IN THE MATTER OF AN ARBITRATION UNDER THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA
RESPONSE TO 1128 SUBMISSIONS OF THE UNITED STATES AND MEXICO

December 27, 2019

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CANADA
1. Canada provides the following response to the non-disputing Party submissions filed by the Governments of the United States and Mexico in this arbitration under NAFTA Article 1128, each dated November 27, 2019.

2. All three NAFTA Parties agree that NAFTA Chapter Eleven tribunals may order security for costs under NAFTA Article 1134, subject to the applicable arbitration rules.¹ In this brief response, Canada explains that the basic rules of treaty interpretation require the Tribunal to take into account the unanimous agreement of the NAFTA Parties on the proper interpretation of Article 1134 and to accord the NAFTA Parties’ interpretation considerable weight because it is consistent with the relevant context.

3. Pursuant to Article 31.3 of the Vienna Convention on the Law of Treaties (“VCLT”), any subsequent agreement or subsequent practice of the parties to a treaty must be taken into account, together with the context of the treaty term under interpretation.² Article 31.3 states:

    [t]here shall be taken into account, together with the context:

    (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

    (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; […].³


4. VCLT Article 31.3 does not limit the form that such an agreement or practice must take. The International Law Commission includes “statements in the course of a legal dispute” as relevant subsequent practice of States for the purposes of treaty interpretation.⁴

5. In the NAFTA context, subsequent agreement and subsequent practice establishing agreement on interpretation may be evidenced by the NAFTA Parties’ submissions, including non-disputing Party submissions under Article 1128. Where the NAFTA Parties express concordant views on how to interpret NAFTA, they create subsequent agreement and subsequent practice within the meaning of VCLT Article 31.3.⁵ As a result, tribunals have accorded considerable weight to the concordant views of the NAFTA Parties.⁶ For instance, the Bilcon tribunal found that the NAFTA Parties demonstrated subsequent practice establishing the agreement of the Parties under VCLT Article 31.3(b) based on their submissions to investor-State tribunals, including the United States’ Article 1128 submission. Accordingly, the tribunal stated: “the NAFTA Parties’ subsequent practice militates in favour of adopting the Respondent’s position”.⁷

6. In this case, the NAFTA Parties’ authentic agreement on the proper interpretation of Article 1134 concerning security for costs constitutes subsequent agreement and practice under VCLT

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⁵ RLA-063, Canadian Cattlemen for Fair Trade v. United States of America (UNCITRAL) Award on Jurisdiction, 28 January 2008 (“Canadian Cattlemen – Award on Jurisdiction”), ¶¶ 181-189. In determining whether the NAFTA Parties had a “subsequent agreement” or “subsequent practice” under VCLT Article 31.3, the Canadian Cattlemen tribunal considered that Mexico had filed an Article 1128 submission but Canada had not. This led the tribunal to decline to find a “subsequent agreement” of the NAFTA Parties. Nevertheless, the tribunal found that the evidence in front of it, including an Article 1128 submission from Mexico, established a “subsequent practice” within the meaning of Article 31.3. In contrast, in Tennant both non-disputing Parties have submitted Article 1128 submissions. The Canadian Cattlemen tribunal also recognized that the power of the NAFTA Free Trade Commission established under Article 2001 to make authoritative interpretations of NAFTA “under Article 1131(2) is not the only means available to the NAFTA Parties of reaching a ‘subsequent agreement.’” The Bilcon tribunal concurred: RLA-100, Bilcon – Award on Damages, ¶ 377.

⁶ See RLA-063, Canadian Cattlemen – Award on Jurisdiction, ¶¶ 181-189; RLA-065, Bayview Irrigation District et al. v. United Mexican States (ICSID Case No. ARB (AF)/05/1) Award, 19 June 2007, ¶¶ 100, 106-107.

⁷ RLA-100, Bilcon – Award on Damages, ¶¶ 376-379. The Bilcon tribunal also correctly noted that analyzing subsequent practice does not replace the primary rule of interpretation of VCLT Article 31.1: RLA-100, Bilcon – Award on Damages, ¶ 379.
Articles 31.3(a) and 31.3(b), respectively. The Tribunal must consider this unanimous interpretation of the treaty Parties pursuant to VCLT Article 31.3.

7. Moreover, the Tribunal should give the NAFTA Parties’ agreed interpretation of Article 1134 considerable weight because it is consistent with the proper interpretation of the phrase “to preserve the rights of a disputing party” in Article 1134 in its context. The context of this phrase includes the example provided in Article 1134 of interim measures that tribunals may order, “to preserve evidence in the possession or control of a disputing party”. As the United States observes, even though the right to the future disclosure of evidence is contingent, NAFTA tribunals have the authority to protect this right. Thus, the context demonstrates that NAFTA Article 1134 allows tribunals to order interim measures, such as security for costs, to protect both contingent and existing rights.

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9 Article 1128 Submission of the United States, ¶ 3.
8. Accordingly, the proper interpretation of NAFTA Article 1134 demonstrates that NAFTA tribunals have authority to order security for costs, subject to the applicable arbitration rules.

December 27, 2019

Respectfully submitted on behalf of the Government of Canada,

[Signature]

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