

Global Affairs Canada  
Department of Justice



Affaires mondiales Canada  
Ministère de la Justice

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**VIA EMAIL**

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Dear Members of the Tribunal:

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

In accordance with the Tribunal's invitation dated November 3, 2019, Canada makes the following submissions on the Claimant's unsubstantiated and incorrect assertions regarding NAFTA Article 1128 in its November 2, 2019 communication to the Tribunal. As Canada explains below, nothing in Article 1128, or the procedural calendar governing this arbitration, limits the ability of the United States or Mexico to file Article 1128 submissions on procedural matters that will be addressed at the upcoming January 14-15, 2020 hearing. Moreover, the timetable proposed by the non-disputing Parties for Article 1128 submissions is reasonable. Further, nothing in Article 1128 supports the Claimant's interpretation that this provision "does not provide a right of audience to the non-disputing Parties".

**A. The Non-Disputing Parties Have a Right to Make Submissions on Questions of Interpretation of the NAFTA and Their Proposed Timetable is Reasonable**

NAFTA Article 1128 provides,

[o]n written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

NAFTA Article 1128 establishes a right for the non-disputing NAFTA Parties to make submissions to a tribunal on a question of interpretation of the Agreement. In this regard, “[m]ost Chapter 11 tribunals have recognized that Article 1128 confers an absolute right on the non-disputing Parties to intervene on questions of interpretation, and is not merely a matter for the discretion of the tribunal in an individual case.”<sup>1</sup> The only limitation in Article 1128 is that a submission must be preceded by written notice, which the non-disputing Parties may provide at any time.

There are important institutional and public policy reasons for this right. The purpose of non-disputing Party submissions is to permit a tribunal to hear from the other State Parties without an interest in the outcome of a particular case, in order to apply the proper interpretation of the treaty. This promotes a balanced and long-term interpretation of the treaty.

Additionally, NAFTA Article 1128 contains little procedural guidance on how it operates. In the current arbitration, the Procedural Calendar ordered by the Tribunal in Procedural Order No. 1 sets out a timetable for non-disputing Parties to make submissions only on a question of law arising out of Canada’s request for bifurcation. As noted by the United States in its letter to the Tribunal dated November 1, 2019, the Procedural Calendar does not establish a deadline for the non-disputing Parties to make submissions on a question of interpretation arising out of the Preliminary Motions of the disputing parties. As recognized by the Claimant, establishing a November 6, 2019 deadline for the non-disputing Parties’ Article 1128 submissions on Preliminary Motions would require the Procedural Calendar to be “modified”.<sup>2</sup>

Canada does not consent to the Claimant’s proposed modification of the Procedural Calendar. The Procedural Calendar’s omission cannot amount to a prohibition on a non-disputing Party’s right to make any other submissions on questions of interpretation of the treaty. Moreover, the proposed timetable of the United States and Mexico provides a reasonable period for both disputing parties to respond before the hearing, without disrupting the rest of the Tribunal’s schedule as set out in the Procedural Calendar. It would afford over five weeks between the date of any Article 1128 submissions (December 6, 2019) and the procedural hearing (January 14-15, 2020). Many other NAFTA tribunals have set similar timelines for Article 1128 submissions.<sup>3</sup> In fact, some tribunals

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<sup>1</sup> **RLA-089**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006) (“Kinnear”), 1128-1, 1128-2 (citing **RLA-069**, *Ethyl Corporation v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998 (“Ethyl – Award on Jurisdiction”), ¶¶ 35, 48 n. 15).

<sup>2</sup> Claimant’s Letter to the Tribunal, November 2, 2019, p. 3: (“Accordingly, the Investor would consent to having the Procedural Schedule modified to confirm that any 1128 observations on procedural matters currently before this Tribunal be provided by either non-disputing Party not later than November 6, 2019, with responses on such Article 1128 submissions to be filed by the disputing parties on the December 9th date currently scheduled in the Procedural Order [emphasis added].”)

<sup>3</sup> For instance, the length of time between the deadline to submit an Article 1128 submission and the related hearing was approximately five weeks in *Windstream Energy LLC v. Canada* (January 12, 2016 to February 15, 2016), see

have permitted such submissions under far more onerous timelines. For example in *Ethyl v. Canada*, Mexico advised the tribunal that it intended to file an Article 1128 submission on the last day of a hearing on jurisdiction, which the Tribunal allowed.<sup>4</sup>

Here, the United States and Mexico have exercised their Article 1128 rights in a timely manner. The Claimant will suffer no prejudice under the United States' and Mexico's proposed timetable for their written submissions and any submissions made at the January hearing.

### **B. The Non-Disputing Parties Have a Right to Attend Hearings and Make Oral Submissions**

Contrary to what the Claimant asserts, NAFTA Article 1128 does not limit the types of submissions that a non-disputing Party can make. Article 1128 does not contain any qualification that non-disputing Party submissions must be in writing. Nor does it limit a non-disputing Party's ability to attend and make oral submissions at a hearing. In fact, the right of non-disputing Parties to make oral submissions at hearings has been long recognized by past NAFTA Chapter Eleven tribunals. For example, in *Bayview v. United Mexican States*, the United States invoked its Article 1128 right to make an oral submission at the jurisdictional hearing, and the tribunal permitted it to do so.<sup>5</sup>

Moreover, NAFTA Chapter Eleven tribunals have consistently allowed non-disputing Parties to attend hearings. Representatives of Mexico and the United States have routinely attended hearings in Canada's past NAFTA Chapter Eleven cases, most recently in the *Bilcon, Mesa, Eli Lilly, Lone Pine, and Mercer* arbitrations.

In sum, to prevent the non-disputing Parties from attending the hearing would impede their ability to effectively exercise their right to inform the Tribunal of their interpretation of the Treaty. Canada supports the United States' and Mexico's proposed procedures and schedule for non-disputing Party submissions on any question of interpretation of the NAFTA, as well as their right to attend and make oral submissions at the January hearing.

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list of dates at: <https://www.italaw.com/cases/1585>; six and a half weeks in *Lone Pine Resources Inc. v. Canada* (August 16, 2017 to October 2, 2017), see <https://www.italaw.com/cases/1606>; and seven and a half weeks in the damages phase of *Bilcon of Delaware et al. v. Canada* (December 29, 2017 to February 19, 2018), see <https://www.italaw.com/cases/1588>.

<sup>4</sup> **RLA-069**, *Ethyl – Award on Jurisdiction*, ¶ 48, fn 15. In this case, the claimant objected to the proposed submission and raised issues of timeliness. However, the *Ethyl* tribunal overruled the claimant's objection and allowed the submission, noting that Mexico had filed its submission within 15 days of the hearing on jurisdiction, as it had undertaken to do, that the disputing parties had three weeks to comment on the Article 1128 submission and that accepting the submission caused no prejudice to the claimant.

<sup>5</sup> See footnote 7 of United States Department of State letter to the tribunal in *Detroit Bridge International Company v. Canada*, confirming that the United States exercised its Article 1128 right to intervene orally at the jurisdictional hearing in *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB (AF)/05/01) Transcript of Hearing on Jurisdiction, Day 2, 15 November 2006, at 328-31. (**RLA-090**, *Detroit Bridge International Company v. Canada* (UNCITRAL) Letter from United States to the Tribunal, 19 March 2014, fn 7).

Yours very truly,



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