

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 Renewed
Application for Security for Costs and
Untimely Admission Request for New
Authority**

24 FEBRUARY 2022

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

ReedSmith

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Investor's Response on Renewed Application for Security for Costs and Untimely Admission of A New Authority

I. OVERVIEW

1. Following the Tribunal's February 17, 2022 directions, Tennant Energy LLC (the "Investor") submits its response to the Government of Canada's ("Canada" or the "Respondent") Renewed Application for Security for Costs of February 16, 2022 (the "Renewed Application"). These applications come four months after the completion of arguments in the Jurisdictional hearing, held from November 15 to 19, 2021.
2. Within its February 16th Renewed Application, Canada requested leave to file a legal authority on the issues of jurisdiction upon which the Tribunal is deliberating (the "Admission Request").
3. The Respondent's Renewed Application lacks merit. As this Tribunal has seen, the record in this arbitration contains admissions in the record of wrongfulness from senior government officials and admissions of systemically making false statements to FIT Proponents and the public to attempt to cover up these internationally wrongful measures. As the Tribunal has seen, Canada has devoted nearly unlimited resources to defeating Tennant Energy in this arbitration. This Renewed Application is yet another salvo in Canada's relentless unnecessary procedural motions designed to increase the cost of this arbitration and prevent the Investor from having the Tribunal adjudicating this case on the merits. Considering Canada's vexatious litigation tactics, Canada's Renewed Application should be dismissed with prejudice and costs should be awarded to the Investor.
4. The Respondent's Admission Request is untimely. Simply too much time has elapsed from the jurisdictional hearing for this authority to be considered without requiring substantial filings from the disputing parties.
5. As noted below, the authority that Canada wishes to admit is technical and contains *sui generis* facts that require contextualization. Allowing such new filings may require the filing of technical US legal evidence on US Bankruptcy law. Also, additional filings from the Westmoreland arbitration related to his award, such as the expert opinion of Jan Paulsson may also need to be introduced as well.
6. In addition, the addition of this new legal authority could trigger demands from the non-disputing NAFTA Parties to file additional NAFTA Article 1128 submissions on the operation of the NAFTA. Such new submissions from the non-disputing Parties require additional responsive filings from the disputing parties. Thus, the addition of

one authority now may potentially delay any decision on the jurisdictional phase for up to six months, adding unnecessary delay and cost to this process. All this effort would result to consider an authority that is untimely and entirely unnecessary to determine the issues before this Tribunal.

7. In the circumstances, the complications arising from Canada's request to add an additional unnecessary authority are significant and burdensome. More importantly, the prejudice to the arbitration process outweighs any marginal benefit from receiving the new authority. Accordingly, the consideration of new authorities should be dismissed.

A. CANADA'S RENEWED APPLICATION DOES NOT MEET THE TRIBUNAL'S TEST

8. The Tribunal recognized that exceptional circumstances must exist before awarding security for costs. There are no new exceptional circumstances, and this Tribunal should reject the request.
9. Canada nonetheless has raised the issue, again, regarding the alleged impecunious of the Claimant. In its last order on this topic, this Tribunal noted that Canada had provided no evidence in its original Application for Security for Costs to establish Tennant Energy could not pay a costs order. In paragraph 178 of *Procedural Order No. 4*, the Tribunal noted: "the Respondent simply lacks evidence about the asset position of the Claimant." That was not an invitation for Canada to conduct discovery into the Investor's assets and make repeated requests for security for costs.
10. In any event, in August 2020, Canada actually obtained extensive additional evidence of the assets Tennant Energy held. This evidence was the subject of the expert valuation report file by Deloitte LLP. Tennant Energy's assets are its investment in Skyway 127 Wind Energy shares and its intangible property rights, including its NAFTA Claim against the Government of Canada. Canada has provided no evidence about the value of such an asset.
11. Canada has had the August 7, 2020 Expert Valuation Report prepared by Deloitte LLP (**CER-01**) filed with the Investor's Memorial for more than eighteen months. The Expert Report confirms that Tennant Energy owns and controls the assets of Skyway 127 Wind Energy Inc.¹

¹ On page 4 of the Application, Canada erroneously claims that Tennant Energy owns 45% of the shareholding of Skyway 127 Wind Energy Inc. Tennant Energy owns more than 90% of the shares of Skyway 127 Wind Energy Inc.

12. The Deloitte Valuation Report placed the mid-point value of Tennant Energy's investment in Skyway Wind 127 at \$172 million-plus 12 million in accrued interest for a total of **\$184 million** as of August 15, 2015.²
13. Canada makes no mention of the detailed valuation evidence filed by the Investor in its current Renewed Application even though Canada is the moving party with the burden of proof for the Renewed Application. At the same time, Canada has had more than eighteen months to provide evidence to support its Renewed Application about the value of the assets owned by Tennant Energy. But Canada chose not to produce any such evidence. **Canada has ignored** the foundational assets of Tennant Energy in this motion. Furthermore, for Canada to raise this issue now after the parties have proceeded through a week-long intensive jurisdictional hearing, is inefficient and unfair to the Investor.

II. CANADA'S RENEWED APPLICATION SHOULD BE DISMISSED

A. THERE IS NOTHING NEW IN CANADA'S APPLICATION

14. There is no compelling reason currently for Canada to bring this Renewed Application. Canada brought a heavily argued motion in the fall of 2019. The Tribunal issued a heavily reasoned award on February 27, 2020, in *Procedural Order No. 4*.
15. Canada brings its Renewed Application amid the Tribunal's deliberations on jurisdiction after the parties and the Tribunal participated in a week-long evidentiary hearing.
16. As noted below, nothing new or surprising was discovered in the hearing testimony upon which Canada relies for its Renewed Application.
17. There is no urgency to this Application. Canada has not presented any new revelations that justify reconsideration of the security for costs issued determined by this Tribunal in *Procedural Order No. 4* on February 27, 2020.
18. The Tribunal stated in *Procedural Order No. 4* that an order for security for costs could be made **only** if the Respondent could **establish the existence of “exceptional circumstances.”** The requisite exceptional circumstances are discussed below – but

² The Deloitte Valuation Report dates August 7, 2020 (CER-01 had a summary table set out in Table 2.1.1 on page 6. This value was set as of an August 15, 2015 valuations date (the date is confirmed in ¶ 4.2.11). Interest for the last seven years (from August 15, 2015) is not included in the 184 million (mid-point) figures. Other damages accruing to Tennant Energy are not included. Such as moral damages arising from Canada's calculated campaign of disinformation to the public about the operation of the Ontario FIT Program and preferential treatment granted to favored friends of the government such as International Power Canada.

Canada has not been able to demonstrate the existence of any of the four exceptional circumstances. To be clear, Paragraph 173 of *Procedural Order No. 4* states:

173. The disagreement between the Parties, it would appear, is whether a security for cost order may be only obtained in “exceptional circumstances.” The Tribunal agrees with the Claimant that the Respondent would have to show “exceptional circumstances.” In considering requests for security for costs, investment arbitration tribunals have emphasised that this power may only be exercised where there are “exceptional circumstances.” The Respondent has not been able to cite a single case where the standard “exceptional circumstances” was *not* applied. This is not surprising, given that security for costs orders raise specific access to justice issues that do not arise with other forms of provisional relief.

19. The Tribunal's earlier decision in *Procedural Order No. 4* was succinctly summarized in paragraph 4 of *Procedural Order No. 6* on May 6, 2020 as follows:

4. In denying the Respondent's Motion for Security for Costs in PO4, the Tribunal stated that the existence of a funding agreement alone would not be sufficient to grant security for costs. Instead, the Respondent would have to show "exceptional circumstances," which would include, for instance, (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behavior. Yet, no such "exceptional circumstances" have been evidenced in the present case, which may justify a targeted document production of the Claimant's financial condition.

20. As discussed in more detail below, Canada has failed to demonstrate the presence of any of these exceptional circumstances, and thus Canada is not able to obtain an award for security for Costs just as its prior request was denied.
21. Further, Canada also has failed to demonstrate urgency, a requirement for an interim measure that Canada must establish to obtain an order for security for costs. Canada has not demonstrated any change in the factual or financial situation as described below. While the Tribunal could order security for costs at any point if the exceptional circumstances arose, **nothing has changed**. Canada still has not met all the other factors required to justify such an extraordinary order.

22. As detailed in this Response, the exceptional circumstances necessary for an order for security for costs do not exist in this case. Therefore, the question of whether a funder would assume responsibility for a costs award against the Investor is irrelevant.³
23. Canada is mistaken when it claims that "new evidence" "provides a reasonable basis to find that the Claimant is impecunious."⁴
24. Canada's renewed claim is tethered on the flimsiest basis arising from testimony on November 17, 2021 (Hearing Day 3) by John H. Tennant. During the Jurisdiction hearing, Mr. Tennant testified that:
 - a. Tennant Energy continued as a registered Ontario corporation whose assets were Skyway 127 Wind Energy shares.
 - b. Tennant Energy did not engage in direct sales to consumers.
 - c. Tennant Energy did not have financial resources in its bank account.⁵
25. Canada knew that Tennant Energy held shares in Skyway 127 Wind Energy before making this Renewed Application:
 - a. In paragraph 66 of John C. Pennie's August 7, 2020, Witness Statement (**CWS-1**) provides:

66. Tennant Energy is the successor in interest to the equity investments of IQ Properties, John Tennant (as trustee for the LLC), and GE Energy. To be clear,

 - a) Tennant owned virtually all of the shares in the corporation when it made the NAFTA claim on June 1, 2017.
 - b. Further, in paragraph 68 of the same witness statement, John C. Pennie testifies:

68. After Tennant acquired GE Energy's interest in Skyway 127 in June 2016, Tennant owned almost all of the shares in Skyway 127, and Tennant continued to control Skyway 127.
26. These statements indicated that Tennant Energy owned financial investment in the form of Skyway 127 Wind Power shares. Such shares would not be held in a bank

³ *South American Silver v. Bolivia*, Procedural Order No. 10, ¶¶ 80-81, **RLA-013**.

⁴ Canada's Renewed Application on page 5.

⁵ November 17, 2021 (Hearing Day 3) Testimony of John Tennant at page 340 :12-17.

account. There has been no fundamental change in the Investor’s financial capacity since the Tribunal issued its decision in *Procedural Order No. 4* on February 27, 2020. There was no new material information about share ownership in Mr. Tennant’s hearing testimony.

27. **Nothing in Mr. Tennant’s testimony constitutes an admission of impecuniosity.** Even Canada recognizes this in its current motion when it merely suggests that Tennant Energy would be unable to comply with an adverse costs order. Canada has conveniently ignored the \$184 million of value in the Skyway 127 Wind Energy shares to make this suggestion.
28. The Tribunal rejected Canada’s motion for security for costs. Nothing has changed, yet Canada demands yet another consideration of the very same motion without demonstrating any change of circumstances.
29. But, as addressed below, even if Canada could establish a change (which is expressly denied), Canada’s motion could never succeed without Canada being able to demonstrate the existence of exceptional circumstances as set out in Paragraphs 174 – 174 of *Procedural Order No. 4*. As discussed below, Canada has not done so.
30. The Tribunal should reject Canada’s Renewed Application on a pre-emptive basis and award costs against Canada.

B. NO FOUNDATION FOR AWARDING SECURITY FOR COSTS

31. Canada claims that “new evidence” “provides a reasonable basis to find that the Claimant is impecunious.”⁶ Even if Canada were correct (which is expressly denied), this would still not constitute a reason for the imposition of an order for security for costs as the Tribunal already noted implicitly when it noted the exceptional circumstances are required.
32. In *Burimi v. Albania*, the Tribunal held that mere financial difficulties are insufficient to justify an order for security for costs, noting that the Tribunal “would be reluctant to impose on the Claimants what amounts to an additional financial requirement as a condition for the case to proceed.”⁷ Yet, the factual situation in *Burimi* rejected by that Tribunal is nearly the same situation that Canada urges upon the Tribunal in the current case.
33. The Tribunal in *RSM v. Grenada* was of a similar mindset, emphasizing that an

⁶ Canada’s Renewed Application on page 5.

⁷ *Burimi S.R.L. and Eagle Games S.H.A v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, 3 May 2012, ¶ 41, **CLA-064**.

investor's access to justice should not depend on a showing of sufficient financial resources:

In an ICSID arbitration, it is also doubtful that a showing of an absence of assets alone would provide a sufficient basis for such an order. First, as was pointed out in Libananco, it is far from unusual in ICSID proceedings to be faced with a Claimant that is a corporate investment vehicle with few assets that was created or adapted specially for the purpose of the investment. Second, as was noted by the Casado Tribunal, it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award.⁸

34. As these and other tribunals have explained, the existence of a special purpose vehicle with insufficient assets to pay a potential costs award does not suffice for security for costs. Indeed, if a State were able to demand security for costs anytime there was a risk that a potential costs award would not be unpaid, it would frustrate investors' access to justice especially when, as here, it is claimed that the State's actions under attack caused the diminished resources in the first instance. As Canada did here, States could undermine the economic value of an investment by blocking its ability to generate cash flow and then demand that the less-liquid investor post-multi-million-dollar securities when those actions are tested on the ground that the investor lacks assets. This would enable States to benefit from their own wrongdoing and would mean that only the most liquid investors could bring a claim.
35. As discussed in the following section of this Response, Tribunals have held, as did this Tribunal, that some other element rendering the situation truly exceptional is needed to award security for costs, such as a serial litigant with a history of unpaid costs awards. As the Tribunal in *EuroGas v. the Slovak Republic* explained:

[T]he underlying facts in [the RSM v. St. Lucia] arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of not complying with cost orders. As underlined by the arbitral Tribunal, these circumstances were considered cumulatively.⁹

⁸ Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada (ICSID Case No. ARB/10/6), Decision on Security for Costs, 14 October 2010, ¶¶ 5.19, **RLA-018**.

⁹ *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 – Decision on the Parties' Requests for Provisional Measures, 23 June 2015, ¶ 122, **CLA-067**. See also *South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016, ¶¶ 59-61, ¶ 68, **RLA-013**.

36. Canada has relied on the *Dirk Herzig* Award in its Renewed Application, which the Tribunal already reviewed and analyzed in its previous order. However, Canada fails to note the grave concern that the *Dirk Herzig* Tribunal expressed regarding imposing security for costs in situations, as in this case, where the government’s wrongful conduct resulted in financial hardship upon the claimant. The *Dirk Herzig* Tribunal stated in paragraph 55:

55. The Tribunal also accepts Dr. Herzig’s argument that a party’s impecunity, in and of itself, is **not sufficient** to meet the exceptional circumstances standard. One reason is that a claimant may be able to prove on the merits that the respondent wrongfully caused its financial difficulty.¹⁰

37. In *Dirk Herzig*, the issue of security for costs arose after the claimant was in bankruptcy. The bankruptcy trustee, Mr. Herzig, admitted that there were no assets. In paragraph 25 of *Procedural Order No 6*, this Tribunal noted the unique situation arising in the *Dirk Herzig* case. The Tribunal commented about the *Dirk Herzig* case:

In that case, the Tribunal itself noted that the facts presented a “more extreme situation” *beyond* impecunity and third-party funding.¹¹ In particular, the claimant in that case, Dr. Dirk Herzig, was the insolvency administrator who brought the claim on behalf of the bankrupt company Unionmatex Industrieanlagen GmbH. As Unionmatex was insolvent, a third-party funder was engaged to fund the claimant’s costs in those proceedings. In that context, the practical import of the third party funder’s absence of liability for an adverse costs award meant that it was “effectively impossible” for Dr. Herzig to pay an adverse costs award without security.¹²

38. By comparison, in the current case, Tennant Energy provided evidence, independently assessed by a significant global accounting and valuation firm, to confirm the value of Tennant Energy. Tennant Energy is not in bankruptcy, and thus the “effectively impossible” test is not met.
39. Finally, the general principle of international law is that no one should profit from their wrongdoing. This NAFTA claim arose from Tennant Energy’s discovery that senior Ontario Energy officials were engaging in internationally wrongful conduct in the administration of the Ontario Renewable Energy Feed-in Tariff program. Canada

¹⁰ *Dirk Herzig v. Turkmenistan – Decision on Request for Security for Costs*, at ¶55 (emphasis added). (RLA-112)

¹¹ *Dirk Herzig v. Turkmenistan*, ¶ 57. (RLA-112)

¹² *Dirk Herzig v. Turkmenistan*, ¶ 58. (RLA-112)

engaged in internationally wrongful behaviour in a coverup that lasted for many years. Ontario and Canada repeatedly engaged in patently false statements to FIT Applicants denying that they engaged in that particular wrongful conduct while knowing that these statements were untrue.

40. In the summer of 2017, with the release of some information in post-hearing pleadings from the *Mesa Power* NAFTA Claim, Tennant Energy discovered that senior Ontario Energy officials admitted to engaging in internationally wrongful conduct in the administration of the FIT Program. Even after the NAFTA Claim was released, Canada continued to make untruthful statements, and it took further steps to prevent the public and other FIT Applicants from knowing the truth.
41. The internationally wrongful conduct directly resulted in the imposition of financial hardship upon Tennant Energy. Repeatedly, Canada seeks to profit from its own wrongdoing.
42. If Canada's approach were to be followed, then disinformation arising from denying the truth to foreign investors would become the rule. The detrimental effects upon such investors, who often will suffer financial hardship on account of the very actions of those States, seriously would erode access to justice and would impair the efficacy of the investor-state dispute settlement system.
43. Canada's renewed Application is simply an improper attempt to add burden and further cost to deny this claim over admitted international wrongfulness from having an independent international tribunal hear it.

C. SECURITY FOR COSTS IS ONLY WARRANTED IN EXCEPTIONAL CIRCUMSTANCES.

44. As identified above, the Tribunal made clear in paragraphs 173 and 174 of Procedural Order No. 4 that the Respondent had to establish the presence of exceptional circumstances for an order for security for costs to be awarded.
45. The four criteria under the Exceptional Circumstances Test set out in the *Orlandini claim* (and followed in Paragraph 174 of *Tribunal Procedural Order No. 4*) are:
 - (i) a claimant's track record of non-payment of costs awards in prior proceedings.
 - (ii) a claimant's improper behaviour in the proceedings at issue, such as to conduct that interferes with the efficient and orderly conduct of the proceedings.
 - (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or

(iv) other evidence of a claimant’s bad faith or improper behaviour.¹³

46. Further to the exceptional circumstances test, to obtain an order for interim measure for security for costs, Canada has acknowledged that it must, at a minimum, establish that:
- a. It has a reasonable possibility of prevailing in the case.
 - b. It would suffer irreparable harm if security for costs is not granted.
 - c. the harm it will suffer if security for costs is not granted substantially outweighs the harm such an order would entail for the Investor; and
 - d. its request must be granted as a matter of urgency.¹⁴
47. Due to these strict requirements, requests for security for costs in investment treaty arbitration are almost always rejected. Tribunals invariably note that an order to pay security for costs is granted only in exceptional circumstances.
48. Canada knows that the “exceptional circumstances” that all other tribunals including this one have required to grant such a request are simply not present here.
49. The Tribunal in *Orlandini v. Bolivia* provided a series of examples of exceptional circumstances that might give grounds for an order of security for costs:

*The Tribunal believes that such factors would include: (i) a claimant’s track record of non-payment of costs awards in prior proceedings; (ii) a claimant’s improper behavior in the proceedings at issue, such as to conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant’s bad faith or improper behavior.*¹⁵

¹³ *Orlandini v. Bolivia*, ¶ 143 (**RLA-034**). The Tribunal in footnote 232 of Procedural Order No. 4 also referenced the ICCA-Queen Mary Taskforce, Report on Third- Party Funding, p. 174, April 2018 (**CLA-065**).

¹⁴ Canada’s original Motion for Security for Costs, ¶ 16.

¹⁵ *Orlandini v. The Plurinational State of Bolivia* (PCA Case No. 2018-39) Decision on the Respondent’s Motion for Security for Costs for Termination, Trifurcation, and Security for Costs, 9 July 2019, ¶¶ 143-144, **RLA-034**. See also *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14), Procedural Order No. 3 – Decision on the Parties’ Requests for Provisional Measures, 23 June 2015, ¶ 123, **CLA-067** (“financial difficulties and third-party funding—which has become common practice—do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs”); *Lao Holdings N.V. and Sanum Investments Limited v. Lao People’s Democratic Republic* (ICSID Case No. ARB(AF)/16/2 and ADHOC/17/1), Decision on Respondent’s Motion for Security for Costs for Security for

50. In the current Renewed Application, Canada has been unable to identify the presence of any exceptional circumstances of the kind found by previous tribunals as justification for an order for security for costs.
51. There is no history of the Investor being a serial litigant, defying court and tribunal orders, or failing to pay adverse costs awards. Put simply, the exceptional circumstances that tribunals have deemed necessary to grant security for costs do not exist. No other material change in financial condition has arisen either.
52. Canada certainly has not justified any changed circumstances that would warrant the Tribunal to revisit its order. This Tribunal dismissed Canada's Original Motion for Security for Costs in *Procedural Order No. 4*. At paragraphs 174 - 176 of *Procedural Order No. 4*, the Tribunal noted:

174. The Tribunal agrees with the Tribunal in *Orlandini v Bolivia* that such exceptional circumstances would include, for instance, (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as to conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour.

175. In *RSM v. Saint Lucia*, for example, the *RSM* tribunal considered that the claimant was impecunious and was funded by a third party that could presumably not be made responsible for any adverse costs award in reaching its decision order security. However, **the decisive factor for the Tribunal to grant the requested security for costs was that the claimant had a proven history of not complying with costs awards rendered against it.**

176. Similarly, in *EuroGas v. the Slovak Republic*, the Tribunal refused to make an order for security for costs as the respondent had failed to establish that the claimants had defaulted on their payment obligations in the proceedings or in other arbitration proceedings. **The Tribunal made clear in that case that "financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs."**¹⁶

Costs, 26 July 2018, ¶¶ 40-41, CLA-056.

¹⁶ *Procedural Order No. 4* at ¶¶ 174 – 176. (Emphasis added)

53. It is incumbent upon Canada to convince this Tribunal that there was a fundamental change in circumstance concerning one of the relevant exceptional circumstances criteria identified by this Tribunal in paragraphs 174 – 176 of *Procedural Order No 4*.
54. Many Tribunals have confirmed that an award for security for costs is not a right as costs themselves are not a right.¹⁷ Instead, the Tribunal has the discretion to award costs after it has decided on the merits and considered the evidence presented during the proceedings.
55. None of the evidence Canada identifies to justify the rehearing of this motion addresses any of these four relevant exceptional circumstances criteria. To be clear,
- i) the Investor had no record of non-payment of costs awards:
 - ii) The Investor has complied with every Tribunal order in this arbitration and has made timely payment of all orders for advance fee payments.
 - iii) The Investor did not move any assets and gave testimony unchallenged by Canada about its assets.
 - iv) Canada does not claim any bad faith or improper behavior on the part of the Investor, and there was none.
56. Canada cannot demonstrate any greater likelihood of success for its motion now than when the Tribunal ruled upon it in 2020. As noted by the Investor in its response to Canada’s original motion:
- a. The Tribunal in *García Armas* recognized the “high threshold” for ordering the payment of security for costs and only granted the respondent’s request in that case on account of circumstances it found to be “exceptional.”¹⁸
 - b. The Tribunal in *RSM v. Saint Lucia*, the only other Tribunal to grant security for costs, also relied on “exceptional circumstances” to justify its decision¹⁹—a fact Canada artfully ignores.

¹⁷ See *Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Decision on Provisional Measures, ¶¶ 21-23, 26-27, **CLA-053** (“the Respondent has only a mere expectation, not a right with respect to an eventual award of costs”) ; *Eskosol SPA in liquidazione v Italy* (ICSID Case No ARB/15/50), Decision on Respondent’s Request for Provisional Measures, 12 April 2017, ¶¶ 33-35, **RLA-041**.

¹⁸ *Manuel García Armas v. Venezuela*, Procedural Order No. 9, ¶¶ 250-251, **RLA-006**.

¹⁹ *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia’s Request for Security for Costs (Dissenting Opinion of Judge Edward Nottingham), 13 August 2014, ¶¶ 52, 75, **RLA-019**.

- c. There are many cases in which tribunals have rejected requests for security for costs because the requisite “exceptional circumstances” were not found.²⁰
57. As there is no likelihood of success for Canada’s motion, the Tribunal should dismiss Canada’s Renewed Application now.

D. THE BALANCE OF INTERESTS FAVORS TENNANT ENERGY

58. The speculative risk of an unpaid costs award does not substantially outweigh the certain harm of security for costs. A critical consideration noted by the Tribunal in Procedural Order No 4 in paragraph 173 is that “security for costs orders raise specific access to justice issues that do not arise with other forms of provisional relief.”
59. The access to justice issues raised by Canada’s Renewed Request is very significant. An award of security for costs should not block access to justice for potentially meritorious claims. In this situation there is certain harm to the Investor in granting Canada’s request which far outweighs the hypothetical cost that Canada “may” suffer if its request is not granted:
- a. *First*, Canada’s alleged harm rests on a hypothetical, *i.e.*, that the Investor will not pay an eventual adverse costs award, which itself rests on other hypotheticals, *e.g.*, that Canada will succeed on the merits, receive a favorable costs award, and the Investor will be unwilling or unable to pay that award. The Tribunal cannot give weight to this potential harm without prejudging the merits of the case. Nor

²⁰ See, e.g., *Libananco Holdings Co. Limited v. Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, ¶ 57, **RLA-015** (“[o]nly in the most extreme cases [should] the possibility of granting security for costs...be entertained at all.”); *South American Silver Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 10, 11 January 2016, ¶¶ 59, 68, **RLA-013** (noting “agreement that the standard to grant the measures is very strict, given that it shall be granted only in case of extreme and exceptional circumstances”); *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia’s Request for Security for Costs, 13 August 2014, ¶ 75, **RLA-019** (citing *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5), Decision on Provisional Measures, 6 April 2007, ¶ 32, **CLA-058**); *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24-, Order of the Tribunal on the Claimant’s Request for Urgent Provisional Measures, 6 September 2005, ¶ 38, **CLA-061**; *Saipem S.p.A. v. People’s Republic of Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 175, **CLA-062**; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, 17 August 2007, ¶ 59, **CLA-063**; *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent’s Motion for Security for Costs for Security for Costs. 14 October 2010, ¶ 5.17, **RLA-018**; *Commerce Group Corp. & San Sebastian Gold Mines, Inc. v. Republic of El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador’s Motion for Security for Costs for Security for Costs, 20 September 2012, ¶ 44, **RLA-017**; *Burimi S.R.L. and Eagle Games SH. A. v. Republic of Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, 3 May 2012, ¶ 34, **CLA-064**).

has the Investor—which has paid its share of the costs in this arbitration and is not accused of any procedural misconduct or bad faith actions here or elsewhere—given the Tribunal any reason to believe that it intends to frustrate an adverse costs award.

- b. *Second*, the harm that the Investor will suffer if it must pay security for costs is tangible. As it has limited assets unconnected to this litigation, requiring it to post security for costs would block its access to justice and hinder it from proceeding with the arbitration. Even if the Investor could convince a third party to post the required security, that avenue of relief would come at a cost that the Investor could not recover, *i.e.*, a decreased financial interest in any amounts awarded by the Tribunal. In the circumstances as this one, in which Canada’s actions are responsible for the Investor’s financial position, such a result would be unfair and prejudicial.
 - c. *Third*, the C\$ 5.45 million Canada requests for security for costs is speculative and grossly excessive.²¹ As noted above, it would be prejudicial for the Tribunal to assume that Canada will receive any costs at all, much less 100% of its anticipated costs in arbitration. In *Mesa Power*, the case on which Canada relies for its estimate, the Tribunal awarded Canada only 30% of its costs, *Canada* assumes 100%.
60. In summary, the harm of granting Canada’s request is genuine, immediate, and permanent. It would either bar the Investor from bringing to its claim or substantially increase the costs of continuing with its claim. At the same time, the harm that Canada alleges it will suffer if its request is not granted is hypothetical and exaggerated. The former outweighs the latter even assuming this Tribunal were to entertain this late, repeated request.

III. CANADA’S UNTIMELY REQUEST TO ADMIT NEW AUTHORITIES SHOULD BE DISMISSED

- 61. This Tribunal also should reject Canada’s request to admit new authorities more than four months after arguing the legal issues before this Tribunal and two months after filing the Post-Hearing Briefs. The jurisdiction deliberations are underway, and a decision on jurisdiction is due shortly.
- 62. The admission of a new authority after the completion of a hearing is a discretionary power. This discretion should not be granted lightly because of its impact on the right of the disputing parties to have their case heard fully. However, there are important

²¹ Canada’s Renewed Application for Security for Costs at page 5.

reasons why the Tribunal should not admit the new authority at this time related to the prejudice suffered by the disputing parties arising from the delay that would result from accepting such a late authority during the deliberations.

A. THE WESTMORELAND AWARD REQUIRES COMMENTS FROM THE DISPUTING PARTIES

63. The *Westmoreland* Award cannot be admitted without comment from the disputing parties. The award deals with a complex and *sui generis* factual matrix that requires commentary from the disputing parties if the case is admitted.
64. The Tribunal will recall that this is not the first time that Canada has attempted to file untimely materials from the *Westmoreland* NAFTA Claim. Paragraph 15 of *Procedural Order No. 8* summarizes the previous situation as follows:
 15. On 10 November 2020, the Tribunal informed the Parties that, prior to receipt of the Respondent's request, it had already decided on the course to be followed in connection with the Respondent's Renewed Request for Bifurcation. As such, it saw no need to depart from that decision for purposes of receiving further submissions from the Parties on the *Westmoreland* Decision. The *Westmoreland* Decision is already in the public domain, the Tribunal nevertheless granted the Respondent permission to submit it into the record, without comment from the Parties.
65. The *Westmoreland Procedural Order No. 3*, addressing the issue of bifurcation, was admitted into the record as **RLA-164**. That order identifies the unique complexities arising in this claim arising from corporate restructurings taken in the face of the operation of US Bankruptcy law. These types of issues are not present in the matter currently before the Tribunal but any admission of the *Westmoreland* Award would require discussion and evaluation of such matters.
66. However, admitting this legal authority at this time during deliberations would result in prejudice to the Investor's right to have its case fully heard, complication and needless delay and unfairness as discussed below.
67. From a review of the *Westmoreland Procedural Order No. 3* already in the record, it is clear that the issues in the *Westmoreland* NAFTA claim involve deep complexities arising from the operation of US bankruptcy law. Such issues are not present in the *Tennant Energy* Claim. The *Westmoreland* award should not be admitted. The prejudice of admitting the *Westmoreland* award would be amplified by admitting it without comment.

68. Canada notes in its Admission Request that it would be “amenable to each Party providing a brief page-limited submission on the relevance of the *Westmoreland Final Award* to the issues arising in this arbitration.”
69. It would not be fair to submit the legal authority without permitting a full opportunity for full comment on the decision. The recently released *Westmoreland* award requires context from the disputing parties which can only arise from an in-depth understanding of US bankruptcy law. Otherwise, this decision could not adequately address the issues in this arbitration.
70. In this regard, Canada has a substantial advantage because Canada was a disputing party to this arbitration. As a result, Canada already has detailed knowledge of the bankruptcy law and other technical elements related to holding this particular arbitration award. Tennant Energy was not a disputing party and did not have such information available. Further, Tennant Energy does not have US bankruptcy counsel on its current legal team. Obtaining such counsel to advise the international lawyers on the Tennant Energy legal team would add considerable time and cost. Counsel will need to properly evaluate the technical US Bankruptcy law issues which determined this claim.
71. In the circumstances, the prejudice to the arbitration process outweighs any marginal benefit from receiving the new authority.

B. TRIBUNALS HAVE REJECTED LATE SUBMISSIONS OF NEW AUTHORITIES

72. Tribunals will reject submissions of legal authorities after the completion of a hearing. This is especially true of submissions of new authorities after the filing of post-hearing briefs.²²
73. For example, the Tribunal in *Eskolol* recently rejected the submission of three new authorities at a late stage of the proceeding. The *Eskolol* Tribunal considered the stage of the proceedings and the nature of the legal authorities at issue to reject their untimely admission. In paragraphs 85 – 87 of the Award, the Tribunal noted the procedural issue, stating:

85. By email of 6 December 2019, the Respondent requested leave to submit two additional legal authorities into the record, reflecting awards recently issued in

²² The Investor will not file new authorities as part of its argument to oppose the filing of new authorities. The Investor’s argument is that the discretionary power of the Tribunal should not be exercised in this situation in the interests of fairness, efficiency, and economy. The references to two recent cases are simply to confirm that other tribunals have also considered such interests in the exercise of discretion.

arbitrations against Spain. By email of the same date, the Tribunal asked the Claimant for its comments on the Respondent's request. By letter of 15 December 2019, the Claimant objected to the Respondent's request.

On 17 December 2019, the Tribunal denied the request, **“taking into account both the stage of these proceedings and the nature of the legal authorities at issue.”**

86. By email of 30 March 2020, the Respondent requested leave to submit a new legal authority, reflecting an award recently issued in an arbitration against Italy. By email of the same date, the Tribunal asked the Claimant for its comments on the Respondent's request. By letter of 6 April 2020, the Claimant objected to the Respondent's request. On 8 April 2020, the Tribunal denied the request **“in light of the stage of these proceedings, and in recognition in any event that the Tribunal resolves issues in this case based on its independent analysis, not based on the rulings of other tribunals.”**

87. On 16 April 2020, the Respondent requested leave to submit a new legal authority, reflecting a decision on annulment recently rendered in an ICSID arbitration brought by Blusun against Italy (the “*Blusun case*”),¹ for which the earlier award already was part of the record. By email of the same date, the Tribunal asked the Claimant for its comments on the Respondent's request. By letter of 23 April 2020, the Claimant objected to the Respondent's request. **By letter of 18 May 2020, the Tribunal denied the request, “on grounds of insufficient materiality and in light of the current stage of the proceedings.”**²³

74. Similarly, the Tribunal in *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela* came to a similar conclusion, stating:

77. On February 22, 2017, the Claimants requested the addition [of a new legal authority] in the proceedings file. On February 27, 2017, the Respondent objected Claimants' request. On March 1, 2017, the Tribunal rejected Claimants' request, considering that there was no reason to justify the addition of a new legal authority [*legal authority*] at this late stage of the proceedings.²⁴

²³ Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award – 4 September 2020 at ¶ 65. <https://www.italaw.com/sites/default/files/case-documents/italaw11779.pdf>

²⁴ *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award - 25 July 2017 - <https://www.italaw.com/cases/2127>

75. In both *Valores Mundiales* and *Eskolol*, the admission of an untimely authority was rejected in light of the late stage of the proceedings. These decisions simply confirm the strong reasons not to admit new authorities in this current arbitration.

C. POTENTIAL NEW SUBMISSIONS FROM NAFTA PARTIES

76. As noted above, Canada noted that Canada would be “amenable to each Party providing a brief page-limited submission on the relevance of the *Westmoreland Final Award* to the issues arising in this arbitration.”
77. As the Tribunal is aware, the term Party in the NAFTA is different from the term disputing party. Party refers to a signatory to the NAFTA, namely the United States of America, Canada, and the United Mexican States.
78. Canada knows full well that allowing this new authority into the record would trigger rights for the non-disputing NAFTA Parties to file NAFTA Article 1128 submissions. Indeed, in the *Westmoreland Claim* itself, Mexico filed an Article 1128 submission. Both NAFTA non-disputing Parties filed 1128 submissions in this arbitration.
79. The addition of a new legal authority addressing the NAFTA could also trigger new demands from the non-disputing NAFTA Parties to file additional NAFTA Article 1128 submissions on this authority. Such new NAFTA Article 1128 submissions would require additional filings from the disputing parties to this arbitration. Such a process would add significant amounts of time and effort to a completed hearing months ago.
80. It would not be efficient or fair to admit this new authority at this late date. Four months have elapsed since the November 2021 jurisdictional hearing. Thus, the process required to admit and address such an authority might add several months of delay and untold cost to determining jurisdiction.
81. Accordingly, the consideration of the new legal authority proposed by Canada should be dismissed.

IV. PRAYER FOR RELIEF

82. Based on the preceding, Tennant respectfully requests that the Tribunal:
- a. Dismiss Canada's Renewed Application for security for costs on a pre-emptory basis.
 - b. Dismiss Canada's request that the *Westmoreland v Canada* award be admitted as a new authority in the jurisdiction phase.
83. The Investor further requests that the Tribunal order the reimbursement of Tennant Energy's reasonable legal and other costs incurred in connection with responding to these Applications.

Respectfully submitted on behalf of the Investor, on February 24, 2021.



Barry Appleton

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS



Edward M. Mullins

ReedSmith