

Global Affairs Canada



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Department of Justice

Ministère de la Justice

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VIA EMAIL

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Dear Members of the Tribunal:

Re: *Tennant Energy LLC v. Government of Canada* (PCA Case No. 2018-54)

Canada writes in response to the Tribunal's April 2, 2019 e-mail, which requested that the disputing parties file and exchange submissions on the two outstanding issues regarding the terms of Procedural Order No. 1, namely: (i) the seat of the arbitration; and (ii) the extent to which documents generated in this arbitration should be made available to the public.

Below, Canada sets out its position on both of these issues.

I. THE SEAT OF ARBITRATION

For the reasons set out in Canada's letters to the Tribunal dated February 19 and March 14, 2019, Canada is of the view that Toronto, Ontario is the most appropriate legal seat (i.e. place) for this arbitration. As such, Canada's submissions in this section are limited to addressing the three issues set out by the Tribunal in its April 2, 2019 e-mail:

- a. the Canadian courts' records in upholding or vacating NAFTA Awards;

- b. the general practice under the NAFTA in respect of the seat of arbitration; and
- c. the need for the Claimant to gather evidence from third parties, and how that would affect the choice of the legal seat of the arbitration.

A. CANADIAN COURTS' RECORDS IN UPHOLDING OR VACATING NAFTA AWARDS

As previously noted, Canadian cities have been selected as the legal seat in no less than 25 NAFTA Chapter Eleven arbitrations (17 of those being in Toronto, Ontario).¹ Canadian cities have been selected as the place of arbitration even when Canada was the respondent Party. Moreover, Canadian courts have been petitioned to set aside arbitral awards on numerous occasions.

i. Canadian courts have consistently upheld NAFTA Chapter Eleven awards

Canadian courts have consistently recognized and enforced NAFTA Chapter Eleven awards and in doing so have emphasized principles of restraint and deference in their review.

The chart below sets out the record of Canadian courts in upholding NAFTA Chapter Eleven awards. It demonstrates that applications were fully rejected in six of the seven cases where a disputing party sought to set aside a NAFTA arbitral award before a Canadian court.² In the remaining case, the Canadian court set aside only part of the tribunal's award. In fact, Canadian courts have never fully vacated a NAFTA Chapter Eleven award.

¹ Canada's letter to the Tribunal dated February 19, 2019 at p. 4.

² The cases where Canadian courts have rejected applications to set aside NAFTA Chapter 11 awards are: *Canada (Attorney General) v. S. D. Myers Inc.*, 2004 FC 38, Reasons for Order, January 13, 2004 ("*Canada v. S.D. Myers*") (**Tab 1**); *United Mexican States v. Feldman*, Decision on Application to Set Aside Award, (Ont. S.C.J.) December 3, 2003 ("*Mexico v. Feldman*") (**Tab 2**); *United Mexican States v. Feldman*, 193 OAC 216, January 11, 2005 ("*Mexico v. Feldman Appeal*") (**Tab 3**); *Bayview Irrigation District No. 11 et al. v. United Mexican States* (Ont. S.C.J.), Reasons for Judgment, May 5, 2008 ("*Bayview v. Mexico*") (**Tab 4**); *Mexico v. Cargill Incorporated*, 2010 ONSC 4656, August 26, 2010 ("*Mexico v. Cargill*") (**Tab 5**); *Mexico v. Cargill Incorporated*, 2011 ONCA 622 (O.A.C.), October 4, 2011 ("*Mexico v. Cargill Appeal*") (leave to appeal to Supreme Court of Canada denied on May 10, 2012) (**Tab 6**); *Attorney General of Canada v. Mobil Investments Canada Inc. and Murphy Oil Corporation*, 2016 ONSC 790, Reasons for Decision, February 16, 2016 ("*Canada v. Mobil/Murphy*") (**Tab 7**); and *Attorney General of Canada v. Bilcon of Delaware et al.*, 2018 FC 436, Judgment and Reasons, May 2, 2018 ("*Canada v. Bilcon*") (**Tab 8**).

Table 1: Summary of Applications for Set Aside of NAFTA Chapter Eleven Awards before Canadian Courts

CASE	PLACE OF ARBITRATION	PETITIONER FOR SET ASIDE	REVIEWING COURT	DECISION
<i>Metalclad Corporation (U.S.) v. Mexico</i>	Vancouver, British Columbia, Canada	Mexico	British Columbia Supreme Court (2001)	Award partially set aside.
<i>Feldman (U.S.) v. Mexico</i>	Ottawa, Ontario, Canada	Mexico	Ontario Superior Court of Justice (2003); Ontario Court of Appeal (2005)	Award upheld in both instances.
<i>S.D. Myers Inc.(U.S.) v. Canada</i>	Toronto, Ontario, Canada	Canada	Federal Court of Canada (2004)	Award upheld.
<i>Bayview (U.S.) v. Mexico</i>	Toronto, Ontario, Canada	Investor (Bayview Irrigation District and others)	Ontario Superior Court of Justice (2008)	Award upheld.
<i>Cargill (U.S.) v. Mexico</i>	Toronto, Ontario, Canada	Mexico	Ontario Superior Court of Justice (2010); Ontario Court of Appeal (2011)	Award upheld in both instances.
<i>Mobil and Murphy (U.S.) v. Canada</i>	Toronto, Ontario, Canada	Canada	Ontario Superior Court of Justice (2016)	Award upheld.
<i>Clayton/Bilcon (U.S.) v. Canada</i>	Toronto, Ontario, Canada	Canada	Federal Court of Canada (2018)	Award upheld.

In the only case where a NAFTA tribunal’s award was partly set aside by a Canadian court, *United Mexican States v. Metalclad Corporation*,³ the British Columbia Supreme Court (“BCSC”), recognized that the extent to which it could interfere with an international commercial arbitral award was limited by the “narrow” grounds set out in the *British Columbia International Commercial Arbitration Act* (“ICAA”).⁴ The BCSC determined in that case that the award contained decisions “on matters beyond the scope of the submission to arbitration.” As such, the Court adopted a standard of review which sought “to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international

³ See *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 (“*Mexico v. Metalclad*”) (Tab 9).

⁴ *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, see specifically section 34: “Application for setting aside arbitral award” (Tab 10). British Columbia’s *International Commercial Arbitration Act* is modelled on the *UNCITRAL Model Law on International Commercial Arbitration*.

commercial arbitral awards [...]”.⁵ Thus, the BCSC only set aside the award to the extent that the tribunal’s decision in that case had gone beyond the scope of the submission to arbitration.

ii. Canadian courts exercise a high degree of deference when reviewing NAFTA Chapter Eleven awards

All of the Canadian courts petitioned to set aside a NAFTA Chapter Eleven award have exercised a high degree of deference to the NAFTA arbitral tribunal. In dismissing Canada’s application for set-aside in *Canada v. S.D. Myers*, for example, the Federal Court of Canada emphasized “the principle of non-judicial intervention in an arbitral award.”⁶

Similarly, in *Mexico v. Feldman*, the Ontario Superior Court of Justice refused to set aside the NAFTA Chapter Eleven award and stated that “a high level of deference should be accorded to the Tribunal.”⁷ In upholding this decision, the Ontario Court of Appeal held that “[n]otions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly.”⁸ The Court of Appeal went on to state that “our domestic law in Canada dictates a high degree of deference for decisions of specialized tribunals generally and for awards of consensual arbitration tribunals in particular.”⁹

When refusing to set aside the *Bayview v. Mexico* NAFTA Chapter Eleven award, the Ontario Superior Court of Justice noted that “[t]he court is not permitted to engage in a hearing *de novo* on the merits of the Tribunal’s decision or to undertake a review such as that conducted by a court in relation to the decision of a domestic tribunal. A high degree of deference is accorded on review by a court.”¹⁰

In *Cargill v. Mexico*, a case in which Canada and the United States intervened in support of Mexico’s challenge of a NAFTA Chapter Eleven award, the Ontario Court of Appeal, upholding the decision of the Ontario Superior Court of Justice to refuse to set aside the award against

⁵ *Mexico v. Metalclad*, ¶ 51 (Tab 9).

⁶ *Canada v. S. D. Myers*, ¶ 42 (Tab 1).

⁷ *Mexico v. Feldman*, ¶ 77 (Tab 2).

⁸ *Mexico v. Feldman Appeal*, ¶ 34 (Tab 3).

⁹ *Mexico v. Feldman Appeal*, ¶ 37 (Tab 3).

¹⁰ *Bayview v. Mexico*, ¶ 11 (Tab 4).

Mexico, reiterated that a high degree of deference should be accorded to NAFTA tribunals and Canadian reviewing courts should interfere only “sparingly or in extraordinary cases.”¹¹

More recently, in *Mobil and Murphy v. Canada*, the Ontario Superior Court of Justice confirmed that a high degree of deference should be accorded to NAFTA tribunals and that the case before it was not one of the “rare circumstances” where there was a true question of jurisdiction that could be decided by the reviewing court.¹²

Similarly, in *Clayton/Bilcon v. Canada*, the most recent application to set aside a NAFTA Chapter Eleven award in Canadian courts, the Federal Court of Canada emphasized that “none of the limited and narrow grounds for setting aside an arbitral decision...permit a court to review the merits of an arbitral tribunal’s award. This is so even if the Tribunal has manifestly erred in fact or in law.”¹³ The Federal Court of Canada, quoting the Ontario Court of Appeal in *Cargill v. Mexico*, also cautioned that Courts should “limit themselves in the strictest terms to intervening only rarely in decisions made by consensual, expert, international arbitration tribunals.”¹⁴

The record of Canadian courts upholding NAFTA Chapter Eleven awards is proven. The above-noted cases further demonstrate that Canadian courts exercise a high degree of restraint when reviewing NAFTA Chapter Eleven awards and are cautious not to interfere with tribunal decisions. As such, this Tribunal can have full confidence as to the suitability and effectiveness of Canada and Ontario’s legal regime on arbitral procedure and can be assured that a legal seat of arbitration in Canada will provide for the appropriate standard review and enforcement of an arbitral award.

B. GENERAL PRACTICE UNDER THE NAFTA IN RESPECT OF THE SEAT OF ARBITRATION

When selecting the legal seat of arbitration, tribunals and the disputing parties are to be guided by NAFTA Article 1130 and the applicable arbitration rules. NAFTA Article 1130 provides:

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

¹¹ *Mexico v. Cargill Appeal*, ¶ 33 (Tab 6).

¹² *Canada v. Mobil/Murphy*, ¶ 51 (Tab 7).

¹³ *Canada v. Bilcon*, ¶ 153 (Tab 8).

¹⁴ *Canada v. Bilcon*, ¶ 155 (Tab 8).

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or

(b) the UNCITRAL Arbitration Rules if the arbitration is under those rules.

Unless the disputing parties agree on a different seat of arbitration, NAFTA Article 1130 requires the seat of arbitration to be in Canada, the United States or Mexico, so long as the country is a Party to the New York Convention. Since all three NAFTA Parties are party to the New York Convention, tribunals have noted that cities in Canada, Mexico and the United States are eligible to be chosen as the place of arbitration.¹⁵

NAFTA Article 1130 also requires that the seat of arbitration be selected in accordance with the applicable rules to the arbitration. In particular, the UNCITRAL Arbitration Rules, which apply to this arbitration, do not list specific criteria that a tribunal must consider in selecting the seat of arbitration, rather, they merely state that the seat of arbitration must be determined by the tribunal “having regard to the circumstances of the arbitration.”¹⁶

Therefore, absent agreement by the disputing parties on the seat of arbitration, tribunals in past NAFTA Chapter Eleven arbitration have considered a range of factors and balanced all relevant considerations when choosing the seat of arbitration.¹⁷ In particular, NAFTA tribunals have commonly considered the *UNCITRAL Notes on Organizing Arbitral Proceedings* (“UNCITRAL

¹⁵ See e.g. *Ethyl Corporation v. Government of Canada* (UNCITRAL) Decision Regarding the Place of Arbitration, 28 November 1997 (“*Ethyl – Decision on Place of Arbitration*”), ¶ 4, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8299.pdf>; *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (ICSID Case No. ARB(AF)/07/4) Procedural Order No. 1 - Decision of the Tribunal on the Place of Arbitration, 7 October 2009 (“*Mobil – Procedural Order No. 1*”), ¶ 13, available at: https://www.italaw.com/sites/default/files/case-documents/italaw3101_0.pdf.

¹⁶ UNCITRAL Arbitration Rules (1976), Article 16, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/arb-rules.pdf>.

¹⁷ See e.g. *Mobil – Procedural Order No. 1*, ¶ 14; Meg. N. Kinnear, Andrea K. Bjorklund, John F.G. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* ((Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) [Excerpt] (“*Kinnear*”), p. 1130 – 11 (**Tab 11**): “NAFTA Chapter 11 tribunals acting under either set of applicable arbitral rules typically canvass a variety of relevant circumstances before selecting the place of arbitration. In so doing, they balance all relevant considerations; no one circumstance is given paramount weight and the final selection of a place is based on a weighing of all the circumstances.”

Notes”), as well as the additional factor of “neutrality”, to guide them when making a decision on the seat of arbitration, as discussed further below.¹⁸

i. NAFTA tribunals generally apply the criteria set out in the UNCITRAL Notes on Organizing Arbitral Proceedings

Whether NAFTA Chapter Eleven tribunals have operated under the ICSID Arbitration Rules or the UNCITRAL Arbitration Rules, most have applied the criteria for selecting a place of arbitration set out in the UNCITRAL Notes.¹⁹ Although tribunals acknowledge that the UNCITRAL Notes are not binding, they have noted that they provide a useful framework for the selection of a venue and are free to use them as they see fit.²⁰ As such, a significant body of jurisprudence has developed applying the criteria set out in the UNCITRAL Notes to NAFTA Chapter Eleven proceedings.²¹

The UNCITRAL Notes were first adopted in 1996 and subsequently updated in 2016 to reflect additional considerations in the selection of the seat of arbitration. Although the majority of NAFTA Chapter Eleven jurisprudence is based on the 1996 version of the UNCITRAL Notes, both versions of the Notes maintain the same criteria for selecting the place of arbitration, with the additional consideration of the law, jurisprudence and practices of the place of arbitration in the 2016 version. Paragraph 29 of the UNCITRAL Notes (2016) sets out the most prominent legal factors to consider when selecting the seat of arbitration:

- (a) The suitability of the arbitration law at the place of arbitration;

¹⁸ *UNCITRAL Notes on Organizing Arbitral Proceedings* (2016) (“UNCITRAL Notes”), available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf>.

¹⁹ *Kinnear*, p. 1130-6 (**Tab 11**). See also *ADF Group Inc. v. United States* (ICSID Case No. ARB(AF)/00/1) Procedural Order No. 2 Concerning the Place of Arbitration, 11 July 2001 (“*ADF – Procedural Order No. 2*”), available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8587.pdf> and *Mobil – Procedural Order No. 1* as examples of cases under the ICSID (Additional Facility) Rules that have considered the UNCITRAL Notes.

²⁰ See e.g. *Ethyl – Decision on Place of Arbitration*, ¶ 6; *Methanex Corp. v. United States* (UNCITRAL) Reasons for the Tribunal’s Decision on the Place of Arbitration, 7 August 2000 (“*Methanex – Decision on Place of Arbitration*”), ¶ 5, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw9095.pdf>; *United Parcel Service of America Inc. v. Canada* (UNCITRAL) Decision of the Tribunal on the Place of Arbitration, 17 October 2001, (“*UPS – Decision on Place of Arbitration*”) ¶ 6, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8390.pdf>; *ADF – Procedural Order No. 2*, ¶ 7; *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 28 January 2013 (“*DIBC – Procedural Order No. 2*”) ¶ 23, available at: https://www.italaw.com/sites/default/files/case-documents/italaw1421_0.pdf; *Mobil – Procedural Order No. 1*, ¶ 38.

²¹ *Kinnear*, pp. 1130-6 – 1130-7 (**Tab 11**).

- (b) The law, jurisprudence and practices at the place of arbitration regarding:
 - i. court intervention in the course of arbitral proceedings;
 - ii. the scope of judicial review or of grounds for setting aside an award; and
 - iii. any qualification requirements with respect to arbitrators and counsel representation; and
- (c) Whether the State where the arbitration takes place and hence where the arbitral award will be made is a Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the “New York Convention”) and/or to any other multilateral or bilateral treaty on enforcement of arbitral awards.²²

Paragraph 30 of the Notes goes on to state that when it is expected that hearings will be held at the seat of arbitration, other factors may become relevant. In this regard, the revised Notes acknowledge that the seat of arbitration and the location of hearings are two distinct concepts. When the hearings will take place in the same location as the legal seat of arbitration, factors relating to convenience become relevant. These factors include:

- (a) The convenience of the location for the parties and the arbitrators, including travel to the location;
- (b) The availability and cost of support services;
- (c) The location of the subject matter in dispute and proximity of evidence; and
- (d) Any qualification restrictions with respect to counsel representation.²³

NAFTA Chapter Eleven tribunals have applied the above factors to determine the suitable place of arbitration in a manner that is highly dependent on the facts of each case. However, a few common trends can be highlighted.

First, NAFTA tribunals have regularly selected jurisdictions in Canada or the United States as the appropriate place of arbitration.²⁴ As well, when assessing the suitability of the arbitration

²² UNCITRAL Notes, ¶ 29.

²³ UNCITRAL Notes, ¶ 30.

²⁴ See e.g. *Methanex – Decision on Place of Arbitration*, ¶ 6; *ADF – Procedural Order No. 2*, ¶ 1; *Merrill & Ring Forestry L. P. v. Government of Canada* (ICSID Case No. UNCT/07/1) Decision on the Place of Arbitration, 12 December 2007 (“*Merrill & Ring – Decision on Place of Arbitration*”), ¶ 35, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8313.pdf>.

law between Canada and the United States, tribunals have usually considered both to be equally suitable in terms of the law on arbitral procedure and enforcement.²⁵

Second, tribunals have also taken note of the difference between the legal seat of arbitration and the location of the hearings.²⁶ As noted above, factors relating to convenience, are relevant when the legal seat and location of the hearing are the same. In this regard, the relative importance of the convenience factors set out in paragraph 30 of the UNCITRAL Notes is highly dependent on the facts of a given case. In terms of general practices NAFTA tribunals in assessing those factors, we note the following:

- **location for the parties and the arbitrators:** tribunals have compared the location of officers of the claimant and of the respondent government, as well as the location of counsel, to assess relative convenience;²⁷
- **availability and cost of support services:** satisfactory support services have been considered to be available in both Canada and the United States, with some tribunals viewing Canada as being more cost efficient and others of the view that hearings held at ICSID facilities in Washington, D.C. provide a cost advantage;²⁸

²⁵ See e.g. *Ethyl – Decision on Place of Arbitration*, ¶ 10; *Methanex – Decision on Place of Arbitration*, ¶ 26; *Merrill & Ring – Decision on Place of Arbitration*, ¶¶ 14 and 27; *DIBC – Procedural Order No. 2*, ¶¶ 24 and 27; *Canfor Corp. v. United States* (UNCITRAL) Decision on the Place of Arbitration, 23 January 2004 (“*Canfor – Decision on Place of Arbitration*”), ¶ 25, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw8683.pdf>.

²⁶ See e.g. *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 3, 28 March 2013 (“*Mesa – Procedural Order No. 3*”), ¶ 39, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1388.pdf>; “One must draw a distinction between the legal place or seat of the arbitration, and the geographical place of the hearings”; *Mobil – Procedural Order No. 1*, ¶ 36: “...the place that is selected to hold any hearings and the place of arbitration raise different considerations. The latter raises considerations of a jurisdictional nature, by bringing the arbitration into the jurisdiction of a particular court in whose geographical ambit the place of arbitration is established.”

²⁷ *Ethyl – Decision on Place of Arbitration*, ¶ 12-14; *ADF – Procedural Order No. 2*, ¶ 18; *Methanex – Decision on Place of Arbitration*, ¶ 28; *UPS – Decision on Place of Arbitration*, ¶ 13; *Waste Management Inc. v. United Mexican States II* (ICSID Case No. ARB(AF)/00/3) Decision on Venue of the Arbitration, 26 September 2001 (“*Waste Management – Decision on Venue of the Arbitration*”), ¶ 13, available at: <https://www.italaw.com/sites/default/files/case-documents/ita0896.pdf>.

²⁸ *Ethyl – Decision on Place of Arbitration*, ¶ 15; *ADF – Procedural Order No. 2*, ¶ 19; *Methanex – Decision on Place of Arbitration*, ¶ 32; *Merrill & Ring – Decision on Place of Arbitration*, ¶ 16; *Waste Management – Decision on Venue of the Arbitration*, ¶ 13.

- **location of the subject matter of the dispute and the location of the evidence:** some tribunals such as those in *Ethyl*, *ADF*, *Canfor*, and *Mobil and Murphy* gave these factors significant weight and viewed the location where the respondent Party adopted the challenged measures, and in turn where the majority of the evidence would be found, as the most suitable seat for the arbitration.²⁹ Critically, tribunals have observed to the extent that potential evidentiary issues might arise, it is more likely that they are to be addressed expeditiously and efficiently by the courts of the jurisdiction that is most closely connected to the facts of the dispute.³⁰

Ultimately, it is for this Tribunal to decide, based on the circumstances of this case, which factors will be determinative for this case.

ii. Neutrality of the seat of arbitration is an additional factor often considered by NAFTA Chapter Eleven tribunals

NAFTA Chapter Eleven tribunals have often remarked that for the seat of arbitration to be truly neutral, it would have to be in the territory of a non-NAFTA Party or in a location different from the territory of both the claimant and the respondent.³¹ However, because NAFTA Article 1130 allows the arbitration to take place in the territory of a NAFTA Party, and since the disputing parties usually limit the choice of seat of arbitration to one or the other's state, a perfectly neutral place is often not possible.³²

Despite this, NAFTA Chapter Eleven tribunals have considered neutrality to be a relevant factor to be assessed when deciding the seat of the arbitration, even if it is not a factor listed in the UNCITRAL Notes.³³ Overall, a venue's actual or perceived neutrality is a matter that, as stated by the tribunal in *Methanex*, "must be approached on a case-by-case basis, depending on the individual circumstances of the particular arbitration."³⁴

To note, general practice reveals that there is no presumption that choosing a seat of arbitration within the territory of the respondent Party weighs against its neutrality. In fact, NAFTA Chapter

²⁹ *Ethyl – Decision on Place of Arbitration*, ¶ 21; *ADF – Procedural Order No. 2*, ¶ 20; *Methanex – Decision on Place of Arbitration*, ¶¶ 33 and 40; *Merrill & Ring – Decision on Place of Arbitration*, ¶¶ 18 and 28; *Canfor – Decision on Place of Arbitration*, ¶ 35; *Mobil – Procedural Order No. 1*, ¶¶ 38 and 40.

³⁰ *Mobil – Procedural Order No. 1*, ¶ 40.

³¹ *Methanex – Decision on Place of Arbitration*, ¶ 36; *Merrill & Ring – Decision on Place of Arbitration*, ¶ 35.

³² *Methanex – Decision on Place of Arbitration*, ¶ 36; *Merrill & Ring – Decision on Place of Arbitration*, ¶ 35; *Canfor – Decision on Place of Arbitration*, ¶ 21.

³³ *Canfor – Decision on Place of Arbitration*, ¶ 16; *Waste Management – Decision on Venue of the Arbitration*, ¶ 21.

³⁴ *Methanex – Decision on Place of Arbitration*, ¶ 37.

Eleven tribunals have chosen a seat of arbitration in the territory of the respondent on many occasions without controversy.³⁵

iii. The circumstances of this case establish Toronto, Ontario as the appropriate seat of arbitration

Taking into account the factors used by other NAFTA tribunals to determine the seat of arbitration, Toronto, Ontario is the most appropriate legal seat for these proceedings. The applicable law will provide suitable support in these proceedings and Canadian courts will exercise a high degree of deference to this Tribunal. While this Tribunal is not required to hold hearings in the legal seat, considerations for convenience bear the most significant connection to Toronto. Specifically, the only measures being challenged in this matter are those of the Government of Ontario, which is located in Toronto. Accordingly, the evidence related to the measures being challenged and the witnesses who could provide relevant testimony are all likely located in or close to Toronto.³⁶ Toronto also offers a convenient place to hold hearings for both the disputing parties and the Tribunal with top-notch facilities and support services at competitive rates. It is therefore a convenient location for provincial officials and representatives most likely to be called as witnesses in this case. Further, Claimant's counsel has its principal offices in Toronto, or can access Toronto via direct flights from Miami, and Canada's counsel is located nearby in Ottawa. Toronto also has a well-connected international airport offering direct flights to London and Houston, and many convenient connections to Singapore.

Lastly, throughout this proceeding, Canada has been prejudiced by the Claimant's refusal to propose a specific seat of arbitration in the United States. This has hindered both the Tribunal and Canada's ability to consider the appropriateness of the law of an alternative seat of arbitration. The Claimant's request should be refused on this basis.

Based on the foregoing, both the circumstances of this case and the applicable law weigh heavily in favour of Toronto, Ontario as the appropriate place of arbitration.

³⁵ See *e.g. Ethyl Corporation v. Government of Canada* (Toronto); *S.D. Myers, Inc. v. Government of Canada* (Toronto); *Vito G. Gallo v. Government of Canada* (Vancouver); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* (Toronto); *ADF Group Inc. v. United States of America* (Washington); *Canfor Corporation v. United States of America* (Washington); *Glamis Gold Ltd. v. United States of America* (Washington); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (Washington); *Methanex Corporation v. United States of America* (Washington).

³⁶ *Mobil – Procedural Order No. 1*, ¶ 40: “[A]ll other things being equal and in light of the fact that the dispute arises in Canada, to the extent that potential evidentiary issues might arise, it is more likely than not that, to the extent such evidentiary issues arise, they are more likely to be addressed expeditiously and efficiently by the courts of the jurisdiction that is most closely connected to the facts of the dispute.”

C. THE NEED FOR THE CLAIMANT TO GATHER EVIDENCE FROM THIRD PARTIES AND HOW THAT WOULD AFFECT THE CHOICE OF THE LEGAL SEAT OF THE ARBITRATION

In its side letter to the Tribunal dated March 14, 2019, the Claimant asserts that one of its “key reasons” for requesting a seat of arbitration in the United States is because the Claimant anticipates that it “*may*” require assistance from United States courts in this arbitration to gather evidence from third parties.³⁷ The Claimant provides no further explanation from what third parties it may petition for evidence, nor does it provide any information on the jurisdiction in the United States that would be most relevant for when it may seek such third party evidence. Rather than offer this highly pertinent information, the Claimant relies on the suggestion that cities with the closest connections to the Tribunal Members would suffice in determining the appropriate seat of the arbitration. This suggestion bears absolutely no cogent connection to the Claimant’s reason for requesting a United States seat of arbitration in the first place. In light of the Claimant’s highly ambiguous and uncertain proposal that ignores all of the relevant factors for determining the seat of arbitration, Canada offers the following comments for the Tribunal’s consideration.

i. The Claimant’s suggested approach to determining the legal seat ignores the applicable law

The Claimant states that it is “unable” to propose a city to serve as the legal seat in this arbitration until it obtains from the Tribunal its preferences, suggesting “Washington, D.C., or a West Coast U.S. city with connections to London and Singapore, such as San Francisco, Los Angeles, or Seattle.”³⁸ The only factor that appears to be relevant to the Claimant’s choices is the convenience of connections to the Tribunal’s “travel needs”.³⁹ The Claimant fails to apply any of the relevant factors set out in the applicable law: the Claimant does not explain how the arbitration law in any of these proposals would be suitable to this arbitration, nor has the Claimant provided the details as to the law, jurisprudence and practices of its suggestions.⁴⁰ This

³⁷ Claimant’s Letter to the Tribunal dated March 14, 2019, p. 2.

³⁸ Claimant’s Letter to the Tribunal dated March 14, 2019, p. 2.

³⁹ Claimant’s Letter to the Tribunal dated March 14, 2019, p. 3.

⁴⁰ If this arbitration is held in any of these jurisdictions, the U.S. *Federal Arbitration Act* (FAA) would very likely apply. However, the applicable courts, and the judicial review, depends on the specific jurisdiction named in the arbitration. At least one NAFTA tribunal has remarked that the FAA is subject to restrictions in New York, and rejected that city as a suitable place of arbitration. See *Mesa – Procedural Order No. 3*, ¶ 54.

basic lack of information makes it virtually impossible to consider the Claimant's proposal in any meaningful way.

Additionally, the Claimant's sole reason for suggesting a U.S. jurisdiction, that it 'may' require the assistance of U.S. courts to gather evidence from third parties, ignores the general practice by NAFTA tribunals as regards to location of the evidence.⁴¹ As noted above, NAFTA tribunals have assigned significant weight to the jurisdiction **where the respondent adopted the challenged measure and where the majority of the evidence would be found** as the most suitable seat for the arbitration. This makes sense, as the Tribunal could most effectively rely on the courts in the jurisdiction where the evidence is located to compel such evidence should it need to do so.⁴² Here, there is no indication if or from what U.S. jurisdiction the Claimant may seek third party evidence, and ultimately, the Claimant does not provide the critical information necessary for this Tribunal to make a reasoned determination based on applicable law. The Claimant's illusory and abstract claim of possibly seeking evidence from third parties abroad should not outweigh the many validly applied criteria to determine the appropriate place of arbitration.

In the absence of any facts establishing that the Claimant will require assistance from United States Courts to obtain evidence from third parties, the most appropriate legal seat for the disputing parties and Tribunal to gather relevant and material evidence in these proceedings weighs most heavily in favour of Toronto, Ontario.

ii. The legal seat does not affect the Claimant's ability to seek evidence from third parties in the United States

To the extent that the Claimant decides that it will seek evidence from third parties, it will be able to do so in these proceedings pursuant to applicable United States laws, even if the legal seat of the arbitration is in Canada. Section 1782 of Title 28 of the United States Code (28 USC §1782), grants United States' courts the power to order discovery from a non-party "for use in a proceeding in a foreign or international tribunal."⁴³ It allows both an arbitral tribunal and "any interested person" in proceedings before such a tribunal to request any district court in the United States to issue a subpoena and does not limit the scope or form of discovery that the court can

⁴¹ Claimant's Letter to the Tribunal dated March 14, 2019, p. 2.

⁴² *Mobil – Procedural Order No. 1*, ¶ 40.

⁴³ United States Code, Title 28. *Judiciary and Judicial Procedure*, Part V. Procedure, Chapter 117 Evidence, Depositions, §1782 "Assistance to foreign and international tribunals and to litigants before such tribunals." (**Tab 12**).

order. To be clear, the legal seat of arbitration in a foreign jurisdiction does not affect the ability of the Claimant to avail itself of this right in United States courts when gathering such evidence in the United States. In fact, Counsel for the Claimant sought evidence pursuant to 28 USC §1782 in *Mesa v. Canada* without issue before the tribunal was constituted or the legal seat of arbitration was named in that case.

iii. If the Claimant seeks evidence from third parties, it must do so under the supervision of the Tribunal

Finally, *if* the Claimant seeks evidence from third parties, it must do so under the supervision and by order of the Tribunal. Seeking evidence for these proceedings *ex parte*, without the oversight of the Tribunal, effectively undermines the authority of the Tribunal to govern the procedure in this arbitration and undermines the principle of equality of the disputing parties, which is provided for in Article 15 of the UNCITRAL Arbitration Rules.

As agreed by the disputing parties, the procedure in this arbitration is governed by the UNCITRAL Arbitration Rules, as modified by Section B of NAFTA Chapter Eleven.⁴⁴ The disputing parties have also agreed that to the extent “these provisions and rules do not address a specific procedural issue, the Tribunal shall, after consultation with the Parties, determine the applicable procedure.”⁴⁵ The issue of the Claimant’s potential requests to United States Courts for assistance to gather evidence from third parties is not specifically addressed in NAFTA Chapter Eleven, the UNCITRAL Arbitration Rules, or draft Procedural Order No.1. Thus, the Tribunal must determine the applicable procedure for the disputing parties to request assistance from United States Courts to gather evidence from third parties.

The tribunal in *Mesa* recognized the importance of setting out procedures to supervise the arbitral proceedings when the claimant in that case sought evidence from third parties *ex parte*.⁴⁶ Specifically, the tribunal ordered the claimant to report on the status of all ongoing proceedings that had been initiated in the United States to obtain evidence from third parties under §1782 of Title 28 of the United States Code prior to the constitution of the tribunal. Moreover, the tribunal further required the claimant to seek the tribunal’s express authorization to initiate new

⁴⁴ Draft Procedural Order No. 1, Tribunal’s Marked-Up Version, 2 April 2019, at ¶ 2.1.

⁴⁵ Draft Procedural Order No. 1, Tribunal’s Marked-Up Version, 2 April 2019, at ¶ 2.2.

⁴⁶ *Mesa – Procedural Order No. 3*, ¶ 68.

proceedings for gathering evidence or to make new requests for further evidence in the existing proceedings.⁴⁷

This same oversight is required in these proceedings to ensure that Canada is not prejudiced by evidence obtained from third parties in these proceedings. Such procedures would provide Canada the equal opportunity to weigh in on the relevance and materiality of the Claimant's requests, and to obtain evidence from the third parties that the Claimant is seeking evidence from. Accordingly, if the Claimant seeks evidence from third parties for the purposes of this arbitration, it must do so only under the supervision of the Tribunal.

II. TRANSPARENCY

The Tribunal has requested the disputing parties' submissions on the issue of transparency, as it pertains to the proposals in paragraph 13.1 of draft Procedural Order No.1. The disputing parties disagree on what documents are to be made available to the public. In addition to Tribunal awards and orders, Canada maintains that all filings to the Tribunal and hearing transcripts are to be made available to the public subject to the redaction of confidential information.⁴⁸

Canada's proposed language in paragraph 13.1 of draft Procedural Order No. 1 seeks to ensure the greatest transparency and openness to the public as possible, while recognizing the legitimate needs of the parties to protect certain types of information. This position is consistent with the NAFTA Free Trade Commission's Notes of Interpretation of Certain Chapter 11 Provisions dated July 31, 2001 (the "FTC's Notes"), which states:

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

1. Access to documents

a. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of

⁴⁷ *Mesa – Procedural Order No. 3*, ¶ 68.

⁴⁸ The Claimant prefers that only Memorials be made available, without supporting materials.

Article 1137(4),⁴⁹ nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

b. In the application of the foregoing:

i. In accordance with Article 1120(2),⁵⁰ the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.

ii. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

a. confidential business information;

b. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

c. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.⁵¹

There is no question that the FTC's Notes are binding interpretations of the NAFTA. As stated by the tribunal in *Mesa*,

[P]ursuant to Article 1131(2)⁵², an interpretation issued by the Free Trade Commission under the NAFTA, such as the FTC Note, is binding on all Chapter 11 tribunals. It is not for this Tribunal to determine whether – as the Claimant alleges – the FTC Note amounts to an amendment of the NAFTA or

⁴⁹ NAFTA, Article 1137(4): “Annex 1137.4 applies to the Parties specified in that Annex with respect to publication of an award.” Annex 1137.4 provides in relevant part “Publication of an Award, Canada: Where Canada is the disputing Party, either Canada or a disputing investor that is a party to the arbitration may make an award public.”

⁵⁰ NAFTA, Article 1120(2): “The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.”

⁵¹ NAFTA Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001) (“NAFTA FTC Note”), available at: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng>.

⁵² NAFTA, Article 1130(2): “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”

not. Rather, faced with an interpretation given by the Contracting States through the FTC, the Tribunal must simply apply it. This approach has been followed by several NAFTA tribunals.⁵³

Furthermore, Canada's proposed language is also consistent with its domestic obligations under the relevant access to information laws. Subject to the applicable legislation and the protection of confidential information, the Governments of Canada and Ontario must produce any record under the control of a government institution.⁵⁴ The documents produced in these proceedings, like all records under the Canadian government's control, are subject to access to information obligations. Thus, Canada cannot be compelled in these proceedings to withhold documents that are subject to production under its access to information laws.⁵⁵

Notably, Canada's proposed language regarding transparency has been adopted in the first procedural orders of other NAFTA tribunals.⁵⁶ Moreover, the requirement to make "all filings to the Tribunal, hearing transcripts, orders and awards" available to the public is "subject to the redaction of confidential information." The Claimant has provided no explanation of how such disclosure would cause it to suffer any prejudice, harm or loss.

Furthermore, the Claimant provides no reasoned basis upon which to make distinctions on the documents that it would seek to make available to the public, subject to the protection of confidential information. For example, in paragraph 13.2 of the draft Procedural Order No.1, the disputing parties have agreed that the hearing shall be open to the public. The Claimant does not

⁵³ *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("Mesa – Award"), ¶ 479, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw7240.pdf>.

⁵⁴ See e.g. *Access to Information Act*, R.S.C., 1985, c. A-1, s. 4(1) (**Tab 13**), complete Act available at: <https://laws-lois.justice.gc.ca/PDF/A-1.pdf>; *Freedom of Information and Protection of Privacy Act* (Ontario), R.S.O. 1990, c. F.31, s. 10(1) (**Tab 14**), complete Act available at: <https://www.ontario.ca/laws/statute/90f31>.

⁵⁵ As provided in the NAFTA FTC Note, ¶ 1(a): "Nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal."

⁵⁶ See e.g. *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 1, 21 November 2012, ¶ 22.1: "All filings to the Tribunal, hearing transcripts, orders and awards generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information[...]", available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1200.pdf>; *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 1, 16 September 2013, ¶ 18.1: "All filings to the Tribunal, hearing transcripts, orders and awards generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information.", available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1588.pdf>.

explain why hearing transcripts should not similarly be available publicly. It is also arbitrary to make the Memorials publicly available, but not the evidence upon which they are based.

In summary, the Claimant's proposal should be rejected in favour of Canada's proposed language in paragraph 13.1 of the draft Procedural Order No. 1, which would ensure that "[a]ll filing to the Tribunal, hearing transcripts, orders and awards" in this arbitration are made available to the public, subject to the redaction of confidential information.

III. CONCLUSION

For all of the reasons set out above, the Tribunal should:

- (i) determine that the legal seat of this arbitration is Toronto, Canada;
- (ii) reject the Claimant's proposed language in paragraph 13.1 of draft Procedural Order No.1, in favour of Canada's proposed language.

To the extent that the Claimant has sought or is seeking assistance from United States Courts in seeking evidence from third parties for these proceedings *ex parte*, Canada further requests that the Tribunal:

- (iii) order the Claimant to immediately disclose to the Tribunal and the Respondent all evidence that it has obtained *ex parte*;
- (iv) order the Claimant to report on the status of any third party evidence it is currently seeking for these proceedings, including through United States court proceedings; and
- (v) order the Claimant to seek prior authorization from this Tribunal if it intends to initiate any new requests for third party evidence for these proceedings, including through United States court proceedings.

Should the Tribunal require any additional explanation, Canada can provide further submissions on these issues during the first procedural meeting.

Yours very truly,



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