



**BEFORE THE TRIBUNAL IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT**

Tennant Energy, LLC
(Claimant)

and

Government of Canada
(Respondent)

PCA Case No. 2018-54

SUBMISSION OF THE UNITED MEXICAN STATES PURSUANT ARTICLE 1128

1. The Government of Mexico makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA) with respect to a question of interpretation of the NAFTA.¹ Mexico takes no position on the facts of this dispute. The fact that a question of interpretation arising in the proceeding is not addressed in this submission should not be taken to constitute Mexico's concurrence or disagreement with a position taken by either of the disputing parties.

Article 1134 (Interim Measures of Protection)

2. NAFTA Article 1120(2) provides that the applicable arbitration rules (i.e., ICSID Convention, Additional Facility Rules of ICSID, or UNCITRAL Arbitration Rules) "shall govern

¹ 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."

the arbitration to the extent modified by [NAFTA Chapter 11, Section B (Settlement of Disputes between a Party and an Investor of another Party)]”. The applicable arbitration rules and NAFTA Article 1134 include provisions on interim measures of protection.² Therefore, in accordance with Article 1120(2), Article 1134 should prevail over the applicable arbitration rules on interim measures of protection to the extent that Article 1134 modifies those rules.

3. NAFTA Article 1134 provides as follows:

“A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.”

4. Article 1134, first sentence, grants Chapter 11 tribunals the power to order interim measures of protection “to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction”. This provision authorizes various types of interim measures of protection.³ Hence, the fact that Article 1134, first sentence, does not include a specific reference to security for costs, but instead describes various types of interim measures of protection, does not mean that Article 1134 limits the Tribunal's authority to order security for costs.

5. NAFTA Article 1134, second sentence, also provides two specific limitations to the power granted to tribunals to order interim measures of protection. Namely, a “Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117”.⁴ As Canada mentioned in its motion for security for costs, none of the limitations set out by Article 1134 limit the Tribunal's authority from ordering security for costs.⁵

² ICSID Convention, Article 47; ICSID Arbitration Rules, Rule 39; ICSID Arbitration (Additional Facility) Rules, Article 46; and UNCITRAL Arbitration Rules, Article 26.

³ See also, M. Kinnear, A. Bjorklund and J. Hannaford, (M. Kinnear et al.) *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2009), pag. 4-1134 (“The wording of Article 1134 and the two categories it lists ('including' an order to preserve evidence or protect a tribunal's jurisdiction) suggest that various interim orders are available under Chapter 11 and that tribunals are not limited to the two categories noted in the article”); and pag. 1134-5 (“an interim measure pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Convention Arbitration Rules may issue only to preserve the rights of a party. This should be contrasted with the broader scope of Article 1134, which authorizes interim measures either to preserve the rights of a party or to ensure that a tribunal's jurisdiction is fully effective”)

⁴ See also, Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 Arb. Int'l, (2000) pag. 416 - 417 (“...a tribunal is not permitted to order attachment or to enjoin the application of the measure which gives rise to a claim. This restricts the right of a tribunal under the UNCITRAL Rules or under the ICSID Additional Facility Rules to order a broader scope of measures”.)

⁵ Canada's Motion for Security for Costs (September 25, 2019), para. 12.

These limitations are directly applicable to the rules on provisional measures of protection governing the arbitration in accordance with Article 1120(2).

6. In general, NAFTA Article 1134 provides a margin of discretion for a Tribunal to order an interim measure of protection “to preserve the rights of a disputing party” which allows the possibility for a Tribunal to order security for costs, provided that other relevant requirements contained in the applicable arbitration rules are met.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "O. Pérez Gárate".

Orlando Pérez Gárate
General Counsel

November 27, 2019