

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE
AGREEMENT AND THE UNCITRAL ARBITRATION RULES, 1976

TENNANT ENERGY, LLC

Claimant

-and-

GOVERNMENT OF CANADA,

Respondent.

PCA CASE No. 2018-54

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 1134 (Interim Measures of Protection)

2. NAFTA Article 1134 provides as follows:

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

3. The Article's first sentence permits the Tribunal to order, *inter alia*, measures "to preserve the rights of a disputing party." One example of such a measure, as noted later in the same sentence, is "an order to preserve evidence in the possession or control of a disputing party." This type of order preserves the other party's potential future right to have that evidence disclosed. The right to disclosure of evidence is contingent: it depends on the tribunal's

authority under the applicable arbitration rules to order the disclosure and the tribunal's determination that it is appropriate under the circumstances to exercise such authority.

4. A measure requiring one party to post security for the other party's costs may also preserve rights, namely a disputing party's potential future right to recover its costs. Again, this right would be contingent but, as with orders to preserve evidence, it would be within the scope of Article 1134's first sentence.

5. Article 1134 makes no distinction between interim measures that protect contingent rights and measures that protect existing rights. Indeed, the phrase "rights of a disputing party" is not qualified in any way. The only types of interim measures that the Article expressly bars a tribunal from ordering are the two types specified in the Article's second sentence: "[a] Tribunal may not order attachment," nor may it "enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117." An order directing a party to post security for costs does not fall into either proscribed category.

6. The United States is not aware of any tribunals that have ruled on requests for security for costs under NAFTA Article 1134, but a number of tribunals have done so under Article 47 of the ICSID Convention, which, similar to Article 1134, permits a tribunal to grant provisional measures that "preserve the respective rights of either party." The United States agrees with the tribunals that have concluded that this language allows for provisional measures that preserve contingent rights, including orders granting a party security for its costs. For example, in *RSM Production Corp. v. Government of Grenada*, the tribunal explained:

As to what rights of a party may be preserved [under Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules], it seems obvious that, in the context of a dispute, the parties' contested substantive rights have yet to be determined. For example, a party seeking damages for contractual or a treaty breach has no "established" or "determined" right to damages. Similarly, a party who seeks an ultimate award for costs has only a potential right to costs. . . .

To construe the rights that are to be protected or preserved under Article 47 and Rule 39 as being limited to "established" rights makes no sense whatever in the context of a provisional measure for their protection. Any such measure must, by definition, precede a determination of their substantive validity.¹

¹ *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Decision on Respondent's Application for Security for Cost ¶¶ 5.6, 5.8 (Oct. 14, 2010). See also *BSG Resources Ltd. v. Republic of Guinea*, ICSID Case No. ARB/14/22, Procedural Order No. 3, ¶ 75 (Nov. 25, 2015) ("[T]he right to be preserved need not necessarily exist at the time of the request. Therefore, while the Tribunal acknowledges that the right requiring preservation relies on two hypothetical events (that the Respondent will prevail in this arbitration and that it will be awarded costs), it nevertheless deems that the *prima facie* existence of a right has been established."); *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs ¶ 72 (Aug. 13, 2014) ("[T]he Tribunal finds that the right to be preserved by a provisional measure need not already exist at the time the

7. In sum, an order directing one party to post security for another party's costs may constitute "an interim measure of protection to preserve the rights of a disputing party." Moreover, such an order is not barred by the second sentence of Article 1134. Accordingly, a tribunal may issue such an order in appropriate circumstances and if so authorized by the applicable arbitration rules.

Respectfully submitted,



Lisa J. Grosh
Assistant Legal Adviser
Nicole C. Thornton
Chief of Investment Arbitration
Nathaniel E. Jedrey
Attorney Adviser
Office of International Claims and
Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

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request is made. Also future or conditional rights such as the potential claim for cost reimbursement qualify as 'rights to be preserved'. The hypothetical element of the right at issue is one of the inherent characteristics of the regime of provisional measures."); *RSM Production Corp. v. Saint Lucia*, ICSID Case No. ARB/12/10 (Annulment Proceeding), Decision on Annulment ¶ 179 (Apr. 29, 2019) ("Article 47 imposes no limitation on the nature of the rights to be preserved and thus does not exclude rights that may be contingent. Thus, the fact that costs have yet to be ordered does not preclude an order for security of those costs."); *Lighthouse Corporation Pty Ltd v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Procedural Order No. 2 – Decision on Respondent's Application for Provisional Measures ¶¶ 56-57 (Feb. 13, 2016) ("The first requirement for provisional measures is that the latter seek to preserve rights of the applicant. These rights can be substantive or procedural in nature and need not necessarily exist at the time of the request. Indeed, the application may well serve to protect contingent rights. Here, the rights sought to be protected are conditional in the sense that they rely on the occurrence of two hypothetical events (that the Respondent will prevail and that it will be awarded costs). This said, they meet the requirement set by ICSID jurisprudence as it is generally understood and was just recalled. Therefore, the Tribunal considers that the Application fulfills the requirement according to which it must seek to preserve rights of a party.").