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 2

HEARING ON BIFURCATION AND PRELIMINARY MOTIONS

Wednesday, January 15, 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 9:30 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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Certified Realtime Stenographer:

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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: Right. Good morning, everyone.

This is the second day of the Hearing, and today we are scheduled to deal with Respondent's Motion for Security for Costs.

Before we do that, if I can just check on Parties' attendance. I can see Claimants are as yesterday. And I would assume Canada has the same individuals as yesterday present here in the Hearing room and the same people on conference.

MS. DI PIERDOMENICO: Yes, that's right.

PRESIDENT BULL: Thank you.

MS. DI PIERDOMENICO: So, the PCA's list of attendees.

PRESIDENT BULL: Thank you.

And then for Non-Disputing Parties, I see one new individual from--not here from yesterday, and I wonder if that person could just be introduced.

MS. THORNTON: Good morning, Mr. President, thank you very much. So, you met my colleague, Nathaniel Jedrey, yesterday.

PRESIDENT BULL: Yes.

MS. THORNTON: My name is Nicole Thornton. I'm the Chief of Investment Arbitration at the State Department. We are also joined by our colleague, Catherine

Gibson, from USTR.

PRESIDENT BULL: Good. Thank you very much.

And the gentleman for the Government of México is as yesterday. Thank you very much.

Right. So, with that done, the Motion for Security for Costs is the Respondent's motion, and if I remember correctly from yesterday, Mr. Klaver will be making submissions.

MR. KLAVER: Yes.

PRESIDENT BULL: Over to you, Mr. Klaver.

AGENDA ITEM 4:

RESPONDENT'S MOTION FOR SECURITY OF COSTS

ARGUMENT BY COUNSEL FOR THE RESPONDENT

MR. KLAVER: President Bull, Arbitrator Bethlehem, and Arbitrator Bishop, thank you for providing us with the opportunity to address the need for Security for Costs in this Arbitration.

At the outset, I wish to highlight some of the key circumstances to keep in mind regarding this Claim. I will explain in detail today why each of these factors is relevant to Canada's motion for Security for Costs.

First, from all available evidence, Tennant appears to be impecunious. Moreover, Tennant has a third-party funder over which this Tribunal has no jurisdiction to compel payment of an Adverse Costs Order

and who may have no responsibility to pay one.

Furthermore, this is virtually a duplicate NAFTA claim substantively replicating another NAFTA claim that a different Tribunal already rejected. Mesa's counsel even is Tennant's counsel. And, as explained yesterday, to date, Mesa has failed to pay a $3 million Costs Order in Canada's favor. In these circumstances, Canada has a very serious concern about history repeating itself.

In fact, the circumstances of this Claim establish a strong basis for the Tribunal to order Security for Costs. It is entirely foreseeable right now that Tennant would fail to pay a Costs Order in Canada's favor. Tennant has done nothing to demonstrate that it can pay an Adverse Costs Order or that its third-party funder will pay an Adverse Costs Order.

So, here is the reality. Tennant effectively seeks permission to retain the option to commit an arbitral "hit and run" against Canada. To allow this state of affairs to persist would severely undermine the integrity of the arbitration, create a significant imbalance between the Disputing Parties, and risk rendering the Tribunal's Award on Costs ineffective to Canada's potentially significant loss.

So, as you can see on the screen, my objective in this presentation is to convey three points: First, the

Tribunal has the authority to order Security for Costs. I will explain that both the 1976 UNCITRAL Rules and the NAFTA authorize the Tribunal to order Security for Costs.

Second, Security for Costs are necessary in this case. I will demonstrate that to preserve the integrity of the Arbitration in these circumstances, it is imperative to order Security for Costs.

And, third, the amount of security that Canada requests is reasonable. I will show that Canada's proposal is in line with another Tribunal's Order for Security for Costs.

Now, starting with the first issue, to determine whether the Tribunal has authority to order Security for Costs, it needs to interpret just two provisions on Interim Measures. First, Article 26(1) of the 1976 UNCITRAL Rules titled "Interim Measures of Protection." The Tribunal must determine whether this provision grants it the authority to order Security for Costs.

Second, Article 1134 of NAFTA, also titled "Interim Measures of Protection," the Tribunal must determine whether this provision modifies any authority to order Security for Costs under the 1976 Rules.

So, proceeding in this order, as you can see on this slide, Article 26(1) of the 1976 UNCITRAL Rules authorizes a Tribunal to order any interim measures it

deems necessary in respect of the subject matter of the dispute. The relevant question is whether this language permits Orders for Security for Costs.

Now, the reference in Article 26(1) to the subject matter of the dispute allows Tribunals to order interim measures to preserve the rights of the disputing Parties to the integrity of the arbitration, as the Igor Boyko v. Ukraine Tribunal confirmed. Security for Costs preserves the integrity of the arbitration by protecting the disputing Parties' rights to the effectiveness of the final Award and Decision on Costs.

Therefore, Tribunals have authority under Article 26(1) to order Security for Costs. Now, multiple Tribunals have affirmed their authority under Article 26(1) to order Security for Costs.

For instance, the Pugachev v. Russia Tribunal, stated at the top of this slide: "This Tribunal is of the view that its power to grant Security for Costs Applications falls under Article 26 of the 1976 UNCITRAL Rules." And the García Armas Tribunal exercised its authority under Article 26(1) to order Security for Costs.

While the disputing Parties in Pugachev and García Armas accepted the Tribunal's authority to order Security for Costs under the 1976 Rules, these Tribunals made this determination themselves.

Moreover, Georgios Petrochilos, who prepared a Report in 2006 with Jan Paulsson on revisions to the UNCITRAL rules, explained in 2010 that in two recent unreported cases, UNCITRAL Tribunals have found that the wording of Article 26 of the 1976 Rules does not exclude the power to order Security for Costs.

In his considered view: "The circumstances where such orders for Security for Costs can play a crucially useful role are obvious, in particular, where the Claimant has undergone a divestiture of assets and become a 'litigation vehicle.'"

Now, for its part, Tennant fails to cite a single investment tribunal operating under the 1976 UNCITRAL Rules that said Security for Costs are only procedural in nature and, therefore, unable to qualify within the subject matter of the dispute under Article 26(1).

We've seen the Invesmart v. Czech Republic Award in Tennant's submissions, yet there are no public details from the Procedural Order in that case explaining why the Tribunal thought that it lacked authority to order Security for Costs.

It may have reached this result for reasons unrelated to the 1976 Rules. Without these details, the Invesmart Award offers no useful guidance to this Tribunal, and it should not be relied upon to conclude that the

Tribunal lacks authority to order Security for Costs under the 1976 Rules.

Now, as for the changes to the 2010 Rules, the 2010 UNCITRAL Rules, they do not detract in any way from the authority granted by the 1976 Rules to order Security for Costs. As you can see on the screen, the 2010 Rules list examples of interim measures that a Tribunal may order. These examples do not support any negative inference relating to the 1976 Rules. They simply make explicit powers that were implicit under Article 26(1) of the 1976 Rules, which offers Tribunals a wide measure of discretion to order interim measures.

Accordingly, this Tribunal has a strong basis to conclude, consistent with the jurisprudence under the 1976 Rules, that Article 26(1) grants it the authority to order Security for Costs.

Moving to NAFTA. Article 1134 authorizes Tribunals to order interim measures to preserve the rights of a disputing Party. To protect the Parties' rights to the integrity of the arbitration and the effectiveness of the Costs Order, NAFTA Tribunals have authority to order Security for Costs.

Now, Article 1134 is not limited to protecting existing rights. NAFTA Tribunals also can order interim measures to protect contingent rights, such as a favourable

Costs Order.

For instance, as you can see on the slide, the Article includes, as an example, Orders to Preserve Evidence. Tribunals can make such Orders to protect both the existing rights to the nonaggravation of the dispute, as the Claimant points out, but also contingent rights to the future production of evidence.

Now, for its part, Tennant relies on the 1999 Maffezini v. Spain Case, which held that the rights the Provisional Measures can protect must not be hypothetical or ones created in the future. However, many investment Tribunals have subsequently rejected this argument, including RSM, Occidental, Casado, Grynberg, and Lighthouse.

For instance, the BSG Resources v. Guinea Tribunal directly addressed the issue of hypothetical rights related to Security for Costs, stating: "As confirmed by the RSM Tribunal, the hypothetical nature of a Costs Award is not a bar to ordering Provisional Measures. The restrictive interpretation of Maffezini v. Spain, relied upon by the Claimant to show that hypothetical future rights are too speculative to merit protection has plainly been rejected by ICSID Tribunals since."

Now, refuting an argument that Tennant also makes, the BSG Tribunal went on to say: "The Tribunal agrees with

the Respondent that its conditional right to the reimbursement of the Claimant's Costs deserves protection. Therefore, while the Tribunal acknowledges that the right requiring preservation relies on two hypothetical events (that the Respondent will prevail in the arbitration and that it will be awarded Costs) it nevertheless deems that the prima facie existence of a right has been established."

Moreover, as you can see on the slide here, all three NAFTA Parties agree that Article 1134 authorizes Tribunals to order Security for Costs. The Tribunal must take this Agreement into account, pursuant to Article 31(3) of the Vienna Convention, because it constitutes subsequent practice and subsequent agreement of the Treaty Parties.

Now, the Canadian Cattlemen Tribunal and the recent Bilcon Tribunal affirmed that Article 1128 submissions can form subsequent practice under Article 31(3)(b) of the Vienna Convention. And while the Canadian Cattleman Tribunal and Bilcon Tribunal did not find subsequent agreement, in those cases, just one 1128 submission had been filed on the relevant issue; in this case, both Non-Disputing Parties filed 1128s.

So, the three NAFTA Parties have a subsequent agreement regarding the proper interpretation of the Treaty under Article 31(3)(a) of the Vienna Convention.

The Tribunal should accord this Agreement

considerable weight because it is consistent with the context of Article 1134. Moreover, the Tribunal should dismiss the Claimant's argument that the NAFTA Parties have tried to amend NAFTA. The United States and México followed the appropriate procedures, pursuant to Article 1128, to make submissions to--on a question of Treaty interpretation facing the Tribunal.

To summarize, NAFTA Article 1134 grants the authority to order Security for Costs. It does not modify the authority to order Security for Costs granted by Article 26(1) of the 1976 UNCITRAL Rules.

Now, moving to the applicable test for Security for Costs, Article 26(1) requires--did you have a question?

ARBITRATOR BETHLEHEM: Just before you moved on, I mean, you--the point that you made was that the--Canada's position, together with the position of the non-disputing Parties, constitutes a subsequent agreement under Article 31(3)(a). I mean, it may constitute agreement on the issue, but does it constitute an agreement?

You would expect an agreement to be something that is reduced to a single document, akin to a Treaty. Isn't that what 31(3)(a) is talking about? Or are you suggesting that, simply by the fact that the non-disputing Parties are agreeing with the position that Canada has advanced, that that actually meets the threshold?

MR. KLAVER: So, the NAFTA Parties have maintained that subsequent agreement can take a variety of forms. It does not need to arise through something as formal as a singular Treaty. It can manifest itself through different forms, including, in this instance, where there can be no doubt the Parties agree clearly that 1134 authorizes Security for Costs.

ARBITRATOR BETHLEHEM: Wouldn't one expect a subsequent agreement with a degree of formality to take the form of something that emerges from the Commission, or just as we've got the notes of interpretation of certain Chapter Eleven provisions, I mean, there seems to be a kind of--a risk of ad hocery if one is simply saying that in the course of any particular dispute, Chapter Eleven investment dispute, the Parties can simply get together and, as it were, cobble together an agreement.

I mean, isn't that sort of in the face of the dispute?

MR. KLAVER: So, first of all, on your point about FTC notes, there are different avenues to find a subsequent agreement. FTC notes may be one. They can also arise through 1128s because these are formal. They are not cavalier. They are not just thrown together. The Parties take this very seriously, and in this case you have three Parties formally taking a position on an issue of Treaty

interpretation. This can constitute subsequent agreement.

And I would also say the 1128s, without a doubt, constitute subsequent practice under Article 31(3)(b), and so, in both cases, you have to take this agreement into account as part of the context.

ARBITRATOR BETHLEHEM: Okay. Thank you.

MR. KLAVER: Now, on the applicable test for Security for Costs, Article 26(1) of the 1976 Rules requires an interim measure to be necessary. Many Tribunals have identified the elements to establish that a measure is necessary, and drawing from Article 26(3) of the 2010 UNCITRAL Rules, the García Armas Tribunal determined that a four-part test summarizes the meaning of necessity as applied in the jurisprudence.

Now, my colleague Ms. Dallaire also discussed this test yesterday, so we'll pull it up on a slide, but I'll avoid repeating all four elements right now. In a moment, I will explain why this case satisfies each element of the test.

But first, the Claimant also asked the Tribunal to adopt an additional standard, namely "exceptional circumstances." The Tribunal should reject this proposal. While some Tribunals have referred to an exceptional circumstance as standard to order Security for Costs, applying that standard is inappropriate in this case for

two reasons: The wording of Article 26(1) and the requirement to treat the Parties with equality.

Now, returning to the slide on Article 26(1), you can see that it makes no reference to "exceptional circumstances." Rather, it uses a necessity test for interim measures. Thus, it would amount to a de facto amendment of Article 26(1) to add an "exceptional circumstances" restriction for Security for Costs that is more stringent than the necessity test.

Notably, the Rules do include an "exceptional circumstances" standard in Article 29(2) for reopening the Hearing. In this context, the 1976 Rules do not permit reading in an "exceptional circumstances" standard into Article 26(1).

Now, the second reason to reject the "exceptional circumstances" standard is that it leads to unequal treatment of the disputing Parties in conflict with Article 15(1) of the 1976 Rules. There can be no reasonable doubt that Canada will pay an Adverse Costs Order and an Award if it is rendered against it.

So, Tennant has the assurance that a Costs Order and an Award in its favor will be effective. But to impose an extraordinarily high threshold to protect the effectiveness of a Costs Order in Canada's favor would create a major imbalance between the disputing Parties.

Now, in this regard, the proposed ICSID reforms and UNCITRAL deliberations at the Working Group III offer the Tribunal some helpful context. While we acknowledge this is not binding, these developments address systemic issues in investment arbitration that are important for the Tribunal to consider in exercising its discretion under the 1976 Rules. In fact, recent Tribunals have considered some of these developments, as I will explain.

Now, on the proposed ICSID reforms, Rule 52 has a provision on Security for Costs that makes no mention to "exceptional circumstances." Instead, Tribunals are to consider all relevant circumstances, including the Claimant's ability and willingness to pay an Adverse Costs Order.

At UNCITRAL, Working Group III concluded that it is desirable for UNCITRAL to develop reforms in Security for Costs due significantly to States' concerns about unpaid Costs Orders.

Moreover, recent data confirms the serious risk of Claimants failing to pay Costs Orders to States. An ICSID study in 2016 found that Claimants failed to pay 12 of 34 Costs Orders to States, which is a nonpayment rate of 35 percent. And a 2015 study published in the Global Arbitration Review found Claimants paid less than half of Cost Orders to States in full.

Now, the García Armas Tribunal took the Global Arbitration Review article into account in its Decision to order Security for Costs. Moreover, the Eskosol and Lao Holdings Tribunals both recognized that States have genuine concerns about their ability to enforce Adverse Costs Orders.

Thus, to summarize Canada's position on the applicable test for Security for Costs, the Tribunal should apply the four-part test to determine whether the Order is necessary. It should not impose a higher threshold exceptional circumstances standard. However, in the alternative, and as Canada stated in its motion, even if the Tribunal chooses to apply an exceptional circumstances standard, this case meets it.

I will now apply the four-part necessity test to this case to show that security for costs are justified, and in so doing, I will explain why the circumstances of this case are exceptional.

ARBITRATOR BETHLEHEM: Before you do so, I'd just like your observations on the following thought--and when one has a look at Rules of Procedure in other contexts, for example, the Rules of Court, of International Court of Justice, and you see many Arbitral Tribunals referring to ICJ jurisprudence: There is no articulation of an exceptional circumstances test as well, and indeed, there

isn't an articulation of any of the sort of the granular tests that we have here. All of this emerges out of jurisprudence. And the appreciation--but the appreciation is that any Order that comes before the Decision on the Merits prejudices one Party or the other.

If you were to prevail here, we would be ordering the Claimant to make a payment. That's a prejudice to them, without any question. And it's in that context that some notion of "exceptional circumstances" arises. It is not just is it necessary or is it fair, but given that this Tribunal has not affirmed its jurisdiction, given that this Tribunal has not--will not have addressed any issue on the Merits, you are actually asking us to prejudice the other Party.

In circumstances in which, in many other systems there isn't the granularity that you are suggesting to us there should be--no exceptional circumstances, not even a sort of an urgency test--why should we not adopt an "exceptional circumstances" test?

MR. KLAVER: So, just on the one point, we are about urgency, we are advocating for an urgency test.

ARBITRATOR BETHLEHEM: I understand.

MR. KLAVER: The answer is simple: The UNCITRAL Rules are the source of the Tribunal's authority to order interim measures, and they identify the test to order

interim measures. It is a necessity test.

ARBITRATOR BETHLEHEM: So, that gets to the nub, I suppose, of what I'm asking.

You are saying that the UNCITRAL Rules set out the test. And I suppose what I'm trying to understand from you, is whether that is right or whether the UNCITRAL Rules simply set out our authority, our competence, and the granular conditions are something that emerges from the jurisprudence, from our reasoned analysis, looking at analogy of the way that the International Court of Justice or the Law of the Sea Tribunal or other established bodies might deal with this issue.

MR. KLAVER: So, I would draw distinction between the authority and the condition to use that authority. The authority to order interim measures is quite broad, but the condition is spelled out. It's the necessity test. I would also draw distinction between finding the components of the necessity test through the jurisprudence versus going beyond the necessity test and adopting a higher threshold, sui generis, for Security for Costs.

So, it's entirely legitimate to think, okay, necessity--let's identify what the components of that are. Let's look at the jurisprudence on that, and that's what the García Armas Tribunal did. It found four--four conditions. But "exceptional circumstances," no Tribunal

has said this is part of the necessity test. They have consistently treated it as something higher, and that is not provided for in Article 26(1).

ARBITRATOR BETHLEHEM: Thank you.

ARBITRATOR BISHOP: I'd like to take you back to Slide 18 for a moment. And you don't have to answer this at the moment, you can take this at any time. But you gave us Rule 52 or proposed Rule 52 of the new ICSID Rules. I notice that one of the tests or one of the--part of the tests is 52(3)(c) that says: "The effect of providing Security for Costs may have on the Party's ability to pursue its claims." At some point during your presentation I'd like for you to address that in as much detail as you can.

MR. KLAVER: Yes. I'm happy to address that.

ARBITRATOR BISHOP: Okay.

MR. KLAVER: I do have a segment I can discuss--

ARBITRATOR BISHOP: That's fine. That's fine.

MR. KLAVER: Okay. Absolutely.

Now, moving to the first part of the test to find that an interim measure is necessary, the Tribunal only needs to determine that Canada has a prima facie reasonable case. The Tribunal does not need to conclude, nor do we ask it to conclude, that Canada likely will prevail. Yesterday Tennant suggested that Canada is asking the

Tribunal to rule now that it will order costs in Canada's favor. That is incorrect. We are not here to test the Merits of the case. Canada only asked the Tribunal to find that it has a reasonable case prima facie.

Now, the Paushok vs Mongolian Tribunal accurately described the test stating: "At this stage the Tribunal need not go beyond whether a reasonable case has been made, which if the facts alleged are proven, might possibly lead the Tribunal to the conclusion that an award could be made in favor of the Claimant or the Applicant for the Measure."

Essentially, the Tribunal needs to decide only that the claims made are not on their face frivolous or obviously outside the competence of the Tribunal.

Now, as we showed yesterday, Canada has a reasonable case of prevailing in this Arbitration. Tennant's Claim is time-barred. As the slide shows, and as my colleague Lori explained yesterday, the Claimant knew or should have known about the alleged breach and loss well before June 1, 2014, the critical date for assessing time bar.

This objection is prima facie reasonable, including because Mesa brought investment proceedings against Canada with almost identical claims on October 4, 2011, nearly three years before the critical date for Tennant's Claim.

Now, Tennant thinks to acknowledge the overlap between the Claims would prejudge its case. This is incorrect. The Tribunal can recognize the overlap between the Claims when finding that Canada has a prima facie reasonable case under the first part of the necessity test. This does not preempt a later finding of fact or conclusion of law.

Now, in reality, as Lori explained yesterday, it is manifest on the face of the Claims themselves that they are substantively duplicates. Tennant challenges virtually the identical measures that faced the Mesa Tribunal under NAFTA 1105.

As Canada revealed in a motion, and as we showed on a slide yesterday, the two Notices of Arbitration contain lengthy sections copied word for word.

Moreover, in response to the Motion for Bifurcation, the Claimant affirmed that nearly all the facts in its Notice of Arbitration and each one of its claims arise from the same issues in Mesa.

Now, the Claimant also protested in response to the Motion for Security for Costs that there are distinctions between Mesa Power and the Investor's Claim. But besides alluding to plans to submit new evidence, Tennant failed to identify a difference between the claims, and even yesterday Tennant was hard pressed to come up with

any meaningful differences.

Now, since we are talking about the Mesa Claim, it is worth noting that the Tribunal is surely aware Canada has faced its fair share of investment claims under Chapter Eleven. Yet, it is truly exceptional for a NAFTA Claimant to bring the same word-for-word claims of a previous NAFTA claim that lost with virtually no substantive differences. And it is also exceptional that the same counsel who acted for Mesa Power brought Tennant's nearly identical Claim. The Mesa Tribunal ordered that Claimant to pay approximately $3 million in costs to Canada.

This slide shows the Tribunal's reasoning. It stated that the Claimant's conduct created a number of procedural difficulties that might have been avoided.

Canada is experiencing similar difficulties in this Arbitration. It has already been required to address a sizable amount of procedural requests from Tennant. Moreover, since Mesa failed to pay its $3 million Costs Order, Canada has a very legitimate concern about, once again, being unable to collect a Costs Order in its favor.

Now, the duplicative claim brought by the same counsel are just two of the circumstances that are relevant to Canada's motion. Two more factors include the Claimant's apparent impecuniosity and of third-party funding, which we will turn to next.

The second part of the necessity test concerns whether Canada would suffer harm that is not adequately reparable through the Final Award or Costs Order. Now, if the Claimant fails to pay an Adverse Costs Order after the Final Award, the Tribunal could not repair Canada's loss by issuing a second Costs Order or by ordering Tennant's third-party funder to pay the Costs Order.

So, as the RSM Tribunal affirmed in the determination on whether to order Security for Costs, the Tribunal must assess the Claimant's ability and willingness to pay an Adverse Costs Order. Tribunals have held that if there is a high economic risk that the Tribunal's Costs Order will be ineffective, that can justify Security for Costs.

But before focusing on the facts in this case, I'd like to briefly address the burden of proof for establishing that Tennant is impecunious. No one knows better about a Claimant's financial condition than the Claimant itself. A Respondent State can conduct diligent investigations into a Claimant's financial condition to provide a reasonable presumption that it is impecunious. Then the burden must shift onto the Claimant to provide evidence to rebut the presumption. And if it fails to do so, the Claimant must be found impecunious.

Now, this is exactly what the Tribunal in García

Armas did. It ordered the Claimants to provide financial documents which clearly demonstrate their solvency. And after allowing them the opportunity to prove it, the Tribunal found that it had not been absolutely proven that the solvency of the Claimants could ensure the Respondent's enforcement of an eventual Costs Award in its favor.

Now, the Tribunal also took particular note of the fact that the third-party funder in the case had not assumed any responsibility for an Adverse Costs Order. As you can see on the slide, these two factors, the Claimant's impecuniosity or its apparent inability to pay a Costs Order, together with its third-party funding, were together sufficient to order Security for Costs and to find "exceptional circumstances." The Tribunal did not consider bad faith or misconduct by the Claimants necessary.

Now, the García Armas Tribunal's approach aligns with recommendations of leading commentators. For instance, Professor Gary Born maintains that the burden may shift to the Claimant, and that the combination of impecuniosity and third-party funding may suffice for Security for Costs. Professor Born states: "Where a party appears to lack assets to satisfy a Final Costs Award but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case exists for Security for Costs."

Now, in this Arbitration, Canada has made a strong prima facie case for Security for Costs because we have shown that Tennant appears to be impecunious and it is funded by a third party who may have no responsibility to pay an Adverse Costs Order. Canada conducted extensive research into Tennant Energy, LLC in order to assess its ability to pay an Adverse Costs Order, and this diligent investigation led Canada to offer its conclusions to the Tribunal that Tennant appears to have no business operations, no revenues, no financial resources, no assets. This created a reasonable presumption that the Claimant is impecunious and unable to pay.

PRESIDENT BULL: Sorry, Mr. Klaver.

MR. KLAVER: Yes.

PRESIDENT BULL: You say that your investigation has shown that Tennant does not have any assets. The slide is a little different. It says: "No public information indicates that it holds financial assets."

Is the position that you have no knowledge about the assets? Is that--would that be more accurate?

MR. KLAVER: Yes. Just to clarify. Our position is that Tennant appears to be impecunious after our extensive research and investigations. This is, to our knowledge, Tennant appears to have no assets, no business, no financial--

PRESIDENT BULL: It's not really knowledge; right? I mean, it's you haven't found any assets?

MR. KLAVER: That is correct. And so--

PRESIDENT BULL: That is quite different from saying that there is proof that the Company has no assets.

MR. KLAVER: To clarify, we're not saying that there is proof that it has no assets. That's why we are saying we have satisfied our burden of creating a reasonable presumption that Tennant has no assets, and now the burden shifts to Tennant. This is part of the--sorry.

PRESIDENT BULL: I'm, perhaps, not understanding you and that's why I'm trying to clarify this. It sounds like you are saying you don't know whether they have any assets.

MR. KLAVER: That is--that is correct. So, the State cannot know the full extent of the financial condition of the Claimant, especially when it's a private enterprise that is not public.

PRESIDENT BULL: Sure. I understand the difficulty. I also understand that Claimant would have that information.

MR. KLAVER: Yes.

PRESIDENT BULL: But I think you have rightly acknowledged that, as an initial step, there is some burden on the Applicant. And it sounds like Canada is saying

simply that it lacks information or it lacks evidence about the asset position of the Claimant rather than Canada being able to say that there is something that suggests that there are no assets.

MR. KLAVER: I would go a little further than saying--Canada has done extensive research here. So, while we can't know, we haven't just sat back and said, "Well, we don't know and Tennant might have nothing." We did extensive research into the Company, its history, and all of our investigation revealed that it appears Tennant has no assets and no resources. And Tennant didn't rebut that. It never provided anything to reassure the Tribunal that it has the assets to pay an Adverse Costs Order, that it has ongoing business operations. It appears to be a defunct entity with no assets beyond this Arbitration.

Now, I'm emphasizing the word "appears" because now the burden is on Tennant to reassure the Tribunal that its Costs Order will be effective.

PRESIDENT BULL: I'm just concerned to make sure that Canada has discharged its initial burden first before anything transfers over to the Claimant.

MR. KLAVER: Yes, I respect that.

PRESIDENT BULL: I'm just wary of a nill return being taken as the discharge of an actual burden. I appreciate Canada has done--made an effort, perhaps a

diligent effort, but that effort isn't the same as discharging a burden. So, that's my concern.

MR. KLAVER: So, the García Armas Tribunal explained that there is a dynamic burden of proof. And the State can only be expected to take reasonable steps to the extent that it is capable of finding out the Claimant's resources. And we have taken every step that we can consider is feasible to learn about Tennant's ability to pay an Adverse Costs Order.

PRESIDENT BULL: In García Armas, one of the factors was that Cost Orders in the Arbitration had not been paid. Am I right?

MR. KLAVER: I'm not sure.

PRESIDENT BULL: That's not García Armas?

MR. KLAVER: No. No.

PRESIDENT BULL: I might have--I might have the cases mixed up.

MR. KLAVER: I would have to confirm that but that is not my understanding of that case, no.

PRESIDENT BULL: I see.

MR. KLAVER: There are certainly other cases where Respondent hadn't paid Cost Orders, and I'll discuss that shortly.

ARBITRATOR BISHOP: I have a question.

MR. KLAVER: Yes.

ARBITRATOR BISHOP: In the research you did--and I realize you did research publicly--publicly available information, but did you find that Tennant had assets or operations at the time that it was seeking the FIT Contract?

And the second part of that is: Did Tennant have to make any sort of financial showing in order to qualify for a FIT Contract or to apply for a FIT Contract?

MR. KLAVER: The answer to your first question is no. The answer to your second question is we will--I will have to get back to you on whether there was a requirement to show financial capability to obtain a FIT Contract, but I can do so.

ARBITRATOR BISHOP: Good.

MR. APPLETON: I don't mean to belabor, would you like me to give you an answer or would you like us to save that? There is an answer, of course.

ARBITRATOR BISHOP: Why don't you save that and let him finish.

MR. APPLETON: Sure.

MR. KLAVER: Did you have a question, Arbitrator Bethlehem?

ARBITRATOR BETHLEHEM: Yes, I do have a question, one practical question.

Am I right in understanding that the only parts of

García Armas in the Record in English are the translations that you added at the end of the Spanish version in RLA-6?

And if that is correct, is there any possibility that you could make available to us the whole text in English? I don't know whether it has been translated. My Spanish is not good enough to be able to read the whole Decision, and I'd like to do. So, that is just a housekeeping request.

The question is that in your Written Submissions, you simply seek an order for Security for Costs with a number, a number and the alternative. I mean, it sounds as if, when you are dealing with the issue of the burden of proof and the burden of proof shifting and it's only the Claimant who can really know about their financial means, it sounds as if there are some preliminary steps that may be appropriate. For example, that the Tribunal requests or orders the Claimants to make certain disclosure about their financial circumstances. You haven't said that. Maybe you are planning to do so, but are you implicitly varying your written petitum, if you like, your written request to us?

MR. KLAVER: So, just in response to your first question about García Armas, yes, all of the information that is translated is at the end of that exhibit. We can also translate the full--the full case.

In terms of the Tribunal seeking further

information from Tennant on its finances, we would absolutely respect if that's the step that the Tribunal considers necessary to confirm whether or not a Costs Order would be effective and to confirm that the Claimant had the funds to pay that. Acknowledging that we would respect that order, I wouldn't consider a revision of our Motion. Right now we consider that the information in front of the Tribunal is sufficient to order Security for Costs because Tennant has failed to rebut the reasonable presumption that we made that it has no capability to pay an Adverse Costs Order.

It had our motion in August 2019, it had the opportunity to respond, it could have identified some financial details, it could have provided balance sheets. It provided nothing. This is beyond saying it has "limited assets beyond the Arbitration." That was the opportunity to reassure the Tribunal that its order will be effective.

ARBITRATOR BETHLEHEM: Could you--and this may most appropriately come in your Reply Submissions at the end of this session, but could you, perhaps, give some thought to whether you would like to address us on what intermediate steps might be appropriate should the Tribunal consider that it would wish to take intermediate steps before making any Decision?

MR. KLAVER: I'm happy to address that now. I

appreciate that the Tribunal may want to have all the information in front of it available. So, intermediate steps would be disclosure of the third-party funding identity and agreement. I appreciate the Tribunal's considering one of the specific terms, disclosure of that, and it also would be completely reasonable for the Tribunal to order Tennant to disclose any financial documents that demonstrates it has the capability to pay an Adverse Costs Order. After that, Canada would reserve the right to make further submissions on the documents that Tennant provides, if the Tribunal is willing.

ARBITRATOR BETHLEHEM: So, I'm sorry to prolong this. That is helpful. I'm wondering where that leads. If, for example, the Tribunal were to require the Claimant that it produces to us a, you know, a current bank statement which shows that there is, you know, in excess of X amount of money in the bank account, I mean, where does that leave the argument subsequently?

It shows that--you know, it would show that Tennant is solvent, it would show that they are not impecunious, but where does that leave the argument in terms of, "Well, are those funds going to be there tomorrow? What's the source of those funds? Are there debts that are outstanding that may draw on those funds in the interim?"

So, it's helpful to have some sense of intermediate steps, but perhaps think about it because it would be helpful to know whether your bottom line is you request us to make an order for Security for Costs because nothing else will satisfy or whether a prudent Tribunal should be properly apprised of facts and, therefore, these are the steps that--where you would not raise objection if we concluded we wanted to take.

MR. KLAVER: Umm-hmm. Umm-hmm.

Would you like me to answer that now?

ARBITRATOR BETHLEHEM: Whenever you want.

MR. KLAVER: So, we certainly, again, would not object to the Tribunal ordering Tennant to disclose financial documents as part of the Tribunal's determination for Security for Costs.

ARBITRATOR BETHLEHEM: Would that then suggest a two or multiparty--multistage process? We order the Claimant to disclose, they either disclose or they don't disclose, or if they disclose, then, you know, it needs to go back to you for comment.

I mean, are we looking at, on that scenario, a stage process rather than simply an order at the end of these proceedings?

MR. KLAVER: I appreciate that we don't want to create, you know, multiple rounds of more submissions, so

we would respect the Tribunal's Decision on this regard whether the Parties then write further submissions on the documents and what they indicate. It would be important to just keep them confined to the specific issue of Tennant's capacity to pay an Adverse Costs Order without raising many other arguments surrounding the Authority to order Security for Costs and other matters like that. I think if we could keep it a very limited submission on what those financial documents indicate, that would seem reasonable.

ARBITRATOR BETHLEHEM: Thank you very much. I've got other questions, but I'll get to them later on.

MR. KLAVER: Okay. Okay.

Now, I was just explaining that Canada created, after its diligent investigation, a reasonable presumption that Tennant is impecunious or appears impecunious and unable to pay a Costs Order. And in response to Canada's motion, Tennant did not refute this presumption. It provided no evidence that it could pay an Adverse Costs Order. It failed to provide a balance sheet or any financial documents whatsoever indicating that it has the financial resources or income to pay a Costs Order. It didn't list any assets, their valuations or jurisdictions where they are located. It failed to show that it's a going-concern with ongoing business operations and revenues, and it failed to offer any banking details and

accounts to assess its creditworthiness to borrow funds. It also did not show that it obtained an after-the-event insurance policy to protect it from the risk of an Adverse Costs Order.

Consequently, the evidence shows that Tennant appears to be impecunious, an empty shell that has demonstrated no ability or willingness to pay an Adverse Costs Order.

Now, yesterday the Claimant said that Canada's actions are responsible for Tennant's financial condition, and Tennant may repeat this argument today. This Tribunal must not accept this proposition at this stage because doing so would prejudge the merits of this case. In this regard, I'll point to a source we discussed at length yesterday, the Queen Mary Task Force Report. It states that: "In practice, when Investor-State Tribunals decide Security for Costs requests, usually at an early stage, they tend not to presume that the State's conduct has actually left an investor with limited available funds in order to avoid prejudging the merits. And, thus, violating fundamental principles of procedural fairness."

That is at Page 174 of Exhibit CLA-065.

Now, as we also discussed yesterday, Tennant has a third-party funder, and if the funding agreement allows the funder to avoid an Adverse Costs Order, then there can be

virtually no doubt that Security for Costs are necessary in this case. But even if there is a term in the agreement stating that a funder will pay an Adverse Costs Order, as Canada explained yesterday, neither the Tribunal nor Canada can force the funder to comply with that term. The funder could still walk away, leaving Canadian taxpayers to foot the bill.

So, in this case, Security for Costs would still be necessary because Tennant has failed to prove that it has the capability and willingness to pay an Adverse Costs Order.

Moreover--

ARBITRATOR BETHLEHEM: You spoke a moment ago about Tennant failing, for example, to indicate that it had taken out an insurance policy. I mean, in that vein, would it satisfy your concerns if--assuming we were with you on the issue of risk and felt there that was a need to address the issue of nonpayment of a Costs Award, would it satisfy you if the Tribunal were to require of the Claimant that it conclude a cost agreement with its third-party funder, assuming there to be a third-party funder, and that that cost--that agreement to the third-party funder to pay costs is then made available to the Tribunal and to Canada so that it was absolutely clear on the record that the third-party funder was committed to the payment of costs,

rather than actually requiring Tennant to stump up with 6.9 million or 1.4 million or whatever the figure might be?

MR. KLAVER: So, my concern there is that there's--could be a difference between a third-party funder and an established insurer. The Tribunal might feel more confident that, if Tennant obtained insurance from an established insurer, the Costs Order would be effective. And that's what the Eskosol Tribunal found.

If the Tribunal ordered Tennant to enter--add a term to the funding agreement saying that the funder will take responsibility, our concern remains that the Tribunal can't enforce that provision, and neither can Canada. So, if the Tribunal does order costs in Canada's favor, we cannot enforce a contract between two private parties. The third-party funder may have that term and may just walk away. Tennant can go after the third-party funder but we couldn't, and so we would be left with, once again, a major Costs Order going unpaid.

ARBITRATOR BETHLEHEM: Thank you.

MR. KLAVER: I also want to emphasize that we are aware of no investment cases where a Tribunal declined to order Security for Costs on the basis of a term in a funding agreement stipulating that the funder would pay an Adverse Costs Order.

In fact, in order to assist the Tribunal with its

determination, you can see a chart on the screen. There is a lot of detail, so I'll just walk us through it a little. The left side, in blue, lists cases on the record, other than Tennant, that denied Security for Costs. So, Tennant is at the top. The other cases denied Security for Costs.

Now, across the top two rows, in purple, the chart includes a brief summary of reasons why the Tribunal denied Security for Costs.

You can see in the first column, in purple, it lists cases where the Claimants appeared to have the ability and the willingness to pay an Adverse Costs Order. For instance, in Orlandini, Lao Holding, Pugachev, the Tribunals determined that the Claimants likely had the ability and the willingness to pay an Adverse Costs Order. In BSG Resources, the Tribunal noted that the Claimant's equity and assets were around $700 million. In Burimi, the Claimants provided their balance sheet to the Tribunal, which illustrated that they had a significant amount of euros.

In contrast, Tennant has provided no specific figures on its financial condition nor any documentation to prove that it can pay an Adverse Costs Order.

Now, the second column lists cases where the Claimant had ongoing business operations. For instance, yesterday we discussed the South American Silver Case where

the Claimant's parent corporation had business operations and provided financial documents.

Moreover, in Guaracachi, the Tribunal observed that the Claimant was a going-concern with assets beyond those in the arbitration. In contrast, Tennant has no ongoing business operations.

And the third column notes where the Claimant had insurance, as we just discussed, to cover an Adverse Costs Order, and this reassured the Eskosol Tribunal that a Costs Order would be effective. Again, Tennant has not stated that it obtained such insurance.

Another factor is that the Tribunals confirmed that no third-party funder was involved, which happened in Orlandini and Pugachev. Here, a third party is funding Tennant's Claim.

Another factor is that the Respondent had alleged that the Claimant merely had financial difficulties without more.

In contrast, Canada contends, among other things, that Tennant is nonoperational, has no revenue streams, no financial resources, no assets to satisfy Costs Order, and has a third-party funder.

A further consideration is that the Respondent had not paid its share of the arbitration fees, which, of course, Canada has paid.

And, finally, in some very early cases, the Tribunals considered it relevant that there had not been any precedents of Orders for Security for Costs. Now, at least two investment Tribunals have ordered Security for Costs, García Armas and RSM. This chart demonstrates that none of the reasons that may have justified a denial of the Security for Costs in past cases are present in this case. Tennant's Claim is distinguishable from all the investment cases on the record that denied Security for Costs. Considered cumulatively, these are "exceptional circumstances."

ARBITRATOR BETHLEHEM: Could we, the Tribunal, as a matter of law require of a third-party funder a commitment into this Tribunal which would, as it were, bind the third-party funder to any order that we may subsequently give on costs?

And the reason why the question has come to mind is, as I recall--I presume that some of this is on the record, but I don't know for certain--in a lot of the Spanish renewable litigation, the European Commission sought to intervene. And I think it is publicly on the record that in--a number of Tribunals gave their permission subject to the Commission giving an undertaking in respect of costs that may arise in respect of their applications.

So, I don't want to set your team to doing sort of

detailed research into Spanish renewables decisions, but it would be interesting, perhaps, to hear from you whether you think we would have the competence as a matter of law to require a third-party funder to give an undertaking into these proceedings in respect of any Costs Award.

MR. KLAVER: I would only be able to answer preliminarily at this point. I think there is a major difference between requiring someone who wishes to make a submission to cover the Costs, as in the European cases, versus enforcing or ordering a third-party funder to cover costs.

The Tribunal does not have the authority to make an order on a non-party such as a third-party funder. Domestic courts have that authority; Investment Tribunals don't.

So, my preliminary answer is that it does not look like it would be permissible for the Tribunal to order Tennant's funder to cover an Adverse Costs Order.

ARBITRATOR BETHLEHEM: Thank you for that. I would be grateful if you would think on it further because one possibility may be to request the third-party funder to make the order, and if they don't, that obviously raises the specter of risk further, but it would be helpful to hear further from you and indeed, of course, it would be helpful to hear from Claimants on that issue.

Thank you.

MR. KLAVER: Now moving to the third part of the test to prove that an interim measure is necessary. Without Security for Costs, it is almost certain that Canadian taxpayers would lose millions of dollars from an unpaid Costs Order in Canada's favor. This harm is substantially higher than the expense to the Claimant of posting Security for Costs.

Now, Arbitrator Bishop raised the issue of access to justice. So, I want to clarify Tennant would not necessarily lose access to justice in posting security. It would merely incur the expense for a third party to do so. Tennant says--

ARBITRATOR BISHOP: Well, I'm concerned about that statement "would not necessarily." I did note your statement in your pleadings that Canada is committed to Parties having access to justice and I certainly understand that, but I'm concerned about whether there would be a practical effect in this case.

Let's assume for a moment that we did grant a Security for Costs order as you request. What happens at that point? What happens if Tennant does not post that security?

MR. KLAVER: So, to answer your specific question, if Tennant does not post that security, the Tribunal would

have the authority to end the proceedings without prejudice to Tennant's ability to restart them if it did have the funds.

ARBITRATOR BISHOP: So, you would then ask for a dismissal order, that we dismiss the case without prejudice?

MR. KLAVER: That's right. Yes.

ARBITRATOR BISHOP: Doesn't that--I mean, doesn't that burden or deny the access to justice?

MR. KLAVER: No, because Tennant has not even tried to ask its third-party funder to post security. It could ask its funder. It never said, "We have asked and the funder said no."

So, the first step is for Tennant to ask its funder to post security. There will be an expense to that, but it is substantially less than Canada's loss of potentially millions of dollars of a Costs Order going unpaid.

I also want to emphasize, in García Armas, we just learned some very recent developments over the holiday period that the Tribunal had ordered Security for Costs. The Claimants were able to comply. They had their funder post Security for Costs. The proceedings went to the Jurisdictional Phase, and the Tribunal found it had no jurisdiction. It then ordered the Parties to cover their

own costs, and it ordered the Security for Costs to go back to the third-party funder.

And we can provide this. This just came out, so we can provide the Investment Arbitration Review article on this update. But what this shows is that Security for Costs does not need to block access to justice. So, Tennant too could post Security for Costs, and it would not lose access to justice in this Claim.

ARBITRATOR BISHOP: All right. Thank you.

MR. KLAVER: Now, the García Armas Tribunal had determined in the case that those Claimants would not lose access to justice because they hadn't said they were insolvent. They could ask their funder to post security and they had not alleged that they would be unable to convince a funder to post security. And that's the same situation here.

Tennant says it has limited assets. It could ask its funder to post security, and it has not said that it did ask and was then unable to convince them. So, in this case, in these circumstances, one Tribunal found this would not block access to justice. For the same reason here, you can find it would not block access to justice.

Now, the Tribunal might also find guidance in the international commercial arbitration context, where the Tribunal in X S.Á.R.L., Lebanon vs. Y A.G., Germany ordered

Security for Costs in similar circumstances. It ruled that: "If a party has become insolvent and likely to rely on third-party funding to finance its claim, the right to have access to arbitral justice can only be granted under the condition that those third parties are ready and willing to secure the other party's reasonable costs to be incurred."

Either Tennant or the funder--not Canada--needs to bear the risk of an Adverse Costs Order against Tennant by posting security.

Now moving to the fourth element of the test to prove that an interim measure is necessary. An order for Security for Costs is urgently required in these circumstances. Canada continues to incur significant expenses in this arbitration without any assurance that Tennant can and will pay an Adverse Costs Order. Canada has devoted a full legal team, as you can see, to this case. It has already incurred substantial costs to resolve many procedural issues, and these expenses will rise significantly in the Jurisdictional Phase.

The potential Merits and Damages phases would bring even greater expenses. The Claim could require Canada to incur millions of dollars in Expert fees. Canada cannot wait until the Final Award only to find that a Costs Order is meaningless. In fact, as we discussed yesterday,

a funder might even withdraw its funding before the Tribunal renders an award, which has occurred in other investment arbitrations, S&T Oil, Ambiente. The Tribunal's only leverage to preserve the effectiveness of the Final Award is to order Security for Costs now at this stage of the proceedings.

So, to summarize, Canada satisfies each element of the four-part test to prove that an order for Security for Costs is necessary. Canada has a prima facie reasonable case that Tennant's Claim is time-barred. Without security, Canada would almost certainly suffer harm that is not adequately reparable with the Costs Order award. The harm to Canada losing millions of dollars is substantially greater than Tennant's harm of having a third party post security. And these circumstances are urgent.

When considered cumulatively, the circumstances truly are exceptional. It is the--Tennant is very likely impecunious. It has a third-party funder over which the Tribunal cannot compel to pay an Adverse Costs Order, and these two conditions together, in themselves, suffice to find "exceptional circumstances." But there is more.

This is a duplicative NAFTA claim brought by the same counsel, replicating, substantively, the factual and legal arguments of another NAFTA claim that lost in 2016. And this resulted in a multimillion-dollar Costs Award to

Canada going unpaid so far.

So, in these circumstances, the only way to preserve the integrity of the Arbitration is with an order for Security for Costs. The Tribunal has a very strong basis to make this Order. It is necessary to prevent Tennant from committing an arbitral "hit and run" against Canada.

Now, finally, the amount of security that Canada requests is reasonable. Yesterday we discussed bifurcation, and if the Tribunal accepts Canada's request to bifurcate the proceedings, then Canada asks the Tribunal to order Tennant to post CAD 1.4 million for the Jurisdiction Phase, and if the case proceeds to the Merits, to then order security of $5.4 million. This figure includes reasonable estimates of Canada's legal representations and expenses as we outlined in the Motion, and this figure is actually lower than the Security for Costs ordered by the García Armas Tribunal for its Jurisdictional Phase. Converted to Canadian dollars, the García Armas Tribunal ordered the Claimants to post about CAD 1.9 million, which is 35 percent higher than Canada's request for CAD 1.4 million.

That said, if the Tribunal does not bifurcate the proceedings, Canada asks for security of CAD 6.9 million. This is commensurate with the average cost of Respondent

States in investment proceedings, which average above CAD 6 million. Nor is it excessive for security to match Canada's anticipated costs. The Mesa Tribunal ordered the Claimant to pay 100 percent of the arbitration costs and 30 percent of Canada's costs, but that case raised novel issues and this case does not. So, Security for Costs should not be discounted.

With that, I wish to thank the Tribunal for your consideration of this very important matter, and I look forward to answering more of your questions.

ARBITRATOR BETHLEHEM: We've got an issue of timing, but this goes into the Tribunal's time questions. I will put a couple of just very brief questions because I'd like to get them on the record to you so that you have an opportunity to respond because I will put the same questions to the other side.

There's a preliminary point I would like you, please, to come back later on in the course of these proceedings to address the issues that we spoke about earlier, whether there are any intermediate steps that you think we should take and whether there would be any consequences and also what latitude we might have as regard to third-party funder.

The two questions I have, very briefly, is: So, you are, I think as a matter of formality, averring the

order that you requested in writing, aren't you? Because you've now said, in the alternative, you've moved your Paragraph 40 request into the requested Order.

I mean, if we were with you on the issue of Security for Costs, wouldn't it be appropriate at this stage simply to order Security for Costs for the Procedural and Jurisdictional Phases only and then to revisit the issue at a later stage? That's the first question.

The second question is: Would there be any merit in the Tribunal thinking about Interim Cost Orders? I mean, for example, we will get to the end of these proceedings. Costs will have been expended. Now, it is normal for a Tribunal to deal with costs right at the end of the process, but if there is a concern about payment of costs, either by Canada to the Claimant or the Claimant to Canada, would you invite us to consider any interim Costs Orders as we go along so that these issues roll up rather than simply come as one big sum at the end of the day?

Thank you.

MR. KLAVER: In regard to your first question about ordering security for the Procedural and Jurisdictional Phase, Canada would respect that Decision.

On your second question about Costs being ordered throughout the proceeding, I think that is something we should discuss with our team. My initial concern is that

might lead to more submissions on Costs, increasing cost, but if I could get back to you in the Response segment, I would appreciate that.

ARBITRATOR BETHLEHEM: Thank you.

PRESIDENT BULL: Thank you, Mr. Klaver.

MR. KLAVER: Thank you.

PRESIDENT BULL: We've run on in terms of time somewhat, and I would rather not interrupt the Claimant's submission for the first break, so I think we'll take a 10-minute break now, and then we can have the Claimant's submissions in one go rather than breaking that up. So, we will just adjourn for 10 minutes.

So, 10 minutes. Thank you.

(Brief recess.)

PRESIDENT BULL: Good. We are back on the record.

And whenever you are ready, Claimants may proceed with their submissions.

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. APPLETON: Thank you very much, Mr. President, Members of the Tribunal, for the opportunity to be able to talk about this very important subject.

We are going to go through a number of cases and points. I invite the questions from the Tribunal. We will try to answer as many as we can as we go along and see if we can work our way through a rather complicated matter.

I believe there's a light at the end of the tunnel, but there are very significant values that are involved here, and I think it is very important that we get this balance right. It's a very important topic. The Tribunal has given it a lot of time at it today for this, and I don't think it is going to be quite as simple as our friends from Canada have made it out. And I think it is very important that we get this balance right.

So, first of all, it is very clear that we do not believe that the Tribunal has authority to grant the request. The starting point on this is the NAFTA, NAFTA Article 1134. Then we turn to the UNCITRAL. The NAFTA says that the NAFTA controls the process. We follow the rules to the extent they are not modified by the NAFTA.

So, first, we deal with that, then we deal with the issue of Article 1126 of the UNCITRAL Arbitration Rules.

And we appear to have some significant differences with the Government of Canada about the meaning of Article 1126 and especially about the relationship of governing 1976 UNCITRAL Arbitration Rules and the 2010 Arbitration Rules. On the UNCITRAL--

ARBITRATOR BETHLEHEM: Sorry. You don't mean 1126, do you? You mean Article 26?

MR. APPLETON: Excuse me, I mean Article 1126. My

apology. Yes. I mean, Article 1134 of the NAFTA and Article 26 of the 1976 UNCITRAL Arbitration Rules. I'm sorry if I misspoke. Thank you for correcting. It would make a terrible Transcript if I kept misspeaking.

So, on the issue of--of the UNCITRAL Rules, and then I'll turn to those second, but just to give you a sense of where we are going, we do not believe that Canada has met its burden under the four-part test. But even more profound, both under Article 1134 and under Article 26 of the UNCITRAL Rules, there's an access to justice question here, and it's a very profound and important--when we're talking about preserving rights, the right to have access to justice is paramount.

It is a primary right that is here, and it's a right that we need to talk about in some detail because that looks like it could be lost in this process. We're concerned. We'll talk about this in some detail. I'm just giving you some headlines to help as we go along.

But, fundamentally, Investor-State arbitration cannot be a process where only the wealthy and the powerful will have access to justice. Canada's process would leave it that only the wealthiest, only the 1 percent of the 1 percent would be able to have their day about wrongful and inappropriate conduct. That cannot be the way that the rule of law of due process is to be interpreted here. That

only those, no matter if they are affected, if their money has been affected, if their capital has been destroyed by the wrongful acts of a State that has the power, the sovereign power to expropriate, to freeze, to do all types of things, if they exercise that and, yet, they cannot have their day in court because they will not have enough free money sitting around in their bank accounts?

That is a plutocracy. That is exactly the opposite of what Investor-State is about. And if we were to take this wonderful institution and convert it into such a way that would cause tremendous problems, we would be denying the ability of labor unions to be able to use the process, to allow nonprofit organizations that have rights under the NAFTA to be able to deal with that, to use the process.

We would be denying all of them, and we're--all we would be doing first is a biopsy on their wallets before we were going to do anything else. That is very problematic to those of us who believe in the Rule of Law and in the progressive development of international law. And that is quite alarming, and I wanted to flag that right up front.

Now, let's talk about the NAFTA, and then we'll turn to Article 26 of the UNCITRAL Rules.

So, first, with respect to the NAFTA, it's important to identify that no NAFTA Tribunal has ever

awarded Security for Costs. We think a key reason for that, fundamentally, is that the NAFTA doesn't permit it. We don't think it's a power that's available to this Tribunal, and, therefore, that would explain why people don't ask for it and why it hasn't been awarded.

Second, we don't believe the Security for Costs is an interim measure that was envisioned by the NAFTA Parties when the NAFTA was signed. I've written two books on the NAFTA. I had the opportunity of being an advisor to the Government of Ontario, one of the subnationals here today, when the NAFTA was being negotiated. I did the very first NAFTA case, and I think this may well be one of the last, if not the last, NAFTA case.

So, I have a pretty good understanding of the nature of the process and clearly this was not what was envisioned in Article 1134. And we'll talk and go through that in some detail.

1134 clearly not only was not envisioned to do that, it doesn't do that. We will talk about that precisely as well.

An Order of Security for Costs is, in our submission, inconsistent with the object and purpose of the NAFTA, which is to create predictable commercial frameworks for business planning. And subsequent practice--and we'll get a chance to talk a little bit about that.

I don't want to start with that because, as a part-time international law professor, it is something that I like talking about, the Vienna Convention, but I was deeply troubled by the suggestions made today about how Article 31(2) of the Vienna Convention and subsequent practice and subsequent agreement could be done.

It seems to me that the idea here is that any position that you would come to at any time would mean that you would change. And, in fact, here you have a situation, where you have long-standing positions of one type of interpretation about how you interpret the NAFTA being changed in one submission. I liken this to a slot machine. You have lined up three cherries somewhere on the screen, and that means that all of a sudden you win. Well, international law is not about that.

Sir Daniel identified exactly what you would need. You would need an agreement. You would need a type--some type of codified document, and there are many ways in treaty practice to obtain such an agreement, but one alignment of litigation positions at one time, especially when they are inconsistent with interpretive provisions in the past.

And we submitted material on this in our Response on the 1128s, could not meet that test, both by way of subsequent agreement or by way of subsequent practice.

That is not what is available. You need more. And because the NAFTA Parties often take a position that whatever they say now, you ignore what they have said before, just whatever we say now is now our position--that could change again later--and, therefore, we took the forethought of actually preparing a section on what might not be subsequent practice and having it in our submission anticipating that that was going to be the position, and that was exactly what happened.

The three NAFTA Parties all decided to say the same thing at one time, different from what they have done in the past, and now they say that means that you should be able to deal with us.

Now, the real question is treaties need to be amended by their treaty process. There's a treaty process that deals with that. Congress has a rule. If you're going to interpret a treaty, there's an interpretive rule. There is a process to deal with that. In fact, this Treaty, through the Free Trade Commission Article 1131 and the Free Trade Commission process in Chapter 21, sets out that process. It is not being followed. So, I just simply want to flag this. We might come back to it later, but it seems that 1134 doesn't give the types of powers that we would want to see.

If we look at it, the powers that you have--and

this is what--this is the power. It comes from 1134. 1126, to the extent that it has any authority, is modified. It is subservient to 1134. It says that you have to preserve the rights of the disputing Party. And here, we would be very concerned that, if you make this Order for Security for Costs, you are actually detrimentally affecting the rights of a disputing Party, namely the Investor, the Claimant in this case. And we will talk about that with some specificity as we go along.

Now, Security for Costs would be prejudging of the case. Because of the prejudging of the case, there has been a lot of discussion about the prejudicial, the effect that would arise from that. A Costs Order, in our view, is not an interim measure that ensures the Tribunal's jurisdiction is made fully effective. It doesn't deal with your jurisdiction at all. It doesn't affect it.

Costs have nothing to do with the Tribunal's jurisdiction, and so the question is: Are you preserving a right? We do not believe that this is a preservation of a right, and we will talk about some cases that focus on that in particular.

But I do want to flag--

ARBITRATOR BETHLEHEM: Mr. Appleton, I'm not quite sure--because it seems if you've moved on from the point. I'm not quite sure why it would be prejudging the outcome.

MR. APPLETON: Because in order to be able to get there, you have to make a determination about specific issues. For example, Canada has invited you to make determinations about the Merits of the case, and, in fact, we will turn to the Queen Mary Task Force that actually Canada referred you and read through a paragraph but kindly omitted the next paragraph that talked entirely about the prejudgment effect and entirely about the conduct you would need to find to go there.

So, they have been very selective. They have done this throughout this presentation, and we are going to take you through, just like they selectively omitted certain other facts I will take you through.

ARBITRATOR BETHLEHEM: Security for Costs, for all the debate that there is in the investment-State space at the moment, I mean, Security for Costs is not a novelty in litigation. I mean, courts require Security for Costs all the time, and there is not a perception that this is somehow, you know, a playing around with access to justice, is there?

MR. APPLETON: Oh. Well, there is always an access to justice issue, and there's a very significant criteria as part of the test. So, yes, there is an access to justice.

If you'll allow me to go here in detail, I'd like

to do that, but in addition, you have to think about the position of the Parties.

Sovereign States have sovereign wealth. They have sovereign abilities, and they use those sovereign powers. In this case, specifically, we would say improperly, they have used that power that--not with respect to the request for Security of Costs, but the request of what they did, the underlying issues in this case.

This case is not the same case as Mesa Power. This case is about the types of issues that were discovered in that Mesa Power case and later from other cases. This is about identification of the use of discretion or inappropriate use of the regulatory structure. So, the fact that this case and Tennant talks about the same regulatory structure as what went on in Mesa--that is one thing.

But the fact of the matter is is that the issues about the use for International Power Canada, a favored company because of its political connections, they took the spot of Skyway 127, the investment owned by Tennant Energy. It had what was called the "dry run." It had a vested position in the queue, and they bounced them from that vested position. They ran the test, they found out that their friends didn't get it, and then they modified it over a weekend.

Nobody knew this until much later. Nobody knew that. You couldn't find that by reading the Regulations. This case is completely and utterly different. And this is a type of meritorious case. But it's the conduct directly of the other side that has resulted in the situation where the Claimant, which had entitlement to millions of dollars' worth of contracts being knocked out to nothing.

And that is exactly the types of issues that would be problematic. And that's why we take a little bit of umbrage. I'm sorry to get a little animated, but it's a complete unbalance that is here that causes this deep concern, and fundamentally the point I just wanted to make is that, if, in fact, the Tribunal did not have the authority to make this Order under the NAFTA, then that would raise the issue of whether or not it would be set aside in a vacatur action, and we certainly don't want that.

We don't want the Tribunal making an Order that is not going to be enforceable. We want the Tribunal making Orders that are enforceable. That is exactly why we're here. And that is something we want to avoid. We don't want that situation to actually occur.

So, I'd like to turn to--oh, sorry. I'd like to turn to the Alasdair Ross Case. That is CLA-52. And here, what the Tribunal had to say in that case, I believe it's

an ICSID Decision--I have note here but unfortunately I can't find it--yes, it's an ICSID Decision.

But when considering provisional measures, the Tribunal here said that "Provisional Measures are intended to preserve Parties' rights, not to protect their mere expectations. The reason for restraint and caution in this area is that the imposition of a provisional measure in many circumstances may have the effect of inhibiting a Party's access to justice and may result in prejudging matters of rights and obligations that are at the core of the case to be heard by a Tribunal and should be decided in a Final Award."

And this was the same type of position taken by the Tribunal in Maffezini in their Procedural Order. That is also in the record at RLA-16.

ARBITRATOR BETHLEHEM: Just for the record, Alasdair Ross is CLA-53, not 52, I think.

MR. APPLETON: Oh, thank you. I'm sorry. I modified some slides last night. If you have other things that are wrong, please help me. I'll make sure we update everything along the way.

Now, preserving rights includes preserving access to justice, as I mentioned earlier. So, the obligation of 1134 is not only an expectation which Canada claims, which we feel doesn't fit in and doesn't fit in there, but a

direct and absolute obligation of the Tribunal to ensure that the rights of the Claimant to be able to continue its case are protected.

And that, we think, is very important. And we're going to come back on that as we look at the actual test.

Now I'd like to turn to Article 26, and as our friends from Canada have spent a lot of time talking about Article 26, I'm not going to take us through the terms of Article 26, as they have done that, but interim measures under UNCITRAL Article 26 need to be necessary in respect of the subject matter of the dispute.

Now, Security for Costs is neither an interim measure in respect of the subject matter of the dispute, nor in this situation do we believe it's going to make the necessary test.

Now, Canada seems to be picking and choosing here because they want to rely on García Armas, one of the two and only two Investor-State Tribunals that have made an Award but yet not apply the fundamental and essential terms in García Armas which required exceptional circumstances, and for sure "exceptional circumstances" are a requirement. There is no question. And the case law is very clear with respect to that.

There are no "exceptional circumstances" here to grant a request for Security for Costs. And Canada doesn't

even meet the obligations of García Armas, the four-part test. They just say it, but they don't meet it. And they have an obligation to meet it. In many respects, this motion was premature, and, in many respects, this motion is faulty. We are going to walk through each of those now.

Yes.

ARBITRATOR BISHOP: What is the underlying rationale for requiring "exceptional circumstances" in this context?

MR. APPLETON: It's because of the fundamentally significant and disruptive impact that occurs upon a Claimant with respect to Security for Costs. It is tremendously disruptive. And, in fact, it is not just disruptive at the beginning when you have to deal with the process--and maybe you can't deal with that process. Maybe all of your assets have been focused in to being able to bring the case to trial. And now you're going to have to have even more assets that you might not--you might only have enough to be able to get to trial. You might not have more for that.

Maybe it's going to be an issue of it's so complicated and difficult to get a policy. Getting policy is, for Adverse Costs, quite significant. And not only is that difficult, it looks like nothing is going to be good enough for Canada. Everything we just hear, when we've had

the opportunity to--where they have had questions from the Tribunal, well, would you consider this, would you consider that?

Well, we would look at it and then we'll come back and look again. And we are not sure that the funder would be good enough, if there was a funder. Maybe we're not sure that the insurance company has enough sufficiency to be able to deal with it.

We just see a lot of ongoing discussion and debate and concern, and we think about the impact on the entire field, what would happen, in general, if we were to reduce access to justice rather than to enhance access to justice.

I'm going to--I'll also let my colleague, Mr. Mullins, just take a moment to take you through what Queen Mary said on this. This is as good a time as any to deal with that, and I think that would be relevant.

MR. MULLINS: Because I think it is directly relevant to your question, Arbitrator Bishop, because what they talk about in the paragraph that Canada wrote, it talked about how that Investor-State Tribunals are reluctant to say, at early-stage proceedings, that they are going to presume that State conduct had left an investor without available funds.

But then they go on to say it's for that very reason, from a review of the growing number of cases

dealing with the matter, it appears that Tribunals in ICSID Arbitration tend to adopt a stricter test when the Claimant's impecuniosity to an Order of Security for Costs, they require evidence of abusive conduct, bad faith on the part of the Claimant.

And then it goes on to say in the paragraph, later, after the paragraph that Canada wrote that explains why investment--the fact that they are reluctant to prejudge on Merits--because it goes both ways; right? You don't want to prejudge the merits.

On our end that, you know, it basically made us penniless, which is an argument, which we--the argument is that the sovereign conduct of a State could render an investor with inability to bring claims, and so, because of that, the Tribunals, the vast majority of the Tribunals explain--this explains, this is what the Queen Mary says, this explains why investment Tribunals tend to focus on other considerations which are not directly related to the merits of the dispute, but nevertheless set a high threshold for a Claimant to be subject to a Security for Costs Order in investment arbitration. Again--

(Interruption.)

MR. MULLINS: --including, for example, the requirement that the Claimant has exhibited abusive conduct by repeatedly failing to comply with Cost Orders or

deliberately dissipating its assets.

And so, what I get out of this, and I think from the Opinions of the Tribunals, is because of the power the States have, the power to expropriate, the power to make regulations that could take people out of granted queues, that we are not going to simply say, okay, this is not just a commercial arbitration.

And it may be common in commercial arbitrations where people can negotiate the contracts and put provisions about security costs in their arbitration clause. We are talking about Treaty behavior of State sovereigns, and because of that, the Tribunal has recognized, with that power comes a responsibility and recognition that we are not going to make you post costs unless this particular Claimant--not some other Claimant, not your experience in other arbitrations, but this particular Claimant--engaged in abusive conduct, and we're going to require exceptional circumstances.

I think that is hopefully the answer to your question. I believe that is what is coming out of these Opinions, and that's why it happens.

(Interruption.)

ARBITRATOR BISHOP: I assume that for your purposes that these tests that you've just said would be the "exceptional circumstances"--abusive conduct, bad

faith, dissipating assets.

MR. MULLINS: Correct.

ARBITRATOR BISHOP: What were you reading from?

MR. MULLINS: That is the Queen Mary Report, Page 174. It's all--this is all on the same page of the page that Canada was talking about.

ARBITRATOR BISHOP: Give us the reference number under the document.

MR. MULLINS: Sure. This is CLA-65.

ARBITRATOR BETHLEHEM: If you've finished, I've got a question.

ARBITRATOR BISHOP: Yes, I'm finished.

ARBITRATOR BETHLEHEM: It goes back to--it is relevant to this discussion, but it also goes back to, Mr. Appleton, your submissions about Article 26(1).

I'm struck by the fact that neither Party has quoted to us Article 26(2). I don't know if you've got the text in front of you, but I'd like you to just refer to it if you have. It says: "Such interim measures may be established in the form of an interim award. The Arbitral Tribunal shall be entitled to require Security for the Costs of such measures."

Now, that seems to suggest that a Tribunal has the competence, the authority to require Security for Costs in Article 26(2). I appreciate that it's linked to the

interim measures which are addressed in 26(1), but I would be grateful, either now or later, if you could address us on what you think the relevance of Article 26(2) of the UNCITRAL '76 Rules are.

MR. APPLETON: I can answer your question by referencing back to a response for Canada's motion for Security for Costs.

ARBITRATOR BETHLEHEM: Yes.

MR. APPLETON: If you look at Paragraph 16 and 17, you will see that this general issue was considered by the UNCITRAL Model Law Working Group, and the UNCITRAL Model Law Working Group came to the conclusion that they had to actually amend the UNCITRAL Model Law specifically because UNCITRAL in the 1976 Rules did not permit for the making of measures for Security for Costs as an interim measure, but that they believe that would be possible under the 2010 changes, because they actually were very clear, and then they created in the Model Law Rule 17(a) to specifically address and deal with these issues.

So, it was because the UNCITRAL Working Group, which I'm sure you may have been involved in in the past, I had the opportunity to work on the Working Group for a number of years, it very carefully studies this with Experts from around the world and with many, many States that are there. In fact, Canada is currently chairing one

of the working groups right now.

And so, this is a very well-placed body, and if they issue a report on this, it is usually a pretty good indication that they carefully thought about it. And they very carefully thought that that was not available.

So, our view is that UNCITRAL got that right and that the '76 Rules did not permit it and that, perhaps, the 2010 rules do permit it, and certainly the amendments to the Model Law now would permit it, but not with respect to the 1976 Rules, and certainly we believe that the NAFTA Article 1134 modifies and governs to that extent, and that, in any event, the preeminent right that has to be covered here is to preserve the right of the Claimants to access to justice more than anything else, and then we'll talk about the rest.

But we find some of what Canada has to say today about how they meet the test to be basically made of whole cloth. It is basically science fiction. We don't see how any of these things could happen. They just say things, but we see no evidence to support them. We will walk through that.

ARBITRATOR BETHLEHEM: Thank you. And just a small point of clarification. I mean, as I read 1120(2) of the NAFTA--this is: "The applicable Arbitration Rules shall govern the Arbitration except to the extent modified

by this Section."

I take it from that that the UNCITRAL '76 Rules govern the arbitration, save insofar as they are modified by 1134 on these issues.

MR. APPLETON: That's correct. That is our position exactly.

Now, if I can go back. Canada--unless there are any other questions arising out of the St. Mary's document and Mr. Mullins.

All right. I will turn back, then, and go back.

During yesterday's discussions, we had the opportunity, from Johannie Dallaire--she gave us a presentation about interim measures. If you recall, she talked about the issues under the UNCITRAL Rules, and she set out the following which I put up in the Transcript. She said: "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."

There's a very specific test that you need to meet, and we don't believe that Canada has met that test. That test is "exceptional circumstances." And that's the standard of Canada's authorities.

That was done by García Armas. That was done by

RSM-Saint Lucia. Both referenced by Canada. Both cases said that Security for Costs requests should only be granted in "exceptional circumstances," but yet today Mr. Klaver has said that we should pick and choose, we can cherry-pick, and we don't have to have exceptional circumstances but, of course, we do because that is exactly what the cases said and the cases they rely say. There must be "exceptional circumstances."

And when Security for Costs has been granted, the standard always has been exceptional circumstances. The situation can't be ordinary. It has to be exceptional. This is exceptional relief.

If we look at RSM Saint Lucia, that is RLA-19, that's the Panel Decision, not the Annulment Decision, just to make sure that we are clear. "Exceptional circumstances" test was not met if you simply had an impecunious Claimant or if you simply had a funded Claimant. Those are not enough to be able to make that test.

For "exceptional circumstances" there had to be a Claimant with a proven history of not complying with orders. We don't have that here. That is, you need to show something on the conduct, something in the way of a party that's a problem. Here you have Tennant. Tennant has paid its amounts on time. Tennant's complied with the

rules. Tennant complied with the rules of the FIT Program.

Tennant posted--or Skyway 127, its subsidiary, posted a $1 million Letter of Credit for the FIT Program. And at that time, its partner, General Electric, was there providing guarantees of supply for millions of dollars of wind turbines. These are, you know, very real operational things at that time. They were reviewed by the Ontario Power Authority as part of the FIT Contract. They got evaluated and accepted in that process.

As a result directly of the wrongful conduct, the Company is not in the same strong financial position it would have been before. And had they received the contract that they were in line to get, that they had vested rights to get, that they were bounced out of improperly, they would have been very successful.

ARBITRATOR BISHOP: Did Tennant ever have to provide any sort of financial statement for purposes of seeking a FIT Contract?

MR. APPLETON: There is a requirement in the FIT process that you have to give information about your financial capacity. You have to give information about your ability to carry out the Contract. There's an evaluation process. They were reviewed and rated, graded, and got what I call "gold star." It's what I give my students. That's what they got. They got it because they

were able to obtain a ranked, in essence, vested contract place.

And they would have had that contract but for the direct and wrongful change of the rules put together at the last minute done over a weekend, notified on a Friday with a closure on a Monday that allowed International Power of Canada, a deeply politically connected and friendly company, to be able to change its connections in the transmission access system, a regulated process, and, thus, be able to take away the vested position of Tennant.

ARBITRATOR BISHOP: I think you said in your pleadings that they would have ranked in sixth place, as I remember, but for the conduct that's being alleged.

Was that ranking based, in part, on financial ability or capacity? I mean, was that part of the test of ranking?

MR. APPLETON: Yes. It is part of the test and there are a variety of things. It had to be based on your technical capability, your actual winds that would be involved there, your ability to complete the Project, your ability to be able to access and deal with $100 million, whatever it would be worth of construction, and engineering that would take place, your ability to connect into the grid, and it had to be your ability to carry out the Project. And if you didn't get that, you didn't meet the

evaluation criteria, you couldn't proceed.

ARBITRATOR BISHOP: I know that you also say in your Memorial--excuse me, your papers that Tennant took this particular--took Skyway over, I assume, from GE or bought GE's interest.

Was the original ranking and financial presentations made by GE or was it by Tennant or was it by Skyway? I mean, can you elaborate on that?

MR. APPLETON: Sure. I would be happy to.

So, the Managing Director, so to speak, of Skyway was Mr. Pennie, who is here. Tennant already had an interest at the beginning in the Project, as did GE. Eventually, after the Contracts fell apart, GE stayed for a very considerable period of time because Skyway's Contract--they weren't shut out when the contracts were announced. They were put on a wait list.

ARBITRATOR BISHOP: I'm sorry. Skyway was a Canadian company?

MR. APPLETON: Yes.

ARBITRATOR BISHOP: Owned in part by GE and in part by Tennant?

MR. APPLETON: Yes. Skyway is the investment. You had to be a Canadian company to be able to apply, and foreign investors would then be able to acquire shares. It is supposed to be an open border on such matters.

So, Tennant had shares in the Skyway Project. GE had shares in the Skyway Project. GE was very interested. They thought this would be an excellent Project. Being in sixth place gave them basically what they thought was guaranteed access because they did what is called the "dry run." In the dry run, they had access. Six projects for sure. Could have been actually more at the time, I think, but for sure they were in the gold zone. They were in the green. They were getting a contract and then all of a sudden they didn't.

That's what this case is about. That is not what the situation was with Mesa. This is a different type of case. Same FIT regime and maybe some of the same bad officials.

ARBITRATOR BISHOP: Is it possible to get the filing made by Skyway with respect to its financial situation as part of the Project?

MR. APPLETON: I can't imagine why that would be difficult. I'm sure that we will be able to produce that very easily.

So, just to put it into perspective, it is because directly of the wrongful conduct of what was done by Canada that the Investor in this case is in a difficulty. If the Contract had been carried out--if the terms of the regulatory process had been followed, there would not have

been a problem. And that's why the question about access to justice and fairness and the whole process comes here. If one side can so badly hurt the other side using its regulatory power and then be able to deny it the opportunity to be heard by saying, "Well, we've denied you all this financial capacity, but you are going to have to pay more, maybe beyond what you could do, to be able to have that heard, to be able to have that judged," that would be a real problem because these companies are all set up for that purpose.

But, yes, for sure, Skyway would have been able to deliver. It was independently evaluated to be able to deliver, and there was a process done by the Government to check and vet other--because there were many, many people who wanted--these were very valuable, very desirable contracts.

To be able to get to sixth place meant that you had to have a highly competent and highly capable team. That's exactly what Skyway 127 had. That's why this is such a shame, because it would have been so good for the people of Ontario to have green energy, and they didn't get it, and that's really a shame.

I'm going to just turn back, if that's all right, unless you have other questions about that. I know that the Tribunal is interested and these are appropriate

questions of course to add.

So, on the García Armas standard, there are four points. Mr. Klaver has taken you through the four points, so I'm not going to belabor them, but we do not believe that Canada can meet the four factors. We're going to go through them.

First is about the possibility of prevailing. As I just pointed out, the Mesa Case is not the same case as the Tennant Case. We talked about that yesterday. Mr. Mullins took you through it in some great detail.

Four of six NAFTA Arbitrators looking at the FIT Program found problems in the administration of the FIT Program. So, it's very hard to say that this case is frivolous and there could be nothing there when at least four very knowledgeable, thoughtful arbitrators studying a complicated regime after a very considerable period of time with filings on both sides came to the conclusion that the conduct of the Government of Canada did not meet the standard of fairness that would be required with respect to the regulation of a program like this.

And in Orlandini that's at RLA-34, the Tribunal there, as well as the Alasdair Ross Case--I think I pointed that out earlier--both found that Merits Decisions about how the case should be and the strength of the case really are premature and should be avoided as much as possible.

Then we have the issue of irreparable harm. This one I'm completely-- amazed at. Canada stated that it likely would suffer harm that is not adequately reparable by the award of damages because it may be unable to recover a Costs Order in its favor. That's in its Motion. They said basically the same type of thing today.

The mere possibility that you may not be able to recover a hypothetical Award of Costs is not irreparable harm. Irreparable harm is a type of damage where you can't get monetary damages. That's irreparable. Irreparable is that something else is going to happen, okay. So, not getting monetary damages is not irreparable harm, especially when you're a Sovereign, when you have tremendous wealth and resources. And the use of this Tennant language doesn't actually demonstrate that they are going to actually suffer harm. That's what you have to have: You have to actually suffer harm.

And Maffezini itself rejected a notion that Security for Costs can be awarded because a Respondent may prevail. They said that wasn't relevant. Also, in Burimi and in Grynberg, financial difficulties or the fact that you might be a special-purpose vehicle, which all of the wind companies are special-purpose vehicles, designed for that specific Project is a liability purposes, that would not be the basis to be able to justify a Costs Award. So,

the harm to Canada if security is not awarded doesn't outweigh the tremendous harm to the Investor if it was awarded.

So, the first issue, of course, is access to justice. It is directly related. The financial constraints of this Company are directly related now to the wrongfulness of what took place in Ontario and in the administration or the misadministration of the Ontario FIT Program.

Canada simply proclaims that the balance is met because the Tennant claim is frivolous. I think we've gone out of our way to try to demonstrate it is not frivolous. We've demonstrated it not just on the issue of IPC, which is very troubling, very troubling, but also with respect to the predatory conduct that has been determined that governmental-like powers were granted under the nondisclosed parts of the Green Energy Investment Agreement, the GEIA, to the Korean Consortium. They then used those powers to be able to move people in the transmission queue to spots that they could not succeed at. They could take a successful project and move it to a nonsuccessful spot, and then they would buy that company after it could not get a contract for salvage value, for scrap. Buy the company for pennies on the dollar and then use its special GEIA powers to convert it to a successful

FIT Contract.

And by doing that, the Korean Consortium was basically predatory. It was raiding companies, converting people who would otherwise would have been successful but nonsuccessful and trying to buy them for scrap and then using that to turn into very valuable things. And that is also very, very wrong, and that was all facilitated and permitted. That's another issue. That was not part of the Mesa Case. That is very much a part of this case.

These are all the types of things that were discovered. These are wrong. You wouldn't know if you just lost your contract--you didn't get your contract, if you didn't know something was wrong, but when you find out that something is a violation of a fundamental duty of--breach of due process, a breach of fundamental justice, that's when you know the loss is attributable to a breach of the Treaty. That is when the limitation comes. That is not frivolous.

Canada would have you believe that this case is the Mesa Case. They tried to get you to believe yesterday that it was controlled by the same Party even though we told you clearly that Mesa didn't have any funder and didn't have a common Party, but they kept saying it again. And then they said, well, maybe because some counsel--a majority of counsel on this case are not the majority of

the counsel that were on that case--different firms, different pieces, different people. But they say, well, somehow they should be responsible.

And then the fact that Canada never took steps to enforce its Award against Mesa, waited until after Mr. Pickens was dead to be able to start issues, contacted the former counsel--never contacted, as far as we know the Company, but we don't really know--and then say, well, you, Tribunal, should make an order because we were lazy and sloppy and didn't do our job to enforce.

That's ridiculous and that is not the basis for showing irreparable harm. It does show irreparable stupidity. It shows poor judgment. It shows questionable lawyering, but does not give you a step of irreparable harm.

Irreparable harm means that it cannot be done by damages. And Canada cannot meet that test. It does not meet that test, and that is a real problem, similarly, like their suggestions today that we heard about impecuniosity.

First of all, who would--if you don't believe that the Tribunal has the authority because of the terms of the Rules to be able to issue an order for Security for Costs--it wouldn't necessarily file materials, but if Canada wanted materials, they could have sought an interim measure for production of information from the Company.

That would have been a normal predisposition or a pre-step.

In fact, in García Armas, they made two Orders about that in advance. Canada didn't do any of the legwork and do any of the spade work to prepare for that. They simply came here and proclaimed we know for a fact.

President Bull questioned Mr. Klaver. It was clear they don't know for a fact. They know some things that they couldn't find. They don't know. There's a process to find information at the right time and the right spot.

We don't believe that is actually a proper inquiry to make. So, where we have a difference of view is that because of the access to justice and the other issues, we don't believe that it is appropriate.

Furthermore, we think it's problematic. Even some of the disclosure in your leanings that you would have about it, whether there is third-party funding--we understand identity of a funder. That's important because that can deal with issues of conflict of interest. We understand that. But the other issues, we don't think that's proper. Of course, we will comply with what you say, but we don't think that is also helpful because what we've heard from Canada is they want to use all this information to create other mischievous procedures that we are going to have other hearings on.

One of them would be a risk of an 1113, an 1113 denial of justice hearing, where Canada has the--will attempt to revoke the authority of the Claimants here saying that NAFTA doesn't apply. And if they were to do that, NAFTA--Tennant is a U.S. entity. The Skyway 127 is a Canadian entity. They don't otherwise connect in in that way, but if we were to find that, then we would have another emergency hearing.

We would have a process with a whole variety of governments. You are going to have to rule on whether or not that's appropriate. It's a diplomatic thing first, so they get to deal with that. It is all going to be coming as a result of what I would call the inadvertent effect from the cyber production. We would strongly urge you to reconsider on that.

But what is relevant and what we think is there--and we put it in our pleadings--is identity to deal with conflict of interest. But we don't believe you should go beyond that. And the reason here is, is that it is not going to be relevant fundamentally because we don't believe you should be issuing Security for Costs. We don't believe you can, but we also don't think you should.

Canada has a burden to meet the test. Canada has a burden to meet all four parts of that test, and they didn't do that.

ARBITRATOR BETHLEHEM: Mr. Appleton, under the rubric of--I understand the argument that you're making in terms of the principles. I'm not asking you to sort of repeat the argument, but you said a moment ago that--in shorthand, that Canada was sort of premature. It jumped to bottom line. It asked for money than rather than asking the Tribunal to order certain disclosures from you.

As I put to counsel for Canada, I'm also putting to you and I'd like you to consider, either to address now or later, what kind of intermediate inquiries in order to allow the Tribunal to satisfy itself on the issue of ability to pay or commitment to pay should we be considering. You can address it now or you can address it later.

MR. APPLETON: Sir Daniel, I'll address them at the end. I jotted down your questions, and that's one of the three, so we will get there.

But--because fundamentally, we don't believe that this Tribunal should be in the process of dealing with this issue generally. There has to be an irreparable harm and there has to be a balance that deals with this. This is not irreparable harm. You would have to show--Canada would have to show you that their functions would not be able to continue as a government. They get tremendous benefits. They are part of a $1-trillion-a-year economic zone.

There's tremendous amounts. There is more than $3 billion a day--or maybe it's $2 billion a day--across, back and forth on the Canada-U.S. border because of the benefits of the NAFTA. They get tremendous benefits through the NAFTA. They also get tremendous benefits from NAFTA Chapter Eleven for Canadian investors being able to operate. And so, those are the benefits that accrue to Canada.

And one of the costs it may have to deal with is the defense if it does something that is inappropriate and wrong. Well, that's a cost of doing business, we would call that, fundamentally. And sometimes in that there are other risks that go with it. We don't think that that is in proportion to what they are trying to seek and the disproportionate impact that would occur to the Claimant, to the Investor, in this case.

And here we could see a very significant roadblock for the Claimant for being able to proceed, to be able to get due process, to be able to seek relief with respect to these specific wrongful acts.

And then the amount that Canada wants--almost $7 million. Now, there are 23 counsel that are on record for this, okay, 23. I counted. I think there are 11 or 12 here today on the other side. Three people have talked on behalf of Canada. 23. They are charging us for 23? These are staff. This is--the Government of Canada has a legal

staff. The Government of Ontario has a legal staff. These are staff that are paid whether they are doing this or something else.

I was a lawyer that worked for the Government of Ontario. I understand that they would have me sometimes talk at times, but they weren't paying me anything in terms of that. It was my salary, and I was in the policy role, and I was dealing with what was there. That's a fixed cost.

If they choose to staff the case in a grossly disproportionate manner--you have two counsel arguing here on behalf of the Claimant. They have a huge number. That's a real problem when we look at the question of what's being brought here. The taxpayers of Ontario, the taxpayers of Canada, they are paying a huge amount to fly these people here, to house these people here. That's their choice. That's their choice, but I don't think that's reasonable in terms of what to get for Security for Costs. A commercial client might have a very different view than a sovereign client.

And if this claim was so frivolous, why would you need an army of lawyers? This is an army. This is like an invasion for us. Why do you need 23 if it's totally frivolous? That we simply don't understand this because it's not frivolous. It's a very significant issue. It

deals with some very serious questions, deep improprieties, serious questions about spoliation of evidence and other issues.

It deeply cuts across the board. That's why there are so many people. It is because it's got serious problems, and they desperately would like this to go away. And with all due respect, they are trying to get this Tribunal to basically create economic capital punishment and try to find a way to make it impossible for this Claimant to be able to continue its case through the rubric of Security for Costs.

ARBITRATOR BETHLEHEM: Leaving aside questions of principle as to whether we've got the competence under Article 26 and Article 1134 and you know all of those legal arguments, you could, I imagine, significantly move the ball forward in terms of the position that you're advocating, the bottom-line position that you're advocating, by simply making representations on the record about Tennant's ability to pay, commitment to pay, you know, undertaking to accept all the obligations that arise under the Rules to pay costs on an award that are rendered.

I mean, you haven't done so, and you may--I mean, your answer to this question may be "We haven't done so because we believe that to do so would be improper as a matter of principle."

But leaving the principle aside, I imagine you could move the ball forward by making those undertakings.

MR. APPLETON: Why don't we address that with the questions at the end?

ARBITRATOR BETHLEHEM: Okay.

MR. APPLETON: Because fundamentally, Sir Daniel, it is clear that we might be seeing the world in different perspectives. We do not believe that it is fundamentally appropriate to start with the idea in an Investor-State case like this with the idea that Security for Costs is where you should start. We think that only in tremendously "exceptional circumstances" where there has been evidence of bad acts, of wrongfulness on the part of the Claimants, would you start to go there. We don't think you even make it there. That's not just the principle part. That's a factual part, but I will--that is a question for--

ARBITRATOR BETHLEHEM: Yeah. And, Mr. Appleton, I understand that entirely. This is not a sort of point against you. I'm just inquiring in the same way as on the question of the identity of a third-party funder.

You made an upfront undertaking in your Written Submissions that if ordered to do so, you would do so. You didn't fight that point to the death. So, I'm just wondering whether there is any issue here.

MR. APPLETON: So, we'll address them at the end.

Let me just, I want to give you an answer so that we can go along and finish off with the other pieces.

The issue about a disclosure--in the proper circumstances dealing within the confidentiality, et cetera, et cetera--is because fundamentally there's a very significant interest in ensuring the impartiality of the Tribunal and this process. That is a paramount and upfront and very high-level type of issue, just like we believe the issue fundamentally of access to justice is a very high-level issue.

That's why we would agree if so ordered, because it is confidential, these issues that deal with the financial relationships of Parties. But that's why we did not object, if ordered, with respect to that.

We don't think that this is the same. We think this is quite different, and I'm going to do my good-golly best to try to convince you as a panel that you should not be going there because we think that it fundamentally disturbs the equality of the Parties and what needs to be done here. And we think that is very problematic, and we think what 1134 says is that you have to preserve the rights of the Party, and one of the rights of the Party is the right to be able to be heard and have a hearing. And that is something we think is being very, very significantly moved in this process.

So--and there are only two cases that have done this, and we are going to take you through a series of cases now that would say what you would need to have, what Canada would have needed to prove that they didn't prove, and they didn't get there.

ARBITRATOR BETHLEHEM: Thank you.

MR. APPLETON: So, irreparable damage to the Investor. You can see I spelled "measure" wrong.

We believe fundamentally that there could be irreparable damage to the Investor caused with respect to an Order for Security for Costs.

First of all, we have to go back. The amount of the costs, we think, at $7 million, will virtually make it impossible to be able to get any type of coverage or insurance or average cost. And the absence of knowing except--but these numbers, they are designed in that way. They are designed to be in terrorem. They are designed to scare us out. They make no sense. Okay. They really--they make no sense.

And if you look at the lavishness of the legal offense versus what would be done, they also tell you that that can't work. Fact is, as you know, in the Mesa Case, they only awarded 30 percent of the costs. If I looked at this, I would award less than 10 percent because it's a question of what are you getting for the value for what's

there. Those are the types of questions that this Tribunal would need to think about.

But, again, we don't even think you need to go there, but these types of numbers would make it virtually impossible to be able to go there. So, this Tribunal would make an order that we think would make it very difficult for anything to continue. And we think you need to be aware of that. We think you need to understand the significant disproportionate impact that would happen. And that is what this is designed to do. That is its design. It's designed like a cruise missile. They come in and blow Tennant out so that's not possible. And we don't believe that you should be assisting in that process. We think what is relevant to assist in that process are things like conflict. We think that's a legitimate area. And that's why we raise that.

And urgency. How can there be any urgency? This is completely lacking. Canada says there is phantom costs. Okay. Look at the army that's defending this case. How could there be any issue on that?

And the staff lawyers are here to defend Canada all the time. Canada is not going to go bankrupt here, as far as we know. Though, maybe, if they do this in every case, maybe there will be a review of the Department of Justice and with the Government of Ontario.

And when you balance it, though, to the tremendous benefits that come from NAFTA, we can't say how there could be any urgency other than Canada just saying, "It is urgent." It is completely lacking, completely unproven. They don't meet the tests.

So, the exceptional circumstances are lacking here.

Tennant is not a serial litigant. Tennant always has efficiently paid its costs. It has complied with all your orders. It has followed the process diligently. No one has had any objections, to my knowledge, with respect to it other than Canada simply objects to the fact that it has to defend a NAFTA case. And there is no evidence of this Investor hiding assets or acting in bad faith. These are all the types of indicia that we would look at.

And now let's just walk through some of the exceptional circumstances. The first is Burimi. The CLA-64 has an extra "I" in it. I'm sorry.

Here they adopted the García Armas test of exceptional circumstances but came to a different holding. They said: "Even if there were more persuasive evidence than that offered by the Respondent concerning the Claimant's ability or willingness to pay a possible award on costs, the Tribunal would be reluctant to impose on the Claimants what amounts to be an additional financial

requirement as a condition for the case to proceed."

Insurance costs can be unbelievably onerous in this, especially if you have a situation where the active, ongoing assets of the Company have been dissipated as a result directly of the wrongful acts of the other side. The assets, generally, would be with respect to what would be a claim because of what was taken, what was wrong, and you would then impose a tremendous detrimental imposition on the Claimants.

And that exactly was the circumstance that Burimi saw, and Burimi was adopted on the same area in Orlandini. That is RLA-34, at Paragraph 145. And Orlandini understood this issue too, said the Claimant should not be required to pay a fee for the right to submit a claim. Claimant's financial distress was caused by the Respondent.

The financial distress here is caused by the Respondent. It would be very unconscionable to have a situation where a victim is not able to have its day in court because of harm imposed and caused directly from the other side.

And when we look at the application of exceptional circumstances in Orlandini, first, we see they adopted the García Armas test--I'm sorry. I said Manuel García, it's not, it's García Armas. And, again, they held differently from García Armas. They said: "'Exceptional

circumstances' would be a record of nonpayment, improper behavior, evidence of hiding assets, bad faith." We have none of those here. That is at Paragraph 146.

And then they said at Paragraph 144, the third-party funding and the Claimant's difficulties that would be involved, they said, "typically, not in and of themselves, constitute a sufficient basis for an order."

And then they adopted Eurogas. We will talk about Eurogas, the amended Paragraph 147, that said that: "Financial difficulties and third-party funding do not necessarily constitute, per se, 'exceptional circumstances.'"

And there they required simply the identity of the funder, which is what we believe is--what you should be considering as being appropriate here.

And then the balancing test. When they look at their circumstances here in Orlandini, they said: "Claimant should not be required to pay a fee for the right to submit a claim," because here I stress the same point I did at the beginning. And there's no urgency.

So, let's go and look at another Tribunal, South American Silver, another situation.

Here they said: "Where there are extreme and 'exceptional circumstances' that have a high, real economic risk for the Respondent and/or that there is bad faith on

the part from whom the Security for Costs is requested," those would be the circumstances that would qualify. Only in those circumstances.

They said--they cited RSM Saint Lucia and Eurogas and said, at Paragraph 61: "It is necessary to prove the 'exceptional circumstances'" and that "it had not been proven that the Claimant had failed to make the payments in the arbitration or in other arbitrations."

This Claimant has made every payment. Claimant has had no other arbitrations. This Claimant has no evidence of bad behavior. Their problem was simply they followed the rules. They followed the Ontario Rules of Republic. They followed the public process. That was the nature. They weren't connected. They weren't a friend of the Government to protect them. And that's what that evidence is going to show. That, if you were their friend, they protected you. They ran the rules, found out that the other company wasn't protected, changed the rules, and knocked out this company that was in the vested area and took it away to help somebody else that wasn't going to make it.

And it said about the issue of the standard to grant a measure, is Paragraph 68, is very strict "given that it shall be granted only in cases of extreme and 'exceptional circumstances.' For example, where there is

evidence of constant abuse or breach that may cause an irreparable harm if the measure is not granted."

That is South American Silver, Paragraph 68. That is RLA-013.

A funder is not enough to justify costs. That is at Paragraph 83.

And then we look at Eurogas. That is CLA-67. It says: "As regularly held by ICSID Arbitral Tribunals, Security for Costs may only be granted in exceptional circumstances. For example, where abuses or serious misconduct has been evidenced."

That is Paragraph 121.

And then just going down, Paragraphs 122 to 124, they say: "The underlying facts in the RSM Saint Lucia case were exceptional. The Claimant was not only impecunious and funded by a third-party funder but also had a proven history of not complying with Cost Orders."

We don't have that here.

MS. DI PIERDOMENICO: Excuse me, could we please have a time check on this?

MR. APPLETON: I'm sorry; you don't like what I have to say?

MS. DI PIERDOMENICO: Not at all.

MR. APPLETON: I've been answering questions from the Tribunal, and I never interrupted--

PRESIDENT BULL: Right. Could both counsel--would both counsel just take a breath.

I am aware of the timing. And, Mr. Appleton, you're on your second-last slide.

MR. APPLETON: Yes.

PRESIDENT BULL: And I'm sure you'll be mindful of the timing as well.

MR. APPLETON: And I still have the three questions to answer from Arbitrator Bethlehem.

PRESIDENT BULL: Yes.

ARBITRATOR BETHLEHEM: Which is arbitrators' time.

PRESIDENT BULL: Yes. So, let's proceed.

MR. APPLETON: Thank you.

So, before the interruption, we were looking at Eurogas, at Paragraphs 122 to 124. And we see that they identify that--in the first paragraph, about the history of noncompliance being an exceptional circumstance. We have proven we don't have that.

In the second paragraph, at 123, that the Claimants have not defaulted on their payment obligations in the present proceedings or in other arbitration proceedings. That was why they decided to not order Security for Costs in that case.

And then we go to the issue of the amount.

The issue of the amount under any circumstance

cannot be considered reasonable or appropriate or in any way. No Tribunal has awarded the lavish cost for this type of thing. Even when we talk about this García Armas, we don't believe that that would be even something that would functionally be available and would work here.

And when you're looking at the situation of interfering and interrupting between the vested existing right to be able to have access here, to be able to have the case heard, the direct causation between the wronged--the wrongfulness from Canada and the effect on Tennant's ability to be able to function and do things, we think these are very, very significant factors that you need to take into account.

So, I'd like to turn to Sir Daniel's three questions, if that's all right. Unless there are any questions from the Tribunal on this, on the amount question.

PRESIDENT BULL: I think you can deal with Sir Daniel's questions now.

MR. APPLETON: Sure.

So, the first question were about intermediate steps. Again, as you know, we don't believe there should be intermediate steps. We also believe that Canada should have brought intermediate steps, like they had done in García Armas, before I brought this. And we think that

it's made its motion, and, therefore, it's too late to be able to go through that. But, in fact, the normal process would be to ask certain questions. But that only would be if there really would be a reasonable prospect to be able to order Security for Costs because you are asking for very invasive types of disclosure that normally aren't done.

We've had situations with claims against Respondent States where I would have wanted all of this information. I couldn't get it. I couldn't get the information. There was a real risk we weren't going to be paid, and some of them we weren't paid.

So, this is a situation that there's a risk that comes in, in the arbitration process. The question is do you to meet the other exceptional circumstances. And they had to meet those exceptional circumstances. They didn't do it. It was their burden.

There is no evidence. None.

And then there was a suggestion that, you know, we looked, maybe we did a Dunn & Bradstreet and we didn't find any information and, therefore, we don't know anything and, therefore, that means there is nothing. That means that, therefore, there is urgency or there's harm. None of these can be right. None of these. It's just not proper commercial practice. It's not proper practice.

So, Sir Daniel, I think that if there was--I think

Canada should have accepted what you had to say. They should have followed what you had offered to them and say, you know, maybe we should have varied our order and sought these things first. They didn't meet their obligation. They didn't meet their test, and they cannot meet the test that you need to rule upon and, therefore, you need to dismiss that application. That's why. It is simply because they don't meet it.

I think that's the answer. But--I mean, and you certainly have signaled what a proper process would be in general. They certainly didn't follow it. They didn't think about it. They just came here and pronounced on that.

On your question two--oh, no, that's their question about varying the order. That is really for them.

Question three, would there be merit with respect to Interim Cost Orders. At the first procedural hearing, we had suggested that the Parties follow the Debevoise Protocol. The Debevoise Protocol deals with efficiency and cost savings in international arbitration. And that part of that is the suggestion that there would be interim Cost Orders. We said at the time that we were in favor of that. We would still be in favor of that.

Canada might lose because it would have to pay money. That's why I think they are taking time to reflect

on this. But the fact of matter is, that would solve a lot of this, and it would seem to me that that would be a much more appropriate way to deal with this.

So, we were in favor before. We are in favor of it now, because we think it is good arbitration policy. We think it is efficient. We think it stops frivolous types of actions being brought from the other side. So, we would be very much in favor of that, and we very much welcome the suggestion.

Sorry, your fourth question, Sir Daniel, which I didn't write down, so you asked while I was here. Would you just give me that one again?

ARBITRATOR BETHLEHEM: I have no idea what it was.

MR. APPLETON: Okay. We will just answer the three then, and, then, we are still here if you have other questions. Or maybe your colleagues have questions here.

And I thank you for the opportunity to address this very significant issue.

PRESIDENT BULL: Thank you, Mr. Appleton. Thank you for the Claimant's submissions.

The Claimant has taken a little longer, though I think a lot of that was Tribunal's time. I do want to say that, if--I think it would be appropriate to give Canada a little bit more time in reply because there may be more material for you to deal with. And I would give Canada

20 minutes in its Reply. But if you do need more because of the material that has been mentioned, and may not have been mentioned in writing, please let the Tribunal know. But hopefully that 20 minutes will be sufficient.

Mr. Klaver, are you able to deal with the response now?

MR. KLAVER: Would a short break be feasible?

PRESIDENT BULL: Yes, I think that would be fine. Why don't we take a 10-minute break.

MR. KLAVER: Thank you.

(Brief recess.)

PRESIDENT BULL: We are back on the record.

Before I ask Respondent to make their further submissions, their Reply Submissions, I think we have one more attendee from the Government of México, and if I could just have the gentleman's name identified for the record, please.

MR. PÉREZ: Thank you, Chair. My name is Orlando Pérez, from the Government of México, Ministry of Economy. Thank you.

PRESIDENT BULL: Thank you.

Mr. Klaver, over to you.

ARGUMENT BY COUNSEL FOR THE RESPONDENT

MR. KLAVER: Thank you.

Today, Tennant had another opportunity to reassure

the Tribunal that its Costs Order will be effective. Canada has raised very serious concerns that the Tribunal's Costs Order may be meaningless because Tennant appears to be impecunious. Yet Tennant has, once again, failed to offer any indication that it has the ability and willingness to pay. This morning, Tennant's counsel gave no details on Tennant's financial resources, no documentation to show its financial condition, no indication that a third party has a responsibility to pay an Adverse Costs Order, and, again, does not say whether a funder is willing to post costs, and Tennant has not indicated that it asked a funder to post costs.

Now, the Claimant's unwillingness to disclose any of this financial information strongly indicates that Tennant cannot pay an Adverse Costs Order.

For the arbitration to carry on, when it is almost certain that a Costs Order would not be effective, would undermine the integrity of the arbitration.

So, the first issue that I would like to address is just the outline of the intermediate steps that we think are appropriate here.

First, it would be reasonable to order disclosure of third-party funding, the identity, the terms that the Tribunal is considering. It is also appropriate to order Tennant to disclose its financial condition, financial

documents, whatever documents it considers can establish that it has the capability to pay an Adverse Costs Order.

It would then be appropriate to permit the Parties to make limited submissions on the specific issue of what the documents say for Tennant's capability to pay an Adverse Costs Order. At that point, Canada understands if the Tribunal considers it appropriate to order Security for Costs for the Jurisdictional Phase first, we think that would be reasonable.

Now, to address some of the points that Mr. Appleton raised today, I'd like to first--

PRESIDENT BULL: Sorry, Mr. Klaver, sorry to interrupt you.

MR. KLAVER: Yes.

PRESIDENT BULL: Just on your second step in the process, what financial information would Canada say the Tribunal should order? And I'm looking here for some precision.

MR. KLAVER: I appreciate the request for precision. I do think that the onus is now on Tennant to provide whatever financial documents it considers sufficient to establish its ability to pay an Adverse Costs Order. But balance sheets, bank statements, these are the types of documents that could help inform the Tribunal's Decision.

PRESIDENT BULL: Right. So, Canada's position is that if a direction like this is made, we should phrase it in a manner that states the objective and leave the actual content to the Claimant, as opposed to specifying a balance sheet or an audited financial statements or anything specific like that. That's the way in which Canada sees this.

MR. KLAVER: Precisely. I think it is fair to give these as examples, but the key is to allow Tennant its full opportunity to explain how it has the financial capability to pay an Adverse Costs Order, and so it can provide what documents it feels satisfy that burden.

PRESIDENT BULL: Thank you.

ARBITRATOR BETHLEHEM: Before you go on, do you think there is any place in this inquiry, either for the Tribunal to seek from the Claimant or for the Claimant to offer of its own accord, a formal undertaking through counsel that they would pay any Adverse Costs Order?

MR. KLAVER: That could serve to indicate the Claimant's willingness to pay.

ARBITRATOR BETHLEHEM: And good faith, presumably.

MR. KLAVER: I'm sorry?

ARBITRATOR BETHLEHEM: And good faith, presumably.

MR. KLAVER: And good faith, yes. I think we would need more for the Tribunal to feel comfortable that

the Claimant has the ability to pay.

ARBITRATOR BETHLEHEM: And just to put it on record, no doubt, Mr. Appleton and Mr. Mullins will think about the questions that they will be putting to the other side so that they can address them as well. Thank you.

MR. KLAVER: And just to clarify on García Armas, this is a similar process that that Tribunal followed. Venezuela applied for Security for Costs, then sought the disclosure of the financial information. The Tribunal ordered disclosure of the financial information. The Parties had an opportunity to consider it, submit brief motions, and then the Tribunal made its Order.

Now, just a couple other points on García Armas, we raised the issue about translating it, the full Decision. Our estimates would be that this would cost about 18,000 to $20,000.

ARBITRATOR BETHLEHEM: Please don't. Don't.

MR. KLAVER: Okay. Appreciate that.

In regard to one issue that came up on unpaid costs in that case, now, our understanding is that Venezuela had not paid some of the arbitration fees. The Claimant's third-party funder did pay some of the arbitration fees, but the Tribunal found that the Claimant still did not demonstrate their own capability to pay an Adverse Costs Order because it was the third party that

paid the arbitration fees.

ARBITRATOR BETHLEHEM: There is one other aspect in the García Armas Decision which interests me. It may be in the Spanish version. I don't know.

In their final Decision, they make the order of the 1.5 million, but then leave it to the Parties for a period of seven days to seek to negotiate the form in which Debt Security for Costs may take. And I'm assuming that there may have been some debate about whether this should have been in the form of a promissory note or actual payment into an escrow account or something of that nature.

Is there anything that we should be aware of in terms of how Security for Costs, what form they take?

MR. KLAVER: Right. No, we're not seeking to specify or limit the form it would take, and putting the funds in an escrow account would be perfectly reasonable. Another potential option is putting the funds in some sort of account that would return a rate of interest that might be comparable to what a third party could otherwise obtain, but this is an option that we haven't explored in detail. Sorry, the third-party funder would obtain.

Now, while we're still on García Armas, the Claimant has made a number of mischaracterizations of the "exceptional circumstances" test. I want to avoid repeating our arguments, but I want to clarify, no Tribunal

has stated that exceptional circumstances requires a finding of bad faith or misconduct. That is one avenue to finding exceptional circumstances. Another avenue is a high real economic risk of an unpaid Costs Order, as demonstrated by the Claimant's inability or unwillingness to pay. This is confirmed by García Armas, Pugachev, Lighthouse. All these Tribunals confirm this route to finding an exceptional circumstance.

Now, Tennant has made a number of factual inaccuracies throughout the course of yesterday and today. I don't want to relitigate them or rehash them, but I just want to clarify that Canada does not agree with many of the factual statements that Tennant has made, and that is--these are issues that would be resolved at the appropriate stage of the proceedings.

One point, however, regarding Tennant's Application for The FIT Program, these indications of its financial condition were taken at face value at the time of the Application. The OPA did not--the Ontario Power Authority did not independently verify these statements on the financial condition, and they also do not provide any evidence that Tennant now has the capability to pay an Adverse Costs Order.

Finally, it's important to just draw the Tribunal's attention to Article 1136 of NAFTA regarding

finality and enforcement of an award. This provides that the Arbitral Tribunal shall have the--the Award shall have no binding effect other than on the disputing Parties. So, this supports Canada's concern that even if a funder has responsibility under a separate contract, to pay an Adverse Costs Order, that is not something that is enforceable by the Tribunal or by Canada.

Now, with that, those are my remarks, and I welcome any questions from the Tribunal.

ARBITRATOR BISHOP: I'm sorry, would you repeat that last statement? I missed part of it.

MR. KLAVER: So, our concern is that even if the funding agreement has a provision stating that the funder takes responsibility, the Tribunal can't enforce that, Canada can't enforce that.

ARBITRATOR BISHOP: Thank you.

MR. KLAVER: Yeah. Okay.

PRESIDENT BULL: Thank you, Mr. Klaver.

MR. KLAVER: Thank you.

MR. MULLINS: Can we just have a moment to talk?

PRESIDENT BULL: Sure.

MR. MULLINS: Thank you.

(Pause.)

ARGUMENT BY COUNSEL FOR THE CLAIMANT

MR. MULLINS: We are just going to split this up

real quick just to be efficient.

In response to the interim measures, what is concerning to us is that the fact that Canada is not prepared on some of these Motions does not give them a second chance at things, but we also think it is also well putting the cart before the horse, for example, in this circumstance. Certainly, it's not just that they had not met their burden, which they haven't, and now they are going to get an opportunity in discovery to do that, but at the end this story is going to be the same.

We believe that the Tribunals--that the vast majority of the Tribunals and the studies and the articles all have made it clear for the arguments that we've made earlier today that "exceptional circumstances" are required. There is no evidence of that. There is not going to be any evidence at the end of disclosure of any financial information. It is just not going to be there, and all this is going to be is more delay and time and cost. They don't want to spend $20,000 for a transcript, perfectly fine to have us just keep on litigating these issues.

This Hearing was set for months. Ultimately, at the end of the day, they cannot meet the standard. If it turns out there is some finding for that later, some activity, then that's a whole other story. But right now

there is no evidence in the record of that. They can't meet their standard, and it should be the end of the story. And that would be our measure until there's a finding that this be denied, and they can't meet the standard. So, that's on that issue.

And similarly, as we argued yesterday, it should not be--we should not be hijacked--the bifurcation issue. We will just make it easier. We will just do this piecemeal. We have shown you that bifurcation is not appropriate here because, again, they didn't meet the standard. They didn't show that the issues would be intertwined. They didn't show that it was clearly--that this was not time-barred. They didn't meet the standard. And so, again, to say, well, let's wait until the Memorial and go back and let's do it all over again just delays this case that has been going on for a long time and just increases the cost on our side.

So, our position, to be clear--and we try respect the Tribunal's orders, and we'll do whatever you ask us to do--is that our concern is that they can't meet these standards, and they are not going to be able to meet them later--and the more costs and expense for us to do these interim points, which, frankly, should have been done earlier, but the argument should have been done now.

But the point is, right now we're hearing them,

today and yesterday, and they didn't meet their standards, and they are not going to be able to meet it later. And that is our concern about delaying this. We have to come back here, and we are going to be arguing the same arguments. Whatever we give them, we are going to be coming back and say, "Well, you can't post them because they don't have exceptional circumstances. You don't have authority under NAFTA.

We are going to be making these arguments again. So, that's the point. They haven't made the threshold burden, and it should not be a standard where we are doing this. And all we are saying is, if they were going to make those points, they should have done them earlier. But now we've already argued it. We don't believe that it should be these interim points where we have to keep on doing these, if I'm making myself clear.

MR. APPLETON: I'm just going to continue on from Mr. Mullins. He identified two issues. I'm going to give you the trifecta misrepresentation here. You would think that the Government of Canada claiming that somehow surreptitiously the Tennant Case is secretly the Mesa Case, would have actually known something about the Mesa Case. But Mr. Klaver has just given us a complete misrepresentation.

I know this because I was counsel in Mesa, and I

had to cross-examine witnesses with respect to the independent audit and evaluation that was done of the submissions. There was an independent company that was hired to evaluate, to consider the sufficiency of and the contractual compliance of all of the submissions that were made. There had to be significant capital behind the companies that were there. There had to be specific obligations posted by letters of credit. They had to be able to meet all types of things. To say that this was not done, it wasn't evaluated, it wasn't done independently is completely and utterly wrong.

I know this because we actually did an audit of the auditors, which one should never want to do lightly, I should tell you that. And it's not particularly fun for those of us that don't really like numbers, but the fact of the matter is, is that, for sure, there was a process. For sure, it was there. For sure, it was part of the record of that case. So, that is completely and utterly wrong.

And certainly if it was relevant, the request that was made by Arbitrator Bishop with respect to the sufficiency and the Application that was made in that FIT Program, for sure that could be produced and provided. We might even be able to find--I don't know if we have the evaluation. I think that would have to come by way of document request from Canada, but there would be a process

for that too because everything in this process had to be regulated.

Tennant's investment, Skyway 127 had to comply and go through rules all the time. The only people who didn't follow the rules were the Government of Canada. Everybody else had to follow the rules, and so, for sure, for a major procurement project like this, there were very careful rules, and they were followed and they were evaluated. And to the extent that this Tribunal would like to see that, that is certainly the case because there had to be very significant assurances.

I knew that because I remember from Mr. Pickens telling me that with respect to his Application, they had to show at least $100 million to be able to show what they were doing, and so they were very significant pieces. And, of course, when you're in and a partner with General Electric, you usually don't have to worry about such things. But there was certainly a letter. Everybody had to file a letter. Everyone had to show these different things because you don't get high up on the list if you are not compliant. And that was exactly the situation here.

(Comments off microphone.)

MR. APPLETON: No. I think that--I'm happy to rest here unless there's more questions from the--

ARBITRATOR BETHLEHEM: Yes. In response or

following the question to Mr. Klaver, I specifically turned to you and asked you to take note of the issue of whether, through the mouth of the counsel, Tennant would be prepared to give a formal undertaking of its commitment to pay any Adverse Costs Order, and I suggested you might like to think about that. Have you thought about that? Would you like to address it or give us a formal undertaking?

MR. APPLETON: I'm not in the position to do that now. We will consider the issue, but fundamentally we don't believe it's appropriate for exactly the reasons we've already expressed.

ARBITRATOR BETHLEHEM: I understand that.

MR. APPLETON: So, just so you understand, we don't want to be difficult. But we think it's very important to be consistent with respect to the position. Are there ways that counsel can assist in the process? Of course, there are. There are lots of ways that counsel can do things to facilitate and do things along the way. We would have expected all types of suggestions in the past from the Government of Canada. Canada came here completely unprepared as to the mechanics of what they wanted. And we are very concerned about what would happen too.

So, for example, a company like Tennant would not be required to have an auditor. So, now, if you are demanding an audited statement, that creates more time,

more cost, more other things--all unnecessary. There are various types of things.

So, all I'm saying on this is that fundamentally there are practical ways to be able to address lots of things, and we are very inclined to do practical things. So, to that extent, we think that's a good idea.

MR. MULLINS: And just to follow up on this, I think--again, practically, I don't know if any Tribunal has ever done this, maybe somebody has and I missed it. But effectively if you tell a party you are going to promise you are going to cover costs, effectively that is posting the security costs; right? Because that means that the Party then has to separate that funds out and make sure that funds are paid. That's really what you are saying.

So, effectively I think it's the same thing. I don't think it's appropriate for the reasons we said, because you don't have the authority to do it under NAFTA, you don't have the authority under UNCITRAL, and we haven't met exceptional circumstances. I don't see a practical difference of saying to somebody we're going to put it into a bank account for a party to simply say "I promise you"--whatever number you come up with--will be there at the end of the day because that effectively is that--they have to reserve that.

And so, I don't see it as a practical difference

and I don't think--it means the same thing. I don't think the Tribunal, with due respect, has authority to do it any more than it would be for security costs. I think it's essentially the same thing.

ARBITRATOR BETHLEHEM: I hear what you say and --the issue of principle, of course, is well noted, and you've so repeated that. I mean, the point, under Chapter Eleven and under the UNCITRAL Rules, is that both sides are committed to implementing, giving effect to the Award, and Costs; if Costs are addressed at all, it would be addressed in the Award.

So, the issue here is whether it would be useful as a practical measure, both to satisfy any concern that the Tribunal might have--and Canada has indicated that this would go in some way to addressing their concern--if counsel for the Claimant would put on the record the commitment to comply with the Award, including as regards any Adverse Costs Order. It doesn't immediately seem to stretch into the issue of competence to give--to award an order for interim relief.

MR. MULLINS: Again, I respectfully disagree with that. I simply--I don't believe there's a practical real difference than saying you've got to post bond or whatever it is, then make a representation because that effectively means that the party--we can do the same thing to Canada.

The Parties are not required to--"you must commit that you're going to pay an award, and we're going to tell you what the number is."

That simply is not done, and I don't believe that there is any difference between requiring a party to post security bonds and make a representation that the money will be paid because that effectively means they have to reserve that out because, otherwise, you will come back to me and say, "You lied to me."

So, I don't believe there's a difference. I don't believe any Tribunal has required that, and I effectively, with respect, to say that it's the same issue, and I don't see it as a difference. All this is the same--no matter what format it is, requiring someone to set aside money if it's going to be held or in a bank or whatever it is, it is still posting security of costs. "Exceptional circumstances" have to be met, assuming you even have authority, and they haven't shown here, under the vast majority of the tribunals that looked at this, especially investor-State arbitrations.

So, I'm trying the best I can. I don't see a practical difference. I really believe that it's the same thing, and I don't think it any different in any circumstance, and the precedent of that is astronomical because every case, every State would go to the Claimant:

"Promise me you are going to hold off the money to sue it." Knowing that is not the standard of presumption that everyone is going to do that. That is not what any Tribunal has done. That is not the standard.

ARBITRATOR BETHLEHEM: Thank you.

PRESIDENT BULL: Thank you to the Claimants for their Submissions on Reply.

And now, according to the schedule, it would be over to the Non-Disputing Parties, and I think it is only the United States that has asked to make Submissions on this point.

U.S. TREATY INTERPRETATION BY COUNSEL FOR UNITED STATES DEPARTMENT OF STATE

MS. THORNTON: Thank you, Mr. President, and Members of the Tribunal. My name, again, is Nicole Thornton from the United States Department of State, and pursuant to Article 1128 of the NAFTA and the Tribunal's ruling of November 11, 2019, I will be making a brief oral submission on treaty interpretation issues arising from the Parties' Replies to the Written Submission made by the United States on the November 27, 2019.

The United States does not take a position on how these treaty interpretation issues apply to the merits of Canada's Request for Security for Costs. In addition, no inference should be drawn from the absence of comment on

any issue not addressed in this submission.

In our Written Submission, we set out the U.S. position on the proper interpretation of Article 1134, and I do not intend to reiterate or expand on that issue now. Instead, I will briefly address the proper role of the NAFTA Party's Submissions in the interpretation of the NAFTA, particularly where, as here, all parties are in agreement as to how the treaty provision at issue should be read.

States are well-placed to provide authentic interpretation of their treaties, including in proceedings before investor-State Tribunals like this one. NAFTA Article 1128 ensures the Non-Disputing NAFTA Parties have an opportunity to provide their views on the correct interpretation of the NAFTA. The NAFTA Parties consider Non-Disputing Party Submissions to be an important tool in this respect, and the United States consistently includes provision for such submissions in its Investment Agreements.

Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States' Parties play in the interpretation of their Agreements. In particular, Paragraph 3 states that: "In interpreting a treaty, there shall be taken into account, together with the context, any subsequent agreement between the parties

regarding the interpretation of the Treaty or the application of its provisions and any subsequent practice in the application of the Treaty which establishes the agreement of the Parties regarding its interpretation."

Article 31 of the Vienna Convention, which reflects customary international law, is framed in mandatory terms. Subsequent agreements between the parties and subsequent practice of the parties shall be taken into account. Thus, if the Tribunal concludes that there is either a subsequent agreement between the NAFTA Parties or subsequent practice that establishes such an agreement, it must take that into account in its interpretation of Article 1134.

In addition, there is no hierarchy of importance amongst the elements of interpretation listed in Article 31. Accordingly, the Tribunal must consider any subsequent agreement of the Parties and any subsequent practice of the Parties alongside the Treaty's text, context, and object and purpose. Where the submissions by the three NAFTA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a) take this agreement into account.

In addition to reflecting an agreement under Article 31(3)(a), the NAFTA Parties' concordant

interpretations may also constitute subsequent practice under Article 31(3)(b). The International Law Commission has commented that subsequent practice may include "statements in the course of a legal dispute." Accordingly where the NAFTA Parties' submissions in an arbitration evidence a common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b). Several Tribunals have agreed that submissions by the NAFTA Parties in arbitrations under Chapter 11, including non-disputing party submissions may serve to form subsequent practice. For example, the Mobil v. Canada Tribunal recently found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that: "The subsequent practice of the parties to a treaty, if it establishes the Agreement of the parties regarding the interpretation of the Treaty, is entitled to be accorded considerable weight."

I will point you to Paragraphs 103, 104, and 158-160 of the Mobil v. Canada Decision on Jurisdiction and Admissibility dated July 13, 2018.

The Tribunal in Bilcon v. Canada reached a similar conclusion at Paragraphs 376-379 of its January 10, 2019, Award on Damages, as did the Tribunal in Canadian Cattleman for Fair Trade v. The United States at Paragraphs 188-189

of its January 28, 2008, Award on Jurisdiction.

Whether the Tribunal considers the interpretations the NAFTA Parties' have presented in Chapter Eleven Cases as a subsequent agreement under 31(3)(a) or subsequent practice under 31(3)(b) or both, the outcome is the same. Here each of the NAFTA Parties has, through its respective submissions, expressed a concordant interpretation of Article 1134, namely that it permits a Tribunal to order Security for Costs subject to the applicable Arbitration Rules.

Canada expressed this view in its initial request for Security for Costs, and México and the United States expressed consistent views in their Article 1128 Submissions.

Finally, in Paragraph 2 of its response to the Non-Disputing Parties Submissions, Canada correctly noted all three NAFTA Parties agree that NAFTA Chapter Eleven Tribunals may order Security for Costs under NAFTA Article 1134, subject to the applicable Arbitration Rules.

In accordance with the treaty interpretation principles that I have outlined, the Tribunal must take the NAFTA Parties' common understanding of Article 1134 as evidenced by their submissions in this arbitration into account.

In closing, I will briefly comment on one strand

of Claimant's argument and its response to the U.S. Article 1128 Submission. Claimant devotes a significant portion of its response to arguing that the NAFTA cannot be amended or modified except through the process set out in Article 2202. Claimant, however, never articulated the basis for its apparent belief that the United States is seeking to amend or modify NAFTA by way of its Article 1128 Submission.

To be clear, the United States is not seeking an amendment or a modification of the NAFTA. On the contrary, the interpretation of Article 1134 that all three NAFTA Parties have advanced is fully consistent with the Treaty's text as demonstrated in the Parties' submissions.

Indeed, all elements of treaty interpretation prescribed in Article 31 of the Vienna Convention, including the ordinary meaning, the context, the Treaty's object and purpose, and the subsequent agreement or subsequent practice of the NAFTA Parties support this interpretation of Article 1134.

Mr. President, Members of the Tribunal, that concludes the Second Submission on behalf of the United States pursuant to NAFTA Article 1128. The United States stands by the interpretations we made in our previous Written Submission.

Thank you for your time and attention.

PRESIDENT BULL: Thank you, Ms. Thornton.

Can I invite Canada to make any comments it has on that submission?

MR. KLAVER: We don't have any comments.

PRESIDENT BULL: Thank you, Mr. Klaver.

And now Claimant has an opportunity to comment on the submissions of the United States.

MR. APPLETON: Thank you very much, Mr. President. And, of course, we thank the Government of the United States for taking the time to bring forth their Second Submission here in person.

COMMENTS BY COUNSEL FOR CLAIMANT

MR. APPLETON: The comments, sir, are really set out quite clearly already in the record. We had some brief discussion about that earlier today about the meaning of "subsequent practice" and "subsequent agreement." Also, while we covered this issue quite carefully with respect to our response to the 1128 Submissions from the Government of México and the Government of the United States--and, in particular, we would bring to your attention Paragraphs 34-47 of that Submission and that we would also identify that Tribunals have taken a position of what we'll call "judicial restraint" with respect to taking positions about the meaning of these 1128 Submissions, especially when you have matters like this which don't have a lengthy

time period being able to demonstrate both agreement or practice, but there is one point I would like to raise, in particular. Well, actually two.

We already gave our comments about, for example, why we believe the Bilcon Case, which was raised by Canada and now raised by the Government of the United States, is not proper with respect to that. We raised that earlier. I just want to flag we maintain that position.

If you look carefully at the Decision, the Bilcon Tribunal on Damages simply said that there were inconsistent positions, that they looked at the various positions that had been taken, and then they interpreted the Treaty, which happened to be consistent with the position that was taken by the various Governments, but they came to that independently, not on the basis of the submissions.

But I would like to address one point that was raised by Ms. Thornton today, which is why did we believe that there would be an amendment that the Government of the United States has very carefully identified they don't intend to amend the NAFTA. That's good. We assumed you did not intend to amend the NAFTA. But we do not believe that your position can be done without, in fact, amendment because of the term rights.

In 1134, the position that is being advanced by

the NAFTA Parties was fundamentally modify what is understood and meant by the term "rights." And if you were to expand that to things that are not rights, which is what we are saying is, in fact, the case here, then that means you would be amending the Treaty. And you are entitled to amend the Treaty, and there's a process to amend the Treaty and there's a process to do other things with respect to that. And we certainly don't say that you can't amend the Treaty.

We are just saying that, if you wish to amend the Treaty, you cannot do it in this way. To the extent that we have a disagreement about that, we think that the Tribunal should extremely be careful--should be extremely careful here with respect to this suggestion because we believe that it may very well lead the Tribunal in the wrong direction, and we don't want that to happen.

So, we just want to answer the question that was posed to us in the submission here, make sure that you were clear so there would be no questions here as to why. But we believe that this would change fundamentally the express and ordinary meaning, the way that you would normally deal with this, and you can't do that by way of a subsequent agreement or subsequent practice unless that's what you have to do by way of the amendment. Amendment is when you change something, and this would require a change. And we

just wanted to flag the position very clearly.

In any event, it may be that the Tribunal never has to go here because Canada never met the obligations that it had to do to be able for Security for Costs to be ordered. So, you may never have to go there. But to the extent you do have to go there, we wanted our position to be very clear.

Thank you very, very much for the opportunity to discuss this matter.

PRESIDENT BULL: Right. Thank you to all counsel for your submissions, and the Application for Security for Costs, those submissions are done, and that's much appreciated by the Tribunal.

Before we adjourn, there are just some administrative matters that we should mention.

ADMINISTRATIVE MATTERS

PRESIDENT BULL: Obviously the Tribunal will deliberate on the submissions that we've heard today and yesterday as well as consider further the Written Submissions that you've provided earlier, and we will come back to the Parties with our Decision on the various applications.

A separate issue, in respect of the Transcript, if I can ask the Parties to provide any corrections and to deal with that within a 30-day period, that would be

helpful because it dovetails with the Confidentiality Order timelines as well. And I think that should be sufficient time for both Parties.

Then the other thing to mention is that, through the course of the day and a half that we've been here together, there have been various presentations, PowerPoint slides that have been handed to us. It would be much appreciated if electronic copies could be provided to the Tribunal Secretary so that the Tribunal could have electronic copies to work with.

Then, can I just check, before I close proceedings, whether there is any other issues to be raised?

And perhaps I'll ask Canada first.

MS. DI PIERDOMENICO: There was a question that was asked by Sir Daniel yesterday on interim measures, and I'll just pass the mike over to my colleague, Johannie Dallaire.

MS. DALLAIRE: If I may just go to a closed session so I will be able to respond to a question that was asked yesterday, please.

(Beginning Closed Session)

CLOSED SESSION

MS. DALLAIRE: Thank you.

So, it's regarding the confidential nature of the [redacted] that we have produced. I can now briefly respond to the question raised by this Tribunal after being able to consult with representative of the Government of Ontario and IESO. I can confirm that Canada does not have anything to add to the information that was provided yesterday.

As I have mentioned yesterday, the [redacted] are subject to confidential designation under domestic law, and, as such, we do not want to publicly disclose such information.

Thank you.

PRESIDENT BULL: I assume that no comments on that from the Claimant? And I see you are shaking your head.

Thank you, Mr. Appleton.

We can go back to open session.

(Beginning Open Session)

OPEN SESSION

PRESIDENT BULL: Anything else that the Government of Canada wishes to raise?

MR. KLAVER: No.

PRESIDENT BULL: Thank you very much.

Anything else that Claimants would like to say?

MR. APPLETON: Thank you very much, Mr. President.

First of all, we would like to thank the Members of the Tribunal for very carefully and patiently wading through these issues. There is a tremendous amount of material, both here and in advance of this, and we appreciate your careful thought. You obviously came very prepared, and you had lots of very good questions. Both sides are feeling the effects, and we thank you with respect to that.

We would be remiss if we did not thank Christel Tham and the team at the PCA for putting this all together and keeping all of the things working, keeping the wheels on the train, so to speak. We would also like to thank ICSID for making this wonderful facility available to us. It was very helpful. And, to that end, I also have to thank Orlando, who, I know, was listening to us. He has been making sure all the audio/visual and the other links are working in all the various spots, and we are very appreciative for his assistance.

And, of course, Dawn Larson has done a fabulous job with the Transcript, and David Kasdan, who is not here, but I'm sure will read the Transcript--he did another wonderful job, and we thank him very much. We thank you, Dawn, because you've really been on top of this. Thank you very, very much.

And, finally, of course, we have to thank counsel for the Government of Canada, for making this as efficient a process as possible. And, of course, the counsel that came here from the Government of the United States of America and the United Mexican States who have participated in this process, have supported this whole thing.

As one of the last NAFTA hearings, I thought it was important that we were able to make sure that we thanked everybody for the very significant commitments to international law and to the Rule of Law and the process that goes on.

So, we just simply, on behalf of Mr. Mullins and myself and, of course, Mr. Pennie on behalf of Tennant Energy, we want to thank you all for your assistance and for your participation today and in the future.

Thank you very much.

PRESIDENT BULL: Thank you, everyone. The Hearing is adjourned.

(Whereupon, at 1:11 p.m., the Hearing was

concluded.)

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