

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF  
THE UNITED NATIONS COMMISSION ON INTERNATIONAL  
TRADE LAW

**PCA CASE NO 2018-54**

BETWEEN

**Tennant Energy LLC**

INVESTOR

AND

**Government of Canada**

RESPONDENT

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**Investor's NAFTA Article 1128 Response**

**27 DECEMBER 2019**

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# Investor's Article 1128 Response

1. On November 27, 2019, the governments of the United States and the United Mexican States filed submissions on the interpretation of the NAFTA. The Tribunal granted the disputing parties until December 27, 2019, for filing responsive observations on these submissions.
2. Tennant Energy LLC (“Tennant” or the “Investor”) submits its response to the NAFTA Article 1128 observations of the Government of the United Mexican States and the United States of America.
3. Unfortunately, the non-disputing Parties’ observations present an incomplete and unbalanced picture of the relevant law. The Investor uses this observation to address these mischaracterizations.
4. The disproportionate harm imposed upon the Investor – indeed of any investor, but especially this investor – of a security for costs order makes the granting of this exceptional remedy harsh, unnecessary, and inappropriate. Fundamentally, there is no necessity or urgency justifying the making of the extraordinary provision of a security for costs order.
5. No NAFTA Tribunal ever has granted a request, such as that which Canada seeks in this arbitration. This Tribunal should not grant this relief either.
6. The Investor maintains its position that the Respondent’s Application is without merit and should be dismissed. The recent observations by the non-disputing Parties do not alter this conclusion.

## I. NEITHER THE GOVERNING TREATY NOR THE GOVERNING RULES AUTHORIZE THE TRIBUNAL TO ORDER SECURITY FOR COSTS.

### A. THE NAFTA DOES NOT EMPOWER THE TRIBUNAL TO ORDER SECURITY FOR COSTS.

7. NAFTA provides that “Article 26.1 of the 1976 UNCITRAL Rules governs this arbitration *except as modified by Section B of NAFTA Chapter Eleven, which includes Article 1134.*”<sup>1</sup> In other words, regardless of what the applicable rules provide in relation to security for costs, the moving party has the burden to

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<sup>1</sup> Motion for Security for Costs, ¶ 12.

demonstrate that such a remedy is available under and consistent with NAFTA Article 1134.

8. NAFTA Article 1134 provides:

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.<sup>2</sup>

9. Notably, Article 1134 of NAFTA limits the measures that a tribunal may order to those that preserve a right or ensure the Tribunal's jurisdiction is made fully effective.

10. No party has a *right* to a costs award—a fact numerous tribunals have confirmed.<sup>3</sup> Rather, it is at the discretion of the Tribunal to award costs after it has deliberated and decided on the merits at issue and the evidence presented during the proceedings. Deciding that a right to a costs award exists at this nascent stage of the proceeding would hinge on several “hypothetical situations,” the outcome of which the Tribunal does not know (including the final result of the proceedings on the merits and the Tribunal's ultimate decision on the final award costs).<sup>4</sup> As the tribunal in *Maffezini v. Spain* noted, “[a] determination at this time which may cast a shadow on a party's ability to present its case is not acceptable.”<sup>5</sup>

11. Similarly, whether the Investor posts security for costs has no bearing on the Tribunal's jurisdiction. The Tribunal still maintains its power to decide the issues in dispute whether security for costs is ordered. The Tribunal is not charged with overseeing the parties' collection efforts or addressing their collection risk. Otherwise, it also would be appropriate for tribunals to ask states to post security for any amounts claimed to ensure that they are readily available for investors to collect in the event of an award.<sup>6</sup> Accordingly, an order to pay security for costs is not an interim measure

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<sup>2</sup> NAFTA Article 1134, (*CLA-042*).

<sup>3</sup> Motion for Security for Costs, footnote 21. *See also Alasdair Ross Anderson et al v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/03, Decision on Provisional Measures, ¶¶ 21-23, 26-27, (*CLA-053*) (“the Respondent has only a mere expectation, not a right with respect to an eventual award of costs”); *Eskosol SPA in liquidazione v Italy* (ICSID Case No ARB/15/50), Decision on Respondent's Request for Provisional Measures, 12 April 2017, ¶¶ 33-35, (*RLA-041*).

<sup>4</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 28 October 1999, ¶¶ 16-18, (*RLA-016*).

<sup>5</sup> *Maffezini v. Spain*, ¶ 21, (*RLA-016*).

<sup>6</sup> *Eskosol SPA in liquidazione v Italy* (ICSID Case No ARB/15/50), Decision on Respondent's Request for

envisaged by the drafters of NAFTA Article 1134, and correspondingly the state parties to the NAFTA. Indeed, had the Parties to the NAFTA intended such security for costs motions to have been included within Article 1134, the NAFTA Parties could have easily included the authority to make such orders within the NAFTA. The fact that no such modification has taken place is telling. That power simply does not exist.

12. No NAFTA tribunal has ever considered a security for costs request,<sup>7</sup> much less granted one.

## B. DISCRETION AND CONCERNS ABOUT RESTRICTING ACCESS TO JUSTICE.

13. The United States and Mexico both suggest in their respective Article 1128 submissions that the Tribunal has the discretion to impose security for costs under Article 1134.<sup>8</sup> As shown above, Article 1134 provides no such discretion, and the Tribunal's authority under Article 1134 is severely limited.
14. In any event, a power of discretion is not the same as using that discretion. Mexico and the United States refrain from addressing the important issues related to the exercise of discretion.
15. Most importantly, under NAFTA Article 1115, the exercise of discretion must be done fairly and in a manner to ensure that both disputing parties are heard. Thus the Tribunal must thoughtfully consider the highly disproportionate effect of a security for costs order.
16. In an investor-state claim, one of the claimants is a state or a state enterprise. The other is a non-state. The differences in access to capital between sovereigns and private parties are considerable.
17. If an award for security for costs were to be ordered, there would be a significant and detrimental effect on access to justice. This could result in a situation where an internationally wrongful state would win simply because it had destroyed the economic resources of the victim.
18. The natural conclusion of the argument of the United States is that access to justice

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Provisional Measures, 12 April 2017, ¶ 35, (*RLA-041*) (remarking that “there is something analytically curious about the notion that an ICSID tribunal, while not empowered to protect a claimant’s ability to collect on a possible merits award, nonetheless should intervene to protect a State’s asserted “right” to collect on a possible costs award.”).

<sup>7</sup> Canada acknowledges this lack of precedent for the relief it seeks. *See* Motion, footnote 34.

<sup>8</sup> United States 1128 Submission at ¶3 and ¶7. Mexico 1128 Submission at ¶6 where Mexico refers to a “margin of discretion”.

could only be obtained for the wealthiest claimants, leaving meritorious claimants without access to impartial and fair dispute settlement. Such a highly restrictive approach should be strongly avoided by the Tribunal in its interpretation of Article 1134 and the use of its discretion under UNCITRAL Article 26.

### C. THE 1976 UNCITRAL RULES DO NOT EMPOWER THE TRIBUNAL TO ORDER A PARTY TO PAY SECURITY FOR COSTS.

19. Moreover, there is no provision in the 1976 UNCITRAL Arbitration Rules explicitly addressing security for costs. Nevertheless, the United States and Mexico continue to support Canada’s motion. In its motion, Canada relies on Article 26(1) of the UNCITRAL Rules, which provides as follows:

At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

20. Article 26(1) circumscribes the Tribunal’s power to award interim relief to measures that are both (a) “necessary” and (b) “in respect of the subject-matter of the dispute.” Accordingly, interim measures that are not related to “the subject-matter of the dispute” may not be awarded.
21. The Security for costs requested here is not related to the subject matter of this dispute—that is, whether Canada breached its obligations under NAFTA Chapter 11. Rather, the security for costs requested here relates to the Tribunal’s power to apportion the costs of the arbitration between the disputing parties in its final award. This is procedural in character.<sup>9</sup> It follows, therefore, that Article 26(1) of the 1976 UNCITRAL Rules does not empower tribunals to order payment of security for costs.<sup>10</sup>
22. Article 26(2) further confirms that security for costs was not envisaged among the interim measures that may be taken under Article 26(1). Article 26(2) provides that the

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<sup>9</sup> Indeed, Canada’s own courts have affirmed the procedural character of a security for costs order. *See Inforica Inc. v. CGI Info. Sys & Mgt Consultants Inc.*, [2009] ONCA 642 (Ontario Ct. App.), (CLA-054) (refusing arbitral review of a security for costs order based on its procedural character); *see also RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia’s Request for Security for Costs (Dissenting Opinion of Judge Edward Nottingham), 13 August 2014, ¶ 64, (RLA-019) (describing the interest protected by security for costs as “a procedural right not directly related to the subject matter of the dispute” (emphasis in the original)).

<sup>10</sup> N. Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11(3) *Am. Rev. Int’l Arb.* 307, 344 (2000) (CLA-060) (“while the UNCITRAL Rules are sweeping in their authorization of interim measures deemed necessary in respect of the subject matter of the dispute, such preliminary steps would not seem to include the purely procedural security for costs order.”).

Tribunal may “require security for the costs of such [interim] measures.”<sup>11</sup> This indicates that the object of such measures is to preserve actual, concrete rights or property in dispute—and not a hypothetical final cost award, the existence and amount of which are yet to be determined. The example Article 26(1) provides an appropriate interim measure, *i.e.*, “the conservation of goods forming the subject-matter of the dispute,” supports this interpretation.<sup>12</sup>

23. NAFTA Article 1134 must be given its natural and express meaning. It was expressly drafted to limit the broad powers that would otherwise arise from Article 26 of the UNCITRAL Arbitration Rules and Article 47 of the ICSID.
24. Article 1134 usefully provides an example of a “right” that should be preserved, specifically “evidence in the possession or control of a disputing party.” As a result of this example, other NAFTA Tribunals have relied on the *ejusdem generis* principle of interpretation. Canada has consistently long relied on this principle, along with the *expressio unius* rule, when interpreting the NAFTA.<sup>13</sup> Canada and other NAFTA Parties consistently advanced the applicability of the *expressio unius* and *ejusdem generis* interpretative approaches in NAFTA cases such as *Pope & Talbot* and *ADF Group*.<sup>14</sup>
25. Prof. Brownlie in *Brownlie’s Principles of Public International Law* (5<sup>th</sup> ed) provided guidance on treaty interpretation as follows:

Other logical presumptions exist. Thus general words following or perhaps preceding special words are limited to the genus indicated by the special words (the *ejusdem generis* doctrine); and express mention excludes other items (*expressio unius est exclusio alterius*).<sup>15</sup>

26. As Canada recently applied the *expressio unius* principle to interpret NAFTA Article

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<sup>11</sup> Article 26(2), *United Nations Commission on International Trade Law (UNCITRAL)*, General Assembly Resolution 31/98, 1976, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>, (CLA-070).

<sup>12</sup> Article 26(1), *United Nations Commission on International Trade Law (UNCITRAL)*, General Assembly Resolution 31/98, 1976, <https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>, (CLA-070).

<sup>13</sup> *United Parcel Service of America, Inc. v. Canada* (ICSID Case No. UNCT/02/1), Counter Memorial, 22 June 2005, ¶ 820 (CLA-083); *Merrill & Ring Forestry L.P. v. Canada* (ICSID Case No. UNCT/07/1), Opinion with respect to the Effect of NAFTA Article 1116(2) On Merrill & Ring’s Claim, 20 April 2008, ¶ 19, (CLA-084).

<sup>14</sup> *United Parcel Service of America, Inc. v. Canada* (ICSID Case No. UNCT/02/1), Counter Memorial, 22 June 2005, ¶ 820 (CLA-083); *Merrill & Ring Forestry L.P. v. Canada* (ICSID Case No. UNCT/07/1), Opinion with respect to the Effect of NAFTA Article 1116(2) On Merrill & Ring’s Claim, 20 April 2008, ¶ 19 (CLA-084); Kinnear, Bjorkland and Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer, 2009), pp. 1103-11b – 1103-13, (CLA-085).

<sup>15</sup> Ian Brownlie, *Brownlie’s Principles of Public International Law*, (5th ed), Oxford University Press, 1998, p. 634, (CLA-089); Canada specifically relied upon Prof. Brownlie and this interpretative approach to the NAFTA in the UPS Case. See – *United Parcel Service of America, Inc. v. Canada* (ICSID Case No. UNCT/02/1), Memorial of the Government of Canada on Preliminary Jurisdictional Objections, 14 February 2002, ¶58, (CLA-092).

1116 in the *Bilcon* damages phase, stating:

14. Article 1116 provides a right for an investor of a Party to bring a claim on its own behalf on the grounds that “the investor has incurred loss or damage.” As the text clearly states, the claim is for losses incurred by the investor, not for losses of an enterprise owned and controlled by the investor. No qualifying clauses (e.g., “including” or “such as”) suggest that the enumeration of eligible claims in Article 1116 is merely illustrative. The *expressio unius est exclusio alterius* interpretive rule precludes supplementing the list in Article 1116 with other NAFTA obligations.<sup>16</sup>

Yet without any explanation, Canada takes a completely different approach here. The United States and Mexico in their Article 1128 submissions do not explain why an alternative approach should be followed in the current arbitration. None of the NAFTA Parties provide any principled basis for this change of this longstanding interpretative position.

27. Canada has also addressed the issue of *ejusdem generis* and *expressio unius* in its Preliminary Jurisdictional Objections in *UPS v Canada* where it states:

First, the principle of *expressio unius est exclusio alterius*, namely, that the express mention of a circumstance or condition excludes others; *noscitur a sociis*, "a word is known by its company"; and *ejusdem generis*, that general words are limited by the meaning indicated by accompanying specific words. All have direct application to the reading of NAFTA in this case.<sup>17</sup>

28. Applying this interpretative approach to the express wording of NAFTA Article 1134 means that the Tribunal does not have discretion to make an order for security for costs. This NAFTA wording governs the wording in the UNCITRAL Arbitration Rules and this Tribunal.
29. The non-disputing Parties, like Canada in the present claim, rely on the availability of security for costs under other arbitral rules as the basis for its assertion that such a measure is available here.<sup>18</sup> However, the Tribunal is bound to apply the 1976 UNCITRAL Arbitration Rules—and those rules alone. When UNCITRAL Working Group II revised Article 17 of the 1985 UNCITRAL Model Law, which was identical to Article 26 of the 1976 UNCITRAL Arbitration Rules, it acknowledged that the

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<sup>16</sup> *Bilcon et al. v. Canada* (PCA Case No. 2009-04), Counter Memorial on Damages, 9 June 2017, ¶ 16. (*CLA-091*).

<sup>17</sup> *UPS v. Canada*, Memorial of the Government of Canada on Preliminary Jurisdictional Objections, 14 February 2002, ¶58, (*CLA-092*). Canada relied upon Prof. Brownlie to support its approach.

<sup>18</sup> Motion for Security for Costs, ¶ 10.



provision had been revised specifically to allow tribunals to grant security for costs:

A proposal was made that paragraph (2)(c) should be amended expressly to refer to security for costs through an addition of the words “or securing funds” after the word “assets.” Opposition was expressed to that proposal as it could connote that the corresponding provision in the UNCITRAL Arbitration Model Law was insufficient to provide for security for costs. The Working Group agreed that security for costs was encompassed by the words “preserving assets out of which a subsequent award may be satisfied.”<sup>19</sup>

30. The implication is that the pre-amendment language, which governs here, does *not* empower tribunals to order a party to pay security for costs.<sup>20</sup> The NAFTA non-disputing Parties did not refute this issue in their Article 1128 submissions. Further, had the Parties to the NAFTA could have easily included the authority to make such cost orders within the NAFTA. The NAFTA could have been modified following its amendment process in Article 2202. However, no such modification of the Treaty has taken place. In the absence of such an amendment, that power simply does not exist.
31. As noted in the Investor’s Response to Canada’s motion, the reliance on ICSID provisions on interim measures likewise is misguided.<sup>21</sup> A tribunal’s power under the ICSID Convention and the ICSID Arbitration Rules to order payment of security for costs does not imply an equivalent power under Article 26 of the 1976 UNCITRAL Rules.
32. Article 47 of the ICSID Convention<sup>22</sup> and Article 39 of the ICSID Rules<sup>23</sup> provide that a tribunal may “recommend provisional measures which should be taken to preserve the respective rights of either party.” Some tribunals have concluded that security for costs is not available in an ICSID arbitration because the expectation of a future costs

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<sup>19</sup> Report of Working Group II (Arbitration and Conciliation), U.N. Commission on International Trade Law (UNCITRAL), 47th Sess., at U.N. Doc. A/CN.9/641 (2007), ¶ 48, (CLA-069).

<sup>20</sup> Cf. C. Kee, *International Arbitration and Security for Costs – A Brief Report on Two Developments*, 17 Am. Rev. Int’l Arb. 273, 276 (2006), (CLA-066) (noting that Article 17 of the 1985 UNCITRAL Model Law was amended, because it did not grant tribunals the authority to grant security for costs).

<sup>21</sup> Response to Motion Security for Costs, ¶ 10. It is also notable that the UNCITRAL Working Group III document that Canada relies on to affirm tribunals’ power to order security for costs references to another document prepared by the Working Group that relies on the 2010 UNCITRAL Rules for that proposition. See Motion for Security for Costs, ¶ 10, footnote 11 (citing UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Thirty-seventh session, New York, 1–5 April 2019, Note by the Secretariat on Possible reform of investor-State dispute settlement (ISDS), Third-party funding, ¶ 32, (RLA-021) (referring back to ¶ 33-37 of UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), Thirty-sixth session, Vienna, 29 October – 2 November 2018, (RLA-038)). Unsurprisingly, neither the 1976 UNCITRAL Rules nor NAFTA is relied upon by the UNCITRAL Working Group III as a source for that power.

<sup>22</sup> Motion for Security for Costs, ¶ 10, footnote 8.

<sup>23</sup> Motion for Security for Costs, ¶ 10, footnote 9.

award is too hypothetical to be considered a “right.”<sup>24</sup> Setting that aside, Article 47 of the ICSID Convention does not contain the limitation in Article 26 of the 1976 UNCITRAL Rules that interim measures must be “the subject-matter of the dispute.” Thus, any ICSID awards suggesting that a tribunal can order the payment of security for costs is simply inapplicable.

33. The truth of the matter is that the one publicly available case in which parties disputed a tribunal’s power to grant security for costs under the 1976 UNCITRAL Arbitration Rules is *Invesmart v. the Czech Republic*. There, the Respondent state sought security for its costs from a funded claimant, who objected to the request. The tribunal rejected that request to impose security for costs on the claimant, affirming “that it did not have the authority to make the order sought in the Respondent’s application.”<sup>25</sup>

#### D. OTHER TREATY INTERPRETATION ISSUES

34. The NAFTA Article 1128 submissions raise for the first time the issue of the interpretation of security for costs within NAFTA Article 1134. However, the similarity of the arguments raised by the United States and Mexico foreshadow the possibility that the NAFTA Parties will attempt to raise interpretative arguments under the *Vienna Convention* arising from the similarity of their newly-founded positions.
35. The Investor submits that this Tribunal should be very cautious in accepting the arguments of the NAFTA Parties that holding a similar view should result in some form of interpretative weight.
36. The overwhelming number of NAFTA Tribunals considering Article 1128 Submissions also have exercised judicial restraint in not confirming that the various Article 1128 Submissions, taken together with the positions of the responding Party in

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<sup>24</sup> See, e.g., *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, 8 October 1999, ¶¶ 12-27, (**RLA-016**) (“we are unable to see what present rights are intended to be preserved”). See also *Lao Holdings N.V. v. Lao People’s Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Procedural Order No. 6, 26 June 2018, ¶¶ 34-35, (**CLA-056**); *Eskosol S.p.A. v. Italian Republic* (ICSID Case No. ARB/15/50), Procedural Order No. 3, 13 April 2017, footnote 51, (**RLA-041**) (citing *RSM Production Corporation v. Saint Lucia* (ICSID Case No. ARB/12/10); Decision on Saint Lucia’s Request for Security for Costs (Dissenting Opinion of Judge Edward Nottingham), 13 August 2014, ¶ 1, (**RLA-019**) (disagreeing with the majority that a security for costs order “is encompassed within the class of ‘provisional measures’ which may ‘be taken to preserve the rights’ of Respondent”); *Grynberg et al v. Grenada* (ICSID Case No. ARB/10/6), Decision on Security for Costs, 14 October 2010, footnote 9, (dissenting opinion) (**RLA-018**) (“the use of the words ‘preserve’ and ‘preserved’ in Article 47 and Rule 39 presupposes that the right to be preserved exists. Because Respondent has no existing right to an ultimate award of costs, the Tribunal is thus without jurisdiction”); L.E. Peterson, “In New Ruling, BIT Tribunal Holds That Alleged Right to Future Costs-Recovery is Not a Right Capable of Grounding an Interim ‘Security for Costs’ Request,” Investment Arbitration Reporter, 26 September 2016, (**CLA-059**), (reporting on unpublished decision in *Valla Verde Sociedad Financieras S.L. v. Venezuela* (ICSID Case No. ARB/12/18), Procedural Order No. 8, 21 September 2016, reportedly disavowing the tribunal’s power to order provisional measures “to protect a right that as of yet does not exist”).

<sup>25</sup> *Invesmart B.V. v. Czech Republic* (UNCITRAL), Award, 26 June 2009, ¶¶ 23-25, (**CLA-057**).

the same or other dispute, constitute a subsequent practice. Patrick Dumberry confirms that the NAFTA Parties have continued to argue in recent cases that their litigation positions set out in Article 1128 submissions are subsequent agreements but that “such a claim has not been endorsed by **any** NAFTA Tribunal so far.”<sup>26</sup>

37. While subsequent practice is one relevant consideration that the Tribunal must consider to establish context for interpretation under Article 31 of the *Vienna Convention*, the normative significance of subsequent practice, must not be outweighed nor taken in isolation from the other sources of treaty interpretation in Article 31 of the *Vienna Convention*.
38. The NAFTA Parties imposed a limit on treaty interpreters by explicit terms in the Treaty. NAFTA Article 102 sets out mandatory interpretative guidance requirements for all treaty interpreters which require following specific interpretative rules and principles in the NAFTA (such as MFN treatment, national treatment and transparency), which are possibly broader than the those contained in applicable rules of International Law. Also, another provision in the NAFTA makes clear that there is a special process required by the Treaty to address the amendment or modification the terms of the NAFTA.
39. It is important to note that NAFTA Article 2202 sets out the treaty-defined process to address any modification to the NAFTA. NAFTA Article 2202(2) requires that any modification or addition to the NAFTA must be approved in accordance with the “applicable legal procedures of each Party.”
40. The United States or Mexico makes no mention of this process of modification in its Article 1128 Submissions. For example, the United States is required to act under applicable legal procedures with respect to any addition or modification to the NAFTA. According to the terms of the United States Constitution and longstanding practice thereunder, the US Executive would be required to proceed through congressional-executive agreement or to obtain a super-majority vote of the US Senate in order to amend the terms of a treaty like the NAFTA.<sup>27</sup> In sum, amendment to the NAFTA could not take place on the basis of executive action alone, such as a statement made by the United States in the course of litigation, that did not also have the authorization arising from the advice and consent of the US Senate. If such a modification were to take place, there would be a fundamental disruption with the process of democracy in the United States and the voice of the US Congress would be unlawfully truncated. For the United States to take lawful actions under its own

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<sup>26</sup> Patrick Dumberry, *The Fair and Equitable Treatment Standard* (Wolters Kluwer, 2013), Chapter II, Part I: “The Meaning of Article 1105”, at pp. 82-83 (*CLA-093*) [*emphasis added*].

<sup>27</sup> Oona Hathaway “Presidential Power over International Law: Restoring the Balance” 119 Yale L.J. 140 (2009), at pp.260-263 (*CLA-094*).

domestic procedures, subsequent state practice must be limited entirely to interpretative questions rather than to any question of amendment to the NAFTA.

41. In their two-volume commentary on the *Vienna Convention*, Professors Corten and Klein examine the meaning of subsequent practice in Article 31 of the *Vienna Convention*. They identify that this procedure cannot be used to envisage an amendment or a termination to a treaty.<sup>28</sup>
42. Professor Martins Paparinskis considered subsequent state practice to see whether it was available to the NAFTA Parties as a means of modifying the interpretation of the Treaty at this time under the Vienna Convention. Professor Paparinskis identifies a number of serious obstacles to the position advanced by the non-disputing Parties in their Second Article 1128 Submissions. He concludes that written pleadings of states in investor-state disputes do not raise the threshold of constituting subsequent practice. Instead, the widespread and consistent practice needs to be demonstrated. Simply aligning various positions of non-disputing NAFTA Governments is not sufficient to establish concordant, common, and consistent subsequent practice supporting a new content of treaty law.<sup>29</sup>
43. Professor Paparinskis concludes his analysis by stating:

The procedural and empirical qualifications for identifying the argument with precision, the contradictions within the identifiable practice, and the consistent emphasis by States and Tribunals alike on the application of the *Vienna Convention* form the background to this debate. It does not seem possible to maintain that there exists sufficient practice to change either the content of custom or reinterpret the treaty rules of the *Vienna Convention on the Law of Treaties*.<sup>30</sup>
44. Thus, subsequent state practice, concerning investor-state treaty practice, is not a reliable or authoritative approach for supplemental interpretation of a treaty like the NAFTA.
45. Professor Gabrielle Kaufmann-Kohler also has expressed a similar caution in relation to the use of state practice in the NAFTA investor-state context, even where such

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<sup>28</sup> Oliver Corten and Pierre Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, Volume I (Oxford University Press, 2011) (“Corten and Klein”), at p.828 (*CLA-095*); They rely upon the International Court’s decision to this effect in *Gabcikovo-Nagymaros (Hungary/Slovakia)*, International Court of Justice, I.C.J. Reports 1997 (September 25, 1997) (“*Gabcikovo-Nagymaros*”), ¶¶100, 114 (*CLA-096*).

<sup>29</sup> Martins Paparinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (Oxford: Oxford University Press, 2013) (“Paparinskis (2013)”), pp.144-145 (*CLA-097*). The entirety of Prof. Paparinskis’s observations were set out in full in paragraph 9 of the Investor’s Response to the Original 1128 Submissions of the non-disputing Parties.

<sup>30</sup> Paparinskis (2013), at p.146 (footnote omitted) (*CLA-097*).

practice is expressed through the explicit interpretative powers of the Free Trade Commission.<sup>31</sup> States may, as the parties to the treaty, assert a concordant interpretation that benefits them as litigants against investments:

This appears to be contrary to due process, specifically contrary to the principle of independence and impartiality of justice, which includes the principle that no one can be judge of its own cause.<sup>32</sup>

46. Professor Kaufmann-Kohler further observes:

Chapter 11 of the NAFTA seeks to protect non-State actors by granting them substantive and procedural rights, including the right to access arbitration.<sup>33</sup>

47. This is a crucial observation: when a treaty brings into being rights of non-State actors that may be asserted against states in arbitration, the fundamental principles of independence and impartiality of justice may require attenuating the extent to which states are regarded as *Herren der Verträge*<sup>34</sup> as far as interpretation is concerned. These concerns are of importance even when explicit interpretative powers under the treaty are being exercised, e.g. through a Free Trade Commission interpretation. They are arguably even more acutely present when the concordant interpretation is asserted simply *ad hoc*, on the basis of general notions of state practice articulated in the *Vienna Convention*, which must be read, in a context where the treaty creates rights of non-state actors particularly, in the light of due process and fundamental rights as essential elements of the international legal system. Professor Kaufmann-Kohler focuses especially on the due process and the rule of law issues that arise where concordant interpretations of states parties are asserted in the course of an on-going litigation.

## E. SPECIFIC RESPONSES TO THE UNITED STATES AND MEXICO

48. The United States suggests that an order to preserve evidence constitutes the protection of a contingent right for potential future production.<sup>35</sup> This argument is fundamentally mistaken. The right to request document production is confirmed in Article 24(3) of the 1976 UNCITRAL Arbitration rules. Also, there is a power for an interim measure for document production. Indeed, in this current arbitration, there is an interim measure request for document production. The request for preservation is not contingent on that request. The United States relies on this confused interpretation

<sup>31</sup> Gabrielle Kaufmann-Kohler, “Interpretive Powers of the Free trade Commission and the Rule of Law” *Fifteen Years of NAFTA Chapter 11 Arbitration*. (2011) JurisNet., 175 (“Kaufmann-Kohler (2011)”) (CLA-098).

<sup>32</sup> Kaufmann-Kohler (2011), at p.192 (CLA-098).

<sup>33</sup> Kaufmann-Kohler (2011), at pp.193-194 (CLA-098).

<sup>34</sup> *Herren der Verträge* translates as « Masters of the Treaty”

<sup>35</sup> US Article 1128 Submission at ¶ 3.

to suggest that NAFTA Article 1134 allows for the protection of contingent rights. The words of the Treaty do nothing of this kind.

49. The Government of the United States misunderstands the function of preservation orders. An order for the preservation of evidence is an immediate order made by a Tribunal and effective immediately. It is not about the protection of contingent rights, but about the protection of immediate and definite rights. A preservation order is an order to protect the integrity of the arbitration process to prevent the aggravation of the dispute. Evidence that is preserved under such an interim order may or may not be produced. The effect of the order is to have an immediate freeze to ensure that harm does not take place. There is nothing contingent about an order made to prevent the further aggravation of the dispute.
50. Security for costs is an extraordinary request. This has been expressly recognized by UNCITRAL Working Group III in its current negotiations<sup>36</sup> and during the ongoing consultations on amendments to the ICSID Rules.<sup>37</sup> The Tribunal in the recent UNCITRAL decision, *Guaracachi America Inc and Rurelec PLC v Bolivia*, described a motion for security for costs under the 2010 UNCITRAL Arbitration Rules as “an order for the posting of security for costs remains a very rare and exceptional measure.”<sup>38</sup> The *Guaracachi* Tribunal identified several necessary requirements for the making of such an extraordinary order and concluded that the Respondent could not satisfy the very high threshold requirements for making an order for security for costs.
51. As discussed below, the exceptional nature of an order for security for costs has been well recognized in the scholarly literature as well as by tribunals.<sup>39</sup>

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<sup>36</sup> Report of Working Group III (Investor-State Dispute Settlement Reform), U.N. Commission on International Trade Law, 36th Sess., at U.N. Doc A/CN.9/964, (*CLA-081*).

<sup>37</sup> ICSID Working Paper #3, "Proposals for Amendment to the ICSID Rules," Vol 1, August 2019, Rule 52: Security for Costs (*CLA-082*).

<sup>38</sup> *Guaracachi America Inc and Rurelec PLC v Bolivia* (PCA Case No. 2011-17), Procedural Order No. 14, 11 March 2013, ¶ 6 (*CLA-086*).

<sup>39</sup> N. Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11(3) Am. Rev. Int'l Arb. 307, 344 (2000) (*CLA-060*); International Arbitration Reporter, Lisa Bohmer and Luke Eric Peterson, "In latest investment treaty tribunal ruling on security for costs, arbitrators reject a request, refuse to order disclosure of funding details and are silent on power to order security in relation to already-incurred costs" October 18, 2018, (*CLA-090*).

## F. THE UNITED STATES AND MEXICO IGNORE KEY TESTS FOR GRANTING RELIEF

52. The Government of the United States did not bring to the Tribunal's attention those passages in *Grynberg v Grenada*<sup>40</sup> where the Tribunal confirmed that a recommendation for a provisional measure is a remedy that should not be granted lightly.<sup>41</sup> Besides not addressing this issue in *Grynberg*, the United States also did not identify the same approach taken by the Tribunal in *RSM Developments*.<sup>42</sup>
53. In the limited proceedings where it is permitted, security for costs is given only in exceptional circumstances. The *Grynberg* Tribunal found that even a lack of assets is not alone reason to grant an order for security for costs.<sup>43</sup>
54. The need to establish exceptional circumstances requirement was also canvassed in *BSG Resources Limited v. Republic of Guinea*,<sup>44</sup> another case inadequately considered by the United States in its NAFTA Article 1128 submission.<sup>45</sup>
55. Again, the United States omitted any discussion of the exceptional circumstances requirement that is necessary for granting security for costs in its discussion of the *BSG Resources*.<sup>46</sup> In *BSG Resources*, the Tribunal did not make an order security for costs because the circumstances were not exceptional. The Tribunal concluded that since the Claimant asserted that it never had defaulted on its financial obligations. This clear lack of risk was sufficient to establish an absence of exceptional circumstances.<sup>47</sup>
56. The issue of access to justice is essential. The United States references the ICSID Tribunal decision in *Lighthouse v. Democratic Republic of Timor-Leste*<sup>48</sup> in its NAFTA Article 1128 submission.<sup>49</sup> However, the United States omitted to consider the Tribunal's analysis. The *Lighthouse* Tribunal held that an application for security

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<sup>40</sup> *Grynberg v. Grenada*, Decision on the Respondent's Application for Security for Costs, 14 October 2010, (*RLA-018*).

<sup>41</sup> *Grynberg v. Grenada* at ¶ 5.17, (*RLA-018*).

<sup>42</sup> *RSM Production Corp v. Saint Lucia*, Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶ 52, (*RLA-019*). Again, the non-disputing parties have ignored the need to demonstrate exceptional circumstances for the making of a security for costs order.

<sup>43</sup> *Grynberg v. Grenada*, ¶ 5.19, (*RLA-018*).

<sup>44</sup> *BSG Resources Limited v. Republic of Guinea* (ICSID Case No. ARB/14/22), Procedural Order No. 3, 25 November 2015, ¶5.19. The United States did not file this case as an authority—accordingly, the Investor has done so to put it in the record, (*CLA-087*).

<sup>45</sup> US Article 1128 Submission at footnote 1

<sup>46</sup> *BSG Resources Limited v. Republic of Guinea*, ¶ 76, (*CLA-087*).

<sup>47</sup> *BSG Resources Limited v. Republic of Guinea*, ¶ 78, (*CLA-087*).

<sup>48</sup> *Lighthouse v. Democratic Republic of Timor-Leste* (ICSID Case No. ARB/15/2), Procedural Order No. 2, 13 February 2016, The United States did not file this case as an authority—accordingly, the Investor has done so to put it in the record, (*CLA-088*).

<sup>49</sup> US Article 1128 Submission at footnote 1.

for costs might be granted only in exceptional circumstances where there is a real risk that the claimant will not comply with a potential order for costs because it is unable or unwilling to do so.<sup>50</sup> The *Lighthouse* Tribunal found no requirement for a claimant to demonstrate its solvency to prevent an application for security for costs.<sup>51</sup> The Tribunal stated that insufficient assets is not sufficient to order security for costs and that there has to be "something more."<sup>52</sup>

57. Here, Canada has not established any facts that demonstrate that the Investor has not complied with payments. Indeed, it has paid for all the costs assessed by the Tribunal to date in a timely and complete fashion.<sup>53</sup> The United States and Mexico similarly avoid this necessary and essential consideration in each of their NAFTA Article 1128 submissions.
58. In the *Lighthouse* arbitration, the Tribunal did not grant the request for security for costs because the Tribunal stated that, unlike the facts in *RSM*, where there was a history of the claimants not complying with their obligation for costs in past cases, there was no history that the applicant before it had not complied with payment.<sup>54</sup>
59. Here, there is also no history of Tennant Energy not complying with any payment request and no evidence from Canada in the record to that effect.
60. The NAFTA Article 1128 submissions did not address the legal context relevant to the those key facts noted in the Investor's Response to Canada's security for costs request, namely that the certain harm to the Investor of granting Canada's request for security for costs far outweighs the hypothetical cost that Canada "may" suffer if its request is not granted:
  - a. *First*, Canada's alleged harm rests on a hypothetical, *i.e.*, that the Investor will not pay an eventual adverse costs award, which itself rests on other hypotheticals, *e.g.*, that Canada will succeed on the merits, that Canada will receive a favorable costs award, and that the Investor will be unwilling or unable to pay that final award. The Tribunal cannot give weight to this potential harm without improperly prejudging the merits of the case. Nor has the Investor—which has paid its share of the costs in this arbitration and is not accused of any procedural misconduct or bad faith actions here or elsewhere—given the Tribunal any reason to believe that it intends to frustrate an adverse costs award.

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<sup>50</sup> *Lighthouse v. Democratic Republic of Timor-Leste*, ¶ 59, (CLA-088).

<sup>51</sup> *Lighthouse v. Democratic Republic of Timor-Leste*, ¶ 60, (CLA-088).

<sup>52</sup> *Lighthouse v. Democratic Republic of Timor-Leste*, ¶ 61, (CLA-088).

<sup>53</sup> February 14, 2019 - Letter from C. Tham to disputing parties confirming timely receipt of the initial fee deposit payment from the Investor, (C-021).

<sup>54</sup> *Lighthouse v. Democratic Republic of Timor-Leste*, ¶ 62, (CLA-088).



- b. *Second*, the harm that the Investor will suffer if it must pay security for costs is tangible. As it has limited assets that are unconnected to this litigation, requiring it to post security for costs would block its access to justice and hinder it from being able to proceed with the arbitration. Even if the Investor could convince a third party to post the required security, that avenue of relief would come at a cost that the Investor could not recover, *i.e.*, a decreased financial interest in any amounts awarded by the Tribunal. In the circumstances like this one, where Canada's actions in fact are responsible for the Investor's financial position, such a result would be unfair, prejudicial, and would reward States for behaviour in violation of their treaty obligations.
- c. *Third*, the C\$6.9 million that Canada requests as the amount for security for costs is speculative and grossly excessive. As noted above, it would be prejudicial for the Tribunal to assume that Canada will receive any costs at all, much less 100% of its anticipated costs in arbitration. As noted in the Investor's Response to Canada's security for costs motion, in *Mesa Power*, the case on which Canada relies for its estimate, the Tribunal awarded Canada only 30% of its costs, *i.e.*, C\$1.8 million.<sup>55</sup> Canada inexplicably seeks almost three times that in an arbitration claim that Canada claims is frivolous. Indeed, if this case is as similar to *Mesa Power* as Canada claims, then there is no reason why Canada should need to spend even the same amount on it as it did on *Mesa Power*, as most of the work would be duplicative if Canada's own arguments are to be taken as true.
61. There is no evidence that the Investor has not paid its bills. To the contrary, there is ample evidence that the Investor has paid substantial financial deposits towards the costs of this arbitration, fully and promptly.<sup>56</sup>
62. There can be no question that the costs of carrying a NAFTA arbitration pale in comparison to the benefits Canada receives by virtue of its membership in the NAFTA. Canada often boasts about the significant benefits accruing to Canada that come with its membership in NAFTA. Canada has posted the following on its website:

Under NAFTA, total trilateral merchandise trade, as measured by the total of each country's imports from its other two NAFTA partners, reached nearly USD \$1 trillion, representing more than a three-fold increase since 1993. Some 77.8 percent of Canada's total merchandise exports were destined to our NAFTA partners in 2016. Total merchandise trade between Canada and the United States more than doubled since 1993, and grew nine-fold between Canada and Mexico.

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<sup>55</sup> Motion for Security for Costs, footnote 49.

<sup>56</sup> February 14, 2019 - Letter from C. Tham to disputing parties confirming timely receipt of the initial fee deposit payment from the Investor, (C-021).

Canada is the largest merchandise export market for the U.S. and one of the three largest country merchandise export markets for 48 U.S. states. In 2016, the U.S. exported nearly US\$266 billion of merchandise to Canada, and for the same year, the United States was the number one destination for Canadian merchandise exports and was Canada's largest supplier of merchandise imports. Almost 9 million jobs in the U.S. depend on trade and investment with Canada, while 1.9 million Canadian jobs are related to Canada exports to the U.S. Canada is the main foreign supplier of energy to United States, and was the fifth largest cumulative source of foreign direct investment (FDI) into the United States.<sup>57</sup>

63. These massive benefits to Canada of a 1 trillion-dollar market must be weighed by the Tribunal in the consideration of the fairness and proportionality of imposing a security for costs award. Besides, Canada is one of the world's largest economies and it is a member of the G8.<sup>58</sup> Canada's Department of Justice, according to its website, has 5000 employees, with approximately 2,500 lawyers.<sup>59</sup> It is very hard to see how any risk to Canada can be in balance to the detriment suffered by the Investor arising from the imposition of an award for security for costs.
64. In summary, the harm of granting Canada's request is real, immediate, and permanent. It either would bar Investor from being able to bring to its claim or substantially increase the costs of continuing with its claim. At the same time, the harm that Canada alleges Canada will suffer if its request is not granted is hypothetical and exaggerated. The former outweighs the latter.

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<sup>57</sup> Government of Canada Website. "North American free trade agreement (NAFTA) – Resources" – accessed at <https://www.international.gc.ca/trade-commerce/consultations/nafta-alena/toolkit-outils.aspx?lang=eng>, (C-022).

<sup>58</sup> Global Affairs Canada Website. "Key Facts about Canada's Competitiveness for Foreign Direct Investment" November 2019 – accessed at [https://www.international.gc.ca/economist-economiste/key\\_facts-faits\\_saillants.aspx?lang=eng](https://www.international.gc.ca/economist-economiste/key_facts-faits_saillants.aspx?lang=eng), (C-024).

<sup>59</sup> Government of Canada Website. "Organization of the Department of Justice – Chart" <https://www.justice.gc.ca/eng/abt-apd/org.html>, (C-023).

## II. PRAYER FOR RELIEF

65. For the preceding reasons, the Investor continues in its views, set out in its earlier submission that this Tribunal should not issue the interim measure for security for costs sought by Canada.
66. As explained above in great detail, the exceptional circumstances necessary for an order for security for costs do not exist in this case.
67. Tennant respectfully requests that the Tribunal REJECT Canada's request to order the Investor to post security for costs;

Respectfully submitted on behalf of the Investor, on December 27, 2019.



Barry Appleton

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