The formatting of the appended submission has been modified in order to comply with Section 508. The version of the submission that was originally filed by the United States is available on the Department of State's website.

In footnotes to this submission, the symbol ¶ denotes the relevant paragraph(s) of the referenced document and the symbol § denotes the relevant section(s) of the referenced document.

TENNANT ENERGY, LLC V. GOVERNMENT OF CANADA
PCA CASE NO. 2018-54
ORAL NON-DISPUTING PARTY SUBMISSION

1. Thank you, Mr. President, and members of the Tribunal. My name is Nicole Thornton and I am the Chief of Investment Arbitration in the Office of International Claims and Investment Disputes within the Office of the Legal Adviser at the U.S. Department of State.

2. Pursuant to Article 1128 of the NAFTA and the Tribunal's ruling of November 11, 2019, I will be making a brief oral submission on treaty interpretation issues arising from the Parties' replies to the written submission made by the United States on November 27, 2019.

3. The United States does not take a position on how these treaty interpretation issues apply to the merits of Canada's request for security for costs. In addition, no inference should be drawn from the absence of comment on any issue not addressed in this submission.

4. In our written submission, we set out the U.S. position on the proper interpretation of Article 1134 and I do not intend to reiterate or expand on that issue now. Instead, I will briefly address the proper role of the NAFTA Parties' submissions in the interpretation of the NAFTA, particularly where, as here, all parties are in agreement as to how the treaty provision at issue should be read.

5. States are well placed to provide authentic interpretations of their treaties, including in proceedings before investor-State tribunals like this one. NAFTA Article 1128 ensures the non-disputing NAFTA Parties have an opportunity to provide their views on the correct interpretation of the NAFTA. The NAFTA Parties consider non-disputing Party submissions to be an important tool in this respect and the United States consistently includes provision for such submissions in its investment agreements.

6. Article 31 of the Vienna Convention on the Law of Treaties recognizes the important role that the States parties play in the interpretation of their agreements. In particular, paragraph 3 states that, in interpreting a treaty, "[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; [and] (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . . ."

7. Article 31 of the Vienna Convention, which reflects customary international law, is framed in mandatory terms: subsequent agreements between the parties and subsequent practice of the parties "*shall* be taken into account." Thus, if the Tribunal concludes that there is either a subsequent agreement between the NAFTA Parties or subsequent practice that establishes such an agreement, it must take that into account in its interpretation of Article 1134.

8. In addition, there is no hierarchy of importance amongst the elements of interpretation listed in Article 31. Accordingly, the Tribunal must consider any subsequent agreement of the Parties and any subsequent practice of the Parties alongside the Treaty's text, context, and object and purpose.

9. Where the submissions by the three NAFTA Parties demonstrate that they agree on the proper interpretation of a given provision, the Tribunal must, in accordance with Article 31(3)(a), take this agreement into account.

10. In addition to reflecting an agreement under Article 31(3)(a), the NAFTA Parties' concordant interpretations may also constitute subsequent practice under Article 31(3)(b). The International Law Commission has commented that subsequent practice may include QUOTE "statements in the course of a legal dispute" UNQUOTE. Accordingly, where the NAFTA Parties' submissions in an arbitration evidence a common understanding of a given provision, this constitutes subsequent practice that must be taken into account by the Tribunal under Article 31(3)(b).

11. Several tribunals have agreed that submissions by the NAFTA Parties in arbitrations under Chapter Eleven, including non-disputing Party submissions, may serve to form subsequent practice. For example, the *Mobil v. Canada* tribunal recently found that arbitral submissions by the NAFTA Parties constituted subsequent practice and observed that QUOTE "the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight UNQUOTE. I would point you in particular to paragraphs 103, 104 and 158 to 160 of the *Mobil v. Canada* Decision on Jurisdiction and Admissibility, dated July 13, 2018.

12. The tribunal in *Clayton/Bilcon v. Canada* reached a similar conclusion at paragraphs 376 to 379 of its January 10, 2019 Award on Damages, as did the tribunal in *Canadian Cattlemen for Fair Trade v. United States*, at paragraphs 188 to 189 of its January 28, 2008 Award on Jurisdiction.

13. Whether the Tribunal considers the interpretations the NAFTA Parties' have presented in Chapter Eleven cases as a subsequent agreement under Article 31(3)(a), or subsequent practice under Article 31(3)(b), or both, the outcome is the same.

14. Here, each of the NAFTA Parties has, through its respective submissions, expressed a concordant interpretation of Article 1134, namely that it permits a tribunal to order security for costs, subject to the applicable arbitration rules. Canada expressed this view in its initial request for security for costs, and Mexico and the United States expressed consistent views in their Article 1128 submissions. Finally, in paragraph 2 of its response to the non-disputing parties' submissions, Canada correctly noted: "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."

15. In accordance with the treaty interpretation principles that I have outlined, the Tribunal must take the NAFTA Parties' common understanding of Article 1134, as evidenced by their submissions in this arbitration, into account.

16. In closing, I will briefly comment on one strand of Claimant's argument in its response to the U.S. Article 1128 submission. Claimant devotes a significant portion of its response to arguing that the NAFTA cannot be amended or modified except through the process set out in Article 2202. Claimant, however, never articulates the basis for its apparent belief that the United States is seeking to amend or modify the NAFTA by way of its Article 1128 submission.

17. To be clear, the United States is not seeking an amendment to or modification of the NAFTA. On the contrary, the interpretation of Article 1134 that all three NAFTA Parties have advanced is fully consistent with the treaty's text, as demonstrated in the Parties' submissions. Indeed, all the elements of treaty interpretation prescribed in Article 31 of the Vienna Convention – including the ordinary meaning, the context, the treaty's object and purpose, and the subsequent agreement or subsequent practice of the NAFTA Parties – support this interpretation of Article 1134.

18. Mr. President, members of the Tribunal, that concludes the second submission on behalf of the United States pursuant to NAFTA Article 1128. The United States stands by the interpretations we made in our previous written submission. Thank you for your time and attention.