

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

BETWEEN:

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

Investors

and

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 1

(9 April 2009)

ARBITRAL TRIBUNAL:

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

1. This first procedural order sets out the procedural rules to which the Claimants and the Respondent (the “Disputing Parties”) have agreed, and the Arbitral Tribunal has determined, shall govern this arbitration.

I. THE ARBITRAL TRIBUNAL AND THE DISPUTING PARTIES

A. Constitution of the Arbitral Tribunal (Article 1123 of the NAFTA)

2. The Disputing Parties agree and confirm that the Arbitral Tribunal has been duly constituted in accordance with Article 1123 of the NAFTA.
3. The Disputing Parties agree and confirm that the arbitration commenced on June 17, 2008.
4. The Disputing Parties agree that the International Bar Association Guidelines on Conflicts of Interest in International Arbitration (“IBA Conflicts of Interest Guidelines”) shall apply to the arbitrators in this arbitration. Members of the Arbitral Tribunal shall, no later than 14 days after the date of this Order, make disclosures required by the IBA Conflicts of Interest Guidelines (the “Disclosures”).
5. Any objections to the appointment of the arbitrators on the grounds of conflict of interest and/or lack of independence or impartiality must be made in accordance with Articles 9-13 of the UNCITRAL Arbitration Rules.

B. Contact Details of Arbitral Tribunal

6. Contact details of each member of the Arbitral Tribunal are as follows:

Judge Bruno Simma (President)
International Court of Justice
Peace Palace, Carnegieplein 2
NL-2517 KJ The Hague, Netherlands

Tel: +31 70 302 24 27
Fax: +31 70 302 24 09
Email: simma@icj-cij.org

Professor Donald McRae
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57 Louis Pasteur Street, Room 340
Ottawa, Canada K1N 6N5

Tel: 613.562.5800 ext.3304
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Email: Donald.McRae@uOttawa.ca

Professor Bryan Schwartz
Faculty of Law, University of Manitoba
Robson Hall
Winnipeg, Canada, R3T 2N2

Tel: 204.474.9773 or 204.474.6130

Fax: 204.474.7580

Email: bryanpschwartz@gmail.com

C. Representation of the Disputing Parties (Article 4 of the UNCITRAL Arbitration Rules)

7. The Claimants are represented by:

Barry Appleton
Appleton and Associates International Lawyers
7 Bloor St. West, Suite 1800
Toronto, ON M5S 1M2

Tel: (416) 966-8800

Fax: (416) 966-8801

Email: bappleton@appletonlaw.com

8. The Respondent is represented by:

Sylvie Tabet
Deputy Director and Senior Counsel
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125 Sussex Drive
Ottawa, Ontario KIA 0G2

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Fax: (613) 944-0027
Email: jean-francois.hebert@international.gc.ca

9. Email Distribution list:

All references to email to counsel used in this order shall mean sending an email to lead counsel, set out below, and to one additional recipient per Disputing Party, also set out as follows:

For the Claimants:

Barry Appleton,
bappleton@appletonlaw.com

With a copy of all emails to:
aa30@appletonlaw.com

For the Respondent:

Scott Little,
scott.little@international.gc.ca
Counsel
Trade Law Bureau, Government of Canada

Elizabeth Hrubesz
elizabeth.hrubesz@international.gc.ca
Paralegal
Trade Law Bureau, Government of Canada

II ADMINISTRATION, FEES AND EXPENSES OF THE TRIBUNAL

A. Administering Authority

10. The Permanent Court of Arbitration (“PCA”) shall administer the arbitral proceedings and will provide registry services and administrative support. The cost of the PCA’s services will be calculated in accordance with the PCA’s Schedule of Fees & Costs and shall be included in the costs of the arbitration.
11. The Arbitral Tribunal may retain an Administrative Assistant to the President of the Tribunal whose fees and expenses shall be included in the costs of the arbitration. Any such individual shall be subject to the same duties relating to impartiality, independence and confidentiality as are borne by the members of the Arbitral Tribunal.

B. Fees and Expenses (Articles 38 and 41 of the UNCITRAL Arbitration Rules)

12. Each member of the Arbitral Tribunal shall receive:
 - (a) a fee of US \$550 each hour of participation in meetings of the Arbitral Tribunal or other work performed in connection with the proceeding; and

- (b) subsistence allowances and reimbursement of travel (in business class) and other expenses within the limits set forth in Regulation 14 of the ICSID Administrative and Financial Regulations and the Memorandum on the Fees and Expenses of ICSID Arbitrators.
- (c) a charge of 10% of the hearing time reserved but not used as a result of postponement or cancellation of a hearing less than 60 but more than 30 days prior to the commencement of the hearing and a charge of 30% for postponement or cancellation less than 30 days before the hearing.

C. Apportionment of Costs and Advance Payments (Articles 38 and 40 of the UNCITRAL Arbitration Rules)

- 13. Without prejudice to the final decision of the Arbitral Tribunal regarding costs, the Claimants and the Respondent agree to share equally advance payments for the Arbitral Tribunal. Upon the issuance of an award, the Arbitral Tribunal may apportion the costs of the arbitration between the Disputing Parties if it determines apportionment is reasonable under the circumstances of the award.
- 14. The Disputing Parties shall each make an initial advance fee payment of USD \$50,000 (a total of USD \$100,000) to be sent to a deposit managed by the Administering Authority no later than 30 days after a request for payment is made by the Arbitral Tribunal.

D. Exclusion of Liability

- 15. No member of the Arbitral Tribunal nor any expert to the Arbitral Tribunal shall be liable to any party whatsoever for any act or omission in connection with the arbitration, save where the act or omission is shown by that party to constitute conscious and deliberate wrongdoing and committed by the body or person alleged to be liable to that party.

E. Professional Assistance to the Tribunal

- 16. Any professional assistance provided to the Tribunal shall be in accordance with Article 27 of the UNCITRAL Arbitration Rules

III PLACE OF ARBITRATION AND LOCATION OF HEARINGS (Article 1130 of NAFTA; Article 16 of the UNCITRAL Arbitration Rules)

- 17. The place of arbitration is Toronto, Ontario.
- 18. The Arbitral Tribunal shall conduct its hearings in Washington, D.C. Meetings may be held at other locations if so ordered by the Arbitral Tribunal, after consultation with the Disputing Parties. In case of emergency, the Arbitral Tribunal may hold meetings or hearings by telephone or videoconference after consultation with the Disputing Parties. Internal meetings of the members of the

Arbitral Tribunal may be held at other locations considered appropriate by the Arbitral Tribunal, including by video or telephone conference.

IV APPLICABLE ARBITRATION RULES (Article 1120 the NAFTA; Article 1 of the UNCITRAL Arbitration Rules)

19. The applicable arbitration rules are the UNCITRAL Arbitration Rules, except to the extent that they are modified by Section B of NAFTA Chapter 11.

V APPLICABLE LAW (Article 1131 of the NAFTA; Article 33 of the UNCITRAL Arbitration Rules)

20. The governing law for this arbitration is the NAFTA and applicable rules of international law.

VI PROCEDURAL LANGUAGE AND TRANSLATION (Articles 17 and 25(3) of the UNCITRAL Arbitration Rules)

21. The arbitration shall be conducted in English.
22. All documentary evidence in a language other than English shall be translated to English by the Disputing Party submitting that evidence at its own cost. Witness testimony in a language other than English shall be translated to English, the cost of which shall be borne by the Disputing Party calling that witness.

VII CONFIDENTIALITY

23. The question of confidentiality will be dealt with in a subsequent procedural order of the Arbitral Tribunal.

VIII DECISIONS OF THE ARBITRAL TRIBUNAL

A. Quorum and Replacement of Arbitrators (Articles 13 and 14 of the UNCITRAL Arbitration Rules)

24. The presence of all three members of the Arbitral Tribunal shall constitute a quorum. The Arbitral Tribunal shall be required to conduct proceedings unless the Disputing Parties agree otherwise.
25. The President of the Tribunal may decide procedural matters alone, upon reasonable consultation with the other members of the Arbitral Tribunal.
26. The replacement of any arbitrator shall be dealt with in accordance with Articles 13 and 14 of the UNCITRAL Arbitration Rules.

B. Decisions of the Arbitral Tribunal (Article 31 of the UNCITRAL Arbitration Rules)

27. Subject to paragraphs 24 and 25 above, the Arbitral Tribunal shall make any award or other decision by a majority of its members.
28. All awards and decisions shall be deemed to be made at the place of arbitration, regardless of where the award or decision is signed.

C. Delegation of Power to Fix Time Limits

29. The Arbitral Tribunal shall, in consultation with the Disputing Parties, fix the time limits in respect of all documents to be filed and hearings to be held. In case of urgency, as determined by the Parties or by the President of the Tribunal, the President may fix a time limit or amend an existing limit.

D. Motions Procedure

30. All procedural motions shall be made in writing. The motion shall be sent by e-mail simultaneously to each member of the Arbitral Tribunal, the Administering Authority and to opposing counsel.
31. Unless otherwise ordered by this Arbitral Tribunal, the other Disputing Party shall have five days, not including the day on which the motion was made, to reply in writing to a motion. The reply to a motion shall be sent by e-mail simultaneously to each member of the Arbitral Tribunal, to the Administering Authority and to opposing counsel by electronic mail.

IX SERVICE AND RECORD OF HEARINGS

A. Service of Documents and Copies of Instruments (Article 15(3) of the UNCITRAL Arbitration Rules)

32. Except as otherwise provided in this Order, the Disputing Parties shall send all submissions, including pleadings and memorials (without exhibits or attachments), by email simultaneously to opposing counsel by email in the manner described in this Order, to each member of the Arbitral Tribunal and to the Administering Authority at the email addresses indicated in this Order on the date the submission in question is due. Paper copies of all exhibits or attachments to any submissions are to be sent, on the date the submission is due, by next business day delivery to the address noted above to Barry Appleton for the Claimants, Scott Little for the Respondent, to the Administering Authority, and to the members of the Arbitral Tribunal.
33. In addition, unless otherwise directed by the Arbitral Tribunal, the Disputing Parties shall send paper copies of submissions over 25 pages in length by next business day delivery to the address noted above to Barry Appleton for the Claimants, Scott Little for the Respondent, to the Administering Authority and the

members of the Arbitral Tribunal. The Disputing Parties shall provide one copy of such documents to opposing counsel to the Administering Authority and to the members of the Arbitral Tribunal. Each Disputing Party shall also provide digital copies of the submissions including witness statements, expert reports, documentary exhibits and legal authorities in PDF format.

B. Record of Hearings (Article 25(3) of the UNCITRAL Arbitration Rules)

34. All hearings before the Arbitral Tribunal shall be tape recorded and transcribed. Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the Disputing Parties and members of the Arbitral Tribunal in the hearing room. The Disputing Parties further agree that transcripts of proceedings should be made available on a same day service basis.
35. The Arbitral Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. In the event of disagreement between the Disputing Parties on corrections to transcripts, the Arbitral Tribunal shall determine whether or not any such corrections are to be adopted.

X SUBMISSIONS AND SCHEDULE OF HEARINGS

A. Written and Oral Procedures – Pleadings: Number, Sequence, Time Limits
(Articles 18-23 of the UNCITRAL Arbitration Rules)

36. The Respondent shall file its Statement of Defence no later than 45 days from March 20, 2009 (May 4, 2009).
37. The schedule of proceedings shall be the subject of a subsequent procedural order to be issued by the Arbitral Tribunal shortly after the filing of the Respondent's Statement of Defence.
38. Expert reports, witness statements and other evidence on which a Disputing Party intends to rely are to be included with the Memorial and Counter-Memorial. The Reply and Rejoinder may only contain evidence that is responsive to the other Disputing Party's last preceding submission.
39. The holding of a pre-hearing conference call shall be at the discretion of the Arbitral Tribunal.
40. At the end of the hearing the Arbitral Tribunal shall decide whether to order post-hearing briefs.

B. Conservation of the Record

41. Each Disputing Party may retain one complete copy of the record, including information designated as confidential under the Arbitral Tribunal's Confidentiality Order, after a Final Award has been rendered under Article 1135

of the NAFTA. All other documentation relating to this matter must be returned to the respective Disputing Party or otherwise destroyed, within two weeks following the full compliance of a Disputing Party with the Arbitral Tribunal's Final Award.

C. Dates of Subsequent or Additional Meetings

42. The Arbitral Tribunal shall decide the date of any subsequent or additional meetings in consultation with the Disputing Parties.

D. Non-Disputing Party Participation

43. The Disputing Parties agree that the Arbitral Tribunal shall consider non-disputing party submissions taking account of the recommendations of the North American Free Trade Commission on non-disputing party participation, issued on October 7, 2003 and applicable rules of international law.
44. The Disputing Parties shall have the opportunity to make submissions on any application by a non-disputing party for leave to file a submission in this arbitration. Where the Arbitral Tribunal allows a submission from a non-disputing party, the Disputing Parties shall be entitled to file their observations on the issues raised in such non-disputing party submissions. Such responses shall be filed on a simultaneous basis on a date fixed by the Arbitral Tribunal, no later than 30 days after the filing of the Respondent's Rejoinder.
45. Submissions made by Non-Disputing NAFTA Parties under Article 1128 shall be delivered no later than 15 days after the submission of the Rejoinder. Each Disputing Party shall be entitled to comment on any Article 1128 Submission filed in this arbitration. Such observations shall be filed on a simultaneous basis on a date ordered by the Arbitral Tribunal, set within 45 days of the filing of the Rejoinder Memorial.

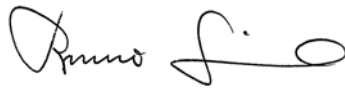
XI DOCUMENT PRODUCTION AND EVIDENTIARY MATTERS

46. Document production and evidentiary matters will be the subject of a subsequent procedural order of the Arbitral Tribunal.

XII BIFURCATION OF PROCEEDINGS

47. The question of bifurcation will be the subject of a subsequent procedural order of the Arbitral Tribunal.

This Procedural Order is issued at the place of arbitration on 9 April 2009

A handwritten signature in black ink, appearing to read 'Bruno Simma', written in a cursive style.

Judge Bruno Simma
(President)

A handwritten signature in black ink, appearing to read 'Donald McRae', written in a cursive style.

Professor Donald McRae

A handwritten signature in black ink, appearing to read 'Bryan Schwartz', written in a cursive style.

Professor Bryan Schwartz