

**IN THE MATTER OF AN INTERNATIONAL ARBITRATION
UNDER THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW 2010 (“THE UNCITRAL ARBITRATION RULES”)**

AND

**CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
 (“NAFTA”)**

BETWEEN:

LONE PINE RESOURCES INC.

Claimant

v.

CANADA

Respondent

***PROCEDURAL ORDER ON TWO DISPUTED ISSUES
DATED 6 FEBRUARY 2015
(English Text)***

The Tribunal:

***Mr David Haigh
Professor Brigitte Stern
V.V.Veeder (President)***

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(A) Introduction

1. The Tribunal here addresses two matters outstanding from the first procedural meeting held by telephone conference-call on 9 January 2015: (i) the language(s) of the arbitration and (ii) this arbitration's procedural schedule regarding document production.
2. It is convenient here to consider each disputed matter in turn, based on the Parties' oral submissions during the first procedural meeting and their respective written submissions of 19 and 23 January 2015, in English and French.

(B) Language(s): the Parties' Respective Cases

3. *Claimant:* In brief, it is the Claimant's case that the English language should be the language of the arbitration because the Claimant is an Anglophone company incorporated in Delaware, USA, with its Canadian operations based in Alberta staffed by Anglophones and not Francophones. The Claimant submits that the Respondent's executive branch is officially bilingual in English and French; and that the Respondent is required, as a matter of Canadian law, to communicate and provide services equally in English and French, namely by Section 22 of the Official Languages Act, R.S.C., 1958, c. 31 (4th Supp.). The Claimant also refers to Section 133 of the Canadian Constitution Act of 1867, requiring (inter alia) Québec legislation to be printed in English and French and that persons participating in legal proceedings in Québec have the right to use English or French. Accordingly, so the Claimant concludes, the use of English could inflict no prejudice on the Respondent, whereas the Claimant would suffer significant prejudice, including increased costs and delay, from the use of French as the language of this arbitration.
4. The Claimant accepts that it is in the interests of both Parties to seek to limit the costs of translation, wherever possible. Accordingly, even with English as the language of the arbitration, the Claimant is willing to accept, that:
 - (i) As regards documentary evidence, documents originally in French may be produced without certified translations; and
 - (ii) As regards witness testimony, a witness may testify and be examined orally in either French or English according to the preference expressed by that witness,

provided that testimony in French will be heard with consecutive translation into English.

5. Subject to the decision of the Tribunal, the Claimant is also willing to accept, that:
 - (i) As regards written communications from the Tribunal to the Parties, these may be issued in both French and English, including any procedural orders, decisions and awards;
 - (ii) As regards procedural meetings (whether held in person or by telephone conference-call), these may be held in English or French with ICSID arranging for consecutive translation from French into English; and
 - (iii) As regards written submissions and pleadings, the Respondent may submit these in French accompanied with an English translation, at the Respondent's own cost. The translation need not be certified; but any dispute over translation shall be decided by the Tribunal with power to order a certified translation at the Respondent's cost.
6. *Respondent:* In brief, it is the Respondent's case that the languages of the arbitration should be both English and French (as each Party may choose), with no requirement for any translation imposed on either Party. Accordingly, the Respondent accepts that documentary evidence may be adduced in its original language without translation and that a witness may testify in the language of his or her choice, whether it be English or French.
7. The Respondent notes the common ground reached between the Parties as regards documentary evidence and witness testimony (as summarised above). The Respondent also notes, however, that no consensus exists between the disputing Parties as regards the language(s) of their written pleadings and submissions, of procedural meetings and hearings and of communications to and from the Tribunal, including its procedural orders and awards. The Respondent submits that the bilingual choice of English and French as the languages of the arbitration for all matters would be fair for both disputing Parties whereas the sole choice of the English language (as primarily asserted by the Claimant) would be unfair on the Respondent, for several reasons.

8. The Respondent emphasises the central role and interest of Québec in this dispute, where the only official language is French under Article 1 of the French Language Charter (1977) RLRQ c, C-11. Further, the Respondent contends that a majority of the relevant documentation to and from the Québec Government (including the Québec licensee) was made in French, not English. Given that the Claimant advances its case under NAFTA, the Respondent notes that NAFTA was ratified in English, Spanish and French and that its three linguistic versions have equal standing under NAFTA Article 2206. As regards documentary evidence and testimony, the Respondent submits that the vast bulk of its materials will be necessarily submitted in French, given the role of the French language used in Québec legislation and by the Québec authorities.
9. The Respondent cites several procedural orders made by NAFTA tribunals in support of its case, including the procedural order made by the tribunal in *Gami Investments v Mexico* (2003) under the UNCITRAL Arbitration Rules 1976.¹ As regards the language of that arbitration, it was ordered that each Party: "... shall make all its written submissions to the Arbitral Tribunal (including witness statements and expert reports) in either English or Spanish, and may provide translations as they see fit ... Documentary evidence submitted by the Parties shall be presented in its original language, provided that such language is English or Spanish ... Witnesses and experts may testify in their own language, provided that simultaneous translation of both is available, in a manner to be determined by the Arbitral Tribunal in consultation with the Parties ..."
10. The Respondent submits that this and other comparable orders in other analogous arbitrations support its case and do not support the Claimant's case.

(C) The Tribunal's Power to Determine the Language(s) of the Arbitral Proceedings and to Order Translations when Necessary

11. In the present case, failing an agreement between the Parties regarding the language(s) to be used in the arbitration proceedings, the Tribunal has the power to

¹ *Gami Investments Incorporated v Mexico*, UNCITRAL, Procedural Order No 1 of 31 January 2003, at Paras. 10.1-104. (The Tribunal has noted the other cases cited in the Respondent's first submissions, at footnotes 7, 9, 10 & 11; but it is unnecessary here to consider them separately).

determine such language(s) in accordance with Article 19(1) of the UNCITRAL Rules.² Under Article 19(2) of the UNCITRAL Arbitration Rules, the Tribunal may also order the translation of documents and exhibits.

12. In the Tribunal's view, Article 19 is consistent with NAFTA Chapter 11 and the law of Ontario as the *lex loci arbitri* (Ottawa being the agreed place, or seat, of this arbitration). Accordingly, the Tribunal makes this order pursuant to its powers in Articles 19(1) and (2) of the UNCITRAL Arbitration Rules which the Parties have agreed to incorporate into their arbitration agreement derived from NAFTA Chapter 11. The Tribunal does not understand that these powers of the Tribunal are disputed by the Parties.
13. In deciding these matters, however the Tribunal has to take both practical and legal issues into account, as set out below. The Tribunal has noted the legal materials relevant to the interpretation of Article 19 of the UNCITRAL Arbitration Rules, particularly Caron & Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd ed. (2013) cited by both Parties.

(D) The Tribunal's Decision on Language(s)

14. The Claimant can derive no assistance in this case from the primary factor usually determinative of the language of an arbitration, namely the language of the contract or treaty at issue. The Tribunal accepts the equality of the English and French languages regarding NAFTA (as submitted by the Respondent); and hence NAFTA can provide no support for the near-exclusive use of the English language in this arbitration (as asserted by the Claimant). Nor is there any assistance for either Party's case from the language of the applicable law, given that international law, unlike municipal laws, has no specific language. The Claimant can derive also little assistance from the seat of the arbitration, albeit outside Québec. Indeed, that legal factor was

² Article 19 ("Language") provides in its English text: "1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings. 2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal."

not asserted by the Claimant as being relevant, doubtless because the Ontario Courts work in both the English and French languages.

15. In the Tribunal's view, the significant factors in this case include the central role played by Québec, as regards the territorial place of the (alleged) investment; the primary legal dealings by the (alleged) investor with the Québec authorities; and the (alleged) breach of NAFTA's Chapter 11 attributable as a fact (but not as a matter of international law) to Québec as distinct from the Canadian Federal Government in Ottawa. Given the factual significance of Québec and the consequential relevance of the French language (as opposed to English), it would be inappropriate for the language of this arbitration to be exclusively English; and, wisely, the Claimant has not attempted to advance that case.
16. Conversely, the Tribunal would not consider it appropriate to decide upon the French language as the exclusive language of this arbitration. The Claimant is a US company with its officers and the majority of its witnesses Anglophone only. It can also point to the official English text of NAFTA's Chapter 11, to its dispute against the Respondent under international law and to the language of the arbitration agreement it choose to invoke for its claim in this arbitration. Québec is not itself a Contracting Party to NAFTA, nor a named disputing Party to this arbitration. The NAFTA Free Trade Commission has made no recommendations regarding the use of French in claims against Canada, as it has for the use of Spanish in claims against Mexico, with the Commission noting only that notice of a claim against Canada may be submitted in English or French. The measure at issue in this arbitration, Bill 18, was published by the Québec legislature in French and English. This Tribunal is an international arbitration tribunal and not a Canadian federal (or Québec) court. Wisely, the Respondent has not attempted to advance that case.
17. Instead, the Parties have made serious attempts in good faith to arrive at a fair, pragmatic compromise. The Tribunal here seeks to build upon the Parties' consensus with the same objectives in mind, ensuring equality of treatment for both sides without inflicting unnecessary expense or delay.
18. Accordingly, the Tribunal has decided that English and French shall both be the languages of this arbitration, as set out below:

- (i) The Tribunal's award(s) shall be in English and French, both texts to be of equal standing; and the Tribunal may there cite the Parties' written submissions in their original language (i.e. English or French) without translation;
- (ii) The Tribunal's procedural orders may be in English or French, as the Tribunal may decide, without translation. (It has decided, without prejudice to this order, that this procedural order shall be issued in English; and it is likely that most orders will be issued by the Tribunal in English only);
- (iii) Correspondence by any Party to the Tribunal (including ICSID) and by the Tribunal (including ICSID) to the Parties may be made in either English or French, as each Party and the Tribunal (including ICSID) may respectively decide, without translation;
- (iv) Document production between the Parties (pursuant to requests inter se) shall take place in the original language of the documentation, without the producing Party being required to provide any translations of documents produced to the requesting Party;
- (v) Each Party may choose whether to submit its written pleadings, including memorials, briefs and other written submissions, in English or French, without being required to produce any translation (although it may do so voluntarily, if it so wishes, in the form of an uncertified and unofficial translation as a matter of professional courtesy - which the Tribunal would encourage, at least as regards the Parties' memorials);
- (vi) Each Party may submit its documentary evidence to the other Party and the Tribunal in the original language (provided it is in French or English), without any translation; but with English or French certified translations if the original language is other than English or French;
- (vii) Each Party may submit its written factual testimony and written expert testimony in French or English, without any translation;
- (viii) Procedural meetings with the Parties by telephone conference-call shall take place in French or English, as each member of the Tribunal and each Party may choose, without translation unless otherwise ordered by the Tribunal; and such

meetings shall be recorded by ICSID, with recordings made available to the Parties. (For procedural meetings taking place with the Parties in person, see subparagraphs x, xi and xii below);

- (ix) At the oral hearing(s), any factual or expert witness may testify orally in French or English, as he or she may choose;
- (x) At the oral hearing(s) and procedural meetings in person, each Party's legal representatives may address its oral submissions to the Tribunal, in English or French, as it may choose;
- (xi) All oral hearings and procedural meetings in person shall take place in English or French (as set out above), with simultaneous interpretation of all oral submissions, oral testimony and oral exchanges with the Tribunal, with the costs of such translation to form part of the costs of the arbitration under Article 40 of the UNCITRAL Arbitration Rules;
- (xii) There shall be English and French verbatim transcripts of all oral hearings and procedural meetings in person, both texts to be of equal standing (subject to correction by order of the Tribunal); and
- (xiii) This order is made without prejudice to the Tribunal's eventual order(s) on costs under Articles 40 and 42 of the UNCITRAL Arbitration Rules.

(In the event of unforeseen practical difficulties in performing this procedural order, whether by any Party, ICSID or the Tribunal, the Tribunal reserves the right to modify its terms upon application by any Party or upon its own initiative).

19. With the Tribunal's decision, the Parties are requested to complete their joint draft of the First Procedural Order as regards the languages of the arbitration, as soon as practicable.

(E) Procedural Schedule for Document Production – The Parties' Cases

20. This matter encompasses a limited dispute between the Parties relating to the timing of document production. The Claimant submits that the Parties should simultaneously exchange requests for document production after the first exchange of substantive written pleadings (i.e. the Claimant's Memorial and the Respondent's Counter-

Memorial, but before the Claimant's Reply Memorial and the Respondent's Rejoinder Memorial). The Respondent submits that document production should take place earlier, after the Respondent's Response (to the Claimant's Notice of Arbitration) but before the Claimant's Memorial. Both Parties emphasise, albeit to different effect, the practical, efficient and fair characteristics of their respective proposals.

(F) The Tribunal's Power to Conduct the Arbitration

21. It is not disputed that the Tribunal has the power to decide this matter pursuant to Article 17(1) of the UNCITRAL Arbitration Rules. It provides (inter alia) that: "... The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

(G) The Tribunal's Decision on Document Production Schedule

22. In exercising its discretion under Article 17(1), for the most part, the Tribunal is persuaded by the case advanced by the Claimant, based on procedural efficiency. Inevitably (given the requirements of Article 20(4) of the UNCITRAL Arbitration Rules), the Claimant's Memorial will be accompanied by many documents sought by the Respondent and the same observation applies mutatis mutandis (by virtue of Article 21(4) of the UNCITRAL Arbitration Rules) to documents sought by the Claimant accompanying the Respondent's Counter-Memorial. This should also be the result if requests for document production are made to the Claimant and the Respondent before their respective written pleading (as both Parties are free to agree, without order from the Tribunal). In these circumstances, the Party receiving the other's pleading can assess more accurately what remains outstanding as regards the other's voluntary document production submitted with that pleading in formulating its definitive requests for document production, such as may be likely to involve the Tribunal as regards disputed requests.

23. There is another important factor. In the event of a dispute over document production, the Tribunal would need to understand the relevant issues and the materiality of the requested documentation. In this case, the Tribunal considers that it cannot fairly decide such disputes without first studying the Parties' Memorial and Counter-Memorial. If the Tribunal were called upon to decide such a dispute prematurely (i.e. before these written pleadings), it would make the Tribunal's task much more difficult, if not impossible, with an inherent risk of error. The Tribunal does not consider that the Claimant's Notice and the Respondent's Response can remove such difficulties.
24. Accordingly, the Tribunal decides that, whilst requests for document production can be made in advance of the Parties' Memorial and Counter-Memorial (even now, as is the case), the stage of document production and the Tribunal's involvement over disputed requests shall take place after the Respondent's Counter-Memorial and before the Claimant's Reply Memorial, with the Parties' simultaneous requests for the production of documents.
25. Given the high level of co-operation between the Parties in this arbitration, the Tribunal is content to leave the Parties to work out the time-tabling consequences of the Tribunal's decision and to complete accordingly their joint draft of the first procedural order, as soon as practicable.
26. In this regard, the Tribunal notes sympathetically the Respondent's submission that its burden on document production may be significantly greater than the burden resting on the Claimant and that it would require sufficient time to discharge its burden in meeting the Claimant's requests for document production. The Tribunal also notes, with equal sympathy, the Claimant's submission that it will need sufficient time to review the Respondent's Counter-Memorial and accompanying materials, so as to make "appropriately focused and targeted document production requests". The Parties should allow for document production to be completed satisfactorily without any risk of delay or disruption to the overall procedural timetable, including, especially, the dates for the hearing. The Tribunal notes that the Claimant's current estimate of 11 weeks from the Respondent's Counter-Memorial to final production (including the Tribunal's involvement) may not suffice in this particular case.

(H) Hearing Dates and Costs

27. The Tribunal does not here decide the dates of the hearing, estimated by the Claimant at 5 days from 5 to 9 September 2016 and by the Respondent at 10 days from 12 to 23 September 2016. The Tribunal notes that the Claimant is agreeable to the Respondent's proposal to reserve 10 days, subject to the Tribunal's decision. In the circumstances, the hearing dates will be fixed for not more than 10 days in or about September 2016. The Tribunal will decide specific hearing dates by separate correspondence with the Parties.
28. The Tribunal reserves to a later order or award all issues as to costs occasioned by the Parties' procedural applications as here decided, reserving in full its jurisdiction and powers to do so under Articles 40 and 42 of the UNCITRAL Arbitration Rules.

Dated: 6 February 2015

Signed:

[Signed]

(V.V.Veeder on behalf of the Tribunal)