

**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 THE INVESTORS OF DELAWARE INC.**

(the “Investors” or “Bilcon”)

-and-

GOVERNMENT OF CANADA

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

PROCEDURAL ORDER NO. 28

(Investors’ Recusal Request and Resumption of the Proceedings)

ARBITRAL TRIBUNAL

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

I. INTRODUCTION

1. This Procedural Order addresses the Investors' request that the Members of the Tribunal recuse themselves and provides directions regarding the submissions on the costs of the arbitration.

II. RELEVANT PROCEDURAL HISTORY

2. In Procedural Order No. 27, the Tribunal ordered as follows:
 - a. **The Disputing Parties' costs submissions shall be deferred until a Canadian court has dismissed or allowed the application for set aside and there is no further appeal; and**
 - b. **The Tribunal's order in the Award on Damages requiring Canada to pay interest on the amount awarded shall be suspended effective April 8, 2019, until a Canadian court has dismissed or allowed the application for set-aside and there is no further appeal.**
3. By letter dated July 14, 2025, the Investors noted that "[t]he court proceedings are now concluded" and requested that the Members of the Tribunal "voluntarily recuse [themselves] to enable the Parties to appoint a separate panel of arbitrators to determine the costs of the arbitration proceedings" (the "**Recusal Request**"). If the Members of the Tribunal decide not to recuse themselves and require the Investors to make "a formal recusal application", the Investors request that the Tribunal "reinstate the arbitration and canvass Counsel as to their respective schedules and availabilities for submission timetables and an in-person hearing".¹
4. By letter dated July 24, 2025, the Respondent requested that the Tribunal: (i) "reject the [Investors'] request, with an order that the costs of the request and any recusal application the [Investors] might lodge, be awarded against the [Investors]" and (ii) "turn immediately to establishing a timetable for submissions on the costs of the arbitration".²
5. By letter dated July 25, 2025, the Investors replied to the Respondent's letter, providing clarifications regarding their position and the set aside proceedings.
6. By e-mail of the same date, the Respondent stated that it sees no need to provide further comments on the matter and noted that it would be available to provide the Tribunal, should it so request, with copies of the relevant decisions of the Canadian courts.

III. THE DISPUTING PARTIES' POSITIONS

7. In support of their Recusal Request, the Investors allege that the Tribunal has "lost [its] jurisdiction to deal with any further matters in the arbitration, including the determination of cost" because, *inter alia*, the Tribunal is "unable to decide the issue of costs fairly".³
8. The Investors note that, in the court proceedings, it impugned: (i) the alleged "arbitrary reasoning of [the] Damages Award"; (ii) the alleged "unfairness of [the Tribunal's] procedural conduct of the hearing in which [it] denied the Investors' right to be heard and to a full and fair opportunity to know and respond to Canada's case"; (iii) the alleged "failure to answer the actual question the Parties submitted to [the Tribunal] by valuing the 'loss of an opportunity for a fair hearing' rather than the value of the loss sustained by the Investors 'as a result of Canada's breach of the NAFTA'"; and (iv) "Member McRae's acceptance of Companionship in the Order of Canada [...]"

¹ Investors' letter dated July 14, 2025, pp. 1, 7-8.

² Respondent's letter dated July 24, 2025, p. 3.

³ Investors' letter dated July 14, 2025, pp. 1-2.

while serving as an arbitrator in this arbitration involving Canada's wrongful conduct, and its impact on the Investors' right to an impartial arbitrator".⁴

9. The Investors further state that the courts, despite their complaints, "decided simply to defer to [the Tribunal]" the above-listed issues and "declined to exercise their jurisdiction to assess the Damages Award for either correctness or reasonableness". Therefore, the Investors request that the Members of the Tribunal recuse themselves to enable the Disputing Parties to enable a separate panel to determine the costs of the arbitration.⁵
10. The Respondent argues that the Recusal Request is "a completely inappropriate attempt at derauling arbitration procedures to which [the Investors] have consented". It submits that the Investors' "conflict of interest" and "procedural unfairness" complaints were either "roundly rejected by three levels of Canadian Courts or abandoned by the [Investors] on their own volition during set aside proceedings".⁶
11. Further, the Respondent submits that the Investors' complaints "have no grounding in the procedural rules governing the arbitration", noting that the Investors are essentially challenging each Member of the Tribunal under Article 10(1) of the UNCITRAL Rules. As such, pursuant to Article 11(1) of the UNCITRAL Rules, each challenge is time-barred.⁷

IV. THE TRIBUNAL'S ANALYSIS AND ORDER

12. The Tribunal agrees that the Recusal Request should be read as a challenge against the Members of the Tribunal pursuant to Article 10(1) of the UNCITRAL Rules and the Investors' letter dated July 14, 2025 should be read as a notice of challenge under Article 11(1) of the UNCITRAL Rules.
13. Article 11(3) of the UNCITRAL Rules provides in relevant part:

When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
14. Having considered the Recusal Request, the Members of the Tribunal have decided not to withdraw from their office. Should the Investors wish to pursue their challenge in any manner, they may do so in accordance with the procedure prescribed in the UNCITRAL Rules.
15. In addition, the Tribunal understands from the Disputing Parties' submissions that the proceedings before the Canadian courts have now concluded. Accordingly, the arbitration shall be reinstated and the Tribunal shall proceed to address the Disputing Parties' cost submissions, in accordance with Procedural Order No. 27.
16. For the reasons set out above, the Tribunal decides and orders as follows:
 - a. **The present arbitration is hereby reinstated;**
 - b. **The Recusal Request is rejected;**
 - c. **The Disputing Parties are directed to confer and seek to agree on a timetable and procedure for the exchange of submissions on costs—including the format of any cost statements, any page limits, and the scope of costs to be addressed—and submit a joint**

⁴ Investors' letter dated July 14, 2025, pp. 2-7.

⁵ Investors' letter dated July 14, 2025, p. 7.

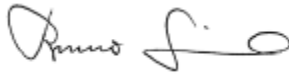
⁶ Respondent's letter dated July 24, 2025, pp. 1-2.

⁷ Respondent's letter dated July 24, 2025, pp. 2-3.

proposal by Wednesday, August 13, 2025 or, in the absence of agreement, their respective individual proposals by the same date;

- d. The Tribunal defers its determination on any costs arising from the Recusal Request to a later stage of the proceedings; and
- e. To the extent not granted above, any other request is rejected.

Date: July 30, 2025



For the Tribunal

Judge Bruno Simma
(Presiding Arbitrator)