

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

TENNANT ENERGY, LLC
(the “Claimant”)

-and-

GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)

PROCEDURAL ORDER NO. 13

The Arbitral Tribunal

Mr Cavinder Bull SC (Presiding Arbitrator)

Mr Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Mr José Luis Aragón Cardiel

9 September 2021

I. RELEVANT PROCEDURAL HISTORY

1. On 7 August 2020, the Claimant submitted its Memorial on Jurisdiction, Merits and Quantum (the “**Memorial**”).
2. On 21 September 2020, the Tribunal issued Procedural Order No. 7 (“**PO7**”), dismissing the Respondent’s request for an order for proper remedies, as well as its claim that the Claimant had in its Memorial inappropriately relied on confidential information included in unredacted videos of the hearing in the *Mesa Power v. Canada* arbitration (“**Mesa Power**”), which the Claimant has submitted in these proceedings as exhibits C-107, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243 (the “**Mesa Power Videos**”). Notwithstanding its decision to allow the Claimant to refer to and rely on the *Mesa Power* Videos in its Memorial, the Tribunal noted that “[i]f the Respondent so requests, the Tribunal would be prepared to order that any confidential information contained in the *Mesa Power* Videos be redacted from the publicly available versions of the Parties’ pleadings and any decision or award”.
3. On 6 May 2021, the Tribunal issued Procedural Order No. 12 (“**PO12**”), *inter alia*, rejecting the Respondent’s request that the publicly available redacted *Mesa Power* hearing transcripts stand as the public versions of the exhibits of the *Mesa Power* Videos in these proceedings. Noting the Respondent’s obligations under the Confidentiality Order dated 24 June 2019 (the “**CO**”) to propose and identify parts of the *Mesa Power* Videos that it asserts are confidential, and to make public the non-confidential version of the *Mesa Power* Videos, the Tribunal further held in paragraph 53 of PO12 that:

In light of the foregoing, the Tribunal hereby directs that the Respondent provides the Claimant with its proposed confidential information designations to the *Mesa Power* Videos within 21 days from the date of this procedural order, and for the Parties to resolve the issue of the confidentiality designations in accordance with the procedure set out in the CO. Should the Parties fail to reach agreement concerning any specific confidential information designations to the *Mesa Power* Videos, they may then submit it to the Tribunal for resolution in accordance with paragraph 17 of the CO. The Tribunal further notes that, given the Respondent’s concern that the identification of confidentiality information in, and subsequent redaction of, the *Mesa Power* Videos may be burdensome, the Tribunal is prepared to grant a reasonable extension of the timelines set out above and in the CO if so requested by the Respondent.

4. On 14 May 2021, the Claimant informed the Tribunal of the statement provided by Mr. Cole Robertson, the client representative of Mesa Power Group in *Mesa Power*, affirming, *inter alia*, that:

Furthermore, I understand that the videos of the *Mesa Power* hearings were subsequently published on the internet for over five years. Mesa Power Group was not consulted by the Permanent Court of Arbitration when the PCA made the decision to remove these videos from the internet in 2020 upon the unilateral request of the Government of Canada. In my view, all of these videos are in the public domain. Had we been asked, we would have maintained our policy of public access to information about this NAFTA arbitration claim. We had no objection to the continued publication of the full *Mesa Power* NAFTA hearing videos.

5. On 18 May 2021, pursuant to paragraph 53 of PO12, the Respondent requested that the Tribunal extend the 21-day timeline to provide the Claimant with its proposed confidential designations to the *Mesa Power Videos* to a total of 60 days from the date of PO12, *i.e.*, by 5 July 2021.
6. On 19 May 2021, in response to the Claimant's correspondence dated 14 May 2021, the Respondent stated that it was proceeding with the Tribunal's direction to propose confidential designations to the *Mesa Power Videos* and to follow the procedures set out in the CO in this regard.
7. On 21 May 2021, in response to the Respondent's 18 May 2021 request for an extension of the filing of its confidentiality designations to the *Mesa Power Videos*, the Claimant noted that while it was "inclined to support reasonable accommodations of the schedule ... [it] hoped that there [would] still be an opportunity for the disputing parties to agree on the treatment of the *Mesa Power Videos*, making an extension unnecessary".
8. On 6 August 2021, pursuant to paragraph 17 of the CO, the Respondent requested the Tribunal to make a final determination with respect to the outstanding confidentiality designations to the *Mesa Power Videos*. As part of its request, the Respondent filed (i) the Claimant's objections to the Respondent's proposed designations contained in an *inter partes* letter to the Respondent dated 23 July 2021; and (ii) a disputed designations scheduled in the form prescribed by Annex A to the CO (the "**Disputed Designations Schedule**").
9. On 12 August 2021, the Tribunal invited the Claimant to confirm if its objections to the Respondent's proposed redactions were comprehensively contained in its 23 July 2021 letter to the Respondent, and if not, to provide final comments it may have on the Disputed Designations Schedule submitted by the Respondent.
10. On 16 August 2021, the Claimant provided its supplementary response to its 23 July 2021 letter, reiterating its objection to the confidentiality designations to the *Mesa Power Videos*.

II. THE TRIBUNAL'S ORDER

11. Having carefully considered the Parties' respective arguments, the Tribunal sets out its decision on the Respondent's confidentiality designations to the *Mesa Power Videos* in the Disputed Designations Schedule enclosed as an **Annex** to this Order.
12. As set out in the **Annex**, the Tribunal has allowed the Respondent's proposed confidentiality designations to the *Mesa Power Videos*. In accordance with paragraph 19 of the CO, the final Confidential and Public Versions of the *Mesa Power* Hearing Video Exhibits shall be filed within thirty (30) calendar days from the date of this Order (*i.e.*, **Monday, 11 October 2021**).

Dated: 9 September 2021

Place of Arbitration: Washington, D.C.

A handwritten signature in black ink, appearing to read 'Cavinder Bull', is enclosed within a thin black rectangular border.

Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal