

**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 BILCON OF DELAWARE INC.**

(the “Investors”)

-and-

GOVERNMENT OF CANADA

(the “Respondent” and, together with the Investors, the “Disputing Parties”)

PROCEDURAL ORDER NO. 10

September 2, 2010

ARBITRAL TRIBUNAL:

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

WHEREAS, on June 28, 2010, the Tribunal held a case management meeting with the Disputing Parties in Toronto, Canada (the “Case Management Meeting”), with the purpose of exploring with the Disputing Parties whether the number of documents that remained to be reviewed and produced could be reduced.

WHEREAS, taking account the discussion at the Case Management Meeting, the Tribunal issued Procedural Order No. 9 on July 16, 2010, in which it determined, among other matters, that the production of all outstanding documents should be completed in the following sequence:

- 2.1 *The production of documents falling within Category A of Annex I shall be handled as a matter of priority and be completed by DATE A (with the exception of those documents for which claims of cabinet privilege, political sensitivity, or legal privilege are asserted). DATE A will be fixed by the Tribunal after considering the Disputing Parties’ July 16, 2010 motion and July 27, 2010 reply regarding the question of documents in the possession of persons or organizations who are not a party to the arbitration.*
- 2.2 *The production of documents falling within Category B of Annex I shall be completed by DATE B (with the exception of those documents for which claims of cabinet privilege, political sensitivity, or legal privilege are asserted). DATE B shall coincide with the due date for the Respondent’s Counter-Memorial.*

WHEREAS, on August 19, 2010, the Respondent informed the Tribunal that it expected to be able to complete its review and production of all remaining documents falling within Category A by February 19, 2011. In the same letter, the Respondent also indicated which types of documents it understood to fall within, respectively, Category A and Category B as defined by the Tribunal in Procedural Order No. 9.

WHEREAS, on August 25, 2010, the Investors suggested that the review of the remaining documents could and should be completed at a considerably faster pace than indicated by the Respondent; the Investors therefore requested that the Tribunal order the completion of the production of all documents (falling within Category A and Category B) by October or November 2010. In addition, the Investors alleged that “13 Document Requests have been completely omitted from Canada’s time estimate”, probably because the Respondent was “subsuming these document requests into others”. The Investors reiterated their objection to the Respondent’s practice of “answering to the Investors’ general document requests (of government departments and project files) solely by responding to specific document requests (of government individuals)”.

WHEREAS on August 26, 2010, the Tribunal provided direction to the Disputing Parties in relation to two outstanding matters pertaining to document production – the treatment of certain correspondence between the Trade Law Bureau and government departments, agencies, and officials; and the existence, restoration, and preservation of electronic correspondence in the possession, custody, or control of persons or entities who are not parties to the arbitration.

THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:


1. Having compared the information provided by the Respondent in its letter dated August 19, 2010 with the Respondent's Status Report on Canada's Responses to the Claimant's Document Request dated June 22, 2010, the Tribunal is satisfied that the Respondent is addressing all pending document requests by the Investors¹ in the sequence set out in Procedural Order No. 9, appropriately distinguishing between documents falling within Category A and Category B.
2. The Tribunal takes note of the Investors' concern that the scope of requests for documents in the possession, custody, or control of "entire departments, agencies or ministries" or for documents pertaining to particular government project files (the "General Requests") may not be reducible to the sum total of requests for documents in the possession, custody, or control of specified individuals employed by these government entities (the "Specific Requests").

The Tribunal understands the Respondent's position to be that the documents that it has identified in response to the various Specific Requests are inclusive of all documents responsive to the General Requests and that, in the Respondent's view, no additional documents responsive to the General Requests exist.

The Tribunal assumes that no responsive documents are being excluded through the Respondent's methodology. However, the Respondent is requested to confirm in writing to the Investors and the Tribunal, at the time of its last production of Category A documents and at the time of its last production of Category B documents, that to the best of its knowledge there are no additional documents responsive to any General Requests that would not already have been produced in response to one of the Specific Requests.

3. Having regard to Section 2.1 of Procedural Order No. 9, the Tribunal determines that DATE A shall be **February 19, 2011**. Accordingly, the arbitration shall proceed according to the consolidated timetable enclosed as Annex I.

Dated: September 2, 2010



Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal

¹ According to the Status Report on Canada's Responses to the Claimant's Document Request, for Requests 6-12, 17 and 19, the production has already been completed. For Request 13, the production is to be completed through responses to Requests 14 and 16-19 (footnote 6 of the Status Report). For Request 15, the production is to be completed through responses to Requests 14 and 16-19. For Request 20, the production is to be completed through responses to Requests 21-24. For Request 22, the production is to be completed through responses to Requests 21-24.

Annex I

Event	Party	Date
<i>Date for the commencement of the time period for the filing of the Memorial</i> and <i>Production of documents in Category A (DATE A)</i>	Tribunal Respondent	Feb 19, 2011
<i>Memorial on jurisdiction and merits</i>	Investors	May 20, 2011
<i>Counter-memorial on jurisdiction and merits</i> and <i>Production of documents in Category B (DATE B)</i>	Respondent	Aug 18, 2011
<i>Privilege logs</i> <ul style="list-style-type: none"> - Exchange between the Disputing Parties - Notification of objections to claims of privilege/sensitivity - Production of submissions and evidence to substantiate claims of privilege/sensitivity - Reply to submissions and evidence regarding claims of privilege/sensitivity - Submission of contested claims of privilege to the Tribunal - Tribunal decision on claims of cabinet privilege, political sensitivity, or legal privilege - Production of documents as ordered by the Tribunal 	Disputing Parties Tribunal Disputing Parties	Aug 25, 2011 Sep 1, 2011 Oct 3, 2011 Oct 18, 2011 Oct 25, 2011 To be set by Tribunal + 30 days
<i>Reply on jurisdiction and merits</i>	Investors	+ 60 days
<i>Rejoinder on jurisdiction and merits</i>	Respondent	+ 60 days
<i>Submissions pursuant to Article 1128 of NAFTA</i>	Non-disputing parties	+ 15 days
<i>Observations on Article 1128 Submissions</i>	Disputing Parties	+ 30 days