

**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

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**PROCEDURAL ORDER NO. 5**

**July 24, 2009**

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**ARBITRAL TRIBUNAL:**

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

**WHEREAS** the Respondent, in its submission dated July 9, 2009, brought a motion pursuant to paragraph 30 of Procedural Order No. 1 (“Motion”), alleging that the Investors’ Requests for Documents From Canada dated July 2, 2009 (“Document Requests”) do not comply with paragraph 3.3 of Procedural Order No. 3, and requesting that the Tribunal order the Investors “to re-submit their document requests in the manner and form required by the Tribunal”.

**WHEREAS** the Investors, in their submission dated July 15, 2009, challenged the Respondent’s Motion, highlighting “the comprehensive and detailed specificity” of the Investors’ Document Requests.

**THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:**

**1 Requests Relating to NAFTA Documents**

- 1.1 The Investors are requested to state with regard to each of the Chapters of NAFTA why such documents are relevant and material to the Investors’ allegations.
- 1.2 The Investors’ revised Document Requests relating to NAFTA Documents shall be submitted by July 31, 2009.

**2 Other Requests**

- 2.1 The Tribunal finds that the individual requests on pages 4 to 24 of the Document Requests offer interpretative context for the fourth introductory paragraph of the Investors’ Document Requests, and *vice versa*. In particular, the Tribunal notes that the Investors have requested documents that relate to environmental assessment and the treatment of the Investors by the Respondent throughout the environmental assessment and panel review process that is the subject of the Claim, and to documents from related environmental assessment processes. Accordingly, the Tribunal interprets the Investors’ requests for “all documents” in the possession of the individual identified, not as all documents “regardless of subject matter” as the Respondent suggests, but as documents in the possession of the identified government department or individual that relate to the Investors or to the environmental assessment process that is at the centre of the Claim.
- 2.2 In addition, since the Investors have requested only documents that were generated in government departments or by government officials or documents relating to environmental assessment and panel review processes, including that relating to the Investors, that are in fact in the possession of the Respondent, the Tribunal sees no need for a further explanation by the Investors of why they believe that they are in the Respondent’s possession and control.
- 2.3 The Tribunal therefore finds that the Document Requests, if thus interpreted in context, are “relevant and material” so as not to warrant intervention by the Tribunal in the ongoing document production phase. The Tribunal invites the Respondent to interpret the Investor’s Request for Documents in light of the

Disputing Parties' previous submissions (in particular, the Investors' Statement of Claim).

2.4 The Tribunal also notes that Procedural Order No. 3 provides for defined procedures for objecting to the production of documents or categories of documents on the grounds specified in its Section 3.4 and Articles 3 and 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999).

### 3 Timetable

In view of the above, the Timetable for the document production phase is amended as follows:

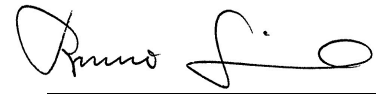
Event	Party	Date
<i>Document production:</i>		
- Requests to produce documents	Disp. Parties	July 2, 2009*
- Revised request re. "NAFTA Documents"	Investors	July 31, 2009
- Production of documents or reasoned objections	Disp. Parties	Aug 14, 2009
- Replies to objections by the other Party	Disp. Parties	Aug 28, 2009
- Submission of application(s) to Tribunal in the form of a "Redfern Schedule"	Disp. Parties	Sep 11, 2009
- Decision on requests for document production	Tribunal	Oct 12, 2009*
- Production of documents as ordered by Tribunal	Disp. Parties	Nov 26, 2009
<i>Date for the commencement of the time period for the filing of the Memorial</i>	Tribunal	To be set by Tribunal (= Day A)
<i>Memorial on jurisdiction and merits</i>	Investors	A + 90 days = B
<i>Counter-memorial on jurisdiction and merits</i>	Respondent	B + 90 days = C
<i>Reply on jurisdiction and merits</i>	Investors	C + 60 days = D
<i>Rejoinder on jurisdiction and merits</i>	Respondent	D + 60 days = E
<i>Submissions pursuant to Article 1128 of NAFTA**</i>	Non-disputing parties	E + 15 days
<i>Observations on Article 1128 Submissions**</i>	Disp. Parties	E + max. 45 days
<i>Notification of witnesses and experts</i>	Disp. Parties	TBD
<i>Pre-hearing conference or teleconference</i>	All	TBD

\* Application of Article 2(2) of the UNCITRAL Rules.

\*\* See Section X.D of Procedural Order No. 1.

<i>Hearings on jurisdiction and merits</i>	All	TBD
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Dated: July 24, 2009



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Judge Bruno Simma  
President of the Tribunal

on behalf of the Tribunal