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Subject: Tennant Energy, LLC v. Canada (PCA Case No. 2018-54) - Request to admit additional authority
Date: 14 December 2021 20:03:52
Attachments: [C-336 - Separate Opinion - Bryan Schwartz -SD Myers First Partial Award.pdf](#)

Dear Mr. President and Members of the Tribunal

According to the Tribunal's clear direction to the disputing parties made of November 19, 2021, the Investor seeks to admit an additional authority to the record of the Jurisdictional Hearing. This authority is to respond to the question raised by Sir Daniel Bethlehem made during the closings regarding the broad definition of the term "investor" in the context of the investment made by the members of the Myers family in the S.D. Myers case.

At that time, counsel for the Investor (who had been counsel for S.D. Myers Inc In the underlying S.D. Myers claim, some twenty years earlier. Tennant Energy adverted to the potential need to admit an additional decision made in the S.D. Myers Claim as it was not in the current record.

Indeed, there is an additional decision necessary to address the investment issue.

That decision is the Separate Opinion by Arbitrator Dr. Bryan Schwartz, concurring except concerning performance requirements, in the First Partial Award (Separate Opinion). Arbitrator Schwartz signed the First Partial Award in November 2000, and his Separate Award was issued along with the First Partial Award.

The copy of the First Partial Award filed in the record (**CLA-111**) did not contain Arbitrator Schwartz's mostly concurring but separate opinion. That Separate Opinion provides relevant information about the factual considerations before the S.D. Myers Tribunal on the investor/ investment issue. Prof. Schwartz concurred in that part of the Partial Award, and Arbitrator Schwartz's comments are both helpful and responsive to the question raised by Sir Daniel on the final day of the hearing. Particularly paragraphs 38 – 46 of his Separate Award where he considers all of the different ways there could be an investor and an investment under NAFTA.

A copy of the Separate Opinion authority is available on the Government of Canada's website. Canada would be aware of this decision as it was a party to the NAFTA Arbitration. The decision appears at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/myers-19.pdf>. A copy is attached with this application.

Accordingly, the Investor seeks leave from the Tribunal to admit the Separate Award of Arbitrator Bryan Schwartz of November 12, 2000.

The Investor has provisionally identified the authority as the following available authority number - **CLA-336**.

Of course, this application would be expedited if Canada were to provide its speedy agreement to admission this decision. We are hopeful of obtaining Canada's consent to this application before the Tribunal needs to rule on this matter.

On behalf of counsel for the Investor,

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