

**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”)**

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**PROCEDURAL ORDER NO. 29**

**(Respondent’s Request to Reinstate the Suspension on Interest Accrual)**

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**ARBITRAL TRIBUNAL**

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

## I. INTRODUCTION

1. This Procedural Order addresses the Respondent's request dated March 16, 2026, to reinstate the suspension on interest accrual on the amounts awarded by the Tribunal to the Investors in the Award on Damages of January 10, 2019.

## II. RELEVANT PROCEDURAL HISTORY

2. On January 10, 2019, the Tribunal issued the Award on Damages, awarding the Investors "the amount of US\$ 7 million as compensation for the Respondent's breaches of NAFTA". In addition, the Respondent was ordered to pay "interest on this amount at a rate of the average one-year U.S. Treasury bill yield for the corresponding calendar year, accruing annually on a compounded basis, starting on 22 October 2007 and until full payment has been made".<sup>1</sup>
3. In its Award on Damages, the Tribunal also determined that "[a]ny decision on the costs of arbitration is deferred to a final award on costs."<sup>2</sup>
4. By letter dated April 26, 2019, the Investors informed the Tribunal that the Disputing Parties had agreed that:
  1. the Parties' costs submissions be deferred until a Canadian court has dismissed or allowed the application for set aside and there is no further appeal; and,
  2. the Tribunal's Order requiring Canada to pay interest on the damages award 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.
5. On May 8, 2019, having regard to the Disputing Parties' agreement, the Tribunal issued Procedural Order No. 27, ordering (i) the deferral of the Disputing Parties' costs submission until a Canadian court had dismissed or allowed the Investors' application for set-aside and no further appeal was available and (ii) the suspension of the Tribunal's order in the Award on Damages requiring the Respondent to pay interest on the amount awarded, effective April 8, 2019, until a Canadian court had dismissed or allowed the application for set-aside and no further appeal was available.
6. By letter dated July 14, 2025, the Investors, *inter alia*, 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."<sup>3</sup>
7. On July 30, 2025, the Tribunal issued Procedural Order No. 28, in which it: (i) concluded that the Investors' recusal request should be read as a challenge against the Members of the Tribunal pursuant to Article 10(1) of the UNCITRAL Rules; (ii) declined to withdraw from office; and (iii) resumed the arbitration.
8. By letter dated August 27, 2025, the Respondent requested that "the Tribunal renew its suspension of the accrual of interest on the [Award on Damages] until such time as this arbitration formally enters into a costs phase" in view of "the delay that has been occasioned by the [Investors'] meritless recusal request".<sup>4</sup>

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<sup>1</sup> Award on Damages, 10 January 2019, para. 400(a), para. 400(b).

<sup>2</sup> Award on Damages, 10 January 2019, para. 400(d).

<sup>3</sup> Investors' letter dated July 14, 2025, pp. 1, 7.

<sup>4</sup> Respondent's letter dated August 27, 2025, p. 2.

9. By letter dated September 12, 2025, the Investors reiterated their request that “they be given a full and fair opportunity to make [...] submissions before [the Tribunal] decide whether the arbitration needs to be suspended pending the outcome of the Investors’ Article 11 challenge.” They also submitted that “pending a further agreement between the Parties there [was] no basis for [the Tribunal] to suspend the accrual of interest.”<sup>5</sup>
10. By letter dated October 6, 2025, having considered the Parties’ views, the Tribunal, *inter alia*, maintained its decision to proceed with the arbitration in the absence of any new circumstances that would warrant otherwise and rejected the Respondent’s request to renew the suspension of interest accrual on the Award on Damages as follows:

The Tribunal previously ordered the suspension of interest accrual on the damages award based on the agreement of the Disputing Parties. In the absence of an agreement between the Disputing Parties to extend the suspension, the Tribunal rejects the Respondent’s request to renew it.
11. By letter dated December 1, 2025, the Investors “ask[ed] again that [the Tribunal] voluntarily suspend the costs proceeding until [their challenge] is determined” referring to a “Notice of Application for a stay of the costs proceedings pending the determination of the outstanding challenge to [the Tribunal’s] impartiality [which] ha[d] been filed with the Ontario Superior Court and ha[d] been served on [the Respondent].”<sup>6</sup>
12. By letter dated December 16, 2025, the Tribunal, *inter alia*, maintained its decision to proceed with the arbitration.
13. By letter dated February 21, 2026, the Investors informed the Tribunal that the Ontario Superior Court had issued a decision on February 20, 2026, ordering a stay of further proceedings in the costs phase of the arbitration until May 4, 2026 to allow the Secretary-General of the Permanent Court of Arbitration (“PCA”) to determine who the “appointing authority” is for this dispute, pursuant to Article 6(2) of the UNCITRAL Rules.
14. On March 13, 2026, the Secretary-General of the PCA determined that the appointing authority in the present proceedings, who is competent to decide the Investors’ challenge to the Members of the Tribunal pursuant to Article 12(1) of the UNCITRAL Rules, is the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”).
15. By letter dated March 16, 2026, the Respondent requested “that the Tribunal reinstate the suspension of the accrual of interest on the [Award on Damages] as of December 31, 2025, the date on which [the Respondent] was willing and able to pay the outstanding amounts to the [Investors], and that this suspension of interest extend until the issuance of a final award on costs” (the “Request”).<sup>7</sup>
16. By letter dated March 20, 2026, the Tribunal, *inter alia*, invited the Investors to: (i) comment on the Request; and (ii) indicate, by March 27, 2026, “whether they have submitted the challenge for decision by the Secretary-General of ICSID and, if so, to provide the Tribunal with a copy of those communications, or to indicate when they expect to do so.”<sup>8</sup>

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<sup>5</sup> Investors’ letter dated September 12, 2025, p. 2.

<sup>6</sup> Investors’ letter dated December 1, 2025, p. 1.

<sup>7</sup> Respondent’s letter dated March 16, 2026, p. 2.

<sup>8</sup> PCA’s letter dated March 20, 2026, pp. 2-3.

17. By letter dated March 27, 2026, the Investors opposed the Request and noted that “[a] stay of proceedings of this arbitration has been and remains in effect.”<sup>9</sup>
18. By letter dated April 2, 2026, the Respondent noted, *inter alia*, that the Investors had failed to update the Tribunal on their challenge, stating that “almost three weeks [had] now passed since the [PCA] Secretary-General’s determination as to where the [Investors’] challenge should have been filed when they first raised it last summer.”<sup>10</sup>
19. By letter dated April 14, 2026, the Investors, *inter alia*, reiterated their view that “the impartiality challenge is required to be determined before the Tribunal proceeds to consider costs and render a costs reward (sic)” and recalled that the stay ordered by the Ontario Superior Court remained in effect.<sup>11</sup>
20. By letter dated May 6, 2026, the Respondent requested that the Tribunal terminate the proceedings in view of the Investors’ failure to pay their share of the supplemental deposit requested by the Tribunal on February 5, 2026, in accordance with Article 41(4) of the UNCITRAL Rules. It further requested that “the Tribunal’s order terminating the proceedings includes a direction for the payment by [the Respondent] of the outstanding amounts on basis of the terms outlined in its March 16 request.”<sup>12</sup>

### III. THE DISPUTING PARTIES’ POSITIONS

#### 1. Canada’s Position

21. The Respondent requests the Tribunal to reinstate the suspension of the accrual of interest on the Award on Damages as of December 31, 2025.<sup>13</sup>
22. In submitting the Request, the Respondent “asks that the Tribunal consider more than the simple fact that the disputing parties do not agree on a suspension of the accrual of interest in this case.”<sup>14</sup> According to the Respondent, it is willing and able to pay the Award on Damages and interest and there is no reason why the outstanding amounts cannot be paid in advance of the conclusion of the present arbitration.<sup>15</sup>
23. Moreover, the Respondent submits that the Investors have continuously taken steps to delay the conclusion of the arbitration, citing the court order to stay the present cost proceedings. In the Respondent’s view, the Investors’ challenge “could and should have been decided [...] many months ago.”<sup>16</sup>
24. The Respondent also states that, following the Tribunal’s rejection of its request to suspend the accrual of interest of October 6, 2025, the Respondent contacted the Investors on November 24, 2025, with a proposal to pay the outstanding Award on Damages plus accrued interest as of December 31, 2025. Having received no response from the Investors, it contacted them again on December 17, 2025, February 3, 2026, and February 11, 2026. According to the Respondent, the Investors replied to the Respondent only on February 11, 2026, stating that “it is ‘premature for

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<sup>9</sup> Investors’ letter dated March 27, 2026, p. 2.

<sup>10</sup> Respondent’s letter dated April 2, 2026, p. 1.

<sup>11</sup> Investors’ letter dated April 14, 2026, p. 1.

<sup>12</sup> Respondent’s letter dated May 6, 2026 (Request for Termination), p. 3.

<sup>13</sup> Respondent’s letter dated March 16, 2026, p. 2.

<sup>14</sup> Respondent’s letter dated March 16, 2026, p. 2.

<sup>15</sup> Respondent’s letter dated March 16, 2026, p. 2.

<sup>16</sup> Respondent’s letter dated March 16, 2026, p. 2.

the Damages Award and interest to be paid pending the final conclusion of all matters involving the arbitration.”<sup>17</sup>

25. The Respondent notes that the amount of interest accrued and accruing represents a “significant draw” on the Respondent’s public funds. Thus, “[i]f the [Investors] are unwilling to accept payment of the amounts currently outstanding, they should not be allowed to enjoy the benefit of continued interest accrual while at the same time taking steps that are delaying the close of proceedings.”<sup>18</sup>

## 2. The Investors’ Position

26. The Investors submit that the Request should be dismissed, arguing that it lacks legal basis, as the Respondent simply repeats the request it had made in August 2025. The Investors note that their position in relation to the issue before the Tribunal remains the same: “absent agreement [between the Disputing Parties] (which there is not), there is no basis for a suspension of the accrual of interest.”<sup>19</sup>
27. The Investors hold the Respondent responsible for the delay caused by the stay of proceedings, arguing that the Investors seized the Ontario Superior Court due to the Respondent’s failure to “consent to a suspension of the arbitral proceedings to allow the Investors’ impartiality challenge to proceed in a timely and orderly manner.”<sup>20</sup> The Investors further state that, “[h]ad [the Respondent] agreed to a suspension when the request was first made, it could have been granted by the Tribunal on consent with terms.”<sup>21</sup>
28. Furthermore, the Investors assert that the Respondent’s contention that the stay does not extend to the Request is incorrect. In the Investors’ view, the Respondent failed to request a carve-out of this issue in the Ontario Superior Court proceedings.<sup>22</sup> In submitting the Request, the Respondent “effectively asks the Tribunal to rule on the scope of the [Ontario Superior] Court’s order,” which goes beyond the Tribunal’s jurisdiction.<sup>23</sup>
29. Therefore, the Investors submit that the Tribunal should stand down pursuant to the Ontario Superior Court order and that, in any event, the Tribunal cannot order the suspension of the accrual of interest in the absence of an agreement between the Disputing Parties.<sup>24</sup>

## IV. THE TRIBUNAL’S ANALYSIS AND ORDER

30. The Tribunal notes at the outset that the stay period ordered by the Ontario Superior Court ended on May 4, 2026. Accordingly, the Tribunal considers the question of whether the issuance of the present Order would violate the Ontario Superior Court’s decision to be moot. Thus, the Tribunal makes no determination on whether the decision of the Ontario Superior Court extends to the Request and on whether the Tribunal has jurisdiction to “weigh in on the scope of the Court’s order.”<sup>25</sup>

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<sup>17</sup> Respondent’s letter dated March 16, 2026, p. 1, quoting from the Investors’ response dated February 11, 2026.

<sup>18</sup> Respondent’s letter dated March 16, 2026, p. 2.

<sup>19</sup> Investors’ letter dated March 27, 2026, p. 1.

<sup>20</sup> Investors’ letter dated March 27, 2026, p. 1.

<sup>21</sup> Investors’ letter dated March 27, 2026, p. 1.

<sup>22</sup> Investors’ letter dated March 27, 2026, pp. 1-2, quoting from the decision of the Ontario Superior Court (emphasis omitted).

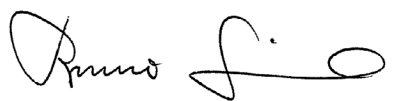
<sup>23</sup> Investors’ letter dated March 27, 2026, p. 2.

<sup>24</sup> Investors’ letter dated March 27, 2026, p. 2.

<sup>25</sup> Investors’ letter dated March 27, 2026, p. 2.

31. In its Request, the Respondent seeks, in essence, that the Tribunal reconsider its decision of October 6, 2025 on the argument that the Investors have: (i) refused to receive “the outstanding damages award plus accrued interest as of December 31, 2025”<sup>26</sup>, and (ii) been taking steps to delay the present proceedings, while enjoying the benefit of interest accrual.
32. The Tribunal maintains its view that, in the absence of an agreement between the Disputing Parties, it cannot reinstate the suspension of interest that they had agreed upon. The Respondent’s arguments in support of its Request are insufficient to change that conclusion. Insofar as the Request concerns the implementation of and compliance with the Tribunal’s Award on Damages, it goes beyond the Tribunal’s powers within this arbitration. Rather, the legal effects of the Investors’ alleged refusal to receive amounts due to them upon the obligation set forth in the Tribunal’s Award on Damages is a matter for any competent forum addressing the recognition, interpretation, and enforcement of that award. The Tribunal also considers that the Respondent has other means available through which it may seek to effect a suspension of the accrual of interest, assuming that its prior offers to make payment have not already had this effect. These means may include depositing the amount due with a competent court (or the PCA), freely available upon demand by the Investors.
33. Leaving aside the question of whether the Investors may have sought to delay the arbitration in order to benefit from continued interest accrual, the Disputing Parties’ conduct in the arbitration and their impact on the efficiency of the proceedings are better addressed in the context of the allocation of the costs of the arbitration. The Tribunal intends to take these matters into account when allocating these costs, in accordance with paragraph 13 of Procedural Order No. 1 and Article 40(1) and (2) of the UNCITRAL Rules.
34. For the reasons set out above, the Tribunal decides and orders as follows:
- a. **The Respondent’s Request is dismissed.**
  - b. **The Tribunal reserves its decision on the Respondent’s request for termination of the proceedings of May 6, 2026, which shall be addressed at a later stage of the arbitration.**

Date: May 14, 2026



For the Tribunal

Judge Bruno Simma  
(Presiding Arbitrator)

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<sup>26</sup> Respondent’s letter dated March 16, 2026, p. 1.