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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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]

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[1] *Tennant Energy, LLC v. Government of Canada*, Article 1128 Submission of the United States, 27 November 2019 ("*Article 1128 Submission of the U.S.*"), ¶ 7; *Tennant Energy, LLC v. Government of Canada*, Article 1128 Submission of Mexico, 27 November 2019, ¶ 6.

[2] The International Law Commission stated in its commentary: "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for the purposes of its interpretation." (Emphasis added.) **RLA-098**, Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session (Monaco, 3-28 January 1966) (U.N. Doc. A/6309/Rev.l) *in* Yearbook of the International Law Commission 1996 (New York: U.N. 1967), vol. II, at 169 (U.N. Doc. A/CN.4/SER.A/1966/Add.1) ("Reports of the ILC Commission 1966"), p. 221, ¶ 14. The International Law Commission also emphasized that "[t]he importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." (Emphasis added.) **RLA-098**, Reports of the ILC Commission 1966, p. 221, ¶ 15.

[3] **RLA-031**, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 23 May 1969, Article 31.3. (Emphasis added.)

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*

[4] **RLA-099**, Report of the International Law Commission, Seventieth session (30April-1 June and 2 July-10 August 2018) (UN Doc. A/73/10) Chapter IV, p. 32. **RLA-100**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Damages, 10 January 2019 ("*Bilcon – Award on Damages*"), ¶ 378.

[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.[8] 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.[9] 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.

[8] Canada has limited its response to an analysis of subsequent agreement and subsequent practice under *VCLT* Article 31.3 and the relevant context. Yet nothing in the remainder of a *VCLT* analysis under Article 31.1 would preclude the authority to order security for costs under NAFTA Article 1134. For instance, the ordinary meaning of the phrase "to preserve the rights of a disputing party" in Article 1134 allows for orders for security for costs, because it encompasses the rights to the integrity of the arbitral proceedings and the effectiveness of the award. The treaty's object and purpose also allows for security for costs, as NAFTA Article 102 provides that one objective of NAFTA is to "create effective procedures for […] the resolution of disputes". Recognizing the authority to order security for costs under Article 1134 aligns with this objective since claimants who evade cost orders, including when funded by third parties, undermine the effectiveness of NAFTA's dispute resolution procedures. *See, for example*: **RLA-084** *Nova Group Investments B.V. v. Romania* (ICSID Case No. ARB/16/19) Procedural Order No. 7 Concerning the Claimant's Request for Provisional Measures, 29 March 2017, ¶ 235; **RLA-019**, *RSM Production Corp. v. Saint Lucia* (ICSID Case No. ARB/12/10) Decision on Saint Lucia's Request for Security for Costs, 13 August 2014, ¶¶ 65-69; **CLA-048**, Georgios Petrochilos, *Interim Measures Under the Revised UNCITRAL Arbitration Rules*, ASA Bulletin, (Kluwer Law International 2010, Volume 28 Issue 4). *See also*: **RLA-101**, *X S.A.R.L., Lebanon v. Y A.G., Germany*, ICC Arbitration, Procedural Order No. 3, 4 July 2008, 28 ASA Bulletin 37–49 (2010); **RLA-102**, Weixia Gu, *Security for Costs in International Commercial Arbitration*, Journal of International Arbitration, (Kluwer Law International 2005, Volume 22 Issue 3) pp. 167–205; **RLA-103**, *Proposals for Amendment of the ICSID Rules*, Working Paper # 3, August 2019, ICSID Convention Proceedings – Arbitration Rules; **RLA-104**, Nadia Darwazeh and Adrien Leleu, *Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding*, Journal of International Arbitration, (Kluwer Law International 2016, Volume 33 Issue 2) pp. 125 – 150; **RLA-105**, *Ambiente Ufficio S.p.A. & ors. v. Argentine Republic* (ICSID Case No. ARB/08/9) Order of Discontinuance of the Proceedings, 28 May 2015; **RLA-106**, William Kirtley and Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant Is Relying upon Third-Party Funding?* Journal of International Arbitration, (Kluwer Law International 2013, Volume 30 Issue 1) pp. 17 – 30; **RLA-107**, ICSID, Survey for ICSID Member States on Compliance with ICSID Awards, 2017; **RLA-108**, *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic* (ICSID Case No. ARB/14/14) Transcript of the First Session and Hearing on Provisional Measures, 17 March 2015, pp. 144:25-145:4; **RLA-109**, Maxi Scherer, *Third-Party Funding in International Arbitration Towards Mandatory Disclosure of Funding Agreements?*, in Bernardo Cremades Sanz Pastor, and Antonias Dimolitsa (eds), *Third-Party Funding in International Arbitration* (ICC Dossier, 2013), p. 96; **RLA-110**, ICC Commission Report, Decisions on Costs in International Arbitration, ICC Dispute Resolution Bulletin, 2015, Issue 2, ¶¶ 87 – 93; **RLA-111**, Judith Gill and Matthew Hodgson, *Cost Awards – Who Pays*, Global Arbitration Review Volume 10 Issue 4, September 2015.

[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.

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Respectfully submitted on behalf of the Government of Canada,

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