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

PCA CASE NO 2018-54

BETWEEN

Tennant Energy LLC

Investor

AND

Government of Canada

RESPONDENT

Response to Canada's Submission on *Herzig v. Turkmenistan*

24 FEBRUARY 2020

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I. INTRODUCTION

1. Canada's reliance on the majority decision on security for costs in *Herzig v. Turkmenistan* is unavailing. It was decided under a different legal regime and is based on different facts. Moreover, with only a couple decisions on security for costs granting that remedy, *Herzig* falls into distinct minority of cases awarding security for costs, but still Herzig is in the majority of cases that hold that security for costs may only be required in exceptional circumstances. *Herzig* as *Garica Armas* before it, simply applied the test incorrectly.

2. To require such security here would create an incentive for States to rely on the financial harm created by their own wrongful measures to deny investors access to justice. The imperative to avoid such perverse incentives underlies the high burden placed on States requesting security for costs and access to the proprietary terms of an investor's funding. This brief supplements the Investor's initial thoughts of February 12, 2020.

II. *HERZIG* WAS DECIDED UNDER A DIFFERENT LEGAL REGIME

3. As detailed in the Investor's previous submissions, this NAFTA arbitration under the 1976 UNCITRAL Arbitration Rules is distinguishable from ICSID arbitrations, because security for costs is unavailable under the treaty and arbitral rules applicable here.[1]

4. Canada's reliance on *Herzig* for the contrary position is misplaced.[2] Although the *Herzig* majority declined to distinguish its own ICSID case from *Garcia Armas*, Canada fails to mention that the security for costs decision in *Garcia Armas* was adjudicated under **both** the UNCITRAL *and* ICSID Additional Facility Rules, and effectively conflated the standards under the two regimes by agreement of the parties to that arbitration.[3] No such agreement exists here, and the only case to consider a dispute on this issue under the 1976 UNCITRAL Rules alone rejected a tribunal's power to order such a remedy.[4]

III. *HERZIG* AFFIRMS THE EXCEPTIONAL CIRCUMSTANCES REQUIREMENT

5. Canada acknowledges that the *Herzig* tribunal, like all tribunals before it (but unlike Canada here), affirmed that exceptional circumstances are *required* to order security for

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[1] *See* Email from Investor to the Tribunal, 4 Feb. 2020; Response to Security for Costs Request, 23 Sept. 2019 ¶¶ 3-23.

[2] *See* Canada's Submission on New Legal Authority, 17 Feb. 2020 ¶ 2.

[3] Response to Security for Costs Request ¶ 22.

[4] *See* Response to Security for Costs Request ¶ 23.

costs.[5] Canada notes that the *Herzig* majority relied on the "certainty" that the investor in that case could not pay an adverse costs award.[6] Yet, this finding is inconsistent with the majority view that impecuniousness alone does not suffice to award security for costs.[7]

6. Canada's description of the *Herzig* majority's reasoning also omits discussion of the balancing factors it considered. The *Herzig* majority took care to assure itself that the investor could post security at low cost without impeding its access to justice.[8] Canada has not shown such a circumstance here. As a moving party, Canada has this burden. Moreover, in the event that the investor were unable to continue its claim due to the security requirement, the *Herzig* majority ruled that the investor could seek reconsideration of the decision due to a lack of access to justice.[9]

7. The *Herzig* majority accordingly premised its order on ensuring the investor's access to justice. The *Herzig* dissent likewise considered this a "paramount consideration."[10] The ICCA-Queen Mary Task Force echoed this view, in particular where (as here) the investor's lack of funds could be due to the State's own wrongful conduct.[11]

8. Thus, Canada must show exceptional circumstances beyond mere lack of funds to warrant further inquiry into the Investor's funding terms,[12] much less the extraordinary remedy of security for costs. Canada utterly has failed to do so.

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[5] Canada's Submission on New Legal Authority, footnote 3 (citing *Herzig*, **RLA-112 ¶¶** 57-58).

[6] Canada's Submission on New Legal Authority, para 3 (citing *Herzig*, **RLA-112 ¶¶**57-58).

[7] *See Herzig*, **RLA-112**, paras 82 (discussing *RSM v. Lucia* and other cases and observing that extraordinary circumstances "go[] beyond mere uncertainty of a claimant being able to meet an adverse costs award"); *see also* Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration, April 2018, **CLA-065**, page 174 ("it appears that tribunals in ICSID arbitration tend to adopt a stricter test than the claimant's impecuniosity to order security for costs: they usually require evidence of abusive conduct or bad faith on the part of the claimant, such as evidence that the claimant has a track record of deliberately failing to comply with costs awards."

[8] *Herzig*, **RLA-112**, **¶¶** 64-65.

[9] *Herzig*, **RLA-112 ¶¶** 65.

[10] *Herzig*, **RLA-112 ¶¶** 79-82.

[11] *See* Report of the ICCA-Queen Mary Task Force, **CLA-065**, page 174 ("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, including for example the requirement that the claimant has exhibited abusive conduct by repeatedly failing to comply with costs orders or deliberately dissipating its assets.")

[12] *See* Report of the ICCA-Queen Mary Task Force, **CLA-065**, page 83 ("There was also general agreement on the Task Force that, absent exceptional circumstances, no other information except the existence and identity of third-party funders was required for the purposes of analyzing conflicts of interest.").

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Respectfully submitted on behalf of the Investor

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