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. 12

May 2, 2012

ARBITRAL TRIBUNAL:

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

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

I. Introduction

1. In this Order, the Tribunal addresses certain of the Disputing Parties' contentions concerning their respective privilege claims in the document production process. As a preliminary matter, the Tribunal recounts the relevant procedural history.

II. Procedural History

2. In Procedural Order No. 3 dated June 3, 2009, the Tribunal set out the procedure for document production. The Tribunal ordered the Disputing Parties to exchange simultaneous document requests, following which the requested Party would have 30 days to state which documents it refused to produce.

3. On September 11, 2009, the Investors submitted their Application for Document Production in the form of a Redfern Schedule, a privilege log, general observations on the Respondent's objections and a letter setting out their objections to the Respondent's requests on grounds of legal privilege and/or political or institutional sensitivity.

4. On the same date, the Respondent submitted its Redfern Schedule, attaching an explanatory note on issues pertaining to document production, including privilege.

5. On October 13, 2009, the Disputing Parties provided the Tribunal with additional submissions regarding their privilege claims.[1]

6. Following a case management meeting with the Disputing Parties on October 16, 2009, the Tribunal issued Procedural Order No. 7 dated November 20, 2009, in which it defined the process for the further production of documents and considerations of privilege. Regarding the latter, the Tribunal determined that the Disputing Parties would prepare and submit privilege logs after having produced all documents for which no privilege is claimed.

7. Procedural Order No. 7 set out five steps for the privilege phase: (1) exchange of privilege logs between the Disputing Parties; (2) notification to the other Disputing Party of any objections to privilege/sensitivity claims; (3) submissions to the other Disputing Party with supporting evidence on said claims; (4) reply submissions; and (5) submission of privilege logs, general observations, and evidence to the Tribunal.[2]

8. On May 3, 2010, the Investors provided an updated privilege log.

9. The Investors informed the Tribunal on April 1, 2011 that the Respondent had inadvertently disclosed to the Investors 16 documents over which the Respondent asserts privilege. The Respondent subsequently requested that the Tribunal address the

[1] Investors' Case Management Brief on Document Production Issues; Additional Submissions and Observations of Canada on Objections to Document Requests.

[2] In accordance with Procedural Order No. 7 and after the Tribunal had approved several modifications to the calendar, the privilege phase was scheduled as follows: (1) Exchange of privilege logs between the Disputing Parties by December 16, 2011; (2) Notification of objections by January 3, 2012; (3) Submissions with evidence by February 3, 2012; (4) Replies by February 17, 2012; and (5) Submissions to the Tribunal by February 28, 2012.

Respondent's privilege claims over those documents in accordance with the timetable for document production. On April 19, 2011, the Tribunal decided to examine the issue together with all privilege matters, in accordance with the previously defined timetable.

10. On February 9, 2012, the Investors filed an application (1) to declare that the Respondent has waived privilege over 61 documents which the Respondent had not included in its draft privilege log of December 16, 2011; and (2) to order the Respondent not to make any modifications to its original privilege log provided to the Investors on December 16, 2011. After an exchange of views, the Tribunal ordered the Disputing Parties to use the modified version of the Respondent's privilege log. Regarding the 61 documents, the Tribunal resolved to defer any decision on their status and invited the Investors to raise this issue with their contested privilege claims.

11. The Investors submitted an abbreviated Redfern Schedule on February 24, 2012, setting out the Respondent's privilege claims and supporting materials including the Investors' Observations on Privilege.

12. By letter dated February 27, 2012, the Tribunal extended the deadline for the submission of the Disputing Parties' contested privilege claims, submissions, and evidence to February 28, 2012, and invited each side to provide further comments on the materials received from the other side.

13. On February 28, 2012, the Respondent submitted its Redfern Schedule, its Submissions to Substantiate Claims of Privilege and Institutional Sensitivity, and supporting evidence. On the same date, the Investors submitted a blank Redfern Schedule, noting that the Respondent had not contested any of their privilege claims.

14. By letter dated February 29, 2012, the Respondent raised concerns that the Investors had failed to reproduce in their privilege log "[d]ocuments made in furtherance of this arbitration made subsequent to October 1, 2007 that are either Attorney-Client or Attorney Work Product Privileged" and requested that the Tribunal order the Investors to file a revised privilege log "describing each and every responsive document" over which they assert privilege. By letter dated March 6, 2012, the Investors submitted that all their legal advice and work product in relation to this arbitration are privileged and that "a blanket claim of privilege is the ordinary and appropriate way of dealing with this issue."

15. Also on March 6, 2012, the Respondent submitted its Response to Claimants' Observations on Privilege of February 24, 2012.

III. The Tribunal's Reasoning

16. At the outset, the Tribunal will briefly review the law applicable to privilege claims in the present arbitral proceedings. Subsequently, the Tribunal will address the Disputing Parties' views regarding the content and application of two specific kinds of privilege – solicitor-client privilege and work product privilege. Finally, the Tribunal will turn to the question whether the Respondent has waived privilege over particular documents, including by inadvertent disclosure.

1. Applicable Law

17. In accordance with NAFTA Articles 1131(1) and 1120(2), the Tribunal will apply any relevant provisions of NAFTA, international law, and the UNCITRAL Rules in resolving the Disputing Parties' disagreement regarding their privilege claims. As the Disputing Parties note, the Tribunal has previously decided that the IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 ("IBA Rules") serve as guidelines in this arbitration.[3] The Tribunal further observes that other NAFTA tribunals have considered national law, as well, for guidance on matters of privilege.[4]

18. While NAFTA and the UNCITRAL Rules are silent on the specific issue of privilege, Article 15 of the UNCITRAL Rules provides that "the arbitral tribunal may conduct the arbitration in such a 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." Likewise, Article 9.2(b) of the IBA Rules leaves it to the Tribunal to determine the legal rules applicable to solicitor-client privilege and work product privilege.

19. While the applicable law thus vests the Tribunal with considerable discretion in determining the standard for adjudging privilege claims, the Tribunal benefits from case law taking up similar questions of privilege. As set out in more detail below, the Disputing Parties agree that previous NAFTA Chapter Eleven tribunals have developed standards pertinent to the privilege issues in this case. The Tribunal notes that the Disputing Parties readily apply these standards and principally ask that the Tribunal elaborate on particular nuances germane to their claims.

2. Standard to Be Applied

a. Solicitor-Client Privilege

20. The Respondent asserts solicitor-client privilege over part or all of more than 2,000 documents requested by the Investors. While the Disputing Parties agree about the appropriate standard for evaluating an assertion of solicitor-client privilege, they disagree with respect to the reach of the privilege in the context of these proceedings.

21. The Disputing Parties share the view that the standard set forth by the NAFTA tribunal in *Vito Gallo v. Canada* is appropriate for evaluating solicitor-client privilege claims in this case.[5] The *Gallo* tribunal determined that a document is protected by solicitor-client privilege if:

- "The document has to be drafted by a lawyer acting in his or her capacity as lawyer;

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[3] Procedural Order No. 3, dated June 3, 2009, para. 2.1.

[4] Vito G. Gallo v. Canada, Procedural Order No. 3, dated April 8, 2009, para. 41; Glamis Gold, Ltd. v. The United States of America, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, dated November 17, 2005, paras. 19-20.

[5] Investors' Case Management Brief on Document Production Issues, dated October 13, 2009, para. 38; Additional Submissions and Observations of Canada on Objections to Document Requests, dated October 13, 2009, para. 44.

- A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;

- The document has to be elaborated for the purpose of obtaining or giving legal advice;

- The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation."[6]

22. The Investors nevertheless challenge the Respondent's claims, arguing that the Respondent has misapplied the *Gallo* standard and that it further failed to show that each of its privileged documents falls within the standard's scope.

(1) Privilege in the Absence of Attorney Privity

23. In particular, the Investors assert, first, that solicitor-client privilege applies only to communications between a lawyer and client. Thus, documents to which no lawyer was privy cannot fall within the scope of the privilege.[7]

24. The Respondent argues that the fact that a lawyer is not directly privy to a document is irrelevant.[8] Rather, in the Respondent's view, the privilege attaches where a document "relates to a request for or receipt of legal advice to or from legal counsel, made in the expectation that it would be kept in confidence."[9]

25. In light of the NAFTA and national court cases cited by the Disputing Parties, the Tribunal agrees with the Respondent's interpretation that the scope of the privilege is broader than the Investors suggest. As the NAFTA tribunal in *Glamis Gold, Ltd. v. United States of America* concluded, in the government context such that "the client is by nature a group, [solicitor-client] privilege is not defeated by circulation beyond the attorney and the person within the group requesting or providing the information" where a document relates to a request for or receipt of legal advice to or from legal counsel.[10] In the present case, the circle of clients includes members of the same federal or provincial department.

26. To construe the standard differently would risk frustrating the purpose of the privilege by inhibiting communications containing legal advice among individuals legally charged with making decisions on the basis of that advice.[11] Thus, the Tribunal further decides, as the *Glamis* tribunal concluded, that privileged communications between

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6 Vito G. Gallo v. Canada, Procedural Order No. 3, dated April 8, 2009, para. 47.

7 Investors' Observations on Privilege, dated February 24, 2012, para. 35.

8 Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 12. The Respondent further notes that the Investors have also excluded documents on this basis.

9 Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 12.

10 Glamis Gold, Ltd. v. The United States of America, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, dated November 17, 2005, para. 24.

11 See First Eagle SoGen Funds Inc. v. Bank of International Settlements, Order with Respect to the Discovery of Certain Documents for Which Attorney-Client Privilege Has Been Claimed, Procedural Order No. 6, dated June 11, 2002, page 11.

different departments remain privileged if "there is a 'substantial identity of legal interests' within the different [departments] in the particular subject matter of the communication."[12]

27. The Tribunal turns next to whether the scope of the privilege equally extends to attachments to privileged communications. To the Tribunal's knowledge and as the Disputing Parties' submissions suggest, this issue has not been addressed by any NAFTA tribunal to date. Thus, it falls to the present Tribunal to take into account the competing interests that surround privilege with respect to attachments, namely an interest in upholding the integrity of the solicitor-client relationship while preventing a party from shielding relevant materials by attaching them to privileged communication. The Tribunal is of the view that attachments created for the purpose of obtaining or providing legal advice and intended to be kept in confidence fall within the scope of the privilege. An attachment with an independent existence by way of its origin or release outside the solicitor-client relationship that does not qualify as privileged on its own does not obtain privileged status by having been appended to a privileged communication, but may nevertheless fall within the scope of the privilege if its disclosure would compromise the protected content of the underlying source communication by inference.[13]

(2) Government Lawyers Meeting the Privilege Standard's Criteria

28. The Investors also suggest – albeit without explaining the point in detail – that Canadian law singles out lawyers within the Canadian Department of Justice as "the only official legal advisor[s] to the Government of Canada and its client ministries."[14]

29. Without taking up any specific question of Canadian law, it appears to the Tribunal that the privilege's purpose of avoiding a chilling effect among decision makers who seek and receive legal advice would be defeated were the circle of qualifying lawyers restricted to the Department of Justice as the Investors appear to propose. Communications containing legal advice may equally be exchanged between decision makers and legal counsel in government who are not within the Department of Justice. Accordingly, the Tribunal decides that solicitor-client privilege attaches to communications containing legal advice from any government lawyer if and to the extent that the lawyer acts as legal counsel in the manner intended under the *Gallo* standard.

(3) Demonstrating the Criteria Required for Privilege

30. Having elaborated upon the appropriate standard for evaluating solicitor-client privilege claims, the Tribunal turns to the question whether the Respondent has adequately presented and substantiated its privilege claims in its privilege log and accompanying materials. The Investors assert that the Respondent has failed to demonstrate that each

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[12] Glamis Gold, Ltd. v. The United States of America, Decision on Parties' Requests for Production of Documents Withheld on Grounds of Privilege, dated November 17, 2005, para. 24.

[13] The Tribunal finds that the same principle was espoused by the Canadian Supreme Court in Descôteaux v. Mierzwinski, [1982] 1 S.C.R. 860, 872-73 & 893-94, referred to in the Respondent's Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 46.

[14] Investors' Observations on Privilege, dated February 24, 2012, para. 29.

document contains legal advice expected to be confidential and given by an individual it has shown to be a qualified attorney acting in the capacity of a lawyer.[15]

31. The Respondent claims that it has demonstrated the legal qualification of those it has named as attorneys or that the qualification information regarding each attorney is easily obtainable by the Investors.[16] It maintains that it has described in good faith the contents of the documents as containing "legal advice."[17]

32. The Tribunal accepts the Respondent's representation of its government lawyers' qualifications and its characterization of documents containing legal advice. As regards the former, the Tribunal takes note of the Respondent's clarification regarding the status of individuals referred to as legal counsel in its observations dated March 6, 2012.[18] In light of these clarifications, the Tribunal is satisfied that any doubts that may have remained with regard to the status of persons listed as legal counsel are resolved.

33. The Tribunal also accepts as appropriate the document summaries provided by the Respondent in its privilege log. It is in the nature of legal privilege that the description of documents for which privilege is asserted must remain broad as a high degree of detail would risk defeating the purpose of the privilege, namely to protect the content of the communication. Accordingly, in the Tribunal's view, a privilege log is not intended to enable the opposing party to take cognizance of the content of listed documents, such as the precise subject matter on which legal advice was sought or provided. Rather, the requirement to keep a log of all documents over which privilege is asserted is to ensure that relevant documents are withheld only through a controlled and transparent process. As such, the party asserting a legal privilege is required to represent that it has reviewed all the substantive conditions for the privilege and to provide some further detail to substantiate its representation. The Tribunal finds that the Respondent has appropriately addressed all conditions for solicitor-client privilege and provided sufficient substantiation for its representation.

34. In considering the appropriateness of the Respondent's document descriptions, the Tribunal has taken account of the overall procedural context of the present privilege phase. Throughout an unusually complex document production exercise, both Disputing Parties have shown that they have carried out a thorough review of large quantities of documents with considerable care and attention. The Respondent's efforts to single out such documents in its possession, custody or control that are relevant and material to the case has led to the production of a substantial number of documents to the Investors. The Tribunal sees no reason to assume that the review of documents for potential privilege protection has occurred with any lesser degree of diligence.

35. The Tribunal also observes that the document summaries contained in the Investors' original privilege log of December 16, 2011[19] resemble the summaries in the

[15] Investors' Observations on Privilege, dated February 24, 2012, paras. 36, 40.

[16] Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, paras. 13-14.

[17] Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, paras. 13.

[18] Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 14.

[19] The Tribunal was copied on the Investors' submission of their privilege log to the Respondent on December 16, 2011. No decision regarding the Investors' privilege claims was requested from the Tribunal, as the Respondent did not contest the privilege claims asserted by the Investors in the log.

Respondent's log both in style and in detail. The consistency in the approaches of the Disputing Parties further reinforces the Tribunal's conclusion that the Respondent has adequately described documents for which it asserts solicitor-client privilege. Hence, the Tribunal does not find it necessary to evaluate on a document-by-document basis the Respondent's objections to document production requests on solicitor-client privilege grounds.

b. **Work Product Privilege**

36. The Respondent claims work product privilege over notations placed on 11 documents for purposes of document review in this arbitration.[20]

37. The Investors challenge the Respondent's assertion of work product privilege on the basis that the Respondent has not established the notations were prepared in anticipation of any litigation.[21] The Respondent submits that "[a]s the notations also constitute confidential communications between a representative of the Government of Canada and legal counsel for the Government of Canada, for the use of legal counsel during document review, they are also subject to solicitor-client privilege."[22]

38. The Tribunal agrees with the Respondent that the notations are protected by solicitor-client privilege as discussed above. Hence, the Tribunal need not decide whether the documents are also protected by work product privilege.

c. **Waiver of Privilege**

39. The Investors allege that the Respondent has waived privilege (1) over 69 documents through disclosure to third parties; (2) over 45 documents through inadvertent disclosure to the Investors; and (3) over 61 documents by not having included them in its draft privilege log of December 16, 2011.[23]

(1) Disclosure of Documents to Third Parties

40. In its response of March 6, 2012, the Respondent asserts that ten of the 69 documents the Investors claim were disclosed to third parties were in fact drafts that were never shared with any third party; that another of the disputed documents (described at line 264 of the Respondent's privilege log) was a communication from a client to legal counsel to which no third party was privy; and, that the remaining 58 documents were attachments to privileged documents.[24]

41. In view of the Respondent's clarifications, the Tribunal is persuaded that ten of the documents were merely drafts shared with legal counsel and not disclosed to any third party. Thus, privilege has not been waived with respect to these documents.

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[20] See Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, n. 13.

[21] Investors' Observations on Privilege, dated February 24, 2012, para. 48.

[22] Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, n. 13.

[23] Investors' Observations on Privilege, dated February 24, 2012, para. 49 et seq.

[24] Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, paras. 45-46.

42. Regarding the document in line 264, the Tribunal notes the Respondent's affirmation of what appears in its privilege log: that the document was exchanged between legal counsel to the Respondent and a government agency employee. The Investors have not identified any third parties as senders or recipients of the document and, therefore, no basis for waiver.

43. The Tribunal lacks sufficient information at this stage to determine whether the remaining 58 documents identified by the Investors were disclosed to third parties. The Tribunal notes, however, that the Respondent has identified each of these documents as an attachment to another privileged communication relating to legal advice. The Tribunal refers the Respondent to the applicable standard with respect to documents attached to privileged communications as described above to evaluate whether these attachments qualify as privileged communications.

(2) Inadvertent Disclosure of Documents

44. The Investors rely on *Vito Gallo v. Canada* to argue that the Respondent has waived privilege over 45 documents by mistakenly producing them to the Investors.[25] Comparing the inadvertent disclosure issue in the *Gallo* case to the issue here, the Investors contend that privileged documents, if provided by mistake, must be disclosed because the "bell [cannot] be un-rung."[26] The Investors further argue that the considerable length of time between the disclosure of the documents and the Respondent's attempt to rectify its error is a basis for waiver.[27]

45. In reply, the Respondent argues that the present situation bears greater resemblance to the situation faced by the tribunal in *Glamis Gold*. There, the tribunal upheld the asserted privilege despite a party's inadvertent disclosure, discussing the following considerations:

- "the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;
- the number of inadvertent disclosures;
- the extent of the disclosures;
- any delay and measures taken to rectify the disclosure; and
- whether the overriding interests of justice would or would not be served by relieving the party of its error."[28]

46. With these considerations in mind, the Respondent notes that only 45 of the 50,000 documents it produced in this arbitration fell through the "substantial safety net" it instituted to prevent inadvertent disclosure.[29] Further, the Respondent asserts that the

[25] Investors' Observations on Privilege, dated February 24, 2012, paras. 49-51.

[26] Investors' Observations on Privilege, dated February 24, 2012, para. 50.

[27] Investors' Observations on Privilege, dated February 24, 2012, para. 50.

[28] Glamis Gold, Ltd. v. The United States of America, Decision on Requests for Production of Documents and Challenges to Assertions of Privilege, dated April 21, 2006, para. 51.

[29] Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 43.

Investors have not relied on any of the mistakenly disclosed documents in their principal submissions; thus, the bell can be un-rung.[30]

47. The Tribunal observes that the *Gallo* tribunal first acknowledged the general rule in Canadian and international law that privilege is not automatically waived by inadvertent disclosure to the opposing party[31] before it concluded that the circumstances in that case compelled it to find that privilege over two documents had been waived.

48. In addition to this general rule, the Tribunal considers the following factors in the present case to be compelling: (1) the number of documents inadvertently produced was small compared to the total number of documents produced by the Respondent in this arbitration; (2) the Respondent had established appropriate procedures to try to avoid inadvertent disclosures; and (3) the Respondent informed the Investors of the inadvertent disclosures as soon as it learned of them. The Tribunal also notes that the Investors did not refer to any of those documents available to them at the time they filed their Memorial.

49. The Tribunal therefore concludes that the Respondent has not waived privilege over the 45 documents.

(3) Inadvertent Omission of Documents in Draft Privilege Log

50. With respect to 61 documents the Respondent neglected to include in its draft privilege log of December 16, 2011, the Investors contend that they are prejudiced by the Respondent's omission and request the Tribunal to deem the Respondent's privilege claims over these documents waived on the basis of this alleged prejudice.[32]

51. Although the Respondent's draft privilege log should have included a complete list of the Respondent's privilege claims, the Tribunal finds that the Investors have not demonstrated any prejudice to their ability to respond to the Respondent's privilege claims over these documents as they have had an opportunity to make their objections to the claims known to the Tribunal. The Tribunal therefore concludes that the Respondent has not waived privilege over these 61 documents.

IV. Order

52. Accordingly, the Tribunal orders the Respondent to review its claims of privilege in light of the standard elaborated by the Tribunal above and to produce to the Investors **no later than May 25, 2012** those documents, if any, that do not qualify for protection under that standard.

53. To the extent that the Disputing Parties' privilege claims are not addressed in the present Order, the Tribunal reserves its decision for a future procedural order to be adopted after an oral hearing with the Disputing Parties.

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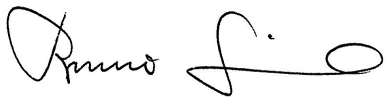
30 Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, paras. 43-44.

31 Vito G. Gallo v. Canada, Procedural Order No. 4, dated December 21, 2009, paras. 27-28.

32 Letter from the Investors to the Tribunal, dated February 9, 2012, page 2.



Dated: May 2, 2012

Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal