

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

BETWEEN:

**TENNANT ENERGY LLC**

Investor

AND

**GOVERNMENT OF CANADA**

Party

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**INVESTOR'S SUBMISSION ON  
PLACE OF ARBITRATION  
April 23, 2019**

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## I. OVERVIEW

1. Article 16 of the 1976 UNCITRAL Arbitration Rules gives the Tribunal discretion to select a place of Arbitration in the event that the disputing parties have not agreed on a location. There has been no agreement between the parties on the Place of Arbitration. NAFTA Article 1130 limits this choice to the territory of the three NAFTA Parties.
2. The Investor proposes Miami, Florida as the seat for this arbitration. Miami was the seat selected by the NAFTA Tribunal in *Mesa Power Group v Canada* when it had to make a similar choice.
3. A particularly important factual issue is the confirmation of illegal despoliation of evidence by senior Ontario government officials. Such despoliation appears to affect relevant and material documents in this arbitration. In particular, senior officials in the Office of the Premier of Ontario were criminally convicted for the destruction of such electronic evidence. Trillium Power, a non-party to this arbitration, who sought a windpower energy contract under the same Ontario Feed-in Tariff has an ongoing case in the Canadian courts involving the destruction of such evidence relating to windpower contracts. The fact of the unlawful destruction has been canvassed in the Claimant's Notice of Arbitration and also by the Canadian courts in criminal convictions which occurred after the filing of the Notice of Arbitration. The illegal destruction of this important evidence has been widely reported in the Canadian media.<sup>1</sup>
4. Much of the wrongful conduct in this arbitration was directed from the Office of the Premier of Ontario. The destruction of such evidence is disconcerting.
5. In such exceptional circumstances, it appears necessary for the Investor to obtain evidence from third persons who received the illegally destroyed emails. The Investor reasonably believes that relevant and necessary evidence exists with recipient companies in the United States. Such evidence can be obtained through recourse to American domestic law that assists the international arbitration process — namely, the Section 1782 process and procedures under the *Federal Arbitration Act* (FAA).
6. Six years ago, a similar dispute about the place of arbitration took place in a NAFTA case involving contracts under the Ontario Feed-in Tariff, *Mesa Power Group v. Canada*. The NAFTA Tribunal had to consider similar facts (other than the knowledge of the criminal destruction of relevant evidence by the Premier's senior staff). After considering the factors at issue, and the need for evidence, the Mesa Power NAFTA Tribunal concluded that a place of arbitration in the United States would be most suitable for the arbitration.<sup>2</sup> In

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<sup>1</sup> See Investor's Notice of Arbitration at paras. 87-88, 113-123, which relied on newspaper reports of the charges and subsequent criminal conviction of the most senior official in Ontario Premier Dalton McGuinty's office for arranging to have all electronic records of a number of computers in the Premier's offices illegally "wiped" by a cyber professional to ensure that all evidence of communications had been destroyed.

<sup>2</sup> *Mesa Power Group*, Procedural Order No. 3, March 28, 2013 (CLA-1)  
<https://www.italaw.com/sites/default/files/case-documents/italaw1388.pdf>

*Mesa Power*, Canada sought a place of arbitration in Canada, and the Investor sought a place of arbitration where evidence was being sought, namely Miami, or New York.

7. The Investor in *Mesa Power Group v Canada* obtained evidence from US parties under the US Section 1782 process. The Section 1782 process allows a US District Court to assist a foreign or international tribunal in obtaining evidence from third parties to an arbitration. In the *Mesa Power Group* arbitration, key evidence from competitors for Ontario Feed-in Tariff energy contracts was located within the State of Florida, near New York City and close to San Francisco. The competitors of Mesa Power Group seeking Ontario Feed-in Tariff Contracts would also be competitors of the Tennant Energy. There is no similar process available to the disputing parties under Canadian law. Also, the Investor also believed it necessary to obtain evidence under the procedures in the US *Federal Arbitration Act*. (FAA).
8. Mesa Power Group was compelled to redact thousands of pages of evidence to facilitate public disclosure under the terms of the Confidentiality Order, and subsequent rulings, by the Mesa Power Group NAFTA Tribunal.<sup>3</sup>
9. Canada has advocated for a Confidentiality Order in the current case like that used in Mesa Power that would compel the Investor to provide redacted “declassified” versions of all evidence and all documents used in the arbitration. Producing the declassified documents is very laborious and imposes great expense to the Investor. Furthermore, the orders advanced by Canada have artificially short periods to produce declassified documents that increase the cost and hardship to the parties.
10. In the *Mesa Power Group* case alone, the Investor had to incur many hundreds of thousands of dollars of cost to comply with these obligations, and there were numerous motions on the sufficiency of the redaction.
11. Even more astonishing was the recent discovery by counsel for the Investor that **none** of the declassified materials filed in the Mesa Power Group claim, or in the Windstream claim, were made available to the public. After this discovery, Counsel for the Investor wrote to counsel for the Respondent on February 20, 2019, and again on February 26, 2019, enquiring about the status and the production of evidence that had been produced in the *Mesa Power* and *Windstream Power* NAFTA Claims. Production of non-confidential evidence filed in these two NAFTA claims, if produced in the current case, could substantially reduce the need for some, but not all, of the document requests that might need to be made to US courts.
12. The Investor’s February 26<sup>th</sup> email stated:

We noted in our February 20th email that non-confidential evidence was filed in the two NAFTA arbitrations about Ontario’s Feed-in Tariff involving Canada,

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<sup>3</sup> Mesa Power Group, Procedural Order No. 3 (CLA-1) <https://www.italaw.com/sites/default/files/case-documents/italaw1388.pdf>

namely Windstream and Mesa Power. We noted that we looked at Canada's NAFTA website and the PCA website for each of these NAFTA cases. We have not been able to locate public access to the declassified evidence available for either case on Canada's website or at the PCA.

We note that you have refused to respond to our request about the location of the documents, just as you have refused to address other procedural questions, we have posed to you about the preservation of documents or the filing of a Statement of Defense. To be clear, our enquiry to you right now is about the current public availability of this declassified public information.<sup>4</sup>

13. In a response on February 27, 2019, Canada confirmed that it had the non-confidential materials, but that none of this information had been made available to the public. The email stated:

While the exhibits in the Mesa and Windstream arbitrations are not posted on the PCA website, this information may be subject to public disclosure in accordance with Canada's domestic laws.<sup>5</sup>

14. Canada would not entertain producing this evidence at this time. Instead, Canada suggested recourse to its lengthy and costly access to information process, subject to challenge and potential court review, to obtain the declassified information filed in the previous NAFTA Challenges involving the Ontario green energy contract program.
15. On account of Canada's lack of cooperation, the Investor will require materials from sources in the United States, at a minimum, to obtain some of the very same documentary materials filed in the *Mesa Power* Claim. Such a situation might be completely obviated should Canada disclose and produce non-confidential evidence from the NAFTA arbitrations in Windstream and Mesa Power Group at this time.
16. The Investor recognizes that this is not a forum for motions on evidence, but it would be appropriate for Canada to address this issue at the Procedural Meeting, and also for the Tribunal to consider hearing such a motion.
17. Canada's detailed submissions to the Tribunal in its letter of March 14, 2019, on the place of arbitration (pages 3 to 5) comprehensively address Respondent's views on the key factors in the 2016 UNCITRAL Organizing Notes. Canada's submission completely ignores the Investor's need to obtain documents in the possession of third parties located in the United States through the cooperation of the US courts. Canada has not indicated in its submissions that judicial assistance will be necessary from Canadian courts. The Investor's need to obtain US based documents must be considered in the context of Canada's lack of expressed need for domestic Canadian court recourse. Both of these factors are relevant to

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<sup>4</sup> Email – Barry Appleton to Lori Di Pierdomenico, February 26, 2019 (also setting out the text of the February 20, 2019 email from Barry Appleton to Respondent seeking declassified materials filed in the Mesa Power and Windstream NAFTA Claims). (C-1).

<sup>5</sup> Email – Lori Di Pierdomenico to Barry Appleton, February 27, 2019 (C-2)

the Tribunal's determination of place of arbitration in this current case.

18. The fact that there are procedures available under American law to assist the disputing parties to obtain evidence from persons located in the United States that are not available under Canadian law is a decisive factor favoring the selection of a US venue over a Canadian one. The *Mesa Power Group* Tribunal relied on this decisive factor to decide to make the place of Arbitration Miami Florida in that case, over Canada's objection.
19. Similarly, a US-based place of arbitration would be the most practical and convenient way to compel necessary witness testimony and documents.
  - a. The US *FAA* is supportive of NAFTA arbitrations and is effective in securing significant third-party evidence that is situated in the United States and central to this arbitration.
  - b. The Courts of the State of Florida are particularly supportive of international arbitration. Both are UNCITRAL Model Law jurisdictions.

## **II. THERE IS MATERIAL EVIDENCE LOCATED IN THE UNITED STATES AND JUDICIAL ASSISTANCE WILL BE NECESSARY TO OBTAIN THIS EVIDENCE**

20. The UNCITRAL *Notes on Organizing Arbitral Proceedings*<sup>6</sup> identify the "prominent" factors that could be considered in determining the seat of arbitration.<sup>7</sup>
21. In this case, third-party evidence located in the United States consists of witnesses and documents in the possession or control of third-party competitors of Tennant Energy who obtained preferential treatment from Canada. A key factor is the "location of the subject-matter in dispute and proximity of evidence".<sup>8</sup>
22. Based on the production of evidence in the *Mesa Power Group v Canada* NAFTA Claim, the Investor reasonably believes that such evidence is located in the possession of third parties located in the states of Florida, in New York and New Jersey.

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<sup>6</sup>UNCITRAL *Notes on Organizing Arbitral Proceedings* (2016) ("UNCITRAL Notes"), available at: <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-2016-e.pdf>. (CLA-28). (Hereinafter, the "UNCITRAL Notes") Paragraph 3 of the Notes state that: "The Notes do not impose any legal requirement binding on the parties or the arbitral tribunal. The parties and the arbitral tribunal may use or refer to the Notes at their discretion and to the extent they see fit and need not adopt or provide reasons for not adopting any particular element of the Notes."

<sup>7</sup> These "more prominent legal factors" are: "(a) The arbitral proceedings; (b) The law, jurisprudence and practices at the place of arbitration regarding: (i) court intervention in the course of arbitral proceedings; (ii) the scope of judicial review or of grounds for setting aside an award; and (iii) any qualification requirements with respect to arbitrators and counsel representation; and (c) Whether the State where the arbitration takes place and hence where the arbitral award will be made is a Party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") and/or to any other multilateral or bilateral treaty on enforcement of arbitral awards." UNCITRAL Notes Paragraph 22 (CLA-28).

<sup>8</sup> For the avoidance of doubt, in this submission, when we refer to Canada, we mean all governments at every level in the territory of Canada (including their agents, agencies, instrumentalists, or interests).

23. Enforcing a subpoena made against a person resident in another US state is easier to obtain and enforce from a court in the United States when the arbitral tribunal is seated in the United States. The *FAA* allows the tribunal to seek the assistance of US Courts in obtaining this evidence.<sup>9</sup> US jurisprudence applying Section 7 of the *FAA* is particularly supportive of the Tribunal convening in the jurisdiction where third-party evidence is located to enable the support of US courts in obtaining the evidence. In addition to the Section 1782 procedure, state law to implement the UNCITRAL Model Law is also available to support an arbitration tribunal within that state. Section 7 of the *FAA* gives arbitrators the authority on their own to summon witnesses, including third-party witnesses. If a witness fails to attend, a court in the district where the tribunal is sitting can compel the witness to appear.

### **Considerations taken by the Mesa Power Group Tribunal**

24. The NAFTA Tribunal in *Mesa Power Group* set the place of arbitration in Miami, Florida specifically to take into account the potential need for assistance from US Courts. In *Mesa Power Procedural Order No. 3*, the *Mesa Power* Tribunal concluded that the benefits of FAA Section 7 and Section 1782 tipped the balance to the United States for the Place of Arbitration.<sup>10</sup>
25. It is not surprising that there is some similarity between the Mesa Power Group claim and the Tennant Energy claim as they were both seeking Ontario Feed-in Tariff contracts and thus facing the same market competitors.
26. The *Mesa Power* Tribunal stated the following:
44. The Tribunal makes no comment here on whether it would actually exercise the power conferred on it by Section 7. Rather, the relevant point at this stage is the potential for the Claimant to make such an application, if it considers this appropriate. If the seat is in the US, the Claimant has the possibility to seek to compel evidence from third parties situated there. The same does not appear to be true, however, if the arbitration is seated in Canada. In other words, a decision at this stage to designate a Canadian seat would appear to entirely exclude this option. This possibility of facilitating the production of allegedly relevant and material evidence - whether or not it is in fact invoked or permitted - thus speaks in favor of a US seat, which would allow all procedural options to be kept open.
45. This is especially so as the Respondent has not asserted a need to compel evidence from third parties in Canada. Neither has the Respondent shown that it would be prejudiced by a US seat in terms of the factors analyzed here. Rather, it has submitted that, depending on the location of the seat in the US, there may be significant territorial and temporal limitations on the Tribunal's authority under

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<sup>9</sup> United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9. U.S.C. §§ 1-307 (2000) (hereinafter the "FAA") (CLA-2). <http://www.legisworks.org/congress/68/publaw-401.pdf>

<sup>10</sup> Mesa Power Group, Procedural Order No. 3 (CLA-1) <https://www.italaw.com/sites/default/files/case-documents/italaw1388.pdf>

Section 7 of the FAA. However, the Claimant itself has disputed this position. While it makes no assessment here on such limitations, the Tribunal notes that, should any such territorial or temporal limitations exist, any related detriment would fall exclusively on the Claimant, who chose to request a US seat. It is the Claimant that takes this risk.<sup>11</sup>

27. In this case, relevant and material third-party evidence is in the possession or control of persons in various locations in the US, and there is no indication that judicial assistance will be necessary to obtain third-party evidence in Canada.
28. The *Mesa Power* NAFTA Tribunal stated the following in paragraph 55 of its Procedural Order:

....., the Tribunal believes that Miami, Florida is the most appropriate. According to the Claimant, “key evidence...is located within the State of Florida” (and hence the Claimant has already filed an application under Section 1782 before the United States District Court for the Southern District of Florida). Courts in Florida are considered to be supportive of international arbitration. Florida is an UNCITRAL Model Law jurisdiction and the legal framework applicable to international arbitrations is thus consistent with transnational standards. Further, in the absence of a decision of the United States Court of Appeals for the Eleventh Circuit, the decision in *Festus* lends credence to the view that United States District Courts within that Circuit may interpret Section 7 of the FAA to permit compulsion of evidence located in the United States for use in a US-seated arbitration without territorial or temporal limitations. Having carefully considered all options, the Tribunal concludes that the appropriate seat for this arbitration is Miami, Florida.<sup>12</sup>

29. The place where the Tribunal sits need not be the place of arbitration. That provides greater flexibility and assists in gathering evidence throughout the US. Under the *FAA*, the Tribunal can hold a hearing in the district where necessary evidence is located to obtain the assistance of the courts in that district to secure that evidence.<sup>13</sup>
30. US Courts also have held that the power under Section 7 of the *FAA* also extends to evidence located outside the district where the court is located.<sup>14</sup> Evidence can be obtained

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<sup>11</sup> *Mesa Power Group*, Procedural Order No. 3 (**CLA-1**)

<sup>12</sup> *Mesa Power Group*, Procedural Order No. 3, March 28, 2013 (**CLA-1**).

<sup>13</sup> Mitchell L. Marinello & John Haarlow, Jr., *Nonparty Discovery Under the Federal Arbitration Act*, 98 Illinois Bar Journal (2010) (**C-5**) <https://www.novackmacey.com/files/5214/6739/0189/Nonparty-Discovery-Under-the-Federal-Arbitration-Act.pdf>; Leslie Trager, *The Use of Subpoenas in Arbitration*, Dispute Resolution Journal 14 (November 2007/January 2008) (**CLA-30**). [https://www.westlaw.com/Document/I0404ea7cb4ba11dc9ef6e6f359b87f02/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I0404ea7cb4ba11dc9ef6e6f359b87f02/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0)

<sup>14</sup> *Security Life Insurance Co. of America v. Duncanson & Holt*, 228 F. 3d 865, 872 (8th Cir. 2000) (**CLA-3**) <https://www.leagle.com/decision/20001093228f3d86511020>; *Wash. Nat'l Ins. Co. v. Obex Grp. LLC*, No. 18 CV



under section 7 of the *FAA* in conjunction with evidence obtained under Section 1782, which is still available and appropriate. This would allow the Tribunal to subpoena evidence located in other US jurisdictions.

31. The *Mesa Power* Tribunal also commented on the relevance of Section 1782 relief when deciding in favor of a US place of Arbitration. The *Mesa Power* Tribunal stated:

46. The Tribunal also notes the Respondent's argument that with a seat in Canada the Tribunal could make use of Section 1782, while it is "at best uncertain" whether Section 1782 is available to a tribunal seated in the US. On the basis of the record as it stands and on a review of the authorities submitted, the Tribunal can reach no conclusion on the availability of Section 1782 proceedings if the seat is set in the US. This is, in any event, a conclusion for the courts to reach. But if Section 1782 were held inapplicable, any prejudice would again fall exclusively on the Claimant, who argued in favor of a seat in the US.<sup>15</sup>

32. Florida, (where evidence directly relevant to this claim is located) has adopted the UNCITRAL Model Law and is supportive of enforcing subpoenas issued by a court in another UNCITRAL Model Law jurisdiction.
33. In the process, the tribunal retains the jurisdiction to determine whether the evidence is material. In *Festus v. Merrill Lynch*, the US Courts have left the assessment of the materiality of the evidence to the tribunal.<sup>16</sup>
34. The jurisprudence of the US Second Circuit, as reflected in *Life Receivables* case, confirms that Tribunal can convene for the sole purpose of obtaining evidence, and does not prohibit the Tribunal from convening in another jurisdiction.<sup>17</sup> In *Stolt-Neilsen* the

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9693 (VB), 2019 U.S. Dist. LEXIS 9300, at \*13-14 (S.D.N.Y. Jan. 18, 2019) [https://www.westlaw.com/Document/I7dd632101d6611e9a1b0e6625e646f8f/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I7dd632101d6611e9a1b0e6625e646f8f/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

<sup>15</sup> *Mesa Power Group, Procedural Order No. 3 (CLA-1)*

<sup>16</sup> *Festus & Helen Stacy Foundation, Inc. v. Merrill Lynch, Pierce Fenner, & Smith Inc.*, 432 F. Supp. 2d 1375, 1379-1380 (N.D. Ga. 2006) (CLA-4) <https://www.courtlistener.com/opinion/2414159/festus-helen-stacy-found-v-merrill-lynch/?q=++Festus+%26+Helen+Stacy+Foundation%2C+Inc.+v.+Merrill+Lynch> (holding that issues of the relevance and materiality of the information sought by subpoena should be left to the arbitrators); see also *Wash. Nat'l Ins. Co. v. Obex Grp. LLC*, No. 18 CV 9693 (VB), 2019 U.S. Dist. LEXIS 9300, at \*16-17 (S.D.N.Y. Jan. 18, 2019) (same) (CLA-17) [https://www.westlaw.com/Document/I7dd632101d6611e9a1b0e6625e646f8f/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I7dd632101d6611e9a1b0e6625e646f8f/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

<sup>17</sup> *Life Receivables v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 218 (2d Cir. 2008) (CLA-5) <https://www.courtlistener.com/opinion/2549/life-receivables-trust-v-syndicate-102-lloyds-of-london/>; see also *Wash. Nat'l Ins. Co. v. Obex Grp. LLC*, No. 18 CV 9693 (VB), 2019 U.S. Dist. LEXIS 9300, at \*13-14 (S.D.N.Y. Jan. 18, 2019) (court upheld subpoena for hearing scheduled to be held in Pennsylvania, although the final hearing would occur in New York) (CLA-17); *Westlake Vinyls, Inc. v. Cooke*, No. 3:18-MC-00018-DJH-LLK, 2018 U.S. Dist. LEXIS 221033, at \*5 (W.D. Ky. Aug. 20, 2018) (court held that "arbitrators have the power to order discovery at a [ ] [preliminary] arbitration hearing") (CLA-18) <https://advance.lexis.com/api/permalink/fad26a37-adc6-4bc4-832f-1b1e775ecb03/?context=1000516>.



Second Circuit Court said that “*Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel...*”, and, quoting the lower court, stated:

*Nothing in the language of the FAA limits the point in time in the arbitration process when [the subpoena] power can be invoked or says that the arbitrators may only invoke this power under section 7 at the time of the trial-like final hearing.*<sup>18</sup>

35. Further, the Eight and Sixth Circuit Courts of Appeal have both held that arbitrators can subpoena documents without holding a hearing.<sup>19</sup> In *American Federation of Television and Radio Artists v. WJBK-TV*, the Court held that Section 7 of the *FAA* “implicitly includes the authority to compel the production of documents for inspection by a party before the hearing.”<sup>20</sup>
36. Any witnesses located in Canada who are expected at this time to give evidence are within the control of the parties, including government representatives over whom Canada has responsibility under NAFTA Article 105 (officials of the government of Canada and its sub-national government).
37. Canada has never suggested that there will be a need to compel evidence by witnesses not controlled by a disputing party in the territory of Canada. Canada has not established that it would be necessary to compel evidence or testimony in Canada. The Investor does not believe it will be necessary to compel witnesses in the territory of Canada who is not controlled by a Disputing Party. This is in sharp contrast to the Investor’s belief about the need to obtain evidence in the territory of the United States.
38. Given the nature of the evidence in the US, it is relatively easier and more direct to obtain evidence from a tribunal order if the place of arbitration is the US than if the seat is located in Canada.

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<sup>18</sup> *Stolt-Nielsen* at page 578 (citing the decision of the lower court in *Odfjell ASA v. Celanese AG*, 348 F. Supp. 2d 283, 287 (S.D.N.Y., 2004)) (CLA-6) <https://www.courtlistener.com/opinion/2306748/odfjell-asa-v-celanese-ag/>

<sup>19</sup> *In re Arbitration Between Security Life Insurance Co. of America*, F. 3d 865, 872 (8th Cir. 2000) (CLA-17). [https://www.westlaw.com/Document/I69a4a670799011d9ac1ffa9f33b6c3b0/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I69a4a670799011d9ac1ffa9f33b6c3b0/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0); *American Federation of Television and Radio Artists v. WJBK-TV*, 164 F.3d 1004, 1009 (6th Cir. 1999) (CLA-8). <https://openjurist.org/164/f3d/1004/american-federation-of-television-and-radio-artists--v-wjvk-tv-a-and-m>.

<sup>20</sup> *American Federation v. WJBK-TV* (CLA-8); see also *UFCW, Loc. 400 v. Kroger Mid-Atlantic*, Civil Action No. DKC 14-3133, 2015 U.S. Dist. LEXIS 40808, at \*6 (D. Md. Mar. 27, 2015) (court upheld subpoena for documents issued by tribunal) (CLA-19) [https://www.westlaw.com/Document/I701e1b31d8bc11e490d4edf60ce7d742/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I701e1b31d8bc11e490d4edf60ce7d742/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

### III. THE FAA IS FAVORABLE PROCEDURAL LAW

39. The suitability of the arbitral procedure law of the place of arbitration is also a factor that favors an arbitral seat in the US. The *FAA* is supportive of arbitration, and the attitude of US courts is much more deferential to arbitration than Canadian courts.
40. In the judicial review of the Metalclad NAFTA Chapter Eleven decision, Canada argued before the courts that Canadian courts have broad powers of review over NAFTA arbitration tribunal decisions and that awards of NAFTA Chapter Eleven tribunals are not worthy of judicial deference.<sup>21</sup>
41. Recent decisions of the US Supreme Court in *AT&T Mobility v. Concepcion*<sup>22</sup> and *KPMG LLP v. Robert Cocchi*<sup>23</sup> have re-affirmed the Court's support of arbitration.<sup>24</sup> In *KPMG LLP v. Robert Cocchi* the court said:

*The Federal Arbitration Act reflects an “emphatic federal policy in favor of arbitral dispute resolution.” Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U. S. 614, 631 (1985); Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U. S. 1, 24–25 (1983) (noting that “questions of arbitrability [must] ... be addressed with a healthy regard for the federal policy favoring arbitration”).<sup>25</sup>*

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<sup>21</sup> *United Mexican States v. Metalclad Corporation*, Outline of Argument of Intervenor Attorney General of Canada, 16 February 2001 (CLA-9) at para. 25. [https://files.pca-cpa.org/bi-c/2.%20Canada/4.%20Legal%20Authorities/RA-94%20-%20United%20Mexican%20States%20v.%20Metalclad%20Corp.,%20Outline%20of%20Argument%20of%20Intervenor%20\(Feb.%202016,%202001\).pdf](https://files.pca-cpa.org/bi-c/2.%20Canada/4.%20Legal%20Authorities/RA-94%20-%20United%20Mexican%20States%20v.%20Metalclad%20Corp.,%20Outline%20of%20Argument%20of%20Intervenor%20(Feb.%202016,%202001).pdf)

<sup>22</sup> *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011) (CLA-10). <https://www.supremecourt.gov/opinions/10pdf/09-893.pdf>.

<sup>23</sup> *KPMG LLP v. Robert Cocchi et al.*, 132 S. Ct. 23 (2011) (CLA-11). [https://www.courtlistener.com/opinion/616808/kpmg-llp-v-cocchi/q=KPMG+LLP+v.+Robert+Cocchi+et+al&type=o&order\\_by=score+desc&stat\\_Precedential=on](https://www.courtlistener.com/opinion/616808/kpmg-llp-v-cocchi/q=KPMG+LLP+v.+Robert+Cocchi+et+al&type=o&order_by=score+desc&stat_Precedential=on).

<sup>24</sup> See also *Directv, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (FAA embodies federal policy favoring arbitration) (CLA-20) [https://www.supremecourt.gov/opinions/15pdf/14-462\\_2co3.pdf](https://www.supremecourt.gov/opinions/15pdf/14-462_2co3.pdf); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (same) (CLA-21) [https://www.supremecourt.gov/opinions/17pdf/16-285\\_q811.pdf](https://www.supremecourt.gov/opinions/17pdf/16-285_q811.pdf); *Sherrard v. Macy's Sys. & Tech., Inc.*, 724 F. App'x 736, 739 (11th Cir. 2018) (same) (CLA-22) [https://www.westlaw.com/Document/Idad4dc100b3711e8818da80a62699cb5/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=da3.0](https://www.westlaw.com/Document/Idad4dc100b3711e8818da80a62699cb5/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=da3.0); *Jones v. Waffle House, Inc.*, 866 F.3d 1257, 1264 (11th Cir. 2017) (same) (CLA-23) [https://1.next.westlaw.com/Link/Document/Blob/I1977420C1DD211B2B1F3B400520D57E5/866\\_F.3d\\_1257.pdf?targetType=NRS&originationContext=pagepdfink&transitionType=DocumentImage&uniqueId=e9c7fb0d-c9c5-4cac-b59f-e3bfdeb40edb&contextData=\(sc.Search\)](https://1.next.westlaw.com/Link/Document/Blob/I1977420C1DD211B2B1F3B400520D57E5/866_F.3d_1257.pdf?targetType=NRS&originationContext=pagepdfink&transitionType=DocumentImage&uniqueId=e9c7fb0d-c9c5-4cac-b59f-e3bfdeb40edb&contextData=(sc.Search)).

<sup>25</sup> *KPMG LLP v. Robert Cocchi* (CLA-11) at page 3.

42. Canada has not indicated that it will be necessary to obtain evidence from third parties located in Canada. All of their evidence in Canada (that is evidence that was not destroyed) is in the control of the parties to the arbitration. So the assistance of Canadian courts to obtain evidence is not needed.

43. In *United States District Court v. Royal American Shows*, the Supreme Court of Canada stated:

*As this court has indicated in Zingre v. The Queen, [1981] 2 S.C.R. 392, comity dictates that a liberal approach should be taken to requests for judicial assistance so long at least as there is more than ephemeral anchorage in our legislation to support them.*<sup>26</sup>

44. In any event, should assistance be required, Canada has also adopted a liberal approach to letters of request from foreign courts,<sup>27</sup> and comity is respected.

45. On the 80<sup>th</sup> anniversary of the FAA, Gabrielle Kaufmann-Kohler echoed the same observation in a speech before the ICDR in Dublin:

*The FAA is an outstanding piece of legislation, not only for its durability, but mainly because it has achieved the goals of legitimating and supporting arbitration remarkably well.*<sup>28</sup>

46. In contrast, Prof Frederic Bachand comments in his article “Supreme Court of Canada: Pro-Arbitration No More” that:

*Anyone considering Canada as the seat of an arbitration or as one among several jurisdictions where recognition and enforcement proceedings could be commenced should pay close attention to the Supreme Court of Canada’s March 18 decision in *Seidel v. Telus Communications Inc.*, 2011 SCC 15, which appears*

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<sup>26</sup> *United States of America (District Court) v Royal American Shows* [1982] 1 S.C.R. 414, at page 421 (CLA-12). <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5463/index.do>.

<sup>27</sup> *R. v. Zingre* [1981] 2 S.C.R. 392 (CLA-13) <https://scc-csc.lexum.com/scc-csc/scc-csc/en/2528/1/document.do>; *United States of America (District Court) v Royal American Shows* [1982] 1 S.C.R. 414 (CLA-12), <http://canlii.ca/t/1mjlv>, <http://canlii.ca/t/1z1bd>; *Germany (Federal Republic) v. Canadian Imperial Bank of Commerce* (1997), 31 O.R. (3d) 684, affirmed at [1998] 0.1. No 2062. (CLA-14), <http://canlii.ca/t/1vv5p>; *France (Republic) v. De Havilland Aircraft of Canada Ltd.* (1991), 3 O.R. (3d) 705. (CLA-15), <http://canlii.ca/t/g1ccj>. See also Michael Penny, *Letters of Request: Will A Canadian Court Enforce a Letter of Request from An International Tribunal?* (2001) 12 *American Review of International Arbitration* 249, at page 258: "where the request for assistance of a foreign arbitral tribunal comes through a foreign court of competent jurisdiction, there will be no jurisdictional bar to a consideration of the request or to the exercise of the Court's discretion in accordance with accepted principles." (CLA-31) [https://www.westlaw.com/Document/I66bc33314a8411dba16d88fb847e95e5/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/Document/I66bc33314a8411dba16d88fb847e95e5/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0).

<sup>28</sup> Gabrielle Kaufmann-Kohler, *Global Implications of the U.S. Federal Arbitration Act: The Role of Legislation in International Arbitration*, American Arbitration Association Federal Arbitration Act at 80 Anniversary Lecture Series, Dublin, 20 May 2005 (CLA-32) at page 355. <https://academic.oup.com/icsidreview/article-abstract/20/2/339/743035?redirectedFrom=fulltext>

to mark a philosophical shift in Canadian arbitration law that is as significant as it was unexpected.<sup>29</sup>

#### IV. FLORIDA HAS FAVORABLE PROCEDURAL LAW

47. The Revised Florida Arbitration Code authorizes an arbitrator to order discovery and prehearing depositions of witnesses.<sup>30</sup>
48. Section 682.08 of the Revised Florida Arbitration Code, in fact, authorizes an arbitrator to compel the production of documents and to issue subpoenas for that purpose.<sup>31</sup> Thus, if the tribunal names Miami as the place of arbitration, it would accordingly be authorized under the Revised Florida Arbitration Code to issue subpoenas and the production of documents or depositions as needed.

#### V. OTHER FACTORS

49. NAFTA Article 1115, and Article 15 of the 1976 UNCITRAL Arbitration Rules reinforce that the choice of the place of arbitration must not compromise the equality between the parties. The *UPS* and *Merrill* NAFTA Chapter Eleven tribunals applied this principle of equality in selecting the United States to be the place of arbitration. Separating the reviewing or supervising court from the state that is under review (Canada) will secure a neutral procedural environment.
50. Another factor in the UNCITRAL Notes is the “convenience of the Parties and Arbitrators.” Miami is a convenient location for the Parties and Arbitrators.

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<sup>29</sup> Frederic Bachand, *The Supreme Court of Canada: Pro-Arbitration No More*,” Kluwer Arbitration Blog, 31 March 2011 (CLA-33). <http://arbitrationblog.kluwerarbitration.com/2011/03/31/the-supreme-court-of-canada-pro-arbitration-no-more/>

<sup>30</sup> See Fla. Stat. § 682.08(2) (“an arbitrator may permit a deposition of any witness to be taken for use as evidence”) (CLA-27) [https://www.westlaw.com/Document/N25B929D0E3AF11E28843F593B78874C5/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=da3.0](https://www.westlaw.com/Document/N25B929D0E3AF11E28843F593B78874C5/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=da3.0); see also *Tenet Healthcare Corp. v. Maharaj*, 859 So. 2d 1209, 1210 (Fla. 4th DCA 2003) (“The Florida Arbitration Code authorizes an arbitrator to order discovery”) (CLA-25) [https://www.westlaw.com/Document/Icd4851d1738c11e18b1ac573b20fcfb7/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cb1t1.0](https://www.westlaw.com/Document/Icd4851d1738c11e18b1ac573b20fcfb7/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cb1t1.0); *U.S. Fid. & Guar. Co. v. Romy*, 744 So. 2d 467, n.4 (Fla. 3d DCA 1999) (“It is within the [arbitrator’s] power to permit document discovery and prehearing depositions of witnesses”) (CLA-26) [https://www.westlaw.com/Document/Icdece9d10e9211d9bde8ee3d49ead4ec/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=da3.0](https://www.westlaw.com/Document/Icdece9d10e9211d9bde8ee3d49ead4ec/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=da3.0).

<sup>31</sup> See Fla. Stat. § 682.08(1) (“an arbitrator may issue a subpoena for the attendance of a witness”); Fla. Stat. § 682.08(4) (“the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator’s discovery-related orders [and] issue subpoenas for the attendance of a witness”); *Tenet Healthcare Corp.*, 859 So. 2d 1209 at 11 (“Section 682.08 explicitly allows the arbitrator to compel production and to issue subpoenas”) (CLA-25); see also Fla. Stat. § 682.014(2)(a)(4) (a party may not waive or agree to vary the authority of arbitrators to issue subpoenas and permit depositions under section 682.08(1) or (2)) (CLA-27). [https://www.westlaw.com/Document/NCEDAFEE0DCA511E39D82DF671CE76D93/View/FullText.html?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=da3.0](https://www.westlaw.com/Document/NCEDAFEE0DCA511E39D82DF671CE76D93/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=da3.0).

51. The “availability and costs of support services,” also supports Miami as the place of arbitration, as the city has state-of-the-art hearing facilities.
52. Conversely, if the arbitration were held in Canada, the arbitrators would be required to file and remit Canada’s Goods and Services Tax (GST) for their arbitration services, which would unnecessarily increase the cost of the arbitration.

**VI. RELIEF SOUGHT**

53. Accordingly, the Investor seeks that the Tribunal determine the place of arbitration to be Miami, Florida or some other convenient location in the United States (such as Washington, D.C. or Houston, Texas).

All of which is respectfully submitted.

Submitted this 23<sup>rd</sup> day of April 2019 on behalf of counsel for the Investor.



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