Global Affairs Canada

Department of Justice

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Ministère de la Justice

CANADA

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December 15, 2020

VIA EMAIL

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Dear Members of the Tribunal:

Re: ***Tennant Energy LLC v. Government of Canada***

Canada writes in response to the Tribunal's email of December 1, 2020, inviting Canada to address the Claimant's letter to the Tribunal of November 30, 2020. In this letter, Canada explains that: (i) the Tribunal has upheld the Claimant's right to due process in these proceedings to date; (ii) the Claimant is not entitled to relitigate the Tribunal's decisions on the timeline and procedures for this arbitration; (iii) the Claimant's proposal to extend the hearing on jurisdiction beyond the three days set aside by the Tribuanal is ill-founded; and (iv) costs should be awarded to Canada because the Claimant's request to undo the procedural calendar adds needless expense to the proceedings. Ultimately, the Claimant's letter is nothing more than an inappropriate attempt to de-bifurcate the proceedings, which must be rejected.

I. The Tribunal Has Upheld the Claimant's Right to Due Process

In its letter, the Claimant argues that its due process rights would be violated if the Tribunal does not permit document production and require Canada to file its Counter-Memorial on merits and damages

in the preliminary phase of the arbitration.[1] This charge is inappropriate, and the Tribunal does not need to engage with the Claimant's frivilous request. The right to due process enshrined in Article 15 of the 1976 UNCITRAL Rules and Article 1115 of NAFTA does not guarantee a substantive result,[2] nor authorize a disputing party to relitigate issues the Tribunal has resolved.[3] Article 15 of the 1976 UNCITRAL Rules requires the Tribunal to allow each disputing party a full opportunity to present its case at each stage of the proceedings. Article 1115 of NAFTA protects the disputing parties' right to due process. Under these provisions, the Tribunal has broad discretion over procedural matters.[4]

The Tribunal has upheld the Claimant's right to due process at each stage of the proceedings to date. In Procedural Order No. 1 ("PO 1"), following submissions from both disputing parties and a procedural meeting where the disputing parties were heard on the matter,[5] the Tribunal established the procedural calendar for this arbitration, including for a potential bifurcated proceeding.[6] The procedural calendar granted each disputing party a full opportunity to present its case on bifurcation.[7] Both parties have been heard extensively on this issue. Indeed, the Claimant's Response to Respondent's Renewed Request for Bifurcation exceeded 100 pages alone.[8] After ensuring the

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[1] Claimant's letter to the Tribunal, dated November 30, 2020, p. 3.

[2] **RLA-165**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Decision on Amici Curiae, 17 October 2001, ¶ 60, stating that Art. 15(1) of the 1976 UNCITRAL Rules is "limited to matters of procedure". *See also*, **RLA-166**, Lucy Reed, "Ab(use) of Due Process: Sword vs Shield" (2017) 33 Arbitration International 361, at p. 366.

[3] **CLA-158**, *Methanex Corp v. United States of America*, (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part II, Chapter E, at 19, ¶ 33, stating it would "lead to an inequality between the parties if at any time the losing party could seek to re-litigate matters contained in an award simply by invoking Article 15(1) of the [1976] UNCITRAL Rules." *See also*, **RLA-167**, K. P. Berger, J. O. Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", (2016) 32 Arbitration International 415, at pp. 419-420.

[4] **RLA-168**, David Caron et al, "The UNCITRAL Arbitration Rules: A Commentary", (2nd Ed., 2013) General Provisions – Article 17 [Excerpt].

[5] A procedural meeting on the procedural calendar, among other matters, occurred in Washington DC on June 17, 2019.

[6] PO 1, Annex I (Procedural Calendar), pp. 15-17.

[7] Canada submitted its original Request for Bifurcation on September 23, 2019. The Claimant submitted its Response to Canada's Request for Bifurcation on October 23, 2019. The Tribunal held a second procedural meeting in Washington DC on January 14-15, 2020, to hear oral arguments from the disputing parties on bifurcation, among other matters. The Tribunal issued Procedural Order No. 4 ("PO 4") on February 27, 2020. In PO 4, the Tribunal dismissed Canada's request for bifurcation as "premature", but modified the procedural timetable to allow Canada, "after having had sight of the Claimant's Memorial", to file a request for bifurcation along with its objections on jurisdiction. (PO 4, ¶ 93.) Canada submitted its Renewed Request for Bifurcation on September 21, 2020. The Claimant submitted its Response to Respondent's Renewed Request for Bifurcation on October 13, 2020.

[8] Claimant's Response to Respondent's Renewed Request for Bifurcation, dated October 13, 2020.

disputing parties were heard on the issue of bifurcation, the Tribunal issued Procedural Order No. 8 ("PO 8"), bifurcating these proceedings. All due process requirements have been met. The Claimant cannot now invoke due process as a sword to relitigate the Tribunal's decisions contained in PO 1 and PO 8.[9] The Claimant may be unhappy with the decision of the Tribunal to bifurcate; but the right to due process does not authorize the Claimant to cause unnecessary delays and to appeal matters the Tribunal already resolved.

II. The Claimant's Letter Merely Relitigates Points the Tribunal Already Decided

(A) The Tribunal Has Already Decided to Resolve the Article 1116(1) Objection in a Preliminary Phase Without Document Production or Canada's Counter-Memorial on Merits and Damages

The Claimant's letter seeks document production in the preliminary phase of the proceedings, and contends that the Claimant needs Canada's Counter-Memorial on merits and damages prior to any further submissions.[10] Yet the Claimant already made its case for document production early in the proceedings and was denied.[11] The Tribunal decided in PO 1 that document production would not occur in a preliminary phase should it bifurcate the proceedings.[12] Moreover, the Claimant already made its case that resolving the Article 1116(1) objection would enter the merits,[13] and again the Tribunal rejected this position. In PO 8, the Tribunal decided that it could resolve the Article 1116(1) objection in the preliminary phase without entering the merits.[14] The Tribunal also determined, based on submissions from the disputing parties, that it can resolve the issue of the Claimant's ownership of the investment without document production.[15] The Claimant is not entitled to relitigate the

[9] **RLA-166**, Lucy Reed, "Ab(use) of Due Process: Sword vs Shield" (2017) 33 Arbitration International 361, at p. 376.

[10] Claimant's letter to the Tribunal dated November 30, 2020, p. 3.

[11] Claimant's letter to the Tribunal, dated March 14, 2019, p. 9: "The legal and factual issues are very important to consider. For example, if the case were bifurcated, document production might need to be factored into the procedural schedule."; p.10: "To the extent that the information about the operation of the Ontario Feed In Tariff program is relevant, the production of this now non-confidential evidence from the two other NAFTA claims involving the Ontario FIT Program at an early juncture could easily reduce the extent of document production and make this arbitration more efficient. Such discussions should come by way of preliminary motions." Moreover, in PO 4, the Tribunal denied the Claimant's request for an interim measure, because it was essentially a discovery request that would depart from the timelines and procedures for document production in PO 1, which did not contemplate document production. *See* Claimant's Request for Interim Measures, August 16, 2019. PO 4, ¶ 59.

[12] PO 1, Annex I (Procedural Calendar), p. 16.

[13] Claimant's Response to Respondent's Renewed Request for Bifurcation, dated October 13, 2020, ¶¶ 326-329, 340.

[14] PO 8, ¶ 42.

[15] Indeed, it is difficult to understand what documents in Canada's possession, custody, or control could even be relevant to the issues concerning the date of the alleged breach and the Claimant's ownership of the investment.

Tribunal's decisions on these points.[16] The Tribual has been clear – jurisdictional objections that form part of the preliminary phase will proceed without document production or submissions on merits and damages from Canada.

(B) Determining Whether to Include the Article 1116(2) Objection in the Preliminary Phase Does Not Require Departing from the Procedure Established in PO 8

The sole outstanding issue on bifurcation is whether the Tribunal will include the Article 1116(2) objection in the preliminary phase. The Claimant argues it is necessary to enter the merits to resolve the Article 1116(2) objection.[17] Yet the Claimant already made these arguments in its Response to Respondent's Renewed Request for Bifurcation, where it devoted numerous pages to the issue.[18] The Tribunal then responded in PO 8 with specific instructions on how it would deal with the Article 1116(2) objection going forward. The Claimant is not entitled to yet another round of submissions on whether these proceedings should be bifurcated. The Tribunal will decide whether the Article 1116(2) objection will form part of the preliminary phase once the Claimant files its Counter-Memorial on Jurisdiction by January 11, 2021. As per PO 8, the Tribunal will then determine whether to hear the Article 1116(2) objection in the preliminary phase.

Further, even if the Tribunal concludes (which, Canada submits, it should not) that resolving the Article 1116(2) objection is too intertwined with the merits for resolution in the preliminary phase, the solution is not to enter into document production or to have Canada file its Counter-Memorial on merits and damages at this time. Instead, following the Claimant's January 11, 2020 submission, PO 8 provides that the Tribunal would address the Article 1116(1) objection alone in the preliminary phase. Under no circmstance does PO 8 provide that the Tribunal will decide the Article 1116(1) objection after document production and Canada's Counter-Memorial on merits and damages. Moreover, while the Claimant postulates that receiving Canada's defence might "possibly have the beneficial effect of narrowing the issues in dispute", [19] it is unclear how asking Canada to submit a Counter-Memorial on merits and damages would narrow the issues in dispute in any way. On the contrary, proceeding as the Tribunal has already decided in PO 8 would have that effect, because if Canada is successful in the preliminary phase the claim would be eliminated in its entirety.

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[16] In the Claimant's email to the Tribunal on behalf of the disputing parties of December 9, 2020, the Claimant presents its position that at least 20 months are necessary for document production and two rounds of submissions from each disputing party, apparently including on merits and damages. The Claimant's unsolicited proposal would undo entirely the Tribunal's decision to bifurcate the proceedings in PO 8.

[17] Claimant's letter to the Tribunal, dated November 30, 2020, p. 3.

[18] Claimant's Response to Respondent's Renewed Request for Bifurcation, dated October 13, 2020, ¶¶ 153-174.

[19] Claimant's letter to the Tribunal, dated November 30, 2020, p. 4.

III. Length and Dates for the Hearing on Jurisdiction

The Claimant argues that three days are inadequate for the hearing on jurisdiction because it does not know how many witnesses it will call. This is nonsensical. PO 1 does not grant the Claimant a right to compel someone to appear at the hearing for cross-examination whom Canada has not advanced as a witness. Indeed, if the bifurcated proceedings are to continue on the Article 1116(1) objection alone, there are no witnesses for the Claimant to cross-examine. Canada has put forward only one witness in the proceedings, whose testimony goes to the Article 1116(2) objection.[20] Thus, even if the Article 1116(2) objection is added to the preliminary phase, there is only one witness for the Claimant to potentially cross-examine. The Claimant's rationale for a five-day hearing in the preliminary phase therefore is unavailing. A three-day hearing, as proposed by the Tribunal and agreed to by Canada, is sufficient.

IV. Canada's Request for Costs

Canada respectfully requests that the Tribunal, at the proper stage of the proceedings, order costs in Canada's favour for the Claimant's inappropriate and duplicative request.[21] The Tribunal asked the disputing parties two simple questions, on (a) the length of the hearing on jurisdiction; and (b) the dates of the hearing. Instead of responding in a succinct, solutions-oriented manner, the Claimant made an unsolicited bid to relitigate issues the Tribunal recently resolved and to undo the procedural calendar. The Claimant's conduct undermines the efficiency of these proceedings, and Canada should not bear the costs of the needless and repeated procedural difficulties created by the Claimant.

Yours very truly,

Senior Counsel/Deputy
Director
Trade Law Bureau

cc: Barry Appleton, TennantClaimant@appletonlaw.com (Appleton & Associates)
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Annie Ouellet, Alexandra Dosman, Mark Klaver, Maria Cristina Harris (Trade Law Bureau)

[20] **RWS-1**, Witness Statement of Lucas McCall, 21 September 2020.

[21] **RLA-167**, K. P. Berger, J. O. Jensen, "Due process paranoia and the procedural judgment rule: a safe harbour for procedural management decisions by international arbitrators", (2016) 32 Arbitration International 415, at p. 432.