

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

**TENNANT ENERGY, LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)**

PROCEDURAL ORDER NO. 10

The Arbitral Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. R. Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms. Christel Y. Tham

15 April 2021

I. RELEVANT PROCEDURAL HISTORY

1. On 24 June 2019, the Tribunal issued Procedural Order No. 1 (“**PO 1**”) establishing the procedural calendar for an initial phase up to the Tribunal’s decision on bifurcation and preliminary motions, and two alternative timetables for a subsequent phase applicable (i) should the proceedings not be bifurcated; and (ii) should the proceedings be bifurcated.
2. On 27 February 2020, the Tribunal issued Procedural Order No. 4 (“**PO 4**”), in which it dismissed the Respondent’s first request for bifurcation on the ground that it was premature. The Tribunal further determined that the proceedings would continue in accordance with the procedural calendar set out in PO 1 for the non-bifurcated scenario, with certain modifications adopted to allow the Respondent to pursue the bifurcation of the proceedings after having had sight of the Claimant’s Memorial. The Tribunal further directed that the Memorial would set out in full detail the Claimant’s pleading on issues of jurisdiction. In the event that the Respondent decided to renew its request for bifurcation, the Tribunal held that it would decide that request on the papers without a hearing, and issue relevant procedural directions thereafter.
3. On 7 August 2020, the Claimant submitted its Memorial on Jurisdiction, Merits and Quantum.
4. On 21 September 2020, the Respondent submitted its Memorial on Jurisdiction.
5. On 12 November 2020, the Tribunal issued Procedural Order No. 8 (“**PO 8**”), *inter alia*, granting the Respondent’s renewed request for bifurcation (the “**Renewed Request for Bifurcation**”), but holding that the scope of the bifurcated jurisdictional hearing shall be determined after the Claimant’s next submission on jurisdiction is filed on 11 January 2021.
6. On 9 December 2020, the Claimant, on behalf of the Parties, informed the Tribunal that the Parties are available to attend the bifurcated jurisdictional hearing from 8 to 19 November 2021, with a preference on the Claimant’s part for 15 to 19 November 2021.
7. By letter dated 23 December 2020, the Tribunal, *inter alia*, requested all parties to tentatively reserve at least five days, from 15 to 19 November 2021, as potential dates for the hearing, and noted that it would confirm the length of the bifurcated hearing once it has decided on its scope.
8. By letter dated 23 December 2020, the Claimant (i) requested an extension from 11 January to 1 March 2021 for the filing of its next submission on jurisdiction; and (ii) proposed a revised procedural calendar, which reflected corresponding adjustments to what it considered to be the remaining procedural events for this phase, namely the Reply and Rejoinder Memorials on Jurisdiction, the non-disputing Party submissions, and the disputing Parties’ responses to those submissions.
9. By letter dated 29 December 2020, the Respondent responded to the Claimant’s 23 December letter at the Tribunal’s invitation, agreeing to the Claimant’s extension request, but objecting to the Claimant’s proposed procedural calendar. The Respondent contended in particular that (i) Reply and Rejoinder Memorials on Jurisdiction are not necessary since both Parties would have each already completed two rounds of submissions on jurisdiction; and (ii) the proposed calendar does not account for the Tribunal’s decision on the scope of the preliminary phase following the Claimant’s next submission on jurisdiction.

10. By letter dated 10 January 2021, the Tribunal (i) confirmed, in accordance with the Parties' consent, that the deadline for the Claimant's next submission on jurisdiction is extended from 11 January to 1 March 2021; and (ii) agreed with the Respondent that two rounds of submissions on jurisdiction from each Party are sufficient, and adopted the procedural calendar proposed by the Respondent.
11. On 1 March 2021, the Claimant submitted its Counter-Memorial on Jurisdiction.
12. On 10 March 2021, the Tribunal issued Procedural Order No. 9 ("**PO 9**"), *inter alia*, deciding on the scope of the bifurcated jurisdictional hearing and granting the Respondent's Renewed Request for Bifurcation in respect of both objections raised.
13. On the same day, the Claimant wrote to the Tribunal (i) contending that PO 9 erroneously "omits Tennant Energy's opportunity to respond by filing a Rejoinder Memorial on Jurisdiction", and proposing a modified procedural schedule for the remainder of the bifurcated jurisdiction phase which corrects for this alleged error; (ii) requesting an extension from 15 to 30 days of the time period for the Parties to respond to the non-disputing Parties' submissions; and (iii) requesting guidance on the length and dates for the bifurcated jurisdictional hearing.
14. On 12 March 2021, at the Tribunal's invitation, the Respondent responded, *inter alia*, (i) rejecting the Claimant's proposed schedule; and (ii) raising no objections to the Claimant's extension request.
15. By letter dated 23 March 2021, the Tribunal (i) rejected the Claimant's proposed schedule, and corresponding request to file an additional submission on jurisdiction after the Respondent's second submission on jurisdiction, on the basis that it had already decided this issue in its 10 January 2021 letter and saw no reason to depart from said decision; (ii) in the absence of any objections from the Respondent to the Claimant's request, the Tribunal confirmed that the time period for the Parties to respond to the non-disputing Parties' submissions shall be extended from 15 to 30 days; and (iii) decided that the bifurcated jurisdictional hearing shall take place over a maximum of four days, in the period from 15 to 19 November 2021, the final hearing schedule to be determined in the light of the Parties' agreement, if any, or submissions, in advance of the pre-hearing conference. The Tribunal also expressed its wish to set the time and date for the pre-hearing conference, and invited the Parties to revert with their availabilities and preferences concerning format.
16. On 26 March 2021, the Respondent requested a one-month extension of the deadline to file its Rejoinder Memorial on Jurisdiction, along with corresponding adjustments to the remainder of procedural calendar for the bifurcated jurisdictional phase.
17. On 30 March 2021, following receipt of the Parties' responses the day before, the Tribunal confirmed that the pre-hearing conference shall take place at 09:00 EDT on Tuesday, 19 October 2021 via videoconference using the Zoom platform.
18. On 31 March 2021, the Claimant consented to the Respondent's extension request.
19. On 12 April 2021, the Tribunal granted the Respondent's extension request.

II. THE TRIBUNAL'S ORDER

20. The Tribunal notes that Section 11 of PO 1 provides as follows under the heading "Amici":
11. Amici
 - 11.1 If a request for the submission of an amicus curiae brief is filed by the date indicated in the Procedural Calendar, the Tribunal will give the appropriate directions in the exercise of its powers under Article 15 of the UNCITRAL Rules.
 - 11.2 By the relevant dates to be indicated in the Procedural Calendar or as determined by the Tribunal, the Parties shall have the opportunity to: (1) make submissions on any request for the submission of an amicus curiae brief; and (2) file simultaneous observations on issues raised in any amicus curiae brief submitted pursuant to a decision of the Tribunal.
 21. The Tribunal recalls that, pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), "[o]n written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."
 22. The Tribunal further recalls that the Statement of the NAFTA Free Trade Commission on Non-Disputing Party Participation sets forth guidelines and recommended procedures for the submission of non-disputing party applications and submissions, guidelines and procedures which the Tribunal hereby adopts.
 23. In accordance with the relevant Procedural Orders, Tribunal directions, and provisions as set out above, the Tribunal determines that the Procedural Calendar for the Bifurcated Jurisdictional Phase shall be as set out in **Annex I**.

Dated: 15 April 2021

Place of Arbitration: Washington, D.C.



Mr. Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal

Annex I: Procedural Calendar for the Bifurcated Jurisdictional Phase

Procedural Event	By	Date
Decision on Scope of Bifurcated Phase of Proceedings (PO 9)	Tribunal	10 March 2021
Rejoinder Memorial on Jurisdiction	Respondent	26 May 2021
Notification of Article 1128 Written Submissions	Mexico/U.S.	11 June 2021
Article 1128 Written Submissions (if any)	Mexico/U.S.	25 June 2021
Responses to Article 1128 Written Submissions (if any)	Claimant/Respondent	26 July 2021
Submissions of <i>Amicus Curiae</i> Applications / Submissions (if any)	<i>Amici Curiae</i>	20 August 2021
Responses to <i>Amicus Curiae</i> Applications / Submissions (if any)	Claimant/Respondent	3 September 2021
Decision on <i>Amicus Curiae</i> Applications (if any)	Tribunal	-
Notification of Article 1128 Oral Submissions at the Hearing (including with respect to any admitted <i>Amicus Curiae</i> Submissions)	Mexico/U.S.	17 September 2021
Notifications of Witnesses/Experts to be Cross-Examined at the Hearing	Claimant/Respondent	21 September 2021
Submissions of Proposed Hearing Schedule(s)	Claimant/Respondent	5 October 2021
Pre-Hearing Conference (via videoconference)	-	19 October 2021, 09:00 EDT
Hearing	-	15 to 19 November 2021 (max. 4 days)