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By email

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Sir Daniel Bethlehem QC
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Dear Mr. President and Members of the Tribunal:

Re: Non-Disputing Party Submission Deadline in Tennant Energy v. Canada

We are writing further to the letter of the Government of the United States sent on November 1, 2019. The Government of the United States is a non-disputing Party to this arbitration. Counsel for this non-disputing Party has identified that it does not wish to file Article 1128 submissions on the issue of bifurcation as permitted by the November 6th set out in Procedural Order No. 1.

The United States Government has asserted that it may wish to file observations on treaty issues arising from other preliminary procedural motions filed on August 16th by the disputing parties. The United States Government has set its deadline for filing its observations – November 26th – without regard for the efficient operation of the current Procedural Schedule. Also, the Investor is concerned with characterizations and demands made by the United States Government in this regard.

The Tribunal is in control of the procedure in this arbitration. It has already considered written and oral arguments on the role of non-sisputing Parties.

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NAFTA Article 1128 sets out a specific process to be followed by the non-disputing Parties if either of them wishes to submit observations on the legal issues in the dispute. This narrow and special role for a non-disputant is expressly limited in the NAFTA. The NAFTA has a prescribed process for such issues which have been considered by tribunals. In some circumstances, tribunals have not permitted the non-disputing Parties to attend the hearing. In others, a non-disputing Party has declined to participate. The Tribunal has an important role here in ensuring procedural due process.

Procedural Order 1 created a timetable for the filing of written submissions from the Non-Disputing Parties. It did not permit the Non-Disputing Parties to set their own timetables in this arbitration, nor did the Procedural Order exceed the express terms of Article 1128 by granting an automatic right of audience to the Non-Disputing Parties. The procedural order gave the United States Government a generous period of two months to consider issues and respond to Canada's September 2019 Bifurcation Motion.

Astonishingly, the United States now claims that it should have even more time to potentially respond to unasserted treaty interpretative issues in procedural motions, which were filed earlier in the middle of August 2019. As a result, the disputing parties would have much less time available to respond to any observations that could be made by the United States.

The Investor objects to the requests made by the Government of the United States in its November 1st letter as follows:

1. The United States claims a right to appear before the Tribunal. Article 1128 does not provide a right of audience to the non-disputing Parties. It simply provides a right to make written submissions. The right of audience lies solely with Canada, the disputing Party, The United States cannot reserve a right that it does not have.

2. The Investor objects to the participation of the United States at the upcoming hearing at this time. The NAFTA permits an extraordinary right to the Non-Disputing Parties to participate in writing. Those writings will be before the Tribunal. Counsel for the Non-Disputing Parties has no other role at the hearing. At this time, the United States Government cannot demonstrate any necessary role for an appearance at a procedural hearing. There is no right to sit as an observer under the NAFTA. Other Tribunals have not granted such requests. This request to attend should not be granted.

3. The period for the filing of any Art. 1128 submission by the United States should not be modified at this late date. Despite already having had more than three months to decide on whether the United States had any treaty- based observations to make, it still has not yet determined if it has something to submit on procedural issues other than bifurcation (on which it has nothing to offer at this time). The primary task for the tribunal is to ensure that the disputing parties have enough time to adequately brief matters before the January 14th hearing. If the United States wishes to file an Art. 1128 submission on the procedural motions – it should be obliged to do so by the November 6th filing date originally set for non-disputing Party submissions on bifurcation. We note that Procedural Order 1 was issued in June 2019. Subsequently, staffing schedules have been set around the entrenched dates in PO 1. To permit the United States to have three additional weeks in November would run the risk of not permitting the disputing parties to have an adequate opportunity to exchange responses on the Non-Disputing Party observations before the January 14th hearing. That eventuality should be avoided.

The Investor does not oppose the submission of Article 1128 submissions from the United States. It simply opposes the late notice and disruption to the orderly unfolding of the arbitration associated with the new demands of the United States Government. 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.

On behalf of counsel for the Investor.

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Encl:

cc:

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