From:	Barry Appleton
To:	Christel Tham; Cavinder.Bull@drewnapier.com; dbethlehem@twentyessex.com; DBishop@kslaw.com
Cc:	Diana Pyrikova; Tennant Claimant; Ed Mullins; Ben Love; Cristina Cardenas (MIA); Nabeela Latif; Heather.Squires@international.gc.ca; Annie.Ouellet@international.gc.ca; Alexandra.Dosman@international.gc.ca; "Benjamin.Tait@international.gc.ca"; Mark.Klaver@international.gc.ca; MariaCristina.Harris@international.gc.ca; Darian.Bakelaar@international.gc.ca; Krystal.Girvan@international.gc.ca
Subject:	RE: PCA Case No 2018-54 Tennant Energy - Investor response on Canada"s request for late filing of legal authorities
Date:	30 October 2020 00:50:37

Dear Mr. President and Members of the Tribunal.

Tennant Energy is writing in response to Canada's email of October 25, 2020, regarding Canada's desire to modify the current procedure to permit the filing of Procedural Order No. 3 from the *Westmoreland Mining v Canada* NAFTA arbitration.

In *Procedural Order No. 4*, this Tribunal was mindful to avoid delay and cost in consideration of the bifurcation question. In Paragraph 93(d) of this procedural order, the Tribunal wrote:

> After receiving the above submissions, the Tribunal will decide **on the papers without a hearing** on whether the proceedings should be bifurcated. In this regard, the Tribunal notes that it has had the benefit of extensive arguments by Parties on the issue of bifurcation, and the oral arguments made at the Hearing in particular have been of assistance to the Tribunal. In the interests of expediency and to save time and costs for all Parties, the Tribunal is confident that it can address a second bifurcation request without a further hearing.

The Tribunal noted that it benefited from extensive arguments at the January 2020 hearing and substantive papers. The Tribunal noted "the interests of expediency and to save time and costs for all Parties." That is the reason why the Tribunal ordered a streamlined procedure without holding successive rounds of pleadings or an oral hearing (as was followed in Westmoreland Mining).

The bifurcation matter is currently before this Tribunal. As the Tribunal is aware from its comments in paragraph 91 of *Procedural Order No. 4*, the question of bifurcation requires the Tribunal to consider this claim's particularities. A tribunal must weigh the costs and benefits of holding a separate jurisdictional phase. That determination may require substantial considerations of the merits to determine the jurisdictional issues in dispute. We note that all of these matters have already been pleaded by each disputing Party and are before the Tribunal at this time.

Tribunals make procedural decisions every day. It is unusual to interrupt the deliberative process on account of a procedural determination. The Investor does not believe that the *Westmoreland Mining* procedural decision merits the interruption of the proceedings at this time. The Investor has no objection to a process to discuss the procedural determination of the Westmoreland NAFTA Tribunal based on the particular facts of that case. Still, on balance, the Investor opposes it based on practicality, delay, and cost.

Allowing a new decision currently is not as simple as Canada suggests.

We note that representatives from each of the two non-disputing NAFTA Parties attended the September 24, 2020, *Westmoreland Mining* Bifurcation hearing. As there is no hearing in the *Tennant Energy* bifurcation consideration, allowing a new case to be submitted could lead to requests from the NAFTA non-disputing parties for the filing of Non-disputing Party observations under NAFTA Article 1128.

Thus, the admission of one new untimely case could result in multiple rounds of additional pleadings. Each non-disputing Party could seek to file a NAFTA Article 1128 observations commenting on the observations on *Westmoreland Mining Procedural Order No. 3*. Then Canada and Tennant Energy would need to be given time to review the Article 1128 submissions and then produce a response.

Indeed, the Investor believes that the Westmoreland Mining decision supports the principal contentions made by Tennant Energy in its submission. Still, Tennant Energy does not believe that any value from the *Westmoreland Mining* decision could outweigh the considerable additional cost and inconvenience from this significant disruption to the current process.

If the Tribunal permits the new authority's filing, the Investor sees no reason to modify the existing procedures followed by this Tribunal. To this end, the Investor suggests the following process:

1) Canada should file its observations on the *Westmoreland Mining Procedural Order No. 3* (as the bifurcation motion moving Party), and Tennant Energy, as the motion respondent, should be entitled to respond subsequently on this matter. Each side should have one week to file.

2) The Tribunal should immediately notify the non-disputing Parties that they would have seven days from the filing of Tennant Energy's observations to file any NAFTA Article 1128 observations on the disputing parties' comments on the *Westmoreland Mining Procedural Order No. 3*.

3) If there are NAFTA 1128 submissions filed, then each disputing Party should be given 14 days to review and respond to the NAFTA Article 1128 submissions.

All parties submitting comments would file materials in a manner consistent with the established arbitration process including electronic filing, posting to the PCA extranet, and the provision of cumulative indexes.

To be specific, a page limit should not be imposed because addressing legal tests arising from this new authority's admission may require the consideration of facts applied to the law. This may well require considering the relevant facts in the current claim compared with those in the *Westmoreland Mining* claim. While all parties should strive to be concise and focused in the observations, a page limit should not be introduced at this point to ensure that the requirements of due process, reciprocity and that each side should be fully heard as required by Article 15 of the (1976) UNCITRAL Arbitration Rules and NAFTA Article 1115.

Conclusions

It is clear that in *Procedural Order No. 4*, the *Tennant Energy Tribunal* sought to minimize the disruption, delay, and cost of determining this procedural issue. Thus, based on considerations of procedural economy and cost, the Investor respectfully disagrees with Canada's new proposal. The Tribunal has had the benefit of oral arguments and written submissions. It is simply too late for the submission of new materials.

However, should the Tribunal determines it advisable to consider the *Westmoreland Mining* procedural order, then the process set out above in points 1, 2, and 3 should be followed to ensure a fair process compliant with the requirements of the NAFTA and the UNCITRAL Arbitration Rules.

On behalf of counsel for the Investor, Tennant Energy

Barry Appleton

Barry Appleton
Managing Partner
Appleton & Associates International Lawyers LP
Tel 416.966.8800 • Fax 416.966.8801
bappleton@appletonlaw.com • www.appletonlaw.com
121 Richmond St. W, Suite 304, Toronto, Ontario • M5R 2K1

From: Christel Tham <ctham@pca-cpa.org>
Sent: Wednesday, October 28, 2020 12:44 PM
To: 'Benjamin.Tait@international.gc.ca' <Benjamin.Tait@international.gc.ca>; Cavinder.Bull@drewnapier.com; dbethlehem@twentyessex.com; DBishop@kslaw.com
Cc: Diana Pyrikova <dpyrikova@pca-cpa.org>; Barry Appleton <bappleton@appletonlaw.com>; Tennant Claimant <tennantclaimant@appletonlaw.com>; Ed Mullins <EMullins@reedsmith.com>; Ben Love <blove@reedsmith.com>; Cristina Cardenas (MIA) <ccardenas@reedsmith.com>; Nabeela Latif <nlatif@appletonlaw.com>; Heather.Squires@international.gc.ca; Annie.Ouellet@international.gc.ca; Alexandra.Dosman@international.gc.ca; Mark.Klaver@international.gc.ca; MariaCristina.Harris@international.gc.ca; Darian.Bakelaar@international.gc.ca; Krystal.Girvan@international.gc.ca
Subject: RE: PCA Case No 2018-54 Tennant Energy LLC v. Government of Canada

Dear Mesdames, dear Sirs,

I write on behalf of the Tribunal to acknowledge receipt of the Respondent's letter of today.

The Claimant is invited to provide any comments it may have to the Respondent's letter by **Friday, 30 October 2020**.

Yours sincerely,
Christel Y. Tham
Legal Counsel

Permanent Court of Arbitration • Cour permanente d'arbitrage
Peace Palace • Palais de la Paix
Carnegieplein 2
2517 KJ The Hague • La Haye
The Netherlands • Pays-Bas
Tel.: +31 70 302 4153
Mob: +31 611 953 304
Fax: +31 70 302 4167
E-mail: ctham@pca-cpa.org
URL: http://www.pca-cpa.org

conforme à sa destination, toute diffusion ou reproduction est interdite.

***

From: Benjamin.Tait@international.gc.ca [mailto:Benjamin.Tait@international.gc.ca]
Sent: 28 October 2020 3:54 PM
To: Cavinder.Bull@drewnapier.com; dbethlehem@twentyessex.com; DBishop@kslaw.com
Cc: Christel Tham <ctham@pca-cpa.org>; Diana Pyrikova <dpyrikova@pca-cpa.org>; bappleton@appletonlaw.com; tennantclaimant@appletonlaw.com; EMullins@reedsmith.com; blove@reedsmith.com; ccardenas@reedsmith.com; nlatif@appletonlaw.com; Heather.Squires@international.gc.ca; Annie.Ouellet@international.gc.ca; Alexandra.Dosman@international.gc.ca; Mark.Klaver@international.gc.ca; MariaCristina.Harris@international.gc.ca; Darian.Bakelaar@international.gc.ca; Krystal.Girvan@international.gc.ca
Subject: PCA Case No 2018-54 Tennant Energy LLC v. Government of Canada

Dear Members of the Tribunal,

Please see the attached correspondence from Canada of today's date.

Kind regards,

Benjamin Tait
Paralegal
Trade Law Bureau (JLTB)
Global Affairs Canada
Tel: (343) 203-6868