

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

**-between-**

**THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN  
EINARSSON, AND GEOPHYSICAL SERVICE INCORPORATED  
(the “Claimants”)**

**-and-**

**GOVERNMENT OF CANADA  
(the “Respondent”, and together with the Claimants, the “Disputing Parties”)  
(ICSID CASE NO. UNCT/20/6)**

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**PROCEDURAL ORDER NO. 1**

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**The Arbitral Tribunal**

*Ms. Carita Wallgren-Lindholm (Presiding Arbitrator)*

*Mr. Trey Gowdy*

*Mr. Toby Landau QC*

**Administrative Authority**

ICSID

**Tribunal Secretary**

*Ms. Geraldine R. Fischer*

**10 May 2022**

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## 1. Background

- 1.1 This first procedural order sets out the procedural rules which shall govern this arbitration.
- 1.2 These rules were discussed between the Disputing Parties and the Tribunal during an initial procedural meeting held 14 October 2020, during which discussion it was agreed that ICSID would be the Administrative Authority of the arbitration, that the arbitration would be conducted pursuant to the 1976 UNCITRAL Arbitration Rules rather than the 2010 UNCITRAL Arbitration Rules (as the Tribunal had proposed) and that the place of the arbitration would be Calgary, Alberta.
- 1.3 Following the first case management conference with representatives of the Disputing Parties and the Tribunal on 13 April 2022, and after having consulted with the Disputing Parties, the Tribunal hereby **ORDERS** and **DIRECTS** as follows:

## 2. Disputing Parties to the Arbitration

The Claimants	Counsel for the Claimants
<p><b>Theodore David Einarsson</b> 2115, 24001 Cinco Village Center Blvd. Katy, TX 77494 United States of America</p> <p><b>Harold Paul Einarsson</b> 403, 655 India Street San Diego, CA 92101 United States of America</p> <p><b>Russell John Einarsson</b> 27103 Skiers Crossing Drive Katy, TX 77493 United States of America</p> <p><b>Geophysical Service Incorporated</b> 2120, 237 4 Avenue SW Calgary, AB T2P 4K3 Canada</p>	<p><b>Ms. Matti Lemmens, Lead Counsel</b> <b>Mr. Zachary Seymour, Counsel</b> <b>Borden Ladner Gervais LLP</b> Centennial Place, East Tower 1900, 520 – 3<sup>rd</sup> Ave. S W Calgary, AB T2P 0R3 Canada</p> <p>Tel.: 403 232 9511 Fax: 403 266 1395</p> <p>E-mails: <a href="mailto:MLemmens@blg.com">MLemmens@blg.com</a> <a href="mailto:ZSeymour@blg.com">ZSeymour@blg.com</a></p>

<b>The Respondent</b>	<b>Counsel for the Respondent</b>
<p><b>The Government of Canada</b> Office of the Deputy Attorney General of Canada 284 Wellington Street Ottawa, ON, K1A 0H8 Canada</p>	<p><b>Mr. Mark Luz, Lead Counsel</b> <b>Ms. Sylvie Tabet, General Counsel</b> <b>Ms. Susanna Kam, Counsel</b> <b>Mr. Mark Klaver, Counsel</b> <b>Mr. Dmytro Galagan, Counsel</b> <b>Ms. Camille Bérubé-Lepage, Counsel</b> <b>Ms. Ana Poienaru, Counsel</b></p> <p><b>Counsel</b> Trade Law Bureau (JLT) Global Affairs Canada 125 Sussex Drive Ottawa, ON, K1A 0G2 Canada</p> <p>E-mails: <a href="mailto:Mark.Luz@international.gc.ca">Mark.Luz@international.gc.ca</a> <a href="mailto:Sylvie.Tabet@international.gc.ca">Sylvie.Tabet@international.gc.ca</a> <a href="mailto:Susanna.Kam@international.gc.ca">Susanna.Kam@international.gc.ca</a> <a href="mailto:Mark.Klaver@international.gc.ca">Mark.Klaver@international.gc.ca</a> <a href="mailto:Dmytro.Galagan@international.gc.ca">Dmytro.Galagan@international.gc.ca</a> <a href="mailto:Camille.Berube-Lepage@international.gc.ca">Camille.Berube-Lepage@international.gc.ca</a> <a href="mailto:Ana.Poienaru@international.gc.ca">Ana.Poienaru@international.gc.ca</a></p>

2.1 Correspondence between the Disputing Parties and the Tribunal should also be copied to the following individuals:

- (a) Mr. Benjamin Tait, Paralegal; Ms. Krystal Girvan, Paralegal, Trade Law Bureau, Government of Canada ([Benjamin.Tait@international.gc.ca](mailto:Benjamin.Tait@international.gc.ca); [Krystal.Girvan@international.gc.ca](mailto:Krystal.Girvan@international.gc.ca))
- (b) Rhonda Lastockin, Legal Assistant, Borden Ladner Gervais LLP ([rlastockin@blg.com](mailto:rlastockin@blg.com))

### 3. Constitution of the Tribunal

3.1 The Tribunal is composed of:

**Ms. Carita Wallgren-Lindholm**  
Lindholm Wallgren, Attorneys Ltd.  
Bulevardi 17 A 38  
Helsinki, FI-00120  
Finland  
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- 3.2 The Disputing Parties confirm that the Members of the Tribunal have been validly appointed in accordance with Articles 1123 and 1124 of NAFTA.
- 3.3 Each Member of the Tribunal confirms that she or he is, and shall remain, impartial and independent of the Disputing Parties. Each of the Members of the Tribunal confirms that she or he has disclosed, to the best of her or his knowledge, all circumstances likely to give rise to justifiable doubts as to her or his impartiality or independence and that she or he will promptly disclose any such circumstances that may arise in the future. Each Member of the Tribunal has provided the Disputing Parties with a Statement of Independence, and the Tribunal will take into account the IBA Guidelines on Conflict of Interest, 2014.
- 3.4 The Disputing Parties confirm that they have no objections whatsoever to the constitution of the Tribunal or to the appointment of any Member of the Tribunal in respect of matters known to them as of the date of this Order.
- 3.5 In order for the Members of the Tribunal to fulfil their continuing disclosure obligations under Article 9 of the 1976 UNCITRAL Arbitration Rules, the Tribunal seeks the cooperation of each Disputing Party in promptly drawing to the Tribunal's attention any such circumstances known to that Disputing Party in respect of which it considers that further information would be appropriate as soon as such circumstances become known to that Disputing Party.

**4. Place of Arbitration**

- 4.1 The Disputing Parties agree that the place of arbitration shall be Calgary, Alberta.
- 4.2 Meetings and hearings may take place at other locations including via telephone or video conference if so decided by the Tribunal after consultation with the Disputing Parties. The Tribunal may meet at any location it considers appropriate for deliberations.

- 4.3 Irrespective of the place where a Decision or the Award is signed, it will be deemed to have been made at the place of arbitration.

## **5. Applicable Arbitration Rules**

- 5.1 The procedure in this arbitration shall be governed by the 1976 UNCITRAL Arbitration Rules except as modified by the provisions of Section B of Chapter Eleven of NAFTA (per Article 1120(2) of the NAFTA).
- 5.2 If these provisions and rules do not address a specific procedural issue, the Tribunal shall, after consultation with the Disputing Parties, determine the applicable procedure.

## **6. Procedural language of the Arbitration, Translation and Interpretation**

- 6.1 Having regard to the circumstances of the case, the procedural language of this arbitration is English.
- 6.2 All Memorials, written submissions, witness statements, expert reports and administrative or procedural correspondence shall be submitted in English, provided that witness statements or expert reports may be submitted in the principal language of the witness or expert, and shall be accompanied by an English translation.
- 6.3 If any Disputing Party submits into evidence a document in any language other than English, an English translation of the document – or of the relevant portions, in the case of lengthy documents – shall be submitted simultaneously with the original text. Such documentation includes all evidential and legal materials upon which that Disputing Party relies, including documentary evidence, factual witness statements and expert witness statements or reports. Where a document produced in the course of document production has been prepared in a language other than English, no translation of such document shall be required unless and until it is submitted into evidence as an exhibit.
- 6.4 The Disputing Parties are not required to produce certified translations; a confirmation from counsel that the document is a translation will suffice. Each Disputing Party reserves its right to: (i) challenge the accuracy of the English translation submitted by the other and submit a new translation that clearly identifies the differences; and (ii) submit additional translated parts of any document not submitted or translated in its entirety. Should a Disputing Party challenge the accuracy of the translation submitted by the other Disputing Party, the challenging Disputing Party may request that the Tribunal order that a certified translation be prepared. Should the wording of the certified translation substantially match that of the uncertified one, its cost shall be borne by the challenging Disputing Party.
- 6.5 Any witness giving oral evidence may give such evidence in his or her mother tongue, in whole or in part, provided that interpretation into English to the

satisfaction of the Tribunal is supplied by the Disputing Party presenting the witness for oral evidence. Any Disputing Party intending to present oral evidence in a language other than English shall notify the Tribunal and the other Disputing Party at least thirty days in advance and shall be responsible for providing suitable interpretation of such evidence into English.

- 6.6 As a general principle, each Disputing Party shall bear the costs of translation of documents and interpretation of testimony on which it intends to rely, without prejudice to the decision of the Tribunal as to which Disputing Party shall ultimately bear those costs and in what amount.

## **7. Procedural Calendar**

- 7.1 The Procedural Calendar for this arbitration is attached as Annex II and is made an integral part of this Order. All dates listed in the Procedural Calendar are subject to the Tribunal's availability. The Procedural Calendar accounts for the Claimants' notice dated 9 March 2022 that the Notice of Arbitration dated 18 April 2019 shall be designated as the Statement of Claim in this arbitration.
- 7.2 At any stage of the proceedings, the Disputing Parties may seek further directions from the Tribunal regarding procedural steps relating to and/or in addition to those set out in the Procedural Calendar.
- 7.3 Unless otherwise provided, all time limits shall refer to midnight at the place of arbitration on the day of the deadline.

## **8. Procedural Requests**

- 8.1 If a Disputing Party introduces a motion or procedural request, as a general rule, the other Party shall have ten days to reply, not including the day on which the request was made, unless otherwise agreed by the Disputing Parties or ordered by the Tribunal. No further submissions on a request shall be made by either Disputing Party without the express authorization of the Tribunal in advance.

## **9. General Document Filing Procedures**

- 9.1 On the date any Memorial (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial) is due, the Disputing Party in question shall send an electronic version of the Memorial, together with any witness statements and expert reports, and indices of exhibits and authorities by e-mail (with all documents (apart from exhibits and authorities) in searchable format) to the Tribunal, with a copy simultaneously to opposing counsel and ICSID. Within three days following the filing of its Memorial, the Disputing Party in question shall upload to the electronic platform, the Memorial, with any accompanying witness statements, expert reports, exhibits, authorities and indices, with hyperlinked citations in the indices.

- 9.2 Any documents submitted by a Disputing Party pursuant to paragraph 9.1 shall be uploaded to the data-sharing electronic platform in a searchable Portable Document Format. With the exception of exhibits, all documents shall be consecutively paragraph-numbered and page-numbered in Arabic numerals, shall be in twelve-point font in Times New Roman and shall contain a table of contents.
- 9.3 For any simultaneous submissions, each side shall submit all electronic copies only to the Administrative Authority. The Administrative Authority will then distribute copies to the Tribunal and opposing counsel once both submissions have been received.
- 9.4 The Disputing Parties shall either submit all documents to the Tribunal in complete form or indicate the manner in which any document is incomplete.

## **10. Form of Memorials and Written Submissions**

- 10.1 Memorials (Memorial, Counter-Memorial, Reply Memorial and Rejoinder Memorial) shall be filed and exchanged by the dates indicated in the Procedural Calendar attached as Annex II.
- 10.2 The Memorials shall specify in full detail the facts and contentions of law, and relief claimed, and shall include citations to all evidence, including exhibits, witness statements, expert reports and legal authorities upon which each Disputing Party relies in support of the relevant Memorial.
- 10.3 In the event of a request for bifurcation of the proceedings, the request for bifurcation shall be accompanied by the written submissions for bifurcation. The response to the request, if deemed necessary by the Tribunal, shall be filed by the date set by it.
- 10.4 All Memorials shall be accompanied by an index of all supporting documentation cited therein, setting forth for each exhibit: (a) the exhibit number; (b) the date of the exhibit; and (c) a brief description of the exhibit; and setting forth for each legal authority: (a) the legal authority number; (b) the date of the legal authority; and (c) the title of the legal authority.
- 10.5 Neither Disputing Party shall be permitted to submit additional or responsive documents after the filing of its respective last written submission unless the Tribunal determines that exceptional circumstances exist based on a reasoned written request followed by submissions from the other Disputing Party.
- (a) Should a Disputing Party request leave to file additional or responsive documents, that Disputing Party may not annex the documents that it seeks to file to its request.
  - (b) If the Tribunal grants such an application for submission of an additional or responsive document, the Tribunal shall ensure that the other

Disputing Party is afforded sufficient opportunity to respond to the introduction of the new document.

## **11. Evidence and Legal Authorities**

- 11.1 In addition to the relevant articles of the 1976 UNCITRAL Arbitration Rules and the provisions on document production above, the Tribunal may use, as an additional guideline, the *IBA Rules on the Taking of Evidence in International Arbitration 2020* (“2020 IBA Rules”), when considering matters of evidence.
- 11.2 The Disputing Parties shall submit with their Memorials and written submissions all evidence and authorities on which they intend to rely in support of the factual and legal arguments advanced therein, including witness statements, expert reports, and documents.
- 11.3 In their rebuttal submissions (i.e., Reply and Rejoinder Memorials), the Disputing Parties shall submit only additional written witness testimony, expert opinion testimony and documentary or other evidence to respond to or rebut matters raised in the other Disputing Party’s prior written submission, except for new evidence they receive through document production.
- 11.4 Following submission of the Reply and Rejoinder Memorials, the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Disputing Parties, unless the Tribunal grants leave on the basis of exceptional circumstances. Should such leave be granted to one side, the other side shall have an opportunity to submit new evidence.
- 11.5 The Disputing Parties shall identify each exhibit submitted to the Tribunal with a distinct number. Each exhibit submitted by the Claimants shall begin with a letter “C” followed by the applicable number (i.e., C-001, C-002, etc.); each exhibit submitted by the Respondent shall begin with a letter “R” followed by the applicable number (i.e., R-001, R-002, etc.). The Disputing Parties shall use sequential numbering throughout the proceedings.
- 11.6 Statements of fact witnesses or reports of experts shall be numbered separately as “CWS-” for Claimants’ witness statements and as “CER-” for Claimants’ expert reports, and “RWS-” for Respondent’s witness statements and “RER-” for Respondent’s expert reports, followed by the applicable number and name (for example, CWS-1 [Jones]).
- 11.7 The Disputing Parties shall identify each legal authority submitted to the Tribunal with a distinct number. Each legal authority submitted by the Claimants shall begin with the letters “CLA” followed by the applicable number (i.e., CLA-001, CLA-002, etc.); each legal authority submitted by the Respondent shall begin with the letters “RLA” followed by the applicable number (i.e., RLA-001, RLA-002, etc.). The Disputing Parties shall use sequential numbering throughout the proceedings.

11.8 All evidence submitted to the Tribunal shall be deemed to be authentic, including evidence submitted in the form of copies, unless a Disputing Party disputes within a reasonable time its authenticity.

## **12. Witnesses**

12.1 Any person may present evidence as a witness, including a Disputing Party or a Disputing Party's officer, employee, or other representative.

12.2 For each witness, a written and signed witness statement shall be submitted to the Tribunal. Where in exceptional circumstances a Disputing Party is unable to obtain a written and signed witness statement from a witness, the evidence of that witness shall be admitted only with leave of the Tribunal in extraordinary circumstances and in accordance with its directions. A Disputing Party shall give the Tribunal and the other Dispute Party notice of any request for leave to admit evidence from a witness in the absence of a written and signed witness statement as soon as it has knowledge of the exceptional circumstances requiring the admission of such evidence, and in any case, no later than 30 days in advance of the filing of that Disputing Party's Memorial.

12.3 Each witness statement shall contain at least the following:

- (a) the full name and present address of the witness;
- (b) a description of the witness's position and qualifications, if relevant to the dispute or to the contents of the statement;
- (c) a description of any past and present relationship between the witness and the Disputing Parties, counsel, or Members of the Tribunal;
- (d) a description of the facts on which the witness's testimony is offered and, if applicable, the source of the witness's knowledge;
- (e) copies of all documents relied upon or alternatively, where the document is already in the record, citations to such documents as indexed under paragraph 10.4 above. If the document has not previously been submitted, it shall be identified as an exhibit as set out in paragraph 11.5 above; and
- (f) the signature of the witness and the date the witness statement was given.

12.4 Only witnesses who are called to be cross-examined by the other Disputing Party, or who are directed to appear by the Tribunal, shall testify at the Hearing. Notwithstanding the above, at the request of a Disputing Party, the Tribunal may allow, in limited circumstances where it is reasonable and appropriate to do so, a witness offered by that Disputing Party but not called to be cross-examined by the other Disputing Party, or directed by the Tribunal to appear, to testify at the Hearing.

- 12.5 Each Disputing Party shall be responsible for ensuring attendance of its own witnesses to the applicable Hearing, except when the other Disputing Party has waived cross-examination of a witness and the Tribunal does not direct his or her appearance.
- 12.6 The Tribunal may, on its own initiative, summon any other witness to appear.
- 12.7 If a witness fails to appear at a Hearing, the Tribunal may, at its discretion, summon the witness to appear at a later date, if it is satisfied that: (1) there was a compelling reason for the witness' failure to appear; (2) the testimony of the witness is relevant to the adjudication of the dispute; and (3) providing a further opportunity for the witness to appear will not unduly prejudice the opposing Disputing Party.
- 12.8 The Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear at a Hearing, having regard to all the surrounding circumstances, including the fact that the witness was not subject to cross-examination. A witness who is not called for cross-examination has a valid reason not to appear. The Tribunal shall not consider the witness statement of a witness who fails to appear and does not provide a valid reason.
- 12.9 Each Disputing Party shall initially cover the costs of appearance of its own witnesses. The Tribunal will decide upon the appropriate allocation of such costs in its final award.
- 12.10 At any Hearing, the examination of each witness shall proceed as follows:
- (a) the witness shall make a declaration of truthfulness;
  - (b) although direct examination will be given in the form of witness statements, the Disputing Party presenting the witness may conduct a brief direct examination of no more than fifteen minutes for the purpose of introducing the witness, correcting, if necessary, any errors in the witness statement and addressing matters that have arisen after the witness statement was given, if any;
  - (c) the adverse Disputing Party may then cross-examine the witness on matters relevant in this arbitration in the witness' knowledge or experience;
  - (d) the Disputing Party presenting the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross-examination limited to the witness's testimony on re-examination at the discretion of the Tribunal; and
  - (e) the Tribunal may examine the witness at any time, either before, during or after examination by any of the Disputing Parties.

12.11 The Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Tribunal may in its discretion:

- (a) refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant;
- (b) limit or refuse the right of a Disputing Party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or
- (c) direct that a witness be recalled for further examination at any time.

12.12 It shall not be improper for counsel to meet with witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.

12.13 Unless the Disputing Parties agree otherwise, a factual witness shall not be present in the hearing room during the hearing of oral testimony, discuss the testimony of any other witness, or read any transcript of any oral testimony, prior to his or her examination. This limitation does not apply to a witness of fact if that witness is the designated Disputing Party representative.

12.14 The Disputing Party representative referred to in the previous paragraph 12.13 means the individuals designated by a Disputing Party to act as its agent and give instructions to counsel at the Hearing. Such representative(s) shall be identified by the Parties in advance of the Hearing allowing for comment by the other Party/ies.

12.15 If the Disputing Parties so agree, or in the case of disagreement between the Disputing Parties, upon the acceptance of the Tribunal, witnesses may be examined by videoconference or other platform.

12.16 The Tribunal notes that the witness statement of the Claimant, Theodore David Einarsson, sworn December 2, 2019, was served prior to the date of this Order and that the Disputing Parties reserve their respective rights to make submissions regarding the admissibility under the provisions of this Section 12 of that witness statement.

### **13. Experts**

13.1 Each Disputing Party may retain and submit the evidence of one or more experts to the Tribunal.

13.2 Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Disputing Parties' written submissions, in which case the expert report need only reference the number of the exhibit.

13.3 The provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts, except that, unless the Disputing Parties agree otherwise, experts shall be allowed to be present in the hearing room at any time and in addition to paragraph 12.10(b), may at the request of the presenting Disputing Party, provide a presentation on his or her report(s) for a duration to be determined at the Pre-Hearing Conference by the Tribunal in consultation with the Disputing Parties. In addition, each expert report shall contain:

- (a) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;
- (b) a confirmation that this is the expert's own, impartial, objective, unbiased opinion which has not been influenced by the pressure of the dispute resolution process or by any Disputing Party;
- (c) a statement that the expert understands that, in giving his or her report, his or her duty is to the Tribunal, and that he or she complies with that duty;
- (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
- (e) an attached current curriculum vitae evidencing the expert's qualifications;
- (f) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions; and
- (g) a statement that, if the expert subsequently considers that his or her opinions require any correction, modification or qualification, he or she will notify the Disputing Parties to this arbitration and the Tribunal forthwith.

13.4 Before she or he is cross-examined, each expert shall be permitted to make a brief presentation summarizing the contents of her or his expert report(s). The expert shall not be permitted to introduce new expert testimony during this presentation.

#### **14. Document Production**

14.1 The Procedural Calendar sets out the steps and applicable dates that shall govern the production of documents in this proceeding.

14.2 Each Disputing Party's request for production shall identify: a description of each requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that is reasonably believed to exist; a statement as to how the documents requested are relevant to the arbitration and material to its outcome; and a statement that the documents requested are not in the possession, custody

or control of the requesting Disputing Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Disputing Party to produce such documents, and a statement of the reasons why the requesting Disputing Party considers the documents requested are in the possession, custody or control of the other Disputing Party. The request for production shall take the form of a Redfern Schedule, as attached at Annex I (Redfern Schedule). For the purposes of this order, the term “relevant” encompasses both the term “relevance” and “materiality”.

14.3 A Disputing Party shall submit its request for document production in writing to the other Disputing Party by completing columns (a), (b) and (c) of the Redfern Schedule attached at Annex I.

14.4 If the requested Disputing Party objects to production, the following procedure shall apply:

- (a) The requested Disputing Party shall submit a response in column (d) of the requesting Disputing Party’s Redfern Schedule stating which documents or class of documents it objects to producing. The response shall state the reasons for each objection and shall indicate the documents, if any, that the Disputing Party would be prepared to produce instead of those requested.
- (b) The requesting Disputing Party shall respond to the other Disputing Party’s objection in column (e) of its Redfern Schedule, indicating, with reasons, whether it disputes the objection.
- (c) The Disputing Parties shall seek agreement on production requests to the greatest extent possible.
- (d) To the extent that agreement cannot be reached between the requesting and the requested Disputing Party, the Disputing Parties shall submit all outstanding requests to the Tribunal for decision. All other correspondence or documents exchanged in the course of this process shall not be copied to the Tribunal.
- (e) Document production requests submitted to the Tribunal for decision, together with objections and responses, must be in tabular form pursuant to the model appended to this Procedural Order as Annex I (Redfern schedule).
- (f) The Tribunal shall rule on any such application in column (f) of the Disputing Parties’ Redfern Schedule and may for this purpose refer to the 2020 IBA Rules as a guideline. Documents ordered by the Tribunal to be disclosed shall be produced within the time limit set forth in the Procedural Calendar.
- (g) Should a Disputing Party fail to produce documents as ordered by the

Tribunal, at the request of a Disputing Party, the Tribunal may draw the inferences it deems appropriate, taking into consideration all relevant circumstances.

- 14.5 Documents produced according to the above procedure shall not be considered part of the evidentiary record unless and until a Disputing Party subsequently submits the document as an exhibit or legal authority to a written submission that makes reference to or relies upon it.
- 14.6 The production of documents under this Order shall be made electronically through a secure electronic platform established by the Administrative Authority, which can be accessed only by counsel to the Disputing Parties, in PDF format or some other similar format to which the Disputing Parties may later agree. Each individual document shall be clearly labelled with a unique identifying number. Each Disputing Party shall provide the other Disputing Party, on the date of the production, with an index of the documents that it is producing.
- 14.7 Claims of privilege falling under the 2020 IBA Rules are to be resolved by means of redaction, wherever possible, and the redactions must note the IBA Rule under which the Disputing Party is claiming privilege. The entirety of a document must be produced in the event that part of it is material and relevant, and sections that are subject to privilege claims may be redacted. All claims to privilege shall be identified in a privilege log, which is to be provided to the opposing side on the date fixed for the production of responsive documents.
- 14.8 Each Disputing Party may withhold from production documents that it considers not subject to production based on a legal impediment or privilege or grounds of special political or institutional sensitivity, as set out in Article 9 of the 2020 IBA Rules. If a Disputing Party withholds documents on one of these bases, it shall submit to the other Disputing Party either: (a) a log identifying such documents (or categories of documents) and the grounds for withholding; or (b) redacted versions of such documents identifying the grounds for withholding.
- 14.9 Privilege logs shall identify individually each document as to which a claim of privilege or sensitivity, including political sensitivity, or legal privilege has been asserted. They shall also state the circumstances giving rise to the assertion of privilege/sensitivity for each document in sufficient detail to permit the requesting Disputing Party to make an initial evaluation as to whether the assertion of privilege/sensitivity is justified.

## **15. Non-Disputing Parties**

- 15.1 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 in the Procedural Calendar. They shall be entitled to receive a copy of the evidence and submissions referred to in Article 1129 of the NAFTA.

15.2 By the relevant dates indicated in the Procedural Calendar or as determined by the Tribunal, the Disputing Parties shall have an opportunity to comment on any submission made by the Governments of Mexico and/or the United States pursuant to NAFTA Article 1128.

## **16. Amici**

16.1 If a request for the submission of an amicus curiae brief is filed, the Tribunal will give the appropriate directions in the exercise of its powers under Article 15 of the 1976 UNCITRAL Arbitration Rules and in accordance with the NAFTA Free Trade Commission Statement on Non-Disputing Party Submissions.

16.2 By the relevant dates indicated in the Procedural Calendar or as determined by the Tribunal, the Disputing Parties shall have the opportunity to: (1) make submissions on any request for the submission of an amicus curiae brief; and (2) file simultaneous submissions on issues raised in any amicus curiae brief submitted pursuant to a decision of the Tribunal.

## **17. Transparency**

17.1 All filings to the Tribunal, hearing transcripts, orders and awards generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information and in accordance with the Confidentiality Order.

17.2 Hearings shall be open to the public. The Tribunal may hold portions of Hearings *in camera* to the extent necessary to ensure the protection of confidential information.

17.3 Sound recordings shall be made of all hearings and sessions. The sound recordings and any video recordings shall be provided to the Disputing Parties and the Members of the Tribunal.

17.4 Verbatim transcripts shall be made of any Hearing other than Hearings on procedural issues.

17.5 Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the Disputing Parties and Members of the Tribunal in the hearing room. The transcripts of proceedings should be made available on a same day service basis where practicable.

17.6 The Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. If the Disputing Parties disagree on corrections to be made to transcripts, the Tribunal shall determine whether any such corrections are to be adopted.

## 18. Pre-Hearing Conference

- 18.1 A Pre-Hearing Conference shall be held on a date to be determined by the Tribunal by telephone or videoconference between the Tribunal and the Disputing Parties in order to resolve any outstanding procedural, administrative, and logistical matters in preparation for the Hearing.
- 18.2 The Tribunal shall make best efforts to provide the Disputing Parties, 30 days in advance of the Hearing, with a list of questions that it wishes the Disputing Parties to address in their oral submissions.

## 19. Hearings

- 19.1 After consultation with the Disputing Parties, the Tribunal shall issue, for each Hearing, a procedural order convening the meeting, establishing its place, time, agenda, format (i.e., in-person or virtual) and all other technical and ancillary aspects.
- 19.2 Subsequent procedures for each Hearing shall be determined by the Tribunal in further consultation with the Disputing Parties.
- 19.3 As a general principle, neither Disputing Party shall advance any new factual allegations or any new legal arguments at the Hearing that have not already been stated in the Memorials and written submissions in accordance with the Procedural Calendar, unless expressly permitted by the Tribunal.
- 19.4 As a general principle, documents relied upon by the Disputing Parties must be filed with the Memorials and written submissions in accordance with the Procedural Calendar and no new documents may be presented by either Disputing Party at the Hearing unless expressly permitted by the Tribunal.
- 19.5 Nonetheless, demonstrative exhibits may be presented by a Disputing Party based on documents in the record. Demonstrative exhibits shall contain citations to the relevant documents in the record. Such demonstrative exhibits are to be provided in electronic and hard copy (the latter in *inter praesentes* circumstances) to the Tribunal and the other Disputing Party. An electronic copy of any such demonstrative exhibit shall be provided by the Disputing Party presenting such exhibit at the Hearing to the other Disputing Party, to each Arbitrator and to the Court Reporter, one hour prior to its use. When demonstratives are proposed to be used on occasions other than a Hearing, the time for their exchange will be decided separately.
- 19.6 As a general principle, no new fact or expert witness may be presented by either Disputing Party at the Hearing; and no witness shall be heard orally at the Hearing who has not provided a witness statement or expert report in accordance with the Procedural Calendar.

19.7 At or before the Hearing, the Tribunal shall decide, in further consultation with the Disputing Parties, whether and when the Disputing Parties shall submit Post-Hearing Submissions whether in addition to or in substitution for oral closing arguments at the Hearing. The Tribunal may fix a page-limit for such Post-Hearing Submissions, in further consultation with the Disputing Parties. At the close of the Hearing, the Tribunal may close the record as regards all issues addressed at that Hearing.

## **20. Communications (other than Written Submissions)**

20.1 As a general principle, no *ex parte* communications shall take place between any Disputing Party and the Tribunal.

20.2 Each Disputing Party shall send any written communication for the attention of the Tribunal by e-mail, with a copy simultaneously to opposing counsel and the Tribunal Secretary subject to paragraph 9.3.

20.3 As a general principle, the Tribunal should not be copied on inter-Disputing Party correspondence. Accordingly, the Tribunal should be sent only those communications that the Disputing Parties intend the Tribunal to read and act upon.

20.4 If either Disputing Party wishes to change or designate additional counsel, that Disputing Party should promptly notify the Tribunal, the Administrative Authority and the other Disputing Party of any proposed change or addition to ensure that no conflict of interest exists. Such proposed change or designation of counsel shall become effective only upon the Tribunal's approval, after giving the other Disputing Party a chance to comment.

## **21. Status of Orders**

21.1 Procedural Orders made by the Tribunal shall remain in force unless expressly amended or terminated by the Tribunal.

21.2 The Tribunal shall be free to decide any issue by way of an Order, a Partial or Interim Award, or a Final Award, as it may deem appropriate.

21.3 Any Order made by the Tribunal (including this Procedural Order No. 1 and the Procedural Calendar) may, at the request of a Disputing Party or upon the Tribunal's own initiative, be varied where the circumstances so require in the Tribunal's discretion, after consultation with the Disputing Parties.

## **22. Tribunal Rulings**

22.1 In accordance with Article 31(1) of the 1976 UNCITRAL Arbitration Rules, any Award or other Decision of the Tribunal shall be made by a majority of the Members of the Tribunal.

22.2 Procedural decisions may be taken by the Presiding Arbitrator after consultation with the Co-Arbitrators whenever possible. An order signed by the Presiding Arbitrator shall be taken to be an order of the Tribunal.

22.3 The Tribunal will draft all rulings, including the Award, within a reasonable time period. If a ruling, other than an Award, has not been issued within one month after the final submission on a particular matter, the Tribunal will provide the Disputing Parties with status updates every month. If an Award has not been issued within six months after the final submission, the Tribunal will provide the Disputing Parties with status updates every three months.

### **23. Extensions of Time**

23.1 The Tribunal may grant reasonable extensions of time, upon application by a Disputing Party or on the Tribunal's own motion before the expiry of any time limit, as determined by the Tribunal in its discretion. In cases of urgency, the Presiding Arbitrator is authorised to grant, or refuse, applications for an extension of time without consultation with other Members of the Tribunal, subject to ratification by the Tribunal as soon as possible thereafter.

23.2 If either Disputing Party should experience any difficulty with any time-limit, it is imperative that such difficulties are notified to the other Disputing Party and the Tribunal immediately, as soon as it arises and before the expiry of the time limit.

23.3 As a general principle, neither Disputing Party should request an extension of time without first having sought agreement, on the basis of mutual courtesy, from the other Disputing Party via inter-Disputing Party communications, and any request should, to the extent reasonably practicable, be made at least five working days before the relevant deadline.

23.4 Short extensions may also be agreed between the Disputing Parties as long as they do not affect later dates in the timetable and the Tribunal is informed before the original due date.

### **24. Case Administration**

24.1 The Secretariat of the International Centre for Settlement of Investment Disputes (“**ICSID Secretariat**”) shall act as the Administrative Authority and administer the arbitral proceedings on the following terms:

- (a) In consultation with the Tribunal, the Secretary-General of ICSID shall designate a legal officer of the ICSID Secretariat to act as Secretary to the Tribunal.
- (b) The Administrative Authority shall maintain an archive of filings of correspondence and submissions.
- (c) The Administrative Authority shall manage Disputing Parties' deposits

to cover the costs of the arbitration, subject to the Tribunal's supervision.

- (d) If needed, the Administrative Authority shall make its Hearing and meeting rooms at ICSID in Washington D.C., or elsewhere available to the Disputing Parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with Hearings or meetings shall be borne by the Disputing Parties.
- (e) Upon request, the staff of ICSID Secretariat shall carry out administrative tasks on behalf of the Tribunal, the primary purpose of which would be to reduce the costs that would otherwise be incurred by the Tribunal carrying out purely administrative tasks. The ICSID Schedule of Fees will govern the annual administrative charge and any additional work carried out by the ICSID Secretariat staff.

24.2 The contact details of the Administrative Authority are as follows:

ICSID  
Attn: Ms. Geraldine Fischer, or whomever ICSID would designate from time to time.  
1818 H Street, N.W.  
MSN C3-300  
Washington, D.C. 20433  
U.S.A.  
E-mail: [gfischer1@worldbank.org](mailto:gfischer1@worldbank.org)  
Paralegal: [achamorro@worldbank.org](mailto:achamorro@worldbank.org)

24.3 The appointment of the ICSID Secretariat as Administrative Authority shall not affect the legal place or geographical venue of the arbitration, the applicable procedural rules, or other aspects of the arbitral proceedings, which shall remain subject to this Procedural Order No. 1 and to any other agreements between the Disputing Parties and any determinations by the Tribunal.

## **25. Tribunal's Fees and Expenses**

25.1 The fees and expenses of each Tribunal Member shall be determined and paid in accordance with the ICSID Schedule of Fees and the Memorandum on Fees and Expenses of ICSID Arbitrators in force at the time the fees and expenses are incurred.

25.2 Under the current Schedule of Fees, each Tribunal Member receives:

- (a) US\$3,000 for each day of meetings or each eight hours of other work performed in connection with the proceedings or pro rata; and
- (b) subsistence allowances, reimbursement of travel, and other expenses,

pursuant to ICSID Administrative and Financial Regulation 14.

- 25.3 Each Tribunal Member shall submit her or his claims for fees and expenses to the ICSID Secretariat on a quarterly basis. A Tribunal Member's submission of fees and expenses shall explain the manner in which those fees and expenses have been calculated.
- 25.4 All payments to the Tribunal shall be made from the deposit administered by the Administrative Authority.

## **26. Deposit**

- 26.1 In order to assure sufficient funds for the fees and expenses of the Tribunal and the Secretary, the Disputing Parties established an initial deposit of US\$300,000 (i.e., US\$150,000 from each Disputing Party) on 5 January 2021 and a second deposit of US\$250,000 (i.e., US\$125,000 from each Disputing Party) on 10 November 2021. The Administrative Authority shall review the adequacy of the deposit from time-to-time and, at the request of the Tribunal, may invite the Disputing Parties to make supplementary deposits by wire transfer to the following account:

Account Holder: IBRT  
Bank: Wells Fargo Bank N.A. 375 Park Avenue, New York, NY 10152  
Account: 2000192003489  
Reference: TF073575 – ICSID Case No. UNCT/20/6  
Swift Code: PNBPUS3NNYC  
ABA Number 026005092

- 26.2 When making a request for a supplementary deposit, or upon the request of a Disputing Party, the Administrative Authority shall provide the Disputing Parties with a statement of accounts detailing the fees and expenses of the Tribunal and the Administrative Authority to date.
- 26.3 Any transfer fees or other bank charges will be charged by ICSID to the deposit.
- 26.4 The unused balance held on deposit at the end of the arbitration shall be returned to the Disputing Parties in proportion to the payments that they advanced to ICSID, without prejudice to the final decision of the Tribunal as to the allocation of costs.

## **27. Publication**

- 27.1 In accordance with Annex 1137(4) of the NAFTA, the Notes of Interpretation of Certain Chapter 11 Provisions of the NAFTA Free Trade Commission of 31 July 2001, and subject to the Confidentiality Order, the Administrative Authority shall publish redacted, public versions of Memorials and written submissions of the Disputing Parties and decisions of the Tribunal, including the Notice of

Arbitration, Statement of Defence, witness statements, transcripts of hearings, procedural rulings and Orders and Awards.

**28. Immunity From Suit**

28.1 Neither Disputing Party shall seek to make the Tribunal or any of its members, or the Administrative Authority, liable in respect of any act or omission in connection with any matter related to this arbitration, except where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing.

28.2 Neither Disputing Party shall require any Member of the Tribunal to be a party or witness in any judicial or other proceedings arising out of or in connection with this arbitration

**29. Disposal of Record**

29.1 Twelve months after the Tribunal has provided the Disputing Parties with notice of the Final Award, the Tribunal shall be at liberty to dispose of the record of the arbitration, unless the Disputing Parties ask that the documents be returned to them or to their counsel, which will be done at the expense of the requesting Disputing Party.

**Dated:** 10 May 2022

**Place of Arbitration:** Calgary, Alberta

[Signed]

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Carita Wallgren-Lindholm  
(Presiding Arbitrator)

[Signed]

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Trey Gowdy

[Signed]

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Toby Landau QC



**Annex II: Procedural Calendar**

<b>Event</b>	<b>Days</b>
Tribunal Issuance of Procedural Order No. 1	10 May 2022
Canada's Statement of Defence <sup>1</sup>	+30
<b><i>Written Submissions</i></b>	
Claimants' Memorial on Jurisdiction, Merits and Damages with supporting evidence including Witness Statement(s) and Expert Report(s)	+110
Respondent's Counter-Memorial on Jurisdiction, Merits and Damages with supporting evidence including Witness Statement(s) and Expert Report(s)	+110
<b><i>Document Production</i></b>	
Simultaneous Requests for Production of Documents (if any)	+30
Production of Documents Responsive to Requests Not Objected to; and Exchange of Objections to Requests for Production (if any)	+45
Responses to Objections to Requests for Production (if any)	+14
Application(s) to Tribunal for Order on Production of Documents in the Form of a Redfern Schedule (if necessary)	+14
Tribunal Decision on Disputed Document Production Requests (if necessary)	TBD
Production of Ordered Documents (if any)	+60
<b><i>Further Written Submissions</i></b>	
Claimants' Reply Memorial on Jurisdiction, Merits and Damages with supporting evidence including Witness Statement(s) and Expert Report(s)	+90
Respondent's Rejoinder Memorial on Jurisdiction, Merits and Damages with supporting evidence including Witness Statement(s) and Expert Report(s)	+90
Submissions of United States and Mexico Pursuant to NAFTA Article 1128 and Applications for Leave to File Non-Disputing Party ( <i>Amicus</i> ) Submissions (if any)	+30
Disputing Parties' Comments on Applications for Leave to File Non-Disputing Party ( <i>Amicus</i> ) Submissions (if any)	+14
Tribunal Decision on Applications for Leave to File Non-Disputing Party ( <i>Amicus</i> ) Submissions (if any)	TBD

<sup>1</sup> This is understood as a preliminary response to the Notice of Arbitration / Statement of Claim, which will not engage Article 21(3) of the UNCITRAL Arbitration Rules (the reference to "Statement of Defence" in that provision being taken as a reference to the Respondent's Counter-Memorial on Jurisdiction, Merits and Damages).

Non-Disputing Party ( <i>Amicus</i> ) Submissions	+14
Disputing Parties' Responses to NAFTA Article 1128 Submissions and Non-Disputing Party ( <i>Amicus</i> ) Submissions (if any)	+21
<b><i>Hearing</i></b>	
Tribunal Circulation of List of Questions for Disputing Parties to Address in their Oral Submissions	TBD
Pre-Hearing Conference	TBD
Oral Hearing	TBD