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**In the Matter of an Arbitration Under Chapter 11 of the NAFTA  
and the UNCITRAL Arbitration Rules (1976)**

**Between:**

**St Marys VCNA, LLC**

**Claimant**

**v.**

**Government of Canada**

**Respondent**

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**PROCEDURAL ORDER NO. 1**

**(September 10, 2012)**

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**The Arbitral Tribunal:**

Professor Brigitte Stern  
Professor Richard Stewart  
Professor Michael Pryles (President)

This **Procedural Order No. 1** sets out the procedural rules to which the Claimant and the Respondent (each a "**Disputing Party**" and together "**Disputing Parties**") have agreed, and the Arbitral Tribunal has determined, shall govern this arbitration.

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## **1. The Disputing Parties, Representation and Arbitral Tribunal**

### **1.1 The Disputing Parties**

- (a) *The Claimant and Investor ("Claimant")*: The Claimant in this arbitration is:

St Marys VCNA, LLC  
871 Coronado Center Dr.  
Suite 200-236  
Henderson, Nevada 89052  
USA

- (b) *The Respondent*: The Respondent in this arbitration is:

The Government of Canada  
c/o  
Trade Law Bureau  
Foreign Affairs and International Trade Canada  
125 Sussex Drive  
Ottawa, Ontario KIA 0G2  
Canada

### **1.2 Representation of the Disputing Parties**

(Article 4 of the UNCITRAL Rules)

- (a) The Disputing Parties may be represented or assisted by persons of their choice.

- (b) The Claimant is represented by:

Mr Barry Appleton  
Appleton & Associates  
77 Bloor Street West  
Suite 1800  
Toronto, Ontario, M5S 1M2  
Canada  
Tel: +1 (416) 966-8800  
Email: [bappleton@appletonlaw.com](mailto:bappleton@appletonlaw.com)  
Email Copy: [aa50@appletonlaw.com](mailto:aa50@appletonlaw.com)

- (c) The Respondent is represented by

Ms Sylvie Tabet  
Director and General Counsel  
Trade Law Bureau  
Foreign Affairs and International Trade Canada  
125 Sussex Drive  
Ottawa, Ontario KIA 0G2  
Canada

Tel: +1 (613) 944 1590  
Email: [Sylvie.Tabet@international.gc.ca](mailto:Sylvie.Tabet@international.gc.ca)

Mr Christophe Douaire de Bondy  
Deputy Director and Counsel  
Trade Law Bureau  
Foreign Affairs and International Trade Canada  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada  
Tel: +1 (613) 944 7245  
Email: [christophe.bondy@international.gc.ca](mailto:christophe.bondy@international.gc.ca)

Mr Adam Douglas  
Counsel  
Trade Law Bureau  
Foreign Affairs and International Trade Canada  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada  
Tel: +1 (613) 944 8009  
Email: [Adam.Douglas@international.gc.ca](mailto:Adam.Douglas@international.gc.ca)

Mr Pierre-Olivier Savoie  
Counsel  
Trade Law Bureau  
Foreign Affairs and International Trade Canada  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada  
Tel: +1 (613) 943 6481  
Email: [Pierre-Olivier.Savoie@international.gc.ca](mailto:Pierre-Olivier.Savoie@international.gc.ca)

Ms Leesa Souliere  
Paralegal  
Trade Law Bureau  
Foreign Affairs and International Trade Canada  
125 Sussex Drive  
Ottawa, Ontario K1A 0G2  
Canada  
Tel: +1 (613) 944 9185  
Email: [Leesa.Souliere@international.gc.ca](mailto:Leesa.Souliere@international.gc.ca)

- (d) A Disputing Party may change its representatives by providing notice to each member of the Arbitral Tribunal and the other Disputing Party of the change. Until notice of a change of representative is provided, all communications sent to the previously notified representative shall be effective.
- (e) A Disputing Party shall inform the Arbitral Tribunal and the other Disputing Party of any direct or indirect relationship between the Disputing Party (or a company in the same group as the Disputing Party or an entity in which a Disputing Party has a material interest) and any member of the Tribunal. The Disputing Party shall

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provide this information on its own initiative as soon as the Disputing Party becomes aware of such relationship.

**1.3 Constitution of the Arbitral Tribunal**  
(Article 1123 of the NAFTA)

- (a) The Disputing Parties agree and confirm that the Arbitral Tribunal has been duly constituted in accordance with Article 1123 of the NAFTA.
- (b) The Disputing Parties confirm that they waive any objection to the appointment of the Arbitral Tribunal on the grounds of conflict of interest and/or lack of independence or impartiality in respect of all matters known, or which reasonably should have been known to them based on available information, at the date of this Procedural Order No. 1.
- (c) *Contact details:* The contact details for each member of the Arbitral Tribunal for the purposes of this arbitration are as follows:

**Professor Brigitte Stern**  
7, rue Pierre Nicole  
75005, Paris  
France  
Tel: +33 (0) 1 40 46 93 79  
Fax: +33 (0) 1 40 46 96 98  
Email: [stern@univ-paris1.fr](mailto:stern@univ-paris1.fr), [brigitte.stern@jstern.org](mailto:brigitte.stern@jstern.org)

**Professor Richard B Stewart**  
New York University School of Law  
40 Washington Square South, 411F  
New York, NY 10012  
USA  
Tel: +1 (212) 998 6170  
Fax: +1 (212) 995 4590  
Email: [richard.stewart@nyu.edu](mailto:richard.stewart@nyu.edu)

**Professor Michael Pryles**  
Level 18, 333 Collins Street  
Melbourne, Victoria 3000  
Australia  
Tel: +61 3 9286 6632  
Fax: +61 3 9286 6460  
Email: [mail@michaelpryles.com](mailto:mail@michaelpryles.com)

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**2. Commencement of the Arbitration**  
(Articles 1119 and 1121 of the NAFTA)

The Claimant filed a notice of arbitration dated 14 September 2011.

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### 3. **Arbitral Tribunal's Engagement**

- (a) Each member of the Arbitral Tribunal shall be remunerated on the following bases:
  - (i) US **\$4,400.00** per sitting day;
  - (ii) US **\$550.00** per hour for all work done in this arbitration outside a sitting day including, without limitation, attending to correspondence, reading submissions, documents and witness statements, and research and writing awards;
  - (iii) For time spent travelling to and from hearings and meetings of the Tribunal the members of the Arbitral Tribunal will be remunerated at the rate of US **\$275.00** per hour; and
  - (iv) The members of the Arbitral Tribunal will be entitled to payment for time reserved but not used as a result of late postponement or cancellation of a hearing other than at the request of the Tribunal:
    - A. at the rate of US **\$4,400.00** per day for the reserved time in the event of a postponement or cancellation occurring within seven days of the commencement of the time reserved; and
    - B. at the rate of US **\$2,200.00** per day for the reserved time in the event of a postponement or cancellation occurring between 8 and 60 days prior to the commencement of the time reserved.
  - (v) All fees as stated above are subject to VAT at the prevailing rate, if applicable.
- (b) In addition to the fees as provided for in paragraph 3(a), the members of the Arbitral Tribunal will be entitled to reimbursement for their reasonable expenses incurred in connection with the arbitration including, but not limited to, travel expenses (business class tariff), hotels, and courier and telephone expenses.
- (c) The scale of the Arbitral Tribunal's' fees, as set out in the proceeding paragraphs, shall apply to the arbitration and to any matter arising there from, whether directly or indirectly, including the situation, should it arise, where the Arbitral Tribunal decides that it does not have jurisdiction or where the Arbitral Tribunal's jurisdiction and/or any award made is challenged, set aside or remitted for further consideration other than as a result of a final finding by a court of competent jurisdiction, of corruption or fraud on the part of the members of the Arbitral Tribunal.
- (d) The members of the Arbitral Tribunal are not liable for any act or omission done in connection with the exercise or purported exercise of their duties as arbitrators.
- (e) No member of the Arbitral Tribunal shall be required to be a party or witness, or shall be subject to any form of discovery, in any judicial or other proceeding arising out of the arbitration.

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## **4. Assistance to the Tribunal and President**

### **4.1 Professional Assistance to the Tribunal**

(Article 27 of the UNCITRAL Rules)

- (a) Any professional assistance provided to the Tribunal shall be in accordance with Article 27 of the UNCITRAL Arbitration Rules.
- (b) If one or more experts are appointed by the Arbitral Tribunal, the Arbitral Tribunal shall cooperate with the Disputing Parties in respect of defining the expert's mission, drafting the expert's terms of reference and drafting the questions to the expert. The Tribunal will be guided (but not bound) by Article 6 of the IBA Rules 2010.

### **4.2 Appointment of Secretary to the Presiding Arbitrator, Responsibilities and Fees and Expenses of Secretary**

- (a) The Disputing Parties agree to and confirm the appointment of a Secretary to the President.
- (b) The responsibilities of the Secretary to the President include the following:
  - (i) assisting the President with preparing and transmitting documents and communications on behalf of the Arbitral Tribunal;
  - (ii) organising and maintaining the Arbitral Tribunal's file and locating documents;
  - (iii) organising hearings and meetings;
  - (iv) attending hearings, meetings and deliberations;
  - (v) taking notes, minutes and keeping time;
  - (vi) conducting legal or similar research; and
  - (vii) proofreading and checking citations, dates and cross-references in procedural orders and awards as well as correcting typographical, grammatical or calculation errors.
- (c) The Secretary to the President shall receive:
  - (i) **US \$220.00** per hour; and
  - (ii) reimbursement of travel and other expenses.
- (d) The fees and expenses of the Secretary to the President shall be included in the costs of the arbitration.
- (e) The Secretary to the President shall be subject to the same duties relating to impartiality, independence and confidentiality as are borne by the members of the Arbitral Tribunal.

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## 5. Administering Authority

- (a) 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.
- (b) *Contact details:* The contact details for counsel at the PCA are as follows:

**Sarah Grimmer**  
Legal Counsel  
Permanent Court of Arbitration  
Peace Palace  
2517 KJ The Hague  
The Netherlands  
Email: sgrimmer@pca-cpa.org

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## 6. Place of Arbitration and Location of Hearings

(Article 1130 of the NAFTA, Article 16 of the UNCITRAL Rules)

### 6.1 Place of Arbitration

The place of arbitration is Toronto, Ontario, Canada.

### 6.2 Location of Hearings and Meetings

- (a) Subject to sub-paragraph 6.2(b) below, the Arbitral Tribunal shall conduct its jurisdictional hearing in San Francisco, California, U.S.A. and, if the Tribunal finds that it possesses jurisdiction, the hearing on the merits will be held in Toronto, Ontario, Canada.
- (b) Hearings and meetings may be held at other locations if so ordered by the Arbitral Tribunal, after consultation with the Disputing Parties.
- (c) If deemed appropriate by the Arbitral Tribunal and after consultation with the Disputing Parties, the Arbitral Tribunal may hold hearings or meetings by telephone or videoconference.
- (d) Internal meetings of the members of the Arbitral Tribunal may be held at any location considered appropriate by the Arbitral Tribunal, including by video or telephone conference.

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## 7. Applicable Law and Arbitration Rules

### 7.1 Applicable Law

(Article 1131 of the NAFTA, Article 33 of the UNCITRAL Rules)

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

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## **7.2 Applicable Arbitration Rules**

(Articles 1120(1)(c), 1120(2) and 1139 of the NAFTA, Article 1 of the UNCITRAL Rules)

The arbitration shall be conducted in accordance with the UNCITRAL Arbitration Rules (1976) ("UNCITRAL Rules"), except as modified by the provisions of Section B of the NAFTA Chapter 11 (*per* Article 1120(2) of the NAFTA).

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## **8. Language of the Arbitration, Translation and Interpretation**

(Articles 17 and 25(3) of the UNCITRAL Rules)

### **8.1 Language of the Arbitration**

The arbitration shall be conducted in English.

### **8.2 Translation and Interpretation**

- (a) Documents submitted or produced by any Disputing Party in any language other than English shall be accompanied by a translation into the English language. Such documentation includes all evidential and legal materials upon which that Disputing Party relies, including documentary evidence, factual witness statements and expert witness statements or reports. These English translations shall always be submitted simultaneously with the original text, so as to allow the opposing Disputing Party a fair opportunity to check the translation and the context of such material passages. In respect of legal materials, the Disputing Party submitting the legal material need only translate in the first instance the particular passage relied upon by that Disputing Party, provided that the context is made reasonably clear in the translation, save that at the request of the other Disputing Party, the Tribunal may order additional parts of such legal material to be translated.
- (b) Any witness giving oral evidence may give such evidence in his or her mother tongue, in whole or in part, provided that interpretation into English to the satisfaction of the Tribunal is provided by the Disputing Party presenting the witness for oral evidence. Any Disputing Party intending to present oral evidence in a language other than English shall notify the Tribunal and the other Disputing Party at least thirty (30) days in advance and shall be responsible for providing suitable interpretation of such evidence into English.
- (c) In general, the costs of any translation or interpretation are to be borne initially by the Disputing Party providing the same, without prejudice to the decision of the Tribunal as to which Disputing Party shall ultimately bear those costs and in what amount.

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## **9. Apportionment of Costs and Advance Payments to the Permanent Court of Arbitration**

(Articles 38, 40 and 41 of the UNCITRAL Rules)

- (a) Without prejudice to the final decision of the Arbitral Tribunal regarding costs, the Disputing Parties agree to share equally advance payments for the Arbitral Tribunal and the PCA.



- (b) The Disputing Parties have each provided an initial advance payment of USD \$30,000.00 to the Secretariat of the PCA.
- (c) The PCA will review the adequacy of the deposit from time to time and, at the request of the Arbitral Tribunal, may request the Disputing Parties to make supplementary deposits in accordance with article 41(2) of the UNCITRAL Arbitration Rules. Any such deposits are to be made no later than 30 days after a request for payment is made by the Arbitral Tribunal or PCA.
- (d) Upon request, the PCA shall provide a detailed statement of account with respect to the deposit.
- (e) Any unused balance held on deposit at the end of the arbitration shall be returned to the Disputing Parties as directed by the Tribunal.
- (f) The PCA will administer the deposit free of charge, but any transfer fees or other bank charges will be charged to the account, and no interest will be paid on the deposit.

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## **10. Confidentiality**

A separate Confidentiality Protocol will be issued.

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## **11. Service of Documents and Copies of Instruments**

(Article 15(3) of the UNCITRAL Rules)

The Disputing Parties shall simultaneously provide all documentation, whether written submissions, pleadings, memorials, exhibited documents, witness or expert statements to the other Disputing Party and each member of the Arbitral Tribunal, the Tribunal Secretary and the PCA in the form and manner prescribed by paragraph 19.1 below on or before the due date.

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## **12. Record of Hearings**

(Article 25(3) of the UNCITRAL Rules)

- (a) 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. Transcripts of proceedings shall be made available on a same day service basis.
- (b) Costs of transcription services shall be costs of the arbitration.
- (c) 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.

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## **13. Communications**

### **13.1 Ex Parte Communications**

The Disputing Parties shall not engage in any oral or written communications with any member of the Tribunal *ex parte* in connection with the subject matter of the arbitration.

### **13.2 Minor Extraneous Correspondence**

The Tribunal does not wish, as a general principle, to be copied unnecessarily into the Disputing Parties' inter-counsel correspondence; and accordingly the Tribunal should be sent only those documents which the Disputing Parties intend the Tribunal to read and act upon.

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## **14. Quorum and Decisions of the Arbitral Tribunal**

### **14.1 Quorum and Replacement of Arbitrators**

(Articles 13 and 14 of the UNCITRAL Rules).

- (a) The presence of all three members of the Arbitral Tribunal shall constitute a quorum.
- (b) The replacement of any arbitrator shall be dealt with in accordance with Articles 13 and 14 of the UNCITRAL Arbitration Rules

### **14.2 Decisions of the Arbitral Tribunal**

(Articles 31(1) and 32 of the UNCITRAL Rules)

- (a) The Arbitral Tribunal shall make any award or other decision by a majority of its members.
- (b) In addition to making a final award, the Arbitral Tribunal shall be entitled to make interim, interlocutory or partial awards.
- (c) All awards and decisions shall be deemed to be made at the place of arbitration, regardless of where the award or decision is signed.

### **14.3 Authority of Presiding Arbitrator to Decide Questions of Procedure Including Fixing Time Limits**

(Article 31(2) of the UNCITRAL Rules)

- (a) The President of the Tribunal may decide questions of procedure alone, upon reasonable consultation with the other members of the Arbitral Tribunal.
- (b) A Procedural Order signed by the President of the Tribunal shall be taken to be an order of the Arbitral Tribunal.
- (c) 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 Disputing Parties or by the President of the Tribunal, the President may fix a time limit or amend an existing limit. Where appropriate,

the President may consult the other members of the Arbitral Tribunal before taking such decisions.

- (d) Extensions of time shall be granted by the Arbitral Tribunal or President in its/his discretion, in exceptional cases only and provided that a request is submitted immediately after the event preventing a Disputing Party from complying with the due date and is made before the due date to be extended has lapsed.
- (e) Dates and times set by the Arbitral Tribunal for each step in this arbitration, unless otherwise provided, refer to the dates and times at the place of arbitration.

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## 15. Objections to Jurisdiction

(Article 21 of the UNCITRAL Rules)

- (a) The Disputing Parties agree that the Arbitral Tribunal shall have the power to rule on objections that it has no jurisdiction.
- (b) The Arbitral Tribunal may rule on a plea concerning its jurisdiction as a preliminary question.

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## 16. Bifurcation of Proceedings

(Article 15 of the UNCITRAL Rules)

Canada's stated objections to jurisdiction shall be determined in a preliminary phase. For the purposes of the first phase of the arbitration dealing with jurisdictional objections only, the Tribunal will treat as *prima facie* established the facts on the merits as asserted by the Claimant and will not require evidence on these facts. The Tribunal reserves the right not to decide any one or more issues of jurisdiction if it is unnecessary to do so. The Tribunal also reserves the right to defer any issue of jurisdiction to the merits phase.

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## 17. Schedule of Proceedings

(Articles 15, 18, 19, 20, 23, 24 and 25 of the UNCITRAL Rules)

### 17.1 Procedural Timetable

The schedule of proceedings ("**Procedural Timetable**") agreed by the Disputing Parties shall be as follows:

Date	Event
September 21, 2012	Disputing Parties to provide an agreed Confidentiality Protocol, setting out their respective individual proposals in a consolidated redline version where there is no agreement.
September 28, 2012	Disputing Parties to exchange requests for documents relating to jurisdictional issues only.
October 19, 2012	Disputing Parties to produce documents in response to any request to which there is no objection and to provide objections to document requests (if any).

Date	Event
November 2, 2012	Disputing Parties to file with the Tribunal consolidated Redfern Schedules setting out their respective requests for documents and any objections, including the grounds for such objections.
November 16, 2012	The Tribunal shall decide on document production objections of the Disputing Parties.
December 14, 2012	Disputing Parties to produce further documents as required, pursuant to the Tribunal's order.
January 25, 2013	Respondent to file its Memorial on Jurisdiction together with documents relied upon and witness statements (if any).
March 8, 2013	Claimant to file its Counter-Memorial on Jurisdiction together with documents relied upon and witness statements (if any).
April 5, 2013	Respondent to file its Reply on Jurisdiction.
May 3, 2013	Claimant to file its Rejoinder on Jurisdiction.
May 13, 2013	Filing of Article 1128 submissions by a non-disputing NAFTA Party (if any).
May 23, 2013	Disputing Parties shall file comments, if any, on any Article 1128 submissions.
July 8 to 10, 2013	Hearing on jurisdiction (two days, with one day in reserve).

## 17.2 Amicus Non-NAFTA Party Submissions

The Disputing Parties agree that the Arbitral Tribunal may consider non-disputing party submissions in a manner consistent with the recommendations of the North American Free Trade Commission on non-disputing party participation, issued on 7 October 2003.

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## 18. IBA Rules of the Taking of Evidence in International Commercial Arbitration (2010)

In connection with document production, the Arbitral Tribunal may have regard to, but is not bound by, the IBA Rules of the Taking of Evidence in International Commercial Arbitration (2010) ("IBA Rules 2010").

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## **19. Written Submissions and Exhibits**

(Articles 15, 18, 19, 20 and 23 of the UNCITRAL Rules)

### **19.1 Form of Documentation**

All documentation, whether written submissions, pleadings, memorials, exhibited documents or witness statements shall be provided to the members of the Arbitral Tribunal, the opposing Disputing Party, the Tribunal Secretary and the PCA:

- (i) in searchable electronic format (via email or USB-drive and CD-Rom for Professor Stern); and
- (ii) other than legal authorities, in hard copy, in A5 size bundles with double-sided printing and A4-size for Professor Stern.

If the electronic copy is provided via email on the due date, the hard copy shall be delivered by courier within 3 days (together with the USB-drives and CD-Rom for Professor Stern).

### **19.2 Shorter Communication**

Shorter communication and correspondence, including the Disputing Parties' inter-counsel correspondence, shall be sent by email, or by fax confirmed by subsequent email containing the content of the communication.

### **19.3 Written Submissions**

- (a) Written submissions shall be in the form of memorials and shall be detailed, specific and comprehensive and shall include allegations of fact and statements of law.
- (b) Written submissions shall be accompanied by the documentary evidence as well as the legal authorities relied upon by the Disputing Parties.
- (c) Wherever possible the evidence adduced or to be adduced in support of an allegation of fact should be identified.
- (d) The Reply and Rejoinder may only contain evidence that is responsive to the other Disputing Party's last preceding submission.

### **19.4 Documents**

- (a) The Disputing Parties shall identify each exhibit submitted to the Tribunal with a distinct number.
- (b) Each exhibit submitted by the Claimant shall commence with the letter "C" followed by the applicable number. Each exhibit submitted by the Respondent shall commence with the letter "R" followed by the applicable number.
- (c) Volumes of the bundle of documents are to be numbered consecutively in a single sequence.

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- (d) The Disputing Parties shall submit all exhibits in chronological or other appropriate order in files with a separate tab for each exhibit. A list describing each of the exhibits by exhibit number, date, type of document, author and recipient (as applicable) shall be placed in the front of each file.
- (e) The Disputing Parties shall submit all exhibits with the written submissions that expressly refer to them. In exceptional cases, the Arbitral Tribunal may permit a Disputing Party to submit further exhibits at a later date, if appropriate in view of all of the circumstances and after hearing the other Disputing Party.
- (f) All documents, including both originals and copies, submitted to the Tribunal shall be deemed to be authentic, unless disputed by the other Disputing Party by way of a written notice served on the other Disputing Party and upon the Arbitral Tribunal within 14 days of its receipt.
- (g) All documents shall either be submitted to the Arbitral Tribunal in complete form or clearly indicating the respect in which any document is incomplete.
- (h) Before the oral hearing, the Disputing Parties shall jointly provide to the Arbitral Tribunal:
- (i) an agreed "List of Dramatis Personae" (describing the legal and natural persons named in the pleadings);
  - (ii) an agreed "Chronology of the Principal Events"; and
  - (iii) an "Agreed List of Issues" setting out the issues to be decided by the Tribunal.

If the Disputing Parties are unable to agree on (ii) or (iii) they shall provide separate chronologies and lists of issues.

- (i) At the hearing the Disputing Parties shall provide a joint or separate bundles comprising:
- (i) submissions;
  - (ii) witness statements; and
  - (iii) documents to be referred to at the hearing.
- (j) The use of demonstrative exhibits (such as charts, tabulations, etc.) will be allowed at the evidentiary hearing, provided that no new evidence is contained therein. A hard copy of any such exhibit shall simultaneously be provided by the Disputing Party submitting such exhibit to the other Disputing Party and to each member of the Arbitral Tribunal. The Disputing Parties shall exchange copies of proposed demonstrative exhibits at the time the opening written submissions are filed.

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## **20. Document Production**

(Articles 24 and 25 of the UNCITRAL Rules)

### **20.1 Request to Produce**

- (a) The Claimant and the Respondent shall each be at liberty to submit to the Arbitral Tribunal a Request to Produce at any time during the period indicated in the Procedural Timetable at 17 above. A Request to Produce shall contain:
- (i) (A) a description of a requested document sufficient to identify it, or (B) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
  - (ii) a description of how the documents requested are relevant and material to the outcome of the case in order to establish relevance and materiality. A Request to Produce shall refer to specific factual allegations made in the submissions filed by the Disputing Parties to date; and
  - (iii) a statement that the documents requested are not in the possession, custody or control of the requesting Disputing Party, and of the reason why that Disputing Party assumes the documents requested to be in the possession, custody or control of the other Disputing Party.
- (b) Within the time specified in the Procedural Timetable at 17 above, unless extended by the Tribunal, the Disputing Party to whom a Request to Produce is addressed shall produce to the other Disputing Party copies of all the documents requested in its possession, custody or control as to which no objection is made.
- (c) If the Disputing Party to whom a Request to Produce is addressed has objections to some or all of the documents requested, it shall state them in writing to the Arbitral Tribunal within the time specified in the Procedural Timetable (unless extended by the Tribunal). The reasons for such objections shall be any of those set forth in Article 9.2 of the IBA Rules 2010.

### **20.2 Objections to Request to Produce**

- (a) All Requests to Produce and objections shall be submitted to the Arbitral Tribunal in a tabular form of a Redfern Schedule. It shall contain 4 columns, as follows:
- (i) first column: identification of the document(s) or categories of documents that have been requested;
  - (ii) second column: short presentation of the reasons for each request and rebuttal (if any) to the objection(s);
  - (iii) third column: a summary of the objections by the other Disputing Party to the production of the document(s) requested;
  - (iv) fourth column: left blank for the decision of the Tribunal.

- (b) The Arbitral Tribunal shall, in consultation with the Disputing Parties and in a timely fashion, consider any Request to Produce and the objections. Having regard to the IBA Rules 2010, the Tribunal considers that the following standards should guide its decision:
- (i) The request for production must identify each document or specific category of documents sought with precision.
  - (ii) The request must establish the relevance and materiality of each document or of each specific category of documents sought in such a way that the other Disputing Party and the Arbitral Tribunal are able to refer to factual allegations in the submissions filed by the Disputing Parties to date. This shall not prevent a Disputing Party from referring to factual allegations yet to be made (in subsequent written submissions) provided that such factual allegations are made or at least summarised in the request for production of documents. In other words, the requesting Disputing Party must make it clear with reasonable particularity what facts / allegations each document (or category of documents) sought is intended to establish.
  - (iii) The Arbitral Tribunal will only order the production of documents or category of documents if they exist and are within the possession, power, custody or control of the other Disputing Party. If contested, the requesting Disputing Party will have to make a case that it is likely that the document is indeed within the possession, power, custody or control of the other Disputing Party.
  - (iv) If necessary, the Arbitral Tribunal may also balance the request for production against the legitimate interests of the other Disputing Party, including any applicable privileges, the extent to which the request places an unreasonable burden on the other Disputing Party and the need to safeguard confidentiality, taking into account all the surrounding circumstances.
  - (v) Before making the decision, the Arbitral Tribunal may exercise its discretion, at the request of a Disputing Party, to hear oral submissions.

### **20.3 Production of Documents**

- (a) Copies of documents submitted or produced must conform to the originals. At the request of the Arbitral Tribunal, any original must be presented for inspection.
- (b) Documents provided pursuant to a Request to Produce shall not be provided to the Arbitral Tribunal and shall not be considered in the record unless and until the requesting Disputing Party produces them.
- (c) The Arbitral Tribunal may of its own motion order a Disputing Party to produce documents at any time.
- (d) Documents as to which production is ordered by the Arbitral Tribunal shall be produced promptly and in accordance with the Arbitral Tribunal's instructions. The



Disputing Parties shall endeavour to ensure that the disclosure process is orderly and not disruptive. If subsequent to 15 days after the filing of an opposing Disputing Party's written submissions, a Disputing Party wishes to make a further request for document production, leave should first be requested from the Arbitral Tribunal. If leave is granted, the procedure detailed above will be applicable.

- (e) If documentary evidence which a Disputing Party is directed by the Arbitral Tribunal to produce or file contains privileged or proprietary information or trade secrets, that Disputing Party shall so indicate to the Arbitral Tribunal and to the other Disputing Party. In that case, the Arbitral Tribunal shall determine, after consultation with the Disputing Parties, the appropriate measures to be implemented in order to respect the proprietary or privileged nature of the information or the trade secret(s) while, to the extent possible, allowing the production of such evidence for the purpose of the arbitral proceedings.

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## **21. Witness Evidence**

(Articles 24 and 25 of the UNCITRAL Rules)

### **21.1 Fact Witness Statements**

- (a) If a Disputing Party wishes to adduce testimonial evidence in respect of its allegations, it shall so indicate in its submissions and submit written witness statements, as provided in the Procedural Timetable at 17 above.
- (b) Any person may present evidence as a witness, including a Disputing Party, a Disputing Party's officers, employees or other representatives.
- (c) All witness statements shall stand as evidence in chief. All witnesses who have given statements shall attend the hearing for cross-examination unless their attendance is not required by the other Disputing Party and the Tribunal. If any witness whose attendance at the hearing is required does not attend, the Arbitral Tribunal shall in its discretion determine what weight, if any, shall be accorded to the witness statement taking into account the reasons for the witness' absence, in so far as they are known.
- (d) Witness statements shall:
  - (i) be in English;
  - (ii) commence with a list of bullet points that the witness intends to establish;
  - (iii) if the statement exceeds 20 pages in length, contain an executive summary of the statement after the bullet points;
  - (iv) contain a photograph of the witness;
  - (v) contain the name and address of the witness, his or her relation to any of the Disputing Parties and a description of his or her qualifications;
  - (vi) state whether the witness is a witness of fact or an expert witness;

- (vii) contain the substance of the evidence that the Disputing Party will present through the testimony of that witness at the hearing;
  - (viii) state the basis of that evidence (for example the witness' own perception; or if on information received, from whom, when and how); and
  - (ix) be signed by the witness and give the date and place of the signature.
- (e) Reply witness statements shall be in the same form as set out above, such statements to be solely responsive to the first round of witness statements and not to reiterate evidence already provided.
  - (f) On or before 30 days prior to the commencement of the hearing, each Disputing Party shall notify in writing to the other Disputing Party, with a copy to the Tribunal, the names of the witnesses for whom the other Disputing Party has submitted a witness statement and the notifying Disputing Party wishes to cross-examine at the hearing.
  - (g) The admissibility, relevance, weight and materiality of the evidence offered by a witness shall be determined by the Arbitral Tribunal.

## **21.2 Evidence of Expert Witnesses**

- (a) Each Disputing Party may retain one or more experts and submit their evidence to the Arbitral Tribunal. Expert reports shall be accompanied by any documents or information upon which they rely unless such documents or information have already been submitted as exhibits with the Disputing Parties' memorials, in which case reference to such exhibits shall be sufficient.
- (b) The provisions of paragraph 21.1 of this Order are applicable, *mutatis mutandis*, to expert witnesses. The expert shall identify his or her area of expertise. Each Disputing Party will be confined to one expert per discipline. The expert's report will contain the expert's opinion including a description of the method, evidence and information used in arriving at the conclusions.
- (c) The Disputing Parties' expert witnesses will meet to prepare list of issues upon which they are agreed and upon which they remain in disagreement.
- (d) The Arbitral Tribunal may determine any issue as to the relevant law on the basis of the written submissions of the Disputing Parties and of the legal authorities submitted by the Disputing Parties to the Tribunal without the need for either Disputing Party to call expert evidence on the law.
- (e) The Arbitral Tribunal may discuss with the Disputing Parties at a date to be later determined whether there should be Witness Conferencing in relation to the expert witnesses (if any).

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## 22. Oral Hearing

(Article 25 of the UNCITRAL Rules)

- (a) By agreement of the Disputing Parties, hearings shall be open to the public, except that either Disputing Party may request that any part of a hearing be held *in camera*, and the Disputing Parties shall make suitable arrangements therefor.
- (b) The Arbitral Tribunal shall at all times have complete control over the procedure, in particular, in relation to a witness giving oral evidence, including the right to limit or exclude any question to, or to refuse to a Disputing Party permission to conduct any examination-in-chief, cross-examination or re-examination of a witness when it considers that the factual allegation(s) on which the witness is intended to be examined is (are) sufficiently proven by exhibits or other witnesses or that the particular witness' examination as such is irrelevant, immaterial, burdensome, duplicative or unlikely to serve any relevant purpose.
- (c) Subject to further order from the Arbitral Tribunal, the oral hearing shall proceed as follows:
  - (i) An opening statement by the Claimant;
  - (ii) An opening statement by the Respondent;
  - (iii) The hearing of the Claimant's factual witnesses testifying orally;
  - (iv) The hearing of the Respondent's factual witnesses testifying orally;
  - (v) The hearing of the Claimant's expert witnesses testifying orally;
  - (vi) The hearing of the Respondent's expert witnesses testifying orally;  
and
  - (vii) Subsequent procedures shall be determined by the Tribunal in further consultation with the Disputing Parties.
- (d) In its opening statement, a Disputing Party shall succinctly explain its case (including its claimed relief) in opposition to the other Disputing Party's case and indicate how the oral testimony of the witnesses may support its case or contradict the other Disputing Party's case. The Disputing Parties are also encouraged to identify what matters are common ground or (if once disputed) no longer in dispute.
- (e) As a general principle, no new documents, factual witness or expert witness may be presented by any Disputing Party at the oral hearing; and no witness shall be heard orally at the hearing who has not provided a witness statement or expert report submitted earlier in accordance with the Procedural Timetable.
- (f) The procedure for hearing oral witnesses at the oral hearing shall, as a general principle, be the following:
  - (i) Factual witnesses should not be examined-in-chief for more than fifteen (15) minutes, without prior permission from the Tribunal. The

Tribunal may limit the examination-in-chief of an expert witness, in further consultation with the Disputing Parties.

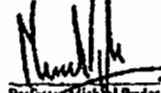
- (ii) The scope of the re-examination shall be limited to matters that have arisen in the cross-examination.
  - (iii) The Arbitral Tribunal shall have the right to examine all witnesses at any time and to interject with questions during the examinations by counsel for the Disputing Parties. Nonetheless, the Arbitral Tribunal will endeavour to save its principal questions to a time following that witness' re-examination; and in that event, the Arbitral Tribunal would seek to ensure that each Disputing Party shall have an opportunity to examine a witness on matters arising from questions by the Arbitral Tribunal.
  - (iv) Notwithstanding anything in this paragraph 22, the Arbitral Tribunal may order witness conferencing, in consultation with the Disputing Parties.
- (g) Ordinarily, witnesses may be present in the oral hearing room during the opening statements. However, a fact witness shall not be present in the hearing room during the hearing of oral testimony, or read any transcript of any oral testimony prior to his or her examination. This limitation does not apply to (i) witnesses of fact who are designated as Disputing Parties' representatives and (ii) expert witnesses, who may remain in the hearing room at all times.
- (h) Each Disputing Party is responsible for ensuring the attendance of its witnesses who are required for cross-examination. If a Disputing Party submits a witness statement and the witness does not appear at the oral hearing upon notification by the other Disputing Party of its wish to cross-examine that witness, the Arbitral Tribunal shall in its discretion determine what weight, if any, shall be accorded to the witness statement taking into account the reasons for the witness' absence, in so far as they are known.
- (i) Whether the witnesses will be asked simply to affirm the witness statement or will be required to take an oath or make a formal affirmation will be determined at the oral hearing.
- (j) It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.
- (k) Unless the Arbitral Tribunal determines otherwise and subject to the overriding requirement of equal treatment, the general principle of equal time for each Disputing Party shall be observed for the oral hearing, with further time allocated to the Arbitral Tribunal. Time for one Disputing Party may nonetheless be extended by the Arbitral Tribunal in special circumstances, including the relative number of witnesses to be cross-examined, the scope of their evidence and the relative complexity of claims and counterclaims.

23. Status of Orders

Any order made by the Arbitral Tribunal or President may, at the request of a Disputing Party or upon the Arbitral Tribunal's or President's own initiative, be varied where the circumstances so require in the Arbitral Tribunal's or President's discretion, after consultation with the Disputing Parties.

Signed: As of September 10, 2012

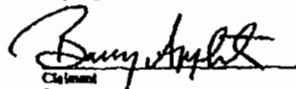
Arbitral Tribunal:

  
Professor Michael Pryles  
(President)

  
Professor Brigitte Stern

  
Professor Richard Stewart

Disputing Parties:

  
Claimant  
Per:

  
Respondent  
Per: SYLVIE TABET