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By email

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Dear Mr. President and Members of the Tribunal:

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

We are writing further to the letter of the Government of Mexico sent on November 4, 2019, where, the Government of Mexico made the following points:

1. Mexico confirmed that it would not be filing a NAFTA Article 1128 submission on the November 6, 2019, deadline on the issue of bifurcation.¹
2. Mexico expressed its intention to attend the January 14th and 15th procedural hearing in Washington DC.²
3. Mexico claimed a right of audience to make “any oral submission” at the procedural hearing.³

¹ Letter from Government of Mexico to Tennant Energy Tribunal, November 4, 2019, at page 1.

² *Ibid.*

³ *Ibid.*

4. Mexico demanded to file a NAFTA Article 1128 submission on treaty interpretative issues on other procedural issues on December 6th. Mexico agreed to notify the Tribunal by November 26th if it was to make such a filing.⁴

This letter is restricted only to the four points raised by Mexico in its November 4th letter. Accompanying the letter is an index of legal authorities and an index of exhibits. The authorities and exhibits will be posted on the PCA extranet shortly.

Overview – NAFTA Article 1128

The terms of the NAFTA provide non-disputing Parties to the Treaty with a special ability to provide comments on the interpretation of the NAFTA. These are special rights not given to other non-disputing parties. Because they can interfere with the orderly operation of the arbitration, the non-disputing Party rights are limited. Article 1128 Submissions are permitted but with a limited scope. This power to provide views on the interpretation of the Treaty is not unfettered, nor is it unlimited. NAFTA Article 1128 provides:

Article 1128: Participation by a Party

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

States have recognized the limits on the specific wording of NAFTA Article 1128. For example, within the wording of the 2004 Dominican Republic–Central America Free Trade Agreement (CAFTA-DR), the drafters selected different wording. The CAFTA-DR is largely modelled on the NAFTA. Article 10.20(2) of the CAFTA-DR provides for non-disputing Party interpretations of the treaty at issue but that its wording is different. The CAFTA-DR states:

‘A non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.’⁵

⁴ Letter from Government of Mexico to Tennant Energy Tribunal, November 4, 2019, at pages 1-2.

⁵ Dominican Republic–Central America Free Trade Agreement (CAFTA-DR) Article 10.20(2). We note that the United States is a common Treaty Party to both the NAFTA and the CAFTA-DR, **CLA-072**.

The difference in wording is significant. The CAFTA-DR provides for “oral and written submissions.” NAFTA Article 1128 provides only for “submissions.”

The nature of Article 1128 submissions

Article 1128 submissions must be understood in their context. These are not independent statements by third parties to the dispute. Scholars examining Article 1128 submissions have concluded that these Article 1128 submissions preponderantly support the position of the respondent state. In the words of Prof. Martins Paparinskis and Jessica Howley,

...with rare exceptions, submissions by non-disputing Parties, including the home State of the investor, tend to be substantially in favour of the position taken by the respondent State and against the position taken by the investor.⁶

Thus, in evaluating the fairness to the disputing parties, the Tribunal needs to carefully consider the fairness of permissively allowing wide-ranging non-disputing Party comments when no one else will be filing offsetting observations in support of the Investor.

Item 1 - Mexico’s decision to not file an Article 1128 submission

Mexico 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 of June 24, 2019.

⁶ Martins Paparinskis and Jessica Howley, “Submission by a non-disputing Party to the Treaty” in Euler, D, Gehring, Markus and Scherer, M (eds), *Transparency in International Investment Arbitration, A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, Cambridge University Press, 2015 at page 204, **CLA-073**.

Items 2 and 3 - Mexico's decision to attend the January 2020 Procedural Hearing and assertion of rights to any oral submissions

In its November 4th letter, Mexico expressed its intention to attend the January 14 and 15th procedural hearing in Washington DC (item 2), and Mexico claimed a right of audience to make “any oral submission” at the procedural hearing⁷ (item 3). Items 2 and 3 share a good deal of commonality and are being addressed together in this letter.

Mexico has no right to attend the procedural hearing under the NAFTA. Any invitation is a privilege extended by the Tribunal and in furtherance of the needs of the arbitration. Furthermore, the Tribunal has already considered these same issues.

These issues have already been considered by this Tribunal

This Tribunal already has considered submissions from the disputing parties on the meaning of this Article 1128 obligation and the right of audience of non-disputing parties.

This was an issue raised by the proposed wording of the original section 12.1 of the draft Procedural Order No 1. As a result of the exchange of views on the draft order, the Tribunal modified its original text of section 12.1. This section of the draft Procedural Order contemplated granting the very rights sought by Mexico. The original text of the Procedural Order stated:

The Governments of Mexico and the United States may attend hearings and make submissions to the Tribunal within the meaning of Article 1128 of the NAFTA by the dates to be determined in the Procedural Calendar.

The Investor objected to this wording in the same manner as it has objected to Mexico's current proposal. In an email of May 29, 2019, the Investor wrote to the Tribunal as follows:

⁷ November 4, 2019 letter from Mexico to the Tribunal, at page 1.

The non-disputing Parties may only attend within the meaning of NAFTA Article 1128 – and that does not permit the non-disputing Parties to participate on procedural matters that do not involve the interpretation of the Treaty.⁸

The Tribunal added a discussion topic on the attendance of non-disputing parties at the First Procedural Hearing. After considering the exchange of pleadings and the subsequent discussion, the Tribunal completely struck the draft language in the Procedural Order that granted rights of audience to the non-disputing Parties.

Yet once again, this very same issue is before the Tribunal. The Tribunal already decided to exercise its authority to control the proceedings and to not confirm a right of audience for the non-disputing NAFTA Parties. There is no reason to modify this decision now.

Mexico incorrectly asserts a right to attend the hearing along with its following contention that it has the right to make “any oral submissions” at that hearing. NAFTA Article 1128 does not grant either of these rights to the non-disputing Parties.

While NAFTA Tribunals have agreed to permit the non-disputing Parties to attend hearings or to make submissions, this is not a right.

The Tribunal should exercise its authority to control the proceedings

The Tribunal has the power to regulate the filing of NAFTA Article 1128 submissions and the power to prohibit the non-disputing Parties from attending the hearing completely. The Tribunal should exercise its powers.

⁸ Email from Barry Appleton to Tribunal, May 29, 2019, C-018.

Indeed, in *Detroit International Bridge Company v. Canada*, the NAFTA Tribunal (presided over by well-known French arbitrator Yves Derain) refused the request of the United States to appear at the hearing as a non-disputing Party.⁹ Paragraph 1 of Procedural Order No. 6 states:

*The Tribunal first notes that NAFTA Article 1128 mentions that “on written notice to the disputing parties, a [non-disputing] Party may make submissions to a Tribunal on a question of interpretation of this Agreement [NAFTA].” However, such provision does not mention anything about the physical participation of a non-disputing Party at hearings.*¹⁰

There is no basis under the treaty to permit the non-disputing Parties to appear at a hearing physically.

Non-disputing Parties may not make oral arguments on any issue

Mexico confuses the rights of disputing parties to the arbitration with the limited rights of non-disputing Parties to the Treaty. Mexico has asserted a right to make “any oral statement” at the upcoming hearing. Such a position is without basis in the treaty and is harmful to the due process and fairness rights of the Investor at the upcoming hearing. Ad-hoc statements by the non-disputing Parties are not a part of NAFTA Article 1128. Only a disputing party to the arbitration has such rights.

The Investor has objected to the attendance of the non-disputing Parties at the forthcoming hearing because there is no purpose served by their attendance. This objection extends to the making of ad-hoc oral statements at the hearing.

There is no reasonable or objective need for such rights of attendance and no objective support in the treaty for such an approach. Mexico has provided no compelling reason for attendance. Indeed, Mexico has not even confirmed that it would file an Article 1128 submission through

⁹ *Detroit International Bridge Company v Canada*, Procedural Order 6 – March 18, 2014, **CLA-074**. The Tribunal contained Yves Derains, Prof Vaughan Lowe and former US Homeland Safety Secretary Michael Chertoff.

¹⁰ *Detroit International Bridge Company v Canada*, Procedural Order 6 – at paragraph 1, **CLA-074**.

which it would be able to carry out its interpretative observation rights as expressed in NAFTA Article 1128.

The Tribunal should not grant Mexico's request as non-disputing Party rights do not provide for a physical right of audience. The objective of receiving the views of the non-disputing Parties is amply addressed through written submissions.

Item 4 - Mexico's wish for further Article 1128 submission

Mexico demanded to file a NAFTA Article 1128 submission on other procedural issues on December 6th. Mexico agreed to notify the Tribunal by November 26th if it was to make such a filing. The Investor remains deeply concerned by the impact of untimely filings by non-disputing Parties such as the Government of Mexico.

Mexico had months to review the pleadings and to contact the Tribunal if Mexico wanted an orderly way to present its views on treaty interpretation relating to these procedural motions. It is difficult to see how there could be extensive questions of NAFTA treaty interpretations arising from the procedural motions.

The Tribunal should not lightly countenance the fact that Mexico has been sitting on its hands. If Mexico had observations on the interpretation of the NAFTA, then Mexico knew since June and had since August to formulate a view. Yet, Mexico has not even confirmed whether it has a view – and seeks another three weeks to come to that conclusion – and then another two weeks to file observations.

We note that during the June 2019 First Procedural Hearing, Canada confirmed the powers of the Tribunal and the sufficiency of the current schedule, and the inherent powers of the Tribunal to control the process. At the hearing, counsel for Canada stated:

*7 To the extent that the Claimant
8 argues that there is a need to impose scheduling
9 requirements on the non-disputing parties, we
10 would also note that the procedural calendar and
11 Procedure Order 1, which we understand the*

*12 Tribunal to have confirmed already, already
13 clearly establishes deadlines for their
14 submissions. And this provides sufficient
15 advance notice and procedural fairness to both
16 disputing parties.¹¹*

The November 4th letter from Mexico was nothing short of an ambush. Mexico refuses to confirm that it has a view on matters that have been before it for months since the making of the June 24, 2019, Procedural Order.

Mexico asserts a self-judging right to re-order the Tribunal's timelines. Mexico demands the right to file its observations on unspecified treaty interpretive issues by December 6, 2019. Such a statement is unfairly burdensome on the disputing parties and the Tribunal.

The non-disputing Parties do not have such broad power to express themselves whenever they want in this arbitration. The Tribunal's ability to control the expression of non-disputing Party submissions has been established since the earliest NAFTA cases. For example, when the United States claimed during the *Pope & Talbot* claim that it would present Article 1128 submissions whenever it wanted, that Tribunal promptly issued a scheduling order to control the timing of the NAFTA non-disputing Party submissions.

Mexico seems to rely on the wording of the scheduling section of Procedural Order No. 1 that referenced a November 6 deadline for NAFTA Article 1128 bifurcation submission rather than all Article 1128 submissions.

This Tribunal, like the previous *Pope & Talbot* Tribunal, should not allow the non-disputing Parties to set their own schedules. Instead, this Tribunal must take control of the orderly unfurling of the arbitration by setting a timeline for written submissions. That should be the approach taken here.

¹¹ Transcript, First Procedural Hearing, June 17, 2019, at page 213, lines 7 to 16, **C-019**.

The addition of an entire month in the suggested timetable proposed by Mexico would play havoc with the existing deadlines and the work schedules established in advance of the hearing. The procedural schedule was developed to take into account the needs of the disputing parties, and those of the Tribunal. The schedule left ample time for the reasonable needs of the non-disputing Parties as well.

The timetable proposed by Mexico may be convenient for Mexico, but it has the effect of running roughshod over the existing timetable and will affect other cases that have been choreographed around the clear deadlines established by this Tribunal in its Procedural Timetable many months ago. The additional month sought by Mexico is unnecessary and disruptive to the arbitration process. It should not be followed.

Conclusions

Given the untimely request from Mexico, it is not feasible to maintain the November 6th date for a filing. Thus, the Investor requests that this Tribunal set a new date for the filing of all remaining NAFTA Article 1128 submissions (that is submissions other than those on the bifurcation issue) to be set not later than Friday, November 8, 2019.

To be clear, the Tribunal already decided that there should be no right of audience for the non-disputing NAFTA Parties in its consideration of Procedural Order No. 1. This issue should not be reconsidered “through the back door” in this request. There should be no other modification of the Procedural Order to address the attendance of the non-disputing NAFTA Parties at the upcoming Washington DC procedural hearing.

Accordingly, the Investor requests a minor modification to the Procedural Schedule to confirm that any NAFTA Article 1128 observations on procedural matters currently before this Tribunal (other than the issue of bifurcation which was already covered by the Procedural Order) be provided not later than Friday November 8, 2019, with responses on any 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.

A handwritten signature in black ink, appearing to read "Barry Appleton". The signature is fluid and cursive, with the first name "Barry" being more prominent than the last name "Appleton".

Barry Appleton
Counsel for the Investor

Encl:

cc:

Edward Mullins
Canada Legal Team