

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL
ARBITRATION RULES 1976**

Between:

St. Marys VCNA, LLC

Claimant/Investor

- and -

The Government of Canada

Respondent/Party
(together the "Disputing Parties")

CONSENT AWARD

Arbitral Tribunal:

Professor Michael Pryles
Professor Richard Stewart
Professor Brigitte Stern

Secretary to the President:

Dr. Chester Brown

Representing the Claimant:

Mr. Barry Appleton
APPLETON & ASSOCIATES, INTERNATIONAL
LAWYERS

Representing the Respondent:

Ms. Sylvie Tabet
Mr. Christophe Douaire de Bondy
Mr. Pierre-Olivier Savoie
Mr. Adam Douglas
Ms. Yasmin Shaker
TRADE LAW BUREAU
DEPARTMENTS OF JUSTICE AND OF FOREIGN
AFFAIRS AND INTERNATIONAL TRADE CANADA

Date of Dispatch to the Disputing Parties: April 12, 2013

The Arbitral Tribunal

Composed as above,

After deliberation

Makes the following CONSENT AWARD:

I. PROCEDURAL HISTORY

1. On May 13, 2011, St Marys VCNA, LLC (the “**Claimant**”) submitted to the Government of Canada (the “**Respondent**”) a Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter Eleven of the North American Free Trade Agreement (“**NAFTA**”).
2. On September 14, 2011, the Claimant served a Notice of Arbitration on the Respondent. The Claimant took the position that this service was in accordance with Articles 3 and 18 of the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (the “**UNCITRAL Rules**”, and Articles 1116 and 1120 of the NAFTA (the “**NOA**”). Canada objected to the NOA on the basis that it failed to respect the timing requirements of NAFTA Article 1120(1).
3. In the NOA, the Claimant sought compensation under NAFTA Chapter Eleven for damages it alleged arose out of a decision on the part of the Government of Ontario to adopt a Minister’s Zoning Order and subsequent Declaration of Provincial Interest, in respect of a site owned by St. Marys Cement Inc. (Canada) (“**SMC**”) in the vicinity of Hamilton, Ontario, along with related decisions by relevant provincial and local authorities (the “**Claims**”).
4. On December 22, 2011, the Respondent notified the Claimant of its jurisdictional concerns arising under NAFTA Article 1113(2) (Denial of Benefits), requesting documents confirming Claimant’s ownership structure, assets, holdings, and business activities in the United States. The Respondent also notified the United States Department of State that subject to delivery by the Claimant of satisfactory evidence of its US business activities, it would deny to the Claimant the benefits of NAFTA Chapter Eleven.

5. Following subsequent exchanges between the Claimant and the Respondent, by a letter dated March 1, 2012, the Respondent wrote to the Claimant confirming that it was formally invoking NAFTA Article 1113(2) to deny Chapter Eleven benefits to the Claimant, and to its alleged investment SMC. That same day, the Respondent wrote to the United States Department of State setting out its reasons for denying NAFTA Chapter Eleven benefits to the Claimant and to its purported investment.

6. On July 12, 2012, the International Centre for the Settlement of Investment Disputes confirmed the appointment of Professor Michael Pryles as President, completing the constitution of the Arbitral Tribunal. Professor Richard Stewart had been appointed by the Claimant on December 14, 2012, and Professor Brigitte Stern by the Respondent, on December 22, 2012.

7. On August 27, 2012, the Arbitral Tribunal submitted a draft Procedural Order No. 1 to be discussed at the preliminary meeting of the Disputing Parties to be held on September 10, 2012.

8. On August 31, 2012, at the request of the Arbitral Tribunal, the Respondent filed a Brief Outline of its Jurisdictional and Substantive Defences.

9. At the meeting of the Disputing Parties and the Tribunal of September 10, 2012, based upon the parties' respective submissions, the Tribunal ordered bifurcation of the arbitration, so that the Respondent's jurisdictional objections could be addressed on a preliminary basis.

10. Between September and December 2012, the Claimant and the Respondent exchanged requests for production of documents relevant to jurisdictional issues only, further to the provisions of Procedural Order No. 1. On November 16, 2012, the Tribunal ruled on the Disputing Parties' respective objections to document production. A follow-up production occurred on December 14, 2012.

11. In the course of initial document production on October 19, 2012, the Claimant produced to the Respondent certain documents that it subsequently argued had been produced in error and should be returned on the basis of privilege. While protecting these

documents under seal, the Respondent requested that the Tribunal establish a process through which a neutral third party would review these documents and determine whether they were privileged, or whether in any event the Claimant had waived such privilege.

12. On November 27, 2012, the Tribunal nominated Justice James Spigelman, AC, QC, to consider the privilege issues raised by the Respondent. By correspondence dated November 30 and December 3, 2012, the Disputing Parties exchanged views as to the appropriate procedure for Justice Spigelman's reference. Based upon the exchanges of the Disputing Parties, Justice Spigelman established a calendar for briefing of the relevant issues. In accordance with this calendar, the Respondent and the Claimant exchanged pleadings on December 7 and 11, 2012, and December 19 and 24, 2012.

13. On December 27, 2012, Justice Spigelman released his Report on Inadvertent Disclosure of Privileged Documents (the "Report"). The Report concluded that no privilege attached to 7 out of the 11 documents at issue, and that in any event any privilege attaching to such documents had been waived. On the same day, the Respondent requested an order from the Tribunal directing Justice Spigelman to release to it the documents referenced in the Report.

14. On January 7, 2013, further to a calendar established by the Tribunal, the Claimant made submissions opposing the release to Canada of the documents referenced in the Report and requesting that the Tribunal reject the conclusions of the Report. On January 10, 2013, the Respondent replied, opposing the Claimant's position.

15. On January 11, 2013, the Disputing Parties wrote to the Tribunal that in light of discussions between them, they were requesting a temporary suspension of the calendar in the proceedings.

16. On January 13, 2013, the Tribunal agreed to suspend the proceedings until February 1, 2013, pending any further notice from the Disputing Parties.

17. On January 29, 2013, the Disputing Parties jointly wrote to the Tribunal requesting a further extension of the suspension of proceedings, until March 1, 2013.

18. On February 28, 2013, the Disputing Parties wrote to the Tribunal confirming that they had signed a Settlement Agreement, and requested that the Tribunal adopt that agreement in a Consent Award.

II. THE SETTLEMENT AGREEMENT

1. The Disputing Parties provided the Arbitral Tribunal with an original copy of the executed Settlement Agreement, which was received on February 28, 2013.
2. Paragraph 1 of the Settlement Agreement provides that the Claimant “hereby irrevocably and permanently withdraws its Notices of Intent in respect of the Claims and Notice of Arbitration in respect of the First Claim severed against the Government of Canada.” Paragraph 8 further records the Disputing Parties’ agreement to request the incorporation in full of the Settlement Agreement in the form of a Consent Award:

The Parties agree jointly to submit this Settlement Agreement to the Tribunal upon its signature and to request the incorporation in full of this Settlement Agreement in the form of a Consent Award, pursuant to NAFTA Article 1136 and Article 34(1) of the UNCITRAL Rules, to be issued by the Tribunal. The terms of this Settlement Agreement shall take effect as of the adoption of the Consent Award.

3. The terms of the Settlement Agreement include that Votorantim Group (including the Claimant and SMC), and its successors and assigns, releases and forever discharges the Government of Canada from the Claims and related claims as defined therein. The Votorantim Group further acknowledges that SMVCNA lacks and has always lacked standing to bring a claim under NAFTA Chapter Eleven in respect of the Claims, and that no payment has been made to it by the Government of Canada in respect of the Claims or the Settlement Agreement.
4. In return for the settlement and waiver of legal action by the Votorantim Group, the Government of Canada agrees not to pursue any claim against the Votorantim Group for its costs incurred to date in respect of the Claims.

5. Further, in accordance with NAFTA Annex 1137.4, the Parties agree to the publication of the Settlement Agreement and the Consent Award. The Votorantim Group also acknowledges Canada's right to make public Justice Spigelman's Report of December 27, 2012. Except for the documents referenced in the Settlement Agreement that are to be made public, the Confidentiality Order issued by the Tribunal shall continue to be in full force and effect.
6. The Settlement Agreement takes effect upon it being executed in three original copies in counterparts, one original for each Disputing Party and one original for the Tribunal, and following its incorporation into a Consent Award by the Arbitral Tribunal. An original copy of the Consent Award shall also be provided to the PCA.

III. AWARD

7. Having reviewed the Settlement Agreement, the Arbitral Tribunal now, pursuant to Article 34(1) of the UNCITRAL Rules, records the terms of the Settlement Agreement verbatim as a Consent Award, as follows:

“Settlement Agreement

This Settlement Agreement is made and entered into by and between St. Marys VCNA, LLC ('SMVCNA'), a Delaware limited liability company, together with Votorantim Cement North America Inc. ('VCNA'), an Ontario corporation, St. Marys Cement Inc. (Canada) ('SMC'), an Ontario corporation (collectively, the '**Votorantim Group**'), and Her Majesty the Queen in Right of Canada (the '**Government of Canada**'). The Votorantim Group and the Government of Canada are hereinafter referred to collectively as '**the Parties**'.

Whereas, on May 13, 2011 SMVCNA filed Notice of Intent to submit a claim to arbitration under NAFTA Chapter Eleven, citing *inter alia* damages it alleged flowed from an Ontario Minister's Zoning Order made effective on April 13, 2010, concerning certain property held by SMVCNA in the vicinity of Flamborough, Ontario (the '**First Claim**');

Whereas, on September 14, 2011, SMVCNA purported to file a Notice of Arbitration under Chapter Eleven of the NAFTA, in respect of the First Claim;

Whereas, as of December 22, 2011, the Government of Canada requested that SMVCNA provide evidence of its business activities in the United States;

Whereas, on March 1, 2012, further to exchanges regarding SMVCNA's business activities in the United States, the Government of Canada formally

relied on Article 1113(2) of the NAFTA (Denial of Benefits), to deny the benefits of Chapter Eleven to SMVCNA and to SMC in respect of the First Claim;

Whereas on March 23, 2012, SMVCNA purported to file a second Notice of Intent to submit a claim to arbitration under Chapter Eleven of the NAFTA against the Government of Canada, concerning *inter alia* the Government of Canada's reliance on Article 1113(2) of NAFTA (the 'Second Claim');

Whereas on March 30, 2012, SMVCNA filed a Notice of Application for Judicial Review in the Federal Court of Canada, in respect of the Government of Canada's reliance on Article 1113(2) of the NAFTA (the 'Judicial Review');

Whereas on April 25, 2012, SMVCNA served the Government of Canada with a Notice of Discontinuance in the Judicial Review on a without-prejudice basis;

Whereas, on July 12, 2012, the International Centre for the Settlement of Investment Disputes confirmed its appointment of the presiding arbitrator in respect of the First Claim, thereby completing constitution of the arbitral tribunal in that matter (the 'Tribunal');

Whereas the Government of Canada in its Brief Outline on Jurisdictional and Substantive Defences dated August 31, 2012, outlined five separate grounds for the Tribunal's lack of jurisdiction to hear the First Claim;

Whereas, at a preliminary meeting between SMVCNA, the Government of Canada and the Tribunal on September 10, 2012, in light of the [disputing] parties' respective submissions, the Tribunal ordered bifurcation of the arbitral proceedings, to allow jurisdictional issues to be dealt with as a preliminary matter;

Whereas from October to December 2012, SMVCNA and the Government of Canada exchanged document productions relevant to issues of jurisdiction only;

Whereas on December 27, 2012, Justice James Spigelman, a neutral referee appointed by the Tribunal to consider issues regarding certain documents produced to Canada by SMVCNA and which [SMVCNA] sought returned on grounds of privilege, released a Decision finding that the documents at issue were not privileged, and that in any event any potential privilege had been waived;

Whereas, the Parties wish finally and irrevocably to settle the First Claim and the Second Claim as well as issues raised in the Judicial Review (collectively, the 'Claims');

Now, therefore, in consideration of the mutual promises, undertakings and representations contained in this Settlement Agreement, the Parties agree as follows:

1. SMVCNA hereby irrevocably and permanently withdraws its Notices of Intent in respect of the Claims and Notice of Arbitration in respect of the First Claim served against the Government of Canada.
2. The Votorantim Group on their own behalf and on behalf of their successors and assigns hereby releases and forever discharges the Government of Canada from the Claims.
3. The Votorantim Group hereby acknowledges that SMVCNA lacks and has always lacked standing to bring a claim under NAFTA Chapter Eleven in respect of the Claims.
4. The Votorantim Group hereby acknowledges Canada's right to make public Justice Spigelman's Decision of December 27, 2012.
5. Except for the documents expressly referenced herein that will be made public, the Confidentiality Order issued by the Tribunal shall continue in full force and effect.
6. The Votorantim Group hereby acknowledges that no payment has been made to it by the Government of Canada in respect of the Claims or in respect of this Settlement Agreement.
7. As consideration for the above-cited final settlement and waiver of any and all legal action by the Votorantim Group against the Government of Canada in respect of the Claims and related acknowledgements, the Government of Canada agrees not to pursue any claim against the Votorantim Group for its costs incurred to date in respect of the Claims.
8. The Parties agree jointly to submit this Settlement Agreement to the Tribunal upon its signature and to request the incorporation in full of this Settlement Agreement in the form of a Consent Award, pursuant to NAFTA Article 1136 and Article 34(1) of the UNCITRAL Rules, to be issued by the Tribunal. The terms of this Settlement Agreement shall take effect as of the adoption of the Consent Award.
9. In accordance with NAFTA Annex 1137.4, the Parties agree to the publication of this Settlement Agreement and the resulting Consent Award.
10. For the purpose of construction and interpretation of this Settlement Agreement the entire agreement shall be read and construed as a whole without giving any specific effect to any article separately.
11. This Settlement Agreement shall be executed in three original copies in counterparts, one original for each Party and one original for the Tribunal.

12. This Settlement Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and such rules of international law as may be applicable.”

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8. Pursuant to Articles 32, 34, 38 and 39(1) of the UNCITRAL Rules, the Tribunal fixes the costs of arbitration as follows:

- a. As per Articles 38(a) and 39 of the UNCITRAL Rules, the fees of the Tribunal members amount to USD 1,824,490 (Professor Pryles’ fees total USD 87,890; Professor Stewart’s fees total USD 34,650; and Professor Stern’s fees total USD 59,950);
- b. As per Article 38(b) of the UNCITRAL Rules, the travel and other expenses of the Tribunal members amount to USD 23,854.18 (Professor Pryles’ expenses total USD 16,431.48; Professor Stewart’s expenses are nil; and Professor Stern’s expenses total USD 7,422.70);
- c. As per Article 38(c) of the UNCITRAL Rules, (i) the fees of the Secretary to the President, Dr. Chester Brown, total USD 11,440 and his expenses are nil; (ii) Justice Spigelman’s fees amount to USD 12,925 and his expenses are nil; (iii) PCA fees for administrative support total USD 4,310.43; and (iv) other expenses include USD 10,607 for court reporting, courier costs of USD 64.05, and bank charges of USD 73.44;
- d. There are no expenses to record with respect to Article 38(d) of the UNCITRAL Rules;
- e. With respect to Article 38(e) of the UNCITRAL Rules, the Tribunal notes that the costs of the Disputing Parties’ legal representation and assistance are covered by the terms of the Settlement Agreement and therefore this Tribunal makes no apportionment of them as between the Disputing Parties for the purposes of Article 40(2) of the UNCITRAL Rules;
- f. As per Article 38(f) of the UNCITRAL Rules, the Tribunal notes that no costs have been incurred by any appointing authority in this matter, nor by the Secretary-General of the PCA.

9. As at the date of this Consent Award, the Tribunal fixes the costs of arbitration at USD 245,764.10.
10. The Tribunal notes that the Disputing Parties paid in USD 130,000 each to establish an initial deposit of USD 260,000 with the PCA. The unexpended balance of the deposit is USD 14,236.90. The PCA shall reimburse one-half of this amount, i.e., USD 7,117.95, to each of the Disputing Parties.
11. The costs of arbitration and the amount to be reimbursed to each Disputing Party may be slightly adjusted to take into account additional administrative costs such as courier fees that may be incurred after the adoption of this Consent Award.
12. The Tribunal notes the parties agreement that (i) the PCA is to keep the original report signed by Justice Spigelman for a period of 5 years and then destroy it; and (ii) the documents disclosed by the Claimant inadvertently are to be kept by the PCA for a period of 5 years and then returned to the General Counsel of St Marys Cement.

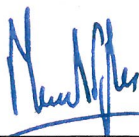
Done at Toronto, Ontario, Canada on this 29th day of March 2013,



Professor Richard Stewart
Arbitrator



Professor Brigitte Stern
Arbitrator



Professor Michael Pryles
President of the Tribunal