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

("Claimants")

-and-

GOVERNMENT OF CANADA

("Respondent")

ICSID CASE NO. UNCT/20/6

DECISION ON CLAIMANTS' MOTION TO DISQUALIFY COUNSEL

Members of the Tribunal

Ms. Carita Wallgren-Lindholm (Presiding Arbitrator)
Mr. Trey Gowdy
Mr. Toby Landau, QC

Secretary of the Tribunal

Ms. Geraldine R. Fischer

Date of dispatch to the Parties: 24 February 2022

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I. INTRODUCTION

1. This Decision addresses a motion filed by Mr. Theodore David Einarsson, Mr. Harold Paul Einarsson, Mr. Russell John Einarsson, and Geophysical Service Incorporated ("**GSI**") (collectively, "**Claimants**") to disqualify members of the legal team representing the Government of Canada ("**Canada**" or **Respondent**") in these proceedings on the basis of an alleged conflict of interest.

2. As explained in the body of this Decision, the motion is premised upon an allegation that one member of Respondent's legal team, Ms. Alexandra Dosman, who joined the Trade Law Bureau in June 2019, had obtained confidential information of Claimants when previously employed at the third-party funder Vannin Capital LLC, from whom Claimants had sought litigation funding.

II. PROCEDURAL BACKGROUND

A. COMMENCEMENT OF PROCEEDINGS

3. On 18 April 2019, Claimants submitted a Notice of Arbitration against Respondent pursuant to Chapter 11 of the North American Free Trade Agreement ("**NAFTA**").

4. As the Tribunal was not yet constituted, on 23 October 2019, Claimants filed an Application with the Federal Court of Canada ("**FC Application**") challenging Canada's legal team on the basis of the alleged conflict of interest. The procedural details of this challenge are contained in Section II.D *infra*.

B. APPOINTMENT OF THE TRIBUNAL

5. On 8 July 2020, Claimants requested that the Secretary-General of the International Centre for Settlement of Investment Disputes ("**ICSID**") appoint a presiding arbitrator pursuant to Article 1124 of the NAFTA. Claimants had previously appointed Mr. Trey Gowdy, a U.S. national, as arbitrator, and Respondent had appointed Mr. Toby Landau, QC, a British national, as arbitrator.

6. On 16 July 2020, the Secretary-General proposed a ballot procedure to appoint the presiding arbitrator, pursuant to NAFTA Article 1123, and invited the Parties to indicate whether they agreed to the proposed method of appointment. The ICSID Secretary-General further explained that, should the Parties fail to agree on any of the ballot candidates, the Secretary-General would proceed to make the appointment in accordance with NAFTA Article 1124(3) from the ICSID Panel of Arbitrators. On 23 July 2020, the Parties agreed to the proposed ballot procedure.

7. On 26 August 2020, the ICSID Secretary-General informed the Parties that, pursuant to the Parties' agreement under NAFTA Article 1123, the Parties had agreed to appoint Ms. Carita Wallgren-Lindholm, a Finnish national, as the presiding arbitrator in this case, and Ms. Wallgren-Lindholm had accepted her appointment.

C. INITIAL EXCHANGES AND PROCEDURAL MEETING

8. On 27 August 2020, Respondent informed the Tribunal that Claimants had filed "*an application in the Federal Court of Canada* [in October 2019] *to disqualify Canada's legal counsel, as well as Canada's consultants and experts, for an alleged conflict of interest*", and Claimants had "*also recently stated that they reserve their right to challenge the arbitrator appointment by Canada, Mr. Toby Landau QC.*"[1] Canada denied that there was any merit to Claimants' allegations "*that Ms. Alexandra Dosman, who joined the Trade Law Bureau in June 2019 from the third-party funder Vannin Capital LLC, obtained the Claimants' confidential information as they sought litigation funding from Vannin while she was employed there.*"[2]

9. The Tribunal subsequently held its first conference, and, on 11 September 2020, the Tribunal President wrote to the Parties to coordinate a meeting with them to address certain preliminary matters, including Claimants' application before the Canadian court to disqualify Canada's legal team, and to discuss the procedural framework for the arbitration.

[1] R. Letter of 27 August 2020, p. 1.
[2] R. Letter of 27 August 2020, p. 2.

10. On 14 October 2020, the Tribunal held an Initial Procedural Meeting with the Parties. On 22 October 2020, the Tribunal circulated the finalized Initial Procedural Meeting minutes to the Parties, which incorporated their comments.

11. At the Initial Procedural Meeting, it was agreed that ICSID be engaged as the Administrative Authority for these proceedings. The Parties further agreed that the 1976 UNCITRAL Arbitration Rules would apply, as modified by NAFTA, and that the place of arbitration, or seat, would be Calgary, Alberta, Canada.

12. During the Initial Procedural Meeting, Claimants advised that there was no challenge to Mr. Landau QC based upon Claimants' current knowledge, and the Tribunal noted that in their exchanges of draft procedural orders, both Parties "*had included language anticipating that there was no objection to the constitution of the* [Tribunal]."[3] The Parties also discussed Claimants' challenge to Canada's legal team. With respect to the "*other matters to be reflected in* [Procedural Order No. 1]", the Parties confirmed that they "*would need to await resolution of the Legal Team Challenge*" as, according to Claimants, these matters also raised substantive issues.[4]

13. On 27 October 2020, ICSID accepted its appointment as the Administrative Authority for the present proceedings.

D. CLAIMANTS' CHALLENGE TO CANADA'S LEGAL TEAM IN CANADIAN COURTS

14. On 20 October 2020, the Federal Court of Canada dismissed the FC Application, on the basis, *inter alia*, that the Tribunal has jurisdiction over the conflict-of-interest issue.[5]

15. On 12 November 2020, Claimants filed a Notice of Appeal of the FC Judgment.[6]

[3] Summary Minutes from Initial Procedural Meeting, para. 7.
[4] Summary Minutes from Initial Procedural Meeting, para. 11.
[5] Cl. Motion, para. 32 (citing C-023).
[6] Cl. Motion, para. 34.

16. On 8 December 2020, the Tribunal requested an update from the Parties on any pending or intended court proceedings in Canada regarding Claimants' challenge to Canada's legal team, which the Parties provided on 15 December 2020.[7]

17. On 17 December 2020, Claimants served Canada with a Motion to stay the Federal Court Appeal.[8]

18. On 21 January 2021, the Tribunal asked the Parties to provide a second update on the status of the Federal Court of Appeal proceedings and Claimants' motion to stay. On the same date, Claimants informed the Tribunal that the Parties were still awaiting the Federal Court of Appeal's decision on their motion to stay the appeal.[9]

19. On 4 February 2021, the Federal Court of Appeal issued a direction to the Parties requesting that Claimants seize the Tribunal of a Motion to disqualify Canada's legal team.[10]

20. On 8 February 2021, the Parties notified the Tribunal of the Federal Court of Appeal's directions, and Claimants noted that they "*anticipate*[d] *bringing a Motion before the Arbitral Tribunal to disqualify Canada's legal team*."[11]

21. On 26 February 2021, the Federal Court of Appeal granted the Stay Motion until 17 May 2021, provided that the Parties would be able to report to the Court on or before 10 May 2021 on the status of the Motion in the Arbitration to disqualify Canada's legal team and whether a further stay of the Federal Court of Appeal was required.[12]

22. On 28 October 2021, Claimants informed the Tribunal that the Federal Court of Appeal "*granted an extension of the stay on September 27, 2021, to November 30, 2021*."[13]

[7] Cl. Letter of 15 December 2020, p. 1.
[8] Cl. Motion, para. 35 (citing C-028).
[9] Cl. Letter of 21 January 2021, p. 1.
[10] Cl. Motion, para. 36.
[11] Cl. Letter of 8 February 2021, p. 1.
[12] Cl. Motion, para. 40.
[13] Cl. Letter of 28 October 2021.

23. On 11 January 2022, Claimants informed the Tribunal of an Order granted by the Federal Court of Appeal providing "*for the final extension of the stay of the FCA Proceedings to February 25, 2022, after which time the stay will expire and not be renewed.*"

E. THE PARTIES' SUBMISSIONS ON CLAIMANTS' MOTION TO DISQUALIFY RESPONDENT'S COUNSEL

24. On 9 February 2021, the Tribunal invited the Parties to confer on a briefing schedule for Claimants' motion to disqualify Canada's legal team. The Parties, however, were unable to agree. Consequently, on 5 March 2021, the Tribunal decided to convene a Second Procedural Meeting to clarify the Parties' positions on Claimants' motion. The Second Procedural Meeting was held on 24 March 2021.

25. On 25 March 2021, the Parties submitted their agreed briefing schedule, which was adopted by the Tribunal. In accordance with the agreed schedule, the Parties presented the following submissions:

26. On 26 March 2021, Claimants filed their "**Motion for Disqualification of Counsel due to Conflict of Interest**" together with: (i) the Witness Statement of Harold Paul Einarsson, dated 26 March 2021(CWS 1); (ii) Exhibits C-001 through C-041; and (iii) Legal Authorities CLA-001 through CLA-026 ("**Claimants' Motion to Disqualify**" or the "**Motion**".).

27. On 20 April 2021, Respondent filed its "**Response to the Claimants' Motion to Disqualify**", which was accompanied by: (i) the Witness Statement of Edith Alexandra Dosman, dated 20 April 2021; (ii) Exhibits R-001 through R-026; and (iii) Legal Authorities RLA-001 through RLA-019 ("**R. Response**").

28. On 27 April 2021, Claimants submitted "**Claimants' Reply to Canada's Response to Motion for Disqualification of Counsel due to Conflict of Interest**" and the following supporting documents: (i) Second Witness Statement of Harold Paul Einarsson, dated 27 April 2021 (CWS 2); (ii) Exhibits C-042 through C-044; and (iii) Legal Authorities CLA-027 through CLA-030 ("**Cl. Reply**").

29. On 7 May 2021, Respondent filed its "**Rejoinder to the Claimants' Motion to Disqualify**", together with: (i) the Second Witness Statement of Edith Alexandra Dosman, dated 7 May 2021; (ii) Exhibit R-027; and (iii) Legal Authorities RLA-020 through RLA-028 ("**R. Rejoinder**").

30. The Hearing on the Motion to Disqualify (the "**Hearing**") was held virtually via Zoom on 18-19 May 2021 with the following individuals present:

Tribunal:

Ms. Carita Wallgren-Lindholm	President
Mr. Trey Gowdy	Arbitrator
Mr. Toby Landau, QC	Arbitrator

ICSID Secretariat:

Ms. Geraldine R. Fischer	Secretary of the Tribunal

For Claimants:

Counsel:

Ms. Matti Lemmens	Borden Ladner Gervais LLP
Mr. Zachary Seymour	Borden Ladner Gervais LLP

Witness:

Mr. Harold Paul Einarsson

For Respondent:

Counsel:

Ms. Sylvie Tabet	Trade Law Bureau
Mr. Alexander Gay	Justice Canada
Ms. Helen Gray	Justice Canada
Mr. Mark Luz	Trade Law Bureau
Ms. Shawna Lesaux	Trade Law Bureau

Witness:

Ms. Alexandra Dosman

Court Reporter:

Ms. Margie Dauster	Worldwide Reporting, LLP

31. The Parties disagreed regarding Canada's representation at the Hearing and, in particular, with respect to the participation of Mr. Mark Luz.

32. On 22 April 2021, Canada advised that Mr. Luz would attend the Hearing as part of Canada's legal team. Claimants on 23 April 2021, asked clarification as to the "*change of status*" since at the Second Procedural Meeting on 24 March 2021 Mr. Luz had advised that he would not participate as Counsel at the Hearing at the Second Procedural Meeting on 24 March 2021.

33. On 23 April 2021, Ms. Tabet, listed as the first participant for Canada at the Hearing, wrote that: "*As stated during the Second Procedural Meeting on March 24, 2021, with respect to the Claimants' Disqualification Motion, Mr. Gay and myself will be speaking on behalf of Canada at the May 18-19 hearing. Mr. Luz has been designated as an active participant for the purpose of addressing other issues related to the conduct of the arbitration, should such issues arise.*"

34. On the first day of the Hearing, the President inquired whether the Parties' correspondence had exhausted the matter of Mr. Luz's participation in the Hearing. Claimants advised that they might address the matter the following day while Ms. Tabet, on behalf of Canada, advised that Mr. Luz would be present without intending to participate on the disqualification motion but only possibly on other issues related to the arbitration, if necessary.

35. After these exchanges at the outset of the Hearing, the President concluded that the Hearing would proceed with Mr. Luz present.

36. Mr. Luz did not speak during the Hearing, and the matter of his presence was not raised or further addressed in the course thereof.

37. The Hearing transcript and recordings were distributed to the Members of the Tribunal and the Parties, and the Parties submitted their revised transcripts on 28 May 2021.

38. At the end of the Hearing both Claimants and Respondent confirmed that they had been treated with equality at the Hearing and been given a full opportunity of presenting their case on the Motion to Disqualify.

III. FACTUAL BACKGROUND

39. Ms. Alexandra Dosman worked as a Managing Director for Vannin Capital LLC in New York from April 2018 until 3 May 2019.[14] Vannin Capital LLC ("**Vannin**") is a legal funding firm offering funding for litigation and other expenses in return for a portion of any monies/damages collected. Vannin is not a law firm, nor does it hold itself out as offering legal or litigation services. According to Ms. Dosman, each Managing Director at Vannin was "*responsible for securing and proceeding with their own 'lead*s'" on possible business opportunities, and cooperation between and amongst Managing Directors was the exception.[15]

40. Ms. Dosman was licensed to practice law in both New York State and Canada.

41. In late 2018, Claimants and their counsel, Borden Ladner Gervais LLP ("**BLG**"), commenced discussions with Vannin to enter into a litigation funding agreement in respect of this Arbitration.[16]

42. In late 2018, Ms. Dosman began discussing potential employment as a legal counsel with the Trade Law Bureau.[17]

43. On 25 January 2019, Ms. Dosman interviewed with the Trade Law Bureau.[18] After that initial interview, Ms. Dosman was told she would receive an offer of employment from the Trade Law Bureau.[19]

44. ln early 2019, and before 8 February 2019,[20] while employed at Vannin in New York, Ms. Dosman was apprised by Mr. José Antonio Rivas, a colleague based in Washington, D.C., that he had been approached by GSI's counsel about obtaining funding for a high value claim against Canada.[21] Mr. José Antonio Rivas called Ms. Dosman to invite her to assist

[14] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, paras. 8, 16. RWS-01, Witness Statement of Edith Alexandra Dosman, 20 April 2021, para. 4.
[15] RWS-01, Witness Statement of Edith Alexandra Dosman, 20 April 2021, para. 5.
[16] CWS-01, Witness Statement of Harold Paul Einarsson, 26 March 2021, para. 4.
[17] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 16.
[18] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 16.
[19] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 16.
[20] RWS-02, Second Witness Statement of Edith Alexandra Dosman, 7 May 2021, para. 5.
[21] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 32.

him with the GSI file. [22] Ms. Dosman took the phone call while walking in a hallway and did not take notes of the conversation.[23] Ms. Dosman declined Mr. Rivas' invitation as she was "*interviewing for a counsel position in the Trade Law Bureau and* [she] *did not want to involve* [her]self *in any new matter related to Canada*."[24] She, however, did not give this reason to Mr. Rivas. During questioning by Claimants' Counsel at the Hearing, Ms. Dosman further clarified that she "*did not want to even skirt the shadow of a doubt of any possible impropriety, and so* [she] *declined, and thereafter actively did not participate in anything to do with that* [Claimants'] *file*."[25]

45. On 4 and 5 February 2019, Mr. Rivas copied Ms. Dosman on an email exchange between himself and Claimants' Counsel, Ms. Lemmens.[26] The subject of the email exchange was a business development trip to Toronto (as reflected in the email title "*Vannin MDs in litigation funding in Toronto this week*"), and Mr. Rivas' 4 February 2019 originating message did not mention GSI.[27] In Ms. Lemmens' 5 February 2019 response message, Ms. Lemmens noted, "*I will catch up with you on the NDA and get that finalized so that we can share some more in depth information*."[28] Ms. Lemmens also wrote that "[i]*t would make sense for you, Alex* [Ms. Dosman], *Matthew Kronby (BLG Toronto) and me to have a call next week to discuss funding.*" Part of this email, as submitted, was redacted by Claimants as they assert that portion of the email is privileged. There is nothing in the record to suggest Ms. Dosman ever participated in the future call referenced in Ms. Lemmens' email.

46. On 8 February 2019, Vannin and Claimants' Counsel, Ms. Lemmens, executed a Non-Disclosure and Common Interest Agreement ("**Common Interest Agreement**").[29]

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[22] RWS-01, Witness Statement of Edith Alexandra Dosman, 20 April 2021, Annex A, para. 36. Hearing Tr., Day 1, pp. 92-93.
[23] Hearing Tr., Day 1, pp. 92-93, 153.
[24] RWS-01, Witness Statement of Edith Alexandra Dosman, 20 April 2021, Annex A, para. 36. Hearing Tr., Day 1, p. 121.
[25] Hearing Tr., Day 1, pp. 121-122. *See also,* Hearing Tr., Day 1, p. 165.
[26] R-003, Email from Matti Lemmens to José Antonio Rivas, Vannin Capital, 4-5 February 2019.
[27] R-003, Email from Matti Lemmens to José Antonio Rivas, Vannin Capital, 4-5 February 2019. Hearing Tr., Day 1, p. 117.
[28] R-003, Email from Matti Lemmens, to José Antonio Rivas, Vannin Capital, 4-5 February 2019.
[29] C-001, Non-Disclosure and Common Interest Agreement dated 8 February 2019 between Vannin Capital LLC and Borden Ladner Gervais LLP, 8 February 2019. R-006, Appendix A, Witness Statement of Harold Paul Einarsson, 8 February 2019.

Appendix A of the Common Interest Agreement was signed by Mr. Harold Einarsson on his own behalf and as Agent and Power of Attorney for his father, Mr. Theodore David Einarsson, and his brother, Mr. Russell John Einarsson.[30]

47. According to Claimants, "*on or around February 8, 2019, following the execution of the Common Interest Agreement*", Claimants provided Vannin with the following documents they term "*Privileged Information*":

> *(a) a lengthy Memorandum prepared for the Claimants by BLG that assessed the merits of the Claimants' claims against Canada in this Arbitration and the Claimants' proposed litigation strategy in this Arbitration, which incorporated information prepared by GSI for the purposes of this Arbitration;*
>
> *(b) a proposed litigation budget for this Arbitration prepared for the Claimants by BLG, which included a detailed breakdown of all the steps BLG anticipated would be taken in this Arbitration based upon our litigation strategy, and an estimate of the costs of same based upon our litigation strategy; and*
>
> *(c) a draft report prepared by an expert witness regarding the Claimants' claims in this Arbitration*.[31]

48. On or about 12 March 2019, Ms. Dosman resigned from Vannin, and she officially and in practice left the company on 3 May 2019.[32] When she resigned, Ms. Dosman informed Vannin that she intended to take a position at the Trade Law Bureau.[33]

49. During the period between Ms. Dosman's notice of resignation and departure, Ms. Dosman continued to attend Vannin team meetings and receive weekly update charts on pending and prospective Vannin matters.[34] According to Ms. Dosman, "[t]*he chart recorded some of the basic information. I did not receive any other information about GSI. Thus, all I*

[30] C-001. R-006, Appendix A, Witness Statement of Harold Paul Einarsson, 8 February 2019.
[31] CWS-01, Witness Statement of Harold Paul Einarsson, 26 March 2021, para. 5.
[32] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 16.
[33] Hearing Tr., Day 1, p. 96.
[34] Hearing Tr., Day 1, pp. 96-97.

knew was that: (a) GSI was represented by counsel in Alberta; (b) the claim was against Canada; (c) the claim was under the NAFTA; (d) the case involved intellectual property; (e) GSI was seeking funding; (f) the damages claimed against Canada were significant; and (g) José Antonio Rivas was in preliminary discussions with GSI counsel."[35]

50. On 31 May 2019, the Trade Law Bureau provided Ms. Dosman with an offer letter, which she accepted on 3 June 2019.[36]

51. On 7 June 2019, Ms. Dosman started her employment at the Trade Law Bureau, and shortly afterwards, Ms. Dosman was assigned to several arbitration and advisory matters, including the present matter.[37]

52. On 24 July 2019, through a conversation with Mr. Luz, Claimants learned that Ms. Dosman had begun working for the Trade Law Bureau.[38] Mr. Luz is the Trade Law Bureau's Deputy Director and Senior Counsel.

53. On 2 August 2019, Claimants wrote to Mr. Luz raising the issue of a potential conflict of interest related to Ms. Dosman and anyone at the Trade Law Bureau with whom she may have exchanged relevant information.[39] On the same date, Respondent removed Ms. Dosman from the case and enacted an ethical screen.[40]

54. On 16 August 2019, Mr. Luz responded to Ms. Lemmens' 2 August 2019 letter. Mr. Luz wrote that Claimants had provided "*no details as to when such confidential information was provided to Vannin and under what conditions, what was the nature of such confidential information, why you believe that Ms. Dosman had access to such confidential information and, even if she did have access to anything provided by GSI to Vannin, what specific legal and ethical obligations are implicated and what prejudice GSI will suffer from Ms. Dosman's continued involvement in the Arbitration.*" Mr. Luz further wrote:

[35] Hearing Tr., Day 2, p. 287 (citing C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 34).
[36] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 17.
[37] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 17. Hearing Tr., Day 1, pp. 97, 103.
[38] Cl. Motion, para. 24 (citing CWS-01, Witness Statement of Harold Paul Einarsson, 26 March 2021, para. 9; C-002, Letter from Matti Lemmens, BLG, to Mark Luz, Canada, 2 August 2019.
[39] R-004, Letter from Matti Lemmens, BLG, to Mark Luz, Canada, 2 August 2019. Hearing Tr., Day 1, p. 130.
[40] R. Response, para. 67 (citing R-012, Letter from Mark Luz, Canada, to Matti Lemmens, BLG, GSI, 16 August 2019 and R-016, Letter from Mark Luz, Canada, to Matti Lemmens, BLG, GSI, 9 October 2019).

"*Ms. Dosman has confirmed that she in fact never saw any documents provided by GSI to Vannin, had no involvement in discussions between Vannin and GSI and did no factual or legal research or analysis of GSI's claims. As of the date when she left Vannin on May 3, 2019, it was her understanding that there was no funding relationship between GSI and Vannin.*" Mr. Luz's letter did not indicate how Ms. Dosman knew the funding status as of the date she left or from whom she had acquired this information.[41]

55. On 18 September 2019, the Trade Law Bureau informed Claimants' Counsel that it had determined, after investigation, that there was no conflict of interest prohibiting Ms. Dosman from working for Canada in this arbitration.[42]

56. Between 18 and 20 September 2019, Ms. Dosman attended a meeting with Canada's legal counsel and other members of the Trade Law Bureau.[43] Claimants allege that this meeting was regarding copyright law and NAFTA, and that there was no other copyright matter pending in the Trade Law Bureau at the time, other than Claimants' claim.[44]

IV. REQUESTS FOR RELIEF

57. In Claimants' Motion to Disqualify, Claimants request that this Tribunal grant an Order:

> *(1) declaring that Ms. Dosman and all Trade Bureau members, experts and consultants acting for or on behalf of Canada in this Arbitration who interacted with Ms. Dosman, including Mr. Luz, Ms. Dallaire, Ms. Kam and Ms. Reynolds-Fry, are in a conflict of interest, must be permanently removed from acting for or on behalf of Canada in this Arbitration and are prohibited from communicating with any new counsel or consultants to Canada regarding this Arbitration;*
>
> *(2) costs of this Motion; and*

[41] R-012, Letter from Mark Luz, Canada, to Matti Lemmens, BLG, GSI, 16 August 2019.
[42] R-014, Letter from Mark Luz, Canada to Matti Lemmens, BLG, GSI, 18 September 2019.
[43] R. Rejoinder, para. 48. CWS-01, Witness Statement of Harold Paul Einarsson, 26 March 2021, para. 14.
[44] Hearing Tr., Day 1, pp. 64-65.

(3) such other or further relief as this Tribunal may award.[45]

58. During the Hearing on the Motion to Disqualify, Claimants modified the relief sought, such that their request to permanently remove members of Canada's legal team in this arbitration was restricted to Ms. Dosman and Mr. Luz.[46]

59. In Respondent's Rejoinder, "*Canada respectfully requests that the Claimants' motion to disqualify Ms. Dosman and other legal counsel from the Trade Law Bureau from representing Canada in these proceedings be rejected. Canada reserves the right to make further representations on costs related to this motion.*"[47]

V. THE PARTIES' POSITIONS

60. The Parties agree that the Tribunal has jurisdiction to decide Claimants' Motion to Disqualify Counsel.[48] The Parties, however, disagree on the applicable law and test that the Tribunal should apply to determine the Motion. The Parties' positions are briefly summarized below. The summaries are not exhaustive, but rather reflect the Parties' principal arguments. The Tribunal has carefully considered the entirety of the Parties' evidence and submissions in arriving at its determination.

A. APPLICABLE LAW

61. In summary, Claimants' primary argument is that Canadian law applies to the Motion to Disqualify whereas Respondent submits that Canadian law is not applicable, and that the Tribunal should be guided by the principles in NAFTA, the UNCITRAL Arbitration Rules and international law.

[45] Cl. Motion, para. 109. *See also*, Cl. Reply, para. 64 ("[…] *the Tribunal should grant the Motion and disqualify the Conflicted Bureau Team to preserve the fairness and integrity of this Arbitration. Not doing so jeopardizes the entirety of this Arbitration*").
[46] Hearing Tr., Day 2, p. 324.
[47] R. Rejoinder, para. 59.
[48] *See e.g.* R. Presentation (19 May 2021), p. 20.

(1) Claimants' Position

i. Claimants' Primary Position- Canadian Law Applies to the Motion

62. Claimants take the position that Canadian law applies to Claimants' Motion to Disqualify.[49] According to Claimants, "[t]*he Tribunal has discretion to conduct this Arbitration* […]*, so long as that equality guarantee is upheld and both the Claimants and Canada have the full opportunity to present their cases.*"[50] As neither NAFTA nor the UNCITRAL Rules address conflicts of interest or motions to disqualify counsel, Claimants contend that the Tribunal must use its discretion to decide this motion and that the law of the place of arbitration —Calgary, Alberta— should be its guide.[51] Claimants further posit that the facts of this arbitration and Motion support the application of Canadian conflict of interest principles, and Claimants note that prior investment arbitration tribunals have turned to domestic law for guidance on disqualification motions.[52]

63. Claimants argue that Canadian law employs an objective test for determining a conflict of interest,[53] which involves two questions:

(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?

(2) Is there a risk that it will be used to the prejudice of the client?[54]

64. Claimants further explain that "*Canadian law provides that once it is shown by the client that that there was a previous relationship that was sufficiently related to the retainer from which it is sought to remove the solicitor, the decision maker should infer that confidential information was imparted unless the solicitor satisfies the decision maker that no information was imparted that could be relevant.*"[55] Moreover, "*prejudice is presumed* [,

[49] Cl. Motion, Section III(A).
[50] Cl. Motion, para. 42.
[51] Cl. Motion, paras. 44-45; Cl. Reply, paras. 27-28.
[52] Cl. Motion, paras. 45-46 (citing CLA-003, *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines,* ICSID Case No. ARB/03/25 – Annulment (Decision on Application for Disqualification of Counsel, 18 September 2008)("*Fraport*")); Cl. Reply, paras. 29-30.
[53] Cl. Motion, para. 42. Hearing Tr., Day 2, p. 207.
[54] Cl. Motion, para. 47 (citing CLA-009, *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (SCC) (Canada, May 10, 1990) "*Martin*")).
[55] Cl. Motion, para. 48 (citing CLA-009, *Martin,* p. 49). *See also*, Hearing Tr., Day 2, p. 207.

and cannot be rebutted,] *when an individual actually received information of an adverse party that is confidential or privileged during the prior retainer.*"[56] Claimants underscore that "[i]*n those cases, the Supreme Court of Canada has held that disqualification due to a conflict of interest is automatic.*"[57]

65. According to Claimants, "[t]*he question of whether a conflict of interest exists* […] *is governed by whether a reasonably informed member of the public would conclude that Ms. Dosman 'may well have acquired confidential information' about the Claimants as a result of her employment at Vannin.*"[58] Claimants argue that the reasonable person standard "*recognizes how difficult it is to prove the sharing of information as between lawyers that work together*", which Claimants further contend is "*near impossible*" in an adversarial situation without such information being disclosed by Respondent, or without Claimants revealing their privileged information.[59]

66. Claimants submit that "*a lack of a solicitor-client relationship has no bearing on the conflict*"[60] and refute Respondent's contention "*that the test for a conflict of interest is different for lawyers and non-lawyers, even in cases that deal with legally privileged information like this one.*"[61] Additionally, Claimants assert that Ms. Dosman breached common interest privilege by disclosing the information from Vannin to Respondent.[62]

ii. Claimants' Alternative Position

67. In the alternative, Claimants argue that if the Tribunal finds that "*Canadian law does not govern the conflict of interest, the Conflicted Bureau Team must still be disqualified pursuant to international law.*"[63] Claimants assert that the few existing international arbitration disqualification decisions are distinguishable from the situation now at hand since they all involved ICSID Convention proceedings and the ICSID Rules, which

[56] Cl. Motion, para. 49 (citing CLA-009, *Martin,* at 49).
[57] Hearing Tr., Day 2, p. 207.
[58] Cl. Motion, para. 50 (citing CLA-012, *Williamson v. R.*, 2009 TCC 222 (Canada, April 23, 2009) ("*Williamson*")).
[59] Hearing Tr., Day 2, p. 208.
[60] Cl. Reply, Section II(B)(ii).
[61] Cl. Reply, para. 35.
[62] Cl. Reply, para. 48. Hearing Tr., Day 2, p. 211.
[63] Cl. Motion, para. 80.

preclude the application of domestic law, and the present dispute involves the UNCITRAL Rules that do not.[64]

68. According to Claimants, however, "Fraport, Khudyan *and* Hrvatska *set out legal principles that can guide the Tribunal's analysis of the conflict of interest*."[65] *Fraport* and *Khudyan* endorse an objective conflict of interest test that is substantially similar to the Canadian law test and "*generally focused on whether: (i) the lawyer at issue represented the party alleging a conflict of interest in the same or a substantially similar proceeding; and (ii) there is a material risk that confidential information the lawyer at issue learned from the party alleging a conflict of interest could prejudice the client in the proceeding*."[66] Moreover, in determining the conflict, the Tribunal can be guided by the *Hrvatska* general principles, namely the "*conduct of counsel subsequent to the alleged conflict of interest being raised was relevant to assessing whether the conflict of interest created an* '[a]*tmosphere of apprehension and mistrust' that impacted the perceived fairness of the proceedings*", which Claimants assert has occurred here.[67]

(2) Respondent's Position

69. Respondent disputes Claimants' position that Canadian law on conflict of interest is applicable.[68] Relying on NAFTA Articles 1131 and 1120(2), Respondent submits that the Tribunal should instead be guided by the principles set out in the NAFTA, the UNCITRAL Arbitration Rules and international law to decide Claimants' Motion.[69]

70. Respondent recognizes that the Tribunal has inherent powers to ensure the proper conduct of the arbitration, including guaranteeing due process and the preservation of the integrity of the proceedings.[70] The source of this inherent power can be found in NAFTA Article 1115 (observance of equal treatment and due process) as well as UNCITRAL Arbitration Rule 15(1), which provides that "*the arbitral tribunal may conduct the arbitration in such*

[64] Cl. Motion, para. 81. Hearing Tr., Day 2, p. 225.
[65] Cl. Motion, para. 86.
[66] Cl. Motion, para. 87.
[67] Cl. Motion, para. 88.
[68] R. Rejoinder, para. 6.
[69] R. Rejoinder, paras. 6-7. Hearing Tr., Day 2, pp. 258-259.
[70] R. Response, para. 29.

a manner as it considers appropriate" "*provided that the parties are treated with equality*" and that "*each party is given a full opportunity to present its case*."[71] When considering the applicable international law rules, Respondent argues that the Tribunal must be guided by these fundamental principles.[72]

71. Citing UNCITRAL Arbitration Rule 4, Respondent further argues that the disputing parties have a fundamental right to select counsel of their choice, and only "*in exceptional circumstances where risk of prejudice to the fairness of the proceedings has been demonstrated, could a disputing party's right to choose its counsel be affected.*"[73]

72. Respondent contends that the committee/tribunals in *Fraport v. Philippines*, *Khudyan v. Armenia*, *Hrvatska v. Slovenia* and *Rompetrol v. Romania* have all decided the relevant conflict issue "*considering international law and the potential effect on the integrity and fairness of the proceedings and on the disputing parties*['] *right to choose its own counsel*,"[74] not the application of domestic law.[75] Specifically, Canada submits that the Tribunal should apply the *Khudyan* tribunal test to decide Claimants' Motion to Disqualify, which test requires that "*it must be demonstrated that there is a real risk that* [the allegedly conflicted individual, Mr. Tumanov] *obtained confidential information that may be of significance to the dispute before the Tribunal.*"[76] Moreover, the *Khudyan* tribunal "*specifically refused to apply any presumption that Mr. Tumanov would have had access to privileged or confidential information about the case.*"[77]

73. Canada disputes that the Tribunal is required to apply Canadian law on conflict of interest to decide the Motion as it would be contrary, for example, to NAFTA Article 1131(1)(Governing Law) and it is not clear that Canadian law would even be the correct domestic law, given the U.S. and New York elements of the allegations.[78] Additionally,

[71] R. Presentation, p. 20.
[72] Hearing Tr., Day 2, p. 259.
[73] R. Response, paras. 29-30 (citing UNCITRAL Arbitration Rule 4).
[74] R. Rejoinder, para. 11.
[75] R. Rejoinder, paras. 11-14.
[76] R. Rejoinder, para. 14 (citing RLA-011, *Edmond Khudyan and Arin Capital & Investment Corp. v. Republic of Armenia*, ICSID Case No. ARB/17/36, para. 59 (Procedural Order No. 2, 5 December 2018)("*Khudyan*")).
[77] *Id* (citing RLA-011, *Khudyan*, para. 72).
[78] R. Response, paras. 53 *et seq*.

even if the Tribunal were to apply Canadian or U.S. law, Respondent submits that neither would support the disqualification of Ms. Dosman or the Trade Law Bureau. For example, Claimants' cited test does not apply as Vannin and Claimants never had a solicitor-client relationship and Ms. Dosman never acted as Claimants' legal counsel.[79]

B. APPLICATION OF THE LAW TO THE FACTS

(1) Claimants' Position

74. Claimants submit that the information they provided to Vannin was confidential or privileged, and Ms. Dosman, while employed at Vannin, received such confidential or privileged information.[80] Claimants specifically contend that Ms. Dosman transferred or otherwise shared protected, privileged or confidential information with Canada's legal team, including Mr. Mark Luz.[81]

75. Claimants allege that "*Canada grossly mischaracterize*s *the evidence before* [the] *Tribunal*".[82] First, Claimants argue that "*Ms. Dosman has admitted to receiving privileged informatio*n", including the fact that Claimants were seeking funding and approached Vannin and the weekly chart containing the amount of funding sought and other information.[83] Claimants further assert that Ms. Dosman was involved in internal reviews and discussions at Vannin regarding Claimants' claim, including discussions with Mr. Rivas and attendance at weekly meetings. Claimants contend that Ms. Dosman does in fact recall the privileged information, specifically that Claimants were seeking funding, which Ms. Dosman, not Claimants' counsel, relayed to Canada's legal team.[84]

76. Moreover, Claimants emphasize that within days of receiving notice of Ms. Dosman's involvement in the arbitration, Claimants notified the Trade Law Bureau of the conflict of interest.[85] Then, as the Tribunal was not yet constituted, Claimants immediately pursued their domestic court remedies by filing the FC Application (and then the FCA Appeal while

[79] R. Rejoinder, paras. 15-20. R. Response, paras. 58 *et seq*.
[80] Cl. Motion, para. 3. Response, paras. 6 *et seq.*
[81] Cl. Motion, para. 3. Response, paras. 17 *et seq.*
[82] Cl. Reply, Section II(A).
[83] Cl. Reply, paras. 6-9.
[84] Cl. Reply, paras. 14-22.
[85] Cl. Motion, para. 100.

seeking Respondent's consent to stay the appeal). When Respondent did not consent to stay the appeal, Claimants brought the Motion before the Tribunal without delay.[86]

77. Contrary to Respondent's assertions, Claimants submit that Canada will not suffer prejudice if the Motion is granted. There is no evidence that the approximately 35 Trade Bureau attorneys, who are not part of the conflicted Bureau team, are incapable of defending Canada in this dispute.[87] Moreover, even if the Tribunal grants the Motion, Canada would still likely be represented by the Trade Law Bureau, so Canada would not be deprived of its counsel of choice.[88]

78. Claimants, on the other hand, argue that they will suffer significant prejudice if the Motion is denied. Claimants highlight that both Canadian and international law "*acknowledge that protecting privileged information is a fundamental component of ensuring the fairness of proceedings*."[89] Claimants, moreover, strongly assert that "*privilege trumps the right to choose counsel, especially at this early stage of these proceedings*."[90]

79. According to Claimants, they have suffered significant prejudice as a result of the conflicted Bureau team continuing to act for Canada, including Claimants being prevented from prosecuting their claims in a timely manner and the impeding of Claimants' ability to obtain litigation financing.[91] Additionally, Claimants assert further possible future damage as the transferred privileged information could at the very least reveal their litigation strategy, and it is possible that Respondent will use the information to "*improperly seek security for costs against the Claimants or continue delaying this Arbitration in an attempt to waste the Claimants' time and money*."[92]

(2) Respondent's Position

80. According to Respondent, while at Vannin Ms. Dosman neither had access to, acquired, nor possessed privileged or confidential information, and was not acting as an attorney in

[86] Cl. Motion, paras. 102-103.
[87] Cl. Reply, para. 52.
[88] Cl. Reply, para. 53.
[89] Cl. Reply, para. 55.
[90] Cl. Reply, para. 56.
[91] Cl. Reply, paras. 57-58.
[92] Cl. Reply, para. 61.

any event. Further, and regardless of the aforementioned, Ms. Dosman transferred no information to any member of Canada's legal team after moving from Vannin to Canada - save the fact that she confirmed Claimants were seeking litigation funding, a fact that Claimants' themselves disclosed to Canada when they informed Canada that they had a *"relationship with Vannin*."[93]

81. Respondent underscores that "*Claimants' challenge is predicated on the fact that confidential and privileged documents were shared with Vannin, specifically with Mr. Rivas. Claimants have not produced any corroborating evidence regarding the communication of this information. Even if Vannin did receive such documents from Claimants, the evidence is that Ms. Dosman herself never did. And it is inaccurate to say that she admitted to receiving the information. In fact, no emails have been produced showing that privileged information was shared with her.*"[94]

82. Respondent submits that the Tribunal should consider the following facts when considering Claimants' Motion:

> *(a) There was no solicitor-client relationship, and indeed no fiduciary duty of loyalty, established between Ms. Dosman, on one side, and Vannin or the Claimants, on the other side. Contrary to the Claimants' suggestions, Ms. Dosman's employment contract shows that she was not employed as a legal counsel dispensing legal services. It is also clear that Vannin provides financing, not legal advice to its clients.*
>
> *(b) Ms. Dosman did not have access to any of the Privileged Information* [defined by the Claimants as the BLG Memo prepared for Claimants, the proposed litigation budget; and a draft expert witness report[95]] *allegedly shared with Vannin. While employed at Vannin, she was not privy to any internal review or discussion of the Claimants' case.*
>
> *(c) While employed at Vannin, Ms. Dosman did not obtain any confidential information that is of significance in the sense that it*

[93] R. Rejoinder, paras. 31 *et seq*. R. Response, para. 66.
[94] Hearing Tr., Day 1, p. 21.
[95] R. Rejoinder, para. 26 (citing Cl. Motion, para. 11; Cl. Reply, para. 3).

> *would result in a prejudice to the Claimants' interests in the arbitration at issue.*
>
> *(d) Ms. Dosman did not breach any confidentiality obligations under the NDA between Vannin and the Claimants or under her employment contract with Vannin: there has not been any disclosure of confidential information by her vis-à-vis Vannin or the Claimants*.[96]

83. It is, therefore, Canada's position that Ms. Dosman did not possess and consequently could not transfer any non-public, confidential, privileged, or other protected information to any other member of Canada's legal team and hence disqualification is not warranted under Canadian law, international law, or to preserve the integrity of the arbitration process.

84. Furthermore, even if there is a conflict of interest, Respondent submits that the prejudice Canada would suffer from the disqualification of several Trade Law Bureau counsel far outweighs any prejudice suffered by Claimants.[97] On 2 August 2019, Ms. Dosman was temporarily removed from the case and an ethical screen remains in place. Moreover, Ms. Dosman does not remember having any such confidential information, so she could not have passed it to any other Trade Law Bureau official. Consequently, "*there is no basis for the Claimants' request to disqualify other counsel in the Trade Law Bureau*."[98] To exclude other Trade Law Bureau counsel "*would be egregiously disproportionate and so prejudicial to Canada that it would violate the fundamental fairness of the proceedings and deprive Canada of its fundamental right to defend itself and fully present its case*."[99] Additionally, Respondent clarifies that the Trade Law Bureau is comprised of 12-15 lawyers, not 35, and "*Canada's right to choose its counsel in this arbitration is a fundamental right which cannot lightly be interfered with, especially where, such as here, the reasons for doing so are tenuous and the potential effect on Canada's fundamental rights would be significant*."[100]

[96] R. Rejoinder, para. 22.
[97] R. Response, Section IV.
[98] R. Response, para. 68.
[99] R. Response, para. 69.
[100] R. Rejoinder, para. 53.

85. Respondent further rebuts Claimants' accusations regarding its conduct. For example, Respondent has made a good faith effort to temporarily remove Ms. Dosman while the Claimants' concerns were investigated and then, despite finding no evidence to disqualify her, Canada has maintained Ms. Dosman's removal as a gesture of good faith.[101]

VI. THE TRIBUNAL'S ANALYSIS

A. APPLICABLE LAW

86. Claimants and Respondent agree that it is incumbent on this Tribunal to decide on the disqualification of Counsel for Respondent. Hence, the competence of the Tribunal to make the relevant ruling is not in dispute between the Parties but only the rules in reliance on which any determination is to be made.

87. As summarised earlier, Claimants' position is that the motion before the Tribunal must be determined in accordance with Canadian domestic law (being the law of the arbitral seat) – and in particular the provincial laws of Alberta as well as the Federal laws of Canada. Failing this, Claimants submit that the matter must be decided in accordance with international law. Respondent's position is that the Tribunal must be guided by NAFTA, the UNCITRAL Rules (1976) and international law alone, without any reference to domestic law.

88. Further, with respect to both competing approaches, the Parties disagree on the relevant principles to be applied.

89. Each of these issues is addressed in turn.

(1) Governing Law

90. Having carefully considered each side's submissions, the Tribunal concludes that there is no basis to apply Canadian domestic law (whether provincial or federal) to the Motion, and

[101] R. Rejoinder, para. 56.

that the Motion must instead be determined in accordance with NAFTA, the UNCITRAL Rules[102] and international law.

91. In arriving at this conclusion, there is an initial question as to the proper characterisation of the issue before the Tribunal. In this regard, there is a key distinction to be drawn between (1) regulating the conduct of counsel in terms of their professional duties and applicable ethical rules and (2) ensuring the integrity of the arbitration process itself, including fundamental principles of fairness, natural justice and equality as between the parties. In the Tribunal's view, issue (1) is not a matter within its mandate but one for the regulatory authorities and courts of the jurisdiction to which any given counsel is subject. Issue (2), on the other hand, is squarely a matter for the Tribunal, and the core substance of the motion before it. Claimants themselves characterise their application for disqualification in the following manner:

> *This Motion is about protecting the fairness of this Arbitration and upholding fundamental principles of natural justice.*[103]

92. This distinction between issues (1) and (2) was highlighted by the *ad hoc* committee in *Fraport*[104] at paragraphs 37 to 41:

> *37. The Committee considers that it has the power and duty to conduct the process before it in such a way that the parties are treated fairly and with equality and that at any stage of the proceedings each party is given the opportunity to present its case. This power and duty necessarily includes the power and obligation to make sure that generally recognized principles relating to conflict of interest and the protection of the confidentiality of information imparted by clients to their lawyers are complied with. Indeed, such principles are of fundamental importance to the fairness of the Committee's procedures, such that the Committee has the power and duty to ensure that there is no serious departure from them.*
>
> […]
>
> *39. However, the Committee does not have deontological responsibilities or jurisdiction over the parties' legal*

[102] Pursuant to NAFTA Article 1120(2), as modified by Section B of NAFTA Chapter Eleven.
[103] Cl. Motion, para. 41.
[104] CLA-003, *Fraport*.

> *representatives in their own capacities. Despite the agreement of the parties to submit the present application to it, the Committee has no power to rule on an allegation of misconduct under any such professional rules as may apply. Its concern is therefore limited to the fair conduct of the proceedings before it.*
>
> […]
>
> *41.* […] *the Committee's consideration of the matter is not, and should not be, based upon a nice reading of any particular code of professional ethics, applicable in any particular national jurisdiction. Such codes may vary in their detailed application. Rather, the Committee must consider what general principles are plainly indispensable for the fair conduct of the proceedings.*

93. Once the issue before the Tribunal has been characterised as issue (2), as distinguished from issue (1), it follows that domestic law does not govern. As explained below, this conclusion is so as a matter of principle and is also consistent with authority.

94. *First*, as pointed out by Respondent, the NAFTA and the UNCITRAL Rules together constitute a complete, self-contained regime which includes broad discretion for the Tribunal to conduct the arbitral proceedings in any way it sees fit, so as to ensure fairness and equality between the parties. Absent the existence of mandatory principles which are to be applied pursuant to Article 1(2) of the UNCITRAL Rules (which are not alleged here)[105] this discretion is not tied to any domestic law. As noted in the leading commentary by Caron and Caplan:

> *a choice of the UNCITRAL Rules is to be understood as an exclusion of all national arbitration law, except for its mandatory provisions.* […] [T]*he arbitrators are not obliged to follow any domestic law in solving procedural problems not covered by the UNCITRAL Rules. They must, however, ensure that the mandatory norms of 'the law applicable to the arbitration' are not circumvented.*[106]

[105] Article 1(2) of the UNCITRAL Rules provides: "*These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail*."
[106] David D. Caron & Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd Ed. (2013), at p. 35.

95. In particular, Article 15(1) of the UNCITRAL Rules provides for a very broad procedural discretion, as follows:

> […] *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 any stage of the proceedings each party is given a full opportunity of presenting his case.*

96. As Paulsson and Petrochilos note, Article 15(1) of the UNCITRAL Arbitration Rules:

> *does not direct the tribunal to any national law (e.g. procedural law) as a source to draw upon.*[107]

97. Claimants accept the existence of this broad discretion,[108] but argue that Canadian law must still be applied because neither NAFTA nor the UNCITRAL Rules address conflicts of interest or motions to disqualify counsel.[109] But bearing in mind the distinction between issues (1) and (2) highlighted in paragraph 91 above, the alleged conflicts of interest that are the subject of the Motion are relied upon specifically in the context of ensuring the fairness and integrity of the proceedings. And the Tribunal's power to safeguard the fairness and integrity of the proceedings is clearly a matter addressed and governed by the UNCITRAL Rules, in particular Article 15(1), or alternatively available by reason of the Tribunal's inherent powers.

98. It is useful in this regard to recall the breadth of Article 15(1) of the UNCITRAL Rules. This is elaborated by Paulsson & Petrochilos as follows:[110]

> […] *this provision is said to be 'one of the most important sections of the* [1976] *UNCITRAL Rules* [as it] *provide*[s] *the key to a variety of problems not regulated elsewhere in the Rules'.*[111]
>
> […]

[107] Jan Paulsson and George Petrochilos, *UNCITRAL Arbitration* (Kluwer 2017) ("Paulsson & Petrochilos"), pp. 120-121.
[108] Cl. Motion, para. 42.
[109] Cl. Motion, para. 44; Cl. Reply, para. 28.
[110] Paulsson & Petrochilos, pp. 120-122.
[111] Citing David D. Caron, Lee M. Caplan & Matti Pellonpää, *The UNCITRAL Arbitration Rules, A Commentary* (OUP 2006), at p.26.

> *Arbitrators have thus relied on this broad authority for a variety of procedural decisions;* […]
>
> *It may be helpful at the outset to examine the broad authority of the tribunal under article 15(1) of the 1976 Rules in the light of the doctrine of inherent powers. The doctrine was primarily developed in public international law ... and holds that tribunals possess certain powers that are not expressly conferred upon them, but which are nevertheless necessary for the proper discharge of their adjudicatory function or for the preservation of the integrity of the proceedings.* […]
>
> *When powers are expressly conferred by the Rules, whether in broad or specific terms, it is difficult to see the need to resort to inherent powers. This applies* […] *to the broad remit of a tribunal under article 15(1) of the 1976 Rules to 'conduct the arbitration in such manner as it considers appropriate' – there is nothing implied about this explicitly broad authority* […].

99. In the alternative, if one looks beyond Article 15(1) of the UNCITRAL Rules, the existence of inherent powers on the part of international tribunals is, as Paulsson & Petrochilos observe, generally accepted. In particular, it is generally recognised that international tribunals have the inherent power to take measures to preserve the integrity of their proceedings and to ensure the effectiveness of their judicial function (being the core concern of this motion). In the words of Brower & Schill:

> [T]*he inherent power of international courts and tribunals to act to preserve the integrity of proceedings, and to ensure the effectiveness of their judicial function, is a general principle of law in the sense of Art. 38(1)(c) ICJ Statute, independent of whether or not such powers are conferred explicitly upon a court or tribunal. The widespread acceptance of the authority of courts and tribunals to regulate the proceedings before them and to conduct them in an efficient manner further suggests that provisions in the constitutive documents of international courts and tribunals that can reasonably be understood as conferring such powers should be interpreted and applied accordingly* […].[112]

[112] C. Brower & S. Schill, "*Regulating counsel conduct before international arbitral tribunals*" in P. Bekker, R. Dolzer, & M. Waibel (Eds.), Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts (Cambridge: Cambridge University Press, 2010) 488-509, p. 499.

100. There are numerous instances of international tribunals deploying this inherent power. By way of example, in *Libananco Holdings v. Turkey*, the tribunal stated that it had:

> [no] *doubt for a moment that, like any other international tribunal, it must be regarded as endowed with the inherent powers required to preserve the integrity of its own process* […].[113]

101. So it is (as noted *e.g.* by Paulsson & Petrochilos) that tribunals in proceedings under the UNCITRAL Rules routinely exercise discretion and fashion procedural solutions on a range of matters in order to ensure the fairness and integrity of their proceedings, without recourse to domestic law, despite there being no specific itemisation of the particular matters in the rules themselves.

102. Indeed, Claimants' own alternative case (that draws on international law) demonstrates that principles are readily available without the need to have recourse to domestic law, despite the lack of specific provision in NAFTA or the UNCITRAL Rules.

103. It follows that, contrary to Claimants' case, it is not correct that NAFTA and the UNCITRAL Rules contain a lacuna with regard to the issues raised by this motion and which must be filled by domestic law.

104. *Secondly*, as emphasised by Respondent,[114] NAFTA in its Article 1131(1) ("*Governing Law*") provides that:

> *A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.*[115]

105. This is a mandate that excludes recourse to Canadian law for the purposes of deciding the issues in dispute. Whilst there is room for debate as to whether the phrase "*issues in dispute*" in Article 1131(1) is restricted to issues concerning the merits, rather than

[113] RLA-007, *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, para. 78 (Decision on Preliminary Issues, 23 June 2008).
[114] R. Response, para. 54; R. Rejoinder, para. 7.
[115] Respondent further relies upon the fact that NAFTA Article 1120(2) provides: "*The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.*" R. Rejoinder, para. 7.

procedural issues, the Tribunal considers that the intention behind Article 1131(1) is a general decoupling from domestic law of all the Contracting Parties to the treaty.

106. *Thirdly*, even if the Tribunal were to look beyond the self-contained regime constituted by NAFTA and the UNCITRAL Rules, and consider connecting factors to determine which law ought to govern, for the reasons that follow, the position is not conclusive.

107. Claimants point to the following connecting factors: (a) the arbitral seat being Calgary, Alberta; (b) the events at issue having occurred in Canada, including the allegedly privileged information at issue being located in Canada and having been transmitted to Respondent's lawyers in Canada, and (c) the impugned members of Respondent's legal team being Canadian lawyers, most of whom are registered with the Law Society of Ontario (Canadian conflict of interest laws being governed by Supreme Court of Canada jurisprudence which is equally applicable across Canadian provinces such as Alberta and Ontario).[116]

108. As for (a), the arbitral seat being Calgary, Alberta, in the absence of any mandatory principles of Alberta or Federal law that may be applicable pursuant to Article 1(2) of the UNCITRAL Rules,[117] the law of the seat has no obvious relevance to issues of conflicts of interest, which concern lawyer-client relations. Importantly, the arbitral seat is often chosen, as here, after the arbitration has commenced, and lawyer-client relationships have been concluded. It would be unfair to test such relations in accordance with a subsequently selected law that has not shaped expectations or conditioned conduct at a previous point in time.

109. As for (b), the location of the events at issue, as noted by Respondent, there are factors pointing in different directions.[118] In particular, alongside the points identified by

[116] Cl. Motion, para. 45; Cl. Reply, para. 29.
[117] As noted by Respondent in paragraph 9 of its Rejoinder, there is no mandatory requirement in the Commercial Arbitration Act requiring the application of domestic rules on conflict of interest in international arbitrations seated in Canada. Moreover, in the course of the Claimants' Federal Court proceedings, the Federal Court of Canada noted that "*arbitrators have wide latitude to manage the proceedings before them, which includes setting procedural rules.*" *Geophysical Services Incorporated, et al. v. Her Majesty the Queen in Right of Canada*, Federal Court File No. T-1735-19, Judgment and Reasons, 20 October 2020, para. 56.
[118] R. Response, para. 56.

Claimants, GSI transmitted the allegedly confidential and privileged information to Vannin, a U.S. firm, under a NDA which was subject to New York law and, at the time of the transmission of information, Ms. Dosman was employed by Vannin at their New York offices, under an employment contract also governed by New York law.

110. As for (c), the impugned members of Respondent's legal team being Canadian lawyers, the connecting factors relied upon by Claimants would be relevant to issue (1) as identified in paragraph 91 above, rather than issue (2).

111. None of the connecting factors, therefore, mandate the application of Canadian law to this motion.

112. The Tribunal therefore does not consider that domestic law provides the legal framework for determining this motion. This is not to say that no reference can be made to domestic law on conflicts of interest, or that domestic law cannot provide guidance, for example, as to what information may be confidential or privileged. But any such reference to domestic law can only be by way of broad guidance – in so far as needed – and must be in the context of the Tribunal's exercise of its discretion under NAFTA and the UNCITRAL Rules under international law.

113. This analysis is consistent with previous decisions of arbitral tribunals.[119] As noted by Respondent,[120] Claimants have not identified any decision by a tribunal constituted under international law that has applied a specific rule of domestic law to decide a motion to disqualify counsel or experts.

114. Claimants have cited the decisions of (a) the *ad hoc* committee in *Fraport*; (b) the tribunal in *Khudyan*;[121] (c) the tribunal in *Hrvatska*;[122] and (d) the tribunal in *Rompetrol.*[123]

[119] The Tribunal is obviously not sitting in a hierarchical and unitary system which requires it to follow precedents. Prior decisions must nevertheless be considered as a matter of due process where these have been relied upon by the Parties. Further, there is value in considering the reasoning of prior tribunals who have grappled with similar issues. Further still, the Tribunal would be hesitant to depart from any *jurisprudence constante*.
[120] R. Rejoinder, para. 11.
[121] RLA-011, *Khudyan*.
[122] RLA-003, *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia,* ICSID Case No. ARB/05/24 (Order Concerning the Participation of a Counsel, 6 May 2008) ("*Hrvatska*").
[123] RLA-004, *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3 (Decision of the Tribunal on the Participation of a Counsel, 14 January 2010) ("*Rompetrol*").

Claimants place reliance on *Fraport* (in so far as the *ad hoc* committee referred to domestic law), and seek to distinguish the other authorities on the basis that they all involved proceedings governed by the ICSID Convention and Rules, which (unlike the UNCITRAL Rules) expressly preclude the application of domestic law.[124]

115. In *Fraport*, it is correct that the *ad hoc* committee considered domestic law applicable to a lawyer who was subject to a disqualification application, despite the fact that the proceedings were governed by the ICSID Convention and Arbitration Rules, which preclude the application of domestic law. But importantly, the *ad hoc* committee made clear that it did so only in order to explore whether there were any "*common general principles*" which could guide it in the exercise of its discretion (under international law) in safeguarding the fair conduct of the arbitral proceedings:

> *40. Mr. Schwartz is a member of the California and Paris Bars. The parties have made extensive reference in their submissions to the Californian law on legal ethics; and also to the ethical rules of the Paris Bar and, following the Committee's request, to the Code of Conduct for Lawyers issued by the Council of the Bars and Law Societies of the European Union.*
>
> *41. This material is valuable to the extent that it reveals common general principles which may guide the Committee. But none of it directly binds the Committee, as an international tribunal. Accordingly, the Committee's consideration of the matter is not, and should not be, based upon a nice reading of any particular code of professional ethics, applicable in any particular national jurisdiction. Such codes may vary in their detailed application. Rather, the Committee must consider what general principles are plainly indispensable for the fair conduct of the proceedings.*[125]

116. Similarly, in each of the other decisions that have been cited, the tribunal approached the conflict issue from the perspective of its potential effect on the integrity and fairness of the arbitral proceedings. In each case, this was treated as a matter of international law, not domestic law.

[124] Cl. Motion, para. 81.
[125] CLA-003, *Fraport*, paras. 40-41.

117. In *Khudyan*, the tribunal stated that it had no authority to apply national law. Instead – citing *Fraport* – it approached the matter from the perspective of whatever was required to ensure the fair conduct of the proceedings, and formulated and applied a test as a matter of international law:

> ***B. Legal Standard***
>
> *51. The Tribunal does not have the authority to police and sanction compliance with any particular national law or professional ethics code that may or may not be applicable to Dr. Tumanov. Accordingly, the Tribunal will focus its assessment on the general principles that are indispensable for the fair conduct of the proceedings. In establishing which are the relevant general principles, the Tribunal will take guidance from the principles established by the ad hoc Committee in Fraport and those laid down in the Hague Principles, although it does not consider itself bound by them.*[126]

118. In *Hrvatska*, the tribunal's analysis reflected the same approach as in *Fraport*. It drew the same distinction between issues 1 and 2 as in paragraph 91 above, and rejected the application of domestic rules regulating the conduct of counsel:

> *23.* […] *For an international system like that of ICSID, it seems unacceptable for the solution to reside in the individual national bodies which regulate the work of professional service providers, because that might lead to inconsistent or indeed arbitrary outcomes depending on the attitudes of such bodies, or the content (or lack of relevant content) of their rules. It would moreover be disruptive to interrupt international cases to ascertain the position taken by such bodies.*

119. Instead, the tribunal approached the conflict of interest objection before it from an exclusively international law perspective, and in particular the overriding principle of the immutability of properly constituted tribunals in Article 56 of the ICSID Convention;[127] the fundamental rule of procedure in Article 52(1)(d) of the ICSID Convention that the proceedings should not be tainted by any justifiable doubt as to the impartiality or

[126] RLA-011, *Khudyan*, para. 51.
[127] RLA-003, *Hrvatska*, paras. 25, 27-28.

independence of any tribunal member;[128] and the tribunal's inherent power "*to take measures to preserve the integrity of its proceedings*", which the tribunal held exists aside from the ICSID Convention and ICSID Arbitration Rules, being:

> […] *an 'inherent power of an international court to deal with any issues necessary for the conduct of matters falling within its jurisdiction';* [and a] *power* [that] *'exists independently of any statutory reference'.*[129]

120. Similarly, in *Rompetrol*, the tribunal made no reference at all to domestic law. Instead, it approached the application purely as a matter of international law, and on the basis that if the tribunal were to accede to the application to disqualify counsel, it would have to be because of:

> *an overriding and undeniable need to safeguard the essential integrity of the entire arbitral process.*[130]

121. Consistent with the Tribunal's approach, none of these decisions applied domestic law. Importantly, and contrary to Claimants' submissions, this was not premised solely on the exclusion of domestic law by the ICSID Convention or Rules, but also on the distinction between issues (1) and (2) as set out in paragraph 91 above, and the lack of relevance of domestic law to issues concerning the integrity of the arbitral process itself.

122. It follows from all these points that the Tribunal need not address the differences between the Parties as to the principles to be applied to this motion as a matter of the provincial law of Alberta and the Federal Law of Canada, where the Parties differ significantly.

123. The Tribunal therefore turns to address the principles to be applied on the basis of NAFTA, the UNCITRAL Rules and international law.

[128] RLA-003, *Hrvatska*, para. 30.
[129] RLA-003, *Hrvatska*, para. 33.
[130] RLA-004, *Rompetrol*, paras. 16-17, 22.

(2) Applicable Principles

124. In accordance with NAFTA, the UNCITRAL Rules and international law, safeguarding the fairness and integrity of these arbitral proceedings requires, in turn, the safeguarding of two fundamental principles, that must be balanced by the Tribunal:

> (1) The assurance of equal treatment as between the Parties in accordance with the principle of international reciprocity and due process (NAFTA Article 1115; UNCITRAL Rules, Article 15(1)); and
>
> (2) The right of the Parties "*to be represented or assisted by persons of their choice*" (UNCITRAL Rules, Article 4).

125. As noted by the *ad hoc* committee in *Fraport*, the first of these principles:

> […] *necessarily includes the power and obligation to make sure that generally recognized principles relating to conflict of interest and the protection of the confidentiality of information imparted by clients to their lawyers are complied with. Indeed, such principles are of fundamental importance to the fairness of the Committee's procedures, such that the Committee has the power and duty to ensure that there is no serious departure from them.*[131]

126. But as also noted in *Fraport*, the second of these principles also raises fundamental issues, given that:

> […] *a decision to disqualify counsel from acting for a party in proceedings* […] *affects that party's freedom to rely upon advice and representation of counsel of its own free choosing.*[132]

127. Indeed in *Rompetrol*, the tribunal placed particular emphasis on this second principle, observing that:

> *A power on the part of a judicial tribunal of any kind to exercise a control over the representation of the parties in proceedings before it is by definition a weighty instrument, the more so if the proposition*

[131] CLA-003, *Fraport*, para. 37.
[132] CLA-003, *Fraport*, para. 38.

> *is that the control ought to be exercised by excluding or overriding a party's own choice.*[133]

128. These competing considerations were analysed and reconciled by the *ad hoc* committee in *Fraport*, as well as the tribunal in *Khudyan*. Both decisions are relied upon by Respondent and cited by the Claimants as part of their alternative case.[134] Indeed the Claimants state in the Motion that:

> […] *if the Tribunal rejects the Claimants' primary position, Fraport, Khudyan and Hrvatska set out legal principles that can guide the Tribunal's analysis of the conflict of interest.*[135]

129. In *Fraport*, an objection was made to a member of the claimant's legal team acting in the arbitration on the ground that the lawyer in question had represented the respondent in prior related proceedings, during which time (*inter alia*) he had access to confidential information and the respondent's case strategy.

130. The objection in *Fraport* and the motion here are similar in that both concern the integrity and fairness of the arbitration procedure, rather than (as with other decisions cited) the impartiality or independence of the Tribunal itself. As noted by the respondent in *Fraport*, the order it sought from the tribunal was "[i]*n the interest of safeguarding the integrity of these proceedings*."[136]

131. The *ad hoc* committee, having noted the two competing interests identified in paragraph 125 above,[137] formulated the applicable standard in the following terms:

> *whether there is a real risk that the lawyer could have received confidential information from that client, which may be of significance in the subsequent proceedings, and which may accordingly prejudice the fair trial of the second proceedings.*[138]

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[133] RLA-004, *Rompetrol*, para. 16. At paragraph 20, the tribunal also cited Article 6(3) of the European Convention on Human Rights, which refers to the right to defend oneself "[…] *in person or through legal assistance of* [one's] *own choosing*" as part of the right to a fair trial [emphasis added by the tribunal].
[134] Cl. Motion, paras. 86-89.
[135] Cl. Motion, para. 86.
[136] CLA-003, *Fraport*, para. 17.
[137] CLA-003, *Fraport*, paras. 37, 38.
[138] CLA-003, *Fraport*, para. 42.

132. This was described as appropriate for a situation involving a former client objecting to counsel, rather than a conflict arising from concurrent representation of clients.

133. According to the *ad hoc* committee, the fact that counsel previously represented another party to the same or closely related proceedings – in and of itself – was not enough to meet the standard. For the integrity of the arbitral proceedings to be impugned, there must be a real risk of receipt in the first proceedings of confidential information which may be of significance in the subsequent proceedings.

134. In *Fraport*, the respondent did not allege that the lawyer in question actually received specific confidential information, but submitted that there was a presumption that he would have done so.[139]

135. Given the fundamental nature of each party's right to be represented by the counsel of its choice, the *ad hoc* committee held that the receipt of confidential information may not be presumed lightly. Rather clear evidence is required, as a party cannot be prevented from access to its chosen counsel on the basis of mere appearances:

> *The Committee cannot act in this regard simply on mere appearances since to prevent a party from having access to its chosen counsel cannot depend upon a nebulous foundation, but rather must flow from clear evidence of prejudice.*[140]

136. In *Khudyan*, an application was made to remove a member of the claimant's legal team – Dr. Gevorg Tumanov – as counsel of record in the arbitration on the basis that he had worked on the case previously while in the employment of the respondent's Ministry of Justice. It was the respondent's case that "*Dr. Tumanov's present involvement as counsel for* [c]*laimants* […] *constitutes a conflict of interest and makes a misuse of the confidential information he obtained while being employed by the Armenian Government highly likely.*"[141]

[139] CLA-003, *Fraport*, para. 47.
[140] CLA-003, *Fraport*, para. 55.
[141] RLA-011, *Khudyan*, para. 26.

137. In terms of the nature of the complaint in *Khudyan*, though not necessarily the precise facts, there are obvious parallels with the motion before this Tribunal. Again, as with *Fraport*, the objection and the motion in *Khudyan* and here concern the integrity and fairness of the arbitration procedure, but – unlike other authorities cited – do not concern the impartiality or independence of the Tribunal itself.

138. The tribunal in *Khudyan* proceeded by focusing on general principles that it considered are "*indispensable for the fair conduct of the proceedings*,"[142] and for this purpose considered The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals, developed by the International Law Society Study Group on the Practice and Procedure of International Tribunals, and the reasoning of the *ad hoc* committee in *Fraport*, noting that it was bound by neither.

139. The tribunal then formulated the relevant test and the relevant question in that case consistently with *Fraport*, as follows:

> *In order to disqualify Dr. Tumanov, it must be demonstrated that there is a real risk that he obtained confidential information that may be of significance to the dispute before the Tribunal.*[143]
>
> […]
>
> *Is there clear evidence of a material risk that Dr. Tumanov received confidential information from the Respondent about the dispute with the Claimants that could be of significance in the present proceedings such that there would be prejudice to the fair disposition of the dispute in this arbitration if the Claimants were allowed to continue being represented by Dr. Tumanov?*[144]

140. Agreeing with the approach in *Fraport*, the tribunal in *Khudyan* stated that:

> […] *it cannot act on the basis of a presumption that a prior retainer gives rise to a material risk that confidential information was imparted by the Respondent to Dr. Tumanov. As the mere appearance of a conflict of interest does not suffice to disqualify Dr. Tumanov, clear evidence is required of the existence of a material*

[142] RLA-011, *Khudyan*, para. 51.
[143] RLA-011, *Khudyan*, para. 59.
[144] RLA-011, *Khudyan*, para. 60.

> *risk that the Respondent imparted to Dr. Tumanov confidential information, which may be of significance in these proceedings and accordingly may prejudice the fair disposition of the dispute in this arbitration.*[145]

141. As for the other authorities cited by the Parties – *Hrvatska* and *Rompetrol* – these are not obviously relevant, since the tests developed in each were premised upon safeguarding the impartiality and independence of the arbitral tribunal, not the fairness and integrity of the proceedings as per the motion here.[146]

142. The Tribunal considers that there is no basis to depart from the reasoning in both *Fraport* and *Khudyan*. Both carefully balance the fundamental competing interests at stake, and both provide a workable, balanced and fair approach.

143. On this basis, the Tribunal finds that the relevant test here is as follows: *Whether there is clear evidence of a material risk that Ms. Dosman and Mr. Luz have received confidential information from Claimants about the dispute that could be of significance in the present proceedings such that there would be prejudice to the fair disposition of the dispute in this arbitration if Respondent were allowed to continue being represented by them.*

B. APPLICATION OF THE LAW OF THE FACTS

(1) Introductory Comments

144. The Tribunal, while noting that it is not bound by legal precedent,[147] has articulated earlier that it will consider prior decisions as a matter of due process when relied upon by the Parties and also that it will be hesitant to depart from any *jurisprudence constante.*

145. Both Claimants and Respondent have relied on *Fraport* and *Khudyan***,** which both deal with situations similar to the one at hand. The Tribunal has already found[148] that there is no basis to depart from the reasoning in such authorities, which well balance the two competing interests at stake, namely preservation of the integrity of the proceedings and

[145] RLA-011, *Khudyan*, para. 61.
[146] This is accepted by Claimants with respect to *Hrvatska*. As stated in Cl. Motion at paragraph 88: "[…] Hrvatska *involved a different type of conflict from the one at issue in this Motion* […]."
[147] *See* fn. 119.
[148] *See* para. 142.

the right of a party to be represented by counsel of its choice. However, any determination of the existence of a conflict of interest is fact specific, and so the Tribunal must evaluate the largely uncontested facts in some detail and consider whether they include elements that differ from *Fraport* and *Khudyan***.**

146. This analysis must start with an assessment of the nature of the information about the dispute that Ms. Dosman is said to have received from Claimants, and subsequently transmitted to Mr. Luz, and that could be of significance in the present proceedings, since this grounds the prejudice to the fair disposition of the dispute in this arbitration of which Claimants complain.

147. Claimants have asked that both Ms. Dosman and Mr. Luz be disqualified. The Tribunal's analysis will center on Ms. Dosman, who also allegedly acted as the conduit of any information that may be in the possession of Mr. Luz. There is no evidence, nor indeed argument, that Mr. Luz had access to any information aside from that to which Ms. Dosman had access.

(2) Nature of Information Allegedly Received

i. Confidential Information

148. The Tribunal considers that the notion of confidential information must include any confidential information imparted by clients to their lawyers without distinguishing between attorney-client privileged information or contractually confidential information under (here) the NDA. The Tribunal also does not find that the specific role or capacity in which Ms. Dosman, who is a lawyer, received the allegedly confidential information at Vannin makes any difference to the disposition of the Motion: both she and Mr. Luz act, or as regards Ms. Dosman intend to act, as counsel in these proceedings, and the Tribunal is tasked with determining whether any information that they possess could be significant in the arbitration and prejudicial to Claimants.

149. According to Claimants, on 8 February 2019, following the execution of the Common Interest Agreement, they provided the following materials to Vannin (referred to as "Privileged Information") for purposes of discussions aimed at funding this Arbitration: a

Memorandum prepared for Claimants by its Counsel that assessed the merits of Claimants' claims against Canada, and Claimants' proposed litigation strategy; a litigation budget outlining relevant steps and a draft report prepared by an expert witness regarding Claimants' claims in this Arbitration (as set out above).[149] These materials have not been made available to the Tribunal (due to their allegedly privileged nature) but the Tribunal has no reason not to believe that documents under the named headings were shared with Vannin, and that the information they contained regarding Claimants' case was thereby made available at Vannin. This, in addition to the (also confidential) fact that Claimants were seeking litigation funding in the first place.

150. Preceding the provision of these privileged materials, Ms. Dosman was copied on an email exchange on 5 February 2019[150] between Mr. Rivas of Vannin and Ms. Lemmens, Counsel for Claimants, which has been partially redacted by Claimants under an assertion of privilege. The email related to a prospective meeting among counsel for Claimants and Vannin. In Ms. Lemmens' 5 February 2019 response message, Ms. Lemmens noted, "*I will catch up with you on the NDA and get that finalized so that we can share some more in-depth information*".[151] It is not in dispute that this email was sent.

151. Ms. Dosman has testified that she does not recall seeing or reading this email.[152] although she would generally read her emails. There is also nothing in the record to suggest Ms. Dosman ever participated in the future call referenced in Ms. Lemmens' email.

152. Ms. Dosman also seems to have had the information that Claimants' claim was considered "*high value*," based upon her, albeit unstable (see further below) recollection of an initial phone call with Mr. Rivas.[153] This evaluation allows for a conclusion that the claim was considered at Vannin to have at least some prospect of success.

[149] *See* para. 47.
[150] R-003, Email from Matti Lemmens, to José Antonio Rivas, Vannin Capital, 4-5 February 2019.
[151] R-003, Email from Matti Lemmens, to José Antonio Rivas, Vannin Capital, 4-5 February 2019.
[152] R-009, Examination for Discovery of Alexandra Dosman, 27 January 2020, p. 33.
[153] Hearing Tr., Day 1, pp. 151-155.

ii. Clear Evidence of a Material Risk of Passing of Information

153. The materials provided by Claimants on 8 February 2019 clearly constitute confidential information that in the Tribunal's view — if available to Respondent — could be both significant in the arbitration and prejudicial to Claimants. Ms. Dosman has denied becoming privy to these specific materials, since she had declined to work on this lead, and there is no evidence to the contrary in the record.

154. The concern for the Tribunal, however, is whether Ms. Dosman became privy to confidential information through the general information sharing and internal briefings that took place on a regular basis in the Vannin firm. It is not in dispute that Ms. Dosman participated in these information sharing and internal briefings, although, in her own words, "*thereafter* [I] *actively did not participate in anything to do with that* [Claimants'] *file*." "*Thereafter*", to the Tribunal's understanding, refers to Ms. Dosman declining from the outset (early 2019) Mr. Rivas' invitation to work on Claimants' file.

155. It is noteworthy, in this regard, that, at the time of its regular information sharing and internal briefings, Vannin did not know that Ms. Dosman was transferring to the Trade Law Bureau and there is no suggestion or evidence that any ethical walls had been put in place preventing Ms. Dosman's access to Claimants' file or information. Indeed, evidence from Vannin has not been presented in these proceedings. It was therefore up to Ms. Dosman to self-regulate in order not to access information.

156. Since Vannin did not know the reason why Ms. Dosman had declined to work on Claimants' case, she continued to attend general staff meeting calls and receive, via email, weekly charts including information about the status of the "*lead*" involving Claimants and the prospective arbitration. Among the information contained in those weekly charts would have been the amount of funding that Claimants were seeking and whether that figure remained static or not.[154]

157. Both the precise contours of the information regularly shared in Vannin's internal briefings and the extent of attention paid my Ms. Dosman to any such information remain unclear,

[154] R-009, Examination for Discovery of Alexandra Dosman, 27 January 2020, p. 25.

and this is compounded by the absence of any evidence from Vannin. It must, however, be presumed that some of this information was confidential, and the test that must now be applied is whether "*there is a real risk that* [Ms. Dosman] *could have received* [such] *information.*" In assessing this question, the Tribunal must consider the relevant timeline.

158. On or about 12 March 2019, Ms. Dosman resigned from Vannin, and she officially and in practice left the company on 3 May 2019.[155] When she resigned, Ms. Dosman informed Vannin that she intended to take a position at the Trade Law Bureau.[156]

159. During the period between Ms. Dosman's notice of resignation and departure, Ms. Dosman continued to attend Vannin team meetings and receive weekly update charts on pending and prospective Vannin matters.[157] According to Ms. Dosman, "[t]*he chart recorded some of the basic information. I did not receive any other information about GSI. Thus, all I knew was that: (a) GSI was represented by counsel in Alberta; (b) the claim was against Canada; (c) the claim was under the NAFTA; (d) the case involved intellectual property; (e) GSI was seeking funding; (f) the damages claimed against Canada were significant; and (g) José Antonio Rivas was in preliminary discussions with GSI counsel*."[158]

160. While it has been concluded above that the record does not show or suggest that Ms. Dosman would have had access to the 8 February materials, it is clear that she did have access to the information shared in Vannin's internal briefings. Ms. Dosman, however, has testified that she does not now recall anything said during these meetings beyond what was contained in the charts and further that the amount of funding sought would have been a column in the chart but that "*I don't know if that number appeared for GSI, and I certainly don't remember if it did*."[159]

161. While Ms. Dosman's recollection of the extent of information presented in internal meetings or charts has varied somewhat between the several testimonies given by her in

[155] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 16.
[156] Hearing Tr., Day 1, p. 96.
[157] Hearing Tr., Day 1, pp. 96-97.
[158] Hearing Tr., Day 2, p. 287 (citing C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 34).
[159] Hearing Tr., Day 1, p. 128.

these proceedings and prior thereto before the Canadian court, the Tribunal has no reason to question her sincerity in giving evidence or in her contemporaneous actions.

162. On 31 May 2019, the Trade Law Bureau provided Ms. Dosman with an offer letter, which she accepted on 3 June 2019.

163. On 7 June 2019, Ms. Dosman started her employment at the Trade Law Bureau, and shortly afterwards, Ms. Dosman was assigned to several arbitration and advisory matters, including the present matter.[160]

164. Ms. Dosman testified that even though she was aware of the fact Claimants were discussing seeking litigation funding from Vannin, she never shared that information with the Trade Law Bureau after she began working for them, with one exception.

165. Ms. Dosman testified that once, at the Trade Law Bureau, she reviewed an exchange of letters between Ms Lemmens and Mr. Luz, dated 2 and 16 August 2019, in which Ms. Lemmens raised the issue of a conflict if Ms. Dosman were indeed working on this arbitration matter. The relevant line from Ms. Lemmens' 2 August 2019 letter is that: "*During the course of Ms. Dosman's previous employment as Managing Director at Vannin Capital LLC ("Vannin"), GSI and its investors shared confidential information regarding the Arbitration with Vannin, and continue to have a relationship with Vannin as the Arbitration moves forward*." Canada's position is that the letter from Ms. Lemmens implied that Vannin did in fact agree to fund this arbitration. When asked about this Ms. Dosman testified:

> *it was put to me that the Claimant*[s] *here had a funding relationship, an ongoing relationship. I did read the letter. And I took that to mean that Vannin had decided to go ahead and fund the claim. And in light of that, I felt that it was appropriate to say that that was not the state of things as I knew it. That as I knew it, there was no funding agreement. So, at that point when the Claimants had come forward and said that had sought funding, so they had revealed that and implied—very strongly implied that you had—that*

[160] C-010, Affidavit of Edith Alexandra Dosman, 18 December 2019, para. 17. Hearing Tr., Day 1, pp. 97, 103.

> *they had a funding relationship, I corrected that, to my knowledge.*[161]

166. It is unclear how Ms. Dosman would be in a position to know the relationship between Claimants and Vannin in August of 2019 given the fact that her conversation with Mr. Rivas was in January of 2019, and she has indicated that she did not actively participate in the matter and paid no or little attention to any discussions about the potential lead thereafter and left Vannin in May 2019.

167. While, again, the Tribunal has no doubt that Ms. Dosman's statements have been made *bona fide*, the above incident serves to illustrate a fundamental risk that is now presented in this arbitration – namely that a latent recollection can be triggered or unearthed by a supervening event. While Ms. Dosman has testified that she did not read or recall emails regarding this "*lead*", nor pay attention to information in emails, calls or charts, Ms. Dosman's current (and understandable) inability to recall details of Claimants' confidential information cannot be a conclusive answer. In particular, the Tribunal finds that there is a real risk that she may recall something of significance as a result of a triggering event. The test to be applied is not a determination that confidential information was passed, but that there is a real risk to this effect. In all the circumstances of this case, the Tribunal finds that this threshold has been met with respect to Ms. Dosman.

168. However, when it comes to the request that Mr. Luz also be disqualified, the Tribunal finds on the evidence before it that the only information that has passed from Ms. Dosman to Mr. Luz is her correction of a (possible) understanding of a funding relationship between Claimants and Vannin. This is a matter, if true, which was already known to Canada prior thereto by virtue of Claimants' own disclosure. The Tribunal does not believe that Ms. Dosman's possible participation in a meeting at the Trade Law Bureau on intellectual property, shortly after her commencement of her employment at the Trade Law Bureau could have been such as to pass to Mr. Luz confidential information regarding Claimants or their case. The Tribunal is confirmed in this view by the absence of any evidence that matters of significance in these proceedings were addressed at the meeting.

[161] Hearing Tr., Day 1, p. 109.

169. The Tribunal therefore decides to disqualify Ms. Dosman from representation of Canada in this arbitration while denying the request in relation to Mr. Luz.

(3) Canada's Right to Counsel of its Choice

170. As already noted earlier, according to *Khudyan*, a party's right to counsel of choice is fundamental. Hence clear evidence is required to disqualify counsel, as a party cannot be prevented from access to its chosen counsel on the basis of mere appearances. In this case the Tribunal has found clear evidence of a real risk. The Tribunal also finds that the consequences of this finding will not in any serious manner affect Canada's right to counsel of its choice: Mr. Luz is the Trade Law Bureau's Deputy Director and Senior Counsel, and the Tribunal understands that among the other Counsel representing Canada, at least those participating in the Hearing on the Motion, are lawyers of considerable seniority and experience at the Trade Law Bureau. Ms. Dosman's disqualification is not therefore likely to have an adverse impact on Canada's ability to plead its case. This, in particular, since Canada has represented that it has maintained Ms. Dosman's removal as a gesture of good faith.[162] Also, the fact that there is a challenge to Ms. Dosman has been known to Canada since the commencement of this arbitration.

(4) Costs

171. The Parties have not requested a cost order in this Decision and costs are accordingly reserved.

VII. DECISION

172. On the basis of the foregoing considerations, the Tribunal:

a. orders Ms. Alexandra Dosman to be permanently removed from acting for or on behalf of Canada in this Arbitration;

b. reserves costs; and

[162] R. Rejoinder, para. 56. Hearing Tr., Day 1, p. 23.

c. rejects all other claims and requests.

Place of Arbitration: Calgary, Alberta, Canada

Date: 24 February 2022

Mr. Trey Gowdy
Arbitrator

Mr. Toby Landau, QC
Arbitrator

Ms. Carita Wallgren-Lindholm
President of the Tribunal