLEHEM: Mr. Mullins, isn't this, you know, you reading the tea leaves and then we're going to get a different reading of the tea leaves from the other side because they'll say, "Mr. Mullins came up with 700, 800 days. Well, in fact, if you bifurcate now and the Tribunal is with us, then the whole thing will be over and done and dusted sort of pretty quickly." So, I'm just sort

of wondering what the dueling numbers of days is--is where that is going to get us.

But my question to you is that we are--we have in Procedural Order Number 1 two scenarios after this initial phase. The first one is should the proceedings not be bifurcated, which is obviously what you are angling for, and then Scenario 2 is should the proceedings be bifurcated, which is what Canada is angling for.

Now, there is an intermediate sort of position, or there may be an intermediate position, which would require, obviously, the Tribunal to vary these calendars where we order that the Claimant produces a Memorial on the Merits, which would allow you to fully plead out your case, set out all the factual issues, all the Witness evidence and everything, and then provide an opportunity in fairly short order because the Respondent knows its case here, for the Respondent to come back within a month or within two months and put forward its time-barred jurisdictional objection and then to renew its Application for Bifurcation at that stage.

And, I mean, is that something that you would think has advantage? And if not, why not?

MR. MULLINS: I don't think this case warrants bifurcation no matter when it's ordered. So, I do think it--I mean, certainly--and I appreciate the effort. I do

think what will end up happening, it would even make the 709 days even longer. I won't go for the math but what you are really suggesting is we are going to do our whole Memorial and then they are going to have a separate briefing on bifurcation and then we're going to have to respond to that. So, it is even going to further delay.

I'm not saying we should rush to do the bifurcation. I don't believe their claim that this is time barred is going to get any better today, you know, or after a Memorial, and I don't--I think it would just be even more time and more delay. Again, I'm--this is my position based on the material that they are never going to be able to show you that we should have known about every single one of these things we're complaining about. They may have some arguments in some, but I don't think they are going to be able to knock out the entire claim.

And what is going to happen is, even if you believe it's just the IPC or it's, you know, and/or just the fact that they lobbied with NextEra or the fact that, you know, GEIA, that they were allowed to breach and they engaged in predatory conduct, if any of all of these things, you know, survive, we've wasted years. And that's why I was showing you the math.

I'm not trying to be flippant about it. It's really to show the delay, and I'm concerned by even the

suggestion you're making will increase the days even further. I don't believe they are ever going to meet it. So, I--like, obviously, I'm biased and I think I'm going to win. I just don't think they are going to be able to do that.

And so, this is so intertwined with the Merits, which is my last point, which is the factor three, that it's not even close. Certainly, about all these programs, what they were doing, what they were hiding is all going to be decided the Merits. And so, when we get into a jurisdictional about this IPC, we are going to end up redoing this twice.

But, Mr. Bull, did you have a question? Because you looked like you were looking at me with that expression on your face.

PRESIDENT BULL: No, I was listening to you.

MR. MULLINS: Oh. Well, good.

PRESIDENT BULL: But I did wonder about just a follow-on from Sir Daniel's question.

At the moment, your Notice of Arbitration is not as detailed as what your Memorial would be. Your Memorial would then set out what are the specifics that go beyond--that fill out the four categories of wrongful actions. When you fill those out with details, might it not be more apparent, then, or more helpful to the Tribunal

in deciding when an investor could have or should have had that information to be able to bring those actions?

For example, you talk about matters that came up during cross-examination. That sort of evidence would, perhaps, be mentioned in your Memorial. And then it would be clearer, would it not, for the Tribunal, whether or not things fall on one side or the other of the critical date?

That, to me--just sort of hearing Sir Daniel's suggestion, that might be something that you might want to address because, at the moment, those--I think not all those details are in your papers. And that's not--no criticism, because the Notice of Arbitration is not the time for all those details.

MR. MULLINS: Sir, I certainly--if the question is was Canada's request premature? Yes. Certainly, this was completely premature. And the question then is should Canada be allowed--could you just simply deny this without prejudice or something and say, "Look, you can revisit this after the Memorial or you can show us this," I would say that, you know, we're trying to save costs. I would be making these same arguments, I feel pretty comfortable.

But, I mean, obviously, the Tribunal is going to feel, you know, am I going to take a bird in the hand? I think, yes, you deny it now, and come back, I'm going to be making the same arguments. But at the end of the day, I do

think, certainly, if the question is was Canada's request premature? Yes, it was. And--but, I think--by the very nature of your question, it speaks of--once you get our Memorial and we detail all this out, we say this is what we learned, you know, this is it. We found this from the Tribunal--you know, we put it in our Memorial. Sue Lo testified, IPC, et cetera. It came public on this day.

Are we really going to be valued to having a separate hearing, another one of these, where we talk about bifurcating again and have a separate bifurcation hearing? The answer is no. We are telling you what--how this is going to play out. We believe that we have won on terms that there is clearly jurisdiction here, but I recognize that--you know, I'm just arguing and you have a chance to, you know, test me. I get it.

But was this premature? Certainly.

So, the last factor--the last factor, is this intertwined with the Merits? And I actually kind of argued this already in my response to the Chair's question. We certainly believe that you would not be able to adjudicate our--the jurisdictional objections that Canada has without knowing if and when things occurred, if and when they were disclosed to the public, and certainly that's what's going to be happening on the Merits, because the whole case is about whether or not things were done secretly and,

therefore, were not disclosed and, therefore, that was the real reason why Tennant lost and not sort of some fair reasons and they just lost because in an open, even-ended, even playing field, they deserved to lose. They lost because someone thought it was a good idea, the Government of Canada thought it was a good idea to put one of their local companies ahead of the line. Canada thought it was a good idea to allow Korean Consortia to take losers and put them ahead of the line. Canada thought it was a good idea to allow the Korean Consortium to reach its GEIA and to the detriment of all the legitimate companies that wanted this fabulous great program, this FIT Program, that had guaranteed money and was going to make them a lot of money. All this is done--was done in secret, and, in fact, what we talked about in the Merits.

And I want to point out something that I thought was pretty unique from conversations earlier today. This case was so simple, and jurisdiction was so clear. Why is Canada asking for $7 million in fees, same amount of money that it claims it used to defend Mesa? And it must be they assume they are going to lose jurisdiction; right? If it was so simple and so clear, why are they asking for all the amount of money that it took them to fight the Mesa Case on the Merits?

And it must be because they know they are not

going to win. They know that bifurcation is going to waste the time, and what they are trying to do is increase the costs on our side. They are just trying to make this as long and labored as possible so that they win, just like they basically violated the Treaty in how they operated this program. They are trying to make it difficult for us to get our day in court and to have adjudication on the Merits.

And the last slide, I believe it was Sir Daniel that stole my thunder on this. So, he had asked--well, you know, "Why wouldn't you do what they did in Mesa Power? I think that Mesa Power got it right." And there's a cost. I mean, if you start down the road, we are going to bifurcate, then you decide, well, it was a bad idea, that just costs more money. And so, ultimately the Panel found that it had jurisdiction. They ruled on the Merits. I recognize we didn't prevail, but that--they did find they had jurisdiction.

But I also recognize, you know, this is going to be a tough case. This is not so clear. Canada lost Windstream, and they had a very strong concurrence from Mr. Brower about what he found. "The Government of Ontario acted arbitrarily, grossly unfairly, unjustly, idiosyncratically, discriminated against the FIT Applicants in the favor of the Korean Consortium, and acted with a

complete lack of transparency and candor." And that's in the Mesa Award that came out afterwards.

And certainly, if you are an investor that found that out based on information that only came out in a hearing, are you supposed to just walk away and not bring your claim? Are you supposed to find out, well, maybe I was ripped off because you acted arbitrarily, un--grossly unfairly, unjustly, idiosyncratically and discriminated?

And the issue is going to be what violations that were available to the public, but clearly the kind of stuff that specifically what he was talking about was the Korean Consortium, you know, acting predatorily. That didn't come out until all this became public and, therefore, our claims are timely.

Unless the Tribunal has any questions, I will--oh, you have question.

ARBITRATOR BETHLEHEM: Yes. Yes. It's just a clarification on the point you say I stole your thunder.

MR. MULLINS: I thought you were agreeing. But maybe--

ARBITRATOR BETHLEHEM: Well, when I put the question to the Respondent, Ms. Di Pierdomenico's response was, well, that's rather different because that was an 1120 issue.

Now, you skated over that.

MR. MULLINS: I did.

ARBITRATOR BETHLEHEM: 1120 is not 1116. So, why is that relevant?

MR. MULLINS: Because I think the same result is going to happen. And I think--

ARBITRATOR BETHLEHEM: It's not an issue of the results, because you're making an argument here about the time bar and bifurcation under 1120. Why is this--the six months having to elapse before the Claim, why is that relevant to the three-year time bar?

MR. APPLETON: Sir Daniel, if I might, the fundamental question that had to be addressed by the Mesa Tribunal and that will have to be addressed here, I believe, as well, is that the questions--the interrelationships are so intertwined between the Merits and the jurisdictional questions that they could not be addressed simply.

Our friends on the other side have said you don't have to look here. This is so clear. It is impossible. There is no way. But of course we've seen from the discussion this afternoon that it is not clear and it's very complicated. But that was, in fact, what happened in Mesa.

In Mesa, at the beginning, the Tribunal said, "This must be clear." Then, once they saw--and in that

case, it was the reception of Article 1782 evidence, evidence that came in from local courts in the United States compelling discovery from third parties that had documents that Canada would not produce or had not had or may have been destroyed, and those documents that were produced by the recipients in the United States came in and they demonstrated that there were very significant questions to be determined. And once that came in, the Mesa Tribunal said, "We are going to reconsider what we did."

Clearly--this is what they wrote in their Award: "Clearly, these are significant issues and they need to be considered in the context of the Merits."

So, to go back directly to your question, it isn't because of which provision, whether it's 1120 or 1116. It's the interrelationship with the complexity of the matrix between the facts and the law that need to be considered. That is the question. That is really--is it efficient and is it appropriate to have a separate phase, or are you just going to really move the Merits up into the jurisdictional discussion and then have to do it again in Merits.

And I believe what Mr. Mullins has been telling you is that we would have to be there anyways. It would be grossly inefficient to do that, very costly. There is an

asymmetry in this case between the resources of Tennant Energy and the Government of Canada, a G8 power. They have tremendous resources. Tennant Energy's main focus, Skyway 127, was destroyed by their conduct.

And so, the longer the hearings, the more hearings, this threat that there is now going to be a denial of benefit, Article 1113 approach, and all the other things are made for a war of attrition. It's like a siege to try to make it so that Tennant Energy will not be able to afford to have its day, to have its case heard. This a significant access to justice issue, and fundamentally, that was the reason why, in Mesa Power, they said, "This complex matter has to be done in terms of the Merits," and that's why they changed.

Unusual. That's why they changed their position, and that's exactly the same reason that we submit here is why you shouldn't go there in the first place, because we now know this.

ARBITRATOR BETHLEHEM: Thank you.

PRESIDENT BULL: Right. Let's take a 15-minute break, and then we can--

ARBITRATOR BISHOP: Sorry. One question. Do you--whenever the time-bar issue is addressed on its own Merits, do you anticipate that there will be witnesses on this issue?

MR. MULLINS: Well, certainly, I do believe--I mean, obviously, there's the obvious, that people could not have known things were kept secret. So, I mean, I think that part of it is just going to be on the record. But, yes, I mean, I think that you would have to put something on--you know, something with testimony, of people say, you know, I did not know this--these facts.

So, I do think we have evidentiary--look, we have--again, this goes back to the opportunity to put on our case. We also talk about discovery. I do think there would be a discovery phase in all this because we have to have a chance to put on our case. So, I think throwing it out on jurisdiction without having an opportunity to do that, would not be--without being able to have an opportunity to provide ability to put on our case.

PRESIDENT BULL: Right.

Then we will take the 15-minute break now and return at 3:50 for Replies and Rejoinders. Thank you.

(Brief recess.)

PRESIDENT BULL: Okay. Thank you, everyone, in returning. We are back on the record.

And next we should hear from Canada in reply to what we've heard from Claimant.

ARGUMENT BY COUNSEL FOR THE RESPONDENT

MS. DI PIERDOMENICO: Thank you.

There was a lot said by Mr. Mullins talking about how this is just a huge waste of time, but I ask the question: For who? If Canada is successful on jurisdiction, the true waste of time is having to engage in full arbitral process when it hasn't agreed to jurisdiction of the Tribunal in the first place. And, therefore, I don't think this is particularly persuasive to us when we are telling you that we have not agreed to jurisdiction--we haven't consented to jurisdiction in this case, and we shouldn't be forced to arbitrate a claim that will ultimately fail on the Merits, in any event.

But even so, Mr. Mullins said even if one claim, if one claim gets through, then you still have to engage in the entire review of case. Be that as it may, it substantially narrows of items for consideration for the Tribunal which meets the test for bifurcation. The test isn't complete elimination of the Claim. It is a substantial narrowing of the issues at bar, and, therefore, this claim is still a claim in which the Tribunal should consider seriously bifurcation because it still continues to meet the test for bifurcation in that regard.

Sir Bethlehem's question on why don't we just make this submission after the Memorial--I believe it was from Sir Bethlehem--that may be something that the Tribunal could consider; however, it still engages the expense of

having to undergo an entire process over which Canada hasn't agreed to arbitrate in the first place. And, therefore, the procedure remains efficient if we bifurcate on jurisdictional grounds alone. In any event, the facts that are required to determine whether or not the case is time-barred have nothing to do with the merits of the claim. So, why consider the jurisdictional grounds that we have brought to you for consideration after the Memorial when we can consider them in a bifurcated preliminary phase on their own?

ARBITRATOR BETHLEHEM: The costs in those circumstances, in terms of the monetary costs, are going to be for the Claimant. I mean, there would be some further delay, but are you saying that there would be costs for Canada? In circumstances in which we might opt for that sort of middle route, Claimant files its Memorial, you then file an Objection to Jurisdiction and apply for bifurcation. At that stage, were we to grant bifurcation at that stage, what would be the costs as it were to Canada?

MS. DI PIERDOMENICO: Well, the costs--in terms of engaging in a full arbitral process, the costs would be exactly same if we even--sorry, let me take a step back.

In order to submit a Memorial, you would have to engage in witness and expert testimony. You would have to

engage in the costly analysis for damages, you would have to, as well, engage in document production which, again, can be costly from a time perspective.

ARBITRATOR BETHLEHEM: I mean, the scenario that I put to the other side was--and this has been applied in a number of arbitrations--Claimant files its Memorial, for example. And this would be the normal, for example, in other interstate proceedings. Claimant files its Memorial, the other side then has an opportunity, shortened opportunity to make an Objection to Jurisdiction. At that point, at the point of the Objection to Jurisdiction, there is then a process to decide on the preliminary measures or the bifurcation.

If the bifurcation is unsuccessful or if the Request for Bifurcation is refused, then there would be a Counter-Memorial and then you would have the disclosure process. So, on this postulate, the costs of producing the witness statements and whatever would be the Claimants'. They would not be Canada's. You would come back and make your Objection to Jurisdiction at a later stage. It goes to the point of prematurity that Mr. Mullins was keen to adopt his "bird in the hand."

MS. DI PIERDOMENICO: Our position is that the evidence that we need already to bifurcate is on the record, and, therefore, even having us to engage in this

later, more-detailed Memorial submission, from our perspective, is still one that would incur additional costs that we do not think would happen if the Claimants bifurcated and we are ultimately successful.

ARBITRATOR BETHLEHEM: Thank you.

MS. DI PIERDOMENICO: In terms of the test for the time bar, it is important to note that the test is what the Investor knew when the Investor first knew of the breach and first knew of damages.

We have already pointed to how two other Claimants knew enough to bring their FIT Program-related Claims in 2011 and 2012, and we have still not heard a satisfactory explanation as to why Tennant could not have done the same.

Claimants that lack simple due diligence and of a reasonable standard of care in terms of just willful blindness for the public record and all the information that might be out there should not be rewarded. And this is exactly what the Claimant is asking you to do by resetting the time bar based on two other diligent Investor's claims that were brought in a timely way.

Moreover, it is still not clear to me why does the Claimant need discovery to establish its own knowledge? This is something the Claimant should inherently know. Importantly, new facts that are exposed during the course of a full arbitral process of another investor also does

not reset the time bar.

Now, I just want to tease out a little bit what they said on their side. As expected, we knew that they were going to try and point to some additional facts in order to prove that they had no idea of their allegation until after the Mesa-Windstream Cases. When they are talking about the Korean Consortium and how this low-hanging fruit was not exposed until after Mesa made allegations and brought its claim to bar is simply not credible. The Mesa Notice of Arbitration was posted on the Government of Canada's website in 2013, before the critical date. And in that Notice of Arbitration, you have the allegation coming from Mesa that the Government of Ontario was favoring the Korean Consortium.

I'm paraphrasing now because I'm trying to answer the questions in the time. But you have this simple allegation of unfair treatment. There is no difference here because they expose some sort of low-hanging fruit conspiracy. The same thing with the IPC and the Susan Lo testimony. There is no difference just because they discovered another investment within which they could compare this unfair treatment. All they found out was that the Government of Ontario was allegedly favoring another investment. How is this a new claim? It is not.

And if Mesa knew to bring its claim in 2011, so

too should have Tennant.

And, finally, I just want to put to rest this whole idea because they made such hay out of the original Contract being secret, the GEIA. The original GEIA, which I was unable to refer to before because it is still not on the record, but this is exactly the type of evidence that I would like to bring to you in a jurisdictional phase, was actually published on August 3, 2011, on the website. Therefore, all this conspiracy and conspiratorial theories that they are bringing to you simply did not exist.

And, finally, Mr. Mullins says Mesa Power got it right. We agree because they brought their claim in a timely way.

So, if we could just take a giant step back from the facts and everything that we just discussed in terms of who brought what, when, where, the question before the Tribunal today is whether or not to the bifurcate. We have laid out the clear test that you have to consider. The first part of the test is whether or not Canada has a serious and substantial objection. We believe we met that part of the test. We also know that, if Canada were successful, we would limit this entire Claim and that the consideration before the Tribunal is not entangled in the merits. All do you have figure out is when the Claimant knew of its Claims and that this happened before the

critical date.

Canada has explained already that the information that you need is already on the public record, and we would just like the opportunity to bring it to the Tribunal for your further consideration. In a preliminary phase, of course.

I think that concludes my remarks.

PRESIDENT BULL: Thank you very much for that.

And Rejoinder from the Claimant, please.

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. MULLINS: Thank you, again, so much to the Tribunal for letting us bring these issues and be able a chance to argue this.

First, you know, at the end of the day, the one part that I clearly take issue with from what I just heard is that, well, if one piece survives, then this was not a waste of time because we narrow the issues. Well this is not a case where, if you narrow down to what the issues that, you know, presumably that some of our Claim might be time-barred or not--I don't think any of it is--if they even did that--this is the same FIT Program, and that statement alone shows you why this is a bad idea.

And I appreciate, Sir Daniel, taking my words "bird in the hand," but I don't think--I do think it is premature, but I also don't think it's going to be a good

idea later. Certainly we can put in our Memorial details about when things became public, more clarity, and that can be done, but I think they're going to be in the same situation and they are not ever going to be able to show that all our Claims are time-barred. And I do think it will be a waste of time and a waste of resources, and as just talking about this middle ground, thinking the cost to us.

They clearly should not do it now. And after we do our Memorial, then they tried to raise it again after we have already done our Memorial and all that work. But, again, so I don't think the answer is ever going to be--that the answer is going to be that we should have a separate Hearing on Bifurcation and also extremely concerned about time--the time it will take to do it in the interim ground that is going to make it even more time-consuming.

And, again, Counsel says, well, this is an issue of due diligence. Two other Applicants knew that there were issues and why didn't Tennant know? Because Tennant--again, no due diligence would show you that they were going to cut a secret deal on the IPC. I didn't hear any response to that. Any evidence or showing that that was somewhere in this Notice of Arbitration. It wasn't there. They mentioned, well, yes, Korean Consortium was in

the Notice of Arbitration and Mesa.

What was not in there is the predatory conduct by Korean Consortium. What was not in there that Korean Consortium, after blocking the transmission access and then blocking the ability for applicants to get contracts, then went to low-hanging fruit after--in the context of the special deal that they got and the fact that a special circumstance was given to IPC. None of that possibly could have been found through due diligence because it was not public. It had all been kept secret.

And so, again, I do think that it's--that it's not just a general: "Hey, you lost, you know. Somebody thought there was unfair treatment. You should have known." The standard is should you know about the actual breaches and the cause of loss, and the things were kept secret are not something that you would be able to take--you just assume that somebody should know and just guess. That's not how people react, and I don't think it's a fair standard.

Not to belabor it--we can brief this later, but the GEIA that was amended was not made public. But the actual GEIA with the terms that were problematic was not made public until much later. We actually had to get that through a court order, but we could obviously brief that later. I don't think it's a strong issue.

I think it is pretty obvious now, based on the arguments, that this is all intertwined. It is going to be complicated, that bifurcation is not going to save us any time. This is not the kind of proceeding that you should do it.

When I say "Mesa Power got it right," what I mean is that the Panel--and what I was trying to say is it is not so much the same statutory or same provision of the Treaty. What I was trying to say is that there's a situation where a Panel decided that you should bifurcate and then found that it was so intertwined. That's where--the situation we're concerned about because I think that the same thing would happen here. If we go down the road of bifurcation, then we spend time doing that, and then the Panel changes its mind. It causes more costs to us and more delay, and more costs, frankly, on both sides if the situation was reversed.

What we don't want is a situation where we didn't get a chance to put on our case because we were prematurely stopped because we are not allowed discovery and some kind of heightened or quick bifurcation, relatively quick bifurcation. It's still going to take a year. But, in any event, we just don't think it's appropriate. We want discovery on these issues before we are told that we haven't been able to put on our case. So, we are going to

want to be able to do that.

So all those reasons, we think that bifurcation should be denied now. Certainly we think it's premature. We hope that the Panel would not invite Respondent to renew their efforts later. That should just be denied. They haven't chose to bring it now, and it should just be denied. But, again, the Tribunal has control of the schedule and how they want to write their Orders, but hopefully this will be denied now and we will go through the Merits and use the non-bifurcation Procedural Order model that was attached to Procedural Order 1.

Thank you. Unless you have any questions, I think this is the end of my comments.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BETHLEHEM: Just a small hypothetical question to both sides. I'm looking at Procedural Order 1 and the schedule should proceedings be bifurcated. Now, I'd like you to take this on a speculative hypothesis and not necessarily if the Tribunal was with the Respondent now and decides to bifurcate at this stage, but if at some point now, some other halfway-house approach, the Tribunal were to conclude that it would be appropriate to bifurcate, we've got in the Procedural Order two rounds of Written Submissions on Bifurcation: Respondent's Memorial on Jurisdiction, Claimant's Counterclaim on Jurisdiction, then

Respondent's Reply, Memorial on Jurisdiction, and then Claimant's Rejoinder Memorial on Jurisdiction. It is just a brief question.

The Respondent is saying that these issues are sort of straightforward. It is common in other proceedings to have one round of written pleadings on a jurisdictional objection and to defer the Reply round to the oral phase. That would, of course, shorten the process by three months. I would just be interested to know from each Party on that sort of hypothetical whether that bifurcation were to be ordered now or to be ordered later. Would you still think that two rounds of Written Pleadings would be appropriate?

And, perhaps, that goes, first of all, to Canada.

Should I repeat the question?

MS. DI PIERDOMENICO: I apologize. I thought you were directing it--

ARBITRATOR BETHLEHEM: No. I was directing it first to you. I thought--you're making the Application.

MS. DI PIERDOMENICO: Yes. Well, in this regard, we would like the opportunity to respond because if we were the first one to write our objection, we would only have the few dates provided for and the Claims provided for in the Notice of Arbitration at this point--

ARBITRATOR BETHLEHEM: No. You are mistaking my question.

MS. DI PIERDOMENICO: Oh.

ARBITRATOR BETHLEHEM: If we were to decide to bifurcate on the basis of a Memorial on Jurisdiction and then the other side had a Counterclaim on Jurisdiction, do you think it would be necessary to have a second round of Written Pleadings, or could the Reply Phase be folded into the oral hearing?

MS. DI PIERDOMENICO: Sir Bethlehem, I apologize, but maybe I'm misunderstanding the process. Even if you were to fold it into the final Memorials, we would still need that opportunity to respond to whatever it is that they are responding to from--sorry, that they are bringing up for the first time in their response to our objection on jurisdiction.

ARBITRATOR BETHLEHEM: In writing. You would want an opportunity to respond in writing?

MS. DI PIERDOMENICO: Yes. Yes.

ARBITRATOR BETHLEHEM: Okay. Thank you.

MR. MULLINS: And we would want a Rejoinder as well. And also there is--I think the United States and México have an opportunity to Rule 28, and we got to respond to that as well.

ARBITRATOR BETHLEHEM: Sure. I was really just trying to get to the views of the Parties on whether those plus-45 days, plus-45 days could be done away with if we

concluded that bifurcation at some point was appropriate, but this one of the rare points on which you agree.

MR. MULLINS: Yeah.

PRESIDENT BULL: So the Tribunal thanks counsel for both Parties for the Submissions, not just this afternoon but for today. We have reached the end of our timetable for today, and we will resume at 9:30 a.m. tomorrow to deal with the Motion for Security for Costs.

MR. MULLINS: Can I just ask one clarification on something you said at the beginning of the afternoon session?

PRESIDENT BULL: Yes.

MR. MULLINS: When you said your preliminary ruling, I recognize that it's not final, but your thoughts, if you will. I am just going to pull them up. The one thing you talked about was termination. Just so I understood that, and I want to make sure I don't misunderstand what you are saying.

PRESIDENT BULL: Yes.

MR. MULLINS: You wanted to know whether or not a funder, if there's a funder, would have the ability to terminate these proceedings. In other words, to tell the Claimant: "You must stop."

Is that what you're talking about?

PRESIDENT BULL: No, termination of the Funding

Agreement. So, if there is a funder and there's a funding arrangement, there will be a contract, and that contract has a clause that deals with adverse costs orders. We would want to--we are inclined to order that that clause be disclosed, and we would also be inclined to order that there be disclosure of any clause that entitles the funder to terminate the Contract with Tennant.

So, if there's a clause that says the funder can terminate this Contract on seven days' notice, the Tribunal would be--is inclined to find that relevant to our Analysis of Security for Costs. So, for example, if the funder was--if there was a clause that provided that the funder would pay for adverse costs orders but there was a provision, a separate provision that says he can terminate this agreement on seven days' notice without any cause, then that would affect the efficacy of the adverse order clause.

MR. MULLINS: I see.

PRESIDENT BULL: So that's why termination is--that is one of the ways in which termination may be relevant to us. Termination of the Agreement; not termination of the arbitration.

MR. APPLETON: Sorry, I just want to make sure I understand.

So, it's not in respect to the issues raised by

Canada about control saying that we want to know if a funder is actually controlling an arbitration because I thought that's what--it's my fault. I misunderstood what you were saying. I thought it was in relation to that issue, not in relation to now what I understand to be the issue of provision of under what circumstances would, if there was an agreement, would funding end. Just to make sure I understand correctly.

PRESIDENT BULL: Yes.

MR. APPLETON: Okay.

(Interruption.)

MR. MULLINS: I said, that was our misunderstanding. That's why we were asking for clarification. Thank you.

PRESIDENT BULL: I'm glad you did.

MR. MULLINS: I am too.

PRESIDENT BULL: If there is nothing else, then we are adjourned for today. Thank you.

(Whereupon, at 4:19 p.m., the Hearing was adjourned until 9:30 a.m. the following day.)

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

Dawn K. Larson

Dawn K. Larson