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

**-between-**

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON AND THE INVESTORS OF DELAWARE INC.**

**(the "Investors" or "Bilcon")**

**-and-**

**GOVERNMENT OF CANADA**

**(the "Respondent" or "Canada" and, together with, the "Disputing Parties")**

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# PROCEDURAL ORDER NO. 23

**(Regarding the Production of Additional Source Documents Relied upon by Experts and Witnesses)**

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**ARBITRAL TRIBUNAL**

Judge Bruno Simma (President)
Professor Donald McRae
Professor Bryan Schwartz

Permanent Court of Arbitration (PCA) Case No. 2009-04

## I. INTRODUCTION

1. This Procedural Order addresses issues raised by the Parties in connection with the production of sources relied upon by some of the Investors' experts and witnesses in their expert opinions or witness statements, submitted with the Investors' Memorial on Damages.

## II. PROCEDURAL HISTORY

2. On February 13, 2017, the Tribunal issued Procedural Order No. 22, dealing, *inter alia*, with the production of sources and documentary evidence in support of expert reports and witness statements. In that Order, the Tribunal requested the Investors to submit certain sources and documents to Canada, namely "[e]xternal sources and documentary evidence that are expressly relied upon/referred to by witnesses or experts in their statements or reports" (Section IV.3(a)) and "sources and documentary evidence underlying specific propositions set out by witnesses or experts in their statements or reports on the basis of a combination of the witness's experience or the expert's expertise and more specific, identifiable sources" (Section IV.3(c)).

3. By letter of April 6, 2017, Canada requested that the Tribunal order the Investors to provide five further pieces of documentary evidence ostensibly relied upon by the Investors' experts or witnesses. In Canada's view, these sources fell within the categories set out in Sections IV.3(a) and IV.3(c) of Procedural Order No. 22. Canada further requested that the Tribunal order that the Investors review their submissions and submit "any and all other documents required to be produced" by Procedural Orders No. 22 and 3.

4. Canada's letter of April 6, 2017 was accompanied by copies of correspondence between the Parties demonstrating that the Parties, in the course of several exchanges since February 21, 2017, were unable to reach agreement in respect of Canada's request.

5. By letter of April 13, 2017, the Investors submitted comments in response to Canada's letter of April 6, 2017 and requested that the Tribunal "confirm that the deadline for Canada's submission of its Counter Memorial remains June 9, 2017", and "direct Canada to deliver any further request it has regarding the Investors' Damages Memorial and the Investors' Memorial Record within five business days."

## III. POSITIONS OF THE PARTIES

### 1. Canada's Position

6. Canada submits that the Investors are under an obligation to provide all documents falling within the categories set out in paragraphs 32 and 40 of Procedural Order No. 22, "including, but not limited to, those requested" on March 8, 2017. Canada argues that "the Claimants' obligations under Procedural Order No. 22 are not contingent on Canada's identification" of pieces of documentary evidence falling within the aforementioned categories.[1]

7. It is Canada's contention that the Investors are under an obligation to review their submissions, so as to determine whether and, if so, which pieces of additional evidence must be produced in order to comply with their obligations of document production under Procedural Orders No. 3 and 22.[2]

[1] Letter of March 16, 2017, to the Investors, p. 1.
[2] Letter of March 24, 2017, to the Investors.

### 2. The Investors' Position

8. The Investors submit that Canada "mischaracterized the Tribunal's directions in Procedural Order No. 22 as imposing some unlimited free-standing obligation to provide additional documents at this time, in addition to the specific sources and documents the Investors were directed to provide by the Tribunal."[3] While, pursuant to paragraph 30 of Procedural Order No. 22, reasonable supplementary requests for documents and information are acceptable, such requests would be more appropriately dealt with if delivered by Canada at once. The Investors argue, any delays or changes to the schedule, on grounds of supplementary requests for document production are not justifiable.[4] In this regard, the Investors contest that Canada's ability to prepare its Counter-Memorial depends on the Investors' additional documentary production,[5] and, in the interest of procedural efficiency, propose to respond to any further request by Canada within ten business days.[6]

9. The Investors further submit that Canada seeks to delay the damages hearing in view of the proceedings concerning Canada's application for setting aside the Award on Jurisdiction and Liability, pending at the Federal Court of Appeal.[7] In the Investors' contention, Canada's alleged dilatory tactic is contrary to NAFTA Articles 102, 1115 and 2022(1) and (2),[8] as further evidenced by Canadian courts' consistent rejection of any applications for setting aside NAFTA awards.[9]

## IV. THE TRIBUNAL'S DECISION

10. The Tribunal would note, at the outset, that the present disagreement between the Parties does not arise in the process of document production—a process in the course of which a party requests access to documents in the possession, custody or control of the other party with a view to submitting them into evidence. Rather, the Parties disagree on the manner in which witness statements and expert reports should be substantiated by sources or documentary evidence.

11. There is no procedural requirement, in this or other NAFTA Chapter Eleven proceedings, that a party's witnesses or experts comprehensively document the sources of their testimony or opinion. As previously noted by the Tribunal in Procedural Order No. 22, "[i]n principle, it is up to a Party to determine how it wishes to prove its case, including by what kind of witness and expert evidence." And, "[i]n the end, the extent to which a statement is accompanied by a source document or accounting model may be a factor in the probative weight given to such statement by the Tribunal."

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[3] Letter of March 22, 2017, to Canada, p. 2. See also Letter of April 13, 2017, to the Tribunal, p. 9.
[4] Letter of March 22, 2017, to Canada, p. 2.
[5] Letter of April 13, 2017, to the Tribunal, p. 8.
[6] Letter of April 13, 2017, to the Tribunal, p. 10, further proposing that future submissions of document production requests be delivered to one party "within thirty days of receipt" of a written submission, "with the other party having fifteen days to reply".
[7] Letter of April 13, 2017, to the Tribunal, pp. 3-7, referring to: (i) Canada's application for setting aside the Award on Jurisdiction and Liability, submitted on June 16, 2015, to the Federal Court; (ii) Canada's application before the Tribunal to stay the damages phase of the arbitration, of June 17, 2015; (iii) the Investors' application to stay the hearing of Canada's set aside application, submitted on December 7, 2015, to the Federal Court; and (iv) the Investors' appeal, submitted before the Federal Court of Appeal on March 3, 2017, of a decision of January 10, 2017, upholding a decision of September 12, 2016, which denied the Investors' stay application.
[8] Letter of April 13, 2017, to the Tribunal, p. 2, referring also to the *North American Free Trade Agreement Implementation Act*, SC 1993, c. 44, ss. 4(e).
[9] Letter of April 13, 2017, to the Tribunal, pp. 6-7, referring to the decisions of the Ontario Superior Court in *Attorney General of Canada v. Mobil et al.*, 2016 ONSC 790, and reproducing the decision of the Ontario Court of Appeal in *Mexico v. Cargill, Incorporated*, 2011 ONCA 622, paras. 34, 37-40, 49-50.

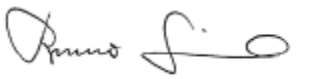
12. On the other hand, the provision of supplementary sources may be helpful, not only to provide the opposing party with a meaningful opportunity to prepare its defence but also for the Tribunal's understanding of the witness statement or expert report. The Tribunal considers that the five pieces of documentary evidence to which Canada refers in its letter of April 6, 2017 fall within this category. Accordingly, the Investors are requested to submit such sources as fall under these five requests **within ten days of this Order**.

13. As regards the Parties' further submissions, the Tribunal notes that, currently, no other requests from Canada that witnesses or experts provide additional sources have been made. The Tribunal understands Canada's position to be that of a general reservation of rights in respect of possible, but currently unforeseen, future circumstances.

14. Similarly, the Tribunal recalls that a procedural timetable for the remainder of the quantum phase of this arbitration was set in Procedural Order No. 20, including a time period for the submission of Canada's Counter-Memorial and Supporting Materials of ninety (90) days from the receipt of the Investors' Memorial.

15. The Tribunal does therefore not consider any further rulings to be necessary or appropriate at this point. Should any specific disagreement arise between the Parties in the future in respect of the adequacy of witness and expert evidence or the timetable for the proceedings, it remains open to each side to have recourse to the Motions Procedure in Paragraphs 30 and 31 of Procedural Order No. 1.

Date: April 26, 2017



For the Tribunal

Judge Bruno Simma
(Presiding Arbitrator)