



PCA (PERMANENT COURT OF ARBITRATION)

PCA Case No. 2018-54

TENNANT ENERGY, LLC V. GOVERNMENT OF CANADA

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PROCEDURAL ORDER NO. 7

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21 September 2020

**Tribunal:**

[Cavinder Bull](#) (President)

[Doak Bishop](#) (Appointed by the investor)

[Daniel Bethlehem KCMG QC](#) (Appointed by the State)

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# Procedural Order No. 7

## I. Relevant Procedural History

1. In accordance with the procedural calendar established in Annex 1 of Procedural Order No.1, the Claimant submitted on 7 August 2020 its Memorial on Jurisdiction, Merits and Quantum (the “**Memorial**”), along with the witness statement of Mr. John C. Pennie<sup>1</sup> and the expert report on valuation by Deloitte.<sup>2</sup>
2. By letter dated 10 August 2020, the Respondent alleged that the Claimant had in its Memorial inappropriately used information that was designated confidential in the *Mesa Power v. Canada* arbitration (“**Mesa Power**”), and requested the Tribunal to order proper remedies (the “**Request**”).
3. On 18 August 2020, the Claimant submitted its “Response to Canada’s Motion to Suppress Evidence from the Public and the Tribunal” (the “**Response**”), accompanied by the witness statement of Ms. Parthenya Taiyanides.<sup>3</sup>
4. On 26 August 2020, the Respondent submitted its reply to the Claimant’s Response (the “**Reply**”).
5. On 2 September 2020, the Claimant submitted its rejoinder to the Respondent’s Reply (the “**Rejoinder**”), accompanied by the witness statement of Mr. Justin Giovannetti.<sup>4</sup>

## II. Summary of the Parties’ Positions

6. The Respondent alleges that in its Memorial the Claimant relies on confidential information included in unredacted videos of the hearing in *Mesa Power*, which the Claimant has submitted in this proceeding as exhibits C-107, C-201, C-204, C-205, C-206, C-208 and C-224 to C-243 (the “**Mesa Power Videos**”).<sup>5</sup>
7. While acknowledging that these videos were publicly available on the website of the registry in that case, the Respondent asserts that the disputing parties in *Mesa Power* only authorized the publication of videos which, like the public hearing transcripts, had all the portions of the hearing that concerned confidential information redacted.<sup>6</sup> As such, the Respondent claims that it only became aware of the publication of the unredacted *Mesa Power* Videos upon reading the Memorial, after which it immediately requested their removal from the public domain.<sup>7</sup> The Respondent

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<sup>1</sup> First Witness Statement of John C. Pennie, dated 7 August 2020 (CWS-1).

<sup>2</sup> Expert Report on Valuation by Deloitte LLP, dated 7 August 2020 (CER-1).

<sup>3</sup> First Witness Statement of Parthenya Taiyanides, dated 10 August 2020 (CWS-2).

<sup>4</sup> First Witness Statement of Justin Giovannetti, dated 2 September 2020 (CWS-3).

<sup>5</sup> Request, pp. 1-2, referring to Claimant’s Memorial, ¶¶ 19; Witness Statement of John C. Pennie, ¶¶ 99, 102.

<sup>6</sup> Request, p. 2; Reply, p. 3.

alleges that notwithstanding their inadvertent publication, the *Mesa Power* Videos include confidential information designated pursuant to the confidentiality order issued by the tribunal in *Mesa Power*.<sup>8</sup> Furthermore, the confidentiality order provides that “[e]xcept with the prior written consent of the disputing party that claimed confidentiality with respect to the information [...] confidential information may be used only in [those] proceedings and may be disclosed only for such purposes” and that “[t]he obligations created by [that] Order shall survive the termination of [those] proceedings.”<sup>9</sup>

8. In its Request, therefore, the Respondent asks the Tribunal to remedy the Claimant’s alleged misuse of the confidential information by: (i) refraining from taking cognizance of the content of the *Mesa Power* Videos until the issue of their inadvertent publication is resolved; (ii) directing the Claimant to refile its Memorial and accompanying documents, with all references to the confidential information removed; and (iii) granting the Respondent an extension of the deadline to file its Objections to Jurisdiction and Request for Bifurcation by the amount of time required by the Claimant to file a corrected version of its Memorial and accompanying documents.<sup>10</sup> The Respondent reserved its right to claim the costs related to its Request at an appropriate stage of the proceedings.
9. The Claimant submits that the Tribunal should reject the Respondent’s Request and seeks full indemnity of the costs it has incurred in relation to the Request against the Respondent.<sup>11</sup>

## 1. The Respondent’s Position

10. In order to remedy the Claimant’s alleged inappropriate use of confidential information, the Respondent requests that the Tribunal grant them the relief described in paragraph 8 above.<sup>12</sup> The Respondent underscores that the Tribunal has the discretion under Articles 15(1) and 25(6) of the UNCITRAL Rules to determine whether to admit the *Mesa Power* Videos now or through the procedures established in Procedural Order No. 1.<sup>13</sup> The Respondent points out that should the Tribunal grant its Request, the Claimant would still be able to seek to obtain the confidential information during the document production phase of the present dispute, and submit it into the record thereafter.<sup>14</sup>
11. In support of its Request, and contrary to the Claimant’s assertion, the Respondent argues that it has not waived in any manner the confidentiality of the information in the *Mesa Power* Videos for several reasons.<sup>15</sup> First, the Respondent did not waive such confidentiality by publishing a link to

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<sup>7</sup> Request, p. 2; Reply, pp. 3-4, *referring to* E-mail from Government of Canada to Permanent Court of Arbitration, 10 August 2020 (R-027).

<sup>8</sup> Request, pp. 2-3; Reply, p. 2, *referring to Mesa Power Group, LLC v. Government of Canada*, PCA Case No. 2012-17 (“*Mesa Power v. Canada*”), Confidentiality Order, 21 November 2012 (RLA-093).

<sup>9</sup> Request, pp. 2-3; Reply, p. 2, *referring to Mesa Power v. Canada*, Confidentiality Order, 21 November 2012, ¶¶ 8, 20 (RLA-093).

<sup>10</sup> Request, pp. 3-4. The Respondent also requested that the Claimant be ordered to refrain from using confidential information in its Rejoinder to the Request. *See* Reply, p. 6.

<sup>11</sup> Rejoinder, ¶ 127.

<sup>12</sup> Request, pp. 3-4; Reply, p. 6.

<sup>13</sup> Reply, p. 4.

<sup>14</sup> Reply, pp. 5-6.

<sup>15</sup> Reply, pp. 3-4.

the videos on its own website.<sup>16</sup> In the Respondent's view, it cannot be held at fault for the disclosure of the unredacted videos when the disputing parties took prudent steps to protect the confidential information, including by carrying out "an extensive process to have confidential designations made to their submissions and the hearing videos."<sup>17</sup> The Respondent submits that Canada had a reasonable expectation that the videos would be published in accordance with the confidentiality instructions agreed upon by the parties, and that therefore, it should not have been expected to re-visit the videos once they had been made public.<sup>18</sup>

12. Second, the Respondent did not waive the confidentiality of the information in the *Mesa Power* Videos by not designating parts of *Mesa Power* post-hearing briefs as confidential. This is because the information designated as confidential in the former is different from the public information contained in the latter.<sup>19</sup> Moreover, since the *Mesa Power* tribunal is *functus*, "no tribunal is in place to overrule Canada's confidentiality designations over the [*Mesa Power* Videos]".<sup>20</sup> In addition, the Respondent notes that Canada has not consented in writing to the use of that information, as required by the *Mesa Power* confidentiality order.<sup>21</sup>
13. Third, the Respondent contends that length of the period during which the *Mesa Power* Videos were inadvertently in the public domain is irrelevant. For the Respondent, the relevant period is the one that follows the moment in which it learned of the disclosure until the moment it requested that the removal the confidential information from the public domain, which in this case was immediate.<sup>22</sup>
14. Fourth, the Respondent maintains that none of the cases, rules, and laws on which the Claimant relies to support its contention addresses the circumstances at issue in its Request, that is, the use of inadvertently disclosed information that remains confidential under the terms of a confidentiality order issued in a previous arbitration.<sup>23</sup> Instead, the Respondent points out, the cases relied upon by the Claimant involve illegally obtained or privileged information. Likewise, the Respondent contends, neither the law of the seat nor the IBA Rules on the Taking of Evidence in International Arbitration 2010 (the "IBA Evidence Rules"), to which the Claimant also refers, offer much guidance to resolve the situation at hand.<sup>24</sup> Accordingly, the Tribunal should exercise its "discretion under Articles 15(1) and 25(6) of the UNCITRAL Rules to determine whether to admit the evidence now or through the procedures established under PO 1."<sup>25</sup>
15. Since the information in the *Mesa Power* Videos is confidential, the Respondent submits that the Claimant's use of them in this proceeding is inappropriate and constitutes a breach on the part of the Claimant's counsel of the confidentiality order issued in *Mesa Power*.<sup>26</sup>

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<sup>16</sup> Reply, p. 3, referring to Response, ¶ 14.

<sup>17</sup> Request, p. 2; Reply, p. 3.

<sup>18</sup> Reply, p. 3.

<sup>19</sup> Reply, p. 3.

<sup>20</sup> Reply, p. 3.

<sup>21</sup> Reply, p. 3, referring to *Mesa Power v. Canada*, Confidentiality Order, 21 November 2012, ¶ 8 (RLA-093).

<sup>22</sup> Reply, pp. 3-4, referring to E-mail from Government of Canada to Permanent Court of Arbitration, 10 August 2020 (R-027).

<sup>23</sup> Reply, p. 4.

<sup>24</sup> Reply, p. 4, referring to International Bar Association, IBA Rules on the Taking of Evidence in International Arbitration, 29 May 2010 (RLA-087).

<sup>25</sup> Reply, p. 4.

<sup>26</sup> Request, p. 3; Reply, p. 5.

16. In this regard, the Respondent rejects as irrelevant the Claimant's argument that no breach has occurred because Tennant Energy LLC does not have any obligations under the *Mesa Power* confidentiality order. The Respondent, in particular, points out that it has never claimed that Tennant Energy LLC was bound by the confidentiality order.<sup>27</sup>
17. Rather, the Respondent's contention is that the Claimant's counsel, in their capacity as former counsel for Mesa Power LLC, are bound by the *Mesa Power* confidentiality order and must prevent other clients, including the Claimant, from using information designated as confidential in that arbitration.<sup>28</sup> In the Respondent's view, the Claimant's counsel "failed to follow the proper procedure for handling inadvertently disclosed information."<sup>29</sup> Specifically, the Claimant should have advised Canada and the registry in that case that unredacted *Mesa Power* Videos were in the public domain so that they could protect the confidential information, rather than using such information to their client's advantage.<sup>30</sup>
18. The Respondent further contends that the inclusion in the Claimant's Response of information that could only be obtained by virtue of the Claimant's counsel former role as counsel of Mesa Power LLC is "highly improper".<sup>31</sup> For instance, the Respondent contends that the Claimant refers to at least six documents exchanged between the parties in those proceedings which were presumed to be confidential unless otherwise confirmed.<sup>32</sup>

## 2. The Claimant's Position

19. The Claimant submits that the Respondent's Request should be rejected as it concerns evidence that is not confidential, was lawfully obtained and is material and relevant to these proceedings.<sup>33</sup>
20. First, the Claimant asserts that the *Mesa Power* Videos are not confidential.<sup>34</sup> This is because even though Canada had the opportunity to review the videos as soon as they were published and raise any objections, it failed to do so for over five years from 30 April 2015 to 10 August 2020, throughout which they remained in the public domain.<sup>35</sup> This failure, the Claimant argues, "constitutes an express choice by Canada and thus operates as a waiver."<sup>36</sup> Moreover, the Claimant contends, Canada's alleged legitimate expectation that the videos would be redacted before their publication, does not absolve it from its obligation to diligently review the posted videos.<sup>37</sup>
21. Similarly, because the videos were in the public domain for over five years, the Claimant alleges that they "do not constitute anything that would be recognized as confidential under any ordinary

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<sup>27</sup> Reply, p. 5.

<sup>28</sup> Request, p. 2; Reply, p. 5, referring to *Mesa Power v. Canada*, Confidentiality Order, 21 November 2012, ¶ 8 (RLA-093).

<sup>29</sup> Reply, p. 5.

<sup>30</sup> Request, p. 3.

<sup>31</sup> Reply, pp. 1-2.

<sup>32</sup> Reply, p. 2.

<sup>33</sup> See e.g. Response, ¶¶ 184-196; Rejoinder, ¶¶ 111-127.

<sup>34</sup> See e.g. Response, ¶ 145.

<sup>35</sup> Response, ¶¶ 11, 37-39.

<sup>36</sup> Response, ¶ 19.

<sup>37</sup> Rejoinder, ¶ 57.

meaning or usual or indeed any definition of that term”,<sup>38</sup> whether under the *Mesa Power*<sup>39</sup> or *Tennant Energy*<sup>40</sup> confidentiality orders or international law.<sup>41</sup> The Claimant further notes that Canada itself contributed to the public release of these videos by publishing a direct link to them on its own website.<sup>42</sup>

22. In the Claimant's view, the fact that Canada never objected to the publication in 2015 of certain sections of the claimant's post hearing brief in *Mesa Power*, which contained information related to the allegedly confidential sections of the *Mesa Power* Videos, further confirms the non-confidential nature of the videos.<sup>43</sup>
23. Second, the Claimant maintains that it lawfully obtained the *Mesa Power* Videos through the internet and that there has been no breach of the *Mesa Power* confidentiality order.<sup>44</sup> Accordingly, under the “clean hands” approach, the Claimant should not be precluded from submitting the *Mesa Power* Videos as evidence in support of its claim.<sup>45</sup>
24. As an initial matter, the Claimant reiterates that the *Mesa Power* confidentiality order cannot apply with respect to the evidence at issue because it has been in the public domain for many years.<sup>46</sup> Even if the order did apply to the *Mesa Power* Videos, the Claimant alleges that the prohibition against disclosing any confidential information under the *Mesa Power* confidentiality order only binds the disputing parties, the tribunal and, by contract, to the parties' counsel, the tribunal secretary, experts and witnesses in that proceeding.<sup>47</sup> Thus, the only members of the Claimant's counsel team that are bound by that order are Mr. Appleton, Mr. Mullins and Ms. Cardenas.<sup>48</sup>
25. However, the Claimant maintains, none of these individuals discovered the videos at issue or released information that was confidential in *Mesa Power*.<sup>49</sup> Rather, as described in their respective witness statements, the *Mesa Power* Videos were accessed through the internet by individuals not bound by the *Mesa Power* confidentiality order, namely Mr. Justin Giovannetti and Ms. Parthenya Taiyanides, an intern and a paralegal at the offices of the Claimant's counsel, and Mr. John C. Pennie, a representative of Tennant Energy LLC.<sup>50</sup>
26. For the same reason, the Claimant disputes the Respondent's contention that, in accordance with their obligations under the *Mesa Power* confidentiality order, the Claimant's counsel should have

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<sup>38</sup> Rejoinder, ¶ 3. See also Response, ¶ 145.

<sup>39</sup> Response, ¶ 140(b).

<sup>40</sup> Response, ¶ 140(a).

<sup>41</sup> Response, ¶ 148.

<sup>42</sup> Response, ¶¶ 50-57; Rejoinder, ¶¶ 53-56, referring to Government of Canada NAFTA Website, *Mesa Power* page, Section entitled “Legal documents”, available at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/ mesa.aspx?lang=eng>, last accessed on 7 September 2020.

<sup>43</sup> Response, ¶¶ 16-18; Rejoinder, ¶¶ 15-17.

<sup>44</sup> See e.g. Response, ¶¶ 138-140; Rejoinder, ¶¶ 20-23.

<sup>45</sup> Response, ¶¶ 135, 137.

<sup>46</sup> Rejoinder, ¶ 48(a). See also Response, ¶ 140(b).

<sup>47</sup> Response, ¶ 69, referring to *Mesa Power v. Canada*, Confidentiality Order, 21 November 2012, (C-250). See also Rejoinder, ¶¶ 41-43.

<sup>48</sup> Rejoinder, ¶¶ 32-33. See also Response, ¶ 115.

<sup>49</sup> Rejoinder, ¶¶ 34, 40.

<sup>50</sup> Rejoinder, ¶ 49, referring to First Witness Statement of John C. Pennie, dated 7 August 2020 (CWS-1); First Witness Statement of Parthenya Taiyanides, dated 10 August 2020 (CWS-2); First Witness Statement of Justin Giovannetti, dated 2 September 2020 (CWS-3).

taken steps to prevent their client from relying on the *Mesa Power* videos.<sup>51</sup> Moreover, the Claimant notes, Canada does not impose the same duty on its own counsel that re-published a link to the *Mesa Power* Videos on its own website.<sup>52</sup> In fact, by re-publishing this link, the Claimant submits that it is Canada's and not Claimant's counsel that is in violation of its obligations under the *Mesa Power* confidentiality order.<sup>53</sup>

27. In support of this position, the Claimant also relies on the *Enron v. Argentina* case, in which both the tribunal and the ICSID annulment committee held that the tribunal did not have jurisdiction to determine whether a witness in that case had breached his confidentiality obligations towards a non-party to the arbitration, and ultimately admitted that witness's testimony into the case record.<sup>54</sup>
28. Since it lawfully obtained the *Mesa Power* Videos through the public domain, the Claimant submits that, in accordance with the decisions of international arbitration tribunals and the International Court of Justice, it should be entitled to submit them as evidence in these proceedings.<sup>55</sup> The Claimant, in particular, cites to *Caratube v. Kazakhstan*, in which the tribunal admitted into the record documents that had been released online by hackers, considering that the respective documents were already in the public domain.<sup>56</sup> The tribunal in that case, the Claimant emphasizes, concluded that the risk of an award that would be “artificial and factually wrong when considered in light of the publicly available information” outbalanced the potential unfairness that might arise from the admission of the evidence.<sup>57</sup>
29. Third, the Claimant alleges that the information contained in the *Mesa Power* Videos is “the best evidence available” for the determination of merits and jurisdictional questions before this Tribunal, and that therefore, even if the Tribunal had any concerns about the confidential nature of the documents, due process and fairness considerations warrant their admission into the record.<sup>58</sup>
30. According to the Claimant, the *Mesa Power* Videos contain admissions of wrongful conduct related to the administration of the Feed-In-Tariff program by Canadian government officials,<sup>59</sup> and “these admissions are the only evidence considering the widespread despoliation of evidence in which Ontario has engaged.”<sup>60</sup> Thus, the admission of these videos into the case record is essential to guarantee the Claimant’s right to present its case and to maintain the integrity of the proceedings.<sup>61</sup> The Claimant also maintains that “[i]t would be an abuse of process to apply confidentiality to

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<sup>51</sup> Rejoinder, ¶ 40.

<sup>52</sup> Rejoinder, ¶ 50. *See also* Rejoinder, ¶ 30.

<sup>53</sup> Rejoinder, ¶ 50. *See also* Rejoinder, ¶ 30.

<sup>54</sup> Response, ¶¶ 116-121; Rejoinder, ¶ 87, *referring to Enron Creditors Recovery Corp. formerly Enron Corporation) & Ponderosa Assets LP v. The Argentine Republic*, ICSID Case No. ARB/01/3, Annulment Proceeding, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶¶ 169-179 (CLA-246).

<sup>55</sup> Response, ¶¶ 82-109, *referring to* GAR, Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails”, 22 September 2015 (CLA-255); *Ahongalu Fusimalohi v. FIFA*, CAS 2011/A/2425, Arbitral Award, 8 March 2012, ¶ 73 (CLA-261); *Amos Adamu v. FIFA*, CAS 2011/A2426, Arbitral Award, 24 February 2012, ¶ 79 (CLA-260); *Corfu Channel Case (United Kingdom v. Albania)*, Order of 9 April 1949, I.C.J. Reports 1949 p. 171, ¶ 4 (CLA-262). *See also* Rejoinder, ¶¶ 85-90.

<sup>56</sup> Response, ¶ 85, 90; Rejoinder, ¶¶ 88-89, *referring to* GAR, Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails”, 22 September 2015 (CLA-255).

<sup>57</sup> Response, ¶ 86, *referring to* GAR, Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails”, 22 September 2015 (CLA-255).

<sup>58</sup> Response, ¶ 144; Rejoinder, ¶¶ 63, 65.

<sup>59</sup> Response, ¶¶ 143-144; Rejoinder, ¶ 63. *See also* Rejoinder, ¶ 16.

<sup>60</sup> Response, ¶ 65. *See also* Rejoinder, ¶¶ 64, 116.

<sup>61</sup> Response, ¶ 66.



information that was available to the public”.<sup>62</sup>

31. Moreover, the Claimant notes that, pursuant to section 6(2) of Procedural Order No. 1, it was entitled to file all evidence that it deemed appropriate in support of its Memorial.<sup>63</sup> Further, the Claimant contends that if the *Mesa Power* videos were removed from the record now, the Claimant would not, as the Respondent claims, be able to request them later during the document production phase because under IBA Evidence Rules a party cannot request the production of a document that is already in its possession.<sup>64</sup>
32. These concerns, the Claimant asserts, should outweigh any confidentiality concerns that the Respondent or the Tribunal may have.<sup>65</sup> Moreover, the Claimant points out, the inclusion of these videos in the record would not restrict the Respondent “from having the opportunity to comment on and clarify the evidence when the Tribunal considers its weight, relevance, and materiality.”<sup>66</sup>
33. Fourth, the Claimant submits that there is nothing in the Treaty, the law of the seat (*i.e.*, Washington D.C.) or the UNCITRAL Rules that prevents the Tribunal from admitting the *Mesa Power* Videos into the record.<sup>67</sup> To the contrary, the Claimant avers that the refusal to hear material and pertinent evidence constitutes grounds to vacate an award under Article 10(a)(3) of the United States Federal Arbitration Act.<sup>68</sup> The Claimant further notes that courts in the United States of America have recognized on a number of occasions that information that is made available to the public, cannot be considered confidential.<sup>69</sup>
34. Similarly, the Claimant contends that nothing in the IBA Evidence Rules, which pursuant to Procedural Order No. 1 may guide the Tribunal on evidence issues, would preclude the admission of the *Mesa Power* Videos.<sup>70</sup> Specifically, none of the seven grounds on which a tribunal shall “exclude from evidence or production any Document”, as stated in Article 9(2) of the IBA Evidence Rules, apply in the instant case. This is because the evidence at issue: (i) is highly relevant and material; (ii) is not subject to any impediment or privilege; (iii) does not impose any unreasonable burden for its production; (iv) was available to the public at the time it was produced and now has been removed at the request of the Respondent, “meaning that the non-admission of the evidence at this point would remove it as a source of evidence”; (v) does not raise any compelling commercial or technical confidentiality issues; (vi) does not have political or institutional sensitivities; and (vi) would favour procedural economy and is necessary to guarantee the Claimant’s due process rights.<sup>71</sup>

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<sup>62</sup> Rejoinder, ¶ 93.

<sup>63</sup> Rejoinder, ¶¶ 94-95, *referring to* Procedural Order No. 1, Section 6(2).

<sup>64</sup> Rejoinder, ¶¶ 97-98.

<sup>65</sup> Response, ¶ 66.

<sup>66</sup> Response, ¶ 125. *See also* Rejoinder, ¶ 65.

<sup>67</sup> Response, ¶¶ 64-65.

<sup>68</sup> Response, ¶ 174.

<sup>69</sup> Response, ¶¶ 129-134, *referring to* *In re Document Techs. Litig.*, 282 F. Supp. 3d 743, 750 (S.D.N.Y. 2017) (CLA-242); *Bailey v. City of NY*, No. 14-CV-2091 (JBW) (VMS), (E.D.N.Y. 25 July 2015) (CLA-243); *Smithkline Beecham Corp v. Pentech Pharmaceuticals*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (CLA-238); *Nycomed US, Inc. v. Glenmark Generics, Inc.*, 8 March 2010, 2010 WL 889799 (CLA-239); *84Jennifer S. Fischman v. Mitsubishi Chemical Holdings America Inc*, United States District Court, S.D. New York, 11 July 2019, Slip Copy, 2019 WL 3034866 (CLA-241).

<sup>70</sup> Response, ¶¶ 76-79, *referring to* Procedural Order No. 1, Section 8.1.

<sup>71</sup> Response, ¶¶ 78-79, *referring to* IBA Evidence Rules, Article 9(2).

35. Fifth, the Claimant maintains that although the Respondent is seeking an interim measure, its Request does not meet the necessary requirements for obtaining interim relief under Article 26 of the UNCITRAL Rules or Article 1134 of the NAFTA.<sup>72</sup> Specifically, the Claimant asserts that the Respondent has failed to demonstrate urgency, irreparable harm that would outweigh the harm that the Claimant would likely incur from the order, and that there is no *prima facie* case on the merits.<sup>73</sup>
36. Finally, the Claimant seeks full indemnity of the costs it has incurred in relation to the Request against the Respondent.<sup>74</sup> In support, the Claimant argues that the Request lacks any legal basis under the law of the seat of the arbitration and the IBA Evidence Rules and seeks a relief that is widely excessive.<sup>75</sup>

### III. The Tribunal's Analysis

37. In essence, the Tribunal has to decide whether the Claimant can refer to and rely on the *Mesa Power* Videos in its Memorial even though the *Mesa Power* Videos allegedly contain confidential information protected by the *Mesa Power* confidentiality order.
38. In this regard, the Tribunal accepts the Respondent's submission<sup>76</sup> that it did not waive confidentiality of the information contained in the *Mesa Power* Videos. The Tribunal notes that the Respondent and Mesa Power LLC agreed upon confidentiality instructions, whereby public versions of the hearing videos were to be created. While it may be that the Respondent could have re-visited the videos after they were published, the Tribunal accepts that the Respondent had a reasonable expectation that the confidentiality instructions would be followed and that any disclosure was purely inadvertent.
39. This, however, in the Tribunal's view, is not the end of the matter.
40. The Tribunal agrees with the Respondent that the Tribunal has the discretion under Articles 15(1) and 25(6) of the UNCITRAL Rules to determine whether to allow the Claimant to refer to and rely on the *Mesa Power* Videos in its Memorial.
41. Article 15(1) of the UNCITRAL Rules provides that the Tribunal "may conduct the arbitration in such a manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case". Article 25(6) of the UNCITRAL Rules in turn provides that the Tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence offered".
42. The Tribunal is loath to criticize anyone for their role in what can only be described as a regrettable chain of events, which led to the inadvertent disclosure of the *Mesa Power* Videos to the public for

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<sup>72</sup> Response, ¶¶ 167-168.

<sup>73</sup> Response, ¶¶ 170-175.

<sup>74</sup> Response, ¶¶ 176-183; Rejoinder, ¶¶ 107-110.

<sup>75</sup> Response, ¶¶ 176-183; Rejoinder, ¶¶ 107-110.

<sup>76</sup> Reply, p. 3.

which confidentiality was being claimed for over a period of five years.

43. The Tribunal is satisfied, having reviewed the Parties' respective submissions, that ultimately a decision must be taken in light of all the circumstances and considerations of fairness. For the reasons set out below, the Tribunal hereby dismisses the Respondent's Request and allows the Claimant to refer to and rely on the *Mesa Power* Videos in its Memorial.
44. First, the Respondent argues that the Claimant's conduct in repeatedly bringing the content of the *Mesa Power* Videos to the Tribunal's attention is "in direct violation of the [*Mesa Power* confidentiality order]" and must cease.<sup>77</sup> However, this misses the point. The fact is that the Claimant is not bound by the *Mesa Power* confidentiality order and the Respondent acknowledges this.<sup>78</sup>
45. The Respondent then argues that the duty is instead on Claimant's counsel, in their dual position as former counsel for Mesa Power LLC whereby they remain bound by the *Mesa Power* confidentiality order, and as counsel for Claimant in the current proceedings, not to disclose confidential information they received from the Respondent in the *Mesa Power* proceedings.<sup>79</sup> This again misses the point.
46. There is no evidence before this Tribunal that the Claimant's counsel, in breach of their obligations under the *Mesa Power* confidentiality order, disclosed confidential information which they received from Canada in the *Mesa Power* proceedings to the Claimant. Instead, it is undisputed that the *Mesa Power* Videos were posted on the case registry's website and available to the public for viewing since 30 April 2015. These videos were in turn accessed through the internet by individuals including Mr. John C. Pennie, a representative of the Claimant,<sup>80</sup> who is not bound by the *Mesa Power* confidentiality order.
47. Secondly, the Tribunal is struck by the length of time that the *Mesa Power* Videos were in the public domain. Even if the information in the *Mesa Power* Videos was subject to a confidentiality order issued by the *Mesa Power* tribunal, the *Mesa Power* Videos were publicly available for a period of over 5 years. This Tribunal cannot "roll back the clock"<sup>81</sup> and pretend that that was not the case.
48. Thirdly, the Respondent does not dispute that the *Mesa Power* Videos contain information which is relevant and material<sup>82</sup> to the issues in this arbitration. Instead, the Respondent argues that these tests are relevant only at the stage of document production, and that the Claimant should not be allowed to "circumvent the proper procedures for document production in this arbitration."<sup>83</sup> However, the Tribunal is not persuaded that the Claimant is seeking to circumvent any procedures for document production. The Claimant is *not* seeking document production at this stage. The Claimant simply wishes to refer to evidence which is already in its possession and which was obtained through public sources.

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<sup>77</sup> Reply, p. 2.

<sup>78</sup> Reply, p. 5.

<sup>79</sup> Reply, p. 6.

<sup>80</sup> CWS-1, John C. Pennie's Witness Statement dated 7 August 2020 at [99].

<sup>81</sup> Response, ¶ 80.

<sup>82</sup> Response, ¶ 48.

<sup>83</sup> Reply, p. 6.

49. Fourthly, the Tribunal agrees with the Claimant that the Respondent will not be prejudiced by the inclusion of the *Mesa Power* Videos in the record as the Respondent would have the opportunity to comment on and clarify the evidence if necessary in its pleadings.<sup>84</sup>
50. The Tribunal notes that the *Mesa Power* Videos have since been removed from the case registry's website and they are no longer in the public domain. It may be that the Respondent will wish to protect the confidentiality of the information in the *Mesa Power* Videos, in accordance with the *Mesa Power* confidentiality order. If 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. In this regard, the Tribunal notes that the Confidentiality Order in this arbitration defines "Confidential Information" to include information "that is not publicly available and is designated by a Party as confidential on the grounds that it is... information subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings".<sup>85</sup>

## IV. The Tribunal's Decision

51. On the basis of the foregoing reasons, the Tribunal decides to dismiss the Respondent's Request.
52. The issue of costs of the above applications is to be reserved to be decided at a later stage.

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<sup>84</sup> Response, ¶ 125. *See also* Rejoinder, ¶ 65.

<sup>85</sup> Confidentiality Order, dated 24 June 2019, Section I.l.b.v.